

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

CRIMINAL APPEAL NO. 184 OF 1997

Hanumant Bhimayya Bore
Aged about 24 years,
R/o. Room No.252, P. B. Marg,
Lokmanya Tilak Nagar,
Mumbai 400 025.

..Appellant

Versus

The State of Maharashtra
(At the instance of Borivali p.stn.)

..Respondent

Mr. S. P. Kadam, for Appellant.
Smt. Veera Shinde, APP for State/Respondent.

**CORAM : SARANG V. KOTWAL, J.
DATE : 28th JULY 2022**

JUDGMENT :

1. This is an Appeal challenging the Judgment and order dated 21/01/1997 passed by the learned Additional Sessions Judge, Greater Mumbai in Sessions Case No.1362 of 1994 with Sessions Case No.648 of 1995 with Sessions Case No. 1145 of 1996. Appellant was the original Accused No.4. He faced the trial along with five other accused. At the conclusion of the trial he was

convicted and sentenced as under:

i) The Appellant was convicted for commission of offence punishable U/s.452 r/w. 34 of I.P.C. and was sentenced to suffer R.I. for 3^{1/2} years and to pay a fine of Rs.1000/- and in default to suffer S.I. for 15 days.

ii) The Appellant was convicted for commission of offence punishable U/s.342 r/w. 34 of I.P.C. and was sentenced to suffer R.I. for six months.

iii) The Appellant was convicted for commission of offence punishable U/s.395 r/w. 34 of I.P.C. and was sentenced to suffer R.I. for 3^{1/2} years and to pay a fine of Rs.1000/- and in default to suffer S.I. for 15 days.

iv) The Appellant was convicted for commission of offence punishable U/s.397 r/w. 395 of I.P.C. and was sentenced to suffer R.I. for 7 years.

All the substantive sentences were directed to run concurrently. The Appellant was given benefit of set off U/s.428 of

the Cr.p.c.

2. The prosecution case is that, on 11/01/1994, at about 10.30a.m. about 5 to 6 persons entered the house of the first informant Jyotiben Madhani and committed robbery in her house. While robbers were still in the house, her husband Jugraj returned from his office. He was assaulted with knife. Their domestic help, who was a 12 years old boy; was also assaulted with a knife. The robbers took away gold ornaments, silver ornaments, cash and other valuable articles. The informant Jyotiben was tied with her *saree*. She somehow rescued herself and rescued other two injured. Thereafter, her husband made a telephonic call to the police from his neighbour's phone. The police came to their house. They recorded the F.I.R. of Jyotiben. The offence was registered vide C.R.No.16 of 1994 at Borivali police station under Sections 452, 341, 342, 395, 397 r/w. 34 of I.P.C. The investigation was carried out. The accused were arrested. The appellant was arrested on 04/02/1995. The Test Identification Parade was held at Borivali police station itself on 20/02/1995, wherein the first informant Jyotiben and her husband Jugraj identified the present appellant

as the person who was carrying knife and who had assaulted the informant's husband Jugraj. The investigation was completed. The charge-sheet was filed and the case was committed the court of Sessions. During trial, the prosecution examined 12 witnesses. The defence of the appellant was of total denial.

3. As far as present Appellant is concerned, out of 12 witnesses only five witnesses are important for him. Other witnesses for consideration of case against him are irrelevant, however, to complete the list of witnesses, those other witnesses are as follows.

PW-1 Uchayya Rame Gouda was a pancha who was present when the Ambassador car was recovered at the instance of accused No.3 Narsayya Asayya Kalmada. PW-2 Ravindra Madhusudan Patade was a pancha who was present when the ornaments were recovered at the instance of accused No.2 Mancherala Lanchchayya Balayya. PW-3 John Benjiman D'Souza was a pancha in whose presence jewellery was recovered at the instance of accused No.6 Thokkalla Narsayya Chandrayya. PW-4

Mohd. Rais Mohd. Amin Shah was a pancha in whose presence money was recovered at the instance of accused No.1 Laxman Lingayya Medi. PW-6 Prabhakar Vithal Inamdar was the S.E.M. who had conducted test identification parade when accused No.5 Pallikoda Ashok Narsayya and accused No.6 Thokkalla Narsayya Chandrayya were identified by the witness. PW-7 Dharmendra Kashinath Jadhav was another S.E.M. who had conducted test identification parade when accused Nos.1 and 2 were identified. PW-8 Narsayya Rayamalu Bore was accused No.2's uncle; he had turned hostile. The prosecution case is that, he had produced heavy golden ring which was given to him by the accused No.2.

4. Thus, important witnesses, as far as the present Appellant is concerned, are PW-9 Jyotiben Madhani the first informant, her husband PW-10 Jugraj Chhogmal Madhani, PW-5 Sitaram Bhaguram Jadhav, S.E.M. who had conducted test identification parade at Borivali police station when PW-9 and PW-10 had allegedly identified the present Appellant. PW-11 Vilas Gemu Rathod, P.S.I. had taken down the F.I.R. and had recorded the statements of some witnesses. PW-12 Maruti Ganpatrao

Sapkal, P.I. was the investigating officer who had arrested the Appellant on 04/02/1995. He had also arrested other accused and had effected recovery at their instance and had filed charge-sheet at the conclusion of the investigation. These are the important witnesses.

5. The prosecution case has unfolded through the evidence of PW-9 Jyotiben. She has stated that, she was residing at Borivali (West) with her husband and son. On 11/01/1994, her husband and son had left for their office, at around 9.00a.m. Their domestic help Dalpat was in the house at that time. At around 9.30a.m. one Laxman, who was a domestic servant in another flat in the same building, had come to her house. He entered the house on the pretext of repaying the loan which the informant had given to his wife. In the deposition, PW-9 has further stated that, he was followed by 5 to 6 others. They covered her face and pushed her. One of them assaulted her with fist blows. She fell down. One of them tied her with her *saree*. She was thrown in a corner. One of them sat on her throat. She identified accused No.2 as the person who had sat on her throat. In the meantime, the door bell rang

once again. Her husband entered the room. The assailants snatched her gold bangles and the gold chain from her person. As soon as her husband entered the room, all the robbers pounced upon him. He was forced to handover keys of the cupboard under threats. They opened the cupboard and removed all golden and silver ornaments from the cupboard. They put those articles in the pillow cover from the flat itself and went away. Somehow she untied herself and rescued her husband and Dalpat. Both of them had suffered injuries. Her husband called the police. In all, the robbers had taken 2 Kg. of golden ornaments and ½ Kg. of silver ornaments comprising of necklace, painjans, bands etc. After the police came, she gave her statement. She has stated that, she was called twice at the police station where certain persons were shown to her. On her first visit she identified two persons, but she does not remember as to how many persons she had identified in her second visit. She identified the Appellant and others in the court as the persons who committed robbery in her house.

In her cross-examination, she has stated that, Dalpat was 12 years of age. She denied the suggestion that her husband

was not tied by the robbers or that he was not in the house at all. She accepted that, in the F.I.R. she had given description of only two persons and that she was informed by her husband and Dalpat that there were five more persons with the accused No.1 Laxman. She accepted that, in the F.I.R. she has attributed role only to three accused persons i.e. accused No.1 and two others. She accepted that, she had not stated before the police that Dalpat was attacked with knife on his chest.

6. Another important witness is PW-10 Jugraj, husband of PW-9. He has stated that, he returned to his house at around 10.30a.m. for having tea. The accused No.1 and one more person opened the door from inside and they left. As soon as he entered the house, 4 to 5 persons came out from the kitchen and bedroom. They covered his face, caught him and started assaulting him. One of them was holding a knife. He sustained injury above the left eyebrow and right side of the chin. They removed articles from the cupboard. Cash amount of Rs.5 lakhs was also removed. Then his mouth was covered. The articles were filled in the pillow cover from the flat and then they left the flat. After some time, his wife

came and helped him and Dalpat. He went to a neighbour's flat and made a phone call to the police. By that time, many persons from the building had gathered. The police came soon after and registered the F.I.R. He has deposed that, during that period the robbers were around him and within his sight. He was injured by means of knife above his left eyebrow and on right side of chin. He has stated that, he went to Borivali police station four times and once to Arthur Road Jail and he identified the accused on those occasions. He was shown various portions from his statement which were contrary to his evidence. Those portions were proved through the evidence of police officer who had recorded his statement.

7. The next important witness is Sitaram Jadhav, S.E.M. who is examined as PW-5. He deposed that, he conducted the test identification parade on 20/02/1995 at around 3.00p.m. He went to Borivali police station and met PI. Sapkal who arranged for two panchas. The Appellant was in the lockup on the first floor. He then selected the dummies. The police officer told him that, witnesses were standing outside the entry gate of the Borivali

police station. He along with panchas went there and brought those witnesses to the reception room of the police station. He inquired with the witnesses whether they had seen the accused after the incident. They replied in the negative. Both these witnesses identified the Appellant by touching him.

In the cross-examination, he admitted that there was an old mark of injury on the nose of the Appellant which was noted by him in the panchanama. He has not mentioned in the memorandum panchanama about such mark on the faces of dummies. The memorandum panchamama was produced on record at Exhibit 26. It is mentioned in the parade memo that the appellant was holding a knife and that he had tied PW-9 with saree and had kept her in the passage. PW-9 had stated that the appellant was holding a knife and he had caused injuries to PW-10's left eyebrow and right side of chin with that knife.

8. PW-11 and 12 had carried out the investigation as mentioned earlier. The contradictions from the statements of the witnesses, as well as, from the F.I.R. are brought on record in the

cross-examination of PW-11. PW-12 had admitted that, there was no recovery at the instance of present appellant. The statements of persons residing in the building were not recorded.

9. Learned counsel for the Appellant submitted that the evidence of PW-9 and PW-10 is not consistent. They had not given description of all the accused. In fact, PW-9 is specific in her F.I.R. that there were only three persons including accused No.1. She was told by PW-10 and Dalpat that there were 5 to 6 other persons. Therefore, her identification carries no weightage. As far as PW-10 is concerned, he had entered the flat subsequently and immediately his face was covered by the accused. Therefore, there was no occasion for him to identify other accused. There are no other circumstances of recovery of either weapon or any of the articles at the instance of present appellant. Therefore, on this weak pieces of evidence, conviction cannot be sustained.

10. Learned APP, on the other hand, opposed these submissions. According to her, evidence of PW-9 and 10 is sufficient to prove the guilt of appellant. There was no lacuna in

the conduct of identification parade. The witnesses were asked by PW-5 as to whether they had seen the appellant before the parade, to which, they had replied in the negative. Therefore, evidence of identification parade was enough to base conviction.

11. I have considered these submissions in the backdrop of the evidence discussed earlier. The prosecution case rests heavily only on the evidence of PW-9 and 10, as mentioned earlier. PW-9 was the first informant. Though, in her deposition she has stated that 5 to 6 other persons entered with accused No.1 at the time of commission of robbery, but her F.I.R. is to the contrary. In her F.I.R. (Exhibit 33) she has categorically stated that, only two persons had followed accused No.1. She had given description of only two accused. She has stated in her F.I.R. that, accused No.1 Laxman had taken her to the passage. There is no reference to any person holding knife. However, in the test identification parade she had attributed knife to the accused No.4. This part is missing from her F.I.R. It is her case in the parade memo that, the appellant had taken her to the passage. Even this is contrary to her F.I.R. Significantly, she has also identified accused Nos.1, 2, 5 and 6 in

two separate identification parades. Therefore, her evidence raises serious doubt about her identification of the offenders.

12. So far as PW-10 is concerned, a very significant contradiction from his police statement is brought on record which is marked at Exhibit 47. He had stated before the police that, out of those persons, who had assaulted him and with what weapon, he was unable to state. However, in the test identification parade he has attributed knife and specific role to the appellant, which is directly contrary to his version in his police statement. In his deposition, he has stated that, as soon as he entered the house, offenders covered his face. Therefore, it is difficult to believe that he could have seen the offenders. In this view of the matter, if the evidence of test identification parade becomes extremely weak, there is no other circumstance against the present Appellant in the form of recovery of either stolen articles or of a knife. In this view of the matter, prosecution has failed to prove the case against the appellant beyond reasonable doubt. Therefore, he deserves to be acquitted.

13. Hence, the following order is passed:

O R D E R

- i) The Appeal is allowed.
- ii) The impugned Judgment and order, as far as present Appellant is concerned, is set aside.
- iii) The conviction and sentence recorded against the present Appellant is set aside.
- iv) The Appellant is acquitted of all the Charges for which he was convicted and sentenced.
- v) The Appellant is already on bail. His bail bonds shall stand discharged.
- vi) It is made clear that this decision is only in respect of the present Appellant.
- vii) The Appeal is disposed of.

(SARANG V. KOTWAL, J.)