

(1999) 06 BOM CK 0056

In the Bombay High Court

Case No : Criminal Appeal No. 785 of 1997, along with Criminal Appeal No. 348 of 1998

Bala Pandurang Kesarkar and another

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 08-06-1999

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 165
Evidence Act, 1872 — Section 101, 114, 3, 8, 9
Penal Code, 1860 (IPC) — Section 34, 392, 397, 406, 411

Citation : (1999) 5 BomCR 884 : (2000) CriLJ 693 : (1999) 3 MhLj 192

Hon'ble Judges : Vishnu Sahai, J; T.K. Chandra Shekhara Das, J

Bench : Division Bench

Advocate : V.R. Naik, R.E. Zarpkar and Ganesh Gole, for the Appellant; Ms. Usha Kejriwal, Assistant Public Prosecutor, for the Respondent

Judgement

Vishnu Sahai, J.—Since both these Criminal Appeals arise out of the same set of facts and a common impugned judgment, we are disposing them off by one judgment.

2. Through these appeals, the appellants challenge the judgment and order dated 1st October, 1997, passed by the Additional Sessions Judge, Greater Mumbai, in the Sessions Case Nos. 80 of 1994 and 834 of 1997 convicting and sentencing them in the manner stated hereinafter:-

Under section 392 read with 34 of I.P.C. to seven years R.I. and to pay a fine of Rs. 500/- in default to suffer further R.I. for three months.

The appellant Devendra Krishna Kalsekar was further convicted u/s 397 I.P.C. and sentenced to undergo seven years R.I. and to pay a fine of Rs. 500/- in default to undergo R.I. for three months.

The substantive sentences of the appellant Devendra Krishna Kalsekar were ordered to run concurrently.

3. In short, the prosecution case runs as under :

The informant-victim Rambahadur M. Tiwari, P.W. 1 in the year 1991 was working as a Press Photographer. On 28-9-1991 he left his house located in Shamji Morarji Bldg. C.B. Road, Bombay 10, for Goregaon. He worked in Goregaon till 5.30 p.m. After 6.00 p.m. he went to Govandi after catching a train at Dadar Railway Station and was there till 10.00 p.m., at which time he left for his residence. He reached Ghatkopar Railway Station at about 11.00 p.m. Since from the said station, bus was not available he started proceeding for his residence on foot via Jagdushaw Nagar Road. When at about 11.30 p.m. he had reached Manisha Apartment, on the said road, he saw a person standing in a lane. The said person whom he identified in the Court as appellant Mohd. Yusuf Gaus Gausmohd enquired from him the time and when he replied that it was 11.30 p.m. pushed him in the lane where three persons were standing. One of them whom he identified in Court as appellant Devendra Kalsekar brandished a knife and put the same on his stomach and another person whom he identified in the Court as appellant Bala Pandurang Kesarkar assaulted him with fists and removed his purse containing Rs. 25/-. Another person whom he identified in the Court as Zulfikar D. Abdul Sattar Khan removed his bag containing camera etc. After robbing the informant-victim, the appellants and Zulfikar D. Abdul Sattar Khan ran away.

4. F.I.R. of the incident was lodged by the informant-victim the same night at about 12.30 a.m. at Ghatkopar Police Station and on its basis A.P.I. Shegar P.W. 4 registered C.R. No. 385/91.

5. Investigation was conducted in the usual manner by A.P.I. Shegar, P.W. 4. On 30-9-1991, the appellants were apprehended and brought to Ghatkopar Police Station where they were arrested in C.R. No. 385 of 1991. On 2-10-1991 they were put up for test identification, which was conducted by S.E.M. Sayyad Hussein Noor Mohd. P.W. 2 and wherein informant-victim correctly identified them.

During the course of interrogation on 4th October, the appellant Mohd. Yusuf agreed to get looted property recovered: The said disclosure made by him was recorded in the panchanama Exh. 13 in the presence of public pancha Narendra Kamble P.W. 3. Thereafter the appellant Mohd. Yusuf led A.P.I. Shegar and Narendra Kamble in the police jeep to his house situated in Ghatkopar and removed a bag which was hanging on a wall and handed over the same to A.P.I. Shegar. In the said bag were found a camera, lens and flash. The said articles during the trial were identified, not only by the informant-victim but also by Narendra Kamble.

On 28-11-1991 A.P.I. Shegar arrested the Zulfikar @ D. Abdul Sattar Khan and put him for test identification on 5th January, 1992 where he was identified by the informant-victim.

After completing investigation the appellants and Zulfikar @ D. Abdul Sattar

Khan were charge-sheeted.

6. The case was committed to the Court of Sessions in the usual manner where the appellants were charged for the offences punishable under sections 392 read with 34 I.P.C. and 397 I.P.C. They pleaded not guilty to the charges and claimed to be tried. During the trial in all prosecution examined four witnesses. Out of them informant-victim Rambahadur M. Tiwari P.W. 1 was examined as eye-witness.

In defence, the appellants pleaded denial but adduced no evidence.

The learned trial Judge believed the evidence of the prosecution and convicted and sentenced the appellants in the manner stated above.

7. It is a matter of profound regret that although these appeals are being shown on the final hearing board since 23-12-1998, the learned Counsel for the appellants are not present. Since the appellants Mohd. Gaus is in jail, we are not inclined to adjourn these appeals. Consequently, with the assistance of Ms. Usha Kejriwal learned A.P.P. Counsel for respondent. (State of Maharashtra), we have gone through the entire record and decided these appeals. That we can do so is clear from the perusal of paragraph 14 of the decision of the Supreme Court reported in 1996 AIR S.C.W. 2986 (Appellants :- Bani Singh and others, respondent :- State of Uttar Pradesh).

After utmost circumspection, we are of the view that the Criminal Appeal No. 785 of 1997 deserves to be partly allowed and Criminal Appeal No. 348 of 1998 warrants to be allowed in entirety.

8. The perusal of the evidence on record shows that the only evidence against the appellants Bala Kesarkar and Devendra Krishna Kalsekar is of a solitary identification by the informant-victim Rambahadur Tiwari P.W. 1. Since the incident took place at 11.30 p.m., when undoubtedly there would be darkness, it was incumbent on the prosecution to show that there was some source of light in which the informant-victim recognized these appellants at the time of incident. But to our dismay, neither in the F.I.R. nor in his statement in the trial Court has the informant-victim deposed about any source of light in which he recognised these appellants. The Investigating Officer A.P.I. Shegar P.W. 4, in his examination in chief, in paragraph 1, stated that there were street lights near about the spot. In our view this mere statement of A.P.I. Shegar would not show that the street lights were on when the informant-victim was robbed. In our view in the absence of definite evidence adduced by the prosecution to establish that the street lights were burning when the incident took place no presumption can be drawn that they were burning.

In paragraph 15 of the impugned judgment, the learned trial Judge has conceded that both in the F.I.R. and in the evidence in the trial Court, it has not been alleged that there was light. But in his view, this would not accrue to the advantage of the defence.

The learned trial Judge has observed that there has been no cross-examination on the question of light. We are amazed by this observation of the learned Judge.

8-A. It should be borne in mind that in cases resting on identification evidence, the burden is on the prosecution to prove that there was sufficient light wherein the victim and witnesses identified the miscreants. No presumption can be raised about the sufficiency of light which to our regret was sought to be raised by the learned Judge in the instant case.

The question of demolishing light through cross examination would only have arisen had the prosecution established the light through examination-in-chief of the informant-victim and his F.I.R.

8-B. In the instant case, learned trial Judge has put the cart before the horse. In para 15 of judgment he has observed that since informant-victim had deposed about the exact overt acts of the appellants and Zulfikar alias. D. Abdul Sattar Khan and mentioned the same in the F.I.R., which was lodged within one hour of the incident, failure of the informant-victim to mention about the light ceases to have any importance. We regret that this is not correct judicial approach.

8-C. To repeat, in cases resting on identification evidence, the burden of proving that there was light always rests on the prosecution and never shifts from it and it is only where the prosecution has discharged that burden the defence, if it wants to show that there was no light, would have to demolish the existence of light through cross-examination.

9. For the said reasons, in our view the solitary identification of appellants Bala Kesarkar and Devendra Kalsekar cannot be accepted and they have to be acquitted.

10. We are now left with the case of appellant Mohd Yusuf Gausmohd. Against the said appellant not only is there solitary identification of Rambahadur Tiwari P.W. 1 but also on his pointing out, on 4-10-1991, the camera, lens and flash belonging to the informant-victim Rambahadur Tiwari were recovered in the presence of A.P.I. Shegar P.W. 4 and public panch Narendra Kamble P.W. 3. In the earlier part of our judgment, we have mentioned the manner in which the said recovery was made and we do not think it necessary to reiterate the details.

We have gone through the evidence of A.P.I. Shegar and Narendra Kamble and we find that the same is implicitly reliable. Both these witnesses were cross-examined but nothing could be elicited there from which would discredit the said recovery evidence in any manner. It should be borne in mind that both these witnesses are wholly independent witnesses having no axe to grind against this appellant. In our view their evidence inspires confidence and we accept the same.

11. The question is merely on the basis of this recovery what offence would be made out against the appellant Mohd Yusuf Gausmohd. As regards his identification by witness Rambahadur Tiwari P.W. 1 the same cannot be accepted because the prosecution has failed to establish that there was any light in which

the informant-victim could have identified the culprits.

12. It is true that in cases where the recovery has been immediately effected this Court can draw an inference u/s 114(a) of the Indian Evidence Act and convict the accused for the substantive offence of theft or robbery or dacoity or dacoity with murder etc. as the case may be. But in the instant case, the recovery is not immediate. It was effected on 4-10-1991 i.e. six days after the incident. In view of this belated recovery, we feel that the offence of robbery would not be established against this appellant and only one u/s 411 I.P.C. would be made out against him. Section 411 I.P.C. reads as under :

"411. Dishonestly receiving stolen property.---Whoever dishonestly receives or retains any stolen property, knowing or having reason to believe the same to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."

We are fortified in our view by the decision of the Supreme Court reported in Sheonath Vs. The State of Uttar Pradesh, , wherein three days after the incident recovery of looted property was effected and the Supreme Court reversed the judgment of the Allahabad High Court upholding the conviction and sentence of the appellant for the offence u/s 396 I.P.C. and instead convicted him for one u/s 411 I.P.C.

In our view the ratio laid down in the said decision applies in the present case.

13. Thus the question which survives is the quantum of sentence to be awarded to appellant Mohd. Yusuf Gausmohd for the offence u/s 411 I.P.C.

In our view, the maximum sentence prescribed by section 411 I.P.C. namely three years R.I. would be commensurate bearing in mind the gravity of the crime.

14. In the result :-

(A) Criminal Appeal No. 785 of 1997 is partly allowed.

The conviction and sentence of appellant Bala Kesarkar for the offence u/s 392 read with 34 I.P.C. is set aside. He is acquitted thereunder. In case he has paid the fine, it shall stand refunded to him. He is on bail. He need not surrender. His bail bonds stand cancelled and sureties discharged.

The conviction and sentence of appellant Mohd Yusuf Gausmohd for the offence punishable u/s 392 read with 34 I.P.C. is also set aside. He is also acquitted for the said offence.

In case he had paid the fine, it shall stand refunded to him. We instead find this appellant guilty for the offence u/s 411 I.P.C. and sentence him to undergo three years R.I. He is in jail and shall be released therefrom after he serves out his sentence.

(B) Criminal Appeal No. 348 of 1998 is allowed.

The conviction and sentence of the appellant Devendra Kalsekar for offences punishable under sections 392/34 I.P.C. and 397 I.P.C. is set aside. He is acquitted in respect of them. In case he has paid the fine it shall be refunded to him. He is on bail. He need not surrender. His bail bonds shall stand cancelled and sureties discharged.

Office shall forthwith communicate this order to the relevant authorities.

15. Appeals partly allowed.