

(2008) 02 BOM CK 0040
In the Bombay High Court
Case No : Criminal Appeal No. 162 of 2006

Santosh Jadhav and Shankar Komar

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 05-02-2008

Acts Referred:

Evidence Act, 1872 — Section 114, 27
Penal Code, 1860 (IPC) — Section 34, 391, 392, 394, 395

Citation : (2008) CriLJ 1861

Hon'ble Judges : V.R. Kingaonkar, J

Bench : Single Bench

Advocate : G.G. Kadam, No. 1 and S.S. Jadhav, No. 2, for the Appellant; D.R. Adhav, APP, for the Respondent

Final Decision : Dismissed

Judgement

V.R. Kingaonkar, J.—Challenge in this appeal is to judgement rendered by learned 3rd Adhoc Additional Sessions Judge, Nanded, in Sessions Case No. 60 of 2005 whereby appellants are convicted for offences punishable u/s 394 read with Section 392 and 34 of the I.P. Code and Section 457 read with Section 34 of the I.P. Code. Appellant No. 1 Santosh is sentenced to undergo rigorous imprisonment for seven (7) years and to pay fine of Rs. 1000/-, in default to suffer rigorous imprisonment for three (3) months, for conviction for the offence punishable u/s 394 read with Section 392 and 34 of the I.P. Code. He is further sentenced to suffer rigorous imprisonment for five (5) years for offence punishable u/s 457 read with Section 34 of the I.P. Code. Appellant No. 2 Shankar is sentenced to suffer rigorous imprisonment for ten (10) years and to pay fine of Rs. 1000/-, in default to suffer rigorous imprisonment for three (3) months for offence punishable u/s 394 of the I.P. Code. He is further sentenced to suffer rigorous imprisonment for five (5) years for offence punishable u/s 457 of the I.P. Code.

2. The incident giving rise to the prosecution occurred in the late night falling

between 16th and 17th May, 1997. Three persons intruded in the residential house of informant - PW Vijay Kasliwal in the wee hours. They had concealed their faces by tying pieces of clothes and were of approximately 5 & 1/2 feet height. The informant - PW vijay was in slumber in his separate bedroom. The three intruders went to the room where old aged mother of the informant was sleeping. They threatened her at point of knife and an iron rod. They robbed his mother Sow. Chanchalbai and maternal aunt Sow. Shakuntala of their ornaments, such as ganthan, gold bangles, ear-tops, etc. They also committed theft of cash amount of Rs. 50,000/- from locker after breaking open it. They were talking in Hindi language. Immediately after the robbers left her room, PW Chanchalbai went outside and narrated the incident to her son. He immediately ran out to give a chase to the culprits. However, it was invain. He gathered further information about commission of the house-theft, the description of the robbers and thereafter, went to Police Station. He lodged first information report at about 5 a.m.

3. The police visited house of the informant. A spot panchanama was prepared. The police arrested the appellants during course of investigation. At instance of appellant No. 1 Santosh, some stolen ornaments were recovered which were concealed underground at an open place. A sachet was recovered after digging at the place. It contained gold bangles and a mangalsutra. Similarly, on basis of information furnished by appellant No. 2 Shankar, two (2) gold bangles, one mangalsutra, a pair of gold ear-tops, two (2) rings, a chain, etc. came to be recovered. The gold ornaments were identified by informant and his mother as the stolen articles.

4. The appellants were chargesheeted for offence punishable u/s 395 and 457 of the I.P. Code. One more accused i.e. original accused No. 3 Daulat was also chargesheeted for offence of dacoity alongwith them. At the trial, charge (Exh-8) was framed against present appellants and original accused No. 3 Daulat, for offence punishable u/s 395 and 457 of the I.P. Code. The accused pleaded not guilty to the charge. At the trial, the prosecution examined in all ten (10) witnesses. The prosecution also adduced certain documentary evidence in support of its case. The learned Sessions Judge came to the conclusion that though there was no medical certificate about injury sustained by mother of the informant, namely, PW Chanchalbai, yet her oral evidence indicated that she sustained minor injury during course of the incident. The learned Sessions Judge held that identity of both the appellants as intruders in the house of the informant and robbers, was duly established. They were accordingly convicted and sentenced as stated at the outset.

5. Original accused No. 3 Daulat was, however, convicted by the Court of Sessions only for offence punishable u/s 411 of the I.P. Code and was sentenced to suffer rigorous imprisonment for one (1) year and six (6) months and to pay fine of Rs. 1000/-, in default to suffer rigorous imprisonment for three (3) months. He is not the appellant in the present case. I am told that he served the

sentence and made no grievance about the conviction.

6. Mrs. Jadhav, learned Counsel, would submit that the impugned order of conviction and sentence is unsustainable because there is no reliable evidence about identification of the culprits. It is argued that recovery of property articles was effected after a considerable time-gap and, therefore, inference ought not to have been drawn that the appellants were the robbers. It is argued that recovery of some ornaments from an open space at instance of appellant No. 1 Santosh would not prove his complicity as thief/robber. It is pointed out that recovery of ornaments was allegedly made from house of appellant No. 2 Shankar. It is argued that said recovery cannot be treated as discovery of fact within the meaning of Section 27 of the Evidence Act. It is contended that identification of appellant No. 2 Shankar by PW chanchalbai is improbable and doubtful. The learned Counsel, Mr. Kadam and Mrs. Jadhav, for the appellants, would submit that the impugned order of conviction and sentence is liable to be set aside. As against this, learned APP Mr. Adhav supports the impugned judgement.

7. Before I embark upon scrutiny of the prosecution evidence, let it be noted that the incident of robbery at house of informant PW1 Vijay Kasliwal took place in the wee hours of 17th May, 1997. There is no denial to the fact that three persons intruded in his house during the late-night, threatened his mother and aunt at point of sharp-edged weapon like knife and robbed them of their ornaments. The fact that the thieves decamped with Rs. 50,000/ and the ornaments from house of PW Vijay, is uncontraverted. The gold ornaments recovered during course of investigation were not claimed by the appellants. The recoveries were effected on 1st July, 1997. The prosecution heavily relies upon the factum of such recoveries of stolen articles. The prosecution also seeks to rely upon identification of appellant No. 2 Shankar in the Court by PW Chanchalbai and PW Shakuntala. Neither of them, however, identified appellant No. 1 Santosh in the Court.

8. So far as version of PW1 Vijay is concerned, it may be gathered that he was informed by his mother (PW Chanchalbai) about the robbery in the house at about 4.00 a.m. He gave information to the police at about 5.00 a.m. He lodged report (Exh-15) without delay. The recitals of the report would show that PW Chanchalbai and PW Shakuntala were relieved of their gold ornaments at point of knife. The recitals of the FIR also show that the locker was broke open with help of iron rod and an amount of Rs. 50,000/- was stolen away by the culprits. The recitals of the FIR further show that the culprits were slim, about 5 & 1/2 feet in height and one of them had put on black T-Shirt and jean pant. Another culprit had put on blue colour jean pant with a label marked "Lee". Needless to say, description of the culprits was immediately stated at the time of filing the F.I.R. The recitals of the FIR would show that gold mangalsutra, gold bangles and gold ear-tops of mother of the informant and his daughter, were stolen away. The recitals would further show that gold mangalsutra and bangles of gold of about twelve (12) tolas were stolen away by the culprits. Though PW Vijay attempted

to show that he saw one of the thieves from rear side, yet his such testimony cannot be relied upon. He admits that he was unable to see exactly whether that person was either of the appellants. His version reveals that there was darkness around the place. There are six rooms to his house. The rooms are adjoining each other. He has no personal knowledge about identity of the culprits. Thus, his version only relates to the fact of robbery of gold ornaments and cash amount by the culprits who had entered his house.

9. There is testimony of PW2 Sow Chanchalbai regarding the incident. Her evidence purports to show that she got up when she heard cry of her sister. She noticed three persons standing in the room. Their faces were tied by cloth pieces. Her version reveals that one of the culprits was armed with a sharp-edged knife whereas another was armed with an iron rod. She narrated as to how her sisters gold ornaments viz. mangalsutra, four gold bangles and a pair of ear-tops were stolen away. Her version reveals that the culprits robbed her of four gold bangles, mangansutra and a pair of gold ear-tops alongwith a pair of ear-chain. Her testimony shows that the culprits ransacked suitcase of her sister and took away four gold bangles from it. They also looted Rs. 50,000/ from the Steel Cupboard/Safe.

10. The version of PW Chanchalbai reveals that she identified appellant No. 2 shankar as one of the culprits. She states that she could identify him on account of the shape and structure of his eyes. According to her, he was continuously threatening her for giving keys of the Safe. She identified the gold ornaments which were produced before the Court as muddemal articles. Similarly, there is version of PW5 Shakuntala to corroborate the manner in which the house robbery took place. Her version reveals that at about 2.15/2.30 a.m., she noticed pressure on her throat and, therefore, cried out. She found that three persons were standing around her. Those culprits had tied pieces of clothes around their faces in order to conceal their identity. Her version reveals that she was threatened by the culprits. Her testimony further shows that the culprits snatched away four gold bangles from her hand besides a gold mangalsutra and a gold chain. Her version also shows that the thieves robbed two gold rings from her person besides the ear-tops. She identified appellant No. 2 Shankar from the dock.

Nothing of much importance could be gathered from her cross-examination.

11. From versions of PW6 Subhash and PW10 PSI Bansode, it may be gathered that on 1st July, 1997, appellant No. 1 Santosh gave confessional statement (Exh-25) leading to recovery of a cloth bag/sachet which was concealed at a place situated near cremation ground at village Ardhapur. Their versions corroborate the memorandum panchanama (Exh-25). Their versions further reveal that the police and panchas accompanied appellant No. 1 Santosh to a place near cremation ground at Ardhapur. The appellant dug at a place and took out a white bundle. The police recovered four gold bangles, etc. valued Rs. 25,000/-, which were concealed under the earth. The gold bangles are identified

as stolen property. Their versions further reveal that on 01-09-1997, appellant No. 2 Shankar gave a confessional statement (Exh-27) which led the police to recover two gold bangles from a place in his house. The recovery panchanama (Exh-28) is duly corroborated by PW Subhash. It is important to note that cross-examination of PW Subhash could not impair his credibility. He narrated as to how the appellants were interrogated and gave the confessional statements leading to the discoveries of the places where the stolen ornaments were kept by them. There is no tangible reason to dislodge version of PW Subhash.

12. True, recovery of the four gold bangles was effected from an open space situated near the cremation ground at Ardhapur. However, it cannot be said that appellant No. 1 Santosh could be attributed only knowledge of the place. The place of recovery is situated in the cremation ground. The bundle was found concealed about 2 and 1/2 feet below the earth. The bundle wrapped with white cloth was not lying in open place. Under the circumstances, it will have to be said that appellant No. 1 Santosh possessed exclusive knowledge of the place where the ornaments were concealed.

13. So far as recovery at instance of appellant No. 2 Shankar is concerned, it is manifest that he gave confessional statement before the Investigating Officer to the effect that he would point out the place where the stolen ornaments were concealed. The memorandum panchanama (Exh-27) is duly corroborated by PW Subhash. The testimony of PW Subhash further reveals that appellant No. 2 Shankar took the police and panchas, including himself near eastern room of his house. He excavated earth at the place by side of tree and took out a plastic bag containing two gold bangles, two ladies rings, two earrings and a pair of ear-tops. Then, recovery panchanama (Exh-28) was drawn by the police. These recoveries are further corroborated by PW10 PSI Bansode. He was the Investigating Officer. He narrated details of the investigation and the recoveries made at the instance of the appellants.

14. The oral evidence of PW3 Suresh and PW4 Narayan is not worth the name. They gave hearsay information regarding the incident of robbery in the house of the informant. So also, version of PW9 Shantilal is formal. He corroborates the spot panchanama (Exh-35). PW7 Dattatraya and PW8 Patil are the police officers, who were incharge of the investigation during the intervening period before the recoveries were made. The evidence of these witnesses is rather formal and need not be elaborately discussed.

15. Clinching question is as to whether the evidence on record is sufficient to prove complicity of the appellants. Mrs. Jadhav, learned Counsel, (12) seeks to rely on certain observations in "Pandurang s/o Mahadeo Ambulkar v. State of Maharashtra 2006 ALL MR (Cri) 1774". It is held by Single Bench of this Court that failure to bring evidence of identification parade before the Court would show that such evidence was unfavourable to the prosecution. It is observed that while the identification before the Court would not by itself be vitiated due to the accused persons having been identified for the first time, such identification

would definitely come under doubt. The learned Counsel Mrs. Jadhav would point out that no identification parade was arranged in the case in hand. It is important to note, however, that the prosecution case in "Pandurang Mahadeo Ambulkar" was not founded on any recovery of stolen articles.

Mrs. Jadhav also seeks to rely on "Vasant alias Roshan Sogaji Bhosale v. State of Maharashtra 1997 ALL MR (Cri) 511". A Division Bench of this Court held that where recovery of ornaments was effected after one month and ten days, it could not be said to be soon after the dacoity. The Division Bench took a view, therefore, that presumption u/s 114 (a) of the Evidence Act would not be available in such a case. With great respect, such a view is unsustainable in the light of observations of the Hon'ble the Apex Court in Narayan Prasad and Others Vs. State of M.P., . The Apex Court observed:

...So far as the accused persons in the appeal 177 of 2000 is concerned, they were charged under Sections 395 and 396 and none of these accused has claimed this property which has been recovered at their instance. It is also unlikely that the police will plant these ornaments so as to implicate these accused persons. Some delay in identification parade or identification of property is likely in cases of dacoity at mid night and the recovery of the ornaments. The delay is natural in such cases. It is not fatal as to throw the prosecution case outright. We failed to understand the reasoning given by the learned trial court as it has proceeded purely on mechanical way and threw the prosecution case. The fact that the recovery of these huge quantity of the ornaments have been made at the instance of the accused persons duly identified by PW-10 & PW-20 and there is no possibility of planting the case against the accused persons by the police, delay in recovery in such cases is not unusual. Therefore, we are of the opinion that the view taken by the learned Division Bench has correctly found accused persons guilty and there is no reason to disbelieve the prosecution version.

16. Mrs. Jadhav, learned Counsel, further invited my attention to Sheonath Vs. The State of Uttar Pradesh, . In view of the facts obtained in the given case, the Apex Court held that the appellant could be presumed to be receiver of stolen property, but not the dacoit. That was a case of recovery of cloth allegedly stolen in the course of dacoity. The appellant Sheo Nath was a cloth merchant. The recovery was effected from him after three days of the occurrence. The fact that the accused was himself a cloth merchant, was considered as indicative of his being purchaser of the stolen cloth and not his being participant in the dacoity.

17. There are cases and cases. In Lachhman Ram and Others Vs. State of Orissa, , the Apex Court held that where there was recovery of stolen articles at the instance of the accused very soon after the occurrence, they would be liable to be convicted not only u/s 412, but also u/s 391 with aid of Section 114 of the Evidence Act. Reliance is also placed by the learned Counsel for the appellants on Sheonath Bhar and Others Vs. The State, , wherein a Single Bench of Allahabad High Court held that where stolen watch was recovered from accused, it could be

presumed that he was receiver of stolen property. In that case, the conviction was altered because there was no recovery evidence adduced by the prosecution to prove identification. In this context, certain observations of this Court in *Mushtaq Abdul Majeed Shaikh Vs. State of Maharashtra*, , may be usefully referred. This Court observed:

...There is no reason to disbelieve the testimony of P.W. 3 as he is an independent witness and, his evidence further corroborates the fact of recovery of cash amount and also the gold and silver ornaments at the instance of the accused. The accused has not offered any explanation regarding the fact of recovery of this amount at his instance. Thus, in our view, the prosecution has established beyond reasonable doubt that the accused had committed a robbery in the shop of P.W. Bhawarlal Jain.

18. Though the culprits had tied cloth pieces around their faces, yet they were present in the proximity of PW Chanchalbai and PW Shakuntala for at least 20/30 minutes. Both these witnesses had occasion to watch the profiles of the culprits. They described the attires of the culprits to PW1 Vijay and as such, it was scribed in the FIR. There is no serious cross-examination to dislodge the claims of the witnesses regarding reason for identification of appellant No. 2 Shankar. According to PW Chanchalbai, sparkle in the eyes and structure of the eyes made her to identify him. Even assuming that such identification is unacceptable, then also the recoveries made at instance of these appellants go to prove their complicity. They are not dealers of such articles. They did not explain as to how they acquired possession of the gold ornaments in question. They had concealed the articles under the earth. Considering these aspects, I am inclined to hold that the appellants entered house of complainant PW Vijay in the relevant night and committed the robbery of gold ornaments owned by his mother and maternal aunt as well as of Rs. 50,000/-, as narrated in the FIR.

19. The learned Sessions Judge awarded sentence of seven years rigorous imprisonment to appellant No. 1 Santosh whereas awarded sentence of ten years rigorous imprisonment to appellant No. 2 Shankar. In fact, there is no reliable evidence to show that appellant No. 2 Shankar caused hurt to PW Chanchalbai during course of the commission of robbery. What transpires from the record is that the appellants threatened the inmates of the house at point of knife during course of the robbery. The appellants had put them under fear of death, and, therefore, only offence made out is the offence punishable u/s 392 read with Section 34 of the I.P. Code. There was no need to award separate sentence for the offence punishable u/s 457 of the I.P. Code. The Trial Court should have awarded uniform sentence to both the appellants only for the offence punishable u/s 392 of the I.P. Code.

20. For the reasons aforesaid, conviction of the appellants is required to be altered from one u/s 394 of the I.P. Code to only u/s 392 of the I.P. Code, maintaining the conviction and sentence for offence punishable u/s 457 read with Section 34 of the I.P. Code. The appeal is, therefore, dismissed. However, the

conviction of the appellants is altered from one u/s 394 of the I.P. Code to Section 392 of the I.P. Code. So also, the sentence awarded to appellant No. 2 Shankar is altered from period of ten (10) years to period of seven (7) years so as to make it uniform with the sentence awarded to appellant No. 1 Santosh. With these modifications in the order of sentence, the appeal is dismissed. The order regarding disposal of muddemal articles is maintained.