



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 80 OF 2005

1. Rahim Sattar Shaikh
Age : 28 Years, Occu: Agril.
R/o Dhoregaon, Tq. Gangapur,
District : Aurangabad.
2. Khalil Mohmad Sayyad
Age : 28 Years, Occu: Agril.
R/o Dhoregaon, Tq. Gangapur,
District : Aurangabad.

... Appellants

[Orig. Accused Nos. 1 & 3]

Versus

The State of Maharashtra

... Respondent

.....

Mr. V. D. Salunke, Advocate for the Appellants.
Mr. S. M. Ganachari, APP for the Respondent State.

.....

**WITH
CRIMINAL APPLICATION NO. 3138 OF 2023
IN
CRIMINAL APPEAL NO. 80 OF 2005**

Mangaldas Ghanshayamdas Zaveri
Age: 67 Yrs, Occ: Nil,
R/o. House No. L-115/3, Shivajinagar,
HUDCO N-9, Aurangabad,
Tq & Dist Aurangabad.

... Applicant
[Org. Complainant]

versus

1. The State of Maharashtra
Through Police Station, Chikalthana,
Tq. & Dist. Aurangabad.
2. Rahim Sattar Shaikh
Age: 47 Yrs, Occ: Business,

R/o. Dhoregaon, Tq. Gangapur,
Dist Aurangabad.

3. Khalil Mohmad Sayyad
Age: 48 Yrs., Occ: Business,
R/o. Dhoregaon, Tq. Gangapur,
Dist. Aurangabad. ... Respondents

.....

Mr. Shivaji N. Dudhate, Advocate for the Applicant.
Mr. S. M. Ganachari, APP for Respondent No.1-State.
Mr. V. D. Salunke, Advocate for Respondent Nos.2 and 3.

.....

CORAM : ABHAY S. WAGHWASE, J.

DATED : 13.03.2024

JUDGMENT :

1. Instant appeal arises out of the judgment and order of conviction dated 11.01.2005 passed by learned 4th Adhoc Additional Sessions Judge, Aurangabad in Sessions Case No. 159 of 2004, recording guilt of appellant for offence punishable under Section 395 of the Indian Penal Code [IPC].

PROSECUTION CASE IN BRIEF IS AS UNDER

2. One Mangaldas Zaveri, claiming to be a jeweler and resident of Chittegaon, approached Waluj Police Station and informed that on 18.03.2004, after closing his shop, he and his son Chetan were carrying the ornaments in a plastic box which was further kept in a cloth bag, on their moped. When, they were in the vicinity of Dalmill

at Gevari and when his son was riding, two persons on motorcycle overtook them and one of them threw chilly powder in the eyes of his son compelling him to halt, but they both fell. Two other persons riding another motorcycle came near them from behind and the person riding motorcycle snatched the bag from his hands and then both motorcycles proceeded towards direction of Aurangabad. He further reported that he did not lodge any complaint that day. However, when he learnt that police have seized gold ornaments, he lodged report Exhibit 15. Such complaint was entertained and investigated by PW10 API Vivek Sarof and accused persons came to be arrested and finally chargesheeted, which culminated into trial vide Sessions Case No. 159 of 2004.

Learned trial court appreciated the oral and documentary evidence adduced by prosecution and convicted accused Rahim and Khalil (present appellants) for commission of offence punishable under Section 395 of IPC and acquitted remaining accused nos. 2, 4, 5 and 6. Hence the appeal by both convicts.

3. Informant Mangaldas has also filed Criminal Application No. 3138 of 2023 praying to get custody of gold ornaments as per serial nos. 3 to 21 in Muddemal Yadi.

SUBMISSIONS

4. Learned Senior counsel Mr. V. D. Salunke for the appellants-convicts would point out that there is apparently false implication. There is no convincing or legally acceptable evidence. That prosecution had miserably failed to establish the charges beyond reasonable doubt. He pointed out that allegations are of snatching by two persons, but offence is registered for Section 395 IPC. He further pointed out that there was no immediate complaint by PW1 Mangaldas who was robbed on 18.03.2004. That, only on news item being flashed about police, while patrolling, apprehending some accused while in possession of ornaments, complaint has been lodged. He pointed out that in fact, for attracting offence under Section 395 IPC, five persons are essential. However, as per police, four persons were initially apprehended while patrolling and even complainant PW1 claims to have been robbed by four persons. Therefore, charge itself is faulty. He further pointed out that even complainant could not place on record any document to show that he was in fact a jeweler. He did not place details of stock or inventory and there was no concrete evidence to show that the robbed articles and the articles recovered accidentally while patrolling were the same. That, only on the basis of statement of police officer, investigation has been carried out and accused are falsely arrested and even tried and held guilty.

5. He further criticized the impugned judgment by pointing out that even learned trial Judge has not got itself satisfied about availability of essential ingredients for attracting Section 395 IPC. That, Test Identification parade was also conducted at a belated stage when there was ample opportunity for the complainant to previously see arrested accused, thereby rendering the very Test Identification parade insignificant. That, there is no corroboration to the testimony of complainant and therefore, on all counts, case of prosecution was weak and therefore, very judgment of conviction, that too of only two accused out of six, cannot be allowed to be sustained and hence, he prays to allow the appeal.

6. In answer to above, learned APP pointed out that a police officer had apprehended some persons while they were moving in suspicious condition. They were found to be in possession of stolen ornaments and therefore such achievement of police was flashed by way of news item. Complainant, a jeweler, who was robbed initially, immediately approached and set law into motion. That, accused have been arrested and identified by complainant in Test Identification parade. They were found to be in possession of stolen property. He pointed out that as out of in all six accused persons, only two are

convicted, this itself shows that there is careful appreciation and only guilty are convicted, whereas accused against whom there was no evidence, are set at liberty. Therefore, it is his submission that no fault can be found in appreciation. Hence, for all above reasons, he prays to dismiss the appeal for want of merits.

EVIDENCE ON BEHALF OF PROSECUTION IN TRIAL COURT

7. Prosecution has examined following witnesses in support of its case:

PW1 Mangaldas deposed that on 18.03.2004, while he and his son were returning home on a moped after closing their jewelry shop, they were robbed by **four persons who came on two motorcycles**. However, he did not lodge complaint that very day. But after two to three days, when he learnt about seizure of gold ornaments at Waluj by police, he lodged report Exhibit 15. He identified ornaments as well as accused by participating in TI parade.

PW2 Naib Tahsildar deposed that on request of Chikalthana police, he conducted TI parade by drawing memorandum Exhibits 24, 25 and 26.

PW3 Chetan, son of PW1 informant, also deposed on the same lines about occurrence on 18.03.2004 regarding he and his father being robbed of jewelry en-route to home.

- PW4** Ankush, pancha to seizure of motorcycle, who did not support.
- PW5** Appasaheb, a tea stall owner, stated that six months back, i.e. on 18.03.2004, he heard shouts on the road towards Paithan. When he went there, he saw goldsmith and his son saying about they being robbed.
- PW6** Sk. Naddem, pancha to memorandum of disclosure and seizure panchanama Exhibits 33 and 34, but he did not support.
- PW7** Dnyaneshwar stated that officer Jadhav showed ornaments of which panchanama was drawn and he signed panchanama Exhibit 39.
- PW8** Balu, pancha to memorandum panchanamas Exhibits 42 to 45. He did not support prosecution.
- PW9** Harischandra, pancha to memorandum of disclosure. He also did not support prosecution.
- PW10** PSI Keshav Jadhav, police officer stated that on 23.03.2004, while he was on patrolling duty at Waluj-Gangapur Road, they found four persons on two motorcycles in suspicious circumstances and were therefore caught and taken to police station. He gave their names as Khalil, Rahim, Azim and Samir. According to him, on search of Khalil, he was found in possession of three gold beds and gold articule. On inquiry, he

could not produce receipt of bill. He called panchas and seized ornaments i.e. vide Exhibit 29. During investigation, accused Rahim gave statement regarding robbing goldsmith near Bagadiya company and memorandum to that extent being drawn. Accused also took them to another jeweler where he sold gold articles on 28th and the same were seized by drawing panchanama Exhibit 34.

PW10 Another police officer API Vivek Sarof attached to Chikalthana Police Station, drew spot panchanama and carried out some part of the investigation.

8. Here, out of six, two accused i.e. Rahim and Khalil are held guilty of committing offence under Section 395 of IPC, whereas, rest are acquitted. Section 395 of IPC reads as under :

“395 Punishment for dacoity.- Whoever commits dacoity shall be punished with imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.”

ANALYSIS

9. In short prosecution case is that on 18.03.2004, complainant PW1 while proceeding after closing his shop with his son on a moped, he was robbed by persons who came on motorcycle.

On carefully analyzing evidence of complainant **PW1**, it is clear that he has not lodged any FIR on that very day. It is further emerging that he came across a news item and thereafter has approached Chikalthana Police Station and lodged report Exhibit 15. He has given details of the ornaments. On carefully scrutinizing his evidence, we find him deposing about chilly powder being thrown in the eyes of his son. He has identified accused when he participated in Test Identification parade at Harsool jail. He has also given their names. It is further pertinent to note that in his deposition before the court, he speaks of person riding motorcycle to have snatched the bag from particularly him, but his own son PW3 allegedly accompanying him, namely, Chetan claims that, persons coming on motorcycle from behind first gave dash to them and threw chilly powder in their eyes and therefore, they fell. Complainant has not uttered about chilly powder thrown in his eyes. According to PW3 son, when they fell, the bag fell aside. He got up and picked up the bag. Thereafter, a person who came on two-wheeler from behind, snatched the bag from him. Therefore, the duo i.e. father and son are apparently giving distinct versions about snatching and therefore there is doubt as to who was actually holding the bag. Further, in the FIR, PW1 who lodged report, informed that the bag containing jewelry was hung to the handle of

the moped. Therefore, apparently, contrary versions are coming from father and son. Another surprising feature is that alleged occurrence is of 18.03.2004 and PW10 PSI Keshav Jadhav claims to have apprehended appellants while in possession of some ornaments on the night of 23.03.2004. It is difficult to accept prosecution version that for five days they were carrying stolen ornaments till being caught.

10. **PW4** Ankush pancha to memorandum of disclosure has apparently not supported. **PW5** Appasaheb a tea stall owner though examined, he merely speaks of hearing goldsmith saying that he was robbed of his bag. **PW6** Sk. Nadeem pancha to memorandum of disclosure and seizure has also not supported. Similar treatment is given by **PW7** Dnyaneshwar, who merely speaks about signing a panchanama and he has received information from police officer about recovery of ornaments vide Exhibit 39. **PW8** Balu, another pancha to Exhibits 42 to 45, which are memorandums, has also not supported prosecution. **PW9** Harischandra, one more pancha to memorandum of disclosure, also turned hostile. Remaining two witnesses are Investigating Officers.

11. **PW2** Rupa Chitrappa is the Naib Tahsildar who had conducted

TI parade, but it is noticed that said TI parade is conducted almost after a month of lodging report about incident of robbing. Therefore, when accused were already arrested during patrolling and they were in police custody, of which news was flashed, there is more possibility of accused being confronted to the witnesses i.e. father and son.

SUMMATION

12. Therefore, here apparently there is no prompt lodgement of complaint in spite of being robbed. Complainant has admitted that he has not handed over any documents to show that he was a jeweler. Though it was his case that documents of shop were also robbed along with bag, he could have easily procured and produced licence of conducting jewellery business. However, that has not happened. Secondly, he has also not placed any inventory record to show that the ornaments which were robbed were in his possession for sale on that day. No documents of procuring ornaments of such nature or manufacturing such ornaments is placed on record. Test Identification parade is apparently conducted at a belated stage. None of the witnesses to memorandum of disclosure at the instance of accused have supported prosecution. Therefore, in the totality of such circumstances, evidence on behalf of prosecution is apparently weak. Except testimony of Investigating Officer, there is no other

independent, reliable evidence. For all above reasons, case of prosecution is full of doubts.

13. On going through the judgment under challenge, it seems that learned trial court has unfortunately recorded conviction accepting the Investigating Officer's evidence and Test Identification parade. There is apparently improper appreciation of both, evidence as well as law. Case is not apparently proved beyond reasonable doubt. Consequently, such judgment cannot be allowed to be sustained. Hence, interference is called for.

14. Criminal Application No. 3138 of 2023 has been moved by complainant for return of property i.e. gold ornaments as per serial nos. 3 to 21 in Muddemal Yadi. However, this Court has already reached to a conclusion that original complainant has not placed on record any distinct papers or record or inventory to demonstrate that the stolen articles were purchased by him/manufactured by him and were further meant for sale. It is already observed that even license to run jewellery shop has not been placed on record either during trial or before this appellate court. There is no independent and distinct evidence about complainant to be a jeweler and moreover, on the day of occurrence, i.e. on 18.03.2004 he was in possession and ownership of alleged ornaments. Therefore, ownership cannot be bestowed on

the complainant for want of evidence. Further, when the very seizure and recovery of ornaments has come under shadow of doubt, prayers so raised cannot be considered. Hence, I proceed to pass the following order:

ORDER

- I. The appeal is hereby allowed.
- II. Conviction awarded to the appellants, i.e. appellant no.1 Rahim and appellant no. 2 Khalil, by learned IVth Adhoc Additional Sessions Judge, Aurangabad in Sessions Case No. 159 of 2004 under Section 395 of IPC stands quashed and set aside.
- III. Both the appellants stand acquitted of the offence punishable under Section 395 of IPC.
- IV. The bail bonds of appellants stand cancelled.
- V. Fine amount deposited, if any, be refunded to the appellants after the statutory period.
- VI. Criminal Application No. 3138 of 2023 is rejected.
- VII. The muddemal property i.e. articles of gold at serial nos. 3 to 21 in muddemal Yadi shall be at the disposal of State Government which shall further deal with it as permissible under law.

[ABHAY S. WAGHWASE, J.]