
(2012) 06 BOM CK 0104
In the Bombay High Court
Case No : Criminal Appeal No. 68 of 2000

Jilaniya Bhosale and Others

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 22-06-2012

Acts Referred:

Evidence Act, 1872 — Section 27, 9
Penal Code, 1860 (IPC) — Section 395, 397, 457

Citation : (2013) 3 BomCR(Cri) 456

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

Bench : Single Bench

Advocate : S.S. Jadhavar, No. 2, for the Appellant; S.J. Salunke, Advocate for respondent No. 3 and Mr. R.P. Phatke, APP for State, for the Respondent

Final Decision : Allowed

Judgement

T.V. Nalawade, J.—The appeal is filed against judgment and order of Sessions Case No. 85/1999, which was pending in the Court of Additional Sessions Judge, Osmanabad. The appellants are convicted and sentenced for offence punishable under sections 395, 397 and 457 of Indian Penal Code. Both the sides are heard. In short, the facts leading to the institution of the appeal, can be stated as follows.

The incident took place on the night between 20.3.1999 and 21.3.1999 at about 3.45 hours. A petrol pump of one Birajdar is situated by the side of national high way No. 9 and it is within the limits of Dalimb village. On that night, the owner Birajdar, his Manager Bankat Chavan and some employees were present in the premises of petrol pump. One Police Constable Gadhave and one Home Guard Deshmukh were also present in the campus of the petrol pump. The Manager was sleeping in the constructed portion of two rooms with the cash and he had closed the shutter of the room from inside. There was cash amount of Rs. 16,500/-and there was a gold chain belonging to the owner with Manager. All other persons were sleeping outside of these two rooms.

2. Around 15-20 dacoits entered the campus of petrol pump and they started assaulting all the persons, who were sleeping outside the rooms. As they gave beating to Birajdar and as they wanted to rob them of the money and articles, Birajdar asked the Manager to open the shutter of the rooms. After opening the shutter of the rooms, the dacoits took away the aforesaid cash and gold chain with them.

3. The Police Constable Gadhave somehow ran towards highway and by blowing whistle, he attempted to bring help. When the dacoits left, the Police Constable went to a bar, having telephone facility and from there he contacted Murum Police Station, Osmanabad to inform about the incident. P.S.I. Bangar and other police staff came to the petrol pump. Bankat, the Manager, gave report and on the basis of his report, the crime at C.R.No. 36/1999 came to be registered for aforesaid offence in Murum Police Station.

4. P.S.I. Bangar made investigation of the case. He arrested accused Nos. 3 to 5 on 21.3.1999 itself. He recorded statements of aforesaid persons. From the possession of accused Nos. 3 to 5 articles like big handkerchiefs called as "Gamjas" were recovered. Such clothes were tied around heads of dacoits at the time of dacoity. Accused No. 2 came to be arrested on 25.5.1999 and accused No. 1 came to be arrested on 26.5.1999. During investigation, all the accused gave statements to Bangar and memorandums of the statements were prepared. On the basis of these statements, recovery was made of some cash amount from each accused and a piece of gold chain was recovered from accused No. 5. These articles came to be seized. Identification parade was held on two dates like 24.3.1999 and 15.4.1999. All the witnesses identified accused Nos. 3 to 5 in the first identification parade. Police Constable Gadhave and Home Guard Deshmukh identified accused Nos. 1 and 2 in identification parade dated 15.4.1999. Bangar filed charge sheet and he showed two accused persons as absconding in the charge sheet.

5. In the Trial Court in all 11 witnesses were examined by the prosecution. The Trial Court has believed all the witnesses. The Trial Court has believed the evidence of identification, the evidence of identification parade and also the evidence of identification of articles like a piece of chain recovered from the accused No. 5. In the appeal, it was submitted for the appellants that the evidence on identification of both the accused and property is highly doubtful in nature and as there is no other convincing evidence, the appellants are entitled to acquittal. The learned A.P.P. argued in support of the decision of the Trial Court.

6. Gadhave (PW 2), a Police Constable, has given evidence that on that night 8 to 10 persons had attacked them. He has deposed that he somehow went towards highway to call for help, but in the meantime the dacoits had left the place. At Exh. 54 there is a copy of station diary entry showing that at about 4.15 a.m. the Police station received information given by Gadhave. Gadhave had informed that 10 to 15 persons had committed dacoity at aforesaid petrol pump. From the evidence of Gadhave, it can be said that he took the first

opportunity to run away from the petrol pump.

7. The crime was registered on the basis of report of Bankat (PW 9). He has deposed that when the dacoits started giving beating, to owner Birajdar, he was asked to open the shutter of the room and so he opened the shutter. He has deposed that with him, there was cash amount of Rs. 16,500/- and a gold chain of the owner. He has deposed that the dacoits took away this cash amount and the gold chain. He has deposed that there were 10 to 12 dacoits and there was the light of electricity in the campus of petrol pump. He has identified accused Nos. 3 to 5 in the Court and he has given evidence that in the identification parade held during investigation, he had identified these accused. He has also identified remaining accused in the Court. The F.I.R. is proved as Exh. 44 in his evidence.

8. In the cross examination, Bankat (PW 9) has admitted that big handkerchiefs were tied by dacoits around their heads. His evidence shows that he had not seen any of the dacoits prior to that date. He has not given any substantive evidence in respect of the physical characteristics of dacoits and he had not described such physical characteristics in the F.I.R., except their age group as, between 25 and 30 years. No particular reason is given by this witness as to how and why he remembers accused Nos. 1 to 5. In the F.I.R., it was not mentioned that there was facility of light in the campus of petrol pump. He has identified part of the ornament, chain when only a piece of chain is produced and piece of chain is not having pendant, which was described in F.I.R. In respect of this article also, there are no characteristics mentioned by Bankat. Admittedly, Bankat was not called for identification parade which was held on 15.4.1999. Bankat did not receive any injury in the incident. There is no specific case as to whether 7 these five persons had entered the room and they had taken away the cash and a gold chain.

9. Gadhave (PW 2) has given evidence that one dacoit was seen first and he had emerged from behind the rooms. He has deposed that this first dacoit started assaulting Deshmukh and then the other 8 to 10 dacoits came from the same side. He has deposed that he and Deshmukh were attacked by the dacoits and then the attack was made on owner Birajdar and his employees. He has deposed that the dacoits were asking Birajdar to open the shutter of the room and at that time, he ran away, towards the road for calling for the help. From his evidence, it can be gathered that 8 to 10 persons had attacked them, all of a sudden. He has deposed that all the persons had wrapped big handkerchiefs -Gamajas around their head. He has given evidence that he identified the accused in the identification parade held on 24.3.1999 and 15.4.1999. He identified all the accused in the Court.

10. In the statement dated 21.3.1999 Gadhave (PW 2) had stated that when dacoits attacked them, all the witnesses were sleeping. He has admitted that in a statement dated 30.3.1999 he had stated before the Investigating Officer the portion mark Exh. 23. Exh. 23 shows that on 30.3.1999 all the accused persons

were shown to Gadhave (PW 2) in the police station and he had identified them. The evidence of Gadhave shows that he was attached to Murum Police Station since 1994. In view of the previous statement, which is proved as Exh. 23, no value can be given to the evidence of identification parade dated 15.4.1999, in which Gadhave identified accused Nos. 1 and 2.

11. Deshmukh (PW 3), the Home Guard, has given evidence that he saw first only one dacoit and when the said dacoit gave blows of stick to him, Gadhave started coming towards him and then the remaining dacoits came towards them. Other evidence given by Deshmukh is similar to the evidence given by the Manager. Deshmukh has identified accused Nos. 3 to 5 in the Court and he has deposed that in the identification parade, he had identified accused Nos. 3 to 5. He has also not given any description of physical characteristics of accused and he has not given reason as to why he could remember accused Nos. 3 to 5. Exh. 48 is the previous statement of this witness and it shows that on 30.3.1999 he was shown accused Nos. 1 to 5 in to the police station. In any case, he has not identified accused Nos. 1 and 2 in the Court.

12. Abdul Razak (PW 4), an employee of Birajdar, has given similar evidence. He has deposed that accused No. 5 Arun had assaulted him in the incident. He has identified all the accused in the Court. He has deposed that in identification parade dated 24.3.1999 he identified accused Nos. 3 to 5. He has deposed that some dacoits had wrapped handkerchiefs around their head, some had wrapped such cloth around ears and some had covered mouth portion by using such clothes and only eyes were visible. There is no specific evidence given by Abdul Razak (PW 4) in respect of accused Nos. 1 to 5 and he has not stated whether they had covered their mouths by using Gamjas or they had simply tied the Gamjas around their heads. He has also tried to say that the lights were on, but the omission in respect of this circumstance is duly proved by the defence in the evidence of Investigating Officer. Similar evidence is given by Birajdar (PW 8). He identified accused Nos. 3 to 5. He has deposed that he identified these accused persons in identification parade dated 24.3.1999 also.

13. Executive Magistrate Bhaledar (PW 5) has given evidence that in identification parade dated 24.3.1999 witnesses Gadhave, Bankat, Deshmukh and Birajdar had identified accused Nos. 3 to 5. The record of identification parade is duly proved as Exh. 28. He has given evidence that another identification parade was held on 15.4.1999 and on this occasion Gadhave and Deshmukh identified accused Nos. 1 and 2. The record in respect of this parade is proved as Exh. 29.

14. The defence has cross examined Executive Magistrate Bhaledar (PW 5) to point out that no care was taken to see that the other persons, who were made to stand with the accused, were having similar characteristics. In the first test identification (T.I.) parade, 9 other persons were called and accused Nos. 3 to 5 were mixed in these persons. Accused No. 3 was aged about 50 years, accused No. 4 was aged about 19 years and accused No. 5 was aged about 25 years. In

the T.I. parade dated 24.3.1999, 3 persons, who were 25 years old were used and one person having aged 45 years was used. Nobody was below 20 years of age. The description of the persons, who were mixed with the accused persons show that they were not similar to the three accused. Similarly, the record of T.I. parade dated 15.4.1999 shows that when accused No. 2 was aged about 19 years, 3 persons having age of 18 years were used. When accused No. 1 was aged about 33 years, one person aged about 28 years and one person aged about 29 years was used. Most of the other persons were having age less than 21 years.

15. The advocate of the appellants submitted that the T.I. parade was not held as per the guidelines issued by Bombay High Court in Chapter I of Criminal Manual. There is force in this contention. Even when all the five accused are from different age groups and their characteristics are not noted to show that they were similar in any manner, three accused persons were made to stand in the first identification parade and only 9 persons were mixed with them. The expected ratio was not followed and the persons having similar characteristics were also not used. As per the guidelines, only two similar accused could have been kept in the parade for identification, but in first T.I. parade, 3 accused persons were kept. In the second identification parade also when the two accused were having totally different characteristics and different age, they were made to stand at the same time and the persons who were mixed were not in expected ratio and there is nothing to show that they were having similar characteristics. This Court has no hesitation to observe that the guidelines given by the Bombay High Court in Chapter -I of the Criminal Manual were not at all followed. The evidence of Executive Magistrate shows that he had no sufficient experience of such work and in the past he had conducted only one T.I. parade.

16. In any criminal case, the prosecution is required to prove two things :

(i) the offence was committed, and

(ii) it was committed by the accused, facing the trial. In view of section 9 of the Evidence Act, the evidence of T.I. parade is relevant and it can be used as corroboration to the substantive evidence given by witnesses in the Court. T.I. parade becomes necessary when eye witnesses have not given indication to identify the accused or when the accused person was not previously known to the witness. T.I. parade is conducted to enable the witnesses to identify the accused before he loses the memory. So when after many months of the incident, during trial the witness identifies the accused in the Court, the record of T.I. parade corroborates his substantive evidence. The record of T.I. parade becomes more important when case comes for trial after many years and due to laps of time, there is laps of memory of the witness. After many years, it becomes difficult to witness to identify a person as there is change in physical characteristics also. In such a case, the witness can depose that in T.I. parade he had identified the accused. Due to such importance of T.I. parade, it is necessary to conduct T.I. parade cautiously and follow the guidelines as far as possible.

17. The reliability of evidence of identification depends on the nature of the opportunity which the witness had to see the accused at the time of commission of offence. For similar reason, the reliability of evidence of T.I. parade also depends on the precautions taken for conducting T.I. parade. T.I. parade is held to test the witness. In strict sense, the substantive evidence of the witness can also be sufficient to establish the identity of the accused in a particular case and so in such a case, the failure to conduct T.I. parade may not prove fatal to the prosecution case. Only to make the evidence convincing and to avoid the problems, which are already mentioned, it is desirable to hold T.I. parade in a case like present one and the guidelines given in Criminal Manual also needs to be followed as far as possible. The effect of the breach of guidelines would depend on the facts and circumstances of the case.

18. When the case is based on the evidence given for proving identity of the accused, the Court is expected to be very cautious as there is always possibility of miscarriage of justice in such a case. The Court is required to first ascertain whether the witness had ample opportunity of seeing the accused at the time of commission of the crime. If there was no such opportunity, not much weight can be given to the substantive evidence given by the witness in the Court and also to the evidence of T.I. parade. It all depends upon the facts and circumstances of each case. When there is not only the evidence of identification of the accused, but there is also the evidence of recovery of stolen articles, the case stands on different footings. In such a case, the Court is required to consider the evidence in entirety. [Relied on the case reported as Lal Singh and Others Vs. State of Uttar Pradesh,]

19. In the present case, the evidence discussed has created probability that the witnesses were attacked all of a sudden; due to the attack they were afraid; the dacoits had covered their faces by using Gamjas to conceal their identity and the witnesses could not note any specific physical characteristics of dacoits, when the offence was committed. Even the complainant has not given substantive evidence on the age group of the dacoits, when he was expected to do so in view of the contents of the F.I.R.

20. Accused Nos. 3 to 5 were arrested on 21.3.1999 and T.I. parade was held on 24.3.1999. It is already discussed that in view of the age and physical characteristics of the accused, it was necessary to have separate T.I. parade in respect of each accused. But on the first occasion, three accused were made to stand in the same identification parade. The proportion of the persons, who were mixed with the accused was not 1 : 6 and there is nothing to show that the persons had similar physical characteristics. Observations are already made regarding the age of the persons, who were mixed with the accused. All the circumstances have made the evidence of T.I. parade and also the substantive evidence of witnesses given on identification very doubtful in nature and benefit of this reasonable doubt must go to accused Nos. 3 to 5.

21. The record of T.I. parade dated 15.4.1999 appears to be farce. Accused Nos.

1 and 2 were arrested on 25th and 26th March 1999, but the T.I. parade was held on 15.4.1999. Only two witnesses like the Constable and Home Guard were given opportunity to identify the dacoits. The police statements dated 30.3.1999 have created probability that on 30.3.1999 itself the accused Nos. 1 and 2 were shown to these two witnesses. The names of all the accused were told to these witnesses on that date. Thus, the substantive evidence given by these two witnesses regarding identification of accused Nos. 1 and 2 is doubtful and the record of T.I. parade is more doubtful. The benefit of these circumstances must go to accused Nos. 1 and 2. To identify accused Nos. 1 and 2, T.I. parade was not held for other

22. Let us see, whether there is other evidence to corroborate the so called identification made by the witnesses. Accused Nos. 3 to 5 were arrested on 21.3.1999 i.e. on the date of incident. Evidence is given that each of these accused was found in possession of big handkerchief called as Gamja. The recovery of such cloth is proved by examining the panch witness Abbas Patel (PW 6). The seizure panchanamas in respect of recovery of Gamjas from these three accused are proved as Exh. Nos. 31, 32, 33. Investigating Officer has given similar evidence on the recovery of Gamjas. It is not the case of prosecution that these pieces of clothes were shown to the aforesaid witnesses. Such pieces of clothes are used by persons of this region in summer days to protect the head portion from heat of sun. PW 6 has committed mistake and he has deposed that one Gamja was recovered from accused No. 2 -Tapasya, when this accused was arrested on 25.3.1999. Thus, the evidence of panch witness PW 6 is also not convincing in this regard.

23. Vinayak Savant (PW 7) and Investigating Officer (PW 11) are examined to prove that from the possession of accused persons stolen property was recovered. Savant (PW 7) has deposed that accused No. 2 - Tapasya gave statement to police on 23.3.1999 in his presence that the cash was kept by him in his house from Jewali village and he was ready to produce the same. The memorandum of this statement is proved as Exh. 35. The witness has further deposed that police and panchas went to the house of sister of this accused and from there, accused Tapasya produced cash of Rs. 2100/-. This cash was seized under panchanama which is at Exh. 35-A. Savant (PW 7) has identified the accused No. 2 -Tapasya in the Court.

24. Savant (PW 7) has given evidence that accused No. 5 gave similar statement and his house is also situated at Jewali. He has deposed that from the house of accused No. 5 cash of Rs. 1700/-was recovered in similar manner. The memorandum of his statement is at Exh. 36 and seizure panchanama in respect of this cash is at Exh. 36-A. Savant (PW 7) has given similar evidence against accused No. 4 -Vilas and accused No. 1 -Jilaniya. Memorandums of their statements are proved as Exh. Nos. 37 and 38 and the panchanamas of seizure of the cash on the basis of the statements are proved as Exh. Nos. 37-A and 38-A. The witness has given evidence that the houses of these two accused are

situated in the village Sindgaon.

25. No substantive evidence is given by any witnesses on description of currency notes stolen from petrol pump and which were recovered from the accused persons. In panchanamas the description is there and the panchanamas show that currency notes of denomination of Rs. 100/-, currency notes of denomination of Rs. 50/-, currency notes of denomination of Rs. 20/- and currency notes of denomination of Rs. 10/- were recovered. Bankat (PW 9) has not given substantive evidence on the denomination of currency notes which were looted from him. Even if the report at Exh. 43 given by Bankat is considered, it can be said that two currency notes of denomination of Rs. 500/-, some currency notes of denomination of Rs. 100/-, some currency notes of denomination of Rs. 50/- and some currency notes of denomination of Rs. 10/- were looted. Thus, the description of the currency notes looted does not tally with the currency notes recovered from the accused persons. There is nothing on record to show that there was any peculiarity mark for identification in respect of any currency note from the currency notes recovered in this case. The evidence further shows that the statements of all the five accused were recorded on the same day, at about the same time. The recovery of amount was also made during short time from the two villages by the same officer. It is admitted that all the five accused were taken together in the same vehicle for making recovery. The delay was caused in recovery of currency notes at the instance of accused Nos. 3 to 5. In view of these circumstances, this Court holds that the evidence on recovery is highly doubtful in nature and it is not possible to believe that the same currency notes were stolen from the petrol pump.

26. Abbas (PW 6) has given evidence that he acted as panch witness again on 30.3.1999. The accused No. 5 gave statement to police that he had kept a gold chain of half tola (approximately 5 grams) in his house at village Jewali. Memorandum statement is proved as Exh. 39. He has deposed that accused took them to Jewali and he produced a piece of gold chain from a box and the chain came to be seized under panchanama Exh. 39-A. He has identified the article, piece of chain, in the Court.

27. Evidence of Abbas in cross examination shows that he is not able to describe the house of accused No. 5 from where the recovery was made. If on the previous occasion a statement was given by accused No. 5 and on the basis of that statement some cash was recovered from his house from Jewali, in ordinary course, police would have taken search of the house as more cash amount was to be recovered and the ornament was also to be recovered. Further, the panch witness has admitted that he had acted as a panch witness for police in past in atleast 8 to 10 cases. All these circumstances have created doubt about the evidence of recovery of piece of chain on the basis of statements given by accused No. 5 u/s 27 of the Evidence Act.

28. A piece of gold locket/chain having length of 8 inches and which weighs around 4 grams is shown to be recovered from the house of accused No. 5.

There is no pendant with it. In the report at Exh. 44, the description of stolen chain was given and particularly the description of pendant was given. On the pendant, there was letter "B" indicating probably the first letter of Surname of owner Birajdar. This pendant is not recovered. Owner PW 8 has identified the piece of chain in the Court. However, no substantive evidence is given by the owner that after the seizure this piece of chain, it was shown to him and he had identified it in the past also. On the piece of chain, no identification mark is present and no reason is given as to why the witnesses can identify such simple piece of chain. In view of these circumstances, the evidence of identification given by these two witnesses in respect of piece of chain has also become doubtful in nature.

29. It is true that there is difference between identification of a person by face etc. and identification of own article which was stolen. The witness may not have sufficient opportunity to see and observe the accused at the time of offence but the owner knows his own article and he can pick up the article from many articles. There is ordinarily necessity of holding identification parade for identifying the accused when the accused was not known to the witnesses, but there may not be such necessity of identification parade to identify the article like ornament, when there are distinctive marks on it. But, when there are no such distinctive marks and such articles are readily available in the market, it becomes necessary to have the record of identification, which can help the investigating agency to form opinion that the same article was really stolen. Such record can also help the Court to ascertain as to whether the article belongs to witness and for some reason like his capacity to identify the ornament from amongst many other similar ornaments, it can be said that the ornament belongs to the witness.

30. The necessity to have identification parade in respect of articles would always depend on the facts and circumstances of the case in view of the aforesaid possibilities. [Relied on the cases reported as Pawan Kumar Vs. State of Haryana, and Bharat Vs. State of M.P.,].

31. This Court has no hesitation to observe that the entire evidence of prosecution with regard to the identification of accused and also the identification of the stolen articles is highly doubtful in nature and on the basis of such evidence, conviction can not be based in such a serious case. It is not disputed that there was the dacoity and dacoits had taken away a gold chain and cash amount from the petrol pump. As there is no dispute over the incident of dacoity, there is no need to discuss the evidence given for proving spot panchanama and also medical record in respect of examination of the witnesses. So this Court holds that all the accused/appellants are entitled to benefit of doubt. The Trial Court has not considered the aforesaid circumstances and so the evidence is not properly appreciated. The appeal deserves to be allowed and so the order.

ORDER

32. Appeal is allowed.

33. The judgment and order delivered by the Additional Sessions Judge, Osmanabad in Sessions Case no. 85 of 1999, convicting and sentencing the appellants for the offences punishable under sections 395, 397 and 457 of the Indian Penal Code is hereby set aside. The appellants stand acquitted of these offences.

34. The record is to be sent back to the trial Court for trial of absconding accused and it is to be preserved.