

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE CRIMINAL JURISDICTION
CRIMINAL APPEAL NO. 1212 OF 2003**

Vipin Shantilal Shah)
aged 70 years, Occupation: barrister)
and Consultant, residing at 8, Vimla)
Mahal, Peddar Road, Mumbai-26) ..Appellant

Vs.

1. The State of Maharashtra)

2. Smt. Roshan Farookh Delkha)
residing at Jasmine Lodge,)
82, L. Jagmohandas Marg,)
Mumbai 400 006) ..Respondents

None for Appellant

Mr. V. R. Kasle a/w Mr. Tushar Momaiyah i/b M/s Ram & Co. for
Respondent No.2

Ms Anamika Malhotra, APP for Respondent No.1

**CORAM : K.R.SHRIRAM, J.
DATE : 3rd JANUARY, 2020**

ORAL JUDGMENT

1 This appeal is filed by appellant- Vipin Shantilal Shah, impugning an order and judgment dated 6-6-2002, passed by the Learned Additional Sessions Judge, Greater Bombay, acquitting respondent no.2 of offence punishable under Section 452 (*House-trespass after preparation for hurt, assault or wrongful restraint*) read with Section 109 (*Punishment of abetment if the act abetted is committed in consequence and where no express provision is made for its punishment*) of IPC and Section 395 (*Punishment for dacoity*) read with Section 109 of IPC.

2 It is the case of prosecution that on 2-4-1992, at about 1.15 p.m., 4 persons (original accused nos.2, 3 and 4 and 1 unknown person) entered the office of complainant and forcibly entered his cabin and informed complainant that they have come on behalf of respondent no.2/accused to collect the shares, stocks, debentures of one Mrs. Narialwala. Respondent no.2 who was original accused no.1, was not one among them. Complainant informed them he did not have it. At that time, Shobhraj, Original accused no.4, who was one of the 4 persons, telephoned respondent no.2 from the cabin of complainant and asked what should be done, to which, according to complainant he overheard the instructions to the effect "Unko Khatam Kar Dalo". Thereafter, one of them, who had given his name as Rajan, took out a revolver from his pocket and said that he would kill him with the weapon and put the same on the left side temple of complainant. Thereafter, Rajan snatched certain keys from complainant and opened the drawer and started searching in the cabin for share certificates. They did not find any share certificate but found Rs.1,00,000/- in cash in a briefcase and table drawer, which they took away. In view thereof, complainant went to MRA Marg Police Station on 3-4-1992 and he was advised to give the complaint in writing. According to complainant, on the next day, i.e., on 4-4-1992, he went to the police station to give his written complaint and obtain acknowledgment which was not accepted. Thereafter on number of occasions he visited the police station but the police refused to

take cognizance of the case and register FIR. Only when complainant approached the DGP, who instructed the concerned ACP, the FIR came to be registered on 24-4-1992 for offences under Section 395 and Section 452 read with Section 120B of IPC, against 4 named persons and against 4 other unnamed persons. The 4 named persons are respondent no.2 Smt. Roshan Delkha, Rajan, Sharekhan and Shobhraj. Rajan, Sharekhan and Shobhraj were never traced by the police and these 3 persons and 4 unnamed persons never stood trial.

3 Respondent no.2, was the only accused, who stood trial and denied all allegations and claimed to be tried. The Trial Court by its judgment and order dated 6-6-2002 acquitted respondent no.2 and also observed that the existence of Rajan, Sharekhan, Shobhraj itself is doubtful and complainant has given fictitious names.

4 To drive home their point, prosecution led evidence of 5 witnesses. PW.-1 is complainant. Defence did not lead any evidence. I have considered the charge. First charge is under Section 452 read with Section 109 of IPC, which begins with the following words “ That you accused no.1 by remaining absent along with on 2-4-1992 committed house trespass.....”. Accused no.1 is respondent no.2. The second charge is under Section 395 read with Section 109 of IPC, which begins with

the following words “That you accused no.1 alongwith wanted accused nos.2, 3, 4 and other 4 unknown persons on 2-4-1992..... conjointly did commit dacoity in respect of one brief case containing cash of Rupees One Lakh..... and thereby committed an offence of dacoity punishable under Section 395 read with Section 109 of IPC.....”. Admittedly, respondent no.2 was not present on 2-4-1992 and, therefore, could not have committed offence under Section 452 or Section 395 of IPC. The Learned APP says, and I agree with the Learned APP, that the charge against respondent no.2 is only under Section 109 - abetment.

5 Section 109 of IPC reads as under:

109:- Punishment of abetment if the act abetted is committed in consequence and where no express provision is made for its punishment - Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence.

Therefore, under Section 109 of the IPC, whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence. There is no express provision for abetment of offence under Section 452 and Section 395 of IPC. The fact is the offence under Sections 452 and 395 has been charged against Rajan, Sharekhan and Shobhraj and 4 unknown offenders. None of those persons have even been traced.

Section 109 provides that if the act abetted is committed in consequence of the abetment and there is no provision for the punishment of such abetment, then the offender is to be punished with the punishment provided for the original offence. The Apex Court in *Joseph Kurian Vs State of Kerala*¹ held that Section 109 is by itself an offence though punishable in context of other offences. The roles of the perpetrator and abettor are distinct. "Abetted" in Section 109 means the specific offence abetted. Therefore, the offence for the abetment of which a person is charged with the abetment is normally linked with the proved offence (**Kishori Lal Vs. State of MP**²), unlike under Section 107. As per Section 107 a person abets the doing of a thing when he does any of the acts mentioned in the following three clauses; (i) instigates any person to do that thing, or (ii) engages with one or more other person or persons in any conspiracy for the doing of that thing, or (iii) intentionally aids, by any act or illegal omission, the doing of that thing. So far as the first two clauses are concerned it is not necessary that the offence instigated should have been committed. Explanation 2 in [Section 107](#) I.P.C. helps to understand the scope of the word aid and it reads thus:

" whoever, either prior to or at the time of the commission of an act, does any thing in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act."

1 (1994) 6 SCC 535

2 2007(10) SCC 797

It is thus clear that under the third clause, as opposed to first two clauses, it is necessary that the offence instigated should have been committed in order to make such aiding an offence. In other words, unlike the first two clauses the third clause applies to a case where the offence is committed (**CBI Vs. V. C. Shukla & Ors.**³). Section 109 stands in the footing similar to the third clause which is based on explanation 2 of Section 107 of IPC. It applies to the case where the offence committed. This Section itself shows that unless act abetted is committed, no offence under Section 109 of the IPC is made out.

6 Therefore, if respondent no.2 has to be charged with abetment, it has to be linked with the offence proved to have been committed by original accused nos.2, 3 and 4 and the unnamed 4 persons. In this case, none of the other accused have even been traced by the police and they have not even stood trial to hold respondent no.2 guilty of abetment. Other accused who are alleged to have committed offence under Section 452 and Section 395 must be proved beyond reasonable doubt to have committed the offences. When that has not been proved, respondent no.2 cannot be charged with abetment. In the present case, it is not proved that accused nos.2, 3 and 4 and 4 unnamed persons have committed the offence charged under Sections 452 and 395. Therefore, the charge of abetment under Section 109 cannot stick against respondent no.2.

3 1998 CRI L.J. 1905)

7 Moreover there are numerous material omissions, contradictions and improbabilities in the evidence of P.W.-1 and also in the evidence of P.W.-2 and P.W.-3. Those contradictions, omissions and improbabilities have been noted by the Trial Court in the impugned judgment in paragraphs 23 to 26. For the sake of brevity, I am not reproducing those contradictions, but having perused the evidence, I am in total agreement with the observations made by the Trial Court.

8 I have to also note that in Testamentary Suit No.61 of 1994 filed in this court, an order of 23-8-2010 has been passed by a Learned Single Judge, in which it is noted that appellant herein had filed in Testamentary Petition No.394 of 1991 a caveat as well as an affidavit in support to challenge any probate being granted to a Will propounded by respondent no.2 as that of Late Mrs. Narialwala. That caveat itself has been dismissed. Therefore, it is possible that this case in hand also could be a cooked up case.

9 The Apex Court in ***Chandrappa & Ors. V/s. State of Karnataka*** ⁴ in paragraph 42 has laid down the general principles regarding powers of the Appellate Court while dealing with an appeal against an order of acquittal. Paragraph 42 reads as under :

“42. From the above decisions, in our considered view, the following general principles regarding powers of appellate Court while dealing with an appeal against an order of acquittal emerge;

(1) An appellate Court has full power to review, reappraise and

4. (2007) 4 SCC 415

reconsider the evidence upon which the order of acquittal is founded;

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law;

(3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasize the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

(4) An appellate Court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the the accused. Firstly, the presumption of innocence available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

10 There is an acquittal and therefore, there is double presumption in favour of accused. Firstly, the presumption of innocence available to the accused under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless they are proved guilty by a competent court of law. Secondly, respondent no.2 having secured her acquittal, the presumption of her innocence is further reinforced, reaffirmed and strengthened by the trial court. For acquitting accused, the Trial Court rightly observed that the prosecution had failed to prove its case.

11 In the circumstances, in my view, the opinion of the Trial Court cannot be held to be illegal or improper or contrary to law. The order of acquittal, in my view, need not be interfered with.

12 Appeal dismissed.

(K.R. SHRIRAM, J.)