

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.333 OF 2011

1) DINESH RAMSEVAK PRAJAPATI)
2) SURESH RAMSEVAK PRAJAPATI)...APPELLANTS

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

WITH

CRIMINAL APPEAL NO.666 OF 2010

1) KAMAL BALRAM TALWAR)
2) MANOJ OMPRAKASH GUPTA)...APPELLANTS

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Ms.Ameeta Kuttikrishnan, Advocate for the Appellants.

Smt.M.R.Tidke, APP for the Respondent - State.

CORAM : ABHAY M. THIPSAY, J.

DATE : 12th JANUARY 2016.

ORAL JUDGMENT :

1 These two appeals can be conveniently disposed of by this common judgment as the appellants in both these appeals were convicted in one and the same trial, held by the Additional Sessions Judge for Greater Bombay. The appellants in Criminal Appeal No.333 of 2011 are the original accused nos.4 and 5 respectively, whereas, the appellants in Criminal Appeal No.666 of 2010 are the original accused nos.1 and 2 respectively. Apart from these appellants, one Vasu Thapa (accused no.3) was also tried in the same case, and was also, like the appellants, convicted; but apparently, no appeal has been filed by him challenging his conviction and the sentences imposed upon him.

2 These appeals are directed against the judgment and order dated 27th August 2010, passed by the Additional Sessions Judge, Greater Bombay, convicting the appellants of the offences punishable under Sections 399 and 402 of the Indian Penal Code (IPC), and Section 25(1)(B)(a) read with Section 3(1) of the Arms

Act. The sentences imposed by the learned Additional Sessions Judge upon the appellants are as follows :

OFFENCE	PUNISHMENT
Section 399 of the IPC	R.I. for 5 years and to pay a fine of Rs.2,000/-, in default, R.I. for 6 months.
Section 402 of the IPC	R.I. for 3 years and to pay a fine of Rs.1,000/-, in default, R.I. for 3 months.

Apart from the aforesaid sentences, the learned Additional Sessions Judge convicted the appellant no.1 also of the offence punishable under Section 25(1)(B)(a) read with Section 3(1) of the Arms Act. The learned Additional Sessions Judge directed that the sentences would run concurrently. Being aggrieved by the said judgment and order of conviction and the sentences imposed upon them, the appellants have approached this court by filing these two appeals.

3 Criminal Appeal No.333 of 2011 was preferred by the appellants therein from prison. As no advocate had been engaged

by the said appellants, Ms.Ameeta Kuttikrishnan was appointed to prosecute the appeal under the Free Legal Aid Scheme. The appellants in Criminal Appeal No.666 of 2010 had engaged an advocate, but she remained absent repeatedly, even though the appeal was listed on board for final hearing. Since it was not desirable to consider and / or decide the appeals separately (as the evidence was common and the same) Ms.Ameeta Kuttikrishnan was appointed to prosecute the said appeal also, under the Free Legal Aid Scheme.

4 For the sake of convenience and clarity, the appellants shall be referred to as “the accused”; and when reference to an individual appellant would be necessary, he shall be referred to, by the serial number given to him in the trial court.

5 The prosecution case, as put before the trial court, in brief, was as follows :

Sharad Shinde (PW1), a Police Constable attached to DCB CID, had, on 18th March 2009, gone to Hotel Ramanand at

Parel to have tea. He was accompanied by Police Constable Farooqi. It was at about 9.45 p.m. While Shinde and Farooqi were having tea in the said hotel, they heard the discussion of some other customers present in the hotel. They could not see those customers at that time, as they were 'at the backside.' The discussion was to the effect that 'one Kali (accused no.2) and one Kamal (accused no.1) were coming with the articles on bike. That, thereafter, Vishal (absconding accused) would come and see the jewelery shop, and thereafter, they would do the work late in the night.' On hearing this conversation, Shinde got suspicious, asked Farooqi to wait in the hotel and himself came out. He telephoned to his office and informed P.S.I. Naik (PW-7) about the happenings, told the address of the place where he was, and asked him to come with police party. It is, at that time, that, by turning back, Shinde saw the said persons, who were four in number. The said four persons came out, stood near a Indica car and were taking among themselves. Constable Farooqi came out of the hotel. At about 10.10 p.m. two more persons came there on Caliber motorcycle. They started talking with the said four

persons. These two persons are said to be the accused nos.1 and 2. After about ten minutes, the police party came there and stopped near Tata hospital. Shinde approached them and gave information about the happenings, but at that time, one of the said six persons, went towards Bhoiwada. A.P.I. Sawant, who had arranged the trap, asked Shinde to keep a watch on the persons and give a signal 'when the person going towards Bhoiwada would return back.' After sometime, that person indeed came back, whereafter Shinde gave signal to A.P.I. Sawant and five of the six persons were apprehended. The one who had come back from Bhoiwada managed to run away. The search of the five persons was taken. Accused no.1 Kamal Talwar was found to be in possession of one pistol, six live cartridges and cash of Rs.50/- and one handkerchief. Accused no.2 Manoj Gupta @ Kali was found to be in possession of a chopper and cash of Rs.40/-. Accused no.3 Vasu Thapa was found to be in possession of a kookri and cash of Rs.20/-. Accused no.4 Dinesh Prajapati was found to be in possession of one knife, cash of Rs.40/- and one napkin. Accused no.5 Suresh Prajapati was found to be in

possession of one knife, cash of Rs.650, key of a vehicle, driving license, certain ther keys, a leather pocket, mobile phone and one receipt from Vashi toll post. All these articles were seized under a panchnama, packed and labeled.

6 The prosecution examined seven witnesses during the trial. Apart from Sharad Shinde (PW1), panch Sanjay Gujar (PW5) and P.S.I.Naik (PW7) are said to have seen the apprehension of the accused persons and the recovery of the arms weapons from them.

PW2 Hamid Master is a car mechanic. His evidence is not quite relevant for determining whether the charge against the accused persons had been satisfactorily proved. PW3 Jijaba Bhillare, Head Constable attached to Bhoiwada Police Station, was examined to show promulgation of the prohibitory order under Section 37 of the Bombay Police Act issued by the Commissioner of Police. PW4 Eknath Kamble, A.P.I. attached to Bhoiwada Police Station at the material time, is the one who had registered the First Information Report (FIR) lodged by PW1 Shinde. PW6

Vasudev Patil is the Assistant Chemical Analyser, who had examined the country made pistol, said to have been recovered from the accused no.1, and who had given his report on such examination to the effect that it was in working condition, and that, it had been used for firing prior to its receipt in the laboratory.

7 The learned Additional Sessions Judge held that the charge of offences punishable under Section 399 and 402 of the IPC had been satisfactorily proved. He also held that so far as the accused no.1 was concerned, the charge of an offence punishable under Section 25(1)(B)(a) of the Arms Act was also satisfactorily proved. He, however, held that charge of an offence punishable under Section 135 of the Bombay Police Act (now Maharashtra Police Act) was not satisfactorily proved as there was no satisfactory evidence that the prohibitory order under Section 37 of the said Act had been properly promulgated in accordance with law.

8 The learned counsel for the appellants contended that the evidence adduced by the prosecution to the effect that the appellants were found to have assembled in or near Ramanand hotel for the purpose of committing dacoity, and that, they had made preparations for committing dacoity was not at all satisfactory. She submitted that there were a number of discrepancies in the evidence of the prosecution witnesses in that regard.

9 I have considered the evidence. The material witnesses in that regard were PW1 Sharad Shinde, PW5 Sanjay Gujar – the panch, and PW7 P.S.I. Naik.

10 A.P.I.Sawant, who laid the trap, has not been examined. The Police Constable Farooqi, who was with Shinde in the said Ramanand hotel, has also not been examined.

11 It is not necessary to discuss the evidence of PW1 Sharad Shinde, PW5 Sanjay Gujar, and PW7 P.S.I. Naik, in details.

What needs to be observed is that, even if it is accepted – just for the sake of arguments – that, that the accused persons were found together, and that, they were possessing arms and weapons, that by itself would not establish that they had assembled for the purpose of committing dacoity or that they had made preparations to commit dacoity (see **Chaturi Yadav & Ors. vs. State of Bihar**¹). In this case, it would be unsafe to accept the evidence of PW1 Shinde in respect of the alleged conversation between the accused persons without which the charge of offences punishable under Section 399 of the IPC and / or Section 402 of the IPC cannot be proved. Even otherwise, the prosecution story is not convincing. Shinde came across the accused persons accidentally, so to say. He had gone to the hotel just to have a cup of tea with his colleague Farooqi, and according to him the accused persons, who were sitting there, and who were talking something between them, could be heard by him, giving rise to suspicion. It is his case that, thereafter, he gave a telephonic message to his office and called the police party, which arrived

1 AIR 1979 SC 1412

there. Even after the arrival of the police party, one of the accused persons left the place and according to Shinde, the police party did nothing and decided to wait for the return of the person, who had gone towards Bhoiwada. It is difficult to believe that things would happen this way. The police party could not have taken the risk of waiting for the sixth person, who had already gone towards Bhoiwada, and could not have known that he was likely to return. Shinde has, however, stated about this in such a manner, as if the whole of the party knew that the sixth person would return to the place.

12 The evidence of PW5 Sanjay Gujar shows that he was told about the “nabbing of the accused” before he was called, and when he went towards Ramanand hotel near Bhoiwada Police Station, the accused were present in their vehicle which was a Indica car. His evidence shows that the accused were sitting in the car and had already been apprehended by the police. This is not consistent with the version of Shinde.

13 The evidence of the police witnesses is not supported by any record such as entries made in the Station House Diary. No Station diary entries to show receipt of any information from PW1 Shinde and of leaving to the place near Ramanand Hotel along with the Police Officers and van, have been produced. There is not even a claim that such entries were made in the police record. Moreover, the Officer who led the police party – A.P.I.Sawant – has not been examined.

14 The evidence about Shinde accidentally going into the hotel and hearing the conversation between the accused persons is too artificial to be believed. Even otherwise, the conversation, which allegedly took place between the accused persons and which was allegedly heard by Shinde, does not satisfactorily establish that the accused persons had assembled for the purpose of committing dacoity, or that they had made preparations to commit dacoity.

15 In my opinion, the charge of offences punishable under Sections 399 and 492 of the IPC could not be said to have been proved.

16 So far as the conviction of the accused no.1 with respect to the offence punishable under Section 25(1)(B)(a) read with Section 3 of the Arms Act is concerned, no sanction, as contemplated under Section 39 of the Arms Act was produced during the trial. The learned Additional Sessions Judge was aware of the necessity of the sanction and has, in paragraph 57 of the impugned judgment, observed “sanction order passed by Deputy Commissioner of Police dated 6/10/09 is placed on record which sanctioned the prosecution of accused no.1 for the offence punishable U/s.25(1)(B)(a) of the Arms Act, 1959.” Actually, the record does not show that the sanction order was tendered in evidence. Because of this sentence appearing in the evidence, I have carefully checked the record and I find that the sanction order was never tendered in evidence, nor was it marked or

exhibited. Infact, while referring to the other documents like panchnama, the learned Judge has referred to the exhibit numbers given to them, but while referring to the sanction order, no such exhibit number has been mentioned. The record does not show that the sanction order was decided to be exhibited by consent. In view of the fact that the learned Additional Sessions Judge has not mentioned the exhibit number given to the sanction order, it is evident that he was merely referring to the sanction order that was found in the charge-sheet. This was not proper. The sanction order was required to be proved by adducing evidence. Since this was not done, the fact of sanction having been accorded for the prosecution of the accused no.1 with respect to the offence punishable under Section 25(1)(B)(a) of the Arms Act cannot be said to have been proved. The cognizance of the said offence could not have been taken without a valid sanction. On this count itself, the conviction of the accused no.1 with respect to the offence punishable under Section 25(1)(B)(a) of the Arms Act is rendered improper and illegal.

17 So far as the offence punishable under Section 135 of the Maharashtra Police Act is concerned, the learned Additional Sessions Judge has not accepted the evidence of the promulgation of the prohibitory order. This view of the learned Additional Sessions Judge does not seem to be suffering from any error.

18 Thus, to conclude, the story of the accused having assembled in and near Ramanand hotel for the purpose of committing dacoity, and of their having been made preparations for committing dacoity, cannot be safely accepted. Further, that the conversation between them could be heard by PW1 Shinde is difficult to believe. Even if it is accepted that the accused were found in possession of certain arms and weapons, the cognizance of the offence punishable under Section 25(1)(B)(a) of the Arms Act could not have been taken without a valid sanction under Section 39, and that, that the sanction had been accorded in the present case, was not proved. So far as the charge of an offence punishable under Section 135 of the Maharashtra Police Act is

concerned, in the absence of evidence that the prohibitory order was duly promulgated, the accused persons could not have been held guilty, as rightly observed by the Additional Sessions Judge himself.

19 This was a case where there was a reasonable doubt about the guilt of the accused. The accused should have been given the benefit of that doubt and should have been acquitted.

20 The appeals are allowed.

OPERATIVE PART IN CRIMINAL APPEAL NO.333 OF 2011

1. The appeal is allowed.
2. The impugned judgment and order is set aside.
3. The appellants are acquitted.
4. Fine, if paid, be refunded to them.
5. The appeal is disposed of accordingly.

OPERATIVE PART IN CRIMINAL APPEAL NO.666 OF 2010

1. The appeal is allowed.
2. The impugned judgment and order is set aside.
3. The appellants are acquitted.
4. The bail bonds of appellant no.1 Kamal are discharged.
5. Appellant no.2, if in prison, be forthwith set at liberty, unless required to be detained in connection with some other case.
6. Fine, if paid, be refunded to the appellants respectively.
7. The appeal is disposed of accordingly.

21 The professional fees payable to the learned appointed Advocate Ms.Ameeta Kuttikrishnan are quantified at Rs.5,000/-.

(ABHAY M. THIPSAY, J.)

CERTIFICATE

**Certified to be true and correct copy of the original
signed Judgment /Order.**