

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

REVISION APPLICATION NO. 629 OF 2017

Shekhar Rahul Tambe

Age 28 year

Ganga Apartment,

Sangam Nagar,

Old Sanghavi, Flat No. 7,

Pune (Yerwada jail custody)

...Applicant

Vs.

The State of Maharashtra

In the instance of through Deccan

Police Station, Pune.

...Respondents

Mr. Mahesh R. Joshi a/w Mr. Prashant Muley - Advocate for the Applicant

Mr. A. D. Kamkhedkar - APP for the Respondent-State

CORAM : S. M. MODAK, J.

DATE : 05th JANUARY 2024

JUDGMENT :-

1. Heard learned Advocate for the Applicant/Original accused No. 3 and learned APP.

2. The Court of the JMFC, Pune tried two accused persons Accused No. 1- Vishal and Accused No. 3-Shekhar-the present Applicant. There was Accused No. 2- Molvin Pol Kasabe, but he expired during pendency of the trial. The offences were registered under Sections 457, 380 read with Section 34 of the

Indian Penal Code with Deccan Police Station, Pune.

3. After considering the evidence of six witnesses and documentary evidence, both were convicted for those offences as per judgment dated 24/03/2011 by the Court of 32nd JMFC, A.C. Link, Pune. The present Applicant challenged the correctness of the said judgment by way of Criminal Appeal No. 140 of 2011 and Court of the Additional Sessions Judge, Pune dismissed the appeal and confirmed the conviction and the sentence and that is why present revision.

Scope of Revision

4. It is true that scope of the Revision under Section 397 of the Criminal Procedure Code is limited. There is no scope for re-appreciation of the evidence. What is open is to verify:--

- a. whether both the Courts below have drawn proper inferences on the basis of proved circumstances and
- b. that too by applying the principles laid down under Indian Evidence Act.

5. With this view in mind, when I have gone through the evidence and the findings, what I find is both the Courts have not drawn correct inferences on the basis of proved facts and consequently, they have come to wrong conclusion.

6. While deciding this revision, I have not gone into the issue

whether circumstances are proved or not because it falls withing purview of appreciation of evidence. When this exercise was done, I have come to conclusion that there is failure on the part of both the Courts below. Hence the conviction is liable to be set aside.

7. In fact this Court is bestowed with the power of revision by legislature by keeping in mind this exercise only. So to say, there may be an occasion that both the Courts below may draw wrong inferences by overlooking the provisions of the law. I am inclined to allow the revision. I will give reasons for the said decision.

About Theft

8. There is a temple of the lord Dattatraya, near Kamla Nehru Park, Pune. The first informant Nagesh Purushottam Karape acts as Trustee whereas one Dattatray Sapre is poojari. The said Poojari found southern side door of the temple opened and he immediately telephoned to PW No. 1-Nagesh on 26/09/2009 at about 5.30 to 6.00 a.m.. The PW No. 1 visited the temple and he noticed the donation boxes were opened. The locks were broken. There was theft of cash amount of Rs. 60,000/-. It was informed to Deccan Police Station. Police have visited the spot. PW No. 1 has doubted Vishal Hingade accused

No. 1. They have also checked the footages from the CCTV cameras installed in Sanctum Sanctorium. Two persons were noticed. Only one was identified as Accused No. 1-Vishal Balasaheb Hingade. Complaint was lodged.

9. During investigation, the Police arrested three accused persons:- one Vishal Hingade, second Molvin Pol (deceased) and third Shekhar Tambe that is present Applicant. All were charge-sheeted.

About Evidence

10. During trial the prosecution examined in all six witnesses.
They are as follows:-

- a) PW No. 1- Nagesh Purushottam Karpe/ first informant/Trustee
- b) PW No. 2- Yogesh B. Bachal – Panch (spot panchnama).
He has supported the prosecution case.
- c) PW No. 3 – Manohar Keshav Kulkarni- API/Investigating Officer
- d) PW No. 4- Dilip Sakharam Hagvane-panch to the panchnama dated 26/09/2009 about visiting the house of deceased Accused No. 2-Kasabe on first floor of RCC building at village Sangavi. All three accused were found alongwith Nylon bag having cash amount of Rs.

24,780.35/-.

- e) PW No. 5- Pandurank Eknath Dikshit-panch about Memorandum panchnama dated 27/09/2009 about seizure of the Hero Honda from the present Applicant.
- f) PW No. 6- Sanjay Dwarkanath Khale, Panch to the panchnama dated 26/09/2009 about seizure of the cash amounting to Rs. 24,780/- alongwith three accused.

11. It is true that first informant has not deposed about witnessing this Applicant in the CCTV footages on the relevant date. From the above evidence, the prosecution relied upon the following circumstances :-

- a) The CCTV footages, CD was produced but unaccompanied by Certificate under Section 65-B of the Evidence Act. This is not against the present Applicant.
- b) The panchnama was carried out to witness assembly of these three accused in one room in the building at village Sangavi. Seizure of the cash of Rs. 24,780.35/-.
- c) The seizure of the motor cycle from the Accused No. 2 deceased.
- d) Seizure of the motor cycle from the present Applicant.

Evidence against Applicant

12. So against this Applicant, following are the two

circumstances :-

- a) He was present in that room as deposed by PW No. 3- Manohar Keshav Kulkarni-API/Investigating Officer alongwith panch witness-PW No. 4 and PW No. 6.
- b) Seizure of the motor cycle.

13. On this evidence, the trial Magistrate convicted two accused for the offence punishable under Section 380 read with 34 of the Indian Penal Code. The punishment is rigorous imprisonment for two years and fine of Rs. 5000/- each. The learned Magistrate while pronouncing the judgment of the conviction gave following findings:-

Findings by the trial court.

- a) Trial court believed the testimony of PW Nos. 1,2,3 and corroborated by PW Nos. 4 and 6 (para no. 18).
- b) Though PW No.5 panch has not supported, evidence of PW No.5 was believed (para 15).
- c) PW No. 4 identified accused no.1, whereas PW No. 6 identified both the accused (para 17).
- d) PW No.2 proved contents of spot panchnama (para 14).
- e) Trial Court held *"the prosecution has established beyond reasonable doubt that accused dishonestly taken the said amount without the consent of informant and moved it"*.

- f) There is conviction for the offence punishable under Section 380 read with Section 34 but there is no conviction for the offence under Section 457 of Indian Penal Code.

Findings by the Appellate court.

14. Whereas the Appellate Court while doing job of appreciation of evidence has not given any reasons for confirming the findings of the trial Court. The Appellate Court reproduced the facts stated by the witnesses in para no. 10 to para no. 18. Conclusion finds place in para nos. 19 and 20. There is no discussion what will be the effect of proved circumstances and what can be the inferences on the basis of proved facts.

Consideration

15. With the assistance of both sides, I have gone through the observations by the trial Court as well as by the Sessions Court. Now it needs to be seen whether on the basis of the these two circumstances, can we say that the involvement of the Applicant in the incident of the house tress pass and theft is proved reasonable doubt.

About seizure of motorcycle

16. It is not the case of the prosecution that this motor cycle

was acquired from the stolen cash. What is the case is this motor cycle was used for travel purpose for committing an offence. It may be while visiting the temple or leaving the spot. This is corroborative piece of the evidence and not substantial evidence. This will fall under the category of conduct of accused under Section 8 of the Evidence Act. This can be considered only when there is primary evidence showing involvement. Furthermore, the panchas examined are not the panchas to the memorandum panchnama dated 27/9/2009. So there was only evidence of PW No.3-Investigating Officer. But the trial court overlooked this fact and there is no discussion on this aspect.

About seizure and cash and assembly

17. Both the Courts below have overlooked the basic principle of the Evidence Act. It is 'what inferences we have can draw on the basis of proved facts'. We cannot draw more inferences than warranted by law. Even if we presume that the present Applicant was amongst the three accused persons found at room on the relevant date, what we can gather is they have assembled there. Mere assembly cannot be treated as an evidence to prove an offence of theft. It is not that they were found near the spot immediately after the incident. Cash

amount of Rs. 24,780.35/- was found. The first informant has not given description of the currency notes stolen from the donation box. So it is difficult to show the connection of this seized cash with cash stolen from the donation box.

18. It may be true that the Applicant may be required to offer an explanation why he was there and in joint possession of the cash amount. The trial Court has drawn presumption on the basis of Section 114 of the Indian Evidence Act. Illustration (a) mentions :-

“that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possessions”.

The said principle is correct. But before drawing that presumption there has to be connection in between the stolen amount and the seized amount. Unless it is established we cannot draw presumption that the amount seized is nonetheless the amount stolen. The currency notes are not having such special denomination. So conclusion drawn by the trial Court by taking recourse to the provision of Section 114 of the Indian Evidence Act is improper.

19. For the above reasons, I conclude that the trial Court has

not appreciated the evidence on the basis of the settled principles of the Indian Evidence Act. Ultimately, it is job of the Police to investigate and collect materials but these materials must be proved on the basis of the provisions of the Indian Evidence Act. This has not been done. At the same time, when I have read the judgment of the Court of the Sessions, what I find is that the judgment consists of only reproduction of what witnesses have deposed and the conclusion finds place in paras. 19 and 20. The Sessions Court has not discussed in detail, how the involvement of the Applicant is proved beyond reasonable doubt. Even Sessions Court has failed in considering the provision of the Evidence Act properly.

20. There is one more reason for setting aside the conviction. Trial court convicted the Applicant for the offence under Section 380 read with Section 34 of the Indian Penal Code. But there is not observation and conclusion for the proof of an offence under Section 457 of the Indian Penal Code. It deals with house trespass. It is true that there can be theft in the temple only when the accused will enter the temple. But there has to be finding. Trial court as well as the Appellate Court overlooked this fact. So there is serious lacunae in the findings.

21. For the above reasons, both the Courts below have failed

in drawing proper inferences on the basis of proved circumstances. In view of the above, both judgments need to be set aside.

Disposal of Property

22. It is true that the cash amount of Rs. 24,780.35/- was not found in exclusive possession of the present Applicant. At the most, it was found in the joint possession. While delivering the judgment, there is no direction given about final disposal of that cash amount. Probably, interim custody must have been given. There is no direction about final custody of the motor cycle seized from this Applicant and about cash amount. Applicant got interim custody as submitted on instructions. In view of disposal of the appeal, he may continue to possess that motor cycle.

About fine

23. The trial Court imposed the fine of Rs. 15,000/- on the Accused No. 1 and Accused No. 3-the present Applicant. There is a further direction to pay Rs. 30,000/- to the Trust of the temple. It is not clear whether the amount is actually paid to the Trust or not. It is also submitted on the basis of the instructions that accused No. 1 is also no more and he has expired. Once the order of the conviction is set aside, fine

amount has to be returned back to the Applicant. On the basis of the instructions from the Applicant, who is present in the Court, learned Advocate submitted that his client is not interested to refund the fine amount. So, if the amount of the fine is paid to the Trust, let it not be recovered from the Trust.

24. In view of above following order is passed:-

ORDER

- a) Criminal Revision Application is allowed.
- b) The Order of the conviction dated 24/03/2011 passed by the **Court of the JMFC, Pune in RCC No. 4943 of 2009** and confirmed by the Court of the Additional Sessions Judge, Pune in **Criminal Appeal No. 140 of 2011 on 05/10/2017 are set aside.**
- c) The Applicant is **acquitted** for the offence punishable under **Sections 457, 380 read with 34** of the Indian Penal Code.
- d) From the fine amount, if any amount is paid to Trust (as directed by the trial Court) **let it be retained with them** and if it is not paid yet, **now the amount of Rs. 30,000/- be paid to the Trust through their present Trustees on showing documents.**

[S. M. MODAK, J.]