

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.269 OF 2014

WITH

CRIMINAL APPLICATION NO.1014 OF 2016

IN

CRIMINAL APPEAL NO.269 OF 2014

WITH

CRIMINAL APPEAL (STAMP) NO.1014 OF 2014

MOHAMMAD ASLAM MOHAMMAD UMAR)
SHAIKH)
Aged 41 years, Occupation – Hawker,)
R/o.Hill View Apartment, Nurani Building,)
2nd Floor, Room No.2/2, Mumbra Devi Road)
Mumbra, District – Thane.)
(At present in Kolhapur Jail))...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.V.S.Tiwari, Advocate for the Appellant.

Mr.S.V.Gavand, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 29th NOVEMBER 2016.

ORAL JUDGMENT :

1 By this appeal, the appellant / accused is challenging the judgment and order passed by the learned Additional Sessions Judge, City Sessions Court, Greater Bombay, on 21st August 2013, in Sessions Case No.317 of 2012, thereby convicting him for the offence punishable under Section 394 read with Section 397 of the IPC and sentencing him to suffer rigorous imprisonment for 9 years with payment of fine of Rs.10,000/-, in default, to undergo further simple imprisonment for 1 year. On realization of the fine amount, by the impugned judgment and order, the learned Additional Sessions Judge had directed to pay Rs.5,000/- to the informant as compensation.

2 Briefly stated, according to the prosecution case, on 12th January 2012, at about 7.30 a.m., the appellant / accused entered in the ladies boggie of the 17058 UP Sikanderabad – Mumbai, Devgiri Express proceeding towards Chhatrapati Shivaji Maharaj Terminus (CST), Mumbai, at Dadar Railway Station, and thereafter, committed robbery by causing grievous hurt to the

informant / PW1 Manjusha Marva. According to the prosecution, the appellant / accused looted cash amounting to Rs.48,000/- one gold chain weighing 5 gms as well as one mobile phone, from the informant / PW1 Manjusha Marva.

3 Heard the learned counsel appearing for the appellant / accused. By taking me through the evidence of the prosecution witnesses, the learned counsel argued that evidence of PW1 Manjusha is not passing the test of credibility, as the same is not corroborated by the other evidence. The learned counsel argued that though it is alleged that Manjusha Marva was traveling in the train with her real brother Ravindra Behl, he is not examined by the prosecution. Her evidence is not corroborated by the evidence of PW5 Sunil Chavan, guard to the said train. It is further argued that the prosecution has failed to examine Najama Shaikh, in order to establish recovery of gold chain. Not prosecuting Najama Shaikh in an offence punishable under Section 411 of the IPC casts a shadow of doubt in the prosecution case. It is further argued that evidence of PW3 Ramchandra

Katkar, PW20 Suresh Kanade and that of PW8 Hanumant Joshi is not consistent and the same is not believable because independent witnesses from the alleged place of arrest of the accused were not examined by the prosecution. It is further argued that there is no signature of the appellant / accused on the panchnama Exhibit 14 by which it is alleged that personal search of the accused was conducted and it has resulted in recovery of a cell phone, a railway pass, as well as currency note of Rs.500/- denomination. Evidence of calling panch witnesses coming from mouth of these three witnesses is also inconsistent. The learned counsel further argued that the evidence regarding stoppage of the train after pulling the chain is also inconsistent. The learned counsel for the appellant / accused criticized the evidence regarding identification of the appellant / accused in the identification parade, allegedly conducted by PW9 Mrs.Hira Golhar, Naib Tahasildar / Executive Magistrate by stating that her cross-examination reveals that no proper care in conducting identification parade was taken by her. The learned counsel argued that scrutiny of evidence of PW10 Nitin Bobade, Investigating Officer, will go to show that arrest of

the accused as well as seizure of articles from him, is doubtful. Those articles were not got identified by conducting identification parade for that purpose. Therefore, according to the learned counsel for the appellant / accused, the appellant / accused deserves acquittal.

4 The learned APP opposed the appeal by submitting that considering the nature of offence alleged against the appellant / accused, evidence of the informant is the only relevant evidence, and therefore, non-examination of the brother does not cast a shadow of doubt on the case of the prosecution. The learned APP further argued that there was ample opportunity to the informant to observe the appellant / accused while committing the crime in question and the FIR lodged by her immediately contains description of the appellant / accused, and therefore, no other evidence is required for establishing identity of the accused. The learned APP further argued that there is no cross-examination of witnesses on the point that Najama is not the sister-in-law of the appellant / accused, and therefore, evidence of

recovery of gold chain is believable as well as acceptable. The learned APP further argued that admission of the Investigating Officer regarding showing of accused to the informant at the police station got explained from evidence of PW1 Manjusha, as her evidence shows that she is a resident of Village Partur in District Jalna, and after commission of crime, she had asked the Investigating Officer whether the accused was arrested, but she could not get any plausible response from the police. With this, the learned APP justified the conviction of the appellant / accused.

5 I have carefully considered the rival submissions and also perused the record and proceedings. According to the prosecution case, while committing robbery, the appellant / accused had caused grievous hurt to PW1 Manjusha and had looted cash and valuables worth Rs.65,200/- from her in the running train, in the morning hours of 12th January 2012. Considering the nature of Charge, at the outset, it will be apposite to examine what information PW1 Manjusha states about the incident, as fate of the prosecution case to a large extent depends

on her testimony. PW1 Manjusha has stated that she and her brother Ravindra boarded 17058 UP Devgiri Express on 11th January 2012 at about 10.00 p.m. from Partur. She sat in ladies boggie whereas her brother Ravindra sat in general compartment of that train. Her testimony further reveals that the train reached at Dadar Railway Station of Mumbai at about 7.30 a.m. of 12th January 2012 and all ladies from that ladies boggie of the train alighted leaving her alone in that boggie. She stated that then the accused boarded that train and told her that he is Musalman and the informant is also Musalman. Upon that, as per version of PW1 Manjusha, she told him that she is not Musalman. Thereupon, as per version of PW1 Manjusha, accused asked her to take out money and she replied that she is not having money. Then the accused started closing shutters of windows of the ladies boggie and she tried to pull the chain of that running train. As per the version of PW1 Manjusha, then the appellant / accused gave a punch on the left side of her face and near left eye. Then, he started strangulating her by means of her *odhani*. PW1 Manjusha further stated that then she told the accused that her husband was

no more and if accused wanted money, then he may take it from her bag, but he should not beat her.

Thereupon, accused took out cash, gold chain and mobile phone from her bag. As per the version of PW1 Manjusha, then the train slowed down and the accused alighted from the train and ran away. She pulled the chain and the train stopped. Thereafter, she narrated the incident to the guard of the train. Evidence of PW1 Manjusha further shows that at around 8.00 a.m., the train reached CST and she narrated the entire incident to the Railway Police. She was then taken to St.George Hospital by police, and thereafter, she lodged report. She was then taken to Dadar Railway Police station and from there to J.J.Hospital. PW1 Manjusha testified that the accused took an amount of Rs.48,000/-, gold chain costing Rs.13,000/- and cell phone costing Rs.4500/-. She further deposed that on 27th February 2012, she identified the accused at Byculla Jail. This witness also identified the accused while in the dock. In her cross-examination it is elicited from her that the incident of robbing her lasted for about 7 to 8 minutes. She also stated in her cross-examination

that the train stopped between the CST and Masjid Bunder Station after pulling the chain. Her cross-examination reveals that she was not sure about the ownership of the currency notes produced before the court, but she was categorical in stating that the gold chain produced before the court belongs to her. She stated in her cross-examination that on the basis of design of the chain, she firmly states that the chain belongs to her. Her cross-examination further reveals that PW9 Hira did not ask her whether she had seen the photograph of the accused or not, and that she along with PW9 Hira went to Byculla Jail by a police jeep.

6 PW1 Manjusha had lodged report to police about the incident on 12th January 2012 itself. This report is at Exhibit 9. PW11 Ashok Mokashi, A.S.I., working with Railway Police Station at CST, has recorded this FIR and then it was sent to Dadar Railway Police Station, where PW12 Eknath Kasure had registered Crime No.8 of 2012 on the basis of the said FIR. It is, thus, seen that, the FIR was lodged with promptitude immediately after the incident. This FIR at Exhibit 9 shows that the informant / PW1

Manjusha had described the robber in detail by stating that the person who robbed her was a less heighted, slim person with fair complexion with round face. She further stated in her FIR that the robber was bald from front and was aged about 35 years, wearing full sleeves T-Shirt and cream coloured pant. Other recitals in the FIR, so far as mode and manner of robbery and assault on her, are perfectly in consonance with her testimony before the court. Needless to state, that the FIR at Exhibit 9 duly corroborates version of informant / PW1 Manjusha.

7 According to the prosecution case, informant / PW1 Manjusha had identified the appellant / accused in the identification parade held by the prosecution on 27th February 2012. Prior to adverting to this aspect, one will have to see how and when the appellant / accused was arrested. Evidence of PW3 Ramchandra Katkar – a panch witness, PW6 Suresh Kanade - Police Constable, Crime Branch, Andheri, and that of PW8 Hanumant Joshi, P.S.I., Crime Branch Andheri, consistently show that on information received by PW8 Hanumant regarding arrival

of robber, a trap was laid on 23rd January 2012, and the accused who had alighted from an autorickshaw at about 1.10 p.m. on that day, was arrested by the police. All these three witnesses have unanimously stated that personal search of the appellant / accused was conducted on his arrest and one mobile phone, one currency note of Rs.500/- denomination as well as one railway pass came to be seized vide panchnama at Exhibit 14. Evidence of these three witnesses so far as the arrest of the accused, is not shattered in the cross-examination. Therefore, the prosecution has proved the fact that the appellant / accused was arrested by police from Crime Branch of Andheri on 23rd January 2012.

8 With this, now let us to to the identification parade conducted by the prosecution with the help of PW9 Hira, the Executive Magistrate. Relevant portion of evidence of PW9 Hira requires production and it reads thus :

“Accordingly as per order of collector I conducted TI parade on 27.2.012 at Byculla Central Jail. I conducted TI parade of present accused at above referred place. Complainant Manjusha Marva had identified to accused in a TI parade. During

conducting TI parade of accused I prepared TI parade panchnama and TI parade memorandum in presence of panch witnesses. I obtained signatures of panch witnesses thereon.

In a very cryptic and telegraphic language, this Executive Magistrate has stated in casual manner that she conducted Test Identification Parade (TIP) in which informant PW1 Manjusha had identified the accused, and that, she prepared the Memorandum of Identification. This is what she states in her examination. In this context, guidelines given by this court in Criminal Manual assumes importance. This court has described the procedure for holding TIP in paragraph 16 of the Criminal Manual. These guidelines also show what care and caution should be taken by the Executive Magistrate while holding TIP. It is found from those guidelines that the Executive Magistrate should first acquaint himself with the facts of the case and find out who is to be put in the identification parade and who are witnesses. It is stated that two independent respectable persons should be called up first and the Executive Magistrate should question them and satisfy himself that they are independent and fairly intelligent persons. The

Executive Magistrate is required to see that the parade should be arranged in such room or place where the identifying witnesses should not be able to look into it. The Executive Magistrate should see that dummies are persons of more or less the same physical appearance and approximately of the same age as the person to be identified. The Executive Magistrate is also expected to see that no person other than the persons in the parade and the two respectable persons should be allowed in the room where the identification proceedings are to be held. It is also stated in the guidelines that after the parade is arranged, one of the two respectable persons should be sent up to bring the accused from the lock-up and care should be taken to see that when the accused is being brought from the lock-up, identifying witnesses do not have an opportunity of seeing them. There are several other guidelines and there needs to be a positive evidence from the Executive Magistrate to show compliance of such guidelines while conducting the identification parade. Evidence of PW9 Mrs.Hira is not disclosing adherence to the guidelines issued by this court for conducting TIP. In cross-examination, she has candidly admitted

that she has not ascertained whether the panch going to call the complainant was having any photograph of the accused with him or not. To crown this all, Investigator i.e. PW10 Nitin Bobade in his cross-examination, has candidly admitted that after arrest of the accused, the accused was shown to the informant at the police station. Even if PW1 Manjusha in her cross-examination states that prior to 27th February 2012, she made efforts to know from police whether the accused was arrested or not, and that, the police did not inform her anything about the arrest, evidence of the prosecution regarding identification parade and consequent identification of the appellant / accused in that parade by PW1 Manjusha cannot be said to be a trustworthy evidence. It is not free from doubts and for want of proper precaution in holding TIP and possibility of the informant seeing the appellant / accused prior to the identification parade, the same is not worth acceptance. Therefore, evidence of PW9 Mrs.Hira and the consequent TIP conducted by her is not of any assistance to the prosecution.

9 At the same time, one will have to keep in mind that TIP is corroborative to identification of the accused in the court. In the case in hand, evidence of PW1 Manjusha shows that she had identified the accused / appellant while in dock. Evidence about identification in the TIP does not constitute a piece of substantive evidence. Such tests are primarily meant for the purpose of helping the investigator for seeking assurance that the investigation is proceeding on right lines and direction. The TIP conducted under Section 9 of the Evidence Act is helpful for the purpose of testing the veracity of the witness. However, identification of a person is required to be proved during trial by adducing direct evidence by dock identification . A person can be identified through the shape of his body or gait. In case of identification of a stranger by the victim, the victim should get sufficient time and opportunity of seeing the culprit, and therefore, impressing his features, identification marks etc. in his memory. In the case in hand, evidence of PW1 Manjusha shows that the incident of robbing her commenced from Dadar Railway Station and lasted up to about Masjid Bunder Railway Station.

This shows that PW1 Manjusha was in company of the appellant / accused for sufficiently long time. Even her cross-examination shows that the actual incident of robbing took time of about 8 minutes. Therefore, she had close interaction with the appellant / accused during that period. Then the appellant / accused gave a blow of fist on her face and attempted to strangle her. This implies that the appellant / accused and PW1 Manjusha were very close to each other during the course of robbery. It also implies that PW1 Manjusha and the appellant / accused were with each other in the ladies compartment of the train from Dadar Railway Station to Masjid Bunder Railway Station. Thus, it is clear that the appellant / accused was at a very close distance for a sufficiently long time. It is also seen from her FIR that she had disclosed features of the accused while reporting the matter to the police. As such, it needs to be held that PW1 Manjusha had clearly observed the appellant / accused during the course of the incident and she had ample opportunity to mark face and features of the accused. Careful perusal of evidence of PW1 Manjusha does not show that her evidence regarding dock identification of

the appellant / accused was shattered in any manner, even during her cross-examination. There are no questions put to her to state that identity of the appellant / accused is not matching to the identity given by this witness in the FIR lodged by her immediately after the incident. Therefore, there is no reason to disbelieve evidence of PW1 Manjusha regarding identification of the appellant / accused before the court.

10 PW7 Dr.Ms.Rajni Chavan is a Medical Officer attached to St.George Hospital, Mumbai. On the date of the incident itself, she examined PW1 Manjusha and noted that PW1 Manjusha was bleeding from nose and had a swollen eye. PW7 Dr.Rajni noted that there was a fracture to nasal bone of PW1 Manjusha causing grievous injury to her. Evidence of PW7 Dr.Rajni is corroborated by contemporaneous Medical Certificate which shows fracture of nasal bone and blunt trauma to her face and left eye. This evidence of PW7 Dr.Rajni is fully corroborating evidence of PW1 Manjusha regarding mode and manner of assault on her, during the course or robbery.

11 Therefore, there is no reason to disbelieve the version of PW1 Manjusha regarding assault on her and the incident of robbery with her in the running train.

12 According to the prosecution case, the golden chain was robbed from PW1 Manjusha in the incident in case. That golden chain came to be seized in presence of PW4 Suresh Awhad, panch witness, by PW10 Nitin Bobade, Investigating Officer. Evidence of PW4 Suresh shows that on 24th January 2012, a lady named Najama Shaikh was present at Dadar Railway Police Station with a golden chain and she disclosed to police that the appellant / accused is her brother-in-law and he had left a golden chain with her. On production of that golden chain it was seized vide seizure panchnama Exhibit 16 which is proved by PW4 Suresh and PW10 Nitin Bobade, Investigating Officer. There is no cross-examination of these witnesses on the point that Najama Shaikh had not disclosed of her relation with the appellant / accused. Therefore, evidence of PW4 Suresh to the effect that sister-in-law of the appellant / accused had produced a golden chain and the same was seized by police needs to be accepted.

13 In her cross-examination, PW1 Manjusha has stated that the golden chain produced before the court is the same golden chain which was robbed from her by the appellant /accused. The informant disclosed that she identified her golden chain on the basis of design of that chain. Evidence of PW1 Manjusha, as such, shows that the golden chain seized by the prosecution was the article of her daily use. In the case of things which are used daily, identification can be made without any special identification mark on those things. A lady can never make a mistake in identifying ornaments which could be treated as ornaments in common use. In the matter of **Earabhadrappa vs. State of Karnataka AIR 1983 SC 446**, the Apex Court has noted this aspect by holding that it is a matter of common knowledge that ladies have an uncanny sense of identifying their own belongings. Seizure of robbed golden chain from relative of the appellant / accused as such corroborates the version of PW1 Manjusha that it was the appellant / accused who had robbed her in the running train. There is no iota of evidence on record to show that Najama was aware of the fact that the chain kept with

her was a stolen property and therefore no capital of the fact that she was not prosecuted for the offence punishable under Section 411 of the IPC can be made out.

14 Evidence of PW1 Manjusha further gains corroboration from evidence of PW5 Sunil Chavan, Guard of the Express train. Evidence of this witness goes to show that 17058 UP Devgiri Express stopped because of chain pulling after passing through Sandhurst Road and Masjid Bunder Railway Station and PW1 Manjusha who was in the ladies boggie of that train disclosed to him that one person robber her. However, rest of the evidence of this witness is rightly disbelieved by the learned trial court as this witness had seen the accused while running from a distance of 150 feet.

15 Seized currency notes are not identified by PW1 Manjusha and as such, alleged confessional statement of the appellant / accused sought to be proved from version of PW2 Suresh Sonkuwar, a panch witness, as well as from evidence of the Investigating Officer, is of no assistance.

16 It was argued that Ravindra Behl who was accompanying the informant / PW1 Manjusha was not examined by the prosecution and therefore, case of the prosecution suffers from doubt. Section 134 of the Evidence Act makes it clear that it is the quality and not the quantity of the evidence, which matters. In the matter of **Hemraj and Others vs. State of Haryana AIR 2005 SC 2110**, the Apex Court has observed that non-examination of independent witness by itself may not give rise to adverse inferences against the prosecution. However, when the evidence of the alleged eye-witnesses raise serious doubts on the point of their presence at the time of actual occurrence, the unexplained omission to examine the independent witness would assume significance. In the case in hand, Ravindra Behl was traveling in some other boggie of the same train and he had not witnessed the incident of assault and robbery. Therefore, his non-examination is of no consequence to the fate of the prosecution case. Similarly, minor discrepancies in the prosecution case cannot be given any undue weightage and importance, once evidence of PW1 Manjusha is found to be acceptable and trustworthy.

17 In the result, the appeal, so far as conviction of the appellant / accused for the offence punishable under Section 394 read with Section 397 of the IPC is concerned, is devoid of merits. However, it is to be noted that the appellant / accused was sentenced to suffer rigorous imprisonment for a period of 9 years and to pay fine of Rs.10,000/-, in default, to suffer further simple imprisonment for 1 year, on the premise that the appellant / accused is a habitual offender. There is no legal evidence to that effect adduced by the prosecution to demonstrate that the appellant / accused is a habitual offender.

18 Considering the nature of evidence and the manner in which the same was committed, interest of justice would meet if this sentence is reduced to 8 years with imposition of fine of Rs.5,000/-, in default, simple imprisonment for 6 months. Therefore the order :

- i) The appeal is partly allowed.
- ii) Conviction of the appellant / accused for the offence punishable under Section 394 read with Section 397

of the IPC recorded by the learned trial court is confirmed. However, sentence imposed upon him is modified and it is directed that for the offence punishable under Section 394 read with Section 397 of the IPC, the appellant / accused shall suffer rigorous imprisonment for a period of 8 years and he shall pay fine of Rs.5,000/-, in default of payment of fine, he shall undergo simple imprisonment for a period of 6 months.

iii) Rest of the impugned order passed by the learned Additional Sessions Judge, Greater Mumbai, is confirmed.

iv) With disposal of this appeal, pending criminal application also stands disposed of.

(A. M. BADAR, J.)