

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

**CRIMINAL REVISION APPLICATION NO.82 OF 2017
WITH
CRIMINAL APPLICATION NO.76 OF 2017
IN
CRIMINAL REVISION APPLICATION NO.82 OF 2017**

Rukhsana Hanif Pathan @
Pushpa Motiram Gawade,
Age-46 years, Indian inhabitant
of Mumbai occu.Housewife,
R/o.Room No.08, Deepak,
Yadav Chawl, Ganesh Nagar,
Kaju Tekadi, Bhandup (W),
Mumbai 400 078.

... **Applicant**

V/s.

The State of Maharashtra,
At the instance of Kurla
Railway Police Station, Kurla,
Mumbai vide C.R.No.03 of 2008.

... **Respondent**

**WITH
CRIMINAL REVISION APPLICATION NO.83 OF 2017
WITH
CRIMINAL APPLICATION NO.77 OF 2017
IN
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Yadav Chawl, Ganesh Nagar,
Kaju Tekadi, Bhandup (W),
Mumbai 400 078.

... **Applicant**

V/s.
The State of Maharashtra,
At the instance of Kurla
Railway Police Station, Kurla,
Mumbai vide C.R.No.02 of 2008. ... **Respondent**

.....

Mr.Aniket Vagal, Advocate for the Applicant.
Mr.A.R.Kapadnis, APP for the Respondent/State.

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CORAM : A.M.BADAR J.

DATED : 16th MARCH 2017.

ORAL JUDGMENT :

1 Both these revision petitions are being decided by common Judgment because except evidence of first informants other evidence in both these revision petitions is common and revision petitioner in both these revision petitions is one and the same.

2 In revision petition bearing No.82 of 2017, the revision petitioner is challenging the Judgment and Order dated 19th January 2017 passed by the learned Additional Sessions Judge, Mumbai in Criminal Appeal bearing No.275 of 2014 filed by her, thereby dismissing her appeal. The said appeal was filed by revision petitioner/original accused for challenging the Judgment and Order dated 01/03/2014 passed by the learned Metropolitan Magistrate, 35th Court, CST, Mumbai in Criminal Case

No.240/PW/2008, thereby convicting the revision petitioner/original accused of the offence punishable under Section 379 of the Indian Penal Code (For short, “the IPC”) and sentencing her to suffer rigorous imprisonment for six months.

3 In revision petition bearing No.83 of 2017, the revision petitioner/accused is challenging the Judgment and Order of dismissal of her appeal bearing No.276 of 2014 by the learned Additional Sessions Judge, Mumbai on 19/01/2017 thereby confirming the Judgment and Order of conviction recorded by the learned Metropolitan Magistrate, 35th Court, CST, Mumbai in Criminal Case No.241/PW/2008. In this Criminal Case also the learned Metropolitan Magistrate was pleased to convict the revision petitioner/original accused of the offence punishable under Section 379 of the IPC and she was sentenced to suffer rigorous imprisonment for six months. It needs to be noted that the learned Metropolitan Magistrate had directed that the sentences in both these Criminal Cases shall run concurrently.

4 Briefly stated, it is case of the prosecution in Criminal Case No.240/PW/2008 that on 06/01/2008 first informant/P.W.No.1 Vaishnavi Vijay Mukale was travelling by a local train from Dombivali to Bhandup. Because of heavy rush in the train, she kept gold chain and cash amounting to Rs.600/- in a purse and that purse was kept by her in the shoulder bag carried by her.

When she alighted at Bhandup Railway Station, she noticed that an unknown person has committed theft of golden chain and cash from her shoulder bag. She immediately lodged report (Exh.6) on 06/01/2008 with Kurla Railway Police Station, which resulted in registration of Crime No.3 of 2008 for the offence punishable under Section 379 of the IPC. Routine investigation followed which resulted in charge-sheeting the revision petitioner/accused. In support of the charge, the prosecution has examined in all three witnesses namely Vaishnavi Vijay Mukale (PW1), Purshottam Soma Gawade, police head constable (PW2) and Anand Nikhale, police head constable (PW3). The defence of the accused was that of total denial. After due trial, the learned trial Magistrate was pleased to convict the revision petitioner/accused of the offence punishable under Section 379 of the IPC and she is sentenced accordingly as indicated in the opening paragraph of this Judgment.

5 Case of the prosecution so far as Criminal Case No.241/PW/2008 which has resulted in filing of Revision Petition bearing No.83 of 2017 is to the effect that on 26/12/2007 Dakshata Suryakant Koli was travelling from Thane to Ghatkopar. She had kept gold Mangalsutra weighing 16.650 gms., ATM card and several documents in a purse and that purse was kept in the shoulder bag carried by her. After she alighted from the train, she found the money purse containing Mangalsutra was missing from

the shoulder bag. She lodged report of this incident to Kurla Railway Police Station on 03/01/2008, which has resulted in registration of Crime Registration No.2 of 2008 for the offence punishable under Section 379 of the IPC.

6 After routine investigation, the revision petitioner/accused came to be charge-sheeted and in order to bring home the guilt to the revision petitioner, the prosecution has examined three witnesses in Criminal Case No.241/PW/2008 also. First informant Dakshata Koli is examined as P.W.No.1, Purshottam Gawade, police head constable as P.W.No.2, whereas Anand Nikhale, police head constable as P.W.No.3.

7 In Criminal Case No.241/PW/2008 also the defence of the revision petitioner/original accused is that of total denial. After hearing the parties in this case also, the revision petitioner/original accused came to be convicted and sentenced as indicated in the opening paragraph of this Judgment.

8 I have heard the learned Advocate appearing for the revision petitioner in both these revision petitions at sufficient length of time. I have also perused the Record and Proceedings in both these revision petitions. By taking me through the evidence of prosecution witnesses in both these cases, the learned Advocate appearing for the revision petitioner vehemently argued that it is

the case of the prosecution that recovery panchanama resulting in recovery of one Mangalsutra and other articles was recorded on 27/02/2008. This recovery is not made in respect of a particular crime, but the recovery is a general recovery of several articles allegedly at the instance of the revision petitioner/accused. Articles involved in different crimes were allegedly recovered by the police. Such course of action is not permissible.

9 It is further argued that cross-examination of P.W.No.1 Dakshata Koli in Criminal Case No.241/PW/2008 shows that Mangalsutra allegedly recovered on 27/02/2008 was shown to her on 16/01/2008 itself. This creates doubt in the prosecution case as on 16/01/2008, even according to the prosecution case, nothing was recovered. It is further argued that panch witnesses to alleged recovery were called subsequently and confessional statement of the revision petitioner/accused was not recorded in presence of panch witnesses. Panchas were also not examined by the prosecution in order to prove confessional statement as well as resultant recovery.

10 The learned Advocate for the revision petitioner further argued that evidence of official witnesses shows that they had chosen not to go to the spot for effecting recovery by official vehicles. There is no entry regarding their departure in the official record such as station diary etc. The seized articles were not

sealed. It is argued that first informant Dakshata Koli in Criminal Case No.241/PW/2008 had lodged report of alleged incident of 26/12/2007 on 03/01/2008 and as such, because of delay in lodging the FIR, prosecution case becomes suspect. It is further argued that it is highly improbable that a person would keep valuable articles in the shoulder purse, while travelling in the local train and, therefore, the element of improbability creeps in the prosecution case.

11 The learned Additional Public Prosecutor supported the impugned Judgment and Order and argued that there is no cross-examination of the first informant, so far as alleged delay in lodging the FIR is concerned. It is further argued that the prosecution has proved the offence alleged against the revision petitioner/accused by adducing necessary evidence in support of the charge.

12 In both revision petitions in hand, Courts below have concurrently held that the prosecution has proved offence punishable under Section 379 of the IPC committed by the revision petitioner/original accused. The accused is invoking the revisional jurisdiction of this Court. It is well settled that revisional jurisdiction is required to be exercised sparingly, when there is glaring defect of procedure or manifest error of law, which has resulted in miscarriage of justice. Sufficiency of evidence

cannot be gone into for holding a fact to be proved. Unless and until it is shown that the findings recorded by the Court below is perverse, the same cannot be upset in the revisional jurisdiction. If the findings is arrived at on the basis of some evidence on record, then adequacy of that evidence cannot be examined in the revisional jurisdiction.

13 Section 3 of the Indian Evidence Act, 1872 defines the term 'proved'. A fact is said to be proved when after considering the matter before it, the Court either believes it to exist or considers its existence so probable that a prudent person acting under circumstances of a particular case is inclined to act upon the supposition that such fact exists. Keeping in mind these parameters, let us examine cases at hand in order to consider whether while holding the charge to be proved, Courts below committed any manifest error of law or procedural impropriety.

14 The first point urged by the learned Advocate appearing for the revision petitioner is to the effect that recovery of articles at the instance of revision petitioner is not proved, as it is a general recovery and panchas were not examined by the prosecution to prove the said recovery. Not using the official vehicles is also stated to be one of the reason for persuading this Court to reject the evidence regarding the recovery. In the matter of *Rameshbhai Mohanbahi Koli v. State of Gujarat* reported in

2011 AIR SCW 378, the Honourable Apex Court has considered somewhat similar arguments and after considering the entire case the Honourable Apex Court has held thus in paragraph Nos.23 to 25 of the said rulings:

“Evidence of Investigating Officer

23) An argument was advanced about reliance based on the evidence of investigating officer. This Court in *State of U.P. vs. Krishna Gopal and Another*, (1988) 4 SCC 302 has held that courts of law have to judge the evidence before them by applying the well recognized test of basic human probabilities. Prima facie, public servants must be presumed to act honestly and conscientiously and their evidence has to be assessed on its intrinsic worth and cannot be discarded merely on the ground that being public servants they are interested in the success of their case. [vide *State of Kerala vs. M. M. Mathew & Anr.*, (1978) 4 SCC 65]]

24) In *Modan Singh vs. State of Rajasthan*, (1978) 4 SCC 435, it was observed that where the evidence of the investigating officer who recovered the material objects is convincing, the evidence as to recovery need not be rejected on the ground that seizure witnesses did not support the prosecution version. Similar view was expressed in *Mohd. Aslam vs. State of Maharashtra*, (2001) 9 SCC 362. In *Anter Singh vs. State of Rajasthan*, (2004) 10 SCC 657, it was further held that even if panch witnesses turn hostile, which happens very often in criminal cases, the evidence of the person who effected the recovery would not stand vitiated.

25) This Court has held in large number of cases that merely because the panch-witnesses have turned hostile is no ground to reject the evidence if the same is based on the testimony of the Investigating Officer alone. In the instant case, it is not the case of defence that the testimony of Investigating Officer suffer from any infirmity or doubt. [Vide *Modan Singh's case* (supra) *Krishna Gopal's case* (supra) and *Anter Singh's case* (supra)].”

15 It is thus clear that it is not at all necessary that for effecting recovery, panch witnesses should be examined and recovery should be made only before panch witnesses. Even otherwise, it is a wise principle of law recognized even by the legislature under Section 114(e) of the Evidence Act that the official acts are regularly done. It is thus clear that statement of the accused can be recorded even in absence of panch witnesses and such recovery can be accepted, provided evidence of official witnesses effecting the recovery is found to be truthful and trustworthy.

16 In cases at hand, prosecution has examined police head constable, who had recorded statement of the revision petitioner/accused, which has resulted in effecting the recovery. P.W.No.2 Purshottam Gawade, police personnel is a witness who recorded confessional statement of the revision petitioner/accused and who had witnessed the recovery. The evidence of P.W.No.3 Anand Nikhale is specifically on the point that by summoning panch witnesses, confessional statement of the revision petitioner/accused came to be recorded. There is no even suggestion to this witnesses to the effect that without calling panch witnesses, the confessional statement of the revision petitioner/accused came to be recorded. Perusal of confessional statement and resultant recovery panchanama do shows that

confessional statement was made in presence of panch witnesses and panch witnesses have duly signed that confessional statement. Hence, I find no substance in submission of the learned Advocate that confessional statement was not recorded in presence of panch witnesses.

17 P.W.No.3 Anand Nikhale and P.W.No.2 Purshottam Gawade in unison have deposed that in pursuant to the statement of revision petitioner/accused, they had recovered articles such as Mangalsutra weighing 16 grams, necklace weighing about 8 grams and cash amount to Rs.1200/-. Both these police personnels have deposed that then recovery panchanama was drawn. Even from cross-examination of P.W.No.2 Purshottam Gawade, it is brought on record that while recording confessional statement of the revision petitioner/ accused panch witnesses Sou.Sunita Shaikh and Shri.Santosh Pawar were present. There is nothing in cross-examination of both these witnesses to disbelieve their versions regarding effecting recovery from the house of revision petitioner/accused at her instance.

18 In the wake of this evidence adduced by the prosecution, it is clear that there was recovery of a Mangalsutra and gold chain at the instance of the revision petitioner/accused.

19 P.W.No.1 Dakshata Koli in her evidence has stated that

the Mangalsutra was in broken condition. In her cross-examination, she has stated that she was shown Mangalsutra on 16/01/2008. The evidence of this witness shows that the recovery of Mangalsutra was owned by her and which was lost while travelling. The incident of theft so far as Dakshata Koli is concerned, took place on 26/12/2007, whereas she has entered into the witness box on 18/11/2011. It is thus clear that after a lapse of so many years, this witness has entered into the witness box. Therefore, her admission in the cross-examination that the Mangalsutra was shown her on 16/01/2008 pales into insignificance particularly when evidence regarding recovery of Mangalsutra at the instance of revision petitioner/accused is trustworthy and reliable. Ultimately, some concession will have to be given to the fact that the witness has entered in the witness box after a gap of several years. Only because of condition of the Mangalsutra as 'broken' is not mentioned in the recovery panchanama, that, by itself, is not sufficient to discard the recovery panchanama. Moreover, all these aspects cannot be adjudged while invoking revisional jurisdiction of this Court, particularly, when both the Courts below considered evidence adduced by the prosecution on the aspect of recovery as trustworthy.

20 P.W.No.1 Vaishnavi Mukale in Criminal Case No.240/PW/2008 (Revision Petition No.83 of 2017) has deposed

that she was travelling to Bhandup from Dombivali on 06/01/2008 and during that journey, she found that gold chain weighing about 8.31 grams and cash amount of Rs.600/- was stolen from her shoulder bag. This witness has lodged report (Exh.6) on 06/01/2008 itself with Kurla Police Station. The evidence of this witness also shows that the necklace recovered at the instance of revision petitioner/accused was the same article, which was stolen during the course of journey.

21 Once it is found that stolen articles were recovered at the instance of revision petitioner/accused, then presumption as envisaged in Article 114, illustration (a) of the Evidence Act comes into play. A person, who is found in possession of a stolen article, after the theft, is presumed to be either the thief or receiver of the stolen property.

22 To conclude, despite due deliberation, it cannot be said that Judgments and Orders passed by the Courts below are either perverse or suffers from procedural impropriety. In the result, following order :

(i) Both revision petitions stand dismissed.

(ii) Record and Proceedings be sent back to Courts below

(iii) In view of disposal of Revision Petitions, pending Criminal Application No.76 of 2017 and Criminal Application No.77 of 2017 stand disposed of.

(A.M.BADAR J.)