IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1037 OF 2019
WITH
INTERIM APPLICATION NO. 1783 OF 2021

Sunil Gaurishankar Kharwar.
Aged about 29 yearsm
R/o. Om Sai Chawl, R. No. 533,
Ganesh Nagar, Jogeshwari(W),
Mumbai 400102. ... Appellant.

v/s.

The State of Maharashtra.
(through Oshiwara Police Station) … Respondent.

WITH
CRIMINAL APPEAL NO. 648 OF 2012
WITH
CRIMINAL APPLICATION NO. 1109 OF 2018

Prasad Prabhakar Jadhav,
Age about 21 years, Occ: Service,
R/o. Renuka Chawl, Room No. 13,
Ganesh Nagar, Link Road,
Jogeshwari(W), Mumbai 400102.
(Presently in judicial custody of … Appellant.
Kolhapur Jail.)

V/s.

The State of Maharashtra.
(At the instance of Oshiwara Police … Respondent.
Station)

Ms. Payoshi Roy i/b. Dr. Yug Mohit Chaudhry, advocate for appellant in Appeal No. 1037/2019.
Mr. Mihir Joshi, advocate appointed for appellant in Cr. Appeal No. 648/2012.
Ms. S.V. Sonawane, APP for State.

ARUNA S TALWALKAR
Digitally signed by ARUNA S TALWALKAR
Date: 2022.03.07 10:51:42 +0530

CORAM : SMT. SADHANA S. JADHAV &
PRITHVIRAJ K. CHAVAN, JJ.

RESERVED ON : FEBRUARY 4, 2022.

PRONOUNCED ON : MARCH 4, 2022.

JUDGMENT (PER SMT. SADHANA S. JADHAV, J)

1 The appellants are convicted for the offence punishable under section 341, 397, 302 read with section 34 of the Indian Penal Code and sentenced to suffer imprisonment for life and to pay fine of Rs. 5,000/- each i.d. to suffer further R.I. for 30 days by the learned Sessions Judge, Gr. Bombay vide Judgment and Order dated 2nd February, 2012 in Sessions Case No. 440 of 2010. Hence, this appeal.

2 Such of the facts necessary for decision of these appeals are as follows:

(i) On 27/3/2010, one Mahendra Morya lodged a report at the police station alleging therein that he works as a wireman at Chembur. While returning home, he has to take bus from Ghatkopar to Oshiwara. On 26/3/2010, he reached Oshiwara at about 9.45 p.m. He wanted to answer nature's call, but found the toilet locked. He therefore, went behind the toilet on the open ground. There were two

more persons standing there.

(ii) He saw 3 persons coming from the right side. One of them was armed with wooden plank. The other two persons dragged him into darkness. He could not rescue himself. He was hit on his head by wooden plank.

(iii) The other two persons tried to rescue him. One of them was Sachin who was assaulted by those three persons. The said miscreants snatched the cell phone and wrist watch of the complainant. They also assaulted other persons present there. Someone at the bus stop had called the police. All the 3 injured were taken to Cooper hospital.

(iv) The police had learnt that the other 2 injured were Sachin Nandgavale and Arun Yadav. Sachin had succumbed to the injuries. On the basis of his report, Crime No. 111 of 2010 was registered at Oshiwara Police Station for offence punishable under section 302, 397 read with 34 of the Indian Penal Code against unknown persons. In the course of investigation, accused Sunil Kharwar and Prasad Jadhav were arrested on 27/3/2010. The third accused happens to be a juvenile in conflict with law.

3 At the trial, the prosecution examined as many as 25 witnesses to bring home the guilt of the accused. Since this is a case of direct evidence, it would be necessary to scrutinize the oral testimony of the complainant and the eye witnesses. P.W. 1 Mahendra Morya is the complainant. P.W.11 Pappu Shaikh is an eye witness and P.W. 15 Arun Yadav happens to be the injured eye witness.

4 P.W.1 Mahendra Morya has deposed in consonance with his first information report. According to him, his narration has been rightly recorded in the FIR, which is marked at Exh. 18. The complainant had stated that his cell phone was also snatched from him. He had given the description of his black coloured Nokia 5030 handset. On 22nd April, 2010, he had been to Arthur Road Jail for test identification parade. He had identified the accused persons and mentioned the role played by each of them. He has denied the proposition that there is no possibility of noticing the incident behind wall when he was at bus stop or in the toilet. There is a clear admission that he had gone to answer nature's call behind the wall. It is admitted that the height of the wall is little more than his height and his height is 5 ft. He further admitted that there is a distance of about

10 ft. between the bus stop and the door of the toilet. In any case, neither the accused nor the deceased and the witnesses had used the toilet. The witness has further stated that he was assaulted by wooden plank on his head and he fell down on the same place, but within 10 to 15 minutes he reached the road and had spoken to unknown person who did not accompany him in the hospital. He did not know the names of the assailants when he was taken to the hospital. He was discharged on 4th day, but he had not reported to the police station. The police had sent a letter to him to which he responded by going to the police station. There are material omissions in the evidence of P.W. 1.

5 On being confronted by his previous statement, it is admitted that he had not disclosed to the police that out of the 3 assailants only one of them had caught hold of him, pressed his mouth and dragged him towards darkness. But he claims that, that is what exactly happened. It is also admitted that he had not disclosed the name of the injured as “Sachin”, neither that Sachin had come to rescue him. It is categorically admitted that a stick and the plank are not one and the same thing. He has denied that one of the accused was

carrying a long wooden stick. The same is marked as a contradiction and further marked "A" for identification of the contradiction. According to the witness, the wooden plank was having two nails, but the same was not mentioned in the FIR. That Exh. 35 would show that there was a blood stain at the edge of the plank.

6 Pappu Shaikh (P.W.11) has stated before the court that on 26/3/2010 he had closed his motor garage and went behind the garage with his friend Amjad. They saw three persons defecating there. Three persons came running and mounted assault upon one of the person with hands. One of them was having a wooden plank and assaulted one person who was already present on the spot. The injured started running towards the road. Upon query made by the public, the injured informed that two persons were lying behind in injured condition. Police was informed by one of the members of the public. The police took cognizance and rushed to the spot and carried the injured to the hospital. A month after the incident, the witness was called for identification parade in Arthur Road Jail and he claims to have identified the accused No. 1 as one of the assailant. It is admitted in the cross-examination that the said area is mostly visited by people

consuming drugs who sit near the garage and inside the compound wall. The witness feigns ignorance as to whether he had knowledge that the said area is mostly visited and used by drug addicts who under the influence of drugs and liquor. sometime assault each other and commit theft. However, they are ignored due to fear that they would cause damage to the vehicles visiting the garage and parked in the garage and also assault people who cause hindrance to their activities. The said portion is marked as "Portion-A". The said contention is admitted in the cross-examination. In fact, according to the witness, Oshiwara police station is at a distance of 5 minutes from the place of incidence.

7 P.W. 15 Arun Yadav claims to be an eye witness to the incident. According to him, on 26/3/2010 till 9.30 p.m. he was doing his work in flat No. 602 in Evershine building. He wanted to answer nature's call and since the public toilets were locked he went to the open ground. There was another person on the open ground answering nature's call. In the meanwhile, 3 persons came to the spot. They were scuffling with the third person who visited the open ground. P.W. 15 objected to their conduct. At that juncture, he had

noticed that one of those 3 persons was having a wooden plank. One amongst them started snatching his purse and cell phone from pocket of P.W. 15 as well as the other two persons. The person armed with the wooden plank assaulted PW.15 on his head, he sustained injury and fell unconscious. He regained consciousness after 15 to 20 days. A statement was recorded on 6/4/2010. In the court, he identified accused No. 1 as a person having wooden article in his hand. It is admitted that he had not identified the said assailants previously i.e. at the test identification parade.

8 P.W.12 Sunil Jadhav claims to have conducted the test identification parade as per provisions of the High Court Manual after one month of the incidence.

9 Since a purshis was filed by APP, P.W. 12 was called for cross-examination since the memorandum of test identification parade was admitted in evidence under section 291-A of the Code of Criminal Procedure, 1973. It is admitted that he had been briefed when he reached near the prison for holding test identification parade and he had prepared a brief note about the same. It is further admitted that the witnesses had not spelt out the role of the identified accused while

pointing out to them and the same is true in respect of all the three accused. He had conducted the test identification parade of all the three accused at the same time, rather simultaneously. It is further admitted that P.W.12 had himself selected and brought the panchas. The panchanama was written after the test identification parade was over and the same was written by the office of the jail superintendent.

10 P.W. 24 Chandrashekhar Gaikwad happens to be the Investigating Officer. According to him, a wooden plank was recovered at the instance of Sunil Kharwar. The memorandum and recovery panchanama are at Exh. 33 and 34. On the same day, i.e. on 30/3/2010 a cell phone was recovered from a play ground at the instance of the accused Prasad Jadhav. On 2/4/2010 a cell phone and clothes were recovered at the instance of Punit Gaud a juvenile in conflict with law. According to him, the accused were in police custody remand till 9/4/2010. He had arrested the accused on 27/3/2010 and was interrogating them till 30/3/2010. But they had not disclosed about the concealment of the wooden plank. The investigation was entrusted to him on 28/3/2010 as it is a matter of record that upon receiving the phone call informing the police about an injured lying in

Oshiwara Park P.W. 25 had intimated mobile van No. 1 to visit the said spot immediately. Thereafter, P.W. 24 and 25 had proceeded to the spot. P.W. 24 had recorded the statement of injured Mahendra More and conducted inquest panchanama of the dead body of deceased Sachin. P.W. 24 and 25 visited the scene of offence and prepared the scene of offence panchanama. Thereafter, further investigation was handed over to P.I. Gaikwad i.e. P.W. 24.

11 It is admitted in the cross-examination that the arrest panchanama was not prepared at the place where the accused were apprehended. He had not recorded the statements of eye witnesses. It is admitted that the weapon of assault as mentioned in the FIR is a stick. During the first four days of police custody the accused had shown no willingness for recovery of the weapon of assault. That the area from which the cell phone was recovered is a play ground and there is slum on both sides of the play ground. The said play ground is used by persons in the hutment for answering nature's call.

12 P.W. 25 Nilkanth Bagale was attached to Oshiwara Police Station as station house officer. By the time, they reached the scene of offence, the injured were taken to the hospital in a mobile van. P.W. 24

had accompanied to the injured to the hospital. It is admitted that P.W. 24 had not recorded the statement of the injured. According to P.W. 25 he had recorded the statement of injured Mahendra More between 11.45 p.m. to 12.20 midnight in the presence of the doctor. However, he had not obtained any endorsement from the doctor on the statement of Mahendra More. He had informed P.W. 24 that the scene of offence was not verified by taking the injured to the spot. P.W. 25 has proved the omissions and the marked contradictions of the complainant as well as witness Pappu Shaikh.

13 It is pertinent to note that the recovery panchanama of accused Prasad Jadhav would show that the accused had led the investigating agency to Pilliya garden. He further led them to the bathroom in a house. The cell phone was recovered from the slab of the bathroom where it was further concealed in a gunny bag. Upon perusal of Exh. 31, it appears that they had entered the premises of a play ground. They went to a room full of garbage and scrap material. They proceeded further to a bathroom and on the slab, there was a bedding consisting of a gunny bag sheet, a bed sheet and a pillow and the cell phone was concealed in the said bedding. The IMEI number of

the said cell phone was 351527/04/14873611 and there was SIM card bearig No. 050809142990597. It is pertinent to note that the prosecution has examined P.W. 7 Dinesh Jadhav in order to prove the recovery. P.W. 7 has stated in the cross-examination that the police had called him from his house and informed him that a panchanama of cell phone is to be prepared and that he should accompany them. He had put 3 signatures at the police station. On the memorandum at Exh. 30 he has identified two signatures on page 2 to have been signed by him. After having obtained the signatures, the panchanama was read over to him. That the said house from where the cell phone was recovered was not occupied by anyone. It was an open place. People were residing on both the side. There is no verification of IMEI number.

14 There is recovery of a wooden plank at the instance of accused No. 1 Sunil Kharwar. The memorandum of recovery is at Exh. 33 and the recovery panchanama is at Exh. 34. The recitals of the panchanama at Exh. 34 would show that it was recovered from a place behind Afifa Glass Center. The glass pieces were kept on wooden plank and some planks were lying down. The accused had led the

investigating machinery to the hut and the plank was recovered from below the roof of the hut. The said plank was admeasuring 74 cm. long 9.5 cm. width and 2 cm. thick. That P.W.3 Gopal Mahawal has proved Exh. 34. According to him, the door of the hut from where the recovery was made was not occupied and was open on all four sides. The witness was known to the police and he had been summoned from his house.

15 The injury certificate of Arun Yadav is at Exh. 56 whereas the injury certificate of Mahendra Maurya is at Exh. 55. That blood stains clothes were recovered at the instance of accused Sunil Kharwar. The memorandum is at Exh. 44 and the recovery panchanama is at Exh. 45. The clothes were recovered from behind Unique Glass shop. There is a compound wall of Satpuda building. The clothes of the accused were recovered from a gap between stall and the compound wall. Upon perusal of Exh. 45, it shows that there were some blood stains on the undergarment but there were no bloodstains on the pant. P.W. 13 Pankaj Mishra has been examined to prove the contents of Exh. 44 and 45. It is admitted by P.W. 13 that at the police station, he had the knowledge that some clothes are to be recovered from a heap of

mud. It is further admitted that P.W. 13 had not entered into the compound rather none of the members of the investigating team had entered the compound. It is a footpath used by people. It is further stated as follows : "It is not true to say that in my presence accused made voluntary statement in pursuant to which we went to the spot and recovered the clothes." The panch had not seen whether the clothes had been kept on a heap of mud.

16 Learned Counsel for the appellant in Criminal Appeal No. 1037 of 2019 has submitted that according to the prosecution the incriminating circumstances against the accused are as follows :

(i) Recovery of a cell phone at the instance of accused No. 2.
(ii) Recovery of a bloodstained underwear at the instance of accused No. 1.
(iii) Recovery of a wooden plank at the instance of accused No. 1.
(iv) The identification of both the accused before the court.

That the prosecution has not proved the recovery of any of these above mentioned items as contemplated under section 27 of the Indian Evidence Act and hence, the conviction of the accused for the offence punishable under section 302, 341, 397 read with 34 of the Indian Penal Code is unjustified. The learned Counsel Ms. Payoshi Roy has

placed reliance upon the Judgment of the Apex Court in the case of **Bollavaran Pedda Nersi Reddi v/s. State of Andhra Pradesh**[1]. According to her, availability of light is a matter of crucial significance.

17 The learned Counsel appointed for the appellant in Criminal Appeal No. 648 of 2012 has submitted that the test identification parade had not been conducted as per the Manual. There was a delay in holding the test identification parade. The learned Counsel has placed reliance on the Judgment of Apex Court in the case of Mohd. Sajjad @ Raju @ Salim v/s. State of West Bengal[2] to substantiate his contention that test identification parade was not conducted as per the Manual.

18 Per contra, learned APP has submitted that the prosecution has proved the recovery of the cell phone and the clothes at the instance of accused No. 2 and recovery of wooden plank at the instance of accused No. 1 is proved. That the accused were identified at the test identification parade as well as in the court. Identification in the court is a substantive evidence and the accused have not given

1 1991 Cr.L.J. 1833
2 (2017) 11 SCC 150

any explanation for being in possession of the said cell phone.

19 Upon perusing the records meticulously what needs to be first appreciated at the threshold is the scene of offence. The scene of offence panchanama was conducted on 27/3/2010 and is marked at Exh. 21. It clearly indicates that at the time of conducting the panchanama, the police had to carry petromax and high power search lights. There are bushes on the said open ground. It has a compound on all four sides. At some places, the compound wall is damaged. On the right side of the compound wall, there is evershine building. At the south east corner of the compound is a public toilet. The wall near the bus stop is damaged. On the west side of the compound, there are 3 shops, namely, Maharashtra Automobile, Sun Control Film and Siddiqui Glass House. On the west side the wall is damaged to a great extent and there is an iron gate on the south east side. The incident of assault had taken place on the remote east side. There are two Ice-apple trees at a distance of 20 ft. 4 inch. The second tree is at a distance 41 ft. 2 inch. The distance between both the trees is 26 ft. 3 inch. There was pool of blood near the roots of the trees. Two school bags are thrown there. There were footwear, one spectacles, a comb

and a key lying nearby and an empty packet of Gold Flake cigarette and one ticket of BEST bus. At the spot there was a bag in which the police found a notebook and a diary on which name of Mahendra Maurya was written. There was domestic account noted in the diary and some telephone numbers. The panchanama was conducted between 2 a.m. to 4 a.m. of 27/3/2010. This would establish presence of Mahendra Morya at the spot on the relevant day and time.

20 In view of the above mentioned description of the scene of offence, it is more than clear that there was no availability of sufficient light to enable anyone to identify the facial features of any person. The investigating agency had to use petromax and high power search lights which would establish that there was no availability of light. In these circumstances, the identification at the test identification parade would loose its significance.

21 In the case of **Bollavaram Pedda Narsi Reddy (cited supra)**, the Hon'ble Supreme Court has held has follows :

> "In the present case, the appellants are admittedly the person to whom the two witnesses had no previous acquaintance. The occurrence had happened on the dark

> night. When the crime was committed during the hours of darkness and the assailants are utter strangers to the witnesses, the identification of the accused persons assumes great importance. The prevailing light is a matter of crucial significance."

In any case, P.W. 15 Arun Yadav has categorically admitted that he had not identified the assailants at the test identification parade. According to P.W.1, one of them had caught hold of him, gagged him and dragged him in darkness.

22 As far as recovery of the cell phone is concerned, it was recovered from an open ground and there was garbage on the said spot. It was an open place and there is no verification of IMEI number. P.W.3 happens to be brother of the deceased. He was not shown the handset, in order to verify as to whether it belongs to the deceased neither P.W. 4 Prakash, father of the deceased has identified the handset to be of the deceased Sachin. P.W. 14 happened to be brother of P.W. 1 and all that is stated by P.W. 14 is that the SIM card used by P.W. 1 was registered in his name. Therefore, it cannot be said that the cell phone which was recovered at the instance of the accused No. 2 was stolen in the said incidence.

23 It would be trite to place implicit reliance upon the judgment of the Privy Council in the case of **Pulukuri Kottaya and ors. v/s. Emporer**[3]. It is held as follows :

> “it is fallacious to treat the "fact discovered" within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge; and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added "with which I stabbed A", these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant.”

In view of the above, it cannot be said even remotely that the cell

3 AIR (34) 1947 Privi Council page 67

phones which were recovered were stolen in the course of the transactions of theft and commission of murder in the course of committing the theft. Moreover, in the memorandum under section 27 of the Indian Evidence Act, the accused has not stated the exact location where the cell phone was concealed. It is necessary to state the same in the memorandum so as to lend assurance to the fact that the article to be recovered was concealed in a particular place and the place of concealment is exclusively within the knowledge of the accused. At this juncture, it would be appropriate to place implicit reliance upon the ratio laid down by Privy Council in the case of **Pulukuri Kottaya(Cited supra)**, wherein it is held as follows :

> "The condition necessary to bring section 27 into operation is that the discovery of a fact must be deposed to and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. The section seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence; but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate."

Hence, it cannot be said that the recovery of the cell phone in the present case is proved by the prosecution beyond reasonable doubt. The same would apply to the recovery of clothes at the instance of accused No. 2 as well as the wooden plank at the instance of accused No. 1.

24 It is seen from the record that the said wooden plank was lying on the ground near Afifa Glass Center. There was no special identification of the plank.

25 None of the witnesses had given any specific features or identification marks of the assailants so as to enable the police to arrest them within 24 hours. The statement of injured was recorded on 6th April, 2010. It is a matter of record as per the evidence of the witnesses that the said deserted compound is habituated by drug addicts and alcoholics. There is no material to show that the present accused were addicted to drug or alcohol.

26 The forensic report shows that the blood group of the deceased was "A" which has matched with the blood group found on the wooden plank. This is the only circumstance which would show

that the deceased was assaulted by the said plank and therefore, the irregularity in the investigation in respect of the recovery of the article may loose its significance. However, as far as accused No. 1 is concerned, it is clear that the intention was not to commit the murder of the deceased but the same had occurred in an attempt to commit theft. Hence, it cannot be said that the accused would be liable to have committed an offence under section 302 of the Indian Penal Code. Section 397 of the Indian Penal Code reads as follows :

> "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 the case of **Phool Kumar v/s. Delhi Administration**[4], the Supreme Court has observed as follows :

> "The term offender under section 397 of IPC is confined to the offender who uses any deadly weapons. Use of deadly weapons by one offender at the time of committing robbery cannot attract section 397 of the IPC for imposition of

4 (1975) 1 SCC 797,

> minimum punishment on another offender who had not used any deadly weapon. There is distinction between "uses" as used in section 397 of IPC and 398 IPC. Section 397 IPC connotes something more than merely being armed with a deadly weapon."

In the present case, the wooden plank was used by accused No. 1, recovered at the instance of accused No. 1 and it had the blood stains of group "A" which is of the deceased.

27 In view of the above, accused No. 1 Sunil Kharwar is liable to be convicted under section 397 of Indian Penal Code. The appellant Sunil Kharwar has been in custody since the date of arrest i.e. since 27/3/2010. The accused No. 2 Prasad Jadhav was enlarged on bail vide order dated 10/7/2012 during the pendency of the appeal. However, the bail application of the accused No. 1 was rejected. Hence, he continues to be in jail. In view of the above discussion, no offence is proved against accused No. 2 Prasad Jadhav. Hence, he deserves to be acquitted.

28 Before parting with the Judgment, we appreciate efforts put in by the learned Counsel Mr. Mihir Joshi, appointed to espouse

the cause of the appellant. The learned Counsel Mr. Mihir Joshi is entitled for the professional fees as per rules.

29 Hence, following order is passed :

ORDER

(I) Criminal Appeal No. 1037 of 2019 is partly allowed.

(II) The conviction and sentence imposed upon the appellant Sunil Kharwar by learned Sessions Judge, Gr. Bombay vide Judgment and Order dated 2nd February, 2012 in Sessions Case No. 440 of 2010 is hereby quashed and set aside.

(III) The accused Sunil Kharwar is acquitted of the offence punishable under section 341 and 302 of the Indian Penal Code.

(IV) The accused appellant Sunil Kharwar is convicted for offence punishable under section 397 of the Indian Penal Code and is sentenced to suffer 10 years R.I. Fine amount is maintained.

(V) The appellant Sunil Kharwar has undergone the substantive sentence as well as the default sentence and hence, he be released forthwith, if not required in any other offence.

(VI) Criminal Appeal No. 648 of 2012 is allowed.

(VII) The conviction and sentence imposed upon the appellant

Prasad Jadhav by learned Sessions Judge, Gr. Bombay vide Judgment and Order dated 2nd February, 2012 in Sessions Case No. 440 of 2010 is hereby quashed and set aside.

(VIII) The Accused Prasad Jadhav is acquitted of all the charges levelled against him.

(IX) The bail bonds of appellant Prasad Jadhav stands cancelled. Fine amount if paid be refunded to him.

(X) Both the appeals are disposed of accordingly.

(XI) In view of disposal of the appeals, nothing survives in the applications. The same are disposed of accordingly.

(PRITHVIRAJ K. CHAVAN, J) **(SMT. SADHANA S. JADHAV, J)**