(1996) 06 BOM CK 0078

Bombay High Court (Goa Bench)

Case No: Criminal Appeals No''s. 44 and 45 of 1994

Subhaya Perumal Pilley and etc.	APPELLANT
Vs	
The State	RESPONDENT

Date of Decision: June 7, 1996

Acts Referred:

- Penal Code, 1860 (IPC) - Section 307, 34, 395, 397

Citation: (1997) BomCR(Cri) 587 : (1997) CriLJ 922

Hon'ble Judges: T.K. Chandrashekhara Das, J; R.M.S. Khandeparkar, J

Bench: Division Bench

Advocate: P.P. Singh, for the Appellant; G.U. Bhobe, Public Prosecutor, for the Respondent

Judgement

Chandrashekhara Das, J.

The two accused in Sessions Case No. 17/90 on the file of the Assistant Sessions Judge, Panaji, file these appeals against the judgment of the learned Assistant Sessions Judge passed on 7th November, 1994, whereby they were convicted u/s 395 read with Section 34 of the Indian Penal Code and sentenced to undergo Rigorous Imprisonment for ten years. They were also sentenced to pay a fine of Rs. 5,000/- each and, in default, to undergo a further period of six months of Rigorous Imprisonment. Accused No. 1 filed Appeal No. 44/94 and accused No. 2 filed Appeal No. 45/94. Since the matter arises out of a common judgment, we propose to dispose of both the appeals by this common judgment.

2. The appellants along with four other accused were charge-sheeted for offences of Sections 395, 397, 307 read with Section 34 of the Indian Penal Code.

3. According to the prosecution, on 25th November, 1989, between 10 and 10.30 a.m. the appellants along with other persons entered in the jewellery shop of P.W. 3, Digambar Raikar, at Mapusa and committed dacoity for stealing the gold ornaments worth Rs. 8.50 lakhs at gun point. According to the prosecution, the accused asked

P.W. 3 for bracelets and after removing them from the show case P.W. 3 showed them to the accused. One of the accused tried the bracelet on his hand and then kept it on the show case. In the meantime, P.W. 3 lowered his head in order to keep the remaining bracelets inside the show case and at that moment accused No. 2, Sunder Pilley, pressed on his temporal region, the pistol with his hand and the said other person pressed one more pistol on the other side of the temporal region and accused No. 1 placed a big knife on the neck of the driver Shivappa who was sitting inside the shop and another person in the gang told him to open the show case or else he would be killed on the spot and after the show case was opened, accused No. 1 came little forward with a bag and at that time no more persons came inside the shop and accused No. 1 told accused No. 2 to go out and bring the vehicle and keep the same near the door of the shop. In the meantime, one accused started collecting the gold ornaments and filling the bag with the same. At that time one Krishna came into the shop. He also was threatened by the accused at gun point. One Shri Shirodkar who came at that time inside the shop also was threatened by the accused. While, in the process of stealing the gold ornaments and putting in the bag, a person, who was holding the pistol fired a shot on the driver Shivappa, but fortunately or unfortunately the said bullet did not hit Shivappa but hit the body of accused No. 1. On occurrence of this unexpected incident at the time of committing dacoity, all the members of the dacoity including the accused, left from the place in a Maruti van bearing No. GDI 6418. Further, the case of the prosecution is that the person, who had hit the bullet was ultimately admitted to the Medical College Hospital and he was identified by the prosecution witnesses. In the course of their investigation police went to Bombay and caught hold of accused No. 2 and from his custody gold ornaments worth Rs. 26,000/- were recovered.

4. As we pointed out earlier, the accused Nos. 1 and 2 were identified by the witnesses, specially P.Ws. 3, 6 and 7, the other accused were not identified, nor were they arrested. They were reported absconding, except accused No. 4. Accused No. 4 was also at the first instance absconding. When the appellants were put on trial and important witnesses were examined, accused No. 4 was apprehended. The trial Court instead of recalling the witnesses already examined, started the trial of the case from the point where the accused No. 4 appeared before the Court. Ultimately, accused Nos. 1, 2 and 4 were convicted. The other accused were reported absconding. All the accused convicted, namely appellants herein and accused No. 4, Joaquim Rodrigues filed appeal before this Court as Criminal Appeal Nos. 10/93, 12/93 and 14/93. These three appeals were disposed of by a common judgment by this Court by judgment dated 12th April, 1994. This Court set aside the judgment of the trial Court and remanded the matter back for adducing evidence and remanded the matter back for adducing evidence as directed by this Court. This Court has directed to recall the witnesses who were already examined before accused No. 4 was booked before the Court and other accused were given opportunity of cross-examining these witnesses further, if necessary. However, except for one

witness, the learned Prosecutor did not choose to examine the witnesses. But, however, the cross-examination was conducted on behalf of the accused at those witnesses who were made available. On appreciation of the evidence the lower Court has acquitted accused No. 4 and convicted the appellants herein as aforesaid.

5. The learned Counsel for the appellants has submitted as far as the appellants are concerned, there was no proper identification of those accused. He submits that in fact no identification parade has been conducted in order of identify the appellants. The identification parade in fact was conducted only to identify accused No. 4. This defect according to him is very fatal to the prosecution. We cannot agree with this submission of the learned Counsel. Even without identification parade there is enough evidence before the Court below that the appellants were properly identified. The appellants were properly identified as pointed out earlier by P.Ws. 3, 6, 7 and 8. Moreover, the injury inflicted on accused No. 1, quoting the words of the lower Court, throws an "indelible mark" on accused No. 2 in order to fasten him with offence. These witnesses have categorically stated that they have identified these appellants. If an accused is identified by cogent and proper evidence by other witnesses who were examined before the Court, normally identification parades are not resorted to. Identification parade is resorted to as part of investigations to identify the accused where the prosecution witnesses are not at all able to identify the accused. Therefore, whatever defect in the identification parade or non-conducting of the identification parade for specific purpose of identifying the appellants will not be a ground to attack the prosecution. Therefore, this argument of the learned Counsel based on the identification parade cannot be appreciated by us.

6. The learned Counsel next argues that there is no sufficient evidence to establish the guilt of the accused. The eye-witnesses examined for proving the occurrence were P.Ws. 3, 6, 7, 8 and 14. On going through the evidence of these witnesses these witnesses corroborate each other regarding the occurrence. As we pointed out earlier, P.W. 3 has spoken about the incident in a very detailed manner and his testimony could not be shaken by the counsel for the accused in his cross-examination. P.W. 3 states that on the day previous to the incident, the second accused along with another person has come to the shop during evening time and accused No. 2 had purchased a gold ring meant for a small boy. He paid Rs. 680/- for that ring, though P.W. 3 demanded the price for the ring as Rs. 692/-. P.W. 3 further says that the person who had accompanied accused No. 2 was speaking Konkani language and accused No. 2 was speaking Marathi. On the next day, according to P.W. 3, he opened the shop at 9.15 a.m., Shri Shivappa, his driver, was there with him as usual. Five, minutes thereafter when he removed the trays and placed them in the show case, accused Nos. 1 and 2 and one more person entered the shop. He identified the third person as the person who came along with accused No. 2 on the previous day. Accused Nos. 1 and 2 then asked to show a bracelet. He showed two to four bracelets. In the process of showing the bracelets P.W. 3 lowered his head

and accused No. 2 pointed out and pressed on his temporal region the pistol with one hand. The other person who was accompanying accused Nos. 1 and 2 also pressed his pistol on the other side of his temporal region. Accused No. 1 placed a big knife on the neck of the driver Shivappa. Then he threatened that if P.W. 3 did not unlock the show case he would kill him on the spot. According to P.W. 3 at this point of time, another two persons came inside the shop. One or two persons entered the shop, thereafter took the pistol from the hands of accused No. 2 and the other person took the bag from the hands of accused No. 1 and the said person started collecting the gold ornament and started filling the same in the bag. P.W. 3 further says that at this juncture one Krishna and another one Shirodkar came inside the shop. They were also threatened by the accused. He also explained as to how the bullet from the pistol which was aimed at driver Shivappa has hit accused No. 1. He said on account of this hit some blood came out from the left side of the body of accused No. 1. Accused No. 1 then held his hand on the wound and he and the others left the shop. This narration of the occurrence by P.W. 3 has been fully corroborated by P.Ws. 6, 7, 8 and 14. P.W. 6 is Krishna. He explained his presence in the shop on that day. He says that he had gone to the shop of P.W. 3 since he was in need of money and he wanted to sell the tea cups made in Japan. He says that as soon as he entered the shop one person caught hold of him from his collar front and pushed him into a corner. He says that the said person put a knife to his neck. He says that the length of the knife was about a foot. That person told him to sit. He also has spoken about the presence of Shivanand Shirodkar, P.W. 7, at that time who also was a goldsmith. He also deposed before the Court the actual incident which happened on that day. Much could not be done by the counsel for the accused to contradict the statement which he has given examination-in-chief. P.W. 7, Shivanand Shirodkar, who is the stone setter for jewellery also explained his presence in the shop on that day at the time of occurrence. He also has spoken about the details of the incident which had happened on that day. In cross-examination none of the material facts spoken by him in examination-in-chief could be shaken. P.W. 14, is a Pancha who attested the panchanama. He has spoken about the bloodstain near the door, the empty trays of gold ornaments which were lying on the ground, the empty cartridge which was recovered from the ground and put in an envelope by the police. He has also spoken about sealing and signing of the envelopes which contained the cartridge.

7. P.Ws. 13, 51 and 33 have spoken about the colour and number of the Maruti van in which the accused fled away from the scene. P.Ws. 9, 11 and 36 spoke about the recovery of gold ornaments worth Rs. 26,000/- from the custody of accused No. 2. P.W. 9 is the Pancha who attested the panchanama prepared when taking custody of the aforesaid gold ornaments from accused No. 2. He has said he has seen the police weighing the ornaments and the weight was 86 gms., worth Rs. 26,000/-. He says that he had gone to Bombay along with Digambar when the police from Goa went in search of accused No. 1. P.W. 11, Gaikwad, the Police Inspector in Crime

Branch, C.I.D., Bombay, who deposed how accused No. 2 was detected and arrested and how he helped the Goa Police etc. He has produced the Station Diary entries dated 28th November, 1989, which are produced as Exh. P.W. 11A and he identified his signature on those records, P.W. 36, I. A. Khatib, who is the Police Officer in-charge of Mapusa Police Station has spoken about the recording of the F.I.R. and registration of the case and details of the investigation held by him with the help of Bombay Police.

8. Even the stiff cross-examination of these witnesses could not bring any materials rendering their evidence unbelievable. The lower Court has relied upon these witnesses, rightly to establish the guilt of the accused in this case. It is proved that more than five persons were involved in this offence, force has been used and threatening words were spoken and gold was taken. These important instances which constitute the essential ingredients of Section 395 have been proved ant established by the prosecution in this case and the Court below is fully justified in finding the appellants guilty for the charge u/s 395 read with Section 34 of the Indian Penal Code. The learned Counsel for the appellants could not succeed in finding out any weakness in the evidence adduced before the Court below.

9. An attempt was made before us by counsel for the appellant that since accused No. 4 was acquitted for non-identification his presence at the scene could not be inferred in which case the theory of the prosecution that there are more than five persons to commit the offence of Section 395 should have been belied. We cannot agree with this argument. As we pointed out earlier, all the witnesses have spoken about the details of the persons who were present at the time of the occurrence, the stage at which each of them came to the scene. The counsel for the accused could not shake the veracity of the testimony of these witnesses for the prosecution. Accused No. 4 was acquitted only because the identification was not proper. That does not mean that the fifth person is not there at the scene. Therefore, the argument advanced by the counsel for the appellants that the main ingredients to make out a case u/s 395 were not established, cannot be countenanced to.

10. In view of the above discussion, we do not find any reason to upset the finding of the Court below. Consequently, we uphold the conviction of the accused.

11. The last limb of the argument of the learned. Counsel for the appellants is that the sentence awarded by the Court below against the appellants is excessive and not proportionate to the gravity of the offence. He argued that Section 395 though allowed the court to award a maximum punishment of ten years, normally, only in the gravest of grave offences, maximum punishment will be awarded. He argues that even u/s 395 where grievous hurt occurred at the time of dacoity, it is stipulated that 7 years'' punishment must be awarded as mandatory. From this the counsel for the appellants argued that there is a discretion left to the Court in awarding the sentence according to the gravity of the offence. He submits that no grievous hurt has occurred in this case, nor that any victim has sustained minor injury in which

case the maximum punishment as envisaged in Section 395 is not called for. We find some substance in this argument. Even though maximum punishment awardable is ten years, Courts will award maximum punishment only in gravest of grave offences. The gravest of grave offences is defined u/s 397 where during dacoity grievous hurt has occurred. In such cases Legislature imposes a mandate on the Court that it should not be less than seven years. The learned Counsel for the appellants submits that taking into account the totality of the circumstances his clients are not liable at any rate, for a punishment exceeding seven years. We think, taking into consideration the totality of the circumstances, that seven years'' imprisonment for each appellant will be sufficient punishment in this case. Therefore, the sentence awarded by the Court below is accordingly reduced to seven years of rigorous imprisonment to each appellant, instead of ten years.

12. Accordingly, the fine awarded by the Court below of Rs. 5,000/- is also reduced to Rs. 3,000/- each and if the appellants fail to pay the fine of Rs. 3,000/- they should undergo another period of three months'' rigorous imprisonment.

13. In the result, the appeals are partly allowed, the judgment of the Court convicting the appellants is confirmed. But the sentence awarded against them is reduced as indicated above. The prison authorities are directed to calculate and adjust forthwith the period of imprisonment that has been undergone by the appellants and they may be released, if they are found eligible.

14. Appeals partly allowed.