

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL REVISION APPLICATION NO.136 OF 2017

WITH

CRIMINAL APPLICATION NO.134 OF 2017

IN

CRIMINAL REVISION APPLICATION NO.136 OF 2017

MANSINGH DHONDIRAM SAKPAL)...APPLICANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.P.G.Sarda, Advocate for the Applicant.

Mr.S.V.Gavand, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 24th APRIL 2017.

ORAL JUDGMENT :

1 By this revision petition, revision petitioner / original accused no.1 / Mansingh Sakpal is challenging the judgment and order dated 14th December 2016 passed by the learned Additional Sessions Judge, Greater Bombay, Mumbai, in Criminal Appeal No.402 of 2012 thereby dismissing his appeal and confirming the judgment of the learned trial Magistrate convicting him of the

offence punishable under Section 394 read with Section 34 of the IPC and sentencing him to suffer rigorous imprisonment for 3 years apart from payment of fine of Rs.500/-, and in default, to undergo further simple imprisonment for 1 month. In all four accused persons including the revision petitioner / accused no.1 Manish Sakpal were put up for trial for offences punishable under Section 394, 411 read with 34 of the IPC vide Criminal Case No.199/PW/2006 with Criminal Case No.760/PW/2008. Learned trial Magistrate by the judgment and order dated 7th March 2012 was pleased to convict the revision petitioner / accused no.1 along with accused nos.2 and 3 for the offence punishable under Section 394 read with 34 of the IPC and they were sentenced as indicated above in this paragraph.

2 According to the prosecution case, as reflected from the charge-sheet filed against accused persons, informant PW1 Rakesh Jain was a salesman with the Millenium Firm. He used to take gold ornaments given by his employer to various jewelers for selling them. On 13th November 2005, he took gold ornaments

such a Mangalsutras, Mangalsutra pendants, ear rings and finger rings weighing 1250 gms for selling to Mulund, Bhandup and Pratap Nagar area of Mumbai. He could not effect any sale and therefore, he boarded an auto rickshaw for going to Kanjur. He sat between two persons who were already sitting in the auto rickshaw. At L.B.S.Road, Mumbai, his auto rickshaw was stopped on the pretext that one of the passengers wanted to alight. At that time, driver of auto rickshaw gave a fist blow on chest of PW1 Rakesh Jain and two persons who were sitting in the auto rickshaw started snatching his bag. Ultimately, his bag came to be snatched and he was pushed out of the auto rickshaw. PW1 Rakesh Jain then called his employer and lodged a report Exhibit 6 on the very same day with Park Site Police Station, Mumbai, which resulted in registration of Crime No.377 of 205 under Section 394 read with 34 of the IPC. After filing of the charge-sheet on completion of the investigation, the revision petitioner along with co-accused were tried for the offence punishable under Section 394 read with 34 of the IPC and after hearing parties, the learned Metropolitan Magistrate was pleased to convict the

revision petitioner / accused no.1 along with accused nos.2 and 3 for the offence punishable under Section 394 read with 34 of the IPC and they came to be sentenced as indicated in the opening paragraph of this judgment.

3 The revision petitioner / accused no.1 carried that judgment in appeal but his appeal came to be dismissed by the impugned judgment and order dated 14th December 2016 by the learned Additional Sessions Judge, Mumbai.

4 I have heard the learned advocate appearing for the revision petitioner / accused no.1 at sufficient length of time. He argued that the court below have rightly discarded the evidence of identification because same was lacunatic and unreliable. He drew my attention to paragraph 7 of the judgment of the appellate court on this aspect and contended that identity of the accused persons was not established and as such, the revision petitioner ought not to have been convicted of the alleged offence. It is further argued that evidence of PW6 Arvind Vinerkar – panch

witness, is discrepant as he has not identified all ornaments allegedly recovered at the instance of the revision petitioner / accused. It is further argued that the only evidence on the basis of which the revision petitioner / accused is convicted is that of recovery at his instance. Such recovery, as per the evidence, is from the open place and therefore, it is of no consequence. Similarly, it is argued that identification of ornaments at the instance of witnesses is also doubtful as it has come on record from their cross-examination that such type of ornaments are easily easily available in open market.

5 As against this, the learned APP argued that impugned judgment and order passed by the appellate court is a well reasoned order based on the evidence on record. He further argued that the first informant had identified the seized ornaments on the basis of logo and there is no cross-examination on this aspect. The recovery panchnama bears signature of the revision petitioner / accused and place and recovery is supported by the evidence adduced by the prosecution witnesses and as

such, other aspects are wholly irrelevant.

6 I have carefully considered the rival submissions and also perused record and proceedings including judgment and order passed by the courts below. The revision petitioner / accused is invoking revisional jurisdiction of this court which needs to be exercised sparingly when there is glaring defect in the procedure or manifest error on point of law consequently resulting in flagrant miscarriage of justice. In revisional jurisdiction, finding of fact cannot be interfered with and the court cannot re-appreciate evidence by functioning as an appellate court. Keeping in mind this parameters for exercising revisional jurisdiction of this court, let us examine whether the court below erred in upholding the conviction of the revision petitioner / accused no.1.

7 The revision petitioner is convicted of the offence punishable under Section 394 read with 34 of the IPC by holding that accused persons in furtherance of their common intention committed robbery and during the course of committing such

robbery, they had voluntarily caused hurt to informant PW1 Rakesh Jain. As such, let us see whether finding of the learned court below that there was incident of robbery on 13th November 2005 in which informant PW1 Rakesh Jain was robbed of gold ornaments weighing 1250 gms is supported by the evidence on record. If this finding is seen to be supported by the evidence on record, then one will have to see whether hurt was caused to informant PW1 Rakesh Jain in the course of commission of robbery and then this court will have to see whether the revision petitioner / accused can be fastened with liability of commission of robbery in furtherance of common intention which he had allegedly shared with co-accused.

8 Evidence of PW1 Rakesh Jain along with evidence of PW8 Nanalal Jain was believed by the court below in concluding that the prosecution has proved that the incident of robbery took place on 13th November 2005 when the informant was robbed of his valuables. Evidence of PW1 Rakesh Jain shows that he was working as a salesman with the Millenium firm owned by one

Sureshkumar Dhakad. His job was to carry gold ornaments to various jewelers in Mumbai for selling them. Evidence of this witness further reveals that on 13th November 2005 he took gold ornaments weighing 1250 gms for selling. He went to jewelers at Mulund, Bhandup and Pratap Nagar area of Mumbai, but was not in a position to sell out those gold ornaments. This witness deposed that then he boarded an auto rickshaw at Pratap Nagar for going to Kanjur Station and sat between two passengers who were already sitting in that auto rickshaw. As per version of this witness, the auto rickshaw stopped at L.B.S. Road as one of the passengers was to alight the auto rickshaw. At that point of time, as stated by PW1 Rakesh Jain, driver of auto rickshaw gave fist blows on his chest and two persons who were sitting beside him tried to snatch the bag containing gold ornaments from his hand. Then, the auto rickshaw started moving and by pulling the bag from his hand, he was pushed outside the auto rickshaw. This witness further stated that because of this incident, he suffered injuries to his face and auto rickshaw went away from the spot. In this way, as per version of PW1 Rakesh Jain, a bag containing

gold ornaments such as Mangalsutras, Mangalsutra pendants, ear rings, finger rings etc. came to be robbed from his person by the driver as well as passengers of the auto rickshaw. Cross-examination of this witness shows that the auto rickshaw was stopped at the gate of the building under construction. He shouted at the time of the incident and one vehicle stopped. People also gathered. From cross-examination of this witness it has been brought on record that this witness was called after the incident to police station for identifying one of the accused and thereafter he was called after a gap of 2 to 2½ hours for identifying two accused persons.

9 The report lodged by this witness is at Exhibit 6. Averments in the FIR lodged by this witness fully corroborates version of this witness regarding the fact that he was carrying gold ornaments weighing 1250 gms for selling them out and those were robbed from his possession by the driver and two passengers of the auto rickshaw in which he was traveling towards Kanjur Station. This FIR is lodged with promptitude i.e. at about 4.30

p.m. of the day of the incident. As seen from evidence of this witness, he immediately called his employer and along with his employer he had been to the police station for lodging the report.

10 Version of PW1 Rakesh Jain is gaining further corroboration from contemporaneous vouchers issued by the Millenium firm which is at Exhibit 7. This voucher shows that gold jewellery weighing about 1268.12 gms was entrusted to him.

11 Evidence of PW8 Nanalal Jain – owner of Samrat jewellers shows that PW1 Rakesh Jain had been to his shop for selling jewellery on 13th November 2005. However, PW8 Nanalal Jain did not like the ornaments brought by PW1 Rakesh Jain and therefore he had not purchased anything from PW1 Rakesh Jain. This evidence duly corroborates version of PW1 Rakesh Jain to the effect that on 13th November 205 he was on his job to sell out gold ornaments such as Mangalsutras, Mangalsutra pendants, ear rings, finger rings etc.

12 Version of PW1 Rakesh Jain regarding robbery of gold ornaments is gaining further corroboration from Injury certificate at Exhibit 22 placed on record by the prosecution. This is a document which is not disputed by the defence and upon admission of this injury certificate by the defence, it is marked as Exhibit 22. This Injury certificate shows that on 13th November 2005, PW1 Rakesh Jain was found to have suffered injuries in the nature of abrasion on his left eye brow as well as forearm apart from tenderness to his right arm. With this evidence on record, no fault can be found in finding of the court below to the effect that the prosecution has proved that gold jewellery weighing 1250 gms came to be looted from possession of PW1 Rakesh Jain after causing hurt to him in the process of robbery.

13 Now let us examine whether the prosecution is successful in establishing the fact that it was the revision petitioner / accused no.1 who along with co-accused in furtherance of common intention committed robbery of gold

ornaments weighing 1250 gms from possession of PW1 Rakesh Jain. As noted above, evidence regarding identification of accused persons was found by the learned appellate court to be sketchy and inconsistent. PW1 Rakesh Jain had initially deposed that accused no.3 Anjan alias Rajan Mahanti was driving the auto rickshaw but subsequently he has stated that it was the revision petitioner / accused no.1 who was driving the auto rickshaw. He could not identify, who out of remaining three accused persons was sitting at the backside of the auto rickshaw. PW4 Ravindra Raut – a panch witness in respect of recovery was not in a position to identify the revision petitioner / accused no.1 as a person who made confessional statement before the police. PW6 Arvind Vinerkar who is the second panch to the confessional statement of the revision petitioner / accused no.1, is the only witness apart from PW11 Baliram Kadam, the Investigator, who has identified the revision petitioner / accused no.1 as the person who made confessional statement. Similarly, so far as Test Identification Parade (TIP) is concerned, the appellate court came to the conclusion that the said evidence cannot be accepted as PW1

Rakesh Jain has not spoken about identification of the revision petitioner / accused no.1 in the identification parade and PW3 Sanjay Sonawane – a panch witness to the TIP has not supported the case of the prosecution in respect of identification parade. As this finding is based on evidence of witnesses and as such cannot be termed as perverse, this court cannot undertake the task of appreciation of evidence of PW1 Rakesh Jain and PW3 Sanjay Sonawane on this aspect, in the revision petition at the instance of the accused.

14 Conviction of the revision petitioner / accused no.1 is based on recovery of some of the looted articles at his instance. For establishing recovery from the revision petitioner / accused no.1, the prosecution has relied on his confessional statement Exhibit 13 recorded on 6th December 2005 and the resultant recovery panchnama Exhibit 14 showing recovery of gold ornaments weighing about 70 gms at the instance of revision petitioner / accused no.1. Section 27 of the Indian Evidence Act, 1872, is an exception to Sections 25 and 26 thereof. It is a proviso

to Section 26 which provides that confession by the accused while in custody of police cannot be proved against him. Ban imposed by Section 26 is lifted by Section 27 of the Indian Evidence Act, 1872, which is concerned with the proof of information whether it amounts to a confession or not which leads to discovery of facts. The conditions necessary for invoking the aid of Section 27 of the Indian Evidence Act, 1872, are as under :

- i) there must be discovery of relevant fact in consequence of information received from a person accused of offence.
- ii) the discovery of such fact must be deposed to
- iii) at the time of receipt of information, the accused must be in the police custody
- iv) that only so much of information as it relates distinctly to the fact thereby discovered is admissible.

15 In the case in hand, as seen from evidence of the Investigator i.e. PW11 Baliram Kadam, Police Inspector, after his

arrest by Dahisar Police, the revision petitioner / accused no.1 was taken in custody by this witness on 6th December 2005. PW11 Baliram Kadam, Police Inspector, deposed that on 6th December 2005 itself while in police custody, the revision petitioner showed his willingness to show the place where the ornaments robbed were concealed and accordingly, memorandum Exhibit 13 came to be recorded in presence of panch witnesses. As per version of this witness, then confession statement of the revision petitioner / accused no.1 came to be signed by the revision petitioner / accused no.1 as well as panch witnesses and by him. PW11 Baliram Kadam further deposed that under directions of the revision petitioner / accused no.1 they proceeded towards gate no.2 of Devnar slaughter house. They were taken near the compound wall of that slaughter house and from the hole in the compound wall, the revision petitioner / accused no.1 took out a bag. That bag was found to be containing three mangalsutras and five mangalsutra pendants. PW11 Baliram Kadam further testified that then they went to government valuer at Vikhroli and obtained certificate regarding weight and value of those ornaments and

then those ornaments came to be seized by him by recovery panchnama Exhibit 14. Except suggestions reflecting that no such confession statement came to be recorded by this witness and that nothing came to be recovered at the instance of the revision petitioner / accused no.1, nothing more is found in cross-examination of the Investigator on this aspect.

16 In the matter of **Modan Singh vs. State of Rajasthan**¹ the Hon'ble Apex Court has 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 is also expressed in **Mohd.Aslam vs. State of Maharashtra**². In **Anter Singh vs. State of Rajasthan**³ it is further held by the Hon'ble Apex Court 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.

1 (1978) SCC 435

2 (2001) 9 SCC 362

3 (2004) 10 SCC 657

17 PW6 Arvind Vinerkar is a panch witness to the recovery. His evidence also shows that on 16th December 2005 while in police custody, the revision petitioner / accused no.1 had made a confessional statement expressing his willingness to show the place where the bag containing gold ornaments is kept. As deposed by this witness, the panchnama Exhibit 13 was then prepared and then the revision petitioner / accused no.1 took them near gate of Devnar slaughter house. From the hole in the stone wall, he took out a bag which contained three mangalsutras and five mangalsutra pendants. As per version of this witness, then they returned to the police station and thereafter went to the goldsmith named Mishrilal where gold ornaments were weighed and valued. Then recovery panchanama Exhibit 14 was then came to be prepared. PW6 Arvind Vinerkar has identified one mangalsutra and five mangalsutra pendants but could not identify remaining chain mangalsutras. In cross-examination of this witness, it is brought on record that another panch by name Raut was also present apart from Police Inspector Baliram Kadam in the process of recovery. This witness admitted that mangalsutras are available readily in the market.

18 PW4 Ravindra Raut is another panch witness who deposed on similar lines by stating that after confessional statement, the revision petitioner / accused no.1 took them to Mankhurd area and took out a bag by climbing on the wall. It was containing gold ornaments and after calling a goldsmith on the spot, these gold ornaments were weighed and then seized by recovery panchnama Exhibit 14. He has not identified revision petitioner / accused no.1, but identified the seized gold ornaments. In cross-examination of this witness it is brought on record that such gold ornaments are available in open market. In his halfhearted cross-examination it is not elicited from him as to which case is pending against him and in which case, whether criminal or civil, he has deposed. This is the evidence regarding recovery effected at the instance of the revision petitioner / accused no.1.

19 PW7 Uttam Mishrilal Chaudhary is the owner of Mangal Jewelers at Vikhroli who deposed that on 16th December

2005 police came and brought gold ornaments for valuation and accordingly he valued them and issued certificates Exhibits 19 and 20. It is seen from the evidence of PW4 Ravindra Raut and PW6 Arvind Vinerkar - panch witnesses - that there is minor variation in their version. PW4 Ravindra Raut has stated that goldsmith was called on the spot whereas PW6 Arvind Vinerkar and PW11 Baliram Kadam has specifically stated that they had gone to the goldsmith for weighing and valuing the recovered ornaments. Name of the valuer goldsmith is stated to be Mishrilal whereas name of the valuer is Uttam Mishrilal Chaudhary. PW6 Arvind Vinerkar, though identified some of the recovered ornaments, was not in a position to identify the remaining two other chain mangalsutras. However, PW1 Rakesh Jain had identified seized gold ornaments in the court. His evidence is to the effect that as ornaments were having stamp of their firm as "SN" he is in a position to identify those gold ornaments.

20 The question which falls for consideration is whether with these discrepancies it can be said that the prosecution has

proved recovery of looted ornaments at the instance of the revision petitioner / accused no.1. In the case in hand, the incident of robbery took place on 13th November 2005. Witnesses have entered in the witness box after a gap of five years i.e. in the year 2010 and 2011. Principles of appreciation of evidence can be found in the matter of **Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat**⁴. While deciding that matter, the Hon'ble Apex court has categorically held that some concession on account of fading memory because of long passage of time between the incident and the actual deposition before the court is required to be given and the prosecution case cannot be jettisoned for the reason of minor inconsistencies and variations in the evidence of the prosecution witnesses. What is relevant in the instant case is whether recovery of looted ornaments was effected at the instance of the revision petitioner / accused no.1 or not. Whether goldsmith was brought on the spot for valuation or whether the valuation was done at his shop, whether name of the goldsmith was Mishrilal or Uttam Mishrilal Chaudhary, is of no consequence. PW1 Rakesh Jain is a salesman dealing with sale of gold ornaments regularly. He has

⁴ AIR 1983 SUPREME COURT 753

duly identified the recovered ornaments. Recovery of those articles is proved at the instance of revision petitioner / accused no.1. It is argued that recovery is from open place accessible to all and sundry. However, even if the recovery is from compound wall of Devnar slaughter house, evidence on record unerringly points out that the revision petitioner / accused no.1 was having knowledge about the place at which the looted gold ornaments were kept concealed and it was he who recovered them. Hence, even if the recovery was from open place, that by itself is not sufficient to conclude that somebody else might have placed those gold ornaments and the revision petitioner / accused no.1 might have acquired knowledge about those gold ornaments subsequently. Such is not the defence of the revision petitioner / accused no.1 nor such defence is fortified by putting such questions to panchas and the Investigator. As such, the court below has rightly concluded that some of the looted ornaments were recovered at the instance of revision petitioner / accused no.1.

21 At this juncture, provisions of Section 114 of the

Indian Evidence Act, 1872, are relevant. This is general section dealing with presumption of fact. Presumption of facts are inferences from certain facts drawn from the experience and observations of human mind, the usage and habits and ordinary course of human affair. This section provides that the court may presume the existence of certain facts which it thinks likely to have happened, regard being had to the common course of natural events, human conduct etc. Illustration (A) to Section 114 of the Indian Evidence Act, reads thus :

“The court may presume –

- (a) that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession.”

22 True it is, that the court has discretion, on facts of each case, either to draw or not to draw the presumption in a particular case, but in the case in hand, the necessary presumption which follows because of absence of any explanation in respect of the

recovery at his instance is that the revision petitioner / accused no.1 must be one of the robber who have looted the recovered gold ornaments from possession of the first informant. Statement of the revision petitioner / accused no.1 recorded under Section 313 of the Code of Criminal Procedure is absolutely silent as to how he was knowing about the place where the robbed ornaments were found concealed. In this view of the matter, the conclusion arrived at by the appellate court that the revision petitioner / accused no.1 had committed robbery by causing hurt to the first informant by acting in league with co-accused cannot be faulted with.

23 The appellate court has accepted that portion of evidence of prosecution witnesses cross-examined by it, which supported the case of the prosecution. This approach also cannot be faulted with. It is settled legal proposition that evidence of a prosecution witness cannot be rejected in toto merely because the prosecution has chosen to treat such witness as a hostile witness. Valuable reference can be had to this proposition from the

judgment of the Hon'ble Apex Court in the matter of **Rameshbhai Mohanbhai Koli Vs. State of Gujarat**⁵.

24 The offence punishable under Section 394 of the IPC is warranting imprisonment which may be up to term for life or which may extend to 10 years. In the case in hand, learned trial Magistrate had imposed rigorous imprisonment for a period of 3 years for the offence punishable under Section 394 read with 34 of the IPC held to be proved against the revision petitioner / accused no.1. As such, it cannot be said that the principle of proportionality of punishment was not kept in mind by the learned trial court or that the appellate court erred in confirming the sentence on this count.

25 In the result, the revision petition fails, and therefore, the order :

i) The revision petition is dismissed.

Consequently the Criminal Application No.134 of 2017 also stands dismissed.

⁵ 2010 ALL MR (Cri) 3868 (S.C.)

(A. M. BADAR, J.)