

(2002) 08 BOM CK 0111

In the Bombay High Court

Case No : Criminal Appeal No's. 641 and 642 of 1999

Subramanian Muttu Harijan and Vijay Kumar Pandi Pillai

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 27-08-2002

Acts Referred:

Bombay Police Act, 1951 — Section 34
Criminal Procedure Code, 1973 (CrPC) — Section 162
Penal Code, 1860 (IPC) — Section 392

Citation : (2003) 2 ALD(Cri) 118

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

Bench : Single Bench

Advocate : Harjeet Kaur, for the Appellant; A.M. Shingarpure, APP, for the Respondent

Judgement

J.G. Chitre, J.—The appellants are hereby assailing correctness, propriety and legality of the judgment and order passed by learned Additional Sessions Judge for Greater Bombay in Sessions Case No. 1169 1998 whereby the learned Additional Sessions Judge convicted these two appellants along with the dead co-accused for committing an offence punishable u/s 392 of IPC and sentenced each of them to RI for three years and to pay fine of Rs. 200/-, in default to undergo further RI for three months. The prosecution case in brief is that on 20.6.1998 at 9.30 a.m. complainant Sanjay Singh went to the Central Bank of India and withdrew cash to the tune of Rs. 13000/- from his account and came out of the said bank and started walking towards square which was created by Mankhurd Turbhe Road and Sion Mankhurd Road for going to Mankhurd Railway Station. It is the prosecution case that these two appellants with other co-accused who is dead came near him by maruti car and by getting down from the said car of red colour, snatched out the rexin bag which he was possessing in which the said cash amount, a calculator, a pocket diary and other sundry articles were kept. After snatching out the said rexin bag, they got in the said maruti car and ran away. Sanjay Singh went to his brother-in-law who was staying in the nearby

vicinity and from his house he rang police control room at telephone No. 100. He was asked to come to Mankhurd Police Station where his FIR was recorded, investigation proceeded. In the meanwhile, police officers of Mankhurd Police Station including Fattehsingh Gaikwad, Wani and his staff members suddenly came across the crowd which had collected at Sion Circle where a maruti car and blue colour maruti van came opposite each other and there was a quarrel. On account of the said quarrel the crowd had collected. When the said police officers accosted the persons who were sitting in the said maruti car, one out of them (who appears to be the accused who is dead) whipped out a revolver at the police officers, he was surrounded by the said police squad amongst which a police constable was having carbine. The person from the said maruti car got down. They were arrested and they were taken to police station.

2. On 27.6.98 complainant Sanjay Singh was called in Mankhurd Police Station. He was shown a rexin bag which was containing a calculator, pocket diary and sundry articles which complainant Sanjay Singh claimed to be belonging to him. An identification parade was held by Special Executive Magistrate in presence of panch witnesses wherein, as per prosecution case, complainant Sanjay Singh identified the dead accused Dhanshekhar Pillai. The investigation ended in filing of the charge sheet against these two appellants and two co-accused for the offence punishable u/s 392 of IPC and Section 34 of Bombay Police Act, 1951 (hereinafter referred to as Bombay Police Act for convenience). Thus, the appellants and those two co-accused were tried by the Additional Sessions Judge who passed the order of conviction and sentence against them which is being assailed by this appeal.

3. Ms. Harjeet Kaur, Counsel appearing for the appellants, submitted that the learned trial Judge committed the error of convicting the appellants without there being any legal evidence. She pointed out that the complainant Sanjay Singh did not identify any of the appellants in the Court when he was giving evidence. She pointed out that his evidence does not show that he admitted to have identified any of them before the Special Executive Magistrate who held the identification parade before panch witnesses. She submitted that the evidence in respect of recovery of articles belonging to complainant Sanjay Singh cannot be also the basis for conviction. She prayed for acquittal by setting aside the said order of conviction and sentence which has been challenged by these two appellants. Shri Shingarpure, Additional Public Prosecutor, made his best to support the judgment and order which has been challenged by these appeals.

4. The evidence in respect of the identification by the witnesses in identification parade is not the substantive piece of evidence unless the same witness identifies the same suspect-accused in the Court while giving evidence on oath. The identification by witness of suspect-accused in the Court on oath is the substantive piece of evidence. Evidence in respect of the identification of such a suspect-accused by the said witness in identification parade happens to be the corroborative piece of evidence to such substantive evidence. In the present case

though the prosecution has adduced the evidence to show that the complainant Sanjay Singh did identify the appellants in identification parade, complainant Sanjay Singh did not identify the appellants in the Court when he was giving evidence on oath. He also did not state that he did identify the appellants in identification parade. The appellants were facing the charge of committing robbery whereby, as per the prosecution case, they robbed complainant Sanjay Singh of Rs. 13000/- which he had withdrawn from Central Bank and had kept in rexin bag which he was possessing at the relevant time. Therefore, the only piece of evidence to connect the appellants with the said incident would have been the evidence of PW Sanjay Singh identifying the present appellants as the persons who robbed him at 9.30 a.m. or so near the Central Bank, when prosecution did not come within a case that at that time other persons were also present there and they had seen those persons robbing complainant Sanjay Singh at the point of weapons. Thus, the prosecution has failed miserably on this important and pivotal point.

5. The prosecution attempted to establish nexus between the appellant and the said incident by way of seizure of a rexin bag containing a calculator, a pocket diary and other sundry articles. But, unfortunately, those articles were not put in test identification which was to be conducted by Special Executive Magistrate or any other person so authorised other than police personnel. As per the prosecution evidence adduced in the present case, the said test identification was held in Mankhurd Police Station by the police officers of the Mankhurd Police Station and there before their police officers, as per the prosecution case, PW Sanjay Singh had identified these articles. In view of the observations of the Supreme Court in the case of Ramkishan Mithanilal Sharma and Ors. v. State of Bombay, reported in 1995 S.C. 104 such identification had been held to be amounting to a statement coming under the purview of provisions of Section 162 of the Cr.P.C. That is not admissible in evidence at all. When that is its value, it can never be the basis for a conviction. Unfortunately, the investigating agency and its officers do not give proper attention to this important facet and engage themselves in holding such test identifications and wasting and destroying the evidentiary value of their exercise in investigation. The investigation has always to be in accordance with law. If the evidence is collected by flouting the provisions of law, Court would not accept such evidence for adjudicating against the accused who have been put to trial before the Court.

6. In the present case, the learned trial Judge instead of concentrating on the charge which was framed against the appellants and dead co-accused, went on discussing other irrelevant evidence which was pertaining to some other incident. He brought that evidence in this case and made it the basis for conviction. The entire exercise was totally wrong and illegal. On account of that he landed in the error of convicting and sentencing the appellants by passing the judgment and order which has been assailed by these appeals.

7. Thus, this Court has no hesitation in coming to the conclusion that the said

order of conviction and sentence is not correct, proper and legal. Therefore, it needs to be set aside by allowing these appeals. Thus, these appeals are allowed. The order of conviction and sentence passed against the appellants stands set aside and they stand acquitted. They be set free if not required for any enquiry, investigation, proceeding or trial. They be also not released if they are undergoing sentence for some different crime by virtue of some different judgment. No order in respect of the disposal of the property brought before the trial Court.