

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 567 OF 1997

Mohmed Salim Abdul Rahim Shaikh.

Age: 28 years, R/at K.B. M.

Room No. 374, Vinobha Bhave Chawl,

Mukut Nagar, 90 ft. Road, Sion,

Mumbai 400 017.

..Appellant.

v/s.

The State of Maharashtra.

(L.T. Marg Police Station)

..Respondent.

Mr. M.G. Shukla, advocate appointed for appellant.

Mr. S.R. Agarkar, APP for State.

CORAM : SMT. SADHANA S. JADHAV,J.

DATE : OCTOBER 9, 2019.

JUDGMENT :

1 The appellant(accused No. 2) herein is convicted for the offence punishable under section 452 read with section 34 of the Indian Penal Code and sentenced to suffer R.I. for 3 years and to pay fine of Rs. 1000/- I.d. to suffer R.I. for one month. The appellant is further convicted for the offence punishable under section 392 read with section 34 of the Indian Penal Code and sentenced to suffer R.I. 5 years and to pay fine of Rs. 2,000/- I.d. to suffer R.I. for 2 months, vide Judgment and

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Order dated 15th March, 1997 passed by Addl. Sessions Judge, Gr. Mumbai in Sessions Case No. 1001 of 1993.

2 Such of the facts necessary for the decision of this appeal are as follows :

(i) P.W. 2 Dalichand Seth runs a shop at Abdul Rehman Street in the name of Nova Trading Company, where he sells watches. He has 3 servants in his shop.

(ii) On 15/2/1993 at about 8 p.m. when he was in his shop, four unknown persons had entered into his shop. Two of them were armed with knives and other two were armed with choppers. They had threatened P.W. 2 Dalichand and his son P.W. 3 on the point of knife. One of their associate was standing at the door, holding chopper.

(iii) They snatched Rs. 4,000/- from his right side pant pocket. They snatched gold chain from his neck and then they tried to snatch his wrist watch. P.W. 2 had resisted it and sustained injury. However, they had snatched it by giving him fist blows on his mouth. They had also robbed his son Rajesh.

(iv) In the mean while, P.W. 2 and P.W. 3 had raised shout as “Chor Chor”. A police jeep was passing by. It

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stopped in front of the shop and enquired with P.W. 2. The police with the help of P.W. 2 chased the thieves and were successful in accosting one of the thieves i.e. accused No. 4 Azrulla Khan near L.T. Marg Police Station. They had recovered knife from his possession.

(v) Thereafter, injured P.W. 2 lodged a report at the police station on the basis of which Crime No. 79 of 1993 was registered at the police station.

(vi) On 2nd April, 1993 the police had carried out a raid at Hotel Alms Parlance near Maratha Mandir Cinema and they had found accused Nos. 1, 2, 3 and 5 alongwith 2 more persons in one of the rooms.

(vii) Present appellant happens to be original accused No. 2. That they were found in possession of weapons like revolver and chopper. The present appellant was found in possession of two knives. The offence was registered against them at Dongri Police Station as they were illegally in possession of knives. In the course of investigation, it had transpired that the said persons had participated in the robbery, which was committed at Abdul Rehman Street on 15/2/1993. They were taken into custody and transferred in the said offence.

(viii) On 11th April, 1993 test identification parade was held at Dongri Police Station by P.W. 6 Raju Phedkar. The witnesses P.W. 2 and P.W. 3 had identified all the accused except accused No. 5, who was standing at the door as guard.

(ix) After completion of investigation, charge-sheet was filed. The case was committed to the Court of Sessions. The prosecution had examined as many as 13 witnesses to bring home the guilt of the accused.

3 The case rests on the evidence of P.W.1 Dr. Umesh Hendre, who had examined P.W. 2 Dalichand in the hospital, P.W. 2 injured complainant Mr. Dalichand Goomchand Seth, P.W. 3 Rajesh Seth, son of P.W. 2 and P.W. 6 Raju Phedkar, Special Executive Magistrate who conducted test identification parade. The present appellant was in custody. They were represented at the trial by an appointed advocate through State Legal Aid. It appears that on the date of judgment also accused Nos. 1 to 3 were produced from Thane jail.

4 P.W. 1 Dr. Umesh Hendre was working as casual medical officer at G.T. Hospital. According to him, Dalichand was examined and treated by Dr. Garud. However, since Dr. Garud was his associate, he had identified handwriting and

signature of Dr. Garud. According to P.W. 1, injured had sustained abrasion at right forearm, abrasion on upper lip inner side, fist, trauma on right side chest. However, there is no visible injury on the right side chest. In any case, the complainant himself has given explanation that when he was resisting the act of snatching his watch, he had sustained injuries and thereafter, when he tried to raise shouts one of the accused had given fist blows at his mouth. It is pertinent to note that despite being armed with weapons none of the accused had used knives and choppers.

5 P.W. 2 Dalichand has deposed in consonance with the first information report lodged by him. According to him, on 15/2/1993 after commission of the report, the thieves had tried to flee when P.W. 2 raised shouts of “Chor Chor”. He had assisted the police in accosting accused No. 4 near L.T. Marg Police Station. He has further clarified that 4 persons had entered into the shop and one of them i.e. accused No. 5 was standing outside. At this stage, it would be relevant to note that Criminal Appeal No. 405 of 1997 filed by accused No. 3 Mohd. Hanif Abdul Rashid Shaikh was heard on 5th March, 2018 and was disposed of. However, he was sentenced to the period already undergone, since he had undergone 4 years and 8 months as an under-trial.

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6 P.W. 3 Rajesh Dalichand Seth is the son of P.W. 2. According to P.W. 3, he was called at Dongri Police Station on 11/4/1993. He had identified all the four accused. On 13/4/1993 he was called at the police station for identifying the articles that were seized at the instance of accused persons. In the cross-examination he has stated that he was not able to give exact description of the accused persons since he was in a frightened state of mind. P.W. 3 Rajesh has corroborated the evidence of P.W. 2.

7 P.W. 6 Raju Phedkar was designated as Special Executive Magistrate at the request of the police from Dongri Police Station. He had summoned dummies at Dongri Police Station for test identification parade. According to him, he had conducted T.I. parade as per Criminal Manuals at Dongri Police Station as was his practice.

8 P.W. 11 Investigating Officer has deposed before the Court about the steps taken by him in the course of investigation. As far as Accused No. 4 Azarulla Khan is concerned, he was accosted by the police and P.W. 2 and 3 within a few minutes after the incident and taken into custody. While the present appellant was taken into custody in April

1993. P.W. 2 and 3 have identified the accused persons at the time of test identification parade as well as in the court. Needless to mention that identification in the court is substantive evidence, whereas identification at test identification parade would only be corroborative evidence. The articles seized at the instance of the accused were identified by P.W. 2 and P.W. 3.

9 It would be pertinent to note that test identification parade was not conducted in accordance with criminal manual. One of the requisite as per the Manual is that the parade should be arranged by an officer who is not a police officer, as contemplated in Chapter I(2)(d). As per sub-clause (3)(iv), the parade should be arranged in a room or a place which is such, that the identifying witnesses, as well persons connected with the police, should not be able to look into it. That care should be taken to see, that, at no stage of proceedings, police officer or any police constable comes in the room in which parade is being conducted. The police should not be allowed to interfere with the proceedings which are entirely to be conducted by the Executive Magistrate/Honorary Magistrate. It will be advisable to note in the memorandum itself that no police officer or constable was present at any time during the entire proceedings of the identification parade.

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10 In the present case, test identification parade itself was held in Dongri police station, where Crime No. 79 of 1993 was registered. Special Executive Magistrate was summoned by the Investigating Officer. There cannot be an assurance that there is no interference by the police in the police station and therefore, it would be a fair test identification parade in the eventuality, that it is not held in the police station.

11 Be that as it may, besides the lacunas in the test identification parade, it is more than clear that the articles, which were seized at the instance of the accused persons, have been identified by P.W. 2 and P.W. 3, for which there is no plausible explanation. Even when accused Nos. 1, 2 and 3 were accosted, they were illegally found in possession of arms and there was no explanation for the same. However, for want of notification under section 3 read with section 25 of the Indian Arms Act, they could not be charged, prosecuted or convicted for the same.

12 The accused/appellant was arrested on 2/4/1993 and was produced at the time of Judgment from Thane Jail on 15/3/1997. The record shows that the present appellant was enlarged on bail by this Court vide order dated 30/9/1997, but could not avail of the same till December, 1997.

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13 In view of the above discussion, the conviction of the appellant deserves to be confirmed. However, the appellant is sentenced to the period already undergone. Hence, following order is passed :

ORDER

- (i) The appeal is partly allowed.
 - (ii) The Order of Conviction passed against the appellant vide Judgment and Order dated 15th March, 1997 by the Additional Sessions Judge, Gr. Mumbai in Sessions Case No. 1001 of 1993 is hereby confirmed. However, the appellant is sentenced to the period already undergone. Sentence of fine is maintained.
 - (iii) The bail bond stands cancelled.
 - (iv) The writ be issued forthwith.
- 14 The appeal is disposed off accordingly.

[SMT. SADHANA S. JADHAV, J.]