
(1983) 06 BOM CK 0008

In the Bombay High Court

Case No : Criminal Appeals No's. 979 and 1028 of 1981

Dattatraya Gunyaba Sidhaganesh and another

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 21-06-1983

Acts Referred:

Penal Code, 1860 (IPC) — Section 395

Citation : (1983) 06 BOM CK 0008

Hon'ble Judges : Sharad Manohar, J

Bench : Single Bench

Judgement

1. I have no other option but to allow these two appeals filed by the original accused against the order of conviction and sentence passed by the II Additional Sessions Judge, Solapur, holding that the three appellants in these two appeals had committed offence of dacoity, punishable u/s 395 of the Penal Code. The most important evidence to prove that the dacoity was committed has been either withheld by the prosecution or the prosecution has been lax in the matter of producing the same.

2. It is unnecessary to state the facts, at length, relating to the prosecution case. They have been sufficiently and correctly stated by the learned Additional Sessions Judge in his judgment out of which both these appeals arise. Appeal No. 979 of 1981 is filed by original accused Nos. 1 and 3 while Appeal No. 1028 of 1981 is filed by original accused No. 2.

All the three accused faced a charge of dacoity punishable u/s 395 of the Penal Code in the Sessions Court. Briefly stated, the prosecution case was that on 26-2-1981 two Policemen of the Railway Protection Force (Rakshakas) noticed C.S.T. 9 plates being loaded in a truck standing on a bridge on the railway track between Kurduwadi Railway Station and Vadsingi Railway Station. At that time they were accompanied by two gangmen. All these four were successful in intercepting and blocking the way of the truck. In the truck there were about 10 men. As the truck was intercepted, an attempt was made by the inmates of the

truck to attack one of the policemen (Rakshakas), with the result that a shot had to be fired by one of them towards, the truck. During the incident certain villagers came to the place of the scene of offence which took place at about 3 a.m. on that day. The Rakshakas, gangmen and the villagers who had gathered there were successful in apprehending four out of the 9 or 10 inmates of the truck including the cleaner. A panchanama of the relevant articles found at the place of the offence as also of the contents of the truck was made. Prosecution contention is that 63 CST pieces of 9 plates were found in the truck under a tarpaulin sheet. The case of the prosecution is that the four accused persons who were produced before the Court to face the charge u/s 395 of the Penal Code are 4 persons out of 9 or 10 offenders who had committed dacoity by committing theft of those 63 pieces of 9 CST plates, and while carrying these stolen articles, they attacked the policemen who were preventing them from effecting the theft and caused injury to one of them.

3. It may be mentioned here that in addition to the four accused six other persons were also arrested by the police during the investigation of the offence and all of them were ultimately produced before the Court of the Judicial Magistrate for the committal proceedings. Accused No. 10 out of them was the owner of the truck. All the 10 accused were committed by the learned Magistrate to the Sessions Court for trial. However, before framing charge against the accused, the learned Additional Sessions Judge was satisfied that no offence could be brought home against the owner of the truck who was added as accused No. 10 in these proceedings. He was therefore discharged by the learned Additional Sessions Judge even before framing of the charge. So far as the remaining 9 accused were concerned, charge was framed against them for offence punishable u/s 395 of the Penal Code to the effect that they had committed dacoity on the date and place in question by committing theft of CST 9 plates belonging to the Railways.

4. The evidence of the prosecution consisted of three so called eye-witnesses viz. Laxman Rane (P.W. 4), Gena Kapara (P.W. 5) and Naganna Bharate (P.W. 6). They claimed to be the eye-witnesses not for the act of actual stealing of the plates in question, but for the fact that the accused tried escaping by the truck, and while trying to escape they caused, hurt to one of the Rakshakas Rane (P.W. 4). The evidence also consisted of the oral testimony of the panch witness Prabhakar Bharate (P.W. 2) for proving the various panchanamas. No other panch-witness was examined. Baburao Mallikarjun Nashte, the owner of the truck who was initially arrested as accused No. 10 in these proceedings was examined as P.W. 8 to prove that accused No. 2 (who is the appellant before me in Appeal No. 1028 of 1981) was the cleaner of the truck which was involved in this incident, and who proved further that Akbar Nabisaheb Mohamadsaheb Shaikh accused No. 7 in these proceedings was the person employed by him as the driver of the truck.

5. The defence of all the three accused was that they had taken no part

whatsoever in the alleged theft committed by any person. Their contention was that they had taken a lift in the truck while it was passing by the road and that when the truck was stopped, they were arrested by the police without any rhyme or reason.

6. Upon examination of the evidence led by the prosecution, the learned Additional Sessions Judge was satisfied (a) that theft of 63 CST 9 plates was committed on the date in question; (b) that the stolen articles were being carried away in the truck by the offenders; (c) that the 4 accused before the Court were not only the inmates of the truck but were the persons who had taken part in assaulting the Rakshakas when they tried to prevent them from effecting their escape, and further that these 4 persons were apprehended by the police and the others while trying to run away from the place of offence.

On the basis of these inferences, the learned Sessions Judge held that the offence of dacoity was proved against accused Nos. 1 to 4 out of the nine accused against whom charge was framed. Hence he sentenced each of them to suffer R.I. for three years and to pay fine of Rs. 100/- and in default, to suffer R.I. for three months. Consequential orders for disposal of the Muddemal property were also passed by the learned Judge.

It is against this order of conviction and sentence that accused Nos. 1 to 3 have filed the present appeals. No appeal has been filed by the accused No. 4 against the order of conviction and sentence passed against him.

7. I have gone through the entire oral evidence as well as the documentary evidence as also the evidence contained in the various panchanamas, and I am satisfied that, the judgment under appeal suffers from grave defect so far as one of the main aspects of the prosecution case is concerned. The main aspect is that in the instant case, the prosecution has badly failed to establish that the articles found in the truck at the relevant time were the articles in respect of which the theft is alleged to have been committed by some offenders and in the absence of the evidence on this main aspect, the entire prosecution case must crumble. In view of this basic short-coming in the prosecution evidence, the question of the veracity of the prosecution evidence on the other points becomes academic. I shall, therefore, deal only with that part of the evidence which deals with this aspect of the case.

8. The first witness examined by the prosecution is the Rakshak Laxman Rane (P.W. 4). It is unnecessary to refer to his evidence which deals with the circumstances in which he and his colleague, the other Rakshak called Bandagi Husen Shaikh happened to be on the railway track. He has stated that they noticed a truck standing on the bridge of the railway track and suspected that it was being loaded by stolen railway property viz., the CST 9 plates. It is somewhat mysterious, the way he, standing on the Railway track could make out that the truck stationed on the bridge was being loaded by CST 9 plates and nothing else. Fact remains that as per the evidence of this witness, the two

policemen did have the said suspicion. At that time they were accompanied by two gangmen. The evidence of P.W. 4 Rane shows that all the four of them took effective steps for blocking the way of the truck by doing some cross-country running. The evidence of P.W. 4 further shows that when the truck stopped, one of the inmates of the truck got down and assaulted P.W. 4. His colleague therefore opened fire at the truck. The driver tried twice to reverse the truck. In his second attempt to reverse the truck, it left the road and got stuck in the mud by the side of the road. By virtue of the sound of the gun, villagers rushed to the place of offence. The inmates of the truck tried to take to their heels, but four out of them were apprehended by the police and the villagers.

His evidence further shows that the accused were taken to the police station and that he lodged the first information report at the police station.

The first information report states that on going near the truck, the witness found that it was loaded with 63 CST 9 plates belonging to the railway. The prosecution also led the evidence of one Gena Tukaram Tapare (P.W. 5), who was one of the gangmen accompanying the Rakshakas and also examined Naganna Hambirrao Bharate (P.W. 6), who is one of the villagers. The contention of the prosecution was that the four accused were apprehended by the police, gangmen and the villagers. Obviously, one witness has been chosen from each of the category of witnesses to prove that the accused were in fact the persons who were trying to escape and were apprehended during the incident.

9. It appears that some spirited criticism was levelled against the evidence of these three witnesses viz., Laxman Rane (P.W. 4), Tukaram Tapare (P.W. 5) and Naganna Bharate (P.W. 6) mainly on the ground that there were certain discrepancies in their evidence inter se. The learned Judge has declined to give much importance to those discrepancies, and to my mind quite rightly. I agree with the learned Judge that some minor discrepancies are bound to occur when three persons give evidence about the way in which they perceived the various incidents that were taking place at the time of the offence. I also agree with the learned Judge that as a matter of fact these discrepancies vouched for the veracity of the truthfulness of their evidence so far as it goes. I must state that I have not heard the two learned Advocates for the accused on this point because I am allowing the appeal on an entirely different ground. But I must record my opinion here that on these aspects of the appreciation of the oral evidence by the learned Additional Sessions Judge, I am not inclined to find fault with the same.

10. Mr. Patankar, the learned Counsel for the accused Nos. 1 and 3 invited my attention to one aspect of the evidence of P.W. 4 wherein he stated that whilst standing on the railway track he heard the sound of CST 9 plates being put in the truck. This is what the witness has stated in his evidence :-

"On seeing the truck, we suspected that some persons must have come to commit theft of the Rly. property because on earlier occasions there were thefts of CST-9 plates, from that area. We then turned back and went in the direction of

Kurduwadi Station. When we proceeded for some distance, we heard the noise of CST-9 plates being put into the truck. We then felt sure that there were thieves committing theft of the said Rly. Property."

While criticising this evidence, Mr. Patankar contended that it was humanly impossible for any one to identify the sound of the loading in the truck to be the sound of loading of CST-9 plates. Mr. Patankar may be right on this point; but to my mind the evidence of P.W. 4 cannot be discarded on this sole ground. It is quite possible that he was on the watch as to whether this particular railway property viz., CST-9 plates were being stolen that night that he was led to the track mainly because just within a month before this incident, thefts of these plates had been committed by some unknown persons. It is, therefore, quite possible that he suspected that the truck was being employed by the thieves for loading the similarly stolen plates. When he heard some clattering sound, he inferred that what was being loaded was the stolen property consisting of CST-9 plates.

11. Next, Mr. Patankar advanced criticism against the fact that the prosecution had examined Baburao Nashte (P.W. 8) when this very witness had been arrayed as accused No. 10 in those very proceedings. Criticism evidently aimed at contending that the evidence or statements of the co-accused could not be used against the other accused in any event, without sufficient corroboration. But I am not impressed by this criticism. All that the evidence of P.W. 8 shows is that accused No. 2 was a cleaner and accused No. 7 was a driver of the truck and that he had employed them as such cleaner and driver for transport of certain commodities in the truck. Out of those two persons, accused No. 7 has already been acquitted by the lower Court. The fact that accused No. 2 was in fact employed as a cleaner could be verified from the witness's cross-examination and by calling upon him to prove that fact by independent evidence. The prosecution has not examined P.W. 8 while he was arrayed as the accused. He has not been discharged at the instance of the prosecution. Order of discharge in his favour is passed on its own by the Court. In fact he was sought to be inculpated because he was the owner of the truck of which accused No. 2 was the cleaner. It is only after the Court passed this order that he has been examined by the prosecution as its witness to prove that accused No. 2 was in fact employed by him as a cleaner of the truck. It would be only a corroborative piece of evidence. From this evidence, it could not be established directly that accused No. 2 had taken part in the episode of dacoity. Moreover, if the accused No. 2 was caught red-handed, while participating in the latter part of the dacoity, the evidence of P.W. 8 would be redundant so far as the prosecution case was concerned and if that fact was not proved by the prosecution by direct evidence, the evidence of P.W. 8 to the effect that accused No. 2 was employed by him as a cleaner of the truck would be of no relevance whatsoever. The criticism against the evidence of P.W. 8 is, therefore, to my mind, of no consequence whatsoever.

12. But this is all that can be stated in favour of the prosecution. Point is that

this much evidence does not carry the prosecution case any further at all. What the prosecution must prove is not that these accused in fact were apprehended by the police and the villagers. One of the further essentials that the prosecution must prove is that at the time when the accused were apprehended as inmates of the truck, the truck was in fact carrying the stolen property belonging to the Railway and this is where the prosecution has bungled miserably while adducing the evidence.

13. It is common ground that so far as the actual act of stealing is concerned, evidence of no eye-witness is available at all. In these circumstances the fact that the driver of the truck and the inmates of the truck were whisking away the stolen property belonging to railway could be proved by the prosecution only by proving that at the time when the truck was accosted, the truck in fact contained the stolen property belonging to railway. Now, in the instant case as per the prosecution, the stolen property was nothing but 63 CST-9 plates. The prosecution must, therefore, prove that the truck contained 63 CST-9 plates. Evidently, this could be done by the prosecution, in the first instance, by proving panchanama of the contents of the truck at the time when it was accosted and further, by producing before the Court at least some of the articles which were seized at that time as sample articles and by proving that those articles were railway property viz., the 63 pieces of CST-9 plates. All the plates being of identical description, production of even one of them as sample would be enough in the instance case.

14. Amazingly enough, the panchanama of the contents of the truck does not at all show that the articles that were found in the truck were CST-9 plates. In this connection, it would be significant to note that the first information report recorded by the police does mention that the truck was carrying 63 pieces of CST-9 plates belonging to the railway, but the panchanama made by the police shows that they were 63 iron Ghamelas. It is impossible to appreciate that the CST-9 plates can be described as Ghamelas. Ghamelas is a Marathi word. As if the prosecution wanted to leave no doubt about the meaning, the word has been translated by the prosecution into English to state that they were iron containers. Now, again, it is difficult, to understand as to how the CST-9 plates can be described as iron containers. Evidence has been led in this case to show as to what is the purpose of the iron plates. The purpose is not to keep anything in these iron plates. No evidence is led to show that these iron plates can be used as containers for anything whatsoever. Moreover, the Marathi word "Ghamelas" leaves no doubt. Ghamelas are meant for carrying through them such things as bricks, cement, stones, or sand etc. A Ghamelas is not meant for giving support to the railway tracks.

In para 9 of his evidence, in his cross-examination, P.W. 4 has stated that CST-9 plates are fixed under the rails. This obviously means that these plates are meant as supports for the rails. If this is so, then it is difficult to understand as to how they could be described as containers or Ghamelas.

15. Mr. Patil, the learned Public Prosecutor argued that there is sufficient evidence on record to show that what was being carried in the truck at the time when it was accosted were the CST-9 plates and not Ghamelas. He contends that the CST-9 plates themselves have been described by the police, while preparing the panchanamas, as "Ghamelas". In support of his contention that what was being carried in the truck were the CST-9 plates, he relied upon the evidence of Laxman Rane (P.W. 4), who has stated consistently in the First Information Report as well as in his evidence that what was carried away by the truck were the CST-9 plates.

The difficulty is that the panchanama cuts across the evidence of this witness. After all, panchanama is required to be made in order to vouch for the evidence of the police witnesses. It is sought to be produced as evidence of independent witnesses. The panchas are independent persons. They are brought with a view to tell the Court as to what were the factual things that they had found at the relevant time. If the panchas say that they had seen Ghamelas in the truck, the evidence of the police that what was carried by the truck were not Ghamelas but were CST-9 plates, cannot be of any help to the prosecution. If the evidence of witness P.W. 4 was to be preferred to the evidence of the panchas reflected in the panchanama, then the very purpose of the panchanama would be defeated. In this connection it is to be noted that there are cases where police find it difficult to get independent panchas for the purpose of panchanama. Difficulty may arise on account of various reasons. It may be unearthly hours; it might be a God-forsaken place; it may be a tense situation or any other similar situation in which it becomes difficult for the police to collect panchas or prepare panchanama. It may be that on such occasion the evidence of the eye-witness or of the police may be relied upon by the Court in spite of the absence of the panchanama or in spite of the absence of the evidence of the panchas. I make it clear that I express no opinion as such on this point. I am only indicating possibilities of the situations in which in the absence of the evidence of any pancha, may, even against the evidence of the panchas the Court might rely exclusively upon the evidence of the police. But the position in the present case is entirely different. The police had in fact prepared the panchanama. The panchanama shows that articles which were found in the truck were something entirely different from the articles which were alleged to have been stolen by somebody from the railway track. Alleged articles stolen are CST-9 plates. The articles found in the truck were iron Ghamelas. It is, therefore, difficult to accept the prosecution case that the truck was whisking away the stolen property belonging to the railway, viz., the 63 pieces of CST-9 plates.

16. But the weakness of the prosecution case does not rest there. It was not sufficient for the prosecution to rest content by making panchanama. The norm expected of the police was that they would seize the articles which were being carried by the truck and which were suspected to be stolen property. It was necessary also for the prosecution to seize them under a panchanama, to seal them under a panchanama and then to produce those stolen goods before the

Court. It may be that in the instant case it was not possible for the prosecution to seal all the 63 pieces of the goods which were suspected to be stolen property. But a few, or at least one, should have been seized, sealed and produced. Curiously enough the prosecution in fact purported to produce one piece out of 63 pieces before the Court. That was Article M.O. 2 before the Court. That piece should have been sealed in the presence of the panchas and that sealed article should have been produced before the Court. Surprisingly the prosecution has not found it necessary to do any such thing. In other words, the prosecution wants the Court to swallow everything that the prosecution alleges against the accused, hook, line and sinker. I called upon the learned Public Prosecutor to show me anything from the evidence to satisfy me that what was produced before the Court was the same piece which was recovered from the truck at the time when it was accosted on the fateful night. The learned Public Prosecutor candidly conceded that no such thing has been done by the police. The total picture, therefore, is as follows :

The Panchanama says that what was found in the truck were Ghamelas. What is produced before the Court is claimed to be the one of the 63 CST-9 plates !

Incidentally I may also mention that though this is a very important piece of evidence sought to be produced before and relied upon in the Court, no attempt was made on behalf of the Government to produce the said article before me at the time of the hearing of this appeal. I had, therefore, no opportunity to verify as to how and in what circumstances the CST-9 plates could be described as iron Ghamelas, or as translated by the prosecution, iron container.

To my mind this lapse on the part of the prosecution weakens the prosecution basically. The very basic fact that what was being carried by the truck were the stolen goods belonging to the railway has not been established. The other evidence of the prosecution to prove that this truck was sought to be stopped by the police and that the inmates of the truck resisted such stoppage, cannot be a piece of evidence of dacoity. The prosecution must fail on this narrow ground.

17. In the result, both these appeals are allowed. The order of conviction and sentence passed against the accused is hereby quashed and set aside and the Appellant in Appeal No. 1028 of 1981 is directed to be released forthwith, unless required in any other case. Fine, if paid, to be refunded back to the accused. The bail bonds of the Appellants in Appeal No. 979 of 1981 to stand cancelled.

18. Appeals allowed.