

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 454 OF 2013**

Rajesh @ Raju Samaydin Chaudhari ... Appellant
Age-28 years, Occupation-Tailor
R/o: 27/M/04, Baiganwadi Govandi Road
No. 12, Mumbai.
(At present Nashik Road Central Prison)
V/s.

The State of Maharashtra ... Respondent

Mr. Aniket Vagal for the appellant.
Mr. S.R. Agarkar-APP for the State.

**CORAM : SMT. SADHANA S. JADHAV, J
DATED : 16th SEPTEMBER 2019.**

JUDGMENT:

1. The appellant herein is convicted for the offence punishable under sections 452 and 395 of the Indian Penal Code and he is sentenced to suffer Rigorous Imprisonment for 2 years and fine of Rs.1,000 (Rs. One Thousand Only) by the Ad-hoc and Additional Sessions Judge, Mumbai in Sessions Case No. 844 of 2011 @ Sessions Case No. 314 of 2012 vide Judgment and Order dated 29th October 2012. Hence, this Appeal.

2. The appellant happens to be the original accused no.1 in Sessions Case No. 844 of 2011.

3. Such of the facts necessary for the decision of this appeal are as follows:-

4. On 9th August 2011, the complainant Sandesh Chavan-PW.1, owner of 'Gurukul Online Learning Solution' lodged a report at Vile Parle Police Station alleging therein that at about 11.55 a.m. two persons had covered their faces and had entered his shop situated at 112/114 Ground floor, Shradhanand Road, Vile Parle (E), Mumbai. The said persons were armed with revolvers. That, they were asking for Diamonds. The complainant had reciprocated by stating that it is not a Diamond Shop and it is a Institute imparting online learning courses. One of them had pointed the revolver, threatened, asked him to sit in the cabin and threatened him of dire consequences. The other three persons had entered into the shop. All the said persons had tied the hands of the employees to the chair and had stolen their cellphones, gold chains etc., On the basis of the said report, Crime No. 298 of 2011 was registered at Vile Parle Police Station.

5. It is pertinent to note that the police station is at a distance of hardly 1 kilometer from the spot of incident. The present appellant was arrested on 19th August 2011. One of the accused namely Akbar Shaikh had led to recovery of cellphones, wrist watches and motor cycle part which was used in the commission of the said offence. The other accused were also arrested.

6. It is the case of the prosecution that while leaving the shop the present appellant had removed his Monkey Cap and therefore, the owner and the witnesses had seen him. After completion of investigation the charge-sheet was filed against the present appellant

and the others. The prosecution has examined 15 witnesses to bring home the guilt of the accused.

7. At the trial, the present appellant was identified by the complainant Sandesh Chavan. While, the accused were in police custody a recovery under section 27 of the Indian Evidence Act was initiated, Memorandum was recorded.

8. It is pertinent to note that on 28th August 2011 the Memorandum Statement of all the accused was recorded between 6.15p.m. to 6.35 p.m.. The place of recovery is also the same which was allegedly shown by all the accused and that was Zoya Apartment, Room No. 703, 7th Floor, Wafa Hill Road, Kausa, Mumbra. The Rexin bags were allegedly recovered at the instance of the accused Rajesh Choudhari and Arputraj Palraj Nadar. The recovery was from Joya Apartment. The Rexin bag was found in the cupboard as stated by accused Rajesh Choudhari. The same location is shown in the course of recovery at the instance of A.R. Nadar and at the instance of Akbar Shaikh. The place of recovery is shown as "Beneath the Fridge". At the time of Panchnama, Zubeda wife of Akbar Jallalu Shaikh was present. This would show that the recovery was not effected in accordance with law. It is a fact that at the time of trial the Muddemal Articles included one Rexin bag and not three different Rexin bags.

9. In the case of *Pulukuri Kottaya and Ors v/s. Emperor* reported in A.I.R. (34) 1947 P.C 67 has held that "it is fallacious to treat the "fact discovered" within the section as equivalent to the object produced; the fact discovered embraces the place from which the

object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge; and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added "with which I stabbed A", these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant. "

The recovery is not in consonance with the Memorandum of the accused which was recorded as a prelude to the recovery under section 27.

10. The recovery was caused at the hands of three different police officers i.e. Dilip Sakham Kale as far as accused Rajesh Choudhari is concerned, A.P.I. Milind Desai and A.P.I. Dinkar Raut as far as PW-12 is concerned. In any case there has been no specific recovery at the hands of the present appellant.

11. The only substantive evidence against the appellant seems to be that while leaving the office premises he had removed the monkey cap and therefore, he could be identified by the witnesses. The incident had occurred during day time. The other accused are Nos. 2, 3 and 6 have been acquitted of all the charges levelled against them on

the ground that there is no identification as against them. The charge was also framed under Section 3 read with Section 25 of the Indian Arms Act, 1959. However, there was no material to show that the competent authority had accorded sanction to prosecute the accused under the Indian Arms Act, 1959 and therefore, all the accused were acquitted of the said charges. Identification by witnesses would be an incriminating circumstance to convict the accused.

12. The learned Judge has placed reliance upon the evidence of prosecution witnesses Nos. 1 to 3, prosecution witness No.5 who have stated that accused was not one of the robber who robbed his cellphone, gold chain etc. at the point of country made revolver. In any case there is no recovery at the instance of the present appellant.

13. The learned counsel for the appellant has submitted that the present appellant has been convicted by the High Court, in appeal, for an offence punishable under section 302 of Indian Penal Code and is undergoing life imprisonment. As far as the present offence is concerned, the appellant has undergone the entire sentence. The case rests on identification of the accused by the witnesses at the time of Test Identification Parade as well as in the Court and learned Sessions Judge has rightly placed reliance upon the said evidence to convict the accused for the offence punishable under Sections 452 and 355 of the Indian Penal Code. There is no reason to interfere with the judgment passed by the Learned Sessions Judge. Hence, the appeal stands dismissed.

(SMT. SADHANA S. JADHAV, J)