

(2006) 12 BOM CK 0043
In the Bombay High Court
Case No : Criminal Appeal No. 1534 of 2004

Dharmavijay Chandru Shedage

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 22-12-2006

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 307, 334, 337, 34, 392

Citation : (2006) 12 BOM CK 0043

Hon'ble Judges : A.M. Khanwilkar, J

Bench : Single Bench

Advocate : S.V. Marwadi and Sunita Sharma, in Appeal No. 1534 of 2004, Vikas Kolekar, in Cr. Appeal No. 1547 of 2004 and Razia Shaikh, in Cr. Appeal No. 80 of 2005, for the Appellant; S.S. Tatkare, APP, for the Respondent

Judgement

A.M. Khanwilkar, J.—By this common Judgment, all the three appeals are disposed of.

2. These appeals are filed by the accused Nos. 1, 2 and 3 respectively against the Judgment and Order passed in Sessions Case No. 2 of 2003 alongwith Sessions Case No. 617 of 2003 dated 20th October, 2004. The appellants were tried for having committed offence punishable u/s 450 r/w 34 and 307, 337 r/w 334 and 392 r/w 397 of I.P. Code. The accused were convicted of the offence punishable u/s 392 r/w 397 of I.P. Code. They were however, acquitted of the offence punishable u/s 450 r/w 34, 307 and 337 r/w 34 of I.P. Code. The charge u/s 392 r/w 34 was dropped as the accused were convicted u/s 392 r/w 397.

3. Briefly stated, the prosecution case is that on 10th September, 2002 at about 8.15 p.m. two persons entered a ready-made garments shop in the name of "Lovely Collection" on the N.C. Kelkar Road, Shivaji Park, Mumbai, posing themselves to be customers. It is stated that at the relevant time other 7 or 8 customers were present in the shop. The two persons selected four pants and five shirts. They went near the cash counter. However, instead of paying the

amount of Rs. 4,349/-, which was payable as per the bill, one of them removed pistol from his pocket and the other person whipped out a chopper concealed in his pant. Those persons at the point of weapons asked all other persons in the shop to remain quiet and not to move. It is stated that one of them claimed that they belonged to gang of Amar Naik. It is the prosecution case that at the point of weapons those persons then removed cash lying in the counter to the extent of Rs. 33,271/- and threatened the shop-keeper as well as his servants and other customers not to chase them. It is stated that after walking out of the shop they went up to a taxi which was waiting outside the shop on the opposite side of N.C. Kelkar Road. One other person was seen waiting near the taxi with a chopper in his hand. The two persons rushed towards the taxi and all the three persons including the person who was standing near the taxi boarded the taxi. This scene was witnessed by the shop owner Manish Kanji Patel and his uncle Deoraj Dharamshi Patel as well as their servants and other customers. Manish Patel-complainant (P.W. 1) as well as his uncle claimed to have chased the taxi, in which the three accused had attempted to escape. When they were chasing the taxi, they were giving shouts as "Chor-Chor". Hearing those shouts, some police personnel who were on petrolling duty in the said area also started chasing the taxi. The taxi proceeded up to Gadkari Chowk and stopped on account of traffic signal. In addition to the police personnel who were chasing the taxi, there were other police personnel on duty near the chowk, who also rushed towards the taxi. The police personnel attempted to catch-hold of the three assailants when they alighted from the taxi. The assailants however, gave threats that they should not be chased, failing which they will open fire. It is stated that one of the assailant even attempted to fire but was unsuccessful. The police however, succeeded in overpowering the said person who had attempted to open fire. During the commotion, the two other assailants managed to escape from the scene. The assailant who was nabbed on the spot was brought to the Shivaji Park Police Station. On enquiry he disclosed his name as Dharmavijay Chandru Shedage. On taking his personal search in the presence of two panchas, police recovered one country made revolver alongwith three live cartridges and three empty cartridges. Police also recovered 200 coins of Rs. 5/- denomination and four pants and five shirts, which the assailants had taken away from the shop of "Lovely Collection". In the preliminary interrogation, the said assailant disclosed the names of his companions as Raju Vasant Patkar aged 35 years and Mohd. Faruq Shaikh aged 30 years. This fact has been recorded in the complaint given by Manish Kanji Patel, which was reduced into writing (Exh.17). After registering the complaint, police proceeded with the investigation. The accused No. 2 Raju Vasant Patkar was arrested on the next day i.e. 11th September, 2002. Both the accused Nos. 1 and 2 were produced for test identification parade on 27th September, 2002 which was conducted in the presence of Special Executive Magistrates (S.E.M.)(P.W. 5 and P.W. 10). Accused No. 3 Abdul Razak Salim Inamdar " Faruq Shaikh came to be arrested on 27th June, 2003. He was put up for test identification parade conducted under the supervision of S.E.M (P.W. 9) on 15th July, 2003. Initially, as accused No. 3 was not arrested and investigation

so far as accused Nos. 1 and 2 was completed, chargesheet came to be filed only against them. After arrest of accused no. 3 and completing further investigation, supplementary chargesheet came to be filed. As the matter was triable by the Court of Sessions, the case was remitted before the Sessions Court, which came to be numbered as Sessions Case No. 2 of 2003. All the accused pleaded not guilty and claimed to be tried. Accordingly, all the three accused were tried together.

4. The prosecution examined in all 16 witnesses in support of its case. Besides, the prosecution relied on the documentary evidence. In so far as the main incident, which occurred in the shop, the prosecution has relied on evidence of sole witness P.W. 1 Manish Kanji Patel. No other witness has been examined. The incident regarding chasing the assailants who had boarded the taxi is spoken by P.W. 1 as well as police personnel Ashok R. Sawant (P.W. 3) and Vilas K.Rane (P.W. 2), who had chased the taxi. The incident of chasing the taxi and halting of the taxi at the signal and thereafter assailants alighting from the taxi till the accused Nos. 2 and 3 having escaped from the scene and accused No. 1 accosted on the spot, is additionally spoken by P.W. 6 Satyaprakash Subedar Yadav, fruit vendor, who claims to be present at the scene. Those events are also spoken by P.W. 1, 2 and 3. The prosecution has examined Pankaj Nandose(P.W. 4), Sanjay Prabhakar Samel(P.W. 7), Shrivankumar Kishorilal Sahani (P.W. 11) and Omprakash Bhavsar (P.W. 12), who acted as panchas. The prosecution also relied on the evidence of Dr. Vinod Shetkar (P.W. 8) who had occasion to examine police personnel who were injured during the commotion while nabbing the accused No. 1 on the spot. Prosecution has also examined Special Executive Magistrates in whose presence test identification parades were conducted being P.W. 5 Krishna Govind Mahadik, P.W. 9-Moreshwar Gopal Thakur and P.W. 10-Manoj N. Punde. On analysing the oral as well as documentary evidence on record, the trial Court proceeded to record finding of guilt against the accused and convicted them for offence punishable u/s 392 r/w 397 of I.P. Code. The trial Court essentially found that the evidence of P.W. 1 was truthful and natural. He identified the accused persons and his version was corroborated by evidence of other prosecution witnesses P.W. 2 and P.W. 3 as well as P.W. 6. The trial Court has noted that even these witnesses have identified the accused during the test identification parade as well as in the dock. The role played by each of the accused has been spoken about by the prosecution witnesses. Consequent to such evidence the trial Court recorded finding of guilt against the accused. This decision of the trial Court is subject matter of challenge in the present appeal. With the assistance of counsel appearing for the accused as well as Public Prosecutor, I have examined the relevant record. The question that needs to be addressed in these appeals is whether the view taken by the trial Court while recording finding of guilt against the accused is a possible view. To consider this aspect I shall now examine the efficacy of the evidence against each of the accused independently.

5. Taking the prosecution case against the accused No. 1, I have no difficulty in

accepting the finding of guilt recorded by the trial Court qua this accused. For, this accused was nabbed on the spot. It is a case of Flagrant Delit. The accused is not only arrested on the spot, but fire weapon and cartridges is also recovered from his possession. He was found in possession of one country made revolver with three live cartridges and three empty cartridges. This accused was also found in possession of the pants and shirts taken away from the Shop "Lovely Collection". These facts are spoken by P.W. 1 as well as P.W. 2, P.W. 3 and P.W. 6. P.W. 2, P.W. 3 and P.W. 6 are independent persons and had arrived on the scene only after the call given by P.W. 1 while chasing the taxi, which was boarded by the assailants. The recovery of revolver is witnessed by panch (P.W. 7) again an independent person. The eye witnesses have deposed about the scuffle and commotion, which took place while nabbing the accused No. 1. During that commotion, police personnel had suffered minor injuries, which is deposed to by P.W. 8. As Accused No. 1 has been arrested on the spot and the prosecution version about his involvement in the commission of crime is fully corroborated, the opinion recorded by the trial Court recording finding of guilt against this accused is unexceptionable. As accused No. 1 is arrested on the spot, it is unnecessary to consider whether this accused has been identified during the test identification parade. Indeed, the Accused No. 1 has been identified in the test identification parade as well as in the dock by the concerned witnesses. Assuming that the test identification parade in respect of this accused was to be discarded, it will make no difference. The present case can still stand on the basis of the substantive evidence of prosecution witnesses about the engagement of the accused in the commission of the alleged crime, which evidence has remained unshaken. Taking over all view of the matter, I see no basis to overturn the conclusion reached by the trial Court about the involvement of the accused No. 1 in the commission of the offence.

6. Counsel for the accused No. 1 would contend that there is discrepancy in the description of the role played by this accused as given by different witnesses. In my opinion, the trial Court has rightly brushed aside this argument as the discrepancies were not significant, but minor discrepancies. Besides, there is no cross on the point of the stated minor discrepancy regarding the weapon held by this accused at the relevant time. The fact remains that this accused has been accosted on the spot and incriminating items are recovered from his possession. Suffice it to observe that the finding of guilt recorded by the trial Court against the accused No. 1 is unassailable.

7. Counsel for this accused would then contend that the sentence awarded by the trial Court should be reduced. It is not possible to entertain even this submission for more than one reason. In the first place, the offence is very serious offence of committing robbery by using deadly weapons. Secondly, the trial Court has awarded minimum sentence provided by law. There is no tangible reason forthcoming why the sentence lesser than the statutory minimum sentence should be reduced.

8. That takes me to the case against the accused No. 2. In so far as this accused is concerned, prosecution case is that he was standing near the taxi, which was waiting outside the shop to facilitate the escape of the other accused who had entered the shop. This accused was seen holding chopper in his hand. This fact has been deposed by P.W. 1. Evidence of P.W. 1 has been accepted by the trial Court as trustworthy and natural and in my view rightly. It is the prosecution case that this accused, alongwith other two accused boarded the taxi and attempted to escape from the scene. The fact that this accused was seen in the company of other accused has been spoken by other prosecution witnesses who are independent persons such as P.W. 2, P.W. 3 and P.W. 6. Even their version has been rightly accepted by the trial Court as trustworthy and natural. Indeed, this accused managed to escape from the scene soon after alighting from the taxi, during the commotion. However, he was arrested shortly as his involvement in the commission was disclosed by the accused No. 1 himself. In any case, there is independent evidence produced by the prosecution about the involvement of accused No. 2 in the commission of the offence. Accused No. 2 has been identified by the prosecution witnesses in test identification parade held on 27th September, 2002. In the entire evidence, there is nothing to doubt the authenticity of test identification parade. Accused No. 2 has been additionally identified in the dock by the concerned witnesses. Indeed, no recovery has been effected from accused No. 2, but having regard to the clinching evidence on record disclosing the involvement of accused No. 2 in the commission of the crime, the finding of guilt recorded by the trial Court against this accused also is unexceptionable.

9. Counsel for the accused No. 2 would contend that there is discrepancy in the evidence of P.W. 1, P.W. 2 and P.W. 3 about the positioning taken by the accused No. 2 at the relevant time, outside the shop as well as while in the taxi. This argument, however, overlooks that the prosecution witnesses P.W. 1, P.W. 2, P.W. 3 and P.W. 6 have spoken about different stages of the events as unfolded. Similarly, the argument that there is discrepancy in the evidence of P.W. 3 and P.W. 1 as to snatching of the plastic bag from Accused No. 1 or 2 also does not commend to me. All such discrepancies being insignificant will be of no avail. The substantive evidence about the presence and involvement of accused No. 2 in the commission of the crime has been corroborated by the prosecution witnesses. There is nothing in the cross-examination of these witnesses to discard their evidence about the involvement of accused No. 2.

10. The main argument of the accused No. 2 was to persuade this Court to discard the identification parade qua this accused. Even this argument does not commend to me. The trial Court has relied on the evidence regarding test identification parade as well as identification of accused No. 2 in the dock by the concerned witnesses. In so far as accused No. 2 is concerned, he has been identified by P.W. 1, P.W. 2, P.W. 3 and P.W. 6. The only suggestion given in the cross-examination to these witnesses at the instance of accused No. 2 is that the witnesses had opportunity to see this accused in the police station before test

identification parade was held, which has been denied. The other question put during the cross-examination is that the dummies were not similar and that the witnesses were not in a position to disclose as to how many other dummies were beared; That they were deposing at the instance of the police. The evidence of those witnesses appear to be truthful and natural. Besides, the witnesses are independent persons having no reason to falsely implicate the accused No. 2 in the commission of the offence. Incidentally, no case of false implication by three witnesses due to inimical terms or otherwise has been put to them by this accused. The Special Executive Magistrate has deposed about the manner in which the test identification parade was conducted. Indeed, in the cross-examination of P.W. 16 suggestion is given to him that Test Identification parade was not conducted. In response, he has obviously denied that suggestion. In the typed copy of the evidence however, the word "not" is missing, which is obviously is a clerical error. Even the Counsel for the Accused has fairly accepted this position. Taking over all view of the evidence with regard to the test identification parade, it is not possible to discard the same. Incidentally, the accused No. 2 has also been identified by the witnesses in the dock.

11. As is mentioned earlier, the involvement of accused No. 2 is disclosed by accused No. 1. The substantive evidence of prosecution witnesses points finger towards involvement of Accused No. 2 in the commission of offence. Accused No. 2 has been arrested immediately on the next day. Accused No. 2 was produced for test identification parade without loss of time. The evidence regarding test identification parade appears to be independent, truthful and natural. There is nothing to indicate that the test identification parade of accused No. 2 was vitiated on account of non-compliance of mandatory formalities or such other vital circumstances. In my opinion, therefore, the finding of guilt recorded by the trial Court even against the accused No. 2 will have to be upheld.

12. The counsel for the Accused No. 2 would then contend that as the Accused No. 2 is alleged to be standing outside the shop across the road near the taxi, there is no legal evidence to conclude that he had the intention to participate in commission of the offence in question. For that reason Sections 392 and 397 were inapplicable. This argument overlooks the case established by the prosecution. P.W. 1 in the complaint (Exh.17) has stated that outside the shop one taxi was parked and one beared person wielding chopper was standing near that taxi. He has then stated that the two assailants after getting out of his shop rushed towards the said tax and all the three boarded the same taxi so as to flee away from the scene. In the evidence also that versions have been reiterated. Nothing has come in the cross-examination at the instance of Accused No. 2 to doubt the involvement of this accused. The other prosecution witnesses P.W. 2, P.W. 3 and P.W. 6 have consistently deposed that they had seen Accused No. 2 in the taxi alongwith other two Accused. There is clear evidence of complicity of the Accused No. 2 in the commission of crime. A priori, there is no substance in this submission. In any case, evidence regarding his(Accused No. 2) common intention is writ large. I am conscious of the fact that the trial Court has

observed that as Accused are found guilty for offence u/s 392 and 397 I.P. Code(charge thirdly), it was unnecessary to separately convict them for offences u/s 392 r/w 34 I.P. Code(charge secondly)- for which they were additionally charged. That however, does not mean that the trial Court has acquitted the accused No. 2 on the finding of no guilt or no evidence. As it makes no difference from the standpoint of punishment, the trial must have loosely observed that charge secondly is dropped. Thus understood, it is not a case where the Accused No. 2 deserves acquittal. The Accused No. 2, therefore, cannot succeed in his appeal as there is sufficient evidence on record to find him guilty of charge thirdly, in any case of charge secondly.

13. That takes us to the case against the accused No. 3. It may be recalled that the incident took place on 10th September, 2002. Indeed, the accused No. 1 disclosed the name of the third assailant as Mohd. Faruq Shaikh, aged 30 years. However, the accused No. 3 is Abdul Razak Salim Inamdar " Faruq Shaikh. What is relevant to note is that the accused No. 3 was arrested on 27th June, 2003 which is almost after nine months from the date of incident. It is seen that no recovery is proved from this accused, except the Chopper. However, that recovery has been discarded by the trial Court for cogent reasons recorded in the Judgment. I am in agreement with the said view taken by the trial Court that the recovery of chopper at the instance of this accused cannot be considered as legal evidence to proceed against him. For, the same is recovered from a spot accessible to common public.

14. The only strong circumstance against this accused is his identification during the test identification parade and also in the dock by the prosecution witnesses P.W. 1, 3 and 6. In the circumstances, if this Court were to doubt the outcome of the test identification parade qua this accused, then it would be right to contend that this accused should be given benefit of doubt. I shall therefore, straightaway advert to the evidence regarding the test identification parade of accused No. 3. He has been identified in the test identification parade held on 15th July, 2003 by P.W. 1, P.W. 3 and P.W. 6 only. None of these witnesses had given prior description of accused No. 3 in their statements recorded before the police. As mentioned earlier, the name disclosed by accused No. 1 of the third accused involved in the offence was of Mohd. Faruq Shaikh, aged about 30 years.

15. Assuming that the accused No. 3 is also known as Faruq Shaikh, the P.W. 1 has not given description of accused No. 3 either in the complaint or the supplementary statements. This assumes significance because arrest of the accused No. 3 is not immediately after the incident in question but after a gap of more than nine months. Reliance is rightly placed on the decision of the Apex Court in the case of Ganpat Singh and Anr v. State of Rajasthan, (1997) 11 SCC 565 , where the accused was put to identification parade after about one year from the date of incident. It was held that identification of the accused in such a case created a reasonable doubt. Besides, the test identification parade has been conducted after about 20 days from the arrest of the accused No. 3. I am

conscious of the fact that similar argument could be pressed in relation to the accused No. 2. However, the case of the accused No. 2 is concerned, he was arrested on the next day after the incident and test identification was held within 15 days. In the cross-examination of the concerned prosecution witnesses, nothing has come on record to doubt the identification of accused No. 2. That is not the case in relation to the accused No. 3. The evidence against the accused No. 3, however, indicates that no description of accused was given by any of the prosecution witnesses. After gap of about 10 months after the incident, the basis on which the witnesses could identify the accused No. 3 is not forthcoming. The witnesses have not referred to any peculiar marks on the person of the Accused No. 3 or any such matter. It may be useful to refer to the exposition of the Apex Court in *Hasib v. State of Bihar* reported in 1972 S.C. 283, wherein it is held that the identification parade should be held at the earliest possible opportunity, as early opportunity to identify tends to minimise the chances of the memory of the identifying witnesses fading away by reason of lapse of time. It is further held, it is relevant to ascertain the effectiveness of the precautions taken against the identifying witnesses having an opportunity of seeing the persons to be identified before they are paraded with others; also against the identifying witnesses being provided by the investigating authority with other unfair aid or assistance so as to facilitate the identification of the accused concerned.

16. In the present case, except P.W. 1, no other witness, namely, P.W. 3 or P.W. 6, can claim to have seen the accused No. 3 for sufficiently long time. However, P.W. 1 has not given the description of this accused in any of his statements recorded by the police. Besides, in the cross-examination by accused No. 3 he admits that on 15th July, 2003 he was told by police that he was required to go to Arthur Road Jail. He stated that initially he went to police Station, then he went to Arthur Road Jail in police vehicle. He admits that police accompanied him upto Arthur Road Jail. In so far as P.W. 3 is concerned, in his cross-examination at the instance of accused No. 3 he admits that the accused was in police custody for over 15 days. Suggestion was given to P.W. 3 that he had occasion to see the accused before identification, which however, has been denied. He has admitted in the cross-examination that the scuffle on the spot went on only for about five minutes. Obviously, there was hardly any opportunity to P.W. 3 and P.W. 6 to memories the features of the Accused No. 3. Similarly, P.W. 6 in the cross-examination at the instance of accused No. 3 admits that on 15th July, 2003 initially he went to Dadar Police Station and then to Arthur road Jail. He admits that he was accompanied by police from police station to Arthur Road Jail. He has however, denied the suggestion put to him that he had opportunity to see the accused before identification parade was held or that he was identifying the accused at the instance of police.

17. There is nothing in the evidence to suggest that these witnesses had given prior description of accused No. 3 in their statements or further statement recorded by the police, even after the test identification parade was over. The basis on which they could identify this accused after such a long gap is not

forthcoming. Notably, the accused No. 3 was arrested almost after nine months of the incident and put to test identification parade after 20 days. No explanation whatsoever is offered for the time taken to hold the identification parade. While he was in police custody, there was possibility of prosecution witnesses having opportunity to see this accused, particularly the police personnel P.W. 3. The witnesses have admitted of having visited the police station before attending the test identification parade and also accompanied the police upto Arthur Road Jail where the parade was conducted. Significantly, no evidence is forthcoming that the accused No. 3 could not be arrested for such a long time because he was absconding. Neither P.W. 13 nor P.W. 15 have spoken about the fact that accused No. 3 was absconding. Moreover, no such case was put to the accused No. 3 in his Statement u/s 313 of Cr.P. Code. These are crucial aspects so far as accused No. 3 is concerned. Taking over all view of the evidence regarding identification of the accused No. 3 either during the identification or in the dock that does not lend confidence to establish the involvement of accused No. 3 in the commission of the offence. For that reason accused No. 3 is right in contending that he should be given benefit of doubt.

18. Accordingly, appeals preferred by the accused Nos. 1 and 2 will have to be dismissed, whereas the appeal preferred by accused No. 3 will have to be allowed by giving benefit of doubt to the said accused. Hence, I pass following order:

ORDER

(A) In the circumstances, the appeals preferred by accused Nos. 1 and 2 are dismissed. The finding of guilt recorded by the trial Court as against Accused Nos. 1 and 2 for offence punishable u/s 392 r/w 397 of the I.P. Code is upheld. As a consequences, the order of sentence imposed by the lower Court is also upheld being minimum sentence imposed for the offences in question.

(B) The appeal filed by the accused No. 3 being Criminal Appeal No. 80 of 2005 however, succeeds. The finding of guilt recorded against the accused No. 3 by the trial Court is set aside. Instead, the accused No. 3 is acquitted of the charge of having committed the offence punishable u/s 392 r/w 397 of I.P. Code by giving benefit of doubt. Accused No. 3 be released forthwith, unless required in connection with some other offence.

(C) Muddemal be disposed of inaccordance with the law.