

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

CRIMINAL APPEAL NO. 121 OF 2023

Kumar Ramu Rathod

..Appellant.

Versus

The State of Maharashtra & Anr.

..Respondents

**WITH
INTERIM APPLICATION NO. 4692 OF 2022
IN
CRIMINAL APPEAL NO. 121 OF 2023**

Mr. Manas N. Gawankar (Appointed Advocate) a/w. Shreyas N. Gawankar for Appellant.

Mr. S. R. Agarkar, APP for State/Respondent No.1.

**CORAM : SARANG V. KOTWAL, J.
DATE : 20 FEBRUARY 2023**

ORAL JUDGMENT :

1. The Appellant has challenged the Judgment and order dated 30/01/2019 passed by learned Additional Sessions Judge, Greater Mumbai, in Sessions Case No.625 of 2017. The appellant was convicted and sentenced as follows:

- i) The appellant was convicted for commission of offence punishable U/s.392 of the I.P.C. and was

sentenced to suffer R.I. for 10 years and to pay a fine of Rs.2000/- and in default of payment of fine to suffer R.I. for six months.

- ii) The appellant was convicted for commission of offence punishable U/s.332 of the I.P.C. and was sentenced to suffer R.I. for 3 years and to pay a fine of Rs.500/- and in default of payment of fine to suffer R.I. for one month.
- iii) The appellant was convicted for commission of offence punishable U/s.353 of the I.P.C. and was sentenced to suffer R.I. for 2 years and to pay a fine of Rs.500/- and in default of payment of fine to suffer R.I. for one month.
- iv) The appellant was convicted for commission of offence punishable U/s.323 of the I.P.C. and was sentenced to suffer R.I. for 1 year and to pay a fine of Rs.500/- and in default of payment of fine to suffer R.I. for one month.
- v) The appellant was convicted for commission of offence punishable U/s.504 of the I.P.C. and was sentenced to suffer R.I. for 2 years and to pay a fine of Rs.500/- and in default of payment of fine to suffer R.I. for one month.

vi) The appellant was convicted for commission of offence punishable U/s.506-II of the I.P.C. and was sentenced to suffer R.I. for 5 years and to pay a fine of Rs.1000/- and in default of payment of fine to suffer R.I. for three months.

vii) The appellant was convicted for commission of offence punishable U/s.153 of the Railways Act and was sentenced to suffer R.I. for 5 years.

All the sentences were directed to run concurrently.

The appellant was granted set off U/s.428 of the Cr.p.c. The appellant was acquitted from the offence punishable U/s.401 of the I.P.C. The amount of fine was directed to be paid to the Respondent No.2.

2. Heard Shri. Manas Gawankar, learned Appointed Advocate for the Appellant and Shri. Agarkar, learned APP for the State/Respondent No.1. The Respondent No.2 is served.

3. The prosecution case is that, on 17/07/2017, at about 5.25p.m., PW-2 Dinesh Chougule was getting down from the local train at Elphinstone Road railway station. The appellant snatched a mobile phone from his hands. Dinesh Chougule and some

passengers followed him. He was apprehended. He was brought to the cabin of the Station Master. The police officers were informed. When he was being arrested, he resisted. He broke a glass and tried to attack the police officers causing incised injury to one of them. He bit the left leg of one Sandip Tilwe who had brought him to the Station Master's cabin. Sandip Tilwe and the police officer Kale were sent for medical examination at Nair hospital. After that, the police officer Kale lodged the F.I.R. vide C.R.No.528 of 2017 at Mumbai Central railway police station. The appellant was already arrested. The investigation was carried out. The statements of the witnesses were recorded. The medical certificates of the injured were collected. The mobile handset was recovered from the pocket of the appellant at the time of his arrest. After completion of the investigation the charge-sheet was filed. The case was committed to the Court of Sessions.

4. During trial, the prosecution examined eight witnesses including the mobile handset owner Chougule and eye witness Tilwe who had caught the appellant, the police officer Kale who was attacked and who lodged the F.I.R., the panchas, the Medical

Officer and the Investigating Officer. The defence of the appellant was that, he was falsely implicated at the instance of one Baba Chavan. He was arrested from his house and he was implicated falsely.

5. Learned Trial Judge disbelieved the defence of the appellant and he relied on the evidence led by the prosecution to convict and sentence the appellant, as mentioned earlier.

6. PW-2 Dinesh Chougule was the main witness. His mobile phone was snatched by the appellant. He has stated that, he was working at Jogeshwari. His office timing was from 10.00a.m. to 7.00p.m. On 17/07/2017, he was going to his work site. He boarded a train from Jogeshwari and got down at Elphinstone Road railway station at around 5.30p.m. He was holding his mobile phone in his hand. He was pushed by a man. That man snatched the mobile phone from his hand. PW-2 caught him with the help of other passengers and took him to the Station Master's office on Platform No.2. The appellant bit the person who had helped PW-2 in catching the appellant. PW-2 has further deposed

that the appellant was shouting. He broke a glass and attacked the police constable with broken piece of glass on his hand causing bleeding injury. PW-2's mobile phone was of Samsung Company, J/7 Model. It was of golden colour. It was found with the appellant. That phone was returned to PW-2 after one month. PW-2 produced the receipt of purchase of that mobile phone before the police. It was produced during trial and was marked at Exhibit 11. PW-2 identified the appellant before the Court.

In the cross-examination, he deposed that he had gone to Mumbai Central Police chowky at 6.00p.m. and he was there till midnight. Two other persons were after the appellant; one of them had accompanied PW-2 when he had gone to make a complaint. There was hardly any effective cross-examination of this witness.

7. PW-5 Sandip Tilwe was an eye witness and he had helped PW-2 in catching the appellant. He has deposed that, on 17/07/2017 at 5.25p.m. he boarded the second class bogie of a Churchgate bound local train from Elphinstone Road railway

station. He saw that, one person was taking mobile phone from right side pocket of the pant of one of the passengers. That person got down from the train. PW-5 also got down and started following him. The owner of the mobile phone and PW-5 caught the appellant and took him to the Station Master's cabin at Elphinstone Road railway station. One police constable was already in the cabin. The appellant started shouting and abusing. Two more police officers came in the cabin. The appellant picked up a glass from the cabin of Station Master and broke it by throwing it on the wall. He tried to assault the police staff and others in the cabin. He was threatening to kill everybody. One of the police was injured on his right palm because of the blow given by the appellant with broken glass. The appellant bit PW-5's left leg. PW-5 identified the appellant in the court. The police took all of them to Mumbai Central Railway police station. Police took search of the person of the appellant in PW-5's presence and in the presence of two panchas. During that search, the mobile handset was seized; which was with the appellant. The police sent PW-5 for the medical examination at Nair hospital.

In the cross-examination, he stated that, his statement was recorded around midnight at about 12.30a.m. on 18/07/2017. The personal search of the appellant was taken at around 6.00p.m. to 6.30p.m. on 17/07/2017. Nothing else was seized from the appellant.

8. PW-1 Head Constable Dilip Kale was the first informant. He deposed that, he was attached to Central Railway Station. On 17/07/2017, he was on duty at Elphinstone Road railway station. At the relevant time, at about 5.30p.m. some persons brought the appellant to the Station Master's office saying that he had committed theft of a mobile phone. PW-1 went to the office of the Station Master to take the custody of the appellant. The appellant pushed the person who had brought him there and bit his leg. The appellant picked up one glass from the table and threw it on the floor. He tried to assault PW-1 on his face with a broken piece of the glass. PW-1 put up his right hand near his face resulting in the injury. The other persons called for other police and the police staff came there from Mumbai Central railway police station. The panchanama of search of the appellant was recorded. The mobile

phone was found from his pocket. PW-1 and PW-5 were sent to Nair Hospital for examination. According to PW-1, he was given 5 to 7 stitches on his right hand. He has deposed that the appellant had assaulted him to deter him from performing his official duty. On this basis he lodged the F.I.R. It is produced on record at Exhibit 9. He identified the broken piece of the glass produced in the Court. He also identified the appellant in the Court.

In the cross-examination, he deposed that the statements of the witnesses were not recorded in his presence. PH Raje Bhosale had called the pancha witnesses. PW-1 did not know the panch witnesses. PW-5 Sandip Tilwe had gone to the hospital with PW-1.

9. PW-4 Maheshchand Gupta was the Station Master on duty on that day, between 2.00p.m. to 10.00p.m. At 5.35p.m. on 17/07/2017 he heard shouts. He was in the cabin. Two passengers brought the appellant in his cabin saying that he had stolen a mobile phone. There were other people in the mob. PW-1 G.R.P. Mr. Kale entered PW-4's cabin. The appellant was abusing

everybody. He threw an empty glass on the wall and tried to hit PW-1 Kale with the broken piece of glass. PW-1 caught him, but in the process, suffered bleeding injury on his hand. In the meantime, PW-4 called the control room for additional force. The additional force was sent. The police took the appellant with them. PW-4 identified the appellant before the court.

In the cross-examination, he admitted that seizure of broken piece of glass panchanama was not effected in his presence. His cross-examination was mostly of suggestions which he had denied.

10. PW-3 Shakil Qureshi was a pancha witness in whose presence, personal search of the appellant was carried out. The mobile phone was found from his possession. In this witness's presence the appellant broke the glass and assaulted PW-1 Kale. He deposed that seizure panchanama was carried out in his presence. It is produced on record at Exhibit 14. It was conducted between 6.25p.m. to 7.05p.m.

11. PW-6 Dr. Upasana Tyagi was attached to Nair hospital.

She had examined PW-1 and PW-5. She found that PW-1 Kale had suffered injury on his right hand, Ulnar border Palmer surface 3cm. C.L.W. and there was another C.L.W. on little finger of the size 1cm. The medical certificate was produced on record at Exhibit 20. She found that, PW-5 Sandip Tilwe had one circular mark over left leg. It was in respect of a bite mark.

In the cross-examination, she deposed that the injuries were simple in nature and she had put bandage on the injury suffered by PW-1 Kale.

12. PW-8 Kishor Rajebhosle was attached to Mumbai Central railway police station as Detection officer at the relevant time. He went to the station master's cabin at Elphinstone Road railway station; after receiving the information. He took personal search of the appellant. The mobile phone was found with him; it was seized. The broken piece of glass which had caused injuries was also seized. The panchanamas were prepared. He had sent PW-1 and PW-5 to Nair hospital for examination and treatment.

In the cross-examination, he explained that he did not

collect the CCTV footage from the railway station. But he explained that the CCTV camera was not installed at that time.

13. PW-7 A.P.I. Sachin Lokhande was also attached to Mumbai Central railway police station. He took over the investigation on 20/07/2017. The offence was registered vide C.R.No.528 of 2017 at Mumbai Central railway police station. He procured the medical certificate regarding the injuries. He produced the record of the cases against the appellant in the past, in which, he was convicted. PW-7 had filed charge-sheet at the conclusion of the investigation.

In the cross-examination, he admitted that he had not recorded the statements of anybody in this particular case.

This, in short, was the evidence led by the prosecution.

14. Learned counsel for the Appellant submitted that, there is discrepancy in the versions of PW-2 Dinesh Chougule and PW-5 Sandip Tilwe. According to PW-2, the mobile phone was snatched from the hands, whereas, PW-5 has deposed that, he had seen the appellant taking out the mobile phone from the pant pocket of

PW-2. Shri. Gawankar further submitted that, the prosecution case is not clear as to whether the offence took place inside the train or on the platform or while getting down from the train. PW-2's deposition indicates that, he had already got down from the train and then this incident had taken place. Whereas, PW-5's version is that, the incident took place in the train. Therefore, these two versions are irreconcilable. He further submitted that, there is no proper identification of the mobile handset. It is not produced in the trial Court. He further submitted that, in any case, the offence U/s.392 of the I.P.C. is not made out and, therefore, the conviction under that section, as well as, sentence of R.I. for 10 years are not sustainable. He submitted that, none of the ingredients required U/s.390 of the I.P.C. is satisfied. At the highest, the offence punishable U/s.379 of the I.P.C. can be attracted, which entails maximum punishment of three years. The appellant is continuously in custody since 17/07/2017 and has served more than five and half years of his punishment. The appellant, therefore, deserves to be released immediately.

15. Learned APP opposed these submissions. According to

him, the discrepancy in the versions of PW-2 and PW-5 does not go to the root of the matter. From the evidence, it was clear that the appellant was immediately apprehended after commission of the offence. There was no scope to even submit that no offence had taken place. The mobile handset was found from the pocket of the appellant. He submitted that, PW-2 had submitted a receipt of purchase of the mobile phone. It was taken on record at Exhibit 11. It was dated 08/09/2016. There is no serious challenge to this particular receipt and, therefore, the identification of the stolen article is proved by the prosecution. He submitted that, since the appellant had caused hurt to PW-5 and PW-1, the ingredients of Section 390 of the I.P.C. are satisfied and, therefore, the offence of robbery is proved against the appellant. He submitted that the conviction and sentence, therefore, need not be interfered with.

16. I have considered these submissions. As far as the incident is concerned, there cannot be a dispute that some incident had taken place. In this context, though, there is discrepancy in the versions of PW-2 and PW-5; PW-2 was an aggrieved person whose mobile phone was stolen. Therefore, the evidence of PW-2 carries

more weight. According to him, after he got down from the train, he was holding the mobile phone in his hand and at that point of time, the appellant snatched it and started running away. PW-2 caught him almost immediately. The others from the mob including PW-5 had held him. PW-2 and PW-5 took the appellant to the Station Master's cabin. The first part of the incident of stealing the mobile phone and catching the appellant was over at that point of time.

17. The next part of the incident took place inside the cabin of the Station Master. The prosecution case is that the appellant was resisting his arrest. He broke the glass kept on the table in the cabin and with that broken glass he tried to assault PW-1 Kale; who was the police officer trying to arrest the appellant. In this second part of the incident, the appellant caused injuries to PW-1 and also tried to prevent him from performing his official duty. In the process, the appellant also bit leg of PW-5. These events are consistently deposed by all the witnesses i.e. PW-1, PW-2, PW-4 and PW-5. There is hardly any discrepancy about the events taking place inside the cabin. This particular part of the evidence is

further corroborated by the evidence of PW-6 Dr. Tyagi, who has proved the injuries suffered by PW-1 and PW-5. According to her, the injuries were simple in nature. Therefore, there appears to be some exaggeration on the part of PW-1 when he deposed that, he required 5 to 6 stitches; but it is not supported by the medical evidence. In any case, the fact remains that the appellant had caused those bleeding injuries to PW-1 and had also bit PW-5.

18. The appellant's personal search was immediately conducted in the presence of two panchas. PW-3 has proved the arrest and seizure panchanama at Exhibit 14. He has supported the prosecution case. That panchanama was conducted between 6.25p.m. to 7.05p.m. This is another corroborative piece of evidence against the appellant.

19. Thus, the prosecution has proved that the appellant had snatched the mobile phone from PW-2. He was apprehended by PW-2 and PW-5. Both of them took the appellant to the cabin of the Station Master. Inside the cabin, the appellant broke a glass and assaulted PW-1; who was a public servant and was performing

his duty while arresting the appellant. The appellant had caused bleeding injury to PW-1 and had caused bite mark to PW-5. All these facts are proved by the prosecution through reliable, cogent and consistent evidence.

20. The next important question which requires serious consideration is regarding whether the offence of 'robbery' punishable U/s.392 of the I.P.C. is made out in this case. The submissions made by Shri. Gawankar in that behalf will have to be seriously considered, because, learned Trial Judge has sentenced the appellant to suffer R.I. for 10 years for committing the offence punishable U/s.392 of the I.P.C.

21. The offence of 'theft' is defined U/s.378 of the I.P.C. There can hardly be any doubt that, ingredients of Section 378 of the I.P.C. are satisfied in this case. Section 390 of the I.P.C. mentions that, 'In all robbery there is either theft or extortion'. It is not the prosecution case that, this was a case of 'extortion' as defined U/s.383 of the I.P.C. Therefore, it is necessary to see whether 'theft' is 'robbery' in this case. First part of Section 390 of

the I.P.C. reads thus:

“390. Robbery -

When theft is robbery – Theft is “robbery” if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, ***for that end***, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint. *[emphasis supplied]*

.....

As can be seen from the wording of this definition, theft is robbery when, for the purpose of committing theft, the offender voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint. The important words are ‘for that end’. Therefore, in order to commit theft or for the purpose of committing theft, if the offender causes or attempts to cause any of those acts, it can be termed as ‘robbery’.

22. Learned APP Shri. Agarkar tried to contend that, since in this case hurt was caused to PW-1 and PW-5, the ingredients of the offence of 'robbery' are satisfied. However, as rightly submitted by Shri. Gawankar, this incident had taken place in two parts. In the first part, the act of snatching the mobile phone was complete. The appellant was apprehended by PW-1 and PW-2. He was then brought to the Station Master's cabin. Only after that, the next events took place which caused injuries to PW-1 and PW-5. By that time, the act of snatching mobile phone was already over and the appellant was already apprehended. As mentioned earlier, the key words in the definition of 'robbery' are "for that end". Therefore, if the hurt was caused or wrongful restraint was caused for the purpose of committing theft, then only the offence of theft would escalate to that of robbery. In this case, while taking away the mobile phone, no such act causing hurt or wrongful restraint or putting PW-2 in fear of either of these was committed by the appellant. Therefore, in this particular case, the act of snatching the mobile phone would remain theft of mobile phone and it will not amount to robbery.

23. The act which the appellant had committed inside the cabin of the Station Master would attract the other offences viz. Section 353 and 332 of the I.P.C. and Section 153 of the Railways Act etc. but what transpired inside the cabin is different from the actual offence of theft.

24. With the result, the conviction and sentence recorded U/s.392 of the I.P.C. will have to be set aside and instead, the appellant is required to be convicted for commission of offence punishable U/s.379 of the I.P.C. Though, there was no separate charge was framed U/s.379 of the I.P.C., this being a lesser offence than one punishable U/s.392 of the I.P.C., the conviction can be recorded for the lesser offence. The basic facts and ingredients of the offence were already explained to the appellant when the Charge was framed U/s.392 of the I.P.C., therefore, there is no impediment in converting the conviction from Section 392 of the I.P.C. to that under Section 379 of the I.P.C. The maximum punishment which can be imposed U/s.379 of the I.P.C. is for three years besides imposition of fine. In this particular case, as recorded by learned Trial Judge, there are similar antecedents against the

appellant and, therefore, maximum sentence of three years is required to be imposed on the appellant for commission of offence punishable U/s.379 of the I.P.C.; besides imposition of fine of Rs.2000/-, which was already imposed on him U/s.392 of the I.P.C.

25. Apart from this alteration, there need not be any alteration in the operative part of the impugned Judgment and order. All the other offences for which the appellant is convicted are proved beyond reasonable doubt. The sentencing part is also reasonable. Therefore, I am not inclined to interfere with the conviction and sentence recorded and imposed on the appellant in respect of other offences.

26. Hence, the following order:

ORDER

- i) The Appeal is partly allowed.
- ii) The conviction of the Appellant for commission of offence punishable U/s.392 of the I.P.C. and resultant sentence of R.I. for 10 years and fine of Rs.2000/- are set aside. Instead, the appellant is

convicted for commission of offence punishable U/s.379 of the I.P.C. and is sentenced to suffer R.I. for three years and to pay a fine of Rs.2000/- and in default of payment of fine to suffer further R.I. for six months.

- iii) The conviction and sentence recorded U/s.332, 353, 323, 504 and 506-II of the I.P.C., as well as, under section 153 of the Railways Act are maintained.
- iv) The Appellant's acquittal U/s.401 of the I.P.C. is also maintained.
- v) All the substantive sentences are directed to run concurrently.
- vi) The Appellant is granted set off U/s.428 of the Cr.p.c.
- vii) The amount of fine, if recovered, is directed to be paid to the Respondent No.2. That part of the operative part of the impugned Judgment and order remains unchanged.
- viii) The operative part of the impugned Judgment and order which is not inconsistent with this operative part, is maintained.

- ix) The Authorities shall calculate the actual sentence which the appellant has undergone and shall also calculate the sentence, if any, that has remained for not paying the fine amount. After such calculation, if it is found that the Appellant has served out of his entire sentence, he shall be released forthwith, if not required in any other case.
- x) With these observations, the Appeal is disposed of.
- xi) With disposal of the Appeal, the Interim Application No.4692 of 2022 for bail is also disposed of.

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(SARANG V. KOTWAL, J.)