

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

**CRIMINAL REVISION APPLICATION NO.455 OF 2017
WITH
CRIMINAL APPLICATION NO.441 OF 2017**

Prashant Ashok Kale, Age 19 years,
Occ.Business, r/o.Room No.5,
Ajinkya Narayan Society,
Mhasrul, Panchavati, Nashik-3
At present at Nashik Jail.

Applicant

versus

The State of Maharashtra

Respondent

Mr.Fauzan Shaikh i/by Hitesh P. Shah for applicant.
Ms.Neeta S. Jain, APP for State.

CORAM : PRAKASH D. NAIK, J.

Date of reserving the Judgment : 24th January 2018
Date of pronouncing the Judgment : 28th February 2018

JUDGMENT :

1. The applicant was prosecuted for the offence under Section 379 read with Section 34 of Indian Penal Code by the judgment and order dated 23rd May 2012 passed by learned Judicial Magistrate, First Class, Court no.2, Nashik in Regular Criminal Case No.104 of 2012. The applicant and the co-accused were sentenced to suffer rigorous imprisonment for one year and fine of Rs.500/- each and in default to suffer simple imprisonment for one month. It was further directed that the sentence of this crime and other Crime nos.328/2011, 360/2011 and 224/2011 shall run concurrently as the nature of offence and order of offence in all the crimes are same.

The appeal preferred by the applicant was dismissed by judgment and order dated 27th July 2017.

2. The prosecution case is that the first informant Ramdas Bairagi lodged first information report on 21st July 2011 with Panchavati Police Station, Nashik alleging that on 19th July 2011 when he was proceeding to his house, two persons snatched his gold chain weighing 10 grams valued at Rs.10,000/- from his neck and both of them fled away. The offence was registered vide CR No.I-282/2011 under Section 379 r/s Section 34 of Indian Penal Code. On completing the investigation the charge sheet was filed.

3. The prosecution examined five witnesses. PW-1 Ramdas Bairagi is the complainant, PW-2 Shailesh Dawade is the punch relating to the statement of accused no.1 leading to recovery, PW-3 Santosh Vaishnav is the panch witness, PW-4 Sayyad Mujaffar Ali is the police constable and PW-5 Mukhtar Shekh is police head constable attached to the concerned police station. The prosecution relied upon documentary evidence in the form of spot panchanama, first information report, memorandum of statement of accused Anil Mathure and memorandum-cum-seizure panchanama etc.. The applicant was convicted by the Trial Court, which conviction was confirmed by the Appellate Court by judgment and order dated 27th July 2017 passed in Criminal Appeal No.94 of 2012.

4. Learned counsel for applicant submitted that both the Courts have committed an error in convicting the applicant. The first information report was lodged against the unknown persons. The recovery was at the instance of accused no.1 and not at the instance

of applicant. There was no test identification parade. The applicant is in custody for more than six months. Learned counsel for applicant relied upon the decision of Hon'ble Supreme Court in the case of **Kashmira Singh Vs. State of Madhya Pradesh**¹ and in case of **Pancho Vs. State of Haryana**¹.

5. Learned APP submitted that there is concurrent finding of two lower Courts convicting the applicant. The applicant is involved in serious crime. There is recovery from co-accused. The evidence laid by the prosecution is sufficient to convict the applicant. She relied upon the decision of Hon'ble Supreme Court in case of **Pawan Kumar @ Monu Mittal Vs. State of Uttar Pradesh and another and group matters**³.

6. I have perused the evidence on record and the judgments passed by the Courts below. The charge was framed against the applicant and the co-accused on 2nd March 2012. The alleged incident had occurred on 19th July 2011. The first information report was lodged against unknown persons. The prosecution is relying upon the statement of accused no.1 leading to recovery u/s 27 of Evidence Act wherein the ornaments were recovered at his instance, which included the property involved in the present crime. It is pertinent to note that there was no identification parade conducted by police qua the complainant. On the basis of statement of co-accused leading to recovery, the applicant cannot be convicted. The applicant is also shown to be involved in the other cases. The conviction cannot be based on surmises. The statement of co-accused cannot be used against the applicant. Taking into

1 AIR-1952-SC-159

1 (2011)10-SCC-165

3 (2015)3-SCC (Cri.)-27

consideration the fact that first information report was lodged against the unknown persons, the investigating machinery ought to have conducted the test identification parade. The complainant in his evidence has stated that the accused are present in the Court. From his evidence it is also apparent that he was called at the police station by police on 7th December 2011. He was informed by police that his chain is recovered and accused are arrested. He was also informed that the chain was recovered from the accused. It is, therefore, apparent that the complainant was called at the police station after accused were arrested. However, police did not deem it fit and necessary to conduct identification parade and in the circumstances as deposed by the complainant, the possibility of the accused being shown to the complainant cannot be ruled out. The incident had occurred within a span of moment and, therefore, identification first time in the Court, cannot be used for convicting the accused. The recovery, as stated above, is at the instance of co-accused. The benefit of doubt is, therefore, required to be given to the applicant. The prosecution has not been able to establish its case beyond all reasonable doubts.

7. In the circumstances, I find that the Trial Court as well as the Appellate Court have committed an error in convicting the applicant for the said offence. The conviction is, therefore, required to be set aside. In case of Kashmira Singh (supra), the Hon'ble Supreme Court has observed that proper way to approach a case is to marshal the evidence against an accused excluding the confession altogether from consideration and see whether, if it is believed, a conviction could safely be based on it. In case of Pancho (supra), the Hon'ble Supreme Court has observed that confession of a co-accused is weak

piece of evidence. In case of Pawan Kumar @ Monu Mittal (supra), the Hon'ble Supreme Court has observed that simply denying the role by the accused without proper explanation as to the knowledge of incriminating material, would justify the presumption drawn by the Court with regards to involvement of the accused in the crime. The confession of the accused is the source of information to put criminal law in motion. The observations of Supreme Court in the said decision are not applicable in the present case in the light of the factual aspects in the present case.

8. Hence, I pass following order :

ORDER

- (i) Criminal Revision Application No.455 of 2017 is allowed;
- (ii) The judgment and order dated 23rd May 2012 passed by Judicial Magistrate, First Class, Court No.2, Nashik in Regular Criminal Case No.104 of 2012 convicting the applicant for offence u/s 379 r/w Section 34 of Indian Penal Code, as well as the judgment and order dated 27th July 2017 passed by Sessions Judge, Nashik in Criminal Appeal No.94 of 2012, are set aside and the applicant is acquitted of the said offence;
- (iii) Criminal Revision Application No.455 of 2017 and Criminal Application No.441 of 2017 stand disposed of.

(PRAKASH D. NAIK, J.)