



Diksha Rane

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

CRIMINAL APPEAL NO.562/1998

NAZIM ABDUL REHMAN SHAIKH	..APPELLANT
VS.	
THE STATE OF MAHARASHTRA	..RESPONDENT

**WITH
CRIMINAL APPLICATION NO.1359/1999
IN
CRIMINAL APPEAL NO.562/1998**

ANSARI ABDUL KADIR SALIMULLAH	..APPLICANT
VS.	
NAZIM ABDUL REHMAN SHAIKH	..RESPONDENT

Adv. Veerdhawal Deshmukh appointed for the appellant.
Mr. S. H. Yadav, APP for the State.

CORAM : M. S. KARNIK, J.

DATE : JANUARY 11, 2024.

ORAL JUDGMENT :

1. Heard learned counsel for the appellant and learned APP for the respondent-State.
2. This appeal challenges the judgment and order of conviction dated 19/10/1996 of learned Additional Sessions Judge, Greater Mumbai, against the present appellant who is the accused no.1. The accused who are four in number were charged by the trial Court for the offence punishable under

Section 452 read with 34, under Section 394 read with Section 34, under Section 397 of the Indian Penal Code (hereafter 'IPC' for short) and Section 3 read with Section 25 of the Indian Arms Act. The trial Court convicted the appellant and other accused for the offence punishable under Section 452 read with 34 of the IPC and sentenced them to suffer rigorous imprisonment for five years and to pay a fine of Rs.1000/- by each of them, in default to suffer further rigorous imprisonment for six months. The appellant was further convicted for the offence charged against him punishable under Section 25 (1-B) sub-section (a) read with Section 3 of the Arms Act and sentenced to suffer rigorous imprisonment for two years and to pay a fine of Rs.2000/-, in default to suffer rigorous imprisonment for nine months. The appellant was acquitted for the offence charged against him and other accused punishable under Section 394 read with 34 of the IPC as well as Section 397 of the IPC.

3. The prosecution case in brief is as follows:-

(I) PW-8 Sunil Chandgude, Station House Officer of Goregaon Police Station received a telephone call from a member of the public at around 8.45 p.m. informing him

that a robbery is going on at Jawahar Nagar, Goregaon (West) in the house of PW-1 Deepak Chavan, who is the complainant. The police party reached the spot when they saw two robbers (including the appellant) were detained by PW-1 and his family members with the assistance of PW-5, a resident of the building and remaining two robbers succeeded in running away from the spot. At that time, the complaint (Exhibit 10) lodged by PW-1 Deepak Chavan was recorded.

4. PW-1 Deepak Chavan in his evidence stated that the incident took place on 11/5/1992, at about 10.00 or 10.30 p.m. in his flat. In the said flat, his wife, two children, his younger brother by name Ajay Chauhan, his wife and his two daughters and his nephew Rishiraj Chauhan were residing. PW-1 had come home at around 8.30 p.m. At the relevant time, PW-1, his younger brother Ajay and PW-2 Rishiraj were present. The other family members had gone to another flat in the same building. At 9.40 p.m. to 10.00 p.m., two persons entered the main door of PW-1's flat and came towards the hall. One person was armed with a revolver and the other one was holding a chopper. The

appellant (accused no.1) who was holding revolver gave a blow on backside of the PW-1's head and kicked him on his abdomen. PW-1 was pushed as a result of which he fell down. Thereafter, two more persons entered the flat. One of them was holding a knife. These two persons, who later entered went in the bedroom and closed the door for searching the belongings. When the accused were in the flat, the door bell rang. PW-1's elder brother PW-3 Arvind Chauhan entered the flat after the main door was opened by the appellant. PW-3 Arvind hit the appellant as a result of which the revolver fell down. The appellant ran out of the flat. On hearing the shouts, the appellant was caught by the residents of the building. The person holding the chopper, who was inside the flat, was disarmed by the PW-1 and his brothers. In the meantime, two accused who were in the bedroom came out. They snatched a gold chain from the person of the PW-2 Rishiraj and fled away after creating a ruckus. PW-5 tried to catch hold the one amongst the two accused but the accused succeeded in fleeing. PW-1 on entering the bedroom realized that cash of around Rs.15,000/- was stolen. On arrival of the police, they took

charge of two persons who were caught at the spot.

- 5.** The prosecution examined as many as nine witnesses. PW-1- Deepak Chavan is the complainant and eye witness to the incident. PW-2 Rishiraj Chouhan is the nephew of PW-1 who was present in the flat at the time of the incident. PW-3 is Arvind Chouhan, brother of the PW-1 who hit the appellant with his briefcase as a result of which the appellant tried to run away. PW-4 is Dilip Pandit, a panch witness in respect of seizure of the weapons i.e. a revolver and a chopper. PW-5 Nadeem Naqvi is a resident of the building, who tried to nab one of the accused who made good his escape with another accused and in the process sustained injury to his hand. PW-6 Tilakraj Kapoor is a panch witness of the panchanama regarding recovery of cash and knife from the co-accused. PW-7 Ramkrishna Samant is the Special Executive Magistrate who conducted the test identification parade. PW-8 Sunil Chandgule, Station House Officer, received information about the incident and recorded the FIR. PW-9 Ajit Wagh is the investigating officer.
- 6.** The trial Court for the reasons recorded in the judgment and order convicted the appellant for the offences

aforestated. With the assistance of learned counsel for the appellant as well as learned APP I have gone through the paper-book, the materials on record and perused the findings recorded by the trial Court.

7. Before I proceed to consider the evidence on record, it would be profitable to note the observations of the Supreme Court in **Mahendra Singh and others vs. State of Madhya Pradesh**¹. Paragraphs 12 and 13 thereof read thus:-

“12. It will be apposite to refer to the following observations of this Court in its celebrated judgment in *Vadivelu Thevar*: (AIR p. 619, paras 11-12)

“11.Hence, in our opinion, it is a sound and well-established rule of law that the court is concerned with the quality and not with the quantity of the evidence necessary for proving or disproving a fact. Generally speaking, oral testimony in this context may be classified into three categories, namely:

(1) Wholly reliable.

(2) Wholly unreliable.

(3) Neither wholly reliable nor wholly unreliable.

12. In the first category of proof, the court should have no difficulty in coming to its conclusion either way - it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subornation. In the second category, the court equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial."

¹ (2022) 7 SCC 157

13. It could thus be seen that this Court has found that witnesses are of three types viz. (a) wholly reliable; (b) wholly unreliable; and (c) neither wholly reliable nor wholly unreliable. When the witness is "wholly reliable", the court should not have any difficulty inasmuch as conviction or acquittal could be based on the testimony of such single witness. Equally, if the court finds that the witness is "wholly unreliable", there would be no difficulty inasmuch as neither conviction nor acquittal can be based on the testimony of such witness. It is only in the third category of witnesses that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony. direct or circumstantial."

8. The Supreme Court then in the case of **Kali Ram vs. State of Himachal Pradesh**² has observed that the onus is upon the prosecution to prove the different ingredients of the offence and unless it discharges that onus, the prosecution cannot succeed. Their Lordships in paragraph 25 observed that the golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. Further, Their Lordships in paragraph 26 has observed that it has to be re-emphasised that if a reasonable doubt arises regarding the guilt of the accused, the benefit of that cannot be withheld from the accused. The observations in paragraph 28 assume

2 (1973) 2 SCC 808

significance which reads thus:-

“28. The fact that there has to be clear evidence of the guilt of the accused and that in the absence of that it is not possible to record a finding of his guilt was stressed by this Court in the case of *Shivaji Sahabrao* as is clear from the following observations:

“Certainly it is a primary principle that the accused must be and not merely may be guilty before a court convict and the mental distinction between “may be” and “must be” is long and divides vague conjectures from sure conclusions”.”

9. Keeping these principles in mind let me now evaluate the evidence in the present case. PW-1 in his evidence stated that he came home at 8.30 p.m. He further stated that at the relevant time, only PW-1, his younger brother Ajay and nephew Rishiraj were present. It is then stated that the appellant armed with a revolver and another accused armed with a chopper entered the flat and two more persons also entered the flat. PW-1 was hit on his head by the appellant with blunt side of the revolver. These four persons are stated to have entered between 9.40 p.m. to 10.00 p.m. In the cross-examination, PW-1 has stated that on the date of the incident, he came home at around 11.45 p.m. PW-1 stated that it is incorrect to say that on that day, he reached home at 9.00 p.m. In this context it would be

significant to notice the evidence of PW-1's nephew Rishiraj. PW-2 Rishiraj in his evidence stated that at the relevant time, his aunt, her children and another uncle by name Ajay and PW-1 were in the house. This version of PW-2 is at variance with the version of PW-1 who says that only PW-1, PW-2 and Ajay were present at the time of incident. PW-1 has categorically stated in evidence that the family members had gone to another flat.

10. So far as PW-3 is concerned, he says that he came home at 10.30 p.m. PW-3 mentions that due to him attacking the appellant with the briefcase, the appellant ran out of the flat. 4 to 5 persons caught hold of the appellant near the gate of the compound of the building. PW-3 in his evidence stated that two more persons fled, one armed with chopper and another one with knife. Thus, PW-3 makes a reference to only three accused whereas PW-1 and PW-2 refer to four accused. PW-3 has categorically stated that the person armed with a chopper was caught by younger brother in the flat itself. The person who had a knife ran away. PW-1 and PW-2 say that apart from the appellant and the person who had a chopper, two accused who were in

the bedroom fled away. There is, thus, variance in the version of PW-1, PW-2 with that of PW-3 as to the number of the accused present in the flat at the time of incident when all of them were present on the spot and claim to have witnessed the happenings.

11. It is further pertinent to mention that PW-1 has stated in his deposition that PW-1 was taken to the police station and the FIR (Exhibit 10) was thereafter recorded by the police whereas, it is in the evidence of PW-8 Station House Officer he say that he recorded the complaint lodged by PW-1 Deepak Chavan was recorded and read over to the complainant at the spot. It is, thus, seen that even as regards place of lodging of the FIR there is material variance in the testimony of PW-1 and PW-8.

12. It is significant to note that though PW-1 says that he was assaulted by the appellant on backside of his head with the blunt side of the revolver, there is no medical evidence on record to corroborate such assault. Another circumstance which needs to be noticed is PW-8 has stated in his evidence that when he reached the spot, he noticed that two robbers were detained by the family members of PW-1

with the assistance of the resident of the building i.e. PW-5. However, PW-3 in his evidence has stated that the appellant was caught near the gate of the compound of the building. The accused who was armed with a chopper was caught by P.W.1's younger brother Ajay in the flat itself. PW-5 Nadeem who is a resident of the same building says that he tried to catch hold one of the accused who tried to flee when he sustained cut on his thumb. PW-5 says he rushed towards the said flat and saw Ajay and PW-3 holding the man with the chopper. There is, thus, variance in the version of PW-1 and PW-5.

13. PW-5 states that due to the cut injury he went to the doctor and treated the injury. He states that after coming back he saw everything had settled down. PW-5 further stated that by that time police had arrived and the enquiry was going on. In this context if the evidence of PW-8 is perused, in his evidence he has stated that two robbers were detained by PW-1 and his family members with the assistance of PW-5 and remaining two robbers succeeded in running away from the spot. There is, thus, variance in the evidence of PW-5 and PW-8 as well. I am not inclined to

place any reliance on the evidence of PW-5 as his deposition does not inspire confidence. It is important to note that though the prosecution case is that the residents of the building had caught hold of the appellant, no independent witnesses have been examined to support this stand. It is also pertinent to note that PW-1's brother Ajay who was present at the time of the incident has not been examined. Though the examination of PW-1's brother Ajay by itself cannot be fatal to the prosecution, however, in the facts and circumstances of the present case, the evidence of the eye witnesses does not inspire confidence to hold the appellant guilty of the offence he is convicted. The statements of the independent witnesses are not recorded.

14. I have also perused the reasoning of the trial Court. The trial Court while rendering the finding of guilt observed that there is direct evidence of PW-1, PW-2, PW-3 and PW-5 against all the accused. The trial Court observed that the evidence of PW-1, PW-2, PW-3 and PW-5 corroborates each other on the fact that the accused persons were present in the flat. The trial Court though has noted the discrepancies in the evidence of PW-1, PW-2, PW-3 and PW-5, was of the

opinion that the said discrepancies do not falsify the story of the prosecution about the incident having taken place. According to me, having regard to the discrepancies in the evidence of PW-1, PW-2, PW-3 and PW-5 which is pointed out hereinabove and even as noticed by the trial Court, it is highly unsafe to hold that the prosecution has proved the case against the appellant. The entirety of the discussion in the facts and circumstances of the present case, the nature of the evidence available coupled with the manner of its consideration, leaves me in no manner of doubt that the appellant is entitled to an acquittal on the benefit of doubt. Accordingly, the appellant is ordered to be acquitted. The impugned order of conviction is set aside.

15. The appellant is on bail. His bail bond shall stand cancelled and the fine amount be refunded back to the appellant.

16. The appeal is disposed of. The Criminal Application is also disposed of.

17. I express my gratitude for the able assistance rendered by the advocate- Mr. Veerdhawal Deshmukh who appeared in the matter appointed through legal aid and has

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taken every possible effort to painstakingly argue the appeal on behalf of the appellant.

(M. S. KARNIK, J.)