



Judgment

203 apeals60 & 180.09

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR

CRIMINAL APPEAL NO.60 OF 2009
WITH
CRIMINAL APPEAL NO.180 OF 2009

CRIMINAL APPEAL NO.60 OF 2009

Viru @ Virendra s/o Ramkrishna
Hingve, aged about 25 years,
occupation : private job, r/o Swawlambi
Nagar, Dupare Layout, Nagpur. Appellant.

:: V E R S U S ::

The State of Maharashtra,
through the PSO Butibori,
Nagpur. Respondent.

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Shri M.B.Agasti & Shri V.W.Meshram, Counsel for the Appellant.
Shri A.B.Badar, Additional Public Prosecutor for the State.

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CRIMINAL APPEAL NO.180 OF 2009

Amar s/o Saktyanarayan Suryawanshi,
aged about 27 years, occupation : private,
r/o Chandan Nagar, Piple Lay-out,
district Nagpur.

:: V E R S U S ::

State of Maharashtra,
through PSO Butibori,
district Nagpur. Respondent.

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Shri Shyam Jaiswal, Counsel appointed for the Appellant.
Shri A.B.Badar, Additional Public Prosecutor for the State.

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CORAM : URMILA JOSHI-PHALKE, J.
CLOSED ON : 12/03/2024
PRONOUNCED ON : 02/04/2024

COMMON JUDGMENT

1. By these appeals, appellants (the accused persons) have challenged judgment and order of sentence and conviction dated 21.1.2009 passed by learned Ad hoc Additional Sessions Judge-5, Nagpur (learned Judge of the trial court) in Sessions Trial Nos.515/2007 and 27/2008.

2. By the said judgment impugned, learned Judge of the trial court convicted the accused persons for offences punishable under Section 394 read with Section 34 of the Indian Penal Code and sentenced them to suffer rigorous imprisonment for four years and to pay fine Rs.1000/- by each of them, in default, to suffer further rigorous imprisonment for six months.

3. Brief facts of the prosecution case run as under:

On the date of incident i.e. 15.7.2005, Arvind Rajmalwar (complainant), after attending a religious function, was returning back with his wife on motorcycle bearing No.MH-32/F/2644 from Nagpur-Wardha Highway. When he reached near Kamalkunj Farmhouse, rain started and, therefore,

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he parked his motorcycle near gate of Kamalkunj Farmhouse and took a shelter under the said Farmhouse and was sitting along with his wife on steps. When they were sitting on steps, at about 5:30 pm, the accused persons along with other two co-accused came there armed with sharp edged weapons like knife and gupti. Two accused caught hold him and caused hurt and also robbed Rs.500/- in cash and stolen his motorcycle. At the relevant time, one of the accused persons, by pointing out a sharp edged weapon, demanded money, gold ear rings, and mangalsutra from his wife Anita. On protest by his wife, the accused persons caused hurt to her and robbed her by obtaining her ornaments and cash Rs.400/-. She sustained bleeding injury and the accused persons fled away from the spot.

4. The complainant succeeded to stop a vehicle and approached Butibori Police Station and lodged a report about the incident. On the basis of the said report, police registered the crime vide Crime No.114/2005 under Sections 394 read with 34 of the Indian Penal Code.

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5. After registration of the crime, wheels of investigation started rotating. During course of investigation, the investigating officer seized the motorcycle of the complainant from present accused Virendra. Present accused Virendra disclosed that he sold ornaments to Vishal Parkhe (original accused No.3). Accordingly, recovery panchanama was drawn. On the basis of the investigation carried out, chargesheet was filed against the accused persons along with other co-accused persons.

6. After framing charge (Exhibit-8), the prosecution examined in all five witnesses, as follows:

1. Arvind Nanaji Rajmalwar vide Exhibit-26 (PW1), the complainant;
2. Anita Arvind Rajmalwar vide Exhibit-28 (PW2);
3. Haribhau s/o Ramaji Raut vide Exhibit-30 (PW3), pancha on spot panchanama;
4. Namdeo Bapurao Dongre vide Exhibit-38 (PW4), Investigating Officer, and
5. Uttam s/o Vithalrao Dakhore vide Exhibit-51 (PW5), Investigating Officer.

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7. Besides the oral evidence, the prosecution placed reliance on report Exhibit-27, spot panchanama Exhibit-31, medical certificate of injured Exhibits-32 and 33, First Information Report Exhibit-39, recovery panchanama Exhibit-53, seizure memo Exhibit-54, seizure of motorcycle Exhibit-55, arrest panchanama Exhibits-56 and 57.

8. On the basis of the oral as well as documentary evidence, learned Judge of the trial court held the accused persons guilty and sentenced them as the aforesaid.

9. Heard learned counsel Shri M.B.Agasti for accused Virendra; learned counsel Shri Shyam Jaiswal appointed for accused Amar Suryawanshi, and learned Additional Public Prosecutor Shri A.B.Badar for the State.

10. Learned counsel Shri Shyam Jaiswal, submitted that no identification parade was held to ascertain involvement of the accused in the alleged crime. The First Information Report is against unknown persons. Witnesses have admitted that the accused persons are identified by them on say of police. As the

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accused persons were unknown, their identifications were required. Insofar as recovery part is concerned, pancha on spot PW3 Haribhau Raut has not supported the prosecution case. The medical officer is not examined to prove medical certificates. Thus, the entire prosecution is not sufficient to warrant the conviction against the accused persons.

11. Learned counsel Shri M.B.Agasti, submitted that there was no identification of gold ornaments. Thus, nexus as to the involvement of the accused persons is not established. Thus, there is absolutely no evidence to connect the accused persons with the alleged offence.

12. *Per contra*, learned Additional Public Prosecutor for the State submitted that recoveries of the vehicle, owned by complainant PW1 Arvind Rajmalwar, from accused Virendra, and gold ornaments at his instance, sufficiently show involvement of the accused persons in the alleged offence. The evidence of the Investigating Officer shows that accused Virendra was arrested when he was proceeding on the motorcycle. During investigation, it further revealed that he had changed original

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registration number of the vehicle and affixed a number plate of a new number to the vehicle of the complainant. Recovery panchanamas are proved by the prosecution on the basis of the evidence of the Investigating Officer. The defence admitted contents of injury certificate which sufficiently proves that complainant PW1 Arvind Rajmalwar and his wife PW2 Anita Rajmalwar have sustained injuries in the alleged incident. They both identified the accused persons before the court. The identification before the court is a substantial evidence. As such, no interference is called for and appeals deserve to be dismissed.

13. Perusal of the evidence of complainant PW1

14. Perusal of the evidence of complainant PW1 Arvind Rajmalwar shows that he narrated the incident took place on 15.7.2005 which shows that on the day of the incident, due to rain, he took a shelter along with his wife in Kamalkunj Farmhouse. At the relevant time, four unknown persons approached and robbed them. They snatched amount Rs.900/- and also snatched gold ear rings of 4 grams and mangalsutra of 6 grams. Immediately, after the incident, they approached the

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police and lodged the report. The evidence further shows that he and his wife were treated for their injuries. During cross examination, he admitted that when he went in the police station, the police told them that these are accused persons. Except this admission, no effective cross examination is carried out.

15. The evidence of PW2 Anita Rajmalwar, the wife of the complainant, is also on similar lines. She also stated the entire incident and identified the accused persons before the court. As per her evidence, when they were sitting in Kamalkunj Farmhouse to protect themselves from rain, three persons came there covering their faces and assaulted and caught hold of them and snatched gold ornaments and cash amount from them. Though she is cross examined, nothing incriminating came on record.

16. Insofar as the spot panchanama and seizure of clothes are concerned, pancha on spot PW3 Haribhau Raut has not supported the prosecution case. The spot panchanama is proved through the evidence of Investigating Officer PW5 Uttam

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Dakhore, who testified that he immediately visited the spot of the incident along with panchas and drawn spot panchanama, as per situation. There were broken pieces of bangles on the spot which he has seized. He also observed dried blood stains at several places on flooring. He collected said blood stains also and drawn panchanama. His evidence further shows that during the investigation, present accused Virendra was arrested and on 26.8.2005 he recorded memorandum statement of accused Virendra from which it revealed to him that gold ornaments are sold to Parve Jewellers. He led them to Parve Jewellers. The owner of the Parve Jewellers, viz. Vishal Parve, was arraigned as an accused and from him gold weighing 6.217 grams was seized. Accordingly, panchanama was drawn which is at Exhibit-53. On 25.8.2005, from present accused Virendra, he has seized motorcycle owned by the complainant. During the investigation, it revealed to him that the motorcycle, seized originally having registration No.MH-32/F/2644, was scored by him and affixed a new number as MH-31/AX/5768. Accordingly, seizure panchanama was drawn which is at Exhibit-55.

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17. Thus, the evidence of the Investigating Officer shows that gold ornaments and the motorcycle of the complainant were seized at the instance of present accused Virendra.

18. As regards possession of the motorcycle of the complainant, no explanation is put forth by the accused. Though the defence counsel has cross examined the Investigating Officer, nothing incriminating came on record.

19. Thus, the prosecution mainly relied upon two circumstances i.e. seizure of the motorcycle of complainant PW1 Arvind Rajmalwar at the instance of present accused Virendra and seizure of gold ornaments on the basis of memorandum statement of accused Virendra.

20. Learned counsel Shri Shyam Jaiswal, vehemently submitted that test identification parade is not held, which was required. In absence of the test identification parade, the evidence of the prosecution witnesses cannot be accepted.

21. In support of his contentions, learned counsel Shri Shyam Jaiswal placed reliance on the decision of the Honourable

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Apex Court in the case of **Mukesh Singh vs. The State (NCT of Delhi)**¹ wherein it is held that test identification parade is a part of investigation and investigation of the case is to be conducted by investigating agency. It is further held that purpose of conducting a test identification parade is that persons who claim to have seen offender at the time of occurrence identify them from amongst other individuals without tutoring or aid from any source. An identification parade, in other words, tests memory of witnesses, in order for the prosecution to determine whether any or all of them can be cited as eyewitness to the crime.

He further placed reliance on the decision of the Madhya Pradesh High Court in the case of **Santosh s/o Keshar Singh and anr vs. State of M.P.**² wherein it is held dock identification of accused is not sufficient for holding them guilty.

He further placed reliance on the decision of the Honourable Apex Court in the case of **Rameshwar Singh vs. State of J&K**³ wherein it is held that evidence relating to identification of accused – necessity of - as accused person, not

1 2023 AIR (SC) 4097

2 2004(1) RCR (Criminal) 267

3 1972 AIR (SC) 102

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known previous to occurrence occurrence, to such witness, identifying accused at the trial - identification by such witness soon after accused's arrests is of vital importance, in the interest of justice and fair play, both to the accused and to the prosecution.

22. Learned Additional Public Prosecutor for the State submitted that holding test identification parade is not rule of law, but rule of prudence. Identification of accused by victim first time in the court is admissible.

23. In support of his submissions, learned Additional Public Prosecutor for the State placed reliance on the decision of the Honourable Apex Court in the case of **S. vs. Sunil Kumar and anr**⁴ wherein it is held that test identification parade is not rule of law, but rule of prudence. Identification of accused by victim for the first time in court is credible wherein nature of offence that took place in broad day light, affording to prosecutrix sufficient time to imprint upon her mind, identity of offender.

4 (2015)8 SCC 478

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24. Thus, it is submitted that in absence of test identification parade of accused in the court is not sufficient to hold accused guilty. There is no dispute that complainant PW1 Arvind Rajmalwar has admitted that police called him in the police station and shown the accused persons. It is also a fact that no test identification parade was held during the investigation. The evidence shows that as there was raining, test identification parade and PW2 Anita, wife of the complainant, halted under a shelter of Kamalkunj Farmhouse and it was about 5:30 pm. Thus, the alleged incident has not taken place in the dark, but it was taken place in the evening at 5:30 pm when sufficient light is available and an opportunity was with the witnesses to see assailants.

25. It is settled position of law that identification of accused before the court by witnesses is a substantive piece of evidence. While identification during test identification parade is only a corroborative piece of evidence. If witness identifies accused before court, it provides necessary corroboration to testimony of witnesses.

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26. Here, it is not case of the defence that before their depositions the accused persons were shown to witnesses by the police. The cross examination shows that it was put to complainant PW1 Arvind Rajmalwar that after the incident, the accused persons were shown to them in the police station. The depositions of witnesses were recorded on 1.8.2008. Whereas the alleged incident has taken place on 15.7.2005. Thus, the accused persons are identified by witnesses after three years of the incident. The purpose of holding test identification parade is to ascertain whether investigation is carried out in a proper manner or not. Merely because test identification parade is not held, it is not sufficient to discard the evidence of the prosecution witnesses when it is corroborated by other circumstantial evidence.

27. The other circumstance, on which the prosecution relied upon, is, seizure of the motorcycle owned by complainant PW1 Arvind Rajmalwar from the possession of accused Virendra.

28. The evidence of complainant PW1 Arvind Rajmalwar shows that on the day of the incident, he was proceeding on the

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motorcycle and rain started and, therefore, he parked his motorcycle and took a shelter in Kamalkunj Farmhouse wherein the alleged incident took place. His motorcycle was also taken by the accused. During the investigation, it revealed that the police were searching the accused persons and in night of 23.8.2005, the Nagpur Crime Branch, during the course of patrolling, caught accused Virendra and accused Deepak who were proceeding on the motorcycle. After seeing them, they started running and the police apprehended them. During the investigation, it revealed that the motorcycle on which the accused persons were proceeding was of the complainant. They seized the motorcycle and also gold ornaments were seized at the instance of accused No.3 Vishal by effecting recovery panchanama. As far as this evidence of the Investigating Officer, regarding recovery of the motorcycle and gold ornaments, is concerned, the said evidence is not shattered during cross examination of the Investigating Officer. In fact, the Investigating Officer is not cross examined on that aspect. It is submitted by learned counsel for the accused persons that pancha witnesses are not examined and panchanamas as to

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recovery are not proved. As far as legal position is concerned, the evidence of the Investigating Officer for proving recovery can be considered in the light of wise presumption of law in view of Section 114 of the Evidence Act. This position of law on this aspect is aptly summarized by the Honourable Apex Court in the case of **Rameshbhai Mohanbhai Koli vs. State of Gujarath**⁵ wherein it is observed in para Nos.23, 24, and 25, as under:

“23. An argument was advanced about reliance based on the evidence of investigating officer. This Court in **State of U.P. vs. Krishna Gopal and another, (1988) 4 SCC 302** has held that courts of law have to judge the evidence before them by applying the well recognized test of basic human probabilities. Prima facie, public servants must be presumed to act honestly and conscientiously and their evidence has to be assessed on its intrinsic worth and cannot be discarded merely on the ground that being public servants they are interested in the success of their case. [vide **State of Kerala vs. M.M.Mathew & Anr., (1978) 4 SCC 65**].

24. In **Modan Singh vs. State of Rajasthan, (1978) 4 SCC 435**, it was observed that where the evidence of the investigating officer who recovered the material objects is convincing, the evidence as to recovery need not be rejected on the ground that seizure witnesses did not support the prosecution version. Similar view was expressed in **Mohd.Asiam vs. State of Maharashtra, (2001) 9 SCC 362**. In

5 2010 ALL MR (Cri) 3868 (S.C.)

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Anter Singh vs. State of Rajasthan, (2004) 10 SCC 657, it was further held that even if panch witnesses turn hostile, which happens very often in criminal cases, the evidence of the person who effected the recovery would not stand vitiated.

25. This Court has held in large number of cases that merely because the panch-witnesses have turned hostile is no ground to reject the evidence if the same is based on the testimony of the Investigating Officer alone. In the instant case, it is not the case of defence that the testimony of Investigating Officer suffer from any infirmity or doubt. [Vide Modan Singh's case (supra), Krishna Gopal's case (supra) and Anter Singh's case (supra)].”

29. It is thus clear that the evidence as to the recovery need not be rejected on the ground that the prosecution witnesses need not support the prosecution version. Even, the evidence of the Investigating Officer can be considered for proving recovery as official acts are regularly done is wise presumption of law recognized by the legislature as seen from provisions of Section 114 of the Evidence Act.

30. Now, a question falls for consideration is, whether the judgment impugned calls for any interference.

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31. Learned Judge of the trial court while passing the judgment impugned considered the evidence of recovery and observed that the evidence as to the recovery is not shattered during the cross examination and no probable explanation is put forth by the accused persons as to the said recovery. It is also transpired from the evidence that accused Virendra made alteration in the original registration number of the motorcycle of complainant PW1 Arvind Rajmalwar and the said motorcycle was seized from his possession. The gold ornaments are also seized at his instance and by taking help of Section 114 of the Indian Evidence Act, presumption is attracted and learned Judge of the trial court convicted the accused persons rightly.

32. In the light of the discussion above, I do not find any error of law committed by learned Judge of the trial court while holding the accused persons guilty. The circumstances discussed above are sufficient to connect the accused persons with the alleged offence. The accused persons are further identified by both witnesses before the court below which is substantial evidence.

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33. In this view of the matter, as no ground is made out to interfere with the judgment impugned and findings of learned Judge of the trial court, both appeals are devoid of merits and liable to be dismissed and the appeals are **dismissed**.

Appeals stand **disposed of**.

34. Fees of learned counsel Shri Shyam Jaiswal appointed for accused Amar Suryawanshi are quantified and the same be paid to him as per Rules.

(URMILA JOSHI-PHALKE, J.)

!! BrWankhede !!