

Bombay High Court

Nagpur Bench: Nagpur vs Unknown on 20 November, 2008

Bench: R. C. Chavan

1

IN THE HIGH COURT OF JUDICATURE AT BOMBAY:

NAGPUR BENCH: NAGPUR

CRIMINAL APPEAL NO.617 OF 2006

APPELLANTS:

1] Arun @ Bitu @ Omprakash s/o Dausing Pawar, aged about

22 years

2] Sundar s/o Prasad Pawar, aged about 23 years
Both residents of Gaurkheda, Tahsil Chandur Railway,

District : Amravati.

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RESPONDENT:

The State of Maharashtra, through P.S.O. Kharangana,
Tahsil Arvi, District : Wardha.

Shri R.N. Khare, Advocate for the appellants

Shri Sanjay Doifode, A.P.P. for state

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CORAM: R.C. CHAVAN, J.

DATE : 20.11.2008 ===== ORAL JUDGMENT:

This appeal is directed against conviction recorded by 2nd Ad-hoc Additional Sessions Judge, Wardha under section 395 of the Penal Code and sentence of R.I. for five years and fine of Rs.1000/-

each inflicted upon the appellant, on the following facts:

2] In the night of 2nd February 2006, when the complainant Kunal was in his house along with his family members, his mother heard some noise and woke him up. On her shouts, three thieves who were removing the articles from the house, started running away. Villagers also got up and gave them a chase. One of the thieves allegedly hit P.W. 7 Prabhakar with stick. Since the thieves managed to escape, villagers proceeded by auto-rickshaw towards Police Station Kharangana, but met a police party coming in jeep at T-point [road junction nearby]. They found three thieves going on motor cycle and P.W. 5 Shamrao found that the persons on motorcycles were thieves because one of the thieves was wearing his shawl. Attempts of the police party to stop motorcycle failed in respect of first two motorcycles. Two persons on the third motor cycle managed to run away, appellant no.1 was caught. He was then taken to the police station.

3] On a report of P.W. 1 Kunal an offence was registered and investigation commenced. Kunal's report mentioned V.C.D. Player of Supremo Company valued at Rs.3000/-, one writ wrist watch of Rs.300/-, one black jerkin valued at Rs.200/-, cash of Rs.78200/-, one gold Ekdani valued at Rs.400/- was lost from his house. Upon interrogation the appellant is said to have disclosed the name of accomplices out of the two police managed to arrest appellant no.2. Appellant no.1 made statement to police which led to discovery of V.C.D. Player in field near T-point. Appellant no.2's statement led to discovery of stick. After completion of investigation, the police sent charge sheet. The case was duly committed by the learned Magistrate to the court of Sessions.

4] Learned Judge of the Court of Sessions charged the two appellants of offence punishable under section 395 and 397 of the Penal Code and since they pleaded not guilty, put them to trial, in the course of which the prosecution examined as many as 9 witnesses. Upon consideration of their evidence the learned Additional Sessions Judge acquitted the appellants of offence punishable under section 397 of the Penal Code, but held them guilty of offence punishable under section 395 of Indian Penal Code and convicted and sentenced them as mentioned earlier. Aggrieved thereby the appellants are before this Court.

5] I have heard Advocate Khare, learned counsel for the appellant and learned A.P.P. Mr. Doifode for the state. With the help of both the learned counsel I had gone through entire evidence tendered by the prosecution. Appellants no.1 and 2 were obviously unknown to the complainant as well as the villagers and they had not been subjected to identification parade. P.W. 1 Kunal complainant claimed that the thieves had themselves put on lights at the time of committing theft and therefore he could see their faces in the electric lights which they had put on. His mother P.W. 8 Lilabai however claimed that it was her son who put on lights. She stated that after her son woke up he put on tube-light. Interestingly these things were not there in the statements of these witnesses. P.W. 8 Lilabai had an additional reason for identifying appellant no.1 because he suffered from leucoderma a fact which no other witness mentions.

6] According to P.W. 1 Kunal, P.W. 2 Pralhad, P.W. 5 Shamrao, who gave a chase, they met police party at T-point and at that place, the dacoits were seen decamping on their motorcycles. The learned counsel for the appellant pointed out that it was strange that when the villagers were

proceeding with auto-rickshaw towards police station and met police party coming from opposite side of the same road, the miscreants could also be passing on their motorcycles by the same road, after a gap of time to enable the police party to reach the spot.

He mentioned that it can not be said that the appellant no.1 was caught red-handed as was sought to be submitted by the learned A.P.P., since the appellant no.1 can at best be said to have caught, but without anything in his hand, since no stolen articles was found with him at that time.

7] The appellant no.1 is alleged to have made a disclosure that he had stolen V.C.D. Player from the house of complainant which he had hidden in bushes near the T-point as can be seen from the panchnama of seizure at exhibit 35 and 36. Exhibit 36 specifically shows that the appellant no.1 led police party from police station on a road from, village Sukali to village Bodad. where the complainant resides and asked police party to stop jeep at T-point, presumably the same T-point where the police party had caught the appellants which was about 1 k.m. away from village Bodad. P.W. 2 Pralhad claims to have seen V.C.D. Player at about 8.30 a.m. on next morning in a field i.e. before police party started from the police station at about 9.30 a.m. If the V.C.D. Player was visible to a villager, it is not clear us, why it could be said to have been discovered. Therefore, the evidence of P.W. 3 Ajij, a Panch on the discovery, and P.W. 9 P.S.I. Salve on this point is of no help.

8] P.W. 6 Haridas states about recovery of stick at the instance of appellant no.2 Sundar, vide panchnama exhibit 40 and 41 under section 27 of the Evidence Act. However, P.W. 7 Prabhakar who was allegedly beaten by the stick was categorical that the person who assaulted him by stick was not present in the court. He thus refused to identify the appellant no.2 as author of stick blow given to him. Therefore, seizure does not connect any of the appellants to crime. In view of this except for mere apprehending of appellant no.1 soon after alleged incident there is no evidence which can be said to connect the appellants to the crime. Even if it is presumed that the appellant no.1 was caught near village, no identification parade has been held to identify the appellant no.1 as a person who has barged in house of P.W. 1 Kunal along with others. Theory of P.W. 1 Kunal and his mother P.W. 2 Lilabai about putting on lights is unbelievable as thieves are unlikely to wake up occupants of the house or alert them before committing theft. In view of this as far as appellant no.2 is concerned, there is absolutely no evidence and as far as appellant no.1 is concerned, there is sufficient room to doubt about his involvement in dacoity at the house of P.W. 1 Kunal.

9] The appeal is therefore, allowed. The conviction of the appellants for the offence punishable under section 395 of the Penal Code and the sentence imposed upon them is set aside. They shall be set at liberty if not wanted in any other case.

JUDGE smp.