

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.222 OF 2014

Mohd. Rafique Rashid Sayyed

@ Lal Topi Farique

Aged about 30 years, occu:- Labour

Residing at:- Kumbhar Wada

Old Takia Id-gah Zopadpatti,

Room No: 1494, Tal:- Malegaon,

District : Nashik.

At present undergoing the Sentence
imposed upon them at

Taloja Prison, New Mumbai.

... **Appellant**

V/s.

State of Maharashtra

(at the instance of Bhoiwada

Police Station Vide their

C.R.No.174 /2011.

... **Respondent**

.....

Mr.Suryakant J. Shelke, Advocate for the Appellant.

Mrs.N.S.Jain, APP for the Respondent/State.

....

CORAM : A.M.BADAR J.

DATED : 28th August 2017.

ORAL JUDGMENT :

1 This is an Appeal by appellant/accused No.1 feeling aggrieved by his conviction and sentence imposed on him on 3rd February 2014 in Sessions Case No.128 of 2012 by the learned Ad-

hoc Additional Sessions Judge, Court No.58, Greater Mumbai. By this impugned Judgment and Order, the appellant/accused No.1 came to be convicted of the offence punishable under Sections 397 and 450 read with Section 34 of the Indian Penal Code (hereinafter referred to as "IPC" for the sake of brevity) as well as Section 3 read with Section 25(1-B) (a) and under Section 27 of the Indian Arms Act. For the offence punishable under Section 397 of the IPC, he is sentenced to suffer rigorous imprisonment for seven years and for the offence punishable under Section 450 read with Section 34 of the IPC, the appellant/accused No.1 is sentenced to suffer rigorous imprisonment for seven years. For the offence punishable under Section 3 read with Section 25(1-B) (a) of the Indian Arms Act, the appellant/accused No.1 is sentenced to suffer rigorous imprisonment for one year and for the offence punishable under Section 27 of the Indian Arms Act, he is sentenced to suffer rigorous imprisonment for three years. The learned trial Court had directed that all substantive sentences shall run concurrently.

- 2 Briefly stated, facts giving rise to this Appeal are thus :
- (a) It is case of the prosecution that P.W.No.1 Shaitansingh Chundawat is owner of shop named as Devnarayan Synthetics and Cloth Merchant, Haq building, Abaji Palav Marg, Dadar (East), Mumbai. P.W.No.2 Kishansingh is his nephew, whereas P.W.No.3 Narendrasingh is his servant.

On 16/09/2011 at about 9.30 p.m., First Informant P.W.No.1 Shaitansingh along with his nephew P.W.No.2 Kishansingh and P.W.No.3 Narendrasingh were present at the shop. At that time, all of a sudden, appellant/accused No.1 Mohd. Rafique accompanied by two co-accused namely accused No.2 Mehboob Badshah Sahab Inamdar and absconding accused entered into his shop. The appellant/accused No.1 was armed with a revolver. One of his associates was armed with a chopper. The prosecution alleged that the robber holding the chopper threatened P.W.No.1 Shaitansingh to give money. At that time, appellant/accused No.1 pointed revolver at the head of P.W.No.2 Kishansingh and threatened him not to shout. The third robber was standing by the door keeping watch. When this offence of robbery was going on one servant of P.W.No.1 Shaitansingh named P.W.No.3 Narendrasingh entered into the shop. The appellant/accused dragged him inside the shop and threatened him. Associate of the appellant/accused who was holding chopper snatched the money kept at the pooja temple kept inside the shop and when P.W.No.1 Shaitansingh tried to resist him from taking money, he gave blow of chopper to P.W.No.1 Shaitansingh. That blow landed on his left palm causing bleeding injury to P.W.No.1 Shaitansingh. Threatening the inmates of the shop not to shout and not to follow them, all robbers fled

from the shop. However, when P.W.No.1 Shaitansingh, P.W.No.2 Kishansingh and P.W.No.3 Narendrasingh followed them while shouting "*thief, thief*". Other neighbouring shop-owners and passers-by started chasing robbers. Ultimately, they were successful in nabbing the appellant/accused when he attempted to cross the road divider and in that process had suffered a fall. Police were informed about the incident. By reaching the spot of incident, police took custody of appellant/accused No.1 Mohd. Rafique. A revolver as well as a big knife came to be seized from his person. As while fleeing he fired a round from the revolver and as his hand was smeared with ammunition of the fire round, by using a cotton swab, the ammunition on the hand of the appellant/accused Mohd. Rafique came to be wiped and collected. That cotton swab came to be seized. The report of the incident came to be lodged immediately by P.W.No.1 Shaitansingh, which resulted in registration of Crime No.174 of 2011 at Bhoiwada Police Station, Mumbai for the offence punishable under Section 394 of the IPC and Sections 3(25) and 3(27) of the Indian Arms Act as well as under Section 37(1) read with Section 135 of the Maharashtra Police Act.

(b) On registration of the crime in question, wheels of

investigation were set in motion. The spot of the crime in question came to be inspected along with panch witnesses. Blood-stained bed sheet and plastic bags came to be seized from the spot of the incident. Statements of witnesses came to be recorded. Clothes of P.W.No.1 Shaitansingh as well as P.W.No.3 Narendrasingh came to be seized. Co-accused i.e. accused No.2 Mehboob Badshah Sahab Inamdar came to be arrested and on completion of investigation, accused persons were charge-sheeted.

- (c) After framing and explaining the charge, as accused persons pleaded not guilty, trial commenced. In order to bring home the guilt to accused persons, the prosecution has examined in all eleven witnesses. Shaitansingh – the First Informant as well as the victim of the crime in question is examined as P.W.No1 and the report lodged by him is at Exh.23. His nephew Kishansingh is examined as P.W.No.2 whereas his servant Narendrasingh is examined as P.W.No.3. P.W.No.4 Laxmansingh is a panch witness to seizure of clothes of P.W.No.1 Shaitansingh as well as P.W.No.3 Narendrasingh. P.W.No.5 Narayan Rathod is a panch, who witnessed seizure of revolver as well as cotton swab on which ammunition from the hand of the appellant/accused No.1 came to be collected on the spot. P.W.No.6 Sandesh Birmode is another panch witness, who

has heard voluntary disclosure statement of the co-accused and witnessed the recovery. P.W.No.7 Chandrashekhar Bhagat is a panch witness to seizure of bed sheet and plastic bag from the shop of P.W.No.1 Shaitansingh. P.W.No.8 Dr.Nilesh Shende had treated P.W.No.1 Shaitansingh after the incident. P.W.No.9 Jagganath Kamble, PSI attached with Bhoiwada Police Station had conducted part investigation of this crime whereas P.W.No.10 Asaram Pathare, Police Inspector had conducted rest of the investigation. P.W.No.11 Smt.Sheela Sail, DCP had sanctioned prosecution of the appellant/accused under the Indian Arms Act.

- (d) On hearing the parties after recording the statement of the appellant/accused No.1 under Section 313 of the Code of Criminal Procedure, the appellant/accused came to be convicted and sentenced as indicated in the opening paragraph of this Judgment.

3 I heard the learned Advocate appearing for the appellant/accused No.1. By drawing my attention to the evidence of the prosecution and more particularly, that of the Test Identification Parade, the learned Advocate argued that chances of mistaken identity of the appellant/accused are there, and therefore, he is entitled for benefit of doubt. The learned

Advocate pointed out Memorandum of Test Identification Parade of the co-accused conducted by the prosecution and submitted that the present appellant/accused No.1 Mohd. Rafique was made to stand in that Test Identification Parade as a dummy. With this, he submitted that evidence of P.W.No.1 Shaitansingh shows that in fact P.W.No.1 Shaitansingh has identified the appellant/accused No.1 and not co-accused Mehboob Badshah Sahab Inamdar and therefore, the appellant/accused No.1 is entitled for benefit of doubt. The learned Advocate further argued that evidence of P.W.No.1 Shaitansingh shows that they all were chasing the robber who took money from the shop and not the appellant/accused No.1. He further argued that though according to the prosecution case, revolver and a knife came to be seized immediately after the incident from the appellant/accused No.1, cross-examination of P.W.No.1 Shaitansingh shows that he was shown the revolver and chopper subsequently at the Police Station. According to the learned Advocate for the appellant/accused No.1, once the revolver and chopper came to be seized and sealed, police were not in a position to show these weapons to P.W.No.1 Shaitansingh subsequent to the day of the incident and, therefore, the prosecution case is doubtful. The learned Advocate further argued that evidence of the Investigator shows that the information of the incident in question was received at Bhoiwada Police Station at about 9.30 p.m. whereas according to the prosecution witnesses, the crime in question took

place at 9.30 p.m. itself. This discrepancy in time of the incident makes the prosecution case doubtful. The learned Advocate further argued that P.W.No.2 Kishansingh and P.W.No.3 Narendrasingh were not called in the Test Identification Parade. He further argued that Test Identification Parade for the appellant/accused No.1 was not conducted by the prosecution. Recovery of weapon is not proved by the prosecution as seen from the evidence of P.W.No.5 Narayan Rathod – panch witness. The arrest-cum-seizure panchanama at Exh.37, which, according to the prosecution case, was prepared at the spot of incident itself soon after the incident contains the Crime Number and at that point of time, no offence was registered. This make arrest-cum-seizure panchanama Exh.37 doubtful. According to the learned Advocate for the appellant/accused No.1, evidence of P.W.No.9 Jagganath Kamble and that of P.W.No.10 Asaram Pathare is inconsistent and vague. P.W.No.10 Asaram Pathare has deposed that on the next day of incident, he forwarded the articles to the Chemical Analyzer, but the Chemical Analysis Report shows that articles were received on 05/10/2011. There was delay in forwarding the articles. By drawing my attention to the evidence of P.W.No.10 Asaram Pathare, the learned Advocate further argued that at 9.30 p.m. P.W.No.9 Jagganath Kamble was present at the Police Station, whereas P.W.No.9 Jagganath Kamble is stating in his evidence that he met P.W.No.10 Asaram Pathare at the spot. Evidence of P.W.No.10 Asaram Pathare shows that the accused

was disarmed on the spot and this evidence is contrary to the evidence of P.W.No.9 Jagganath Kamble. The learned Advocate further argued that evidence of the prosecution shows that in fact two persons in crowd suffered a fall at the time of incident and therefore, identity of the appellant/accused as robber is not established. The learned Advocate further criticized the Judgment of the learned trial Court by stating that the learned trial Court proceeded on the wrong presumption that it was appellant/accused No.1 who had assaulted P.W.No.1 Shaitansingh and thus, he prayed for acquittal of appellant/accused No.1.

4 The learned Additional Public Prosecutor supported the impugned Judgment and Order by contending that identity of the appellant/accused No.1 is established from the evidence of eye-witnesses.

5 I have carefully considered the rival submissions and also perused the Record and Proceedings including depositions of witnesses as well as the documentary evidence.

6 As stated in foregoing paragraphs, it is case of the prosecution that the appellant/accused No.1 along with his associates had committed daring dacoity at the shop of P.W.No.1 Shaitansingh and while committing such dacoity caused hurt to him. The incident in question, according to the prosecution case,

took place in presence of P.W.No.1 Shaitansingh, P.W.No.2 Kishansingh and P.W.No.3 Narendrasingh. As such, fate of the prosecution case to a large extent hinges on testimony of these three eye-witnesses. Let us, therefore, scrutinize evidence of these three witnesses. If ultimately, they are found to be witnesses of truth, then conviction can solely rest on eye-witness account given by all of them. P.W.No.1 Shaitansingh apart from being an eye-witness of the incident in question is also an injured witness. He had suffered a blow of chopper on his left palm and as seen from evidence of P.W.No.8 Dr.Nilesh Shende, this witness has suffered cut wound of size 5 c.m. x 2.5 c.m. on his left thumb. It is well settled that evidence of injured witness regarding the incident carries great weight and his presence on the spot cannot be challenged. Perusal of evidence of P.W.No.1 Shaitansingh, P.W.No.2 Kishansingh and P.W.No.3 Narendrasingh shows that they have unanimously stated that on 16/09/2011 at night hours they all were at the shop of P.W.No.1 Shaitansingh. All these three witnesses congruously stated that in the night hours of 16/09/2011, three persons entered in the shop. P.W.No.1 Shaitansingh and P.W.No.3 Narendrasingh are stating that the incident took place at about 9.30 p.m, whereas his nephew is stating that the incident took place at about 9.00 p.m. What happened after entry of these three people inside the shop of P.W.No.1 Shaitansingh is also stated by all these three witnesses. Their evidence on this aspect is congruous. In unison these three

witnesses, who were present inside the shop have stated that the first amongst these three robbers was armed with a chopper and by pointing the chopper at P.W.No.1 Shaitansingh, he had threatened inmates of the shop not to shout and to give money. The second amongst them, as per the version of these three prosecution witnesses, was armed with revolver and he had pointed that revolver at head of P.W.No.3 Narendrasingh and by slapping him had also threatened him not to shout. The third robber, according to these three witnesses, was standing at the door of the shop obviously for the purpose of guarding the spot. These three prosecution witnesses then congruously deposed that a person holding a chopper took money from the small pooja temple kept inside the shop and pocketed that amount. When P.W.No.1 Shaitansingh attempted to obstruct, that robber gave a blow of chopper which ultimately landed on left palm of P.W.No.1 Shaitansingh causing bleeding injury to him. The blood then spilled on clothes, bed sheet, mattress, plastic bag etc. As deposed by these prosecution witnesses namely P.W.No.1 Shaitansingh, P.W.No.2 Kishansingh and P.W.No.3 Narendrasingh, then robbers left the shop by threatening them not to follow or else they will open fire. These three prosecution witnesses then started chasing robbers by shouting which attracted attention of neighbouring shop owners as well as passers-by. The chase continued. Ultimately, as seen from the evidence of these three witnesses, the appellant/accused while on run attempted to cross the road

divider and suffered a fall. He was caught by these three prosecution witnesses as well as other persons. It is also seen from evidence of these three witnesses that while running away, the appellant/accused fired a bullet from his revolver. As per version of these three prosecution witnesses, apart from possessing a revolver a chopper was also found to be concealed at the back side under his full pant.

7 P.W.No.2 Kishansingh further deposed that revolver held by the appellant/accused was smelling ammunition indicating recent fire. Police seized it before panch witnesses. Hand of the appellant/accused was also wiped by a cotton swab by the police and then that cotton swab was seized.

8 The FIR at Exh.23 lodged by P.W.No.1 Shaitansingh is fully in tune with his version before the Court and evidence of P.W.No.1 Shaitansingh is gaining full corroboration with the FIR lodged with promptitude.

9 Now, let us, examine material elicited from cross-examination of these three witnesses in order to ascertain whether such material casts a shadow of doubt on the case of prosecution and is sufficient to dislodge their version about the incident. In this regard, it is argued by the defence that after accused persons left the shop, they were chased by the prosecution witnesses after

one minute giving sufficient time for them to escape from the spot. Question of mistaken identity is also raised. On this aspect, reliance is placed on cross-examination of P.W.No.3 Narendrasingh, who stated about gap of time of one minute. Version of P.W.No.5 Narayan Rathod, a panch witness to the effect that two persons in the crowd suffered a fall, is relied to demonstrate mistaken identity.

10 As seen from the material elicited from cross-examination of P.W.No.2 Kishansingh, the incident of daring robbery lasted for about three to four minutes. Evidence on record does not show that there was no source of light in the shop of P.W.No.1 Shaitansingh. During course of the incident, P.W.No.1 Shaitansingh had suffered a blow of chopper as seen from his evidence as well as evidence of P.W.No.8 Dr.Nilesh Shende. Robbers were threatening the prosecution witnesses not to shout and P.W.No.2 Kishansingh was held at the point of the revolver by the appellant/accused. Exhibit 43 is the spot panchanama which is duly proved by P.W.No.7 Chandrashekhar Bhagat, a panch witness. The spot panchanama shows that the spot of incident which is shop of P.W.No.1 Shaitansingh, was a very small shop admeasuring 15 feet x 8 feet. At the time of the incident in question, there was nobody else in the shop except three prosecution witnesses namely P.W.No.1 Shaitansingh, P.W.No.2 Kishansingh and P.W.No.3 Narendrasingh. Servant

Chandraprakash Pandya came inside during the course of the robbery. As such, considering small size of the shop and as nobody else was present inside the shop, the prosecution witnesses had an ample opportunity to see facial and bodily features of robbers and particularly of the robber who was holding chopper and the robber who was holding the revolver. Time of four minutes in such a ghastly incident is sufficient to have imprint of getting facial and bodily expressions of robbers who held them on gun-point. As such, in my opinion, there is sufficient evidence on record to hold that prosecution witnesses had ample opportunity to witness, remember and identify the real culprits before the Court.

11 To crown this all, the appellant/accused was apprehended on the spot itself. Evidence of these three prosecution witnesses coupled with evidence of P.W.No.5 Narayan Rathod as well as P.W.No.9 Jagganath Kamble and P.W.No.10 Asaram Pathare, PI well establishes the fact that the appellant/accused was apprehended from the spot of the incident soon after the incident. There is no probable evidence to infer that the appellant/accused was merely a person chasing accused persons and he was wrongly apprehended particularly when a revolver as well as a big knife is seized from him.

12 It is in evidence of P.W.No.5 Narayan Rathod, a panch

witness that on 16/09/2011, he was present near Chitra Talkies. He saw one accused apprehended near Chitra Talkies. As per his version, police seized revolver from the apprehended accused and then wiped his hand with cotton swab to gather particles of ammunition from his hand. P.W.No.5 Narayan Rathod deposed that a panchanama of this event was prepared by police. While in the witness box, P.W.No.5 Narayan Rathod has identified the appellant/accused as the person, who was arrested on the spot and the one from whom weapons were seized. In the wake of this positive evidence, half-hearted cross-examination of this witness to the effect that he saw two persons suffering a fall is not sufficient to make the prosecution case suspect. There is no further cross-examination to the effect that a person sitting in the dock is not a person, who was arrested with weapons on that day. On the contrary, from cross-examination of this witness, it has been elicited by the defence that there was a big knife in the backside pant pocket of the appellant/accused, who was apprehended from the spot. I see no reason to disbelieve this version of P.W.No.5 Narayan Rathod, which has come on record through his cross-examination.

13 Similar is the evidence of P.W.No.9 Jagganath Kamble, PSI attached with Bhoiwada Police Station, who has deposed that on reaching the spot, he found person gathered there apprehending one person with revolver and chopper. As per

version of P.W.No.9 Jagganath Kamble in the presence of panch witnesses, he seized those weapons and cotton swab on which ammunition came to be collected by wiping hand of the present appellant/accused.

14 This evidence ultimately leads to unsuspectable conclusion that it was the accused, who was found arrested near the spot of incident by public including P.W.No.1 Shaitansingh, P.W.No.2 Kishansingh and P.W.No.3 Narendrasingh, who was one of the robber. At that time, he was holding a revolver as well as a big knife. Attempt was made to make this evidence suspect by contending that there is discrepancy regarding time of the incident as witnesses are deposing different time, so far as incident is concerned. It is also pointed out that according to the P.W.No.1 Shaitansingh, the incident took place at about 9.30 p.m. of 16/09/2011, whereas the FIR shows that the police was informed about the incident at about 9.30 itself. Reliance is placed on cross-examination of P.W.No.5 Narayan Rathod to show that by 9.20 p.m. panchanama was over and this witness had left the spot and boarded a local train to his home.

15 In criminal trial what is required is a proof beyond all reasonable doubt. A doubt is required to be reasonable and not probable. The definition of term 'proof' as seen from Section 3 of the Evidence Act requires yardstick of a prudent person. 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 man ought, under the circumstances of the particular case, to act upon the supposition that it exists. Here, in this case, three witnesses including the victim have given eye-witness account. Those witnesses were having ample opportunity to have facial and bodily expressions of robbers imprinted in their brain. The appellant/accused is proved to have apprehended on the spot with arms. Those arms were seized from him by police. If such evidence put up before a prudent person, the yardstick of a prudent person will certainly require him to believe that the person was apprehended and identified by the victim of the crime in question is one of the robber involved in the incident. Sluggish chronometric sense of people at large is a judicially recognized fact. Witnesses are generally overtaken by event. In this case, P.W.No.1 Shaitansingh had suffered injury in the robbery, during the course of which he lost an amount of Rs.70,000/-. In such a situation, mentioning incorrect time by him is not fatal to the prosecution. Ordinarily, a witness cannot be expected to recall accurately the time and sequence of events which took place in rapid succession which gives an element of shock and surprise to such witness. Power of observation and sense of time differs from person to person. It is not expected that a person will keep an eye on his watch in order to note and then recall the actual time of robbery. Hence, discrepancy in

mentioning the time of the incident by prosecution witnesses cannot be a factor to jettison otherwise believable evidence regarding the evidence adduced by them.

16 Then, there is a aspect of showing weapons of the offence subsequent to the incident to P.W.No.1 Shaitansingh at the police station. Reliance is placed on his cross-examination to show that after two-three days, a chopper and revolver was shown to him at the Police Station. With the aid of evidence of seizure of these weapons coming on record through P.W.No.5 Narayan Rathod, it is urged that weapons were sealed and the question how they were shown to P.W.No.1 Shaitansingh remained unanswered by prosecution evidence making it suspect. It is also urged that evidence of P.W.No.10 Asaram Pathare, PI is inconsistent with evidence of P.W.No.5 Narayan Rathod so far as time and presence of scene at the spot are concerned. All these aspects pertain to defects or lapses or omission in investigation. In the matter of *Dhanraj Singh alias Shera v. State of Punjab* reported in **2004 SCC (Cri.) 851**, the Honourable Apex Court by relying on its earlier decisions has held that if the lapses or omissions are committed by the investigating agency because of negligence, the prosecution evidence is required to be examined *de horse* such omission to find out whether such evidence is reliable or not. The Apex Court has further held that if the primacy is given to omission or lapses by perfunctory investigation

or omission, the faith and confidence of the people would be shaken not only in the law enforcing agency, but also in the administration of justice. This completely answers the arguments so far as inconsistent evidence of investigator and lapses, if any, on their part in showing weapons of offence to P.W.No.1 Shaitansingh after the incident.

17 The Judgment in the matter of Dhanraj Singh (supra) also takes care of probably inadvertent statement in the chief-examination of P.W.No.10 Asaram Pathare, PI to the effect that on the next day of the incident, he had sent muddemal article for chemical analysis. The report of Chemical Analysis at Exh.13, in fact, shows that articles were received by the Chemical Analyzer on 05/10/2011 and the forwarding letter shows that those were sent on 03/10/2011. Perusal of the Chemical Analysis report at Exh.13 shows that the revolver seized from the appellant/accused was used for firing prior to receipt thereof. Lead and nitrite were detected on the cotton swab which was seized after wiping it on the hand of the appellant/accused.

18 Now comes the evidence regarding the test identification parade. In fact, the prosecution has conducted test identification parade on two occasions. Firstly, on 09/02/2012 and subsequently on 20/08/2012. The test identification parade was not conducted for identifying the appellant/accused, he being

apprehended on the spot of the incident. Therefore, evidence of P.W.No.1 Shaitansingh to the extent that in the test identification parade, he has identified the appellant/accused, cannot be used to give any benefit to the appellant/accused. It appears that the Executive Magistrate ignoring the norms for conducting the test identification parade, probably required the present appellant/accused to stand as a dummy for the purpose of conducting the test identification parade in respect of accused No.2 Mehboob Badshah Sahab Inamdar and in that process appellant/accused No.1 Mohd. Rafique was got identified by P.W.No.1 Shaitansingh. This by no stretch of imagination weakens the case of the prosecution so far as the offences alleged are concerned.

19 The net result of foregoing discussion requires me to held that the appeal is devoid of merit and, therefore, the Order :

(i) The Appeal is dismissed.

(A.M.BADAR J.)