

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 478 OF 2001

1. Devendarsing s/o. Jagirsing Panjabi,
Age 30 years, Occu. Business,
R/o. Badachak, Dist. Pahal,
At present R/o. Mohadi,
Taluka and District - Dhule.
2. Baldeosing s/o. Darbarsing Khaire,
Age 20 years, Occu. Business,
R/o. Khadursahen, Taluka Amritsar
in Panjab, At present R/o. NC-6/
3/2, Sector-3, Nehru Nagar,
New Mumbai. .. Appellants

Versus

The State of Maharashtra .. Respondent

...
Mr. Chaitanya Deshpande h/f. Mr. C. R. Deshpande, Advocate for
appellant.
Mr. K. D. Munde, APP for respondent/State.
...

CORAM : K.K. SONAWANE, J.

DATED : 2nd FEBRUARY, 2018.

JUDGMENT :-

1. Being dissatisfied with the Judgment and Order of conviction and resultant sentence of rigorous imprisonment and fine dated 25-10-2001 passed by the learned First Ad-hoc Additional Sessions Judge, Dhule in Sessions Case No. 115 of 1999, the appellants-original accused taking recourse of remedy under Section 374 of the Code of Criminal Procedure, 1973 (here-in-after, "Cr.P.C.") preferred the present appeal to redress their grievances.

2. The prosecution case in nutshell is that – the first informant Assistant Sub-Inspector (ASI) Shri. Nhanu Motiram Bhadane, on 20-06-1999, filed the report to concerned police of Mohadi Police Station and alleged that his superior Police Sub-Inspector (PSI) Shri. Shukla received the tip-off about the illegal act of some persons, who were making preparation for committing dacoity by utilizing the vehicle Tata Sumo bearing No. MP-09-S-2122. Accordingly, PSI Shri. Shukla secured presence of two panchas for conducting the raid. Thereafter, PSI- Shukla accompanied with first informant- ASI Shri. Bhadane, panchas and other police personnel conducted the raid at the spot located behind Aslam Garage, near the Bombay-Agra Highway within the vicinity of Dhule town. The members of raiding party saw the vehicle Tata Sumo parked behind the garage. There were five persons sitting in the vehicle. PSI Shri. Shukla made inquiry with all these occupants of the vehicle and put some innocuous questions to them. But, they did not give satisfactory reply. The police personnel took the personal search of all the suspects. The members of the raiding party also frisked the vehicle Tata Sumo and recovered one country made revolver loaded with six cartridges, nylon string, five loose cartridges, etc. from the vehicle. PSI Shri. Shukla drawn the seizure panchnama of the vehicle and articles recovered from it.

3. Thereafter, the first informant ASI Shri. Bhadane filed report to the concerned police for penal action against the culprits. Pursuant to FIR, crime No. 53 of 1999 came to be registered under Section 399 of Indian Penal Code (in short, "IPC") and Section 3 read with 25 of Arms Act. The investigation was set in motion and it was entrusted to PSI

Shri. Shukla. He recorded the statement of members of raiding party. He collected relevant documents. It was revealed that motor vehicle Tata Sumo No. MP-09-S-2122 was the stolen property of the crime committed within jurisdiction of Indore City (Madhya Pradesh State). Therefore, Investigation Officer (I.O.) added Section 379 of the IPC in this case. The weapon country-made revolver and cartridges were referred for Ballistic expert for examination. I.O. collected report from the Ballistic expert. After completion of investigation, I.O. filed charge-sheet against in all six accused persons before the learned Judicial Magistrate, First Class, Court No.2, Dhule.

4. The offence under Section 399 of the IPC was triable by learned Sessions Court. Therefore, learned Magistrate transmitted the case bearing Regular Criminal Case No. 123 of 1999 to the Sessions Court for trial of the accused within ambit of law. Pending the sessions trial, the alleged accused namely Kulvantsing Mahendrasing Gil and Sukhdevsing Hasasing Kaler passed away, and consequently, proceedings came to be abated against them. The learned First Ad-hoc Assistant Sessions Judge, Dhule, proceeded further and framed the charge against rest of the four accused in this case. The accused denied the charges and claimed for trial.

5. In order to bring home guilt of the accused, prosecution has examined in all four witnesses in this case. The learned trial Judge recorded statement of the accused prescribed under Section 313 of the Cr.P.C. The accused denied the allegations and put-forth their innocence in this case. The learned Sessions Judge appreciated the

entire oral and circumstantial evidence adduced on record and arrived at the conclusion that the appellants-accused and another accused No. 1 Gunwant are guilty for the offence punishable under Section 379, 399 of the IPC and Section 3 read with Section 25 of the Arms Act. Accordingly, the learned trial Judge convicted the appellants and their accomplice namely Gunwant for the offence under Section 379, 399 of the IPC and Section 3 read with Section 25 of the Arms Act and imposed the resultant sentence of R.I. and fine on each count. Being dissatisfied with the findings of conviction and resultant sentence, the appellants preferred the present appeal to redress their grievances.

6. The learned counsel for appellants vehemently submitted that the impugned findings of conviction and resultant sentence for the offence punishable under Section 379 and 399 of the IPC as well as Section 3 read with Section 25 of the Arms Act by the trial Court is erroneous, illegal and not within the ambit of law. The learned trial Court did not appreciate the facts and circumstances of the matter in its proper perspective. There was no direct or circumstantial evidence available on record to nail the accused in this case. The prosecution made allegation of theft of vehicle, which has been allegedly stolen from the jurisdiction of Indore City (Madhya Pradesh State). The learned trial Court has no jurisdiction to entertain the allegation of theft of vehicle Tata Sumo committed in Madhya Pradesh State. The learned counsel further alleged that there were no any independent witnesses examined by the prosecution to prove the charges against the accused. The witnesses examined by the prosecution are only the police personnel and they all are interested and partisan witnesses in this

case. The panch witness of seizure panchnama was the stock witness of the prosecution. It has brought on record that panch witness has given the evidence before the Court in many police cases and he was the habitual panch of the police. The evidence of prosecution witnesses are suspicious and doubtful. There was no cogent and reliable evidence to establish the nexus and proximity of the appellants-accused with alleged crime. It has been submitted that, the appellants-accused has no concerned at all with the vehicle or the articles recovered from it. The prosecution did not examine witnesses residing nearby the spot of incident. Therefore, learned counsel urged that, the impugned judgment and order of conviction and resultant sentence be set-aside and quashed. The appellants-accused and accused be absolved for the charges pitted against them. The learned counsel explained the circumstances on record in detail and prayed to allow the appeal.

7. In refutation, the learned APP raised objection to the contentions propounded on behalf of appellants and submits that the learned trial Court has correctly dealt with the matter and on consideration of facts and circumstances, held the appellants guilty for the charges under Sections 379 and 399 of the IPC as well as Section 3 read with Section 25 of the Arms Act. The evidence of prosecution witnesses are consistent with each other. The recovery of articles from the vehicle as well as Ballistic report in regard to the country-made revolver corroborated the version of police personnel. The panch witness strengthen the evidence of the police personnel. Therefore, it cannot be said that the findings of the conviction and resultant sentence are

erroneous and illegal one. Therefore, learned APP has requested to dismiss the appeal.

8. I have given anxious consideration to the arguments advanced on behalf of both sides. The intense scrutiny of the entire evidence adduced on behalf of prosecution reflects that the arguments advanced on behalf of appellants-accused appears to be more sustainable and considerable one. The impugned Judgment and Order of conviction and resultant sentence found erroneous, illegal and not within purview of law. The prosecution has examined in all four witnesses in this case to prove the charges against appellants-accused. The learned trial Court convicted the appellants for the offence of theft of vehicle Tata Sumo No. MP-09-S-2122 punishable under Section 379 of the IPC. It is strange to appreciate that the impugned vehicle Tata Sumo recovered in this case was the stolen property of the crime of theft committed within territorial limit of Madhya Pradesh State. It has been alleged that the vehicle came to be stolen from Indore (M.P.). The prosecution did not produce any document about the F.I.R. of the theft of vehicle Tata Sumo in this case. No any witnesses were examined on behalf of prosecution to prove that the appellants-accused committed theft of alleged vehicle from Indore (M.P.). It would fallacious to appreciate the allegations that the appellants-accused committed theft of vehicle Tata Sumo from Indore (M.P.). It also remains a conundrum that how the learned trial Court entertain the charges of theft of vehicle committed beyond the territorial jurisdiction of Sessions division Dhule. It would cumbersome to appreciate that the learned trial Court was empower to entertain the allegation of theft

committed at Indore City in Madhya Pradesh State. Therefore, the conviction of appellants under Section 379 of the IPC is not sustainable and maintainable one.

9. Now, turning to the allegation under Section 399 of the IPC. The prosecution relied upon the evidence of P.W. 1-Nhanu Bhadane, first informant, P.W. 2-Narayan Kalaskar, member of the raiding party and P.W.3-Subhash Karane, seizure panch of the articles recovered in this case. The provision of Section 399 of the IPC is reproduced as under -

“399. Making preparation to commit dacoity. - Whoever makes any preparation for committing dacoity, shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.”

10. In order to prove the charge under Section 399 of the IPC, the prosecution has to prove that there were five or more persons, making preparation for committing dacoity. The word “preparation” has not defined in the penal code. But, it can be said that the prosecution must show some objectionable conduct to prove the factum of preparation by the assemblage of five or more persons and that the accused persons had conceived any such designs for committing dacoity and in fact intended to achieve the object for which they had assembled. Once the prosecution succeeded to prove the factum of preparation by the assembly then only the recovery of fire arm and other articles become relevant. There should be assemblage for contemplated act of committing dacoity.

11. P.W.1 Nhanu Bhadane deposed that, on 20-06-1999, when he was present in the police station, that time, his superior PSI Shri. Shukla received secret information about assembly of culprits for committing dacoity by using the vehicle Tata Sumo bearing No. MP-09-S-2122. Therefore, the raid was conducted at the scene of occurrence. The members of raiding party saw in all five persons sitting in the vehicle Tata Sumo, which was parked behind the Aslam garage on Mumbai-Agra road. The police party took personal search of the appellants-accused and also frisked the vehicle. The members of raiding party recovered the fire arm, cartridges and nylon string from the briefcase kept in the vehicle. The P.W.2 Narayan also stated the similar facts before the learned trial Court. The P.W. 4 - Shri. Shukla, Investigating Officer was one of the member of raiding party. He has also deposed in the similar fashion as narrated by the P.W.2 Narayan.

12. The evidence of prosecution witnesses demonstrate that the appellants-accused and their accomplices were found sitting in the vehicle Tata Sumo at the relevant time of raid and the incriminating articles fire arm, nylon string, etc. were recovered from their possession. The learned trial Court, while appreciating the evidence, seems to be very much obsessed by the fact that the assemblage was in a lonely place with incriminating articles like fire arm and nylon string, and therefore, the learned trial Judge arrived at the conclusion that the accused had assembled there for making preparation to commit dacoity. The adverse inference drawn by the learned trial Court does appear to be erroneous, illegal and not conceivable within

the purview of law. The mere assemblage does not prove the charge. The people may assemble for many fold purposes. It would be hazardous to draw inference that the appellants and their accomplices were assembled only for the purpose of committing dacoity, which is punishable under Section 399 of the IPC. The Honourable Apex Court in the case of **Chaturi Yadav and others Versus State of Bihar**, reported in **1979 Cri. L. J. 1090** delineated that - mere fact that the persons were found assembled at 1 a.m. does not, by itself, prove that they had assembled for committing dacoity itself or for making preparation to accomplish that object.

13. In the instant case, the P.W.4- I.O. Shri. Shukla conducted the raid and apprehended the appellants-accused and their accomplices, who were found in the vehicle Tata Sumo. There were no attempt on the part of appellants or their accomplices to escape from the spot nor there was any resistance or demur on the part of appellants to make their escape good from the spot. In such circumstances, adverse inference could not be drawn that the appellants were assembled with an object to make preparation for committing the crime of dacoity.

14. It is also worthy to note that except the police personnel, the prosecution did not examine any independent witness in this case. The P.W.4 PSI Shri. Shukla investigated the crime and collected the evidence. But, it can not be ignored that, he was also one of the member of raiding party and under his supervision, the raid was conducted. Therefore, the credibility of his evidence found doubtful

and suspicious one. It has brought on record that the P.W.3 Subhash Karne, panch witness was the stock witness of the police personnel. He deposed that he had given evidence on behalf of police in multiple criminal cases. Therefore, it would unsafe to keep reliance on his version for any sort of adverse inference against the accused. [Emphasis is supplied on exposition of law in case of ***Jasbir Singh @ Javri @ Jasbir Singh @ Javri @ Jabbar Singh Versus State of Haryana***, reported in ***CJD 2015 SC 291***.]

15. In view of aforesaid discussion, the evidence of prosecution witnesses does appear incredulous, suspicious and not free from doubt. In absence of any overtact on the part of appellants-accused, it would hard to believe that the appellants and their accomplices were assembled for making preparation of committing the crime like dacoity. Mere recovery of incriminating articles like fire arm, nylon string, etc. would not itself sufficient to prove the charges against the accused. Therefore, inference drawn by the learned Judge for conviction of the appellants-accused in this case is erroneous, illegal and not within the purview of law. The learned trial Judge failed to appreciate the evidence in it's proper perspective. The findings of conviction does appear perverse, erroneous and liable to be upset.

16. In the above premises, appeal deserves to be allowed. Accordingly, the appeal stands allowed. The impugned Judgment and Order of conviction and resultant sentence of imprisonment and fine imposed on the appellants-accused is hereby set-aside and quashed. The appellants-accused are hereby acquitted for the offence punishable

under Section 379, 399 of the IPC and Section 3 read with Section 25 of the Arms Act. The appellants-accused are released on bail. Their bail bonds stand cancelled. No order as to costs.

[K. K. SONAWANE]
JUDGE

rrd.