

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

CRIMINAL APPEAL NO.202 OF 2019

Shaukatali Abdulsalem Shaikh	 Appellant
Versus	
The State of Maharashtra	 Respondent

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Mr. Vinay Bhanushali, Advocate a/w. P.K. Sanghrajka, Sanmit Vaze, for the Appellant.

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

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CORAM : SARANG V. KOTWAL, J.

DATE : 10th OCTOBER, 2022

ORAL JUDGMENT :

1. The appellant has challenged the judgment and order dated 17.1.2019 passed by the Additional Sessions Judge, Thane in Sessions Case No.37/2011. The appellant was convicted for commission of offence punishable under Section 392 read with 34 of the Indian Penal Code and was sentenced to suffer RI for seven years and to pay fine of Rs.1,000/- and in default of payment of fine to suffer RI for three months. He was also convicted for commission of offence punishable under Section 397 read with 34 of IPC and was sentenced to suffer RI for seven years and to pay

fine of Rs.1,000/- and in default of payment of fine to suffer RI for three months. Both the sentences were directed to run concurrently. He was granted set off under Section 428 of Cr.P.C. for the period of detention undergone as under-trial prisoner.

2. Initially, there were two accused in the case. However, accused No.2 Mhammaad Mehtabli was absconding and, therefore, the trial was conducted only against the present appellant.

3. The prosecution case is that on 14.9.2009 after midnight i.e. between the intervening night of 13.9.2009 and 14.9.2009, the first informant was waiting to go home after reaching Thane. Two persons came in Indigo car, offered him lift and when he sat in the car, he was taken to a distant place. He was shown knife by one of them. He was assaulted by the same person. Both the persons then took away his golden ornaments and mobile phone. The prosecution case is that the appellant was driving the car when his companion showed knife and took away the ornaments and mobile phone. The first informant was allowed to go. Thereafter, he lodged his FIR on 15.9.2009 vide C. R.

No.I-163/2009 at Rabodi police station, Thane. The appellant was arrested on 3.10.2019 by laying a trap because there were allegations of commission of similar offences. At that time, the informant's mobile phone was found on his person. The appellant was arrested on 3.10.2009. In the meantime, the investigation was commenced. There was recovery of ornaments at the instance of the appellant. At the conclusion of the investigation, the charge-sheet was filed and the case was tried before the Sessions Court.

4. During trial, the prosecution examined seven witnesses including the first informant, the Medical Officer who examined him, the panchas for recovery, a jeweller to whom the appellant had sold the golden ornaments, the Special Executive Magistrate who conducted test identification parade and the investigating officer. The defence of the appellant was of total denial.

5. Heard Shri Vinay Bhanushali, learned counsel for the appellant and Shri S.R. Agarkar, learned APP for the State.

6. The prosecution case naturally depends on the

evidence of PW-1 Rakesh Kanwade the victim. He has deposed that on 12.9.2009 he had gone to Sangamner. He returned from there on 13.9.2009. He reached Thane at around midnight. He wanted to go to his residence at Sawarkar Nagar in a rickshaw. At that time, one Indigo car came there. There were two persons in the car. The driver offered him lift till Nitin Company. They showed willingness to drop him there for Rs.10/-. He sat in the car. The other person, who was described as a 'slim person', sat besides the informant on the back seat. The car reached Cadbury junction. The informant entertained some doubt and, therefore, asked the driver to stop the car there. However, the car was taken in high speed beyond Nitin Company and it was driven towards Nashik. The 'slim person', who was sitting next to the informant, showed a knife to him. It was pointed to the chest of the informant. It was also kept on the right knee of the informant. He demanded payment of money that the informant possessed. The informant resisted. That person then gave a punch with an iron fighter on the informant's nose. According to the informant, he became semi-conscious. The car was stopped near a temple below the bridge. The person carrying knife then forcibly took

away the informant's golden chain, bracelet, three golden rings, a mobile phone and Rs.2,000/-. The informant was pushed outside the car; and then both those persons went towards Kasarvadavali. The informant's shirt was stained with blood. He threw it in a dustbin. On 15.9.2009, he lodged his FIR with Rabodi police station. According to the first informant, because of the assault, he had sustained fracture of his neck. He was scared and, therefore, till the afternoon of 15.9.2009 he had not lodged the FIR. The FIR is produced on record and marked as Exhibit-62. The FIR describes the incident in similar manner as was deposed by him. It also describes the stolen property which included a mobile phone of Nokia company being Model No.5130 IMEI No.356944030516552 with a SIM-card. The FIR also mentions description of those two persons.

On 24.10.2009, the police called him to the office of Thane Crime Branch. They showed him golden ornaments and a mobile phone. He identified those. He received back his mobile phone and golden ornaments under the orders of the Court. On 9.12.2009, he was called for test identification parade. He

identified the 'slim person' but that accused was not before the Court.

In the cross-examination, he has admitted that he had attended the court on 10-15 occasions for giving evidence. He also admitted that he had seen the accused in the Court and he had also admitted that he was shown the accused in the office of Thane Crime Branch for the first time. Thereafter he was cross-examined on the conduct of test identification parade.

7. PW-7 Dr. Prashant Male has deposed that he had examined PW-1 on 15.9.2009 and he had found following two injuries :

- (i) CLW on the right side chest below nipple, &
- (ii) CLW on right babck.

The first injury was of the size 2 x 1 x 1 cm and other was of the size 2 x 2 x 1 cm.. The injuries were simple and they could have been caused by a sharp weapon. He admitted that there was a possibility of using any other object to cause these injuries.

8. PW-5 Smt. Jyoti Wagh was the Naib Tahsildar who had

conducted the test identification parade on 8.12.2009. She used twelve dummy persons provided by the jail authorities. Both the accused were asked to stand in the parade. According to her, PW-1 identified the present appellant but did not identify the other accused. She produced memorandum of panchnama of test identification at Exhibit-102.

This evidence will not be of any help to the prosecution in this particular case because PW-1 has admitted that the accused were shown to him for the first time in the office of the Crime Branch. Moreover, he has not identified the appellant before the Court. He has deposed that he had identified other accused in the test identification parade. He had not even deposed that he had identified the present appellant at the time of test identification parade. Therefore, the evidence of test identification and identification of the appellant by PW-1 is not sufficiently proved beyond reasonable doubt by the prosecution and, therefore, the evidence regarding the identification of the appellant will have to be ignored.

9. PW-2 Sanjay Ghole was the pancha, in whose

presence, the appellant had given memorandum statement pursuant to which the ornaments were recovered from a jeweller PW-4 Hiralal Jain. PW-2 has deposed that the appellant had made a statement showing willingness to produce those ornaments. He then led the police and the panchas to Madhuri Jewellers, Antop Hill, Wadala. A gold-chain and a bracelet were produced by the shop-keeper who informed that the appellant had come to his shop with a lady to sell these articles. The memorandum of the statement is produced on record at Exhibit-85 and the panchnama is produced at Exhibit-86.

10. PW-4 the jeweller Hiralal Jain was examined on the same point and he has deposed that the appellant had come to his shop on 15.9.2009 to sell a golden chain and a bracelet. He was his old customer and, therefore, the jeweller purchased those articles for Rs.46,000/-. After about 20-22 days, the police officers came to his shop with the appellant and on that day the recovery was effected as was deposed by PW-2 Sanjay Ghole.

11. PW-3 Ashok Satam was another pancha. In his presence the appellant showed willingness to produce the golden

rings. The memorandum of this statement is produced on record at Exhibit-88. The panchnama carried out pursuant to that statement is produced on record at Exhibit-89. Those golden rings were recovered at the appellant's instance from his hut.

12. PW-6 P.I. Ghosalkar is an important witness. He was the investigating officer. He has deposed that there were two offences registered at Rabodi police station i.e. C.R. No. I-163/2009 which is the present subject matter of this appeal and the other offence registered vide C.R. No.I-160/2009. The *modus operandi* in both these offences was the same. In both these cases, the accused had given lift to the passengers in the night and had robbed them. The police, therefore, arranged to lay a trap. On 3.10.2009 accordingly the Indigo car was intercepted. It was driven by the appellant. There were two other persons in the car. All of them were searched in presence of the panchas. The appellant was having a steel fighter on his fingers. He was also carrying a mobile phone and cash amount. One knife was recovered from Mehtabali. The mobile phone belonging to the informant in this case i.e. in C.R. No.I-163/2009 was found in

possession of the appellant. He has then deposed about recovery effected at the instance of the present appellant of the golden ornaments and rings from the jeweller and from his own house. He requested the Executive Magistrate to conduct test identification parade which was accordingly conducted. He obtained the injury certificate and then filed the charge-sheet.

In the cross-examination, he admitted that the articles were not produced before the Court during trial. They were returned to the complainant but no such panchnama was prepared or produced before the Court when the ornaments were returned to the complainant. He also admitted that the appellant was acquitted in connection with C.R. No.I-160/2009.

13. Learned Judge recorded the statement of the appellant under Section 313 of Cr.P.C.. There, his only defence was that he was innocent and had not committed the offence. The trial Court relied on the evidence of the prosecution case and held that the case was proved beyond reasonable doubt and, therefore, convicted the appellant, as mentioned earlier.

14. Learned counsel for the appellant submitted that the

recovery evidence is doubtful. The PW-6 investigating officer as well as PW-1 have not deposed about the IMEI number of the mobile phone and, therefore, recovery of that mobile phone cannot be held against the appellant. He submitted that since admittedly the accused were shown to PW-1 in the Crime Branch office at the first instance, the test identification parade loses its significance. Moreover, the appellant has not been identified by PW-1 during the course of trial. PW-1 has not even deposed that he had identified the appellant during the test identification parade.

15. He submitted that the medical evidence does not support the ocular evidence of PW-1 and there is clear exaggeration. It in fact falsifies the story of PW-1 and, therefore, benefit of doubt must go to the appellant. Neither the ornaments nor the weapon nor the mobile phone was shown to the witness PW-1 in the court; and this lacuna in the prosecution case goes to the root of the matter.

16. Learned APP, on the other hand, submitted that the evidence of recovery is not seriously challenged by the appellant

in the cross-examination. The IMEI number in the FIR tallies with IMEI number mentioned in the arrest panchnama which is a significant factor. He submitted that slight exaggeration in describing the injury and the incident will have to be ignored. He submitted that the test identification memo does show that the appellant was identified by PW-1 during that parade.

17. I have considered these submissions. As far as PW-1 Rakesh Kanwade is concerned, there are some definite improvements and exaggeration in his evidence. He has deposed that a knife was put on the right side of chest and on his right knee. He was also punched on his nose. He has further explained that he had suffered fracture of his neck and a lot of blood was oozing out. All this is exaggeration as in the evidence of the doctor PW-7 Dr. Male there are only two injuries – one was on the back and other on the chest. Both these injuries were minor injuries. There was no fighter punch injury on the nose and there was no injury to his right knee. There, certainly, was no fracture of the neck. All these show that the first informant had highly exaggerated the incident. And, therefore, use of knife or fighter

punch or causing hurt to the complainant by the appellant is extremely doubtful and to that extent the appellant deserves to be given benefit of doubt.

18. As discussed earlier, the evidence regarding identification of the appellant is also doubtful. Therefore, even that circumstance will have to be left out of consideration. The only main consideration which is in favour of the prosecution beyond reasonable doubt is that of recovery evidence. The golden ornaments which were stolen from PW-1 were sold by the appellant to a jeweller on that very day i.e. on 15.9.2009. There is no reason to disbelieve the evidence of PW-4 Hiralal Jain. A bracelet and a golden-chain were recovered from him, which were sold by the appellant to him. Those ornaments were not produced during trial. Those articles were returned to PW-1 during the investigation phase itself. There is no serious challenge in the cross-examination about the identity of those stolen articles. Similarly PW-1's golden rings were also recovered at the instance of the appellant from his own house. Even that evidence has remained unchallenged.

19. PW-1 has also not produced the blood-stained shirt, which according to him was stained with blood during the offence because of assault on him. This also is a circumstance in favour of the appellant.

20. What weighs in faovur of the prosecution in particular is the recovery of mobile phone. The first informant at the very first instance while lodging the FIR had given the IMEI number of his mobile phone. When the appellant was arrested on 3.10.2009 a mobile phone was recovered from his person bearing the same IMEI number. This is seriously an incriminating circumstance against the appellant. The appellant was found in a Indigo car and the *modus operandi* was the same. This particular evidence also has remained unchallenged and, therefore, the prosecution has proved this recovery evidence against the appellant beyond reasonable doubt.

21. Thus, from the above discussion it is established that on that night PW-1 was robbed of his articles inside the car. The appellant was driving the car according to the prosecution, though, identification is not established. But the recovery of

articles and the mobile phone connects the appellant with the crime.

22. The next question is whether the offence would fall within the meaning of Section 397 of IPC. Section 397 of IPC reads thus :

“397. Robbery, or dacoity, with attempt to cause death or grievous hurt. – If, at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years.”

In this case, as discussed earlier, to that extent PW-1 has exaggerated his case and it will not be safe to hold that either of the accused had caused or attempted to cause grievous hurt or had even used a deadly weapon because the doctor has opined that those two minor injuries could have been caused by any other means. Therefore, the ingredients of Section 397 of IPC are not fulfilled in this case. Therefore, at the highest the offence would

fall within the provisions of Section 392 of IPC.

23. The appellant is already in custody since the date of the impugned judgment and order i.e. from 17.1.2019. The appellant is in custody continuously after his conviction. During trial he was in custody from 3.10.2009 to 5.5.2010, as pointed out by learned APP. Thus, the appellant was in custody for more than four years. Therefore, interest of justice would meet if the sentence imposed on him is reduced to a period of four years under Section 392 of IPC.

24. Hence, the following order :

:: O R D E R ::

- i. The appeal is partly allowed.
- ii. The conviction and sentence of the appellant recorded under Section 397 read with 34 of IPC is set aside.
- iii. The conviction of the appellant under Section 392 read with 34 of IPC is maintained. However, the sentence imposed on him for that offence is modified and instead of seven years, the appellant is sentenced to suffer RI for four years and to

pay fine of Rs.1,000/- (Rupees One Thousand Only) and in default to suffer RI for three months.

- iv. The appellant is entitled to get set-off under Section 428 of Cr.P.C. for the period he has undergone in detention during investigation and trial.
- v. The articles returned to PW-1 can be retained by him.
- vi. Criminal Appeal is disposed of accordingly.

(SARANG V. KOTWAL, J.)

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by
PRADIPKUMAR
PRAKASHRAO
DESHMANE
Date:
2022.10.12
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+0530

Deshmane (PS)