

State Through Public Prosecutor, High Court of Bombay at Panaji Vs. Anil Jacob, Driver and ors.

State Through Public Prosecutor, High Court of Bombay at Panaji Vs. Anil Jacob, Driver and ors.

SooperKanoon Citation : sooperkanoon.com/361429

Court : Mumbai

Decided On : Aug-08-2008

Reported in : 2009CriLJ1355

Judge : S.C. Dharmadhikari and ;R.C. Chavan, JJ.

Acts : Indian Penal Code (IPC) - Sections 395 and 397; Code of Criminal Procedure (CrPC) - Sections 172 and 313

Appeal No. : Criminal Appeal No. 25 of 2003

Appellant : State Through Public Prosecutor, High Court of Bombay at Panaji

Respondent : Anil Jacob, Driver and ors.

Advocate for Def. : P.P. Singh, Adv. for respondent Nos. 1 and 4, ;T. Geoge John, Adv. for respondent No. 2 and ;Asha Dessai, Adv. U/LAS for respondent No. 3

Advocate for Pet/Ap. : Winnie Coutinho, Public Prosecutor

Disposition : Appeal dismissed

Judgement :

R.C. Chavan, J.

1. This appeal by State is directed against acquittal by the learned IIIrd Assistant Session Judge, South Goa, Margao, of five respondents tried before him for offence of Dacoity punishable under Section 395 of the Penal Code.

2. Facts which led to prosecution of respondents are as under. One Pandurang Upadhye, running a shop of electrical goods at Tisk Usgaon, resided with his family at Pillem, Dharbandora. On the evening of 23/5/99 at about 7 p.m., when Pandurang's wife Kunda, her Father-in-law Ganesh and a servant Archana were at home, 5-6 persons armed with knives broke into the house and robbed them of ornaments and valuables. Servant Archana managed to slip. Pandurang reached home at 8.30 p.m. and he too was robbed of Rs. 1,50,000/- in cash. Pandurang and Kunda had sustained injuries and were taken to hospital.

3. Upon being informed, police arrived, recorded a report by Kunda, registered an offence and commenced investigation. The Investigating Officer performed panchanama of spot, seized incriminating articles and recorded statements of witnesses. On 25.5.99, Investigating Officer was informed by P.S.I. Collem that he had spotted respondent No. 1, Anil Jacob in the area of incident, and that modus operandi of Anil tallied with the crime. Anil was facing a sessions cases Nos. 15/98 and 37/99 in the sessions Court at Margao. When Anil appeared for hearing in S.T. No. 15/98 on 28.6.99, he was apprehended. His interrogation revealed the complicity of other respondents namely, Henrik Kadam, respondent No. 3, and Mohamad Ali, respondent No. 2. Certain articles were seized from these persons. Since involvement of Abdul Rehiman @ Venkatesh Hunchali was also disclosed, the Investigating Officer arrested said Abdul Rehiman at Hubli and seized certain articles, including a car bearing registration No. GDC 3363, allegedly purchased by said Abdul Rehiman from booty which had been stolen from the complainant.

4. The Investigating Officer could not, however, trace out accused Murgesh, who was absconding. He collected other evidence and filed a chargesheet showing Murgesh as absconding. The Investigating Officer had also caused the accused arrested to be identified by eye-witness at a identification parade held on 3.7.99. On 14.12.99, Murgesh was arrested by Margao police and the Investigating Officer

secured his custody. Upon Interrogation, Murgesh claimed to have sold gold ornaments to one Shivshankar, a goldsmith at Dharwad. At the instance of accused Murgesh, articles were seized from the said goldsmith. The Investigating Officer had also caused Murgesh to be identified at Test identification parade held on 4.1.2000.. He then filed supplementary chargesheet in respect of accused Murgesh.

5. After first chargesheet was filed, the trial against first four respondents had commenced, upon commitment of the case by the learned Judicial Magistrate, First Class, Sanguem. The charge of offence punishable under Section 395 read with Section 397 of the Penal Code was framed against four accused person, who pleaded not guilty. On 25.10.99, after the supplementary chargesheet was filed, accused Murgesh was also charged of the offence punishable under Section 395 read with Section 397 of the Penal Code on 19.1.2000 vide Exh.94. By this date evidence of as many as 21 prosecution witnesses had been recorded. The witnesses, who had been already examined, were recalled for further examination and cross-examination. After completion of recording of evidence, all the accused were examined under Section 313 of Criminal Procedure Code. After considering the evidence tendered in the light of arguments advanced, the learned Illrd Assistant Session Judge, South Goa, Margao held that the guilt of all the accused person, was not proved and, therefore, proceeded to acquit them. Aggrieved thereby the State has preferred this appeal.

6. We have heard Public Prosecutor Ms Winnie Coutinho for the State, Advocate P. P. Singh for the respondent Nos. 1 and 4, Advocate T. George John for the respondent No. 2, and Advocate Asha Dessai for the respondent No. 3. The respondent No. 5 is reported to be in jail in some other crime. Though served with notice of the appeal, he has neither cared to engage an Advocate nor has sought any legal aid. With the help of all the learned Counsel, we have gone through the entire record of the trial. In his elaborate judgment, the learned Assistant Session Judge has concluded that the prosecution proved that on 23.5.99 between 7.30 and 8.30 p.m., a dacoity had taken place at the house of the Kunda Upadhye. He however, held that complicity of the respondents in the said dacoity was not proved. The learned Public Prosecutor submitted that the learned Assistant

Session Judge was in error in not believing the evidence of P.W.1, Kunda Upadhye and P.W.2 Pandurang Upadhye, who were injured eye-witnesses, and who had identified the respondents as the dacoits, who had plundered their home. She submitted that the learned trial Judge ought to have also believed the P.W.21, Archana Chavan, who had also witnessed the incident in part. She submitted that the articles stolen from the house of the complainant, were recovered either from the respondents themselves or at the instance of the respondent from others. These articles were duly identified and, therefore, the learned Assistant Session Judge should have believed even this part of the evidence, which would clearly connect the respondents to the crime. She, therefore, submitted that the learned Assistant Session Judge ought to have convicted the respondents.

7. We would first go to the evidence relating to discovery of various articles at either the instance of and from the respondents, or at their instance but from others, before going to the eye-witnesses' account of the incident. Respondent No. 1 was arrested on 28.6.99 by P.W.33, Investigating Officer, P.I. Mohan Naik. It may be useful to recall that P.I. Mohan Naik, suspected the complicity of respondent Anil Jacob because he had been informed by P.S.I. Collem that on 25.5.99, when the P.S.I. was proceeding from Collem to Margao, he had spotted near the MRF factory, Anil Jacob, who had similar modus operandi. Anil Jacob was to appear in two sessions cases bearing No. 15/98 and 37/99 in the Sessions Court at Margao. According to Investigating Officer, Anil was absent in the Court on 1.6.99 and 14.6.99. P.W.23, Borges, who is working as Manager of Hotel Naaz in Khareband Road stated that the accused No. 1 booked a room in his hotel from 28.6.99, but came with police on 30.6.99. P.I. Mohan Naik, P.W.33, stated that on 30.6.99, Anil Jacob produced one Titan ladies wrist watch, one brass statute of Lord Ganesh and a metallic ring, which were seized in presence of panchas Minguel Pereira and Anthony D'Costa, one of whom, Minguel, has been examined as P.W.6. Further evidence about seizure of hotel register on 14.7.99 does not receive corroboration from P.W.13, Agnelo, who turned hostile.

8. P.W.33, P.I. Mohan Naik further states that upon learning of involvement of accused Henrique Kadam and Mohammad Ali, they were apprehended at Shapur Ponda and in presence of P.W.10, Farookh Mulla. Certain articles were seized

from them vide panchanamas Exh.10/A and Exh.10/B. P.W.10 Farookh proved these panchanamas drawn up between 8 and 8.50 a.m. From accused Henrique, an idol of Goddess Saraswati, and a silver anklet and a copper ring were seized. He further stated that from Mohammad Ali, a steel ring and an idol of Lord Vithoba was seized. As far as the accused No. 3 Henrique is concerned, witness states that the articles were produced by the accused from his pocket !

9. The learned Counsel for the accused rightly submitted that this evidence is contrived. First, these articles are not stated in the FIR to have been stolen and presumably in the first statements of the witnesses, since P.W.33, P.I. Mohan Naik states that in the supplementary statement of P.W.1 Kunda, she stated about these articles being lost. Secondly, all these articles are in fact not valuable, since the idols are of brass and other articles are of copper/steel, except an anklet, which is shown to be worth Rs. 200/-. Thirdly, it is incredible that the accused, who are alleged to be history sheeters, having a modus operandi, would be carrying on their persons, a month after the incident, these worthless articles which could connect them to the crime. Fourthly, the Investigating Officer seems to suggest that while distributing the booty, the accused even shared idols of deities equally, without realising that all the three accused are not shown to be idol worshipers. At least from their names they appear non-Hindus and therefore, could not have any fascination for the idols. The idols are not shown to have any antique value. Therefore, it seems more probable that the Investigating Officer contrived of showing the seizures of worthless articles by picking them up from complainant's house subsequently. Consequently, their identification by P.W.1, Kunda is meaningless. This contrivance by the Investigating Officer would certainly cast a shadow of doubt on fairness of the investigation carried out by P.W.33, Investigating Officer, Mohan Naik.

10. The learned Public Prosecutor submitted that recovery of idols from the accused persons need not be discarded merely because it may appear improbable that the respondents would carry incriminating articles on their person long after the incident. In view of the seriousness with which the learned Public Prosecutor made this submission, to rule out suspicions, we called for the case diary. The learned Public Prosecutor made copy of diary with the Dy.S.P. available

for our perusal. Far from dispelling doubts about the recovery of idols, the case diaries reinforce the possibility that these recoveries could be a part of attempt to create, and not collect, evidence. It may be recalled that in the first report by P.W.1, Kunda Exh. P.W.1/A, there is no reference to loss of these idols. Kunda is shown to have disclosed loss of these articles in her statement purported to have been recorded on 28.5.99. A look at the case diaries would disclose the following facts as to their despatch to higher officer in the same town-Ponda.

Casediary No.

Date

O.W.No. and date of despatch

InwardNo. and date of receipt

Nil.

24.5.99

PondaPolice Station O.W. No. 4888, dated 26.5.99

S.D.P.O.Ponda, I.W. No. 2992, dated 26.5.99

1)

25.5.99

PondaPolice Station O.W. No. 5216, dated 7.6.99

S.D.P.O.Ponda, I.W. No. 3110/99, dated 7.6.99

2)

27.5.99

PondaPolice Station O.W. No. 5217, dated 7.6.99

S.D.P.O.Ponda, I.W. No. 3109/99, dated 7.6.99

3)

28.5.99

PondaPolice Station O.W. No. 6040, dated 2.7.99

S.D.P.O.Ponda, I.W. No. 3667, dated 2.7.99

4)

29.5.99

PondaPolice Station O.W. No. 6075, dated 3.7.99

S.D.P.O.Ponda, I.W. No. 3667, dated 7.7.99

5)

01.06.99

PondaPolice Station O.W. No. 6064, dated 3.7.99

S.D.P.O.Ponda, I.W. No. 3628/99, dated 7.7.99

6)

7.6.99

PondaPolice Station O.W. No. 6065, dated 3.7.99

S.D.P.O.Ponda, I.W. No. 3627/99 dated 7.7.99

7)

9.6.99

PondaPolice Station O.W. No. 6066, dated 3.7.99

S.D.P.O.Ponda, I.W. No. 3626, dated 7.7.99

8)

10.6.99

PondaPolice Station O.W. No. 6067, dated 3.7.99

S.D.P.O.Ponda, I.W. No. 3625/99 dated 7.7.99

9)

13.6.99

PondaPolice Station O.W. No. 6068, dated 3.7.99

S.D.P.O.Ponda, I.W. No. 3624/99 dated 7.7.99

10)

14.6.99

PondaPolice Station O.W. No. 6069, dated 3.7.99

S.D.P.O.Ponda, I.W. No. 3623/99 dated 7.7.99

11)

18.6.99

PondaPolice

S.D.P.O.Ponda,

StationO.W. No. 6070, dated 3.7.99

I.W. No. 3622, dated 7.7.99

12)

20.6.99

PondaPolice Station O.W. No. 6071, dated 3.7.99

S.D.P.O.Ponda, I.W. No. 3621/99, dated 7.7.99

13)

24.6.99

PondaPolice Station O.W. No. 6072, dated 3.7.99

S.D.P.O.Ponda, I.W. No. 3620/99 dated 7.7.99

14)

28.6.99

PondaPolice Station O.W. No. 6073, dated 3.7.99

S.D.P.O.Ponda, I.W. No. 3669/99 dated 7.7.99

15)

29.6.99

PondaPolice Station O.W. No. 6074, dated 3.7.99

S.D.P.O.Ponda, I.W. No. 3668/99, dated 7.7.99

16)

30.6.99

PondaPolice Station O.W. No. 6450, dated 13.7.99

S.D.P.O.Ponda, I.W. No. 3933, dated 15.7.99

11. It is a strange coincidence that case diary relating to Kunda's supplementary statement was despatched to the superior on 2.7.99 after the recoveries were effected on 29.6.99 & 30.6.99. No diary was forwarded to the Sub Divisional Police Officer from 7.6.99 to 2.7.99, when most of the allegedly incriminating evidence

was collected in the end of June 99.

12. Section 172 of the Code of Criminal Procedure requires a police officer to enter his proceedings in a diary day by day. It also empowers a Criminal Court to look into diaries, not as evidence, but to aid it in enquiry or trial. Object of requiring a diary to be maintained day by day is obviously to avoid concoction of evidence, or changing chronology to suit investigation. Every authority whose actions have a potential of jeopardising liberty of a citizen must ensure a transparency in its actions by scrupulously following requirement to keep a record of such activities. The chronology of despatch of diaries creates a doubt about objectivity in investigation.

13. According to the prosecution the respondent No. 4, Abdul Rahiman had purchased car No. GDC 3363 from the booty received. His vendor P.W.15 Deepak, who was not the owner of the car, however, stated that he had received the price about 15-20 days prior to 24.5.99 i.e. before the dacoity. He rules out the case of car having been purchased from the booty. It is, therefore, not necessary to go to evidence of P.W.16, Shaikh Babu and P.W.17, Sayyed Hasan in respect of this seizure. The owner of this car, one Deelip Naik, is not at all examined. These recoveries cast a shadow of doubt on the integrity of the investigation itself, creating a possibility that for whatever reasons, when investigation did not make headway, an easy option of roping in history sheeters to solve the crime was chosen, recoveries were shown and witnesses were made to identify the history sheeters so arrested.

14. Reliance by the learned Public Prosecutor on judgment of Apex Court in State of Karnataka v. David Rozario reported at 2002 AIR SCW 3798 is unhelpful. It is not the case here that miscreants had left valuables and picked up articles which were worthless. If the respondents have a modus operandi and are history sheeters, it makes no sense that they would pick up brass idols and retain them for a month. The learned Assistant Sessions Judge, therefore, rightly rejected this evidence.

15. This takes us to the identification of respondents by P.W.1 Kunda, P.W.2 Pandurang and P.W.21 Archana. P.W.1 Kunda identified accused Nos. 2 & 4 alone

in the Court as also at the test identification parade. P.W.2 Pandurang identified accused Nos. 1,3,4 & 5 before the Court, but all 5 at the identification parades. P.W.21 Archana identified accused 1 to 4 before the Court as also at the parade.

16. The learned Public Prosecutor vehemently contended that identifications of respondents by victims should not be lightly discarded, particularly because injured eye witnesses are unlikely to identify wrong persons. For this purpose, she relied on a judgment in Appabhai v. State of Gujarat reported at : 1988 CriLJ848 . It was a case of murder as a fallout of political rivalry. Cases and counter cases were already pending against the parties. While one of the victims died, the other, Devji, had suffered 9 injuries on his person and he had to be treated as indoor patient in Civil Hospital for a long time. In this context in para 13, the Apex Court observed, as regards identification by Devji that, 'It must not be forgotten that he was a victim of the assault. Fortunately he has survived.' The Court therefore, accepted his version.

17. There are two striking dissimilarities in the case at hand. First, the assailants were total strangers and not political rivals as in Appabhai's case. Secondly, injuries allegedly suffered by P.W. Nos. 1 & 2 are not serious, though even these injuries could be questioned in the background of absence of medical record of any public hospital and the exaggerative tendency of P.W.2 Pandurang. Therefore, simply because these witnesses had some injuries, their word about identification of the respondents cannot be accepted as gospel, at its face value and would require careful scrutiny.

18. Same holds good about observations about identification in judgment in Somappa v. State of Mysore reported at : 1979 CriLJ1358 on which the learned Public Prosecutor relied. There too, not only there was enmity between the parties, some of them were even convicted. All of them were kinsmen and not strangers.

19. The learned Public Prosecutor had also relied on judgment of this Court in Ankush Rathod v. State of Maharashtra reported at 2008 All M R (Cri.) 496 to support her contention that infirmities in a test identification parade, in themselves, cannot erase evidence of identification of culprits. In that case the witness was victim of gang rape. It may be seen that weight to be attached to such

identification would be a matter of fact, depending on evidence tendered in each case.

20. The learned Public Prosecutor submitted that apart from identification at test identification parade, the witnesses had identified miscreants in the Court too. This identification was substantive evidence, and, in view of judgment in Prashant Tembhornikar v. State of Maharashtra reported in 2008 All M R (Cri.) 390, this evidence should be accepted. In that case a test identification parade was not at all held. But even that was not a case of assault by total strangers. A quarrel broke out due to mismanagement in a marriage ceremony and then the accused persons are alleged to have assaulted the victim, who tried to pacify. In any case, the question whether a Court should accept evidence of identification, is one of fact and would depend on evidence tendered in each case.

21. It may be recalled that only P.W.1 Kunda had witnessed the entire incident from the beginning to end and had the maximum opportunity to see the miscreants. Yet, at the test identification parade, as also in the Court, she identified only respondent Nos. 2 and 4. P.W. 21, Archana identified the accused Nos. 1, 2, 3 & 4. However, Kunda's husband P.W.2, Pandurang identified respondent Nos. 1 to 4. In the second identification parade, both P.W. Nos. 1 & 2 identified the accused No. 5. Probably realising this discrepancy, P.W.2, Pandurang stated in para 2 of his deposition at Exh.12 that Kunda had fallen unconscious, though she herself did not make such a claim. On the other hand, in para 2 of her deposition she gave a graphic account of the incident and stated that she untied her husband after miscreants left. P.W.2 Pandurang gave a highly exaggerated account of the incident, which is not corroborated by his wife. While saying so, he forgot that he had claimed that in fact he was tied up by miscreants and it was Kunda, who untied him. An attempt was made to cover up failure to identify all by P.W.1, Kunda by saying that miscreants had covered their faces and were covering/uncovering their faces, in para 2 & 17 of deposition of P.W.2, Pandurang. Kunda does not state so. This depicts bankruptcy of imaginative faculties of whosoever cooked up such a story. If persons cover their faces, in order that their identities should not be known, why would they uncover their faces ?

22. There is no reason why test identification parades were not held in jail or sub-jail. This would have reduced doubts about credibility of the parades. In view of all this, the learned Assistant Session Judge cannot be said to have erred in holding that evidence of identification was not reliable.

23. To sum up, we hold that the learned Assistant Session Judge rightly discarded the evidence pertaining to recoveries as also identification of miscreants by the witnesses. The view taken by the learned Assistant Session Judge far from being perverse or untenable, is possibly the only view that could have been taken. We, therefore, see no merit in the appeal. The appeal is, therefore, dismissed. The bail bonds if any, furnished by the respondents, stands canceled.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com