

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.520 OF 2001

1. Navnath S/o. Santaram Barde
Age: 25 years, Occ.:Labour,
R/o. Balewadi, Tq. Ashti,
Dist. Beed

2. Bhimrao S/o. Eknath More,

(Appeal stood abated against
Appellant No.2 as per Hon'ble
Court's Order dated 08/06/2016.)

3. Balu @ Nigro S/o. Namdeo Mali,

(Appellant No.3 has undergone
the substantive sentence)

...APPELLANTS

VERSUS

. The State of Maharashtra

...RESPONDENT

Mr.S.S.Jadhavar, Advocate for Appellants;
Mr.S.P.Tiwari, APP, for Respondent-State.

CORAM : P.R.BORA, J.

RESERVED ON: 22nd December, 2017

PRONOUNCED ON: 5th January, 2018

JUDGMENT:

1) The appellants have filed the present
criminal appeal against the judgment and order

passed in Sessions Case No.51/2001 decided by II Additional Sessions Judge, Beed on 31st October, 2001.

2) The appellants were prosecuted in the aforesaid Sessions Case for the offences punishable under Section 395 and 397 of Indian Penal Code. The additional Sessions Judge, vide the impugned judgment convicted the present appellants for the offence punishable under Section 392 of Indian Penal Code and sentenced them to suffer rigorous imprisonment for four years and to pay fine of Rs.5,000/- each, in default to suffer simple imprisonment for one month each.

3) Appellant Nos.1 to 3 were accused Nos. 1 to 3 respectively in the aforesaid Sessions Case. During pendency of the present appeal, appellant No.2 died and the appeal thus stood abated against him.

4) Appellant No.3, i.e. original accused No.3, viz. Balu @ Nigro s/o Namdeo Mali, has undergone the substantive sentence. In the circumstances, the arguments were restricted by the learned Counsel appearing for the appellants to the extent of appellant No.1 only. Appellant No.1 is herein after referred to as accused No.1.

5) According to the case of prosecution, in the intervening night of 27.9.2000 to 28.9.2000, six persons, armed with sticks, knives and other weapons, entered into farm house of informant – Sarjabai w/o Dattoba Nalawade, situated at village Kada, Tq. Ashti, District Beed and committed dacoity. It was alleged that the said persons stole gold and silver ornaments as well as cash amount worth Rs.28,630/- by threatening the inmates with their lives. Sarjabai lodged the report of the alleged incident in the police station at Ashti, whereupon the investigation was set in motion. The Investigating Officer visited the spot of occurrence and drew the spot

panchanama in presence of the panch witnesses. The Investigating Officer also recorded the statements of the witnesses viz. Hanumant Ganpat Sawant (PW 3), Dattu s/o Bhimaji Lakde (PW 6), Vijubai w/o Hanumant Sawant (PW 4), Sarjabai w/o Dattoba Nalawade (PW 2) 520-2001 Cri and Dattoba s/o Baburao Nalawade (PW 7). Their supplementary statements were also subsequently recorded by the Investigating Officer on 6.10.2000. Accused No.1 was arrested by the police on 3.10.2000. Accused Bhimrao was also arrested on the same day. The other accused were already arrested in one another crime and were in custody of the police. It is the further case of the prosecution that accused No.1 gave his memorandum statement to the police in presence of the panch witnesses and in pursuance of the said statement, the gold ornaments and some cash amount, allegedly stolen away in the dacoity committed on 28.9.2000 on the Farm-house of the informant - Sarjabai, were discovered and subsequently seized by the police. The articles, which were seized at the instance

of accused No.1, were identified by the informant Sarjabai. After completing the investigating, charge sheet was filed against all the accused for the offence punishable under Sections 395 and 397 of Indian Penal Code. In order to prove the guilt of the accused, the prosecution examined as many as nine witnesses. Defence of accused No.1 was of total denial. The learned Sessions Judge, after having assessed the oral and documentary evidence on record, held accused No.1 guilty along with other accused for the offence punishable under Section 392 of IPC and sentenced him to suffer the imprisonment as noted herein above.

6) Shri S.S.Jadhavar, learned Counsel appearing for the appellant - accused No.1 assailed the impugned judgment on various grounds. The learned Counsel submitted that the Sessions Court has held accused No.1 guilty for the offence punishable under Section 392 of IPC only on the basis of his so-called memorandum

statement and the recovery allegedly shown in pursuance of the said memorandum statement.

. The learned Counsel further submitted that the entire said evidence is shrouded with doubts. The learned Counsel further submitted that neither Sarjabai (PW 2) nor Hanumant Sawant (PW 3) identified accused No.1. The learned Counsel submitted that Sarjabai identified accused No.2 – Bhimrao as well as accused No.3 – Balu, but did not recognize accused No.1. The learned Counsel submitted that PW 3 – Hanumant Sawant did not identify any of the accused. The learned Counsel further submitted that PW 4 – Vijubai w/o Hanumant Sawant also did not identify accused No.1 though she identified accused Nos. 2 and 3. The learned Counsel submitted that PW 6 – Dattu s/o Bhimaji Lakde and PW 7 – Dattoba s/o Baburao Nalawade though did identify accused Navnath in the Court, considering the admissions given by the said witnesses in their cross-examination, their testimonies cannot be relied upon. The learned Counsel, placing his reliance

on the judgment of the Hon'ble Apex court in the case of Ravi @ Ravichandran Vs. State Rep.by Inspector of Police – AIR 2007 SC 1729, submitted that since the FIR was lodged against unknown persons and no identification parade was ever conducted, the conviction recorded by the trial court against accused No.1 cannot be sustained. The learned Counsel, therefore, prayed for setting aside the impugned judgment and order of conviction against appellant No.1 and to acquit him of the charges levelled against him.

7) Shri S.P.Tiwari, learned APP supported the impugned judgment and order. The learned APP submitted that sufficient evidence had come on record against accused No.1 also and the Trial Court has, therefore, rightly convicted the accused No.1 for the offence punishable under Section 392 of Indian Penal Code. The learned App, therefore, prayed for dismissal of the appeal.

8) After having considered the submissions made by the learned Counsel appearing for the parties and on perusal of the impugned judgment as well as the evidence on record, I find it difficult to sustain the order of conviction against the appellant – accused No.1.

9) The learned Additional Sessions Judge has convicted accused No.1 on the basis of his alleged memorandum statement and the subsequent recovery of certain articles in pursuance of the said memorandum statement. The learned Sessions Judge has observed that the panch witnesses on the memorandum as well as seizure, have fully supported the prosecution version and both the said witnesses, viz. PW 5 – Ajinath and PW 8 – Parivant have also identified accused No.1 – Navnath as well as the articles seized in their presence on the basis of the memorandum statement given by accused No.1 – Navnath.

10) The learned Additional Sessions Judge

has also observed that in the cross-examination the fact stated by PW 5 – Ajinath that in his presence the accused gave memorandum statement has remained unchallenged. However, it is difficult to accept the reasoning so given by the learned Additional Sessions Judge.

11) I have carefully gone through the cross-examination of PW 5 – Ajinath s/o Paraji Shelke. He has candidly admitted that he signed the panchanama in the police station. Further, a suggestion was also given to him that he did not go to Balewadi. Of course, the said suggestion was denied by him. The said witness has further admitted that he was not remembering as to how many accused persons were there in the jeep when they had been to Balewadi. Further, the said witness has clearly admitted that only police went inside the house and brought the articles. Similarly, PW 8 – Parivant has also admitted in his cross-examination that when the accused went inside the house, he and the other panch were

waiting outside the house. It is thus evident that no such unimpeachable evidence has come on record showing that the articles were recovered at the instance of accused No.1 from his house. The evidence on the point of recovery is thus not free from doubt.

12) It is further significant to note that the First Information Report was lodged by PW 2 Sarjabai against the unknown persons on 28.09.2000. Admittedly, no identification parade was conducted. In the circumstances, though, some of the witnesses did identify accused No.1 before the Court, possibility of accused being seen by the said witnesses, either at the police station or at some other place cannot be ruled out. The conviction, therefore, cannot be based on such a weak evidence. Admittedly, PW 2 Sarjabai who lodged the report of the alleged incident, did not identify accused no.1 before the Court, though, she identified accused nos. 2 and 3. PW 3 Hanumant Ganpat Sawant, who is also

posed as an Eye witness of the alleged occurrence, also did not identify accused no.1.

13) It is further significant to note PW 3 in its testimony before the Court has deposed that the accused persons were brought to their house by the police and Sarjabai recognized some of the accused, but he did not recognize any of the accused. It is thus evident that, though, as per the version of PW 3 Hanumant all the accused including accused no.1 were taken to the house at which the dacoity was committed, neither PW 2 Sarjabai nor PW 3 Hanumant nor PW 4 Vijubai identified accused no.1. PW 4 Vijubai identified accused no.2 but did not identify accused no.1.

14) It was sought to be canvassed by the learned APP that PW 7 Dattoba, i.e. husband of the informant Sarjabai (PW 2) has identified accused no.1 before the Court. However, it is the matter of record that on the day of incident, PW 7 Dattoba was not present at the spot of

occurrence. As has been deposed by him, on the day of alleged occurrence, he was at his another Farm House and he visited the spot of occurrence on the next day of the incident.

15) Further, it has come on record in the evidence of PW 7 Dattoba that on the next day of the incident, he had been to the house of one Eknath and at that time accused no.1 Navnath and accused Bhimrao were present there. PW 7 Dattoba has further deposed that he then told the accused persons to give his belongings stolen by the accused persons from his house. PW 7 Dattoba has further deposed that, he promised the accused that if the accused persons return his articles, he would not file complaint against them. Dattoba has further deposed that accused no.1 Navnath and accused Bhimrao promised him to return articles taken by them from his house. Dattoba also deposed that, on such a promise given by accused no.1 Navnath and accused Bhimrao, he waited for two hours but as the

accused did not return his articles he told his wife Sarjabai to file a complaint and accordingly Sarjabai filed the complaint. In the cross-examination Dattoba Nalawade has reiterated that the talk between him and the accused persons taken place prior to filing of the complaint. However, it is undisputed that in the FIR lodged by Sarjabai she has not impleaded any person by name, but has filed the FIR against the unknown persons. The question arises when the husband of Sarjabai was well aware of the fact that accused no.1 Navnath and another accused Bhimrao were involved in the alleged dacoity, why Sarjabai did not disclose the said fact in the FIR lodged by her.

16) After having considered the entire evidence, it does not appear to me that any such evidence has come on record on the basis of which accused no.1 Navnath could have been held guilty by the learned Additional Sessions Judge. I reiterate that on relying the evidence of the

Panch Witnesses on the Memorandum statements allegedly given by accused Navnath, the learned Additional Sessions Judge has held his involvement to have been proved in commission of the alleged dacoity. However, as I have stated earlier, there is no such unimpeachable evidence showing that the alleged articles were seized at the instance of accused No.1 Navnath. As has been noted by me earlier, both the witnesses i.e. PW 5 Ajinath and PW 7 Dattoba did not enter into the house and only police persons along with accused no.1 went inside the house and came out of the house with some articles. Thus, the evidence which has come on record against accused No.1 falls short in proving the complicity of accused no.1 in commission of the alleged crime. Moreover, evidence against the accused no.1 is not free from doubts, the benefit of which would certainly go to him. In the circumstances, the conviction of accused No.1 cannot be sustained.

17) For the reasons stated above, I am

inclined to allow the present appeal. Hence, the following order, -

ORDER

i) The judgment and order of conviction passed on 31.10.2001 in Sessions Case No.51/2001, so far it relates to appellant – accused No.1, stands quashed and set aside;

ii) The accused No.1 is acquitted of the offences with which he was charged. His bail bond stands cancelled;

iii) Fine amount, if any, paid by the appellant No.1 be refunded to him;

iv) The accused is directed to furnish P.R. Bond in the amount of Rs.15,000/- with one surety in the like amount under Section 437-A of the Code of Criminal Procedure before the trial Court.

(P.R.BORA)
JUDGE

bdv/
fldr 28.12.17