

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.312 OF 2013

PANKAJ @ RAHUL RAMGOPAL JAGARIA)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

WITH

CRIMINAL APPEAL NO.349 OF 2013

PAVAN VASUDEO SHARMA)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Ms.Nasreen Ayubi, Advocate for the Appellants in both appeals.

Ms.Anamika Malhotra, APP for the Respondent – State in Criminal Appeal No.312 of 2013.

Mr.Prashant Jadhav, APP for the Respondent – State in Criminal Appeal No.349 of 2013.

CORAM : A. M. BADAR, J.

DATE : 12th MARCH 2018

JUDGMENT :

1 Criminal Appeal No.312 of 2013 is filed by appellant/accused no.2 Pankaj @ Rahul Ramgopal Jagaria whereas Criminal Appeal No.349 of 2013 is filed by appellant/accused no.1 Pavan Vasudeo Sharma. They both were tried for offences punishable under Sections 307, 394 and 332 read with 34 of the Indian Penal Code in Sessions Case No.539 of 2006 before the learned Additional Sessions Judge, Pune, and by the impugned judgment and order dated 10th January 2011, they are convicted of offences punishable under Section 394 read with 34 and Section 332 read with 34 of the Indian Penal Code. For the offence punishable under Section 394 read with 34 of the Indian Penal Code, they both are sentenced to suffer rigorous imprisonment for 7 years apart from payment of fine of Rs.1,000/-, and in default, to undergo rigorous imprisonment for 3 months. For the offence punishable under Section 332 read with 34 of the Indian Penal Code, they are sentenced to suffer rigorous imprisonment for 2 years. The substantive sentences are directed to run concurrently by the learned trial court.

2 Brief facts leading to the prosecution of appellants/accused can be summarized thus :

- (a) PW2 Vishnu Nangare, Police Constable, at the relevant time was attached to Police Station Nigdi. The incident in question took place in the night intervening 20th December 2005 and 21st December 2005. On that day, he was entrusted with the duty of Commando and he was supposed to undertake night patrolling on motorcycle bearing No.MH-12-JA-450. Similar duty was also entrusted to PW3 Arvind Pawar, Police Constable. He, therefore, took another motorcycle bearing no.MH-12-G-353. At about 9.45 p.m. of 20th December 2005, they both proceeded for night patrolling duty. They undertook patrolling of area known as Ota Scheme, Nigdi and proceeded towards Anandnagar Thermax Square and thereafter to Dalvinagar. PW3 Arvind Pawar, Police Constable, was ahead of PW2 Vishnu Nangare. Police Constable PW3 Arvind Pawar thereafter turned towards Lokmanya Hospital, Nigdi. PW2 Vishnu Nangare, Police Constable, followed him. When PW2 Vishnu

Nangare, Police Constable, reached the railing of Nigdi bridge, he found a motorcycle parked near the railing. Two persons were standing on one side of the bridge whereas the another one was standing on the other side. When PW2 Vishnu Nangare, Police Constable, reached near the parked motorcycle, the person standing on one side of the bridge threw some object like rope to other persons who were standing on the opposite side. PW2 Vishnu Nangare, Police Constable, suspected some foul play and therefore, he slowed his motorcycle. All of a sudden, the trio pounced upon him. His revolver was snatched by one of them. He was given five or six blows on head by the butt of his revolver by the assailants, causing bleeding injury to him. Thereafter, all three robbers fled from the spot by a motorcycle of Bajaj Boxer make bearing Registration No.MH-12-AC-4827.

- (b) PW2 Vishnu Nangare, Police Constable, informed the incident to Nigdi Police Station as well as his associate PW3

Arvind Pawar, Police Constable. PW3 Arvind Pawar, Police Constable, then took PW2 Vishnu Nangare to Lokmanya Hospital, Nigdi, for medical treatment. There, First Information Report Exhibit 36 of PW2 Vishnu Nangare came to be recorded and accordingly, Crime No.506 of 2005 for offences punishable under Sections 332 and 394 of the Indian Penal Code came to be registered. Routine investigation followed. Appellants/accused came to be arrested. Clothes of the informant came to be seized under panchnama Exhibit 14. Spot panchnama Exhibit 65 came to be recorded. Then the charge-sheet came to be filed.

- (c) Appellants/accused persons pleaded not guilty and claimed trial. In order to bring home the guilt to appellants/accused, the prosecution has examined in all eight witnesses. The panch witness Yeshwant Khune is examined as PW1. He witnessed seizure of clothes of appellants/accused vide panchnama Exhibit 16. First Informant Vishnu Nangare, Police Constable is examined as PW2. Arvind Pawar, Police

Constable, is examined as PW3. Security guard of Lokmanya Hospital Vikas Gaikwad is examined as PW4. Medical Officer of Lokmanya Hospital Dr.Vikas Patil is examined as PW5. PW6 and PW7 namely Vinod Bhosale and Ashok Bardia are panch witnesses. Investigating Officer Anant Nikam is examined as PW8. Defence of appellants/accused is that of total denial.

- (d) After hearing the parties, by the impugned judgment and order, the learned trial court was pleased to convict appellants/accused for offences punishable under Sections 394 and 332 read with 34 of the Indian Penal Code and they are sentenced as indicated in the opening paragraph of the judgment.

3 I have heard Ms.Ayubi, the learned advocate appointed to represent both appellants/accused at the cost of the State. She argued that evidence of the prosecution is discrepant and lacunic. The prosecution has not proved the offence. The

revolver allegedly looted from the First Informant was never seized. The incident took place in the midnight and there is no evidence regarding proper identification of appellants/accused. Therefore, they are entitled for benefit of doubt.

4 The learned APP supported the impugned judgment and order by contending that evidence of PW4 Vikas Gaikwad shows that there was street light as well as moonlight available on the spot. The identification is proper and evidence of prosecution is sufficient to establish guilt of appellants/accused.

5 I have carefully considered the rival submissions and also perused the Record and Proceedings including the oral as well as documentary evidence.

6 PW2 Vishnu Nangare, Police Constable, who is alleged victim of the crime in question is a star witness for the prosecution. His categorical evidence shows that on 20th December 2005, on two different motorcycles, he along with his

colleague Police Constable PW3 Arvind Pawar had left Nigdi Police Station at about 9.45 p.m. for doing night patrolling in their territorial jurisdiction. They conducted patrolling at Anandnagar area, Thermax square area as well as Dalvinagar. Thereafter, as seen from evidence of PW2 Vishnu Nangare, Police Constable, they both proceeded towards Gawade Mala area and at that time, PW3 Arvind Pawar, Police Constable, was proceeding ahead of PW2 Vishnu Nangare, Police Constable. He turned towards Lokmanya Hospital, Nigdi, and therefore, PW2 Vishnu Nangare, Police Constable, also followed him on his motorcycle.

7 As seen from evidence of PW2 Vishnu Nangare, Police Constable, the incident took place at the bridge of Nigdi. He stated that he saw a motorcycle parked at the railing of the said bridge. Two persons were standing on one side of the bridge whereas one was standing on the other side of the bridge. PW2 Vishnu Nangare, Police Constable, noticed throwing of an object like rope by person standing on one side of the bridge towards two others who were standing opposite. This, naturally, caused

suspicion in the mind of PW2 Vishnu Nangare, Police Constable. He deposed that, he, therefore, stopped his motorcycle and immediately thereafter, all three persons pounced upon him. On checking his pant pocket, one of those persons noticed that he is having revolver. His revolver was then snatched. Two persons had beaten him by means of fist and kick blows whereas the third one gave blows of butt of the revolver on his head. Apart from this, as per version of PW2 Vishnu Nangare, Police Constable, the person holding the revolver attempted to fire but could not, as the revolver was locked. By taking his revolver with them, they all fled from the spot and he suffered giddiness. From his cell phone he informed the incident to Nigdi Police Station as well as to PW3 Arvind Pawar, Police Constable. Then, he was taken to Lokmanya Hospital by PW3 Arvind Pawar, Police Constable, where his FIR Exhibit 37 came to be recorded.

8 PW2 Vishnu Nangare, Police Constable, has deposed that thereafter on 16th January 2006, Senior Police Inspector of Nigdi Police Station showed four suspects to him from which he

identified two persons to be the robbers. PW2 Vishnu Nangare, Police Constable, deposed that the accused persons present before the court are the same persons who robbed him.

9 Cross-examination of PW2 Vishnu Nangare, Police Constable, shows that at the time of the incident, there was darkness on the road. The spot of the incident was a barren land from which a stream passes. He, further, admitted that, three robbers abruptly came near him and the incident took place.

10 Version of PW2 Vishnu Nangare, Police Constable, about the incident of robbery is gaining corroboration from evidence of PW3 Arvind Pawar, Police Constable. He stated that, he along with PW2 Vishnu Nangare, Police Constable, were doing patrolling from 9.45 p.m. of 20th December 2005 and when he was proceeding from Gawade Mala area, he got a phone call from PW2 Vishnu Nangare, Police Constable, and therefore, he came back and saw PW2 Vishnu Nangare, Police Constable, in an injured condition. This witness also proved former statement of

PW2 Vishnu Nangare, Police Constable, regarding robbing of revolver. As per version of PW3 Arvind Pawar, Police Constable, he, thereafter, admitted PW2 Vishnu Nangare, Police Constable, to Lokmanya Hospital, Nigdi.

11 Cross-examination of PW3 Arvind Pawar, Police Constable, shows that the incident took place in an area surrounded by trees. PW4 Vikas Gaikwad is the security guard working at Lokmanya Hospital, Chinchwad. He claims himself to be an eye witness to the incident in question. He deposed that while proceeding from the road at Gawade Mala, at about 10.30 to 10.45 p.m., on 20th December 2005, he saw three persons assaulting one person in the moonlight as well as electric light on that spot. Subsequently, the police brought injured PW2 Vishnu Nangare, Police Constable, to Lokmanya Hospital for treatment.

12 Most glaring infirmity in evidence of this witness is to the effect that this witness has not identified any of the appellants/accused while in the dock. Rather, the Public

Prosecutor had not pointed out appellants/accused to him during the course of recording of his evidence in order to ascertain whether he is in a position to identify the robbers, whom he alleged to have seen assaulting PW2 Vishnu Nangare, Police Constable. Moreover, evidence of this witness that there was moonlight as well as electric light on the scene of occurrence is coming on record by way of omission.

13 The harmonious reading of evidence of all these seven witnesses goes to show that PW3 Arvind Pawar, Police Constable, who was in the vicinity at the time of the incident, had not seen any of the robbers. PW4 Vikas Gaikwad, who claims to have seen the incident as well as the robbers, was not shown appellants /accused for the purpose of identification. PW2 Vishnu Nangare, Police Constable, the First Informant as well as the victim of the crime in question is stating that there was darkness on the spot of the incident and the incident took place abruptly. His cross-examination reveals that the spot was surrounded by barren land a stream. Exhibit 65 is the panchnama of the spot of the incident

prepared by the Investigator. The spot panchnama does not show that there was any source of light on the spot of the incident. What is noted in the spot panchnama is existence of iron pole of light on the northern side of the road. The spot panchnama reveals that neither there was any house in the vicinity of the spot of the incident nor there were street lights on the spot, which was on the road proceeding from Gawade Mala to Udyog Nagar, Chinchwad. Thus, the incident happened at an isolated spot in the midnight of the night intervening 20th December 2005 and 21st December 2005. Cross-examination of PW8 Anant Nikam, the Investigating Officer, reveals that when he inspected the spot in the night, it was dark. Thus, the incident took place in the dark night on a spot where the visibility was poor. Evidence on record does not indicate that there was electric pole with electric light in a lit condition near the spot of the occurrence. Evidence of PW2 Vishnu Nangare, Police Constable, and PW3 Arvind Pawar, Police Constable, is conspicuously silent regarding availability of light or street light at the spot or in the vicinity of the spot. The spot panchnama does not reveal availability of source of light at the

spot. Investigating Officer PW8 Anant Nikam, Police Sub-Inspector, who immediately proceeded to the spot after the incident, did not find availability of moonlight thereat, nor he found any streetlight. Even the FIR Exhibit 37 lodged by injured PW2 Vishnu Nangare, Police Constable, does not show that source of light was available on the spot of the incident. It is a matter of common knowledge that in the darkness, unknown persons cannot be identified unless and until there is sufficient opportunity to see such persons. In this view of the matter, holding that appellants/ accused persons are the same persons who robbed PW2 Vishnu Nangare, Police Constable, of his firearm in the midnight, would be risky and evidence regarding identification of appellants/ accused coming on record from mouth of PW2 Vishnu Nangare, Police Constable, is doubtful. He claims to have been shown four suspects on 16th January 2006 out of which he identified two persons. Even the Test Identification Parade was not conducted by the prosecution to lend assurance to the evidence of PW2 Vishnu Nangare, Police Constable. To crown this all, despite thorough investigation, the Investigator could not recover the

firearm allegedly robbed from PW2 Vishnu Nangare, Police Constable.

14 The prosecution is relying on the voluntary disclosure statement of appellants/accused persons which is at Exhibit 57. This statement is recorded on 20th January 2006. The fact which the prosecution is alleged to have discovered on the basis of disclosure statement of the accused persons is the spot of the incident. This spot of the incident was already known to the police, in view of the fact that the same was shown by PW2 Vishnu Nangare, Police Constable, and that, on 21st December 2005 itself, by inspecting the spot, the Investigator had seized the walkie talkie therefrom.

15 Except this, there is no evidence to connect appellants/accused to the crime in question. Though the prosecution has established that PW2 Vishnu Nangare, Police Constable, was robbed of his firearm in the night hours of 20th December 2005 at Nigdi bridge after causing injuries to him, as

seen from evidence of PW5 Dr.Vikas Patil, the prosecution has failed to establish the fact that those were appellants/accused persons along with the absconding accused, who committed robbery of the firearm after causing hurt to First Informant PW2 Vishnu Nangare, Police Constable. In the result, the appeals deserve to be allowed, and therefore, the order :

ORDER

- i) Both the appeals are allowed.
- ii) The impugned judgment and order dated 10th January 2011 passed by the learned Additional Sessions Judge, Pune, in Sessions Case No.539 of 2006 is quashed and set aside.
- iii) Both appellants/accused persons are acquitted of offences punishable under Sections 394 and 332 read with 34 of the Indian Penal Code.
- iv) They be set at liberty forthwith if not required in any other case.
- v) Fine amount, if any paid by them, be refunded to them.
- vi) The appeals stand disposed of in above terms.

(A. M. BADAR, J.)