

(1998) 06 BOM CK 0046

In the Bombay High Court

Case No : Criminal Appeal No's. 3 and 101 of 1985 and Criminal Revision
Application No. 20 of 1985

Robert Peter Kadam and etc.

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 30-06-1998

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 482
Evidence Act, 1872 — Section 114
Penal Code, 1860 (IPC) — Section 395, 397, 412, 414
Probation of Offenders Act, 1958 — Section 4(1)(3)

Citation : (1998) CriLJ 3879 : (1998) 3 MhLj 625

Hon'ble Judges : Vishnu Sahai, J;T.K. Chandra Sekhara Das, J

Bench : Division Bench

Advocate : B.M. Jadhav, for J.R. Gore, in Cri. A. No. 3/85 and G.K. Jadhav, for Subhash Keluskar, in Cri. A. No. 101/85, for the Appellant; D.S. Mhaispurkar, Assistant Public Prosecutor, for the Respondent

Judgement

Vishnu Sahai, J.—Since these matters arise out of the same set of facts and a common impugned judgment, we are disposing them off by one judgment. 9 persons namely (1) Robert Peter Kadam (2) Tulshidas Ramchandra Bhokre (3) Balu Mogal Kharb(4) Yadav Baburao Karote (5) Bhimrao Kabir Waghmare (6) Salim Dilvar Munshi (7) Ashok Laxman Ghoderao (8) Anil Nathu Kale and (9) Gangubai Laxman Shinde were tried by the learned Additional Sessions Judge, Nasik, for offence punishable u/s 395, IPC. In addition, some were charged for offences punishable under Sections 397, 412 and 414, IPC. The learned Additional Sessions Judge vide his Judgment dated 3-1-1985 passed in Sessions Case No. 86 of 1984, convicted and sentenced three of them namely Robert Peter Kadam, Ashok Laxman Ghoderao and Anil Nathu Kale, for offence u/s 395 read with Section IPC. He sentenced Robert Peter Kadam to undergo seven years R.I. for the same but, released the other two on probation of good conduct of their furnishing bonds in the sum of Rs. 500/- with one surety in the like amount and to appear and receive sentence within a period of one year if and when

called upon by the Court and in the meantime, to keep peace and good behaviour. They were also kept under the supervision of the District Probation Officer for a period of one year u/s 4(1)(3) of the Probation of Offender's Act.

Remaining six persons were acquitted.

2. In short, the prosecution case is that the informant Zakir Hussein Sayyad Hussein P.W. 22, Vijay Kumar Isinath P.W. 23 and Ramkishor Shamlal Gupta P.W. 26 were travelling on 13-12-1983 by Bombay-Gorakhpur Express which left Bombay at 12 noon. It reached Nasik Road Railway Station at about 4 p.m. and as soon as it left the said railway station, eight unknown persons boarded it. Five of them were armed with knives. They started searching and robbing the passengers. One of them whom informant identified in Court as Ashok Laxman Ghoderao, robbed him of Rs. 10,000/-. One amongst them whom Vijay Kumar Isinath identified in the Court as Robert Peter Kadam, deprived him of Rs. 450/- and his wrist watch. One of them whom Ramkishor Shamlal Gupta P.W. 26 identified in Court as Anil Nathu Kale was leading the dacoits.

3. The F.I.R. of the incident was lodged by Zakir Hussein Sayyad Hussein when the train reached Manmad Railway Station. It is at Exhibit 73.

4. The investigation was conducted in the usual manner by P.I. Khanderao Ghorpade P.W. 27. On 14-12-1983, he arrested the appellant Robert Peter Kadam. He was searched in the presence of two public panchas namely Vithal Barse P.W. 1 and Bhaskar Sukhalal Koli and as is apparent from the recovery panchanama Exhibit 24, a wrist watch of Riko make was recovered from him, along with cash to the tune of Rs. 810.10ps.

He arrested the appellant Anil Nathu Kale and on his pointing out, two wrist watches were recovered. Since there is no evidence to indicate that the watches recovered were looted during the dacoity we are not going deeper into them. It is significant to point out that no recovery was made from Ashok Laxman Ghoderao who was arrested on 29-12-1983.

5. It is significant to point out that during investigation, in the presence of Azad Kumar Vishvakarma P.W. 25, Vijay Kumar Isinath P.W. 23 identified the watch recovered from the appellant Robert Peter Kadam a panchanama Exhibit 77 was prepared. It was signed by P.W. 25. The said watch is Article 12.

6. The case was committed to the Court of Session in the usual manner. In the trial Court, the appellants and other accused persons were charged on a number of counts including Section 395, IPC. They pleaded not guilty to the charges and claimed to be tried. During trial, in all the prosecution examined 29 witnesses. Three of them namely Zakir Hussein Sayyad Hussein P.W. 22, Vijay Kumar Isinath P.W. 23 and Ramkishor Shamlal Gupta P.W. 26 were examined as eyewitnesses. In defence, no witness was examined. The learned trial Judge believed the evidence adduced by the prosecution and convicted and sentenced the appellants in the manner stated above.

7. We have heard the Counsel for the parties and perused the entire material on record. In our view :-

(a) Criminal Appeal No. 101 of 1985 deserves to be allowed;

(b) Criminal Revision Application No. 20 of 1985 deserves to be dismissed and the suo motu notice issued for enhancement of sentence to appellant Anil Nathu Kale and Ashok Laxman Ghoderao warrants to be discharged;

(c) Our powers u/s 482, Cr.P.C. should be invoked and Ashok Laxman Ghoderao be acquitted for the offence u/s 395/397, IPC; and

(d) Criminal Appeal No. 3 of 1985 deserves to be partly allowed inasmuch as the conviction of appellant Robert Peter Kadam deserves to be altered from that u/s 395/397, IPC to one u/s 395, IPC and for that offence, he deserves to be sentenced to 7 years R.I.

8. We would like to individually take up the cases of the accused persons and the discussion hereinafter would show as to why we have reached the conclusion mentioned above.

We would first start with the case of Ashok Laxman Ghoderao against whom, suo motu notice for enhancement of sentence has been issued by this Court. There is no dispute that the only evidence against him is that of identification for the first time in Court by the informant Zakir Hussein Sayyad Hussein P.W. 26. The Supreme Court in a large number of Judgments has held that it is extremely unsafe to accept the evidence of identification for the first time in Court, in the absence of identification parade having been held during investigation. In this connection, reference may be made to the decision of the Apex Court reported in Kanan and Others Vs. State of Kerala, . We find that no explanation has been given by the prosecution for not holding the identification parade during investigation. It would also be pertinent to mention, as observed in para 46 of the Division Bench decision of the Allahabad High Court rendered in the case of Asharfi and Another Vs. The State, , it is extremely unsafe to convict a accused on a solitary identification because the element of chance cannot be excluded. The relevant part of the said para reads thus :-

Hence only one identification cannot eliminate the possibility of the pointing out being purely through chance and for this reason is insufficient to establish the charge.

Since the only evidence against Ashok Laxman Ghoderao is that of identification for the first time in Court and that too by a solitary witness, he has to be acquitted even in the absence of his preferring an appeal against his conviction and sentence. It is well-settled that this Court can do so in exercise of its inherent powers u/s 482, Cr.P.C. Accordingly, he has to be acquitted for the offence u/s 395 read with Section 397, IPC and the suo motu notice for enhancement of sentence issued to him by this Court has to be discharged.

9. We now come to the case of the appellant Anil Nathu Kale. It is true that pursuant to his arrest, during the course of the investigation, two watches were recovered on his pointing out but, as observed by the trial Judge the said watches were not proved to have been looted during the course of dacoity. Hence, the only evidence which remains against him is that of identification for the first time in Court by the informant and Ram Kishor Shamlal Gupta. Since no test parade was held during investigation and he was identified for the first time in Court, he has also to be acquitted.

10. This brings us to the case of the appellant Robert Peter Kadam. The evidence against him is of a dual nature :-

(a) Identification for the first time in Court by witnesses Zakir Hussein Sayyad Hussein P.W. 22 and Vijay Kumar Isinath P.W. 23; and

(b) Recovery of a wrist watch belonging to Vijay Kumar Isinath P.W. 23 on the next day of the dacoity, from his person and its identification by Vijay Kumar Isinath in the presence of Azad Kumar Vishwakarma P.W. 15 during investigation coupled with the statement of Vijay Kumar Isinath in the trial Court that it was the same watch which was looted from him.

11. It is true that since no identification parade was held during the investigation, evidence of identification of this appellant by the informant and Vijay Kumar Isinath cannot be accepted.

Even after excluding the identity evidence against the appellant Robert Peter Kadam, we find that his conviction can be sustained on the evidence of recovery of the looted watch from his person. In this connection, it is significant to point out that the evidence of P.I. Khanderao Ghorpade P.W. 27 shows that he was arrested the next day of the dacoity i.e. on 14-12-1983. His evidence and the panchanama of the recovery Exhibit 24 shows that a wrist watch of the RIKO make was found with him at the time of his arrest. It is true that the public panch of recovery Vithal Barse P.W. 1 stated that the watch recovered was SICO but, in our view the said statement appears to have been made under some confusion. We prefer to believe the evidence of P.I. Ghorpade who stated that a RICO watch was recovered because the same is corroborated by recovery panchnama. It should be borne in mind that Vijay Kumar Isinath also stated that a RICO watch was looted from him.

It is pertinent to point out that the said watch was identified during the course of investigation by Vijay Kumar Isinath P.W. 23. It was also identified by him during trial.

It is significant to point out that P.I. Ghorpade is an independent witness and had no axe to grind against the said appellant. In our view, unless the watch was recovered from him, P.I. Ghorpade would not have falsely deposed about it. We farther find that no suggestion was given to either P.I. Ghorpade or Vithal Barse, during the cross-examination, that the said recovery was false and foisted upon

the appellant.

It is true that during investigation, no identification of recovered watch was conducted and normally the same should have been done but it cannot be laid down as an inflexible rule of law that failure to hold identification of recovered property renders the evidence of recovery unworthy of acceptance.

We are fortified in our view by the decision of the Supreme Court reported in (Earabhadrappa v. State of Karnataka) wherein it has been observed thus (para 12):-

There is no merit in the contention that testimony of these witnesses as regards the identity of the seized articles to be stolen property cannot be relied upon for want of prior test identification. There is no such legal requirement.

12. Illustration (a) to Section 114 read with Section 114 of the Indian Evidence Act shows that if a man is found in possession of stolen goods soon after the theft and cannot account for his possession, then either of the two presumptions can be drawn :-

(a) that he is a thief; or

(b) that he has received the goods knowing them to be stolen.

In the instant case, in our view considering the circumstance that recovery was effected within 24 hours of the incident, the inference that the said appellant had committed dacoity can legitimately be raised.

We are fortified in our Judgment by the decision of the Supreme Court reported in Gulab Chand Vs. State of Madhya Pradesh, wherein three days after the murder and robbery, articles were recovered from Gulabchand and the Supreme Court held that on the basis of the said recovery, his convictions for offences of murder and robbery were sustainable. In our view, the conviction of appellant Robert Peter Kadam for the offence u/s 395, IPC suffers from no infirmity.

13. Before parting with the question of recovery we would be failing in fairness if we do not mention that in his statement recorded u/s 313, Cr.P.C. this appellant claimed the watch to be his own but, this belated claim of his, in the absence of any receipt showing that he had purchased it or a suggestion to Vijay Kumar Isinath P.W. 23, P. I. Ghorpade P. W. 27 and Vithal Barse P.W. 1 that the watch was his, we are not prepared to accept.

14. But, in our judgment, Robert Peter Kadam" s conviction u/s 397, IPC cannot be sustained. The same is based on the evidence of Vijay Kumar Isinath P. W. 23 who identified him in the Court as the person who brandished a knife and robbed him of money. However, as we have rejected the evidence of identification on the ground that it is not safe to accept the evidence of identification for the first time in Court, his conviction for the offence u/s 397, IPC cannot be sustained.

15. In the result:-

(A) Criminal Appeal No. 3 of 1985 is partly allowed. We acquit the appellant Robert Peter Kadam for the offence u/s 395, r/w. Section 397, IPC and set aside his sentence of 7 years R.I. on the said count. Instead we find him guilty for an offence u/s 395, IPC and sentence him to undergo seven years R.I. He is on bail and shall be taken into custody forthwith to serve out his sentence.

(B) Criminal Appeal No. 101 of 1985 preferred by Anil Nathu Kale is allowed. His conviction and sentence for the offence u/s 395/397, IPC is set aside. He is acquitted for the said offence. In case he has not executed the bond, which he was directed to execute by the trial Court, he shall not execute the same.

(C) Criminal Revision Application No. 20 of 1985 is dismissed. The sue motu notice of enhancement issued to appellant Anil Nathu Kale and Ashok Laxman Ghoderao to show cause as to why their sentence be not enhanced is discharged.

(D) Ashok Laxman Ghoderao is acquitted for the offence u/s 395/397, IPC.