

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO. 339 OF 2000

Vijay Dulichand Lot
Age 19 years, R/at. Chawl No.4,
Room No.59, Walmiki Nagar,
Bandra (East), Mumbai. ..Appellant
Vs.
The State of Maharashtra ..Respondent

**WITH
CRIMINAL APPEAL NO. 881 OF 2000**

Dilip Bhikaji Dhotre
Age 19 years, R/at. Hut at
Dnyaneshwar Nagar,
Bandra (E), Mumbai. ..Appellant
Vs.
The State of Maharashtra ..Respondent

**WITH
CRIMINAL APPEAL NO. 1019 OF 2001**

Bhumayya Rajayya Gumala
Age 24 years, R/o. Hut,
Maharashtra Nagar, Bandra (E),
Mumbai. ..Appellant
Vs.
The State of Maharashtra ..Respondent

Mr. Subir Sarkar, for the Appellant in Apl/339/2000 and
Apl/881/2000 (Legal Aid Appointed)

Ms. Akshata Desai i/b. Mr. Nitin Sejpai, for the Appellant in Apl/1019/2001.

Mr. S. R. Agarkar, APP for the Respondent / State.

CORAM : C.V. BHADANG, J.

DATE : 4 OCTOBER 2021

Judgment :

. These Appeals arise out of judgment and order dated 20 April 2000 passed by the learned Sessions Judge for Greater Mumbai in Sessions Case No.902/1998. As such, these Appeals are being disposed of by this common judgment.

2. The Appellants are the original Accused Nos.1 to 3. The Appellants alongwith four others were prosecuted for the offence punishable under Section 399 and 402 of the IPC read with Section 135 of the Maharashtra Police Act. The Accused Nos.5 to 7 were absconding.

3. The prosecution case is that on 17 July 1998, the Senior Inspector of Police Mr. Sonawane attached to Police Station Kherwadi, Mumbai had received an information that about six to seven persons had assembled near the Northern gate of garden situated in front of Chetana College, Bandra (East), Mumbai, with

weapons and were preparing for committing dacoity. Mr. Sonawane asked API Shri Shaikh (P.W.4) alongwith other police staff to visit the site. Accordingly, API Shaikh alongwith others went to the spot in civil dress and found that about six to seven persons had assembled there and were discussing a plan for committing dacoity in Khar area. According to the prosecution, when an attempt was made to apprehend these persons, three out of the seven persons managed to escape and the Appellants alongwith one Raju Konda (Accused No.4) were apprehended. In their personal search, the Appellant Vijay Lot (Accused No.1) was found in possession of a knife in the right side pocket of his pant. Appellant Dilip Dhotre (Accused No.2) was found having a knife in left side pant pocket and Appellant Bhumayya Gumala (Accused No.3) was found in possession of a knife concealed in his shirt on the front side. Accused No.4 was found in possession of a chopper wrapped in a newspaper and tucked on the back side of his pant. According to the prosecution, on inquiry, it was revealed that the Appellants / Accused were planning to commit dacoity in Khar area. Accordingly, a search panchanama was drawn in presence of panchas and the Appellants / Accused were brought to Police Station Kherwadi where Police Head Constable Rajaram Phulare (P.W.1) lodged a complaint. The investigation in the offence was carried out by API Shaikh (P.W.4). According to the prosecution, at the relevant time, there was an order issued by the Commissioner of Police under

Section 37 of the Maharashtra Police Act which was in operation and the Appellants / Accused were found in possession of the weapons which was in breach of the said prohibitory order. Upon completion of investigation, a chargesheet came to be filed which was committed to the Court of Sessions and was registered as Sessions Case No.902/1998.

4. The learned Sessions Judge framed charge against the Appellants / Accused for the offence punishable under Section 399 and 402 of IPC read with Section 135 of the Maharashtra Police Act. The Appellants / Accused pleaded not guilty to the charge and claimed to be tried. The defence of the Appellants / Accused is of total denial and false implication.

5. At the trial, the prosecution examined Police Head Constable Shri. Rajaram Phulare (P.W.1), panch witness Shri. Narayan Vinerkar (P.W.2), Police Head Constable Shri. Mahavir Durukkar (P.W.3) and API Shri. Abdulla Shaikh (P.W.4) and produced the record of investigation.

6. The Appellants did not lead evidence in defence.

7. The learned Sessions Judge by the impugned judgment has found the Appellants / Accused guilty of the offences as charged.

For the offence under Section 399 and 402 of the IPC, the Appellants / Accused have been sentenced to suffer Rigorous Imprisonment for five years and to pay fine of Rs.500/- each on either count and in default, to suffer Rigorous Imprisonment for a period of one month on each count. For the offence under Section 135 of the Maharashtra Police Act, the Appellants / Accused have been sentenced to suffer Rigorous Imprisonment for a period of one year and to pay fine of Rs.100/- each and in default, to suffer Simple Imprisonment for 15 days. All the sentences have been directed to run concurrently. It appears that the Accused No.4 has served the sentence and has not chosen to challenge the conviction and the sentence.

8. I have heard the learned counsel for the Appellants and the learned APP. With the assistance of the learned counsel for the parties, I have gone through the record.

9. It is submitted by the learned counsel for the Appellants that the prosecution evidence on the point of apprehension of the Appellants and recovery of the weapons is not acceptable and in any case, there is no acceptable evidence to show that the Appellants had made preparations for committing a dacoity which is the gist of the offence under Section 399 / 402 of IPC. It is submitted that mere

recovery of the weapons even assuming it to be proved, is not sufficient to establish the offence under Section 399 / 402 of IPC.

10. The learned counsel for the Appellants has placed reliance on the decision of the Supreme Court in *Chaturi Yadav and Others Vs. State of Bihar*¹ in order to submit that the mere fact of the persons assembling with weapons is not sufficient to establish the offence under Section 399 and 402 of IPC.

11. Learned APP has supported the impugned judgment. It is submitted that the evidence of the Investigating Officer alongwith P.W.2 Narayan Vinerkar who is a panch witness is acceptable on the point of recovery of the weapons and the planning by the Appellants / Accused to commit a dacoity in Khar area. It is submitted that there was an order under Section 37 of the Maharashtra Police Act which was in force and the possession of the arms by the Appellants / Accused is in breach thereof. Thus, in the submission of learned APP, the Appellants have been rightly convicted for the offences as charged.

12. I have carefully considered the circumstances and the submissions made.

¹ (1979) 3 SCC 430

13. P.W.1 Head Constable Rajaram Phulare states that he alongwith the police staff had visited the Northern gate in front of the garden, Chetana College, Bandra (East), Mumbai upon prior information and had found that there were seven persons who were present on the spot. He states that he went near those persons. It is the material evidence that he heard their discussion in which one of them was saying that they would commit dacoity at Khar on the point of chopper and knife. He states that the rest of the members of the police staff were standing at a distance. It can thus be seen that P.W.1 is the only witness to the alleged conversation amongst the persons / Accused who were present at the spot. All that P.W.1 states is that one out of them was stating that they would commit dacoity in a flat in Khar on the point of chopper and the knives. The subsequent evidence is about the apprehension of the four out of the seven persons and recovery of the weapons from them. It is significant to note that P.W.1 does not state as to who was the Accused who had stated about their planning to commit dacoity at Khar. It is thus not clear whether he was one of the persons who had managed to escape or he was the Accused No.4. It is the evidence of P.W.1 that out of members of police party he was the only one who had gone near those persons and heard their conversation which in fact is a statement by one of them to the others about the planning to commit dacoity.

14. In *Chaturi Yadav*, eight persons were found to have assembled in a school compound near a market place at 1.00 a.m. and there was a recovery of a gun and cartridges from them. The Supreme Court held that in such case the possibility of intention to commit some other offence cannot be ruled out.

15. The evidence of P.W.2 Narayan Vinerkar who is a panch witness is only on the point of recovery of the weapons. In my considered view, the mere recovery of the weapons even assuming it to be proved cannot lead to an inescapable conclusion that the Appellants and the other Accused had made preparation for committing dacoity. It is necessary to note that according to the prosecution, the Appellants / Accused had assembled at a public place, that too at 8.00 to 8.30 p.m. when the area cannot be said to be deserted. It is improbable that the Accused would discuss about their planning to commit dacoity, which can be overheard by others.

16. In such circumstances, in my considered view, the conviction of the Appellants / Accused for the offence under Section 399 and 402 of IPC cannot be sustained. In so far as recovery of the weapons is concerned, the evidence of P.W.1 and P.W.2 and for the matter of that P.W.4 who is the Investigating Officer is consistent and has not been displaced in the cross examination. P.W.3 Head Constable Mahavir Durukkar was examined on the point of

promulgation of the order under Section 37 of the Maharashtra Police Act. He has produced the order dated 24 June 1998 by the Deputy Commissioner of Police prohibiting carrying of arms and weapons etc. In my considered view, the conviction of Appellants under Section 135 of the Maharashtra Police Act deserves to be confirmed. The offence carries a maximum imprisonment for a term which may extend to one year and except for the reasons to be recorded in writing, shall not be less than four months, alongwith fine. In my considered view, the sentence can be modified to imprisonment for a period of four months and a fine of Rs.100/- and in default, to suffer Simple Imprisonment for 15 days. The learned counsel for the Appellants pointed out that the Appellants have already served imprisonment for a period of more than four months looking to their under trial imprisonment. In any event, the Appellants would be entitled to set off under Section 428 of Cr.P.C.

17. In the result, the following order is passed.

ORDER

1. The Criminal Appeals are partly allowed.

2. The conviction and sentence of the Appellants under Section 399 and 402 of IPC is hereby set aside. The Appellants are acquitted of the said offence.

3. The conviction of the Appellants under Section 135 of the Maharashtra Police Act is hereby confirmed.

4. The Appellants shall suffer imprisonment for a period of four months and shall pay a fine of Rs.100/- each and in default, to suffer Simple Imprisonment for 15 days.

5. The Appellants are entitled to set off against the period already undergone under Section 428 of Cr.P.C.

6. The order regarding disposal of the muddemal property is hereby maintained.

7. The Counsel appointed on legal aid shall be entitled to fees as per rules.

C.V. BHADANG, J.