

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.528 OF 1996**

The State of Maharashtra

... Appellant /
(Orig. Complainant)

Versus

1. Alex @ Taklya Francis Dias.
Triveni Sangam, 2nd floor, R.No.51,
Nikamwadi, Bhavani Shankar Road,
Dadar, Mumbai-28.
2. Asgarali Abdulali Khan.
Lokwani Bungalow, Satrasta,
(Jacob Circle), Mahalaxmi, Mumbai.
3. Joseph Mariya Prekaram Chattiya.
Babrekar Nagar, Sidhi Vinayak Chawl,
Charkop, Andheri (W), Hutments,
Tardeo, Mumbai.

... Respondents /
(Orig. Accused)

.....

- Mrs. M. M. Deshmukh, APP for State / Appellant.
- None for Respondent No.1.
- Mr. Jayant Bardeskar (Appointed Advocate) for Respondent Nos.2 & 3.

**CORAM :- INDRAJIT MAHANTY &
SARANG V. KOTWAL, JJ.**

DATE :- JANUARY 08, 2019

JUDGMENT (PER : SARANG V. KOTWAL, J.) :-

1. The State of Maharashtra has preferred this Appeal against the Judgment and Order dated 07/06/1996 passed by the learned Additional Sessions Judge, Greater Mumbai, in Sessions Case No.1196 of 1993. The Respondents (original accused) were acquitted from the charges framed against them.

2. The Respondent No.1 Alex @ Taklya Francis Dias, Respondent No.2 Asgarali Abdulali Khan and Respondent No.3 Joseph Mariya Prekaram Chattiya were the original Accused Nos.1, 2 and 3 respectively. By the impugned Judgment and Order all the Respondents were acquitted from the charge of commission of offence punishable u/s 395, 394 r/w 34 of the IPC. The Respondent No.2 was acquitted from the additional charge of commission of offence punishable u/s 397 of IPC. There was one more accused i.e. accused No.4 Ganesh Sakharan Khaire who had faced the trial. He was similarly acquitted from commission of offences mentioned above. The said accused is not a Respondent before this Court in the present Appeal.

3. The prosecution case in brief is as follows;

On 10/02/1999 P.W.1 Kishor Prabhakar Mastakar was travelling in his car along with his two employees. He was carrying an amount of Rs.4,14,906/- for depositing it in a bank. When their car reached at V.R. Desai Road, Linking Road, one jeep intercepted them. Three persons came out of the jeep. Two were carrying choppers and was one carrying a hockey stick. There were others in the jeep. Out of these three, one person with chopper wielded his weapon to prevent the members of public to intervene. The other person carrying a chopper broke windshield of the car and took away the bag containing the cash amount. The person carrying a hockey stick assaulted one of the employees. After taking away the money, all of them went away in their jeep. The incident took place in the morning. The FIR was lodged immediately by Kishor Mastakar at about 09.55 a.m. at Oshiwara Police Station, vide C.R.No.110/92. The investigation was conducted. During investigation it was revealed that the accused in C.R.No.28/92 and 359/92 registered at N.M. Joshi Marg Police station were the

culprits in the C.R.No.110/92 of Oshiwara Police Station. Therefore these accused were taken in custody in connection with C.R.No.110/92 of Oshiwara Police Station under transfer warrants. The accused/Respondent No.1 was arrested in the present crime on 25/05/1992. Accused/Respondent No.2, 3 and one more accused namely Sadiq were shown arrested on 23/06/1992 and the accused No.4 was shown arrested on 07/07/1992. Aforementioned Sadiq absconded subsequently and did not face the trial.

4. During course of investigation, three Test Identification Parades were held to enable the witnesses to identify the suspects. In the first Test Identification Parade on 30/05/1992, the accused No.1 was made to stand in the parade and as per the prosecution case, two witnesses identified him. In the second identification parade dated 25/06/1992 all the three eyewitnesses identified accused/Respondent Nos.2, 3 and Sadiq. In the third identification parade dated 14/07/1992, accused No.4 was identified by all three witnesses. There was no recovery of the cash amount or the

weapons involved in the crime. After completion of the investigation, the charge-sheet was filed and the trial was committed to the Court of Sessions.

5. During trial, the prosecution examined 8 witnesses.

P.W.1 Kishor Prabhakar Mastakar was the victim whose cash amount was stolen. P.W.2 Ankush Pundalik Chavan, and P.W.3 Sankatha Prasad Faujadar Pathak were the employees of P.W.1. These three were travelling together. P.W.4 PSI Ramchandra Keshav Gade had recorded the complaint. P.W.5 Dwarkabhai Maganbhai Patel was the owner of the jeep in which the offenders had travelled and intercepted P.W.1's car. His jeep was stolen by the offenders before the present incident. P.W.6 Vishnu Yeshwant Khushe was the Special Executive Magistrate, who had conducted the Test Identification Parades dated 30/05/1992 and 14/07/1992. P.W.7 Mahendra Yashwant Chikhalikar, was another Special Executive Magistrate who had conducted the Test Identification Parade dated 30/05/1992. P.W.8 PI Rupsing Singa Tadwi was the Investigating Officer.

6. The defence of the accused was of total denial. After recording the evidence and the statements of the accused; the parties were heard and at the conclusion of the trial, the learned Judge was pleased to acquit all the accused. It was observed that there was no recovery of weapons or the stolen property and the only evidence against the accused was the possibility of identification. The learned Judge observed that the identification of the accused was not beyond doubt. The witnesses had improved upon their version from the statements given to the police during investigation. On the basis of these observations, the learned Judge was pleased to acquit the accused.

7. P.W.1 Kishor Mastakar as mentioned earlier, was the first informant. He was owning a Petrol Pump situated at Oshiwara, Mumbai. On 10/02/1992 at about 09.30 a.m. he collected the cash from his Petrol Pump in two bags and proceeded towards his bank in his Fiat Car along with his cashiers Ankush Chavan and Sankata Prasad Pathak. The cash amount of

Rs.4,14,905/- was kept in two separate bags. P.W.1 Kishor Mastakar was driving and P.W.2 Ankush Chavan was sitting next to him. His other employee was sitting on the rear seat. When they reached near Sundar Nagar on Link Road, they were intercepted by a jeep bearing registration No.MH-01-1759. According to P.W.1, two persons came out. One was having a chopper and the other was having a hockey stick. The third person alighted from the jeep with chopper. One of them with the chopper broke the windshield of the car. The one with hockey stick broke left side window glass and backside glass with his hockey stick. P.W.1 has further categorically stated in his deposition that the person with a hockey stick took away one bag out of the two bags which were kept on the front seat of his fiat car. P.W.1 has further deposed that because of the splinters of windshield and glass window, he sustained injuries on his face and hand. Chavan was assaulted with hockey stick. He suffered injury on his left shoulder. The third person with a chopper was preventing the public from helping victims. After that the culprits went away from the spot in their jeep. P.W.1 then went to police station and lodged his FIR. The

actual amount which was stolen in one of the bags was to the tune of Rs.3,13,905/-. He further stated that he had noticed that there were in all 8 persons in the jeep including the three who had got down. P.W.1 has further deposed that the accused No.2 was the person with hockey stick. The person who broke the windshield was not before the Court. According to the prosecution case he was the absconding accused Sadiq. Third person who was having chopper was identified as accused No.4 by these witnesses. P.W.1 has further deposed that the accused No.3 was driving the jeep and the accused No.1 was sitting on the rear seat. He has further deposed that on three occasions as mentioned earlier, he was called to police station for the purpose of identifying suspects and he had duly identified the accused during the Test Identification Parade. In the cross-examination some important discrepancies and contradictions from his FIR vis-a-vis his depositions were pointed out to him. He could not explain those contradictions. He had not mentioned about the third person who was carrying a chopper having got down from the jeep. Importantly, according to his case in the FIR, the accused with the chopper had taken away

the bag from his seat, whereas in his deposition he has clearly attributed this role to the accused carrying hockey stick. In his cross-examination he has deposed that in the month of May 1992 he had identified two accused in the Test Identification Parade. Similarly, according to him he had identified two more in June 1992 and one in July 1992. This again is contrary to the other evidence on record, which shows that in May 1992, he had identified one accused; in June, he had identified three accused (one of them was absconding during trial) and on the third occasion he had identified accused No.4 only. The FIR lodged by him is produced on record at Ex.17. In his FIR he has stated that his companion Chavan was dragged out of car and was assaulted with a hockey stick.

8. P.W.2 Ankush Chavan was the cashier of P.W.1 and was travelling with him. He was sitting in the front seat next to P.W.1. He has deposed about the incident. According to him, two persons got down from the jeep. One was carrying a chopper. Accused with the chopper broke the windshield and the accused

with hockey stick broke window glass on this witness's side. P.W.2 sustained blow of that stick on his left shoulder. Accused with a chopper took away the bag and then all accused ran away in their jeep. He has identified the accused No.2 as the person with the hockey stick. He did not identify others. He has deposed that in June 1992 he identified accused No.2 at the police station in a Test Identification Parade. He has admitted in his cross-examination that he had attended the Court for about 10-12 times before his deposition was recorded and he had seen all the accused.

9. P.W.3 Sankatha Prasad Faujadar Pathak, was the third person travelling in the same Fiat car. He has deposed about the incident in the same fashion as deposed by P.W.2 except that he has added that P.W.2 was pulled out of the car and thereafter was assaulted with a hockey stick. P.W.3 has mentioned that two persons had got down from the jeep carrying chopper and hockey stick. He has identified the accused No.2 as the person with hockey stick. He has further deposed that he has identified accused No.2 at the Test Identification Parade.

10. P.W.4 PSI Ramchandra Keshav Gade had recorded the First Information Report and his evidence is limited to that extent. However, he has proved the contradictions between the deposition and FIR given by P.W.1.

11. P.W.5 Dwarkabhai Maganbhai Patel was the owner of the jeep. This jeep was stolen and he had lodged his complaint regarding theft of his jeep. On 24/06/1992 he was informed that his jeep was found.

12. P.W.6 Vishnu Yeshwant Khushe was the Special Executive Magistrate who had conducted the two Test Identification Parades dated 25/06/1992 and 14/07/1992. He has deposed about the procedure followed by him in conducting the Test Identification Parade. Importantly, he has deposed that he had ascertained that identifying witnesses had arrived at police station and were sitting in an adjoining room. This also means that identifying witnesses had arrived before he had come to the police

station. Hence the possibility cannot be ruled out that the accused were shown to these witnesses by the police. Subsequently, the Test Identification Parade was conducted at the Oshiwara Police Station itself. It was conducted on the first floor. The Lockups were on the ground floor.

13. P.W.7 Mahendra Yashwant Chikhalikar was the other Special Executive Magistrate, who had conducted the Test Identification Parade dated 30/05/1992. P.W.7 has also deposed about the procedure followed by him in conducting the Test Identification Parade dated 30/05/1992. This parade was also conducted at Oshiwara Police Station. He has admitted that the identifying witnesses were sitting in another room on the first floor.

14. P.W.8 PI Rupsing Singa Tadwi was the Investigating Officer and he has described the steps taken by him during the investigation. He had filed charge-sheet on 28/08/1992.

15. As mentioned earlier, the entire case is based on the aspect of identification of the accused. There is no recovery of either the weapons or the stolen property. Though the witnesses had identified some of the accused during trial, it is to be noted that the evidence was recorded after more than four years and therefore not much importance can be attached to such identification in the Court, particularly in the light of the admission given by P.W.2 that he had seen the accused many times when he had visited the Court before his evidence was recorded.

16. Insofar as the Test Identification Parades are concerned, they were conducted at Oshiwara Police Station itself. A Division Bench of this Court has considered this aspect in the case of *Ramcharan Bhudiram Gupta and other Vs. The State of Maharashtra*¹. In this judgment, the Court has criticized the practice of conducting identification parade at Police Station and has emphasized as to why such parades at the police station are looked at with suspicion. The Division Bench has observed in paragraph Nos.16 and 17 as follows;

¹ 1995 (1) ALL MR 122

“16. We strongly deprecate the practice of conducting identification at police station; a practice which we are informed at the Bar, is only prevalent in Greater Bombay. The sooner it is abandoned the better it is because, the probability of the suspects being shown to the witnesses prior to the test identification is always there at the police station. At any rate, on account of such a practice, there is always a lurking suspicion in the mind of the court that the witnesses might have seen the suspects prior to the test identification.

17. In order to make identification evidence beyond reproach, it is high time that an end is put to the practice of holding of identification at police station and identification parades instead are held in jail. This practice would not only enable the police to wash the stigma of showing suspects prior to their identification, a stigma which more than often is unfounded but has manifold other advantages. Jails have a large population these days. It would be easy there to find persons similar to the suspects sought to be put for identification. Such similar persons have to be mixed with the suspects at the time of identification.

The identification in jail would not only

actually be free from any taint or suspicion but equally importantly it would also appear to be so. It would instill a sense of confidence both in the minds of the suspects sought to be put for identification as well as the Court.....”

17. In the present case also, there are compelling reasons to hold that the Test Identification Parade held by the Oshiwara Police Station was highly improper. The evidence of both SEM's i.e. the P.W.6 and P.W.7 shows that the witnesses were already present in a separate room, when P.W.6 and P.W.7 were ascertaining about the identity of the accused and completing the procedural formalities. The prosecution has not ruled out the possibility that the suspects were shown to the identifying witnesses. Therefore it is not possible to rely on the evidence in respect of such identification parade. Moreover, P.W.1 has deposed that he had identified two accused in the parade held in May 1992; two more, in the parade held in June 1992 and one in the parade held in July 1992. This is contrary to the prosecution case, because in May 1992 only accused No.1 was subjected to

identification parade. In June the parade was held in respect of accused Nos.2, 3 and Sadiq and in July 1992 it was held in respect of accused No.5. This contrary stand of the P.W.1 was not explained by the prosecution. Thus, the entire evidence in respect of the identification of the accused is not satisfactory.

18. Apart from this, the P.W.1 i.e. the first informant is not even consistent about his version. The important role of snatching away the bag is given to two different accused in his FIR and his deposition. This aspect has also remained unexplained which also shows that his memory had failed him and he has not described the incident or an important part of the incident consistently before the Court and therefore it is not safe to rely on his evidence.

19. The learned Judge has considered all these aspects in their proper perspective. The view taken by him is a possible view and we are not inclined to interfere with his reasoning in an Appeal against acquittal, in the light of the infirmities mentioned hereinabove. With the result, we do not find any merit in the Appeal and the Appeal is accordingly dismissed.

20. We appreciate the efforts put in by Mr.Jayant Bardeskar in assisting the Court.

21. Fees of Mr.Jayant Bardeskar, learned Advocate, appointed to appear on behalf of the Respondent No.2 and 3, is quantified at Rs.5000/- to be paid by the High Court Legal Services Committee from their funds.

(SARANG V. KOTWAL, J.)

(INDRAJIT MAHANTY, J.)