



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 116 OF 2004

Nemjya S/o. Englisha Kale,
Age : 46 years, Occu. : Agril.,
R/o. Kautgaon, Tq. Paithan,
Dist. Aurangabad.

... Appellant
(Orig. accused No.2.)

Versus

The State of Maharashtra

... Respondent

...
Mrs. Surekha G. Chincholkar, Advocate for Appellant
Mrs. Chaitali Choudhari – Kutti, APP for Respondent – State
...

CORAM : ABHAY S. WAGHWASE, J.

RESERVED ON : 20th JULY, 2024

PRONOUNCED ON : 31st JULY, 2024

JUDGMENT :

1. The judgment and order dated 05.02.2004 passed by 1st Ad-hoc Additional Sessions Judge, Aurangabad in Sessions Case No. 482 of 2002, convicting appellant for offence punishable under sections 395 and 353 of Indian Penal Code (IPC), is under challenge herein.

IN BRIEF PROSECUTION CASE IN TRIAL COURT

2. PW7 P.I. Crime Branch, summoned informant PW1 PSI Muley on the morning of 14.02.2001 and introduced him to secrete informer and further told that, one Yusuf is about to handover treasure-trove. Raid to that effect is to be planned. Accordingly

PW1 PSI Muley - informant accompanied by secret informer, engaged a rickshaw and went to Samatanagar to the house of one Yusuf, but as he was not found, on information of his family members, they went to office of Manmandir Travels, met Yusuf, who joined informant in the rickshaw, which was directed to be taken towards paithan road. On the way, Yusuf met one pan stall owner and then directed the rickshaw to be taken to Videocon company, near Chitegaon. Yusuf got down, went towards quarry and returned with one person, namely Malkhare. They continued further journey towards Kautgaon and in the premises of a closed factory, rickshaw was halted near a fig tree. Yusuf and Malkhare went and returned with one unknown person. Secret informer, Yusuf, informant PSI Muley and Malkhare went towards a boundary of a field and approached three persons and a female. Discussion took place amongst the. Informant posed himself to be a goldsmith and he was asked whether he brought the amount and it was agreed by the persons to sell one kilogram gold at the rate of Rs.2,75,000/-. When informant asked about the gold, he was pointed to a boy 18 to 20 years standing at 100 ft. distance. The three persons insisted informant to take out entire cash from the bag carried by him, to which informant refused and while he was about to walk back towards rickshaw and when further discussions were going on, 8 to 10 men, who had concealed themselves in the

jawar crop, rushed towards them and pelted stones. Three persons, who were on the *bandh*, including a lady, indulged in with scuffle with him. The person wearing dhoti had a dagger and he whisked it out. Informant was manhandled, made to fall and his service revolver was snatched. Informant suffered injury in the said episode. By that time, raiding party reached there. Chase was given to those persons. All, but one, managed to escape. The sole apprehended person gave his name as Naba Bhosale. He was brought to police station and on inquiry, he gave names of his Associates. Informant identified persons scuffling with him from the photo album, and thereafter, he lodged report at Exh.25, on the basis of which, crime was registered and was further investigated by PW7 P.I. Crime Branch.

After gathering sufficient evidence, accused were charge-sheeted and tried by learned 1st Ad-hoc Additional Sessions Judge, Aurangabad for offence punishable under sections 395, 307, 397 and 353 read with section 34 of IPC, vide Sessions Case No. 482 of 2002.

After analyzing and appreciating the evidence, learned trial Judge convicted appellant for offence punishable under sections 395 and 353 of IPC and acquitted him from remaining charges. Such judgment is the subject matter of appeal herein.

SUM AND SUBSTANCE OF EVIDENCE IN THE TRIAL COURT

3. **PW1** PSI Muley, informant, who narrated all events since he was called by PW7 P.I. regarding secret informer disclosing transaction of sale of treasure-trove through one Yusuf and then taking him towards Paithan road, meeting one Malkhare and these three persons going towards field, meeting another three persons including a lady and about discussion of sale and rate of one kilogram gold. These persons sitting on the *bandh* scuffling with informant to snatch the bag possessed by informant. 8 to 10 persons, who were hiding in the crop coming out in open space and pelting stones. Raiding party reaching there. All persons fleeing and police managing to catch one, namely, Naba Bhosale and PW1 PSI Muley setting law into motion.

PW2 Kisan Jadhav, Police Head Constable and a member of raiding party headed by PW7 P.I., reaching the spot, seeing informant in injured condition and apprehending one person. They all coming to police station and PW1 PSI Muley lodging FIR.

PW3 Vasant Jiwade, Police Naik also a member of raiding party, narrated that, they have followed rickshaw on

motorcycle to carry out trap at Kautgaon. He also stated that they saw 20 to 25 persons running away, complainant Muley to be injured and one person being caught by PW7 P.I. Ambildhage.

PW4 Pandurang, pancha to house search at the house of one Nemjya Kale, seizing receipts of jeweler by drawing panchanama at Exh.29.

PW5 Sheshrao, pancha to memorandum of disclosure by accused Nemjya, expressing his willingness to handover revolver, taking police and pancha to the field and taking out revolver buried in the ground and it being seized by drawing panchanama at Exh.32.

PW6 Sudhakar, pancha to spot panchanama (Exh.35).

PW7 P.I. James Ambildhage is the Investigating Officer.

PW8 Sk. Samad a rickshaw driver and PW1 PSI Muley along with informer, went to Samtanagar in his rickshaw and thereafter went towards the spot of occurrence. He was declared hostile and cross-examined by learned APP.

PW9 Dr. Shivaji Rathod, Dy.S.P. and **PW10** Balasaheb Dhiwar, Dy.S.P. and **PW11** PSI Sandip Gurme are also Investigating Officers.

SUBMISSIONS

On behalf of Appellant :

4. Learned counsel for the appellant pleaded false implication and about prosecution failing to prove the case beyond reasonable doubt by adducing cogent and reliable evidence. Learned counsel apprised the court about the prosecution version regarding alleged receipt of secret information about transaction of sale of treasure-trove and raid being arranged and conducted. Taking this court through the testimony of informant PW1 PSI Muley and his cross, she would submit that, his version is unworthy of credence and is concocted and fabricated version. She pointed out that there is no corroboration to his testimony. She questioned the very manner of alleged raid planned and executed. According to her, here, admittedly secret informer is not examined. Secondly, identity of so called Yusuf is not clearly established. That, there is no independent and reliable evidence and no distinct panchanama was drawn before leaving police station. Learned counsel pointed out that, PW1 PSI Muley informant, also a police officer, is unable to give details of the rickshaw, which was allegedly hired and used to travel a long distance, thereby rendering the very story of prosecution doubtful.

5. Learned counsel submitted that, except testimony of

PW1 PSI Muley informant, there is no other evidence either oral or documentary regarding alleged journey to reach the alleged spot. That, there is no supporting evidence that since leaving police station, PW1 PSI Muley informant reached the alleged scene of occurrence, and therefore, according to her, the story of prosecution is a fabricated version.

6. Learned counsel also took this court through the testimony of PW2 Kisan and PW3 Vasant and would question the credibility of their substantive evidence by submitting that surprisingly though they claimed to be part of the raiding party, they are not witnesses to the alleged occurrence as stated by informant. She pointed out that, in fact PW3 Vasant has claimed to have tailed the very rickshaw occupied by informant, but surprisingly even this witness has not seen and supported the version of PW1 PSI Muley about scuffle and snatching service pistol. Consequently, it is her submission that, testimony of PW2 Kisan and PW3 Vasant deserves to be discarded outright.

7. Learned counsel posed a question as to when none of the so called persons were initially known then why investigating machinery did not conduct T.I. parade. According to her, identity of accused would have been got established by conducting proper

T.I. parade, but according to her, surprisingly, this necessary formality has not been carried out by Investigating Officer.

8. She further pointed out that, here, only one person was said to be apprehended. Prosecution claims that, there was disclosure of names of other accused by such apprehended accused. Taking exception to such version of prosecution, learned counsel pointed out that, it is not open for prosecution to rope in other co-accused on an information given by one person in police custody and consequently she questioned the implications of accused persons.

9. She further strenuously submitted that, accused are arrested on the basis of mere photo identification. But, such evidence has not been proved by prosecution by adducing legally acceptable evidence.

10. Criticizing the judgment, learned counsel pointed out that all above crucial aspects are lost sight of by the learned trial Judge. That, prosecution version, in absence of sufficient corroboration, has been directly accepted. According to her, required ingredients for attracting even charge of sections 395 and 353 of IPC were not available in the prosecution evidence and

therefore guilt recorded by learned trial court being illegal and perverse and being in absence of evidence, according to her, is not sustainable in the eyes of law and so she prays to interfere by allowing the appeal.

On behalf of State :-

11. Supporting the conviction and judgment, learned APP pointed out that, on receipt of secret information, raid was planned by PW7 P.I. Ambildhage. That, PW1 PSI Muley had posed himself as a goldsmith and has accompanied Yusuf and one Malkhare towards a factory premises in a field. That, PW1 PSI Muley had interacted with three accused persons including main accused no.1 a lady. That, there were talks of selling gold, which was said to be treasure-trove. That, informant was manhandled and cash carried by him in the bag, was tried to be snatched. That, they succeeded in snatching service pistol of PW1 PSI Muley. He is an injured and a victim. That, there is no reason for false implication. That, he has narrated all events. His testimony has not disturbed or shaken. That, one person was apprehended and on inquiry he disclosed the names and details of co-accused. Informant, who had close encounter with accused persons, has identified them through photograph. Learned APP submitted that, photo identification is valid in the eyes of law. That, guilt has been cogently proved.

Learned APP pointed out that, there were charges of 307 of IPC and other penal sections, learned trial Judge has recorded guilt for only two offences i.e. sections 395 and 353 of IPC. According to her, this itself shows that learned trial court has properly sifted and analyzed the evidence. That, the view taken by the learned trial court is the possible view and hence she prays to not to disturb it.

ANALYSIS

12. Here, though appellants were charge-sheeted for offence punishable under sections 395, 307, 397 and 353 read with section 34 of IPC, admittedly, guilt is recorded under sections 395 and 353 of IPC.

Before re-appreciating and re-analyzing the evidence, it would be profitable to first deal with the essential and legal requirements for bringing home the charge of 395 of IPC. This provision defines and provides for punishment for committing dacoity. Section 391 defines dacoity as *“when five or more persons conjointly commit or attempt to commit robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amounts to five or more, every person so committing, attempting or aiding, is said to be commit “dacoity”.”*

It is essential that, all such persons, who are five or more members, must share common intention.

The essential ingredients which constitute the offence could be summarized as under :-

“Firstly, the accused commit or attempt to commit robbery.

Secondly, persons committing or attempting to commit robbery, it must necessarily be five or more.

Thirdly, they should act in concert and conjointly.”

13. Here, admittedly, though 11 witnesses were examined, evidence of PW1 PSI Muley is crucial. PW8 Sk. Samad also was of use to the prosecution, but he has not supported the prosecution. Remaining police witnesses apparently have reached after the so called episode had come to an end.

On carefully going through the testimony of PW1 PSI Muley - informant, it is emerging that, on being apprised by PW7 P.I. Ambildhage about transaction of sale of treasure-trove, he swung into action. His evidence shows that, one Yusuf, who was to handover the said treasure-trove, and therefore, raid was planned. PW1 PSI Muley alone seems to have hired rickshaw of PW8 Sk. Samad to first go to Samatanagar i.e. to the said abode of Yusuf. Said person was approached near a travel agency and there informant claims that said Yusufkhan agreed to deliver treasure-

trove to two more persons, namely, Ajimkhan and Raju Kaka. His evidence shows that, he himself and informer Ajij travelled in the rickshaw, which was taken towards Paithan. This witness has deposed that, police staff was following their rickshaw on motorcycle as well as in a police jeep. According to him, Yusufkhan on the way took one Malkhare and accordingly they all went towards a field having jawar crop. At that time, informant was carrying a bag, in which only few currencies and other rough papers were stuffed. They approached a boundary of the field and they saw three persons and one female sitting on the *bandh*. Discussion took place regarding sale of gold. According to him, those persons insisted him to handover the entire amount of the bag, which he refused and when he asked about the gold, he was pointed to a boy of 18 to 20 years of age. PW1 PSI Muley requested those three persons to call the boy, but he refused to come forward. While those three persons taking body search of PW1 PSI Muley, 8 to 10 men, who had concealed themselves in the jawar crop, rushed upon them along with weapons like axe and dagger. Such persons pelted stones. One amongst the persons, who caught him, was wearing a dhoti and he was armed with dagger, which he took and attempted to hit it to PW1 PSI Muley. Therefore, PW1 PSI Muley took out service pistol and fired it. It was misfired. Those three persons made him fall. Women and those persons beat him

with fist and kicks blows as well as stones and sticks. The lady, who gave him bite on the right ear and cheek, causing him bleeding injury with some object.

14. Some persons went and beat secret informer as well as rickshaw driver and therefore they fled. According to him, because of injury to the finger, he lost grip over the service pistol and those three persons snatched it from him.

15. While scuffle was going on other members of raiding party came there. According to informant, there were in all 15 to 16 persons, who had attacked. One amongst those was caught and others fled. The person who was caught, gave his name as Naba Bhosale and on inquiry he disclosed names of persons, who ran i.e. Nandu, Nemjya, Ashok Chavan, Sambhya, Pritam and two brothers of Nemjya. In police station, he was shown the album and seen the photograph. He identified Nemjya to be the person who attacked him with dagger and he also identified three more assailants, namely, Sambhya, Nandya and Ashok. From two albums, he identified in all five persons. He identified accused Nemjya.

While under cross, informant - Police Officer admitted that, he cannot give the name of rickshaw driver, whose rickshaw was hired. He answered that, at the time of incident, there were

nine cartridges in his service pistol. In cross examination, he answered that, on the day of incident, no bullet was fired by him. He answered that, the members of raiding party had concealed themselves in the premises of factory, which was half kilometer away from the scene of occurrence. Rest is all denial.

16. Admittedly, except testimony of PW1 PSI Muley, there is no independent witness regarding actual events taking place at the spot. So called rickshaw driver, whose rickshaw was used for traveling, has not supported the prosecution. Though Investigating Officer (PW7 P.I. Ambildhage) is examined, he has reached after the incident was over. Therefore, virtually there is no corroboration to the testimony of PW1 PSI Muley.

17. It is noticed that, in spite of PW1 PSI Muley claiming raiding party to be following them since beginning, why the raiding party kept themselves away half kilometer from informant, is a mystery. The very purpose of raid has been frustrated. PW1 PSI Muley states that, the jeep was parked in the factory premises. Said spot, according to informant, is half kilometer away from the place of occurrence. Alleged two police personnel, who were said to be on motorcycle and in a police jeep, also did not follow PW1 PSI Muley towards the field of jawar. Therefore, the aspect of raiding party following informant itself has comes under shadow of doubt.

18. According to informant, initially there were three persons and a lady sitting on the *bandh*. In the FIR, he has not given description, age and physical features of any of them. Subsequently, he claims to have identified those persons on being confronted with photo album. It is settled legal position that, photo identification and test identification parade are only aides into investigation and they are not substantive piece of evidence. Thus, here, there is no T.I. parade got conducted for the best reasons known to the Investigating Officer. Information of fleeing accused was upon disclosure of Naba Bhsoale, who was said to be apprehended at the spot and on the basis of said information, remaining accused are shown to be arrested. Further PW1 PSI Muley claims that there were almost 15 to 16 persons, but only chosen few are arrested and made to face trial.

19. In substantive evidence, PW1 PSI Muley has stated that, three persons whom he met near the *bandh* and interacted, tried to snatch his bag as well as service pistol. Allegation of snatching pistol is attributed to three persons. Recovery of pistol is shown to be at the instance of Nemjya. As stated above, PW1 PSI Muley has not noted or described even the physical features and characteristic of the persons, who actually snatched his service pistol. Very Investigating Officer claims to have heard from

informant that a person wearing white cap had snatched service pistol, but such version is not coming from very informant. Therefore, even recovery under section 27 of the Indian Evidence Act has also come under shadow of doubt.

20. In examination-in-chief, informant has stated that, when there was attempt to hit him with a dagger by a person wearing dhoti, that time, he used his service revolver and fired it. He categorically stated that, it was misfired. But in cross examination, in paragraph no.6, he has denied using revolver at the time of incident. Therefore, he is contradicting himself.

21. Further, after so called seizure of pistol under section 27 of Evidence Act, weapon is taken to the superior police officer, seizure is opened before him to show it to him and then again it was re-sealed by drawing panchanama. This also further creates doubts about chain of custody or link evidence.

22. As stated above, in this case no T.I. parade arranged. PW1 PSI Muley claims that, he identified accused on the basis of photograph in the album. That the same album is not before the court. It is fairly settled position that, test identification parade itself is not substantive piece of evidence. It become substantive

evidence, when there is identification of accused in the court. It is pertinent to note that, while informant PW1 PSI Muley was examined in the witness box, he is not confronted with arrested accused in the court for confirmation. Admittedly, accused are arrested on the information passed by arrested accused Naba Bhosale. But, no person by such name is arraigned therein and accused here.

23. To sum up, there is no corroboration to the testimony of PW1 PSI Muley. Material witness rickshaw driver has not supported prosecution. In spite of raiding party claiming to have followed PW1 PSI Muley, surprisingly, they have kept themselves away at the distance of half kilometer. According to informant, 15 to 16 persons had concealed themselves and mounted attack on him and even took away his service pistol. Informant has not given description of any of the person in spite of alleged incident taking place in the bright day light. No T.I. parade is conducted. Identification of accused is on the basis of information given by sole apprehended accused. Informant has not identified accused in the court. Therefore, there are several serious lapses in the investigation. Story so put-forth by prosecution, is not supported by adducing cogent, reliable and legally acceptable evidence.

24. Perused the judgment, learned trial court has in paragraph no.11 of the judgment observed that, evidence of complainant PW1 PSI Muley, which is the only piece of evidence, does not make it clear as to which of the 15 to 16 persons had snatched the hand-bag, which was said to be entrusted to one Ajij and said person is not examined. Learned trial court has also admitted that, no amount was recovered from the accused, who was facing trial. Mere identification by PW1 PSI Muley of photograph immediately prompted learned trial Judge to hold that there is no reason to doubt such identification. On one hand, learned trial Judge has admitted that there is variance as regards to evidence of recovery panchanama is concerned, but by assigning a reason that, evidence is recorded after three years, prosecution version is accepted as regards to commission of offence under section 395 of IPC is concerned and there is acquittal from offence of 307 and 397 of IPC i.e. on same set of evidence. Therefore, such judgment cannot be allowed to be sustained. Hence, I proceed to pass the following order :-

ORDER

- I) Criminal Appeal stands allowed.
- II) The conviction awarded to appellant - Nemjya S/o. Englisha Kale in Sessions Case No. 482 of 2002 by the learned 1st Ad-hoc Additional Sessions Judge, Aurangabad on 05.02.2004 for the offence punishable

under sections 395 and 353 of Indian Penal Code, stands quashed and set aside.

- III) The appellant stands acquitted of the offence punishable under sections 395 and 353 of Indian Penal Code.
- IV) The bail bonds of the appellant stands cancelled.
- V) The fine amount deposited, if any, be refunded to the appellant 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, J.)