
(2012) 02 BOM CK 0056
In the Bombay High Court
Case No : Criminal Appeal No. 272 of 2011

Vitthal Bobade, Presently in Jail,	APPELLANT
Vs	
The State of Maharashtra	RESPONDENT

Date of Decision : 06-02-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 173(2)
Penal Code, 1860 (IPC) — Section 391, 392, 394, 395, 397

Citation : (2012) BomCR(Cri) 371

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

Bench : Single Bench

Advocate : Hemant Surve, for the Appellant; Y.M. Kshirsagar, APP, for the Respondent

Final Decision : Allowed

Judgement

A.M. Thipsay, J.—This appeal is directed against the judgment of conviction, delivered by the learned Additional Sessions Judge-1, Aurangabad in Sessions Case No. 369 of 2009, whereby he convicted the appellant, who was the sole accused in the said case, of an offence punishable u/s 397 of the I.P.C. and sentenced him to suffer imprisonment for seven years. The report u/s 173(2)(i) of the code of Criminal Procedure filed by the police against the appellant alleged that the appellant had committed an offence punishable u/s 394 of the I.P.C. The learned Additional Sessions Judge, however, framed a charge of an offence punishable u/s 392/395 of the I.P.C. r/w U/sec. 397 of the I.P.C. against the appellant. After the trial, he recorded the acquittal of the appellant with respect to the offences punishable under Sections 392 and 395 of the I.P.C. He convicted the appellant only of the offence punishable u/s 397 of the I.P.C. Being aggrieved by the conviction and the sentence imposed, the appellant has approached this Court by way of the present appeal.

2. I have heard Mr. Hemant Surve, the learned advocate for the appellant and Smt. Y.M. Kshirsagar, the learned A.P.P. for the respondent-State.

3. With the assistance of the learned advocates, I have gone through the entire evidence adduced during the trial. I have gone through the impugned judgment and also the other relevant record.

4. The prosecution case, as put forth before the trial court, was as follows:

a) The first informant, Popat Borade (P.W.1), was having his medical shop at village Gajgaon, at the material time. Popat was residing at village Wadgaon Rampuri. On 22nd March 2006, Popat had, as usual, closed his shop at about 8.00 pm. to 8.30 p.m. and he was to proceed to his village Wadgaon Rampuri on his motorcycle. At that time, one person came to him and requested for a lift up to Ambelohal village. Popat gave him lift and allowed him to sit as a pillion rider on the motorcycle. After they had travelled on the motorcycle for about 4 kilometers, the pillion rider, suddenly placed a knife (Article 2) on the neck of Popat, asking him to stop the motorcycle. Popat stopped the motorcycle. Then the pillion rider, by giving threat of the knife (Article 2), demanded money from Popat. The pillion rider also caused injury on the right cheek of Popat by the knife. The said pillion rider took out the money pocket from the pant pocket of Popat and took away the cash of Rs.1100/-consisting of 10 currency notes of Rs.100/-each and two currency notes of Rs.50/-each therefrom. Thereafter, the pillion rider ran away from the spot.

b) Popat went to village Ambelohal on the motorcycle and reported the incident to his nephew Sominath Borade. Thereafter, Popat, his nephew and 2 to 3 other persons searched for the culprit at Gajgaon and from one Raju Vyavhare (P.W.3), they learnt the name of the culprit as "Vitthal Jagannath Bobade" i.e. the name of the appellant. Thereafter, Popat lodged a report with Waluj M.I.D.C. police station, which was treated as the first information report and the case in respect of the offence punishable u/s 394 of the I.P.C. was registered against one Vitthal Jagannath Bobade i.e. the appellant.

c) In the course of investigation, the knife (Article 2), allegedly used by the appellant in the commission of the alleged offence, was recovered from his person.

5. On completion of the investigation, report U/sec. 173(2)(i) of the Code was filed by the P.S.I. Vilas Dinapurkar (P.W.6), who had investigated into the matter.

6. In order to establish its case, the prosecution examined seven witnesses during the trial.

7. It has already been seen that the first witness is Popat Borade-the first informant and victim.

8. The second witness is one Balu Borade, in whose presence the clothes of the appellant were removed from the person of the appellant, and in whose presence, from the clothes of the appellant, the knife (Article 2), with handkerchief, was taken charge of and seized by the police under a panchnama (Exh.19.)

9. The third witness, as aforesaid, is Raju Vyavhare. It is pursuant to his giving the "name of the culprit" the first informant Popat-and even the police-believed the appellant to be the culprit in the present case i.e. pillion rider who had robbed Popat. Raju Vyavhare, however, did not support the case of the prosecution and was declared as hostile. There is nothing in his evidence, which would advance the case of the prosecution.

10. The fourth witness Kadu Sukase, is a panch in respect of the panchnama (Exh.19) relating to the seizure of the knife (Article 2) and handkerchief from the pant of the appellant. Even this witness did not support the prosecution case and was also declared hostile. His evidence also does not assist the prosecution, in any manner.

11. The fifth witness Laxman Borse, Sub Inspector of Police, attached to Waluj M.I.D.C. police station at the material time, had carried out part of the investigation in the case. In his evidence, he stated about certain disclosure statement made by the appellant, and the recovery of a mobile handset pursuant thereto. It is clear from his evidence, that he was disclosing about the facts of another case in which the appellant was, apparently, involved. The evidence of this witness is not relevant in the context of the present case.

12. The sixth witness Vilas Dinapurkar is the investigating Officer in the matter. He has narrated the steps taken by him in the investigation. According to him, after registering the crime, on the next day, he went to the spot of the offence and found spectacles lying there. The said spectacles were taken charge of under panchnama. He also disclosed that he recorded statements of 8 persons including that of Raju Vyavhare. Certain portion, found in the statement of Raju Vyavhare, was brought on record through this witness as and by way of contradicting the version of Raju Vyavhare in the court.

13. The seventh witness Dr. Aparna was attached to the GHATI hospital, Aurangabad as casualty Medical Officer, at the material time. Her evidence shows that on 23.3.2006, she examined Popat Borade, the first informant and that he had sustained injuries on both his palms. According to her, the age of the injuries was within six hours from the time of examination;-i.e. 12.20 a.m. She also stated that such injuries could be caused by a knife.

14. I have carefully considered the matter.

15. The property said to have been robbed, or any part thereof, has not been recovered, in the course of investigation.

16. The case against the appellant rests solely on his identification as the culprit, made by the first informant Popat. In the court, Popat identified the appellant, as the person, to whom he had given the lift on his motorcycle and who had robbed him of Rs.1100/-, by causing injury in the process.

17. Before proceeding further, it may be observed that, that the incident of robbery, as narrated by Popat, indeed took place, cannot be doubted. In my

opinion, it has been satisfactorily established. Apart from the fact that Popat had no reason to make a false report by imagining some incident, that he had sustained injuries at the material time, leaves no manner of doubt about this aspect. The only question is, whether the person, who robbed Popat is the appellant.

18. Once the incident of robbery is believed, it is to be believed that, the pillion rider, who had been given lift by Popat, had committed the said robbery. The suggestions given to Popat in the cross examination to the effect that due to darkness, he did not know who the culprit was or that, there was a third person who attacked Popat and that therefore, the pillion rider ran away, do not impress me. Thus, the question would be whether the appellant was the person to whom lift was given by Popat.

19. Admittedly, the culprit was not previously known to Popat, either by name or by face. This position is not in dispute. The prosecution case is that after the incident, Popat made some private enquiries, on the basis of which, he ascertained the name of the culprit as "Vitthal Bobade" (which the name of the appellant) and mentioned that name in the report, as that of the culprit.

20. When the culprits who are not previously known to the victim or to the witnesses, either by name or by face, are not caught on the spot and when they make good their escape, it becomes necessary to get the identity of such culprits established, in the course of investigation. Such establishing of identity of the culprit, who was not known previously to the victim or to the witnesses, would not be substantive evidence, but without getting such identity proved, the investigating agency cannot get itself satisfied that the person apprehended by it is the culprit. It is for this reason that the Test Identification Parades are held. They serve a dual purpose:-the first being they provide assurance to the investigating agency that the investigation is proceeding on proper lines and that the right person has been apprehended; and the second being, the evidence of identification of the culprit during the Test Identification Parade would corroborate the evidence of his identification, as would be given later during trial.

21. In the instant case, admittedly, after the apprehension of the appellant, he was not placed in any test identification parade. Not only that, even the inferior mode of establishing his identity i.e. by confronting him with first informant Popat, was not attempted. It is therefore, not clear as to on what basis the investigating agency, at that time, concluded that the present appellant was the culprit. It must be understood clearly that though the name of the appellant is found in the F.I.R., it was not given by the informant on the basis of his knowledge, but on the basis of his belief, formed from what others told him, that a person by such a name, indulges into such activities.

22. It has already been seen that there is no other evidence, except the identification of the appellant, made by Popat in the court, for the first time.

23. The incident had taken place in the month of March, 2006. Popat was

examined in the Court on 10.11.2010 and in his evidence, all that he said about the identity of the accused is :-"I identify the accused to whom I had given the lift on my motorcycle." Barring this, there is nothing else on record, to indicate the identity of the appellant as the culprit. In fact, this sentence does not make it clear, whether the appellant was specifically pointed out by the said Popat, during his evidence, but assuming it to be so, the question is, whether on this basis, it would be safe to convict the appellant? In the cross examination, Popat has admitted that after the date of incident, he had seen the appellant for the first time, in the Court itself, and that he was not called by the police at any time after 23.3.2006 till date. (His deposition in English reads as "I was called by the police after 23.3.2006 till today." But this is obviously a typing mistake, which is clear from the context. The correct deposition would be, "I was not called by the police.....". Though this is clear from the context, I have verified this aspect by checking with the record of the evidence in Marathi.)

24. It is well recognized that the mere fact that a person is in the dock as an accused is likely to influence the mind of the witness and make him think that the person in the dock is the person he had seen at the time of incident. In this case, when the appellant was not previously known to Popat and when he had seen him for the first time in the Court, after the incident, which was after a gap of more than four years from the incident, the identification of the appellant as the culprit by the said Popat, is worthless. In my opinion, no reliance on such identification, could be placed.

25. In the course of investigation, the investigating agency may fix the identity of the culprit based on their investigation, and even on the material which would not be admissible in evidence. However, when the question of establishing the identity of the accused, as the culprit, before a court of law, would arise, the investigating agency would be bound to explain to the court the basis on which it fixed the identity of the accused, as the culprit. If the source or the basis on which the investigating agency fixed the identity of an accused, as the culprit, would be something, which cannot be given in evidence, the satisfaction of the investigating agency about the identity would be immaterial. The investigating agency would be bound to explain to the court, as to how it came to the conclusion that the accused before the court was the culprit and if this basis would be some material, which is admissible in evidence, it would be considered by the court. In the instant case, what is curious is that, there is no way of knowing how the investigating agency concluded the appellant to be the culprit. Admittedly, the appellant was never confronted with Popat and it was never got verified from Popat that the appellant was the culprit. This creates a doubt that, in all probability, the investigation was not done honestly or sincerely.

26. That, it would be unsafe to hold the appellant guilty only on the basis of his identification, as the culprit, made by a solitary witness for the first time in the court, after a period of more than four years from the incident, has already been observed; but that is not the crucial aspect of the matter. The crucial aspect is

that the appellant came to be prosecuted without getting his identity established. Leaving apart the holding of a test identification parade, when even the one to one confrontation between the appellant and Popat was not undertaken during the investigation stage, really speaking, there was no material to put the appellant on trial. There was also no other material to connect the appellant with the alleged offence. Thus, the prosecution of the appellant without any material was thoroughly lacking in bonafides.

27. In my opinion, the impugned judgment is not proper or legal. The learned Additional Sessions Judge failed to grasp that the only evidence against the appellant was of his identification made by Popat in the Court for the first time after a gap of 4 years from the incident, and he failed to consider whether on the basis of such solitary piece of evidence, it would be safe to convict the appellant, particularly when the investigating agency had not got the identity of the appellant fixed during investigation.

28. This was a case where the appellant was entitled to be acquitted.

29. Before parting, another error committed by the learned Additional Sessions Judge, needs to be mentioned. The charge sheet filed by the police against the appellant was in respect of the offence punishable u/s 394 of the I.P.C. and on the facts alleged, in the police report, that charge was proper. The learned Additional Sessions Judge however, framed a charge in respect of the offences punishable under Sections 392 of the I.P.C. and 395 of the I.P.C. r.w. Section 397 of the I.P.C. The basis for framing a charge of an offence of dacoity punishable u/s 395 of the I.P.C. is impossible to understand. "Dacoity" is robbery committed by five or more persons. (Section 391 of the I.P.C.). It was nobody's case that there was an involvement of five or more persons in this matter.

30. Moreover, the learned Sessions Judge passed an order of acquittal of the appellant with respect to the offences punishable under Sections 392 and 395 of the I.P.C.. The operative order reads as follows:

1. The accused Vithal s/o Jagannath Bobde is appellant only with respect to the offence "punishable u/s 397 of the I.P.C." A bare reading of Section 397 of the I.P.C. indicates that it does not create any substantive offence, but merely regulates the punishment provided for "robbery" and "dacoity", by fixing a minimum term of imprisonment, if the culprit has used a deadly weapon, or caused grievous hurt, or attempted to cause death or grievous hurt at the time of committing any robbery or dacoity. The provisions of Section 397 of the I.P.C. can never be applied, unless the accused is found to be guilty either of robbery or dacoity. In fact, once an accused was acquitted of the offences punishable under Sections 392 and 395 of the I.P.C., there would be no question of holding him guilty of the offence punishable u/s 397 of the convicted u/s 235(2) of the Cr.P.C. for the offence punishable u/s 397 of the Indian Penal Code and sentenced to suffer imprisonment for 7 years.

2. The accused is acquitted for the offence punishable u/s 392 and 395 of the

Indian Penal Code.

31. Thus, the learned Additional Sessions Judge convicted the appellant only with respect to the offence "punishable u/s 397 of the I.P.C." A bare reading of Section 397 of the I.P.C. indicates that it does not create any substantive offence, but merely regulates the punishment provided for "robbery" and "dacoity", by fixing a minimum term of imprisonment, if the culprit has used a deadly weapon, or caused grievous hurt, or attempted to cause death or grievous hurt at the time of committing any robbery or dacoity. The provisions of Section 397 of the I.P.C. can never be applied, unless the accused is found to be guilty either of robbery or dacoity. In fact, once an accused was acquitted of the offences punishable under Sections 392 and 395 of the I.P.C., there would be no question of holding him guilty of the offence punishable u/s 397 of the I.P.C.

32. As a result of the aforesaid discussion, it follows that the appeal succeeds.

33. The appeal is allowed.

34. The impugned judgment of conviction and the sentence imposed by the learned Additional Sessions Judge-1, Aurangabad is set aside.

35. The appellant is acquitted. He be set at liberty forthwith unless required to be detained in connection with some other case.