

(1997) 03 BOM CK 0039

In the Bombay High Court

Case No : Criminal Appeals No's. 820 with 854 of 1984 and 7 of 1985

Kayyumkhan Alias Shankar and etc.

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 13-03-1997

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 377
Penal Code, 1860 (IPC) — Section 392, 397

Citation : (1998) BomCR(Cri) 41 : (1997) CriLJ 3137

Hon'ble Judges : Vishnu Sahai, J;Ranjana Desai, J

Bench : Division Bench

Advocate : S.M. Oak, for R.B. Sule and M.Z. Shaikh, for the Appellant; D.A. Nalavade, Assistant Public Prosecutor, for the Respondent

Judgement

Sahai, J.—Vide judgment and order dated 1-10-1984, passed in Sessions Case No. 587 of 1983, the Additional Sessions Judge, Gr. Bombay, convicted and sentenced Kayyumkhan alias Shankar s/o Yusuf Khan and Salim alias Munna s/o Mohammed Shaikh, in the manner stated hereinafter :-

- i) Kayyumkhan alias Shankar under S. 392 r/w S. 397, IPC to seven years R.I.;
- ii) Salim @ Munna under S. 392 to five years R.I.

Kayyumkhan alias Shankar challenged his conviction and sentence by preferring Criminal Appeal No. 820 of 1984 and Salim alias Munna challenged his conviction and sentence by preferring Criminal Appeal No. 854 of 1994.

Criminal Appeal No. 7 of 1985 has been preferred by the State of Maharashtra u/ S. 377, Cr.P.C. with a prayer that the sentence awarded to Salim alias Munna be enhanced.

2. Since all the three appeals arise out of the same set of facts and a common judgment, we are disposing them off by a common judgment.

3. Briefly stated the prosecution case runs as under :-

PW 1 Rajendra is closely related to PW 2 Kalaben and Meenaben (not examined). Kalaben is the sister of Rajendra's father. Meenaben is the sister of Rajendra's maternal grand-father. It is said that on 30-5-1983, the three of them boarded Gujarat Express at Baroda, at about 9.15 a.m., for Bombay where their relation, one Maheshbhai had died. Gujarat Express reached Dadar station at about 5 p.m. At the said station, all the passengers got down and only the three of them remained in the compartment. After the train left Dadar, the appellant Salim entered the compartment wearing Khaki pant and a shirt and started closing shutters of the windows. The appellant Kayyumkhan alias Shankar armed with a knife also joined him. He asked Rajendra not to shout and hand over whatever he had. Salim also came there. Kayyumkhan removed the ring from the finger of Rajendra and the wallet from the pocket of his pant. He went to Meenaben and removed the two bangles and a diamond ring on the point of knife. Salim removed the bangles and chain from Kalaben.

4. The FIR of the incident was lodged by Rajendra, PW 1, the next day at the Bombay Central Railway Station. It was recorded by S.I. Shaikh Hassan PW 8.

5. Kayyumkhan was arrested on 9-6-1983. He was taken to his native place Sindburdi by P.I. Sonar, PW 9 and from his house his clothes, articles 6 and 7, were seized under a Panchanama Exh. 18. On 26-6-1983, Kayyumkhan made a statement that he could point out the place and the person with whom he had kept the knife and the diamond ring. The police party along with Kayyumkhan and Sitaram PW 4 went to Vikroli at the shop of Maratha Mandir Jewellers owned by PW 3 Mangilal Jain. At the instance of Kayyumkhan, Mangilal produced a ring and a knife. The said articles were seized under a Panchanama. On 28-6-1983, the Executive Magistrate Lalit Parekh, PW 6 conducted identification of Kayyumkhan and Salim who had also been arrested by that date, at the CID Office. First Salim was put up for test identification and was identified by Rajendra, PW 1 and Kalaben PW 2. Thereafter, the parade of Kayyumkhan was held and both the said witnesses also identified him.

6. It is said that during the course of the investigation, P.I. Sonar showed the ring and knife recovered at the instance of Kayyumkhan @ Shankar to PW 2 Kalaben who, identified them.

7. On 11-7-1983, Salim made a statement that he could point out the shop of Prakashchandra Jain where he had kept the ring, the bangles and chain. Consequently, the police party along with Salim went to Vikroli Fire Brigade Station and at the instance of Salim, PW 5 Prakashchandra Jain the proprietor of Madircha Jewellers, produced the said articles. The seizure was made under a Panchanama. Thereafter, Salim took the police party and the Panch witnesses to his house and there from below the mattress, a knife, article 10, and articles 8 and 9 (clothes of Salim) were recovered. The latter (clothes) were recovered from the cupboard. The said recoveries were also made under a Panchanama.

8. After completing the investigation, the accused persons Kayyumkhan and

Salim were charge-sheeted.

9. The case was committed to the Court of Sessions in the usual manner. In the trial Court, the appellants were charged for offences u/S. 392, I.P.C. Appellant Kayyumkhan was further charged for an offence under S. 397, I.P.C. To the said charges, they pleaded not guilty and claimed to be tried.

10. During trial, in all, the prosecution examined nine witnesses. Two of them namely Rajendra, PW 1 and Kalaben PW 2 were examined as eye-witnesses. In defence, no witness was examined.

After recording the evidence adduced by the prosecution; the statement of the appellants under S. 313, Cr.P.C.; and hearing the learned counsel for the parties, the learned trial Judge convicted and sentenced the appellant in the manner stated in para 1.

As mentioned in para 1, Criminal Appeals Nos. 820 of 1984 and 854 of 1984 have been preferred by Kayyumkhan and Salim respectively, against their convictions and sentences and Criminal Appeal No. 7 of 1985, has been preferred by the State of Maharashtra for enhancement of sentence of the appellant Salim.

11. We have heard Mr. S. M. Oak for the appellant and Mr. D. A. Nalavade, Additional Public Prosecutor for the respondent in Criminal Appeal No. 820 of 1984. Although, Criminal Appeal No. 854 of 1984 has been on the Board of this Court for long time, neither of the two counsels namely Mr. V. G. Sawant and Mr. M. B. Girkar, representing the appellant Salim, have chosen to remain available. Since the appeal pertains to the year 1984, we did not adjourn it and in view of the decision of the Apex Court report in Bani Singh and others Vs. State of U.P., , we decided it on merits. We would be failing in our fairness, if we do not record the assistance which we received from Mr. S. M. Oak and Mr. D. A. Nalavade, in disposal of Criminal Appeal No. 854 of 1984. We have heard Mr. D. A. Nalavade, Additional Public Prosecutor for the appellant in Criminal Appeal No. 7 of 1985. Although, respondent Salim alias Munna was served, he has not chosen to engage any counsel.

After carefully examining the entire evidence on record, and reflecting over the matter, we are satisfied that all the three appeals deserve to be dismissed.

12. In our view, the short question in Criminal Appeal No. 820 of 1984 and 854 of 1984 is whether the evidence of identification and recovery adduced by the prosecution against the appellants Kayyumkhan and Salim, inspires confidence ? Our answer to the said question is in the affirmative. We would first like to take up the evidence of the identification. We find that in the instant case the robbery took place on 30-5-1983 and the test identification was held within a month i.e. 28-6-1983. In the said identification, both Rajendra, PW 1 and Kalaben PW 2, correctly identified both Kayyumkhan and Salim. Considering the circumstance that the incident took place in broad day light i.e. at about 5 p.m. when the month of May was about to end as also the circumstance that the identification

took place within one month of the incident when memory of both the witnesses was fresh. We find the identification of the appellants at the test parade to be perfectly acceptable.

Mr. Oak, learned counsel for the appellant Kayyumkhan tried to assail this evidence of identification on a number of grounds. He firstly argued that the evidence on record is that prior to the commission of the robbery, appellant Salim closed the shutters of the compartment and therefore, there must not have been any light for the witnesses to recognise the miscreants. We regret that we cannot accede to this submission because the evidence is that only the shutters on one side were closed and those of the other side of the compartment were open. In this view of the matter, and bearing in mind that time of the incident was 5 p.m. and the date was 30-5-1983, in our judgment, there must have been plenty of light for the witnesses to recognise the miscreants.

Mr. Oak drew our attention to some other infirmities in the evidence of identification which have been considered in para 15 of the impugned judgment and rightly rejected by the trial Judge as inconsequential. He pointed out that the evidence of Lalit Parekh who conducted the test identification shows that while identifying Kayyum, Rajendra stated that the man who was his companion looted the two other women. He urged that it is not the prosecution case that Salim looted Meenaben. It is true that this discrepancy is there but, in our judgment it would not have any bearing. It should be remembered that both at the time of identification and in the trial Court, Rajendra PW 1 identified Kayyumkhan as the person, who at the point of Rampuri-knife had snatched his golden ring and cash. Mr. Oak also invited our attention to the circumstance that the Executive Magistrate stated that while identifying Salim, Kalaben identified him as the person who had removed her gold bangles and gold chain and also as the person, who had robbed her mother and Raju (Rajendra). The trial Judge brushed aside this discrepancy on the ground that so far as the accusation against Salim robbing Kalaben was concerned, there was no inconsistency in the prosecution case in as much as both at the time of test identification and in her statement in the trial Court, Kalaben stated that it was Salim alias Munna who had robbed her. The trial Judge felt and rightly in our judgment, that the infirmities pointed out in the evidence of identification did not militate against the core or meat of the prosecution case.

In our view, the evidence of identification is implicitly reliable and sufficient to sustain the conviction of the two appellants.

13. We are fortunate in this case for having evidence which corroborates the evidence of identification. That evidence is in the form of recovery on the pointing out of Kayyumkhan and Salim. We have given details in paras 5 to 7. We have gone through the relevant evidence pertaining to the recovery and we find that it inspires implicit confidence. None of the Panchas of recovery had any grouse or axe to grind against Kayyumkhan and Salim. Further, Mangilal Jain, PW 3, who at the instance of Kayyumkhan took out the knife and gold ring had no

animosity against him and Prakashchandra, PW 5 who, at the instance of Salim alias Munna took out the ornaments also had no animosity against the said appellant. The evidence on record does not show that police witnesses had any malice or animosity either against Kayyumkhan alias Shankar or Salim alias Munna.

We find the evidence of recovery to be perfectly trustworthy.

14. In our judgment the convictions and sentences of the appellants Kayyumkhan alias Shankar and Salim alias Munna have been correctly recorded by the trial Judge and consequently, Criminal Appeal No. 820 of 1984 and Criminal Appeal No. 854 of 1984 preferred by the said appellants are devoid of substance and have to be dismissed.

15. This brings us to Criminal Appeal No. 7 of 1985 preferred by the State of Maharashtra, under S. 377, Cr.P.C. with a prayer that the sentence awarded to the appellant Salim alias Munna be enhanced. We also do not find any merit in this appeal. It is well-settled that the question of sentence is primarily a question of discretion of the trial Court, and unless that discretion has been capriciously exercised and the sentence awarded is manifestly inadequate, the Appellate Court would not be justified in enhancing it. A sentence of five years R.I. (for an offence under S. 392, I.P.C.) which has been awarded to the appellant Salim alias Munna, can by no stretch be castigated as one which is unduly lenient or inadequate. In our judgment, it was substantial sentence. Consequently, this appeal also has no force.

16. In the result, all the three Criminal Appeals i.e. 820 of 1984, 854 of 1984 and 7 of 1985, are dismissed appellant Kayyumkhan alias Shankar (in Criminal Appeal No. 820 of 1984) and appellant Salim alias Munna (in Criminal Appeal No. 854 of 1984) are on bail. They shall be taken into custody forthwith to serve out their sentence.

Before parting with this judgment, we would like to put on record our appreciation for the assistance rendered to us by the learned counsel for the parties in the disposal of these appeals.

In case a certified copy of this judgment is applied for, the same shall be issued on an expedited basis.

17. Appeals dismissed.