



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 106 OF 2004

- 1) Lahu S/o Bhaurao More
Age: 27 yrs., Occu.: Labour
- 2) Kailas S/o Kachru More
Age: 23 yrs., Occu.: Labour.

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

..Appellants

Versus

. The State of Maharashtra

..Respondent

.....
Advocate for Appellants : Mr. A.R.Borulkar
APP for Respondent : Mrs.Ashlesha S.Deshmukh
.....

CORAM : ABHAY S. WAGHWASE, J.

RESERVED ON : 15 OCTOBER, 2024

PRONOUNCED ON : 23 OCTOBER, 2024

JUDGMENT :-

1. In this appeal, there is challenge to judgment and order of conviction dated 21-04-2003 rendered by IInd Additional Sessions Judge, Jalgaon in Sessions Case No.177 of 2002 holding appellants guilty for offence under Sections 392 read with 34 of the Indian

Penal Code (IPC).

PROSECUTION CASE IN BRIEF

2. It is the case of prosecution that informant Komalsing was returning from Chalisgaon on Motorcycle with his wife on 09-06-2000 at around 08:30 p.m. to 08:45 p.m.. Three years daughter was also accompanying the couple. When Motorcycle reached vicinity of village Bhortek Phata, informant noticed a person and one Motorcycle lying on the road and one old person sitting near the Motorcycle. When Motorcycle of the informant reached 10 feet away from the said Motorcycle, the person sitting near the Motorcycle, stood up with a stick. Informant halted his motorcycle. Then 4-5 persons hiding around joined the said person. Informant and his wife got down from the Motorcycle. Then on knife point, ornaments on the person of informant's wife and his own wallet containing cash were taken away. Occurrence was reported at Nagar Deola Police Station, on the strength of which, crime was registered and investigated by PW13 Joshi, who after gathering evidence, chargesheeted accused and they were made to face trial vide Sessions Case No.177 of 2002 for offence under Section 395 of the IPC.

Vide judgment and order dated 21-04-2003, on appreciation of

evidence, learned trial Judge has convicted appellants (accused nos.2 and 4) for offence under Section 392 read with 34 of the IPC. Hence, instant appeal.

SUBMISSIONS

On behalf of appellants :

3. Learned Counsel for the appellants would plead innocence and alleges false implication. At the threshold, taking this Court through the charge, he pointed out that same was framed under Section 395 of the IPC. According to learned Counsel, for attracting said charge, strength of accused should be five, but here there were only four persons allegedly robbed informant and his wife and therefore, according to him, chargesheet itself was misplaced.

His second attack is on identification. He pointed out that alleged incident had taken place in the dark and outside village and only source of light was headlight of Motorcycle. Therefore, according to him, it is difficult to identify faces of accused at such place at such time. He further pointed out that detail physical description was not given while filing the crime. Here T.I. parade has not been conducted immediately, rather it is after more than two months and therefore, he questions the credibility of identification.

According to him, both Police Station and Tahsil Office, where T.I parade was conducted, are in the same premises and therefore, there are bright chances of confrontation of arrested accused to the victim and on such count also he questions their identification. He pointed out that there are allegations of taking away articles but its receipts were not placed on record. Therefore, it is his submission that prosecution could not cogently establish that the belongings allegedly seized were of informant and his wife only. Hence, learned Counsel points out that entire evidence of prosecution is not free from doubt and so, he questions judgment of conviction and prays to set aside the same.

On behalf of State :

4. Per contra, learned APP supported the judgment by pointing out that informant has clearly identified accused persons. That there is prompt lodgment of complaint. According to him, there is nothing to suggest that accused were confronted to witnesses. That there is no cross-examination on the point of identification and moreover, according to her, articles robbed are seized at the instance of accused and therefore, according to her, guilt is proved. That there is no explanation from accused for possession of articles belonging to

informant and his wife. She would strenuously submit that prosecution has examined witnesses, who were earlier robbed by present accused and as such accused are habitual criminals. Therefore, she supports the judgment and prays to dismiss the appeal.

SUM AND SUBSTANCE OF PROSECUTION EVIDENCE

In support of its case, prosecution has examined as many as thirteen witnesses.

5. **PW1** Komalsing Gansing Pawar is informant. He deposed at exh.13 that while he was proceeding with his wife and daughter on Motorcycle, he was robbed of his belongings. Therefore, he lodged report. That he was called for identification parade, where he identified accused Lahu and Kailas. He also identified articles recovered from accused.

6. **PW2** Dattatraya Dhanaji Kokande is Pancha to spot panchanama exh.18.

7. **PW3** Dadasaheb Julal Patil identified accused and he is second pancha to spot panchanama.

8. **PW4** Jaishri w/o. Komalsing Pawar is the wife of informant. She also stated that while she was proceeding with her husband on Motorcycle, 3-4 persons encircled them and on point of knife, they took away her ornaments. That her husband lodged report.

9. **PW5** Ashok Julalgir Gosavi stated that about 1-2 months ago, Tahsildar, Pachora, called him to his office for identification and he had identified accused Kailas.

10. **PW6** Tulshiram Shivilal Gaikwad stated that he knew informant. He had seen wrist watch of informant as he had given the same to him and the said watch was given to this witness by son of his brother-in-law.

11. **PW7** Raosaheb Bhagwan Patil deposed that one year ago when he was going from Kajgaon to Bhortek Phata, two persons robbed him of his money and he identified accused no.2 Lahu to be one of them.

12. **PW8** Ishwar Budha Patil also claims that he was robbed six months ago while he was proceeding from Bhortek Phata after being assaulted by stick. He also identified accused no.4 to be the person

amongst those persons.

13. **PW9** Manoj Ananda Patil also claims to have been victimized by Lahu six months back and there was attempt to rob him.

14. **PW10** Gautam Dharma Nikam is the pancha to panchanama exh.30.

15. **PW11** Subhash Ragho Patil is pancha to memorandum of disclosure and seizure of wrist watch.

16. **PW12** Bhimrao Abhiman Shinde is Tahsildar, who had conducted T.I. parade on 03-08-2002 on request of Police and he drew panchanama exh.30.

17. **PW13** Chandrakant Vishwanath Joshi is the Investigating Officer.

ANALYSIS

18. Admittedly, charge at exh.7 framed by learned trial Judge is for offence under Section 395 of the IPC.

Crucial evidence is of **PW1** Komalsing, informant and his wife **PW4** Jaishri, as they together, while undertaking journey on

motorcycle, were allegedly intercepted and robbed.

19. At exh.13 **PW1** Komalsing gave evidence that about 200-300 feet away after crossing Bhortek Phata, he saw a motorcycle lying down and an **old** person sitting near Motorcycle. That while informant was 10 feet away from said motorcycle, said person stood up with a stick and therefore, motorcycle was halted by informant and at that time, **4-5 persons** hiding around came towards him. That wife of informant got down. Informant pointed out to accused Kailas for pointing knife on his chest. That all persons asked them to give whatever they have. That his wife gave away ornaments like Mani-Mangalsutra, ear rings and from his wallet. That they removed Rs.250/- from his pocket and took away wrist watch from his hand. That his wife's ornaments were 11 gm. gold. That those persons left. According to him, accused no.2 Lahu was also one of the above persons. Then he lodged report at Nagar Deola Police Station. According to him, after two and half months, he was called by Pachora Police Station for identification parade and he identified accused no.2 Lahu and accused no.4 Kailas. In examination-in-chief itself he stated that he was called at Police Station 2-3 times for identification parade. He identified accused nos.2 and 4 in T.I.

parade conducted by Tahsildar. He answered that he saw faces of accused Lahu and accused Kailas in the light of Motorcycle, but could not see faces of others as they were in dark. He identified wrist watch article A. He further deposed that he found this watch in the hand of father of his one student while said person was causing signature in the token receipt of rice packet distributed by the School and therefore, he asked him where he brought it from and was allegedly told that it was brought from Aurangabad one year back. He testified about telling that person that it was his watch, which was stolen and that person gave back the watch to him and he handed over it to Police.

While under **cross-examination** informant is unable to state whether panchanama was drawn after he gave watch at Police Station. He stated that he did not have receipt of the watch as according to him it was given by his father-in-law. There is omission as regards to alphabet "K" on the backside of the wrist watch. He admitted that in the report there are some mistakes. He answered that he deposed in examination-in-chief that old person was sitting because he was short person. It was written in his statement that there were four persons. He admitted that in report he gave ages of the accused to be of 20-25 years old. He admitted that lock up of

accused persons was in the same campus.

20. **PW4** Jaishri, wife of informant, who is examined at exh.22, also stated that 200-300 ahead of Bhortek Phata, one Motorcycle was lying by the side of the road and one person sitting near it. That person stood with stick, therefore, her husband halted Motorcycle. According to her, **3-4** persons encircled them. Then accused Kailas, who was sitting before the Court, showed knife to her husband and said in "Ahirani" language to give away whatever they have. The persons removed money from her husband's pocket alongwith wrist watch and she handed over 4 gm. gold marriage string and 7 gm. gold ear-rings. She identified the wrist watch.

While under **cross-examination**, she admitted that they had no receipt of the watch. Rest is all denial.

21. Another important witness for prosecution is **PW6** Tulshiram and according to him, he knew informant, he is Teacher in the school of which his son was a student. He deposed that he had been to receive rice packet distributed by School and at that time, while making signature, complainant asked about wrist watch in his hand and he gave him that watch. According to him, this watch was given to him by his brother-in-law's son namely Nathu Laxman Surase 2-3

weeks ago. That Nathu Laxman was absconding.

22. **PW7** Raosaheb, **PW8** Ishwar, **PW9** Manoj are examined by prosecution to demonstrate that one year back and six months ago respectively, they three were robbed on the road from Kajgaon to Bhortek in three distinct instances. **PW7** Raosaheb and **PW8** Ishwar identified accused no.2 Lahu and accused no.4 Kailas respectively.

All these witnesses **PW7** Raosaheb, **PW8** Ishwar, **PW9** Manoj have apparently not lodged any report of they being robbed at any Police Station, but merely gave statement recorded by **PW13** Joshi, Investigating Officer in this case. **PW12** Shinde is Tahsildar.

PW10 Gautam is pancha to T.I. parade conducted by **PW12** Shinde (Tahsildar). **PW11** Subhash is pancha to seizure of wrist watch.

23. Therefore, on appreciating the above evidence, here it is noticed that **PW1** informant and his wife **PW4** are not consistent about strength of robbers, who allegedly intercepted them. **PW1** informant deposed about coming across Motorcycle lying and an old person sitting there and he subsequently standing up by means of stick. Admittedly, all accused who are arrested, are in the age group of 20-25 years and as such there is no old person. **PW1** Informant

deposed about 4-5 persons, whereas his own wife PW4, who was allegedly accompanying him, deposed about 3-4 persons encircling them. Evidence of PW1 informant discussed above goes to show that his testimony is full of material omissions, contradictions and improvements. He had lodged report at Nagar Deola Police Station but according to him T.I. parade was conducted by Pachora Police Station. Both husband wife i.e. PW1 and PW4 identified accused Lahu and accused Kailas. Admittedly, as per informant himself, T.I. parade was conducted after two and half months. Informant himself deposed about he being called by Police Station twice and thrice.

Prosecution own witness **PW12** Bhimrao admitted that Police Station and Tahsil Office are in the same campus. As stated above, PW1 informant himself speaks of being called for identification twice thrice. In above situation and circumstances, as pointed out by learned Counsel for appellants, there is possibility of arrested accused shown to witnesses. Admittedly, T.I. parade was conducted after two and half months.

Another noteworthy feature is that accused Lahu was shown to be arrested on 31-08-2002 whereas PW12 Tahsildar deposed about conducting T.I. parade on 03-08-2002. How can there be identification post arrest.

24. PW13 Joshi (PSI), Investigating Officer, who is examined at exh.35 deposed about entertaining complaint, conducting investigation. In paragraph 6 of his examination-in-chief he stated that he sought permission of Superintendent of Police and took Tulshiram Gaikwad in search of Nathu Laxman Surase, who allegedly handed him the watch. Investigating Officer's evidence shows that they went to Gangapur, Dhoregaon, in search of Nathu Laxman, but he could not be found. However, Investigating Officer claims that Police Patil of Dhoregaon revealed the names of persons, who were companions of Nathu Laxman and based on such names, he arrested three accused i.e. Kailas, Sheshrao and Latif that too on 19-07-2002. Apparently, such version of Investigating Officer shows that accused are arrested on information given by Police Patil of village Dhoregaon. Merely receiving information about companions of Nathu, present appellants appeared to be taken in custody by Investigating Officer. So called Police Patil is not examined. Arrest is shown to be made on 19-07-2002, but admittedly T.I. parade is conducted on 03-08-2002. Investigating Officer has categorically deposed that on 31-01-2002 accused Lahu was arrested by seeking transfer warrant from other case. Again he got T.I. parade conducted on 13-09-2002. Very Tahsildar PW12 has admitted in para 11 of the

cross-examination that his Office and Police Station are located in the same premises. Therefore, again there are brighter chances of confrontation of arrested accused to the witnesses. Coupled with the facts of delayed arrest, delayed T.I. parade, the identification has lost its significance. Even otherwise, PW1 Komalsing, informant and his wife PW4 Jaishri could identify only two accused. Therefore, with such quality of evidence, prosecution version is shrouded with serious suspicion.

25. Here there was charge for Section 395 of the IPC, but four accused persons were made to face trial even when requirement was of five or more persons. Guilt is recorded for Section 392 of the IPC, which provides punishment for robbery. Out of alleged 4-5 persons, who stripped PW4 Jaishri of her ornaments and who took out cash from wallet of accused is not clarified by PW1 Komalsing and PW4 Jaishri, who are said to be victims. Apparently, except wrist watch, ornaments or cash is not recovered. Accused Nathu is said to be absconding. Prosecution version is that, Nathu handed over wrist watch to PW6 Tulshiram and according to this witness, watch was given to him by son of his brother-in-law. If it was so, then it was infact easy for investigating machinery to lay hands of Nathu. So

called brother-in law of PW6 Tulshiram is also not examined. Though only on the basis of wrist watch, other accused are shown to be arrested, father-in-law of PW1 Komalsing, who allegedly gave him watch, is also not examined. Therefore, there is no corroboration to PW1 informant's version regarding the watch belonging to only and only him. Said recovery is caused on 17-07-2002 by way of panchanama exh.33 in presence of PW11 Subhash, but his signature is not obtained on seized packet. PW1 informant claims that he identified the watch in the hand of Tulshiram because alphabet "K" was embossed on the watch, but he himself has admitted that there is omission to this extent.

Consequently, mere recovery of watch that too at the instance of PW6 Tulshiram at the belated stage and without there being any receipt or in absence of evidence of father-in-law of PW1 informant, it cannot be said that the recovery is of the same wrist watch, more particularly, when PW1 informant has categorically admitted that there are several such watches available in the market.

Even circumstance of seizure of wrist watch is doubtful because on one hand PW1 informant, in his evidence in paragraph no.6, deposed about he himself handing over wrist watch to Police, but PW17 Investigating Officer, in his evidence in paragraph no.3,

deposed that he has seized wrist watch from PW6 Tulshiram vide panchanama exh.33. Therefore, prosecution witnesses are not consistent as regards to seizure of wrist watch is concerned.

26. For all above reasons, prosecution version is surrounded by several suspicious circumstances. If Nathu Laxman was son of brother-in-law of PW6 Tulshiram, then atleast his photograph ought to have been confronted to PW1 informant and his wife PW4 to get it confirmed that he was amongst the accused persons, who took away the watch. Though PW1 informant identified accused Kailas and Lahu, it is merely deposed that Kailas kept knife on his chest. Knife is admittedly not seized. Accused Lahu though is identified by PW1 informant, what role he played and for what he was identified as has happened against Kailas, is also not clarified. Out of four accused, who were chargesheeted, only accused nos.2 and 4 i.e. Lahu and Kailas are convicted, remaining two are acquitted by the learned trial Judge without assigning sound reasons as to why only two deserves conviction and two deserves acquittal. Same evidence has been applied to hold only two persons guilty.

Resultantly, learned trial Judge has failed to appreciate the evidence as required. Therefore, it being case of benefit of doubt

coupled with serious doubts about identification, conviction cannot be allowed to be sustained. Accordingly, I proceed to pass following order :

ORDER

- I) Criminal Appeal No.106 of 2004 is allowed.
- II) The conviction awarded to appellant nos.(1) Lahu Bhaurao More and (2) Kailas Kachru More in Sessions Case No.177 of 2002 by IInd Additional Sessions Judge, Jalgaon on 21-04-2003 for the offence punishable under Section 392 read with 34 of the Indian Penal Code, stands quashed and set aside.
- III) The appellants stand acquitted of the offence punishable under Section 392 read with 34 of the Indian Penal Code.
- IV) **The bail bonds of appellants stand cancelled.**
- V) The fine amount deposited, if any, be refunded to the appellants after the statutory period.
- VI) It is clarified that there is no change as regards the order in respect of disposal of muddemal.

(ABHAY S. WAGHWASE)
JUDGE