
(2013) 02 BOM CK 0073
In the Bombay High Court
Case No : Criminal Appeal No. 297 of 1996

Raju Shinde Londhe	Vs	APPELLANT
The State of Maharashtra		RESPONDENT

Date of Decision : 28-02-2013

Acts Referred:

Penal Code, 1860 (IPC) — Section 341, 395

Citation : (2013) ALLMR(Cri) 1848

Hon'ble Judges : R.C. Chavan, J

Bench : Single Bench

Advocate : R.R. Bhosale,-original accused No. 6, for the Appellant; J.P. Kharge, APP, for the Respondent

Judgement

R.C. Chavan, J.—This appeal is directed against the appellant's conviction by the learned Sessions Judge, Pune, for offences punishable under Sections 341 and 395 of the Indian Penal Code and sentence of rigorous imprisonment for one month with fine of Rs. 100/- or in default further rigorous imprisonment for ten days and further sentence of rigorous imprisonment for five years with fine of Rs. 500/- or in default further rigorous imprisonment for six months, imposed upon the appellant alongwith five other co-accused on the two counts respectively, on conclusion of trial of Sessions Case No. 333 of 1995. Facts which are material for deciding the appeal are as under:

On 24.3.1995, the complainant Jamil Ahmed was travelling towards Mumbai alongwith his family members in a Fiat Car. The car encountered some obstacle at the Ghat near Lonawala. The complainant and some occupants of the car got down and found that some iron rods had been laid on the road in order to obstruct the car. Then mob of about 14 persons is alleged to have come and robbed the occupants of the car of their valuables, cash and other belongings. The complainant and some others were also injured in that process. The complainant and other occupants raised cries, which attracted the passer-by and the miscreants ran away. A report was made to the Vadgaon Maval Police

Station, Pune, immediately, whereupon an offence was registered and investigation commenced.

2. In the course of investigation, the investigating officer performed panchanama of spot and recorded statements of the witnesses, apprehended five of the six accused persons, recovered a wrist watch from Ganpat S. Waghmare (PW-6), arrested the present appellant, i.e., accused No. 6, and got a test identification parade of the miscreants conducted by the Nayab Tehsildhar and on completion of investigation, sent the Charge-sheet to the learned Judicial Magistrate, First Class, Vadgaon Mawal, District Pune, who committed the case to the Court of Sessions at Pune.

3. The learned Additional Sessions Judge to whom the case was made over, charged the appellant and five others of having committed the dacoity and having wrongfully restrained the complainant and others. All the accused persons pleaded not guilty and hence they were put on trial at which the prosecution examined in all nine witnesses in its attempt to bring home guilt of the accused persons. After considering their evidence in the light of defence of denial, the learned Judge convicted and sentenced all the accused persons as aforementioned. It appears that co-accused Nos. 1 to 5 were in Jail at the time of their conviction and seem to have suffered the sentence and have been released. The co-accused have not preferred any appeal. The appellant was on bail. The appellant has questioned his conviction by the present appeal.

4. I have heard the learned counsel for the appellant and learned APP for the State. With the help of both, I have gone through the evidence on record.

5. The occupants of the car, including the first informant were examined as PW-1 Sayyed Jamil Ahmed Noor Ahmed, PW-2 Mustaq Safad Khan and PW-3 Nizamuddin Jainabuddin Shaikh. PW-1 Sayyed and PW-2 Mustaq identified the original accused Nos. 3, 4 and 5 as the miscreants. PW-3 Nizamuddin identified the appellant as the miscreant, who snatched away his "HMT" made wrist watch. He also identified wrist watch Article No. 2, which was shown to him. PW-4 Sambhaji Mahadu Temgire is the panch witness, in whose presence on 12.5.1995 Article No. 2 was seized from one Ganpat Sitaram Waghmare (PW-6). PW-6 Ganpat Waghmare turned hostile. PW-6 Ganpat Waghmare was supposed to have told that he had received the wrist watch, i.e., Article No. 2 from accused No. 1. PW-8 Shaikh Abdul Razak Abdul Latif was the Executive Magistrate/Nayab Tehsildhar before whom the test identification parade of the accused was held on 8.8.1995 and PW-7 Zippa Chindhu Khandave was the panch at this test identification parade. At this parade, the Magistrate paraded all the six accused persons alongwith sixteen dummies. He had first called the dummies without having seen the accused persons. All the accused persons are said to have been identified by PW-5 Mohammad Ibrahim Khan, a Watchman of a nearby building, who was supposed to have been seen the accused persons due to barking of the dogs. PW-5 Mohammad Ibrahim Khan had not actually witnessed the robbery. He only saw the miscreants going towards Boras. However, he did not identify all the

accused persons before the court. He identified only accused Nos. 2, 3 and 4. PW-9 PSI Raosaheb Baburao Sardesai conducted investigation.

6. The learned counsel for the appellant submits first that except for PW-3 Nizamuddin, no other witnesses have identified the appellant at the trial. He submits that identification of the appellant by PW-3 Nizamuddin at the trial is doubtful since other two injured persons have identified accused Nos. 3, 4 and 5, but have not stated anything about the complicity of the appellant. He further submits that if the appellant was indeed miscreant who snatched away the watch from PW-3 Nizamuddin, the watch should have been shown to have sold to PW-6 Ganpat Waghmare by the appellant. However, the evidence about seizure of this Watch by PW-4 Sambhaji and PW-9 Raosaheb Sardesai show that Ganpat Waghmare told that watch had been sold to him by accused No. 1. The learned counsel, therefore, submits that since the watch itself, which seems to be connecting link between the appellant and identification by PW-3 Nizamuddin, was in-fact with accused No. 1. The complicity of the appellant could not be inferred on the basis of this evidence. He submits, and rightly in my view, that there is absolutely no reason as to why the investigating officer could not call PW-1 Sayyed, PW-2 Mustaq and PW-3 Nizamuddin for the purpose of identifying the miscreants at the test identification parade. As far as identification of the miscreants by PW-5 Mohammad Khan is concerned, it is worthy of note that though the record of test identification parade proved by PW-7 Zippa Khandave and PW-8 Shaikh Abdul Razak shows that all the miscreants were identified by PW-5 Mohammad Khan, this witness does not identified the present appellant as one of the miscreants in the Court. Therefore, identification of the appellant at the test identification parade, which itself was defective, would be of no use.

7. The learned Additional Public Prosecutor for the State, on the other hand, submits that identification of the appellant by PW-3 Nizamuddin in the Court and identification by PW-5 Mohammad Khan at the test identification parade was rightly relied by the learned trial Judge and the learned trial Judge was justified in convicting the appellant on the basis of evidence of PW-3 Nizamuddin, who identified the appellant as the person, who snatched the wrist watch, i.e., Article No. 2 from him.

8. Firstly, absence of participation of PW-1 Sayyd, PW-2 Mustaq and PW-3 Nizamuddin in the test identification parade without any plausible explanation, would cast a doubt on the identification of the appellant by PW-3 Nizamuddin in the Court, particularly in the context of the fact that other two witnesses, i.e., PW-1 Sayyed and PW-2 Mustaq have identified accused Nos. 3, 4 and 5 but not the appellant when they were examined before the Court. Secondly, wrist watch, which the appellant is alleged to have snatched from PW-3 Nizamuddin, according to the prosecution story, was with accused No. 1, who had given it to PW-6 Ganpat Waghmare from whom it was allegedly seized in presence of PW-4 Sambhaji Temgire by PW-9 PSI Sardesai. Thus seizure of watch Article No. 2 does not show that it was ever in possession of the appellant and consequently

does not show that it could have been snatched by the appellant from PW-3 Nizamuddin.

9. In view of this, the learned counsel for the appellant is right in submitting that the evidence connecting the appellant to the crime is shaky and unreliable and the benefit thereof should have been given to the appellant. The Appeal is, therefore, allowed. The conviction of the appellant for the offences punishable under Sections 341 and 395 of the Indian Penal Code and sentence of rigorous imprisonment for one month with fine of Rs. 100/- or in default further rigorous imprisonment for ten days and further sentence of rigorous imprisonment for five years with fine of Rs. 500/- or in default further rigorous imprisonment for six months are set aside. The appellant is acquitted of those offences. His bail bonds stand cancelled.