

(2012) 07 BOM CK 0024

In the Bombay High Court

Case No : Criminal Appeal No. 150 of 2000

Bhaskar Zumbar Kale, Narya alias Narayan Umrao Pawar and
Jalindar Shivaji Karanjkar

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 19-07-2012

Acts Referred:

Evidence Act, 1872 — Section 114, 27, 9
Penal Code, 1860 (IPC) — Section 279, 304A, 394, 457, 506
Probation of Offenders Act, 1958 — Section 4

Citation : (2012) BomCR(Cri) 282

Hon'ble Judges : T.V. Nalawade, J

Bench : Single Bench

**Advocate : B.R. Sontakke-Patil, for the Appellant; N.H. Borade, Assistant Public
Prosecutor for State, for the Respondent**

Final Decision : Dismissed

Judgement

T.V. Nalawade, J.—The appeal is filed against judgment and order of Sessions Case No. 164/1999, which was pending in the Court of Additional Sessions Judge, Osmanabad. The Trial Court has convicted the appellants for offences punishable under sections 457, 394 of Indian Penal Code. Both the sides are heard. The facts leading to the institution of the appeal can be stated as follows :-

The complainant was living with her husband in a shed situated in village Savargaon, Tahsil Kallam, District Osmanabad. The incident took place on the night between 23rd and 24th of August 1999. Some persons knocked the doors of the house of the complainant Jaishree at about 3.00 a.m. As they were giving threats and they were using force, the door of the shed was opened. Four persons, who had covered their faces by using pieces of clothes or blanket/rugs entered the shed and they robbed gold ornaments and cash amount of the family of the complainant. Force was used by these persons to create terror. Ornaments like Bormal, ear tops and Mangalsutra were taken away along with cash amount

of Rs. 300/-. The wrist watch of the husband of the complainant was also taken away. While leaving the shed, these persons put on the latch of the door from the outside to prevent the complainant and her family from calling help. Injuries were caused to the members of the family of the complainant in the incident.

2. On the same night, the same thieves robbed other person, who were living in the vicinity of the house of complainant. Police reached the spot at about 5.00 a.m. Jaishree gave report and on the basis of this report, crime came to be registered. A.P.I. Gaikwad made investigation of the case. He took the help of dog squad. The trained dog took the police to the houses of persons like Babu Pawar, Ankush Pawar and Bhaskar (accused No. 1). Accused No. 1 was available in the house and he came to be arrested. During investigation and the interrogation of the accused No. 1, the names of accused Nos. 2 to 6 were transpired and they came to be arrested. The names of two more persons were transpired, but they could not be traced out.

3. On 29.8.1999 accused No. 3 gave statement to police u/s 27 of Evidence Act in presence of panch witnesses that he had kept the stolen property in concealed condition on the backside of his house. Accused took police and panchas to the spot and from there he produced a gold Bormal. Accused No. 3 gave statement u/s 27 of the Evidence Act and it led to the discovery of gold ear tops. On 30.8.1999 accused No. 1 gave similar statement to police and it led to discovery of gold Mangalsutra with black beads. During the investigation, these articles came to be shown to the witnesses including complainant and they identified their ornaments. On the basis of this evidence, charge sheet came to be filed for aforesaid offences against six accused and two absconding accused.

4. The fact that on the night between 23 and 24 of August 1999 the family of Jaishree was robbed, is not seriously disputed by the defence. It was submitted that the evidence of discovery of so called ornaments is highly doubtful in nature and on the basis of such evidence, conviction cannot be based. It is not the case of the prosecution witnesses that they could see the faces of the thieves or dacoits and so there is no evidence of identification of the accused. In view of the defence of total denial taken by the accused and as the defence has not disputed that the family of Jaishree was robbed of their ornaments and in the incident injuries were caused to them, there is no need to discuss the medical evidence, the evidence of spot panchanama etc.

5. F.I.R. was given immediately. In the F.I.R. the description of the stolen ornaments was given. Jaishree (PW 2) has deposed that in the incident, her gold ornaments like Bormal, ear tops and Mangalsutra were stolen. She has deposed that wrist watch of her husband Shankar (PW 3) and cash amount of Rs. 300/- was also stolen. The F.I.R. at Exh. 50 is duly proved in her evidence. The F.I.R. contains the description of the ornament like weight and specific names given to the ornaments. The witness has given evidence that she was called to the police station after few days of the incident and the ornaments were shown to her in the police station. She has deposed that she identified the ornaments in the

police station on that occasion. The record shows that the interim custody of this property was given to Jaishree during the trial by the Court. This property was brought to the Court during trial and in the Court also the property was identified.

6. Evidence of Shankar (PW 3), the husband of Jaishree, is similar to the evidence of Jaishree. He has also identified the ornaments in the Court and he had identified the ornaments in the police station. Cross examination of PW Nos. 2 and 3 shows that the defence did not seriously dispute the incident, even in the Trial Court as there was no possibility of identification of the accused by PW Nos. 2 and 3.

7. Kakasaheb (PW 10), a panch witness, has given evidence that accused Narya gave statement to the police on 24.8.1999 and this statement led to the discovery of gold ornament Mal (Bormal). He has deposed that Mal was found in concealed condition behind the house of accused. The memorandum of statement of the accused and seizure panchanama of Bormal are proved as Exhs. 63 and 64 in the evidence Kakasaheb.

8. Kakasaheb (PW 10) has given similar evidence against the accused Jalindar Karanjkar. He has deposed that ear tops, which were kept in concealed condition in the land of sugarcane crop, were produced by this accused after giving statement to police. Memorandum of the statement of accused and the seizure panchanama in respect of ear tops are duly proved as Exhs. 65 and 66. Nothing is brought in the cross examination of Kakasaheb to create doubt about his evidence. The Trial Court has believed this witness and this Court sees no reason to disbelieve this witness. He identified these two accused in the Court as the persons, who had given statements and as the persons at whose instance the aforesaid property was recovered. Similar evidence is given on the recovery of stolen property from these accused by Gaikwad (PW 12), who investigated the case.

9. Rajendra (PW 11), another panch witness, has given evidence that on 30.8.1999 accused Bhaskar gave statement that he had kept Mangalsutra behind his house. He has given evidence that the accused took police and panchas to the side of his house and there after digging the earth, he took out Mangalsutra. Exh. 68. Memorandum of the statement of accused and Exh. 69, seizure panchanama in respect of Mangalsutra are duly proved in the evidence of PW 11. The evidence of PW No. 11 shows that he did not identify this accused in the Court. However, the evidence does not show that he was not in a position to identify the accused No. 1. The evidence shows that the name of the accused No. 1 Bhaskar is given by this witness, as a person, who gave statement to police on 30.8.1999. The evidence of this witness was recorded on 1.3.2000 and it can be said that the prosecutor did not take proper care to obtain the substantive evidence of identification in the Court. This circumstance has not affected the prosecution case, as Gaikwad (PW 12) has given similar evidence on Exhs. 68 and 69 and he has identified this accused in the Court. All the ornaments recovered from these three accused are identified by Investigating Officer also.

The cross examination of Investigating Officer is only on the point of necessity of holding identification parade to give opportunity to the witnesses to identify the accused. As the witnesses have come with a specific case that to conceal the identity, the thieves had covered their faces with pieces of clothes or rugs, there was no necessity for holding such identification parade.

10. The defence taken in this Court and the Trial Court shows that the defence wants to make out much due to the circumstance that bills of purchase of ornaments are not produced by the witnesses. Indian ornaments have specific names. When the ornaments belong to a lady and the ornaments are in her use, it is not difficult for such a lady to identify the ornaments. The identification made by a witness of article in such a case is relevant u/s 9 of the Evidence Act and the evidence given by a lady like Jaishree, can be safely believed in such a case. The Trial Court has believed these witnesses and as appellate Court, there is no scope to interfere in that finding.

11. The discovery of stolen property was made from the possession of accused Nos. 1, 3 and 4, who were arrested within six days of the incident. These ornaments are identified as stolen property by Jaishree (PW 2). Their description tallies with the description given in the F.I.R., which was given immediately after the incident. There is evidence of statement given by the accused u/s 27 of the Evidence Act to Gaikwad and there is no reason to disbelieve that evidence also. The ornaments were found in concealed condition and so they were there as per exclusive knowledge of accused Nos. 1, 3 and 4. The accused did not claim these ornaments and there is case of total denial. In view of these circumstances, there is no escape for these three accused.

12. Section 114, Illustration (a) of the Evidence Act raises factual presumption in such a case. It is within the discretion of the Court to draw the presumption. This Court has no hesitation to hold that it is a fit case, where the presumption u/s 114, Illustration (a) of Evidence Act needs to be drawn. As the recovery was made within a short period, this Court holds that it needs to be presumed that the property was stolen by these three accused on that night and so they were in possession of the stolen property. These persons had used force and they had caused injuries to Jaishree and other persons. Danger was caused to the life of PW Nos. 2 and 3 and other members of their family. This evidence is sufficient for proof of both the offences against these three accused. The Trial Court has properly considered all the aforesaid evidence and circumstances and this Court sees no reason to interfere in the findings given by the Trial Court. For appellants following reported cases were cited.

(i) 2008 CRI.L.J. 1458 [State vs. Kaptan Singh],

(ii) AIR 2000 SC 3622 (1) [Jagat Pal Singh and Ors. Vs. State of Haryana],

(iii) 1974 SC 35 [Ramnaresh Pandey Vs. State of Madhya Pradesh]

On the basis of arguments made in these cases, it was submitted for the

appellants that benefit of section 4 of Probation of Offenders Act can be given to the appellants. In the first case, there was conviction for offence punishable u/s 279 and 304A of I.P.C. In the last case, there was conviction for offence punishable u/s 506 of I.P.C. The facts and circumstances of each and every criminal case are always different. In the night time, the appellants had forced the family of Jaishree to open the door, the appellants had concealed their identity by covering their faces with pieces of clothes or rugs, they had put the life of PW Nos. 2 and 3 in danger. These two persons had no protection of any kind. This Court holds that it is not possible to give benefit of the provisions of section 4 of the Probation of Offenders Act when the offence is committed in the night time and after concealing the identity. Such offence needs to be treated as more serious offence and no lenient view can be taken in such a case. So this Court holds that on the point of sentence also no interference is possible and so the order.

O R D E R

The appeal stands dismissed.