

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**CRIMINAL APPEAL NO. 1224 of 2010****With****CRIMINAL APPEAL NO. 1504 of 2010****With****CRIMINAL APPEAL NO. 1627 of 2010****With****CRIMINAL APPEAL NO. 417 of 2011****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR.JUSTICE AKIL KURESHI****and****HONOURABLE MR.JUSTICE R.P.DHOLARIA**

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
- 2 To be referred to the Reporter or not ?
- 3 Whether their Lordships wish to see the fair copy of the judgment ?
- 4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?
- 5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT....Appellant(s)

Versus

CHUNARA SATTAR @ TANKI MANGABHAI SHIVABHAI &

3....Opponent/Respondent

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Appearance:

MS H B PUNANI, APP for the Appellant(s) No. 1

MR BHUNESH C RUPERA, ADVOCATE for the Opponent/Respondent No. 4

MR HEMANT B RAVAL, ADVOCATE for the Opponents/Respondents No. 2 - 3

MR MUKESH B DAVE, ADVOCATE for the Opponent/Respondent No. 3
RULE NOT RECD BACK for the Opponent/Respondent No. 1

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CORAM: **HONOURABLE MR.JUSTICE AKIL KURESHI**
and
HONOURABLE MR.JUSTICE R.P.DHOLARIA

Date : 30/08/2013

ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)

1. These appeals arise out of common judgement of conviction and sentence rendered by learned Additional Sessions Judge, Gandhinagar at Kalol on 07.05.2010 in Sessions Case No. 18 of 2008. There were, in all, five accused. One of them, accused No.4, absconded while the trial was going on. Learned Judge, therefore, completed the trial against rest of the accused and, by the impugned judgement, convicted them for offence under Section 395 of IPC and sentenced them to rigorous imprisonment of seven years. He also imposed fine of Rs. 10,000/- on each of the accused. Criminal Appeal No. 1504 of 2010 is, therefore, filed by original accused No.1 challenging the said judgment. Criminal Appeal No. 1627 of 2010 is filed by accused No.5 and Criminal Appeal No. 417 of 2011 is filed by accused Nos. 2 and 3. The State has preferred Criminal Appeal No. 1224 of 2010 seeking enhancement of the sentence.

2. Briefly stated the prosecution version is as follows:

2.1 The complainant, Ashokpuri Ramdayalpuri

Goswami, was engaged in the business of transport. He owned two trailer trucks. On 14.12.2007, he loaded his two trailers with iron pipes at Baroda and started journey at night from Baroda to reach Jammu, where the pipes were to be delivered. He, himself, was driving the first truck-trailer bearing Registration No. H.R.38 H5421. The other truck bearing Registration No. H.R.55.6461 was being driven by his driver Sardarsingh Bhimsingh Rajput. The company which had hired his services for transport of the goods had paid him sum of Rs. 99,200/- in cash towards on account payment inclusive of costs. In the early morning, he reached near Kalol town, north of Ahmedabad. He realized that the second, truck which was following him, was not seen. He, therefore, pulled over his truck waiting for the other truck to catch up. Realizing that it would be unsafe to stop the truck on the highway, he pulled his vehicle over to the service road near Janpath Hotel and waited for the other truck to catch up. This was at about 6.30 to 6.45 in the morning.

While waiting, he got down from his truck. Not to leave such substantial cash that he was carrying in the truck unattended, he put the amount in his jacket which he had worn. Soon thereafter, the accused came in a Qualis car. One of them asked him if he wanted to buy diesel. Having thus engaged him in conversation, one of them caught him. The others quickly got down from their vehicle. A brief scuffle ensued. The assailants snatched away his jacket and quickly disappeared in their car. He soon realized that he was robbed of his cash alongwith his jacket which also had his mobile phone and two ATM

cards. He, therefore, informed the police. The FIR was registered on the spot.

For sometime, the accused were not found. However, on 18.02.2008, the LCB Police Station, Gandhinagar, on a tip off, that the five accused were near Fun Republic Cinema (a location to the north of city Ahmedabad) went there fully prepared and arrested all five accused from there. The accused were, thereupon, handed over to the Kalol Police Station, where further investigation was carried out and charge sheet was filed.

2.2 The first informant, Ashokpuri Ramdayalpuri Goswami, P.W. 7 was examined at Exh. 45. He deposed that on 14th night he had started from Baroda after loading the two trucks with iron pipes. He was driving the first truck. Sardarsingh Bhimsingh was driving another trailer truck. Loading work was over at 11 O'clock. He was paid, by two persons of the transport company who had come on motor cycle, an advance of Rs. 99,200/-. Such amount was delivered to him. He had to deliver the goods at Jammu. At about 6.30-6.45 in the morning, he reached near Kalol. He realized that, near Ambica over bridge the second truck had stopped following him. He stopped at the bus stand for a couple of minutes. He did not find it appropriate to stop on the highway for longer time. He, therefore, pulled his vehicle on the service road, a little ahead of Janpath Hotel. Since he was alone in the truck, he locked the vehicle and put the money in his jacket. He also had his mobile and a wallet which contained two ATM cards of ICICI Bank. When he was

near the trailer, one Qualis car came from the direction of Ahmedabad. Driver of the car asked him if he needed diesel. He told him that he did not need any diesel. When this conversation was going on, the driver caught his jacket from behind, at which time, some four or five people got down from the car and surrounded him. In course of the scuffle that followed, his jacket came off which, these people took away and disappeared in their car. He, thereafter, from a nearby petrol pump, got the number of police station and called the police. The police arrived in about 15 minutes. He informed the police about the incident and also about the second truck. The police took him where the second truck was waiting since its diesel pipe had broken. He produced FIR at Exh. 46. He stated that the assailants were in the age group of 20-25 years. He identified the four accused and stated that the driver of the qualis car was not present.

On 20.02.2008, he was called in the Mamlatdar's office for test identification parade. Out of a line of about 18-20 people, he had identified all five accused. He again identified four of them before the Court. He also identified the mobile phone, which was stolen from him on that day.

In the cross examination, no major contradiction has come on record. He stated that 75% of the transportation charges were paid in advance. The rest were for costs. Full accounts are taken at the end of the trip. He stated that after his trucks were loaded, he had called up Mohmmad on his mobile no. 9879571836 for payment of

advance. Mohmmad told him that he would be talking to Mr. Ajay Valia and also gave him mobile number.

He agreed that being a winter season the sun rise was delayed, due to which, the lights of his truck were on. He stated that the incident took place at a distance of about 100-150 ft from Janpath Hotel and 300-400 ft from the petrol pump.

2.3 The other driver of the truck, Sardarsingh Bhimsingh Rajput, P.W. 19 was examined at Exh. 77. He deposed that he was working as a driver with Ashokpuri Ramdayalpuri. On the date of the incident, they had loaded the pipes at Vadodara. Ashok Ramdayal had received Rs. 99,200/-, by way of advance. Since his truck ran out of diesel, he stopped it near the over bridge. Ashokpuri Ramndayalpuri crossed the over bridge and went ahead. About one hour later, police came. Ashok Ramdayal informed him about the incident.

2.4 Mohsinkhan Jabirkhan Pathan, P.W. 15, Exh. 72 was the employee at Speed Roadways, Vadodara. This company had engaged the complainant for transportation. He deposed that Ajay Valia is the owner of the company. He was an employee. Rakeshkumar Mishra was the cashier. Through two tractors of Ashok Ramdayal, company had sent pipes to Jammu. The trucks were loaded on GTP Pipe Industries, Manjusar, GIDC. Amount of Rs. 1 lac was paid at the cross roads near express highway. He and Rakeshkumar Mishra had gone to deliver the amount on the company's motor cycle. Out

of such sum, Rs. 400/- for each truck was deducted and a net of Rs. 99,200/- was paid. He had also made Ashokpuri Ramdayalpuri talked to his boss, after payment of the amount.

In the cross-examination, he stated that sum of Rs. 800/- was demanded towards their commission.

2.5 The cashier of Speed Roadways Transport Company, Rakeshkumar Manekchand Mishra, P.W. 16 was examined at Exh. 73. He deposed that he was working as a Cashier in the said company. Late at night, he had received a call from Mohsin that advance of Rs. 1 lac was to be paid. He had, therefore, talked to Shri Ajay Valia and told him that he had a sum of Rs. 80,000/-. Mr. Valia told him that Mohsinkhan Pathan had the remaining Rs. 20,000/- and that, they should, therefore, deliver the amount to the truck owner. Along with Mohsinkhan Pathan, he had gone to Gumud Chowkadi, where Ashokpuri Ramdayalpuri, along with his two trailers, was present. They gave him Rs. 1 lac and received Rs. 800/- back from such amount. They, thereafter, returned home.

This witness also stated that Rs. 800/- was received towards staff commission.

2.6 Ajay Jangsher Valia, P.W. 17, Exh. 74 also gave a similar account. He deposed that for transporting the pipes, he had contacted Mohmmad at Ahmedabad. After the trucks were loaded Mohmmad had called. He had Rs. 20,000/- with him. He had instructed Mohsinkhan Pathan

to contact Rakeshkumar Mishra and take 80,000/- from him and that, both should deliver the amount. After paying the amount, he was informed.

2.7 Jagdishsinh Tenubha Chudasma, P.W. 22 Exh 83 was discharging duties as PSI, LCB Police Station, Gandhinagar. He deposed that on 15.12.2007 in the jurisdiction of Kalol Police Station a case of robbery was recorded. Investigation of the offence was going on during which time, on 18.02.2008, he received a definite information that the offence was committed by the gang of Paresh Nepali. He gave the names of the members (that of the present accused) of the gang. He received the information that these members had collected at Fun Republic Cinema for commission of the similar offence. On the basis of such information he went to the place with the staff members. The vehicle was parked at a distance. They cautiously approached and apprehended all the five accused. From accused No.1 one Nokia mobile of Model No. 2626 with damaged screen was found.

He identified before the Court the mobile phone with damaged screen seized by him from accused No.1.

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2.8 After verifying that the accused were wanted in connection with the case of robbery registered before Kalol City Police Station, their custody was handed over to such Police Station.

In the cross-examination by accused No.1, he

denied that the accused were kept in the police custody before three days since they were shown to have been arrested. There was no cross by accused Nos. 2, 3 and 5.

2.9 As soon as the accused were so apprehended, Test Identification Parade was arranged. Such TIP was conducted by the Executive Magistrate, Kanaksinh Zala, P.W.14 – Exh.64. He deposed that on 20th February 2008 the Identification Parade was held in the morning at about 11:30. He had offered to the accused if they wanted to change their dress, hair style, footwear, etc. The accused were allowed to stand as per their choice between the dummies. During such parade he ensured that the complainant would not be able to see the accused. During the TIP the complainant identified all five accused from amongst the dummies. During the identification he had properly closed the doors and windows of the chamber. The glass windows were also properly covered so that no one could see from either side.

In the cross-examination, he agreed that the dummies should be selected in such a way that they are of a similar age and appearance as of the accused. He had, however, not gathered such details of the accused.

2.10 Sheikh Nizamuddin – P.W.8, Exh.51 was a Panch during the Test Identification Parade. He deposed that the Magistrate had called 13 dummies. The accused were offered to change their clothes and were allowed to stand in the line as per their desire. The complainant was

brought from another room. During the identification parade the complainant identified five accused, out of which four were present before the Court.

In the cross-examination he stated that the dummies were in the age group of 30 to 35 years. The line was formed in a U shape.

2.11 Panchnama of Test Identification Parade was produced at Exh.52 in which the details of the dummies and the factum of the accused having been identified by the complainant were recorded.

2.12 The investigating agency had attempted to recover the jacket of the complainant at the instance of accused no.1. However, no such jacket was found from the place shown by the said accused. The police had also recovered a sum of Rs.10,000/- from the mother of accused no.1, which was a part of a total of Rs.12,000/- given to her by accused No.1 from his share of the loot. However, this witness turned hostile and did not support the prosecution. We may, therefore, not advert to such aspects in our judgment any further.

3. In conclusion of recording of the relevant evidence, we may now briefly refer to some of the remaining witnesses.

3.1 Subhashchandra Kirtilal Trivedi – P.W.23, Exh.91 had carried out substantial portion of the investigation. He had explained the steps taken by him

for recording the statement of different witnesses and carrying out Test Identification Parade, etc.

3.2 To record the movement of the stolen mobile of the complainant, the prosecution had examined one Krunal Pravinchandra Gupte – P.W. 24, Exh.126 who was the Executive Nodal Officer of Bharti Airtel Ltd. He had produced at Exh.129 the call details of the mobile phone in question during the period between 16th December 2007 to 17th December 2007.

3.3 The prosecution also examined one Ramakant Meena – P.W.25, Exh.132 who was an officer in BSNL. He had produced at Exh.135 the call details of the same number on 12th and 14th December 2007.

4. From the evidence on record few things clearly emerge. That the complainant had set out from Baroda on the night of 14th December 2007 to deliver iron pipes to Jammu. There were two trucks carrying such goods. The first truck was being driven by the complainant himself and the second one by his driver Sardarasingh. Before leaving Baroda, the complainant also paid a cash of Rs.99,200/- towards on account payment to cover the expenses and part charges for transportation. Near Kalol town two trucks were separated. The truck behind had some snag forcing the driver to stop. The complainant, near Janpath hotel, realizing that the second truck was not following, stopped the truck on the highway and thereafter pulled it service road. Some five people came

there who engaged the complainant in conversation and thereafter with an intention to rob him, scuffled with him. During the process his jacket came undone. It was snatched away. The accused had put the cash on his jacket before getting down from his truck.

5. We have no doubt about the genuineness of this version. Not only the complainant's own testimony is quite reliable but the version is also strongly supported by several other witnesses. We may recall that apart from Ashokpuri Goswami – P.W.7 – Exh.45 giving such version, it was supported by his driver Sardarasing – P.W.19, Exh.77. He had also deposed about the two trucks being loaded. A sum of Rs.99,200/- being paid to the complainant and just before Kalol two trucks getting separated. The complainant later on came along with police. This version was also supported by Mohsinkhan J. Pathan – P.W.15, Exh.72. He and Rakesh Mishra of Speed Roadways had paid a sum of Rs.99,200/- to the complainant on 14th December 2007. This witness had given full account of the amount being paid to the complainant. Rakeshkumar Mishra – P.W.16, Exh.73, who was also present when the amount was paid, also supported the complainant's version of receiving said sum in cash and starting from Baroda in two trucks carrying iron pipes to be delivered at Jammu. Even the owner of the company who had hired the complainant for transportation i.e. Ajay Valia – P.W.17, Exh.74 deposed that he had instructed his office people to deliver a sum of Rs.1,00,000/-. After deducting the staff commission of Rs.800/-, a sum of Rs.99,200/- was paid.

6. Thus, the fact that the complainant carried a sum of Rs.99,200/- on his person while travelling in his transport trucks from Baroda towards Jammu is established on record. The fact that they reached Kalol at early in the morning hours on 15th December 20013 is supported by second driver Sardarsing. The complainant's own version that he was robbed by some five persons though receives no direct corroboration, we have absolutely no reason to discard or disbelieve his testimony. After lodging the complaint he had to wait at Kalol Police Station for few days before the formalities could be completed. In the meantime, his trucks would be detained on the road side and the delivery of the goods would be delayed. Surely this would not be good for his business. It is not as if he was going to be reimbursed the amount lost by his hirer or some other agency such as insurance company. He, therefore, had absolutely no reason to fake the robbery. He himself was the owner of the truck and not an employee-driver. He did not benefit in any manner out of fabricating the case of robbery.

7. The complainant, in his deposition, had also stated that after the trucks were loaded he had spoken to Mohmadbhai (through whom he was contacted by the transport company to deliver the goods) on his mobile phone to arrange for the advance payment. He had also given the telephone number of Mohmadbhai as 9879571836. Significantly, the call details of the mobile phone allegedly taken away by the accused from him showed telephone conversation for 35 seconds on such

number 9879571836 at 23:54 hours on 14.12.2007. Surely when the witness was giving the details of conversation with Mohmadbhai and also supplying the number, he would not have access to the call details data which the investigation produced before the Court later on. Thus, the testimony of this witness is totally trustworthy and credible.

8. The sum total of above discussion is that the prosecution fully succeeds in convincing us that the incident of robbery of complainant's cash of Rs.99,200/-, mobile phone and couple of ATM cards, is totally believable.

9. The only question that may need closer scrutiny is the involvement of five accused in such robbery. In this context, their identification becomes crucial. We may, therefore, focus only on this aspect of the matter.

10. We may recall that as per the complainant, the incident took place at about 6:30 to 6:45 a.m. The complainant after realizing that the second truck was not following, stopped on the highway for a couple of minutes. Thinking that it would be unsafe to stop the vehicle on highway, he pulled it over on the service road; locked the truck; put the money in his jacket and got down from his truck waiting for other driver to catch up. At that time, a Qualis car came and the driver of that car engaged him in conversation. The other got down and robbed him. All these would have taken some time after he stopped the truck for the first time. We may therefore

put the time of the incident at about 6:45 to 7:00 in the morning. It was, of course, a winter morning but the day would have been progressed and there would have been sufficient visibility. The incident did not happen in a flash. First a brief conversation was made. Thereafter, when the other members of the group were getting down from the car and scuffling with the complainant he did put a semblance of resistance. The complainant thus had sufficient time to see the accused and to identify them at a later point of time. It is true that in the cross-examination he admitted that the lights of his truck were still on. That by itself would not mean that there was no day light. In a winter morning, heavy vehicles do put their lights on not necessarily to see the road ahead but more out of the concern that the on coming vehicles may be able to spot the truck more easily and from a distance.

11. The Test Identification Parade was successful. It was conducted withing two months after the incident. Though there was serious criticism by the counsel for the accused, we have no reason to discard the validity thereof. Out of several dummies, the five accused were shown by the complainant in presence of the Panchas and the Magistrate. All necessary precaution to preserve the sanctity of the T.I.Parade was taken. The room was properly secured from any visibility from outside. The complainant was brought only after the accused were allowed to stand in the line as per their desire after offering them to change their clothes, hair style, footwear, etc.

12. In addition to the complainant himself deposing before the Court about successful Test Identification Parade, it was established through the testimonies of the Executive Magistrate as well as Panch Witness, who both supported the prosecution.

13. It is true that the accused were shown to be in the age group of 25 to 30 years. It was also true that couple of dummies were 40 years or even 45 years of age. That by itself would not destroy the credibility of the Test Identification Parade particularly when large number of other dummies of similar age were also mixed up. In addition to such identification during the investigation, the complainant also identified the accused before the Court. We may recall that the incident took place on 15.12.2007. The deposition of the complainant was recorded on 26.03.2009. Thus, the complainant had the occasion to identify the accused before the Court just after one year and few months.

14. We have no reason to discard such identification initially successfully carried out during the investigation in Test Identification Parade and thereafter before the Court in the examination of the complainant. To summarize, insofar as the incident is concerned, in the manner in which the same is happened, we do not hesitate in accepting the version of the complainant. The fact that he was carrying cash of Rs.99,200/- was established through several other independent sources. He had no reason to fake the robbery. When we also believe that the identification of the accused is proper

and reliable, we find no error in the judgment of the learned Additional Sessions Judge in convicting the accused for the offence punishable under Section 395 of the Indian Penal Code. Merely because as pointed out by the counsel for the accused that the complainant was shaken up because of the unpleasant experience would not mean that his faculties for face recognition and retention would be hampered. Similarly, the criticism of the investigation that no independent witnesses were examined also needs to be discarded. We may recall that the incident took place 150 feet from Janpath hotel and 300 to 400 feet from petrol-pump. In cold winter morning there would be hardly any movement of people at the time of the day. The incident happened on a service road away from main highway. If, therefore, no vehicle stopped or no people rushed to help the complainant, it would hardly surprise us.

15. Coming to the State appeal for enhancement. Section 395 of the Indian Penal Code for which the accused have been convicted prescribes punishment for the offence of dacoity and provides that whoever commits dacoity shall be punished with imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years and fine. The accused have been sentenced to R.I. for 7 years. In our opinion, such sentence is sufficient. We may recall that the accused were not carrying any weapons. They had not caused any injury to the complainant. No previous conviction has been brought on record. Considering the manner in

which the incident took place; the fact that the accused were not armed with any deadly weapons; the accused have not caused any injury to the complainant, we do not find any scope for further enhancing the sentence.

16. Before concluding, we were requested to reduce the fine of Rs.10,000/- each imposed by the learned Additional Sessions Judge. We are informed that the accused are extremely poor and would not be in position to pay such fine. The fine of Rs.10,000/- (Rupees ten thousand only) imposed on each accused is reduced to that of Rs.2,000/- (Rupees two thousand only) on each accused and in default of payment of fine the accused shall undergo simple imprisonment of one month.

17. In the result, the appeals are disposed of in following manner:

- (i) The State appeal being Criminal Appeal No.1224 of 2010 is dismissed.
- (ii) The judgment and order of conviction and sentence passed by the learned Additional Sessions Judge, Fast Track Court No.2, camp at Kalol in Sessions Case No.18 of 2008 is confirmed with following modification:

The fine of Rs.10,000/- (Rupees ten thousand only) imposed on each accused is reduced to that of Rs.2,000/- (Rupees two thousand only) on each accused and in default of payment of fine the accused shall undergo simple imprisonment of one month.

- (iii) Subject to such modification, remaining appeals against conviction are dismissed.

- (iv) The police authorities will be at liberty to proceed further for absconding accused no.4 if so far not arrested and tried.
- (v) R & P to be transmitted to the trial Court.

(AKIL KURESHI, J.)

(R.P.DHOLARIA,J.)

Jyoti