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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 163 OF 2002

The State of Maharashtra

} ...Appellant
(Orig. Complainant)

Versus

1. Arun Shetty @ Sumir Jeevan Shera,
age 34 years, R/o Margaret House,
Room No. 13, 3rd floor, Vadala,
Mumbai.
2. Prasanna @ Prashant Govind Pujari,
age 29 years, R/o. A-5/2/3, S. No. 18,
Nerual, Navi Mumbai.
3. Ramesh Gouda @ Swami Gouda Inge
Gouda,
age 28 years, R/o Saat Rasta, Arthur
Road Jail, Hari Chawl.
4. Safat Hussain Irfan Hussain,
age 21 years, R/o Bldg. No. 120,
Kannamawar Nagar, Room No. 3499,
Vikhroli (W), Mumbai.

} ...Respondents
(Orig Accused)

Mr. V.B. Konde - Deshmukh, APP for Appellant – State.
None for the Respondent.

CORAM : PRASANNA B. VARALE &
N. R. BORKAR, JJ.

DATED : JULY 05, 2021.

JUDGMENT (PER PRASANNA B. VARALE, J)

1. The present Criminal Appeal takes an exception to the judgment and order passed by the learned IV Additional District and Sessions Judge, Thane, dated 18.10.2001, in Sessions Case No. 229/1999, whereby acquitted the Respondents herein for the offences punishable under Sections 420, 395, 397, 120(B) and 34 of Indian Penal Code (for short "IPC"), the present Appeal is preferred by the Appellant – State of Maharashtra.

2. At the outset, we may state here that this Court vide order dated 04.10.2010 dismissed the Criminal Appeal against Respondent No. 3.

3. The prosecution case unfold through the complaint / report lodged at the instance of Narayanrao Donkyama on 19.09.1998. Though, this witness is the person who set the investigating agency in motion by lodging the report but, for the reason best known to the prosecution, this material witness was not examined by the prosecution. Be that as it may, now we may refer to the complaint, firstly.

It is the case of the prosecution that on 19.09.1998 at about 05.40 p.m. Arun Shetty (A 1) made phone call at Adarsh lodge which was received by Konda Reddy and it was informed by Arun Shetty (A 1) to him that he and his associates would come to the hotel to receive him. At about

6.00 pm Arun Shetty (A 1) reached at the said hotel by taxi and thereafter he picked up the complainant - Narayanrao, Konda Reddy and Raju Adams (PW 4). It is the case of the prosecution that Raju Adams has brought brown colour briefcase with him which contains passports, dollars and some Indian currency. As they reached near the taxi, Arun Shetty (A 1) told them that to get visa from American Embassy, one person namely, Mike will help them who stayed in farmhouse outside the Mumbai. Arun Shetty (A 1) further told them that to get those visa, it is necessary to meet Mike and has to pay total 62,000/- dollars to him. It is the case of prosecution that complainant and other persons went with Arun Shetty (A 1) in the taxi. Thereafter complainant and Arun Shetty stopped at one hotel to drink beer. Thereafter after passing some the distance on Mumbai – Pune highway accused Arun Shetty stopped the taxi on left side of road. Complainant and other persons got out of the taxi. By that time two persons from the right side of the taxi came there and Arun Shetty (A 1) thrown chilli powder on the face of Raju Adams (PW 4) while he was outside the taxi. At the same time, accused persons assaulted complainant Narayan Rao and Raju Adams (PW 4) by fist blows. On account of blows unleashed by accused, Naraynrao fell down in the gutter adjoining to the road. Thereafter Arun Shetty (A 1) and other accused persons snatch the brown colour briefcase from the hands of Raju and fled away from the spot.

Thereafter Narayanrao reached to the police station and lodged the complaint Exh. 44 against the accused persons.

4. On the basis of the report, the investigation agency was set in motion. During the course of investigation, P.I. Shivdas (PW 5), the investigating officer visited the scene of occurrence, drew the spot and seizure panchnama, arrested the accused persons. After completion of the investigation, charge-sheet came to be filed in the Court of Judicial Magistrate F.C at Vashi. As the offences being exclusively triable by the Court of Sessions, the case was committed to the Court of Sessions. The accused abjured charges levelled against them and claimed trial. On appreciation of evidence learned Trial Court vide its judgments and order acquitted the accused of the charges.

5. Learned APP appearing for the Appellant – State vehemently submitted that the prosecution through eye witnesses, and more particularly, the injured eye witness and other supporting evidence in the form of various panchanamas such as spot and seizure panchanama, etc established its case. Learned APP further submitted that learned Trial Judge while appreciating the evidence has not appreciated the evidence in proper perspective more particularly, the evidence of eye witness. Thus, learned APP prayed for setting aside the judgment and order of acquittal by allowing the Criminal Appeal.

6. None appeared for the Respondent.
7. With the assistance of learned APP, we have gone through the record.
8. To bring home the guilt of the accused persons, the prosecution has examined as many as 5 witness as follows: Suresh Pandurang Gurav (PW 1) and Sunil Babasaheb Ghorpade (PW 2) both are the panch witnesses to the scene of offence,, Ramesh Dhondu Bhoir (PW 3) panch to memorandum panchnama, C.A. Raju Adams (PW 4) eye witness and Ramesh Shivdas (PW 5) the investigating officer.
9. As the prosecution mainly relies on the version of C.A. Raju Adams (PW 4), now we may refer to the version of this witness, firstly.
10. C.A. Raju Adams (PW 4) deposed before the Court that he is doing the business of globe consultancy and he used to sent students to United States of America (U.S.A) for agricultural work. One Konda Reddy was his assistant. He further deposed that in the month of May 1998 his assistant Konda Reddy told him that one of his friends namely, Shetty resides at Mumbai and having contract to send students to U.S.A and he asked him to take over the said contract from Arun Shetty. Therefore, this witness

accompanied him and reached at Mumbai and it was agreed to pay commission of Rs. 10,000/- per candidate to Konda Reddy. He further deposed that he has accepted 1,000/- U.S. dollars per candidate and Rs. 1935 per candidate for D.D. and Rs. 2,100/- towards visa charges. He further deposed that he got 62,000/- U.S. dollars, 62 D.D. for Rs. 1,20,000/- in lump sum and 62 passports. On 05.08.1998 after reaching to Mumbai he contacted Arun Shetty (A 1). He further deposed that Arun Shetty (A 1) then reached the hotel where this witness stayed by 6.00 pm. Accordingly, this witness got down from the hotel along with Konda Reddy. Thereafter both boarded in the taxi. He further deposed that Arun Shetty (A 1) told him that with the help of one Mike he should prepare separate parcels of documents of each candidates with the relevant papers. He further deposed that near the London Pilsner Brewery at Mumbai – Panvel highway Arun Shetty stopped the taxi at about 09.00 pm. Two persons came from the right side of the taxi. Then accused Shetty thrown the chilli powder on his face also on the face of Narayan and snatch briefcase from his hands. He further deposed that he caught hold of the door of the taxi. As the taxi was in motion, he was dragged upto some distance. He further deposed that one person sitting in the taxi gave him blow, due to which he fell down. Thereafter he took out Narayan from the gutter and then they both were went to the police station and lodged the complaint.

Both of them taken to the hospital for treatment. Statement of this witness was recorded on 20.09.1998.

11. Suresh Gurav (PW 1) is the panch witness to the scene of occurrence. He deposed before the Court that on 20.09.1998 he went to the police station for panchnama. He was taken to the Tata Press to draw a panchnama. The police had prepared the panchnama as per their procedure and he was asked to sign thereupon. He further deposed that one unknown person old aged, has pointed out the spot. On the spot he saw wooden logs and some chilli powder. The wooden logs were three in numbers. He further deposed that nothing was recovered from the spot or seized by the police.

In the cross-examination, this witness stated that neither chilli powder nor wooden logs were seized by the police on the spot. He further stated that he has not seen any chilli powder lying on the spot.

12. Sunil Ghorpade (PW 2) deposed in the examination-in-chief that on 20.09.1998 for his own purpose he went to the police station. Then police took him to Panvel highway to draw the panchnama of seen of offence. He was then taken to MIDC area of Mumbai – Panvel highway. There is a adjoining drainage to the highway. He further deposed that Suresh Gurav (PW 1) was also with him. On the spot he saw three wooden logs and chilli

powder lying on the spot. He himself, Suresh Gurav (PW 1) and policemen were present on the spot. Then police drew the panchnama.

In the cross-examination, this witness admitted that on Mumbai – Panvel highway is having heavy traffic day and night. He further admitted that the drainage was having depth of approximately 6 ft. He further admitted that the commodity which he is telling as chilli powder was identical to chilli powder but he has not tested it. He further admitted that he has not asked the policemen to seize the article from the spot nor they were seized by the police.

13. Ramesh Bhoir (PW 3) is the panch to memorandum panchnama. He deposed before the Court that on 03.10.1998 he was not called by police at any place.

In the cross-examination by APP, this witness stated that it did not happen that accused Arun Shetty had made a voluntary statement in his presence in the police station that he has received Rs. 50,000/- of his share in connection with the crime and out of that he had spent certain amount however, he is possessing Rs. 10,000/-, student files, motorcycle and he is ready and willing to handover to the police. He admitted that the police read over the contents of memorandum to him and thereafter he put his signature. In the cross-examination on behalf of accused he stated that it is true that all the signature shown to him at Exhibit 40 and 41 were obtained by police in

the police station. He further stated that the signature of another panch was not obtained in his presence.

14. Ramesh Shivdas (PW 5) is the investigating officer. This witness deposed before the Court that on 19.09.1998 he was attached to Nerul Police Station, Thane. The complaint Exhibit 44 is lodged in his presence which was recorded by PSI Avad. C.A. Raju Adams (PW 4) was with him. They were in injured condition. Therefore, this witness referred them to hospital for first aid. He then stated about the steps taken by him in the process of investigation such as, recording the statement of witnesses, preparing spot and seizure panchnama, arrest of the accused persons were effected by him, recording the statement of witnesses under Section 161 of the Cr.P.C, then recovery of the cash amount, student files from the accused persons and preparing the memorandum panchnama.

15. Now on the backdrop of the case of prosecution that the accused persons before the Court and one absconding accused hatched a conspiracy and pursuant to said conspiracy complainant – Narayan, Raju Adams (PW 4) were contacted by Arun Shetty (A 1) and his associates. They reached to the hotel and took Narayan and Raju Adams (PW 4) in a vehicle who were having cash amount in Indian currency, U.S. dollars, certain documents, to an

unknown place. On the way Arun Shetty (A 1) and Raju Adams (PW 4) consumed beer in a restaurant. Then the vehicle proceeded further and it was stopped at one place. Arun Shetty gave a punch on the face of Narayan and threw chilli powder, dash was given to Narayan due to which he fell in gutter. Chilli powder was also thrown on the person of Raju Adams (PW 4). Then Arun Shetty (A 1) and two unknown persons who were standing on the highway boarded in the taxi. They snatched briefcase from the hands of Raju Adams. The taxi then proceeded towards Pune. Raju Adams (PW 4) was able to catch hold at handle of the taxi however, as it was in motion, he was dragged for some distance. The accused persons were then successful in fleeing away from the spot.

16. On assessment of the evidence brought before the Trial Court, firstly the learned Trial Court was unable to find any evidence so as to prove the theory of the conspiracy. Secondly, it found that the prosecution utterly failed to establish the identity of the accused persons. Thirdly, the Trial Court was unable to place reliance on the aspect of the so called recovery. On perusal of the evidence, we are of the opinion that the learned Trial Court committed no error in appreciating the evidence and arriving at the final conclusion.

17. Suresh Gurav (PW 1) and Sunil Ghorpade (PW 2) are the panch

witnesses. Interestingly, Suresh Gurav (PW 1) admitted in the cross-examination that from the spot neither chilli powder nor the wooden logs were seized by the police. He further admits in the cross-examination that he had not seen any chilli powder lying on the spot.

In so far as Sunil Ghorpade (PW 2) is concerned, his examination-in-chief opens with a statement that on 20.09.1998, he went to the police station for his own purpose and the police authorities asked him to act as a panch. In his cross-examination he admits that the article lying on the spot was an article like chilli powder and he had not tested that article so as to identify that it was chilli powder. In the cross-examination, this witness stated about his purpose for going to the police station on that day and he stated that he had visited the police station to secure permission of Navratra Utsav.

18. Then the very important witness for the prosecution is Raju Adams (PW 4). Raju Adams (PW 4) in his examination-in-chief stated that sometime in the month of May, 1998 his assistant Konda Reddy informed him about the Arun Shetty (A 1) and asked him i.e. Raju Adams (PW 4) to take over contract from Arun Shetty (A 1). Accordingly, Konda Reddy and Raju Adams (PW 4) reached Mumbai. Then he stated that when he reached Mumbai on 05.08.1998, he had established a telephonic contact with Arun Shetty (A 1). Then he stated that Narayan also reached there with 17

candidates. Raju Adams (PW 4) then stated that Arun Shetty (PW 4) told him that he will come to his hotel. Raju Adams then stated about the reaching of Arun Shetty (A 1) in the hotel in one taxi, then proceeding to one place. Midway Arun Shetty and Narayan consuming beer, then stopping the taxi at one place, throwing of chilli powder, pushing Raju from the taxi, then Raju (PW 4) catching handle of the taxi and being dragged to some distance etc.

19. Taking into consideration the sequence of events, it can safely be said that, Raju Adams (PW 4) had enough opportunities and time to see Arun Shetty (A 1) in person and interestingly enough, this so called star witness of the prosecution fails to identify Arun Shetty (A 1) and his associates in the Court. On the contrary, he categorically stated in the cross-examination that none of the accused before the Court, those who have committed an offence on the day of incident, are present before the Court. Assuming that till date of incident when Arun Shetty (A 1) reached hotel there was only telephonic conversation between Raju Adams and Arun Shetty but, on the date of incident right from reaching to the hotel for further nearly two hours Raju Adams (PW 4) was in company of Arun Shetty (A 1) and his associates and constantly Raju Adams (PW 4) was sitting along with Arun Shetty (A 1) in the taxi till he was pushed from the taxi. On the backdrop of this fact, failure of Raju Adams (PW 4) to identify the accused in Court is a major blow to the

case of prosecution.

20. Perusal of record further shows that complainant - Narayan was referred to medical examination and MLC issued to Narayan was placed on record at Exhibit 36. Now interestingly, Raju Adams (PW 4) stated that he was dragged to a distance. He stated before the Court that he took out Narayan from the gutter. He sustained injury. Thereafter they went to police station and he was immediately taken to the hospital for treatment. Now though there is a MLC issued in favour of Narayan is placed on record but, no medical certificate of Raju Adams (PW 4) is placed on record. The medical certificate could have been one of the important material but for the reasons best known to the investigating agency the same was not obtained in the process of investigation and as such it was not placed on record.

21. In so far as the recovery part is concerned, it is the case of the prosecution that some articles were recovered. The learned Trial Court assigned the reasons for not accepting the so called recovery from Arun Shetty (A 1) and accused no. 4. There is also an interesting theory put up by the prosecution that one Gabriel has deposited sum of Rs. 30,000/- saying that Accused No. 2 deposited the amount with him which was recovered under panchnama Exhibit 46 and amount deposited by Kotiyan at Exhibit 49.

Learned Trial Court was justified in observing that there was no material brought by the prosecution to establish the nexus of Gabriel and Kotiyan with the accused persons and in absence of any such nexus, it would be unsafe to rely on the so called recovery. It may be useful for our purposes to refer to the observations made by learned Trial Court in paragraph 12 of the judgments, same reads thus:

12. *Having regard to this evidence on record, it is to be seen whether prosecution has succeeded in proving the charge against the accused. It is very surprising to note here that accused persons, they have been chargesheeted under the charge of criminal conspiracy to commit dacoity by cheating complainant and prosecution witness P.W. 4 C.A. Raju Adams. Not only that it is the case of prosecution that on the date of incident on 19/9/98 at about 6.00 p.m. P.W. 4 Raju, complainant and one Konda Reddy in response to the call of accused no. 1 along with all the properties they got down on the ground floor of the lodge and after arrival of accused no. 1 that they boarded therein along with one taxi brought by him. However, at 9.00 p.m. it was transpired to them that they have cheated and brought at remote place at Bombay Pune Highway. Two unknown persons came from the right side of the taxi and 11 the accused forcibly snatched articles no. 1,3,4,6 kept in article no. 7 by assault no. 7 by assault to then and thus complaint has been lodged vide Exh.*

44 by Narayanrao against accused and absconding accused Nitin and after entrustment of investigation to P.W. 5 Shivda, on 26/9/98 he arrested accused no. 1 to 3, accused no. 4 however, he could not get, so also absconding accused Nitin. Though prosecution evidence is going to show that on 28/9/98 in accordance with the voluntary statement made by accused no. 1 Exh. 46, Muddemal property has been recovered under the discovery panchnama Exh. 47. After arrest of accused no. 4, memorandum vide Exh. 40 came to have been recorded and the remaining muddemal property came to have been recovered and seized under the discovery panchnama Exh. 41 by the investigating officer. Moreover, one Gabriel has deposited sum of Rs. 30,000/- saying that accused no. 2 had deposited the said amount with him which was recovered under the panchnama Exh. 48 and amount deposited by Kotiyan at Exh. 49. It appears that the production of the aforesaid sum by Gabriel and Kotiyan is not that much incriminating against accused because none of them witnesses, they have been examined by the prosecution, so their nexus with accused no. 2 is remained to be brought on record. The recovery of muddemal property as per Exh. 47 and 41 brought on record by the prosecution through the I.O. P.W. 5 Shivdas prima facie appears to be not a proper recovery as concerned panch they have resiled from the factual aspect. So the bare testimony of P.W. 5 the I.O. Shivdas in that context though it is relied upon itself is not sufficient to connect the accused for which they have been chargesheeted

because the key witness of the present case P.W. 4 C.A. Raju Adams did not identify either of the accused facing trial for reasons best known to P.W. 4

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22. Though, it is the case of prosecution that certain amount was handed over to the accused persons through one Gabriel and Kotiyan and though the name of those two persons find place in the list of witnesses, and both of them are resident of Mumbai, for the reasons best known to the prosecution they are not examined before the Court.

23. Considering the serious *lacunae* in the case of prosecution, the learned Trial Court was justified in observing that the accused have taken a probable defence that Narayan and Raju Adams (PW 4) to save their skin might have lodged a false complaint against accused persons with whom they have business dealings on the pretext that by hatching a conspiracy they were looted by accused persons.

24. Thus, the evidence brought before the Court by the investigating agency in support of case of prosecution is neither reliable nor trustworthy. On the contrary, many *lacunae* in the case of prosecution only created doubts and

suspicion over the prosecution case. Learned Trial Court, as such, committed no error in appreciating the evidence and arrived at just and proper conclusion. No interference in the judgment and order of the learned Trial Court is warranted. Appeal, thus, being devoid of merits, deserves to be dismissed. Accordingly, Criminal Appeal is dismissed.

(N. R. BORKAR, J.)

(PRASANNA B. VARALE, J.)