

Sarnobat

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL REVISION APPLICATION NO. 453 OF 2017
WITH
CRIMINAL APPLICATION NO. 439 OF 2017**

Prashant Ashok Kale

Age : 19 Yrs., Occ: Business,

R/o. Room No.5, Ajinkya Narayan Society,

Mhasrul, Panchavati, Nasik-3.

.. Applicant.

Vs.

The State of Maharashtra.

.. Respondent.

.....

Mr. Fauzan Shaikh i/b. Hitesh P. Shah, Advocate for the Applicant.

Ms. Neeta S. Jain, APP for the Respondent/State.

CORAM : PRAKASH D. NAIK, J.

RESERVED ON : 24TH JANUARY, 2018

PRONOUNCED ON : 28TH FEBRUARY, 2018

JUDGMENT:

1. The applicant was prosecuted for the offences punishable under Section 379 r.w. 34 of Indian Penal Code. By judgment and order dated 23rd May, 2012 the applicant was convicted by the Court of learned Judicial Magistrate First Class, Court No.2, Nasik in RCC No.107/2012. The applicant and the co-accused were sentenced to suffer rigorous imprisonment for one year and fine of Rs.500/- each. It was further directed that the sentence of the subject crime and other crime Nos. 282/2011, 328/2011 and 360/2011 shall run concurrently as nature of offence and year of offence in all crimes are same.

2. The prosecution case is that the informant Smt. Muktaben Thakkar lodged the First Information Report on 20th June, 2011 with Panchvati Police Station, Nasik alleging that on 20th June, 2011 when she was opening the gate of her house, two persons came on motor cycle and snatched her gold necklace weighing about three tolas worth Rs.45,000/-. The offence was registered vide C.R. No.1224/2011. On completing investigation, the charge-sheet was filed.

3. The prosecution examined three witnesses. P.W. No.1 Shailesh Dawda is the witness to the panchanama relating to the statement of the accused leading to discovery at the instance of accused No.1 Anil Mathure. P.W. No. 2 Sayyed Mujaffar Ali is a Police Constable and P.W. No. 3 Ramesh Wamanrao Nile is the police Head Constable attached to the concerned police station.

4. The prosecution relied upon the documentary evidence in the form of spot panchanama, complaint, memorandum statement of the accused Anil Mathure and memorandum cum seizure panchanama etc. On the basis of the said evidence, the applicant was convicted. The conviction was confirmed by the Sessions Court by dismissing the appeal preferred by the applicant, vide judgment and order dated 27th July, 2017.

5. The learned counsel for the applicant submitted that both Courts have committed error in convicting the applicant. The First Information report was lodged against unknown persons. The recovery was at the instance of accused No. 1 and not applicant. The applicant is not identified by the complainant. The complainant was not examined by the prosecution. The applicant was arrested on 10th November, 2011. He is in custody for more than six months. The learned counsel relied upon the decision in the case of **Kashmira Sigh Vs. State of Madhya Pradesh, AIR 1952, Supreme Court, 159** and another decision of the Supreme Court in the case of **Pancho Vs. State of Hariyana, 2011, 10, Supreme Court Cases, 165.**

6. Learned APP submitted that there is concurrent finding of two Courts convicting the applicant. The applicant is involved in serious crime. There is recovery from co-accused. The evidence lead by prosecution is sufficient to convict the applicant. She relied upon decision of Supreme Court in the case of **Pawan Kumar Vs. State of Uttar Pradesh and Anr. (2015) 3 SCC (Cri) 27.**

7. I have perused the evidence on record. I have also gone through the impugned judgment passed by both the Courts below. The charge was framed against the applicant and the co-accused on 2nd

March, 2012. The alleged incident had occurred on 20th June, 2011. The First Information Report was lodged against unknown persons. Prosecution is relying upon the statement of accused No.1 leading to discovery under Section 27 of the Evidence Act wherein, the ornaments were recovered at his instance which includes the property involved in the present crime. It would be pertinent to note that the complainant was not examined by the prosecution. There is no identification of the applicant at the instance of the complainant. Only on the basis of statement of the co-accused leading to the discovery, the applicant cannot be convicted for the said offence. The applicant is also shown to have been involved in the other cases which are registered as crime Nos. 282 of 2011, 328 of 2011 and 360 of 2011. However, merely on the surmises the accused cannot be convicted for the offence. There is no other evidence showing the involvement of the applicant except the statement of the co-accused leading to recovery. There was no identification parade for identifying the accused by complainant.

8. In these circumstances, I find that the Trial Court as well as Appellate Court has committed an error in convicting the applicant for the said offence. The conviction is therefore, required to be set aside. In the case of Kashmira Singh (Supra) the hon'ble Supreme Court was

pleased to observe that the proper way to approach a case is to marshal the evidence against the accused excluding the confession all together from consideration and see whether if it is believed, a conviction could safely be based on it. In the case of Pancho (Supra) the Supreme Court has observed that the confession of co-accused is a weak piece of evidence. In the decision relied upon by learned Additional Public Prosecutor, the Apex Court has observed that simply denying the role by the accused without proper explanation as to the knowledge of the incriminating material would justify the presumption drawn by the Court as to the involvement of the accused in the crime. Confession given by the accused is not the basis for the Court below to convict the accused but it is only a source of information to put the criminal law into motion. Hence, the accused cannot take shelter under section 25 of the Evidence Act. Hence, the order :

ORDER

I) Criminal Revision Application No. 453 of 2017 is allowed.

II) The Judgment and Order dated 23rd May, 2012 passed by Judicial Magistrate First Class, Court No. 2, Nasik in RCC No.107/2012 convicting the applicant for the offence under section 379 r.w. 34 of Indian Penal Code as well as the Judgment and Order dated 27th July, 2017

passed by Sessions Judge Nasik in Criminal Appeal No. 92 of 2012 are set aside and the applicant is acquitted of the said offence.

III) The Revision Application No. 453 of 2017 as well as the Criminal Application No. 439 of 2017 stand disposed of.

[P. D. NAIK , J.]