

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

**CRIMINAL APPEAL NO. 16 OF 2017
WITH
CRIMINAL APPLICATION NO.627 OF 2017
IN
CRIMINAL APPEAL NO. 16 OF 2017**

Dharmendra Subhodh Choudhari ... **Appellant / Applicant**

residing at Yashwant Nagar,

Telco Nagar, Pimpri, Pune.

(At present languishing in Yerawada Central Prison, Pune.)

V/s.

State of Maharashtra ... **Respondent**

Mr.Satyavrat Joshi for the appellant/applicant .

Mr.S.V. Gavand, APP for the respondent / State.

CORAM : A.M.BADAR J.

DATED : 5th MARCH 2018.

ORAL JUDGMENT :

1. While working out the Criminal Application No.627 of 2017 which is for suspension of sentence and releasing the appellant / accused on bail, both the parties agreed that the arguments so advanced be considered as their final arguments and the appeal itself may be disposed of as the appellant/accused is behind bar from 4th January, 2015. That is how the instant appeal is being finally disposed of.

2. By this appeal, appellant / accused no.1 is challenging Judgment and Order dated 9th December, 2016 passed in Sessions Case No.252 of 2015 by the learned Assistant Sessions Judge, Pune thereby convicting the appellant/accused along with the co-accused of offences punishable under Section 397 of IPC and under Section 25(1-B) of the Arms Act. For the offence punishable under Section 397 of IPC, the appellant/accused is sentenced to suffer Rigorous Imprisonment for seven years apart from imposition of fine of Rs.1000/- and default sentence of Simple Imprisonment for three months. For the offence punishable under Section 25(1-B) of the Arms Act, he has been sentenced to suffer Rigorous Imprisonment for two years apart from imposition of fine of Rs.500/- and default sentence of Simple Imprisonment for two months.

3. The brief facts leading to the prosecution of the appellant/accused can be summarized thus;

- (a) PW1 Purushottam Dasani is owner of the liquor shop under name and style as a Vicky Wines. It is situated at Sitaram Complex, Chinchwad Railway Station, Pune. PW3 Ravi Yadav is a salesman working with PW1 Purushottam Dasani.
- (b) The incident in question took place allegedly at about 11.30 pm on 4th January, 2015 at Vicky Wines shop, Chinchwad, Pune owned by PW1 Purushottam Dasani. On that day, at about 11.00 pm PW1 Purushottam Dasani closed his wine shop by putting down the front shutter thereof. However, the shutter at the back side of the shop was open. PW1 Purushottam Dasani and his employees were winding up the affairs of the shop for the day. At about 11.30 pm of 4th January, 2015, two unknown persons

entered into shop through the rear shutter of the shop. They demanded a quarter of Bagpiper whisky. PW1 Purushottam Dasani told them that the shop has been closed for the day and as such the liquor bottle cannot be given to them. Both those unknown persons then left the shop.

- (c) It is the case of the prosecution that, within a short period of time again both those unknown persons entered in the shop of PW1 Purushottam Dasani through the rear shutter. By pointing the fire arm at PW1 Purushottam Dasani, appellant / accused no.1 asked him to handover the cash. The Co-accused was directed by the appellant/accused no.1 to take the cash from the cash counter. Employees of PW1 Purushottam Dasani were restrained by accused persons from proceeding towards the Godown. The Co-accused then collected cash amounting to about Rs.12,000/- from the cash counter. This was done by putting rear shutter down. After committing the robbery, the appellant/accused along with co-accused, left the shop of PW1 Purushottam Dasani. While opening the rear shutter for getting out the shop, the fire arm held by appellant/accused no.1 got accidentally fired and the bullet hit the floor.
- (d) According to the prosecution case, because of the incident in question, PW1 Purushottam Dasani and his employees became frightened. PW1 Purushottam Dasani disclosed the incident to his elder brother Teju Dasani. Then the report came to be lodged with Police Station Pimpri on 7th January, 2015 which has resulted in registration of Crime No.11 of 2015 of offence punishable under Section 397 read with 34 of IPC and under

Section 3(25) of the Arms Act as well as under Section 37(1) read with 135 of the Bombay Police Act.

- (e) During the course of the investigation, appellant/accused no.1 and the co-accused came to be arrested. Then spot was inspected. On the basis of voluntary disclosure statement of appellant/accused no.1, a country made pistol, magazine, as well as five live rounds came to be seized on 9th January, 2015. From the co-accused, four motor cycles, a bag as well as choppers and knife came to be seized. Test identification was conducted, and on completion of investigation the appellant/accused came to be chargesheeted.
- (f) The learned trial Court framed the charges for offences under Section 397 read with 34 of IPC, under Sections 37 and 135 of the Bombay Police Act, under Section 3(25) of the Indian Arms Act against the appellant / accused as well as co-accused. They pleaded not guilty and claimed to be tried.
- (g) In order to bring home guilt to the appellant/accused the prosecution has examined in all six witness. The informant, Purushottam Dasani is examined as PW1. PW2 Anil Lakhawani is a panch witness of spot panchanama. Eye witness Ravi Yadav, who is working as salesman with PW1 Purushottam Dasani is examined as PW3. Siddharth Mhaske, the Panch witness to the memorandum and resultant recovery from the co-accused is examined as the PW4. PW5 Vinod Kamat is panch witness to the memorandum statement and resultant recovery from appellant / accused no.1. Investigating Officer Ravindra Chaudhar, Police Inspector of Chitalsar Police Station is examined as the PW6.

After hearing the parties, the learned trial Court concluded that the appellant / accused along with the co-accused, in furtherance of their common intention committed robbery by using deadly weapon i.e. the pistol, and thereby committed offence under section 397 of IPC. Similarly, it is held that appellant/accused no.1 possessed the fire arm i.e. pistol without licence while committing crime in question. Accordingly, appellant/accused no.1 came to be convicted of offence punishable under Section 397 of IPC as well as under Section 25(1-B) of the Indian Arms Act. He is accordingly sentenced as indicated in the opening paragraph of this judgment.

4. I heard Shri Joshi, the learned Advocate appearing for appellant / accused no.1. He argued that for convicting the appellant /accused, the learned trial Court took aid of test identification parade which is marked as Exh.56. He argued that the report of test identification parade was not put to the appellant/accused in his cross-examination under Section 313 of the Cr.P.C. in order to enable the appellant/accused to tender his explanation in respect of the same. The learned Advocate further argued that after conclusion of the trial and at the time of delivery of the impugned Judgment and Order, the report of the test identification parade was made use of by the trial Court, by marking it as Exh.56. This fact is established from the impugned Judgment and Order itself which is also marked as Exh.56. Thus, the evidence to that effect cannot be made use for conviction of the appellant/accused. The learned Advocate relied on Judgment and Order dated 5th May, 2017 passed by the learned Single Judge of this

Court in the case of *Rajesh Laxman Shirke & Ors Vs. State of Maharashtra*¹ for contending that the report of the test identification parade cannot be made use of unless and until the accused is given opportunity to cross-examine the Executive Magistrate.

5. The learned Advocate further argued that so called fire arm recovered at the instant of the appellant/accused was never sent for forensic examination. There is no evidence on record to suggest that what was recovered from appellant/accused no.1 were in fact a fire arm and live rounds. The learned Advocate further argued that there is delay in lodging the FIR which is making the prosecution case suspect. Therefore, the appellant/accused deserves acquittal.

6. The learned APP opposed the appeal by contending that the incident in question took place in two parts and as such the prosecution witnesses were having ample opportunity to see both accused persons while committing the act and therefore there is no possibility of mistaken identification.

7. I have carefully considered the rival submissions and also perused the record and proceedings including copies of the deposition of the prosecution witnesses as well as documentary evidence adduced on record by the prosecution.

8. Considering the nature of offence, fate of the prosecution case hinges on testimony of PW1 Purushottam Dasani who is owner of the Vicky Wines shop where the incident allegedly took place as well as that of PW3 Ravi Yadav salesman in that shop. Both these witnesses,

¹Criminal Writ Petition No.1665 of 2017

congruously deposed that at about 11.30 pm of 4th January, 2015 when the front shutter of the Vicky Wines shop was put down, two accused persons came from the rear shutter of the shop and demanded a quarter of Bagpiper whisky. Evidence of both these witnesses further shows that PW1 Purushottam Dasani refused to sell the bottle of liquor as the shop was closed for a day and therefore both accused persons left the shop. In unison both these witnesses further deposed that after gap of four to five minutes, both the accused person again entered in side the Vicky Wines shop and at that time appellant/accused no.1 was holding a fire arm. He then directed PW1 Purushottam Dasani to hand over the cash. The rear shutter of the shop was then put down by the appellant/accused no.1 as seen from the evidence of both these witnesses. The co-accused then collected cash from the counter. Thereafter, the appellant/accused no.1 opened the rear shutter and at that time the fire arm held by him got accidentally triggered, causing fire from it. Both the accused persons then left the shop.

9. PW1 Purushottam Dasani deposed that in such manner both accused persons robbed him of Rs.12,000/-. He, therefore, lodged a report to the Pimpri Police Station which is marked as Exh.38.

10. While in dock PW1 Purushottam Dasani and PW3 Ravi Yadav have identified both the accused persons. Both of them have stated that appellant/accused no.1 Dharmendra was holding fire arm at the time of incident.

11. During the cross-examination of both these witnesses, it is brought on record that their evidence to the effect that while lifting the

shutter, the fire arm held by appellant/accused no.1 got accidentally triggered causing firing, is coming on record by way of omission. This omission is duly proved by the defence through evidence of PW6 Ravindra Chaudhar, Police Inspector. Even perusal of the FIR Exh.38 lodged by PW1 Purushottam Dasani goes to show that he has not disclosed the fact of accidental firing from the fire arm held by appellant / accused no.1 Dharmendra to the police while lodging the FIR. Other omissions are also sought to be brought on record but those are regarding non consequential aspect of the matter and as such those does not go to the root of the prosecution case. The only material aspect which could be brought on record as the omission made by these two prosecution witnesses is that of firing of a bullet from the fire arm held by the appellant/accused.

12. PW1 Purushottam Dasani while in chief examination has not stated the date on which he lodged the report of the incident to the police. When confronted about this aspect in the cross-examination PW1 Purushottam Dasani has stated that he lodged report of the incident on 6th January, 2015, but the police registered the offence on 7th January, 2015. Perusal of the report Exh.38 lodged by the PW1 Purushottam Dasani shows that the same was lodged on 7th January, 2015 and it contents the averments to the effect that as the first informant was got frightened because of the incident, he could not lodge the report immediately. The FIR contents the averments that he disclosed the incident to his elder brother Teju Dasani and because of support of his brother, he has lodged the report. Substantive evidence of PW1 Purushottam Dasani also shows that on the next day morning he had informed about incident to his brother Teju Dasani and then the

report came to be lodged. It is thus obvious that the report of incident which took place at about mid night of the night intervening 4th January, 2015 – 5th January, 2015 came to be lodged on 7th January, 2015.

13. It is well settled that some delay in lodging FIR cannot be used as formula for doubting the prosecution case. It can at the most put the Court on guard to search for any explanation in respect of the delay. The delay may assume character of introducing serious infirmity in the prosecution case if there are circumstances suggesting that the investigator was deliberately taking time with a view to decide the shape to be given to the prosecution case and for the purpose of introducing eye witnesses. However, if properly explained, the delay in lodging the FIR cannot be a ground for disbelieving and discarding entire prosecution case. Let us therefore examine whether sequence of event following the commission of crime as described by the prosecution witnesses provides satisfactory explanation for the delay in lodging FIR.

14. As stated in foregoing paragraphs, PW1 Purushottam Dasani is having liquor shop which remains open up to about 11.00 pm. The incident in question took place on 4th January, 2015 from about 11.30 pm up to mid night. Initially both accused persons entered in the shop probably for getting themselves appraised with the situation prevalent in side the shop, of which front shutter was closed. This was done on the pretext of visit for purchasing a bottle of liquor. On refusal by the owner to sell out the bottle of liquor after closing hours, both appellant/accused persons left the shop, to again come back after four

to five minutes. Then they indulged in robbery by pointing a fire arm at PW1 Purushottam Dasani. Cross-examination of PW3 Ravi Yadav comes to show that the incident of robbery was going for about five to seven minutes. During that period, as seen from the evidence of PW1 Purushottam Dasani and PW3 Ravi Yadav, the appellant/accused Dharmendra was standing by holding a fire arm at PW1 Purushottam Dasani, whereas the co-accused was collected cash from the counter. Then they fled from the spot from the rear shutter of the shop. This evidence indicates that in two visits of the accused persons to the shop, of PW1 Purushottam Dasani and PW3 Ravi Yadav had ample opportunity to witness the accused persons. While in witness box, both these witnesses have identified the accused persons and they had ascribed specific role of holding and pointing the fire arm at PW1 Purushottam Dasani to appellant/accused no.1 Dharmendra. Cross-examination of both these witnesses could not elicit anything to suggest that there are chances of mistaken identity of the appellant/accused.

15. Incident in question was that of robbing the owner of the liquor shop by pointing fire arm at him in the mid night. Such type of incident triggers fear in the mind of the owner of the shop as he has to operate his shop daily till mid night.

16. The FIR contains explanation for delay so also substantive evidence of PW1 Purushottam Dasani – the first informant. PW3 Ravi Yadav being the salesman at the shop is a natural witness to the incident. As such, it is not possible to hold that there was a deliberate delay in lodging the FIR for indulging in concoction. Therefore, I hold that the delay in lodging the FIR is not introducing any infirmity in the

case of prosecution, in the light of trustworthy and reliable evidence of PW1 Purushottam Dasani and PW3 Ravi Yadav.

17. The prosecution is shown to have seized a fire arm i.e. country made pistol with its magazine and five live round on the basis of voluntary disclosure statement allegedly made by the appellant/accused before the panch witness PW5 Vinod Kamat. Evidence of PW5 Vinod Kamat as well as PW6 Ravindra Chaudhar shows that after recording voluntary disclosure statement of the appellant/accused on 9th January, 2015, from the room of the appellant/accused, country made pistol, magazine, and five live rounds came to be seized vide recovery panchanama Ehx.48. This recovery could have made use of, if the said fire arm along with rounds was sent for forensic examination in order to establish the fact that the said articles seized at the instant of the appellant/accused was in fact the fire arm and live cartridges. This exercise was not done by the prosecution. These articles seized from the appellant/accused were not sent for forensic examination. Even PW6 Ravindra Chaudhar, Police Inspector who had seized the article which is alleged to be pistol, has not deposed that he had examined the same and he found it to be the fire arm. Thus, there is no satisfactory evidence to show that whatever was seized at the instant of the appellant/accused was the fire arm and live cartridges. In this view of the matter, though it is seen from the prosecution evidence that the appellant/accused along with co-accused had indulged in robbing the cash amounting to Rs.12,000/- from the Vicky Wines shop owned by PW1 Purushottam Dasani, there is no satisfactory evidence to conclude that such robbery took place with use of the fire arm by the appellant/accused. There is no evidence to demonstrate that while

committing robbery, the appellant/accused had used the deadly weapon and attempted to cause death or grievous hurt to the victim. The exaggerated version of the prosecution witness to the effect that in an attempt to lift up the rear shutter, the fire arm got accidentally triggered causing firing needs to be ignored because at the time of conducting spot panchanama (Exh.40) no marking of bullet was found either on the floor or shutter of the shop. Testimony of PW2 Anil Lakhawani, recitals in the sport panchanama as well as evidence of PW6 Ravindra Chaudhar, Police Inspector is conspicuous silent on this aspect. While conducting spot panchanama on 7th January, 2015, as deposed by PW6 Ravindra Chaudhar that he had inspected the spot minutely and carefully. However, he could not locate the empty jacket from the spot. The same is shown to have been recovered on 9th January, 2015 when after effecting discovery, the appellant/accused was taken to the shop. This obviously is not possible as the incident in question took place on 4th January, 2015 and the empty jacket is shown to be found at the shutter on 9th January, 2015 i.e. after conducting the spot panchanama. This improbable evidence needs to be ignored in the wake of conducting the spot panchanama on 7th January, 2015. In the result, it cannot be said with certainty at the time of committing robbery the appellant/accused used deadly weapon.

18. So far as the evidence regarding test identification parade is concerned the said needs to be ignored as it was not put to the appellant / accused through his cross-examination under Section 313 of Cr.P.C.

19. As consequences of this discussion, the prosecution case successful in establishing commission of robbery by the appellant/accused with the aid of the co-accused, but the appellant/accused is entitled of benefit of doubt so far as the offence punishable under Section 397 of IPC is concerned. Similarly, the appellant/accused deserves acquittal from the offence under Section 25(1-B) of the Arms Act. As such the following order:

:: ORDER ::

- (i) The appeal is partly allowed.
- (ii) Conviction and resultant sentence of the appellant/accused for the offence punishable under Section 397 of IPC and Section 25(1-B) of the Arms Act is quashed and set aside.
- (iii) Instead, the appellant/accused is convicted of the offence punishable under Section 392 of IPC and is sentenced to suffer Rigorous Imprisonment for five years and to pay fine of Rs.1000/- and in default to undergo simple imprisonment for three months.
- (iv) The appeal stands disposed of accordingly.
- (v) In view of the disposal of the Criminal Appeal, Criminal Application No.627 of 2017 also stands disposed of.
- vi) The copy of this Judgment be sent to the concerned prison.

(A.M.BADAR J.)