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C.C. NO.1388/PW/2016
CNR No.:MHMM13-000921-2017

Presented on : 11/07/2016
Registered on : 11/07/2016
Decided on : 22/09/2022
Duration : 06Y.02M.11D.

**IN THE COURT OF ADDL. CHIEF METROPOLITAN MAGISTRATE,
11TH COURT, KURLA, MUMBAI.**

(Presided over by Mr. S. P. Shinde)

(Judgment Under Sec. 355 of Cr. P. C.)

Exhibit-

1. The serial number of the case : **C.C. No.1388/PW/2016**
CNR No.:MHMM13-000921-2017
2. The date of commission of the offence : 02/06/2016
3. The name of the informant (if any) : Vinod Somnath Sabale.
4. The name of the accused : **Aarti Subodh Pagare**
persons, their parentage and **Age:** Adult,
residence
R/o. Siddharth Colony,
Mohan Salave Plot No. 130,
Room No. 130, Room No.
1/2, Chembur, Mumbai.
5. The offences complained of or proved : Under sections 454, 457, 380
of IPC.
6. The plea of the accused and his examination (if any). : Accused pleaded not guilty.
7. The final order: : Accused is convicted.
8. The date of such order : 22/09/2022

Ld. APP for the state: Shri. A. S. Thakur.
Name of Advocate for accused Shri. Arun Gaikwad.

JUDGMENT

(Delivered on **22nd September, 2022**)

The accused is charge-sheeted for the offences punishable under Sections 454, 457 and 380 of the Indian Penal Code, 1860 (In short "IPC").

2. The case of the prosecution in short is as under:-

Informant Vinod Somnath Sable approached police station Chembur on 04/06/2016 and lodged report alleging that on 02/06/2016 he left his house for his work at about 7.00 p. m. He returned back to his house on 03/06/2016 at about 8.30 morning. While he was opening latch of his house a lady namely Aarti Pagare i. e. accused residing in his neighbour came there and asked her whether he had come to house during that night. The informant told her that he did not come house during last night. Thereupon, the said lady told him that she heard noise of door of his house during that night. The informant entered his house and found that household articles were lying in scattered condition. He searched a bag to see gold ornaments of his wife. But he could not find gold ornaments of his wife. So, at about 12.45 noon he made phone call to his wife Suvarna and narrated

the incident happened in house to her. His wife immediately returned back. Thereafter, the informant and his wife took search for gold ornaments in their house. But the informant did not get gold ornaments of his wife till 04/06/2016. So, on 04/06/2016 he lodged report about the theft of gold ornaments consisting of gold mangalsutra weighing 10 grams worth Rs.25,000/- gold necklace weighing 10 grams worth Rs.25,000/-, gold ear chain weighing 4 grams worth Rs.12,000/-, gold earrings weighing 1.5 grams worth Rs. 2000/- and 3 gold finger rings total weighing 8 grams worth Rs.20,000/-.

3. On the basis of report lodged by the informant, PSI Sunil Shinde, who was PSO of PS Chembur on that day, registered crime bearing No.183/2016 against an unknown person for the offences punishable under Sections 454, 457 and 380 of IPC. Thereafter, he went to spot of incident and prepared spot panchnama in presence of two panchas. Thereafter, he handed over case diary to PSI Bharat Satpute for further investigation. Bharat Satpute during the course of investigation recorded statement of witnesses. He effected arrest of the accused. During the course of police custody, accused made disclosure statement. Consequently, he seized 4 of the 5 stolen articles under seizure panchnama Exh-13. After completion of investigation, he submitted charge-sheet.

4. My learned predecessor framed charge (Exh-2) against the accused for the offences punishable under Sections 454, 457 and 380 of the IPC. It was read over and explained to the accused. She pleaded not guilty and claimed to be tried.

5. Following points arise for my determination. I recorded my findings thereon for the reasons given there under :

Sr. No.	Points	Findings
1.	Does the prosecution prove that in between 7:00 p.m. of 02/06/2016 to 8:30 a.m. of 03/06/2016 the accused committed house breaking in the house of informant in order to committing theft?	Yes.
2.	Does the prosecution prove that in between 7:00 p.m. of 02/06/2016 to 8:30 a.m. of 03/06/2016 the accused committed house breaking by night in the house of informant in order to committing theft?	No.
3.	Does the prosecution prove that the accused committed theft of gold ornaments consisting of gold mangalsutra weighing 10 grams, gold necklace weighing 10 grams, gold ear chain weighing 4 grams, gold earrings weighing 1.5 grams and 3 gold finger rings total weighing 8 grams from the house of the informant ?	Yes.
4.	What order?	As per final order.

REASONS

6. In order to prove the guilt of the accused, the prosecution has examined the informant Vinod (PW1) (Exh-8), who deposed in consonance of his report (Exh-9), Suvarna (PW2) (Exh-10), Gauri Sitafale (PW3) (Exh-11) who deposed about disclosure statement (Exh-12) and seizure panchnama (Exh-13), Mangesh (PW4) (Exh-14) who proved spot panchnama (Exh-15), PSI Sunil Shinde (PW5) (Exh-16) who prepared spot panchnama (Exh-15) and PSI Bharat Satpute (Exh-17) who deposed about the steps taken by him during investigation.

7. After completion of prosecution evidence statement (Exh.19) of accused under section 313 of Cr. P. C. is recorded. From the answers given by the accused to the questions put to her in her statement (Exh-19), her defence appears to be of false implication.

8. Heard the learned APP for the state and the learned counsel Mr. Arun Gaikwad for the accused.

As To Point No. 1 To 3 :-

9. Evidence led by prosecution on all these points is common. So, in order to avoid repetition while discussing evidence, all these points are taken for common discussion.

10. As mentioned above accused charged for offences punishable under sections 379, 454 and 457 of IPC. In order to

prove the offence of theft, the prosecution must prove that 1. the dishonest intention to take property; 2. the property must be movable 3. it should be taken out of possession of another person; 4. it should be taken without consent of that person and 5. there must be some removal of the property in order to accomplish the taking of it.

11. To prove offence punishable under section 454 of IPC, the prosecution must prove that the accused has committed lurking house trespass or house breaking in order to commit any act punishable by imprisonment.

12. To prove offence punishable under section 457 of IPC, the prosecution must prove that the accused has committed lurking house trespass or house breaking by night in order to commit any act punishable by imprisonment.

13. In the case at hand evidence of informant Vinod (PW1) (Exh.8), his wife Suvarna (PW2) (Exh.10) and Gauri (PW3) (Exh.11) is of very importance. Informant Vinod (PW1) (Exh.8) deposed in consonance with his report (Exh.9). As deposed by the informant Vinod incident occurred on 02/06/2016 during night hours. On that day he was on night duty. His wife i.e. Suvarna (PW2) (Exh.10) has gone to her parental house for delivery. When he returned from his duty accused told him that she heard noise from his house. He opened lock and went in his house and

saw that articles in his house were scattered. He then checked the bag in which ornaments were kept and found that ornaments consisting of gold mangalsutra weighing 10 grams, gold necklace weighing 10 grams, gold ear chain weighing 4 grams, gold earrings weighing 1.5 grams and 3 gold finger rings total weighing 8 grams were stolen. He then made phone call to his wife and narrated incident to her.

14. Suwarna (PW2) (Exh10), wife of the informant Vinod (PW1) deposed in same manner as that of the informant Vinod and corroborated his testimony as to theft of gold ornaments consisting of gold mangalsutra weighing 10 grams, gold necklace weighing 10 grams, gold ear chain weighing 4 grams, gold earrings weighing 1.5 grams and 3 gold finger rings total weighing 8 grams from their house. Thus, from the evidence of informant Vinod (PW1) and Suwarna (PW2) it becomes clear that in the incident of theft occurred in their house in between 7:00 p.m. of 20/06/2016 to 8:30 a.m. of 03/06/2016 gold ornaments consisting of gold mangalsutra weighing 10 grams, gold necklace weighing 10 grams, gold ear chain weighing 4 grams, gold earrings weighing 1.5 grams and 3 gold finger rings total weighing 8 grams were stolen.

15. PSI Sunil Shinde (PW5) (Exh16) registered crime and prepared spot pnchnama (Exh.15) in presence of Mangesh (PW4) (Exh.14) and another pach.

16. On the point of report (Exh.9) learned advocate for the accused submits that there is delay of more than 24 hours in lodging report. As to this aspect he submits that as per prosecution case itself the incident occurred between 7:00 p.m. of 02/06/016 to 08:30 a.m. of 03/06/2016. He further submits that the report came to be lodged on 04/06/2016 at 09:15 a.m. Thus, he submits that the delay caused in filing report is not at all explained by the prosecution. So, the prosecution case becomes doubtful. He further submits that the premises where the informant and his were residing were owned by the family of accused. The informant was paying rent of said premises to the mother-in-law of the accused. Husband of accused had asked informant to pay rent to him. So the informant had grudge against the accused and her husband. So, the informant lodged false report of theft. Learned advocate for the accused invited attention of the court towards the cross-examination of Suwarna (PW2) and pointed out that as admitted by Suwarna (PW2) report (Exh 9) came to be lodged after deliberations between the informant Vinod (PW 1) and Suwarna (PW 2). On the basis said material came on record during cross-examination of Suwarna (PW 2) he submits that there were inimical terms between the informant Vinod (PW 1) on one hand and accused and her husband on the other hand. As such he submits that the informant belatedly lodged false report and on the basis of the same accused came to be implicated in the present case.

17. However, the aforesaid argument advanced by the learned advanced for the accused is not acceptable. It is for the reason that the report (Exh 9) was lodged by the informant against unknown person. If the informant had to implicate the accused in false theft case, certainly he would have mentioned name of accused therein. But it is not so.

18. Another important aspect which needs to be discussed is that as deposed by the informant on 03/06/2016 when he returned back to his house at 08:30 a.m. accused told him that at night she heard sound of his door. He then opened the door of his house and went inside and found that his household articles were scattered. He then inspected the bag in which gold ornaments were kept. But he did not find gold ornaments. So, he made phone call to his wife Suwarna (PW 2) who had gone to her parental house and narrated incident to her. His wife, Suwarna (PW 2) came back to their house and she also took search of gold ornaments, but in vain. So, both of them thought of what to do and lastly on next day informant Vinod (PW 1) lodged report (Exh 9). Thus, from the aforesaid material it becomes clear that the informant and his wife took search of their gold ornaments and when they get themselves confirmed that their gold ornaments were stolen, then and then only they decided to lodge report and accordingly reported matter to police. It is necessary to mention here that the informant did not took suspicion on anybody.

This shows that the informant acted like a man of ordinary performance. Thus, for the aforesaid reason and considering the nature of offence, by no stretch of imagination it can be said that delay in lodging report is inordinate and fatal to prosecution.

19. In the case at hand four of five stolen articles came to be seized at the instance of the accused. On this point evidence of Gauri (PW 3) (Exh.11) is very much material. As deposed Gauri (PW 3) in the year 2016 police called her at police station to act as panch. At the that time accused Arati, who was in police custody shown her readiness to produce the gold articles kept by her in her house. Accordingly, police prepared memorandum panchnama (Exh. 12). Then police left police station alongwith this witness, another panch and accused by private car. They all went to Sidharth colony as per directions of the accused. They all got down of the vehicle and from there accused took them to her house. Accused knocked door of her house. Person inside the house i.e. husband of accused opened the door. Then accused went inside her house and took out two ear tops, necklace and two finger rings. Police seized those articles and prepared seizure panchanama (Exh.13). This witness admitted her signatures on memorandum panchnama (Exh.12) and seizure panchnama (Exh.13).

20. Learned advocate for the accused submits that that Gauri (PW 3) is habitual panch. So her testimony cannot relied.

But the said submission put forth by the learned advocate for the accused cannot be relied. For during cross-examination of the said, except suggestion that she acted as panch in number cases, no worth material has brought on record. Moreover, said suggestion is denied by the said witness.

21. It would not be out of place to mention here that on the point of recovery of stolen articles in addition to the evidence of Gauri (PW 3), the prosecution also led evidence of Investigating Officer PSI Satpute (PW 6), (Exh. 17). As came on record during the evidence of Investigating Officer PSI Satpute (PW 6) (Exh. 17) during the course of investigation he made inquiry with the informant, other persons and accused. During inquiry accused gave irrelevant and contradictory answers. Hence, he arrested accused on 04/06/2016 at 04:10 p.m. vide arrest panchnama (Exh.18). He also deposed that while accused was in police custody, she made disclosure statement and shown her readiness produce stolen articles kept by her in her house. Accordingly, he prepared memorandum panchnama (Exh.12) and consequent to that accused produced stolen articles from her house. He seized those articles vide seizure panchnama (Exh.13). It is necessary to mention here that the description of the seized property match with the description of the property given in the report (Exh.9). Moreover, stolen property and seized property is one and the same.

22. In para 9 of the judgment in the case of **Pulukuri Kottaya Vs. King-Emperor, AIR 1947 PC 67** Privy Council laid down as under:

“9. Section 27, which is not artistically worded, provides an exception to the prohibition imposed by the preceding section, and enables certain statements made by a person in police custody to be proved. The condition necessary to bring the section into operation is that the discovery of a fact in consequence of information received from a person accused of any offence in the custody of a Police officer must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. The section seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence; but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate.”

23. Thus, the evidence of Gauri (PW 3) and investigating officer Satpute (PW6) on the point of disclosure statement (Exh.12) and seizure of stolen articles seized vide seizure panchnama (Exh.13) is cogent and convincing. For in case at hand as discussed above while the accused was in police custody he made disclosure statement and consequent to that four of the five articles stolen from the house of the informant came to be seized.

24. It is necessary to mention here that within 7 hours of the lodging of the report the accused came to be arrested. Thereafter, while the accused was in police custody she made a disclosure statement and in consequence to that four items namely 1. Necklace weighing 10 gm. worth Rs.25,000/-, 2. Two gold ear tops weighing 4 gm. Worth Rs. 12,000/-, 3. an ear ornament weighing 1.5 gm. Worth Rs. 2000/- and 4. Two gold finger rings weighing 6 gm. Worth Rs. 20000/- came to be seized. Thus, out of five stolen properties except a Mangalsutra and a gold finger ring all other articles came to be seized at the instance of the accused. The accused has not claimed ownership as to those seized articles. The accused has also not tendered any explanation as to how those articles came in her possession. Apart from that it also not case of the accused that the informant in collusion with her husband and mother-in-law planted those articles in the container kept on the plank in her house. So, the two fold defence of the accused that her husband demanded rent from informant and another defence

that because of quarrel between the accused and her mother-in-law, the informant lodged false report against her cannot be accepted.

25. Thus, from the memorandum panchnama Exh.12 and recovery panchnama Exh.13 it becomes clear that the four of the five stolen articles came to seized at the instance of the accused within 24 hours from the lodging of the report. Thus, the stolen articles came to be seized immediately. So, as laid in illustration (a) of section 114 of the Evidence Act, 1872 the court may presume *“that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen.”* Here in the case at hand it is also not the case of the accused that she received those articles from any other person not knowing to be stolen. As already discussed above the accused has not given any plausible explanation as to how she came in possession of those articles of which theft was occurred from the house of the informant i.e. from his possession. Thus, above discussion leads to the court to a conclusion that the accused committed theft of those articles. As such presumption can safely be drawn that the accused is thief and accordingly such presumption is drawn.

26. In the case at hand, accused is charged for the offences punishable under sections 454 and 457 of the IPC. In the case at

hand, from the evidence of Vinod (PW1) (Exh-8), it becomes clear that theft of gold ornaments described by him in his report (Exh-9) had taken place in his house in between 7.00 p.m. of 02/06/2016 to 8.30 a.m. of 03/06/2016. As already discussed above, it has proved that he accused has committed theft in the house of the informant. Thus, it becomes clear that in the said incident, accused committed house breaking by entering house of informant when it was locked and it was not intended by the informant to be entered by anybody either by breaking its lock or by pushing it.

27. It would not be out of place to mention here that as per the prosecution case itself, the incident occurred in the house of informant while nobody was present in his house from 7.00 p.m. of 02/06/2016 to 08.30 a.m. of 03/06/2016. However, there is no material on record to show that the incident of theft has taken place during night hours i.e. after sunset and before sunrise. Therefore, it can not be said with certainty that incident of theft had occurred in the house of informant during night hours only.

28. Thus, from the material evidence discussed above, it becomes clear that the prosecution has proved beyond reasonable doubt that in between 7.00 p. m. of 02/06/2016 to 8.30 a.m. of 03/06/2016 accused committed house breaking and also committed theft of gold articles, as four of the five stolen gold articles came to be seized at the instance of the accused herself. Thus, for the aforesaid reasons, points No. 1 and 3 are answered

in the affirmative. However, point No.2 is answered in the negative.

As To Point No.4 :-

29. In view of affirmative findings recorded as to the points No. 1 and 3, the accused is held guilty for the offences punishable under Sections 380 and 454 of IPC. Hence, it is necessary to hear the prosecution, the accused and her advocate on the point of quantum of sentence.

30. On the point of quantum of sentence Ld. Advocate for the accused submits that the accused is woman having children. He further submits that this is the first offence of the accused. He further submits that during the course of trial accused never remained absent. As such, he prayed to extend benefits of Probation of Offenders Act.

31. On the point of quantum of sentence accused submits that she has to look after her three small school going children and husband. As such, she also prayed to show leniency.

32. On the other hand, Ld. APP for the State submits that there is no just ground for extending benefit of Probation of Offenders Act. As such, he prayed for awarding maximum sentence to the accused, as provided by law.

33. I have given anxious consideration to the submissions advanced by the accused herself, her advocate and Ld. APP for the

State. The offences proved against the accused are of lurking house tress-pass and theft in dwelling house. It is necessary to mention here that there is nothing on record to show that the accused is habitual offender and she has been convicted previously for the offence of theft or like offence. Admittedly, the accused is a woman. She has three small school going children. She is one of the earning member of her family. Thus, considering all these circumstances, I think that this is a fit case to extend benefit of Probation of Offenders Act to the accused. Hence, in answer to point No.4, I pass the following order.

ORDER

- 1) The accused **Aarti Subodh Pagare** is convicted for the offences punishable under sections 380 and 454 of the Indian Penal Code vide Section 248(2) of the Code of Criminal Procedure and instead of sentencing her at once to any punishment she is directed to be released under section 4 of the Probation of Offenders Act on her entering into a bond in the sum of Rs.5000/- with one surety in the like amount to appear and receive sentence whenever called upon by this Court within a period of one year and in the mean time to keep the peace and be of good behaviour.
- 2) The accused is acquitted for the offence punishable under section 457 of Indian Penal Code vide section 248(1) of Code of Criminal Procedure.

- 3) The bail bonds of the accused are cancelled.
- 4) Interim custody of the seized property already given to the informant is ordered to be confirmed after appeal period is over.

Date:22/09/2022

(S. P. Shinde)
Addl. Chief Metropolitan Magistrate,
11th Court, Kurla, Mumbai.