



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.178 OF 2005

1. Kuklal @ Kishor Motilal Kale,
Age : 30 years, Occ : Agril,
R/o Moharwadi, Tq. Shrigonda,
Dist. Ahmednagar.
2. Arun Nathu Bhosale,
Age : 30 years, Occ : Agril,
R/o Pimpalgaon Pisa,
Tq. Shrigonda, Dist. Ahmednagar.
...Appellant/ accused Nos.1 and 2

- *Versus* -

The State of Maharashtra.

...Respondent/ State.

...
Shri Sagar P. Mahale, Advocate for appellant No.1.
Shri Rajendra Temkar, advocate for appellant No.2.
Shri Vivek M. Lomte, APP for the respondent/ State.
...

CORAM : SUSHIL M. GHODESWAR, J.

Reserved on : 24 November 2025
Pronounced on : 15 December 2025

JUDGMENT :-

1. The accused were charged for offences punishable under Sections 395 and 397 of the Indian Penal Code (for short, “the IPC”). By this appeal filed under Section 374(2) of the Code

of Criminal Procedure (for short, 'the CrPC'), the appellants/accused challenge the judgment and order dated 03.02.2005 passed by the learned 3rd Ad-hoc Additional Sessions Judge, Ahmednagar, in Sessions Case No.139/2004. Relevant operative portion of the impugned judgment reads thus:-

“The accused no.1 Kuklal @ Kishor Motilal Kale is convicted u/s.235 of Cri.P.C. for the offence punishable u/s.395 of I.P.C. and is sentenced to suffer R.I. for 7 years and to pay a fine of Rs.500/-. In default of payment of fine, he shall suffer further R.I. for 6 months.

Accused no.1 Kuklal @ Kishor Motilal Kale is further convicted for the offence punishable u/s.397 of I.P.C. and he is sentenced to suffer R.I. for 7 years.

Accused no.2 Arun Nathu Bhosale is convicted u/s.235 of Cri.P.C. for the offence punishable u/s.395 of I.P.C. and he is sentenced to suffer R.I. for 7 years and to pay a fine of Rs.500/-. In default of payment of fine, he shall suffer further R.I. for 6 months.

Accused no.2 Arun Nathu Bhosale is further convicted for the offence punishable u/s. 397 of I.P.C. and he is sentenced to suffer R.I. for 7 years.

Both the substantive sentences to run concurrently. Accused no.1 Kuklal is entitled for set of his pre-detention period u/s.428 of Cri.P.C.. He was in jail from 22/5/2004 to 3/2/2005.

Accused no.2 Arun is entitled for set off of his pre-detention period u/s.428 of Cri.P.C. He was in jail from 22/5/2004 to 3/2/2005.

All muddemal property be preserved for the trial of absconding accused.”

2. The brief facts leading to filing of the present appeal

are as under:

The prosecution case is that PW-3 Lankabai Vitthal Wagh was residing at Waghmala, Burudgaon, along with her husband PW-4 Vitthal Jagannath Wagh and their sons PW-7 Gahininath Vitthal Wagh and Navnath Vitthal Wagh. Navnath is having his wife. One Mangal Jagtap, daughter of PW-3's sister, was also staying with them. On 18.05.2004, after dinner, the family retired to sleep. PW-4 Vitthal and PW-7 Gahininath slept in the courtyard (locally called "Padhavi") whereas, Navnath and his wife slept in one room, while PW-3 Lankabai and Mangal slept in another. At about midnight, PW-3 woke up on hearing the shouts and when she opened the door, she saw four persons armed with sickles. Two of them were assaulting PW-4 (Vitthal) and PW-7 (Gahininath). When PW-3 Lankabai attempted to shut the door, however, two of the assailants forced it open, entered the house, threatened them with sickles, and robbed their ornaments valuables including *mangalsutra*, nose-ring, earrings, silver anklets, and cash of about ₹40,000/-. After committing the robbery, the assailants fled. The injured were taken to Dr. Deshpande's hospital. According to the prosecution, six

assailants committed the dacoity. On the basis of the complaint, investigation commenced.

3. During the course of investigation, a spot panchnama (Exh.21) was drawn. PW-7 (Gahininath) produced his blood-stained banyan under panchnama (Exh.23). The appellants/ accused were arrested and the recoveries were made at the instance of the accused. Vide seizure panchnamas (Exh.32 and 34). PW-8 Ulhas Dayaram Pawar (Executive Magistrate) conducted the test identification parade and his reports are at Exhibits 39 to 42. PW-9 Prakash Karbhari Pawar conducted the investigation. On completion of the investigation, the charge-sheet was filed. Since offences were triable by the Sessions Court, the case was committed to the Sessions Court. The learned Additional Sessions Judge framed charge at exhibit-3 against the appellants/ accused. The appellants/ accused pleaded not guilty and claimed to be tried. The prosecution has examined in all nine witnesses as under:-

PW No.	Name of witness	Significance/ role
PW-1	Bapusaheb Dnyandeo Kulat	Panch to the spot panchnama
PW-2	Dnyandeo Namdeo Shelke	Panch to seizure of banyan of injured PW-7.

PW-3	Lankabai Vitthal Wagh	Informant/ eyewitness
PW-4	Vitthal Jagannath Wagh	Eyewitness
PW-5	Dr. Vijaykumar	Medical Officer, issued injury certificates at exhibits 28 and 29
PW-6	Pandharinath Narayan Landge	Panch to recovery of articles
PW-7	Gahininath Vitthal Wagh	Eyewitness. Injured son of the informant PW-3
PW-8	Ulhas Dayaram Pawar	Special Executive Magistrate, who conducted the identification parade.
PW-9	Prakash Karbhari Pawar	Investigating Officer

4. Learned advocates appearing for the appellants submitted that only two accused are prosecuted and both of them are convicted for the offences punishable u/sec.395 and sec. 397 of I.P.C., however, the impugned judgment is silent on the involvement of other accused persons. For convicting the accused under Sections 395 and 397, there should be at least 5 persons. However, in the present case, none of eyewitnesses has stated that the number of accused was more than four. On the number of accused also, there is no corroboration.

5. According to the learned advocates for the appellants, the Trial Court has erred in holding that eyewitnesses

PW 3, PW 4, and PW 7 have identified the accused persons during the incident, by ignoring the fact that the informant PW-3 in the FIR has specifically stated that, she was very scared and she did not minutely see the accused persons and therefore, she is unable to state the details of accused persons. Even I.O. PW 9 has admitted that all eyewitnesses have stated that they could not identify the accused persons during the incident. During the test identification parade, Navnath, who was locked inside the room, was called as witness and he had no occasion to see the assailants. Similar is the case of witness Mangal. Both Navnath and Mangal are not examined by the prosecution. Therefore, the identification parade has no evidentiary value and it was only farce to implicate the accused.

6. Learned advocates further submitted that the weapons were seized from the spot and the panchanama shows that there were no blood stains. There were houses adjoining to the spot and also there was security guard in the adjoining company, however, no independent witness is examined by the prosecution. According to the learned advocates, there is failure on the part of the prosecution to prove recovery and

identification of seized cash and ornaments. Navnath and Mangal who are alleged eyewitnesses, are not examined by the prosecution. There are contradictory statements of PW-3 Lankabai because in her deposition she stated that, there were four accused, out of them two accused were assaulting her husband and son and two accused had entered inside and had robbed the gold ornaments and cash amount. However, in the FIR, she has stated that she was frightened and she could not see the decoity property and so she is unable to give the details of the decoity. Learned advocates, therefore, submitted that the learned Sessions Judge committed grave error by convicting the appellants as it has not properly appreciated evidence brought on record. The prosecution has failed to prove guilt of the appellants beyond reasonable doubt. As such, the appeal needs to be allowed and the appellants be acquitted.

7. *Per contra*, the learned APP strongly opposed the submissions of learned advocate for the appellants. According to learned APP, the statements of witnesses proved the guilt of the appellants beyond all reasonable doubts and, therefore, their evidence cannot be discarded. Learned Sessions Judge has

rightly considered evidence on record and rightly convicted the appellants. Learned APP, therefore, prayed for dismissal of the appeal.

8. After hearing the submissions of learned advocates, with their assistance, I have gone through evidence on record carefully. The learned Trial Court vide the charge exhibit 3 framed the charge against the present appellants and other absconding accused persons, namely, Ramesh Motilal Kale, Dabhya Motilal Kale and Santosh Motilal Kale, for the offences punishable under Sections 395 and 397 of the Indian Penal Code. Thus, on the basis of the aforesaid charge, out of five accused persons, only the present appellants came to be prosecuted before the Trial Court as other three accused persons are absconding. Therefore, in such situation, first and foremost issue arise for consideration is whether, the appellants, who are two in number, can be prosecuted for the offence punishable under Sections 395 and 397 of the IPC because in order to attract the offence under Sections 395 and 397, there should be involvement of five or more accused persons, who have conjointly committed the offence. The definition of dacoity is provided under Section 391

of the IPC, which clearly states that there should be five or more persons who have conjointly committed or attempted or aided to commit robbery. Now, in order to ascertain whether, there were five or more persons, there needs finding to the effect that the crime has been committed by five or more accused persons. Therefore, the prosecution was required to prove before the Trial Court that there were five or more persons have conjointly committed the offence. The prosecution has examined as many as nine witnesses, out of them, PW-3 Lankabai (complainant), PW-4 Vitthal Wagh and PW-7 (Gahininath Wagh) were eyewitnesses to the incident.

9. If deposition of PW-3 Lankabai is perused, she has stated that the incident took place on 18.05.2004 at 12:00 in the midnight and they had taken meal at 09:00 pm and retired for bed. Her husband Vitthal (PW-4) and their son PW-7 (Gahininath) were sleeping in courtyard. Her another son Navnath, who is not examined by the prosecution, and his wife were sleeping in another room whereas, PW-3 and her sister's daughter Mangal, who is also not examined by the prosecution, were sleeping in next room. At midnight, PW-3 heard hue and

cry and therefore, woke from sleep and opened the door. She saw four persons in the courtyard and out of them, two were assaulting her husband (PW-4) and son (PW-7) by means of sickle. When PW-3 tried to close the door, it was forcibly opened by the thieves and they gave threat by showing sickle and asked PW-3 and Mangal, not to shout. They broke open the cupboard by iron rod and taken away the ornaments. PW-3 and Mangal also handed over the ornaments on their persons to the said thieves. PW-3 further stated that identification parade of the accused persons was taken place before the Magistrate and she had identified the accused in that identification parade. However, in her cross-examination, she stated that she was not present for identification parade. She has again candidly admitted that she had not seen other dacoits apart from four accused persons. Thus, in view of the deposition of this witness, the number of accused persons present at the time of offence was four. PW-3 was not present during the test identification parade to identify the accused persons.

10. Another eyewitness PW-4 (Vitthal Wagh) deposed that he and his son PW-7 (Gahininath) were sleeping in

courtyard. He stated that there might be three to four thieves entered in their house and somebody assaulted him on his head by means of sickle and he woke up. Due to the injuries, he became unconscious. His son PW-7 was also injured by the thieves and he also became unconscious. PW-4 stated that his wife PW-3 informed that three dacoits were in the house and robbed cash amount and ornaments. He also admitted that his son Navnath was sleeping in one room, which was closed from outside by dacoits. Though PW-4 stated that he has identified the accused persons in test identification parade, however, he deposed that accused No.1 broke open the lock of cupboard and accused No.2 robbed the ornaments of his wife. Again on the aspect of assaulting him, PW-4 has not stated as to who has given him blow of sickle or iron rod. However, in his cross-examination, PW-4 has admitted that due to the assault, he became unconscious and regain consciousness after ten minutes after opening the door of the room of his son Navnath and by that time, thieves had fled away. At that time, his wife PW-3 told PW-4 that dacoits had assaulted him and their son PW-7 and robbed ornaments and cash of Rs.40,000/-. PW-4 also admitted that the accused persons had covered their faces with clothe at the time of

crime and he came to know about the names of the accused persons from the police. Thus, on the aspect of number of total accused persons, the testimony of PW-4 is not reliable because he became unconscious on account of assault by the thieves and regain consciousness only after thieves left. His wife PW-3 informed PW-4 that there was dacoity. Therefore, whatever PW-4 has stated is based on hearsay evidence.

11. Likewise, another eyewitness PW-7 Gahininath has nowhere stated as to how many accused persons were there. He stated that at midnight somebody assaulted on his face by means of weapon and due to which, he sustained injury. He stated that there might be 5 to 6 thieves. PW-7 stated that when he was taken to hospital, her mother PW-3 told him that there were dacoity in their house committed by 5 to 6 thieves and in that dacoity, he and his father sustained injuries. PW-7 also admitted in cross-examination that he became unconscious on the spot and regained consciousness on the following day. He also admitted that the ornaments which have been recovered at the behest of the accused persons, were not have any special identification mark. Because PW-7 was unconscious, his statement about

number of thieves is not direct evidence.

12. On perusal of evidence of eyewitnesses PW-3, PW-4 and PW-7, it is clear that none of them have clearly stated as to how many accused persons were there at the time of commission of crime. PW-3, who is stated to have witnessed the incident, has clearly stated that there were four accused persons. As regards PW-4 and PW-7, their evidence is silent on the aspect of number of accused persons. For commission of offence punishable under Sections 395 and 397 of the IPC, the basic requirement is that the crime should be committed by five or more persons. However, the prosecution has failed to prove that there were more than five accused persons. The prosecution alleges that the offence was committed by six assailants, but the FIR and depositions do not consistently support this number. In view the evidence brought on record, it is not appropriate to convict the appellants/ accused under Sections 395 and 397 of the IPC.

13. It is the matter of record that other accused persons are absconding and only the appellants came to be tried before the Sessions Court. The prosecution has failed to prove by establishing cogent evidence on record that there were five or

more accused persons, who conjointly committed the instant crime. In the present case, the prosecution witnesses either stated the presence of only 3–4 assailants, or were unsure due to unconsciousness or fear. Thus, foundational ingredient of the offence is not proved, and consequently, the conviction under Sections 395 and 397 IPC cannot be sustained. In view of the above, this Court can alter charge for the offence punishable under Sections 392 and 394 of the IPC. However, before coming to that conclusion, it is necessary to ascertain as to whether, the allegations are proved against the appellant so as to attract Sections 392 and 394 of the IPC.

14. The test identification parade was conducted by the prosecution and total three witnesses, namely, PW-4 (Vitthal), his son Navnath and Mangal, both were not examined by the prosecution, were taken for identifying the appellants/ accused. The prosecution claims that these three witnesses PW-4 Vitthal, Navnath and Mangal have identified accused No.2 Arun Bhosale vide exhibit-39 and vide exhibit-40, PW-4 Vitthal and Navnath have identified accused No.1 Kishor Kale. Though Navnath and Mangal were present in the test identification parade, however,

they have not been examined. Though PW-4 Vitthal has been examined and who claims to have identified the accused persons, however, he has deposed that he was unconscious after assault on his head and he came to know from his wife PW-3 Lankabai that he and his son PW-7 Gahininath have been assaulted and robbed by the accused persons. It is also important to note here that the prosecution claims to have conducted the test identification parade to identify the accused persons with the help of Navnath, however, it has come on record that the said Navnath was locked inside his room and he was not eyewitness. Therefore, the test identification parade conducted by the prosecution is itself in doubt. On the basis of evidence brought on record by the prosecution, it is impossible to prove that the appellants were involved in robbery. The direct evidence brought on record by the prosecution connecting the appellants with the crime is not sufficient to convict the appellants under Section 392 and 394 of the IPC.

15. As far as circumstantial evidence is concerned, the ornaments seized were not have special identification marks and therefore, it is doubtful as to how those ornaments are belonging

to the witnesses, particularly when the prosecution has not brought any cogent evidence on record to prove that the ornaments seized are belonging to the witnesses. The ornaments seized were not having any seals or signatures of the panchas. Similar is the case with regard to recovery of the amount of Rs.2300/-. Though this amount is shown to be seized from the hut of appellant No.2, however, this much amount can be available in anybody's house. Further, this amount of Rs.2300/- was seized after 10 days. Thus, the prosecution has failed to prove the recovery beyond all reasonable doubts. As far as weapons seized from the spot are concerned, it has come in evidence that there were no blood stains on weapons. The prosecution has also failed to send the clothes of the victims and other material having blood stains to the Chemical Analyzer. PW-9 Investigating Officer was unable to give details of the vehicle used by the accused persons. Thus, the prosecution has failed to prove recovery and identification of seized cash and ornaments.

16. In the present case, the prosecution has failed to prove by cogent and reliable evidence the identity of the

assailants and the participation of the appellants in the alleged robbery. So also, the test identification parade is unreliable, and the alleged recoveries are wholly doubtful. In absence of credible evidence showing either commission of robbery by the appellants or their infliction of hurt in the course of the alleged robbery, even the ingredients of Sections 392 and 394 of the IPC remain unproved. Therefore, the appellants cannot be convicted for the offences punishable under Sections 392 or 394 of the IPC as well.

17. In view of the foregoing discussion, I am of the view that the prosecution has failed to establish the ingredients of Sections 392, 394, 395 and 397 beyond all reasonable doubts. Consequently, **this Criminal Appeal is allowed and the impugned judgment and order is quashed and set aside.** The appellants/accused are acquitted for the said offence. As the appellants are on bail, they need not surrender. The bail bond stands cancelled. Surety, if any, stands discharged. Fine amount, if deposited, be refunded. The record and proceedings be sent back to the concerned Court.