

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

CRIMINAL APPEAL NO. 793 OF 2010

Tirathsingh Tarasingh Jath

... Appellant
(Org. Accused Nos.)

VERSUS

The State of Maharashtra

... Respondent
(Org. Complainant)

...

Ms. Ameeta Kuttikrishnan appointed advocate for Appellant.
Ms. G. P. Mulekar APP for the State.

...

CORAM : A. S. GADKARI, J.
DATE : 27th JULY ,2016

ORAL JUDGMENT :

1. The Appellant has challenged the Judgment and Order dated 30.01.2010 passed by the learned Ad-hoc Additional Sessions Judge, at Sewree, Mumbai in Sessions Case No. 617 of 2009 thereby convicting the appellant under Section 395 of the Indian Penal Code and sentence to suffer rigorous imprisonment for four years and to pay fine of Rs. 400/-, in default of payment of fine to further suffer rigorous

imprisonment for a month and convicted under Section 342 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for one year to pay a fine of Rs. 350/- in default of payment of fine to further suffer rigorous imprisonment for one month. The trial court has directed that the substantive sentences, to run concurrently.

2. The present appeal was admitted on 15.10.2010, That the Criminal Bail Application No. 1210 of 2010 preferred by the Applicant was rejected by this Court by an Order dated 11.04.2011. As none appeared for the Appellant on various occasions at the time of final hearing of the present Appeal, this Court by an order dated 21.06.2016 directed the Registry to appoint an advocate to represent the Appellant from the Legal Aid Panel. Accordingly Ms. Ameeta Kuttikrishnan is appointed by the Legal Aid Committee to represent the Appellant.

3. Heard the learned Advocate appointed for the Appellant and the learned APP and also perused the entire record pertaining to the present case.

4. The facts which are necessary to decide the present appeal and as enumerated from the record can briefly be stated as under:-

i) Uttam N. Potekar (PW No. 1) was serving as a driver on a Tata Sumo vehicle bearing registration No. MH-43-D-4516 owned by Smt. Sangita S. Vare. Kishor J. Keni (PW No. 2) was a travel agent and was in the vocation of booking the vehicles for the passengers/customers. That on 14.06.2009 at about 10:30 pm. Kishor Keni (PW No. 2) came to Uttam Narayan Potekar (PW No. 1) and told him that 5 persons wanted to go to Uran and willing to pay Rs. 1300/- as the travel fare. Accordingly Uttam Potekar took those 5 persons in his Tata Sumo vehicle. Kishor Keni (PW No. 2) paid 1200/- to Uttam Potekar and kept Rs. 100/- with him as his commission.

(ii) It is the prosecution case that at about 10:45 pm. Uttam Potekar (PW 1) along with the said 5 passengers left from Dadar, T. T. That the Appellant was sitting on the front seat adjoining to the driver's seat and the other 4 persons were sitting on the rear seat of the said vehicle. That at about 00:45

am (12:45 am) they reached at Kalamboli. . That the 4 persons went to have their meals in Trupti Hotel and one person went to a bar. After about an hour the said persons came back and proceeded from J.N.P.T. Road to go to Uran. The person who was sitting next to the driver (appellant) asked Uttam Potekar (PW 1) to take them from Sonari village road instead of J.N.P.T. road. After passing of some distance, the person sitting on the front side, i.e. adjoining to the seat of the driver asked Uttam Potekar to stop the vehicle. He along with other persons sitting on the rear seat alighted for urination. After some time, the person who was occupying the adjoining seat of driver, pressed the neck of Uttam Potekar, and the persons sitting on the rear seat lifted him, covered his face with the handkerchief, tied his hands and made him to lie on the rear seat and they sat over him. That the person who was occupying the front seat thereafter started the vehicle.

(iii) After traveling some distance, the vehicle was stopped. The occupants of the said vehicle asked Uttam Potekar (PW No. 1) to alight from the vehicle. They took him at some

distance from the road and thereafter they tied his legs to a tree with the aid of a rope. They also snatched Rs. 1000/- from the pocket of Uttam Potekar (PW No. 1). The Appellant with other persons left the spot. Thereafter Uttam Potekar removed the handkerchief from his mouth and shouted for help. A passerby directed him to go to Padgha police station which was near in the vicinity. The police of Padgha police station directed the Uttam Potekar (PW No. 1) to go to Matunga police station, Mumbai. Uttam Potekar reached Mumbai by a train at about 5:30 pm on 15.06.2009 and lodged a first information report with Matunga Police Station.

(iv) It is the further prosecution case that at Matunga a C.R.No. 237/2009 under Section 395 and 342 read with 34 of the Indian Penal Code came to be registered on the first information given by the victim Uttam. The investigation of a said crime was entrusted to Maruti Jadhav (PW No. 4) who was then attached to Matunga Police Station as Police Sub Inspector. During the course of investigation Maruti Jadhav received information that the vehicle of Uttam Potekar (PW No. 1) was

seized by the police from Rajasthan State in some other offence and therefore he went to Rajasthan and brought the said vehicle of the complainant to Mumbai. The Appellant was arrested on 26.07.2009.

(v) The test identification parade of the Appellant was conducted by Mehermash P. Fitter (PW No. 3), the Special Executive Officer, at Thane Central Prison. That Uttam Potekar (PW No. 1) identified the Appellant during the said test identification parade. After recording the statements of witnesses and after completion of investigation, Maruti Jadhav (PW No. 4) filed charge sheet in the Court of Metropolitan Magistrate, 51st Court, Kurla, Mumbai. Since the offence punishable under Section 395 of the Indian Penal Code was exclusively triable by the Court of Sessions, the learned Metropolitan Magistrate committed the said case to the Court of Sessions on 15.10.2009 as contemplated under Section 209 of Cr. P.C.

(vi) After committal of the said case the trial court framed charge below Exh. 2 for the offences punishable under

section 395 and 342 read with 34 of the Indian Penal Code. The said charge was read over and explained in vernacular language to the Appellant to which he pleaded not guilty and claimed to be tried. The defense of the appellant was of total denial and false implication in the case. The prosecution in support of his case has examined in all 4 witnesses. The learned trial court after recording the evidence and after hearing the parties to the said case was pleased to convict the Appellant by the impugned judgment and order dated 30.01.2010 as stated earlier.

(vii) The learned counsel for the appellant submitted that the vehicle of the Complainant (PW No. 1) is seized by the police officer (PW No. 4) from the State of Rajasthan, however, the prosecution has not produced any seizer panchanama of the said vehicle on record. She further submitted that the prosecution has also failed to prove and produce the arrest Panchanama of the Appellant and the evidence of investigating officer is silent on these two aspects. She submitted that the police officer (PW No. 4) has also not mentioned about the fact that how he received the information that the Appellant is

arrested and the vehicle in question is seized by the Rajasthan police. She further submitted that the owner of the said vehicle i.e. Smt. Sangita S. Vare is not examined by the prosecution for identification of the vehicle and the prosecution has also not produced any document on record to show that Uttam Potekar (PW No. 1) was in fact appointed by her as driver on the said vehicle. She submitted that in view of the infirmities in the prosecution case, the appellant may be given benefit of doubt. She submitted that after taking into consideration the aforesaid informaties which leads to a strong suspicion about the genuineness of the prosecution case and therefore the Appellant deserves to be acquitted from the offence charged against him.

(viii) The learned APP per-contra opposed the appeal and submitted that the evidence on record undoubtedly show the involvement of the Appellant in the present crime. She submitted that the victim i.e. Uttam Potekar (PW No. 1) has identified the Appellant in the test identification parade and also in the Court at the time of recording of the substantive evidence and therefore there is no question of granting any

benefit of doubt to the Appellant. She submitted that the evidence of the prosecution witnesses is trustworthy and reliable and in view of the same the impugned judgment and order needs no interference by this Court. She therefore prayed that the present appeal may be dismissed and the conviction and sentence imposed upon the Appellant be up held.

5. As stated earlier the prosecution in support of his case has examined in all 4 witnesses. Uttam Potekar (PW No. 1) is the victim/first informant, in his testimony he has narrated all the facts from the point, of his being approached by Kishor Keni (PW No. 2) the travel agent till the point of his release from the rope which was tied to his leg to a tree near Village Padgha. Uttam Potekar (PW No. 1) in his testimony has categorically stated that the Appellant is the same person who was sitting adjoining to him on the front seat from 10:45 pm. on 14.06.2009 till he was forcibly removed from the vehicle in the wee hours of 15.06.2009 at village Savat Naka near village Padgha. PW No. 1 has also proved the first information report which is at Exh. 13.

In the cross-examination of the said witnesses except a few inconsequential omissions no other material which is useful or beneficial to the Appellant is elicited.

6. Kishor Keni (PW No. 2) was the travel agent through whom the Appellant along with other 4 persons booked the vehicle of Uttam Potekar (PW No. 1). Kishor Keni (PW No. 2) has deposed about the facts of the Appellant, approaching him along with 4 persons and the settlement of travel fare of the Tata Sumo Car which was being driven by Uttam Potekar (PW No. 1). This witness has also admitted that he received the commission of Rs. 100/- towards the said transaction. Kishor Keni (PW No. 2) has further deposed that he has identified the Appellant in identification parade which was conducted at Thana Central Prison. Kishor Keni (PW No. 2) has also identified the Appellant in the Court i.e. at the time of recording of the substantive evidence. PW No. 2 has identified the Appellant as the same person who through him had hired the vehicle of PW No. 1 for traveling to Uran.

7. Mehermash P. Fitter (PW No. 3) is the Special Executive Magistrate who had conducted the test identification parade of the Appellant. The evidence of this witnesses is formal in nature and therefore the defence has cross examined this witness by putting stock questions, to which he has answered satisfactorily. No material which is beneficial to the Appellant is elicited in the cross-examination of this witness. Maruti Jadhav (PW No. 4) is the investigating officer. PW No. 4 was then attached to Matunga Police Station as Police Sub Inspector and has conducted the investigation of the present case that is C. R. No. 237 of 2009. He has deposed about the facts pertaining to the investigation and filing of charge sheet.

8. After taking into consideration the entire evidence on record, it is clear that the Uttam Potekar (PW No. 1) and Kishor Keni (PW No.2) not only had sufficient opportunity to see and accompany the Appellant but to have interaction with him at the time of booking of the said vehicle and during the course of travel to Uran. As a matter of fact Uttam Potekar (PW No. 1) was in the company of the Appellant from 10:45 pm of

14.06.2009 till the wee hours of 15.06.2009. Therefore in my considered opinion there is no doubt about the identity of the Appellant and it is proved beyond reasonable doubt by the said 2 witnesses i.e. PW No. 1 and 2. PW No. 1 has also stated that the Appellant first pressed his neck and thereafter the other absconding accused persons lifted him from the front seat, tide his hand and made him to lie on the rear seat. PW No. 1 has also stated that the appellant along with other accused persons have robbed Rs.1000/- from his pocket, after the PW No. 1 was tide to a tree with the help of the rope. I find the evidence of PW No. 1 and 2 fully reliable and trust worthy. It is to be noted here that the number of the vehicle involved in the present crime has been specifically mentioned by PW No. 1 in the F. I. R. itself and the same vehicle was seized by the Police at the instance of the appellant in other crime from the State of Rajasthan. As far as identity of the said vehicle is concerned according to me it is duly proved by the prosecution and therefore non-production of the panchanama of seizer of the said vehicle from the State of Rajasthan has inconsequential

importance. As far as non-examination of the owner of the vehicle i.e. Smt. Sangita Vare is concerned, according to me in view of the facts of the present case, her non-examination makes no difference to the prosecution case. The Appellant in the cross-examination of any of the witnesses has not brought on record that any legal prejudice is caused to him because of the non-examination of the said witnesses. No adverse interference can be drawn against the prosecution for non-examination of the said witnesses by it, as according to me the evidence of the said witnesses is of no consequence in view of the peculiar facts of the present case.

9. Thus after taking into consideration the entire evidence available on record, I am of the considered opinion that the prosecution has proved beyond reasonable doubt, the guilt of the appellant in the present crime under Section 395 and 342 read with 34 of the Indian Penal Code. As a result I find no merits in the appeal and the appeal is accordingly dismissed.

10. Before parting with the judgment it is necessary to place on record the efforts put in by the learned advocate appointed by the Legal Aid Committee to represent the Appellant. The professional fees to be paid to the learned counsel appointed for the appellant is quantified at Rs. 3500/-.

(A. S. GADKARI, J.)