

(2002) 02 BOM CK 0053

In the Bombay High Court

Case No : Criminal Appeal No. 865 of 1998

Shree Rajkumar Asaram Gupta and Shree Rakesh Balkrishna Pande APPELLANT

Vs

The State of Maharashtra (at the instance of P.S.O.) RESPONDENT
Panchavati P.S., Nashik

Date of Decision : 13-02-2002

Acts Referred:

Arms Act, 1959 — Section 25(1), 3
Penal Code, 1860 (IPC) — Section 392, 397, 454

Citation : (2002) 02 BOM CK 0053

Hon'ble Judges : D.G. Deshpande, J

Bench : Single Bench

Advocate : Naveen Chomal, for the Appellant; Pravin Singhal, APP, for the Respondent

Judgement

D.G. Deshpande, J.—Heard Mr. Chomal for the appellants original accused Nos. 2 and 3, and Mr. Pravin Singhal, learned APP for the State.

2. Appellants before this court are original accused Nos. 2 and 3. Accused Nos.2 and 3 have been convicted u/s 392/397 of Indian Penal Code and have been sentenced to R.I. for 10 years and fine of Rs.500/- in default R.I. for one month. They are also convicted u/s 454 of Indian Penal Code and sentenced to suffer R.I. for 10 years and fine of Rs.500/- in default R.I. for one month. They are further convicted u/s 3/25(1) of Arms Act and sentenced to suffer R.I. for one year and fine of Rs.500/- in default R.I. for one month.

3. Prosecution case in brief was as under: Complainant Harilal Jethava had a house in Vijay Nagar, Nashik. In fact he had three houses on plots bearing No. 25, 26 and 27. He was residing in a house situate on Plot No. 27 with his wife, and his daughter was residing in a house situate on Plot No. 26. On 19.9.1995 Mira - the daughter of the complainant at about 1 p.m. had gone to the house of one Mohanbhai for meals. She had locked her house. After taking meals she was

returning to her house. She went to another house of her father situate on plot No. 25. At that time Prashant Patwardhan (P.W.7) informed Harilal that some persons had entered the house of his daughter and one person was standing in front of House No. 26. Two motorcycles were there in front of that house. Thereafter, Harilal went to the house of his daughter Mira, saw those unknown persons and motorcycles. He questioned the unknown person, unknown person started running away. Harilal tried to catch him. In the meanwhile three unknown persons came out of the house of Mira and they started running. Harilal also tried to catch them but they pushed him. In the meantime Prashant Patwardhan arrived there. He tried to nab them. There was a scuffle between him and those 3, one of the thieves was having a revolver and other was having a knife. One of the thieves was trying to start motorcycle, when Prashant Patwardhan pushed him and at that time one of the thieves who was running fired two rounds of the revolver. Out of those two rounds, one round hit witness Sachin causing bullet injury to his hand but even then the witnesses were successful in catching accused No.2 Rajkumar who was having knife in his hand. On hearing shouts residents of the locality gathered and in the meantime police had also arrived there. Police took Rajkumar Gupta - Accused No.2 to the police chowky and other accused i.e. original accused No. 1 was also nabbed. In the search of original accused No.1 revolver was found with three rounds, the gold rings and wrist watch were also found, and from the search of accused No.2 Rajkumar Gupta a Rampuri knife,, gold mangalsutra, gold bangles, silver bangles, ear rings and one wrist watch were found and the same were seized by the police under panchnama. P.I. Kale (P.W. 12) recorded the complaint of Harilal vide Exhibit 21. Then scene of offence panchnama was made in the house of Harilal. Motorcycles were seized under Spot Panchnama Exhibit 23. Sachin (P.W. 5) witness injured by bullet was treated by doctor, and both the accused i.e. original accused Nos. 1 and 2 were also referred to the hospital as they had sustained injuries. Complainant Mira identified the ornaments which were recovered from both the accused.

4. On 17.12.1995 original accused No.3 Rakesh Pande came to be arrested at Bodhpur (UP). He was brought and transferred in this case. On 28.6.1996 Special Judicial Magistrate Shri Pawar held Identification parade and this accused was arrested.

5. For proving offence complainant examined Harilal Jethava (P. W. 1), Prashant Patwardhan (P.W. 7), Mira Rathod (P.W. 3) and other witnesses, recoveries were proved, injuries to the witness Sachin Purohit (P.W. 5) were also proved, and since trial court accepted the case of the prosecution, accused came to be convicted as stated above, hence this appeal.

6. It was strenuously urged by Mr. Chomal that the evidence of the prosecution was full of contradictions and improvements on all material aspects, that there was variance between each of the witness as each was giving a different story, that the evidence of Prashant Patwardhan was nothing but improvements, that

name of the accused No.3 was different and he was wrongly identified, that even though the accused No.3 had no fingers to his right hand, the same fact was not mentioned anywhere in the description of the said accused in the panchnama, and therefore his identification is totally wrong and therefore for all these reasons the accused were entitled for acquittal.

7. On the other hand, learned APP contended that conviction was perfectly justified and proper because two out of the three accused were caught on the spot, stolen property was recovered from them for which they had no explanation and the property was identified by Mira as belonging to her, that ornaments were recovered from the two accused and therefore there was nothing to create doubt about the prosecution case. So far as accused No.3 is concerned, the learned APP contended that there is nothing on record to show that at the time of the incident the accused No.3 did not have fingers to his right hand. It could be that this disability cropped up during the period the accused No.3 was absconding and therefore that could not be a reason to reject the evidence of identification. About the improvements and contradictions in the evidence of the witnesses, the learned APP contended that the reasons given by the trial court were justified and there was no reason to interfere.

8. There cannot be any dispute that accused No.2 with absconding original accused No.1 were caught on the spot along with revolver, chopper and the ornaments, which were identified by Mira. Admittedly accused had no concern with the house of Mira. They were strangers and the manner and the circumstances in which they were caught on the spot and attempted to escape, they are being caught on the spot and beaten by the mob is also supported by the injuries which the accused No.2 had on his person as proved by the doctor. Report was also lodged immediately. Evidence of Harilal P.W. 1, F.I.R. lodged by him at Exhibit 21, evidence of Mira - P.W. 3 evidence of Sachin (P. W. 5) a person who was injured by fire of the bullet and evidence of Prashant Patwardhan (P.W. 7) prove beyond reasonable doubt that accused No.2 was caught on the spot along with absconding accused No.1. After the accused was arrested, a panchnama was made of his arrest and the same is proved at Exhibit 24. In the personal search of accused No.2 - Rajkumar Gupta, it is noted that there was swelling to his lips because of beating, that 15" Rampuri knife was snatched from his hand by the people and following ornaments were found with accused No.2, mangalsutra of 15 gms. artificial pearl bangles, a chain and tops, a pair of silver bangle, gold tops. Again golden tops, wrist watch of Simplex company, golden ring with red stone, another ring with green stone, one golden chain, a gold ring and silver ring. Similarly the live cartridges were also recovered. This recovery of ornaments from accused No.2 on the spot and identification of the ornaments by Mira and P.W. 1 Harilal are the clinching pieces of evidence against accused No.2, from which he has no escape nor any explanation the manner in which the incident occurred after it was reported to Harilal has been given by him and since accused No. 2 was caught on the spot with stolen articles, there cannot be any dispute about his involvement in the

offence and in the incident. The scene of offence - panchnama Exhibit 23 is also proved that house of Mira was looted and robbed. Two motorcycles were also found which neither the complainant nor his daughter nor any of the witnesses claimed.

9. It is true that there are improvements in the story of Prashant Patwardhan (P.W. 7) and contradictions in the evidence of the witnesses but even if all those contradictions and omissions are set aside, the case against accused No.2 is full proof case.

10. So far as accused No.3 is concerned, it was contended by Mr.Chomal that accused was arrested after about three months and since in the FIR complainant has not given the description of this accused No.3, no reliance can be placed on the identification of this accused in the identification parade held by Special Judicial Magistrate Shri Pawar on 28.6.1996. Complainant has stated that in all four persons had entered the house of Mira. All the four were tried to be caught, there was scuffle between the accused and Prashant Patwardhan (P.W. 7) and ultimately accused No.1 and 2 were caught on the spot and when questioned those accused gave the name of other accused as Vinod Gupta, Tilak Nagar, Indore and Rakesh Sharma, Laxman Talav, Gwalior.

11. Mr. Chomal contended that in the FIR the name of the accused No.3 was given as Rakesh Sharma and in fact his name is Rakesh Pande, therefore benefit of doubt should be given to the accused. I do not find any merit in this contention. The question is that the name of the accused No.3 tallies with the name given in the FIR. There is change in the surname but even in the appeal memo the address of accused No.3 is shown as Laxmantaliya, Gwalior, and in the FIR the address of Rakesh Sharma is as Laxmantaliya, Gwalior. It is clear that even the accused No.3 is not disputing that he is residing at the address given in the FIR.

12. It is true that there is no identification parade of this accused. However, the other evidence on record is strong enough and sufficient enough, as rightly found by the trial court to connect accused No.3 with the crime. When absconding accused No.1 and the appellant - accused No.2 were caught on the spot in the manner stated above, enquiry made from them revealed that they were staying in Kala Lodge situate at Malviya Road, Panchvati, Nashik. The incident has taken place on 19.9.1995 and P.W. 8 Smt. Shobha wife of Machindra Royziyani has stated that she was owner of the said Kaka Lodge and on 19.9.1995 at about 11.30 a.m while she was at the counter, four persons with two motorcycles came to her lodge. One of them enquired about the room for their stay. She asked them from where they had come and she was told that they had come from Indore. She therefore made entry in the hotel register and entry was made in the name of Vinod Gupta for Room No.20. The Room was booked for two days and she was paid Rs.230/- towards two days charges. She identified accused Nos. 2 and 3 to be persons out of those four. She has further stated that after taking meals they went outside on their motorcycles between 12 to 12.30 noon and

thereafter they did not return to their lodge and on the same day in the afternoon at 3 p.m. police came with those two persons in the lodge. Therefore, apart from eye witnesses who identified accused No.3 there is direct evidence of the owner of the lodge who identified the accused No.3. Nothing is brought out in the cross-examination of this witness to discredit her and she had denied suggestions of falsely implicating accused Nos. 2 and 3.

13. So far as other eye witnesses are concerned, accused No.3 has been identified by Harilal to be the person who was standing in Varanda, that he went to house of his daughter Mira. Further, accused No.3 is identified by Prashant Patwardhan (PW 7).

14. It was contended by Mr. Chomal that the evidence of identification of these two eye witnesses, particularly of accused No.3 cannot be accepted because they saw the accused for a short while. This argument cannot be accepted. The incident has taken place in broad day light. Harilal has seen accused No.3 specifically so also Prashant Patwardhan (P.W. 7) and this identification is supported by the particulars given of this accused No.3 in FIR as information revealed by the other accused to the complainant and to the police and this is further corroborated by the evidence of the owner of the lodge who identified accused No.3 specifically and who stated that all the four accused with two motor cycles came to their lodge. All this is therefore sufficient to hold that accused No. 3 was also present and there is no mistaken identity.

15. The happening of the incident as alleged by the prosecution witnesses is however proved by bullet injury suffered by Sachin to his right hand. Bullet was recovered from the hand of Sachin after operation. This bullet was seized, sealed and sent to C.A. The revolver was found. It was also sent to C.A. and there is a report of the C.A. which support the prosecution case about use of the weapon at the time of robbery.

16. So far as improvements in the evidence of witnesses or contradictions are concerned, it is true that an important witness Prashant Patwardhan (P.W. 7) has improved his story considerably. He has been confronted with as many as 19 statements, all of which are improvements. However, they are all improvements regarding specific particulars with reference to specific point, e.g. in the cross-examination para 3 he stated :

1) I have also stated before police that as soon as Jethava was entering his bungalow, three persons came from the inner side of the bungalow.

2) I have also stated before police that out of other two persons, one came ahead near the gate and asked me to open the gate by showing chopper.

3) I have also stated before police that, that time the another person who was having revolver in his hand was trying to fire at me and, therefore, I gave kick to another motorcycle due to which that motorcycle also feel down....."

4) I also stated before the police that in the meanwhile several persons

assembled there and we all nabbed that person. Out of the 19 improvements made, I have quoted some but all versions are of the same type and nature, therefore they are as held by the trial court are improvements with reference to particular statement made before the police or the particulars given in court but they do not affect the material part of the evidence of witness Prashant Patwardhan that he was present at the scene, he obstructed the accused, he informed Harilal and his daughter, and witnessed the entire incident and he was one of the person to nab accused Nos. 1 and 2. Therefore merely because this witness has made improvements or he has stated something in the court which he did not told to the police in the manner the questions are put, cannot be a ground to reject his testimony.

17. Appreciation of evidence by the trial court is proper, reliance on the testimony of witnesses for convicting the accused is also proper and all the circumstances brought on record including recovery of the ornaments from the accused, their immediate arrest, injury to Sachin and similarity of particulars about the accused No.3 in the FIR, and identification in court by independent witnesses and the lodge owner are all sufficient to hold the accused guilty. Therefore, appeal is required to be dismissed.

18. However, alternatively, it was contended by Mr. chomal that considering the age of the accused, the time gap and other circumstances, punishment should be reduced. I therefore pass the following order :

ORDER

19. Appeal is partly allowed. Conviction of Accused Nos. 2 and 3 under Sections 392/397 of the I.P.C. and u/s 454 of I.P.C. is maintained. Sentence is however reduced to eight years respectively. Their conviction u/s 3/25(1) of Arms Act and the sentence awarded is maintained. Rest of the impugned order to remain the same. Accused to surrender before the trial court within four weeks from today. Thereafter, their bail bonds will stand cancelled. Appeal disposed of accordingly. Certified copy expedited.