

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL REVISION APPLICATION NO. 142 OF 2002

Kishore Dagdu Aware	.. Applicant
Versus	
The State of Maharashtra	.. Respondent

Ms. Anjali Patil Advocate for the Applicant.
Ms. S.S. Kaushik, APP for Respondent-State.

CORAM : SARANG V. KOTWAL, J.

DATE : 25 OCTOBER 2018.

ORAL JUDGMENT :-

1. The Applicant has preferred this Criminal Revision Application challenging the judgment and order dated 21.03.2002 passed by the Additional Sessions Judge, Mumbai in Criminal Appeal No. 64 of 2000. By the impugned judgment, the Appellate Court had dismissed the Appeal preferred by the Applicant herein. The Applicant had challenged the judgment dated 01.12.1999 passed by the Metropolitan Magistrate, 28th Court, Esplanade, Mumbai in C.C. No. 67/P/93, before the Sessions Court at Mumbai.

2. The trial Court had convicted the Applicant for commission of offence punishable under Sections 384, 170 read with 114 of IPC and had sentenced him to suffer Rigorous imprisonment for six months and to pay a fine of Rs.1000/- in default to suffer Simple imprisonment for

two months. The Applicant was the original accused No.2 before the trial Court. The original accused No.1 Shashikant Kolwalkar has pleaded guilty to the charges. The original accused No. 3 Sachin Gupta had absconded and this case was transferred to the Dormant file. Accused No. 4 Vijay Zaveri was acquitted from all the charges.

3. The case of the prosecution is that, on 01.12.1992, at about 9.30 pm, the first informant Pankaj Patel was travelling on the scooter of PW-2 Sandeep Sanghavi. At that time, two persons stopped them and told the first informant and Sandeep Sanghavi that they were police officers. They asked the first informant and Sandeep Sanghavi as to why they were standing there. They asked the first informant and his friend Sandeep Sanghavi (PW-2) to sit in the rickshaw for inquiry purposes. In the rickshaw, there was one more person already sitting in the back seat. While all of them proceeded in the same rickshaw, two gold rings, one gold chain, one wrist watch as well as cash amount of Rs. 300/- were removed from the first informant and one gold ring, one silver ring, chain and one wrist watch were removed from PW-2 Sandeep Sanghavi. After some distance, both of them were asked to get down from the rickshaw and the culprits went away in the same rickshaw. Initially, the first informant and his friend Sandeep Sanghavi went to Kandivali Police

Station to lodge FIR but they were directed to go to Malad Police Station to lodge their FIR. The FIR was lodged by PW-1 Pankaj Patel vide C.R. No. 584 of 1992 at about 1.20 am on 02.12.1992. In the FIR, the first informant Pankaj Patel gave description of three persons who had taken away their property. It appears that thereafter the investigation was taken over by L.T. Marg Police Station and the charge sheet was filed by L.T. Marg Police Station in the Court of Chief Metropolitan Magistrate, Esplanade, Bombay. During investigation, some property was recovered from a jeweller at the instance of accused No.4.

4. After filing charge sheet, the case was numbered as C.C. No. 67/P/93 before the Court of Metropolitan Magistrate, 28th Court, Esplanade, Bombay. The charges were framed under Sections 384, 170 read with 114 of IPC. During the trial, the prosecution examined PW-1 Pankaj Patel the first informant, PW-2 Sandeep Sanghavi who was also a victim of the incident and PW-3 Rameshchandra Jain from whom one golden chain was recovered.

5. PW-1 Pankaj Patel has deposed that, on 01.12.1992, he was returning to his house in Malad from his factory at Kandivali. At about 9.30 pm. He met his friend Sandeep at Kandivali Station. PW-1

requested Sandeep to drop him at Malad on his scooter. When they reached Malad and when PW-1 was getting down from the scooter, one auto rickshaw came there and two persons got down. They came near PW-1 and PW-2 Sandeep and told them that they were Policemen. PW-1 and PW-2 were asked to come with them for inquiry purposes. They were made to sit in the rickshaw. There was one more person already sitting in the back seat of the rickshaw. After traveling for some distance, those persons took away two gold rings, one golden chain, one wrist watch and a cash of Rs. 300/- from PW-1. They also took away one gold ring, one silver ring, chain and one wrist watch from PW-2. Thereafter PW-1 and PW-2 were asked to get down from the rickshaw. The rickshaw proceeded further and the offenders run away. PW-1 went to Kandivali Police Station to lodge FIR but he was directed to go Malad Police Station. In the Malad Police Station, FIR was registered which is produced at record at Exhibit-1. PW-2 was further deposed that on 16.12.1992 he was called at the L.T. Marg Police Station, at that time, the police shown accused No. 1 and 2 to him, whom he identified. He was also shown two gold rings and one gold chain recovered during investigation. After the examination-in-chief of these witnesses was over, the present applicant was called upon to cross-examine these witnesses. At that time, applicant's advocate was not present and

therefore he was asked to cross-examine in person, to which the applicant declined. The deposition of PW-1 was completed on 12.08.1993.

6. The prosecution thereafter examined PW-2 Sandeep Sanghavi, who was right throughout the incident was with PW-1. He has deposed exactly on similar lines as deposed by PW-1. However, in respect of identification of the accused at the L.T. Marg Police Station on 16.12.1992, he has not said anything in his deposition. He has merely stated that on 16.12.1992, the property was shown to them and he identified his gold ring. Even on this occasion, the Advocate for the Applicant was absent and he was asked to cross-examine this witness, to which the Applicant had declined.

7. PW-3 Rameshchandra Jain who was a jeweller. He has deposed that accused No. 4 sold one gold chain to him and he had produced the said chain before the police. He has deposed that he produced one chain and one gold ring before the police. Since the accused No.4 is already acquitted and the present Applicant has nothing to do with him for such recovery, this evidence is not material for deciding the present Revision Application. In the statement recorded under Section 313 of Cr.P.C., the Applicant had denied the entire

incident.

8. After recording the evidence and the statement of the Applicant under Section 313, the learned trial Judge reached a conclusion that the evidence of PW-1 and PW-2 had gone unchallenged as there was no cross-examination. He accepted the prosecution case and convicted and sentenced the Applicant as mentioned earlier.

9. The Applicant challenged the trial Court's judgment and order by filing Appeal before the Court of Sessions as mentioned earlier. Even the Appeal was dismissed on the same reasoning. The learned Appellate Judge in paragraph 14 of the judgment has observed thus :-

“14. As there is no cross-examination of these two witnesses there is no reason why their testimony is to be discarded. The property is recovered. Learned Advocate for the appellant/accused argued that as there is no identification parade their testimony should not be accepted. In normal course that proposition would have been accepted when there is challenge to that fact. Here, in this case, there is no challenge at all. The identification done by the complainant Pankaj and his friend Sandeep in the Court had got unchallenged. After going through the evidence on record I really do not find any reason why under such circumstances they should be disbelieved or their evidence to be brushed aside.”

10. Thus, it can be seen that both the Courts below have mainly based their reasoning on the fact that PW-1 and PW-2 were not

cross-examined. In this context, it is necessary to mention that the learned trial Judge should have afforded a reasonable opportunity to the Applicant to cross-examine the witnesses. Though the Applicant had engaged an Advocate, the Advocate was absent on those dates. In the interest of justice, the learned trial Judge should have given him some reasonable opportunity to either engage another Advocate or to apply for Advocate through Legal Aid. Be that as it may, the fact remains that the Applicant had pleaded “not guilty” to the charges and had denied the prosecution case in his statement recorded under Section 313 of Cr.P.C. This means that he was disputing the incident.

11. The core question remains as to whether the identification in Court without any cross-examination can be accepted. In the instant case, there is one glaring fact in respect of identification of the Accused. PW-1 has categorically deposed that when they were called to L.T. Marg Police Station, accused were shown to them. In this view of the matter, the identification of the accused in the Court loses significance because, the suspects were already shown by the police to the witnesses. Both the Courts below should not have ignored this crucial aspect. Because of this, it is not safe to rely on the identification in the Court. Though there was no cross-examination conducted on behalf of the Applicant. Apart from the identification, there are no other circumstances against

the Applicant. There is no recovery at the instance of the Applicant. The recovery effected by the police from PW-3, at the instance of Accused No.4 cannot be linked with the present Applicant. The prosecution has not established any link between the accused No.4 and the present Applicant. Therefore, there is no other material against the Applicant. The prosecution has not examined the investigating officer. No police officer either from Kandivali, Malad or L.T. Marg Police Station was examined and no explanation is offered for the same.

12. In this view of the matter, I am of the opinion that both the Courts below erred in not extending benefit of doubt to the Applicant. Therefore, it is the case which calls for interference with the judgment and orders passed by the learned trial Court as well as the Appellate Court. Hence, the following order :-

The Criminal Revision Application is allowed. The Applicant is acquitted from the charges framed against him in the present case. The Applicant is on bail his bail bonds shall stand discharged.

(SARANG V. KOTWAL, J.)