

(2013) 11 BOM CK 0019

In the Bombay High Court

Case No : Criminal Appeal No's. 580 and 592 of 2012

Noora

APPELLANT

Vs

State of Maharashtra
 Gorakh Narayan Bhosale Vs The
State of Maharashtra

RESPONDENT

Date of Decision : 25-11-2013

Acts Referred:

Citation : (2014) ALLMR(Cri) 106 : (2014) 1 BomCR(Cri) 647

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

Bench : Single Bench

Advocate : H.D. Deshmukh, Mr. Rajendra N. Chavan, Mr. Vijay Sharma and Mr. Shaikh Ashpak Taher Patel, for the Appellant; V.A. Shinde, APP, for the Respondent

Final Decision : Partly Allowed

Judgement

T.V. Nalawade, J.—All the appeals are filed against the judgment and order of Sessions Case No. 96/2011, which was pending in the Court of Additional Sessions Judge, Ahmednagar. From the case, accused Nos. 2, 3, 5 and 7 are convicted and sentenced for offences punishable under sections 396, 457 and 380 of Indian Penal Code. The maximum substantive sentence of ten years is given, which is for the offence punishable u/s 396 of I.P.C. and for offence under each section the fine of Rs. 5,000/- is imposed on each of the accused. Navnath (accused No. 2) has filed Criminal Appeal No. 375/2013, Gorakh (accused No. 3) has filed Criminal Appeal No. 592/2012 and Noora (accused No. 5) has filed Criminal Appeal No. 580/2012. Accused No. 7 has not filed any appeal. 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 27.11.2010 and 28.11.2010 in the locality known as Langore Galli, Karjat, District Ahmednagar. The houses of

deceased Ashok Langore, Satish Jadhav, Vilas Mahajan and Anaspure are situated in that locality and these houses were broken on that night and the offence of dacoity was committed. In the house of Ashok, two murders were committed. The deceased Ashok was cousin of complainant Ramesh and the house of Ramesh is also situated in the same locality.

2. The wife of Ashok was out of station. The old mother of Ashok and his sister Pramila were present in the house along with Ashok on that night. Satish Jadhav was out of station and he had put lock on his house, when he had left the station. Other persons were at home.

3. On that night, the dacoits broke open the houses of aforesaid persons and they took away valuables like ornaments and bags containing articles. When the complainant visited the house of Ashok, Ashok was already dead. Pramila was seriously injured and she succumbed to the injuries in the hospital. On the basis of report given by Ramesh, the crime was registered for offences punishable under sections 380, 396 etc. of I.P.C. in Karjat Police Station at C.R. No. 223/2010.

4. Annasaheb Ghavte, the P.S.I., who was attached to the aforesaid police station made some investigation. When he prepared the spot panchanama in the house of Ashok, he found one rexine wallet. The complainant and others told that the wallet was not of family members of Ashok. In the wallet, there were receipts of census of the Government and the receipts were bearing in the name of Devidas Dinya Bhosle (accused No. 7). There was one passport size photograph of accused No. 7 in the wallet. Vishal Mahajan informed that a bag of his father containing the clothes of the father and blank cheque was taken away by dacoits. In one house, the handkerchief of Vishal Mahajan was found and in that house also, the dacoity was committed.

5. On the same day, the Investigating Officer searched the house of accused No. 7 in the presence of panch witnesses. The bag of the father of Vishal Mahajan, containing clothes was recovered from the house of accused No. 7 and these articles were identified by the owner of the articles. There was laundry mark "Mahajan" on these clothes. As police traced the house of accused No. 7, the other accused were also traced during the course of investigation.

6. During the course of investigation, on the basis of statement given by accused No. 2-Navnath, son of accused No. 7. gold ornament like Bormal came to be recovered from the vicinity of the house of accused Nos. 2 and 7. They were living together. This Bormal came to be identified by the widow of Ashok as it was stolen from their house.

7. Jadhavrao (PW 12), another Investigating Officer, arrested the accused No. 5-Noora. On the basis of statement given u/s 27 of Evidence Act by Noora (accused No. 5), stolen articles like two envelopes and blank cheque of the family of Mahajan were recovered and they were identified by this family.

8. Another Investigating Officer Shri. Rakh (PW 9) made investigation in respect of accused No. 3-Gorakh. Accused No. 3 gave statement u/s 27 of Evidence Act and he took the police and panchas to the shop of a goldsmith where he had sold some gold ornaments. The goldsmith Shri. Kulte (PW 5) produced ornaments like Mangalasutra, nose ring, two gold rings and one gold ornament known as "Manchali". The statement of goldsmith came to be recorded and he informed that accused No. 3 had sold him the ornaments.

9. The chargesheet came to be filed for aforesaid offences. All the accused, which were seven in number, were tried for the aforesaid offences. They pleaded not guilty. They took the defence of total denial. In view of the recovery of aforesaid articles and circumstances, the appellants are convicted and sentenced for aforesaid offences.

10. The Investigating Officer got clue due to the rexine wallet found in the house of one victim and it is mentioned in the panchanama, which was drawn on the same day. The defence has not disputed that the two murders were committed and offence of dacoity was also committed there. The circumstance of finding of rexine wallet of accused No. 7 from the spot of offence is proved by prosecution by examining Investigating Officer and one panch witness. Police visited the house of accused No. 7 on 29.11.2010 for searching his house and from his house, a bag containing clothes of witness Vilas Mahajan was recovered. These articles are identified by Vilas (PW 7). There is evidence of Shri. Ghavte (PW 13) on this recovery. As Devidas (accused No. 7) has not filed appeal, the evidence in detail as against Devidas need not be discussed. However, this piece of evidence can be used as against other accused as due to this clue, other accused came to be arrested.

11. Ghavte (PW 13) has given evidence that on 14.2.2011 while in police custody Noora (accused No. 2) gave statement to him that he was ready to produce gold ornament Bormal. He has given evidence that memorandum of his statement was prepared, which is at Exh. 52. He has deposed that accused No. 2 then took police and panchas to his house and from vicinity of his house, he produced gold Bormal, Article No. 13. The seizure panchanama in respect of this article is proved as Exh. 53.

12. The panch witness on Exhs. 52 and 53 turned hostile initially, but during cross examination made by the learned Assistant Public Prosecutor, he admitted that the documents bear his signatures. He also admitted the incident of preparation of panchanama in his presence. This evidence is sufficient to prove that independent witnesses were associated with the seizure. There is thumb impression of accused No. 2 on memorandum of statement. There is no reason to disbelieve the Investigating Officer. It appears that due to mistake, Article 13-Bormal is not mentioned in the evidence of widow of Ashok (PW 10). However, in Exh. 53, the ornament is described as ornament of family of Ashok. During the course of investigation, this ornament was described and that can be seen from Exh. 53. In view of these circumstances, not much can be made out from the

mistake committed by widow of Ashok of not mentioning specifically Article 13 in her evidence. It can be said that it was a fault on the part of the Court also as the evidence does not show that each and every article by description was shown and the evidence was recorded accordingly.

13. The evidence given by the Investigating Officer and the record of panchanama like Exhs. 53, 66 show that the address of accused Nos. 2 and 7 was given same as the accused No. 2 is son of accused No. 7. This record and the evidence of Investigating Officer is sufficient to infer that accused Nos. 2 and 7 were living together in the house where the bag of witness Vilas was recovered. In view of the record and the circumstances, this Court holds that the presumption available u/s 114 of Evidence Act needs to be used as against accused No. 2.

14. Rakh (PW 9), the other Investigating Officer has given evidence that accused No. 3-Gorakh gave statement to him while in police custody on 14.5.2011. He has deposed that the statement was to the effect that Gorakh had sold ornament to the goldsmith from the area of Rashin. The memorandum of statement is at Exh. 59 which is proved. The description of ornaments seized from this shop is given in Exh. 60. These ornaments are described as Article Nos. 14 to 17 and they are two gold rings, one gold "Manchali", one gold Mangalasutra and one gold nose ring. There is evidence of panch witness Deepak Langore (PW 6) on Exhs. 59 and 60. He is a relative of complainant, but there is no reason to disbelieve him as these ornaments were already described on 28.11.2010 by widow (PW 10) of deceased Ashok and on that basis, the investigation was made. There is no reason to disbelieve the evidence of PW 9 also. Ratnaprabha alias Triveni (PW 10) has identified these ornament in the Court.

15. There is evidence of Kulte (PW 5), the goldsmith to the effect that articles Nos. 14 to 17 were sold to him by accused No. 3. His statement was recorded u/s 164 of Criminal Procedure Code and it is duly proved. Though initially Kulte (PW 5) had wrongly identified accused No. 7, the Court suo-moto recalled this witness on subsequent date and the evidence was recorded again. The Trial Court has given the reasons for recalling that on 21.5.2012 the date on which Kulte was examined, accused No. 3 was not brought to the Court from jail and only accused No. 7 was there. After recalling, opportunity was given to the witness to see all the accused and accused No. 3 was kept present. Then on 25.7.2012 accused No. 3 was identified by Kulte. As there is other evidence of statement u/s 27 of Evidence Act of accused No. 3, no reasonable doubt is created due to the mistake committed by PW 5. In the cross examination, PW 5 has given admission that Article Nos. 14 to 17 appear to be new brand ornaments. These are gold ornaments and the polishing can give a look like a new ornament. What is important is that the description of the ornaments was given immediately after the incident of dacoity and these ornaments are identified by the owner, PW 10. In view of these circumstances, this Court holds that the presumption available u/s 114 of Evidence Act needs to be used as

against accused Nos. 3-Gorakh also.

16. Jadhavrao (PW 11), another Investigating Officer has given evidence that on 9.12.2010 accused No. 5-Noora gave statement to him while in police custody. His statement was to the effect that one cheque and two envelopes were kept by Noora in his house from village Durgaon. Memorandum of this statement at Exh. 72 is duly proved. This witness has deposed that from the house of accused Noora, the accused produced these three articles and they were seized under panchanama under Exh. 73. Vilas Mahajan (PW 7), owner of these articles, has identified these articles. Vishal (PW 2) son of PW 7 has also identified these articles. These articles were described during the course of investigation by owner and his son to police on 28.11.2011 and so, there is no possibility of giving of false evidence. No inconsistency or contradiction is brought on the record with regard to the identification. There is no evidence of panch witness on seizure of these articles, but there is no reason to disbelieve the Investigating Officer (PW 11) and two witnesses as description is specific in nature are bearing the names of the owner. This Court holds that the presumption available u/s 114 of Evidence Act needs to be used as against accused No. 5-Noora also.

17. The evidence of Ghavte (PW 13) shows that one handkerchief of family of Mahajan was found in the house of deceased Ashok. Panchanama at Exh. 81 is consistent with the oral evidence. This circumstance is sufficient to draw inference that the dacoits, who committed the offences in aforesaid houses were the same. The evidence given in this case shows that the stolen property of witness Jadhav is not recovered. It is the case of investigating agency that more persons were involved. Chargesheet is filed against many other persons u/s 299 of Cr.P.C. though seven accused were tried.

18. The tenor of the cross examination made by the defence counsel and the statements given u/s 313 of Cr.P.C. show that none of the aforesaid appellant explained the aforesaid incriminating circumstances.

19. The learned counsel for the appellant/Gorakh submitted that evidence u/s 27 given as against Gorakh is doubtful. He submitted that the memorandum of the statement was prepared between 14.10 and 14.20 hours and seizure was made between 14.22 and 14.30 hours and this small time gap creates doubt. He submitted that the distance between the spots like police station and the spots where action was taken needs to be considered. This Court holds that there is no force in this submission. The police station is situated in Karjat and the house which was shown by accused Gorakh is also situated in Karjat. Exh. 59 was drawn between 9.05 a.m. and 10.05 a.m. on 14.5.2011 after that seizure panchanama at Exh. 60 was drawn between 10.10 a.m. and 11.15 a.m. The shop of goldsmith is situated in Roshin, Tahsil Karjat. Accused No. 3-Gorakh was arrested on 10.5.2011 as per evidence of PW 9 and remand papers. This accused was got transferred from C.R. No. 54/2011 to the present crime in the night time of 10.5.2011. On 11.5.2011 requisition was made before Judicial Magistrate, First Class for police custody remand as against this accused and P.C.R. was

granted by J.M.F.C. till 16.5.2011. As per the procedure, the accused are produced before J.M.F.C. in the second session after 2.30 p.m. The remand report shows that already some interrogation was made to the accused-Gorakh. Thus, in respect of document dated 11.5.2011 also there is nothing doubtful.

20. The learned counsel for the appellants placed reliance on case reported as Om Prakash and Another Vs. State of Rajasthan, . The facts show that there was allegation that five accused had robbed complainant and out of them, two were acquitted. In view of this circumstance, the Apex Court held that the offence would fall u/s 392 of I.P.C. and not u/s 395 of I.P.C. There cannot be dispute over this proposition. The aforesaid observations were made in view of the facts of that case. In the present case, though seven accused were tried, as per the police papers more than ten accused were involved and others are shown as absconding. Already four accused are convicted by the Trial Court. So, the aforesaid observations are of no use to the appellants. The facts and circumstances of the present case are sufficient to infer that more than five persons were involved in the crime. In view of these circumstances, acquittal of some of the accused from present case is not sufficient to infer that less than five person were involved in the offence.

21. In the case reported as Raj Kumar @ Raju Vs. State of Uttaranchal, , the following observations were made:-

It is thus clear that for recording conviction of an offence of robbery, there must be five or more persons. In absence of such finding, an accused cannot be convicted for an offence of dacoity. In a given case, however, it may happen that there may be five or more persons and the factum of five or more persons is either not disputed or is clearly established, but the Court may not be able to record a finding as to identity of all the persons said to have committed dacoity and may not be able to convict them and order their acquittal observing that their identity is not established. In such case, conviction of less than five persons,-or even one-can stand. But, in absence of such finding, less than five persons cannot be convicted for an offence of dacoity.

These observations are referred in the case reported as 2013 AIR (SCW) 3034 [Majoj Giri Vs. State of Chhatisgarh] by the Apex Court.

22. The learned counsel for the appellants submitted that no test identification parade was held to show that the witnesses are able to identify the stolen ornaments or articles. This submission has also no force. So far as the articles like two envelopes and cheque are concerned, there was virtually no need to hold test identification parade as they were bearing the names of the owner and the cheque is from the cheque book of the owner. So far as the ornaments are concerned, they are identified by Trivani (PW 10). The reasons for believing this lady are already given. There is no rule of law that there should be test identification parade to make the evidence admissible. In the case like present one, identification of such articles by the witnesses first time in the Court will be

sufficient, if the Court is satisfied with the nature of the evidence. In the case reported as Earabhadrapa Vs. State of Karnataka, , the Apex Court has made following observations at para No. 12.

Even if the seized ornaments could be treated to be ornaments in common use, this witness could never make a mistake in identifying the seized six silk sarees (M. Os. 10 to 15). It is a matter of common knowledge that ladies have an uncanny sense of identifying their own belongings, particularly articles of personal use in the family. That apart, the description of the silk sarees in question shows that they were expensive sarees with distinctive designs. There is no merit in the contention that the testimony of these witnesses as regards the identify of seized articles to be stolen property cannot be relied upon for want of prior test identification. There is no such legal requirement.

In the case of Earabhadrapa cited supra at para No. 13, the Apex Court has made following observations.

The nature of presumption under Illustration (a) to Sec. 114, must depend upon the nature of the evidence adduced. No fixed time limit can be laid down to determine whether possession is recent or otherwise and each case must be judged on its own facts. The question as to what amounts to recent possession sufficient to justify the presumption of guilt varies according as the stolen articles is or is not calculated to pass readily from hand to hand. If the stolen articles were such as were not likely to pass readily from hand to hand, the period of one year that elapsed cannot be said to be too long particularly when the appellant had been absconding during that period. There was no lapse of time between the date of his arrest and the recovery of the stolen property.

23. So, the discovery of goods from the present accused made after so many days of the incident has not created reasonable doubt about the prosecution case and this circumstance cannot help the accused.

24. For the use of section 114(a) of Evidence Act, for proving the offence of murder, reliance can be placed on the cases reported as AIR 1949 277 (Nagpur) and The State Vs. Mohanlal and Another, .

25. The law is summed up in the last reported case as under:-

The law seems to us, therefore, to be well settled at this date that where murder and robbery are proved to have been integral parts of a certain transaction, the presumption that can be drawn from the possession of the property may, consistent with all the facts proved in the case, be that person to whom such possession was traced not only committed the theft thereof but also committed the murder which forms part of the same transaction as theft.

The discussion of the evidence made already and the position of law show that it is necessary to use the provision of section 114(a) of Evidence Act as against the appellants. This Court has no hesitation to hold that the evidence on record is sufficient to prove beyond reasonable doubt that the appellants and others

committed the offence punishable u/s 396 and 457 of I.P.C. The Trial Court has convicted them for offence punishable u/s 380 of I.P.C. also. When there is conviction and sentence for offence u/s 396 of I.P.C., the conviction again for offence u/s 380 of I.P.C. is not possible. To that extent only the judgment and order of the Trial Court needs to be modified. Two murders were committed and so no reason to interfere on the point of quantum of punishment. In the result, the following order is passed.

ORDER

(I) All the appeals are partly allowed.

(II) The judgment and order in respect of offence punishable u/s 380 of I.P.C. is set aside.

(III) The appeals filed in respect of conviction and sentence given for offences punishable u/s 396 and 457 of I.P.C. stand dismissed.

(IV) Copy of the judgment is to be given free of costs to the appellants and it is to be informed to them that they can challenge the decision in the Supreme Court and they can get legal aid also.

(V) Fees of the learned counsel Shri. Shaikh Ashpak Taher Patel appointed for appellant in Criminal Appeal No. 375/2013 is quantified as Rs. 3500/- (Rupees three thousand five hundred).