

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

[1] CRIMINAL APPEAL NO.538 OF 1995

Azgar Ali Abdul KhanAppellant

Versus

The State of Maharashtra Respondent

.....
WITH

[2] CRIMINAL APPEAL NO.252 OF 1997

Ganesh Sakharam KhaireAppellant

Versus

The State of Maharashtra Respondent

Smt. Jai Vishal Kanade, Advocate (appointed) a/w. Rahul Shirgavkar, for the Appellants in both Appeals.

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

CORAM : SARANG V. KOTWAL, J.

DATE : 27th JANUARY, 2023

ORAL JUDGMENT :

1. Both these appeals are decided by this common judgment and order because they arise out of the same Sessions Case. The appellant Ganesh Khaire in Criminal Appeal No.252/1997 was the original accused No.1 and the appellant Azgar Ali Abdul Khan in Criminal Appeal No.538/1995 was the original accused No.3 in Sessions Case No.22/1991 along with Sessions Case No.113/1994.

2. Apart from these two accused, there were three more accused, namely, accused No.2 Vasant Gala, accused No.4 Paul @ Umar Manual and accused No.5 Wasim Qureshi. At the conclusion of the trial, the learned Judge acquitted accused No.2 Vasant Gala. Accused No.5 Wasim Qureshi had filed Criminal Appeal No.48/1995, but, during its pendency he passed away and, therefore, the appeal filed by him stood abated.

3. At the conclusion of the trial, vide judgment and order dated 17.8.1995, learned trial Judge convicted both the appellants as well as accused No.4 and accused No.5 for commission of the

offence punishable under Section 365 read with 34 of IPC and they were sentenced to suffer RI for three years. They were convicted for commission of the offence punishable under Section 347 read with 34 of IPC and were sentenced to suffer RI for three years. They were convicted for the offence punishable under Section 339 read with 34 of IPC and were sentenced to suffer SI for one month. They were convicted for commission of the offence punishable under Section 395 read with 34 of IPC and were sentenced to suffer RI for seven years. They were convicted for commission of the offence punishable under Section 397 of IPC and were sentenced to suffer RI for seven years. They were also convicted for the offence punishable under Sections 365, 339, 347, 395 and 397 of IPC read with Section 120B of IPC and were sentenced to suffer RI for seven years. All the sentences were directed to run concurrently. They were granted set off under Section 428 of Cr.PC.. The original accused No.2 was acquitted. There was one more accused, namely, Angelo Fernandes. He died during pendency of the trial and he did not face the trial. One more accused Vasant Pawar was absconding. He also did not face

the trial.

4. The prosecution case is that, on 30.11.1989, the accused No.1 i.e. the appellant Ganesh came to the shop of one Shahjahan Ali (PW-2), who was the victim in this case; and made some irrelevant enquiry just to fix the identity of PW-2. On the next day i.e. on 1.12.1989 when Shahjahan Ali was going back to his house in Kurla in a taxi with three other passengers, their taxi was intercepted by a light colored Ambassador Car. Three persons got down from the car and came towards the taxi. One of them removed the ignition key. The other two persons, pulled Shahjahan Ali forcibly from the taxi and made him sit in the Ambassador car. The other passengers ran away out of fear. The victim was taken in the Ambassador car. Keys of the taxi were thrown away. The taxi driver picked up the keys. Other passengers again sat in the taxi. They went to the police station and lodged the FIR. In the meantime the victim Shahjahan Ali was taken to a flat at Nepean Sea Road. He was kept there overnight. He was assaulted. He was shown a revolver. In the

morning, he was allowed to go home so that he could give them money and ornaments. He gave them gold bangles and some amount. He was told to arrange for more amount. He promised to pay them more amount. On the next day, the police made inquiries with him. He told them this story. In the meantime, he took treatment from a doctor in his house. On 9.12.1989, a trap was laid and the accused Angelo Fernandes was caught as he had come to collect more amount from the victim. On his information, the accused No.1 i.e. the appellant Ganesh was arrested on 1.12.1989. The appellant Azgar Ali i.e. accused No.3 was arrested on 24.12.1989. Test identification parades were held on different dates.

5. The appellant Ganesh was identified in the test identification parade on 11.12.1989 and 15.12.1989 by different witnesses. Accused No.3 Azgar Ali was identified in the test identification parade held on 25.12.1989. During investigation, some amount was recovered at the instance of the accused No.1. Some ear-rings and watch purchased out of the robbed amount

was recovered at the instance of accused No.3. The investigation was carried out and at the conclusion of investigation, the charge-sheet was filed. All the accused, as mentioned earlier, faced the trial.

6. During trial the prosecution examined twelve witnesses including the victim, two eye witnesses for abduction, panchas for recovery, two S.E.Ms who had conducted different test identification parades, watchman of the building where the victim was kept overnight, the doctor who had treated the victim, and finally the investigating officer. The learned trial Judge mainly relied on the evidence of identification of the accused in abducting the appellant. Defence of the accused of total denial was not accepted. According to the accused No.1 he was arrested from his house and he had not committed any offence.

7. The victim Shahjahan Ali was examined as PW-2. He has deposed that he was having his shop at Reay Road. On 30.11.1989 an unknown person came to his shop in the afternoon. He asked about some person. He verified that PW-2's name was

Shahjahan Ali. Then he left the place. On 1.12.1989, PW-2 was there throughout the day in his shop. As usual, he had hired a taxi of one Habib to go home. He offered lift to Kamrulla and Anis. Both of them were staying at Kurla. They started going towards Kurla. They had reached Mesant Road. There was not much traffic. They had reached near a godown called 'E-Shed'. One Ambassador car intercepted their taxi. It was white in colour. There were six persons in that car. Three of them got down. Two came near them. One person went near the driver and took the ignition key. Two persons who had come to PW-2, caught him and pulled him out of the taxi and put him forcibly in the Ambassador car. He was blindfolded and then he was taken away. He identified accused No.1 – the appellant Ganesh and accused No.5 Wasim as the persons who had pulled him out of the taxi. The person who had snatched the ignition key was identified in the court as accused No.4 Paul. PW-2 further identified accused No.3- the appellant Azgar Ali as the person who was driving the Ambassador car. While he was being taken to a different place, a revolver was pointed at the back of his neck. He was threatened

that he would be killed if he shouted. Accused No.4 Paul Manual was holding that revolver. Then he was taken to a building. He was taken to the second floor. When he had reached the building, the towel covering his face was removed. He was taken to a flat. The abductors told him that they wanted money and if they were paid money he would be released. They demanded Rs.5,00,000/-. He was taken to the servant's quarter. They removed Rs.2200/- which he was carrying. Then he was assaulted and kicked. The abductors were drinking. They offered him food but he could not eat. In between, one person came there and gave blows to PW-2. The abductors bargained for settling the amount and agreed to accept Rs.2,00,000/-. PW-2 told them that he could give them Rs.25,000 which he had kept in his house and he could also give them six bangles of his wife. They agreed to take him home by 4:00 a.m. for taking that money and bangles. He was left at his house at around 4:00 a.m.. PW-2 brought the cash and bangles and gave those to the abductors. They told him to arrange for Rs.1,50,000/- more and then threatened him. On the next day, he was examined by the doctor. Police came to his house and

recorded his statement. On 8.12.1989, he received a telephone call in the morning. It was made by the abductors. They inquired about the money. They agreed to accept Rs.1,00,000/-. They told him that one person would come next morning to collect the amount. PW-2 then contacted the police, who arranged to tap his telephone. On the next day, a person came in a taxi to collect the amount. The police caught him. That accused was not before the court. That person was arrested on 9.12.1989. Then he has deposed about the test identification parades held on 11.12.1989, 13.12.1989, 15.12.1989 and 25.12.1989. As mentioned earlier, he had identified the appellant Ganesh on 11.12.1989 and the appellant Azgar Ali on 25.12.1989 in the test identification parades.

On 16.12.1989 he was taken to the house where he was confined. He was taken there by the police. He identified the flat where he was kept.

In the cross examination he could not give the number of the flat. On 16.12.1989, the flat was opened by accused No.2

Vasant Gala. He could not explain as to why his statement mentioned that there were eight persons in the car. In the cross examination, he has deposed that one person punched him thereby causing loosening of one of his teeth. He showed that loose tooth on the right side of the mouth even in the court. One of the abductors has caused a minor injury with knife on his neck. That was also shown to the court.

In the cross examination, he was specifically asked as to whether, when he had reached the police station the Magistrate was already present. He answered that the Magistrate was present in the police station and he met him. He has deposed that he had not seen that Magistrate before 13.12.1989. He further deposed that more than one Magistrate conducted test identification parades on different occasions. He further deposed that when he was abducted he did not shout for help. The money recovered in the offence was returned to him by the police.

8. PW-1 Mohd. Anis was an eye witness and was the first informant. On 1.12.1989 he had gone to a shop of one Sikandar

whose shop was near the shop of PW-2. He knew Kamrulla and Mohd. Harun. Kamrulla told him that PW-2 Shahjahan was going to Dharavi and he could give him a lift. Harun was brother-in-law of PW-2 Shahjahan. After that, PW-2 Shahjahan, Harun, Kamrulla and this witness PW-1 sat in the taxi. That was around 6.15 p.m.. After traveling for some distance, their taxi was intercepted by an Ambassador car. Thereafter he has described the incident in the same manner as is described by PW-2. He correctly identified both the appellants in the Court. He had also attended the test identification parades on 11.12.1989 and 25.12.1989 when he had identified accused No.1 the appellant Ganesh and accused No.3 the appellant Azgar Ali respectively.

In the cross-examination, he explained that though the incident occurred in a short time, even a glance was sufficient to enable him to identify the accused. He and his colleagues had gone to the police station separately for test identification parades. He has produced the FIR given by him at Exhibit-20. In the FIR, he has given description of one person.

9. PW-4 Kamrullah Rehemtullah was another eye witness. He was having a shop near that of PW-2. He knew PW-1 Mohd Anis and Shahjahan Ali's brother-in-law Harun. On 30.11.1989, one person had come to his shop making enquiries about Shahjahan Ali. On 1.12.1989, he was offered a lift by Shahjahan and others. Then he has described the incident in the same manner as is described by PW-1 & PW-2 about abduction of PW-2 in the Ambassador car. He identified the accused No.1-the appellant Ganesh as well as the accused No.3 the appellant Azgar Ali in the Court and he described their roles specifically. He then deposed about the test identification parades held on 11.12.1989 and 25.12.1989 when he had identified both these appellants in those parades.

10. PW-3 Dr. Jallaluddin Hawaldar had examined and treated PW-2 on the next day of the incident i.e. on 2.12.1989. He has produced the medical certificate issued by him on record. On his examination, he found that there was a marked tenderness on the right side of the lower jaw. PW-2 was in pain. One tooth in

the lower jaw (the lateral incisor) was loose. There was tenderness on the right side of the neck below his right ear. There was tenderness on the back above the shoulder. There was tenderness on the 8th, 9th and 10th ribs on the right side. His blood pressure had shot up. According to him, those injuries were possible by fist blows and kick blows.

11. The ballistic report is produced on record in respect of the country-made revolver recovered at the instance of the accused Angelo Fernandes who did not face the trial as he was dead. The spot of abduction was recorded in the panchnama which is produced on record at Exhibit 26.

12. PW-5 Shendge was a pancha for recovery of bangles at the instance of Angelo Fernandes, and therefore, his evidence is not material for these two appellants.

13. PW-6 Muttu was a pancha for recovery of Rs.700/- at the instance of the appellant Ganesh. That amount of Rs.700/- was recovered at his instance from his hut. However, recovery of that cash is not really an incriminating circumstance as it was a

small amount and it could not be connected with offence, with a reasonable certainty.

14. PW-7 Annal Malai Harijan was a pancha for recovery made at the instance of the accused No.3 appellant Asgar Ali. That recovery was of ear-rings and a wrist watch. It is the prosecution case that those ear-rings and the watch were purchased by him out of the robbed amount. They were worth around Rs.4000/-. Again this recovery cannot be directly connected with the offence.

15. PW-8 Hindurao Kale was a watchman of the building where the victim was taken by the abductors. He has deposed that on 1.12.1989, he was on duty from 3.00 p.m. to 11.00 p.m.. In the afternoon, one Ambassador car came to their building. One Raju, who was working on the second floor told PW-8 to allow the car to enter the building. The car was parked by the accused No.2 Vasant. Those persons had come to the building around 4.00 p.m. in the car. He saw that car again at around 7.00 p.m. After that, he went to the terrace. When he went home at 11.00 p.m., at that time, he saw that the car was parked in the visitor's parking lot.

He had not seen PW-2 the victim and he has not identified the accused or the victim. Therefore, his evidence is of limited value only to show that the car was parked in the building at around 11.00 p.m.

16. PW-9 Arvind Chaulkar was an S.E.M. who had conducted the test identification parade in which accused No.5 was identified. Therefore, his evidence is not material for the present appeals.

17. PW-11 Shaikh Gulam Usman was the S.E.M. who had conducted the important identification parades in which the prosecution witnesses had identified both these appellants. In the first part of his deposition, he has described the procedure which he followed in conducting the test identification parade. He has specified the precautions which he took in conducting the test identification parade. He has deposed how he selected the dummies to resemble the accused and how he took precaution so that the identifying witnesses were not in a position to see the accused. He has deposed about the two important test

identification parades dated 11.12.1989 and 25.12.1989 when the above mentioned prosecution witnesses had identified the accused No.1 and the accused No.3 respectively. He has described the procedure and has deposed that all the above prosecution witnesses identified both these accused and described their roles. The accused No.1 – the appellant Ganesh had come to the car and had pulled the victim towards the ambassador car. The accused No.3 Azgar Ali was the driver of that Ambassador car.

Most significantly in the cross-examination itself while answering a question he had volunteered that when he was called to the police station, the witnesses were called after him and hence there was no question that the witnesses could have seen the suspects and still he asked the witnesses to satisfy his conscience whether they had seen the suspects. He has produced the test identification parade memoranda, which he had conducted, on record from Exhibit-48 upto Exhibit-52. These test identification parade memos substantially corroborate his evidence.

18. PW-10 API Panaskar was the first investigating officer. He has deposed that the offence was registered at Sewri police station vide C.R. No.177/1989. He recorded statements of the witnesses. On 2.12.1989 he was informed that the victim had returned home. He carried out the panchnama of the spot from where he was abducted. He got to know that one of the abductors had made a phone call asking for money. Another phone call was received on 8.12.1989. On 9.12.1989, a trap was laid and the accused Angelo Farnandes was arrested. He then gave name of the accused No.1 Ganesh. He was arrested. During investigation, a revolver and a knife was recovered at the instance of the accused Angelo Farnandes. On 14.12.1989 the accused No.2 Vasant showed the flat where the victim was taken. The revolver and the cartridge were sent for CA analysis. The ballistic report shows that it was a live-cartridge and the revolver was in a working condition. He then deposed about the recovery effected at the instance of the accused Nos.1 and 3 as mentioned earlier.

19. PW-12 PI Pote was another investigating officer. He

has deposed about tapping the victim's telephone and then apprehending Angelo Farnandes. He has also deposed about the arrest of the other accused including the accused No.3. He then recorded statements of other witnesses. He had filed the charge-sheet in this case.

20. Learned counsel for the appellants submitted that there are two major circumstances in this case against the appellants; first is of recovery and the other is of identification. She submitted that the alleged recovery at the instance of accused Nos.1 & 3 cannot really be connected with the offence. She submitted that even identification of the accused is not properly established beyond reasonable doubt. There are too many discrepancies in the evidence of the victim and the alleged eye witnesses. Their evidence does not inspire confidence. There is description of only one accused in the FIR, and therefore, it was quite surprising that the first informant PW-1 identified the other accused. The conduct of the eye witnesses is also suspicious. They did not try to help the victim. At that point of time no weapon was

involved. These eye witnesses ran away from the spot and therefore it was not possible for them to have identified the accused. There was no consistency about color of the Ambassador car. It was late in the evening and, therefore, it was not possible to observe features of the accused.

21. She submitted that there was nothing to show that the revolver was actually used in the commission of the offence and, therefore, the conviction under section 397 of IPC is not sustainable.

22. Learned APP opposed these submissions. According to him, the evidence of recovery and identification is strong enough to prove the prosecution case beyond reasonable doubt. He submitted that even the use of revolver is spoken by the victim himself and, therefore, the offence under section 397 of IPC is made out.

23. I have considered these submissions. As far as recovery is concerned, as mentioned earlier, only small amount is recovered at the instance of accuse No.1 Ganesh. Some ear-rings and wrist

watch is recovered at the instance of accused No.3 and the prosecution case is that those articles were purchased from the amount which was robbed from the victim. However there is no cogent evidence to link the recovery of these articles with the amount robbed in the Offence. Those articles were not taken from the victim and, therefore, it is difficult to connect these articles with the actual robbery. Therefore, to that extent I am inclined to agree with the submissions of learned counsel for the appellants that the recovery evidence in this case is not beyond reasonable doubt.

24. However I am unable to accept the submission that identification of the accused is not proved beyond reasonable doubt. The evidence shows that the accused were arrested almost immediately . The first test identification parade was held on 11.12.1989 where the prosecution witnesses i.e. PWs-1, 2 & 4 had identified the accused No.1. This identification was within a period of ten days from the offence and within two days from the date of arrest of the accused. Therefore, there was no lacuna or

lethargy on the part of the investigating agency in arranging for conducting the test identification parades. Even accused No.3 was immediately put for test identification parade on his arrest and that parade was held on 25.12.1989. He was also immediately identified in the test identification parade.

25. I have considered the evidence of PW-11 Shaikh who was the S.E.M. who had conducted the test identification parades. He has described, in detail, regarding the precautions which he had taken. He has specifically deposed in the cross examination that he has taken precaution to see that the witnesses had not seen the suspects before they were actually put in the test identification parade. He has also mentioned that he was present in the police station before the witnesses were called.

26. Learned counsel for the appellant relied on the judgment of a Division Bench of this court in the case of ***Ramcharan Bhudiram Gupta Vs. The State of Maharashtra***¹. However, the ratio of this judgment will not help the appellants in this case because in that particular case it was observed that the

¹ 1995 Cri LJ 4048

witness was already present in the police station and at the same time the suspects were in the lockup. In that situation, sufficient doubt was created about that identification.

However, in the present case the S.E.M. has explained that he had gone to the police station before the witnesses and he had taken precautions so that the witnesses could not have seen the suspects. Thus, I find that the evidence laid by the prosecution in respect of identification parade of the culprits is cogent and beyond reasonable doubt. Therefore, on the basis of this evidence alone the prosecution has proved its case against both the appellants.

27. The next question would be whether the offence under section 397 of IPC is made out. In that behalf, the victim PW-2 has categorically deposed that the revolver was used while abducting him. It was put on his neck. The appellants are also convicted with the aid of section 120-B of IPC. Besides this, there was dislocation of his tooth and hence it was a grievous hurt. Therefore, all the ingredients of section 397 of IPC are satisfied.

28. In this view of the matter, I do not find any infirmity in the reasoning and findings recorded by learned trial Judge. With the result, I do not find any merit in the appeals and the appeals are accordingly dismissed. The trial court shall find out how much sentence is still remained to be served by both these appellants and shall take steps to secure their presence to serve out the remaining sentence.

Digitally signed
by
PRADIPKUMAR
PRAKASHRAO
DESHMANE
Date:
2023.01.31
15:47:23 +0530

(SARANG V. KOTWAL, J.)

Deshmane (PS)