
(2015) 01 BOM CK 0190
In the Bombay High Court
Case No : Criminal Appeal No. 336 of 2011

Yogesh Raghunath Vyapari	Vs	APPELLANT
The State of Maharashtra		RESPONDENT

Date of Decision : 13-01-2015

Acts Referred:

Penal Code, 1860 (IPC) — Section 34, 341, 392, 395, 397

Citation : (2015) ALLMR(Cri) 2271

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

Bench : Single Bench

Advocate : Sarojini Upadhyay, for the Appellant; M.R. Tidke, APP, Advocates for the Respondent

Final Decision : Allowed

Judgement

A.M. Thipsay, J.

1. By this Appeal filed from prison, the appellant who was accused No. 6 in Sessions case No. 43 of 2010 tried by the Addl. Sessions Judge, Kalyan challenges the judgment and order dated 5th April 2011 passed by the learned Addl. Sessions Judge, convicting the appellant of offences punishable under section 392 of the IPC and 341 of the IPC read with section 34 of the IPC, and sentencing him to suffer RI for three years, and to pay a fine of Rs. 1,000/- with respect to the offence punishable under section 392 of the IPC, and to suffer SI for 1 (one) month with respect to the offence punishable under section 341 of the IPC. Apart from the appellant, there were five other accused in the said case. The appellant was mentioned as the accused No. 6. The allegation against the appellant and the other accused was that they had committed offences punishable u/s. 395 of the IPC read with section 397 of the IPC, and an offence punishable u/s. 341 of the IPC read with section 34 of the IPC. The learned Addl. Sessions Judge, however, came to the conclusion that the offence that had been committed was not one punishable under section 395 of the IPC, but under section 392 of the IPC. Except the appellant, the accused No. 1 Raju and the

accused No. 3 Sharad Kumar, no other accused was convicted and the other three were acquitted.

2. I have heard Smt. Sarojini Upadhyay, learned counsel for the appellant who was appointed to prosecute the appeal under the Free Legal Aid Scheme. I have heard Mrs. M.R. Tidke, learned APP for the State. I have gone through the impugned judgment and the evidence that was adduced before the trial.

3. The prosecution case before the trial court was that while the First Informant Jayantilal Kothari was carrying cash of Rs. 2,05,000/- and some documents, and while he was going to his residence on a scooter, he was robbed by four persons. Two of them had come there on a motorcycle. The said four persons were wearing helmets. They took away the rexin bag of Jayantilal in which he had kept the cash and documents. They also took away his scooter.

4. In the course of investigation, the robbed property came to be recovered. The motorcycle allegedly used by the culprits in the commission of the offence also came to be recovered.

5. The prosecution examined five witnesses before the trial court.

6. So far as the appellant is concerned, the evidence against him is said to be his identification as one of the culprits by a solitary witness i.e. the First Informant Jayantilal and alleged recovery of a part of the robbed property i.e. cash of Rs. 5,000/- from his person. Additionally, it is stated that the motorcycle used in the commission of the offence, was found parked in front of the house of the appellant.

7. The learned trial Judge disbelieved the evidence of identification of the appellant by Jayantilal. The learned Judge observed that admittedly, the appellant and other accused were shown to the First Informant at the police station immediately on their arrest. The learned Judge also observed that the culprits were wearing helmets at the time of the incident. The conclusion arrived at by the learned Judge about the unreliability of the identification evidence, is proper and legal.

8. The question is whether the two circumstances i.e. the alleged recovery of cash of Rs. 5,000/- from the person of the appellant, (which cash is alleged to be part of the robbed property), and that the motorcycle used in the commission of the offence being found parked in front of the house of the appellant which the learned Addl. Sessions Judge held as proved, were sufficient to hold the appellant guilty. What needs examination and consideration is, therefore, whether these circumstances were satisfactorily proved in the first place, and secondly, whether they, taken together, but without anything else, were sufficient to hold the appellant guilty.

9. The evidence shows that after the arrest of some other accused on the previous day, the appellant came to be arrested on 19th November 2009. The incident had taken place on 16th November 2009.

10. The evidence of Uttam Chakare (PW 5), the Investigating Officer shows that when the appellant was apprehended in his personal search, an amount of Rs. 5,000/- consisting of 5 (five) currency notes of Rs. 1,000 denomination were found. His evidence also shows that in front of the house of the appellant, the motorcycle "used in the commission of the offence", was recovered. This recovery was said to be under a panchnama. However, no panch witnesses were examined during the trial.

11. What is more significant is that the identity of the amount allegedly recovered from the appellant as part of the robbed property, has not at all been established. Similarly, the identity of the motorcycle allegedly recovered from in front of the house of the appellant as the one that was used in the commission of the alleged offence, has also not been established. Thus, neither the fact that the said property was recovered from the appellant was proved, nor the fact that such recovered property, if any, was the same that related to the alleged offence, was proved.

12. As aforesaid, the evidence of identification was disbelieved by the learned trial Judge and rightly so. This was a case where there was absolutely no evidence against the appellant. The impugned judgment and order is clearly contrary to law and untenable. The learned Judge nowhere discussed whether the property said to have been recovered from the appellant was proved to be the property connected with the alleged offences, and if so on what basis.

13. The impugned judgment is not only patently incorrect but is perverse inasmuch the finding of guilt has been recorded without any evidence whatsoever. When such is the state of affairs, it is unfortunate that the appellant has already undergone whole of the sentence imposed upon him by the trial court.

14. Appeal succeeds.

15. The Appeal is allowed.

16. The impugned judgment and order of conviction of the appellant is set aside.

17. The appellant stands acquitted.

18. Fine, if paid be refunded to him. Appeal stands disposed of accordingly.