

**(2014) 07 BOM CK 0310**  
**In the Bombay High Court**  
**Case No : Criminal Appeal No. 108 of 2012**

Sakil Azim Shaikh

APPELLANT

Vs

The State of Maharashtra and Others

RESPONDENT

**Date of Decision :** 25-07-2014

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 313  
Penal Code, 1860 (IPC) — Section 342, 392, 394, 397, 452

**Citation :** (2015) ALLMR(Cri) 319

**Hon'ble Judges :** P.D. Kode, J

**Bench :** Single Bench

**Advocate :** Nasreen S.K. Ayubi, Appointed Adv, Advocates for the Appellant;  
M.H. Mhatre, Learned APP, Advocates for the Respondent

## **Judgement**

P.D. Kode, J.—The appeal is directed against the judgment and order dated 5th December, 2011 delivered by the learned Ad-hoc Additional Sessions Judge, Sewree, Mumbai in Session Case No. 507 of 2011 convicting the appellant for commission of offences punishable under Sections 392 read with Sections 397, 394, 452 and 342 of Indian Penal Code and sentencing him to suffer rigorous imprisonment for eight years and to pay fine of Rs. 3,000/- and in default of payment of fine to suffer rigorous imprisonment for six months on the first count; and to suffer rigorous imprisonment for three years and to pay fine of Rs. 2,000/- and in default of payment of fine to suffer rigorous imprisonment for three months on the second count; and to suffer rigorous imprisonment for one year and to pay fine of Rs. 1,000/- and in default of payment of fine to suffer rigorous imprisonment for two months on the third count; and to suffer rigorous imprisonment for two months and to pay fine of Rs. 500/- and in default of payment of fine to suffer rigorous imprisonment for one month on the fourth count; and ordering substantive sentences imposed to run concurrently and awarding a compensation of Rs. 3,000/- to victim/Respondent No. 3 out of the fine amount recovered from the appellant. The said prosecution emerged out of the charge-sheet filed by PW-11 PI. Chandrakant Dhanaji Khanvilkar on the

conclusion of investigation of Crime No. 59 of 2011 for offences punishable under Section 392 read with Sections 397, 394, 452 & 342 of IPC, upon the F.I.R. (Exh.-9) lodged by Respondent No. 3 on 22nd March, 2011 regarding the incident which had occurred on the same day at her house i.e. Flat No. 1301, 13th Floor, Hafizuddin Marg, Irfan Palace, Byculla, Mumbai in which the appellant after making preparation to commit offences had entered in said flat and on point of knife robbed her of two gold chains. PW-11 on conclusion of investigation had submitted charge-sheet against the appellant in the Court of learned Metropolitan Magistrate, Mazgaon, Mumbai and the said Court had committed the case registered therein involving the offences triable by the Court of Session, to said Court.

2. The appellant pleaded not guilty to charge(Exh-2) framed by the Court of Sessions for offences punishable under Sections 392 read with 397, 394, 452 and 342 of Indian Penal Code and claimed to be tried.

3. The prosecution in support of its case examined in all 12 witnesses i.e. victim PW-1 Parvin Hasan Rajak Shaikh; her husband PW-2 Dr. Hasan Rajak Siddique; PW-5 Shabana Abdul Hannan Ansari who was working in their flat as maid servant with PW-1 and present at the time of incident; PW-3 Tariq Amin Khan, a shop-keeper who had apprehended the appellant while running away from the place of offence and then being chased by a watchman; PW-9 Natharam Manaram Choudhary from whom the appellant had purchased chilly powder; PW-4 Mohmood Farooq Hanif Tai, a panch witness for spot panchanama(Exh-16); PW-6 Arun Pandurang More in whose presence the weapon of offence article knife was seized by the police; PW-7 Dr. Pranav Raman Chickermane from Nair hospital who had examined victim PW-1 soon after the incident and PW-8 Dr. Hunaid Inayat Hatimi from same hospital who had examined the appellant regarding multiple injuries sustained by him in assault affected by crowd gathered. The prosecution also adduced the evidence of investigating officer PW-10 PSI. Surjerao Shamrao Kubhar who had carried out the initial investigation and PW-11 Chandrakant Dhanaji Khanvilkar and later on submitted the charge-sheet and so also that of PW-12 Inamji Maharya Gavit, a police constable who had carried packets of muddemal seized during the investigation to chemical analyzer.

4. The defence of the appellant was that of total denial and false implication. However, during the examination under Section 313 of Code of Criminal Procedure, he claimed that he was taking treatment from PW-2 Dr. Hasan for 2-3 years prior to the incident in question. According to him, the medicines prescribed had reacted upon him and due to it, he had slapped PW-2 and PW-2 had pushed him out of his clinic. It is his defence that on the date of incident at about 1.00 p.m. PW-2 telephoned and called him in clinic and asked him to bring all the medical reports so that he could show it to some other doctor. PW-2 after examining the other patient has seen the said medical papers shown by the appellant, but thereafter had torn all the said medical reports and threw it in the

dustbin. As he asked PW-2 for it, PW-2 slapped him and thereafter pushed him out of his clinic and told that he should do whatever he desires. It is the case of appellant that he had told to PW-2 that he would be lodging a complaint in the police station, PW-2 had shouted as "chor-chor". The people then apprehended him and started beating and torn his clothes though he had shouted that he is not a thief. Thereafter, he had become unconscious. The appellant did not adduce any evidence of any witness in support of his defence.

5. The trial Court after assessing the evidence adduced and hearing both the sides had come to the conclusion of the guilt of appellant being established for the offences narrated herein-above and in consonance with such finding arrived convicted and sentenced the appellant.

6. In view of the absence of learned advocate for the appellant and in view of the ratio of the decision in the case of Bani Singh and others Vs. State of U.P., " and more particularly the observations made in paragraph 15 of the judgment, Mrs. Nasreen S.K. Ayubi was appointed to espouse the cause of the appellant.

7. The record of the case was carefully perused with the assistance of the learned appointed advocate and learned APP and both of them were heard at length.

8. The learned appointed advocate by meticulously taking through the evidence on each of witnesses and particularly that of the victim PW-1 strenuously contended that trial Court having committed error of relying upon her evidence and so also corroborative evidence of other witnesses and arriving at the conclusion of the guilt of appellant for the offence for which he was convicted by the trial Court. The learned appointed advocate contended that considering the discrepancies revealed from the said evidence, the appellant is entitled for the benefit of doubt. It was urged that appeal be allowed by giving benefit of doubt to the appellant. The learned counsel alternatively contended that if the Court is not in agreement with the submissions canvassed by her then at least in the facts and circumstances of the case, rigorous imprisonment of eight years awarded to the appellant on the count of commission of offence punishable under Section 392 read with 397 of Indian Penal Code being harsh, be reduced.

9. Mrs. M.H. Mhatre, learned APP on the contrary submitted that the judgment and order of conviction and sentence is imposed upon the appellant after properly assessing the evidence on record and for detail reasons recorded in the judgment. It is urged that the infirmities from the evidence attempted to be pointed out by the learned counsel are of trifle nature without affecting the testimonies of witnesses whose evidence was relied and acted upon by the trial Court for arriving at the conclusion of the guilt of the appellant and convicting and sentencing him. Learned APP thus contended that there is no merit in the appeal and it may be dismissed.

10. Though both sides have made elaborate submissions after meticulously taking the Court through the evidence surfaced and the judgment delivered, for

the sake of brevity and to avoid the repetition, instead of recording said submissions, at the present stage, the gist of the same has been given hereinabove and only the submissions meriting reply are discussed in the further part of the judgment.

11. Thoughtful considerations were given to the submissions advanced at the bar and proceedings of the trial Court including judgment impugned in the appeal were carefully considered for ascertaining merits in submissions canvassed.

12. As the glance at the impugned judgment reveals that the trial Court arrived about the conclusion of the guilt of the appellant mainly by accepting the evidence of victim involved in the incident as well as corroborative evidence adduced by the prosecution, it will be necessary to firstly take into account the evidence of PW-1 who was victim of the incident in question. The perusal of the evidence of PW-1 reveals that she has given sketchy account of the incident which had occurred in her flat while her husband PW-2 had been at his dispensary. At 11.00 a.m. after she returned from the market, the incident in question had taken place. It reveals that at the relevant time, she had returned along with her maid servant PW-5 from market and thereafter she had been to the kitchen. It reveals that thereafter door bell rang and PW-5 opened the door and asked the person who had rang the bell as to who was he and to whom he wanted to meet. It reveals that in the meantime, PW-1 had been out of the kitchen. Her evidence discloses that then she had seen the person standing outside the door of her house and the said person has disclosed that he wanted to meet her husband and he was his uncle. It reveals that thereafter PW-1 had told the person that she will inquire about it with her husband on telephone as to whether said person was his relative. It reveals that thereafter she had given a call to her husband on mobile but she was unable to contact with her husband as the said person snatched her mobile and threw it on the bed.

13. Further part of her evidence reveals that thereafter said person removed knife from his pocket. PW-5 who was observing the said incident was scared and locked herself in the toilet. It reveals that thereafter said person told PW-1 to handover money and ornaments she was having and threatened that in event of herself not handing over the money and ornaments, he would thrust the knife in her stomach. It reveals that as the said person was about to thrust the knife in her stomach, she hold it with her left hand and in said process blood started oozing from the left hand. The said person again asked her to give him all the money and ornaments. It reveals that said person was having red chilly powder in his hand and he threw it on her eyes and thereafter snatched the knife from her hand. PW-1 further deposed that said person snatched her two gold chains with locket on her person. She further deposed that said person then pushed her on the bed and locked the door from the outside. Her evidence reveals that in the meantime, her cell phone was ON and her husband was listening the conversation going-on in between said person and PW-1. Her evidence reveals that thereafter she again rang up her husband on mobile and he replied that he

was down and the culprit was apprehended. It reveals that again she called her husband and told herself being locked by locking the door from outside and for opening it. The evidence of PW-1 further reveals that thereafter her husband came and opened the door. The said evidence reveals that then she had seen said person i.e. culprit involved in the incident. She further deposed of having again seen said person in the hospital. She identified the appellant as being the same person at the trial. Her evidence discloses that herself and the appellant both were treated in the hospital and thereafter she was asked to go home while the appellant was admitted in the Nair hospital.

14. Further evidence of PW-1 is confined for give details of chains which were snatched and having identified the muddemal articles before the Court i.e. the gold chains and the knife which was seized during the investigation. Her evidence discloses of having lodged F.I.R. (Exh-8) with the police. She also deposed that police then having shown said knife and gold chain. Now considering the said testimony of PW-1 in the light of answers elicited during her cross examination, it is difficult to discard her claim as being vulnerable much less unbelievable. On the contrary, her evidence is found to be duly corroborated by same story narrated by her while lodging F.I.R(Exh-8). Furthermore, the claim taken by her is also found corroborated by evidence of PW-5 as well as the evidence of PW-2.

15. Now reverting to the evidence of PW-2, the husband of PW-1, the perusal of his evidence reveals that after receipt of call from his wife and hearing loud voice of his wife and the threatening given by the person who had been to the flat, he has realized of some person having entered in his house and causing hurt to his wife. It discloses that thereafter he had rushed to his house. It reveals that as he reached on the 13th floor of the building in which he was staying, he saw one person coming out of his house and fleeing away. It reveals that he tried to chase the said person but he fled away. It reveals that himself and other persons from the building were chasing him, the said person reached on the ground floor and pushed the watchman and fled away. It reveals that however the said person was caught by the persons outside the building. PW-2 also identified the appellant as being the same person. Further part of his evidence reveals similar story as narrated by his wife regarding the incident. His evidence also reveals of having learnt about incident from wife i.e. happening in the said flat before he reached the flat. It reveals of himself having taken the wife to Nair hospital and then having been to the police station and lodging of complaint. PW-2 during his evidence also identified knife seized during the course of investigation as well as Dupatta of his wife.

16. The perusal of the cross-examination of PW-2 does not reveal that his aforesaid evidence was shaken in any manner by eliciting any answers during the cross-examination. On the contrary, the answers received during the cross-examination reveals that PW-2 admitted that 2-3 years prior to the incident, the appellant had been to him for the treatment of viral fever and he had treated him. PW-2 denied the suggestion given on behalf of appellant that for 2-3 days

prior to the incident, the appellant had been to his dispensary and other suggestions given on behalf of the appellant on the line of his defence as narrated herein-above. Thus considering the evidence of PW-2 in entirety, it can be said that the said evidence duly corroborates the evidence of PW-1 as well as it does not reveal any admission secured therein in support of the defence.

17. Now reverting to the evidence of next eye witness i.e. PW-5, a maid servant of aged 13 years. A corroborative account of an incident has been narrated by PW-5 in her deposition. Her evidence reveals that she was taking tuitions from PW-1 and was also performing household work at her house. The perusal of her cross-examination does not reveal that her evidence is shaken in any manner due to any answer elicited in the cross-examination.

18. The prosecution through the evidence of PW-7 has established the fact of PW-1 having sustained injury and the said being probable by a sharp edge cutting instrument like knife and so also by knife(Article-1) before the Court i.e. knife seized by the police. The evidence of PW-7 is also well corroborated by injury certificate (Exh-23) issued by him. Needless to say that his unshattered evidence not only establishes the fact of PW-1 having sustained injury but also corroborates her claim of having sustained the said injury during the incident.

19. Similarly the prosecution through the evidence of PW-8 also has established that on the relevant day, he has examined the accused and the injuries were found on his person. Evidence of PW-8 is found corroborated by the medical certificate(Exh-27) of the injuries noticed by him on person of appellant, issued by him.

20. Thus after taking into consideration, the evidence of above referred witnesses, it is difficult to find any substance in the arguments advanced by the learned appointed advocate that an error was committed by the trial Court in accepting and relying upon the said evidence.

21. The learned appointed advocate by pointing out minor discrepancies from the evidence of PW-1 and PW-5 has submitted that the said discrepancies creates doubt in the mind. It is extremely difficult to accept the said submission, as it is a settled legal position that evidence of each of the witness involved in the incident is required to be assessed independently. The such assessment of evidence of PW-1 and PW-5 in the said manner, it is difficult to accept that their testimonies have been shaken in any manner i.e. on the relevant date and time the incident involving a person affecting entry in the flat of PW-1, on the guise of meeting her husband and thereafter at the point of knife having threatened her for giving money and the ornaments; PW-1 having snatched knife and during scuffle sustained bleeding injury. Having regard to the minor discrepancies attempted to be pointed out by the learned counsel for the appellant, it can not be said to be of such a nature deserving rejection of evidence of either of them.

22. Now coming to the question of identity of appellant as the person involved in the alleged incident, hardly any circumstance has surfaced on the record by

doubting the claim staked by PW-1 and PW-2. Indeed it is true that PW-2 was not present in the said flat when the incident in question had occurred. However, taking into account the rapid succession in which events taken place and the place at which the appellant was caught and unshattered evidence of PW-1, it is difficult to accept the submissions canvassed that the identity of the appellant has not been established by the prosecution. Such a conclusion is inevitable as the account of same incident in terms reveals that the appellant has been in the close vicinity of PW-1, affording to her, sufficient opportunity to observe and remember the appellant at the time of incident. Hardly any circumstance brought on record for doubting her claim. It can be further added that incident of such type being uncommonly to occur in the life of any person, makes it difficult that the person involved in such incident would be able to forget such robber.

23. Having regard to the same, merely because the evidence of PW-1 being not supported by the prosecution by prior identification made by her at test identification parade would not be a good ground to discard testimony of PW-1 in the instant case. Such conclusion is inevitable as it is well settled that the identification of the culprit made by the witnesses in test identification parade is not a substantive evidence but corroborative evidence and the same is useful for corroborating her evidence at the trial. However, it has been also settled legal position that if the evidence of witnesses is impressive then merely because the said evidence is not corroborated by the evidence of identification made at the test identification parade, would not be a good ground to discard the said evidence. The same is obvious as the necessity of corroboration is always considered to be the rule of prudence and not the rule of law.

24. Needless to add that the corroboration would be necessary only in such cases when some infirmity is found in the evidence to be corroborated. No such case is spelt out from the evidence of PW-1. Hence her evidence, on the said count is not liable to be discarded. It can be further added that except the aspect of identity, the evidence is also found corroborated on the other aspects from the evidence of PW-2 and so also medical evidence. It can be further added that careful perusal of the evidence of PW-5 also reveals that her evidence also corroborates the evidence of PW-1 as the appellant being a culprit. Such conclusion is obvious as the evidence reveals that PW-5 during her evidence having claimed that appellant being the same person who was involved in the incident. Hence merely because of absence of specific evidence of PW-5 as appellant was the said person, neither her evidence nor evidence of PW-1 regarding identity can be said to be shakened.

25. Now considering the evidence of PW-3, it reveals that at the trial he has staked the claim of having apprehended the appellant while he was fleeing away after the incident. The defence had not at all challenged the identity of appellant as the same person. Thus, the same would be an additional ground of accepting the evidence of PW-1, PW-2 and PW-5 as appellant being the same person involved in the incident.

26. Since a conclusion can be safely reached after the assessment of the evidence of main witnesses, that the person involved in the incident or the person who was caught by PW-3 soon after the incident and treated by PW-8, was appellant, it will be wholly unnecessary to discuss in detail the other corroborative evidence adduced by the prosecution and referred herein-above, except making brief reference to it.

27. Suffice it to say that the prosecution through the evidence of PW-4 has squarely brought on the record situation prevailing at the spot of offence and recorded by police under panchanama to which the said witness was a party. Needless to add his evidence and the said situation is in consonance with the evidence of PW-1.

28. The prosecution additionally through the evidence of PW-9 has brought on record of the appellant having purchased a chilly powder from PW-9 on the day of incident itself. The said circumstance though not deceive, is definitely supports the prosecution case and particularly due to such chilly powder being purchased by appellant only on the day of incident. Though it is true that the said circumstance by itself would not be deceive as there could be many persons purchasing chilly powder, in the facts and circumstances of the present case, the said evidence definitely corroborates the prosecution case.

29. The learned appointed advocate has attempted to urge that it being a prosecution case that during the incident two gold chains were snatched from PW-1 but in fact only one gold chain being found and the same creates doubt about of her case. It is difficult to accept the submission after taking into consideration the place at which the appellant was apprehended. Such conclusion is obvious as evidence of PW-2 and so also of other witnesses in terms reveals that after PW-2 arrived on the spot, appellant was hurriedly trying to flee away from the spot during the process had scuffle with the watchman. The evidence also reveals that after the appellant was apprehended, he was beaten by the mob. The same squarely denoting, a scuffle having occurred and in the said process the possibility of part of the stolen property being misplaced, can not be ruled out. Having regard to the same on the basis of one gold chain being not found, can not legal to conclusion that PW-1 has staked a false claim and the entire story being concocted for so called alleged event as claimed by the appellant. Needless to add fresh injury sustained by PW-1 militates against such submission.

30. Now considering the defence of the appellant as claimed and the place at which he was apprehended, nowhere it is brought on record regarding the place being near dispensary of PW-2. Hence, it is difficult to accept on preponderance of probability that an incident tried to be canvassed by the appellant having occurred and due to it the appellant being falsely implicated in the case.

31. Thus after entire reappraisal of prosecution evidence, it is difficult to find any substance in the submissions canvassed of the trial Court having committed any

error about the guilt of the appellant in commission of offences punishable under Sections 392 read with 397, 394, 452 and 342 of Indian Penal Code.

32. Lastly coming to the submissions advanced by the learned appointed advocate for the appellant and after taking into account of nature of injury sustained by PW-1, the fact of part of muddemal property being already recovered, the part being lost not due to an particular act on the part of the appellant, may be probably due to being misplaced, there is some substance in the submissions canvassed that the substantive sentence of eight years awarded to the appellant being some what excessive. Needless to add it deserves to be reduced to the tune of rigorous imprisonment for Seven years.

33. In the premises aforesaid, the appeal is partly allowed only to the extent of reducing the substantive sentence awarded to the appellant to suffer rigorous imprisonment to the tune of Seven years instead of eight years as ordered by the trial Court on the count of commission of offence under Section 392 read with 397 of Indian Penal Code.

34. Excepting the aforesaid reduction the remaining part of judgment and order passed by the trial Court including the amount of fine imposed on the count of committing offence under Section 392 read with 397 of Indian Penal Code, conviction and sentence imposed for commission of other offences for which he was found guilty by the trial Court, ordering substantive sentences imposed to run concurrently, entitlement of appellant for set off for the period in which he was in custody, payment of compensation to victim PW-1 Parveen Hasan Raza Siddiqui and order of disposal of muddemal property, stands unmodified.

35. The learned appointed advocate for the appellant, for valuable services rendered, entitled for remuneration as per the rules made in the said regard.

36. Copy of the judgment and order be sent to the appellant who is in custody, through the Superintendent of the Prison in which he is presently lodged. The appeal stands disposed of accordingly.