

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

## CRIMINAL APPELLATE JURISDICTION

**CRIMINAL APPEAL NO.660 OF 2011**

AAFTAB JAVED SIDDHIQUI @ ALTAF )  
ASHFAQ SIDDHIQUI @ AASIF )...APPELLANT

V/s.

THE STATE OF MAHARASHTRA )...RESPONDENT

Ms.Megha Bajoria, Advocate for the Appellant.

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

**CORAM : A. M. BADAR, J.**

**DATE : 28<sup>th</sup> FEBRUARY 2018**

**JUDGMENT :**

1 This is an appeal by convict accused no.6 challenging his conviction for offences punishable under Sections 394 read with 397 of the Indian Penal Code as well as under Section 3/25(1-B) as well as under Section 5 read with 27(1) of the Arms Act recorded by the learned Additional Special Judge, Greater Mumbai, in MCOC Special Case No.7 of 2009. For offences

punishable under Sections 394 and 397 of the Indian Penal Code, the appellant/accused no.6 is sentenced to suffer rigorous imprisonment for 8 years apart from imposition of fine of Rs.1,000/- and default sentence of 6 months. Similarly, for offences punishable under Sections 3/25(1-B) of the Arms Act, the appellant/accused no.6 is sentenced to suffer rigorous imprisonment for 1 year apart from payment of fine of Rs.1,000/- and default sentence of 6 months. For offences punishable under Sections 5 read with 27(1) of the Arms Act, he has been sentenced to suffer rigorous imprisonment for 3 years apart from imposition of fine of Rs.1,000/- and default sentence of rigorous imprisonment for 6 months.

2           Brief facts leading to the prosecution of the appellant/accused along with six acquitted accused can be summarized thus :

(a) PW1 Suresh Dhakan is a goldsmith dealing with manufacturing of gold jewelery at his Shop Block No.105 in a building known as Sony Diamond Center located at

Dahisar (East), Mumbai. A firm named Max Jewelers having office at Kalbadevi Road, placed an order for manufacturing 41 gold bangles bearing the mark “916 MX12” with PW1 Suresh Dhakan on 24<sup>th</sup> April 2009. The required quantity of gold was also supplied to PW1 Suresh Dhakan by Max Jewelers. Accordingly, PW1 Suresh Dhakan manufactured 41 gold bangles as per the order and left his manufacturing unit at about 4.15 p.m. of 25<sup>th</sup> April 2009 for going to Kalbadevi by a local train from Dahisar Railway Station for delivering the gold bangles, which he carried in a shoulder bag.

- (b) While passing from the subway of Dahisar Railway Station, PW1 Suresh Dhakan was accosted by two unknown persons, out of which, according to the prosecution case, the appellant/accused no.6 was the one. One from them assaulted PW1 Suresh Dhakan on his head and attempted to snatch the bag containing gold bangles from him. PW1 Suresh Dhakan resisted. The said person then fired two

shots from the firearm carried by him. The second assailant also fired one shot from the firearm carried by him, by snatching the bag containing the gold bangles from PW1 Suresh Dhakan. Both assailants fled from the spot. PW1 Suresh Dhakan collapsed there with three bleeding gunshot injuries.

- (c) Upon hearing the sound of gunshots, PW26 Agand Fad, Police Constable, deputed at Dahisar Subway, rushed on the spot and took injured PW1 Suresh Dhakan to Bhagwati hospital for medical treatment. He informed to his superiors the information given to him by injured PW1 Suresh Dhakan. Relatives of the injured then shifted him to Nanavati hospital, Mumbai, for further medical treatment, where his First Information Report (FIR) Exhibit 30 was got recorded by PW32 Budhan Sawant, Assistant Police Inspector. Accordingly, Crime No.68 of 2009 came to be registered for the offence punishable under Section 397 read with 34 of the Indian Penal Code as well as under the Arms Act against the unknown persons.

- (d) During the course of investigation, accused persons came to be arrested. The incident got recorded in the C.C.T.V. cameras installed at the Dahisar Subway. The C.C.T.V. footage came to be collected in the pen drive through PW25 Mahesh Powle, Technician with Zicon Company. The applicant/accused no.6 made a disclosure statement, pursuant to which, a gold bangle as well as a firearm with three live cartridges came to be seized.
- (e) During investigation, it was transpired that the subject crime was an organized crime committed by the Organized Crime Syndicate headed by Mohd.Ayub Aarmuddin Shaikh @ Ayub Chikna (acquitted/accused no.7). Therefore, with prior approval of the Joint Commissioner of Police, provisions of the Maharashtra Control of Organized Crimes Act (hereinafter referred to as the MCOC Act for the sake of brevity) came to be added to the case diary of the crime. On completion of investigation after obtaining due sanction (Exhibit 142) from the Commissioner of Police, the charge-

sheet came to be filed against accused persons including appellant/accused no.6 for offences punishable under Sections 3(1)(ii), 3(2) and 3(4) of the MCOC Act as well as under Sections 394 read with 397 of the Indian Penal Code and under Sections 3/25(1-B) and 5 read with 27(1) of the Indian Arms Act, so also, under Sections 37 read with 135 of the then Bombay Police Act. Similarly, Charge for offences punishable under Sections 394 read with 34 and 120B of the Indian Penal Code was also leveled against accused nos.1 to 5 and 7.

- (f) After framing and explaining the Charge to the appellant/accused and on their pleading not guilty to the Charge, the prosecution has examined in all 41 witnesses to bring home the guilt to the accused persons. After hearing both parties, by the impugned judgment and order dated 19<sup>th</sup> May 2011, passed in MCOC Special Case No.7 of 2009, the learned Additional Special Judge was pleased to convict the appellant/accused no.6 of offences punishable under

Sections 394 read with 397 of the Indian Penal Code, under Section 3/25(1-B) and under Section 5 read with 27(1) of the Indian Arms Act. Accordingly, he came to be sentenced as indicated in the opening paragraph of the judgment.

3           Heard Ms.Megha Bajoria, the learned advocate appearing for the appellant/accused no.6. She took me through entire evidence adduced by the prosecution and argued that evidence of the prosecution is discrepant, in so far as it relates to the timing of taking PW1 Suresh Dhakan to Bhagwati hospital as well as Nanavati hospital. Evidence of PW26 Agand Fad, Police Constable, shows that injured PW1 Suresh Dhakan was at Bhagwati hospital till 6 p.m. and thereafter, he was taken to Nanavati hospital. As such, it is not possible to record his statement in the form of the FIR at 6.30 p.m. to 7.00 p.m. of 25<sup>th</sup> April 2009. At Bhagwati hospital, neither blood nor saline was administered to the injured. The injured has stated that he did not disclose anything to PW26 Agand Fad, Police Constable, whereas, this witness has stated that the injured informed him

about the incident, which he reported to the superior officer. The learned advocate further argued that PW2 Manoj Sanghani did not identify the appellant/accused no.6 but he has stated that it was accused no.1 Vinod, who was holding the bag. This witness had not informed the relatives of the victim about the incident. This witness states that when he reached Bhagwati hospital, at that time, the relatives of PW1 Suresh Dhakan were not present there, whereas, PW1 Suresh Dhakan has stated that when he reached Bhagwati hospital, his relatives were present. The learned advocate criticized the evidence of PW4 Manoj Dhakan by stating that this witness has noted presence of PW35 Madhukar Bhingardive, Police Inspector, at Bhagwati hospital and has further stated that condition of injured PW1 Suresh Dhakan was serious. This implies that, the injured was not in a position to lodge the FIR. This witness has not seen PW1 Suresh Dhakan leaving his shop block. The learned advocate further submitted that evidence of PW7 Mohd.Ayub Choudhary and PW9 Harikisan Chavan was not believed by the learned trial court.

4           The learned advocate for the appellant/accused no.6 further argued that though PW25 Mahesh Powle, Technician with Zicon Company had given the data of the C.C.T.V. footage to the police, this evidence is inadmissible for want of necessary certificate under Section 65B of the Evidence Act. For this purpose, she placed reliance on Anvar P. V. vs. P.K.Basheer and Others<sup>1</sup>.

5           The learned advocate for the appellant/accused no.6 further argued that consent of the victim was not taken while his medical treatment at the Nanavati hospital, as seen from evidence of PW31 Dr.Deepak Vyas and as such, the injured was not in a position to lodge the FIR. The prosecution has not explained as to why statement of PW26 Agand Fad, Police Constable, was not recorded as the FIR. Evidence of PW36 Sandeep Vishwasrao, Assistant Police Inspector, shows that the spot of the incident was populated area but he has not recorded statement of other persons. PW35 Madhukar Bhingardive, Police Inspector, deposed that the FIR came to be recorded by PW32 Budhan Sawant, Police

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Sub-Inspector, after operation, whereas, the injured has stated that without any medical treatment, his FIR came to be recorded. These discrepancies, in submission of the learned advocate for the appellant/accused no.6 are fatal to the prosecution case, thereby entitling the appellant/accused no.6 for acquittal.

6           The learned APP supported the impugned judgment and order of conviction and the resultant sentence.

7           I have carefully considered the rival submissions and also perused the record and proceedings including oral as well as documentary evidence adduced by the prosecution.

8           Considering the nature of offence and the fact that the same was committed in the broad day light of 25<sup>th</sup> April 2009, at subway of Dahisar Railway Station, fate of the prosecution case to a large extent hinges on the testimony of PW1 Suresh Dhakan. This witness is an injured witness and is a victim of the crime in question. This witness survived the attempt on his life in the

incident of robbing gold bangles from him at the subway of Dahisar Railway Station. He had suffered three gunshot wounds as seen from the evidence of PW31 Dr. Deepak Vyas of Nanavati hospital. As such, this witness has no reason to depose false and it is case of the prosecution that gold bangles – 42 in number – were robbed from this witness by the appellant/accused no.6 as well as wanted accused named Khan Saheb. Let us examine whether evidence of this witness is trustworthy and reliable.

9 PW1 Suresh Dhakan has deposed about placing of order with him for manufacturing 41 gold bangles by Max Jewelers of Kalbadevi on 24<sup>th</sup> April 2009 as well as supply of one sample bangle to him. Then, as per version of this witness, he manufactured 41 gold bangles for complying the order placed by Max Jewelers and then proceeded for delivery of all those 42 bangles to Max Jewelers at about 4.15 p.m. of 25<sup>th</sup> April 2009. Evidence of PW1 Suresh Dhakan further reveals that he left his unit located at Sony Diamond Center by a walk and proceeded towards Dahisar Railway Station for going to Kalbadevi by a local

train. He stated that at about 4.20 p.m., he was passing from the subway of Dahisar Railway Station and at that point of time, two persons came from behind and one from them started snatching the bag containing gold bangles held by him. He resisted. The person who snatched the bag then fired two gunshots at him from the firearm and he suffered consequent injuries at his abdomen. The other person then attempted to snatch the bag and he too fired one gunshot causing injury on his left shoulder. PW1 Suresh Dhakan further deposed that, then, the first assailant took control of the bag containing gold bangles and both the assailants fled from the spot. As per version of PW1 Suresh Dhakan, then, he was taken to Bhagwati hospital by an autorickshaw by a police constable and from Bhagwati hospital, he was later on shifted to Nanavati hospital for further treatment. As per version of this witness, his statement was recorded at the said hospital by police.

10           While in the witness box, PW1 Suresh Dhakan has duly identified the appellant/accused no.6 as a person who fired the gunshot at him from the firearm which hit his shoulder. This

witness has also identified seized 33 bangles which were bearing the mark “916 MX12” as ordered by Max Jewelers. PW1 Suresh Dhakan had also identified his clothes seized by the police.

11            Though PW1 Suresh Dhakan was cross-examined at length, evidence of this witness, so far as it relates to identification of the appellant/accused no.6 Aaftab Javed Siddhiqui, has not shaken at all in the cross-examination. The incident of snatching the bag and in that process firing bullets at PW1 Suresh Dhakan had lasted for sometime. It took place at about 4.20 p.m. of 25<sup>th</sup> April 2009 at the subway. As such, PW1 Suresh Dhakan had an ample opportunity to see his assailants and such incident puts a long lasting impression on the mind of the victim who suffers injuries in such an incident. Therefore, I see no reason to disbelieve the version of PW1 Suresh Dhakan in respect of firing a shot from the firearm at him by the appellant/accused no.6 and robbing him of the gold bangles.

12           Evidence of PW1 Suresh Dhakan is gaining corroboration from other evidence adduced on record by the prosecution. PW32 Budhan Sawant, Assistant Police Inspector had deposed about recording the FIR of PW1 Suresh Dhakan. The said FIR is at Exhibit 30. The promptly lodged FIR of PW1 Suresh Dhakan fully corroborates his version about the incident in question. The injured First Informant had specifically given details of both the robbers who had fired gunshots at him and who had robbed him of gold bangles. Consequently, the injured had duly identified the appellant/accused no.6 as one of the assailant robber, while in the witness box.

13           Much arguments were advanced as to whether the injured was in a position to lodge the FIR and whether he was conscious and well oriented at the time of lodging the FIR. All these arguments are of no assistance to the defence because ultimately the FIR was not required to be treated as Dying declaration as the injured PW1 Suresh Dhakan survived the brutal

attack on him and stood in the witness box to depose about the incident and the manner in which it took place. Similarly, it was argued that statement of PW26 Agand Fad, Police Constable, ought to have been recorded as FIR. This witness had not seen happening of the incident and he was not having any detailed information about the incident. The victim was very much available for lodging the report, and as such, with vague information which was carried by PW26 Agand Fad, Police Constable, no infirmity can be found with the prosecution case by not getting that information recorded as the FIR.

14           Evidence of PW26 Agand Fad, Police Constable, shows that after hearing the sounds of gunshots, he reached the spot and carried the injured PW1 Suresh Dhakan to Bhagwati hospital for medical treatment. PW39 Dr.Lalit Agrawal from Bhagwati hospital had spoken about admission of injured PW1 Suresh Dhakan to the said hospital. Subsequently, PW1 Suresh Dhakan was treated by PW31 Dr.Deepak Vyas at Nanavati hospital. Evidence of this witness shows that injured PW1 Suresh Dhakan

was having three firearm injuries. Thus, evidence of these Medical Officers fully corroborates version of the injured witness regarding the assault on him and robbing of his bag containing gold bangles by the appellant/accused no.6 and the wanted accused.

15           The prosecution has placed reliance on evidence of PW25 Mahesh Powle, Technician serving with Zicon Company, who had provided C.C.T.V. footage in the pen drive to the Investigator, which was made use of by the learned trial court for convicting the appellant/accused no.6. This evidence of C.C.T.V. footage cannot be made use of against the appellant/accused no.6 for want of certificate as specified in Section 65B(4) of the Evidence Act.

16           However, even after ignoring the said evidence, evidence of injured PW1 Suresh Dhakan corroborated by other evidence on record, establishes that the appellant/accused no.6 committed robbery by using deadly weapon and attempting to

cause death of PW1 Suresh Dhakan while robbing the 42 gold bangles from him.

17           The prosecution has established that for committing robbery and injuring PW1 Suresh Dhakan, the appellant/accused no.6 used the firearm and fired bullets at PW1 Suresh Dhakan. Sanction to prosecute the appellant/accused no.6 under the Arms Act was also duly proved by the prosecution and the sanction order at Exhibit 143 indicates that the Sanctioning Authority had perused the papers of investigation before according the sanction.

18           In the light of the foregoing discussion, no infirmity can be found in the impugned judgment and order of conviction and the resultant sentence. Generally, people at large are lacking time sense and in case of commission of serious crime, it is not expected of them to note the time at each and every event which took place in rapid succession in such incident. Therefore, the argument in respect of timings of reaching Bhagwati hospital or

Nanavati hospital are of no consequence to disbelieve the case of the prosecution.

19            In the result, the appeal fails. Therefore, the order :

**ORDER**

The appeal is dismissed.

(A. M. BADAR, J.)