

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CRIMINAL APPELLATE JURISDICTION

**CRIMINAL APPLICATION NO.37 OF 2015**  
**IN**  
**CRIMINAL REVISION APPLICATION NO.443 OF 2014**  
**WITH**  
**CRIMINAL REVISION APPLICATION NO.443 OF 2014**

Rahul Guruprasad Mishra  
Aged 20years, Residing at Jay  
Maharashtra Nagar Near V.I.T.  
College, Room No.62, S.P. Road,  
Wadala (East), Mumbai -400 037.  
(now confined at Nasik Road Central  
Prison, Nasik Road).

...Applicant  
(orig. Accused)

Versus

The State of Maharashtra  
(at the instance of Wadala Police  
Station vide C.R. No.27 of 2013  
tried in Sessions Case No.403 of  
2013.)

.... Respondent

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Mr. Manas N. Gawankar for the Applicant.  
Mr. V.B.K. Deshmukh, APP for the Respondent -State.

**CORAM:-M.L. TAHALIYANI, J.**

**DATED : 23<sup>rd</sup> MARCH, 2015.**

**Oral Judgment :**

Admit. By consent of the parties taken up forthwith for final  
hearing.

2. Revision application challenges order passed by Additional Sessions Judge Mr. M.N. Bondre, Court Room No.17 of Sessions Court, Greater Bombay, dismissing the appeal of the Applicant bearing Criminal Appeal No.152 of 2014. The Applicant has been convicted by the Assistant Sessions Judge, Mr. D.K. Mulla by his judgment dated 14-2-2014 in Sessions Case No.403 of 2013 for the offence punishable under section 397 of the IPC and has been sentenced to suffer R.I. for a period of four years and to pay a fine of Rs.5,000/-. Said order of conviction and sentence has been maintained by the Appellate Court in the above stated appeal.

3. Hence, the Applicant feels aggrieved by both the judgments has moved this Court by way of revision application. At the outset it may be mentioned here that both the learned Judges failed to take note that minimum punishment for the offence punishable under section 397 of the I.P.C. is seven years. There is no provision for imposing punishment of less than seven years. As such, it is abundantly clear that both the learned Judges of the Trial Court and Appellate Court passed orders without reading section 397 of the IPC.

4. Apart from what has been stated by me hereinabove, I have considered the merits of the case on the basis of the arguments submitted by learned counsel for the Applicant and learned APP for the Respondent-State. Learned counsel for the Applicant brought to my notice various discrepancies in the prosecution case particularly in the evidence of PW5, who is the complainant and injured.

5. The incident in question had occurred on 21-2-2013. The P.W.5 /injured Mr. Mahesh Mandare, who was resident of Sangamnagar, S.P. Road, Wadala (East), Mumbai-37 was passing from near the Railway station, Wadala at 4.30 a.m. to go home. Two persons accosted him in front of Cement Factory on the said road. One of them was taller and one of them was shorter in height. Both of them used force against him and took away his Black berry white colour Mobile phone. PW5 tried to chase them. However, the person who was taller in height inflicted knife blow on the stomach of PW5 and ran away from the spot. In the meantime, fortunately for PW5, police vehicle reached there and PW5 was taken to hospital where he was admitted for treatment. His statement was recorded by police and offence under section 397 of the IPC was registered.

6. During the course of investigation statements of the witnesses were recorded. The Applicant was arrested on 22-2-2013. The co-accused was juvenile. Therefore, he was separately dealt with in accordance with Juvenile Justice (Care and Protection of Children) Act. It is alleged during the course of interrogation of the Applicant, he made a voluntary statement on the basis of which a Black berry phone of white colour was seized by the police. After completion of investigation and collection of medical certificate, charge-sheet was filed against the Applicant for the offence punishable under section 397 of the IPC.

7. The Applicant pleaded not guilty to the charge framed by learned Trial Judge and came to be tried. Prosecution / Respondent had examined 9 witnesses in support of its case. Case of the Respondent is mainly based on evidence of PW5 and alleged recovery of phone at the instance of the Applicant. Admittedly the Applicant was not known to PW5. It can be seen from the evidence that Applicant had a very little chance to memorise the face and personality of the Applicant. However, in the test identification parade on 5-4-2013 the Applicant was identified by PW5. During the course of recording of evidence PW5 narrated the incident and stated that the Applicant, who

was present before the Court on the date of recording of evidence of PW5 was the same person who had taken away his mobile hone and had assaulted him by means of a knife.

8. The learned counsel for the Applicant has submitted that in the first place, there is no reasonable explanation as to why identification parade was held after about more than one and half month of the date of arrest. Learned APP has no answer for the delay. In this regard it may be mentioned here that delay in holding the test identification parade is not always fatal to the prosecution case. However, the delay is necessary to be explained by the investigating agency. If there is a proper explanation explaining delay in holding test identification parade and if the court comes to the conclusion that the delay has not vitiated the evidence of identifying witnesses the Court may rely upon evidence of such witnesses. However, in the present case there is no material to show as to what was the reason for the delay. What is pertinent to note is that PW5 though has identified the Applicant in the test identification parade has not stated in his evidence that any identification parade was ever held and he had identified the Applicant in the said parade. Therefore, in my opinion evidence of PW-5 in respect of identity of the Applicant is highly unreliable.

9. The next piece of evidence against the Applicant is recovery of black berry phone. Both learned Judges have taken note of the fact that the stolen phone was of black colour and recovered phone was of white colour. Both the learned Judges have brushed aside this discrepancy by stating in their judgments that it was a minor discrepancy and did not go to the root of the case. In my opinion, these observations of the learned Trial Court and Appellate Court are absolutely not acceptable as much as if the PW5 /complainant on the very first day of the incident states in his FIR and in his evidence that the mobile was of black colour then it is difficult to understand as to how could he identify white colour mobile to be belonging to him and the same mobile robbed from his possession by the Applicant.

10. As such it is abundantly clear that evidence against the Applicant was absolutely unreliable and the Trial Judge should not have convicted the Applicant for the offence punishable under section 397 of the IPC. Learned Appellate Court in fact should have granted the appeal. In these circumstances, it follows that the revision application needs to be granted and the Applicant deserves to be acquitted of the offence punishable under section 397 of the IPC.

11. Hence, I pass following order :

a) Revision application is allowed. Judgment dated 14-2-2014 passed by the Assistant Sessions Judge, Mumbai in Sessions Case No.403 of 2013 and the judgment dated 1-10-2014 passed by the Additional Sessions Judge, Mumbai in Criminal Appeal No.152 of 2014 are set aside.

b) The Applicant is acquitted of the offence punishable under section 397 of the IPC. He shall be released from the prison, if not required in any other case.

c) The revision application stands disposed of. In view of the disposal of revision application itself, Criminal Application No.37 of 2015 does not survive.

(JUDGE)