IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.185 OF 2000

Harish @ Harish Chandra Shahdeo Kusum
Age years,
residing at Santacruz Golibar,
Santacruz (E), Mumbai
(At present in Arthur Road Central Prison) .... Appellant

versus

The State of Maharashtra
(at the instance of Dahisar
Police Station in C.R.No.498/1995) ... Respondent

.....

- Mrs.Anjali P. Patil a/w Ms.Pracheta Rathod, Advocate for the Appellant.
- Mrs.Geeta P. Mulekar, APP for the State/Appellant.

CORAM : SARANG V. KOTWAL, JJ.
DATE : 30th JUNE, 2018.

JUDGMENT :

1. This is an Appeal preferred by the Original Accused No.3 in Sessions Case No.892 of 1996 on the file of learned Additional Sessions Judge, Greater Mumbai. By the impugned Judgment and Order dated 20/10/1999 the Appellant and the original Accused No.2 were convicted u/s 452 r/w 34 of the

Indian Penal Code (for short 'IPC') and were sentenced to suffer rigorous imprisonment for 7 years and to pay a fine of Rs.10,000/- each and in default of payment of fine to undergo rigorous imprisonment for six months. The Appellant and the accused No.2 were also convicted u/s 392 r/w 34 of IPC and were sentenced to suffer rigorous imprisonment for 10 years and to pay a fine of Rs.10,000/- each and in default of payment of fine to undergo further rigorous imprisonment for one year. Both of them were also convicted u/s 397 of IPC and were sentenced to suffer rigorous imprisonment for 7 years. Set off was given to them. However, the accused Nos.1 and 4 were acquitted of all the charges.

2. The prosecution case in brief is as follows;

The FIR was lodged by one Jayantibhai Keshubhai Patel. According to him on 26/12/1995, he was working in a diamond factory at Nitin Industries, Dahisar, Gala No.203. At that time, 6 to 7 persons were cutting and polishing diamonds. At that time, around at 08.00 p.m. 4 to 5 persons entered the

premises. They were having Choppers. The first informant and others were forced to sit quietly. The keys of the safe were removed forcibly and from the safe partly finished and partly unfinished diamonds worth Rs.2.10 lakhs were removed. Thereafter all these persons left the premises after locking the door from outside. After about half an hour, the first informant and others came out from the rear door. The first informant went to Dahisar Police Station and lodged his FIR vide C.R.No.498/95 at 11.00 p.m.

3. After registration of the FIR, the investigation commenced. The spot panchanama was conducted and the statements of various witnesses were recorded. The accused were arrested on 11/01/1996. It is the prosecution case, that, some diamonds were recovered at the instance of the present Appellant and the accused No.2. At the conclusion of the investigation, the charge-sheet was filed and the case was committed to the Court of Sessions, Greater Mumbai.

4. During the trial the prosecution examined in all 7 witnesses, including the first informant, the Investigating Officer, Panchas for recovery etc. P.W.1 Jayantibhai Keshubhai Patel is the first informant who has narrated the incident. According to him, on 26/12/1995, as usual he and his co-workers were working in their diamond factory. At about 08.00 p.m. 4-5 persons entered the premises with choppers. He further deposed that they forcibly removed the keys and thereafter removed the diamond from the safe cupboard and went away. They had locked the door from outside. After about half an hour the workers could come out of the premises. First informant went to the police station with his brother and lodged his FIR. The FIR is produced on record at Ex.9. This witness has further admitted that he would not be able to identify those four persons who had entered the premises. He has deposed that, after 10 days from the incident, he was called for identification of suspects at Dahisar Police Station and he could identify one of the 15 persons present at that time. He has categorically stated that the identification parade was held at the police station. In

the Court he was shown in all 7 packets of diamonds wrapped in two wrappers and he has identified the diamonds produced in the Court. P.W.7 PI Baban Shivram Kadam who was then attached to Dahisar Police Station has deposed about the investigation which was carried out. In his deposition he has stated that on 25/01/1996, Test Identification Parade was arranged at Arthur Road Prison. But he has not further deposed as to what was the outcome of the test identification parade. The test identification parade memo is not produced on record neither there is in evidence of any of the witnesses including the Special Executive Magistrate who had conducted the said parade. Therefore there is nothing before the Court to fix the identity of the culprits who had entered the premises of the first informant on the date of incident. The first informant i.e. the P.W.1 has not identified any of the accused in Court. Therefore prosecution has not proved as to who were the persons who had entered the premises and had committed the offence of robbery on that particular date.

5. Apart from P.W.1, prosecution has examined P.W.2 Sanjaykumar Ramlotan Jaiswal, who was one of the co-workers present there when the incident took place. He has deposed on the similar lines as deposed by the P.W.1. However, even he has admitted that he was not able to identify any of the persons in Court.

6. I have heard the learned Counsel Mrs.Anjali Patil for the Appellant and the learned APP Mrs.Geeta P. Mulekar for the State of Maharashtra. The learned counsel Mrs.Patil submitted that the prosecution has not proved the identity of the offenders. The recovery at the instance of the Appellant was not believable and there is no evidence produced on record by the prosecution to show involvement of the Appellant. The learned APP Mrs.Geeta P. Mulekar, on the other hand submitted that the prosecution has proved the case as to the recovery of the lost quantity of diamonds at the instance of the Appellant. The learned Trial Judge has rightly relied on the said recovery and therefore there is no necessity to interfere with the findings recorded by the learned Trial Judge.

7. The prosecution has relied on the recovery effected at the instance of the accused No.2 and the present Appellant. The prosecution has examined P.W.3 Balaram Vishwanath, who was the Pancha in whose presence the recovery of diamonds was effected at the instance of the accused No.2. The prosecution has further examined P.W.5 Sunil Tukaram Angre. P.W.3 and P.W.5 are the witnesses for recovery of diamonds at the instance of the accused No.2. Since the accused No.2 is not before the Court, I am not discussing their evidence and effect of their deposition in the present Appeal, because their deposition has no bearing on the prosecution insofar as the present Appellant is concerned.

8. To connect the present Appellant with the crime, the prosecution has examined P.W.4 Jamsed Shafi Khan who was the Pancha witness in whose presence, the diamonds were recovered at the instance of the present Appellant. According to him, on 15/01/1996 he was called by Dahisar Police Station at about 04.15 p.m. to act as a Pancha. He further deposed that one person in handcuffs was brought before him and he stated

that he was willing to show the part of stolen property which was kept by him. His memorandum statement was recorded and it was produced on record vide Ex.14. P.W.4 Jamsed Shafi Khan has identified the present Appellant as the accused who had made that statement. He further submitted that thereafter the Appellant led them to a room at Sambhaji Nagar, Dahisar, where he called one Devendra and asked him to hand over diamonds which he had given to him. The said Devendra then produced 81 finished diamonds of 3.54 Carat, 61 unfinished diamond of 2.22 Carat and 437 unfinished diamonds. The recovery Panchanama is produced on record at Ex.14 and 14-A.

9. The evidence of P.W.4 is supported by another witness P.W.6 Devendra Pandurang Pabekar. According to him, in January 1996, the present Appellant had brought diamonds for selling them. This witness P.W.6 Devendra Pandurang Pabekar did not sell the diamonds. On 15/01/1996 when the Appellant came to him with police, he handed over diamonds to the Appellant. P.W.7 PI Baban Shivram Kadam the Investigating Officer has further corroborated the evidence of P.W.6 and

P.W.4 in respect of recovery of diamonds. It is interesting to note that the FIR mentioned that 400 cut and uncut diamonds were stolen on 26/12/1995 from the factory of P.W.2 and taking into account the total number of diamonds recovered at the instance of the present Appellant and recovery at the instance of accused No.2, the diamonds are much more in quantity than what was stolen on 26/12/1995.

10. From the evidence of P.W.4, P.W.6 and P.W.7 it appears that their evidence is reliable on the point that a large number of diamonds were recovered at the instance of the present Appellant. However, the question still remains as to whether the present Appellant can be connected with the actual incident of robbery, which took place on 26/12/1995 at the premises where P.W.1 was working at that time. There is no charge of conspiracy against any of the accused. Therefore the case of each of the accused, including the present Appellant, is required to be considered on its own merits depending on the evidence led by the prosecution. Admittedly the prosecution has

not led any evidence in respect of the identity of any of the persons, who had committed robbery on 26/12/1995. The witnesses have not identified any of the accused in the Court. Therefore in absence of any evidence in respect of the identification of the persons who had committed robbery, it is not possible to arrive at a conclusion that any of the accused before the Court, including the present Appellant, was one of the persons, who had entered the premises on 26/12/1995 and had removed the diamonds. Therefore in my opinion the prosecution has failed to prove that the Appellant and any of the accused committed the offences under Section 397, 392, 452 r/w 34 of the Indian Penal Code. However, Mrs.Mulekar rightly relied on the provisions u/s 114 of Evidence Act and in particular on the illustration (a) mentioned therein to contend that, it can be presumed that a person who is in possession of stolen goods soon after theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession.

11. In the present case, the prosecution had to prove the main case against the accused that they had committed robbery. I have already pointed out that the prosecution has not proved that the Appellant was one of the persons who had committed the robbery in the present case. The illustration given u/s 114 is in two parts. Court can presume that either the said person is a thief or is a receiver of stolen property, since neither of the witnesses have identified the Appellant in Court, on the basis of the prosecution evidence itself, the Appellant has rebutted this part of the presumption and therefore it cannot be held that the Appellant was one of the persons who had committed robbery on that day. However, the second part of the illustration mentioned u/s 114 of the Evidence Act is still applicable and in my opinion, the prosecution has sufficiently proved that the stolen property was recovered at the instance of the Appellant soon after the incident. The Appellant has not been able to give satisfactory explanation and thus has not rebutted the presumption under Section 114 of the Evidence Act. The prosecution has sufficiently proved this incriminating

circumstance against the Appellant that he had the stolen diamonds in his possession. Therefore, in my opinion, he has committed the offence punishable under Section 411 of IPC. It is the offence of dishonestly receiving the stolen property. Though charge was not framed u/s 411; it being a lesser offence, there is no impediment in convicting the Appellant under this section. Therefore in my opinion, though the Appellant deserves to be acquitted from the charges under Section 452, 392, 397 r/w 34 of IPC, he is still liable to be convicted u/s 411 of IPC. The maximum sentence provided for the said offence u/s 411 is 3 years or the payment of fine or both. In the instant case, the Appellant was in custody since 11/01/1996 up to 20/10/1999. Considering the large quantity of the diamonds which were recovered at his instance, I am inclined to award maximum sentence of three years u/s 411 of IPC. Hence, the following order:

ORDER

1. The Appeal is partly allowed.

2. The conviction and sentence recorded by the learned Additional Sessions Judge, in Sessions Case No.892 of 1996 vide Judgment and Order dated 20/10/1999, convicting and sentencing the Appellant under Section 452, 392, 397 r/w 34 is set aside. Instead, the Appellant is convicted for commission of offence punishable u/s 411 of IPC and is sentenced to suffer rigorous imprisonment for three years and to pay a fine of Rs.10,000/- and in default to suffer rigorous imprisonment for six months. The Appellant was in custody for more than four years, which includes the sentence of three years awarded to him as well as the sentence awarded to him in default of payment of fine. The Appellant is on bail. Therefore since he has already undergone the sentence awarded to him, he need not surrender for further undergoing his sentence. His bail bond stands discharged.

4. The Appeal is disposed of in the aforesaid terms.

(SARANG V. KOTWAL, J.)