

Urmila Ingale

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 610 OF 2015

Mustafa Yunus Khan
A male, age 26 years
residing at Room NO. 303,
3rd floor, China Heights Building,
Mumbra, Dist. Thane
(At present lodge in Arthur
Road Central Prison)

.. Appellant

Vs.

The State of Maharashtra
at the instance of Kalachowki
Police Station C.R.XVII2/20XII

.. Respondent

Mr.Mandar Goswami, for Appellant.
Mr.H.J.Dedhia, APP for State.

**CORAM : S.S.Shinde &
M.S.KARNIK, JJ.**

DATE : 19th AUGUST 2020

ORAL JUDGMENT :-

1. The opponent – Mustafa Yunus Khan alias Sohail Batla is the original accused No.2 in C.R.No. 172 of 2012I registered with the Kalachowki Police Station.

2. At the outset, learned Counsel for the appellant – original accused No.2 submitted that he is not challenging the conviction, but prays that the sentence imposed by the learned Sessions Judge under Maharashtra Control of Organised Crime Act, 1999, (MCOC Act for short) for Greater Mumbai for an offence punishable under section 394 read with 34 of Indian Penal Code ('IPC' for short) be reduced. The appellant is sentenced to suffer rigorous imprisonment for life with fine of Rs.5,000/- in default, to suffer simple imprisonment for two years.

3. Learned Counsel submits that the original accused No.1 - Vijay Satish Patil alias Namdeo Parshu Powar who is also convicted under section 394 read with 34 of IPC is sentenced to suffer rigorous imprisonment for seven years with fine of Rs.5,000/- in default, to suffer simple imprisonment for one year. Learned Counsel submitted that the role of the accused Nos. 1 and 2 (appellant) is the same. He urged that no weapon has been used by the appellant in the commission of the offence and that no injuries are sustained by the complainant.

4. Learned Counsel submits as true that the appellant was convicted earlier for three years for an offence punishable under section 392 read with 34, section 451 read with 34, Section 242 read with 34 IPC. It is however the contention that without framing a separate charge under section 75 of IPC, the Sessions Court was not justified in enhancing the sentence and thereby sentencing the appellant to suffer imprisonment for life. According to him his co-accused No.1 - Vijay Patil was sentenced to suffer seven years rigorous imprisonment for the very same offence whereas the appellant is convicted for life. He emphasized that even the role of the original accused No.1 Vijay is exactly similar to that of the appellant.

5. In any case, he urged that even assuming without admitting that the operation of section 75 warrants an enhanced of punishment upon previous conviction, even then in the facts of the present case, considering the role of the appellant sentence of life imprisonment imposed is disproportionate & harsh which deserves to be reduced.

6. The submission made by learned Counsel for the

appellant for reduction of sentence is opposed by learned APP. He submits that the appellant does not deserve leniency. According to him the appellant is the head of an organized crime syndicate. The co-accused are its members. Learned APP submitted that there are as many as nine charge-sheets filed against the appellant and other accused. There is previous conviction against the appellant. The appellant is convicted for three years for the offence punishable under section 392 read with 34, section 451 read with 34, section 342 read with 34 IPC vide judgment dated 10th August 2009 in Sessions Case No. 415 of 2008 along with Sessions Case No. 687 of 2008.

7. Heard. The trial Court found that the appellant along with original accused No.1 and 2 and other persons committed house trespass by entering the house of informant- P.W.5 on 03rd September 2012 and committed robbery of ornaments and cash. In doing so, they wrongfully confined P.W.5 and voluntarily caused hurt to her. The Sessions Court therefore came to the conclusion that the prosecution has succeeded in proving the offence under

sections 342, 452, 394 read with 34 of IPC against the appellant and original accused No.1. The robbery was committed when P.W.5 - Manisha Mahadev Dalvi was alone at home. Accused No.1 and the appellant caught hold of the informant from behind and forced her against the wall. The other two accused entered the bed room. When PW.5 tried to resist, one of the accused assaulted her by giving fist blow on her mouth and stomach. One accused gagged her mouth with a cloth. One of four accused pointed a pistol at her and threatened to kill her if she raised her voice.

8. The trial Court held that the prosecution failed to prove fire arm i.e. revolver and chopper were used during this robbery. The trial Court found that evidence of P.W.5 coupled with evidence of P.W.1, P.W.4, P.W.7, P.W.11 and P.W.12 as sufficient to prove the charge against the accused No.1 & appellant on the point of their intentional entry in the house of the informant and the robbery committed by them. The offence of house trespass against accused No.1 & appellant and two more person is held to be clearly established. Further the trial Court held from the evidence

of P.W.5 that her hands and legs were tied and she was made to lie in a prostrate condition to prove that the accused No.1 and accused No.2 (appellant) and two more persons have wrongfully confined the informant. The trial Court further held that evidence of P.W.22 read with evidence of P.W.5 and Doctor P.W.10 shows that the accused involved in the incident have voluntarily caused hurt to P.W.5. The trial Court ultimately held that ingredients of robbery by causing voluntary hurt as established.

9. It is the contention of learned Counsel for the appellant that without framing a charge for enhancement of punishment under section 75, the trial Court was not justified in enhancing the sentence. According to him framing of a charge is mandatory as the appellant is entitled to know the charge he has to defend as the consequence is deprivation of liberty and hence Section 75 is to be strictly construed. In his submission, framing of the charge under Section 75 has to be held as a mandatory statutory requirement. Failure to frame a charge in terms of Form 32

in Schedule II of CrPC would render enhanced punishment illegal and a nullity.

10. With a view to appreciate the submission of learned Counsel for the appellant & learned AGP, it would be material to extract section 75 of IPC which reads thus :-

“75. Enhanced punishment for certain offences under Chapter XII or Chapter XVII after previous conviction.—Whoever, having been convicted,—

(a) by a Court in ³[India], of an offence punishable under Chapter XII or Chapter XVII of this Code with imprisonment of either description for a term of three years or upwards, ⁴[*]

⁴[***]

shall be guilty of any offence punishable under either of those Chapters with like imprisonment for the like term, shall be subject for every such subsequent offence to ⁵ [imprisonment for life], or to imprisonment of either description for a term which may extend to ten years.]”

11. Form 32 in Schedule II of CrPC provides the form for a charge after previous conviction which reads thus :-

“I,, (name and office of the Magistrate, etc.), hereby charge you (name of the accused) as follows :

That you, on or about the day of, at, committed an offence punishable under section, I.P.Code and within my cognizance (or Court of Session).

That you, the said, stand further charged that before committing the said offence you had been convicted on of an offence punishable under Chapter XII or Chapter XVII of the I.P. Code with imprisonment for a term of three years and the said

conviction is still in force, and that you are thereby liable to enhanced punishment under section 75, I.P.Code.

And I hereby direct that you be tried by the said Court on the said charge.”

12. The question for consideration is whether the enhanced punishment imposed by the Sessions Court after previous conviction stands vitiated on account of failure to frame a charge in the prescribed Form 32 in Schedule II of CrPC.

13. The object of providing for enhanced punishment for certain offences under Chapter XII or Chapter XVII after previous conviction is obviously to deal with the accused with an iron hand as even the previous conviction has not been a deterrent. A grim view is taken as the accused has not stopped himself/herself in indulging in commission of an offence under Chapter XII or Chapter XVII despite having been previously convicted by a Court in India. The underlying principle is that an offender who is not deterred by previous conviction then has to face an enhanced punishment for certain offences under Chapter XII or Chapter XVII after previous conviction. The form of charge is specified under section 75 of CrPC.

14. In the present case admittedly the charge was not framed. In our opinion, absence of framing a charge in the form specified under Section 75 in the present fact situation would not vitiate the enhanced punishment. The object of framing a charge under section 75 for enhanced punishment is to provide an opportunity to the offender to deal with the aspect of enhanced punishment to be imposed after previous conviction. Section 75 mandates the Court to impose enhanced punishment for certain offences under Chapter XII or Chapter XVII after previous conviction. The Sessions Court was conscious of the requirement of the form of charge under section 75. The trial Court observed that it is not necessary to frame a separate charge under section 75 of the IPC. The Sessions Court recorded that accused No.2 admitted that he was convicted for three years for the offence punishable under section 392 read with 34, section 451 read with 34, section 342 read with 34 IPC vide judgment dated 10th August 2009 in the Sessions Case No. 415 of 2008 along with Sessions case No. 687 of 2008. The appellant was asked to explain as to why life imprisonment should not be granted to him and the only ground upon

which the appellant sought leniency is that he is engaged to Ms.Shahista Abdul Hamid Khan and wants to settle down in life. Thus, the appellant was aware about the charge he was to defend as regards enhanced punishment on account of previous conviction. An opportunity was given to him by Sessions Court to deal with the said charge. He even sought leniency on the ground that he is engaged to Ms.Shahista and wants to settle down. The appellant admitted that he was convicted for three years in the previous Sessions case. In such a situation, merely because, the Sessions Court did not frame a separate charge in the form prescribed under section 75 will not vitiate the enhanced punishment in the absence of any prejudice shown to the appellant and moreover when all other essential requirements as regards the purpose for which the charge is to be framed are complied with.

15. We now proceed to deal with the next submission of the learned Counsel for the appellant for reduction of sentence as according to him enhancement of sentence to life imprisonment for previous conviction is disproportionate

and harsh. In the facts of the present case, we are not inclined to take a lenient view and reduce the sentence. No doubt, role of accused No.1 and accused No.2 is the same.

16. The appellant was liable for enhanced punishment in terms of Section 75 and the sentence has been so enhanced as discussed earlier. Learned APP invited our attention to paragraph 56 of the Judgment of the Sessions Judge where it is recorded that from the evidence of IO-P.W.20 it is proved that as many as 9 charge-sheets are filed against the accused No. 2 (appellant) who is the head of organised crime syndicate. The charge-sheets pertain to the commission of offences of robbery or dacoity conjointly with the co-accused therein. As recorded earlier the Sessions Judge in paragraph 61 of the judgment has observed that though the appellant is earlier convicted for 3 years for the offences punishable under Sections 392 r/w 34, 451 r/w 34, 342 r/w 34 of IPC despite which he committed the present crime. The Sessions Court therefore held that the appellant is not entitled to leniency. In paragraph 65, learned Sessions Judge observed that it is not

necessary to frame separate charge under Section 75 of IPC as the accused No.2 admitted that he was convicted for 3 years for the various offences punishable under Section 392 r/w 34, 451 r/w 34 , 342 r/w 34 of IPC vide judgment dated 10/08/2009 in Sessions Case No. 415 of 2008 along with Sessions Case No. 687 of 2008. In these facts it is not possible for us to accede to the plea of learned Counsel for the appellant that the sentence be reduced. In our opinion, sentence cannot be said to be disproportionate or harsh. Consequently, we do not find any substance in the Appeal.

17. The Appeal is dismissed.

18. This order will be digitally signed by the Private Secretary of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

(M.S.KARNIK, J.)

(S.S.SHINDE, J.)

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Digitally signed
by Urmila P.
Ingle
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2021.02.23
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