

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 408 OF 1997

Shakil Ahmed Shafi Khan .. Appellant
Versus
The State of Maharashtra .. Respondent

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Ms. Manisha Devkar, for the appellant.
Mr. S.R. Agarkar, APP for the State.

CORAM: BHARATI DANGRE, J.
DATED : 25th AUGUST, 2023

JUDGMENT:-

1 The appeal is filed by accused no.3, who stand convicted for committing an offence punishable under Section 451, 452, and Section 394 of IPC along with accused no.1 in Sessions Case No.855 of 1993, under a judgment passed by the Additional Session Judge, Greater Bombay on 29/04/1997.

 Upon being convicted, he is directed to undergo Rigorous Imprisonment for a term of 4 years and pay fine of Rs. 1000/-, in default to undergo six months Rigorous Imprisonment.

 The accused persons, who are convicted are held entitled for set off, for period already undergone and the sentences are directed to run concurrently except the default sentence.

2 The appeal filed by the appellant came to be admitted on 23/07/1997 and the appellant was released on bail on furnishing fresh bond.

The appeal was made ready for final hearing in the year 2006 with the Record and Proceedings with paper books being received.

The appellant, who was released on bail, however, was not traceable and repeated attempts by the Court to secure his presence have failed. The bailable warrant was issued against him in the year 2017, but it could not be executed and it was returned back with an endorsement that the accused is not traceable at his given address.

The report from the Senior Police Inspector, Goregaon Police Station placed before the Court refer to the extensive search carried out for tracing the accused and on 6/09/2017, this Court passed the following order:

“This is an appeal challenging conviction filed by the appellant/accused. The appeal can be heard even in absence of the appellant on the basis of the record. Hence, the appeal to proceed further”.

By order dated 28/02/2019, the Appeal was directed to be listed for final disposal in the week commencing from 1/04/2019.

On 9/12/2021, this Court directed the Registry to place on record the necessary depositions. A supplementary paper book was accordingly prepared and placed before the Court. Once again, the appeal was listed for final hearing on 7/02/2022.

On 22/08/2023, since none represented the appellant, Ms. Manisha Devkar, an Advocate empanelled with the High Court Legal Services Committee, Mumbai was appointed to represent the appellant and the paper book was made available to her.

Hence, I have heard Ms. Manisha Devkar for the appellant.

3 The prosecution case, which has surfaced on record, through the complainant Suresh Ghagda (Suresh Bhai) i.e. (PW-4) is he owned a workshop of making gold ornaments and was running a factory under the name and style of “Suresh Changanlal Ghagda”.

On the date of incident i.e. 17/05/1993, he was present in the factory along with his worker Narendra Dave and two guests namely KirtiKumar (PW1) and Aporva Bodke along with one Roshanlal, who was associated with him.

At around 1:30 to 2:00 p.m, someone knocked the door and one person was seen standing outside. Narendra opened the door and the person gained an entry and to his utter surprise, he took out a chopper and started saying “*Nikalo Nikalo*”. Sensing trouble, Narendra attempted to escape but at that very moment, two other persons gained entry into the premises, one with a chopper and other holding a knife and Narendra was pushed down. The third person brandished a knife at Kirti Kumar, PW-1, and he suffered bleeding injury.

Roshanlal, raised a hue and cry and all the trespassers fled away.

On the version of Suresh Ghagda, crime was registered with Goregaon Police Station, and five persons were arraigned as accused by invoking Section 452, 394, 395, 398, r/w 34 of IPC.

4 The complainant in his statement recorded on 17/05/1993 gave the description of the two persons, who had gained an entry in the shop, by informing their physical description and the clothes which they were wearing.

5 As a part of investigation, the spot panchanama was conducted and it was noted that the spot was a garage and it was used

as the office as well as a workshop for making the gold ornaments. The spot panchanama was also recorded, presence of the blood stains in the office portion on the floor, where the tiff had occurred.

During investigation, the accused persons were subjected to Test Identification Parade and the memorandum of T.I. Parade, forms part of the charge-sheet and was presented before the Court through the Special Executive Magistrate, examined as PW-6.

PW-2, Narendra Dave, and PW-4 Suresh Ghagda, the complainant identified the accused no. 1 and accused no.3, where as PW-1 Kirti Kumar identified the person who had mounted an attack on him and injured him.

The Memorandum Panchnama came to be exhibited through PW-6 as Exhibit-32, 33 and 34.

6 Apart from the informant, the prosecution examined the injured, Kirtikumar as PW-1.

Kirtikumar, corroborate Suresh Bhai, when he state that on 17/05/1993, he visited Narendra Dave, who was working in the shop belonging to Suresh Bhai, as he had to collect money for an item, which was taken by him. According to him, in the workshop apart from him, Suresh Bhai, Narendra Dave, one Apporva Bokde were present and some workers were also working in the workshop while they were having tea.

Around 1:30 p.m. one person hurriedly entered into the shop by opening the door and took out the chopper tucked under his waist and before anybody could understand what is happening, he mounted assault on the witness with the chopper in his hand.

As per PW-1, one other person entered into the shop and in the dock, he identified, accused no.3 (present appellant) as a

person, who attacked him with chopper. He also deposed that he attempted to shield himself by means of a brief-case, which he was carrying, but despite this, the accused no.3 injured him on the neck, near the collar bone and also on his right hand wrist.

He could notice that the companion of the persons, who had barged in entered into the shop, was standing outside, and though they were three persons, out of which he could identify only one and while in the dock, he pointed out to a person, accused no.2, as the person who was standing outside the shop.

As these persons attempted to enter the shop, the two accused persons on account of a hue and cry raised, escaped through the door but accused no.1 was caught on the spot.

Version of PW-2, Narendra Dave, corroborate Kirtikumar who state that Kirti Bhai received the injuries below the neck, and wrist of his hand, as he was attacked by a chopper.

7 By and large, the prosecution story surfaces on record, through these three witnesses and there is an identification of the present appellant i.e. accused no.3 by all the three witnesses, i.e. PW-1, PW-2, and PW-3. The consistent version of these witnesses have established the case of the prosecution, that the accused persons in an attempt to commit a dacoity had entered the shop and injured PW-1 Kirtikumar, as they face obstruction in their attempt. However, realizing that they will not be in a position to succeed, they took to their heels.

8 The injured, PW-1 Kirtikumar was taken to the doctor, who examined him and issued a certificate at Exhibit-20, which is proved by PW-3, Doctor Dinesh Panwalkar, who corroborated the version of the other witnesses and specifically Kirtikumar.

PW-3 has deposed that on 17/05/1993, at about 3:00 p.m, Kirti Bhai Shah was brought to his hospital in an injured condition and he noted the following injuries on his person:

“1. I have got my own nursing home at Goregaon (W) I am qualified doctor. In the year 1993, on 17th May at about 3.00.p.m one Kirtibhai Shah was brought to the hospital in injured condition. I examined him and found following injuries on his person:

- 1.C.L.W. right wrist 1/2”X 1/2” bone deep*
- 2. Incised wound right wrists 2” X skin deep.*
- 3. left Supraclavicular C.L.W. 2 ½” X 1” bone deep.*
i.e. just below the neck on that side.

The injuries were fresh about one and half hours old.

It was bleeding, the patient was in pain and agony due to injuries. After examination I gave necessary treatment, I called a Surgeon Dr. Panditrao who has stitched the injuries in my presence in my hospital and gave the certificate in my presence. Now shown to me is the same. I say it is the same which was given by Dr. Panditrao on my letter head under his signature. I say it bears his signature as he had signed in my presence. It is marked at Ex. 20.

- 2. From the nature of the injuries I can say that they were caused by sharp edged weapon like chopper, or a big knife, as the edges were sharp and wounds were quite deep.*

The Doctor specifically deposed that the injuries were fresh about 1 and ½ hours old and they were bleeding and the patient was in agony.

PW-3 opined that the injuries could be caused by a sharp edged weapon like chopper or a big knife, as the edges were sharp and wounds were deep.

9 The minor contradictions about the acts committed by the accused persons, when they entered the shop do not, in any way, affect the case of the prosecution, which has consistently surfaced on record through the injured as well as the two other witnesses.

 Though the appointed counsel representing the appellant would submit that the other persons, who were present in the shop were not examined and therefore, the veracity of the prosecution case cannot be said to be conclusively established, I do not subscribe to the said submission since it is a settled position of law that it is not the quantity but the quality of the witnesses, which attains significance in a trial.

 There were several persons present but, the prosecution has chosen to examine three witnesses, who have consistently established its case that, the accused persons forcibly entered into the shop and in an attempt to commit dacoity, as they were armed with weapons, injured PW-1.

 The minor discrepancy as to whether the weapon used was a chopper or a knife, is also not of any significance as for a layman, he may not be able to distinguish, but when the evidence of PW-2 is perused, he was specifically confronted with the article which was seized being article 'X-1' which is a flat patta of iron having a pointed arrow at one end and handle at the other end. On being shown the weapon, Kirtikumar has deposed that this was similar to something which was carried out by accused no.3. He was also confronted with Article 'X-2' , which is a knife and he has identified that this is the weapon which is carried by one of the accused person, but he could not definitely state, as to which of the accused was carrying this weapon.

10 I do not find any merit in the submission of Ms. Devkar, that there is inconsistency in the description of the weapons, which were carried by accused persons while they entered into the shop. It is the accused no.3, who mounted the assault, and the prosecution case is fortified by the doctor i.e. PW-3, who deposed that, the injury to PW-1 could have been caused by a sharp edged weapon like chopper or a knife.

The prosecution has conclusively established its case and the evidence was rightly appreciated by the trial judge, who has acquitted the accused persons, who were alleged to have been present outside the shop and who did not participate in the actual act of robbery, as they are tried under Section 394 of IPC i.e. for voluntarily causing hurt in committing robbery, though the actual robbery did not take place. The prosecution has, by cogent and reliable evidence, established the guilt of the accused nos.1 and 3, who are found to be guilty of committing an offence under Section 451, 452 of the IPC, since the prosecution has succeeded in proving that, these two accused persons, had committed an house trespass after preparing for causing hurt, assault and wrongful distress and hence they are rightly convicted under Section 451, and 452 of IPC and along with Section 394, which punishes an act of voluntarily causing hurt in committing robbery.

On recording the finding of guilt, commensurating to the act and the role played by the accused nos.1 and 3, a befitting sentence of imprisonment for a term of four years along with a fine is imposed by the trial Judge.

Finding no legal infirmity in the judgment delivered by the Additional Sessions Judge on 29/04/1997 in Sessions Case No. 855 of 1993 along with Sessions Case No.1082 of 1994, the appeal

deserve to be dismissed and is accordingly dismissed. As a sequence the conviction and sentence imposed on the appellant is confirmed.

11 The appellant was released on bail and continue to enjoy the liberty till date. Orders passed by the Court reflect that despite extensive search, the appellant could not be traced for executing theailable warrant.

In any case, when the conviction and sentence imposed upon him by the trial court is now upheld, and the appeal is dismissed, the Sessions Court shall take steps to implement the sentence imposed and commit him to jail to undergo the sentence.

12 I would like to record my appreciation for Ms. Manisha Devkar, who on being appointed by this Court, has ably assisted in the appeal. The Legal Services Authority is directed to make over the legal remuneration due and payable to her within a period of four weeks from today.

(SMT. BHARATI DANGRE, J.)