**BOMBAY HIGH COURT**

Mahamad Jamsher Tadvi

Vs.

State. (Bombay)

Criminal Appeal No. 990 of 1955

(Shah and Vyas, JJ.)

04.11.1955

**JUDGMENT**

**Shah, J.**

1. This is an appeal filed by accused Nos. 2, 3, 8, 14 and 15 who were tried with ten other persons an Sessions Case No. 20 of 1955 before the learned Additional Sessions Judge, East Khandesh. for offences under Sections 395, 457, and 397, Penal Code, and under Section 19(f), Arms Act. The learned Additional Sessions Judge tried the case with the aid of Assessors. The Assessors were of the view that the appellants and certain other persons were guilty of an offence under Section 395 read with Section 457, Penal Code. They were also of the view that the 8th accused, who is the third appellant before us, was guilty of an offence under Section 19(f), Arms Act. The learned Sessions Judge convicted the appellants of an offence under Section 395 read Section 457, Penal Code. He further convicted the 8th accused, who is the third appellant, of an offence under Section 397, Penal Code, and also under Section 19(f), Arms Act. He sentenced the appellants to various terms of imprisonment. The appellants have appealed to this Court against that order of conviction and sentence.

2. On the night between the 19th and 20th February, 1955, at about midnight dacoity was committed in the house of one Nandlal Motiram of the village of Bhokar. At that time about 15 to 18 persons, who were armed with deadly weapons like guns, swords, spears and knives, forcibly entered the house of Nandlal Motiram and removed property worth Rs. 691/12/-. It is the case for the prosecution that resistance was offered to the dacoits and gun-shots, were fired as a result of which some of the dacoits were injured. The first accused was caught on the scene of the offence. There was another dacoit who was also injured by gun-shot and as he was unable to run away his head was cut off by his companions and was removed and the remaining dacoits ran away with the head of the dacoit. A complaint was lodged at the police station, Jalgaon, by one Manakchand Gulab and investigation was started. The police officers came to the village of

Bhokar and arranged for sending the persons who had been injured by the dacoits to the Civil Hospital, Jalgaon, and they made 'panchnamas' of the scene of the offence and of the injuries suffered by various persons. Thereafter 15 persons were charge-sheeted and they were ultimately tried before the Additional Sessions Judge of East Khandesh at Jalgaon. It is unnecessary for us in this appeal to consider the evidence as against persons other than accused Nos. 2, 3, 8, 14 and 15 because their cases are not before us in this appeal. We will, therefore, confine our observations to the evidence against accused Nos. 2, 3, 8, 14 and 15 who are the appellants before us.

3. It may be mentioned that as against the present appellants there is no. evidence that they were identified at the time of the dacoity by any of the witnesses for the prosecution. It is not stated that any of the witnesses identified accused Nos. 2, 3, 8, 14 and 15 as amongst the dacoits who entered the house of Nandlal Motiram and removed property.
As against accused Nos. 3, 8, 14 and 15 also there is no evidence that they were found in possession of any property which was removed at the time of the dacoity. Only against the accused No. 2 there was the evidence that he had pointed out article No. 79, which is alleged to be the property belonging to Nandlal Motiram, after digging up the place wherein was lying buried in a shed belonging to the second accused. The learned Sessions Judge convicted accused Nos. 2, 3, 8, 14 and 15 upon evidence which may be regarded essentially as circumstantial evidence. It was not disputed in the trial Court nor on the state of the record in this Court can it be disputed that there was a dacoity committed on the night between the 19th and 20th of February, 1955, in the house of Nandlal Motiram, and that at the time of the commission of the dacoity the dacoits were armed with deadly weapons, and those persons were required to be treated in the Civil Hospital at Jalgaon. The only question which falls to be determined in this appeal is whether amongst the dacoits were accused Nos. 2, 3, 8, 14 and 15.

4. Now against accused No. 2 the evidence which the prosecution tendered was firstly the evidence that accused No. 1 had given to Nandlal Motiram the name of the second accused as one of the dacoits on the morning on 20-2-1955. The learned Sessions Judge did not believe the evidence of Nandlal Ramchandra who stated that the first accused had given the name of the second accused to him. Nandlal Ramchandra had not made the statement which he supported to make in the Court of Session before the police or the committing Magistrate. The second piece of evidence on which the prosecution relied against the second accused was that he had produced after digging in the cattle shed of his house a gold ring which was article No. 79 before the trial Court. He had also produced a Pishwi or a hand-pick, Article 80. Nandlal Ramchandra and his father Motiram Laxman (sic) identified the ring, Article 79 as belonging to them. Similarly the witness Shankarlal Ramchandra identified the ring, Article 79, as belonging to Nandlal Motiram. Both Nandlal and Motiram, however, admitted in cross-examination that there were no special identification marks on the ring. Nandlal admitted that the ring which he identified as belonging to him was worn by him occasionally and that other people used to wear rings similar to the ring which was produced before the Court. He also admitted that rings of that type could be obtained

in the bazar. He further admitted that he had no written evidence to show that he had purchased the ring which was produced before the Court.
Evidently the ring had no special identification marks. The fact that the second accused had buried the ring in his cattle shed and at the instance of the police it was produced by him before the police is a circumstance which does create suspicion against the second accused. But it is to be noted that the ring was produced by the second accused on 27-2-1955, whereas he was arrested early in the morning on 20th February. There being no special identification marks, we do not think that it can be accepted as proved beyond reasonable doubt that the ring produced by the second accused on the 27th February does really belong to the complainant and that it was the ring which was lost at the time of the dacoity. The second accused stated that the ring belonged to him and he further stated that he had not produced it from his cattle shed. The third piece of evidence on which the prosecution relied against the second accused was that on the night of the offence the second accused was not in his house. But that evidence in our judgment is not very reliable. After the commission of the offence, it is the case for the prosecution, the police patil went round the village and ascertained whether the second accused was in his house on the, night of the offence. Such evidence can at best be regarded as hearsay and can have little evidentiary value. It is true that the first accused had stated in his confession that the second accused was one of the dacoits who had accompanied him in the commission of the offence of dacoity at the house of Nandlal Motiram. Now the confession of the first accused is not evidence against any person other than the first accused. It may be used as evidence against a co-accused provided it is corroborated in material particulars. On the record, of the case there appears to be no reliable evidence which corroborates the statement of the first accused that the second accused was one of the dacoits who participated in the dacoity at the house of the complainant Nandlal Motiram. In our view, there is no reliable evidence on the record relying on which the second accused could have been convicted.

5. So far as the third accused is concerned, there is no evidence against him of identification by any of the witnesses that he was one of the dacoits who participated, in the dacoity at the house of Nandlal Motiram. There is also no evidence that he was in possession of any property which was lost in the dacoity. The only evidence the learned Sessions Judge relied upon for convicting the third accused was firstly that the third accused pointed out a sword from the field of one Yadav Ziparu after digging up in a heap of thorns and took out the sword which was lying underneath it. It is not suggested that the sword belonged to any of the witnesses for the prosecution or that it was lost in the commission of the offence. At best the evidence would indicate that the third accused knew that in the field of Yadav Ziparu there was a sword lying underneath a heap of thorns but that evidence cannot, in our judgment, lead to an inference that he had participated in the commission of the offence of dacoity. It is true that there is evidence of witnesses for the prosecution that some of the dacoits were armed with swords but there is no evidence to prove that the sword before the Court, and which was pointed out by the third accused, was one of the swords used in the commission of dacoity. There being no evidence that the third accused was found in possession of any property alleged to be stolen and there also

being no evidence for identification, we do not think that the finding of the sword at the instance of the third accused could be pressed into service for holding that the third accused was guilty of the offence of dacoity at the house of Nandlal Motiram on the night between the 19th and 20th of February, 1955.

6. The evidence against the 8th accused in so far as it relates to the charge of dacoity, is similar to the evidence against the third accused. There is no evidence of identification, and no evidence of the possession of any property alleged to have been stolen. It is true that from the house of the 8th accused a tin box was found which contained articles 73 to 77. But these articles were ten rupee notes and could evidently be not identified by any of the prosecution witnesses as belonging to them and as stolen in the dacoity. The 8th accused pointed out a spear but there was no identification marks on that spear. The 8th accused had also pointed out a gun which was hidden by him, saying that he had concealed it in a particular spot. The 8th accused took the police and the Panchas to a spot behind a tomb of a Pir and took out a gun which was concealed beneath a heap of mud. The gun was produced before the Court as article 54. It was the case of the 8th accused that the gun was not pointed out by him and that no panchnama was made in his presence. There is no reason to disbelieve the evidence of the police officer, exhibit 112, and the Panch, Shivnarayan, exhibit 47, that the 8th accused had pointed out a gun from behind a place of Pir at Jalgaon. If that evidence is accepted and as we accept that evidence, the 8th accused must be regarded as having been in possession of a gun. The 8th accused had not contended and there is otherwise no evidence to show that he held a licence for that gun. There was, therefore, evidence against the 8th accused that he was in possession of an unlicensed gun but there is no evidence against him that he was in any way concerned with the dacoity or in committing house-breaking by night at the time of the commission of the dacoity. There being no evidence that the 8th accused was concerned in the commission of dacoity, evidently the offence under Section 397 Penal Code with which he has been convicted cannot be made out against him. The only offence, on the evidence we can accept, made out against the 8th accused is the offence under Section 19(f), Arms Act. The case against accused Nos. 14 and 15 is also similar to the case against accused Nos. 3 and 8. There is no evidence against these accused that they were identified as dacoits at the time of the commission of the offence. There is also no evidence that any property was found in their possession or that they pointed out any property lost in the dacoity. The learned Sessions Judge relied, however, upon the circumstance that accused Nos. 14 and 15 had gun-shot wounds upon their persons when they were arrested. But the fact that when the accused were arrested more than a week after the date of the commission of the offence with injuries upon their persons, which were testified by medical evidence to be gun-shot wounds, cannot, in our view, be sufficient to justify the conviction 1 of these accused for the offence of dacoity on the night between the 19th and 20th of February, 1955. At best the evidence that they had gunshot wounds on their persons may lead to an inference that they were concerned in some transaction in which they received gunshot injuries but that does not lead to the inference that they were present in the village of Bhokar on the night between the 19th and 20th of February, 1955, and that they received injuries on that night while they were committing the offence of

dacoity at the house of Nandlal Motiram.

7. In our view, therefore, none of the accused Nos. 2, 3, 8, 14 and 15 can be convicted on the evidence before the Court of the offence of dacoity or house-breaking. Accused Nos. 2, 3, 14 and 15 will, therefore, be acquitted of the offence under Sections 395 and 457, Penal Code. Similarly accused No. 8 will also be acquitted of the offences under Section 397 and Section 457, Penal Code. There being, however, evidence against the 8th accused that he was in possession of an unlicensed gun, his conviction under Section 19(f), Arms Act, will be affirmed. The sentences passed against accused Nos. 2, 3, 14 and 15 for the offences for which they were convicted in the Court below will be set aside. The sentence passed against the 8th accused for the offences under Sections 397 and 457 will also be set aside. The conviction of the 8th accused for an offence under Section 19(f), Arms Act, and the sentence passed upon him for that offence will be maintained. Accused Nos. 2, 3, 14 and 15 to be released forthwith.
Order accordingly.