

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.85 OF 2016

SADDAM HUSSAIN SHAUKAT ALI SHAIKH)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

AND

CRIMINAL APPEAL NO.86 OF 2016

RANJAN @ MUNNA KANCHAN ADHIKARI)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.Aniket Vagal, Advocate for the Appellants.

Ms.A.A.Takalkar, APP for the Respondent - State.

CORAM : P N. DESHMUKH, J.

DATE : 1st OCTOBER 2016.

P.C. :

1 Both these appeals take exception to the judgment and order dated 4th February 2012 passed by learned Ad-Hoc Assistant Sessions Judge, Greater Mumbai, in Sessions Case No.13 of 2011 vide which appellants who are original accused nos.1 and 2 came to be

convicted for the offence punishable under Section 395 read with Section 397 of IPC and are sentenced to suffer rigorous imprisonment for 10 years and to pay a fine of Rs.2,000/-, in default, to suffer rigorous imprisonment for 3 months. Appellants are further convicted for the offence punishable under Section 462 of IPC and are sentenced to suffer rigorous imprisonment for 5 years and to pay a fine of Rs.1,000/-, in default, to suffer rigorous imprisonment for 2 months. Both the appellants are further convicted under Section 307 of IPC and sentenced to suffer rigorous imprisonment for 7 years and to pay a fine of Rs.2,000/-, in default, to suffer rigorous imprisonment for 3 months. All the substantive sentences are directed to run concurrently.

2 This court by its order dated 20th April 2016 had directed to list both these matters for final hearing in the week commencing from 27th June 2016, as the learned counsel for appellants had requested for early hearing on the ground that the appellants in these appeals are not challenging the judgment of conviction, however, are only praying for modification of sentence imposed upon the appellants, since both the appellants, pending appeals, have undergone 6 years and 7 months of imprisonment. Having considered facts as aforesaid, appeals are thus heard finally.

3 It is noted that original accused no.3 has already undergone term of sentence, who was convicted for the offence punishable under Section 395 read with Section 397 of IPC and was sentenced to suffer rigorous imprisonment for 7 years.

4 The case of prosecution, in brief, can be stated as under :

On 27th September 2010 both the appellants along with co-accused, at around 10 p.m., having armed with weapons like chopper, knife and pistol etc. committed robbery / dacoity on committing house trespass in Room No.10, situated on first floor, at Devji Building, Bhuleshwar, Mumbai, which premises was used for preparing gold ornaments. At the time of incident, there were around 14 workers working at this place. This business was carried out by one Bappi Samant and Ramjan Mulla. The workers who were present at the time of incident were PW1 Sanjay Samant, PW4 Tapas Patra, PW5 Shaikh Mushrat, PW8 Dilip Tudu, PW13 Alamgir Shaikh and others namely Hemanto Dinda, Ranjit Modi, Gautam Maji and Abhijit Modi who are not examined. At around 10 pm when Tapas had gone to the bathroom which was situated outside the workplace and was returning back, he found six persons present near the workshop, out of which one extended threats to him on the point of chopper and directed to open

the door of the workplace. At that moment, Tapas raised shouts due to which PW13 Alamgir opened the door, upon which both the appellants having armed with chopper and knife respectively, assaulted Alamgir in his abdomen. At the same time other four co-accused entered in the workshop and extended threats to the workers on the point of weapons. In the course of same transaction, appellant no.1 Ranjan @ Munna assaulted Ranjit Modi by chopper, however he is not examined. It is further case of prosecution that appellant Munna directed appellant Saddam to collect gold ornaments which were lying on the table, which were accordingly collected in a sack and both the appellants left the spot who were chased by the workers shouting “Chor Chor.” PW6 Rajesh Patel also chased the appellants when appellant Munna assaulted him by chopper, while Tapas – the complainant, with the assistance of public on road, could apprehend co-accused Bappa. In the meantime, police arrived on the spot and shifted Alamgir, Rajesh Patel and Ranjit Modi to G.T.Hospital, while Tapas proceeded to lodge report. On the basis of his report, offence came to be registered vide Crime No.260 of 2010 and was investigated by PW20 A.S.I. S.T.Desai and other officers.

5 After registering offence, PW7 Mohan Mohite, Police Constable, was deputed to keep watch for apprehension of both the appellants at the entry gate of Grant Road Railway Station, where, at around 00.50 hours, both the appellants came to be apprehended on the basis of physical description given to the police by co-accused Bappa, who was apprehended by the police on the spot itself.

6 On apprehension of appellants, their personal search was obtained in the presence of panchas, who were found having in their possession one blood stained chopper kept in the socks, possessed by appellant no.1 along with some cash and three pairs of yellow metal ear tops, gold beads, gold wire, gold particles on wax ball, one wrist watch, while, one blood stained knife and a plastic pouch containing yellow metal wire nose rings, were found in possession of appellant no.2. All the muddemal articles came to be attached under panchnama Exhibit 31. During the course of investigation, spot panchnama Exhibit 62 came to be drawn. Muddemal property found in possession of co-accused Bappa was seized under panchnama along with one toy revolver.

7 Clothes of Rajesh came to be seized under panchnama

Exhibit 34. Similarly, clothes of both the appellants came to be seized and drew Detection panchnama of finding of finger prints on the revolver. Police, during the course of investigation, got verified yellow metal ornaments recovered from appellants from the goldsmith if they were of gold and had obtained certificate Exhibit 48 certifying the ornaments to be of gold. Blood samples of both the appellants were collected and all the muddemal articles were forwarded for its analysis to Chemical Analyser under forwarding letter Exhibit 68 and 69. Subsequent finger prints of absconding accused Bappa were sent to Finger Print Expert. Statement of witnesses came to be recorded, after holding Test Identification Parade (TIP) by PW12 Gajanan Narvekar on 30th December 2010, of which Memorandum of TIP is on record at Exhibit 38. As investigation was complete, charge-sheet came to be filed before the learned Additional Chief Metropolitan Magistrate, 47th Court, Esplanade, Mumbai.

8 During the course of time, case came to be committed to the court of Sessions for trial. Charge is leveled against appellants vide Exhibit 2, to which they pleaded not guilty and claimed to be tried. Defence of accused is of total denial. To bring home the guilt of accused, prosecution in all examined 20 witnesses. Considering

evidence and documents on record, learned Sessions court convicted appellants as aforesaid.

9 Heard learned counsel for appellants and learned APP. As aforesaid, learned counsel has fairly submitted that they are not disputing the judgment and conviction, however, by referring to the evidence on record, it is submitted that having considering evidence as such, both the appellants be convicted up to the period already undergone, which comes to 6 years and 7 months. Learned counsel, thus, on the strength of evidence on record, has prayed for modification of conviction as aforesaid.

10 As against this, learned APP on the other hand had supported the impugned judgment contending that the judgment is just and legal, as according to her, from the evidence on record, involvement of both the appellants in the present crime is clearly established. Learned APP has also submitted that even otherwise there are criminal antecedents against accused no.1 (appellant Ranjan @ Munna) and as such contended that both the appeals are liable to be dismissed.

11 Having considering facts of the case of prosecution, submissions advanced as aforesaid, with the assistance of learned counsel for both the sides, I have scrutinized the evidence to consider the case as set out on behalf of appellants as well as by the learned APP.

12 Evidence of Tapas Patra – complainant, reveals that at the time of incident, he was working in the workshop along with Dilip, Musharaf Shaikh and other workers, where gold ornaments were manufactured, when on 27th September 2010 at about 9.45 p.m., after he came out of the workshop to attend washroom and was returning back, noticed six persons present in front of the workshop, out of whom one pointed chopper towards him, who is identified by said witness as appellant no.1 Munna, who then entered in the workshop along with all the accused. He has further stated that at the time of incident, he was standing near the door and in the assault committed by accused persons, other workers along with Dilip Tudu and himself sustained injuries. According to his evidence, one of the co-accused who has assaulted him, however is not present before the court and has stated that along with him, on causing injuries to Ranjit, Dilip and Raju, accused persons ran away with gold ornaments which were on the working table.

13 He has further stated that police arrived on the spot in short time and took him along with other injureds for medical treatment to G.T.Hospital. On providing first aid he was relieved and then he visited police station and lodged report Exhibit 25. He has further deposed that on 30th December 2010, he along with Dilip, Raju, Mushraf and Rajan Modi attended jail and participated in the TIP, when he had identified both the appellants.

14 In the cross-examination it has come on record that at the time of incident, ten workers were working at the working table and seven persons were otherwise present in the workshop. Rest of the cross-examination is on the point of TIP. However, nothing material could be elicited in the cross-examination to doubt his evidence, which as such, establish involvement of both the appellants out of which appellant no.1 is found to have armed with chopper and on extending threats committed dacoity along with other accused persons in respect of gold ornaments.

15 In the evidence of PW8 Dilip Tudu, who is also relied by prosecution as one of the injured eye witness, it has also come on record that at the time of incident, apart from him, Tapas and Musharaf

were present in the workshop. He has further deposed that at around 10.00 p.m., after Tapas went to washroom, he heard his shouts from outside, upon which one of the workers namely Alamgir @ Sona went outside, however, was assaulted by two persons in his abdomen and at the same time, all the six accused persons entered workshop and extended threats. He has further stated that one of the workers Ranjit was subjected to assault when he refused to part away with gold ornaments and sustained blow of chopper on his hand. According to him, all the gold ornaments which were lying on the table were looted by accused persons by putting in their pant pockets and at the same time, he had got an opportunity to leave the workshop, and thus, came out of it by jumping from the balcony. He has further stated that during the course of incident, both the appellants were armed with chopper and knife respectively and after leaving from the spot when they were running towards bhaji galli, they were chased. He has identified both the appellants being the same having armed with chopper and knife respectively. Thereafter, police arrived. By then, one co-accused was apprehended and was handed over in the custody of police. He has further deposed about his identifying both the appellants in the TIP held on 3rd December 2010.

16 Evidence of PW13 Alamgir Shaikh is to the effect that on the day of incident when he was present in the workshop, at around 10.00 p.m., along with other workers – Tapas and Dilip. After Tapas had went out of the workshop to attend bathroom, when he was returning, six persons intercepted him and along with him entered the workshop, out of them one, who was armed with a sword, dealt sword blows on his stomach, chest and hand. Said assailant is identified by this witness as appellant no.1 Munna. He has further deposed that appellants along with co-accused collected all the gold ornaments which were lying on the table and after putting it into the bags, ran away. He has identified both the appellants, who on the day of incident, were armed with weapons and had committed dacoity. As such, this witness has also established involvement of appellants in the act of committing dacoity at the material time, at the workplace where process of manufacture of gold ornaments was in progress.

17 From the cross-examination of both these witnesses, nothing is brought on record to doubt their evidence. As per this witnesses, though he was present at the time of TIP, he could not identify any of the appellants. Evidence of above witness is further found substantiated with the evidence of PW1 Sanjay Samant when he

has stated that on the day of incident he along with Dilip, Tapas, Alamgir and other workers namely Hemant, Bappi and others, were present at around 10.00 p.m. After Tapas went out to attend washroom, 5 to 6 persons entered the workshop and committed assault on PW13 Alamgir @ Sona, who sustained bleeding injuries, and extended threats to all the persons. He has further stated that he then collected all the gold ornaments and by putting them in bag, left the room. According to him, he concealed himself by the side of iron cupboard and had witnessed the incident from that spot. He has also stated that along with him PW5 Musharaf had also concealed himself and was watching the incident and after the accused left the place, he along with other workers came out of the workshop and found that two amongst them were already caught by public and has identified appellant no.2 Saddam and co-accused Bappa, to be the same. Though evidence of this witness finds materially corroborated to the evidence of other injured witnesses, his evidence with regard to apprehension of appellant no.2 Saddam appears to be contrary to the case of prosecution, as according to its case, both the appellants at around 12.55 hours came to be apprehended by police officers.

18 In that view of the matter, on considering evidence of PW2 Krishna Phadke, Head Constable, it reveals that on 27th September 2010 while he was on duty along with other staff, and was patrolling in the Grant Road area, PW19 P.S.I.Mali contacted and informed them about robbery which had taken place and further informed about fleeing of some of the accused and thus directed him to keep watch at the entrance gate of Grant Road Railway Station. Accordingly, when he was keeping watch along with P.S.I.Mali, two persons were suspected and thus apprehended. On inquiring, they disclosed their names as of appellant nos.1 and 2 and on putting questions to them were giving evasive replies. On obtaining personal search of appellant no.1, one chopper stained with blood and currency notes of Rs.76/- and yellow metal ornaments in the form of ear rings, wrist watch and one cell phone came to be seized from his possession.

 Similarly, from the possession of appellant no.2 Saddam, one blood stained knife and yellow metal ornaments in the form of nose stud came to be recovered from his possession, who were then taken to L.T.Marg Police Station. This witness has identified both the appellants to be same who were apprehended by him at the entrance gate of Grant Road Railway Station. In that view of the matter, evidence of PW1 Sanjay to the effect that appellant no.2 was

apprehended by mob on the spot does not appear to be convincing though apprehension of co-accused Bappa on the spot appears to be true, as according to evidence of PW2 Krishna Phadke, Head Constable, he was one of the members of the Police Officers team, who at the material time had apprehended appellant nos.1 and 2 at Grant Road Railway Station. Evidence of PW7 further corroborates the case of prosecution as from the evidence of this witness, namely, Mohan Mohite, Police Constable, evidence of PW2 Krishna Phadke is corroborated as he was one of the members of the Police Officers team who had apprehended appellants nos.1 and 2 at Grant Road Railway Station.

19 Evidence of PW7 reveals that on the day of incident, he was on mobile van duty as a driver and was patrolling in Chira Bazar area, when on the basis of information received, he visited the spot and found two injurers present there while co-accused was also found caught by public. According to him, he took both the injureds to G.T.Hospital. He has further deposed about the absconding accused who was apprehended by public on the spot giving physical description of appellants and other accused who accordingly came to be apprehended at the entrance gate of Grant Road Railway Station. His

evidence corroborates with evidence of PW2 Krishna Phadke on the point of apprehension of appellants as from his evidence he along with said Police Constable and A.S.I.Mali, appears to be members of the police team who had laid trap for apprehension of appellants at Grant Road Railway Station. Evidence of this witness is fully corroborated with the evidence of PW7 Mohan Mohite, Police Constable, and all above discussed evidence is further found corroborated with the evidence of PW5 Shaikh Mushrat, who has deposed about the incident which had occurred on 27th September 2010 in the night at around 10.00 p.m. in the presence of workers at workshop including PW4 Tapas – the complainant and others, and has further deposed about appellants entering into the workshop when the complainant had gone out to attend washroom and has further deposed about appellants causing injuries to PW13 Alamgir and others and of his sustaining injuries. He has identified both the appellants as one of the accused who had committed dacoity at the material time. On considering cross-examination of the witnesses discussed above, nothing has come on record to doubt their evidence. Infact, evidence of PW5 Shaikh Mushrat goes unchallenged, as such, establishing involvement of appellants.

20 The case of prosecution is further found substantiated from the evidence of PW12 Gajanan Narvekar, who has held the TIP and on considering his evidence together with the memorandum of TIP on record at Exhibit 38, it is found that PW4 Tapas Patra, PW5 Shaikh Mushrat, PW8 Dilip Tudu and PW1 Sanjay Samant had identified both the appellants in the TIP. Thus, contents of Exhibit 38 find fully corroborated with the oral evidence of PW12 Gajanan Narvekar wherein he has stated about four witnesses identifying both the appellants in the TIP.

21 Evidence of PW9 Jagannath Jana, independent witness, establish that in the night at 1.45 a.m., he was called by police to act as a panch where two persons were apprehended by police and on inquiry disclosed their names as of appellant nos.1 and 2. In his presence, their personal search was obtained one after another, and from possession of appellant no.1 Ranjan @ Munna, one knife and from his pant pocket 3 to 4 pairs of yellow metal tops, one wax ball having rooted therein golden metal particles came to be seized along with currency notes of Rs.50/-, Rs.20/-, Rs.5/- and Rs.1 respectively. On obtaining personal search of appellant no.2, knife, ear rings made of golden metal came to be seized. Panchnama of all these facts Exhibit 31 on record corroborate oral version of PW9 Jagannath Jana.

22 Lastly, considering evidence of PW11 Dr.Nandratna Paikrao, prosecution case is found further substantiated when evidence of this witness establish that when he was on duty at G.T. Hospital, in the midnight of 27th September 2010, apart from other injurers, he had examined PW6 Rajesh, PW4 Tapas and PW8 Dilip. PW6 Rajesh is found to have sustained following injuries :

- i) CLW on left side of chest antero laterally at the level of 7th and 8th ribs, oblique in nature, edges are sharp, margins are well defined, measurements are 6 cm x 2 cm x 1 cm.
- ii) CLW on left loin laterally; oblique in nature, edges are sharp, margins are well defined, measurements are 5 cm x 2 cm x 1 cm.
- iii) CLW from frontal to mid parietal region of head, measurements are 7 cm x 0.5 cm x 0.5 cm.

23 He has further noted that injuries sustained by PW4 Tapas are i) abrasion at Right forearm dorsally, measurements are 0.5 cm x 0.5 cm. and ii) blunt trauma to left ankle, and the injuries suffered by PW8 Dilip Tudu about his having restricted movement at right ankle joint, contusion 2 x 2 cm. Though it is contended on behalf of appellants that no medical certificate of any of the injurers are placed on record, I find no substance in the statement, as in the evidence of

Dr.Paikrao it has come on record that on his examining the injurers, he has taken entry in the Medico-Legal Register at Sr.No.2099 and has placed on record copies of said extract of such register at Exhibit 36 Collectively. According to his evidence, injuries sustained by one Shaikh Alladdin and PW6 Rajesh Patel were grievous in nature and were possible by sharp weapons like chopper or knife. However, Shaikh Alladdin is not examined.

24 Apart from submissions advanced for appellants as aforesaid, on perusal of record it is revealed that Charge Exhibit 2 was framed against three accused, wherein, three accused are shown as absconding. Present appeals are of appellant nos.1 and 2, who, for the offences punishable under Section 395 read with Section 397 of IPC are sentenced to suffer rigorous imprisonment for 10 years and to pay a fine of Rs.2,000/-, in default, to suffer rigorous imprisonment for 3 months. This is the maximum sentence imposed upon the appellants as they are already convicted for the offence punishable under Section 452 of IPC as well as under Section 307 of IPC read with Section 34 of IPC and are sentenced to suffer rigorous imprisonment for 5 years and 7 years respectively with fine. Co-accused no.3 Bappa @ Polash Shaman Dhara is convicted for the offences punishable under Section

395 read with Section 397 of IPC and is sentenced to suffer rigorous imprisonment for 7 years and to pay a fine of Rs.2,000/-, in default, to suffer rigorous imprisonment for 3 months. Admittedly, said co-accused has already undergone his sentence and is released from jail.

25 Record reveals that both the appellants are in jail since 27th September 2010. When the scheme of relevant sections of IPC is considered, it is found that Section 397 of IPC itself does not provide punishment for any specified offence. It only provides for a principle or a rule about awarding sentence in the case of robbery or dacoity. Section 392 provides punishment for robbery and it extends to R.I. for ten years with fine and if the robbery is committed on the highway between sunset and sunrise, the imprisonment may be extended to fourteen years. Section 394 provides that if a person voluntarily causes hurt while committing robbery, he shall be punished with imprisonment for life or R.I. which may extend to ten years with fine. Section 395 provides that whoever commits dacoity shall be punished with life imprisonment or with rigorous imprisonment for a term which may extend to ten years and shall also be liable to fine.

26 It is material to note that in none of these provisions, minimum sentence of imprisonment is prescribed and, therefore, unless the imprisonment for life is awarded, the Court has discretion to fix the quantum of punishment within the maximum limit. However, Section 397 provides that if, at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person or attempt to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years. In the present case, there is no allegation that any grievous hurt was caused or any attempt was made to cause death or grievous hurt. The allegation is only about assault and use of weapons at the time of commission of the offence of dacoity. In view of section 397, if it is held that the accused used deadly weapons like chopper, knife and pistol, which could cause death, the discretion of awarding sentence for the offence of robbery or dacoity would be curtailed by the provisions of Section 397. The Court in such case may fix the quantum of sentence of imprisonment but while using the discretion the Court cannot award the sentence of imprisonment less than seven years in view of the mandate of Section 397. Section 397 does not create an independent and substantive offence, but only provides a restriction on the discretion to be used at the time of

awarding the sentence of imprisonment. Thus Section 397 of IPC is a kind of proviso to Sections 392, 394 and 395, which prescribes minimum sentence of imprisonment, which may be awarded while convicting an accused under any of these Sections.

27 Having considering eye witness account, fact of apprehension of both the appellants immediately after the incident and about recovery of yellow metal ornaments from their possession, the medical evidence corroborating the eye witness account of their sustaining injuries in the incident involving appellants and further considering evidence of TIP, involvement of appellants in the crime is clearly established by the prosecution. However, for the reasons as aforesaid, and considering case of prosecution of both the appellants having been apprehended in the night at 00.55 hours, of which offence is registered with the concerned police station at 00.30 hours, there appears to be substance when it is contended on behalf of appellants that within short period of 25 minutes, it was not possible for complainant to give lengthy FIR and physical description of accused persons including the appellants, on the strength of which they are stated to have been apprehended at Grant Road Railway Station within 25 minutes. In the light of above facts, and as from the above

discussed evidence it is found that as no injuries are sustained by PW1 Sanjay, but according to him appellants had only pointed out knife and revolver to him, while according to complainant PW4 Tapas, since he is found to have sustained abrasion on his right forearm and blunt trauma on his left ankle and as per his evidence, though he is said to have sustained injuries by one of the persons amongst six persons, as according to him, person who has caused him injuries is not present before the court and as according to evidence of PW5 Shaikh Mushrat, appellant had caused injury to PW13 Alamgir @ Sona and since from his evidence it is revealed that appellants have not caused any injury to him, and since evidence of PW8 Dilip is similar to that of PW5 Shaikh Mushrat, and since as per the evidence of PW6 Rajesh, he has not identified any of the appellants, submissions made on behalf of appellants to convict the appellants to the extent of period of conviction already undergone, appears to be just and reasonable.

28 Though prosecution has also raised point of criminal antecedents of appellants, record reveals that this court on 28th April 2016 had considered that there are no criminal antecedents of appellant no.2 Saddam, and inspite of appellant no.1 Ranjan having criminal antecedents, he is found acquitted from Sessions Case No.295

of 2007 and on his conviction in Crime No.107 of 2008 by L.T.Marg Police Station, he has already undergone sentence of 7 years in that crime and is acquitted in Crime No.55 of 2008.

29 Having considering the fact and above discussed evidence, prosecution can said to have established charge leveled against both the appellants accordingly. Both the appeals stand dismissed. Appellants are convicted up to the period already undergone by each of them.

30 The order of learned Sessions Judge is thus partly modified thereby sentencing both the appellants to the period of imprisonment already undergone by them.

31 In the circumstances, both the Appeals are dismissed, in above terms.

(P N. DESHMUKH, J.)