

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

CRIMINAL APPEAL NO.285 OF 2017

1. Pravin Kashinath Pagare
Age 29 years, Occupation Service
Residing at Brk No.14,
Near Sahyadri Colony, Ulhasnagar No.1
 2. Rajan Dashrath Chavan
Age 27 years, Occupation Service
Residing at Brk No.27
Room No.315, Near Bhim Nagar,
Sangram Colony, Ulhasnagar No.1
 3. Yogesh Vasant Navade
Age 28 years, Occupation Service
Residing at Sahyadri Colony,
Brk No.13, Ulhasnagar No.1
 4. Sonusingh @ Sandy Dhansingh Rajpur
Age 26 years, Occupation Service
Residing at Hanuman Nagar,
Near Public Toilet, Ulhasnagar No.1
 5. Avinash Pramod Mahale
Age 20 years, Occupation Service
Residing at Near Hanuman Mandir
Behind Dr. Gopal, Ulhasnagar No.1
presently lodged in
Kalyan Central Prison
- Appellant

versus

State of Maharashtra
Through Sr. P. I.
Ulhasnagar Police Station
(C.R.No.I-25/2012)

.... Respondent

.....

- Mr. Aashish Satpute, Appointed Advocate a/w Ms. Akshata Desai, Advocate for Appellant .
- Mr. Yogesh Y. Dabke, APP for the State/Respondent.

CORAM : SARANG V. KOTWAL, J.
DATE : 03rd AUGUST, 2022

JUDGMENT :

1. The Appellants have challenged the judgment and order dated 17/03/2017, passed by Additional Sessions Judge, Kalyan, in Sessions Case No.211 of 2012. All the Appellants were the accused in that trial. Appellant Nos.1 to 5 were respectively accused Nos.1 to 5 before trial Court. It is stated before the Court that during pendency of this Appeal, the Appellant No.4 – accused No.4 Sonusingh @ Sandy Dhansingh Rajpur has expired and therefore the Appeal is now pending only in respect of Appellant Nos.1, 2, 3 and 5. At the conclusion of the trial all the Appellants were convicted for the offence punishable u/s 397 r/w 34 of the Indian Penal Code and were sentenced to suffer rigorous imprisonment for 7 years and to pay a fine of Rs.2,000/- each and in default of payment to suffer

simple imprisonment for one month. They were also convicted u/s 506(2) r/w 34 of the Indian Penal Code and were sentenced to suffer rigorous imprisonment for 3 years and to pay a fine of Rs.2,000/- each and in default of payment of fine to suffer simple imprisonment for one month. They were further convicted for the offence punishable u/s 341 r/w 34 of the Indian Penal Code and were sentenced to suffer simple imprisonment for one month and to pay a fine of Rs.500/- each and in default of payment to suffer simple imprisonment for 8 days.

2. Heard Mr. Aashish Satpute, learned counsel for the Appellant and Mr. Yogesh Y. Dabke, learned APP for the State.
3. The charge against the Appellant was that on 03/02/2012 at about 02.00 p.m. at Sahyadri Nagar, Near Saibaba Mandir, on Public Road, Ulhasnagar No.1, the Appellants committed robbery of Rs.700/- by using deadly weapon i.e. a knife and also attempted to cause grievous hurt to the first informant Bhagwan Shivaji Sonar and thus committed offence

punishable u/s 397 of the Indian Penal Code. In the same incident, they also committed the offence punishable u/s 341 r/w 34, 506(2) r/w 34 of the Indian Penal Code.

4. The Appellant Nos.1 and 2 were arrested at the spot. It is alleged that the Appellant No.2 had tried to pour petrol on the person of the first informant and had tried to lit a matchstick. The Appellant No.2 was found carrying a knife and a bottle containing petrol. The other accused were arrested subsequently. At the instance of Appellant No.3 a cash amount of Rs.700/- was recovered from his house, which he had kept in the pocket of his pant.

5. After investigation was over, the charge-sheet was filed and the case was committed to the Court of Sessions. During trial the prosecution examined 8 witnesses. The important witnesses were the first informant and the police officer who had caught the Appellant No.1 and 2 at the spot. The articles were sent for chemical analysis. No report of C.A. was produced

on record. However, the article i.e. the bottle and currency notes of Rs.100/- denomination were produced in the Court and were identified. After recording of the evidence, statements of the Appellants u/s 313 of Cr.PC were recorded. They denied the entire incident. At the conclusion of the trial, the Appellants were convicted and sentenced as mentioned earlier.

6. The most important witness in this case is the first informant PW.1 Bhagwan Shivaji Sonar. He has stated that at the relevant time he was working in a computer institute as a teacher. Two months prior to the incident dated 02/12/2012 the Appellant No.4 and the Appellant No.3 had demanded Rs.100 for buying liquor. The first informant was having one sided love affair. These Appellants threatened to tell about it to others and because of this apprehension the first informant had paid Rs.100/- to them. Again thereafter there was some demand, but the Appellant did not pay anybody. On 02/12/2012 at about 11.30 p.m. all the Appellants approached him and abused him as he had not paid the money. Then they left. At about 01.30

a.m. the first informant was talking with his friend Sunil Kadam. The Appellants confronted him near Saibaba Mandir and started beating him. The first informant was travelling on his motorcycle. The Appellant No.3 Yogesh Navade removed the key of the motorcycle and handed it over to Appellant No.1. All the accused then demanded Rs.10,000/-. He did not have any money. The Appellants threatened to kill him if the payment was not made. It is further deposed by P.W.1 that the Appellant No.2 Rajan Chavan had removed some petrol from other motorcycle. He poured it on P.W.1's person. The Appellant No.3 Yogesh Navade tried to set him on fire by lighting a match stick, but the Appellant No.1 extinguished it and nothing untoward further happened. It is his case that the Appellant No.2 Rajan Chavan threatened him with a knife and one broken beer bottle. P.W.1 then ran in one lane. The Appellant No.2 caught him. At that time the police officer patrolling in the area came there and caught Appellant Nos.1 and 2. According to him the Appellant No.2 was having bottle filled with petrol with him. P.W.1 then went to the police station and lodged his FIR. The FIR is

produced on record at Ex.19. It was lodged at 09.30 a.m. at Ulhasnagar Police Station u/s 397 r/w 34 of the IPC vide C.R.No.I-25 of 2012. The informant showed the spot of incident to the police. They carried out spot panchanama. The police seized his clothes on which petrol was poured. He was sent for medical examination at Central Hospital Ulhasnagar.

7. In the cross-examination he has stated that he new the Appellants as they resided in the same locality. P.W.1 was on visiting terms with the Appellant No.1's brother Pagare who is friend of P.W.1. He could not give details about when Rs.100/- were taken from him. Some omissions from the FIR were brought on record. It was not mentioned in the FIR that at 11.30 p.m. all the Appellants met him and that they again demanded money. It was not mentioned that at around 12.30 a.m. he had met his friend Sunil Kadam and that they kept talking till about 01.30 a.m. It was also not mentioned in the FIR that the Appellant No.2 had threatened him with a broken beer bottle. He could not explain as to why all these important facts were

not mentioned in the FIR. He was cross-examined about the locality. But he denied the suggestion that the locality was crowded at about 01.30 a.m. to 02.00 p.m. He admitted that there was Mamta hospital near the spot, which was open for 24 hours and there were constant visits by patients and others during the night. The police station was only a minutes walk from the spot. He had also not mentioned in his FIR that the Appellant No.2 had caught him.

8. After this cross-examination he was re-examined by the learned APP. He was shown a motorcycle key, a cold drink bottle, purportedly containing petrol, 7 notes of Rs.100/- denomination, a blue shirt, a white T shirt, a pant and a knife. He identified all those articles. In further cross-examination he admitted that there were no special marks on the currency notes. He admitted that the cold drink bottle was easily available in the market. He also admitted that the knife was not seized by the police in his presence.

9. P.W.2 Pravin Gulab Bhopale was a police constable. He is an important witness. He was on the patrolling duty at the relevant time. He has deposed that, at about 03.30 a.m., he heard noise from the main road. He along with others went to that spot near Saibaba temple. There was quarrel going on between some people. He saw that five persons had caught one person. One of those persons was having plastic bottle in his hand. When the police reached there, three out of five ran away. The police arrested two persons at the spot. The first informant told the police that those five persons had taken his money and had tried to set him on fire by pouring petrol on him. The arrested accused were Appellant No.1 Pravin Pagare and the Appellant No.2 Rajan Chavan. P.W.2 and others brought the first informant P.W.1 and the arrested two accused to the police station. He prepared a report. He stated that the Appellant No.2 was having a bottle which was having smell of petrol. Even the first informant's clothes were smelling of petrol. He identified these articles in the Court. His report is produced on record at Ex.22. It was addressed to Sr.P.I. of Ulhasnagar police station.

There is no time mentioned on that police report. No further action was taken on this report and no FIR was lodged. The FIR was lodged at about 09.00 a.m. In the cross-examination, he deposed that he was not knowing whether Mamta hospital was open for whole night and whether CCTV cameras were installed in that hospital. He had not stated names of other police officers on patrolling duty. He could not explain as to how his police statement did not mention that five persons had caught one person. The names of accused Nos.1 and 2 were not mentioned in his police statement and he could not explain it though he deposed about it during examination-in-chief.

10. P.W.3 Bunt Ramesh Bhamree, P.W.4 Ajay Baisane, P.W.5 Deepak Dayaram Lasi and P.W.6 Sanjay Chanderlal Karara are all hostile witnesses. They were panchas for various panchanamas. Therefore those panchanamas were produced on record through the evidence of police officers.

11. P.W.7 PI Kalyanji Narayan Ghete was attached to Ulhasnagar Police Station on that day. He took over

investigation. He received the FIR, spot panchanama and personal search panchanama of the Appellants. He arrested the Appellants Avinash, Yogesh and Sonu Singh. The accused/Appellant Yogesh showed willingness to produce Rs.700/- which allegedly were taken from P.W.1. Pursuant to that statement; Rs.700/- were recovered from his house, which were kept in the pocket of his pant. The memorandum statement and panchanama are produced on record at Ex.34 and 35. He recorded statements of witnesses. Seized Muddemal articles were sent for chemical analysis. The letter sent for C.A. is produced at Ex.36. After completion of investigation, the charge-sheet was filed. He has not produced C.A. report on record. In the cross-examination he admitted that C.A. report is not on record.

12. P.W.8 P. I. Popat Santram Thanage was attached to Ulhasnagar police station as A.P.I. He has deposed that the report at Ex.22 was given by P.W.2. He had recorded the FIR. He had taken physical search of the Appellant. From one of the

accused, he found motorcycle keys and from the Appellant Rajan he found a plastic bottle containing petrol and a knife from other pocket. The seizure panchanama to that effect was prepared and it is produced on record at Ex.38. He went to the spot with P.W.1 and during spot panchanama he found one match box below street light. He seized those articles. There was smell of petrol on the clothes of the complainant. They were seized. The first informant was referred to hospital and thereafter he handed over the investigation to P.W.7. In the cross-examination he admitted that he did not make enquiry whether CCTV cameras were installed at Mamta Hospital. He admitted that there is a watchman employed for 24 hours in the hospital. He denied that there was heavy traffic of patients in Mamta Hospital. He did not record statements of residents of the locality. He did not verify or enquire as to whether key found on the person of the Appellant was of the motorcycle of the first informant. He could not find the motorcycle which was allegedly used by the Appellant for removing petrol.

13. Learned Judge relied on this evidence and in particular on evidence of P.W. 1, 3, 6, 7 and 8 to convict the Appellant. He observed that all odd hours late in the night there was no possibility of anyone else witnessing the incident. After consideration of evidence and the articles, the Appellants were convicted and sentenced by him as mentioned earlier.

14. Learned counsel for the Appellants submitted that in the deposition of P.W.1 there is absolutely no reference to taking away Rs.700/- from P.W.1. On the currency notes recovered from P.W.1, there were no special marks. Key found with the Appellant No.1 Pravin Pagare was not tested on P.W.1's motorcycle to establish that it was of the same motorcycle. The C.A. Report is not produced on record. Therefore adverse inference needs to be drawn. There is nothing to prove that the petrol was poured on the person of P.W.1 or that the bottle actually contained petrol.

15. Learned APP submitted that the weapon used is seized and therefore offence u/s 397 of IPC is made out and the conviction is properly recorded by the trial Court. He submitted

that though there is absence of C.A. report, the evidence of P.W.1 is clear enough. Though he has not deposed about Rs.700/- in his examination-in-chief, he was shown the currency notes in his re-examination and he had identified them. He submitted that two accused were caught at the spot by the police officer, who is an independent person and his evidence cannot be overlooked.

16. I have considered these submissions. The crucial point in this case is about Rs.700/-. P.W.1 has not uttered a word about the Appellant taking that amount forcibly from him. There is no charge regarding Rs.100/- which were taken two months earlier. The prosecution case is specifically about the incident dated 03/12/2012 when this amount was forcibly taken from P.W.1 at the point of knife.

17. As far as recovery of knife and a thumps up bottle filled with petrol from the Appellant No.2 is concerned, it is important to note that P.W.2 who had caught the Appellant No.2 at the spot. He has not uttered a word about the finding of knife. He in fact had taken the Appellant Nos.1 and 2 to the police station

and yet he had made no reference to Appellant No.2 having any knife. He has only made reference to the bottle containing petrol. In the report at Ex.22, there is no reference to any knife. The FIR was lodged at 09.00 a.m. in the morning when the personal search of the Appellant Nos.1 and 2 was taken. There is a long gap between the time when these two Appellants were taken to the police station and the time when their physical search was taken. There is no explanation as to why the FIR was not registered in the night itself and why the personal search was not carried out immediately in the police station.

18. The prosecution has failed to prove use of petrol. The C.A. report is not on record. Therefore there is nothing to infer or conclude that the bottle which was allegedly carried by the Appellant No.2 was filled with petrol. Though clothes of the first informant were sent for chemical analysis, again there is no report showing that those clothes showed presence of petrol. Therefore even to that effect prosecution has failed to prove its case.

19. The other circumstance of recovery of motorcycle key with Appellant No.1 is not connected with the motorcycle of the first informant. Therefore even this circumstance is not incriminating.

20. Next circumstance is about recovery of notes at the instance of Appellant No.3. This also loses its significance because P.W.1 has not uttered a word about that amount in his examination-in-chief. Only in the re-examination he has identified 7 notes of Rs.100 denomination. But even then he has admitted that there were no special marks on these notes. Therefore having of some amount in the house of the Appellant No.3 Yogesh Navade is hardly of any consequence.

21. As far as medical certificate is concerned, the record shows that though the first informant had made complaint about blunt trauma, the medical certificate which is produced at Ex.44 along with police letter does not show that he had actually suffered any injuries. Thus, the prosecution case is extremely

doubtful. The friend Sunil Kadam who was talking with the first informant around that time is not examined. He could have thrown light on the incident. Thus, the evidence led by the prosecution is insufficient to prove the case against the Appellants beyond reasonable doubt and therefore all the Appellants deserve to be acquitted in this case.

22. Hence, the following order :

ORDER

- (i) The Appeal is allowed.
- (ii) The Judgment and Order dated 17/03/2017, passed by Additional Sessions Judge, Kalyan, in Sessions Case No.211 of 2012 convicting and sentencing the Appellants is set aside.
- (iii) The Appellants are acquitted of all the charges which they were facing.
- (iv) Appeal stands disposed of accordingly.

(SARANG V. KOTWAL, J.)