

(2004) 09 BOM CK 0030

In the Bombay High Court

Case No : Criminal Appeal No. 37 of 2001

Sarfraj Birgis Kadar Shaikh, Moinuddin Ahmed @ Butta
Ekramulla Ahmed Khan and Barmadin @ Batla Ramlakhan
Yadav

APPELLANT

Vs

The State of Maharashtra and Mohd. Aslam Laik Ahmed

RESPONDENT

Date of Decision : 30-09-2004

Acts Referred:

Penal Code, 1860 (IPC) — Section 34, 392, 394, 397

Citation : (2004) 09 BOM CK 0030

Hon'ble Judges : V.M. Kanade, J

Bench : Single Bench

Advocate : Uday Warunjikar, Naveem Chomal, Kishor Walanju and Balasaheb Bandal, for the Appellant; D.P. Adsule, APP, for the Respondent

Final Decision : Allowed

Judgement

V.M. Kanade, J.—The Appellants are challenging the judgment and order passed by the Addl. Sessions Judge for Gr. Bombay in Sessions Case No. 733 of 1999 dated 23rd November, 2000. By the said judgment and order the accused were held guilty of the offence punishable under Sections 392 r/w 34 and Section 394 r/w 34 of the Indian Penal Code and sentenced to suffer RI for 10 years. Accused No. 1 was further held guilty u/s 397 and was sentenced to suffer RI for 7 years.

2. The prosecution case is that on 11-3-1999 the complainant was returning home and was carrying an amount of Rs. 33,000/- along with him. He was returning home at about 2 a.m. and after getting down from the rickshaw he was walking down towards his house. Then he saw the Appellant/original Accused No. 1, who was residing in the same locality. As the complainant proceeded further he heard the foot steps of the several persons and three people attacked him with a iron bar and they took away the cash in his possession and also took away the watch and mobile. Thereafter he went to the police station. He was treated in the hospital and came back to the police station to record his statement. The

complainant identified Sarfraj and Moinuddin in the identification parade. He also identified accused No. 3/Barmadin and iron pipe used as a weapon. The prosecution has examined the complainant/P.W.1 who was the eye witness, Special Executive Magistrate/P.W.4, who conducted the Test Identification Parade. Dr. Trupti Vasant Poyrekar/P.W.3, P.W.2 Chandrakant Sadashiv Salvi, who also held an identification parade. P.W.5 Bhalchandra Yeshwant Hemji, who acted as a panch, for the recovery of the iron pipe and sim card and charger. Prosecution also examined P.W.6 who was the Investigating Officer.

3. From the perusal of the evidence produced by the prosecution it is difficult to accept the prosecution case regarding involvement of the present Appellants. The incident in question took place at about 1.30 a.m. The commandant has stated that while he was returning home at about 2 a.m., three people attacked him with an iron pipe and robbed him of the cash which was in his possession and also took away watch and mobile. The prosecution has not recovered the money which was stolen nor the mobile phone or a watch which was stolen from him,. The prosecution, however, has recovered the iron pipe, one sim card and a charger at the instance of accused No. 1. The complainant has, in the FIR, stated that Sarfraj was one of the persons who robbed, though he does not say so in the examination-in-chief. In the examination-in-chief he has stated that he knows one Sarfraj and that he identified a person who was sitting in the Court. However, while narrating the incident he has stated that three people attacked him and does not say that Sarfraj was one of the persons who attacked and robbed. The Prosecution has also not proved the spot panchanama. If the prosecution had prepared the spot panchanama, some light would have been thrown on the exact location of the site of the incident, and whether there was any light or lamp post near the site of the incident. From the evidence of the Investigating Officer it is not clear as to where the accused were arrested and how they were identified as same persons who had assaulted and robbed the complainant. P.W.6 Sudhakar Patil has stated that took over the investigation on 13-3-1999 after the earlier Investigating Officer Shrish Jadhav was transferred out of Bombay. It is not clear as to how the accused No. 1 and 2 were arrested on 14-3-1999 and accused No. 3 was arrested on 30-3-1999. Prosecution has not produced the arrest panchanama. The panchanama for recovery of mobile also was not examined. From the evidence of P.W.3 Dr. Trupti Poyrekar, it can be seen that the injury which was received by the complainant was simple in nature. From the evidence led by the prosecution, I am of the view that the prosecution failed to prove beyond reasonable doubt that the Appellants had committed the said offence. From the evidence of the complainant it is difficult to believe that he was in a position to carefully see the accused, particularly when the incident occurred at 2 a.m. in the morning. It is difficult to accept that the complainant knew Sarfraj, who was residing in the same locality and there was no necessity to hold face identification parade. The evidence of recovery of mobile at the instance of the accused cannot be accepted as the independent panch witness is not examined. Similarly, recovery of iron pipe and the mobile charger also

appears to be doubtful particularly when the accused were brought in the police jeep and were handcuffed, which creates doubt as to whether the statement was voluntarily given by the accused or was as a result of interrogation by the police. In view of the case, benefit of doubt will have to be given to the accused. Hence, the prosecution has not proved the case beyond reasonable doubt.

4. Appellants/accused, therefore, are acquitted for the offence with which they are charged. The judgment and order passed by the trial court is set aside. The appeal is allowed in the above terms. The accused be released forthwith, unless, otherwise they are required in any other case.