

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.510 OF 2015

1) NAUSHAD @ AZAD TAJ MOHAMMED)
SHAikh)
2) AFTAB YASEEN SHAIKH)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Ms.Rohini Dandekar, Advocate for the Appellants.

Mr.S.V.Gavand, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 27th APRIL 2018

JUDGMENT :

1 By this appeal, appellants/accused persons nos.1 and 3 are challenging the judgment and order dated 31st July 2010 passed by learned Additional Sessions Judge, Mumbai, in Sessions Case No.761 of 2008, thereby convicting them for offences punishable under Sections 392 read with 34, 397, 394 read with

34 and 452 read with 34 of the Indian Penal Code. For offences punishable under Section 392 read with 34 and 397 of the Indian Penal Code, both appellants/accused persons were sentenced to suffer rigorous imprisonment for 7 years each, apart from direction to pay fine of Rs.500/- each, and in default to suffer further rigorous imprisonment for 15 days, by each of them. For the offence punishable under Section 394 read with 34 of the Indian Penal Code, they are sentenced to suffer rigorous imprisonment for 3 years each, apart from direction to pay fine of Rs.500/- each, and in default to suffer rigorous imprisonment for 15 days. For the offence punishable under Section 452 read with 34 of the Indian Penal Code, they are sentenced to suffer rigorous imprisonment for 3 years each, apart from direction to pay fine of Rs.500/- each, and in default to undergo further rigorous imprisonment for 15 days, by each of them.

2 Facts, in brief, leading to the prosecution of appellants/accused persons nos.1 and 3 along with three other co-accused can be summarized thus :

- (a) First Informant Nasima Khatun Ansari (PW2) was working as maid servant in the house of PW1 Farzana Khan, who used to reside along with her husband, in-laws, three children and nephew of her husband namely Mohd.Rashid Khan, who is arraigned as accused no.5 by the prosecution, at Lucky Compound, Byculla, Mumbai. The incident in question took place in the afternoon of 16th August 2008. On that day, husband of PW1 Farzana Khan was out of station. PW1 Farzana Khan, PW2 Nasima Khatun Ansari, accused no.5 Mohd.Rashid Khan and three children of PW1 Farzana Khan were present in her house. In the afternoon, at about 4.30 p.m. of 16th August 2008, all of a sudden three dacoits entered in the house of PW1 Farzana Khan. Two of them were holding knife and chopper, whereas the third one was holding a rope. The dacoit holding the chopper threatened accused no.5 Mohd.Rashid Khan, who in turn remained silent during the episode. Thereafter, the dacoit holding the chopper threatened PW1 Farzana Khan for extracting keys of the box. When PW1 Farzana Khan showed her reluctance to

hand over the keys, the dacoit holding knife gave a blow thereof on her arm. PW1 Farzana Khan and PW2 Nasima Khatun Ansari then raised hue and cry. Therefore, three dacoits, who entered in the house of PW1 Farzana Khan, left the house. The dacoit holding the chopper took away ladies wrist watch kept near the T.V. Set.

- (b) Upon hearing shouts of PW1 Farzana Khan and PW2 Nasima Khatun Ansari, neighbours residing in the locality gathered and they were successful in nabbing the dacoit holding the knife as well as the another one holding the rope. The dacoit holding the chopper was successful in running away from the spot of the incident.
- (c) It is case of the prosecution that appellant/accused no.1 Naushad @ Azad Shaikh was holding a knife at the time of the incident and he had caused injuries to PW1 Farzana Khan. He was apprehended near the spot of the incident by the neighbours. Similarly, according to the prosecution,

accused no.2 Sajid Ali Ansari was carrying the rope and he was also apprehended near the spot of the incident. Appellant/accused no.3 Aftab Shaikh was holding the chopper and he was successful in fleeing from the spot of the incident. Appellant/accused no.1 Naushad @ Azad Shaikh and accused no.2 Sajid Ali Ansari came to be apprehended by the neighbours in presence of PW9 Mohd. Sher Khan and PW11 Tanveer Ahmed. They were then handed over to the police party who came on the spot while patrolling. PW7 Bhaskar Malve, Police Constable, and his colleague took both appellant/accused no.1 Naushad @ Azad Shaikh and accused no.2 Sajid Ali Ansari in their custody. Knife held by appellant/accused no.1 Naushad @ Azad Shaikh was also handed over to them. They were then taken to the police station where PW2 Nasima Khatun Ansari lodged the First Information Report (FIR) Exhibit 52, which was recorded by PW5 Prakash Satpe, Police Sub-Inspector, Agripada Police Station, Mumbai. Accordingly, Crime No.162 of 2008 for offences punishable under Sections 452, 392 and 394 read

with 34 of the Indian Penal Code came to be registered against accused persons. Appellant/accused no.1 Naushad @ Azad Shaikh and accused no.2 Sajid Ali Ansari came to be arrested. The knife held by appellant/accused no.1 Naushad @ Azad Shaikh was also seized by the police while effecting his arrest vide Arrest cum Seizure Panchnama Exhibit 59. PW5 Prakash Satpe, Police Sub-Inspector, then went to the spot of the incident and drew Spot Panchnama Exhibit 57. He collected blood lying on the spot of the incident in a bottle and seized that bottle.

- (d) Appellant/accused no.3 Aftab Shaikh came to be arrested on 18th August 2008 by PW12 Sitaram Shinde, Assistant Police Inspector. During the course of investigation from him, this witness recorded voluntary disclosure statement of appellant/accused no.3 Aftab Shaikh on 20th August 2008 in presence of panch witness PW6 Nisar Qureshi. This disclosure statement Exhibit 75 resulted in recovery of the ladies wrist watch, a knife as well as a chit at the instance of

appellant/accused no.3 Aftab Shaikh, on 20th August 2008 itself.

- (e) During the course of investigation, PW10 Sharad Vichare, Special Executive Magistrate, conducted the Test Identification Parade, wherein, PW1 Farzana Khan and PW2 Nasima Khatun Ansari have identified appellant/accused no.3 Aftab Shaikh. Exhibit 88 is the Memorandum of Test Identification Parade. The Investigating Officer then collected Injury Certificate of PW1 Farzana Khan given by PW3 Dr.Gautam Kale, Medical Officer of Nair Hospital. Routine investigation followed.
- (f) According to the prosecution case, accused no.4 Ashraf Ansari was keeping a watch outside the house of PW1 Farzana Khan in order to facilitate remaining accused persons to commit dacoity by using dangerous weapons and accused no.5 Mohd.Rashid Khan, who is nephew of husband of PW1 Farzana Khan, aided the other accused persons in

commission of dacoity by remaining silent. Accordingly, on completion of investigation, the accused persons were charge-sheeted for offences punishable under Sections 395, 397 and 120B of the Indian Penal Code.

- (g) The learned trial court framed the Charge for offences punishable under Sections 120B, 452 read with 34, 395 and 395 read with 397 of the Indian Penal Code against the appellants/accused persons as well as the co-accused. They pleaded not guilty and claimed trial.
- (h) In order to bring home the guilt to the appellants/accused persons as well as the co-accused, the prosecution has examined in all thirteen witnesses. Victim of the crime in question Farzana Khan is examined as PW1. Her maid servant and First Informant Nasima Khatun Ansari is examined as PW2. FIR lodged by her is at Exhibit 52. Dr.Gautam Kale, Medical Officer with Nair Hospital, who treated PW1 Farzana Khan, is examined as PW3 and Exhibit

55 is the Medico Legal Certificate issued by him. PW4 Aslam Sayyad, panch witness, is examined to prove Spot Panchnama Exhibit 57. Investigating Officer Prakash Satpe, Police Sub-Inspector, Agripada Police Station, is examined as PW5. Nisar Qureshi, panch witness to the disclosure statement of appellant/accused no.3 Aftab Shaikh and resultant Recovery Panchnama Exhibits 75 and 76 respectively, is examined as PW6. Bhaskar Malve, Police Constable, who took appellant/accused no.1 Naushad @ Azad Shaikh and the co-accused to the police station is examined as PW7. Shripad Valanju, panch witness to disclosure statement and resultant panchnama is examined as PW8. Neighbours, who saw the public apprehending appellant/accused no.1 Naushad @ Azad Shaikh and accused no.2 Sajid Ali Ansari, namely, Mohd. Sher Khan and Tanveer Ahmed are examined as PW9 and PW11 respectively. Special Executive Magistrate Sharad Vichare is examined as PW10. Investigating Officer Sitaram Shinde, Assistant Police Inspector, is examined as PW12, whereas

another Investigating Officer Ravindra Khandagale, Senior Police Inspector, is examined as PW13.

- (i) After hearing the parties, by the impugned judgment and order dated 31st July 2010 passed in Sessions Case No.761 of 2008, the learned trial court was pleased to convict the appellants/accused persons and they were accordingly sentenced, as indicated in the opening paragraph of this judgment.

3 I have heard Ms.Rohini Dandekar, the learned advocate appointed at the cost of the State to represent appellant/accused no.1 Naushad @ Azad Shaikh and appellant/accused no.3 Aftab Shaikh. She vehemently argued that conviction of appellants/accused persons is on the basis of defective evidence and is not sustainable in law. The evidence adduced by the prosecution is suffering from serious infirmities and therefore, on the basis of such lacunic evidence, conviction cannot be sustained. Identification of appellants/accused persons

is not established by the prosecution and it is not proved that at the time of commission of the alleged offence, appellants/accused persons used deadly weapons. The incident itself is not proved by the prosecution.

4 As against this, according to the learned APP, evidence adduced by the prosecution establishes identity of appellants/accused persons in the crime in question and the learned trial court has properly considered the evidence and come to the conclusion that appellants/accused persons had committed robbery by using deadly weapons after committing house trespass with an intention to cause hurt to the inmates of the house.

5 I have carefully considered the rival submissions and also perused oral as well as documentary evidence adduced by the prosecution.

6 Now let us examine whether it is proved by the prosecution that both appellants/accused persons, in furtherance

of their common intention, caused house trespass by entering in the house of PW1 Farzana Khan, having made preparation for causing hurt to the inmates of the house and indulged in robbery with deadly weapons. PW1 Farzana Khan and PW2 Nasima Khatun Ansari are eye witnesses to the incident in question, and therefore, their evidence carries great weight. PW1 Farzana Khan is an injured witness having suffered the injury by a sharp edged weapon on her arm as certified by PW3 Dr.Gautam Kale, and as such, her presence on the spot of the incident cannot be doubted. From cross-examination of PW2 Nasima Khatun Ansari, the defence has brought on record that she used to work at the house of PW1 Farzana Khan throughout the day and she used to sleep in the house of PW1 Farzana Khan, meaning thereby that, PW2 Nasima Khatun Ansari, as a maid servant, used to work and reside in the house of PW1 Farzana Khan. As such, PW2 Nasima Khatun Ansari, on the basis of material elicited on record from her cross-examination by the defence, is a natural witness to the incident in question, which took place inside the house of PW1 Farzana Khan. Thus, if evidence of both these witnesses is found reliable and

trustworthy, then conviction can be based merely on evidence of these two witnesses. Their evidence cannot be discarded or brushed aside lightly in the wake of the fact that both of them are natural witnesses to the incident in question, which took place inside the house of PW1 Farzana Khan, who herself was injured in the incident.

7 PW1 Farzana Khan has deposed that in the afternoon of 16th August 2008, when her maid servant PW2 Nasima Khatun Ansari as well as her children and accused no.5 Mohd.Rashid Khan were present in her house, four persons entered in her house and closed the door and windows of her house. One was having rope whereas the rest were having knives. One person put knife on neck of her daughter and remaining culprits beat her. One of them gave a blow of knife on her right arm. They threatened her maid servant. Thereafter, PW2 Nasima Khatun Ansari opened the door and shouted. The dacoits, then, dropped the knives and rope and ran away carrying her wrist watch. PW1 Farzana Khan has stated that during identification parade, she identified the accused

persons. While in dock, this witness identified both appellants/accused persons. From her cross-examination, it is brought on record that the identification parade was held in open place and suspects were in jail uniform. She admitted that she had seen two accused persons at the police station. As PW1 Farzana Khan had identified the wrist watch before the court, from her cross-examination it is elicited that similar wrist watches are available in the market.

8 From cross-examination of PW1 Farzana Khan, some minor and inconsequential improvements are tried to be brought on record, but those are not material and those do not go to the root of the prosecution case.

9 PW2 Nasima Khatun Ansari has deposed that when she herself, PW1 Farzana Khan and accused no.5 Mohd.Rashid Khan were present in the house of PW1 Farzana Khan, four persons entered in the house and bolted the door from inside. They demanded keys but PW1 Farzana Khan refused. Then, she

was assaulted by a knife. As per version of PW2 Nasima Khatun Ansari, she then opened the door and cried. She stated that those four persons were caught in the compound of the residential complex and then she lodged report Exhibit 52 with the police. As per version of PW2 Nasima Khatun Ansari, she identified the accused persons in the Test Identification Parade. While in the dock, she identified the accused persons. From cross-examination of this witness, minor omissions are tried to be brought on record, but perusal of the FIR goes to show that this witness had made a hue and cry at the time of the incident, and thereafter, neighbours had gathered on the spot. These facts are clearly mentioned by her in the FIR and as such, those cannot be considered as omissions. Even otherwise, these facts are inconsequential in nature.

10 According to the prosecution case, appellant/accused no.1 Naushad @ Azad Shaikh was apprehended on the spot of the incident itself by the neighbours. To establish this fact, the prosecution has examined PW9 Mohd. Sher Khan and PW11

Tanveer Ahmed. However, both these witnesses have not supported the prosecution case fully. PW9 Mohd. Sher Khan deposed that he heard shouts of maid servant of PW1 Farzana Khan and then had seen two to three persons running. Two of them were then apprehended by the neighbours and those were given to the police. Thereafter, this witness has not supported the prosecution case. In the similar way, PW11 Tanveer Ahmed has supported the prosecution case to the extent that after hearing hue and cry, he came out of his house and saw one person caught by the police. He, then, failed to support the prosecution case, any further. Both these witnesses are neighbours residing in the vicinity of house of PW1 Farzana Khan. That portion of evidence of hostile witness, which supports the prosecution case and which is found to be reliable and trustworthy, can be made use of to further the prosecution case. Evidence of both these witnesses, to the effect, that there was hue and cry and ultimately some culprits were apprehended on the spot by the neighbours, is in tune with the prosecution case and is reliable and trustworthy. This portion of evidence of PW9 Mohd. Sher Khan and PW11 Tanveer Ahmed

fully corroborates version of PW7 Bhaskar Malve, Police Constable, to the effect that, on 16th August 2008, during the course of patrolling, his team received message about the incident at the Lucky Compound, and therefore, they reached there and saw ten to twelve persons holding custody of two persons. Then PW7 Bhaskar Malve, Police Constable, deposed that appellant/accused no.1 Naushad @ Azad Shaikh and accused no.2 Sajid Ali Ansari were those persons, who were apprehended by the public. PW7 Bhaskar Malve, Police Constable, then took custody of appellant/accused no.1 Naushad @ Azad Shaikh and accused no.2 Sajid Ali Ansari from the spot. The police team was also handed over the knife. This witness then handed over both these accused as well as knife to PW5 Prakash Satpe, Police Sub-Inspector, at Agripada Police Station. That is how, appellant/accused no.1 Naushad @ Azad Shaikh came to be arrested vide Arrest Panchnama Exhibit 59 on 16th August 2008 itself. Vide the same document, the knife held by him was also seized by police.

11 Evidence of PW1 Farzana Khan regarding robbery at her house is gaining corroboration from evidence of PW4 Aslam Sayyad – panch witness to the Spot Panchnama Exhibit 57. Evidence of this witness as well as that of Investigating Officer PW5 Prakash Satpe, Police Sub-Inspector, shows that the spot of the incident was inspected on 16th August 2008 and blood was found lying on the spot. Similarly, evidence of PW1 Farzana Khan is gaining corroboration from evidence of PW3 Dr.Gautam Kale, Medical Officer, working with Nair Hospital, who deposed that on 16th August 2008, upon examination of PW1 Farzana Khan, he found that she had suffered one clean incised wound on right upper arm of size 5 x 3 x 3 cms., which is possible by the knife. Exhibit 55 is the contemporaneous Medico Legal Certificate to that effect.

12 With this evidence, the prosecution has certainly established that it was appellant/accused no.1 Naushad @ Azad Shaikh, who, along with his associates, entered in the house of PW1 Farzana Khan with preparation to cause hurt to the inmates of the house, while armed with the deadly weapon.

13 Evidence of PW12 Sitaram Shinde, Assistant Police Inspector, shows that on 18th August 2008, he arrested appellant/accused no.3 Aftab Shaikh. This witness further deposed that during the course of investigation, appellant/accused no.3 Aftab Shaikh made a voluntary disclosure statement Exhibit 75, which came to be recorded in presence of PW6 Nisar Qureshi. This evidence is duly corroborated by version of PW6 Nisar Qureshi. Both these witnesses congruously deposed that appellant/accused no.3 Aftab Shaikh took the panch witness and police team to Room No.3 at Kurla and from that room, he took out a bag containing the ladies wrist watch, a knife as well as a chit, and those articles came to be seized vide Panchnama Exhibit 76. There is nothing in cross-examination of both these witnesses to disbelieve their version regarding voluntary disclosure statement and resultant recoveries. Cross-examination of these witnesses do not show that appellant/accused no.3 Aftab Shaikh was under duress or threat while making confessional statement.

14 Appellant/accused no.3 Aftab Shaikh was subjected to Test Identification Parade by PW1 Farzana Khan and PW2 Nasima Khatun Ansari on 4th September 2008. The Test Identification Parade was conducted by PW10 Sharad Vichare, Special Executive Magistrate. Careful scrutiny of evidence of PW10 Sharad Vichare, Special Executive Magistrate, shows that this witness has conducted the Test Identification Parade properly with the help of twelve dummies, as two accused persons were put up for Test Identification Parade. Evidence of PW10 Sharad Vichare, Special Executive Magistrate, to the effect that appellant/accused no.3 Aftab Shaikh is identified by PW1 Farzana Khan and PW2 Nasima Khatun Ansari is gaining corroboration from the Memorandum of Test Identification Parade Exhibit 88. Evidence of PW1 Farzana Khan and PW2 Nasima Khatun Ansari shows that they had identified appellant/accused no.3 Aftab Shaikh during the course of Test Identification Parade. Though from cross-examination of PW1 Farzana Khan it is elicited that she had seen two accused persons at the police station, those two were appellant/accused no.1 Naushad @ Azad Shaikh and accused no.2 Sajid Ali Ansari,

who were apprehended on the spot and were taken to the police station, on the day of the incident. Appellant/accused no.3 Aftab Shaikh was not arrested on the day of the incident i.e. 16th August 2008, but he was arrested on 18th August 2008. Hence, there is no possibility of PW1 Farzana Khan seeing his accused prior to the Test Identification Parade nor evidence on record indicates that the identifying witnesses were having opportunity to see appellant/accused no.3 Aftab Shaikh prior to the Test Identification Parade.

15 Evidence on record adduced by the prosecution, thus, unerringly establishes that the wrist watch recovered at the instance of appellant/accused no.3 Aftab Shaikh is the same wrist watch, which was robbed from her house during the course of incident on 16th August 2008. The wrist watch identified by PW1 Farzana Khan and which is recovered from appellant/accused no.3 Aftab Shaikh is an article of daily use of PW1 Farzana Khan, and therefore, her identification of her wrist watch cannot be suspected.

16 The net result of foregoing discussion requires me to hold that appellant/accused no.1 Naushad @ Azad Shaikh and appellant/accused no.3 Aftab Shaikh had entered in the house of PW1 Farzana Khan, armed with deadly weapons, on 16th August 2008, and robbed PW1 Farzana Khan of her wrist watch after causing hurt to her by a sharp edged weapon. Thus, the prosecution has successfully proved offences punishable under Sections 397 and 452 read with 34 of the Indian Penal Code. The learned trial court has convicted appellant/accused no.1 Naushad @ Azad Shaikh and appellant/accused no.3 Aftab Shaikh also for offences punishable under Sections 392 and 394 read with 34 of the Indian Penal Code and separate sentence came to be awarded for the offence punishable under Section 394 read with 34 of the Indian Penal Code. Section 397 of the Indian Penal Code provides for punishment for robbery whereas Section 394 of the Indian Penal Code provides for punishment for voluntarily causing hurt in committing robbery and Section 397 of the Indian Penal Code deals with robbery using deadly weapons or causing grievous hurt to any person as well as attempt to cause death or grievous hurt to

any person during commission of the robbery. Minimum sentence for commission of such offences is provided in Section 394 and Section 397 of the Indian Penal Code. Section 394 of the Indian Penal Code deals with punishment for committing or attempt to commit robbery and voluntarily causing hurt to the victim. Essential ingredients of Section 397 of the Indian Penal Code are commission of robbery, using deadly weapons while committing robbery, causing grievous hurt or attempt to cause grievous hurt or death of the victim. Therefore, after convicting the offender for the offence punishable under Section 397 of the Indian Penal Code, there is no necessity to impose separate punishment for the offence punishable under Section 394 read with 34 of the Indian Penal Code. Section 71 of the Indian Penal Code provides that where anything, which is an offence, is made up of parts, any of which part is itself an offence, the offender shall not be punished with the punishment of more than one of such offence, unless it be so expressly provided. Therefore, separate punishment for the offence punishable under Section 394 read with 34 of the Indian Penal Code to appellants/accused persons is unjustified in the

wake of their conviction for offence punishable under Sections 392 and 397 read with 34 of the Indian Penal Code. The appeal, therefore, deserves to be allowed to that extent only. Hence, the order :

ORDER

- i) The appeal is partly allowed.
- ii) Conviction of appellants/accused persons recorded by the learned trial court is confirmed. However, sentence imposed by the learned trial court on the appellants/accused persons for the offence punishable under Section 394 read with 34 of the Indian Penal Code is quashed and set aside. Fine amount, if any paid by them on this count, be refunded to them.
- iii) Needless to mention that sentence on other counts is not interfered with.
- iv) The appeal is accordingly disposed of.

(A. M. BADAR, J.)