



Judgment

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

CRIMINAL APPEAL NO.242 OF 2013

1. Sikandar @ Shebu s/o Shafi Khan,
aged 24 years, occupation private,
r/o plot No.35, Mecosabag, Sindhi
Colony, Jaripatka, Nagpur.

2. Rahul s/o Suresh Panjwani,
aged 22 years, occupation student, r/o
Choudhari Chowk, near Sindhu
Balodyan, Jaripatka, Nagpur.

3. Kamal s/o Paijaad Bajwani @
Radhwani, aged 24 years, occupation
student, r/o plot No.271, Kabrasthan
Road, CMPDI Nagar, Jaripatka, Nagpur. **Appellants.**

:: V E R S U S ::

State of Maharashtra,
through PSO, Police Station
Wadi, Nagpur. **Respondent.**

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Shri J.M.Gandhi, Counsel for Appellants.
Ms.Sneha Dhote, Additional Public Prosecutor for the State.
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CORAM : URMILA JOSHI-PHALKE, J.

CLOSED ON : 05/12/2023

PRONOUNCED ON : 10/01/2024

JUDGMENT

1. By this appeal, appellants (accused persons) have challenged judgment and order of conviction dated 4.4.2013 passed by learned Ad hoc Additional Sessions Judge-1, Nagpur (learned Judge of the trial court) in Sessions Trial

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No.477/2011 whereby accused persons are convicted for offence punishable under Section 397 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for four years each and to pay fine Rs.4000/-, in default, simple imprisonment for one year.

2. Brief facts, necessary for disposal of the appeal, are as under:

3. Complainant Shivdas Dhanrajji Bhoskar, lodged report with Wadi Police Station, Nagpur that on 4.7.2011. The complainant and his colleague Prafulla Raut were proceeding to deposit amount of Rs.24,49,770/- in the State Bank of India from petrol pump. They were proceeding on a motorcycle along with the cash amount. At the relevant time, they were followed by four persons on two motorcycles. The complainant and the colleague were restrained by these persons on Nagpur-Amravati National Highway by throwing chilly powder and attempted to snatch the bag of the amount. As the complainant and the colleague caught the bag of the amount tightly with them, accused persons could not snatch the bag. However, they were assaulted by

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accused persons. The accused persons were having dangerous weapons like knives. In the alleged incident, the complainant and the colleague sustained injuries. During the scuffle, they shouted for help and accused persons ran away from the spot of the incident. Regarding the said incident, the report was lodged against accused persons and another unknown persons.

4. After receipt of the information of the alleged incident, the police rushed to the spot of the incident and arrested one of accused. On the basis of the information received from the arrested accused, remaining accused persons were arrested and the incriminating weapons were seized from them. The investigating officer drawn spot panchanama. The medical certificate of the injured are collected and after due investigation, the investigating officer filed chargesheet against accused persons. During the investigation, the accused persons were also put in identification parade and accordingly its panchanama was also included in investigation papers.

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5. As offences punishable under Sections 395 and 397 of Indian Penal Code are exclusively triable by the court of sessions, the case was committed to the court of sessions. Learned Judge of the trial court framed charge vide Exhibit-44. The accused persons pleaded not guilty and claimed to be tried. In support of the prosecution case, the prosecution examined in all 15 witnesses, as follows:

Shivdas Dhanrajji Bhoskar vide Exhibit-52 (PW1),
the complainant;

Raju Somaji Hedau vide Exhibit-55 (PW2);

Vilas Keshavrao Rode vide Exhibit-56 (PW3);

Arjun Murlidhar Ikhar vide Exhibit-59 (PW4),
pancha on seizure of clothes;

Prafulla Vinayakrao Raut vide Exhibit-66 (PW5),
the injured;

Purushottam Devraoji Gore vide Exhibit-71 (PW6),
pancha on spot;

Mahendrakumar Shankarrao Sharma vide Exhibit-4 (PW7),
pancha on seizure of articles from
accused Rahul;

Ashok Ganpatrao Sonde vide Exhibit-88 (PW8),
duty officer;

Santosh Govindrao Wankhede vide Exhibit-89
(PW9);

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Mangesh Janardhan Solanki vide Exhibit-93 (PW10);

Popeshwar Sudhakar Punatkar vide Exhibit-102 (PW11);

Sanjay Narhar Hardas vide Exhibit-103 (PW12);

Dr. Deepak Rajendra Deshmukh vide Exhibit-110 (PW13), the medical officer;

Dinesh Vithalrao Zambre vide Exhibit-114 (PW14), and

Motiram Mahadeo Bodakhe vide Exhibit-123 (PW15), the investigating officer.

6. Besides the oral evidence, the prosecution placed reliance on report Exhibit-53, First Information Report Exhibit-54, seizure memo Exhibits-60 and 127, seizure memo Exhibit-61, Chemical Analyzer's Reports Exhibit-64, memorandums of test identification parades Exhibits-67 and 68, spot panchanama Exhibit-71, seizure panchanamas Exhibits-76 to 82, seizure memos Exhibits-90 to 92, requisition for holding test identification parade to the tahsildar Exhibits-104 and 105, test identification parade panchanama Exhibit-106, injury report Exhibits-111 and 112, query report Exhibit-112.

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7. On the basis of the oral as well as documentary evidence, the prosecution claimed that the prosecution has proved its case beyond reasonable doubt. After appreciating the evidence, learned Judge of the trial court was pleased to convict accused persons, as the aforestated.

8. Heard learned counsel Shri J.M.Gandhi for accused persons and learned Additional Public Prosecutor Ms.Senha Dhote for the State.

9. Learned counsel for accused persons submitted that the entire prosecution case relied upon the test identification parade, is not a substantial evidence. The amount is not recovered from accused persons. At the most, the case is of an attempt to commit dacoity. The injury report shows that the injured have sustained injuries, which are simple in nature. Perusal of the test identification parade reveals that Prafulla Raut identified Sikandar Khan and Rahul Panjwani as accused. However, all witnesses have admitted that accused persons were shown to them prior to the test identification parade. Accused Shivraj Basant is not identified by any of witnesses. The accused persons though were identified

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during the test identification parade, the evidence on identification parade is not inspiring confidence as all witnesses admitted that at the time of incident, they have not seen faces of culprits. They have identified persons as police have informed that persons who are in custody are involved in the alleged crime. He further submitted that the entire prosecution story is suspicious as the evidence of witnesses is not corroborating to each other. In view of that, accused persons deserve to be acquitted.

10. *Per contra*, learned Additional Public Prosecutor for the State submitted that prosecution witnesses have identified accused persons during the test identification parade. The cash amount of Rs.1000/- is also seized from accused persons. There are blood stains found on clothes of accused persons. The incriminating circumstances are not explained by accused persons. The evidence of injured eyewitness is sufficient to connect accused persons with the alleged offence.

11. After hearing both sides and going through the entire evidence, admittedly, except injured witnesses, there is no

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independent witness who witnessed the incident. The entire prosecution case relied upon the evidence of complainant PW1 Shivdas Bhoskar; PW2 Raju Hedau; PW3 Vilas Rode, and PW5 Prafulla Raut. As per the prosecution, during the investigation, the investigating officer collected blood stains clothes of accused persons and their clothes were found with blood of group "A". The said incriminating circumstance is not explained by accused persons.

12. Appreciation of the evidence of complainant PW1 Shivdas Bhoskar reveals that he along with PW2 Raju Hedau; PW3 Vilas Rode, and PW5 Prafulla Raut were serving on Bharat Petrol Pump at Bazargaon. As per the evidence of this witness, on 4.7.2011, he along with PW5 Prafulla was carrying the cash amount from their petrol pump for depositing the same in State Bank of India at defence Branch. At the relevant time, he was riding bike and PW5 Prafulla was pillion rider holding the bag of cash in his hands. When they reached at the distance about 10-12 kilometers, two motorcycles chased them. There were four persons on motorcycles and one of them raised with them by saying that why they abused them. They all were covered their faces by

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scarves. They got down from motorcycles and snatched the key of the motorcycle and started assaulting them. At the relevant time, PW5 Prafulla was holding the cash. He immediately ran along with the cash amount from the spot. The accused persons thrown chilly powder over their faces and also snatched Rs.1000/- from pocket of PW1 Shivdas. As PW5 Prafulla ran away from the spot, he also ran towards Prafulla and obtained custody of the bag from him. Though he was assaulted, he caught hold the bag tightly. Prafulla was also assaulted by them by knife due to which Prafulla had sustained injuries. As he shouted, people gathered there and, therefore, assailants ran away from the spot of the incident.

The similar is the narration by PW5 Prafulla, the another witness, who corroborated the version by complainant PW1 Shivdas.

Thus, the sum and substance of the evidence of these witnesses is that when they were proceeding on their bike to deposit the cash collected at petrol pump, they were chased by four persons attempting to snatch the cash and one of

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accused namely Kamal assaulted PW5 Prafulla by fists blows. Though they were assaulted, they have not handed over the bag and as people gathered there, the assailants ran away from the spot.

13. Though the prosecution examined PW2 Raju Hedau and PW3 Vilas Rode, the said witnesses were not present at the spot.

As per the evidence of PW2 Raju, he was working on the petrol pump on 4.7.2011. He had tallied sell account and the cash was handed over to complainant PW1 Shivdas and PW5 Prafulla for depositing the same in bank. Later on, he came to know about the incident and also came to know about names of culprits.

Though PW3 Vilas Rode has not witnessed the incident, he was examined on the point of handing over the cash to PW1 Shivdas and PW5 Prafulla.

14. During cross examination of PW1 Shivdas, it came on record that at the time of the incident, he had not seen faces of culprits and even after the incident also. He specifically

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admitted that the police had stated him that persons who are in the custody are the persons who are involved in the incident.

During cross examination of PW5 Prafulla, he also admitted that he is unable to give description of faces of assailants. He had not stated description of accused persons. He could not see accused persons as they had scarves over their faces. He had also not stated about description of faces of those persons. He specifically admitted that he was not knowing accused persons by name prior to the incident. It further came in his evidence that he identified accused persons in the police station and, therefore, he identified accused persons in jail.

Thus, the evidence of both these witnesses shows that they had no opportunity to see assailants as faces of assailants were covered by scarves. It further came in their evidence that they have identified assailants during the test identification parade only on the basis of information given by the police to them. Admittedly, the amount was not snatched by accused persons.

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Witnesses, viz. PW2 Raju Hedau and PW3 Vilas Rode, are only on the point that the amount was handed over to complainant PW1 Shivdas and PW5 Prafulla for depositing the same in the bank.

15. Besides the evidence of above these witnesses, the prosecution placed reliance on the evidence of PW4 Arjun Ikhar, who acted as a pancha on various seizure memos like seizure of clothes of injured, seizure of clothes of accused persons, but he has left loyalty towards the prosecution and he has not supported the prosecution case.

Though the said witness is cross examined at length by learned APP, nothing incriminating came on record.

16. Another material witness, examined by the prosecution, is PW6 Purushottam Gore, who acted pancha on the spot. As per his evidence, the alleged spot of the incident was mere 8 miles area on Amravati National Highway. On examining the spot of the incident, two vehicles were there on the spot. The chilly powder was also lying on the spot. Accordingly, panchanama was drawn.

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Though he is cross examined at length, nothing incriminating came on record.

17. Recital of the spot panchanama also shows that the dry chilly powder was found at the spot.

18. PW7 Mahendrakumar Sharma, is also pancha on the spot as well as the seizure panchanamas. As per his evidence, on 4.7.2011, he was called by the police in the police station. Accused Rahul was present and gave memorandum statement that chilly powder had been thrown on persons of employees of the petrol pump. The said statement was reduced into writing. Accordingly, panchanama was drawn. During his evidence, he identified the wrong accused as accused Rahul.

19. PW8 Ashok Sonde, is the police officer, who reduced into writing the report of the complainant. He is a formal witness.

20. PW9 Santosh Wankhede, has also acted as a pancha on seizure of clothes of accused persons. The said witness had not supported the prosecution case.

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21. PW10 Mangesh Solanki, has acted as a pancha on the test identification parade panchanama, who has also not supported the prosecution case.

22. The another material evidence, on which the prosecution placed reliance, is PW11 Popeshwar Punatkar, who is also working as sales man at the petrol pump but not the witness of the said incident.

23. PW12 Sanjay Hardas, is Naib Tahsildar. The said witness conducted the test identification parade. As per his evidence, he received requisition from the police. Accordingly, he arranged the test identification parade in Central Jail on 30.7.2011. He had called 12 dummy persons of the similar figures and conducted the test identification parade. PW5 Prafulla identified accused Rahul and Sikandar. The said test identification parade was held in the presence of two panchas. Again, he called 12 dummy persons and PW5 Prafulla identified accused Kamal. Accordingly, , he prepared panchanama.

During cross examination, he admitted that he had kept the same dummy persons in both identification parades.

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From this cross examination, an attempt was made to show that he has not followed due procedure while conducting the test identification parade.

24. Learned counsel for accused persons vehemently submitted that PW1 Shivdas and PW5 Prafulla both have stated that faces of assailants were covered and they were informed by the police that these are persons who are involved in the alleged crime. Thus, the nature of the evidence itself shows that accused persons were identified merely on instruction of the police. In fact, identification during the test identification parade is not a substantial evidence. These both witnesses have not identified accused persons before the court, which would be the substantial evidence.

25. To prove the injuries, the prosecution examined PW13 Dr.Deepak Deshmukh. The said doctor examined PW5 Prafulla and noticed following injuries on his person:

- i) multiple stab injuries on right hand and right thigh,
- ii) CLW 5 to 6 inches with muscle exposed on lateral aspect of thigh above right knee joint,

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- iii) multiple tendon rupture of finger hand with open wound on back of right hand,
- iv) multiple clean cut incise wound on right leg,
- v) CLW nearly 3-4 cm on shoulder joint.

As per his evidence, injuries sustained by Prafulla were of serious nature. He also examined the weapon and opined that these injuries are possible by knife.

Though this witness was cross examined, nothing incriminating came on record. The injury certificates and the query report are placed on record.

26. PW14 Dinesh Zambre and PW15 Motiram Bodakhe, are investigating officers.

As per evidence of PW14 Dinesh Zambre, he received an information and reached Bharat Apartment and made an enquiry with suspected person who was caught by NPC Ishwar Jaiswal. The suspected person disclosed name as Sikandar Khan. During his personal search, one piece of scarf, cash amount of Rs.1000/-, and two mobile phones

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were seized. On the basis of information given by him, the other accused were arrested.

During cross examination, he stated that he had not carried out the investigation as to authorship of the mobile phones and the sim cards.

PW15 Motiram Bodakhe, in his evidence admitted that PW2 Raju Hedau has not stated before him that accused No.5 Prafulla was working with him at the petrol pump. Even, PW3 Vilas Rode has also not stated that he visited the spot. PW5 Prafulla has not stated that amount of Rs.24,49,770/- was along with him.

On the basis of the evidence, the prosecution claimed that the prosecution has proved its case beyond reasonable doubt. Another incriminating evidence shows that jeans pant of accused Kamal, jeans pant of accused Sikandar, and T-Shirt of accused Rahul were having blood stains of Group "A".

27. After going through the entire evidence on record, there is no dispute that accused Sikandar was taken into possession by the police from the spot. As per the

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prosecution, he was identified during the test identification parade.

The evidence of the identification parade is to be scrutinized in the light of the evidence of two material witnesses complainant PW1 Shivdas and PW5 Prafulla. Both have admitted that neither they have observed faces of assailants at the time of the incident or after the incident. They have specifically admitted that the police informed them that persons in their custody are persons who have committed the incident. Admittedly, culprits were not caught by these two witnesses.

Evidence of investigating officer PW14 Dinesh Zambre shows that accused Sikandar was in the custody of NPC Ishwar Jaiswal. Said Ishwar is not examined to ascertain from which place he had caught hold the said suspected person.

If accused Sikandar was caught on the spot of the incident, there was an opportunity for complainant PW1 Shivdas and PW5 Prafulla to see and identify him, but they both have stated that they have not seen assailants during or

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after the incident as assailants had covered their faces. Their evidence also nowhere shows that accused Sikandar was caught at the spot itself. If the evidence of PW5 Prafulla is considered, he also stated that at the time of the incident, one person was having cap and one person had covered his face. He specifically stated that two persons were travelling on "Yamaha" vehicle and admitted that he is unable to describe faces of accused persons.

28. In the light of the above evidence, if the evidence in respect of the test identification parade conducted by Naib Tahsildar PW12 Sanjay Hardas is taken into consideration, he admitted that he used the same dummy persons for identification of all four accused persons.

29. It is well settled that learned Magistrate holding identification parade should follow all guidelines given as object of an identification parade is to make sure that ability of witness to recognize the suspect has been fairly and adequately tested. As per guidelines, it should be fair and every precaution must be taken to exclude any suspicion of unfairness or risk of erroneous identification through the

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witnesses' attention being directed specially to the suspected persons instead of equally to all the persons to be paraded and, therefore, officer concerned who is carrying out investigation must not take part in conducting the parade. The witnesses should be prevented from seeing the suspect before he is paraded with other persons and, therefore, the executive magistrate, who is holding identification parade, should remember that he is the person who conducts a parade; he is in full and sole charge of the entire proceedings. He should first acquaint himself with the facts of the case and find out who are to be put in the parade and who are witnesses. He shall call two independent persons to act as panchas and shall satisfy himself that they are independent. The parade should be arranged in a room or a place which is such that the identifying witness should not be able to look into it. If one accused person is to be identified, there should be six persons placed in a parade and if two accused persons are to be identified, there should be 12 persons in parade. The Magistrate holding parade should see that dummy persons should be of the same physical appearance and approximately of the same age. After the

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accused are brought, they should be instructed to occupy the place as per the choice and if they want to change their clothes, opportunity is to be granted to them. Thus, every precaution is to be taken by the person holding the identification parade. The test identification parade if held promptly and after taking the necessary precautions ensures its credibility which would lead the required assurance to the court. In the absence of precaution taken during the test identification parade, it would be extremely for the court to place implicit reliance on identification parade of the accused.

30. In the light of above these guidelines and the cross examination of two witnesses, it reveals that there was no opportunity for these two witnesses to see faces of assailants. The evidence of the Naib Tahsildar nowhere shows that he has chosen dummy persons according to the description of accused persons and as per their physical appearance.

31. It is well settled that the test identification is only a corroborative evidence. Whereas, identification of accused by witness at the trial is substance evidence. If evidence on

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test identification parade inspires confidence, the same can be taken into consideration.

32. Here, in the present case, the nature of the evidence adduced is not following guidelines above. The admissions given by witnesses specifically state that they have identified only on the basis of information given by police officers. The another incriminating evidence is the Chemical Analyzer's Report which shows that blood stains of Blood Group "A" was found on the clothes of accused persons Kamal, Sikandar, and Rahul. Admittedly, blood samples of accused persons are obtained during the investigation and forwarded to the Chemical Analyzer. The report regarding blood group of accused persons is not placed on record. The Chemical Analyzer's Report showing the blood group of the injured is also not placed on record.

33. PW4 Arjun Ikhar, who acted as a pancha on various seizure memos, has not supported the prosecution case. Seizure memos regarding seizure of clothes of accused persons are at Exhibits-76, 77, and 78. These seizure memos nowhere show that at the time of seizure, blood

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stains are witnessed on clothes. Thus, these evidence in the nature of the Chemical Analyzer's Report are also not helpful to the prosecution to prove the guilt of accused persons beyond reasonable doubt.

34. Admittedly, no amount was snatched by accused persons. As far as recovery of amount of Rs.1000/- is concerned, the said recovery is from one of accused. Complainant PW1 Shivdas has stated that he is not aware whether amount of Rs.1000/-, which was in his pocket, was snatched or that has been missed from his pocket. Thus, the evidence of complainant PW1 Shivdas nowhere states that amount of Rs.1000/- was stolen from his pocket. One knife was alleged to be seized from accused Sikandar and the same was forwarded to the Chemical Analyzer. No blood is detected on the said knife. Thus, this circumstance is also not helpful to the prosecution to prove charges against accused persons.

35. It is well settled that the prosecution has to stand on its own footing and cannot take assistance of lacuna on the

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side of the defence. It has to prove the entire case beyond reasonable doubt.

36. Here, in the present case, neither the prosecution has proved the presence of accused persons at the spot nor it has been proved that accused persons are persons who assaulted the injured with intent to commit the dacoity with deadly weapons. The entire case rest on the evidence of complainant PW1 Shivdas and PW5 Prafulla who specifically stated that they have not witnessed faces of assailants either at the time of the incident or after the incident. They have not described the description of assailants. They have identified them as the police have informed them that accused persons are the persons who involved in the crime. Thus, they have identified assailants on the basis of information given to them. The test identification parade is also not held by following guidelines issued in the criminal manual. The another evidence in the nature of seizure of clothes having blood stains is also not proved as none of witnesses described clothes of accused persons which were on their persons at the time of the incident. The pancha witnesses have not supported the prosecution to prove

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seizures. The seizure memos nowhere disclose when clothes were seized and the same were having blood stains. The blood group report as to the blood samples of injuries and blood samples of accused persons are not placed on record.

37. Thus, the entire evidence adduced by the prosecution is not sufficient to prove charges against accused persons beyond reasonable doubt and, therefore, benefit of doubt will go in favour of accused persons as the prosecution failed to prove charges against them.

38. In the light of the above, as the appeal deserves to be allowed, I pass following order:

ORDER

(1) The criminal appeal is **allowed**.

(2) The judgment and order of conviction dated 4.4.2013 passed by learned Ad hoc Additional Sessions Judge-1, Nagpur in Sessions Trial No.477/2011 convicting accused persons is hereby quashed and set aside.

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(3) The accused persons are acquitted of offences for which they are charged.

The appeal stands **disposed** of.

In view of disposal of the appeal, criminal application (if any) also stands disposed of.

(URMILA JOSHI-PHALKE, J.)

!! BrWankhede !!