

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

[I] CRIMINAL APPEAL NO.352 OF 2019

Shabbir @ Sabir Haroon Shaikh	Appellant [orig.accused No.5]
Versus	
The State of Maharashtra	 Respondent

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WITH
INTERIM APPLICATION NO.111 OF 2020
IN
CRIMINAL APPEAL NO.352 OF 2019

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WITH
[II] CRIMINAL APPEAL NO.1444 OF 2018

Anwar Hussain Abdul Rashid Shaikh @ Anna	Appellant [orig.accused No.6]
Versus	
The State of Maharashtra	 Respondent

.....
WITH
INTERIM APPLICATION NO.154 OF 2021
IN
CRIMINAL APPEAL NO.1444 OF 2018

Dr. Yug Mohit Chaudhry, Advocate a/w. Ms. Madhvi Gomathieswaran, for the Appellant in Criminal Appeal No.352/2019.

Mr. Gaurav Bhawnani, Advocate a/w. Shahabuddin Shaikh i/b. Khan Abdul Wahab for the Appellant in Criminal Appeal No.1444/2018.

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

CORAM : SARANG V. KOTWAL, J.

DATE : 06th DECEMBER, 2022

ORAL JUDGMENT :

1. These two appeals are being decided by this common judgment because they arise out of the same case. In both these appeals the same judgment and order dated 15.10.2018 passed in Sessions Case No.306/2013 along with Sessions Case No.719/2013 along with Sessions Case No.453/2014 is challenged. The impugned judgment and order was passed by the Additional Sessions Judge for Greater Bombay in these cases. For the sake of convenience, the appellants in these appeals are referred to by their original status as accused in the Sessions Case. The appellant in Criminal Appeal No.352/2019 Shabbir @ Sabir Haroon Shaikh was the original accused No.5 and the appellant in Criminal Appeal No.1444/2018 Anwar Hussain Abdul Rashid Shaikh @ Anna was the original accused No.6. There were four other accused i.e. accused No.1 Parvez Salim Khan, accused No.2 Sachin Suresh Nikharange, accused No.3 Tarbez Rahamatulla Sayyed and accused No.4 Jainal Sardar @ Chachu @ Jalil Miya.

All the accused, including the present appellants, were convicted and sentenced as follows :

- i. They were convicted for commission of the offence punishable under Section 342 read with 34 of IPC and were sentenced to suffer RI for one year and to pay fine of Rs.1,000/- each and in default of payment of fine to suffer SI for one month.
- ii. They were convicted for commission of the offence punishable under Section 395 of IPC and were sentenced to suffer RI for ten years and to pay fine of Rs.10,000/- each and in default of payment of fine to suffer SI for three months.
- iii. They were convicted for commission of the offence punishable under Section 458 read with 34 of IPC and were sentenced to suffer RI for ten years and to pay fine of Rs.10,000/- each and in default of payment of fine to suffer SI for three months.
- iv. No separate sentence was imposed on them for the offence punishable under Sections 452, 457 and 392 of IPC.
- v. All the substantive sentences were directed to run concurrently.
- vi. They were acquitted of the offence punishable under Section

397 of IPC.

All the accused were granted set off under Section 428 of Cr.P.C. for the period they had undergone as under-trial prisoners.

2. Heard Dr. Yug Mohit Chaudhry, learned counsel for the appellant in Criminal Appeal No.352/2019, Shri Gaurav Bhawnani, learned counsel for the appellant in Criminal Appeal No.1444/2018 and Shri S.R. Agarkar, learned APP, for the State.

3. The original accused No.1 Parvez had not filed any appeal. The accused Nos.2, 3 & 4 had filed separate appeals but they have withdrawn their appeals. Therefore, I am considering the appeals of only two accused i.e. accused No.5 and accused No.6 and, therefore, it is necessary to discuss the evidence in respect of these two accused only.

4. The prosecution case is that on 13.12.2012 at around 6.00 a.m., six accused went to a shop on three motorcycles. It was a shop for selling watches. Three accused entered the shop. They broke the showcase glass and removed the watches in a bag. They had threatened the watchman of the shop with a knife. After

collecting the watches, they left the place. The security alarm was sounded. The Manager of the shop came to the said shop on being informed by the security agency. By that time the watchman had already informed the police. The police were at the spot and they had started their investigation. FIR was lodged by the Manager of the shop. The investigation was carried out and different accused were arrested at different time. The accused No.5 Shabbir was arrested on 27.3.2014 and the accused No.6 Anwar was arrested on 22.8.2017. As far as these two accused are concerned, they were subjected to test identification parade as discussed hereinafter. The evidence against them was of their identification. There was no recovery at the instance of accused No.6. There was recovery of three watches at the instance of accused No.5. After completion of investigation, the charge-sheet was filed and the case was committed to the Court of Sessions.

5. During trial, the prosecution examined 31 witnesses including three alleged eye witnesses, the first informant who was the shop Manager, different panchas, Naib Tahsildars who had conducted the test identification parades [TIP], various panchas

for recovery of articles and the investigating officers.

6. As far as the present two appellants are concerned, the important witnesses are the Shop Manager, eye witnesses, the Naib Tahsildars who conducted TIPs, the pancha witnesses for recovery and the investigating officers.

7. The defence of the accused was of total denial. At the conclusion of the trial, learned trial Judge believed the prosecution evidence and convicted and sentenced all the accused, as mentioned earlier.

8. PW-1 Haresh Dedhiya was the Manager of the shop. He has deposed as follows :

He was serving in ‘World Time’ a shop situated opposite Shoppers Stop, S.V. Road, Andheri (West), Mumbai since past fifteen years. There were eight workers. A watchman was deputed during day time as well as for night-duty. There was an alarm system installed in the shop. The premises were covered by CCTV cameras. One Shri Maru was the owner of the shop. The shop used to open at 9.45 a.m. and used to close at 9.00 p.m..

There were two keys of the shop, one was with PW-1 and the other was with the owner. The security guard was provided by a security agency. At about 6.30 a.m. on 13.12.2012, he received a phone call from the security alarm system informing that the alarm in his shop was ringing. PW-1 tried to contact the security guard Ranjeet Kumar, but, he was unable to contact him telephonically. He went to the shop at about 7.15 a.m.. At that time, the police were already making enquiries. The security guard Ranjeet Kumar gave details about the incident. Based on that information, PW-1 gave his FIR. The FIR is produced on record at Exhibit-47. When he inspected the shop, he saw the show-case glass was broken and many watches from those show cases were found stolen. The watches were of different makes. Approximately 255 watches were stolen. The photographs of the shop were taken. Some fingerprints from the spot were collected. The CCTV footage was also collected. The examination of CCTV footage showed that there were three accused inside the shop. One of them had broken the glass and the other two had removed the watches. All the accused had covered their faces. However,

the veil of the accused who had broken the glass, had fallen and PW-1 could see his face. The other accused had worn a helmet and through the glass or visor of the helmet PW-1 could notice his face. He could not see the third accused who had covered his face. One of them was having a blue coloured plastic bag. The watches were kept in that bag. The cash of Rs.12,000/- from the counter was stolen. On 26.12.2012, he was called to Kurla Crime Branch. He identified 43 watches. On 14.1.2013, he gave details of the watches which were stolen, to Kurla Crime Branch. On 16.1.2013, he was called to Taloja jail for test identification parade in which he identified the accused Tabrez. On two more occasions, he identified different watches. As far as accused No.5 is concerned, according to him in May or June, 2014 he identified the watches recovered at the instance of accused No.5 Shabbir. According to him, he had identified the accused No.5 Shabbir in the test identification parade. The CD of CCTV footage was shown to him. According to him accused No.3 Tabrej had broken the glass. He pointed out at accused No.5 and according to him he was the accused who was wearing helmet. The CCTV footage was

zoomed in concentrating on the face and according to this witness it was the face of accused No.5.

In the cross-examination of this witness, he admitted that he lodged his FIR only on the information supplied by Ranjeet Kumar. He did not recollect how many times the police had recorded his statement. He further deposed that he had seen the CCTV footage on three to four occasions before giving his evidence in the Court.

9. Learned counsel for the appellants submitted that the evidence of this witness is vague. He has not seen the incident. His deposition and the FIR are based on the information supplied by Ranjit Kumar. His identification of the accused is very weak

10. Learned APP submitted that PW-1 was the Manager of the shop and, therefore, he was aware of the property which was stolen.

11. As far as story of the prosecution about the incident is concerned, there is nothing wrong in his lodging the FIR based on the information supplied by Ranjeet Kumar. He was the

responsible person and he was aware of the property. However, his identification of the accused is extremely doubtful. He has deposed that the accused No.5 was wearing a helmet and on seeing of his face he could make out that it was the accused No.5. He was asked to identify the accused No.5 at the test identification parade but this is based on the CCTV footage which was shown to him by the police. That particular part of the evidence is missing. It is not established, under what circumstances and to what extent he was shown CCTV footage before the test identification parade to enable him to identify the accused in the parade and in the Court. Even in the Court he was again required to see the CCTV footage by using the zooming in option, to base his opinion regarding identity of the accused No.5.

12. As far as the accused No.6 is concerned, PW-1 had made a vague statement that the accused No.6 was identified by him in the parade on 7.10.2017 based on the CCTV footage. This parade was held after five years from the date of the incident. Though the accused No.6 was arrested much later and for that reason no fault can be found with the investigating agency. PW-1's

evidence regarding the accused No.6's identity is based on the CCTV footage. There is no reference as to under what circumstances and in what manner the CCTV footage was shown to this witness PW-1. His identification of the accused No.6 is also doubtful. Therefore, as far as both the accused Nos.5 & 6 are concerned, the evidence of PW-1 does not prove the prosecution case beyond reasonable doubt. In any case, he was not present at the spot at the time of incident. He is not an eye-witness.

13. The next important witness is PW-17 Peraiswamy Devendra. He claims to be an eye witness. He was a tempo-driver. He was a chance witness. On that day i.e. on 13.12.2012 he had stopped at a tea-stall opposite the shop where the incident had taken place. He saw three motorcycles coming near the shop. In all, there were six persons on the motorcycles. When he was returning back to his tempo, he saw four persons coming out of the shop and he heard shout that 'the work was done'. He has given description of those four persons. One of them was having a blue coloured bag in his hand. He identified those four persons in the Court. According to him, the person who was wearing a

yellow shirt on that day and was having the bag with articles and who was carrying an iron rod; was the accused No.5. He had also identified the accused No.5 in the test identification parade held in Taloja Jail held on 13.5.2014.

14. In the examination-in-chief he had not identified the accused No.6. At that point of time the accused No.6 was not facing the trial. He was arrested subsequently and faced the trial subsequently. Thereafter this witness was recalled for further examination-in-chief and then he deposed that in the year 2017 he was called for test identification parade and there he had identified the accused No.6. He had described the accused No.6 as the person who was carrying a helmet and had a blue-coloured bag in his hand.

15. Both the learned counsel for the accused Nos.5 & 6 attacked his deposition showing that there is clear confusion in his mind in respect of identities of the accused Nos.5 & 6.

16. Their submissions has force because at the first instance he deposed that the person who was carrying the bag was accused No.5 Shabbir and on the second occasion he deposed that

the person who was carrying the blue-coloured bag and the helmet was the accused No.6. Thus, even before the Court this witness has not clearly identified the accused Nos.5 & 6 beyond reasonable doubt. Apart from this infirmity, the fact remains that he was a chance witness and his statement was recorded on 14.12.2012. He has not mentioned this incident to anybody else during the entire day. He also appears to favour the prosecution unnecessarily. He has denied that there would be darkness at around 5.30 a.m. to 6.00 a.m. in the month of December. His entire effort appears to be to help the prosecution case. From these infirmities it is clear that he is not a reliable witness and the conviction cannot be based on his evidence. His evidence cannot be used as one of the incriminating circumstances against either of the accused.

17. The next eye witness is PW-18 Ranjeet Kumar, who was the watchman. He is an important witness. He has described the incident. According to him, two motorcycles came from Andheri side. There were four persons. One of them pointed a knife and threatened him. Three of them went inside the shop.

Within fifteen minutes they all came out. Two of them were carrying articles in a bag and one was holding a helmet in his hand. Then they went away. He ran behind them and then informed the police officers at Juhu police station. He also saw the CCTV footage. He identified the accused No.4 Jainal as the person who had pointed the knife. According to him, the other two persons who had entered and returned from the shop were accused Tabrej and accused No.5 Shabbir. In July, 2013 he identified accused No.4 in the test identification parade. As far as this witness is concerned, he has not identified the accused No.6 either in the Court or in the test identification parade. He was not even asked to identify the accused No.6 in any test identification parade. Therefore, his evidence is not useful for the prosecution to prove its case against the accused No.6. Interestingly, this witness was asked to identify the suspects in the test identification parade held on 13.5.2014 and at that time he had failed to identify the accused No.5 in the test identification parade and in fact had identified a dummy suspect in the parade. This is seen from the evidence of PW-20 Narendra Thakur, Naib Tahsildar who

had conducted the test identification parade. Therefore, his identification of accused No.5 is doubtful. Therefore, this witness is also not useful to the prosecution to prove its case against the accused No.5 also.

18. The only other eye witness was PW-19 Rajesh Sharma, who was a hawker and he was present at the spot at the time of incident but he has not identified the accused Nos.5 & 6 either in the Court or in any test identification parade. Therefore, even his evidence is of no use as far as accused Nos.5 & 6 are concerned to prove the case against them in favour of the prosecution.

19. The only other circumstance worth mentioning against the accused No.5 is the recovery of three watches at his instance from his house. PW-8 Raees Shaikh was the pancha for this recovery. He has deposed that the appellant accused No.5 was arrested on 27.3.2014. This witness was a pancha for the arrest panchnama. On 1.4.2014, again this witness was called to Crime Branch, Kurla. In his presence, accused No.5 gave memorandum statement showing his willingness to produce the watches which

he had received in the offence. That memorandum statement was produced on record at Exhibit-71. Pursuant to this statement, the accused No.5 took the police party to his house and three watches worth around Rs.24,000/- were produced by him from a bag. Importantly this witness initially could not identify the accused No.5. He identified accused No.1 instead. However, subsequently he corrected himself and identified accused No.5 as the person at whose instance the watches were recovered. According to PW-1 the watches were identified by him, but, his deposition shows that he had identified the other watches recovered from the other accused based on the price tags and tag of the shop. As far as those three watches are concerned, there was no such identification mark on them. They were recovered after one year. In the memorandum statement, the place where the watches were kept was not mentioned. There was no mention of authorship of concealment. The room was opened by his sister. The place was not in his exclusive possession. Therefore, this weak piece of evidence can not be used to base the the order of conviction against the accused No.5.

20. There is no other incriminating piece of evidence against either of these appellants. Therefore, the prosecution has not proved its case beyond reasonable doubt against them. With the result, the appeals succeed. Hence, the following order :

:: O R D E R ::

- i. The appeals are allowed.
- ii. The impugned judgment and order dated 15.10.2018 passed by the Additional Sessions Judge for Greater Bombay in Sessions Case No.306/2013 along with 719/2013 along with 453/2014 is set aside in respect of the Appellants Shabbir @ Sabir Haroon Shaikh and Anwar Hussain Abdul Rashid Shaikh @ Anna.
- iii. These two appellants are acquitted of all the charges levelled against them.
- iv. These two appellants are in jail. They be released forthwith, if are not required in any other case.
- v. These two Criminal Appeals are disposed of accordingly. With disposal of appeals, nothing survives in pending interim applications and same stand disposed of.

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(SARANG V. KOTWAL, J.)