

(2017) 06 BOM CK 0204
In the Bombay High Court
Case No : 151 of 2015

Balu @ Meghanand s/o Punamchand Meshram, & Anr.

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 20-06-2017

Acts Referred:

[Indian Penal Code, 1860](#), [Section 397](#),
[Section 34](#) - Robbery or dacoity, with attempt to cause death
or grievous hurt - Acts done by several persons in furtherance of common intention

Citation : (2017) 06 BOM CK 0204

Hon'ble Judges : V.M. Deshpande

Bench : SINGLE BENCH

Advocate : Mahesh Rai, N.B. Jawade

Final Decision : Allowed

Judgement

1. Present appeal is directed against judgment and order of conviction passed by learned Additional Sessions Judge-4, Amravati dated 2.4.2015 in Sessions Trial No.132 of 2009, by which learned Judge of the Court below convicted both appellants for the offence punishable under Section 397 read with Section 34 of the Indian Penal Code and were directed to suffer rigorous imprisonment for seven years and to pay a fine of Rs.3,000/by each of them and in default to suffer further rigorous imprisonment for three months.

2. The prosecution case in brief, is as under: PW10 Mohan Thakurdas Sugandhi, who on 31.3.2009 was police officer of Tiwasa Police Station, while on patrolling near Patil Dhaba, received an information about firing on Shirajgaon - Tiwasa Road. He also received information that injured in the said incident is brought to the Gurudeo Hospital, Mozari. He, therefore, rushed to the said hospital. There he noticed an Ambulance was standing outside the hospital and injured PW1 Vinod Bhimraoji Isal was inside the Ambulance. PW10 Sugandhi noticed that though PW1 Vinod was afraid, he was conscious and upon inquiries made by

PW10 Sugandhi, he found that PW1 Vinod was in a position to talk. Therefore, he made inquiries with PW1 Vinod. He recorded his statement. Thereafter, injured Vinod was referred to Amravati. Then, PW10 Sugandhi came to the spot. That time there he noticed presence of Sub Divisional Police Officer Shri Patil. The spot of the incident was within the jurisdiction of Kurha Police Station and the Police Station Officer of Kurha in the meantime reached to the spot. At the directions and instructions of Sub Divisional Police Officer Shri Patil, PW10 Sugandhi handed over the statement of PW1 injured Vinod recorded by him to the Kurha Police Station Officer.

3. Exhibit 27 was recorded by PW10 Sugandhi. It is dated 31.3.2009 and it was recorded at camp Gurukuj Hospital. As per said statement, when PW1 Vinod was proceeding to Dhotra at about 01:30 p.m. on 31.3.2009 with a money bag for payment of labourers on his motorcycle bearing registration No.MH27/ R/5364, he was accosted by two unknown persons in between Dhotra and Shirajgaon. Their faces were covered in order to hide their identity and were holding small gun. They tried to snatch the bag from him containing amount of Rs.1,03,400/. However, PW1 Vinod resisted with full force and thereby defeated attempt of those two unknown persons to snatch away the money bag. That time, fire was open towards him resulting into an injury on his left shoulder. Thereafter, those two unknown persons ran away from the spot along with his motorcycle and cellphone.

4. PW9 Gulabsingh Gyansingh Solanke, was Police Station Officer at Police Station Kurha in the month of March 2009. When got information about firing, he reached to Shirajgaon - Dhotra Road. Exhibit 27 was handed over to him. On the basis of aforesaid statement Exhibit 27, a crime was registered with Kurha Police Station vide Crime No.33 of 2009 for the offences punishable under Section 397 read with Section 34 of the Indian Penal Code and under Sections 3 and 25 of the Arms Act, 1959. The printed F.I.R. is at Exhibit 81.

5. After registration of crime, PW9 Solanke again visited to the spot of occurrence, prepared spot panchanama, and seized three cartridges and pieces of motorcycle's indicators from the spot. He drew spot panchanama Exhibit 77 and Japti panchanama Exhibit 78 in the presences of panchas. He also seized motorcycle of the complainant laying in the lake in jungle area of Dhotra. To that extent, seizure was drawn in the presence of panchas. At about 06:00 p.m. on 31.3.2009 itself, he arrested the appellants and recorded the statements of three witnesses.

6. During police custody remand, appellant/accused No.1 Balu @ Meghanand s/o Punamchand Meshram gave his memorandum statement by which he agreed to show the place where he concealed the weapon, i.e. a revolver used in the crime. His memorandum statement was recorded in the presence of panchas (Exhibit 41). Thereafter, Investigating Officer along with panchas and other police personnel reached to the spot as per the directions of appellant/accused No.1 Balu Meshram and seized revolver which was concealed beneath a stone near a

tree. No separate recovery panchanama was recorded. However, in Exhibit 41 itself, its recovery is mentioned.

7. Appellant/accused No.2 Sandeep s/o Digambar Wasnik also made his disclosure statement by which he agreed to show the place where he has thrown the cellphone of the complainant. His disclosure statement was recorded in the presence of panchas Exhibit 42 and, thereafter, police party reached to the spot, which was a well. With the help of one Sagar Ingole, cellphone was retrieved from the said spot. The recovery is also mentioned in Exhibit 42.

8. Thereafter, he again recorded statement of witnesses. He asked police personnel to visit the hospital at Nagpur where PW1 injured Vinod was admitted. Thereafter, he sent all Muddemal articles to chemical analyzer. After completion of investigation, final report was presented in the Court.

9. The case was made over to the Court of Sessions by learned Magistrate by passing committal order. Learned Additional Sessions Judge framed charged against both the accused for the offences punishable under Section 397 read with Section 34 of the Indian Penal Code and under Sections 3 and 25 of the Arms Act, 1959. Both the appellants/accused denied the charge and claimed for their trial.

10. In order to bring home the guilt of the appellants/accused, 11 prosecution witnesses were examined. Learned Judge of the Court below after appreciating the prosecution evidences, acquitted the appellants/accused from the charge under Sections 3 and 25 of the Arms Act, 1959. However, learned Judge of the Court below convicted the appellants/accused for the offence punishable under Section 397 read with Section 34 of the Indian Penal Code.

11. I have heard learned counsel Shri Mahesh Rai for the appellants/accused and learned Additional Public Prosecutor Shri N.B. Jawade for the respondent/State. Both learned counsel took me through the record and proceedings and submitted their elaborate submissions in order to canvass their respective prayers. Though the prosecution has examined about 11 witnesses, there is no eyewitness's account in the present case.

12. PW2 Dr. Rajesh Ramkrushna Basate was working as a Residential Medical Officer at Shri Gurudeo Ayurved Rugnalaya. On 31.3.2009, PW1 Vinod was brought to him by the police having gun shot injury to his left shoulder. He examined him. He, thereafter, referred him for XRay and further treatment to the Civil Hospital at Amravati. The certificate was given by him and said certificate is at Exhibit 34, which was obtained by the police from him on 21.4.2009.

13. PW3 Sanjay Rangraoji Gadage was examined by the prosecution to prove the panchanama of the spot. However, the said witness turned hostile.

14. PW4 is Virendra Tukaram Ashtikar. This witness was examined by the prosecution to prove the disclosure statement made by both the accused persons.

15. PW5 a pancha witness Dhnyaneshwar Namdeorao Taywade who has proved the seizure panchanama Exhibit 47 by which motorcycle of PW1 Vinod was recovered from Dahegaon Dhanora Talao (Lake).

16. PW6 Ramesh Bhashkarrao Bhandari was police constable at relevant time and was working with Kurha Police Station who was sent by PW9 Investigating Officer Gulabsingh Solanke with a duty pass for obtaining medical report and bullet, which was found in the body of PW1 Vinod, from the Orange City Hospital at Nagpur. He handed over the medical certificate as well as bullet in a sealed bottle to the investigating officer and the investigating officer took in his possession from PW6 Ramesh Bhandari by drawing seizure panchanama Exhibit 53.

17. PW7 Nirbhay Ashok Karandikar is a medical practitioner and was consulting Honourary Orthopaedic Surgeon at Orange City Hospital and Research Centre at Nagpur. He treated PW1 Vinod and also operated on his left shoulder on 1.4.2009. He proved his operational notes and those are at Exhibit 60. Injury report of PW1 Vinod is at Exhibit 61.

18. PW8 Niranjan Wamanrao Ganorkar is a pancha to the spot of the incident.

19. Another witness is, PW11 Nayab Tahsildar Vijay Ramchandra Kalbande, who conducted test identification parade.

20. From the evidence of PW7 Dr. Nirbhay Karandikar, who operated on the left shoulder of PW1 Vinod, operational notes Exhibit 60 and injury notes Exhibit 61 show that there cannot be any doubt that PW1 Vinod suffered gun shot injury on his left shoulder. The chemical analyzer's report also corroborates the gun shot injury. The question is, whether appellants/accused are authors of said gun shot injury occurred to PW1 Vinod?

21. From report Exhibit 27 it is clear that incident has occurred in broad daylight. The prosecution also could not bring any eyewitness to the said firing. Report Exhibit 27 is also silent that at the time of incident, PW1 Vinod was knowing appellants/accused as his assailants. The said report is very specific. It says that when he was accosted on road in between Dhotra and Shirajgaon by two unknown persons, their faces were covered with scarf and they tried to snatch the bag containing cash. Thus, from the first information report it is crystal clear that at the time of incident, he was not having any opportunity to observe faces of appellants/accused.

However, in examination-in-chief, PW1 Vinod stated on oath that during scuffle in between him and them, those two persons' scarf were removed and he could observe their faces and he was knowing them by their faces.

22. The test identification parade was held at the hands of PW11 Nayab Tahsildar Vijay Kalbande. However, test identification parade was discarded by learned Judge of the Court. I concur with his reasonings for discarding the test identification parade.

23. The test identification parade is not a substantive piece of evidence. The identification by PW1 complainant Vinod or eyewitness in the Court during the course of the trial has its own importance. During the course of evidence, PW1 Vinod states as under:

"When I refused to give bag, there was scuffle between me and them. Then he has shot on my left hand shoulder. During the scuffle between them, their clothes covered were removed by me. I was knowing them by face. One of them was also working as labour in Hriyali Science. Accused before the Court are the same."

During the scuffle removal of scarf from their faces and noticing that those two persons were known to PW1 complainant Vinod by face was very vital piece of information. Nonmentioning of this particular fact at first, an opportunity assumes importance since subsequently those two persons were identified by PW1 complainant Vinod in the identification parade in the police station when they were on bail refrain me from believing this version straightway unless there is a corroboration to the entire prosecution case by attending the circumstances.

24. Both the appellants/accused were arrested on 31.3.2009. Arrest panchanama of appellant/accused No.1 is placed on record at Exhibit 82, whereas arrest panchanama of appellant/accused No.2 is at Exhibit 83. Arrest panchanamas show time of arrest as 18:00 hours.

25. PW9 Gulabsingh Solanke is very specific that he got a lead from statements of three persons whose statements he recorded on 31.3.2009 itself and on the basis of statements of those, at 6:00 p.m. on 31.3.2009, he arrested appellants/accused. Perusal of chargesheet, however, shows that on the basis of statements of witness Nos.4 and 5, who are mentioned in the chargesheet, present appellants/accused were arrested. Witness Nos.4 and 5 in the chargesheet show their names as Ganesh and Pramod. Thus, it is the case of the prosecution that on the basis of statements of these two persons, the investigating officer got a lead and, thereafter, he arrested the appellants/accused person. Therefore, naturally, these two witnesses would have been most important witnesses for the prosecution. However, for the reasons best known to the prosecution, these two witnesses were not examined by the prosecution.

26. Further, Exhibit 47 is seizure panchanama. Under this seizure panchanama, herohonda of PW1 complainant Vinod bearing No.MH27/ R/5364 was seized from Dhotra lake. According to the first information report, the appellants/accused ran away from the spot along with motorcycle. The appellants/accused were arrested at 18:00 hours on 31.3.2009 while Exhibit 47 seizure memo shows that vehicle was seized from the spot at 17:25 hours, that is even prior to arresting of the appellants/accused persons. Further, the entire version of the prosecution case is totally silent as to how the investigating officer or the prosecution got information about laying of the motorcycle in the lake even prior to arrest of the appellants/accused persons.

27. Insofar as memorandum statement of the appellants/accused persons are concerned, firstly I shall deal with seizure of cellphone. This cellphone, which was taken away from PW1 complainant Vinod, was discovered at the behest of appellant/accused No.2 Sandeep Wasnik. His disclosure statement is at Exhibit 42. According to the evidences of the prosecution, the place, that was disclosed by this appellant/accused where he thrown Nokia Cellphone, was a well having depth of 50 to 60 feet. As per the evidence of the investigating officer, the Nokia Cellphone was brought from inside the well with the help of one Sagar Ingole. This Sagar Ingole was also not examined. It is worth to note an admission of the investigating officer during his crossexamination that when the police along with appellant/accused No.2 proceeded towards the well, Sagar Ingole was not with him. In that behalf, therefore, examination of Sagar Ingole, in my view, was important to prove his presence so as to give credit to the prosecution version that it is he who took out the cellphone from the well.

Another important thing, in respect of this seizure, is that after seizure of this cellphone, the investigating officer failed to get it identified through PW1 complainant Vinod to show that the said Nokia Cellphone was the very same cellphone that was snatched away by the appellants/accused persons from him at the time of incident.

Exhibit 42 disclosure statement, which also includes recovery panchanama, shows that the Nokia Cellphone was silver colour mobile phone. However, when PW4 Virendra Ashtikar, who was a pancha to the process of recording memorandum statement and recovery of the Nokia Cellphone, stated on oath that he can distinguish the colours. However, when ArticleD Nokia Cellphone was shown to him, he admitted that its colour is light yellow one. Thus, it is crystal clear that it was not a cellphone having silver colour. From the crossexamination of this prosecution witness it is clear that his house is adjacent to the police station and he has also acted as a pancha in one or two cases, therefore, his possibility under thumb of the police cannot be completely ruled out.

28. Insofar as pistol is concerned, though the pistol is shown to be recovered beneath a stone, however from the open spot which was accessible to anyone. Further, the investigating officer has not only shown ignorance but also has admitted that he has not investigated at all as to how this particular weapon came in possession of appellant/accused No.1. There is nothing on record to show that cartridges, which were seized from the spot of incident by the investigating officer, are fired through the pistol which is recovered at the behest of appellant No.1. In that view of the matter, the recovery of the said pistol at the behest of appellant No.1 loses its importance.

Having this quality of evidence available on record, in my view, it will be very unsafe to accept recoveries made by the police at the behest of the appellants/accused.

29. PW1 Vinod used to visit the police station to get released his vehicle. He also

admitted that he used to see the accused persons in the police station prior to their test identification parade that was held in the police station. Therefore, I am of the view that identification of these two accused persons in the Court not only loses its importance but also its sanctity.

30. So far as the chemical analyzer's report is concerned, it is a corroborative piece of evidence. However, primarily it is the duty of the prosecution that the appellants/accused are authors of injury and if their culpability is proved beyond reasonable doubt. Further, the evidence of PW1 Vinod is totally silent that which of the appellant fired at him. If his evidence is to be believed that he removed scarf during scuffle, thereafter, there was a fire from the revolver, and he was able to identify the appellants/accused by faces, it would have been most natural on the part of PW1 injured Vinod to state from the witness box which appellant fired at him. The said also one of the indications that really any of appellants/accused fired at him. In the totality of the evidences, as discussed above, though PW1 Vinod suffered fire arm injury on his left shoulder, the prosecution has utterly failed to prove the guilt of the appellants/accused as his assailants and appellants/accused are responsible for the injury caused to him by pistol.

Consequently, I pass the following order:

ORDER

The criminal appeal is allowed.

2. Judgment and order of conviction, passed by learned Additional Sessions Judge4, Amravati dated 2.4.2015, in Sessions Trial No.132 of 2009, convicting appellants/accused for the offence punishable under Section 397 read with Section 34 of the Indian Penal Code, is hereby quashed and set aside.

3. Both the appellants/accused are acquitted from the charge under Section 397 read with Section 34 of the Indian Penal Code.

4. The appellants/accused, who are in jail, shall be released forthwith, if their presence is not required in any other matter.

5. Muddemal property be destroyed, after the appeal period is over.