

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1035 OF 2012

JALINDERSING AJITSING KALYANI)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Ms.Nasreen Ayubi, Appointed Advocate for the Applicant.

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

CORAM : A. M. BADAR, J.

DATE : 27th JUNE 2018

ORAL JUDGMENT :

1 By this appeal, the appellant/accused no.4 is challenging the judgment and order dated 30th April 2012 passed by the learned Additional Sessions Judge, Pune, in Session Case No.260 of 2007, thereby convicting the appellant/accused of the offence punishable under Section 392 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for 7 years

apart from directing him to pay fine of Rs.3,000/- and in default to undergo further rigorous imprisonment for 3 months. Other co-accused were acquitted by the learned trial court of the charge leveled against them.

2 Facts, in brief, leading to the prosecution of the appellant/accused along with co-accused, are thus :

(a) First Informant/PW1 Vivek Borkar along with his family used to reside at Rajyog Heights Co-operative Housing Society, situated at Viman Nagar, Pune. The incident in question took place in the night intervening 27th April 2006 and 28th April 2006. At the time of the incident, PW1 Vivek Borkar and his wife PW2 Bhavna Borkar were the only residents of the apartment, as their sons had gone out of station.

(b) After having dinner, PW1 Vivek Borkar and his wife PW2 Bhavna Borkar slept in the bedroom of their apartment situated in the building of the co-operative society. At about

4.15 a.m. of 28th April 2006, PW1 Vivek Borkar heard some noise and thumping of the door. He woke up and saw three dacoits in the hall of his house. They threatened PW1 Vivek Borkar and questioned him as to where money and valuables were kept. In that process, PW2 Bhavna Borkar also woke up. The dacoits then assaulted PW1 Vivek Borkar and snatched the gold chain from his neck. By threatening the couple by means of sharp edged weapons, the dacoits snatched ornaments from person of PW2 Bhavna Borkar. They took away gold mangalsutra from the cupboard apart from silver utensils. In this way, the dacoits committed dacoity and looted the ornaments and utensils worth Rs.48,000/- from the apartment owned by PW1 Vivek Borkar. After committing the dacoity, they fled away from the spot of the incident.

- (c) The incident came to be reported to police by PW1 Vivek Borkar and accordingly, Crime No.180 of 2006 came to be registered at Police Station Yerwada for offence punishable

under Sections 459, 457, 380 read with 34 of the Indian Penal Code. During the course of investigation, eight accused persons including the appellant/accused came to be arrested. Voluntary disclosure statement of the appellant/accused no.4 has resulted in recovery of gold ornaments and silver articles from absconding accused Mannaram Prajapati. PW1 Vivek Borkar was called for identification of recovered ornaments and he duly identified the ornaments belonging to him as well as his wife PW2 Bhavna Borkar. Recoveries were also effected from other accused persons and on conclusion of investigation, in all eight accused persons came to be charge-sheeted.

- (d) The learned trial court framed Charge for offences punishable under Sections 395 and 397 of the Indian Penal Code against the appellant/accused no.4 as well as co-accused who were put to trial. They pleaded not guilty and claimed trial. In support of the charge leveled against the accused persons, the prosecution has examined in all eight

witnesses including PW1 Vivek Borkar, his wife PW2 Bhavna Borkar, watchman of the society – PW3 Premsingh Bike, panch witness PW6 Mangesh Waikar as well as Investigating Officer PW7 Bajirao Jagtap. Reliance was also placed on documentary evidence. The defence of the appellant/accused was that of total denial. After hearing the parties, by the impugned judgment and order, the learned trial court was pleased to convict the appellant/accused no.4 for the offence punishable under Section 392 of the Indian Penal Code and he was sentenced as indicated in the opening paragraph of this judgment. The co-accused put to trial came to be acquitted of the charge leveled against them.

3 I have heard Ms.Nasreen Ayubi, the learned advocate appointed to represent the appellant/accused no.4, at the cost of the State. She vehemently argued that considering the time at which the alleged incident took place as well as the fact that the prosecution witnesses have admitted in their cross-examination

that faces of the dacoits were covered at the time of the incident, evidence regarding identification of the appellant/accused, as perpetrator of the crime, is too scanty and conviction cannot be recorded on the basis of such evidence. She criticized evidence of PW6 Mangesh Waikar, thus, arguing that, his evidence is discrepant and he was not in a position to properly identify the accused from whom recovery came to be effected. Therefore, the appellant/accused no.4 is entitled to acquittal.

4 As against this, the learned APP supported the impugned judgment and order, by contending that evidence of recovery at the instance of the appellant/accused no.4 is sufficient to convict him in respect of the offence held to be proved against him.

5 I have carefully considered the rival submissions and also perused the record and proceedings including copies of deposition of prosecution witnesses as well as documentary evidence adduced by the prosecution,

6 The incident took place in the wee hours of 28th April 2006 in the residential apartment of PW1 Vivek Borkar and his wife PW2 Bhavna Borkar. Evidence of both these witnesses coupled with evidence of PW3 Premsingh Bike – watchman of the society, is sufficient to hold that the prosecution has established robbery at the house of PW1 Vivek Borkar. It is in evidence of PW3 Premsingh Bike that when he was working as night watchman, at about 4.00 a.m. of 28th April 2006, in all four persons entered in the campus of the society by jumping the wall. His evidence shows that, then, two of them entered in the building and he heard noise of PW1 Vivek Borkar. This witness further deposed that after ten minutes, those two persons came out and all robbers fled from the spot.

7 Evidence of PW1 Vivek Borkar and PW2 Bhavna Borkar also shows that in the morning hours of 28th April 2006, three persons entered in their residential apartment and snatched and took away gold and silver ornaments from them by threatening them with sharp edged weapons. Cross-examination

of these two witnesses shows that at the time of the incident, which took place at about 4.15 a.m., there was darkness in the hall and the dacoits had covered their faces. Both these witnesses have identified the appellant/accused before the court which constitute the substantial evidence of identification, but considering the fact that at the time of the incident there was darkness in the hall, and the prosecution has not conducted the Test Identification Parade, it would be apposite to seek corroboration to the evidence of both these witnesses.

8 Evidence of the Investigating Officer PW7 Bajirao Jagtap shows that during the course of investigation, he had arrested the appellant/accused no.4 and in presence of panch witnesses PW6 Mangesh Waikar and co-panch Prakash Dhakate voluntary disclosure statement of the appellant/accused no.4 Exhibit 66 came to be recorded. This evidence of PW7 Bajirao Jagtap, Investigating Officer, is gaining corroboration from evidence of PW6 Mangesh Waikar – panch witness. Both these witnesses unanimously deposed that the appellant/accused no.4

had led them to Ramtekde area of Pune. They were taken to a shop named and styled as Parvati Jewellers, where the absconding accused Mannaram Prajapati was present. At the instance of the appellant/accused no.4, then, gold and silver ornaments were recovered from the shop of absconding accused Mannaram Prajapati, and they came to be seized by panchnama Exhibit 67. Only because in examination-in-chief, panch witness PW6 Mangesh Waikar fumbled for a short period of time when he was asked to identify the accused from whom the recovery was effected, his evidence cannot be discarded. On the contrary, his evidence contains explicit explanation as to why he could not identify the accused immediately. This witness has stated that period of four to five years has lapsed and therefore, he took time to identify the appellant/accused no.4 from whom recoveries were effected. Moreover, ultimately, PW6 Mangesh Waikar had correctly identified the appellant/accused no.4 as the person whose disclosure statement came to be recorded by police and from whom recoveries came to be effected.

9 Evidence of PW6 Mangesh Waikar and that of PW7 Bajirao Jagtap further shows that recovered ornaments were shown to PW1 Vivek Borkar immediately on the next day i.e. on 15th September 2006 and panchnama Exhibit 68 came to be recovered. Their evidence coupled with evidence of PW1 Vivek Borkar indicates that PW1 Vivek Borkar had identified the ornaments looted from him at the time of the incident. Thus, it is seen that, the looted ornaments belonging to PW1 Vivek Borkar came to be recovered at the instance of appellant/accused no.4. The delay in effecting recovery is not of any assistance to the defence because the appellant/accused no.4 was not arrested immediately after the incident. Infact, he was arrested in some other crime and then he was transferred to the subject crime and thereafter, the recoveries were effected. Not only the ornaments belonging to PW1 Vivek Borkar were recovered at the instance of the appellant/accused no.4, but ornaments involved in other cases of dacoity and robbery were also recovered on the basis of confessional statement of the appellant/accused no.4.

10 Thus, with this evidence, the prosecution has established guilt of the appellant/accused no.4 for the offence punishable under Section 392 of the Indian Penal Code and no fault can be found in the impugned judgment and order of conviction as well as the resultant sentence imposed on the appellant/accused no.4, by the learned trial court.

11 In the result, the appeal is devoid of merits, and therefore the order :

ORDER

The appeal is dismissed.

(A. M. BADAR, J.)