

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

**CRI. REVISION APPLICATION NO.454 OF 2017
WITH
CRIMINAL APPLICATION NO.440 OF 2017**

Prashant Ashok Kale .. Applicant

Vs.

The State of Maharashtra .. Respondent

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Mr.Fauzan Shaikh i/b. Mr.H.P. Shah, Advocate for the Applicant.
Mrs.Neeta S. Jain, APP for Respondent – State.

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CORAM : PRAKASH D. NAIK, J.

RESERVED ON : JANURARY 24, 2018.
DELIVERED ON : FEBRUARY 28, 2018.

JUDGMENT :

The applicant is convicted for the offence punishable under Section 379 read with Section 34 of the Indian Penal Code (IPC). The appeal challenging the judgment and order of conviction has been dismissed hence the applicant has preferred the present Revision Application, challenging the said judgment and order of conviction.

2 Applicant was prosecuted in the proceedings arising out of R.C.C No.106 of 2012, before the Court of Judicial

Magistrate First Class, Court No.2, Nashik.

3 The prosecution case is that the complainant Smt. Kamal Wagh lodged the First Information Report (FIR) with Panchavati Police Station. It is alleged that on 23rd August, 2011 at about 8:00 p.m., the complainant was returning home and at that time two persons came on a motorcycle and snatched her gold necklace worth Rs.21,000/-. FIR was registered against unknown person vide C.R.No.I-360/2011. During the course of investigation, co-accused Anil Mathure made a memorandum statement and further made discovery about production of articles. In pursuant to that the gold necklace was recovered under panchanama. On completing investigation, police file charge - sheet and case was numbered as R.C.C. No.106 of 2012.

4 Prosecution examined four witnesses. P.W. 1 Smt. Kamal Sakharam Wagh is the complainant, P.W.2 Shailesh Davda is the panch witness for memorandum statement of recovery, P.W. 3 Sayyed Mujaffar Ali is the police constable attached to the said police station and P.W.4 Mukhtar Shaikh is the police head constable. P.Ws. 3 and 4 conducted the investigation. Prosecution also relied upon the documents such as spot panchanama,

complaint, memorandum statement of accused Anil Mathure etc. The memorandum statement of accused no.2 Anil Mathure is the subject matter of the three complaints for which P.W.No.2 Shailesh Davda was examined as panch witness and in all these cases the applicant has been convicted.

5 Learned Judicial Magistrate First Class Court No.2, Nashik vide judgment and order dated 23rd May, 2012, convicted the applicant and the co-accused for offence punishable under Section 379 read with 34 of IPC and he was sentenced to suffer rigorous imprisonment for one year and fine of Rs.500/-. The sentence in this crime and other crimes Nos.282 of 2011, 328 of 2011 and 224 of 2011, were directed to run concurrently, as the nature of offence and year of offence in all crimes are same. Applicant preferred an Appeal bearing No.93 of 2012, before the Sessions Court at Nashik, which was dismissed by confirming the conviction and sentence imposed by the trial Court vide judgment and order dated 27th July, 2017, and, hence, the applicant has preferred the present Revision Application challenging the impugned judgment and orders.

6 Learned advocate for the applicant submitted that

both the Courts have committed an error in convicting the applicant. It is submitted that there is no recovery at the instance of the applicant. The prosecution has relied upon the statement leading to discovery made by accused no.1 Anil Mathure and, there is no independent evidence to convict the applicant. It is submitted that there was no identification parade conducted by the investigating machinery. FIR was registered against unknown person. In the absence the test identification parade, the applicant ought not to have convicted for the said offence as there is no other evidence to establish his involvement in the crime. It is submitted that the alleged property was recovered from the co-accused and the statements leading to discovery made by the co-accused cannot be relied upon against the applicant.

7 Learned advocate placed reliance on the decision of the Supreme Court in the case of ***Kashmira Singh Vs. State of Madhya Pradesh***¹ and another decision of the ***Supreme Court in the case of Pancho Vs. State of Haryana***².

8 Learned APP submitted that there is concurrent

1 AIR 1952 SCC 159

2 2011 (10) SC 165

finding of two courts. The complainant has identified the property. The co-accused had made a discovery statement leading to recovery of property. The complainant and the co-accused are involved together in several identical crimes. It is submitted that there is sufficient evidence to convict the applicant.

9 On perusal of the evidence, it is apparent that the prosecution is relying upon the evidence of four witnesses. Prosecution case is based on the complaint and the evidence of P.W.1 who is the informant. The complainant has deposed in her evidence that unknown person had committed the alleged act on 23rd August, 2011. She further stated that she lodged the FIR in pursuant to the incident. She was called at the police station. She was informed that the articles belonging to her is brought to the police station. She further stated that she identified the accused at the police station who are the same person. She also identified the accused as the person who are present in the Court. P.W.2 is the common witness in all the cases for recovery statement made by the accused no.1. From the statement of the complainant, it is apparent that the incident had occurred within fraction of seconds. The accused were brought at the police station as the persons who are involved in the crime and shown to the

complainant thereby she identified them. In the circumstances, there was no test identification parade carried out and identification at the police station without the parade, cannot be relied upon. It is true that the complainant had identified the accused in the Court, however, the identification would vitiate as accused were shown to the complainant at the police station. There is no recovery at the instance of the applicant. The statement made by the co-accused cannot be relied upon to convict the applicant. There is no other cogent evidence to convict the applicant in the said crime. In the case of ***Kashmira Singh (Supra)***, the Hon'ble Supreme Court has observed that The proper way to approach a case is to marshal the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed, a conviction could safely be based on it. If it is capable of belief independently of the confession, then it is not necessary to call the confession in aid. In the case of ***Pancho (Supra)***, the Supreme Court has observed that confession of co-accused is a weak piece of evidence. The learned APP had relied upon the decision in the case of Pawan Kumar @ Monu Mittal³. In the said decision, the Supreme Court has observed that simply denying

3 2015 (2) SCC (Cri) 27

their role without proper explanation as to the knowledge about those incriminating material would justify the presumption drawn by the Courts below to the involvement of the accused in the crime. Confession is a source of information to put the criminal law in motion.

10 In the circumstances, the benefit of doubt ought to be given to the applicant accused. There is no proper identification of the accused. There is no recovery as stated above at the instance of the applicant. Prosecution has thus not proved the case beyond all reasonable doubt and therefore, the judgment and order of conviction is required to be set aside.

11 Hence, I pass the following order:

:: ORDER ::

- (i) Criminal Revision Application No.454 of 2017 is allowed;
- (ii) The impugned judgment and order dated 23rd May, 2012 passed by the Judicial Magistrate First Class Court No.2, Nashik in R.C.C. No.106 of 2012 and order dated 27th July, 2017, passed

by the Sessions Judge, Nashik in Criminal Appeal No.93 of 2012 are set aside and the applicant is acquitted of the offence punishable under Section 379 read with 34 of the Indian Penal Code;

- (iii) Criminal Revision Application No.454 of 2017 as well as Criminal Application No.440 of 2017 stand disposed of.

(PRAKASH D. NAIK, J.)