



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 713 OF 2004

Arun Nafya Bhosale,
Age : 34 years,
R/o. Pimpalgaon Pisa, Shiwar,
Tq. Shrigonda,
Dist. Ahmednagar.

... Appellant

Versus

The State of Maharashtra

... Respondent

...
Mr. S. T. Shelke, Advocate for Appellant.
Mrs. Ashlesha B. Deshmukh, APP for Respondent – State.
...

CORAM : ABHAY S. WAGHWASE, J.

RESERVED ON : 03 SEPTEMBER 2024

PRONOUNCED ON : 09 SEPTEMBER 2024

JUDGMENT :

1. In this appeal, there is challenge to the judgment and order of conviction passed by 5th Ad-hoc Additional Sessions Judge, Ahmednagar dated 25.10.2004 in Sessions Case No.101 of 1993 + 33 of 1997 recording guilt of appellant for offence punishable under section 392 of Indian Penal Code (IPC).

PROSECUTION STORY IN BRIEF IS AS UNDER

2. Informant Devram resided with his wife and children at Vadzire. After labouring for the day and on taking dinner on the

night of 29.09.1992 entire family went to sleep in distinct rooms including married daughter PW2 Shobha, who had come for delivery. Around 1:30 a.m., informant woke up on hearing big noise and went towards the room of his wife and pregnant daughter. There he saw his wife to have suffered bleeding injury and his pregnant daughter informed him that two thieves snatched nose ring of his mother Jijabai and had also forcibly taken away cash. After taking injured wife to hospital, he approached police on the next day and lodged report, on the basis of which, crime bearing No.139 of 1992 was registered for commission of offence under section 394 of IPC.

PW5 P.S.I. Chavan, who was entrusted with investigation, after gathering sufficient evidence, charge-sheeted both accused and they both were made to face trial before Ad-hoc Additional Sessions Judge, Ahmednagar.

3. At trial, prosecution adduced evidence of PW1 informant Devram; his daughter PW2 Shobha; his wife PW3 Dropadabai; PW4 Pralhad Kachare, the then Naib Tahsildar, who conducted T.I. parade and PW5 P.S.I. Chavan, Investigating Officer. Defence denied to lead any evidence.

4. After appreciating the oral and documentary evidence, learned trial Judge reached to a finding that present appellant i.e. accused no.1 Arun alone is held guilty for commission of offence under section 392 of IPC and thereby acquitted accused no.2 Khavadya.

This judgment is now taken exception to by filing instant appeal.

SUBMISSIONS

On behalf of Appellant :-

5. Pleading innocence and alleging false implication, learned counsel for applicant pointed out that, in fact prosecution has miserably failed to bring home the charges by leading cogent and reliable evidence. He claims that, alleged incident has taken place in the night. It is doubtful whether there was a source of light to identify so called thieves, who forced entry in the house of the informant. Taking this court through the evidence of informant PW1 Devram, it is pointed out that, witness has stated that, he has seen four persons from behind when such persons were running. Therefore, he doubts about the identification. He pointed out that, no details, physical characteristics or features were reported at the time of incident. He pointed out that, the lady whose ornaments were snatched could not identify the thieves in T.I. parade. He pointed out that, even T.I. parade is conducted after almost three

months of alleged occurrence and police station as well as Tahsil office where T.I. parade was conducted being housed in the same premises, possibility of confronting the accused to the witnesses prior to T.I. parade cannot be ruled out.

6. He next pointed out that, initially there was charge under section 394 of IPC as story reported was of more number of thieves, but subsequently guilt is recorded for commission of offence under section 392 of IPC. He strenuously submitted that, out of the two accused, on same set of evidence, accused no.2 has been acquitted, but accused no.1 alone has been convicted.

7. It is further pointed out that, recovery is shown upon disclosure from a temporary shed made of fodder and there is no evidence regarding its ownership or possession to be of appellant. Therefore, he questions such evidence of recovery also as unworthy of credence. Lastly, he submitted that learned trial court has not correctly appreciated the available evidence and has also not considered the settled law and has erred in convicting appellant and hence he seeks indulgence of this court to set aside the impugned judgment.

On behalf of Prosecution : -

8. Supporting the judgment, learned APP would submit that, incident is promptly reported. That, witnesses have identified appellant in T.I. parade. That, there is recovery at the instance of appellant and therefore, according to learned APP, there is no infirmity in the findings and judgments rendered by trial Judge.

EVIDENCE ON RECORD

9. PW1 Devram stated that, 12 years back, after working for the entire day and after taking meals, he and his family went to sleep. He slept in the front room and his wife and daughter Shobha were sleeping in the middle room along with Nandabai and another daughter. Around 1:00 to 1:30 a.m., in the night, he heard big noise in the house. He tried to open the door of the house, but noticed that it was chained from the outside and so he rushed to the middle room and saw his wife unconscious. She had bleeding injury. His daughter told that, nearly four persons have entered the room from the back door. She further told that, her mother was trying to switch on the light, at that time, thieves hit something on her face. Thieves took away her *Mangalsutra* and nose-ring of her mother and cash of Rs.25/-. Witness claims that he saw four persons running from the spot in electric light and after taking wife to the doctor, he approached police and lodged report (Exh.16).

After three months, he himself, his daughter and wife were called at Parner police station and they were taken to Tahsil office and there 20 to 25 persons were shown and he was asked to identify and he identified 3 to 4 persons including present appellant.

Relevant cross of above witness is as under :-

Soon after he came out of the house from western door, he saw accused in the light. He had seen thieves from the distance of 20 feet. He saw accused from behind and some of the accused were wearing black clothes. He denied that, accused were shown to him prior to T.I. parade. Initially he stated that he does not know whether Tahsil office, police station are in the same premises, but again stated that they are situated in the same building. He answered that, some persons made to stand in the line were tall and some were short. He is unable to state accused standing where and on what serial number.

PW2 Shobha, deposed that, she had come for delivery. After her parents returned from their work, they went to sleep. Father slept in the front room. She herself, her sister and mother were sleeping in the middle room. Around 1:00 to 1:30 a.m., somebody touched her neck and so she got up. One thief was standing near her head and another was standing near her legs.

She saw two thieves. They had come from back door. The thieves snatched *Mangalsutra* from her neck and also nose-ring of her mother. They also took away her suitcase. Thieves hit her mother near the forehead causing injury. Therefore, she gave call to her father. Her father took her mother to hospital. After few months, they were called for T.I. parade.

In cross she answered that, police did not record her statement, but again stated that, inquiry was made with her. After two days, police came to her. Omission is about giving call to her mother and father. She answered that, when thieves entered tube-light was off. She denied that, thieves have covered their faces. She answered that in T.I. parade, she identified accused because they were *Paradhi*. She further admitted that some suspects, who were arrested, were shown to them in identification parade.

PW3 Dropadabai at Exh.21 testified that, in the late night, thieves entered her house, they beat her husband and her son. Ornaments of her son and her own *Mangalsutra* was taken away by thieves, who two in number. She deposed that, as there was nobody to go to police station, they did not go to police station. In examination-in-chief she herself stated that, she was unable to identify the thieves.

PW4 Pralhad Kachare, the then Tahsildar and Taluka Magistrate, who conducted T.I. parade on 12.01.1993 and drew panchanama at Exh.24.

In relevant cross he admitted that, Tahsil Office, Police Station and custody room are situated in the same premises and accused were taken out from the police custody for identification.

PW5 P.S.I. Chavan is the Investigating Officer, who carried out investigation and charge-sheeted accused.

10. It transpires that initially FIR was registered under section 394 of IPC, but charge-sheet was for offence under sections 395 of IPC and finally conviction is recorded for section 392 of IPC. Further, out of two accused, who faced trial, only one is convicted i.e. present appellant.

11. On analyzing and appreciating the above discussed substantive evidence, it is emerging that, alleged incident has taken place around 1:30 a.m. in the house of informant. As pointed out, it has come in his cross examination that he saw four persons running i.e. from their back side. Therefore, question arises whether he had opportunity to see their faces. Secondly, there is no material to show that, at that time, outside the house there was

source of light. Apparently, as pointed out physical characteristics or features of the persons are not reported. Out of four, only two are apprehended and out of two only one is held guilty. Admittedly, informant has no occasion to see the thieves because whatever he heard was from his daughter Shobha. Therefore, even if there is identification through him, it is rendered doubtful for above reasons.

12. Second important witness is daughter of informant i.e. PW2 Shobha, however, she claims that she saw only two persons i.e. one who was standing near her legs and other one who snatched her ornaments. Question arises is then, who were the other two as informant has seen four persons running from the house. She in her cross examination has admitted that, when thieves entered their tube-light was switched off. Even she has deposed that, while her mother was about to switch on light she was hit. Therefore, apparently there is no source of light or occasion to identify the thieves. Her cross examination also shows that, she merely identified the accused because they were *Pardhi*. PW3 Dropadabai mother gave contrary version to that of her husband PW1 Devram and daughter PW2 Shobha because she stated that her son and husband were beaten. Husband has not uttered anything about he being beaten or his son being beaten.

She also stated that, she was unable to identify any accused in T.I. parade. Admittedly, T.I. parade is conducted after three months of the occurrence. Further, Tahsildar, who conducted T.I. parade has admitted that, police station, Tahsil office and custody room are located in the same building and as such there is every possibility accused being confronted to witnesses prior to T.I. parade. Therefore, exercise of T.I. parade also loses significant as it comes under shadow of doubt.

13. Further as submitted, on same set of evidence, out of two accused, accused no.2 is acquitted. Why present appellant alone is held guilty, is not supported by sound reasons. Above crucial aspects like belated T.I. parade, inconsistency in testimonies of PW1 Devram, PW2 Shobha and PW3 Dropadabai and aspect of non availability of sufficient light for identification, are not considered by learned trial Judge.

14. Hence, there is apparently improper appreciation of evidence. Necessary legal requirements for attracting the charges are not considered by the learned trial Judge and learned trial Court having erred in holding accused appellant guilty, appeal deserves to be allowed by quashing and setting aside the judgment and order. Hence, I proceed to pass the following order :-

ORDER

- I. The criminal appeal is allowed.
- II. The conviction awarded to the appellant - Arun Nafya Bhosale by 5th Ad-hoc Additional Sessions Judge, Ahmednagar in Sessions Case Nos.101 of 1993 + 33 of 1997 for the offence punishable under section 392 of Indian Penal Code on 25.10.2004 stands quashed and set aside.
- III. The appellant stands acquitted of the offence punishable under section 392 of Indian Penal Code.
- IV. The bail bonds of the appellant stands cancelled.
- V. 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 regarding disposal of *muddemal*.

(ABHAY S. WAGHWASE, J.)