

(2014) 08 BOM CK 0077

In the Bombay High Court

Case No : Criminal Appeal No. 459 and 466 of 2004

Shaikh Mujeeb

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 21-08-2014

Acts Referred:

Penal Code, 1860 (IPC) — Section 395

Citation : (2015) ALLMR(Cri) 219 : (2014) 4 BomCR(Cri) 181

Hon'ble Judges : A.I.S. Cheema, J

Bench : Single Bench

Advocate : R.D. Sanap, Maya Jamdhade and R.P. Dhase, Advocate for the Appellant; P.P. More, A.P.P, Advocate for the Respondent

Final Decision : Dismissed

Judgement

A.I.S. Cheema, J.—Before the Ad-hoc Additional Sessions Judge, Nanded in Sessions Case No. 86 of 2002 following were the 7 original accused:-

- 1) Shaikh Mujeeb s/o Shaikh Maheboob,
- 2) Hanuman @ Hanmant s/o Kashinath Ugale,
- 3) Sadashiv Kashinath Ugale,
- 4) Ramesh s/o Sugand Kamble,
- 5) Shivaji s/o Madhavrao Suryavanshi,
- 6) Promod @ Ramatya Madhavrao Suryatale,
- 7) Mahesh Ramkishan Sharma.

Out of the above accused, accused No. 6 Promod died during pendency of the trial. Rest of the accused came to be convicted u/s 395 of the Indian Penal Code, 1860 (for short "I.P.C.") and were sentenced to suffer rigorous imprisonment for three years and fine of Rs. 1000/- each. In default, to suffer simple

imprisonment for three months. Against the Judgment of conviction and sentence, present Criminal Appeal No. 459 of 2004 was filed by original accused Nos. 1 to 3. Appellant No. 2 Hanuman died pending this Appeal and the matter abated regarding accused No. 2 Hanuman. Original accused Nos. 4 and 5 Ramesh Sugand Kamble and Shivaji Madhavrao Suryavanshi, respectively, are the Appellants in Criminal Appeal No. 466 of 2004. Thus, the present Appeals came up for hearing for original accused Nos. 1 and 3 to 5.

2. The case of prosecution, in brief, is as follows:

(A). Complainant Bhagwan Dhadekar (PW-8) is Auto Rickshaw driver at Nanded. On 14th January, 2001 in the afternoon when he was waiting for passengers at about 1.30 noon, at Sarpanchnagar on Malegaon road, suddenly four persons came from behind and boarded his Rickshaw. One of the persons (accused No. 1) had bleeding injury on the head. He (accused No. 1) had a sword and the persons threatened the complainant to proceed and take the Rickshaw towards Swyamwar Mangal Karyalaya. After proceeding about 150-200 feet, they asked the Auto Rickshaw to be stopped and another two persons sat on both sides of the complainant and abused the complainant on the name of his mother and asked him to proceed or they would hit by the sword. The complainant proceeded accordingly and the vehicle proceeded towards Navjeevan Nagar. There the complainant was asked to stop and the six persons got down. When the complainant asked for the fare, he was threatened and beaten by kicks and fist blows. At that time from a house, yet another person came with a sword and out of fear for life the complainant ran towards a house. The seven persons damaged the Auto Rickshaw No. MH-26/B-1884 to the glass and frame by sword and stones. To save the damage to the Auto, the complainant again went near the accused persons, at which time one of the accused raised sword and asked him to go away and the seven persons sat in the Rickshaw and forcibly took the same away. Complainant ran to Taroda Naka Police Chowki and informed the Police officials there and with the help of Police jeep, searched for the accused persons. The complainant when he went to the Police Station for giving complaint, found three of the persons in the Police Station and identified them who had robbed his Auto Rickshaw. Their names were learnt as Hanuman Kashinath Ugale (accused No. 2), Sadashiv Kashinath Ugale (accused No. 3) and Shaikh Mujeeb (accused No. 1). The person who had injury to the head was accused No. 1 Shaikh Mujeeb. After forcibly taking the Auto Rickshaw at Navjeevan Nagar, Kirana Shop owner Rajesh Shridharrao Debadwar (PW-1) had also been robbed, was learnt by the complainant. First Information Report (F.I.R.) to above effect was filed by the complainant and Crime No. 6 of 2001 came to be registered at Bhagyanagar Police Station, Nanded at 4.05 p.m. At 4.35 p.m. the arrest Panchnamas of accused Nos. 1 to 3 were drawn and they were formally arrested by the Police.

(B). Information was received of Auto Rickshaw being abandoned at a place in Navjeevan Nagar and Police seized the same at 6.30 p.m. on the same day. The

vehicle was found on Purna Road near Bapatnagar of the city. A.P.I. Bhimrao Shingare (PW-9) prepared Panchnama (Exhibit 75). The vehicle was found in damaged condition with glass broken. The pieces of glass were also seized.

(C). A.P.I. Bhimrao Shingare recorded statements of witnesses. Accused Nos. 4 and 5 came to be arrested on 16th January 2001 at 22.15 hours (Exhibit 99 and Exhibit 100). Deceased accused No. 6 Promod was also arrested on 16th January 2001 (Exhibit 101) and accused No. 7 came to be arrested on 30th January 2001 (Exhibit 102).

While in custody, accused No. 2 Hanuman, on 16th January 2001 gave discovery of sword, in presence of Panchas, which was hidden near an electrical D.P. between Taroda Naka to Chhatrapatinagar, on Purna road where it had been buried in open place. The memorandum and Panchnama (Exhibit 65 and 66) were drawn. Accused No. 1 Shaikh Mujeeb gave discovery of the amount of Rs. 700/- which was robbed from the shop of PW-1 Rajesh and the amount was discovered at the instance of accused No. 1 on Purna road, near Lokmitranagar from bushes near a field. The amount had been kept in a carry bag. Memorandum and Panchnamas (Exhibit 67 and 68) were drawn, by PW-9 A.P.I. Bhimrao Shingare. After the investigation, charge-sheet came to be filed before the J.M.F.C., 3rd Court, Nanded. The offence being sessions triable, the matter was committed to the Court of Sessions. Charge was framed vide Exhibit 32 against accused Nos. 1 to 5 and 7, for the two incidents committed in the same series of offence, u/s 395 of I.P.C. The accused persons pleaded not guilty. Their defence is of total denial.

3. In the trial Court, prosecution brought on record oral evidence of nine witnesses. After considering the evidence, the trial Court convicted the accused persons as mentioned above.

4. The present Appeals have raised various grounds and the respective learned counsel for the Appellants have argued on behalf of the original accused Nos. 1 and 3 to 5. The arguments raised are that the Panchas in the matter had turned hostile and that Panchnama of the shop was not drawn. The complainant claimed to be the owner of the Auto Rickshaw and that he had license to drive the Rickshaw, but no document was produced. What was the value of the damage caused to the Auto Rickshaw was not proved by bringing any bills on record. The complainant (PW-8) and the shopkeeper (PW-1) were not supported by any other independent witnesses. The persons examined as eye witnesses, turned hostile. The accused persons were not known to the complainant or the shopkeeper, since before, but no Test Identification (T.I.) Parade was held. There were omissions in the evidence of the complainant as he had not stated in the F.I.R. that the accused persons had consumed liquor. The Panchas of the discoveries had turned hostile and did not support the prosecution. The accused Nos. 4 and 5 had not been named in the F.I.R. For all such reasons, the learned counsel submitted that the accused were entitled to be acquitted. Reliance was placed on the case of Sunil Kundu and Another Vs. State of Jharkhand,

5. Against this, the learned A.P.P. submitted that the evidence of the shopkeeper PW-1 Rajesh and the complainant PW-8 Bhagwan were unshaken in the cross-examination and there was no reason to disbelieve them. They had no reason to depose against accused persons. The record shows that the accused were involved in yet another incident before the present offence and forced the complainant to proceed in the Auto Rickshaw threatening him by sword and later Auto Rickshaw of the complainant was robbed and in the same series of events, the shopkeeper was also robbed of Rs. 700/-, but the accused Nos. 1 to 3 were caught almost immediately and the F.I.R. recorded their names. Accused Nos. 4 and 5 arrested on 16th January 2001, were also identified by the complainant. The complainant had sufficient opportunity to see all these accused during the course of incident which continued for some time in broad day light and thus the complainant could identify them and holding of T.I. Parade was not necessary which, in any case only has corroborative value. The learned A.P.P. relied on the reasonings recorded by the trial Court to submit that the accused persons have been properly convicted.

6. If the evidence of the complainant PW-8 Bhagwan is perused, it can be seen that the incident is of afternoon of 14th January 2001. At about 1.30 noon he was waiting at Sarpanchnagar near Marriage Hall, for passengers. According to him, suddenly 2 to 4 boys came from behind and boarded in his Auto Rickshaw. One of them had injury on his person. This was accused No. 1. In the further evidence, complainant pointed out to accused Nos. 1 to 3 and 7 as the four persons who had boarded his Rickshaw. The evidence is that these accused Nos. 1 to 3 and 7 insisted the complainant to take the Auto Rickshaw towards Marriage Hall. The complainant was threatened by showing him sword. The evidence shows that after going to some distance, these accused asked the Auto Rickshaw to be stopped and two more persons boarded the Auto Rickshaw sitting by both the sides of the complainant in the cabin of Rickshaw. The further evidence of the complainant shows that these were accused Nos. 4 and 5. These six accused asked the complainant to proceed towards Navjeevan Nagar. When the complainant asked them for payment of the fare, the accused assaulted him and damaged his Auto by pelting stones. He was beaten by fist and kick blows and glass of his Auto was damaged by blow of sword. The complainant deposed that after these accused alighted from his Rickshaw, one person came from his house having sword in his hand and complainant escaped from the clutches of these persons and entered a house for shelter. His evidence is that he saw that the accused were about to take his Rickshaw and therefore he again came out of the house to stop them. One of the accused raised sword to assault him and so complainant immediately ran towards Taroda Naka Police Outpost.

7. The evidence of the complainant shows that he went and took Police help from the Police Outpost and in the Police Jeep went in search of the accused persons. The accused persons had taken away his Auto Rickshaw. The complainant deposed that the Auto Rickshaw was later found in Navjeevan Nagar in damaged condition.

8. The further evidence of the complainant shows that the complainant filed report Exhibit 59 (F.I.R.). In the F.I.R., names of accused Nos. 1 to 3 were recorded.

9. Accused Nos. 4 and 5 came to be arrested by PW-9 A.P.I. Bhimrao Shingare on 16th January 2001. The evidence of complainant is that he had taken order from the Court for release of his Auto and when he went to Police Station, on that day Police had arrested accused Nos. 4 and 5 and he identified them also as the two accused persons who had sat on his both sides in the cabin of the Rickshaw. In the evidence recorded of the complainant in March 2004, he identified the accused Nos. 1 to 5 and 7. Accused No. 1 was identified as the person who had put the sword to his back.

10. In the cross-examination of the complainant, he was asked regarding the documents of ownership of Auto and his license to drive. He submitted that he had produced the documents when the Auto was being released. I find, this is not material. In the cross-examination further details were taken by the accused persons and the complainant stated that when the sword was put to his back, he did raise shouts but nobody came to his help. He informed that he had not received any bleeding injury in the incident. The Taroda Naka Outpost from the spot was at a distance of about 1 k.m. The frame of the Auto Rickshaw had been damaged by accused No. 1. On 14th January 2001 it was day of Sankrat but according to the complainant, there was not much traffic. Complainant was asked and he stated that he did not tell Police that the Auto was lying in a ditch at Navjeevan Nagar and that he has not stated in the report that the accused were under the influence of liquor at the time of incident. Complainant accepted that the name of accused No. 7 was not disclosed at the time of report. He accepted that in the report he did not specifically state as to how each of the accused assaulted him.

Looking to the cross-examination, it cannot be said that the evidence of the complainant as regards main incident, was shaken in any manner. In the cross-examination complainant was asked and he stated that he did not tell before the Police while filing report that he had seen the other two accused (accused Nos. 4 and 5) in Police Station when he went for release of Auto Rickshaw. This suggestion has no value as the evidence was that subsequent to the filing of the report on 14th January 2001, on the day when Police arrested accused Nos. 4 and 5, the complainant had gone to the Police Station for release of his Auto on the basis of orders of the Court. That was an incident dated 16th January 2001, looking to the arrest Panchnamas. Thus, the same could not have been stated when report was filed on 14th January 2001. In substance, the omissions tried to be shown in the cross-examination are not material and evidence of complainant remained unshaken. There was no reason for the complainant to depose against these accused persons and the present Appellants.

11. It has been argued that the complainant was not knowing the accused persons before the incident and thus Test Identification Parade should have been

held. The incident as it occurred, shows that the complainant had lot of opportunity to see the accused persons. Accused Nos. 1 to 3 and 7 sat in his Auto Rickshaw, had travelled with him for some distance before accused Nos. 4 and 5 joined by sitting on sides of the complainant. The complainant had talked to these accused and even noticed the bleeding injury to the head of the accused No. 1. It could be made out that these accused had earlier indulged in some other incident and were escaping, carrying sword (in the hand of accused No. 1). The incident which started from Rickshaw stand at Sarpanchnagar, continued till these persons reached Navjeevannagar and there also further incident took place where the complainant was beaten and threatened when he asked for money and when yet other accused joined the earlier six. The complainant was threatened and Auto Rickshaw was taken away. The incident occurred in broad day light and the complainant had sufficient opportunities to watch the accused persons and helped the Police to search them and even before the F.I.R. was filed, accused Nos. 1 to 3 were at Police Station and were even named in the F.I.R. The complainant identified accused Nos. 4 and 5 also when they were arrested and when he had gone for release of his Auto Rickshaw.

In the matter of Bhopat Singh Kishan Singh Vs. State of Maharashtra, there was pickpocketing of the informant who was travelling on foot board of bus along-with two other persons and the appellant. When the informant therein realized that his pocket had been picked, he got down from the bus and saw the appellant therein traveling in another bus. The informant also boarded that bus and requested the bus to be taken to the Police Station, which request was not accepted. The appellant offered to accompany the informant to Police Station and both got down. The appellant admitted to have stolen the diamond studs and claimed that same were given to his accomplices and so the informant-complainant should accompany him. They travelled in a taxi and when getting down, the appellant gave a slip to the complainant and boarded a bus and disappeared. The complainant filed complaint with the Police Station. The Presidency Magistrate held the appellant-accused guilty and the High Court maintained the conviction. In the Hon''ble Supreme Court, it was argued that the identification parade was a farce as the complainant had ample opportunity to see appellant before the parade was held. Hon''ble Supreme Court found that the High Court had not attached importance to the identification parade. It was observed that the F.I.R. gave description of the appellant and the complainant had ample opportunity to see the appellant when they both went in taxi.

In the present matter, T.I. Parade was not held and even if the same has not been held, the facts clearly show that the complainant had lot of opportunity to not only see the accused persons but also accused Nos. 1 to 3 were caught even before the F.I.R. was filed, within about two hours of the incident taking place. Thus not holding T.I. Parade does not affect the case of prosecution.

12. The facts of the case of Sunil Kundu and others vs. State of Maharashtra (cited supra), relied on by the Appellants are different. In that matter the seized

articles were not sent to the C.A., nor to the Court; no seizure list of the clothes of the deceased was made; blood group of deceased was not ascertained and the I.O. was evasive. In the facts and circumstances of that matter, the lapses were found by the Hon"ble Supreme Court to be serious. It was also found that evidence of the eye witnesses did not inspire confidence and there was grave suspicion about the involvement of accused in the offence of murder. For such reasons the accused came to be acquitted. It is clear that facts of that matter were different and present matter has to be appreciated on the basis of its own facts and circumstances.

13. Regarding the other part of incident which took place at the shop of PW-1 Rajesh Debadwar, there is evidence of Rajesh which shows that four persons came to his shop and asked for cigarettes and when he said that he did not sell cigarettes, they entered the shop and damaged articles in the shop. He deposed that accused No. 1 Shaikh Mujeeb was one of the persons and was having sword. His evidence is that one of the four persons removed cash from his counter to the extent of Rs. 700/-. He deposed that he fled from shop with mere banyan on his person. He identified accused Nos. 1 to 3 and 7 as those four persons. The cross-examination of this witness shows that it was a small Kirana Shop which did not have even name displayed. This witness accepted that he had not taken license to run Kirana Shop. He admitted that he did not know accused Nos. 1 to 3 and 7 since before the incident. His evidence shows that there were people in the Shop and that he raised shouts also but nobody intervened to help him. According to him, incident took place between 1.00 to 4.00 p.m. PW-2 Indirabai Dhage and PW-6 Ramabai Manjramkar examined as eye witnesses, turned hostile. Although the evidence of PW-1 Rajesh does not appear to have been shattered in the cross-examination, still the fact remains that no Spot Panchnama of the Shop was drawn recording details which would corroborate the PW-1. The evidence of PW-1 itself shows that four persons came, asked for cigarettes and when refused, started damaging the shop and he claims that the accused No. 1 was there who had sword and he ran away from the Shop with mere banyan on his person. Thus, as far as regards PW-1 Rajesh is concerned, he did not have the same opportunity as PW-8. He could not tell as to who took out Rs. 700/- from his counter. In the absence of any other oral evidence and the Spot Panchnama not having been drawn, although PW-1 named the accused persons in evidence, when the admitted fact is that he was not knowing them since before, I am ignoring the evidence of PW-1 Rajesh regarding the incident in the Shop, although the trial Court has accepted the evidence on this count.

14. PW-5 Panch Mohd. Feroz turned hostile to the discoveries of sword given by accused No. 2 and the discovery of money given by accused No. 1 Shaikh Mujeeb. No doubt PW-9 A.P.I. Bhimrao Shingare proved Exhibit 65 to 68 in this regard. As Panchas have not supported, even if these discoveries are ignored, still there is no reason to discard the evidence of complainant PW-8 Bhagwan that he was threatened by the accused persons and his Auto Rickshaw was robbed.

15. For the above reasons I agree with the trial Court regarding the finding that present Appellants, original accused Nos. 1, 3, 4 and 5, along with others, robbed the complainant of his Auto Rickshaw after threatening him as above and thus dacoity was committed.

16. For the above reasons, there is no substance in these Appeals. Hence I pass following Order:-

ORDER

(A) Both the Criminal Appeals i.e. Criminal Appeal No. 459 of 2004 and Criminal Appeal No. 466 of 2004 are rejected.

(B) The conviction and sentence as imposed by the trial Court is maintained, against Appellants.

(C) Appellant No. 1 Shaikh Mujeeb in Criminal Appeal No. 459 of 2004 and Appellants Ramesh and Shivaji in Criminal Appeal No. 466 of 2004 to surrender to their Bail Bonds and suffer the sentence as was passed by the trial Court.

(D) The fees of Advocate Shri R.D. Sanap, appointed Counsel for Appellants-accused Nos. 1 and 3 in Criminal Appeal No. 459 of 2004, is quantified at Rs. 8000/- (Rupees Eight Thousand).