

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO.202 OF 2018

Ram s/o. Sheshrao Bodkhe,
Age : 38 years, occ. Agri.,
r/o. House No.2,
Siddheshwar Nagar, Jadhavwadi,
Aurangabad

..Appellant

Vs.

The State of Maharashtra

..Respondent

Mr.S.S.Thombre, Advocate holding for Mr.A.K.Bhosale, Advocate
for appellant

Mr.K.B.Jadhavar, A.P.P. for respondent

**CORAM : R.G. AVACHAT, J.
DATE : JULY 01, 2021**

JUDGMENT :-

This appeal is directed against the judgment and order dated 15.02.2018 passed by learned Addl. Sessions Judge, Aurangabad, in Sessions Case No.153 of 2014. By the impugned judgment and order, the appellant has been convicted for the offence punishable under Section 397 of Indian Penal Code

("I.P.C.", for short) and sentenced to suffer rigorous imprisonment for a period of seven years and pay a fine of Rs.10,000/-. In default of payment of fine, he has been directed to undergo rigorous imprisonment for three months.

2. The facts giving rise to the present appeal are as follows:-

Sanjay (PW 1) was a professional auto-rickshaw driver. He would ply auto-rickshaw bearing registration No.MH-20-W-477. It belonged to Ferozkhan (PW 6). Sanjay (PW 1) had taken said auto-rickshaw on hire from Ferozkhan (PW 6).

On 29.04.2012 by 08.30 p.m., Sanjay (PW 1) was present with his auto-rickshaw outside of 'Pyasa Wine Shop'. Three persons came to him. They boarded the auto-rickshaw and asked him to take them to Raje Sambhaji Colony. The trio alighted from the auto-rickshaw. Sanjay (PW 1) asked them to pay the rickshaw fare. Thereupon, one (appellant) of three pulled him out of auto-rickshaw. He claimed himself to be 'Ram Bodkhe'. He said, "मला राम बोडखे म्हणतात, राम बोडखे कोणाला पैसे देत

नाही पण पैसे घेतो (Ram Bodkhe do not pay, he only knows to take money from others)". He then fished out a knife and stabbed Sanjay (PW 1) in his stomach. Sanjay (PW 1) was robbed of Rs.2,000/-. The trio then beat him up and fled away in said auto-rickshaw, leaving Sanjay behind. Some other auto-rickshaw drivers took Sanjay (PW 1) to his residence. Savita (PW 2), sister of Sanjay (PW 1), admitted him to Ghati Hospital. Sanjay (PW 1) underwent an operation there. On the next day, he lodged the FIR (Exh.26) in the hospital itself.

3. Based on the FIR (Exh.26), Crime bearing C.R. No.I-136 of 2012 came to be registered with C.I.D.C.O. Police Station, Aurangabad, for the offence punishable under Section 397 of I.P.C. against Ram Bodkhe and two unknown persons. Vithhalsing (PW 9), P.S.I. attached to C.I.D.C.O. Police Station, took up the investigation. He paid visit to the scene of offence and drew the scene of offence panchnama (Exh.47). He examined the persons acquainted with the facts and circumstances of the case, obtained injury certificate of the victim and arrested the appellant and two others. On

completion of the investigation, charge-sheet came to be filed in the Court of Chief Judicial Magistrate, Aurangabad. The case came to be committed to the Court of Sessions for trial.

4. Learned Addl. Sessions Judge framed charge (Exh.17) against the appellant and one Anil Rathod (accused no.3). Chandrakant @ Rahul Navnath Gaikwad (accused no.2) was said to be absconding. It appears that pending the trial, accused no.3 – Anil Rathod passed away. The case stood abated against him. The prosecution examined in all nine witnesses and tendered in evidence some documents. The defence of the appellant is of false implication. According to him, Sanjay (PW 1) suffered injuries in the accident involving auto-rickshaw.

5. Heard learned counsel for the parties. Mr.S.S.Thombre, learned counsel for the appellant, would submit that Sanjay (PW 1) did not know the appellant before the incident. He named the appellant in the F.I.R. since the alleged assailant claimed himself to be Ram Bodkhe. On arrest of the appellant, test identification parade was not held. No

independent witness has been examined. The evidence indicates that Sanjay (PW 1) did not have Rs.2,000/- with him, while the alleged incident took place. The same suggests that the appellant and others were falsely implicated in the offence of robbery. According to learned counsel, the trial Court ought not to have convicted the appellant in the facts and circumstances of the case.

6. Mr.Jadhavar, learned APP, would, on the other hand, took me through the reasons given by the trial Court in support of the impugned judgment. He also read out evidence of the victim. According to learned APP, the appellant has been identified before the Court. The injury certificate reinforces the prosecution case.

7. Sanjay (PW 1) testified that on the given date, by 08.30 p.m., he was present with his auto-rickshaw outside 'Pyasa Wine Shop'. Ram Bodkhe and his two associates came. The trio boarded the auto-rickshaw and asked him to take them to Raje Sambhaji colony. He, accordingly, took them to said colony. After the trio alighted from the rickshaw, he asked

them to pay the rickshaw fare. Ram Bodkhe pulled Sanjay (PW 1) out of the rickshaw. He said, "मला राम बोडखे म्हणतात, राम बोडखे कोणाला पैसे देत नाही पण पैसे घेतो (Ram Bodkhe do not pay, he only knows to take money from others)". Ram Bodkhe then fished out a knife and stabbed Sanjay (PW 1) in his stomach. Other two robbed him of Rs.2,000/- and thrashed him with fist and leg blows. Due to the assault, he became unconscious. The trio fled away in his auto-rickshaw, leaving him (Sanjay) behind. Someone took him to his residence. His sister – Savita (PW 2) admitted him to the hospital. He underwent an operation there. On the next day, he lodged the FIR (Exh.26).

8. In response to the questions put to him during cross-examination, it has come on record that he did not know the appellant before the incident. He named the appellant in the F.I.R. since the assailant claimed himself to be Ram Bodkhe. On arrest of the appellant and his associate, Sanjay (PW 1) was called to police station. He was shown both of them. He identified them as assailants.

9. True, the F.I.R. was lodged within hours of the incident. The history of the assault has been given therein. The injury certificate (Exh.76) has been proved in the evidence of Dr. Pushpa (PW 7). The injury certificate indicates the appellant to have suffered following injuries :-

Sr No	Type of injury	Part of body	Type of probable weapon	Nature of injury
1	Stab injury, 2x1 cavity deep	Right flank	Sharp	simple
2	Blunt trauma	Chest	Hard and blunt	simple
3	Blunt trauma	Mouth	Hard and blunt	simple

10. Savita (PW 2), sister of Sanjay (PW 1) testified that somebody brought Sanjay (PW 1) to his home. It was she, who admitted him to the hospital. The evidence of Savita (PW 2) does not take us further.

11. Dr.Pankaj (PW 4) was examined to show that while the statement/F.I.R. was recorded, Sanjay (PW 1) was conscious and well-oriented. Shahadeo (PW 5) was said to be an eye-witness to the incident. He, however, did not stand by

the prosecution. Firozkhan (PW 6) is owner of the auto-rickshaw. It is in his evidence that he had given his auto-rickshaw to Sanjay (PW 1) on hire. On the fateful day, he found his auto-rickshaw in damaged condition at Jadhavwadi-Jalgaon road.

12. The other two witnesses examined in the case are police personnel. One of them has recorded the F.I.R. and other one is the Investigating Officer. As such, the case was based on the sole testimony of the victim - Sanjay (PW 1). It is reiterated that Sanjay (PW 1) did not know the appellant before the incident. He gave the appellant's name in the F.I.R. because the assailant claimed to be Ram Bodkhe. On arrest of the appellant, no test identification parade was held. In the police station, the police shown Sanjay (PW 1) the appellant. The evidence of Sanjay (PW 1) was recorded in October, 2016 i.e. four and half years after the alleged incident. The appellant's identification in the Court, therefore, loses its efficacy.

13. The Hon'ble Supreme Court in the case of **Malkhansingh and ors. Vs. State of Madhya Pradesh, (2003)5 SCC 746**, has observed thus :-

"7. It is trite to say that the substantive evidence is the evidence of identification in court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure, which obliges the investigating agency to hold, or confers a right upon the accused to claim, a test identification parade. They do not constitute substantive evidence and these parades are

essentially governed by section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration."

14. The trial Court convicted the appellant relying on the evidence of the victim alone. Since the appellant was named in the F.I.R. only on the basis of the assailant claimed that he was 'Ram Bodkhe'; on his arrest, no test identification parade was held; and he having been shown to Sanjay (PW 1) in the police station, his identification before the Court is of little consequence. As such, it has to be said that the prosecution failed to establish the charge beyond reasonable doubt. The appellant is, thus, entitled for acquittal. The appellant has been in jail for little over three years and five months.

15. In the result, the appeal succeeds. Hence, the following order:-

(i) The appeal is allowed.

(ii) The impugned judgment and order dated 15.02.2018 passed by learned Additional Sessions Judge, Aurangabad, in Sessions Case No.153 of 2014, convicting the appellant for the offence punishable under Section 397 of Indian Penal Code, is set aside.

(iii) The appellant is acquitted of the offence punishable under Section 397 of Indian Penal Code. He be set at liberty forthwith, if not required in any other offence.

(iv) Fine amount, if paid, be refunded to him.

[R.G. AVACHAT, J.]