

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.319 OF 1999

Ayub Khan Farman Shah & Ors. .. Appellant

Versus

The State of Maharashtra .. Respondent

WITH

CRIMINAL APPEAL NO.410 OF 1999

Stanley Jhon Sam Sundaram .. Appellant
Nellipan

Versus

The State of Maharashtra .. Respondent

...

Ms.Akshata Desai for the Appellants in both the Appeals.

Mr.S.R.Agarkar, A.P.P. for the State.

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CORAM: BHARATI DANGRE, J.

RESERVED ON : 09th MARCH, 2023
PRONOUNCED ON : 28th MARCH, 2023

JUDGMENT:-

1. Through the two Appeals, four Appellants i.e. Accused Nos.3, 4, 8 and 10 have assailed the judgment delivered by the learned Additional Sessions Judge on 25/29th June, 2019 in Sessions Case No.1370 of 1994, convicting them for the offences punishable under Sections 452 and 395 read with Section 34 of the Indian Penal Code (for short, “IPC”), which

has resulted in sentencing them to suffer R.I. for three years and five years respectively.

2. The impugned judgment came to be delivered, on 6 accused persons being tried for committing the offences punishable under Sections 452, 395, 397, 342 read with Section 34 of IPC, as it alleged that on 14/08/1993 at about 7.30 p.m., at M/s.M.A.Motiwala Jewellers situated on first floor, Abdul Rehman street and the Accused in furtherance of the common intention, committed house trespass by entering into the shop belonging to Mr.Murtaza Shaikh Mohammad Hussain Motiwala, after making preparation to cause hurt or wrongful restraint or assault or fear thereof. In the course of the same transaction, they are charged of committing dacoity of gold, silver, ruby and diamond and cordless telephone, Panasonic handset, collectively valued at Rs.5,75,100/- by pointing out deadly weapons and, thus, held liable for committing the offence punishable under Section 394 of IPC. Since the deadly weapons like choppers, revolver were put to use by the accused persons for committing dacoity, they were also charged for committing an offence under Section 397 of IPC and on wrongfully confining the complainant and his father in the cabin, they were accused of committing an offence punishable under Section 342 of IPC.

Accused No.3, who disposed off the stolen property, namely, gold ornaments to accused No.12, was also charged for committing an offence under Section 414 of IPC, whereas accused No.12, who dishonestly received the stolen property, was accused of committing an offence under Section 411 of

IPC. Pertinent to note that the case of Accused No.5 was abated, as he was reported dead and the case of Accused No.11 was separated, as he was absconding. Accused Nos.1, 7 and 9 were discharged at the time of framing of charge, on recording that there was no sufficient material to proceed against them.

3. All the four Appellants before me, being arraigned as Accused Nos.3, 4, 8 and 10, pleaded not guilty and, hence, were tried in Sessions Case No.1370 of 1994.

The prosecution examined 12 witnesses, the star witness being the informant, Murtaza Mohd. Hussain Motiwala (PW 1). Three other eye witnesses deposed as PW 2 to PW 4 and the Investigating Officer entered into the witness box as PW 7 alongwith API Ajit Surve and PSI Yashvant Thoravde, being examined as PW 9 and PW 10 respectively.

4. PW 1-Murtaza deposed that on 14/08/1993 at 7.30 p.m. in the evening, he was present in the jewellery shop-'M/s.M.A.Motiwala', located at Abdul Rehman Street alongwith his father-Mohd.Hussain Motiwala (PW 3), sister-Tasneen (PW 4), servant-Mr.Pandey and his cousin Mohd.Rupawala (PW2), when 10 to 11 persons entered into the shop and approached his father, who was sitting across the table. By brandishing a chopper, they threatened all other present in the shop to remain quiet and, therefore, all of them stood stand still. Thereafter, six persons started removing jewellery from the showcase and they told the persons present in the shop to sit on a 'sofa' with their heads down. One of

these persons approached PW 1 and by pointing out a gun at him, asked for keys of the safe, where the gold jewellery and precious stones were stored. Two other persons also joined him and they took PW 1 and his father in another room, by opening the door closer and were made to sit in the room.

Thereafter, the unknown persons fled away with booty, comprising of gold, diamond and silver jewellery. An attempt was made to establish contact with the police, but the telephone wires in the shop were snapped. After coming out of the shop, contact was established with the neighbours and complaint was lodged with Pydhonie police station.

F.I.R. bearing C.R.No.471 of 1993 is brought on record through the said witness.

5. PW 1-Murtaza deposed that the jewellery and gold ornaments removed from the shop were approximately worth Rs.3,20,000/-. He specifically deposed that he is in a position to identify the culprits, who have gained entry into the shop and robbed them.

While in the witness box, he specifically identified Accused Nos.2, 3, 4, 6, 8 and 10 by stating that they are the same persons, who entered into the shop on the date of incident. While in the dock, he also narrated the role played by each of them, when he state that accused No.3-Ayub Khan Farman Shah was standing near the entrance door of the shop and was armed with chopper and was giving instructions to his other accomplice. Accused No.4-Stanley Jhon Sam Sundaram Nelippan has been identified to be the person, who

was holding gun in his hand and pointed it on him and asked for keys of the safe. Accused No.8-Mohd. Akhtar is described as a culprit, who brandished chopper at his father. Accused No.10-Niyazullah Hussain was identified as a person with chopper, who had carried himself and his father to the inner chamber in the shop.

PW 1, during investigation, was called to attend the police station for conduct of TI parade held in the month of March 1994, where he identified Accused No.2. Thereafter, in the subsequent TI parades, he had identified more accused persons.

PW 1 particularly assert that he is able to recollect the culprits, as he had given their description, and he had identified Accused No.3-Ayub Khan in the first TI parade.

PW 1 also identified the property (ornaments), which were stolen, before the Court and asserted that all the articles shown to him belong to his shop and they were stored in M/s.M.A.Motiwala shop, and were stolen.

6. The version of PW 1 is corroborated by PW 2-Shabbir Zariwala, who was present in the shop when the accused persons robbed the jewellers. He deposed that Mohd.Murtaza and Mohd. Hussain were present in the shop along with Tasneen, sister of PW 1. He corroborate PW 1 on the manner in which the entire incident occurred, when the persons present in the shop were made to sit on sofa and the person armed with the chopper, asked them to look down. PW 2 was asked to hand over his wrist watch and he complied

Thereafter PW 2 with Mr.Mohd.Roopawala and Mr.Pandey were taken inside in one cabin on the back side of the shop and the cabin was closed and after some time, the goons left the shop.

In the Court, PW 2 identified Accused Nos.3, 4, 6 and 8 and assigned specific roles to them.

7. The father of PW 1, Mohd. Hussain Shaikh also stepped into the witness box as PW 3, who reiterate the version of his son, that at 7.30 p.m., while he was examining some jewellery on his table, he noticed some persons entering into the shop through the staircase and immediately thereafter, person wearing cap, approached him and other person, armed with chopper gave a blow, which was resisted by him and, hence, he sustained a minor injury. He corroborate the version of PW 1, when he state that one of the persons pulled the curtains in the shop and the telephone wires were cut. The two persons then approached the showcase where the jewellery was kept and one person demanded the keys of the big safe, which was procured from PW 1 by pointing out gun at him and on being threatened that if the keys are not given, he would be done to death. Thereafter, PW 1 replied to him that the keys were in the safe and they asked them to sit in a cabin and when the shutter was operated, PW 1, 2 and 3 came out and, subsequently took steps to inform about the said incident.

8. PW 4, sister of PW 1, is also examined and she had deposed in sync with other witnesses.

9. In order to establish the guilt of the Accused, the prosecution also examined the Fingerprint Expert as PW 8, who deposed that chance print on a mirror door of the shop matched with left hand palm portion of Accused No.4. The said report came to be exhibited as Exhs.42 to 45.

10. PW 9-API Ajit Surve, through his evidence, established the recovery of article Nos.1, 3 and 4 at the instance of Accused No.3-Ayub through the disclosure panchnama, which was exhibited as Exhs.48-A and 48-B.

11. In the wake of the aforesaid evidence placed before the learned Sessions Judge, he concluded that the prosecution has proved beyond reasonable doubt the case against Accused Nos.2, 3, 4, 6, 8 and 10 and held them guilty of commission of dacoity in M/s.M.A.Motiwala Jewellers, by brandishing weapons. As a sequel, he imposed commensurative sentence upon the Accused persons.

12. The learned counsel Ms.Akshata Desai representing the Appellants in the two Appeals, would seek reversal of the said judgment by submitting that the case of the prosecution suffers from various loopholes and the benefit of the same must go to the Appellants. She would invite my attention to the discrepancies in the testimony of the witnesses, who claimed to be the eye witnesses to the said incident and according to her, unless and until the prosecution establish it's case beyond any doubt through cogent and reliable evidence, no finding of guilt could have been recorded.

Her further submission is, despite these eye witnesses being available, it was only the PW 1, who had been called for identification in the parade and this identification was also faulty, since the guidelines provided for conduct of TI parade in the criminal manual have not been adhered to, as more than one Accused were subjected to TI parade on the same date and in all the identification parades, same dummies are used.

She would place reliance upon the decision of the Apex Court in the case of *Budhsen & Anr. Vs. State of U.P.*¹ and a decision in the case of *The State of Maharashtra Vs. Sachin Shivshankar Menon & Anr.*², wherein the evidence of identification of the Accused by the prosecution was not accepted because of the infirmity in holding the second parade, on the same date and using the common dummies in both the parades. She would also place reliance upon the decision in the case of *Mahesh Rohidas Kinalkar & Ors. Vs. State of Goa*³

13. Mr.Agarkar, the learned A.P.P., would however support the judgment, which is called in question in the Appeals and would submit that the Appellants are identified in the Court by the witnesses and this is sufficient piece of evidence, apart from the fact that the prosecution has established it's case beyond reasonable doubt, by adducing reliable and cogent evidence.

14. When the evidence placed before the trial Court is carefully looked into, the prosecution has established the

¹ 1970 SCC (Cr) 343

² 1999 ALL MR (Cri) 241

³ 2005(2) Bom.C.R.(Cri) 670

commission of dacoity by the Accused persons in M/s.M.A.Motiwalla on 14/08/1993, at the time when PW 1, PW 2-an independent witness, PW 3-the owner of the shop and father of PW 1 and PW 4-daughter of PW 3 were present in the shop.

PW 1, in his deposition has given the details of the accused persons by attributing distinct role to each of them. It is PW 1, who had filed the FIR and in the said report he described the Accused persons by attributing role to each of them.

Apart from giving details and description of the articles removed from the shop, he also gave the description of the culprits by giving their specification in form of their physical appearance i.e. height, colour and the clothes, each one of them was wearing. He give the description of the culprits by describing the role assigned viz., (a) the man who was standing on the main gate; (b) the man who was roaming; (c) the man with revolve in his hand; (d) the first man in front of his father; (e) the second man in front of his father; (f) the man who collected the ornaments; and (g) the man who was standing near the counter.

While lodging the report itself, he stated that he will be able to identify the accused persons as well as the ornaments. The complaint lodged by PW 1 immediately after the incident, record the description of the accused persons and it is in great detail, when he give description like height, colour, clothes, accent, approximate age, as the incident being fresh in his mind.

When PW 1 participated in the TI parade conducted by PW 11, he identified Accused Nos.3 and 4 in the first TI parade and he even narrated the role played by Accused No.3, Ayub Khan as the person, who had come in the shop and was leading the other culprits, whereas Accused No.4-Stanley Jhon, who was identified, was assigned a role of being armed with gun. In the second parade, he identified Accused No.6-Naseer Hussain Mohd. and Accused No.10-Niyazul Asim Mohd., with a specific role being assigned to the former as of threatening and Niyazul as the one, who collected the ornaments inside the shop. Further, in the third TI parade, PW 1 identified Accused No.8-Mohd.Akhtar Mohd. Salim, who was identified as the associate of other culprits and standing near cash counter.

15. Much arguments have been advanced by the learned counsel for the Appellants upon the lacuna in the TI parade and she would submit that the parade was conducted in Dharamshala and the same dummies were used throughout all the parades that were conducted.

PW 11, the Special Executive Magistrate assigned a reason why the TI parade was held in Dharamshala and it is stated that since Pydhonie Police Station has no lock-up, the TI parade was conducted in Dharamshala, just opposite to Pydhonie Police Station.

PW 11 categorically deposed about the procedure that he followed once he reached on the second floor of the Dharamshala, when he paraded the suspects in presence of two panchas with the aid of ten dummies. The names of ten

dummies were recorded in the memorandum of TI parade alongwith the names of two panchas and by asking the suspects to be placed amongst the dummies, the identifying witness was asked to identify them one after another

Five TI parades were conducted for identifying the different suspects on the same date and the memorandum of TI parade is exhibited through PW 11 as Exh.58, which bear the seal and signature of the SEM.

In the witness box, he identified the signature on the memorandum as well as the rubber seal of SEM. In the cross-examination, an admission has come that the same dummies were used for identification of all the suspects and though much argument is advanced, no prejudice has been established by any of the Appellant. The authenticity of the TI parade cannot be questioned, since PW 11 specifically admitted that he was aware of the guidelines for conducting TI parade, which are contained in the rules framed by the Government of Maharashtra, which prescribe that six dummies can be arranged for holding parade of one suspect, whereas ten dummies can be arranged for holding parade of two suspects.

16. In absence of any prejudice, the evidence value of the TI parade cannot be called in question as ultimately, PW 1 has identified the Appellants during his testimony before the Court, which is a substantive piece of evidence and the purpose of TI parade, being only to offer re-assurance about the identity of a suspect before he is treated as an accused by the Investigating Officer. The evidence of identification merely

corroborates and strengthen the oral testimony in the Court, which alone is a primary and substantive as to identity.

17. The purpose of TI parade is to test that evidence, the safe rule being that the sworn testimony of the witness in court as to the identity of the accused, who is stranger to him, as a general rule, requires corroboration in the form of an earlier identification proceedings.

It is relevant to note that the substantive evidence of a witness is his evidence in the Court, when the accused person is not previously known to the witness concerned then identification of accused by the witness soon after the former arrest is of vital importance because it furnishes the investigating agency an assurance that the investigation is proceeding on right lines in addition to furnishing corroboration of the evidence to be given by the witnesses later in the court at trial. The whole idea of a TI parade is that the witnesses, who have claimed to have seen the culprits at the time of occurrence, are able to identify them from the midst of other persons, without any aid or any other source. The test is done to check the veracity of their version and to test the memory of a witness, based on first impression, so as to enable the prosecution to decide, whether all or any of them could be cited as eye witnesses of the crime.

The aforesaid position of law is well settled and in a recent decision in the case of *Gireesan Nair & Ors. Vs. State of Kerala*⁴, the law as regards the TI parade came to be reiterated to the effect that it is for the prosecution to prove that a TI

⁴ (2023) 1 SCC 180

parade was conducted in a fair manner and all necessary measures and precautions were taken before conducting the TI parade.

What was observed by Their Lordships as regards the evidence in form of TIP with reference to Section 9 of the Evidence Act need a specific reproduction.

“29. TIPs belong to the stage of investigation by the police. It assures that investigation is proceeding in the right direction. It is a rule of prudence which is required to be followed in cases where the accused is not known to the witness or the complainant (*Matru v. State of U.P.*; *Mulla v. State of U.P.* and *C. Muniappan v. State of T.N.*). The evidence of a TIP is admissible under Section 9 of the Indian Evidence Act. However, it is not a substantive piece of evidence. Instead, it is used to corroborate the evidence given by witnesses before a court of law at the time of trial. Therefore, TIPs, even if held, cannot be considered in all the cases as trustworthy evidence on which the conviction of an accused can be sustained (*State of H.P. v. Lekh Raj* and *C. Muniappan and Ors v. State of T.N.*).

30. It is a matter of great importance both for the investigating agency and for the accused and a fortiori for the proper administration of justice that a TIP is held without avoidable and unreasonable delay after the arrest of the accused. This becomes necessary to eliminate the possibility of the accused being shown to the witnesses before the test identification parade. This is a very common plea of the accused, and therefore, the prosecution has to be cautious to ensure that there is no scope for making such an allegation. If, however, circumstances are beyond control and there is some delay, it cannot be said to be fatal to the prosecution. But reasons should be given as to why there was a delay (*Mulla v. State of U.P.* and *Suresh Chandra Bahri v. State of Bihar*).”

18. The broad guidelines for conduct of TI parade find place in the Criminal Manual and though it is expected that the test identification should be conducted with promptitude, the delay in it's conduct will have to be construed in the light of the

surrounding circumstances featuring to the case of the prosecution. A prompt test identification parade would ensure justice and fairness to the accused as well as to the prosecution, as immediately after the arrest of the accused, the TI parade is expected to be conducted to affirm the suspicion about a person, being the perpetrator of crime and no hard and fast rule can be laid down about the period within which such TI parade should be held as in such cases, prejudice to the accused would assume great significance. The delay, at times, will be considered to be fatal, if during the interregnum, the photograph/picture is disclosed to the witnesses and in *Rajesh Govind Jagesha Vs. State of Maharashtra*⁵, delay of about one month was viewed seriously, since there was a possibility of the accused being shown to the witness.

19. In the light of the aforesaid authoritative pronouncement, in the present case, it can be seen that the Appellants before me i.e. Accused Nos.3, 4, 8 and 10 have been specifically identified in the TI parade conducted by PW 11. The only ground that the dummies were repeated, in my considered opinion, would not affect the veracity of the identification. The TI parade came to be conducted by the Executive Special Magistrate (PW 11) on 07/05/1994 and this was done pursuant to the custody of the Appellants, being obtained on 03/05/1994. Though the alleged incident took place on 14/08/1993, since the Appellants were shown to be arrested on 03/05/1994, there is no delay in conduct of TI parade, which was held on 07/05/1994.

⁵ (1999) 8 SCC 428

20. The argument that though there were four eye witnesses to the incident, only PW 1 was asked to identify the accused persons, is of no consequence, since PW 1 from the very beginning was assertive about the identification of the accused persons and in the FIR lodged by him, he specifically gave the description of the accused person by describing their features and also the role played by them in the whole episode. The evidence of identification of the accused person at the trial for the first time is considered to be inherently of a weak character, but in this case, PW 1 in the TI parade, identified the present Appellants. According to PW 1, the incident lasted awhile, when after barging entry into the shop, the accused persons asked for the keys from him and after opening the almirah, looted the booty and, therefore, since he had sufficient time to see the accused persons, their faces and features having been imprinted in his mind, they are reflected through his complaint and re-affirmed during the TI parade and, subsequently, when he stepped into the dock as a witness of the prosecution. It is not necessary that all the eye witnesses should have been subjected to the TI parade and in fact, because of the old age, the father of PW 1 clearly deposed before the Court that he was not in a position to recollect the identity of the accused persons. It is ultimately the quality of the evidence and not the quantity of the witnesses that gains significance to establish a prosecution case.

21. In the wake of the above, the evidence that has come on record has been appreciated in it's proper perspective by the learned Sessions Judge and the case of the prosecution, being

proved beyond reasonable doubt, the Appellants stood convicted for the offence with which they are charged and a befitting punishment being imposed upon them, I see no reason for any interference.

As a result, upholding the judgment and the sentence imposed by the learned Additional Sessions Judge, Gr. Bombay dated 25/29th June, 1999 in Sessions Case No.1370 of 1994, Criminal Appeal No.319 of 1999 filed by Appellants/Accused No.3-Ayub Khan Sayyed Farman Shah, Accused No.8-Mohammed Akhtar Salim Shaikh, Accused No.10-Niyazulla Hussain Mohammed Shaikh and Criminal Appeal No.410 of 1999 filed by Appellant/Accused No.4-Stanley John Sam Sundaram Nelippan, are dismissed.

As far as the Appellant in Criminal Appeal No.410 of 1999 is concerned, it is informed that on undergoing the entire sentence imposed upon him, he has been released.

The Appellants in Criminal Appeal No.319 of 1999, i.e. Accused Nos.3, 8 and 10 are directed to surrender themselves before the learned Additional Sessions Judge, Gr.Bombay on or before 28/04/2023 and the learned Sessions Judge shall then carry out the procedure for they being forwarded to the prison authorities, for undergoing the remaining sentence.

(SMT. BHARATI DANGRE, J.)