

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.974 OF 2015

RAMESH NARSING BHOSALE)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.Ganesh Bhujbal, Advocate for the Appellant.

Ms.N.S.Jain, APP for the Respondent - State.

AND

CRIMINAL APPEAL NO.246 OF 2012

ANAND ANIL RAIMOKAR)...APPLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.Prasanna Shahane h/f. Mr.Milind Deshmukh, Advocate for the Appellant.

Ms.N.S.Jain, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 22nd AUGUST 2017

ORAL JUDGMENT :

1 Criminal Appeal No.974 of 2015 is by the appellant who was accused no.1 before the trial court where as Criminal Appeal No.246 of 2012 is by the appellant who was original accused no.3 before the learned trial court. It is seen that, though Sessions Case bearing no.573 of 2010 arising out of Crime No.97 of 2010 registered against these appellants and other co-accused was heard by the learned trial court, at the stage of recording statement under Section 313 of the Code of Criminal Procedure, appellant / accused no.1 Ramesh Bhosale (Criminal Appeal No.974 of 2015) absconded. Therefore, initially said Sessions case bearing no.573 of 2010 came to be decided against remaining accused persons on 4th January 2012 by the learned Additional Sessions Judge, Pune. The trial of appellant / accused no.1 Ramesh Bhosale (Criminal Appeal No.974 of 2015) came to be separated at that time. By the impugned judgment and order dated 4th January 2012, appellant / accused no.3 Anand Raimokar came to be convicted of the offence punishable under

Section 411 of the Indian Penal Code (IPC) and he came to be sentenced to suffer rigorous imprisonment for 2 years apart from directing him to pay fine of Rs.2,000/-, in default, to undergo simple imprisonment for 1 month. Being aggrieved by his conviction and sentence, this Criminal Appeal bearing no.246 of 2012 by convicted appellant / accused no.3 Anand Raimokar. Subsequently, appellant / accused no.1 Ramesh Bhosale came to be apprehended and after recording his statement under Section 313 of the Cr.P.C., and after hearing the parties, learned Additional Sessions Judge, Pune, vide judgment and order dated 20th August 2015 passed in Sessions Case No.572 of 2010 was pleased to convict the appellant / accused no.1 Ramesh Bhosale of the offence punishable under Section 392 of the IPC and sentenced him to suffer rigorous imprisonment for 5 years apart from directing him to pay fine of Rs.1,000/-, in default, to undergo simple imprisonment for 15 days. This judgment and order dated 20th August 2015 is challenged by the said appellant / accused no.1 Ramesh Bhosale by filing Criminal Appeal bearing No.974 of 2015. As both these criminal appeals are arising out of the same

sessions case and as evidence against both appellants / accused is common, both these appeals are being decided by this common judgment.

2 Briefly stated, facts leading to the institution of the present appeals at the instance of appellant / original accused no.1 Ramesh Bhosale and appellant / accused no.3 Anand Raimokar are thus :

(a) First Informant / PW1 Kalpana Kalaskar is resident of Ghodganga Sahakari Sakhar Karkhana, Navhra, Taluka Shirur, District Pune. Her family comprises of her husband Bhagwat Kalaskar and minor son named Rishikesh. On 19th March 2010, her husband was on night duty at the sugar factory. Hence, informant PW1 Kalpana Kalaskar and her son Rishikesh, after having dinner, slept at about 9.30 p.m. In the night intervening 19th March 2010 and 20th March 2010, at about midnight, informant PW1 Kalpana Kalaskar woke up and saw one unknown person of average height in her house. He threatened informant PW1 Kalpana Kalaskar by showing a sword. Then another

unknown person of less height came before her and demanded mobile and keys of cupboard from her. By opening the cupboard, robbers then took cash and gold ornaments from it. They also took mangalsutra and two pairs of ear tops from informant PW1 Kalpana Kalaskar. Robbers then fled from back door of the house by bolting it from outside. When informant PW1 Kalpana Kalaskar thereafter opened the front door, she saw four more robbers in front of her at the front door and therefore she again closed the door. After sometime, informant PW1 Kalpana Kalaskar came out from the window, opened the rear door and informed the incident to neighbours and security persons. She then lodged report – Exhibit 62, setting the wheels of investigation into motion. In pursuant to her First Information Report (FIR), Crime No.97 of 2010 for the offence punishable under Section 392 of the IPC came to be registered against accused persons.

(b) PW9 Vishnu Pawar, P.I. of Shirur Police Station, conducted investigation. By visiting the spot of the incident, spot panchnama Exhibit 68 came to be recorded in presence of PW4 Sachin Thorat.

(c) Appellant / accused no.1 Ramesh Bhosale came to be arrested in this Crime No.97 of 2010 on 6th May 2010 after getting him transferred under orders of the learned JMFC from Crime No.92 of 2010. Co-accused Tanhya Kale also came to be arrested.

(d) During the course of investigation, on 10th May 2010, co-accused Tanhya Kale made a voluntary disclosure statement – Exhibit 70, which came to be recorded in presence of PW5 Ramesh Chaudhary, which ultimately resulted in recovery of robbed gold ornaments from appellant / accused no.3 Anand Raimokar. Ultimately, they came to be seized by effecting recovery panchnama dated 10th May 2010 – Exhibit 71. Accordingly, appellant / accused no.3 Anand Raimokar, came to be arrested. PW6 Rushikesh Shelke, Naib – Tahsildar, in presence of PW2 Ramesh Kawade – panch witness, conducted Test Identification Parade (TIP) of appellant / accused no.1 Ramesh Bhosale and that of co-accused Tanhya Kale on 3rd August 2010, at Yerwada Prison, Pune, in which PW1 Kalpana Kalaskar is claimed to have identified appellant / accused no.1 Ramesh Bhosale, so

also the co-accused. Accordingly, memorandum of identification parade – Exhibit 64 came to be recorded by PW6 Rushikesh Shelke. Routine investigation followed, and ultimately, on completion of investigation, charge-sheet came to be filed against both appellants / accused and co-accused, which ultimately resulted in registration of Sessions Case No.572 of 2010.

(e) The learned trial court framed and explained the charge to accused persons. They abjured guilt and claimed trial. In order to bring home the guilt of accused persons, the prosecution has examined as many as nine witnesses. Informant PW1 Kalpana Kalaskar is examined to prove the incident of robbery. The FIR lodged by her on 20th March 2010 is at Exhibit 62. PW2 Ramesh Kawade is a panch witness to the identification parade conducted by PW6 Rushikesh Shelke on 3rd August 2010. Exhibit 64 is the Memorandum of Test Identification Parade. PW3 Ashok Minde - a panch witness to confessional statement and resultant recovery panchnama (Exhibits 70 and 71 respectively) has turned hostile to the prosecution. As such, prosecution has examined another panch

PW5 Ramesh Chaudhary on this aspect. Sachin thorat - a panch witness is examined as PW4 to prove spot panchnama Exhibit 68 conducted on 20th March 2010. PW7 Ramesh Kumbhar, Police Head Constable, had recorded FIR Exhibit 62 and part of the investigation of the crime in question came to be conducted by PW8 Ashok Wandekar, P.I., by visiting the spot and effecting spot panchnama. Rest of the investigation of the crime in question is conducted by PW9 Vishnu Pawar, Police Inspector, of Shirur Police Station.

(f) After hearing the parties, on recording statements under Section 313 of the Cr.P.C. of respective appellants / accused persons, ultimately by impugned judgments and orders appellants / accused came to be convicted and sentenced accordingly, as indicated in the opening paragraph of this judgment.

3 I have heard the learned advocate appearing for appellant / accused no.1 Ramesh Bhosale. He argued that though

it is averred by the first informant PW1 Kalpana Kalaskar that she was threatened at the point of sword, this weapon of the offence is not seized during investigation. The learned advocate further argued that evidence of first informant / PW1 Kalpana Kalaskar shows that robbers had covered their faces with scarf and there was no availability of light at the spot of the incident. Hence, evidence regarding identity coming on record through the TIP, so also the dock identification is suspicious and benefit thereof naturally goes to the accused. He further argued that there is delay in conducting TIP and there were "n" number of opportunities to the prosecution witnesses to see appellant / accused no.1 Ramesh Bhosale prior to conducting the TIP.

4 The learned advocate appearing for appellant / accused no.3 Anand Raimokar argued that one of the panch to the Memorandum and recovery panchnama namely, PW3 Ashok Minde has turned hostile to the prosecution, and as such, benefit of doubt goes to accused. He further argued that ingredients of the offence punishable under Section 411 of the IPC are not

established by the prosecution, in as much as, there is no evidence to come to the conclusion that the appellant / accused no.3 Anand Raimokar had reason to believe that ornaments allegedly purchased by him were stolen ornaments.

5 As against this, the learned APP supported the impugned judgments and orders of conviction by arguing that the learned trial court has properly appreciated the evidence on record and come to the right conclusion in holding that the appellant / accused no.1 had committed robbery along with co-accused at the house of PW1 Kalpana Kalaskar, and appellant / accused no.3 Anand Raimokar having belief that ornaments were stolen, had purchased them from the co-accused.

6 I have carefully considered the rival submissions. Similarly, I have gone through the record and proceedings including oral as well as documentary evidence adduced by the prosecution. Let us now examine whether with the help of evidence available on record, it can be held that prosecution has

established that appellant / accused no.1 Ramesh Bhosale with the aid of co-accused had committed robbery at the house of PW1 Kalpana Kalaskar and looted ornaments and other articles worth Rs.68,800/- in the night intervening 19th March 2010 and 20th March 2010 at Colony of Sugar Factory at Navhra in Shirur Taluka of Pune District. Considering the nature of charge leveled against the appellant / accused no.1 Ramesh Bhosale, fate of the prosecution case to a large extent, hinges on the testimony of the sole eye witness to the incident, namely, PW1 Kalpana Kalaskar. The incident in question occurred at the midnight in the night intervening 19th March 2010 and 20th March 2010. Let us, therefore, peruse her evidence at the outset in order to ascertain whether there is sufficient evidence to implicate appellant / accused no.1 Ramesh Bhosale in the offence held to be proved against him by the learned trial court, keeping in mind the important aspect that the incident in question took place in the midnight.

7 It is in evidence of PW1 Kalpana Kalaskar that her husband was not present in the house in the night intervening 19th March 2010 and 20th March 2010, he being in the sugar factory for his night duty. She further deposed that after having dinner with her young son, she slept at her house. At about 12.30 a.m., she woke up to see one strong man with good height holding sword and another person with less height in her house. As per her version, on the point of sword, the man with good height threatened her to keep mum. He had taken her mobile phone. Another person with short height took keys of the cupboard. PW1 Kalpana Kalaskar further testified that both robbers then opened the almirah and took out cash amounting to Rs.10,000/-, apart from ear ring, nose ring, finger ring as well as a key holder of silver metal. PW1 Kalpana Kalaskar further deposed that tall robber removed her ear rings, mangalsutra and toe rings. After committing robbery, as stated by PW1 Kalpana Kalaskar, both robbers ran away from back door of the house by bolting it from outside. She then opened the front door of her house to see four more robbers standing there, and therefore, she closed the door.

Subsequently, as stated by PW1 Kalpana Kalaskar, she came out of the house through a window and informed the neighbours as well as security of the sugar factory in respect of the incident in question. This witness lodged FIR Exhibit 62 with promptitude in the said night itself which resulted in registration of Crime No.97 of 2010 against unknown persons for the offence punishable under Section 392 of the IPC.

8 Before dwelling upon other aspects of the matter, let us examine whether this witness has duly identified the culprits for sustaining conviction for the offence punishable under Section 392 of the IPC. PW1 Kalpana Kalaskar, in her chief-examination, has stated that she identified both accused persons viz. appellant / accused no.1 Ramesh Bhosale and co-accused Tanhya Kale at the time of identification parade conducted by the Investigating Officer. This witness identified both of them before the court by stating that appellant / accused no.1 Ramesh Bhosale is the said heightened person where as co-accused Tanhya Kale is a person, who she has stated to be a person with short height. In her cross-

examination, PW1 Kalpana Kalaskar has accepted the fact that at the time of the incident there was darkness in the house and only a zero power bulb was on, emitting light. PW1 Kalpana Kalaskar candidly accepted the fact that at the time of the incident of robbery at her house, accused persons had covered the faces by scarf. She further stated that during her second visit to the Police Station Shirur, seized articles were shown to her.

9 The FIR lodged by PW1 Kalpana Kalaskar at Exhibit 62 shows that one of the robbers to whom she has described as a person with average height had wrapped his face with red and blue muffler.

10 PW9 Vishnu Pawar, the Investigating Officer, during his cross-examination has candidly accepted the fact that during investigation it transpired to him that accused persons had covered their faces by scarf at the time of the incident in question. Paragraph 11 of his cross-examination further reveals that after giving this admission, the Investigating Officer PW9 Vishnu Pawar

further accepted the fact that when accused persons were produced before the learned JMFC for the purpose of getting their remand, their faces were not covered and they were not produced in veil. Deposition of PW9 Vishnu Pawar, Investigating Officer, further shows that thereafter the learned APP made him alert and the request of the learned APP to repeat the same question is also unfortunately allowed by the learned trial court, for no reason. Then, PW9 Vishnu Pawar, Investigating Officer, started giving answers in negative to further questions put to him in respect of production of appellant / accused no.1 Ramesh Bhosale for remand on 2nd May 2010, and thereafter production before the court of the learned JMFC subsequently, without veil. The tone and tenor of cross-examination of PW9 Vishnu Pawar as such, makes it clear that, at the first blush, understanding the questions put to him during cross-examination rightly, he came out with the version that during investigation it was transpired to him that accused persons while committing robbery had covered their faces by scarf and subsequently when they were produced before the learned JMFC for remand, they were not in veil. I see no reason

to accept this version of the Investigator coming on record from his cross-examination.

11 On the backdrop of this evidence, absence of sufficient light on the scene of occurrence at the time of the occurrence assumes importance. The incident in question took place inside the house where except a zero power bulb, there was no other source of light. As indicated by material prosecution witnesses i.e. PW1 Kalpana Kalaskar – an eye witness to the incident and PW9 Vishnu Pawar – the Investigator, the robbers had covered their faces by scarf. In this view of the matter, there was no occasion for sole eye witness PW1 Kalpana Kalaskar to see the faces of robbers and their facial expressions in order to enable her to identify them in the TIP, which was conducted subsequently after about three months.

12 Evidence regarding delayed TIP conducted by the Investigator is also wholly unsatisfactory, particularly, in the light of evidence of Investigator i.e. PW9 Vishnu Pawar. It is well settled

that TIP is required to be conducted with a reasonable dispatch. It is also well settled that identification of an accused for the first time in the court after lapse of a considerable time by a witness to whom he was stranger, should not be relied upon, the same being, from its very nature, inherently of a weak nature. Evidence of identity is required to be scrutinised by giving all benefits of doubt to the accused. What weightage should be given to the evidence of the TIP always depends upon facts and circumstances of a particular case before the court and no straight jacket formula can be laid on this aspect. On this backdrop, let us examine peculiar facts and circumstances of this case making the evidence of TIP suspect and lacunic. The evidence adduced by the prosecution on this aspect does not eliminate the possibility of the appellant / accused no.1 Ramesh Bhosale being shown to the prosecution witnesses prior to the TIP. The evidence of the sole eye witness PW1 Kalpana Kalaskar shows that she had no opportunity to see faces of robbers. In this fact situation, it is relevant to note that appellant / accused no.1 Ramesh Bhosale came to be arrested in this Crime No.97 of 2010 on 6th May 2010 after getting him

transferred from Crime No.92 of 2010. It is brought on record from chief-examination of PW9 Vishnu Pawar, the Investigating Officer, that on 6th May 2010 itself, appellant / accused no.1 Ramesh Bhosale was produced before the learned JMFC for seeking his remand and accordingly, the Investigator got his remand up to 14th March 2010. Examination-in-chief of PW9 Vishnu Pawar, Investigating Officer, further shows that on 23rd May 2010 accused persons were produced before the learned JMFC and their remand up to 31st May 2010 was obtained. It is, thus, seen that, as per mandate of Section 167 of the Cr.P.C., appellant / accused no.1 Ramesh Bhosale was being regularly produced before the learned JMFC for seeking his remand from 6th May 2010. There is no positive evidence coming on record through the Investigator that during this visit to the court of the learned JMFC for getting remand, appellant / accused no.1 Ramesh Bhosale was kept under veil in order to eliminate the chances of seeing him by the prosecution witnesses including PW1 Kalpana Kalaskar.

13 At this juncture, it is also relevant to note that cross-examination of PW1 Kalpana Kalaskar shows that after the incident she visited police station once for lodging the FIR and on second occasion she visited the police station for identifying all seized articles. Thus, PW1 Kalpana Kalaskar had been to the Police Station Shirur, after seizure of ornaments on the basis of confessional statement and resultant recovery panchnama at the instance of co-accused Tanhya Kale. PW5 Ramesh Chaudhary, panch witness, duly proved the memorandum statement of co-accused Tanhya Kale recorded on 10th May 2010 and resultant recovery of ornaments on the same date. The memorandum statement is at Exhibit 70 whereas recovery panchnama is at Exhibit 71. Evidence of PW9 Vishnu Pawar – the Investigating Officer shows that on 12th May 2010 he had shown seized ornaments to PW1 Kalpana Kalaskar and had then recorded her statement. As stated earlier, first remand of appellant / accused no.1 Ramesh Bhosale was up to 14th March 2010. Obviously, it was police custody remand. As such, up to 14th March 2010, appellant / accused no.1 Ramesh Bhosale was in custody of

Shirur Police Station, which was visited on 12th May 2010 by PW1 Kalpana Kalaskar – an eye witness to the incident in question. As such, during her second visit to the Police Station on 12th May 2010, she had an opportunity to see appellant / accused no.1 Ramesh Bhosale. The prosecution has not adduced any positive evidence in this regard to eliminate chance of witnessing the appellant / accused no.1 Ramesh Bhosale by PW1 Kalpana Kalaskar during her visit to the Police Station on 12th May 2010. Similarly, there is no evidence to the effect that during his visit to the court of learned JMFC in company of police, necessary precautions were taken to keep him in veil.

14 In the case in hand, the Investigator took time of more than three months for conducting the TIP. Accused / robbers were certainly strangers to PW1 Kalpana Kalaskar. Evidence on record indicates that robbers had covered their faces with scarf at the time of incident. In the backdrop of these facts, evidence of Executive Magistrate PW6 Rushikesh Shelke so also panch witness PW2 Ramesh Kawade does not show that at the time of

identification of the appellant / accused no.1 Ramesh Bhosale during the course of TIP conducted on 3rd August 2010, PW1 Kalpana Kalaskar had ascribed the role allegedly performed by him during the course of robbery. Evidence of both these witnesses, so also that of PW1 Kalpana Kalaskar – an identifying witness is conspicuously silent on this aspect. Evidence of Investigator PW9 Vishnu Pawar shows that charge-sheet against accused persons came to be filed on 2nd August 2010 i.e. prior to conducting of TIP. There is no positive evidence to show that precaution was taken on this day in order to assure that prosecution witnesses have no opportunity to see accused persons on that day.

15 In view of foregoing discussion, a reasonable doubt lurks in the judicial mind that during all this period from 6th May 2010 i.e. arrest of the appellant / accused no.1 Ramesh Bhosale to 3rd August 2010, there was ample opportunity to prosecution witnesses to see appellant / accused no.1 Ramesh Bhosale. In this view of the matter, evidence regarding TIP held by the prosecution

after three months of arrest of the appellant / accused no.1 Ramesh Bhosale does not seem to be trustworthy and reliable. In the result, as evidence regarding identity of appellant / accused no.1 Ramesh Bhosale is found to be suspect, the benefit of doubt needs to be given to him.

16 It is also worthwhile to note that though according to the prosecution case, the victim of the crime in question was threatened with a sword, during the course of investigation, weapon of the offence was to seized. Similarly, as seen from the evidence adduced by the prosecution, no recovery was effected at the instance of appellant / accused no.1 Ramesh Bhosale. This is a factor which creates doubt in the version of the prosecution.

17 Now let us examine whether the charge for the offence punishable under Section 411 of the IPC can be held to be proved against the appellant / accused no.3 Anand Raimokar. Section 411 of the IPC reads thus :

Section 411 - Dishonestly receiving stolen property — Whoever dishonestly receives or retains any stolen property, knowing or having reason to believe the same to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

18 As seen from the evidence of PW5 Ramesh Chaudhary, a panch witness to memorandum statement Exhibit 70 of co-accused Tanhya Kale, in presence of PW9 Vishnu Pawar, Investigating Officer, the said accused had disclosed that he will produce gold ornaments and will show the place and person to whom and where those gold ornaments were sold out. As seen from evidence of this panch witness and that of the Investigator, police team accompanied by co-accused Tanhya Kale and panch witness proceeded to Belwandi and co-accused Tanhya Kale pointed out appellant / accused no.3 Anand Raimokar. Then, as per evidence of these witnesses, this appellant / accused produced gold ornaments which came to be seized by recovery panchnama Exhibit 71. Ultimately, as seen from evidence of PW1

Kalpana Kalaskar, she identified those gold ornaments to be belonging to her and which were robbed by robbers during the incident. According to the prosecution case, appellant / accused no.3 Anand Raimokar having reason to believe that those ornaments were stolen ornaments, had purchased the same from accused persons, making him liable for penal consequences prescribed by Section 411 of the IPC.

19 Bare perusal of provisions of Section 411 of the IPC makes it clear that the prosecution must establish that the accused had reason to believe that the property which he receives is a stolen property. The word “believe” used in Section 411 of the IPC indicates that it is necessary to point out that the circumstances were such that a reasonable man must have felt convinced that the property in which he is dealing is a stolen property. Even if it is established that the accused suspected that the property might have been a stolen property, he is not liable to be guilty of the offence punishable under Section 411 of the IPC. Carelessness on the part of the accused does not make him liable for penal

consequences of Section 411 of the IPC. In the case in hand, it is the stand of the prosecution that appellant / accused no.3 Anand Raimokar is a goldsmith dealing in sale and purchase of gold ornaments, having a jewellery shop, named and styled as Shweta Jewellers. This implies that he must be purchasing and selling out gold ornaments and at the most one may infer that he was negligent in purchasing gold ornaments from the accused persons but it cannot be said that he had reason to believe that the articles purchased by him was stolen property. As such, conviction of appellant / accused no.3 Anand Raimokar for the offence punishable under Section 411 of the IPC must fail.

20 In the result, the following order :

- i) Criminal Appeal No.974 of 2015 and Criminal Appeal No.246 of 2012 are allowed.
- ii) The impugned judgment and order passed by the learned Additional Sessions Judge, Pune, in Sessions CaseNo.572 of 2010 on 20th August 2015 so far as it relates to convicting appellant /

accused no.1 Ramesh Bhosale for the offence punishable under Section 392 of the IPC and sentencing him to suffer rigorous imprisonment for 5 years and directing him to pay fine of Rs.1,000/- and in default, to undergo further simple imprisonment for 15 days, is quashed and set aside.

iii) The appellant / accused no.1 Ramesh Bhosale is acquitted of the offence punishable under Section 392 of the IPC.

iv) The impugned judgment and order passed by the learned Additional Sessions Judge, Pune, in Sessions Case.No.572 of 2010 on 4th January 2012 so far as it relates to convicting the appellant / accused no.3 Anand Raimokar of the offence punishable under Section 411 of the IPC and sentencing him to suffer rigorous imprisonment for 2 years and directing him to pay fine of Rs.2,000/- and in default to undergo

further simple imprisonment for 1 month, is quashed and set aside.

v) The appellant / accused no. 3 Anand Raimokar is acquitted of the offence punishable under Section 411 of the IPC.

vi) Both appellants / accused be released forthwith from the prison, if not required in any other case.

vii) Fine amount, if any, paid by them, be refunded to them.

(A. M. BADAR, J.)