
(2002) 06 BOM CK 0039
In the Bombay High Court
Case No : Criminal Appeal No. 399 of 1998

Shri Sadashiv Krishna Shetty

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 10-06-2002

Acts Referred:

Penal Code, 1860 (IPC) — Section 162, 34, 392, 397, 452

Citation : (2003) CriLJ 3590 : (2003) 4 RCR(Criminal) 533

Hon'ble Judges : J.G. Chitre, J

Bench : Single Bench

Advocate : None, for the Appellant; Adsule, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

J.G. Chitre, J.—None present for the appellant. Shri Adsule, A.P.P. for the prosecution. The appeal pertains to year 1998 and accused are in jail. Therefore, this appeal which has been listed in the daily board is being decided finally.

2. The appellant Sadashiv Krishna Shetty is hereby assailing correctness, propriety and legality of the judgment and order passed by the Additional Sessions Judge for Greater Bombay in Sessions Case No. 145 of 1995, whereby the learned Judge had convicted the appellant for committing the offence punishable under the provisions of Section 397 r/w Section 34 of Indian Penal Code and sentenced him to undergo rigorous imprisonment for 7 years and to pay a fine of Rs. 500/- in default to suffer further R.I. for 7 days. The learned Additional Sessions Judge also convicted the appellant for the offences punishable under Sections 452 and 392 read with Section 34 of Indian Penal Code but no separate sentence has been inflicted on him.

3. The prosecution case in brief is that on 23/7/1994 at about 10.45 p.m. the appellant and his associates made entry in the shop owned and possessed by P.W. Mohammed Madani Musa Supariwala and Abba Musa Supariwala and by

showing them arms like chopper and revolver, they looted them of cash of Rs. 81,000/-. The F.I.R. was lodged by Mohammed Madani Musa Supariwala in the police station and investigation started. The appellant and his associates were caught. They were put to identification parade which was held in the police station. P.W. Mohammed Madani Musa Supariwala identified the appellant as one of the culprits. The learned Judge after accepting the evidence of Mohammed Madani Musa Supariwala, his father Abba Musa Supariwala, Special Executive Magistrate Moreshwar Thakur and Manohar Pujari passed the said order of conviction and sentence.

4. The learned Additional Sessions Judge held that, the present appellant and one of his associate committed house trespass with intention to commit an offence by entering into the said shop known as "Alfa General Stores", Fort, Mumbai, and they committed dacoity and looted cash of Rs. 81,000/- from the possession of Mohammed Madani Musa Supariwala and Abba Musa Supariwala. He also held that the appellant and his associates were armed with deadly weapons like revolver and chopper.

5. This Court examined the evidence on record carefully, because none is present for the appellant to defend him when he happens to be in jail, though two advocates have been engaged by him to defend him.

6. The judgment and order passed by the learned Additional Sessions Judge is incorrect, improper and bad in law, for the reasons stated herein under. Section 397 provides that if, at the time of committing robbery or dacoity the offender used any deadly weapons or caused grievous hurt to any person or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished, shall not be less than 7 years. Therefore, while convicting the appellant and his associates, the learned Additional Sessions Judge should have convicted him for an offence punishable under the provisions of Section 392 read with Section 397 of I.P.C. Therefore, that needs to be corrected.

7. In the present case, the identification parade has been held in Police Station, may be in a room, but there is no evidence to show that the said room was totally secluded from the police station.

The evidence of Special Executive Magistrate Moreshwar Thakur is totally silent about the important aspect of the identification parade. According to the prosecution case, identification parade was held in the police station, in which PW Mohammed Madani Musa Supariwala and Abba Musa Supariwala had identified the appellant and his associates. The evidence of Mohammed Madani Supariwala and Abba Supariwala and Moreshwar Thakur is very much ambiguous on this point and is not showing that sufficient care was taken to see that the witnesses who were to identify the appellant and his associates could not have an opportunity of seeing the suspects before the identification parade. The suspects before the identification parade. The identification parades are to be held with

caution and after taking sufficient care to see that the suspects who are to be kept in identification parade for identification by witnesses should not suffer prejudice. The identification parade is to be taken in a separate premises, it should be away from the normal business of the police station. The identification parade should be free of the influence of the police concerned or police in general. In the matter of Ramkishan Mithanlal Sharma Vs. The State of Bombay, , the Supreme Court held that;

"Where the whole of the identification parades were directed and supervised by the police officers and the Panch Witnesses took a minor part in the same and were there only for the purpose of guaranteeing that the requirements of the law in regard to the holding of the identification parades were satisfied. It could not be said that the said identification parades were above the board".

It is further held that:

"The process of identification by the identifying witnesses involves the statement by the identifying witness that the particular properties identified were the subject-matter of the offence or the persons identified were concerned in the offence. This statement may be express or implied. The identifier may point out by his finger or touch the property or the person identified, may either nod his head or give his assent in answer to a question addressed to him in that behalf or may make signs or gestures which tantamount to saying that the particular property identified was the subject matter of the offence or the person identified was concerned in the offence. All these statements express or implied including the signs and gestures would amount to a communication of the fact of identification by the identifier to another person. Such communications are tantamount to statements made by the identifiers to a police officer in the course of investigation and come within the ban of Section 162. The physical fact of identification has thus to separate existence apart from the statement involved in the very process of identification and in so far as a police officer seeks to prove the fact of such identification such evidence of his would attract the operation of Section 162 and would be inadmissible in evidence, the only exception being the evidence sought to be given by the identifier himself in regard to his mental act of identification which he would be entitled to give by way of corroboration of his identification of the accused at the trial".

"In the case of test identification parade arranged by the Police and held in the presence of panch witnesses, the statements involved in the process of identification would be statements made by the identifying witness to the panch witnesses and would be outside the purview of Section 162, Criminal Procedure Code provided the process of identification is carried out under the exclusive direction and supervision of the panch witness and the police had completely obliterated themselves from the parade. But where the test identification is carried out by the police in their presence no distinction can be made between the statements made to the police officers and the statements made to the panch witness called by the police officers when conducting the test identification

parades".

In the present case, the evidence coming forth from the side of prosecution shows that police had not obliterated themselves from the said identification parade. When that is so, and when the evidence adduced by the prosecution is very much insufficient to inspire confidence in the judicial mind, such evidence has to be discarded. In the matter of Kanan and Others Vs. State of Kerala, , the Supreme court held that:

"Where a witness identifies an accused who is not known to him in the Court for the first time, his evidence is absolutely valueless unless there has been a previous T.I. Parade to test his powers of observations. The idea of holding T.I. Parade u/s 9 is to test the veracity of the witness on the question of capability to identify an unknown person whom the witness may have seen only once. If no T.I. parade is held then it will be wholly unsafe to rely on his bare testimony regarding the identification of an accused for the first time in Court".

8. Thus the identification of the appellant by Mohammed Madani Musa Supariwala and Abba Musa Supariwala in the Court when they gave the evidence had last value, because the T.I. Parade held is illegal. Undoubtedly, the appellant was not known to both of them. The evidence adduced by the prosecution does not prove that they had described the features of the appellants/accused when they looted them of Rs. 81,000/- on that day and at that time. It is pertinent to note that their supplementary statements were required to be recorded. On count of this infirmity, the learned judge has not appreciated the evidence keeping in view this important facet of the case and therefore, he landed in the error or recording the finding of guilt against this appellant and resultantly passing the order of conviction and sentence which has been assailed by this appeal. It being improper, incorrect and illegal will have to be set aside by allowing this appeal.

Thus, appeal stands allowed. The order of conviction and sentence passed against the appellant stands set aside and he stands acquitted. He be set at liberty forthwith, if not required for any enquiry, investigation, proceeding or trial. No interference in respect of other portion of order.

The parties are directed to act upon the copy of this order duly authenticated by the Sheristadar of this Court.