

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.735 OF 2012

SANJAY SHIVRAM PAWAR)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.Rahul Arote, Appointed Advocate for Appellant.

Ms.V.S.Mhaispurkar, APP for the Respondent – State.

WITH

CRIMINAL APPEAL NO.1085 OF 2013

MANISH GIRISH RATHOD)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.S.V.Kotwal a/w. Mr.Ashish Sawant, Advocate for the Appellant.

Ms.V.S.Mhaispurkar, APP for the Respondent – State.

CORAM : P N. DESHMUKH, J.

**DATE : 28th SEPTEMBER 2016 &
29th SEPTEMBER 2016.**

ORAL JUDGMENT :

1 These two appeals arise out of same judgment, and as such, for the purpose of convenience, they are decided by common judgment. Both these appeals take exception to judgment dated 9th April 2012 passed by the learned Sessions Judge, Greater Mumbai, in Sessions Case No.513 of 2003 and Sessions Case No.511 of 2003 (common judgment) vide which both appellants, who are original accused nos.1 and 2, came to be convicted for the offences punishable under Section 392 read with Section 34 of IPC and are sentenced to suffer rigorous imprisonment for 7 years and to pay a fine of Rs.10,000/- each, in default, to suffer simple imprisonment for one year.

Both the appellants are further convicted for the offence punishable under Section 452 read with Section 34 of IPC and are sentenced to suffer rigorous imprisonment for 2 years and to pay a fine of Rs.2,000/- each, in default, to suffer simple imprisonment for 3 months, and are further convicted for the offence punishable under Section 342 read with Section 34 of IPC and are sentenced to suffer rigorous imprisonment for 6 months and to pay a fine of Rs.5,000 each, in default, to suffer simple imprisonment for one month.

Both the appellants also came to be acquitted for the offences punishable under Section 397 read with Section 34 of IPC and Section 37(a) read with Section 135 of Bombay Police Act. Sentences imposed upon appellants are directed to run concurrently.

2 The case of the prosecution can be briefly stated as under :

PW4 Murari Goyal is a commission agent having his office situated on the second floor of a building situated at Kalbadevi area, Mumbai. On 28th February 2002, after reaching his office in the noon hours at around 5.30 p.m., he sent his servant PW3 Kapildev Tiwari to hospital to collect medical reports of his wife and at around 6 p.m., while he was talking on telephone, two persons arrived in his office and had inquired about some address, which Murari was not knowing and at the same time, one more person entered in his office and closed the door. In the meantime, Kapildev returned back to the office, who was threatened by said persons to keep mum and they disconnected telephone lines. Thereafter, they closed the door and one of them took chopper in his hand, while other was having pistol and had extended threats to complainant as well as his servant to keep quite and to hand over amount whatsoever was available in the office, else to face the consequences. At that time, complainant informed said persons that

the safe was open. Accordingly, he removed cash consisting 8 bundles of currency notes in denomination of Rs.10/- each and at the same time, removed cash of Rs.1,75,000/- from the locker and carried the same in their brief case, as well as in the carry bag. The accused also removed some documents and cash from the shirt pocket of the complainant and ran away one after another.

It is the case of prosecution that Kapildev as well as his master Murari then untied their hands and noticed that appellant Manish was running towards Cotton Exchange Police Chowki side and thus they started chasing him shouting “thief thief” when said appellant threatened them not to chase, else he would kill them. However, when they reached near Cotton Exchange Police Chowki, one of the Police Officers apprehended appellant Manish.

3 It is the case of prosecution that complainant then visited L.T.Marg Police Station and lodged his report which was received by PW5 P.S.I. Ashok Gaikwad, on the basis of which he registered Crime No.34 of 2002. When the report was being recorded by P.S.I. Gaikwad, appellant Manish was brought in the police station by PW6 P.S.I. Vijay Kadam and said official then by arranging two independent panch witnesses obtained personal search of appellant Manish and recovered

toy revolver, cash of Rs.37,900/-, railway pass and identity card of Murari, and seized the same under panchnama. On the same day, P.I.Gaikwad drew spot panchnama and recorded statement of Kapildev. Further investigation was carried by PW7 A.P.I. Shivappa Malesh, during the course of which, on 3rd March 2002, he effected arrest of appellant no.2 Sanjay Pawar. During the course of investigation, memorandum statement of said appellant came to be recorded and in pursuance to same, one chopper came to be recovered and seized under panchnama. Test Identification Parade (TIP) of appellant Sanjay was thereafter held in which Murari as well as Kapildev identified appellant Sanjay as one of the accused who had committed robbery.

4 During the course of investigation, inspite of search, co-accused no.3 Rajesh @ Munna could not be traced out. Thus, charge-sheet came to be filed against present appellants in the court of learned Metropolitan Magistrate, 28th Court, Esplanade Court, Mumbai, showing said co-accused Rajesh as absconding.

5 In the meantime, as absconding accused Rajesh came to be arrested, on completion of investigation, supplementary charge-sheet came to be filed against the present accused before the same court. In

due course, learned Metropolitan Magistrate committed both the cases for trial to the learned Sessions court. Charge is leveled against the appellants and accused Rajesh, to which they pleaded not guilty and claimed to be tried. The defence of accused is of total denial and of false implication. However, during the pendency of trial, co-accused Rajesh @ Munna absconded, and as such, trial against said accused came to be separated. In the circumstances, present appellants came to be tried for above offences. Learned trial court on considering evidence on record and the relevant documents found that charge leveled against the appellants are duly proved and thus convicted them as aforesaid. Hence these appeals.

6 Heard learned counsel Mr.S.V.Kotwal for appellant no.1 Manish and learned counsel Mr.Rahul Arote for appellant no.2 Sanjay. Learned counsel at the outset had contended that prosecution did not find it necessary to bring on record evidence of any independent witnesses but had chose to examine interested witnesses only, without placing on record any satisfactory explanation in that regard. It is contended that evidence of Kapildev and Murari who are admittedly interested witnesses is even otherwise not convincing as same is contradictory to each other on material particulars. Evidence of PW1

Tukaram Ghuge, who according to the prosecution has apprehended appellant Manish immediately after the incident, is not worthy to be relied upon as his statement is recorded almost 3 months after the incident. Learned counsel for the appellants has also invited my attention to the evidence with reference to identification of accused Manish and had submitted that evidence on this aspect since also is not convincing, there is every possibility of false apprehension of appellant Manish, as at the time of incident he was found running with one carry bag in his hand, in a mob of persons, and therefore, contended that in view of contradictory evidence on record, both the appeals be allowed.

7 As against this, learned APP has submitted that evidence of complainant is fully corroborated with evidence of Kapildev on all material aspects. She has further stated that evidence of these two witnesses is further found corroborated with evidence of PW5 Gaikwad as well as PW6 Kadam, both the Investigating officers. By referring to their evidence, learned APP submitted that there is no doubt in the case of prosecution of false implication of appellant Manish on mistaken identity as he is the person who was shouting “mere piche mat aao” when he was being chased by PW3 Kapildev and was caught hold by PW1 Tukaram Ghuge. Learned APP has thus contended that even if

there are minor discrepancies in the evidence of Kapildev and Murari and that of Investigating Officer, they do not go to the root of the case and has thus contended that both the appeal are liable to be dismissed. Prosecution has thus supported the impugned judgment.

8 Having considered the facts of the case of prosecution, submissions advanced on behalf of appellants as well by the learned APP, I have scrutinized the evidence to see if the appellants' involvement is established in the present case. Evidence of Murari – the complainant is to the effect that he has his office premises situated at Kalbadevi Road and on the day of incident, he was present in his office from 11 am onwards along with Kapildev his servant, to whom at 5.30 p.m. he deputed to collect some documents from hospital and as such was alone in the office. His evidence further reveals that at about 5.30 p.m. one person entered his office and inquired of some address. In the meantime, another person entered who also inquired about similar address and third person followed him who closed office door from inside. Two persons who entered into the office earlier, extended threats to complainant on the point of revolver to hand over cash from the cash box. At that time, PW3 Kapildev returned back to office who was also threatened on being taken inside the office. His hands were

tied with the cloth bandage and third person, extended threats to PW3 Kapildev on the point of chopper to part away with the cash. All the culprits then removed cash of Rs.8,000/- from the cupboard consisting of 8 bundles of currency notes of Rs.10/- each in denomination and has also robbed amount of Rs.1,75,000/- from the locker and ran away with said cash and railway pass, identity card of complainant Murari on removing it from his shirt pocket.

9 Complainant has further deposed that he got hands of his servants untied and found that one of the culprits was running towards Kalbadevi side and therefore chased him along with Kapildev shouting “chor chor” when the person who was being chased threatened of consequences if complainant continued to chase him. In the meantime, two police officers who were on the road, seeing complainant chasing the accused, apprehended appellant no.1 Manish. However, two other co-accused managed to run away.

10 From his further evidence it has come on record that complainant thereafter visited L.T.Marg Police Station and lodged his report. At that time, two police officers who had apprehended appellant no.1 arrived with him in the police station. Complainant has

proved his complaint on record at Exhibit 36. It has further further come in his evidence that in the police station amount of Rs.39,000/- came to be seized from person of appellant Manish along with railway pass and identity card of complainant Murari, which came to be seized under panchnama. Complainant identified said appellant to be the same person who had committed robbery in his office and had also identified chopper which was in possession of co-accused.

11 As per his evidence on 20th March 2002, he attended TIP which was held in Arthur Road Jail wherein he identified appellant no.2 Sanjay as one of the co-accused along with apprehended accused Manish.

12 On considering evidence of complainant as aforesaid, he is found deposed giving details of incident, which has occurred on 28th February 2002 and has also identified appellant to be the same involved in the present crime before the court along with chopper. On considering his cross-examination, nothing material is elicited which could doubt evidence of complainant. He has specifically denied that appellant Manish was not apprehended as aforesaid nor amount of Rs.39,000/- with railway pass and identity card of complainant was

recovered from his possession. He specifically denied case of appellant of his false implication to the effect that appellant Manish, infact, was also one of the member of the mob who at the material time was running from Kalbadevi road. However, as he was also having carry bag in his hand, came to be wrongly apprehended as was chased by complainant. Even otherwise, there appears no substance in the case of appellant Manish as aforesaid as no sufficient explanation is put forth on his behalf with regard to recovery of cash of Rs.39,000/- and more particularly, railway pass and identity card of complainant from his possession, that too immediately after the incident. Nothing is brought on record to establish under what circumstances said appellant was in possession of documents which belonged to complainant Murari.

13 Above evidence of complainant is found fully corroborated with evidence of PW3 Kapildev when he has stated that on the day of incident after 5.30 p.m. when he returned back to office after collecting the documents as instructed by his master Murari, he found three persons present in the office along with his master and amongst said three persons, one tied his hands while another person who was close to his master having chopper in his hand, demanded keys on the point of pistol. He has further stated that persons who had entered in the

office committed robbery in respect of cash and had left the office. PW3 Kapildev thereafter, on getting his hands released came out their office and found one of the accused person running towards Cotton Exchange and thus chased him and with the assistance of others, apprehended appellant Manish. He also corroborates evidence of complainant about recovery of cash as well as of identity card and railway pass of complainant Murari from possession of appellant Manish.

14 Further evidence of PW3 Kapildev is with reference to his identifying appellant Sanjay in the TIP which came to be held in the jail premises and has identified articles pistol and chopper. As such, evidence of Kapildev corroborates evidence of complainant on all material points.

15 Though it is argued on behalf of appellant Manish that he came to be falsely apprehended as he was one of the members of mob, who at the material time was chasing the real culprit on Kalbadevi Road, I do not find much substance in this submission in view of specific evidence of complainant as well as Kapildev which evidence is further found substantiated by evidence of PW1 Tukaram Ghuge, Police

Constable, as he has stated that on 28th February 2002, at 6.50 p.m. while he was on duty with other staff members at Cotton Exchange Chowk, Kalbadevi Road, he found one person running while other two persons chasing him shouting “chor chor”. He further states that on his inquiring with the persons who were chasing one person, they informed that the person running had committed robbery in their office on the point of revolver and chopper and thus, he assisted them in chasing the accused, who ultimately came to be apprehended. It has further come in his evidence that on inquiring name of the apprehended person, he disclosed as Manish Girish Rathod who was having one carry bag in his hand. His evidence further corroborates evidence of Kapildev and Murari when he has deposed that police had obtained search of said carry bag which was found containing cash of Rs.39,000/- along with railway pass and identity card of complainant which came to be seized.

16 On considering cross-examination of all the witnesses it is found that except for minor contradictions on record, nothing is elicited from their evidence so as to doubt the same. On the contrary, considering evidence of above witnesses, since said material evidence is found corroborating to each other, prosecution can said to have

established its case beyond reasonable doubt involving appellant nos.1 and 2 in case of committing robbery in the office of complainant on 28th February 2002. Said fact is further found corroborated as all these witnesses have identified the accused persons and appellant no.1 Manish, infact, is apprehended immediately after the incident and is found having in his possession part of cash amount involved in the robbery as well as identity card and railway pass of complainant.

17 Involvement of appellant no.2 Sanjay is further found substantiated, as from the evidence of PW7 Shivappa Malesh, who effected arrest of appellant Sanjay on 3rd March 2002, and has carried out part of investigation, it has come on record that during interrogation, memorandum statement of appellant Sanjay came to be recorded and in pursuance to his statement, one chopper came to be recovered which came to be seized from the house of his sister under panchnama Exhibit 121.

Further evidence of Investigating Officer Shivappa reveals that he had arranged for TIP wherein appellant no.2 Sanjay came to be identified by identifying witnesses Kapildev and Murari.

18 Though it is contended on behalf of appellants that neither of the panch witnesses are examined by prosecution at the time of trial and from the evidence of Investigating Officer though it is pointed out that he took no steps to procure presence of panch witnesses, as at the time of recording evidence, he had already retired, that by itself does not doubt the case of prosecution, as other documents which are in the form of memorandum statement and recovery panchnama of chopper etc., otherwise find corroborated with the evidence of witnesses PW1 Tukaram, PW3 Kapildev and PW4 Murari. In that view of the matter, merely because no panchas are examined, if other evidence on record which in the present appeal is available and is convincing, there is nothing to disbelieve the same.

19 Case of prosecution is infact further found substantiated from the evidence of PW5 Ashok Gaikwad when he has stated that on 28th February 2002 when he was on duty as P.S.I., attached to L.T.Marg Police Station, and was recording report lodged by PW4 Murari wherein he has stated about the entire incident of robbery which took place in his office on that date, at around 7.00 p.m. involving both the appellants and one co-accused. PW6 Vijay Kadam, P.I., along with

other two police officers arrived along with appellant Manish in the police station, who was identified by complainant as one of the culprits. In the police station, his personal search was obtained and he was found having in his possession – cash of Rs.39,000/-, railway pass and identity card of PW4 Murari, and one toy revolver which came to be seized.

Case of prosecution is further established from the evidence of PW8 Narayan Alave who has held TIP and has proved on record memorandum of TIP at Exhibit 123. As per said document and evidence of witnesses, appellant Sanjay was identified.

20 Having considered above evidence and the documents, prosecution is found to have established charge leveled against appellants beyond reasonable doubt. There is no explanation which can be satisfactorily considered in favour of appellant no.1 when he is found to have in his possession cash of Rs.39,000/- against the amount which came to be robbed from the office of complainant along with complainant's identity card and railway pass. This fact, thus, establishes involvement of appellant Manish, who even otherwise is found apprehended immediately after the incident.

21 Involvement of appellant Sanjay is also found substantiated, as evidence of above witnesses also establish that during the course of investigation at the instance of said appellant, chopper was discovered, which came to be seized under panchnama and is identified by complainant and Kapildev. In that view of the matter, there is no reason to disbelieve evidence of these witnesses which is further found corroborated by the evidence of police officers, as aforesaid.

22 In the background of evidence as discussed above, thus both the appeals are liable to be dismissed. However, from the record it reveals that both the appellants as on today are aged about 37 years old. Appellant no.1 is also stated to be suffering from HIV+ve. Both the appellants are awarded conviction. The maximum conviction awarded to both the appellants is for offence punishable under Section 392 read with Section 34 of IPC, which is rigorous imprisonment for 7 years and fine of Rs.10,000/-, in default, to suffer simple imprisonment for 1 year. Record further reveals that appellant no.1 has already undergone sentence to the extent of 6 years and 2 months while appellant no.2 has undergone sentence of 6 years and 1 month. Having considering facts as aforesaid, age of appellants and as

appellant Manish is HIV+ve patient, to meet the ends of justice, appellants are convicted till the period of conviction already undergone.

23 In the circumstances, both the appeals stand dismissed and are disposed of as above.

(P. N. DESHMUKH, J.)