

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

**CRIMINAL REVISION APPLICATION NO.456 OF 2017
WITH
CRIMINAL APPLICATION NO.442 OF 2017**

Prashant Ashok Kale, Age 19 years,
Occ.Business, R/o.Room No.5,
Ajinkya Narayan Society, Mhasrul,
Panchavati, Nashik-3

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 punishable under Section 379 of Indian Penal Code. By judgment and order dated 23rd May 2012, the applicant was convicted for the said offence by the Court of Judicial Magistrate, First Class, Court no.2, Nashik, in Regular Criminal Case No.105 of 2012. The applicant was sentenced to suffer simple imprisonment for six months and fine of Rs.500/- and in default to suffer simple imprisonment for one month. It was further directed that the sentence of the subject crime and other crime numbers 282/2011, 360/2011 and 224/2011 shall run concurrently as the nature of offence and order of offence in all

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

2. The case of prosecution is that the informant Smt.Rekha Dilip Kuril lodged a first information report on 9th August 2011 with Panchavati Police Station, Nashik alleging that on 6th August 2011 she was pushed in the crowd when she had gone to the temple for darshan. When she went to house she noticed that her gold necklace weighing 9 grams worth Rs.15,000/- was missing. She realized that the person who pushed her in the crowd had committed the theft of her gold necklace. The complainant therefore visited the police station and lodged the first information report. The offence was registered u/s 379 of Indian Penal Code vide CR No.I-328/2011. The investigation was completed and charge sheet was filed.

3. The prosecution examined three witnesses. PW-1 Santosh Sukhdeo Bhamre is the panch witness for recovery panchanama, PW-2 Sayyad Ali is the police constable and PW-3 Ramesh Nile is the police head constable attached to the concerned police station. The prosecution also relied upon the documentary evidence in the form of spot panchanama, complaint, memorandum statement of the accused etc.. On the basis of said evidence the applicant was convicted. The conviction was confirmed by the Sessions Court by dismissing Criminal Appeal No.95 of 2012 filed by the applicant by judgment and order dated 27th July 2017.

4. Learned advocate for the applicant submitted that both the Courts have committed an error in convicting the applicant. The first information report was lodged against unknown person. The

applicant is not identified by the complainant. The complainant was not examined by the prosecution. Thereupon the property involved in the crime was not identified by the complainant. The applicant is in custody for more than six months. Learned counsel relied upon the decisions 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**².

5. Learned APP submitted that there is concurrent finding of two lower Courts convicting the applicant. He is involved in serious crime. There is recovery from the applicant. The evidence led by 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. I have also perused the judgments passed by Courts below convicting the applicant. The charge was framed against the applicant on 2nd March 2012. The alleged incident had occurred on 6th August 2011. The prosecution had examined PW-1. He is the panch witness for the alleged discovery statement made by the applicant. He has deposed that the accused was sitting in the custody. He confessed the crime. He also made a statement that he has committed theft of golden chain. According to him, the article was recovered at his instance. He has stated that when the accused was introduced to him, he was in the lock-up. PW-2 is the police havaldar attached to the police station. He has also deposed that the statement made by the accused leading

1 AIR-1952-SC-159

2 (2011)10-SCC-165

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

to discovery. PW-3 is police head constable who reiterated the version of PW-2.

7. It is true that police had allegedly made recovery at the instance of applicant. However, the said article is not identified by the complainant. The first information report was lodged against unknown person. The incident had occurred at the spur of moment in a crowd wherein the complainant was pushed by the accused. In the circumstances identification of the accused could have been a vital evidence. Merely on the basis of recovery of the property, which is not established to be belonging to the complainant, the applicant cannot be convicted. The identity of the applicant as the person who has committed the crime, has not been established. Merely on the basis of statement leading to discovery and in the absence of any corroborative evidence, the applicant cannot be convicted. It is also pertinent to note that when the alleged statement leading to discovery was recorded, the applicant was in police lock-up. The prosecution has failed to examine the complainant who was a prime witness in this case. In the circumstances, benefit of doubt will have to be given to the accused.

8. 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.

9. Hence, I pass following order :

ORDER

- (i) Criminal Revision Application No.456 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.105 of 2012 convicting the applicant for offence u/s 379 of Indian Penal Code, as well as the judgment and order dated 27th July 2017 passed by Sessions Judge, Nashik in Criminal Appeal No.95 of 2012, are set aside and the applicant is acquitted of the said offence;
- (iii) Criminal Revision Application No.456 of 2017 and Criminal Application No.442 of 2017 stand disposed of.

(PRAKASH D. NAIK, J.)