

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

**CRIMINAL APPEAL NO.376 OF 2015
WITH
CRIMINAL APPLICATION NO.1452 OF 2017
AND
CRIMINAL APPLICATION NO.382 OF 2015
AND
CRIMINAL APPLICATION NO.383 OF 2015
IN
CRIMINAL APPEAL NO.376 OF 2015**

SANTOSHKUMAR SHRIJAYLAL ROY)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.Abhaykumar Apte, Appointed Advocate for the Appellant.

Mr.Prashant Jadhav, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 21st MARCH 2018

ORAL JUDGMENT :

1 By this appeal, appellant/accused no.1 Santoshkumar Roy is challenging the judgment and order dated 28th January

2015 passed by the learned Additional Sessions Judge, Pune, in Sessions Case No.528 of 2012, thereby convicting the appellant/accused no.1 Santoshkumar Roy of offences punishable under Sections 75, 393 read with 34, 397 and 398 read with 34 of the Indian Penal Code as well as under Sections 3 read with 25 of the Arms Act. The learned trial court, upon conviction of the appellant/accused no.1 Santoshkumar Roy for the offence punishable under Section 393 read with 34 of the Indian Penal Code, has sentenced him to suffer rigorous imprisonment for 3 years apart from imposition of fine of Rs.2,000/-, and default sentence for 3 months. Similarly, by convicting appellant/accused no.1 Santoshkumar Roy for the offence punishable under Section 397 and 398 read with 34 of the Indian Penal Code, he has been sentenced to suffer rigorous imprisonment for 7 years. Appellant/accused no.1 Santoshkumar Roy is separately convicted for the offence under Section 75 of the Indian Penal Code by the learned trial court and on this count, he has been sentenced to suffer rigorous imprisonment for 7 years. It appears that, without assigning any reason, despite conviction of appellant/accused no.1

Santoshkumar Roy for offences punishable under Sections 3 read with 25 of the Arms Act, the learned trial court has failed to impose sentence on this count.

2 Briefly stated, case of the prosecution is thus :

- (a) PW1 Santosh Parage is owner of Omkar Jewellers situated opposite to Dominoz Pizza Hut, Magar Patta, Hadapsar, Pune. The incident in question took place at about 1.15 p.m. of 11th May 2012. Appellant/accused no.1 Santoshkumar Roy, according to the prosecution case, is a convict who was found to be guilty of offences punishable under Sections 302 read with 120B, 364A read with 120B, 387 read with 120B and 201 read with 120B of the Indian Penal Code in Sessions Case No.14 of 2002 decided by the learned 2nd Additional Sessions Judge, Pune, on 18th May 2004 and at the relevant time, he was undergoing the sentence of imprisonment for life as well as sentences imposed on him on other counts in that case. The incident took place when appellant/accused no.1 Santoshkumar Roy was on furlough leave.

- (b) According to the prosecution case, appellant/accused no.1 Santoshkumar Roy along with co-accused Sonu Joseph reached at the Omkar Jewellers at about 1-1.15 p.m. of 11th May 2012. While appellant/accused no.2 Sonu Joseph was waiting outside the said jewellery shop, appellant/accused no.1 Santoshkumar Roy entered inside the jewellery shop and informed PW1 Santosh Parage that he wants to purchase a gold chain. PW1 Santosh Parage suspected bonafides of appellant/accused no.1 Santoshkumar Roy. He refused on the pretext that owner of the shop is not available and that appellant/accused no.1 Santoshkumar Roy should come to the shop at 5.30 p.m. Upon that, appellant/accused no.1 Santoshkumar Roy took out a pistol and by pointing it at PW1 Santosh Parage, attempted to snatch gold ornaments from the counter of the shop. PW1 Santosh Parage then pressed the alarm and pounced upon appellant/accused no.1 Santoshkumar Roy. He dragged appellant/accused no.1 Santoshkumar Roy outside the shop

and then both indulged in scuffle. In the melee, appellant/accused no.1 Santoshkumar Roy fired a pistol while he was being dragged out of the shop and the bullet pierced into the ceiling of the shop. During the course of the scuffle, the people caught hold of appellant/accused no.1 Santoshkumar Roy and appellant/accused no.2 Sonu Joseph fled from the spot by a motorcycle. The incident of scuffle between appellant/accused no.1 Santoshkumar Roy and PW1 Santosh Parage was witnessed by PW5 Ganesh Gade. Similarly, the post event happenings were witnessed by PW4 Santosh Gosavi, Police Constable, who was on patrolling duty along with Assistant Commissioner of Police V.T.Pawar. Pistol held by appellant/accused no.1 Santoshkumar Roy was snatched. The police then took appellant/accused no.1 Santoshkumar Roy as well as PW1 Santosh Parage to Police Station Hadapsar, where PW1 Santosh Parage lodged the First Information Report (FIR) Exhibit 8.

- (c) The police team accompanied by PW1 Santosh Parage returned to the spot of the incident and in presence of PW2 Shankar Pimplekar, drew spot panchnama Exhibit 15. One empty cartridge came to be seized.
- (d) At Police Station Hadapsar, PW6 Vishambhar Gorde, Police Inspector, seized the pistol along with live cartridges from appellant/accused no.1 Santoshkumar Roy vide Seizure Panchnama Exhibit 18 prepared in presence of PW3 Sanjay Tithe – a panch witness. Seized pistol, live cartridges as well as the empty were sent for ballistic opinion. After completing routine investigation, appellant/accused no.1 Santoshkumar Roy came to be charge-sheeted.
- (e) The learned trial court framed the Charge for offences punishable under Sections 393 read with 511 and 34 of the Indian Penal Code and under Sections 397 read with 398 and 34 of the Indian Penal Code as well as under Section 25 read with 3 of the Indian Arms Act. Appellant/accused no.1

Santoshkumar Roy abjured his guilt and claimed trial. During the course of his trial, appellant/accused no.1 Santoshkumar Roy was charged for the offence under Section 75 of the Indian Penal Code.

- (f) In order to bring home the guilt to the appellant/accused, the prosecution has examined in all seven witnesses. First Informant Santosh Parage is examined as PW1. The FIR lodged by him is at Exhibit 8. Panch witness Shankar Pimplekar is examined as PW2 and the spot panchnama is at Exhibit 15. Another panch witness Sanjay Tithe is examined as PW3 and panchnama of seizure of the pistol and the live cartridges is at Exhibit 18. PW4 Santosh Gosavi – Police Constable and PW5 Ganesh Gade – a Vadapav stall owner are eye witnesses to the post event happenings. PW6 Vishambhar Gorde, Police Inspector, and PW7 Sunil Pandalkar are the Police Officers who investigated the crime in question.

- (g) Defence of the appellant/accused no.1 Santoshkumar Roy was that of total denial. However, he did not enter in defence.
- (h) Upon hearing the parties, by the impugned judgment and order, the learned trial court was pleased to convict appellant/accused no.1 Santoshkumar Roy for offences under Sections 75, 393, 397, 398 read with 34 of the Indian Penal Code as well as under Section 3 read with 25 of the Arms Act. He came to be sentenced as indicated in the opening paragraph of the judgment. The learned trial court further directed that substantive sentences shall run concurrently.

3 I have heard Shri Apte, the learned advocate appointed to represent appellant/accused no.1 Santoshkumar Roy, at the cost of the State. By drawing my attention to Section 71 of the Indian Penal Code, Shri Apte, the learned advocate argued

that, the learned trial court ought not to have sentenced appellant/accused no.1 Santoshkumar Roy for the offence punishable under Section 393 as well as for offences punishable under Sections 397 and 398 of the Indian Penal Code. At the most, the learned trial court, if found appellant/accused no.1 Santoshkumar Roy guilty, should have convicted and sentenced him for the offence punishable under Section 398 of the Indian Penal Code. The learned advocate further argued that no separate sentence should have been imposed by the learned trial court on appellant/accused no.1 Santoshkumar Roy for the offence under Section 75 of the Indian Penal Code, after sentencing him for offences punishable under Sections 393, 397 and 398 of the Indian Penal Code. The learned advocate further argued that the prosecution has failed to prove the offence of possession of firearm in absence of the sanction to prosecute him for the said offence.

4 The learned APP supported the impugned judgment and order of conviction and the resultant sentence by contending

that there are eye witnesses to the incident in question apart from the victim of the crime in question and conviction of appellant/accused no.1 Santoshkumar Roy as well as the resultant sentence is proper.

5 I have carefully considered the rival submissions and also perused the Record and Proceedings including oral as well as documentary evidence. I am of the considered opinion that the learned trial court ought not to have imposed separate sentence on appellant/accused no.1 Santoshkumar Roy for the offence punishable under Section 393 of the Indian Penal Code and he should not have been convicted of the offence punishable under Section 397 of the Indian Penal Code as well as for the offence punishable under Section 3 read with 25 of the Arms Act. Similarly, the learned trial court ought not to have convicted appellant/accused no.1 Santoshkumar Roy under Section 75 of the Indian Penal Code and he should not have been imposed separate sentence of 7 years on that count. However, conviction of appellant/accused no.1 Santoshkumar Roy for the offence

punishable under Section 398 read with 34 of the Indian Penal Code cannot be faulted with for the reasons given below.

6 PW1 Santosh Parage – the First Informant is the victim of the crime in question. His version, to the effect that at about 1-1-15 p.m. of 11th May 2012, two persons came to his shop on a motorcycle, out of which, one entered in his shop, whereas the another waited outside the shop, is virtually unshattered in the cross-examination. PW1 Santosh Parage further deposed that then the person who entered in the shop informed him that he wanted to purchase a gold chain. Suspecting his credentials, as stated by PW1 Santosh Parage, he told that person that the owner is not available and he should come at 5.30 p.m. Upon hearing that, the person who entered in the shop, took out a pistol and attempted to snatch gold ornaments from the counter. PW1 Santosh Parage further testified that then he pressed the switch of the alarm and jumped upon that person from the counter. The robber then fired from the firearm and the bullet pierced the ceiling of the shop. PW1 Santosh Parage then deposed that then

he made hue and cry and pulled the robber outside the shop. People gathered on the spot, then caught hold of the robber. That is how PW1 Santosh Parage has described the incident. By stating that the person who was apprehended on the spot has told his name as Santoshkumar Roy, PW1 Santosh Parage has identified appellant/accused no.1 Santoshkumar Roy while in the dock. Despite searching cross-examination of this First Informant, nothing could be brought on record to disbelieve his evidence regarding identity of appellant/accused no.1 Santoshkumar Roy as the robber, who entered in the shop and attempted to loot the gold ornaments. Insignificant stuff is brought on record from cross-examination of this First Informant. He admitted that he had not produced the register or the stock register before the police. The First Informant further stated in the cross-examination that during the scuffle, appellant/accused no.1 Santoshkumar Roy tried to run away. His cross-examination reflects that due to commotion, passing police van stopped on the spot. Police personnel from Hadapsar Police Station were in that van. Thus, the prosecution case is being cemented by bringing

this material on record from the cross-examination. It was brought on record that appellant/accused no.1 Santoshkumar Roy tried to run away during the scuffle and presence of the police on the spot is also brought on record through the cross-examination.

7 PW5 Ganesh Gade is a neighbouring Vadapav stall owner. His evidence shows that he heard the sound of the siren as well as the sound of a fire bullet and therefore, he rushed to see two persons scuffling outside the Omkar Jewellers, one of whom was holding a pistol, whereas the another was owner of the Omkar Jewellers namely PW1 Santosh Parage. PW5 Ganesh Gade has identified appellant/accused no.1 Santoshkumar Roy as that another person who had indulged in the scuffle holding a pistol in his hand. Apart from identifying appellant/accused no.1 Santoshkumar Roy, PW5 Ganesh Gade had identified the pistol. From his cross-examination it is brought on record that his shop is located just 40 to 50 feet from Omkar Jewellers, and when he reached on the spot, about 100 people had gathered there and subsequently, police arrived on the spot. This material is, in no

way, casting a shadow of doubt on version of PW5 Ganesh Gade. He appears to be a witness of truth because he has fairly accepted in the cross-examination that the pistol held by appellant/accused no.1 Santoshkumar Roy was snatched by the people who had gathered on the spot.

8 PW4 Santosh Gosavi is a Police Constable, who arrived on the spot during the course of patrolling, upon getting wireless call. His version shows that he was accompanying Assistant Commissioner of Police V.T.Pawar and was patrolling in the area. On getting information that two persons are scuffling and one was holding a pistol, PW4 Santosh Gosavi, Police Constable, along with police party rushed to the spot and found two persons scuffling there with one holding a pistol in his hand. As per version of PW4 Santosh Gosavi, Police Constable, Assistant Commissioner of Police V.T.Pawar snatched the pistol and handed over the same to the police party on the spot itself. As per version of PW4 Santosh Gosavi, Police Constable, PW1 Santosh Parage had told them about firing a bullet from that pistol by

appellant/accused no.1 Santoshkumar Roy. In cross-examination, PW4 Santosh Gosavi, Police Constable, has accepted the fact that at the police station, he saw the pistol with Police Inspector Vishambhar Gorde (PW6).

9 Appellant/accused no.1 Santoshkumar Roy was apprehended on the spot as seen from the evidence of PW1 Santosh Parage, PW4 Santosh Gosavi and PW5 Ganesh Gade. All these witnesses have duly identified appellant/accused no.1 Santoshkumar Roy as the robber who was scuffling with PW1 Santosh Parage. Evidence of these witnesses show that the pistol held by him was snatched by police from his hand and he was then taken to the police station.

10 Evidence of PW1 Santosh Parage and that of PW2 Shankar Pimplekar as well as PW6 Vishambhar Gorde, Police Inspector, shows that on the day of the incident i.e. on 11th May 2012 itself, the spot was inspected and spot panchnama Exhibit 15 came to be prepared. In presence of the panch witness and the

First Informant PW1 Santosh Parage, an empty cartridge came to be seized during the course of preparation of the spot panchnama from Omkar Jewellers. This evidence is fully corroborating the version of PW1 Santosh Parage – owner of Omkar Jewellers and demonstrate that during the course of attempting the robber, appellant/accused no.1 Santoshkumar Roy fired a round from the pistol held by him at the shop of Omkar Jewellers.

11 It is case of the prosecution that at police station, personal search of appellant/accused no.1 Santoshkumar Roy was conducted and during his personal search, a pistol with four live cartridges came to be seized vide panchnama Exhibit 18 in presence of PW3 Sanjay Tithe. This exercise is allegedly done by PW6 Vishambhar Gorde, Police Inspector. However, this evidence is unworthy of credence as evidence of PW4 Santosh Gosavi, Police Constable, as well as that of PW1 Santosh Parage and PW5 Ganesh Gade goes to show that when PW1 Santosh Parage and appellant/accused no.1 Santoshkumar Roy had indulged in a scuffle, the pistol was snatched from the hand of

appellant/accused no.1 Santoshkumar Roy, and thereafter, he was taken to the police station by the police. It does not stand to reason that police would again hand over the pistol to appellant/accused no.1 Santoshkumar Roy – a robber while undertaking the journey towards the police station and then at the police station would again recover that pistol by undertaking the exercise of personal search of appellant/accused no.1 Santoshkumar Roy. No sane policeman will hand over the pistol with live cartridges to the robber while fetching him to the police station, at the cost of his life and then will recover the same at the police station. This part of the evidence adduced by the prosecution is, therefore, totally unreliable. However, the evidence on record does show that the pistol was seized from appellant/accused no.1 Santoshkumar Roy and it was containing live rounds. It was fired during the course of attempting the robbery.

12 It is seen from the evidence of PW6 Vishambhar Gorde, Police Inspector, that the seized firearm along with four live rounds and one empty were sent to the ballistic expert for the

opinion. Report of Forensic Science Laboratory is at Exhibit 43. Upon examination of the pistol as well as seized cartridges and the empty, the Assistant Chemical Analyser (Ballistic) had reported that the seized pistol is a country made pistol capable of chambering and firing 7.65 mm pistol cartridges. Residue of fired ammunition – nitrite – was detected in the barrel washings of the said country made pistol showing that it was used for firing prior to its receipt in the laboratory. The empty seized from the spot is reported to be having characteristic feature of drag mark on the base brass portion of the empty tallying with drag mark on cartridge test fired through the said country made pistol. Thus, this report at Exhibit 43 shows that the seized pistol was, infact, fired at the Omkar Jewellers and the empty seized from the shop of Omkar Jewellers was tallying with the test fired empty of the seized pistol. This forensic evidence, as such, supports and corroborates the version of PW1 Santosh Parage to the effect that appellant/accused no.1 Santoshkumar Roy entered in his shop and attempted to rob gold jewellery by pointing a pistol and firing a round from it.

13 The prosecution has placed on record the certified copy of the judgment and order (Exhibit 40) passed by the learned 2nd Additional Sessions Judge, Pune, in Sessions Case No.14 of 2002 decided on 18th May 2004. Appellant/accused no.1 Santoshkumar Roy is shown to be accused no.3 in the said Sessions Case No.14 of 2002. Perusal of the certified copy of the judgment and order in Sessions Case No.14 of 2002 reflects that apart from convicting appellant/accused no.1 Santoshkumar Roy for the offence punishable under Section 302 read with 120B of the Indian Penal Code, he has been convicted of the offence punishable under Section 387 read with 120B of the Indian Penal Code and is sentenced to suffer rigorous imprisonment for 7 years apart from fine on this count. It is, thus, clear that, appellant/accused no.1 Santoshkumar Roy, at the time of facing the trial of the instant case, was a convict of the offence punishable under Chapter XVII of the Indian Penal Code which deals with offences against property. Section 387 of the Indian Penal Code provides for imposition of sentence of imprisonment of either description for a term which may extend to 7 years. Thus,

appellant/accused no.1 Santoshkumar Roy was convicted for the offence punishable under Chapter XVII of the Indian Penal Code with imprisonment for a term of 3 years or upward. The prosecution has proved this fact.

14 In his cross-examination, PW1 Santosh Parage has candidly accepted the fact that no ornaments from his jewellery shop came to be robbed during the course of the incident. This makes the proved act as an attempt to rob the jewellery shop while armed with deadly weapon. Thus, the prosecution has proved that appellant/accused no.1 Santoshkumar Roy, in furtherance of his common intention with co-accused had attempted to commit robbery at Omkar Jewellers while armed with a pistol. Undoubtedly, the loaded pistol is a deadly weapon and it was fired during the course of the attempted robbery. Thus, conviction of appellant/accused no.1 Santoshkumar Roy for the offence punishable under Section 398 read with 34 of the Indian Penal Code cannot be faulted with. Section 393 of the Indian Penal Code deals with attempt to commit robbery. Section 398 of

the Indian Penal Code is an aggravated form of this offence. The learned trial court ought not to have sentenced appellant/accused no.1 Santoshkumar Roy separately for the offence punishable under Section 393 of the Indian Penal Code as is done by it. At this juncture, provisions of Section 71 of the Indian Penal Code can be quoted with advantage :

“Section 71 - Limit of punishment of offence made up of several offences — Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such his offences, unless it be so expressly provided.

Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or

where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence, the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences.”

15 It is, thus, clear that when several acts of which one or more than one would by itself or themselves constitute an offence, constitute when combined a different offence, then the offender cannot be punished with a more severe punishment than the court which tries him could award for any such offence. Hence, imposition of separate sentence for the offence punishable under Section 393 of the Indian Penal Code by the learned trial court is unjustified. Similarly, the learned trial court has also convicted and separately sentenced appellant/accused no.1 Santoshkumar Roy for 7 years under Section 75 of the Indian Penal Code. This is also improper. Section 75 of the Indian Penal Code is invoked for enhancement of the sentence and that comes only at the time of imposition of sentence. Section 75 makes a provision for enhanced punishment / sentence for the second conviction. To simplify, once accused is convicted for the offence punishable under Chapters XII or XVII of the Indian Penal Code with imprisonment for a term of 3 years or upward, then on recording his second conviction for any offence punishable under either of

those chapters with imprisonment for a term of 3 years or upward, such accused is liable for subsequent offence to imprisonment for life or to imprisonment of either description for a term which may extend to 10 years. Section 75 of the Indian Penal Code does not create substantial offence but it prescribes enhanced punishment for second conviction for certain offences. The effect of Section 75 of the Indian Penal Code is reflected on quantum of sentence to be imposed on the accused on his second conviction. Therefore, the learned trial court after inflicting punishment for the offence punishable under Section 398 of the Indian Penal Code on appellant/accused no.1 Santoshkumar Roy is not justified in separately sentencing him for 7 years rigorous imprisonment under Section 75 of the Indian Penal Code. Similarly, appellant/accused no.1 Santoshkumar Roy is also convicted for the offence punishable under Section 397 of the Indian Penal Code which deals with using of deadly weapon, causing grievous hurt or attempt to cause death or grievous hurt during conducting robbery or dacoity. Commission of robbery or dacoity is sine-qua-non for the offence punishable under Section

397 of the Indian Penal Code. Case in hand is that of attempting robbery and therefore, the learned trial court erred in convicting appellant/accused no.1 Santoshkumar Roy of the offence punishable under Section 397 read with 34 of the Indian Penal Code.

16 The learned trial court is pleased to convict appellant/accused no.1 Santoshkumar Roy for the offence punishable under Section 3 read with 25 of the Arms Act. Appellant/accused no.1 Santoshkumar Roy is convicted for acquisition as well as possession of firearm as well as ammunition in contravention of provisions of Section 3 of the Arms Act, 1959. Section 39 of the Arms Act, 1959, mandates that no prosecution shall be instituted against any person in respect of the offence under Section 3 without previous sanction of the District Magistrate. In the case in hand, as observed by the learned trial court, the prosecution has failed to bring on record the evidence regarding previous sanction to prosecute appellant/accused no.1 Santoshkumar Roy on this count. For want of previous sanction,

appellant/accused no.1 Santoshkumar Roy could not have been convicted of this offence.

17 In the result, the appeal is partly allowed with the following order :

ORDER

- i) Appellant/accused no.1 Santoshkumar Roy is convicted of the offence punishable under Section 398 read with 34 of the Indian Penal Code and Section 75 of the Indian Penal Code and he is sentenced to suffer rigorous imprisonment for 7 years.
- ii) Conviction of appellant/accused no.1 Santoshkumar Roy for the offence punishable under Section 393 read with 34 of the Indian Penal Code is maintained but no separate sentence is awarded on the said count because of the sentence imposed on him for aggravated form of this offence.

- iii) Conviction of appellant/accused no.1 Santoshkumar Roy for the offence punishable under Section 3 read with 25 of the Arms Act is quashed and set aside.
- iv) The appeal stands disposed of accordingly.
- v) With disposal of this appeal, Criminal Application No.1452 of 2017 for early hearing as well as Criminal Application No.382 of 2015 for grant of bail and Criminal Application No.383 of 2015 all sent by appellant/accused no.1 Santoshkumar Roy through jail also stand disposed of.

(A. M. BADAR, J.)