

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1034 OF 2012

Jalindersing Ajitsing Kalyani,
Age 32 years, R/o.Survey,
No.110, Ramtekdi, Hadapsar,
Pune.

Presently detained at Yerawada
Central Prison, Pune.

... **Appellant**

V/s.

The State of Maharashtra

... **Respondent**

.....

Ms.Nasreen S.K.Ayubi, Advocate for the Appellant.

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

....

CORAM : A.M.BADAR J.

DATED : 26th JUNE 2018.

ORAL JUDGMENT :

1 By this appeal, the appellant/accused No.1 is challenging the Judgment and Order dated 31/05/2012 passed by the learned Additional Sessions Judge, Pune in Sessions Case No.278 of 2007 thereby convicting the appellant/accused No.1 of the offences punishable under Section 392 and 451 of the Indian Penal Code. For the offence punishable under Section 392 of the IPC, he is sentenced to suffer rigorous imprisonment for eight years apart from imposition of fine of Rs.3,000/- and default

sentence of rigorous imprisonment for three months. For the offence punishable under Section 451 of the IPC, the appellant/accused No.1 is sentenced to suffer rigorous imprisonment for six months apart from imposition of fine of Rs.2,500/- and default sentence of rigorous imprisonment for two months.

2 Facts in nutshell leading to the prosecution of the applicant/accused No.1 along with other co-accused can be summarized thus :

- (a) The incident of robbery took place in the night intervening 07/07/2006 and 08/07/2006 at the residential bungalow of P.W.No.1 Arvind Kothari. He is owner of the Jewellery shop named and titled as 'Shree Mahaveer Jewellers' located at Surya Terrace, Pratiknagar Square, Pune. P.W.No.1 Arvind Kothari along with his family used to reside at bungalow at Mazi Sainik Nagar, Yerwada, Pune. As his jewellery shop was undergoing repairs, he used to carry all gold and silver ornaments from his shop to his house after closure of the shop for the day. Accordingly, on 07/07/2006 after closing his jewellery shop, P.W.No.1 Arvind Kothari carried all his goods to his house.
- (b) According to the prosecution case, in the morning hours of 3.30 a.m. to 4.00 a.m. of 08/07/2006, P.W.No.1 Arvind

Kothari woke up to see two persons in his bedroom. One was holding sword, whereas another was holding pistol as well as iron rod. P.W.No.1 Arvind Kothari was beaten by the iron rod by the robber. His wife and children also woke up and robbers had threatened them. Two other robbers were found in the hall of the bungalow. The robbers then searched bedroom of P.W.No.1 Arvind Kothari and took away bags containing gold and silver ornaments apart from cash and had also snatched gold chain and mobile from P.W.No.1 Arvind Kothari.

- (c) Upon getting intimation, P.W.No.17 Pratap Poman, police officer, who was on petrolling duty, visited the spot of incident i.e. bungalow of P.W.No.1 Arvind Kothari and then went to the hospital, wherein P.W.No.1 Arvind Kothari was taking treatment. FIR (Exhibit 50) was then recorded by P.W.No.17 Pratap Poman in the form of statement of P.W.No.1 Arvind Kothari. Accordingly, Crime No.258 of 2006 for the offences punishable under Sections 395, 397, 412, 120-B of the IPC as well as under Section 37(1) read with Section 135 of the Bombay Police Act and under Sections 3 and 4 read with Section 25 of the Arms Act came to be registered with Police Station, Yerwada. Wheels of investigation were then set in motion. Parallel investigation of this crime was entrusted to the Anti-Dacoity Squad of Pune.

- (d) P.W.No.19 Bajirao Jagtap, police officer from the Anti-Dacoity Squad, during the course of investigation, had arrested six accused persons including the appellant/accused No.1. On the basis of confessional statement of appellant/accused No.1 (Exhibit 108) recorded on 14/09/2006, pancha witness including P.W.No.4 Mangesh Waikar and P.W.No.19 Bajirao Jagtap went to Parvati Jewellers in Ramtekdi area of Pune and effected recovery of several gold and silver ornaments from absconding accused Mannaram Prajapati. During the course of investigation, in all eight accused apart from absconding accused were found to be involved in the dacoity at the house of P.W.No.1 Arvind Kothari and accordingly, those accused persons were charge-sheeted.
- (e) The learned trial Court framed charge against the accused persons including the present appellant/accused No.1. They pleaded not guilty and claimed trial. During the pendency of the trial, accused Nos.6 and 7 absconded and the trial continued as against the appellant/accused No1 as well as accused Nos.2 to 5 and 8.
- (f) In order to bring home the guilt to the accused, the prosecution has examined in all twenty witnesses. Defence of the appellant/accused was that of total denial.

(g) After hearing the parties, the learned trial Court by the impugned Judgment and Order was pleased to convict the appellant/accused of the offences punishable under Sections 392 and 451 of the IPC and he was sentenced accordingly as indicated in opening paragraph of this Judgment. Rest of the accused were, however, acquitted of the charges levelled against them.

3 I heard Ms.Nasreen S.K.Ayubi, the learned Advocate appointed to represent the appellant/accused at the cost of the State. She vehemently argued that the incident in question took place in the dark hours of 08/07/2006 and there was no source of light in order to enable P.W.No.1 Arvind Kothari and his wife P.W.No.2 Neetu to identify the appellant/accused No.1 as one of the robbers. The learned Advocate further argued that evidence regarding recovery is doubtful. The recovery is effected after about two months from the date of the incident and the panch witnesses before whom the disclosure statement was recorded is a stock panch of police. The evidence regarding identification of the ornaments is also unbelievable and untrustworthy.

4 As against this, the learned Additional Public Prosecutor supported the impugned Judgment and Order conviction by stating that articles looted from the house of the

First Informant came to be recovered at the instance of the appellant/accused and, therefore, he has been rightly convicted by the learned trial Court.

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

6 Case of the prosecution as against the appellant/accused rests on evidence of P.W.No.1 Arvind Kothari as well as his wife P.W.No.2 Neetu so also on evidence of P.W.No.4 Mangesh Waikar a panch witness and that of P.W.No.19 Bajirao Jagtap, Investigating Officer. The evidence against the appellant/accused comprises of oral evidence of his identification as one of the robbers by P.W.No.1 Arvind Kothari and P.W.No.2 Neetu Kothari, so also that of recovery of gold and silver ornaments belonging to P.W.No.1 Arvind Kothari at his instance. Let us, therefore, examine evidence of P.W.No.1 Arvind Kothari and P.W.No.2 Neetu Kothari in respect of the incident in question and identification of the appellant/accused No.1 as one of the robbers.

7 In tune with prosecution case, P.W.No.1 Arvind Kothari has deposed that after closing his shop for the day, on 07/07/2006, he carried gold and silver ornaments from his shop

in bags to his house. He further deposed that at about 3.30 to 4.00 a.m. of 08/07/2006, he and his wife P.W.No.2 Neetu were sleeping in the bedroom. He woke up to notice two unknown persons in his bedroom holding sword, pistol as well as iron rod. As per his version, he was threatened with those weapons and was assaulted by the iron rod. Because of his shouts, his wife and children woke up. P.W.No.1 Arvind Kothari testified that the robbers then threatened all of them and asked them to give valuables. Two persons, who were in his bedroom, then started searching his cupboard and found the bags, which were containing gold and silver ornaments. After finding the bags, those persons left his house. As per version of this witness, two other robbers were present in the hall of his bungalow. This witness further deposed that looted ornaments were containing embossing as 'JJ', 'KM' and 'AG'. The version of this witness makes it clear that while taking medical treatment in the hospital on 08/07/2006, his FIR (Exhibit 50) came to be recorded by police.

8 The version of P.W.No.2 Neetu is congruous to what has been deposed by her husband P.W.No.1 Arvind Kothari. She has also stated about presence of four robbers in her house and taking away bags containing gold and silver ornaments by them.

9 The incident lasted for about 30 minutes and cross-examination of both these witnesses goes to show that faces of the

robbers were covered with cap and handkerchief. So far as source of light is concerned, version of both these witnesses shows that zero powered bulb was lit in their bed room. The incident in question happened all of a sudden and it gave shock and surprise to both these witnesses. P.W.No.1 Arvind Kothari as well as P.W.No.2 Neetu have identified the appellant/accused No.1 while in the dock. The prosecution has failed to conduct test identification parade, despite the fact that the robbers were unknown to the victims. The learned trial Court, as such, rightly refused to place implicit reliance on version of both these witnesses in order to conclude that the appellant/accused was one of the robbers involved in looting the valuables from the house of P.W.No.1 Arvind Kothari and P.W.No.2 Neetu.

10 Let us, therefore, examine whether evidence of P.W.No.1 Arvind Kothari and P.W.No.2 Neetu is gaining corroboration in order to infer guilt of the appellant/accused in the crime in question. Evidence of P.W.No.19 Bajirao Jagtap shows that the appellant/accused No.1 was arrested by him and thereafter, he had recorded confessional statement of the appellant/accused on 14/09/2006. P.W.No.4 Mangesh Waikar as well as co-panch Prakash Dhakate had witnessed the recording of confessional statement of the appellant/accused No.1 by P.W.No.19 Bajirao Jagtap. P.W.No.4 Mangesh Waikar has testified that on 14/09/2006, he was called at the house of the

Commissioner of Police, Pune and the appellant/accused was present there. While in the dock this witness was initially confused while identifying the appellant/accused No.1 because of lapse of period of four to five years. However, evidence of this witness shows that then he has correctly identified the appellant/accused as a person who gave his statement on 14/09/2006. This panch witness then deposed about the appellant/accused taking the panchas and police team to Parvati Jewellers at Ramtekdi area of Pune and recovery of gold and silver ornaments from the shop owned by the absconding accused Mannaram Prajapati. Cross-examination of this panch witness does not show that he was habitual panch witness. On the contrary, from his cross-examination it is reflected that he acted as a panch witness for the first time on 14/09/2006. His confusion regarding identification of the appellant/accused is attributable to the normal wear and tear of memory because of lapse of four to five years after the incident. That vouches about truthfulness of evidence of this witness. Nothing is seen from the cross-examination of this witness to disbelieve his version about recording of confessional statement of the appellant/accused No.1 and resultant recovery of gold and silver ornaments vide recovery panchanama (Exhibit 109)

11 Evidence of P.W.No.4 Mangesh Waikar is gaining corroboration from evidence of P.W.No.19 Bajirao Jagtap. His

version also reveals that in presence of pancha witnesses, he recorded disclosure statement (Exhibit 108) of appellant/accused No.1 and then the appellant/accused lead them to Parvati Jewellers at Ramtekdi area from where gold and silver ornaments came to be recovered vide recovery panchanama (Exhibit 109). There is nothing in cross-examination of this police officer to disbelieve his version about the recovery at the instance of the appellant/accused No.1.

12 Gold and silver ornaments recovered at the instance of the appellant/accused No.1 on 14/09/2006 were shown to P.W.No.1 Arvind Kothari on 15/09/2006 in presence of pancha witness including P.W.No.4 Mangesh Waikar. P.W.No.1 Arvind Kothari has identified the gold and silver ornaments belonging to him in presence of pancha witnesses. Accordingly, panchanama (Exhibit 110) came to be recorded on 15/09/2006 and this panchanama is duly proved by the prosecution witnesses including P.W.No.1 Arvind Kothari and P.W.No.19 Bajirao Jagtap. During the course of recording evidence, P.W.No.1 Arvind Kothari has duly identified the ornaments looted from his house. This witness has reason to identify the recovered ornaments, as they were containing embossing of specific letters. Even otherwise, P.W.No.1 Arvind Kothari was the owner of the gold and silver ornaments and he used to handle them daily by taking them to his house after closure of the shop and bringing them to the shop in the morning

hours. As such, P.W.No.1 Arvind Kothari had ample opportunity to see the ornaments belonging to him daily and that is how his evidence regarding identification of his ornaments belonging to him, which were recovered at the instance of appellant/accused No.1, cannot be faulted with.

13 In the light of foregoing discussion, the prosecution duly established guilt of the appellant/accused No.1 for the offences punishable under Section 392 and 451 of the Indian Penal Code and the impugned Judgment and Order, as such, cannot be faulted with. The sentence imposed on the appellant/accused No.1 is also in consonance with the offences held to be proved against them. In the result, the appeal is devoid of merit and, therefore, the Order :

ORDER

- (i) The Appeal is dismissed.

(A.M.BADAR J.)