

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO.1100 OF 2018

1. Sunil Vishnu Mukane,
2. Dilip Vishnu Pawar,
3. Sitaram Vasant Sawant, &
4. Tukaram Vitthal Jadhav, Appellants
Versus
The State of Maharashtra Respondent

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WITH
INTERIM APPLICATION NO.2452 OF 2022
IN
CRIMINAL APPEAL NO.1100 OF 2018

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WITH
INTERIM APPLICATION NO.1525 OF 2018
IN
CRIMINAL APPEAL NO.1100 OF 2018

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WITH
INTERIM APPLICATION NO.331 OF 2019
IN
CRIMINAL APPEAL NO.1100 OF 2018

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WITH
INTERIM APPLICATION NO.1005 OF 2020
IN
CRIMINAL APPEAL NO.1100 OF 2018

Mr. Aashish Satpute, Advocate (appointed) a/w. Vivek N. Arote, for
the Appellants.

Smt. M.R. Tidke, APP for the Respondent-State.

CORAM : SARANG V. KOTWAL, J.

DATE : 24th AUGUST, 2022

ORAL JUDGMENT :

1. The appellants have challenged the judgment and order dated 10.8.2018 passed by the Additional Sessions Judge, Mangaon, Raigad in Sessions Case No.27/2016. By the impugned judgment and order, the appellants, who are the original accused Nos.1 to 4, were convicted for commission of the offence punishable under Section 395 of the Indian Penal Code and were sentenced to suffer RI for ten years and to pay fine of Rs.50,000/- each and in default to suffer RI for one year. They were granted set-off under Section 428 of Cr.P.C..

2. Heard Shri Aashish Satpute, learned Advocate appointed for the appellants and Smt. M.R. Tidke, learned APP for the State.

3. The prosecution case is that PW-1 Ravindra Lad and

PW-2 Ankit Dasure were the Supervisors of a Poultry Farm. They had supplied chickens to their customers and had got money. They were carrying amount of Rs.4 Lakhs. They were traveling on the highway around midnight on 11.12.2015. Suddenly they were intercepted by the accused. One of the accused gave a blow by stick because of which both of them fell down. The other accused joined the first accused and they were assaulted with sticks. The bag containing more than Rs.4 Lakhs was taken away. The victims then went to one Vilas Bait and informed the incident. All of them along with others then went to Kolad Police Station. C.R. No.239/2015 was registered at Roha police station under Section 395 of IPC. The investigation was carried out. All the appellants-accused were arrested on 17.12.2015. Apart from the appellants, there was one more offender who was below 18 years of age. His trial was separated. The investigation was carried out. During investigation, it is the prosecution case that the appellants were identified in the test identification parade held in the Tahsildar office at Roha on 18.1.2016. It is also the prosecution case that during investigation some cash amount was recovered at the instance of different appellants. The wives of the appellants produced some ornaments

which were purchased using the amount involved in this offence. After this recovery, the investigation was continued. Statements of witnesses were recorded and at the conclusion of the investigation, charge-sheet was filed. The case was committed to the court of Sessions. The appellants were the original accused Nos.1 to 4.

4. During trial, the prosecution examined twelve witnesses including two victims, the pancha for recovery, the Tahsildar who had conducted the test identification parade and the investigating officers. The defence of the appellants was of total denial. At the conclusion of the trial, learned Judge believed the evidence of identification parade and of recovery. He convicted and sentenced the appellants as mentioned earlier.

5. The evidence led by the prosecution in brief is as follows:

(i) PW-1 Ravindra Lad was the first informant. He has deposed that he was working as a Supervisor with Modern Poultry at Chondhi, Taluka-Alibag. The business of that poultry farm was to supply small chicks to poultries and after growth of those chicks into chickens they were selling them to the traders and in this

process they used to earn profit. The cash collected from the traders used to be deposited in the company situated at Kihim, Taluka-Alibag. On 10.10.2015, they sold their chickens to Aayan Traders and Harshad Traders. They paid Rs.2,65,000/- and Rs.2,20,000/- respectively. Thus, the first informant-PW.1 was having amount of Rs.4,85,000/-. He was accompanied by his colleague Anikt Dasure (PW-2). They were travelling on a motorcycle bearing No.MH-06-BK-8525. They were proceeding towards Chondhi, Taluka-Alibag from Baitwadi. At around 1.00 a.m. on 11.12.2015, they had reached a spot near Dolvahal Electric Project. The speed of their motorcycle was slightly slow because they were on a turn. Suddenly one person rushed towards them with a stick. He assaulted them by stick. PW-1 lost control of his motorcycle and both of them fell down. In the meantime, four more persons came on the spot with sticks. All the five persons assaulted PWs-1 & 2 with sticks. They took away the bag forcibly which was with PW-2 Ankit. Thus, they were robbed of the cash amount of Rs.4,85,000/- and Ankit's mobile handset of TATA Indicom company. PWs-1 & 2 went to Baitwadi by walk. The motorcycle was lying at the spot. According to PW-1 he had

suffered injury over his right arm and PW-2 had suffered injury over his legs. They met Vilas Bait at Baitwadi. He was told about the incident. Then he along with ten other persons accompanied PWs-1 & 2 to Kolad police station. They lodged FIR. The FIR is produced on record at Exhibit-21. The FIR was actually registered at Roha police station at 6.30 a.m. on 11.12.2015. On 18.1.2016, PWs-1 & 2 were called at the Tahsildar's office at Roha for identification of the accused. There were twenty persons in one room. According to PW-1, he identified four persons in the presence of Tahisldar and two panchas. Those four persons were the accused Nos.1 to 4 before the Court as identified by him in the Court as well. He was told by the police that they had seized cash of Rs.3,81,000/- and some gold and silver ornaments from the accused. He identified the cell-phone of PW-2 produced before the Court.

He was cross-examined on behalf of the accused. In the cross-examination he was cross-examined as to how the amount was in their possession. According to him, he had prepared three copies of delivery challen and on the delivery challen itself the receipt of amount was mentioned. A copy of the delivery challen

was given to the police, but, it is not produced on record. He deposed that because of the stick blow, he suffered injury on his right shoulder and PW-2 suffered injury on his leg because of fall from motorcycle. After they fell down, the accused assaulted PW-1 on his leg with sticks. He could not explain why his FIR did not mention that his own bag was taken away by the accused. He also could not explain as to why the FIR did not mention that they narrated the incident to Vilas Bait. They reached Kolad police station at around 1.45 a.m.. He accepted that the police did not record his statement immediately. They went to the spot of incident at around 2.00 a.m. and they returned to police station in that night itself. PWs-1 & 2 were referred for medical examination and Medical Officer treated them. He has further deposed in his cross-examination that the police had informed him to remain present for identification parade on 14.1.2016. PWs-1 & 2 accordingly had gone to Tahisildar's office on that day. However, test identification parade was not held on 14.1.2016 and they were called again on 18.1.2016 when the test identification parade was held. He admitted that the Tahsildar's office and Roha police station are situated in the same building. He denied the suggestion

that on 14.1.2016 the appellants were brought to the Tahsildar's office. He has further deposed that all the four accused were kept in one row of sixteen dummies. He denied the suggestion that after arrest of the accused they were shown to him and PW-2 by the police and even on 14.1.2016 they were shown and, therefore, he identified the appellants on 18.1.2016. In the FIR, there are no descriptions of the accused.

(ii) PW-2 Ankit Dasure was accompanying PW-1 Ravindra during the incident. He has deposed in exactly the same manner as is deposed by PW-1. However, the crucial difference is that PW-2 has deposed that there were four persons, they were initially assaulted by one person and three more joined him. He had not spoken about five persons. He has further deposed that on 18.1.2016 the police called both of them for test identification parade where he identified accused Nos.1 to 4 who were present before the Court.

In the cross-examination he deposed that the receipts issued by Aayan Traders and Harshad Traders were also kept in the bag along with cash and, therefore, the receipts were not available.

The first person who assaulted them was wearing black clothes. He has given description of four persons approximately to the police. Those four persons assaulted him by sticks on his back and then they snatched his bag and ran away. Because of the assault, he suffered blunt trauma on his back. He could not explain as to why his police statement did not mention that both of them had gone to Vilas Bait and had narrated the incident to him and then all of them had gone to Kolad police station. He deposed that the motorcycle was lying at the spot and both of them went to Vilas Bait by running. He has also deposed that both of them were referred to Medical Officer at Roha at 9.30 a.m. He had taken PW-2's X-ray. Initially identification parade was to be held on 14.1.2016. They had gone to Tahsildar's office at Roha on that day. He also admitted that the Tahsildar's office and the police station were situated in the same building. He pleaded ignorance as to whether all the four accused were brought to Tahsildar's office on 14.1.2016 from Alibag jail. After that he was asked to remain present on 18.1.2016 when the test identification parade was held. All the accused were kept in single row of sixteen dummies. Significantly he was not shown his own mobile phone in the Court.

(iii) PW-3 Mahesh Mohite was a pancha in whose presence father of the other accused, who had not faced the trial along with the appellants, had produced some cash amount. Therefore, his evidence is not relevant for the present appellants.

(iv) PW-4 Subhash Dahinakar was a pancha for the spot panchnama. The spot panchnama is produced on record at Exhibit-32. The motorcycle was lying at the spot and it was seized. The spot panchnama does not show that there was any street lights available or there was any other source of light at the spot. The spot was surrounded by bushes, trees and hilly region.

(v) PW-5 Rohan Patil was an important witness but he has turned hostile. He is not a reliable witness. He was a pancha to three panchnamas wherein the wives of the accused-appellant Nos.1,3 & 4 had produced their ornaments. According to the prosecution case, those ornaments were bought with the cash amount which was stolen by the appellants.

(vi) PW-6 Kishor Jain was a jeweller. He has deposed that on 15.12.2015 accused No.1 and his wife had come to his shop and they had purchased golden tops and ear-chain worth Rs.30,500/-.

He produced the receipt on record at Exhibit-39. On 16.12.2015, the accused No.4 and his wife purchased jewellery. That receipt is produced on record at Exhibit-40.

In the cross-examination, he admitted that the receipt does bear the details of sales-tax and VAT.

(vii) PW-7 Pinkesh Jain was another jeweller from whose shop appellant No.1 and his wife had purchased a silver *painjan* on 15.12.2015. He also admitted that he had not mentioned the details of sales tax and VAT on the receipt produced at Exhibit-42 in that connection.

(viii) PW-8 Waman Kadam was an important witness. He initially did not support the prosecution case and, therefore, learned APP with permission of the Court cross-examined him. He produced Exhibits-46, 47, 48 & 49 on record. These were the memorandum statements given by different accused pursuant to which different cash amounts and articles were recovered at the instance of those accused. Accused No.2 led the police and panchas to a farm-house of his grand-father. He removed a box buried under a tree. There was cash amount of Rs.53,500/-. In his

memorandum statement, he had not mentioned that particular place where he had concealed this cash amount. Immediately after this recovery, the appellant No.3 led to another farm-house. Another box was buried near the bushes. It was recovered and it was found to contain Rs.45,000/-. Immediately after that accused No.4 led the police party to Adivasiwadi and took them to his own house. The container was buried under-ground near his house. It was taken out. It was found to contain Rs.1,07,000/-. After that appellant No.1 led all of them to his sister's hut and a box which was kept in a corner was recovered. It was found to contain Rs.1,43,800/-. The memorandum statements and recovery panchnamas showed that the memorandum statements were recorded from 10.50 a.m. onwards on 19.12.2015. They were recorded one after the other. Then all of them were kept in the same jeep and thereafter the cash amount kept in the boxes was recovered from different places upto around 5.45 p.m.. During all this period, all the accused, panchas and police were together. The prosecution chose to examine only one of the panchas Waman Kadam. He had turned hostile. The other pancha Chandrakant Sanap was not examined and no explanation was offered as to why

he was not examined. No other witnesses from the farm house or the hut or the people around that area from where the boxes were recovered were examined. None of the memorandum statements mentions the places where the appellants had actually concealed those boxes.

(ix) PW-9 Vikram Jain was another jeweler from whom appellant No.1 and his wife had purchased gold-rings worth Rs.4,000/- on 15.12.2015.

(x) PW-11 Rahul Sakpal was a pancha for panchnamas Exhibits-61, 62 and 63. Under those panchnamas, the wives of accused Nos.3, 4 & 5 respectively produced golden ornaments which they had purportedly purchased from various jewellers on 15th & 16th December, 2015. The wives of these appellants had simply produced those articles in the police station and those were seized under panchnama in the presence of this witness.

(xi) PW-12 was the Tahsildar Amit Munde. The test identification parade memo was produced on record vide Exhibit-65 because the prosecution had made application for producing the test identification parade report under the provisions of Section

291-A of Cr.PC.. After the report was produced on record the accused asked for the Tahsildar's cross-examination. Their application was allowed and PW-12 Amit Munde was cross-examined on behalf of the accused. In the cross-examination he deposed that the dummies were brought by the police. He also admitted that the police station and the Tahsildar's office were situated in the same building. The witnesses were sitting in the tenancy room whereas the police and the dummies were sitting in election room. There was a passage in between two rooms. He denied the suggestion that on 14.1.2016 the accused were brought for T.I. parade and at that time the witnesses were shown the accused and, therefore, they could identify the accused during test identification parade held on 18.1.2016.

(xii) PW-10 PI Sanjay Dhumal is the investigating officer. He has deposed about the investigation carried out by him. Spot panchnama was conducted. He then arrested all the accused. Initially Rs.22,800/- were seized from father of the accused who had not faced the trial with the appellants. On 19.12.2015, the cash was recovered at the instance of the appellants as mentioned earlier. The mobile phone was recovered at the same time when

cash was recovered at the instance of appellant No.1. Apart from cash some ornaments were recovered at the instance of the appellant No.1. He then requested the Tahsildar to conduct the test identification parade. At the conclusion of the investigation he had filed the charge-sheet. He denied the suggestion that the accused were taken for test identification parade on 14.1.2016 and the witnesses too were called on that day.

. **This in short is the prosecution evidence.**

6. **Learned counsel for the appellants submitted that identification of the appellants is not proved by the prosecution. There was no light at the spot of incident. It was on a highway. PWs-1 & 2 could not have seen the features of the accused. Their version is not supported by any medical evidence. No such evidence is produced on record to show that they had suffered any injury. There is no explanation offered as to why the doctor who had treated PWs-1 & 2 was not examined. Vilas Bait, who is an important witness as PWs-1 & 2 had gone to him at the first instance, is not examined and, therefore, adverse inference is required to be drawn. The FIR was registered in the morning whereas the police had visited the place of incident before**

registration of the FIR. The test identification parade was not held as per the requirement of the Criminal Manual. Only sixteen dummies were brought whereas the rule requires that for every person there has to be minimum six dummies and not more than two accused should be placed in the parade at the same time. Whereas in the present case all the accused were asked to stand in one row at the same time for the same parade. The other evidence of recovery is not reliable. The pancha has turned hostile. The evidence of the investigating officer could not be relied on in the background of the fact that he was interested in proving the prosecution case and his evidence shows that the investigation was not proper. Recovery was made from the places which were accessible to others and the places were not in exclusive control or possession of the appellants. In any case, the recovered cash amount could not be connected with the offence. As far as the ornaments are concerned, they were of the wives of the appellants and there is nothing to show that those have any connection with the offence. The wives' statements cannot be read in evidence. They were not examined as witnesses. The evidence of the jewelers only show that some ornaments were purchased by different

appellants but that by itself does not connect the appellants with the crime.

7. Learned APP, on the other hand, submitted that PWs-1 & 2 had ample opportunity to see the appellants and, therefore, their identification can be safely relied on. She further submitted that the mobile handset was also recovered at the instance of accused No.1, which is an incriminating circumstance. Apart from that the golden ornaments were seized. They were produced by wives of the appellants. Those were purchased from the money taken away in the offence by the accused-appellants. She submitted that there is sufficient material in this case.

8. I have considered these submissions. Though learned counsel for the appellant tried to canvass argument suggesting that the incident has not taken place, it is difficult to accept such argument. No reason is brought on record to show as to why PWs-1 & 2 would concoct a false story. The motorcycle was lying at the spot and the police were immediately informed in the night. Therefore, though there is no medical evidence supporting the versions of PWs-1 & 2, that does not mean that the incident has not taken place.

9. The crucial question in this case is about the identity of the accused. In that behalf in my opinion, the prosecution has miserably failed to establish that the appellants were the actual offenders.

10. As discussed hereinabove, the evidence shows that the incident had taken place at a secluded spot of highway at 1.00 a.m.. There were no lights anywhere around. The motorcycle had fallen down. The description of the accused was not mentioned in the FIR. PW-1 has also not clearly answered as to what description he had given of the accused. The prosecution has failed to prove that the witnesses had sufficient opportunity to observe the features of the accused in sufficient light.

11. Though the prosecution case is that the appellants were identified in the test identification parade, even that evidence is doubtful. The witnesses i.e. PWs-1 & 2 have deposed that they were called at the Tahsildar's office on 14.1.2016. In spite of that PW-10 and PW-12 have not deposed about the date of 14.1.2016. They have deliberately kept it vague. Therefore, there is a strong possibility that on that day the prosecution witnesses had an opportunity to see the accused. The prosecution has to rule out

that possibility, which is not done. All the witnesses have admitted that the Tahsildar's office and the police station were situated in the same premises and, therefore, it was all the more necessary for the prosecution to have explained that all the precautions were taken so that the accused were concealed from the witnesses not only on 18.1.2016 but also on 14.1.2016.

12. PW-12 in the cross-examination has admitted that the dummies were brought by the police. In this background it was also necessary for the prosecution to have led the evidence to show that the witnesses i.e. PW-1 & PW-2 had no opportunity to see the dummies. In this particular case, it was not sufficient to conceal the accused but if the witnesses had an opportunity to see the dummies before the test identification parade; then it was very easy to identify the accused. This precaution is not shown to have been taken by the investigating agency. PW-12 has admitted that the witnesses were sitting in one room and the accused and the dummies were sitting in the other room and there was a passage in between. However, no further evidence is led to show that it was not possible to see the persons in other room while sitting in one room. Apart from that, as rightly submitted by learned counsel for

the appellants sixteen dummies were asked to take part in one single identification parade for four accused. All these factors cumulatively leads to a reasonable conclusion that identification of the accused is extremely doubtful and, therefore, benefit in that behalf must go to the accused.

13. Other equally important circumstance is of recovery of ornaments and cash amount. As mentioned earlier, the ornaments were produced by the wives of the appellants. They were not examined and, therefore, their statements to the police in presence of panchas cannot be read in evidence. The jewellers have only deposed that the ornaments were purchased by different accused and their wives on 15th & 16th December, 2015. Significantly neither PW-6 Kishor Jain nor PW-7 Pinkesh Jain were shown the articles which were produced by them. Only PW-9 Vikram Jain has identified one golden-ring. Thus recovery of ornaments falls short of the required degree of proof.

14. As far as recovery of cash amount is concerned, PW-8 was the only pancha examined by the prosecution. He had not supported the prosecution case and, therefore, he was cross-examined by the prosecution. In the cross-examination, he spoke

about the memorandum statements and the consequent recovery. Thus, he is not a reliable witness at all. The other pancha Chandrakant Sanap is not examined and no explanation is offered as to why he was not examined. The investigating officer's evidence in respect of these recoveries of cash amount is vague. In none of the statements, the accused-appellants had mentioned the place where they had concealed the cash amount. All the accused were taken together for effecting the recoveries. Their statements were recorded one after the another. They were taken in the same jeep to effect recovery. Some of the places were farm-houses and a hut belonging to other persons and hence were accessible to others. No other supporting evidence is led to show that only the accused had access to those private places. Such recoveries could have been accepted if there was an independent evidence which was reliable.

15. The pancha PW-8 Waman Kadam has stated that when he was called to the police station that time the police told them to proceed towards the place where the incident had taken place. Accordingly the police took them towards the place in order to find the articles; those were kept there. This part of his evidence makes the police investigation doubtful about recovery of the cash

amount. After this cross-examination, he has given all the favourable answers to the prosecution in answers to the leading questions. In the cross-examination on behalf of the accused, he admitted that when he and other panchas went to police station, that time the police told them as to which articles were to be seized and that the police themselves informed them as to which places were to be visited. This also indicates that the recovery was made at the instance of the accused but the police already knew the places from where the recovery was to be effected. There was no further re-examination on behalf of the prosecution to clarify this.

16. The evidence of the investigating officer is not satisfactory. He has tried to cover up lapses in arranging the test identification parade by the police and, therefore, it is not safe to rely upon his evidence in respect of recovery of cash amount.

17. As discussed earlier, the pancha is also not reliable. Therefore, it is not safe to rely on such type of evidence which is the only other evidence apart from doubtful identification; available with the prosecution against the appellants.

18. In this particular case in view of these infirmities, benefit of doubt must go to the accused. There are no other

incriminating circumstances against the appellants.

19. The appellants are in custody since 17.12.2015. Considering the above discussion, the appellants deserve to be acquitted. Hence, the following order :

:: O R D E R ::

- i. The appeal is allowed.
- ii. The impugned judgment and order dated 10.8.2018 passed by the Additional Sessions Judge, Mangaon, Raigad in Sessions Case No.27/2016, is set aside.
- iii. The appellants are acquitted from the charges faced by them in Sessions Case No.27/2016 before the Additional Sessions Judge, Mangaon, Raigad. The appellants shall be released from jail, if not required in any other case.
- iv. Criminal Appeal is disposed of in aforesaid terms. With disposal of the appeal, all the connected applications are also disposed of.

(SARANG V. KOTWAL, J.)