

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO. 682 OF 1999

Shri. Badrul Haque Hasanali Shaikh
Residing at 11-12, first floor,
Bablubhai Chawl,
216-218, Moulana Azad Road,
Mumbai 400 008.

... Appellant
(original complainant)

Vs

1. Deepak Balkrishna Anubhavane
2. Dinesh Balkrishna Anubhavane
3. Santosh Ramdot Kanojia
All residing at Room No.11,
Sankraman Baithi Chawl,
Sherechi Wadi, Gilder Lane,
Mumbai 400 008.
4. The State of Maharashtra
Through the Senior Inspector of
Police, Sir J.J. Marg Police
Station, Mumbai.

... Respondents 1 to 3
(Orig. Accd. Nos. 1,3 and 2)

....

None for the Appellant
Mr. Chandrakant Chavan for Respondent No. 3.
Mr. P.H. Gaikwad, APP for the State-Respondent No. 4.

....

CORAM : MRS. SWAPNA S. JOSHI, J.

DATE : 1st OCTOBER, 2016

JUDGMENT :

1] This appeal is preferred by the appellant/complainant against the judgment and order dated 7th September, 1999, delivered in the case of 89/P/97 by the learned Metropolitan Magistrate Court,

Mazgaon, Mumbai, thereby acquitting the Respondent/ accused no. 1 to 3 of the offences punishable under section 381 r/w 34 and 414 r/w 34 of Indian Penal Code.

2] Since the appellant/complainant remained absent, the learned Counsel Mr. Yashpal Thakur was appointed as an *amicus curiae*. I have heard Mr. Yashpal Thakur, the learned APP for state and the learned Counsel for the respondent/accused.

3] I have carefully gone through the record of the case and the impugned judgment and order. It is noticed that the judgment passed by the learned Magistrate Court is not illegal or perverse. The learned Counsel Mr. Thakur has taken me through the entire evidence adduced on behalf of the prosecution. He did not dispute that no perversity and illegality is noticed in the said judgment.

4] Brief facts of the case are that the complainant (PW-1) was running a Trading Company at the relevant time having office at Sarthi Mohalla. About 7 to 8 employees were working with him. The accused no. 2 Santosh was working as an employee with the complainant. About 4 months prior to the alleged incident which occurred on 19th March, 1997, the accused no.2 left the job. In his place accused no. 1 Deepak started working with the complainant. Accused no.3 is the brother of accused no.1. It is the case of the prosecution that during the period from January, 1997 to 19th March, 1997, time to time, accused no.2 Santosh and thereafter, accused

no.1 Deepak removed the total cash amount of Rs.1,30,000/- from the drawer of the table, by using duplicate keys. The complainant use to keep the cash amount, in connection with the business in the drawer. On the date of incident i.e. 19th March, 1997, in the evening while the complainant was standing outside the office, talking with his employees he asked PW-2 to go and bring a cheque book from his cabin. Therefore, PW-2 went inside and he noticed accused no.1 removing something from the drawer of the table and pocketing it. PW-2 immediately went and informed about the same to the complainant. The complainant immediately went towards his cabin and he found that the amount of Rs.5,000/- was missing. On inquiry with accused no.1, as per the prosecution case the accused no.1 admitted to have removed the amount of Rs.5,000/-. On the same day, the complainant had removed the amount of Rs.20,000/- from the Union Bank of India, which was lying in the drawer and the amount of Rs. 5,000/- was found less. According to the complainant the accused no.1 had used duplicate keys of the drawer and removed the said amount. The complainant proceeded to the police station along with the accused no.1 and lodged the complaint. The investigation officer PW-5 took personal search of accused no.1 and found the amount of Rs.5,000/- and bunch of keys. The said articles were seized by PW-5 under panchnama. During the course of investigation it was found that the accused no.1 had removed the cash amount from the drawer from time to time and out of the said amount he had purchased one gold bracelet worth Rs.13,000/- and one gold ring worth Rs.4,750/- from PW-3. Later on, the accused

no.3 was arrested. The bracelet and gold ring were found with PW-3, as per the memorandum panchnama under section 27 of Evidence Act, and the voluntary statement made by accused no.1.

5] Later on, accused no.2 was arrested and the amount of Rs.21,378/- was recovered by the Investigating Officer from accused no.2. It is the case of the prosecution that the accused no.1 used to hand over the stolen amount to him and he used to deposit the same in Bank. The amount of Rs.21,378/- was taken charge by the police from the bank account of accused No.2. It is the case of the prosecution that the accused no.1 purchased one gold chain worth Rs.8,500/-, which was prepared at the instance of the father of accused no.1 and 3 namely Balkrishna Anubhav. So also the Titan watch, Colour T.V. were also purchased by accused no.1 Deepak, from the said amount.

6] The prosecution examined in all 4 witnesses. PW-1 and PW-2 employees working in the office of complainant, PW-3 and 4 are the owners of jewellery shop. On perusal of the testimony of the complainant PW-1 and his employee PW-2, it is noticed that there are major contradictions in their version. According to the PW-1, PW-2 was asked to go and bring the cheque book, accordingly he went. PW-1 stated that when he was sitting in the adjoining cabin, he asked PW-2 to bring the cheque book from his cabin. Accordingly, PW-2 went there and after returning told him that he saw accused no.1 removing and putting something in his pant pocket from the

drawer of the table. The PW-1 therefore rushed to his cabin. He found, the cash lying in his drawer was short of Rs.5,000/-. On inquiry with accused no. 1, he admitted that he has duplicate keys of the drawer and he used to remove money from time to time. The accused no.1 also showed the amount of Rs. 5,000/- to the complainant. PW-1 took them to the police station. Police took search of the accused no.1 and found duplicate keys (Article B) and the amount of Rs.5,000/-(Article A) which was taken charge under panchnama.

7] According to the PW-1 when he opened the drawer of his table he found that Rs.5000/- were missing and therefore, he inquired with accused no. 1. At that time he found the amount as well as the keys lying on the table of accused no. 1. PW-1 stated that those keys were duplicate and on making inquiry with accused no. 1 he informed that accused No. 2 Santosh handed over those keys to him. During the cross examination PW-1 specifically stated accountant Mr.Paras looks after the account and the keys are always kept with him. PW-1 further stated that Mr. Paras used to tally the account on every evening and prior to the incident once or twice the amount was found less. PW-1 further stated that he had never lost these keys either from the cupboard or drawer. On careful scrutiny of testimony of PW-1, it is noted that once or twice the amount was found less. In that case it is not clear as to when the amount of Rs.1,30,000/- was found missing by PW-1, how he kept mum. In fact Paras failed to inform PW 1, time to time finding of less amount. It is also

surprising that when the keys were kept with the Accountant Mr. Paras, when the accused no. 2 had an occasion to get those keys or when exactly the duplicate keys were got prepared by him. Significantly, the Accountant Mr. Paras was not examined by the prosecution, in order to clarify the aspects with regard with the accounts and the amount found less, as well as about the keys. Similarly, as the cash amount as well as the keys were found by PW-1 with accused no. 1, there is no significance of the panchnama of those articles in the police station. The entire process of search of cash as well as the keys is repeated by the Investigating Agency. Ultimately, the prosecution has not established whether the keys, which were found allegedly with accused no. 1 were the duplicate keys.

8] Now coming to the testimony of PW-2. According to the PW-2 on the date of incident at about 6 p.m. he was standing along with PW-1 outside. PW-1 asked him to bring the cheque book, which was kept under drawer of the table. When PW-2 went there, he noticed that accused no. 1 opened the drawer and he was doing something in the drawer. Hence, PW-2 closed the door of the cabin from outside and went to call PW-1. PW-1 then inquired with accused no. 1. On inquiry, he admitted that he had committed the theft. The accused no. 1 was taken to the police station, the cash of amount of Rs.5000/- and bunch of keys were recovered from him. In the cross examination PW-2 specifically stated that the door was closed. Significantly, PW-1 has not stated about the facts that the accused no. 1 was inside the

cabin and the door was closed from outside. If at all the accused no. 1 was found inside the cabin, in that case it was appropriate for the complainant to call the police and get accused no. 1 arrested at that place. However, PW-1 has not stated about the said fact, with regard to the closure of the door thus in the testimony of PW-1 and PW-2 with regard to the place, whether the complainant PW-1 was present there is discrepancy. So also there is contradiction with regard to the fact that the accused no. 1 was inside the cabin and the door was closed from outside. It is already discussed about that the importance of the personal search of accused no. 1 in the police station loses its significance, as the said search was not for the first time. Similarly, the prosecution has failed to examine the panchas, in order to prove the said panchnama. There is also discrepancy about the place, where the keys and the amount were kept. It is doubtful whether the keys and amount were found with the accused no.1 at the time of incident or they were found on his table. Thus, the testimony of PW-1 as well as the PW-2 does not inspire confidence. Significantly, the investigating agency failed to find out whether the set of the keys allegedly found with the accused no. 1 was the original bunch or it was duplicate. Merely stating that the keys were duplicate is not sufficient.

9] As far as the testimony of PW-3 and PW-4 is concerned, they are the jewellers. According to PW-3 the Gold Bracelet and Gold Ring were purchased by accused no. 1 from him and so far as the testimony of PW-4 is concerned, from him the father of accused no. 1

and 3 purchased a chain. On perusal of the testimony of PW-3 as well as PW-4, it is noticed that the prosecution has failed to establish the nexus between the cash amount and the articles. Similarly, the prosecution has failed to connect the said cash and articles with the accused persons. As far as accused No. 3 is concerned the prosecution has failed to prove that accused No. 3 assisted accused No.1 and accused No. 2 in concealing or disposing of the stolen property, which was allegedly taken charge by the investigating agency.

10] It is well settled that the prosecution prove its case beyond reasonable doubt and this court cannot interfere with the judgment of the lower court unless, it is found to be perverse or illegal. In the present case, the prosecution has failed to conduct the investigation fairly and independently, the Investigating Officer investigated the case, as per the version of the complainant. No independent investigation has been carried out by PW-4. It is already discussed above that prosecution has also failed to examine the material witness PW-4, Mr. Paras on the point of statement of accounts and the deficit in the cash amount. There are glaring discrepancies in the testimony of PW 1 and PW 2, which go to the root of the case. Seizure of cash amount of Rs.5,000/- and the keys of the drawer of table is not proved by prosecution. I do not find any illegality or perversity in the judgment passed by the learned Magistrate. The appeal is therefore dismissed.

(MRS. SWAPNA S. JOSHI,J.)