

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

**CRIMINAL APPEAL NO.1299 OF 2018
WITH
CRIMINAL APPLICATION NO.1348 OF 2019
IN
CRIMINAL APPEAL NO.1299 OF 2018**

SARUIDDIN @ KALU TAJUDDIN SHAIKH)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.Silvin Kale, Advocate for the Appellant.

Mr.A.R.Kapadnis, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

**DATE : RESERVED ON 11th SEPTEMBER 2019
PRONOUNCED ON 18th OCTOBER 2019**

JUDGMENT :

1 By this appeal, the appellant/convicted accused no.3 is challenging the judgment and order dated 3rd May 2018 passed by the learned Additional Sessions Judge, City Civil & Sessions Court,

Greater Mumbai, in Sessions Case No.467 of 2016 thereby convicting him along with the co-accused of offences punishable under Sections 395 and 397 of the Indian Penal Code. For the offence punishable under Section 395 of the Indian Penal Code, the appellant/convicted accused as well as co-accused were sentenced to suffer rigorous imprisonment for 5 years apart from a direction to pay fine of Rs.500/- and in default, to undergo simple imprisonment for 3 months. For the offence punishable under Section 397 of the Indian Penal Code, they are sentenced to suffer rigorous imprisonment for 7 years by the learned trial court. Substantive sentences are directed to run concurrently.

2 Facts, in brief, leading to the prosecution of the appellant/convicted accused, can be summarized thus :

(a) PW1 Manoj Shetty was working as Manager at the Sainath Country liquor bar situated at Mazgaon, Mumbai. His brother Ashwat Shetty was also working with him in the said bar along with five other co-workers. Working hours of the said bar used to be from about 8.00 a.m. till midnight. The

collection of the day used to be deposited by PW1 Manoj Shetty in the bank account on the next day.

- (b) The incident in question took place on 5th March 2016, when the customers were being entertained in the bar. On that day, at about 1.50 p.m., about five to six persons rushed in the bar. They were armed with knife, chopper and iron rod. Those dacoits then threatened the customers and drove them out of the bar. Similarly, the dacoits also drove all the employees in the bar. Thereafter, PW1 Manoj Shetty, his brother Ashwat Shetty and another employee named Raju Jadhav remained at that country liquor bar. One dacoit holding chopper accompanied with another dacoit, then rushed at PW1 Manoj Shetty. The dacoit holding chopper threatened him and asked him to take out the cash. Both these dacoits then grabbed the collar of PW1 Manoj Shetty and dragged him out of the cash counter. The dacoit holding chopper asked another dacoit to take out all cash from the counter, by addressing him as Tabrez. Three dacoits waited at the shutter. After taking out

cash from the cash counter, while going out, the person holding chopper had forcibly taken out Rs.500/- from the shirt pocket of PW1 Manoj Shetty. Other dacoits took cell phones from Ashwat Shetty and Raju Jadhav. After looting the country liquor bar, the dacoits went away while threatening the mob, who had gathered at the spot of the incident. On 5th March 2016 itself, PW1 Manoj Shetty lodged report of the incident with Police Station Sewree and accordingly, Crime No.21 of 2016 for offences under Sections 395 and 397 of the Indian Penal Code came to be registered against unknown dacoits and Tabrez.

- (c) During the course of investigation, the spot was inspected and Panchnama Exhibit 53 was drawn. Accused Mohd. Tabrez and Anthony D'Souza came to be arrested on 5th March 2016 itself. However, the appellant/convicted accused came to be arrested on 6th March 2016.

(d) On the basis of Disclosure Statement of Mohd.Tabrez, Exhibit 26, on 8th March 2016 a mobile phone and knife came to be seized in presence of panch witnesses vide Panchnama Exhibit 28. On the basis of Disclosure Statement of accused Anthony D'Souza, Exhibit 45, an iron rod as well as knife came to be seized vide Panchnama Exhibit 45A from his house in presence of panch witnesses. On 24th May 2016, Test Identification Parade of arrested accused came to be conducted by PW4 Vijay Deodhar, Naib Tahsildar and accordingly, Memorandum thereof at Exhibit 36 came to be prepared. In that Test Identification Parade, PW1 Manoj Shetty as well as Raju Jadhav had identified accused persons. On completion of investigation, they came to be charge-sheeted.

(e) Charge for offences punishable under Sections 395 and 397 of the Indian Penal Code came to be framed against the accused persons. They pleaded not guilty and claimed trial. In order to bring home the guilt to the appellant/accused, the

prosecution has examined in all six witnesses. First Informant Manoj Shetty came to be examined as PW1 and his First Information Report (FIR) is at Exhibit 16. Anil Nakwa, panch witness to the Memorandum Statement of accused Mohd.Tabrez, Exhibit 26, and resultant Recovery Panchnama, Exhibit 27, came to be examined as PW2. Balu Harijan is another panch witness to the said proceedings and he is examined as PW3. Naib Tahsildar Vijay Deodhar is examined as PW4 and Memorandum of Test Identification Parade conducted by him on 24th May 2016 is at Exhibit 36. Panch witness Aslam Shaikh to the voluntary disclosure statement of accused Anthony D'souza, Exhibit 45, and resultant Recovery Panchnama, Exhibit 45A, came to be examined as PW5. Investigating Officer Rahimutulla Sayyad, Police Inspector, was examined as PW6.

- (f) Defence of the appellant/convicted accused was that of total denial. He, however, did not enter in the defence. After hearing the parties, by the impugned judgment and order, the

learned trial court was pleased to convict the appellant/accused and sentenced him accordingly, as indicated in the opening paragraph of this judgment.

3 I have heard Mr.Kale, the learned counsel appearing for the appellant/convicted accused. He vehemently argued that evidence regarding Test Identification Parade adduced by the prosecution is not at all trustworthy and reliable. PW1 Manoj Shetty was taken to the Arthur Road jail by a Police Officer in a police vehicle and in the Test Identification Parade, police were present. He further argued that people of different height and different colour were paraded jointly. In chief-examination, PW1 Manoj Shetty has deposed about six dacoits but subsequently he has not maintained his stand. It is further argued that evidence of PW5 Aslam Shaikh shows that in the detention room only one accused was present and he was handcuffed. Therefore, recovery cannot be said to be reliable.

4 The learned APP supported the impugned judgment and order of conviction and the resultant sentence.

5 I have carefully considered the submissions so advanced and also perused the record and proceedings including oral as well as documentary evidence.

6 PW1 Manoj Shetty, Manager of the Sainath Country Liquor bar of Mazgaon, where the alleged incident of dacoity took place, is the only eye witness examined by the prosecution to prove the parade. He is the First Informant. In the FIR lodged with promptitude, this First Informant has stated that five to six dacoits entered in the bar, out of which, three stayed at the shutter, whereas two came to him. As against this, in his substantive evidence before the court, First Informant/ PW1 Manoj Shetty has deposed that, at about 1.50 to 2.00 p.m. of 5th March 2016, total six persons entered in the bar and they were armed with chopper, knife and rod. He deposed that they threatened the customers and drove the customers as well as the

staff members out of the bar. PW1 Manoj Shetty testified that, then, he himself, his brother Ashwat Shetty and Raju Jadhav remained inside the bar.

7 The mode and manner in which the robbery took place is also explained by First Informant/ PW1 Manoj Shetty. As per his statement before the court, one of the dacoits stood at the shutter and two came towards him. Out of those two dacoits, the one who was holding a chopper, had threatened him and directed him to take out the cash. PW1 Manoj Shetty stated that then, both of them grabbed his collars and dragged him out of the cash counter. Thereafter, chopperwala told another dacoit, whom he addressed as Tabrez, to open the counter and take all cash. Accordingly, the another dacoit, who was with chopperwala, took money from the cash counter. PW1 Manoj Shetty further deposed that then the dacoit holding chopper, took Rs.500/- from his shirt pocket. That chopperwala then asked the another dacoit accompanying him to take money from Ashwat Shetty and Raju Jadhav. As per PW1 Manoj Shetty, then the other dacoits took

mobile phone of Samsung make from Raju Jadhav. Thereafter, they moved out of the liquor bar and he discovered that they lost Rs.26,000/- to Rs.26,500/- in this dacoity apart from mobile phone of Raju Jadhav.

8 PW1 Manoj Shetty has also deposed about his participation in the Test Identification Parade. As per his statement, on 24th May 2016, along with one police personnel, he as well as Raju Jadhav went to Arthur Road jail. He was then taken to a closed room where two panchas came. Then, according to PW1 Manoj Shetty, in two lines of six persons, accused came to be paraded for two times and that is how, he identified four accused persons. As per his version, he identified the appellant/convicted accused as the dacoit, who was standing at the shutter of the bar.

9 Veracity of version of PW1 Manoj Shetty came to be tested in his cross-examination and it is brought on record that after the incident, there was rush of people near the door of the

bar. He admitted that the dacoit, who showed the chopper during dacoity, is not present as an accused before the court. This witness further stated that when he, along with one Raju Jadhav, went by police vehicle to Arthur Road jail, one officer in civil dress was present with him. This witness further admitted that people of different height and colour were standing in the parade.

10 PW1 Manoj Shetty had entered in the witness box after about ten months from the incident. He had reported that five to six persons committed dacoity but before the court he had stated that in all six persons entered in the bar at the relevant time. However, PW1 Manoj Shetty has ascribed role of only three persons in the dacoity. As per his version, one of the dacoits stood at the shutter, whereas the one holding the chopper and another, whom that chopperwala referred as Tabrez, came near him at the cash counter. PW1 Manoj Shetty has not disclosed role of other three persons, who, allegedly, entered in his bar for committing dacoity, throughout his deposition. Thus, version of PW1 Manoj Shetty is giving indication that only three robbers had participated

in the incident. Out of those three, two persons rushed at him when he was at the cash counter of the bar whereas one robber was standing at the shutter. PW1 Manoj Shetty has not disclosed any overt act of the robber, who was allegedly standing at the shutter. His evidence indicates that, the said person was meekly standing at the shutter without doing anything. PW1 Manoj Shetty has not stated that the person standing at the shutter was keeping watch or that he was preventing others from helping out the victims. A dacoity is required to be committed jointly for imposing vicarious liability on all accused persons. Such act is required to be committed by combined efforts of all by their joint and united association. Evidence of PW1 Manoj Shetty is conspicuously silent about role, if any, played in the incident by three other dacoits. As such, whether incident was robbery or dacoity, is not clear from version of PW1 Manoj Shetty.

11 Evidence of PW1 Manoj Shetty unerringly points out that he was having all his attention to the person holding the chopper as well as another person, who was being referred to as

Tabrez by that chopperwala. This is clear from the acts which are sought to be attributed to them by PW1 Manoj Shetty. According to him, they both had grabbed his collars, dragged him out of the cash counter, had looted the cash counter apart from taking out money from his pocket and then after taking the cell phone from employee Raju Jadhav, they left the spot. When the incident was taking place in quick succession, naturally, focus of attention of PW1 Manoj Shetty was the dacoit holding the chopper as well as the dacoit accompanying that chopperwala. In such situation, whether PW1 Manoj Shetty was in a position to see the other dacoits or not is not clear from his evidence.

12 In order to corroborate version of PW1 Manoj Shetty about dock identification of the appellant/convicted accused, the prosecution has relied on evidence regarding the Test Identification Parade. The alleged incident took place on 5th March 2016. Evidence of Investigating Officer PW6 Rahimutulla Sayyad shows that the appellant/convicted accused came to be arrested on the next day of the incident i.e. on 6th March 2016.

There is no positive evidence on record to show that after 6th March 2016 till conducting of the Test Identification Parade on 24th May 2016, PW1 Manoj Shetty had no opportunity to see the accused.

13 In cross-examination PW1 Manoj Shetty has candidly stated that for conducting identification parade, at one time, two accused were paraded with six dummies. This happened in one go. Thereafter, as stated by PW1 Manoj Shetty, in second round, again two accused were paraded with six dummies. He claims to have identified the appellant/convicted accused. If this version of the First Informant / PW1 Manoj Shetty is compared with evidence of PW4 Vijay Deodhar, the Special Executive Magistrate, who conducted the Test Identification Parade, then it becomes clear that evidence on this aspect is not consistent but rather divergent. PW4 Vijay Deodhar, Special Executive Magistrate, has deposed in his cross-examination that separate identification parade was conducted for each accused by parading him with six dummies. An element of doubt creeps in judicial mind as to

whether really the Test Identification Parade was conducted or not. The identifying witness was taken to the place where the parade was conducted in a police vehicle by a police personnel. The Special Executive Magistrate has deposed about separate identification parade for each accused whereas identifying witness has deposed about identification parade in which two accused were paraded on each occasion with two lines of six dummies. The appellant/convicted accused was arrested on 6th March 2016 whereas the Test Identification Parade was conducted after a lapse of more than two months i.e. on 24th May 2016. The prosecution has not explained the reason for not conducting the Test Identification Parade with promptitude. This inordinate delay in conducting the Test Identification Parade, gives an indication that the identifying witness might have seen the accused prior to conducting of the identification parade. Suffice to state that evidence regarding the Test Identification Parade adduced by the prosecution is far from satisfactory.

14 In the wake of this discrepant evidence, there is no explanation coming on record from the prosecution for not examining the two eye witnesses, namely, Ashwat Shetty and Raju Jadhav. Evidence made available by the prosecution is discrepant and lacunic. The prosecution was having two eye witnesses to the incident who are not examined for the reason best known to the prosecution. Foregoing discussion makes it clear that despite thorough and careful scrutiny of evidence of the PW1 Manoj Shetty and PW4 Vijay Deodhar, the Special Executive Magistrate, the same cannot be said to be worth placing the explicit reliance thereon and testimony of these witnesses cannot be accepted and acted upon on its face value. The reasons therefor are stated in the foregoing paragraphs. Thus, available evidence against the appellant/ convicted accused is certainly suffering from several infirmities and lacuna. The same, as such, cannot be accepted in absence of other evidence. Though such other evidence was certainly available in the form of eye witnesses, namely, Ashwat Shetty and Raju Jadhav, the same has been withheld from the court, for no reasons, by the prosecution. This, certainly, invites

adverse inference against the prosecution. As per illustration (a) to Section 114 of the Evidence Act, if a party in possession of best evidence which will throw light on controversy, withholds it, the court can draw an adverse inference against such party. Non-examination of Ashwat Shetty and Raju Jadhav, in the given set of facts and circumstances emerging on record, as such makes the prosecution case suspect, warranting drawing of an adverse inference.

15 So far as the appellant/convicted accused is concerned, nothing is recovered at his instance. Even role alleged to him is to the effect that he was just standing at the shutter of the door. The FIR lodged by PW1 Manoj Shetty makes it clear that even during the course of the incident, lot of people had gathered in front of the country liquor bar. There is doubt which needs to be considered as a reasonable doubt as to whether the appellant/convicted accused was a part of the dacoity or whether he was a mute spectator to the incident which took place.

16 The net result of the foregoing discussion requires me to hold that that charge leveled against the appellant/convicted accused is not proved by the prosecution beyond all reasonable doubt. He needs to be given benefit of doubt and as such the order :

ORDER

- i) The appeal is allowed.
- ii) The impugned judgment and order, so far as it relates to conviction and resultant sentence imposed on the appellant/convicted accused, is quashed and set aside.
- iii) The appellant/convicted accused is acquitted of offences with which he is charged. He be set at liberty, if not required in any other case.
- iv) Fine amount, if any paid by him, be refunded to him.
- v) The appeal stands disposed off accordingly.
- vi) In view of disposal of the appeal, Criminal Application No.1348 of 2019 also stands disposed off.

(A. M. BADAR, J.)