

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 1057 OF 2015
WITH
CRIMINAL APPLICATION NO. 880 OF 2016**

1. Shabaj Isaq Shaikh,
Aged: 44 yrs, Occ.: Service,
Residing at 18/57, B.I.T Chawl, 3rd floor,
Sofiya Zuber Road, Near Nagpada Police
Station, Nagpada, Mumbai Central,
Mumbai – 400 008

2. Arif Abdul Sattar Shaikh,
Aged: 32 yrs, Occ.: Service,
Residing at Du. 3, Mu. G. No. 41,
Siddhqui Hazi Building, 3, K. Undriya Road,
Nagpada, Mumbai – 400 008.

[Both presently undergoing sentence at
Arthur Road Central Prison, Mumbai]

...Appellants
(Ori. Accd. 1 & 2)

Versus

The State of Maharashtra,
[Through Mahim Police Station,
Mumbai in C.R. No. 300/2013]

...Respondent

Mr. Solkar Mohammed Amin Haroon with Ms. Misbah Solkar for the
Appellants

Ms. P. P. Shinde, A.P.P for the Respondent-State

CORAM : REVATI MOHITE DERE, J.
FRIDAY, 29th JULY, 2016

ORAL ORDER :

1. The appellants have been convicted by the learned Additional Sessions Judge, City Civil and Sessions Court, Greater Bombay vide judgment and order dated 30th September, 2015, passed in Sessions Case No. 1037 of 2013, for the offence punishable under Section 392 r/w 34 of the Indian Penal Code ('IPC') and have been sentenced to suffer RI for 4 years and to pay a fine of Rs. 1,000/- each. The appellants, however, have been acquitted of the offence punishable under Section 397 r/w 34 of the IPC.

2. Mr. Solkar, learned Counsel for the appellants has impugned the aforesaid judgment and order only to the extent that it convicts the appellants for the offence punishable under Section 392 r/w 34 of the IPC. He submits that the evidence on record adduced by the prosecution does not disclose the commission of an offence under Section 392 r/w 34 as against the appellants, but, at the highest discloses an offence punishable under Section 379 r/w 34 of the IPC.

3. In order to examine this short legal submission, it would be necessary to refer to the facts as have come on record. According to the

prosecution, the incident took place on 23rd June, 2013 opposite Shehnaz Hotel, Bandra, at about 9:20 a.m. It is the prosecution case that Ms. Margaret Bruno D'Souza (PW 1-complainant) and her sister Mrs. Florence Nelson Carlos (PW 2) were crossing the road to go to Vile Parle Bus Station, when two persons came on a bike and snatched one chain worn by Ms. Margaret D'Souza (PW 1), whereas, Ms. Margaret D'Souza held on to the other chain. Pursuant thereto, Ms. Margaret D'Souza shouted "*Chor-Chor*" and ran after the appellants alongwith her sister, Ms. Florence Carlos, by which time, people gathered at the spot. According to the prosecution, Ms. Florence Carlos (PW 2) and the public held the appellants who tried to escape after snatching the chain. Ms. Margaret D'Souza (PW 1) held the person, who was riding the bike and pushed him, after which, the public held him. Thereafter, the police came and apprehended the appellants. Pursuant to the aforesaid incident, Ms. Margaret D'Souza (PW 1) lodged a complaint/FIR with the Mahim Police Station (Exhibit 14). After investigation, charge-sheet was filed and the case was committed to the Court of Sessions, as the offence alleged were triable by the Sessions Court.

4. The prosecution in support of its case, examined 11 witnesses; including PW 1 - Ms. Margaret D'Souza (complainant), PW 2 – Florence Carlos (sister of the complainant); and four independent witnesses i.e. PW 3- Vishnu Raoba Thawal (police hawaldar, Antop Hill Police Station), who was passing by at the relevant time; PW 4- Riyaz Abdul Hamid Khan, Police Constable, who also happened to be passing by at the relevant time from the said spot; PW 5 – Surendra Balkrishna Jadhav, Police Naik, who was attached to the Mahim Police Station and was close to the Church, where the incident took place; and PW 6 – Imrankhan Walekhan, a hawker from the footpath, who was also present at the spot at the relevant time. The appellants were apprehended red-handed on the spot and therefore, the only contention/submission raised by the learned Counsel for the appellants is whether the prosecution had established that the appellants had committed an offence punishable under Section 392 r/w 34 of the IPC ?

5. In view of the same and considering the evidence on record adduced by the prosecution, it would be necessary to consider what is the offence committed by the appellants, one under Section 392 r/w 34 of the

IPC or one under Section 379 r/w 34 of the IPC. Section 390 of the IPC defines robbery as under :

“390. Robbery.—In all robbery there is either theft or extortion.

When theft is robbery.—Theft is “robbery” if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint.

.....”

6. According to the learned Counsel for the appellants, the prosecution had not brought on record any material to show that while committing theft or in carrying away or attempting to carry away property obtained by theft, the appellants had voluntarily caused or attempted to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint.

7. Perused the evidence on record. The evidence on record of PW 1 to 7, does not, in any way, show that while committing theft, the appellants had caused or attempted to cause to any person, in particular,

Ms. Margaret D'Souza (PW 1) and Ms. Florence Carlos (PW 2), death or hurt or wrongful restraint, or fear of instant death or instant hurt or instant wrongful restraint. There is not a whisper in the evidence of the witnesses to even suggest anything to that effect.

8. Learned A.P.P also does not dispute the said fact that there is no evidence to that effect adduced by the prosecution.

9. Considering the aforesaid, the offence with which the appellants would be guilty of, would be under Section 379 r/w 34 of the IPC for committing theft and not under Section 392 r/w 34. The evidence on record clearly shows that the appellants were apprehended red-handed on the spot and as such, there is nothing to doubt the identity of the appellants. From the evidence, it is evident that the offence could not be one of robbery punishable under Section 392 but would be an offence punishable under Section 379 r/w 34 of the IPC. Accordingly, the conviction of the appellants is modified from Section 392 r/w 34 to Section 379 r/w 34 of the IPC.

10. The question that next arises is, what would be the appropriate sentence that should be awarded to the appellants for the offence punishable under Section 379 r/w 34 of the IPC. Learned Counsel for the appellants states that the appellants have been in custody for the last 10 months. He submits that Section 379 is punishable with imprisonment of either description for a term, which may extend to 3 years or fine or with both. He submits that the appellants come from an economically weaker section of the Society and have no antecedents. He submits that the sentence be reduced to the period already undergone i.e. 10 months.

11. Learned A.P.P opposed the said prayer. She submitted that considering that the appellants were apprehended red-handed on the spot, the punishment which should be imposed should be commensurate with the offence committed by the appellants under Section 379.

12. Considering the peculiar facts of this case and the fact that the appellants have no antecedents, it would be appropriate to sentence the appellants to suffer RI for one year.

13. Accordingly, the appeal is partly allowed. The conviction and sentence awarded to the appellants under Section 392 r/w 34 is quashed and set-aside and the appellants are convicted for the offence punishable under Section 379 r/w 34 of the IPC. Accordingly, the sentence awarded is also modified and the appellants are sentenced to suffer RI for 1 year and are directed to pay a fine of Rs. 1,000/- each, in default, to suffer SI for 1 month.

14. Appeal is disposed of accordingly.

15. In view of the above, nothing survives for consideration in Criminal Application No. 880 of 2016. The same is accordingly disposed of.

16. All concerned to act on the authenticated copy of this order.

REVATI MOHITE DERE, J.