

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

CRIMINAL APPEAL NO. 1095 OF 2022

Dharam alias Taditapdya Pitambar

Shinde @ Kale

..Appellant

Versus

The State of Maharashtra

..Respondent

Mr. Vikas Kolekar for Appellant.

Mr. Arfan Sait, APP for State/Respondent.

CORAM : SARANG V. KOTWAL, J.

DATE : 26 JUNE 2024

ORAL JUDGMENT :

1. The Appellant has challenged the Judgment and order dated 13.10.2020 passed by Additional Sessions Judge-1, Islampur, in Sessions Case No.13 of 2019 along with Sessions Case No.95 of 2019. The Appellant was the accused in Sessions Case No.13 of 2019. His co-accused Jin alias Andhlya Pakshya Kale was the accused in Sessions Case No.95 of 2019. The learned Trial Judge convicted the Appellant for commission of the offences punishable under sections 395 and 397 of the I.P.C. and sentenced him to suffer R.I. for seven years and to pay a fine of Rs.500/- and in

default to suffer S.I. for two months. The sentences were directed to run concurrently. He was given set off for the period he has spent in jail as under trial prisoner. His co-accused Andhlya Kale was acquitted from those charges.

2. The prosecution case is that, in the night of 18.09.2018, 5 to 6 accused including the present Appellant committed dacoity in the house of Sunanda Shirsat and PW-4 Hariba Mahind. They had used deadly weapons as rods and scythe. They took away gold ornaments and mobile phones. The Appellant was arrested on 26.09.2018. He was found with some ornaments and a mobile phone. The Test Identification parade (hereinafter referred to as 'T.I.P.') was held in which both the victims identified the Appellant. The investigation was carried out. The charge-sheet was filed and the case was tried before the learned Trial Judge, as mentioned earlier.

3. During trial, the prosecution examined eight witnesses including the two victims, the Medical Officer, the panchas, the Tahsildar who conducted T.I.P. and the investigating officers. The

defence of the Appellant was of total denial. At the conclusion of the trial, the Appellant was convicted and sentenced as mentioned earlier.

4. The important witnesses in this case are the two victims. The first was PW-2 Sunanda Shirsat. She has stated that, she was residing at village Shirshi, Taluka Shirala, District Sangli. Her married daughter was residing at Mumbai. The daughter had come to her house for Ganpati festival. She had kept her ornaments with PW-2 and had gone back to Mumbai. On 18.09.2018, PW-2's family was sleeping in the house after dinner. She and her husband were sleeping in separate rooms. At about 2:30a.m., she woke up as some person was sitting on her. There was one more person wearing black jerkin. He was having a scythe. He took Mangalsutra from her neck. He also took gold earrings from her ear and *painjan* from her legs. There were two persons standing on her both sides with iron rods. All the three persons started beating her. Those three persons then took away the gold which her daughter had kept with her. On some pretext, PW-2 went out of the house and raised shouts. Then those three persons ran away. The

neighbours took her to the hospital. She came to know that robbery had taken place in the house of one Hariba Mahind. Thereafter she went to the police station and lodged her F.I.R. It is produced on record at Exhibit-13. She added that, even her mobile phone was stolen. She further deposed that, after some days she identified one of the persons in the T.I.P. as the person who had come to her house.

In the cross-examination, she admitted that since it was night time, she had not seen the faces of the assailants. She could not tell the exact number of the assailants who had come to her house. When she went to the Tahsildar's office for T.I.P., 7 persons were standing in a room. Her F.I.R. describes the gold ornaments taken away by the offenders. She had also mentioned two mobile phones with their SIM card numbers. The F.I.R. was lodged at Shirala police station, Sangli vide the C.R.No.126 of 2018 U/s.395 and 397 of the I.P.C.

5. PW-4 Hariba Mahind was another victim in whose house also the offence was committed. He has stated that on 18.09.2018,

at about 9:30p.m., he went to sleep. His wife, mother and sister were sleeping in the house. At about 1:00 to 1:30a.m. five to six persons entered his house. Two of them showed scythe to his mother and sister. They demanded gold ornaments. They took away earrings of his mother and *Mangalsutra* from his sister. They entered this witness's room. They took away his wife's *mangalsutra* and mobile phone. Then they went away. At around 4:00a.m. this witness went in the village and told about the incident to others. He came to know that there was similar offence committed in the house of PW-2 Sunanda Shirsat. After a few days, he was called at Tahsildar's office at Shirala. He identified the appellant in the T.I.P. He clarified that the Appellant had not covered his face by scarf at the time of the incident and, therefore, he could identify him. The other offenders had covered their faces with scarf. He deposed that, it was Ganpati festival and there was a light around the idol.

In the cross-examination, it was pointed out to him that, he had not stated before the police that the appellant had not covered his face with scarf.

6. PW-5 Krishna Naik was Naib Tahsildar who had conducted the T.I.P. The memo of the T.I.P. is produced on record at Exhibit-27. It shows precautions which he had taken while conducting the T.I.P. He had ensured that the witnesses had not seen the accused. It was conducted in presence of two panchas. It shows that, both these witnesses had identified the Appellant.

7. PW-6 Dr. Vilas Rawal had examined PW-2 on 19.09.2018. She had suffered abrasions on her neck, elbow and right knee, and there was tenderness over her back.

8. PW-1 Arvind Mahind was pancha for spot panchanama at both the houses where this offence was committed.

9. PW-3 Chetan Patil was an important witness. He was a pancha when the appellant was arrested. That panchanama is produced at Exhibit-17. The Appellant was arrested and this panchanama was carried out on 26.09.2018. He identified the appellant on the Video conferencing during court proceedings. On 26.09.2018 he was called at Shirala police station. P.S.I. Patil told him that they wanted to apprehend one person from Talicha

Kopra. As per the information, one person came there. The police apprehended him. He was the appellant. From his custody gold ornament, two mangalsutra and the mobile phones were found. The panchanama is produced on record at Exhibit-17. Besides the ornaments like two mangalsutra and gold chain, two mobile phones were mentioned. Out of them, one mobile phone was having the same SIM card number which was mentioned by PW-2 in her F.I.R. Therefore, this particular panchanama was important in the context of the present case.

10. PW-8 API Vishal Patil was the investigating officer. He had carried out the spot panchamas. He had arranged for conducting the T.I.P. and he had filed the charge-sheet.

This, in short, is the evidence of the prosecution.

11. Learned counsel for the applicant submitted that the identification of the Appellant is not properly proved by the prosecution. PW-2 Sunanda had admitted that, she could not see the faces of the assailants. Therefore, her identification in the T.I.P. is vitiated. She had not even identified the Appellant in the Court

during trial. He submitted that the same reason would apply to PW-4 Hariba Mahind; as it was night time and he could not have seen the assailants. He submitted that the panchanama of arrest of the Appellant and recovery from him are doubtful and, therefore, benefit be given to him.

12. Learned APP opposed these submissions. According to him, identification by PW-4 is beyond reasonable doubt. The T.I.P. was conducted after taking all the necessary precautions. The mobile phone mentioned in the F.I.R. was found with the Appellant when he was arrested on 26.09.2018. Considering all these factors, the learned Trial Judge has rightly convicted the Appellant.

13. I have considered these submissions. While it is true that PW-2's identification of the Appellant is doubtful firstly because she had not identified him in the Court and secondly, she admitted that she had not seen the faces of the assailants. Therefore, that part of the evidence can be left out of consideration against the Appellant. However, the evidence of PW-4 and PW-5 in respect of identification by PW-4 is sufficiently established by the

prosecution. PW-4 has stated that, there was light in the house where Ganpati idol was kept and secondly, he had clearly stated that the Appellant had not covered his face with a scarf. The said witness identified the Appellant in the T.I.P. and also in the Court at the time of giving deposition. His evidence is not shattered in the cross-examination. He is supported by the evidence of PW-5 Krishna Naik, Tahsildar who had conducted the T.I.P. He had taken precautions while conducting the T.I.P. According to him, PW-2, as well as, PW-4 had identified the Appellant during T.I.P. This is a serious circumstance against the Appellant. The other important circumstance against the Appellant is that the prosecution has established that those incidents had taken place. PW-2 Sunanda, though, could not identify that Appellant, her evidence about the incident was not false. The incident of dacoity had taken place in both the houses. PW-2's grievance is supported by the evidence of PW-6 Dr. Vilas Rawal. He has stated about the injuries suffered by her. Therefore, the prosecution has established that, in that night, the offence was committed in the house of PW-2, as well as, PW-4. Apart from that, another important circumstance against the

present appellant is recovery of the ornaments and the mobile phone. In particular, the same phone having the same SIM card numbers as was mentioned in the F.I.R. The evidence of PW-3 Chetan Patil and PW-8 API Vishal Patil in that behalf is consistent. There is no explanation offered by the Appellant, as far as, the recovery of mobile phone and the ornaments are concerned.

14. In this view of the matter, the prosecution has sufficiently proved its case beyond reasonable doubt against the present appellant. The learned Trial Judge has properly appreciated the evidence on record. In this view of the matter, I do not find any infirmity in the order and Judgment passed by the learned Trial Judge.

15. The Appeal, is therefore, dismissed.

(SARANG V. KOTWAL, J.)