

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 684 OF 1995

Mohammed Nizam @ Iqbal Hidayat
Iqbal Ansari.

... Applicant.

Versus

The State of Maharashtra
at the instance of D.B. Marg
Police Station under
C.R. No. 656/1991.

... Respondent.

Mr. Ashish Dube, advocate appointed for Applicant.

Mrs. A.A. Mane, APP for State.

CORAM : SMT. SADHANA S. JADHAV,J
DATE : JANUARY 12, 2016

JUDGMENT:

1 Heard the learned advocate appointed for the appellant and the learned APP for State.

2 The appellant herein is convicted for offence punishable under Section 392 of the Indian Penal Code and sentenced to suffer R.I. for 5 years by the Additional Sessions Judge, Greater Mumbai in Sessions

Case No. 604 of 1992 vide Judgment and Order dated 31/7/1995.

Hence, this appeal.

3 The appellant was enlarged on bail by this Court vide order dated 14/12/1995. At that time, the Hon'ble Court had observed that the appellant had been sentenced to suffer 5 years imprisonment and from perusal of the impugned Judgment, it appeared that he was in jail since 28/12/1991. That he has almost undergone about 4 years of imprisonment and therefore, he was enlarged on bail.

4 It is the case of the prosecution that on 4/11/1991 the statement of one Yogesh Bhogilal Shah was recorded by the police. In the said statement, the complainant had alleged that on that day i.e. on 4/11/1991 he had opened his jewellery shop, which was run in the name and style of M/s. Labdhi Jewellers situated at Vishnu Dham, Linking Road Corner, Khar(W), Mumbai. That his father Bhogilal M. Shah was the owner. That at about 11.30 a.m. he had given the keys of strong room to Mr. Babu Narayan and has asked

him to bring golden ornaments from the strong room of the shop. Babu was carrying the said ornaments from the basement to the shop. At that time, one person had entered into the shop and has asked the complainant to show a silver coin. The complainant had disclosed that silver coins are not available in the shop. Thereafter, the said person had asked him to show a gold mangalsutra and had given Rs. 500/- as an advance. He had informed the complainant that he would return alongwith his wife to take ornaments. He returned within 5 minutes. At that time, he was accompanied by two persons. The said two persons had wielded revolver and had threatened Babu. Thereafter, they had forced the complainant and Babu to proceed towards staircase. They were assaulted. The complainant and Babu were locked in the toilet. They had coerced the complainant to hand over the keys of the safe. Thereafter, they had asked him to open drawers. One person had reached on the spot. He has picked up golden ornaments from the safe. They collected the same and placed them in cloth bag. Then, Babu and Yeshwant were released. They had pushed them inside the strong room and kept them there. They

pushed watchman inside. The watchman had informed that the two persons were standing outside the shop. In the first information report, he had given description of the ornaments, which were stolen from the shop. On the basis of the said statement, Crime No. 656 of 1991 was registered at Khar Police Station and investigation was set in motion.

5 The present appellant was arrested on 28/12/1991. After completion of investigation, charge-sheet was filed. The case was committed to the Court of Sessions and registered as Sessions Case No. 604 of 1992. Prosecution examined 15 witnesses to bring home the guilt of the accused.

6 The nature of evidence in the present case is circumstantial in nature. After arrest of the accused, the complainant, owner and employees of Labdhi Jewellers were called for identifying the accused. It is pertinent to note that none of the witnesses have identified the present appellant in the test identification parade. Moreover,

witnesses have also not identified the accused before the court and hence, no substantive evidence as far as the identification of the accused is concerned.

7 Upon perusal of the evidence on record, it appears that the only incriminating circumstance against the present appellant is the finger print which was found on the glass. P.W.10 Sanjay Jumaledar is the police photographer attached to crime branch. He has deposed before the court that on 5/11/1991 he had received a message to take photographs/finger print impressions. He attended the place of occurrence i.e. shop of Labdhi Jewellers on 6/11/1991. Upon reaching the scene of offence, he had found finger print impressions which were covered and protected by affixing a piece of paper at four places. He removed those papers and took photographs from these impressions from very close distance. The impressions were encircled and found to be signed. He has admitted in the cross-examination that he had reached the spot in between 12 noon and 1 p.m. on 6/11/1991. He had noticed paper slips at four places. Nothing was

written on the slip. He could not recollect as to the colour in which the impressions were encircled. He took only four photographs. He has admitted that he cannot definitely say whether the impressions are of fingers of the hand or leg.

8 It is pertinent to note that in fact the photographer ought to have taken the photographs of the impressions before removing the slips affixed on the spot and thereafter, other photographs to show that there was no tampering of evidence. This would be necessary for the simple reason that the incident has occurred on 4/11/1991, whereas the photographs were taken on 6/11/1991.

9 The record would show that the present appellant alongwith the co-accused was also an accused in Crime No. 591 of 1991. The said incident had taken place on 26/11/1991. The accused were arrested on 4/12/1991 i.e. after commission of offence in Crime No. 591 of 1991 and 656 of 1991. It further appears from the record that the present appellant was first arrested in Crime No. 591 of 1991 and

was then taken by transfer warrant and was arrested in the present case i.e. Crime No. 656 of 1991. It is pertinent to note that the finger prints of the present appellant were taken on 4/12/1991 which is at Exh. 44A i.e. prior to the arrest of the appellant in the present crime. It was incumbent upon the investigating agency to take the finger prints of the accused in the present case and the evidence in connected cases cannot be utilised in a subsequent case in which there is no evidence to show that it is an incriminating circumstance in the present case. The finger prints of the present appellant were taken by the investigating agency in Crime No. 591 of 1991. Exh. 44A has been proved by the prosecution witness No. 13 Balwant Jadhav. He has deposed before the Court that he was working as slip operator on 5/12/1991. He had verified the log book. He had noticed the names of 3 fresh accused persons. The appellant was one of them. He had sent finger prints of 3 persons to the finger print bureau. He had taken finger prints of accused Pravin Kumar on 18/12/1991. He had taken finger prints of accused Ataulla on 28/11/1991.

10 He has admitted in the cross-examination that he has no documentary evidence to show that he had taken finger print impression of the present appellant. It is further pertinent to note that the finger prints of the original accused Nos. 1 and 2 were tallied with the images taken on 6/11/1991. They had corroborated with the same. However, the original, accused Nos. 1 and 2 have been acquitted.

11 The learned Counsel appointed for the appellant rightly submits that there is suppression of genuineness of obtaining finger print impressions. That there is nothing on record to remotely indicate that the finger prints of the present appellant were obtained by the investigating agency after accused were arrested on 28/12/1991.

12 The learned Counsel has rightly further submitted that firstly, the accused has not been identified at the test identification parade or in the court. Secondly, that there is no recovery of any

incriminating material, which would establish the nexus of the present appellant with the offence on the basis of which Crime No. 656 of 1991 is registered. Thirdly, that the prosecution has failed to establish that finger prints of the present appellant were found on the glass in the premises of Labdhi Jewellers. The photographer also does not say that the slips which were affixed on the finger print impressions were signed by the panchas. The learned Counsel rightly submits that the possibility, that such impressions have been tampered with, cannot be ruled out. In any case, there is no evidence to show that the finger print impressions were taken in the present case. P.W. 13 has failed to establish that finger print impressions of the present appellant were obtained. In view of this, the appellant deserves to be acquitted of all the charges levelled against him.

13 Learned APP has vehemently supported the impugned judgment. Learned APP submits that the appellant herein has criminal antecedents, which is apparent from the fact that his finger

prints were obtained on 4/12/1991 prior to the offence registered in Crime No. 656 of 1991. Although it is true that the appellant had criminal antecedents, it is incumbent upon the prosecution to prove each and every case against the accused beyond reasonable doubt. The accused cannot be convicted in a particular case only because he has criminal antecedents and hence, submissions cannot be accepted.

14 Upon perusal of records and considering the submissions advanced, conclusion can be drawn that the prosecution has rather failed to establish the guilt of the accused beyond reasonable doubt. In view of this, appeal deserves to be allowed.

15 The efforts taken by the advocate Mr. Ashish Dube, appointed to espouse the case of the appellant needs to be appreciated at this stage. He has put in the best of the efforts to espouse the cause of the appellant. His professional fees is quantified at Rs.5,000/- to be paid to him within 3 months from today.

16 Hence, following order is passed:

ORDER

- (i) The appeal is allowed.
- (ii) The Judgment and Order of conviction dated 31st July, 1995 passed by the Additional Sessions Judge, Greater Bombay in Sessions Case No. 604 of 1992 against the appellant is quashed and set aside.
- (iii) The appellant is acquitted of the charge levelled against him in this proceedings.
- (iv) His bail stands cancelled.

17 The Appeal is disposed of accordingly.

(SMT. SADHANA S. JADHAV,J)