
(2014) 09 BOM CK 0229

In the Bombay High Court

Case No : Criminal Revision Application No. 255 of 2013

Suresh Ananda Lohar

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 03-09-2014

Acts Referred:

Penal Code, 1860 (IPC) — Section 332, 34, 394

Citation : (2014) 09 BOM CK 0229

Hon'ble Judges : A.M. Thipsay, J

Bench : Single Bench

Advocate : H.V. Akolkar i/b Yug Mohit Chaudhari, Advocates for the Appellant;
S.V. Sonawane, APP, Advocates for the Respondent

Judgement

A.M. Thipsay, J.—The applicant and another - one Jagannath Shenekar - were prosecuted on the allegation of having committed offences punishable under section 394 IPC and 332 of the IPC read with section 34 of the IPC. After holding a trial, the Judicial Magistrate, First Class, at Shirala, convicted the applicant and also the said Jagannath (Accused no.2) of offences punishable under section 394 of the IPC and 332 of the IPC. He sentenced each of them to suffer Rigorous Imprisonment for two years and to pay a fine of Rs.2,000/- on each of the said two counts and directed that the sentences would run concurrently. Being aggrieved by the order of conviction as recorded by the learned Magistrate and the sentences imposed by him, the applicant and the said Jagannath filed an Appeal in the Court of Sessions. However, the learned Addl. Sessions Judge who heard the Appeal, found the judgment of conviction proper and dismissed the Appeal. The applicant has now approached this Court by filing this Revision Application challenging the propriety, legality and the correctness of his conviction and the sentences imposed upon him. The said Jagannath (accused no.2) has filed a separate revision application, which is also pending before this Court.

2. I have heard Mr.H.V. Akolkar, learned counsel for the applicant. I have heard

Ms.S.V. Sonawane, learned APP for the State. With the assistance of the learned counsel, I have carefully gone through the impugned judgments. I have also gone through the Record and Proceedings. In view of the contentions advanced, I have carefully gone through the entire evidence recorded during the trial.

3. The prosecution case before the trial court was as follows:-

That, the First Informant Vasant Nalawade (PW 1) was working as a watchman and Dattatraya Beldar (PW 3) was working as a cashier, with the Maharashtra State Road Transport Corporation (MSRTC). Both were posted at Shirala Depot. It was their practice to deposit the cash collected in the S.T. Depot in the bank account of the MSRTC in the Bank of India, Shirala Branch. That, on 30th July 2002, Vasant Nalawade (PW 1) and Dattatraya Beldar (PW 3) were going to the Bank of India, Shirala branch in order to deposit an amount of Rs.1,94,024/- in the bank account of MSRTC. Vasant Nalawade was holding the cash box containing the said amount. While Vasant Nalawade and Dattatraya Beldar were proceeding from the road, and going towards Bank of India, a motor-cycle came from behind. There were two persons on it - one who was driving it, and the other - a pillion rider. The pillion rider attempted to snatch the cash box from Vasant Nalawade. Nalawade, however, did not loosen his grip on the cash box and resisted, whereupon the pillion rider assaulted Nalawade on his right hand by a knife and ultimately succeeded in snatching the cash box. Nalawade raised shouts, but the said two persons managed to run away by driving the motor-cycle at a high speed. Nalawade had sustained injuries on his hand and knees. Members of public gathered on the spot and a police vehicle also came there within a few minutes. Thereafter, chase of the robbers was undertaken. The robbers had left the motor-cycle at Padali naka, and had entered in a sugarcane field. The police entered in the sugarcane field for apprehending the robbers, who then left the cash box in the field itself. The police and the members of public apprehended one of the robbers. He is said to be the Accused no.2 Jagannath. The other offender - said to be the applicant managed to run away. It appears that he was subsequently, but quite immediately thereafter, caught. The cash box containing the sum of Rs.1,92,024/- had already been recovered by the police from the sugarcane field. In the course of investigation, a knife and a number plate of a motor-cycle came to be recovered by the police pursuant to the information disclosed by the applicant to the police, on two different occasions.

4. After completion of investigation, the applicant and the said Jagannath were prosecuted, convicted and sentenced as aforesaid.

5. The prosecution examined 11 witnesses during the trial. The accused persons examined five witnesses in their defence.

6. The learned Magistrate observed that the evidence against the accused persons was direct as well as circumstantial. He observed that the direct evidence constituted of the testimonies of Vasant Nalawade (PW 1), Dattatraya

Beldar (PW 3) and Head Constable Suresh Jadhav (PW 9). The Magistrate observed that the circumstantial evidence against the accused persons was of recovery of the cash box containing cash from a sugarcane field, the recovery of number plate of a motor-cycle and recovery of a knife by the Investigating Officer pursuant to the information disclosed by the applicant to the Investigating Officer in the course of investigation.

7. As the co-accused Jagannath has filed a separate Revision Application, and as it appears that the nature of evidence against the present applicant and against the said Jagannath is not identical, only the question of the legality, propriety and correctness of the conviction of the present applicant as recorded by the Magistrate, and as maintained by the Court of Sessions is being considered and dealt with in the present Revision.

8. The learned Magistrate observed that the applicant had been identified by Vasant Nalawade and Dattatraya Beldar. He found the evidence of identification of the applicant as one of the robbers reliable. He was of the view that the direct evidence of these witnesses was corroborated by the evidence of recovery of a number plate of a motor-cycle and the knife, pursuant to the information disclosed by the applicant to the police.

9. Mr.Akolkar, the learned counsel for the applicant submitted that there was no satisfactory evidence regarding the identification of the applicant as one of the culprits. He also submitted that once there was no satisfactory evidence regarding the identity of the applicant as one of the culprits, the circumstantial evidence in the nature of recovery of a number plate of a motor cycle, and a knife was not at all sufficient to connect the applicant with the alleged offences.

10. While dismissing the Appeal, the learned Addl. Sessions Judge has also proceeded on the basis that there was satisfactory evidence regarding the identification of the applicant as one of the culprits. It would therefore, be necessary to see whether indeed, there was such evidence of identification.

11. Admittedly, no Test Identification Parade was held by the Investigating Officer in this case. It is true that the applicant appears to have been arrested immediately after the incident, but it cannot be lost sight of that he was not apprehended on the spot. He had made good his escape and was apprehended thereafter. It would have been more appropriate therefore, on the part of the Investigating Officer to have got the identity of the applicant established in the course of investigation by holding a Test Identification Parade - or at least in some other reasonable method. Anyway, since I am dealing with a Revision Application and since appreciation or an independent re-appraisal of the evidence adduced during trial, ought not to be done in revision proceedings, I leave the matter at that.

12. However, after going through the evidence of Nalawade and Beldar, I am unable to hold that there was evidence of the identification of the applicant as one of the culprits by any of these two witnesses. I have carefully read the

evidence of these two witnesses with the assistance of the learned counsel for the applicant and also the learned APP and I am unable to find that the applicant was identified before the Court as one of the culprits by any of these witnesses. Even if the aspect of not holding of a Test Identification Parade, and the consequent reliability of the identification evidence is kept aside, the least that was to be expected is that the identifying witnesses would state before the Court, by pointing out to the applicant that he was culprit, or one of the culprits.

13. The notes of the evidence recorded in the examination-in-chief of Nalawade begin with the sentence "I know the accused present before the Court". Nalawade then describes the incident. In the concluding part of his evidence, he says that "the police had shown the accused to him after arrest, and that he had identified the accused.

14. It does not appear from the evidence that attention of Nalawade was drawn to the accused persons present before the Court and it does not appear that, by pointing out towards them, he identified them as the culprits. It is significant in this context, that he was not asked about either of the accused individually and the general statement that "after arrest, he had identified the accused", is appearing in the notes of his evidence. It is also difficult to comprehend what was sought to be conveyed by the opening the sentence in his examination-in-chief i.e. "I know the accused present before the Court". It is impossible from the evidence of Nalawade to come to a conclusion that he had "identified the accused persons as the culprits" before the Court. Nalawade did not make any statement before the Court that the accused present in the Court were the robbers. It will not be out of place to observe at this stage that a specific role was given to both offenders by the prosecution. The theory of the prosecution was that the applicant was the pillion rider and the co-accused Jagannath was driving the motor-cycle. However, no attempt was made before the Court to make the witnesses say by asking appropriate questions to them as to who was the driver, and who was the pillion rider. That no such attempt was done itself indicates that the prosecution avoided to question the so-called identifying witnesses with respect to the precise identity of the accused persons and the role allegedly performed by each one of them during the incident, for reasons best known to the prosecutor who was in-charge of the prosecution.

15. Coming to the evidence of Dattatraya Beldar (PW 3), I do not find that he had identified the applicant as one of the robbers before the Court. In his evidence, he has described the incident, and has categorically stated that the motorcycle had come from behind. He has spoken about chasing "thieves", but the thieves escaping. He also speaks of the police searching for the thieves in the sugarcane field, and of his having seen Jagannath (Accused no.2) in the sugarcane field. The only statements in his examination-in-chief which would be relevant in the context of identification of the accused, are "I know the accused present before the Court" and "the police has shown me the accused in the police station". No sensible person would even suggest that the first statement i.e. "I

know the accused present before the Court" is to be construed as "the accused persons before the Court are the robbers". With respect to the second sentence reproduced above, the witness does not even say that he identified the accused after they were shown to him by the police in the police station. (That would not have amounted to the stating before the Court that the accused were the robbers, but that would at least explain why the accused were put on trial). Interestingly, he has stated that the police had shown to him the cash box, and that he had identified the same. However, though a statement about identifying the cash box has been made by this witness, he did not make any statement about the identification of the applicant as the accused. He has even not said about his having seen the accused persons at the time of the incident, and he speaks of having seen Jagannath (Accused No.2) in the sugarcane field, later. As regards the present applicant, he does not even claim that he is one of the robbers.

16. The third witness in the context of identification is Head Constable Tukaram Jadhav (PW 9). According to him, the accused Jagannath (Accused no.2) was apprehended by Police Constable Warke in the sugarcane field, and that Jagannath was identified by Nalawade and Beldar. He does not speak even a word about the applicant, or the identity of the applicant, as one of the robbers. He even does not speak of having seen the applicant at any time. The last sentence in the notes of his evidence in examination-in-chief reads thus:-

"I know the accused present before the Court"

17. It is indeed shocking that in spite of this position, the trial court as well as the appellate court has held that there was "direct evidence of identification" of the accused persons by the aforesaid three witnesses. In fact, in view of such a finding, I have re-read the evidence of these witnesses with the assistance of the learned Addl. Public Prosecutor and even read the depositions of these witnesses recorded in Marathi. However, there is absolutely no evidence to establish the identity of the applicant as one of the robbers. There is no statement made by any of these witnesses to the effect "that the applicant i.e. the accused no.1 in the case, was one of the robbers". Nobody has identified him as such.

18. If the question would be of reliability of the identification evidence in the absence of a Test Identification Parade, it might not have been gone into, in the revision proceedings. However, here is a case where the trial court as well as the appellate court has come to a conclusion that the applicant was one of the robbers, though nobody has stated so before the trial court.

19. Interestingly, it does not appear that the identity of the accused persons as the culprits was got established at the investigation stage. I have carefully examined the evidence of the Investigating Officer PI Baba Saheb Kamble (PW 11). He does not state that he got the identity of the accused persons established in the course of investigation from the witnesses. That, anyway, would not have amounted to substantive evidence of the identification of the

applicant as the culprit, but would have atleast explained why the applicant was put on trial.

20. The learned Magistrate observed that Nalawade has "identified the accused present before the Court" (paragraph no.14 of the judgment). He also observed, while discussing the evidence of Dattatraya Beldar (PW 3) that Accused no.2 Jagannath was apprehended in the sugarcane field, and that he (Beldar) "had identified the accused present before the Court". The Magistrate observed "the accused were shown to him by the police after arrest". The Magistrate then observed "here the identity of the accused that they were present at the time of commission of the offence has been established by the evidence of this witness". This observation and the finding arrived at by the Magistrate is indeed perverse. Not only his finding that identity of the accused "that they were present" at the time of the commission of the offence, was established by the evidence of Dattatraya Beldar (PW 3) is absolutely baseless, but the "presence of the accused" at the commission of the offence was not the issue. The issue was whether they had committed the robbery in question. According to the learned Magistrate himself, the evidence only showed or established the identity of the accused as "persons present at the time of commission of offence".

21. The Appellate Court also proceeded on the basis that there was "direct evidence establishing the identity of the applicant as one of the culprits". The learned Addl. Sessions Judge who dealt with the Appeal in paragraph no.9 of the appellate judgment, mentioned the basic principles of criminal jurisprudence. However, he has not followed these principles while arriving at a conclusion. Perhaps, the awareness on the part of the learned Judge that he was arriving at a conclusion by flouting the basic principles of criminal jurisprudence made him mention the basic principles of criminal jurisprudence in his judgment so that a possible criticism that he was not aware of the same, could be avoided. In fact, the Appellate Court has gone a step ahead of the trial court, and has held that Nalawade "identified the motorcycle rider and pillion rider before the Court".

22. Thus, the trial court as well as the appellate court has read something in the evidence which is actually not at all there. The conclusion that the applicant was identified by witnesses as one of the culprits is based on no evidence, whatsoever. The evidence was only to the effect that Beldar and Nalawade "knew the accused before the Court", and that "the police had shown accused persons after their arrest to these two witnesses". There was no statement made before the Court by any of these witnesses that the accused were, (or any of them was) the culprits. Only such statement would amount to the evidence of the identity of the accused persons as the culprits; and that "the accused were shown by the police to them after arrest, and were identified by the witnesses", cannot constitute evidence of the identity of the accused persons as the culprits. It is elementary that only statements made by the witnesses before the Court would constitute evidence, and not the statements made by them, at the pre-trial stage. In this case, interestingly, there is not even a pre-trial statement by any

of the witnesses about the identity as one of the robbers. That the witnesses had identified the persons who were shown to them by the police at the police station, as the culprits who had committed robbery, is also missing in the evidence. Thus, not only there is no statement about identity of the applicant by any witness before the Court, but even a pre-trial statement about such identity (which is sometimes wrongly accepted as evidence) is not there.

23. Head Constable Tukaram Jadhav (PW 9) does not, and is not expected as per the prosecution case to establish identity of the applicant as one of the culprits. He speaks of the identification of Jagannath (Accused no.2) as one of the culprits, and does not identify the present applicant. In fact, that is not the case of the prosecution at all.

24. Once the finding regarding the identity of the applicant as one of the culprits is discarded - the same having been arrived at without any evidence - the circumstantial evidence relating to the recovery of a number plate of a motorcycle, and a knife at the instance of the present applicant, would hardly be sufficient to connect the applicant with the alleged offences. Much can be said about the value to be attached to this evidence, inasmuch as the recovery of the knife has been attributed by one of the witnesses - Prasad (PW 7) to Jagannath (Accused no.2), and not to the present applicant. In order to overcome this difficulty, the other panch in respect of the said recovery was examined when he attributed the recovery of the knife from a cattle shed to the information allegedly disclosed by the applicant. There is nothing to show that the knife in question was the same which was used in the commission of the robbery. Similarly, the recovery of the number plate of the motorcycle is not connected, in any manner, with the motorcycle used by the robbers. There is no evidence to show that the number plates were of the particular motorcycle that was used by the robbers. As such, the evidence of recovery of these articles, even if accepted as true and/or reliable (for the sake of argument) does not connect itself with the alleged offence, and is, thus, irrelevant.

25. The finding that the applicant is guilty of the alleged offence, has been arrived at by the trial court without any evidence, whatsoever. The Appellate Court has also read something in the evidence which is actually not there, and has wrongly supported the conclusion of the trial court that the witnesses had identified the applicant as one of the robbers.

26. Both the Courts below have committed a manifest error of law in arriving at a finding without any evidence, whatsoever. The order of conviction of the applicant as recorded by the trial court and as maintained by the Appellate Court, being not in accordance with law, needs to be set aside in the interest of justice.

27. Revision Application is allowed.

28. The order of conviction of the applicant as recorded by the learned Magistrate and the sentences imposed upon the applicant are set aside.

29. The applicant stands acquitted.

30. He be set at liberty forthwith unless required to be detained in custody in some other case.

31. Fine, if paid, be refunded to him.