

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 404 OF 1997
IN
SESSIONS CASE NO. 1001 OF 1993

Mohd. Hanif Abdul Rashid
Shaikh

....Appellant/
Orig.Accd No.3

V/s.

The State of Maharashtra
at the instance of Dongri
Police Station

....Respondent/
Orig. Complainant

* * * * *

Mr. K.M. Sangani, Advocate for the appellant.

Ms. A.A. Takalkar, APP for State.

CORAM :- SANDEEP K. SHINDE, J.

DATED :- 3RD MARCH, 2018.

JUDGMENT :

1. This Appeal is preferred under Section 374(2) Criminal Procedure Code against the conviction under Section 452 read with Section 34 and under Section 392 read with Section 34 of the Indian Penal Code and sentence of 3

years and 5 years respectively recorded in Sessions Case No. 1001 of 1993 by the Additional Sessions Judge, Greater Bombay.

2. The appellant, accused was charged and tried for having committed offence of robbery punishable under Sections 452 and 392 read with Section 34 of the Indian Penal Code alongwith other five. It is the prosecution's case that, on 15th February, 1993 Mr. Dalichand Seth, his son, Rajesh Seth and their servants, when were present in the shop at Abdul Rahman Street, Mumbai-400 003, four unknown persons illegally entered the said shop, out of whom, two were armed with choppers and others were armed with knives. Dalichand Seth (complainant) and his son, Rajesh were busy in their cabin and their servants were working in another cabin but in the same shop. It is unfolded in the evidence that out of the four unknown persons, one stayed at the door of the shop by holding chopper and the three entered in the cabin of the complainant. One unknown

person held the knife by pointing the same demanding cash from the complainant. He robbed him of Rs.4,000/- and also removed the gold chain which the complainant was wearing. It is further unfolded in the evidence that the complainant offered some resistance when his wrist watch was removed from his person and in the course of the same, slight injury was sustained to the right forearm of the complainant. It further appears that the fistblows were inflicted on the face of the complainant and as such had received a bleeding injury on his upper lip. Other unknown persons holding choppers went towards the son of the complainant and threatened him not to raise alarm or else he would kill him. The said person took out the cash of Rs.5,000/- from the pant pocket of Rajesh, the son of the complainant and also removed gold chain and a wrist watch from his person. The third unknown person took search of drawers of table found in the said cabin but nothing valuable was found. The fourth person chose to put a guard on the door and had threatened the servants of the complainant by pointing chopper. It is further unfolded

in the evidence that, all four unknown persons fled the shop Nagdevi Street, after committing robbery. The complainant and his son-Rajesh followed them and raised alarm. Coincidentally, there was a police jeep passing through the road side and after hearing the alarm of Rajesh, the police successfully caught hold one of the unknown persons out of the four. Rest of the three succeeded in running away.

3. It is the prosecution's case that, the police brought the caught hold persons to the Lokmanya Tilak Marg Police Station. It appears the complainant and his son identified the said person, so sooner he was nabbed by the police. The complainant, thereupon lodged his complaint whereupon Crime No. 79 of 1993 was registered under Sections 452, 395, 397 read with Section 34 of the Indian Penal Code. The complainant was sent for medical examination for the injuries sustained by him when he had offered resistance to the accused. The panchanama and other formalities were completed by the police.

4. It is the prosecution's case that, on 2nd April, 1993 they carried out raid at Hotel Alams Palace near Maratha Mandir Cinema when accused nos.1, 2, 3 and 5 alongwith two more persons were found present in the said hotel room. That on the personal search of accused no.1, he was found in possession of revolver, cartridges and chopper. Accused no.2 was found in the possession of two knives. Accused no.3 was found in possession of revolver and three cartridges and a chopper. Accused no.5 was found in possession of revolver, two cartridges and knife. The other inmates were also found in possession of pistol, cartridges and other dangerous weapons. Some amount of cash was also recovered from such persons and offence vide C.R. No. 00/93 was registered at Dongri Police Station. Investigation in the said C.R. has revealed that all the accused had history and were involved in robbery cases in South Bombay. The investigation has revealed the fact that accused nos.1, 2, 3 and 5 were involved in the present robbery case i.e. Crime No. 79 of 1993 registered with L.T. Marg Police Station.

5. That, on 11th April, 1993 Test Identification Parade was conducted by Raju Phodkar, P.W.6, Special Executive Magistrate. Accused nos.1, 2, 3 and 5 were arrested in the present case on 15th April, 1993 in Crime No. 79 of 1993. After completing the investigation, the case was committed to the Court of Sessions.

6. The prosecution in support of the charge under Sections 452, 392 both read with Section 34 and charge under Sections 34 and 392 read with Section 394, examined eye witnesses namely the complainant and his son as P.W.2 and P.W.3 respectively, besides the panch witness to the alleged recovery of the stolen goods and weapons.

7. The Learned Sessions Judge was pleased to convict the accused nos.1 to 4 of the offence punishable under Section 452 read with Section 34 and sentenced to suffer rigorous imprisonment for three years. Accused nos.1 to 4 were also convicted of the offence punishable under Section

392 read with Section 34 and sentenced to suffer rigorous imprisonment for five years. Accused no.4 was convicted of the offence punishable under Section 411 and sentenced to suffer rigorous imprisonment for three years. All the accused were acquitted of the offence punishable under Section 392 read with Section 394 of the Indian Penal Code.

8. It appears from the records and proceedings that the appellant herein had preferred this Appeal through jail. It appears from the record that, the appellant herein had preferred a Criminal Application No. 3671 of 1997 for bail during the pendency of the Appeal. It was granted by this Court on 24th November, 1997, in view of the fact, that the appellant was in custody from 2nd April, 1993 and by that time, had suffered sentence for a period of 4 years and 8 months, while the sentence imposed on him was of five years.

9. Heard, Mr. Sangani, Learned Counsel for the appellant and Learned APP for the State. Perused the

evidence on record.

10. Mr. Sangani has taken me through the evidence of the prosecution witnesses. His principal contention appears to be that, the appellant was arrested in the present case on 15th April, 1993 but the identification parade was held on 11th April, 1993 i.e. prior to the arrest of the present appellant in the subject case. He would therefore submit the possibility of the accused being shown to the witnesses prior to the identification parade cannot be ruled out. He has also taken me through the evidence of P.W.6, Special Executive Magistrate and would contend that the said Magistrate had no knowledge as how the parade is to be held. Mr. Sangani has strenuously argued that, the Test Identification Parade was wholly defective being contrary to the guidelines framed by the High Court.

11. That, on the other hand, the Learned APP has submitted that even assuming the Test Identification Parade

was not held properly in terms of the Rules contained in the Manual but such other evidence of P.W.2 and P.W.3 who were the eye witnesses is consistent, cogent, and was sufficient to sustain their conviction. The Learned APP has taken me through the evidence of the panch witness on the point of recovery, besides the evidence of the eye-witnesses.

12. I have gone through the evidence of P.W.2 who is the complainant and P.W.3 who is the son of the complainant. These two eye-witnesses had given a clear account as to how the incident had taken place. The evidence of the complainant is amply corroborated by the evidence of the son, P.W.3. The evidence of P.W.8 who had witnessed the disclosure and consequent recovery of the stolen articles at the instance of the accused has amply corroborated the evidence of the complainant and his son on the material particulars. I have also gone through the evidence of P.W.9. This witness would depose that, soon after the incident, one Khalid Hasan, accused no.5 had been to his house and sold

the wrist watch to him which was belonging to the son of the complainant. This witness has produced on record the extract of the Register at Exhibit-39A. This extract shows it was the business of the P.W.9 to advance loans to the needy persons against some security. The document at Exhibit-39A shows and records the fact (entry) that, accused no.5 herein had kept the wrist watch as a security with this witness against which Rs.750/- was advanced to the accused no.5. The evidence of the P.W.8, the panch witness to a recovery panchanama has rightly been considered while convicting the accused. The evidence of this witness would show that, there was a recovery of stolen articles which were sold to one, Bharat Jain.

13. Thus, after going through the entire evidence on record and particularly that of the complainant and his son and such other witness, I do not see any reason to disbelieve and discard the prosecution's case. Though, there were some discrepancies in the evidence of the Special Executive

Magistrate who had held the Test Identification Parade but even if that evidence is not considered, in my view, the evidence of P.W.2 and P.W.3 and such other evidence on the point of recovery of stolen articles has been rightly and correctly appreciated by the Learned trial Judge. That even otherwise, the accused herein including the appellant had the criminal antecedents.

14. Thus, taking into consideration the entire evidence on record, I am of the view that the Appeal deserves no consideration. That in the given circumstances, I hereby uphold the conviction recorded by the Learned Trial Judge.

15. The Learned Counsel, Mr. Sangani would submit that, the present appellant was on the guard at the door of the shop and as such had not actually committed the robbery. Mr. Sangani, would further submit that, since the present appellant has already suffered the sentence of four years and eight months as against the sentence of five years, his

sentence may be reduced for the period which he has already undergone.

16. In my view, a fact cannot be overlooked that the accused has been convicted under Section 392 read with Section 34 of the Indian Penal code. Though he has not been attributed with the role of committing the robbery, but had shared the common intention as he was on the guard on the doorstep of the shop where the robbery was committed. Be that as it may, since the appellant has already undergone the sentence of four years and eight months as against the sentence of five years, it would be just and proper to up hold the conviction and reduce the period of four years and eight months, which he has already suffered.

17. In view of the aforesaid discussion, the Appeal is dismissed. However, the conviction of five years is reduced to the conviction already undergone.

18. The Appeal is accordingly disposed of.

19. The appellant, if not required in any other case, may be released forthwith. His bail bond stands cancelled. The mudemaal property, if any, may be disposed of after the period of 3 months.

(SANDEEP K. SHINDE, J)