

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

CRIMINAL APPEAL NO.317 OF 2014

1. Vijaykumar Harihar Giri,
2. Ashokkumar Shivkant Jaiswar,
3. Narendra @ Kandi @ Lalmani Giri, &
4. Anil Sherbahadur Giri. Appellants
Versus
The State of Maharashtra Respondent

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Mrs. Pooja Sejpál, Advocate i/b. Nitin Sejpál for the Appellants.
Mr. S.R. Agarkar, APP, for the Respondent-State.

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CORAM : SARANG V. KOTWAL, J.

DATE : 14th & 17th OCTOBER, 2022

ORAL JUDGMENT :

1. The appellants were the original accused Nos.1 to 4 in Sessions Case No.482/2008. Accused No.5 was discharged and accused No.6 was absconding. At the conclusion of the trial, learned Special Judge under the MCOC Act, Greater Mumbai vide his judgment and order dated 6.3.2014 convicted and sentenced the appellants as follows :

i. The appellants were convicted for commission of offence punishable under Section 399 of IPC and were sentenced to suffer RI for five years and to pay fine of Rs.1000/- and in default to suffer

further RI for three months.

ii. It was observed that the accused Nos.1, 2 and 3 had undergone the sentence and accused No.4 was granted set off under Section 428 of Cr.P.C.

The appellants have challenged this order in the present appeal.

2. The prosecution story, in brief, is as follows :

PW-1 Ramesh Bhokare was a Constable attached to Crime Branch. On 26.4.2008 he received a secret information that some persons were to assemble near Govindram Lacchi Snacks and Veg. Hotel for committing dacoity at a jewellers shop at Kalbadevi. He informed the superiors and arrangement was made to lay a trap. At about 3.15 p.m., three persons came near that hotel. After about 15 minutes, two more persons came there on motorcycle and joined them. They went inside the hotel. PW-1 followed them there. He sat close to them. He overheard their plan to commit robbery in Prakash Gold Palace. All these persons came out. One of them started going towards the jewellers shop. Four persons remained near the hotel. The raiding party apprehended them immediately. The fifth person

managed to escape. The apprehended persons were searched and weapons were recovered from their possession. On this basis, FIR was lodged vide C.R. No.118/2008 under Sections 399 and 402 of IPC read with Sections 3, 25 and 27 of the Indian Arms Act at L.T. Marg Police Station. The investigation was carried out and the charge-sheet was filed. It was revealed that the accused – appellants were involved in a murder case. They faced a separate trial under the provisions of the MCOC Act vide Special Case No.7/2008. That trial was concluded before the present Sessions Case. In that trial, all of them were convicted and sentenced. By consent of both parties i.e. prosecution as well as defence, evidence of some of the witnesses from that trial was taken on record in the present Sessions Case No.482/2008. In all, seven witnesses were part of the Sessions Case No.482/2008. The defence cross-examined four witnesses out of them in addition to the cross-examination which was already conducted in the said MCOC Act case. Thus, the prosecution relied on the evidence of PW-1 Head Constable Ramesh Bhokare, PW-2 Head Constable Saiman Fernandes, PW-3 Ashish Shukla who was a pancha, PW-4 API Ajay Joshi, PW-5 Shamsundar Munj who was an ballistic expert, PW-6 Mrs. Anjali Badade who was an Assistant Chemical

Analyst, PW-7 DCP Jadhav who had recorded confessional statement of the appellant Anil Giri during the course of investigation of the offence under the MCOC Act. He had also given sanction to prosecute these accused under the Arms Act.

3. The defence of the appellants was of total denial. Appellant No.1 Vijay Giri's defence was that he was apprehended from his house by Shri Dhamankar of Unit No.III who was accompanied by team of police officers. Appellant No.2 Ashokkumar Jaiswar's defence was that he was apprehended by four police officers from his house on 25.4.2008. The defence of appellant No.3 Narendra Giri was that he was apprehended by police of Unit-III on 25.4.2008 from Ashokvan Rikshaw Stand at 6.00 to 6.30 a.m.. And the defence of the appellant No.4 Anil Giri was that he was apprehended on 24.4.2008. His mobile phone was seized. His mother had filed complaint of missing with Kurar Village police station on or about 25.4.2008 as he had not reached home on 24.4.2008. He was falsely implicated in this case.

4. After considering the evidence on record and the defence of the appellants-accused and after hearing the parties, learned trial Judge convicted and sentenced the appellants as mentioned earlier.

5. Heard Ms. Pooja Sejpai, learned counsel for the appellants and Shri S.R. Agarkar, learned APP for the Respondent-State.

6. PW-1 Head Constable Ramesh Bhokare has deposed that on 26.4.2008 he was on duty in the office of Crime Branch, CID, CIU Operation. At about 1.30 p.m. he received a secret information that some persons were to assemble near Govindram Lacchiram Hotel and they were planning to commit dacoity at one of the jewelers shop in Kalbadevi. PW-1 conveyed this information to his superior Sr.PI. Shri Sandbhor. The police arranged to lay a trap. They proceeded towards Kalbadevi. They reached there at around 2.15 p.m.. They divided themselves into two groups. PW-1's group stood near the said hotel. The other group stood at some distance. At about 3.15 p.m., three persons came near that hotel. After fifteen minutes, two persons came there on a motorcycle and met those three persons. Then all those five persons entered said hotel. PW-1 followed them. He sat just behind the table of those five persons. He overheard them discussing commission of robbery at Prakash Gold Palace. One of those five persons was asked to enter the shop with his weapon and others were to follow him. The accused Anil was asked to keep his motorcycle started. After the robbery, two of them planned to go on

that motorcycle and they decided to meet at Dahisar. On hearing this conversation, PW-1 was convinced that they were the same persons who had come there to commit dacoity. He came outside the hotel and informed his superior Sr.PI Shri Sandbhor. Those five accused came out of the hotel and one of these five accused proceeded towards Prakash Gold Palace. The other four came outside the hotel and stood nearby. PW-1's other group started joining the other group. Those four accused persons got alerted and they started keeping distance between themselves. The raiding party immediately apprehended them. PW-1 himself went to Prakash Gold Palace in search of the fifth person but he was not found. He had absconded. Those four persons, who were apprehended at the spot, were searched in presence of the panchas. All those four persons are the present appellants before the Court. Their names were given by those persons themselves. Appellant No.1 Vijaykumar Giri was found to carry a country-made firearm containing two live-cartridges. Appellant No.2 Ashokkumar was having one knife. Appellant No.3 Narendra was having one knife and appellant No.4 Anil was also having a knife. Besides these weapons, the accused were carrying currency notes, cards etc.. Motorcycle key was found with the

appellant No.4 Anil. The motorcycle bearing No.MH-03-AL-8044 was parked on the other side of the road. It was tested with the key found with the appellant No.4. It started. Therefore, the motorcycle was also seized. The appellant No.1 did not have license to possess the firearm. It was a handgun with yellow metal covering on the grip. The wooden grip was reddish in colour. The seized articles were wrapped separately. The accused and the articles were taken to the office of Crime Branch where the first information report was lodged. PSI Shri Joshi recorded the FIR. The FIR is produced on record at Exhibit-28. It was revealed that the revolver and the cartridges were connected with MCOC Special Case No.7/2008. Those articles were produced before the Court in the present case. PW-1 identified the handgun which was produced in the Court. He also identified the three knives produced before the Court which were taken from possession of the above appellants. Accused No.4 was also found with a sack containing masala powder.

PW-1 was cross-examined in this case. He was subjected to a very lengthy cross-examination. He deposed in the cross-examination that before leaving for the raid, a station diary entry was made. When he had received the secrete information he did not

record it. The informant had not given description of the persons who were to come to that hotel. The information did not mention the shop where the robbery was to be committed by these accused. There were about 5-6 tables in the hotel on the ground floor. There were 2-3 waiters working in the hotel. The informant left the spot after pointing out the suspects. He had pointed out to the first three persons who had arrived there. He had then left the spot. The accused sat on the second table from the entrance and he sat on the first table after they had taken their seat. The accused had not placed any order. PW-1 was in the hotel for about five minutes. He then came out of the hotel. No waiter had come to him for his order. Contable Kharat had brought two panchas from just outside the hotel. On return to CIU he first lodged the FIR and station diary entry was made thereafter. On the way to CIU from the hotel, L.T. Marg Police Station was on the way but he did not go to the L.T. Marg police station to lodge his FIR. He could not explain as to why his FIR did not mention the statement that he had asked accused No.1 whether he had license to possess a firearm. He denied the suggestion that on 26.4.2008, the accused were already detained by the DCB, CID Unit-III. His FIR substantially corroborates his deposition.

7. Head Constable Saiman Fernandes was PW-2. He had deposed that in April, 2008 he was attached to L.T. Marg Police Station as a Head Constable. On 8.4.2008, he was assigned the duty to publicise the order of DCP prohibiting possession of arms. He had taken megaphone phone and loudly read out the order at Marine Lines, Flyover bridge, M.K. Road etc.. He had also affixed a copy of the order on some conspicuous places. His cross-examination is not very material. In any case the appellants are not convicted for commission of offences punishable under the Arms Act or the Maharashtra Police Act.

8. The third witness in this case was Ashish Shukla. He was a pancha witness. He was examined in MCOC Special Case No.7/2008 with 16/2008 with 3/2009 as PW-26. His deposition including examination-in-chief and the cross-examination was brought on record of this case and he was also cross-examined on behalf of the present appellants in this case. He has deposed that he was summoned by the police officials of CIU Operations. He was passing along Kalbadevi road at that time. It was around 3.30 p.m. to 4.00 p.m.. There were five to six police officials. All of them were in civil dress. They had apprehended 3-4 persons. The police officers

wanted to take search of the appellants. Whatever was found on their person was being recorded. It was done in the presence of this witness. One of the apprehended persons had chilly powder with them. One of them had a gun and each of those had a knife with them. There were some cell-phones and money. Those were also seized. A gun was seized but he was unable to describe the gun. He did not recollect the name of the person from whom the gun was seized. A police officer opened the gun and had found one bullet inside. All those articles were wrapped, sealed and the panchas signed the wrappers. There were four persons who were apprehended. He identified the paper-slips in the Court. The panchnama is produced on record at Exhibit-76-B.

In the cross-examination, he admitted that he could identify all the articles before the Court only on the basis of their wrappers and paper-slips containing his signatures. When he saw the accused, they were on the footpath. This witness was on his motorcycle. There was chaos and, therefore, he has stopped there. Crowd had gathered at the spot. As this witness volunteered to act as a pancha witness, other pancha also came forward to act as a pancha. His house was about 20-30 minutes walking distance from that place.

He was in service in Fort area. He was working with a bank. He had visited Crime Branch occasionally in his official capacity. He was also cross examined on behalf of the present appellants in the present Sessions Case No.482/2008. He admitted that said road was so busy that there used to be traffic jam. There was heavy pedestrian traffic and it was difficult to walk on that road when there was traffic jam. When the accused were apprehended pedestrian traffic got disturbed.

9. The next witness was PW-4 API Ajay Joshi. He was examined as PW-27 in the aforementioned MCOC Special Case. His deposition was produced on record of this case. He has deposed about the events taken place on 26.4.2008. PI Shri Sandabhor told them about the information. Preparation was made to conduct the raid. He then described the incident substantially in the same manner as is described by PW-1. He has also deposed about the search and seizure. He had conducted panchnama. He identified the gun and the knives in the Court. After they came back to the office along with the accused and the articles, he recorded statement of PW-1 HC Bhokare. He then informed the L.T. Marg police station about arrest of the four accused. He went to L.T. Marg police station along with the statement of HC Bhokare. At that police station, the crime

was registered as C.R. No.118/2008 on the basis of the information of Shri Bhokare. On return to his office, he re-numbered the C.R. as D.C.B. C.I.D. C.R. No.66/2008. He then commenced the investigation of the crime. He interrogated all the four persons. During that interrogation complicity of those four accused in the murder of Kamlakar Jamsandekar was revealed. After the initial investigation, API Dinesh Kadam took over the investigation from him. But subsequently again the investigation was entrusted to this witness. He ultimately filed the charge-sheet in this case.

In the cross-examination, he deposed that after having reached the spot till the arrival of the suspects there was no discussion amongst them for bringing the panchas. He himself had apprehended accused No.4 Anil Giri. PI Sandbhor had enquired with the panchas. When he had gone to L.T. Marg police station, at that time copy of the panchnama was not with him. He denied the suggestion that all the accused were in his custody from 24.4.2008 and the false case was registered against them. He had handed over the weapons to the investigating officer who was investigating the MCOC case. That officer had issued request letter and had mentioned that the weapon would be referred to CA as that weapon was

connected with the case he was investigating.

10. PW-5 Shyamsundar Munj was the Ballistic expert witness. PW-6 Mrs. Anjali Badade was an Assistant Chemical Analyst. In the context of the present case their evidence will not change the fate of the case either way. Both these witnesses were also examined in the MCOC Special Case where they had deposed about those weapons and the examination conducted regarding them. Suffice it to say that the handgun was in working condition. The prosecution case is that the same handgun was used in committing murder of Jamsandekar. However, that aspect is not relevant for the present case.

11. The last witness was - PW-7 DCP Vijaysingh Jadhav. He had recorded the confessional statement of the accused No.4 under the provisions of the MCOC Act and had also accorded sanction in the present case. As mentioned earlier, the appellants were acquitted from the offences under the Arms Act and Maharashtra Police Act and there is no appeal preferred by the State of Maharashtra in respect of that. Even the confessional statement of the accused No.4 Anil Giri is not used in the present case. Therefore, even his evidence is not really of any relevance.

12. Learned counsel for the appellants submitted that the

entire prosecution case is unbelievable and improbable. It was not possible that the accused would discuss their plan in a hotel within hearing distance of PW-1, who was sitting on the very next table. In spite of the fact that it was a crowded place, no other independent witness is examined except a pancha. Even the staff of the hotel, where the accused had their conversation, was not examined. PW-2 was a habitual pancha as he has admitted that he used to visit the Crime Branch office.

13. Learned counsel for the appellants then relied on the judgment of the Hon'ble Supreme Court in the case of **Chaturi Yadav and others Vs. State of Bihar** as reported in **AIR 1979 Supreme Court 1412**. In that case some persons were found armed with guns and some had cartridges and the others had ran away. It was observed in that case that the mere fact that the persons were found at 1.00 a.m., did not by itself prove that they had assembled for the purpose of committing dacoity or for making preparations to accomplish that object. Therefore, the accused in that case were acquitted.

Learned counsel for the appellants submitted that even the facts in the present case are similar and, therefore, merely because the accused were apprehended with weapons will not show

that they had committed the offence under Section 399 of IPC.

14. Learned APP, on the other hand, submitted that there were no suggestions put to PW-1 that he could not overhear the conversation between the accused and their plan to commit dacoity at Prakash Gold Palace. The weapons were recovered. PW-3 is an independent witness. Therefore, according to him, the offence under Section 399 of IPC was made out and, the learned Judge has rightly convicted and sentenced the appellants – accused.

15. I have considered these submissions. Section 399 of IPC reads thus :

“399. Making preparation to commit dacoity. –
whoever makes any preparation for committing dacoity, shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.”

Therefore, it is necessary to see whether the prosecution has proved its case beyond reasonable doubt to attract the ingredients of Section 399 of IPC. For this purpose the evidence of PWs-1, 3 & 4 is important. PW-1 has described the incident in detail. He was the

person involved in this investigation right from the time when he had received the secret information. He has immediately conveyed the information to his superiors and a raid was arranged. The police party had gone on the spot. The secrete informant had shown three suspects who had come at the spot. PW-1 had then followed all the accused including the persons who had subsequently arrived at the spot. Inside the hotel, he had sat next to those accused and had overheard their conversation. It was not that the plan to commit the offence was hatched at first instance in the hotel. They were only discussing the final steps of commission of offence and, therefore, it was not unnatural that they would enter into such discussion. Even their discussion was not explicit. One of them had told the absconding accused to enter the shop with '*saman*'. The others were also directed to proceed likewise. They had taken care not to mention the name of the weapons. Accused No.4 Anil Giri was asked to keep his motorcycle started. One of them was to come back to the motorcycle with '*mal*'. There was no reference to 'robbery'. The conversation would not have straightway indicated that the plan was to commit robbery. It is only because PW-1 knew the background of the matter, this conversation was understood by him. The

conversation was short and was giving final touches to their plan to commit dacoity. This conversation was different from the facts of **Chaturi Yadav's** case and, therefore, the ratio of that judgment will not be applicable in the facts of this case.

16. Even the subsequent events support the prosecution case. The person who was referred to as 'Pintu' had gone ahead to the shop and had absconded because in the meantime other four were apprehended on the spot. All of them were found carrying weapons. Appellant No.1 was found with a handgun and the appellant No.4 was having chilly powder. The appellants No.2, 3 & 4 were having knives. All this is indicative of their plan and preparation to commit dacoity in the shop known as 'Prakash Gold Palace'.

17. PW-1 has clearly deposed about this and there is no reason to disbelieve him. The rest of the evidence described by PW-1 is sufficiently corroborated by PW-3 Ashish Shukla and PW-4 API Ajay Joshi. There is no substance in the submission that Ashish Shukla was a habitual pancha. There is nothing to show that he had acted as a pancha in other cases. Though he had visited the Crime Branch that did not disqualify him from acting as a pancha. There is nothing to show that in his cross-examination that he would be an interested

witness to earn some benefits from the investigating agency. PW-3 acting as pancha has fully supported and corroborated the prosecution case. The panchnama is proved by him. The articles are identified by these three witnesses. API Ajay Joshi has fully corroborated the evidence of PW-1. I do not find any infirmity in the evidence of these witnesses.

18. The learned Judge has properly appreciated these facts and this evidence. The defence of the appellants do not travel beyond their mere suggestions and denials. There is nothing on record supporting their defence. As against that, the prosecution has proved its case beyond reasonable doubt. Therefore, I do not find any merit in the appeal. The appeal is accordingly dismissed.

(SARANG V. KOTWAL, J.)

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