

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

CRIMINAL APPEAL NO. 339 OF 1998

Nagraj Kalyanappa Sankole

...Appellant

vs.

The State of Maharashtra
Through : Senior Police Inspector,
Jogeshwari Police Station,
Jogeshwari, Mumbai - 400 060.

...Respondent

Mr.Veerdhaval P. Kakade - Appointed Advocate for Appellant.
Mr.S.R.Agarkar - APP for Respondent - State.

CORAM : S. M. MODAK, J.

DATE : 11th DECEMBER 2023

P. C. :-

1. Heard learned Advocate for the Appellant / Accused No.1 appointed by way of legal aid and learned APP.
2. There were four accused persons who were tried for the offences punishable under Section 397 read with 392 of Indian Penal Code, 1860 ["IPC"]. There are two other accused persons but their case is kept on dormant file as per the charge on Page No.28. The Prosecution in all examined six witnesses. After conclusion, the trial Court convicted the Accused No.1 and Accused No.4 for the offences punishable under Sections 452, 392 read with 34 of IPC and under Section 397 read with Section 392 of IPC.
3. The correctness is challenged by this Appellant. The

witnesses examined on behalf of the Prosecution are as follows :-

- (a) PW No.1 - Manojkumar Chandmal Rathod - First Informant. (Page No.36).
- (b) PW No.2 - Gulabchand Davadin Jaiswal - Panch witness about recovery of chain from co-accused. (Page No.59).
- (c) PW No.3 - Govind Ramchandra Kumat - Special Executive Magistrate. (Page No.69).
- (d) PW No.4 - Ismail Ramjan Kashmiri - Panch witness for recovery of wrist watch from this Appellant. (Page No.90).
- (e) Vasantjibhai Meghjibhai Dediya - Panch for recovery from Accused Nos.2 and 3. (Page No.100).
- (f) PW No.6 - Prakash Bhujang Bhandari - PSI - Investigating Officer (Page No.105).

4. Two circumstances considered by the trial Court against the Appellant are as follows :-

- (a) The identification in the parade held on 18th November, 1991 at Jogeshwari Police Station
And
- (b) Recovery of wrist watch of Citizen company at his instance belonging to the First-Informant.

5. With their assistance, I have gone through the record and the findings in the judgment.

6. The incident took place on 2nd November, 1991 at about 8.30 p.m. The spot is Panchsheel provisional store in Panchsheel building at Bandra (West). Apart from the First-Informant Manojkumar, his employees Ramu and Majid were also there. Four unknown persons entered the shop. One of

them showed a knife and threatened the First-Informant if valuables will not be handed over. Other three persons also entered the shop and amongst them, one also showed a knife at Majid and another pointed out a knife at Ramu. Fourth person disconnected the telephone connection and robbed cash of Rs.5500/- from the cash-box. His golden chain and wrist watch were snatched. He lodged complaint with Jogeshshwari Police Station (Exhibit-9) and offences came to be registered against four unknown persons. During investigation, the Appellant is one of the arrested accused.

7. According to learned Advocate for the Appellant, there is violation of the provisions of Criminal Manual relating to holding of identification parade. He relied upon the observations in case of ***Ramcharan Bhudiram Gupta v/s. The State of Maharashtra***¹.

8. I have gone through the evidence of PW No.1 and PW No.3. I find inconsistency in their evidence. On one hand, PW No.1 has deposed that he has identified three persons. He has not clarified whether these three persons identified by him were on one occasion or on different occasion on same day. Whereas, PW No.3 has deposed that there were six accused persons who were asked to stand in the parade and every time there were two accused persons. So, the evidence of PW No.1

¹ 1995 SCC OnLine Bom 212

is inconsistent with the evidence of PW No.3 on this aspect. Whereas, according to Clause No.(v) of Para No.3 of the Chapter, procedure for holding identification parade as per the Criminal Manual, there should not be more than two accused persons who should be placed on any single identification parade. Whereas, in this case, as per PW No.1, he has identified three persons.

9. On second aspect, there is inconsistency. PW No.1 has deposed that after him, his employees Ramu and Majid were called for identification. Whereas, the evidence of PW No.3 is silent. On this aspect, my attention is invited to the findings given by the trial Court in Para No.10 to Para No.11. The trial Court has not believed the evidence so far as Accused Nos.2 and 3 are concerned but believed it against the Accused Nos.1 and 4. However, these aspects are not considered by the trial Court. When the Criminal Manual says that on one occasion, there should be two Accused persons, it has to be followed. If there are more than one Accused persons in the parade, there may be a difficulty for the witness and also there may be lack of clarity while identifying the Accused person.

10. In this case, the evidence of PW No.1 on the point of identifying three Accused is vague. No doubt, the Special Executive Magistrate is an independent person to whom the

responsibility is given to conduct the parade. At the same time, the evidence of witness who had actually seen the incident is also important. There has to be consistency. It is not there. It creates doubt in that evidence of identification.

11. It is true that in case of **Ramcharan** (supra), this Court has deprecated the practice of conducting the parade in the Police Station. This practice was prevalent in Greater Bombay and this Court has expressed an opinion about abandoning this practice. I think, in this case, when the parade was conducted, that practice must be prevailing. The High Court Criminal Manual - Clause No.p of Para No.16 (2) of Chapter 1 says that if the parade is held in the prison, the prison officer should be present throughout the parade. If it is conducted at the jail, it attaches more importance. If it is in the Police Station, then there has to be evidence to show that the witnesses have not seen the Accused earlier to actual parade. This has not happened in this case. So, the evidence on the point of parade cannot be considered. The trial Court has overlooked this fact.

12. The evidence of the recovery of wrist watch, we have got the evidence of Panch witness PW No.4 and PW No.1. As per PW No.1, he has identified his golden chain and wrist watch from the various chains and wrist watches kept in the Police Station. It is recovered on 17th November, 1991 (Page No.96).

Whereas, the incident of robbery took place on 2nd November, 1991. So, the recovery is not immediate. Even though I do not find any fault in the evidence of the Panch witness, merely on the basis of recovery, a person cannot be convicted for the offence under Section 392 of IPC. There must be evidence about the involvement in the actual robbery. For this reason also, even the evidence of Prosecution cannot be believed so far as Section 452 of IPC is concerned. There is no prosecution under Section 411 for receiving a stolen property. This is a case wherein benefit of doubt has to be given to the Appellant. If the Appellant is acquitted for the offence under Section 392 of IPC, he cannot be convicted under Section 397 of IPC.

13. For the above reasons, the conviction cannot be sustained. Hence, order :-

O R D E R

- (i) Appeal is allowed.
- (ii) The order of conviction and sentence dated 29th December, 1997 passed by the Court of Additional Sessions Judge – Greater Mumbai in Sessions Case No.367 of 1992 is set aside in respect of this Appellant.
- (iii) The conviction of this Appellant for the offences under Sections 452, 392 read with 34 of IPC and under Section 397 read with 392 of IPC is set aside.
- (iv) Fine, if paid, be returned to the Appellant.

[S. M. MODAK, J.]