

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

CRIMINAL APPEAL NO.1300 OF 2018

Alam Adam Mansuri
Aged 26 years, Occupation – Nil
Residing at : Room No.20,
Abdulla Ghadiwali Chawl, Naupada,
Bandra, Mumbai

.... Appellant/
Orig. Accused No.2

versus

The State of Maharashtra
(At the instance of Mahim Police Station,
Mumbai, vide C.R.No.365/2012)

.... Respondent

.....

- Mr. Shashikant D. Chandak (Appointed Advocate) for Appellant.
- Mr. S. R. Agarkar, APP for the State/Respondent.

CORAM : SARANG V. KOTWAL, J.
DATE : 19th DECEMBER, 2022

JUDGMENT :

1. The Appellant has challenged the Judgment and Order dated 13/07/2018 passed by the Additional Sessions Judge, Greater Mumbai, in Special MCOCA Case No.4 of 2013. There were two accused. The Appellant was the accused No.2. Both the accused including the Appellant were convicted and sentenced as under.

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They were convicted for the commission of offence punishable u/s 379 r/w 34 of the Indian Penal Code. They were sentenced to suffer rigorous imprisonment for three years each and to pay a fine of Rs.5,000/- and in default of payment of fine to suffer rigorous imprisonment for six months.

They were acquitted from the charges of commission of offence punishable u/s 3(1)(ii), 3(2), 3(4) of the Maharashtra Control of Organised Crimes Act (for short 'MCOCA') and u/s 392 r/w 34 of the Indian Penal Code. They were granted set off u/s 428 of Cr.P.C.

This Appeal is preferred only by original accused No.2.

2. The prosecution case is as follows;

On 02/09/2012, the first informant, Nidhi Kadam was traveling in a four wheeler. She was sitting on the rear seat next to her father. The car was driven by her brother. Her uncle was on the other front seat of the car. In Mahim area, one motorcycle came from behind the car. There were two persons on that two

wheeler. Both of them were wearing Helmets. The pillion rider snatched P.W.1's Mangalsutra and both of them went away on their motorcycle. P.W.1's brother tried to chase them, but he was unsuccessful. P.W.1 and her family then went to Mahim police station and lodged FIR vide C.R.No.362/2012 at around 06.00 p.m. The investigation was carried out. According to the prosecution, the Appellant was involved in many cases. He, along with the co-accused were arrested on 09/09/2012 in connection with some other offence. But, during the investigation it transpired that they were involved in the present case. Therefore, they were also shown as accused in this particular case. On 20/09/2012 both the accused were shown to the witnesses in the police station where they were identified. The Mangalsutra was recovered at the instance of the accused No.1 from his house after recording his memorandum statement u/s 27 of the Evidence Act.

3. The house of the Appellant was searched on 26/02/2013. At that time, one jacket and one Helmet were

recovered. During the course of investigation, it was found that there were many cases pending against both the accused. Therefore, provisions of MCOCA were applied. The investigation was carried out by the officer, who was authorized u/s 23(1) of the MCOCA. After the investigation was over, sanction u/s 23(2) was obtained from the competent authority and the charge-sheet was filed. The trial was conducted before the trial Judge as mentioned earlier.

4. During trial, the prosecution has examined 12 witnesses including the first informant, her brother, father, Panchas and the police officers. The charge was framed u/s 392 r/w 34 of the IPC and 3(1)(ii), 3(2), 3(4) of the MCOCA. As mentioned earlier, the Appellant and his co-accused were acquitted from the charges of commission of offence under MCOCA. Learned Judge observed that the offence u/s 392 r/w 34 was not proved. However, the offence punishable u/s 379 r/w 34 was proved. Though charge under that section was not framed, it was a lesser offence than 392 r/w 34 of the IPC and

therefore on the basis of the evidence, learned trial Judge convicted and sentenced the Appellant and his co-accused for commission of offence punishable u/s 379 r/w 34 of the IPC.

5. Heard Mr. Shashikant D. Chandak, learned counsel for the Appellant and Mr. S. R. Agarkar, learned APP for the State.

6. The prosecution case is brought on record through the evidence of the first informant. She was examined as P.W.1. She has stated that on 02/09/2012, all the aforesaid members of her family were travelling in their four wheeler. They had reached Mahim area. At that time, one motorcycle came from the left side of the car. There were two persons on that motorcycle. The pillion rider who was wearing a Helmet, put his hand in the car and snatched P.W.1's Mangalsutra. Then, they fled away. P.W.1's brother who was driving the car, tried to chase them, but they could not be caught. They took advantage of the traffic and went away. P.W.1 and others then went to Mahim police station and lodged the FIR. The FIR is produced on record at Ex.97. On

20/09/2012, she was called at Mahim police station. The officer showed two persons. She identified both of them. According to her, both of them were present in the Court at the time of recording of her deposition. She deposed that the accused No.1 had snatched her Mangalsutra and the accused No.2 i.e. the present Appellant was driving the motorcycle. She had made application for return of the Mangalsutra. It was already given back to her before the trial began, on her executing a bond on the conditions to produce it as and when required. She had also identified the motorcycle shown to her.

In the cross-examination, she admitted that both the persons on the motorcycle had worn Helmets. The Mangalsutra which she was wearing, was of common design. Both the accused were around the age of 30 years. The accused were shown to her by Mr. Bhagwan Kadam who was the police officer at Mahim police station on 20/09/2012. The FIR lodged by her substantially corroborates her evidence.

7. P.W.2, Bhushan Eknath Jadhav, was P.W.1's brother. He has narrated the incident exactly as narrated by P.W.1. He was driving the car. According to him, the said two wheeler was Pulsar bike and the pillion rider was wearing a Helmet and a black jacket. He has also deposed that on 20/09/2012; the two accused were shown to him in the police station. He identified both the accused in the Court at the time of his deposition.

In the cross-examination, he deposed that he had given the number of motorcycle to the police, but he could explain as to why it did not appear in his police statement. The FIR was lodged against unknown persons. After the accused were identified in the police station on 20/09/2012, he had seen them for the first time on 11/09/2017 when his deposition was recorded.

8. P.W.3 Eknath Bhikaji Jadhav, was P.W.1's father. He has deposed exactly in the same manner as is deposed by P.W.1 and P.W.2.

In the cross-examination, he admitted that the incident took place in a fraction of second. He was sitting on the rear side in the car.

9. P.W.4 Simon Babu Roshan was present in the area. He had seen the incident. On 02/09/2012, at around 05.00 p.m., he saw one Indica car coming from Mahim. There was a two wheeler, which was also coming along with the car. Then, he heard some shouts from the lady inside the car. Then, the two wheeler went away. The car chased it. At that time, P.W.4 and others were cleaning other cars in the area. According to him, the persons on the bike were wearing Helmets and the pillion rider was wearing a black jacket.

10. P.W.5 Dayanand Ramesh Kondal was a Pancha for recovery of Mangalsutra and the motorcycle. He did not support the prosecution and he was cross-examined by learned APP. Those two Panchanamas are produced on record at Ex.107 and Ex.108. The Mangalsutra was recovered at the instance of the

accused No.1 from his house on 19/09/2012. At the same time, the accused No.1 also showed pulsar motorcycle which was parked near his house.

11. P.W.6 Mahesh Laxman More was a Pancha for recovery of Mangalsutra and motorcycle (Panchanama at Ex.107). He was also a Pancha for Spot Panchanama, which is produced on record at Ex.110. He has not supported the prosecution and is declared hostile. However, the Spot Panchanama of the incident is hardly in dispute.

12. P.W.7 Gajendrakumar Bastimal Jain was the valuer. He had valued the recovered Mangalsutra on 24/09/2022. According to him, it was worth Rs.32,000/- at that time. It was weighing around 18 gms.

13. P.W.8 Mohd. Faruq Gulam Hussain Shaikh had witnessed this Panchanama of valuation of Mangalsutra. The Panchanama was produced on record at Ex.115.

14. P.W.9 Allabaksh Noormohd. Shaikh was a Pancha. He proved the Panchanama at Ex.117. He could not identify the accused No.2, a long time had lapsed. But subsequently, in the cross-examination conducted by the learned SPP, after having been declared hostile, he identified the accused No.2 in the Court. Ex.117 was the Panchanama for search of house of the Appellant. It was conducted on 26/02/2013. The police had gone to his house for search. One Helmet and one black Jacket were recovered from his house.

15. P.W.10 API Satish Ravindra Borate, attached to Mahim police station, was the first Investigating Officer. He has deposed about the registration of the offence at the instance of P.W.1. He had conducted the Spot Panchanama. He had sent P.W.1 to Bhabha hospital for medical examination.

16. P.W.11 PI Bhagvan Kadam, was the next Investigating Officer. He had arrested both the accused on 09/09/2012. They were moving in suspicious circumstances. They were found in

connection, with C.R.No.368/2012 of Mahim police station. In that connection they were arrested. Even the motorcycle was seized. The Mangalsutra was recovered under his supervision. He recorded statements of some of the witnesses. He had got the Mangalsutra valued by the valuer. He had produced the previous charge-sheets and orders taking cognizance. Those charge-sheets along with the orders were produced on record at Ex.126 to Ex.131. He initiated action under MCOCA. The subsequent investigation was carried out by ACP Bagwe.

In the cross-examination, he accepted that since the offence was against unknown persons, it was necessary to hold an identification parade. In this case, it was not held. The informant had not produced the receipt of Mangalsutra. He did not verify the ownership of the motorcycle which was seized.

17. P.W.12 ACP Vijay Balkrishna Bagwe, was then investigating the case under the authorisation u/s 23(1) of MCOCA. According to him, more than 50 offences were

committed by the accused. Bail was granted to the accused. He took steps to seek extension to file charge-sheet. Accused No.1 was externed vide externment order, which is produced on record at Ex.134. He had conducted house search of the Appellant on 26/02/2013, where the Helmet and the Jacket were seized. He filed the charge-sheet after obtaining the sanction. The sanction is produced on record at Ex.137.

This in short was the evidence of the prosecution.

18. Learned counsel for the Appellant submitted that there was no evidence against the Appellant. There is no description of the culprits in the deposition of PW.1, PW.2 and PW.3. In the FIR, the only description was given that those unknown persons were in the age group of 30 years. The test identification parade was absolutely necessary, which was not held in this case. To make the matter worse the accused were shown in the police station. Therefore, it loses sanctity of proper identification even before the Court. There is nothing on record to show that the Mangalsutra which was recovered from the accused No.1 was

properly identified by PW.1. In any case, that was a circumstance only against the accused No.1 and not against the accused No.2. The ownership of both, the Mangalsutra and the motorcycle recovered, was not established.

19. Learned APP submitted that the offence is very serious. The accused have a long list of antecedents. However, he conceded that the State has not preferred any application for challenging the acquittal of the accused under MCOCA. He submitted that the cognizance in the past offence was taken by the competent Courts. According to learned APP, identification in the Court was sufficient. There was recovery from the accused No.1. Therefore, by virtue of section 34 of the IPC, even the accused No.2 can be convicted.

20. I have considered these submissions. From the entire evidence I do not find a single acceptable incriminating circumstance against the present Appellant. The most important circumstance in this case was about the identity of the offenders.

In that case, the investigating agency has miserably failed to prove the prosecution case beyond reasonable doubt. The accused were shown in the police station to all the three witnesses on 20/09/2012. This action on the part of the investigating agency has seriously damaged the prosecution case. Because of this, even the identification in the Court during trial, has lost all its significance. There is absolutely no explanation offered by any of the Investigating Officers as to why the test identification parade was not or could not be conducted. The witnesses have deposed that both the offenders were wearing Helmets. PW.3 has added that the incident had taken place in a fraction of second. All these factors make the evidence of identification extremely weak in this case and therefore it is not possible to hold it as an incriminating piece of circumstance against the Appellant.

21. There is no recovery of any incriminating articles at the instance of the present Appellant. There was no statement given by him which had led any discovery or recovery u/s 27 of the

Indian Evidence Act. The Appellant was arrested on 09/09/2012 in connection with some other offence and his house was searched much belatedly on 26/02/2013. On that day the Helmet and the black jacket were seized from his house. This circumstance can hardly be termed as incriminating circumstance. There is no explanation why his house was not searched during all this period. Even otherwise, there is nothing to show that these particular articles had any connection with the actual offence. There is no evidence to show that the two wheeler recovered in this case was connected to the present Appellant in any manner. The only independent eyewitness P.W.4 has not identified the accused in the Court or during investigation.

22. The recovery of Mangalsutra was at the instance of the co-accused. Even that Mangalsutra was not produced on record and there is no evidence to show that it was actually identified by the P.W.1 anytime earlier. No such Panchanama or any other material is on record.

23. Considering all these aspects, it is not possible to hold that the prosecution has proved its case beyond reasonable doubt. As mentioned earlier, there is no acceptable evidence against the Appellant. Therefore the Appellant deserves to be acquitted from all the charges. He was already acquitted from commission of offences under the provisions of MCOCA. He was also acquitted from the charges u/s 392 r/w 34 of the IPC. But the perusal of the evidence shows that he cannot be convicted even u/s 379 r/w 34 of IPC for which he was convicted and sentenced. With the result the following order is passed :

ORDER

- (i) The Appeal is allowed.
- (ii) The Appellant is acquitted from all the charges in this case.
- (iii) Appeal stands disposed of accordingly.

(SARANG V. KOTWAL, J.)