(1996) 10 BOM CK 0104

Bombay High Court

Case No: Criminal Appeal No. 231 of 1994

Pravinkumar Kailashchandra Shukla And Others		APPELLANT
	Vs	
State of Maharashtra		RESPONDENT

Date of Decision: Oct. 3, 1996

Acts Referred:

- Penal Code, 1860 (IPC) - Section 34, 392, 393, 397

Citation: (1997) CriLJ 577 : (1997) 2 MhLj 136

Hon'ble Judges: T.K. Chandrashekhara Das, J; A.C. Agarwal, J

Bench: Division Bench

Advocate: O.A. Siddique and J.R. Khan, for the Appellant; S.R. Borulkar, Assistant Public Prosecutor, for the Respondent

Judgement

T.K. Chandrashekhara Das, J.

1/ The accused in Sessions Case No. 224 of 1991 filed this appeal challenging the Judgment of the Sessions Judge Greater Bombay whereby accused Nos. 1 and 2 were convicted under Sec. 392 r.w. Sec. 397 and Sec. 34 of IPC and sentenced to suffer R.I. for 7 years each and to pay a fine of Rs. 1000/- each i/d. R.I. for 2 months each. The accused Nos. 1 and 2 were also convicted u/s 135 r.w. Section 37(i)(a) of Bombay Police Act, 1951 and sentenced to suffer R.I. for 4 months each and to pay a fine of Rs. 100/- each i/d. S.I. for one week. (Sentences imposed on accused Nos. 1 and 2 to run concurrently). The accused No. 3 was convicted u/s 392 r.w. Section 34 of the IPC and sentenced to suffer R.I. for 4 years and to pay a fine of Rs. 500/- i/d. R.I. for one month.

2. The case of the prosecution is that on 29-7-1990 at about 12.00 noon PW-1 Ramtej R. Gupta who owns a taxi car took the taxi out for business from Golibar, Santacrus and by 9.15 p.m. came to Regal Cinema. At that time three persons approached him and asked him to take them to Dadar and they got into the taxi. While the taxi was

proceeding to Mahatma Phule Market, the accused asked PW-1 to stop the taxi at Manish Market. Then two of them went towards the Manish Market and returned after 5 minutes and PW No. 1 then proceeded towards Dadar. When the taxi reached near Sharda Cinema, Dadar one of the accused told him to take the taxi to Dr. R. A. Kidwai Road by taking a right turn. Then it was about 10.00 p.m. Then PW No. 1 was again asked to take taxi towards Wadala Station and as the taxi was proceeding, one of the accused persons told PW No. 1 to stop the taxi in front of the two tankers standing by the side of the road. Accordingly the taxi was stopped in front of these tankers. Then one of the accused persons sitting behind, opened the complainant''s side door and sat in the taxi and pointed out a knife to complainant above his waist and one person who was sitting in the taxi on the rear seat pointed out a knife on his neck and the person who was sitting by the side of the complainant threatened him and removed cash from his pocket and demanded the wrist watch. Thereafter PW No. 1 was asked to get down of the taxi. Then the first person who pointed out the knife to PW No. 1 took the taxi taking ''U'' turn and fled away. Though the complainant shouted for help nobody came forward. When the complainant was walking ahead he saw one taxi driver and he told the incident to that taxi driver and with the help of that taxi driver he came to the police station to lodge complaint and the complaint was lodged. The complainant has given description of the accused persons in his statement.

3. On 29-7-1990 the police have drawn panchanama of the scene of offence. During investigation an identification parade was conducted. In that parade all the three accused were identified by PW No. 1. After that charges have been laid against the accused persons. On behalf of the prosecutions in all six witnesses have been examined. PW No. 1 is the complainant. PW No. 2 is the constable who proved Police Commissioner''s order dt. 26-9-90 prohibiting the use and carrying of weapons by any person during the period from 29-7-1990 till 28-8-1990. PW No. 3 is PSI who recorded the panchanama, PW No. 4 is Special Executive Magistrate who conducted identification parade. PW No. 5 is the panch witness for recovery of the wrist watch. PW No. 6 is the Investigating Officer. The accused persons denied the charges. The Learned Sessions Judge after appreciation of the evidence of PW No. 1 and other witnesses found all the three accused guilty.

4. The learned Counsel for the appellants Mr. Siddiqui has strongly assailed the Judgment mainly on two grounds :-

(1) That the prosecution would not have been sustained mainly on the oral evidence of PW No. 1 without having any corroborative evidence.

(2) No identification parade as alleged by the prosecution was conducted, and if at all it was conducted, it was only a farce. It was conducted in violation of the guidelines laid down by the Criminal Manual and therefore, it cannot be relied upon to fasten the accused to the offence.

5. Dwelling on the first point, the Learned Counsel for the appellants has submitted that the PW No. 1 has improved his case while he was examined before the Court. The learned counsel for the appellant relied on certain discrepancies that has crypt in, in the evidence of PW No. 1 to point out that the PW-1 has improved his case. We have gone through the evidence of PW-1 in great details. In all material facts, he has completely and correctly stuck up on the versions that has been stated in his FIR. Even though the PW No. 1 was meticulously cross-examined, his evidence could not be shaken. The improvement that has made by PW No. 1 as alleged by the counsel for the appellant is that in narrating the incident at one place PW No. 1 says that he was injured and blood was oozing. But actually no blood stain was found in the place of occurrence or recorded in the panchanama. However, this discrepancy in the evidence of PW No. 1 according to us does not shake the testimony of the witness to establish the guilt of the accused.

6. The learned counsel for the appellants further submits that there are serious laches on the part of Investigating Officer in failing to find out the taxi driver to whom PW No. 1 had first met and narrated the incident and along with whom PW-1 went to the Police Station. It is true that the examination of that driver would certainly make better the case of the prosecution but we do not see that failure to bring that driver to the witness box has any way affected the prosecution case adversely. As we have pointed out earlier, PW No. 1 in all details has described the offence committed by the accused and no amount of evidence could be impeached by or on behalf of the accused persons while cross-examining him. Therefore, on first point, the appellant''s case cannot sustain.

7. Regarding second point with regard to the identification parade, we got the evidence mainly of PW No. 4. Special Executive Magistrate. The learned counsel for the appellants submits that, the PW No. 1 had no occasion to see the accused before identification parade because the occurrence as stated by PW No. 1 has taken place in the night and the accused sat on the rear side. The learned counsel relying on certain discrepancies of PW No. 1 made an attempt to show that PW No. 1 had no occasion to see the accused before the parade. But PW No. 1 has clearly stated in his deposition that he had seen all the three accused approaching on his front side. He could very well describe the dress that the accused was wearing. He has seen that accused No. 2 was wearing red coloured windcheater. PW 6 in his evidence had stated that windcheater in red colour and Allwyn watch was recovered from Accused No. 2. This aspect of the evidence is very important not only for fastening the accused with the offence but also for identification of the accused by PW No. 1.

8. Another criticism levelled against the identification parade is that there was clear violation of Clause Xl of the Criminal Manual in conducting the identification parade. PW-4 Special Executive Magistrate deposed before the Court that in the year 1990 he was called by Dr. R. A. Kidwai Road Police Station to hold identification parade on 13-8-1990. He attended police station at about 4.00 p.m. There were 4 suspects to

be identified and only 1 witness in identification parade. The identification parade at R. A. Kidwai Marg Police Station concluded at 5.20 p.m. He deposed that he made the witness to sit in a room of Inspector of Police. The suspects were made to sit in a separate room in the next building adjacent to the police station. He had seen all the suspects in the above said room in which they were made to sit for the first time. He had selected 15 dummies of age between 18 to 24 years comparing body structure with the suspects. He had taken the help of two respectable persons for conducting identification parade. After the suspects were made to sit in a room, he had sent another respectable man to fetch identifying witness to bring him to the parade room. The identifying person after coming to the parade room went round the parade and identified 3 persons by holding their left hand or left shoulder or right hand or right shoulder and identified all the three accused. PW-4 also filed detailed memorandum before the Court as envisaged in the Criminal Manual. Even though he was subjected to thorough cross-examination, his evidence could not be impeached by the counsel for the accused. The learned counsel for the appellants submitted, referring to Clause XI of the Criminal Manual, that PW No. 4., Special Executive Magistrate did not ask the identifying witness as to whether he had any opportunity to see the suspects before the identification parade. He relied on Clause XI which is extracted below :-

"Then one of the respectable persons should be asked to fetch the first identifying witness from the room in which he may be sitting. When the witness arrives, the Executive Magistrate/Honorary Magistrate should question him and ascertain from him whether he had an opportunity to see the culprit at any time subsequent to the offence or after the arrest. He may either record the statement separately or make a reference to that statement in his memorandum ....."

9. The learned counsel for the appellants strenuously argued that non compliance of this clause by the Special Executive Magistrate is fatal to the prosecution and the conviction based on such identification is not sustainable. We do not agree with this submission of the learned counsel of the appellants. First of all the question that is envisaged to be asked under Clause XI is to the identifying witness. But in this case such question was asked to the suspects. This is the answer of PW-4 to what the learned counsel for the accused asked to the witness PW No. 4 :-

"I did not ask the suspects whether there was any chance of the identifying witness being shown to them or they being shown to the identifying witness."

In this question it may be seen that the question was asked is to the suspects and not to identifying witness. Clause XI of the Criminal Manual says that the question is to be asked to the identifying witness. About that aspect no question was put to PW-4 by the counsel for the accused. Therefore, whole argument advanced by the counsel for the appellant based on Clause XI falls to the ground. PW No. 4 also stated in his memorandum that no other persons than those in the parade, himself and the above mentioned two respectable persons remained in the parade room. All

Police Officers and constables were asked to withdraw completely from the parade room. This statement has not been challenged on behalf of the accused. Memorandum has been produced before the Court and it has been proved by the Special Executive Magistrate, PW No. 4. Going by this memorandum and evidence of PW No. 4 we find that no defect could be pointed out in conducting identification parade. All precautions have been taken to obviate errors in the identification. Of course the Manual says that at the time only 2 accused can be subjected to identification. However, in this case we see more than 2 accused were sought to be identified. However, no prejudice is shown to have been caused while identifying more than 2 accused in one identification parade. The learned counsel for the appellants relied upon the decision of this Court reported in Ramcharan Bhudiram Gupta Vs. State of Maharashtra, and 1995 (1) All MR 513 between Vilas Vasantrao Patil v. The State of Maharashtra and argued that the Clause in a Criminal Manual in Chapter I which are the guidelines to be observed in conducting the identification parade is statutory and they should be strictly followed and the chances of suspect being shown to witness prior to parade is to be completely eliminated. We see that no such law has been laid out in these decisions. The learned Judge in these cases after appreciating evidence has found that the identification parade conducted in those cases was totally illegal, we find that no reliance can be placed on the above decisions by the Counsel for the appellants for the purpose of this case. From the foregoing evidence of PW-4 we find that Clause XI of Criminal Manual has been substantially complied with. No serious defects could be pointed out in the identification parade conducted in this case. The accused have been properly and clearly identified in this case. As we stated earlier, the PW No. 1 had sufficient opportunity to see the accused before commission of the offence and three accused have been properly identified at the identification parade. There is nothing wrong on the part of the trial Court basing the convictions of the accused on such identification.

10. The learned counsel for the appellants lastly argued that since there is no recovery of the knife and the use of knife in commission of the offence cannot be said to be proved. Particularly when the knife could not be recovered. The counsel for the appellants therefore, submits that the appellant accused must be given reduction in the sentence bringing the offence only u/s 393 of IPC. We cannot accept this request of the counsel for the appellant. Simply because the knife used in commission of the offence could not be recovered, it cannot be said that the weapon was not used at all. There is unimpeachable evidence in this case that knives were used by the accused and nothing could be controverted at the instance of the accused. Therefore, attempt made by the counsel for the appellant to bring the offence in the fold of Section 392 is not sustainable. We find no ground to show any such leniency in reducing sentence awarded by the Court below. No other valid point has been argued by the Counsel for the appellant except to point out some minor discrepancies in the evidence of PW-1 and witnesses. We have already stated

about such discrepancies and found these discrepancies has not vitally affected the prosecution case.

11. In the result, we find no valid grounds to interfere with the conviction and sentence passed by the Sessions Court against the appellants. The conviction and sentence awarded by the Addl. Sessions Judge, Bombay against accused in Sessions Case No. 224/91 vide his Judgment and order dated 25-2-1994 stands confirmed. Appeal dismissed.

12. Appeal dismissed.