

(2022) 02 BOM CK 0038

In the Bombay High Court

Case No : Criminal Appeal No.672 Of 1996

Prakash @ Dampa Vasudev Gurav And Others

APPELLANT

Vs

State Of Maharashtra

RESPONDENT

Date of Decision : 17-02-2022

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 313, 374

Indian Penal Code, 1860 — Section 34, 347, 395, 397, 411, 412, 414, 452

Citation : (2022) 02 BOM CK 0038

Hon'ble Judges : Prakash D. Naik, J

Bench : Single Bench

Advocate : Siddhi Bhosale, C.K.Pendse, P.B.Patil, S.R.Agarkar

Final Decision : Allowed /Dismissed

Judgement

Prakash D. Naik, J

1. This appeal is preferred under Section 374 of Code of Criminal Procedure challenging the judgment and order dated 7th November 1996 passed by

the Court of Additional Sessions Judge for Greater Bombay in Sessions Case No.1097 of 1989 convicting appellant nos.1 and 2 for offences under

Section 412 of Indian Penal Code and appellant no.3 under Section 414 of Indian Penal Code. The appellant nos. 1 and 2 were sentenced to suffer

imprisonment of five years and pay fine of Rs.10,000/- each. The appellant no.3 was sentenced to suffer imprisonment of two years and pay fine of

Rs.10,000/-.

2. The appellant no.1 (accused no.3) has expired during pendency of appeal and his appeal stands abated vide order dated 31 st August 2021. The

appellants were arraigned as accused nos.3, 6 and 9 before Trial Court.

3. The case of the prosecution is as follows :-

PW-1 Smt.Mangala Pradhan is the complainant. On 22nd November 1988 she was in the house along with her children. On ringing of door bell, the complainant's son opened the door. The person at the door told him that he came from Mazgaon dock with parcel of spare parts. The said person along with others entered their flat. One of them took out knife and pointed it at complainant. Other two persons pointed knife at other children. They were taken to bed room. Their mouth was stuck with tape. The accused demanded keys of safe. Keys were handed over to the accused. They latched the door of bed room and escaped. The complainant and her children invited attention of neighbour. Door was opened. Ornaments were missing. Complaint was lodged. CR No.819 of 1988 was registered for offences under Sections 395, 397, 347 of Indian Penal Code. Investigation was conducted. Accused were arrested. Statements of witnesses were recorded. Ornaments were recovered. On completing investigation charge sheet was filed.

4. Charge was framed on 14th June 1995 for offence under Sections 452 r/w 34 of Indian Penal Code, 395 IPC, 395 r/w 397 IPC, under Sections 411, 414 IPC. As per the charge, the accused had acted in furtherance of the common intention on 22nd November 1988 and committed criminal trespass with intention to commit dacoity armed with dangerous weapons and thereby committed the offence punishable u/s.452 r/w Section 34 of IPC. During the course of same transaction the accused committed robbery of cash and gold ornaments valued at Rs.2,84,730/- from the possession of complainant by putting her in fear of instant hurt/death and causing criminal restraint by tying hands and putting bandage tape and thus committed offence u/s.395 of IPC. The accused nos.3 and 6 in the course of same transaction while committing dacoity used deadly weapons like knives and committed offence punishable u/s.395 r/w Section 397 of IPC. The accused no.9 received the stolen property obtained from the dacoity knowing it to be stolen and assisted in concealment of the said property and thereby committed offence punishable u/s.411 and 414 of IPC.

5. The evidence of witnesses was recorded. During the course of trial the charge was altered on 5th August 1996. The modified charge is that on

22nd November 1988 the accused no.1 dishonestly received or retained the part

of the stolen property of complainant recovered from him on 14th

April 1989 and transferred the parts of said stolen property to Balaram Govind Satavilkar. The accused no.3 dishonestly transferred the property to

Ashwin Dharmasi Ruparel viz small yellow metal bangle recovered from him. The accused no.3 dishonestly transferred property of dacoity to Pravin

Khimji Dedhia viz. White metal trophy @ Biscuit, a white metal pendant recovered from him vide panchanama dated 18th March 1989. The accused

no.9 dishonestly received the part of property involved in the dacoity from accused no.1 and transferred it to Ramesh Jain viz. Yellow metal chain,

yellow metal bangle, yellow metal rings recovered from him by panchanama dated 30th March 1989 and also transferred to Balu Shankar Nichal viz

yellow metal necklace, ear tops, chain, yellow metal ring etc recovered from him by panchanama dated 31st March 1989. The accused nos.1, 3, 6 and

9 dishonestly received, retained and/or transferred the stolen properties and thereby committed offences under Section 412 of IPC.

6. Since the appeal preferred by appellant no.1 (accused no.3) stands abated, the appeal is pursued on behalf of appellant nos.2 and 3 (accused nos.6 and 9).

7. Learned advocate for the appellants submitted that the appellants were charged for the offence u/s.412 of IPC. There is no evidence to prove the

charge against appellants. The prosecution has relied upon the recovery panchanama in support of charge, however, the panchanamas are full of

doubt. The evidence relating to panchanama suffers from serious discrepancies. The panchas have not supported the prosecution case. There is no

independent evidence to support the prosecution case. Two panchanamas were recorded on 14th April 1989 being Exhibit-16 and Exhibit-81 which

show that both the panchanamas were prepared at the same time and concluded at the same time. These documents are fabricated. Most of the

prosecution witnesses have not supported the prosecution case. The charge of robbery/dacoity was altered and the accused were tried as receiver of

stolen property stolen in the commission of dacoity. Appellant no.2 was convicted for offence under Section 412 of IPC and appellant no.3 was

convicted under Section 414 of IPC.

8. Learned APP submitted that there is recovery of stolen property from accused nos.6 and 9 (appellant nos.2 and 3). The recovery panchanamas

were proved. The recovered items were stolen from the house of complainant. The property was identified by the complainant. The property was

found in possession of appellants. The recovery has been proved on the basis of panchanamas adduced in evidence. There is no defect in the

panchanamas. Accused were rightly convicted by the Trial Court for the offences charged against them.

9. Initially the charge was framed vide order dated 14th June 1995 against accused under Section 452 r/w 34 IPC; 395 IPC; 395 read with 397 IPC;

411, 414 IPC. Evidence of PW-1 to PS-13 was completed on 5th August 1996. Charge was modified with addition of charge fifthly for the offence

under Section 412 of IPC.

10. The prosecution has examined 16 witnesses. PW-1 Mangala Pradhan is the complainant. She has stated that the accused entered into her

premises. They were armed with weapons. She was present in the house along with her children. All of them were confined in the bed room. The key

of cupboard was obtained by the accused by force. Adhesive tape was pasted on their mouth to prevent them from shouting and the accused robbed

the valuables from the house. The door was opened by the neighbours and thereafter the FIR was registered. She will not be able to identify the

persons due to lapse of time. Accused no.6 might be one of them. She is not sure. He might be person who pointed out the knife on her neck. She

further stated that jewellery was taken away by the accused. Her statement was recorded by police. The jewellery was produced in the Court. She

identified the jewellery.

11. PW-2 Amod Pradhan is the son of PW-1. He opened the door. One person was standing at the door. Six persons entered in the flat. It will be

difficult for him to identify them. He cannot say whether those culprits are present in the Court. He viewed the Court room before giving answer. All

the accused were sitting in the dock. The accused took him and his sister in the bed room. They were made to sit there, their hands were tied and tape

was stuck on their mouth. The accused left with booty. They closed the door while leaving the premises. He wrote a chit and threw it from the

window. Mr. Raymond Dâ??souza came after 15-10 minutes and opened the door.

12. PW-3 Sadanand Gangaram Vinerkar is the panch witness. He was called by police on 13th March 1989. Police told him that there was theft of

jewellery. Police told him to sign and he signed on the paper. He signed on the panchanama and went home. Since he did not support prosecution, the

APP sought permission to ask questions to him in the form of cross-examination. On 31st March 1989 he was called at Dadar Police Station. One

person was in custody of Police. The said person made voluntary statement to show the place of ornaments. Panchnama was read over to him. He

admitted the contents. It was marked as Exhibit-19. The panchanama dated 31st March 1989 (Exhibit-19/19-A) relates to statement of accused no.9

(appellant no.3) stating that Babu Pathak had given ornaments to him. He further stated that some of the ornaments are sold by him to the jeweller

and he is willing to show the place. It is pertinent to note that PW-3 has not stated while recording his evidence that the said statement which is

subject matter of panchanama is made by appellant no.3 (accused no.9). He did not identify him in the Court stating that he is the same person on

whose statement police proceeded to recover the articles.

13. PW-4 Ashok Kadam is the panch witness. He stated that he was called at Dadar Police Station on 19th March 1989. One person gave his name

as Avdhut Teli. The said accused made a statement that he would show the place where he has sold the silver pendent. The accused took them to a

shop keeper. The articles viz. Silver biscuit and sai baba pendent were recovered from shopkeeper Pravin. Signatures of panch were obtained on plain

paper. Since this witness did not confirm contents of part of panchanama, only signatures were encircled. In the cross-examination he stated that he

cannot say what was written in the panchanama. The accused himself took out the property from the shop. Police did not tell as to what panchanama

was to be done in the beginning. He is unable to identify the person who made the statement before Police due to lapse of time.

14. PW-5 Ganesh Dudhwadkar is the panch witness. According to him, he was called by Dadar Police Station. One person namely Parshuram

Pathak (accused) was present at the police station. The said accused made a statement that he will show the jewellery and place. Panchanama was

recorded. He further stated that the accused lead them to Suresh Jewellers. Articles were recovered from the said shop.

15. PW-6 Ashok Khedekar is the neighbour of the complainant. He stated that Raymond Dâ??souza told him about chit and both of them tried to

open the door of the house of complainant. It was opened with the duplicate key and they found that the complainant and her children were in the house.

16. PW-7 Ratan Bhosale is the panch witness. According to him, he visited police station. He was asked to sign and he affixed his signature. Person

by name Prakash Gurav was sitting at police station. The accused stated that the bangle is kept at Phanawadi. He took to Phanawadi. He pointed

out at accused no.3 who was sitting at the dock and identified him as the same person who was at the police station and made the statement.

17. PW-8 Ashok Aderkar was discharged at the instance of prosecution without recording his evidence on the ground that while collecting information

regarding disclosure of property, the accused was handcuffed and prosecution do not wish to examine said witness.

18. PW-9 Nandkishor Pujari is the goldsmith. According to him, the accused no.1 came to his house with gold ornaments. He told him that he want to

construct his friend's house and required money urgently. The witness identified jewellery handed over by accused no.1. He took ornaments and

gave money. After about 4 to 5 months, accused came with police and told him to produce articles. He produced them.

19. PW-10 Rajaram Gurav is the panch witness. He stated that he was called by Dadar Police Station to act as panch. Accused no.3 Prakash Gurav

was present at Police Station. He identified them. Police told him that he has stolen the bangle and he is willing to show the place where it is kept.

Accused no.3 made a statement that he will show the bangle. The panchanama was recorded. Accused no.3 took them to premises of one

Ashwinbhai. The bangle was recovered.

20. PW-11 Meerabai Gurav has not supported the prosecution case. She was declared hostile. In the cross-examination she stated that she do not

know any person by name Prakash. She do not wish to say anything. She do not remember whether her statement is recorded by police. She do not

recognize accused no.3.

21. PW-12 Ashwin Ruparel has stated that in 1988 Meerabai had approached him and stated that friend of her nephew is in difficulty and needs

money for his medical treatment. She asked him to pledge one bangle and give money to her. He took the bangle and paid cash of Rs.1,200/- to

Meerabai. She handed over the money to persons accompanying her. He cannot identify the boys who were accompanying Meerabai. His statement

was recorded by police. It did not happen that he paid Rs.1,200/- to Prakash. He kept the bangle in the house. He identified the bangle. Police had

come with Prakash Gurav. He is unable to properly identify Prakash Gurav.

22. PW-13 Pravin Dedhia is the owner of jewellery shop. He deposed that in November-1988 he purchased one trophy from boy whose name is Teli.

He is present in the Court. He identified accused no.6. The said accused also showed to him Sai Baba pendent. He paid him cash. HE identified the

articles. Thereafter accused no.6 came with police. The articles was produced before police. The articles were taken away by police. In the cross-

examination he stated that he was not knowing Teli prior to purchase of articles. He was with him only for 10 to 15 minutes. He did not know his full

name. He did not ask his address on that day. He did not take any receipt or writing from him for selling the article. If the articles are not proper, then

they are melted. Even if it is proper and not in the salable form, he melts such articles. He was aware that thefts are conducted and stolen articles are

sold in market. He identified article-6 since it has shape of Prudential Cup. He did not have any other basis to identify the article. Nothing was written

on the same except Prudential Cup trophy. Nothing was attached with the trophy. The pendent of Sai Baba was not having chain. The trophy like

Article-6 can be purchased by anybody. It was his mistake that he did not notice Article-6 before purchase. He did not weigh both the articles at the

time of purchase. The accused had told him that articles sold to him are stolen. The writing was executed by police. His signature was not taken. The

panchas did not sign on the same. He is required to maintain record of sale and purchase. He was managing the books of accounts in November-

1988. Police did not ask him whether he had made the entry of same in account book. When accused no.6 came to sell the articles, he had told him

that he require money to pay his college fee. Normally he used to purchase silver articles from the market.

23. PW-14 Baliram Setvilkar is the owner of jewellery shop. He stated that he knows Dilip Jethe and Babu Pathak.. He identified Dilip Jethe

(accused no.9). He stated that Babu Pathak is not in the Court. In November-1998 Babu Pathak came to his shop. He gave him locket, one ring and

vali and told him to keep it with him. The accused no.9 was with accused no.1. Accused no.9 left place before he paid money to accused no.1. On

24th March 1989 Babu Pathak came along with police party. Babu Pathak asked him to return the articles. The articles were handed over to police.

In the cross-examination he stated that he was holding license since 1956. He did not make any enquiry in the books of accounts and did not obtain

receipt from Babu Pathak. He knows Dilip Jethe as he belongs to his in-laws village. He saw accused nos.1 and 9 coming together. The accused no.9

came up to the staircase but not up to the shop. Accused no.9 told that Babu Pathak is known to him and asked him to check the articles and give him money.

24. PW-15 Ravindra Patil was attached to Dadar Police Station as Police Sub Inspector. On 22nd November 1988 he recorded complaint of

Smt.Mangala Pradhan. Crime was registered vide CR No.819 of 1988 under Sections 395, 397, 347 of Indian Penal Code against unknown persons.

Investigation proceeded. Spot panchanama was recorded. Thereafter investigation was handed over to another officer. In the cross-examination he

stated that he did not receive any telephonic message regarding incident. PW-1 gave description of the properties which were stolen in the incident.

Articles 27 to 31 and Exhibits.44 to 49 could not be produced as same were not traceable.

25. PW-16 Aslam Momin was posted at Dadar Police Station as Police Sub Inspector. He stated that accused were arrested during the course of

investigation. Some of them are absconding. Identification parade was conducted. Recovery was effected. On completion of investigation charge

sheet was filed. In the cross-examination he stated that he did not make station diary entry Exhibit-81. He did not seal and label the properties which

were seized at the instance of accused no.1 since the properties were required to be verified from the valuer. The report of the valuer was received.

He will not be able to depose from his memory alone. He give evidence on the basis of his case diary. He interrogated accused Avdhut Teli on 18th

August 1989. He do not remember whether initially he tried to find out his involvement in the case. He did not have any record of interrogation of

accused no.6 prior to Exhibit-21. He did not remember whether he interrogated accused no.6 before he made voluntary statement. During the

interrogation of accused no.6 he wanted to know about other culprits.

26. The statements of accused were recorded under Section 313 of Code of Criminal Procedure. Their defense is of denial.

27. On analyzing evidence it is clear that charge under Sections 395 and 397 of IPC could not be established. Eye witnesses to the incident viz. PW-1

and PW-2 could not identify the accused who were involved in committing dacoity. No weapons were recovered at the instance of appellants. Charge

was altered on 5th August 1996. Section 412 was added. Section 412 relates to offence of dishonestly receiving property stolen in the commission of a

dacoity and the offence under Section relates to offence in assisting in concealment of stolen property. Accused no.9 has been convicted for the

offence u/s.414 of IPC and accused no.6 has been convicted for the offence u/s.412 of IPC. The charge of dacoity has not been established. As far

as appellant nos.2 and 3 are concerned (accused nos.6 and 9), the prosecution is relying upon evidence of panch witnesses viz PW-3 and PW-4, the

jewellery shop owner PW-13 and PW-14. It is pertinent to note that PW-3 has not identified appellant no.3 as a person who made the statement

leading to recovery. PW-4 has not identified accused no.6 as the person who gave statement leading to recovery of ornaments. PW-13 is the owner

of jewellery shop. The prosecution case is that appellant no.2 (accused no.6) had sold the trophy and pendent to him. On perusal of his cross-

examination it is clear that evidence of this witness is shaky. He has stated that he is not closely acquainted with accused no.6. He was not known

him prior to purchase of articles. He did not know his full name. He did not enquire about his address on the date when he visited his shop. He did not

take any receipt or writing from the accused for selling the articles to him. His signature was not taken on the panchanama. The panchas did not sign

on the panchanama. The evidence of this witness does not inspire confidence and it is not sufficient to believe recovery of article from this witness

and the other fact that accused no.6 has sold them to this witness. PW-14 is the owner of a shop. He has been examined by prosecution to show that

Babu Pathak and Dilip Jethe (appellant no.3) had visited his shop. On reading his evidence it is apparent that Babu Pathak is from the village of his in-

laws. He knows him. Accused no.9 was accompanying him. Babu Pathak gave him locket and other articles and took amount of Rs.12,000/-.

Although accused no.9 was with Babu, he had left premises before this witness paid the amount to Babu Pathak. Thereafter Babu Pathak came with

police and told him to return the articles. By any semblance the evidence of this witness cannot be used as incriminating against appellant no.3.

28. Thus, considering the evidence as above, the prosecution has failed to establish the charges for which the appellant nos.2 and 3 are convicted. The evidence does not inspire confidence. Hence, the appellants deserve to be acquitted. Hence, I pass following order :

ORDER

(i) Criminal Appeal No.672 of 1996 is allowed and disposed of;

(ii) Impugned judgment and order dated 7th November 1996 passed by Additional Sessions Judge for Greater Bombay in Sessions Case No.1097 of

1989 convicting Appellant nos.2 and 3 (accused nos.6 and 9) is set aside and the Appellant nos.2 and 3 stands acquitted;

(iii) Appeal of appellant no.1 is abated.