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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 743 OF 2010

Nitin @ Nimesh Lalu Ingle

..Appellant.
(Original Accused)

Vs.

The State of Maharashtra
through Wadala Railway Police Station

..Respondent.

Miss. Lakshmi Raman, Appointed as Amicus Curiae for the Appellant.
Mrs. G.P. Mulekar, APP for State.

CORAM: A.S. GADKARI, J.

DATE : 8th August 2016.

P.C.

1 The appellant is convicted under Section 392 of the Indian Penal Code and is sentenced to suffer rigorous imprisonment for three years and to pay a fine of Rs.1000/-, in default of payment of fine to further suffer rigorous imprisonment for six months and under Section 397 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for seven years and to pay a fine of Rs.1000/-, in default of payment of fine to further suffer rigorous imprisonment for six months by the learned Ad-Hoc Additional Sessions Judge, Sewree, Mumbai in Sessions Case No.134 of

2010 by its Judgment and Order dated 4th September 2010. The said Judgment and Order dated 4.9.2010 is impugned herein by way of the present appeal.

2 The present appeal is admitted on 12.10.2010. The criminal application bearing No.1236 of 2010 preferred by the appellant for bail was rejected by this Court by its Order dated 19.1.2011. The appeal was thereafter listed for final hearing, however, the Advocate for the appellant did not remain present on various occasions. This Court therefore requested Miss. Lakshmi Raman to appear in the present appeal as an Amicus Curiae and the said fact is recorded in Order dated 22.6.2016. Miss. Lakshmi Raman the learned Advocate has gracefully accepted the said request and argued the present appeal.

3 It is the prosecution case that, the complainant-Mr. Vijay Giri (PW-1) was working as a railway guard at Kurla yard. That on 15.10.2009 after completing his duty at about 2.55 a.m. at Kurla yard, he was proceeding from platform No.9 to aboard the local train for going to Kalyan. At that time all of a sudden three unknown persons came there. Out of three persons, two persons were standing behind him, whereas one person came in front of him and pointed out a knife at him. The person who was in front of the complainant asked the complainant as to from where he

was coming. The complainant replied that he was working as a railway guard and after completion of duty, he was proceeding to his house. The said person asked the complainant Shri Vijay Giri to show his Identity Card. The said person who was holding a knife told the complainant, that he should pay money to him. The said persons took search of the complainant and thereafter robbed an amount of Rs.170/- and a Nokia mobile hand-set of the complainant and left the place. The said Nokia mobile hand-set was bearing model No.3110. The complainant thereafter went to the Station Master who directed him to approach Wadala Railway Police Station. The complainant lodged the first information report which is at Exh.9.

4 On the basis of the first information report, Wadala Railway Police Station registered offence under Section 392 read with Section 34 of the Indian Penal Code vide CR No.105 of 2009. Mr. Kisan Gavit (PW-6) was entrusted with the investigation of the said crime. The Investigating Officer thereafter visited the spot of incident, prepared panchanama arrested the accused and requested Mr. Parshuram Kale (PW-4) Tahasildar to conduct test identification parade of the appellant. The said test identification parade was conducted at Byculla jail. During the course of investigation, the mobile handset of the complainant was seized from Sunil L. Pradhan by effecting panchanama on 16.11.2009 which is at Exh.17.

That the appellant after robbing the said mobile handset from the complainant sold it to the said Sunil Pradhan. Sunil Pradhan in turn gave the said handset to Usman Golandaj (PW-5) for his use and the said PW-5 had put his SIM card in the said mobile handset. The said mobile handset was traced/located by the Police after ascertaining its IMEI number from mobile number of the complainant. During the course of investigation, the weapon i.e. knife used in the crime was recovered at the instance of the appellant in presence of Mr. Radhesham Yadav (PW-2) a panchwitness. After completion of investigation, the Investigating Officer submitted chargesheet in the Court of Metropolitan Magistrate, 35th Court, CST Railway Court, Mumbai.

The learned Metropolitan Magistrate committed the said case to the Court of Sessions as contemplated under Section 209 of Cr. P.C. After committal of the case, the Trial Court framed charge below Exh.2 under Sections 392 read with 397 read with 34 of the Indian Penal Code on 18.3.2010. The said charge was read over and explained to the appellant in vernacular language to which he denied and claimed to be tried. The defence of the appellant was of total denial and false implication due to misunderstanding and suspicion. The prosecution in support of its case examined in all seven witnesses. The learned Trial Court after recording

the evidence of the witnesses and after hearing the parties to the said case, was pleased to convict the appellant by the impugned Judgment and Order dated 4th September 2010.

5 As stated above, the prosecution in support of its case has examined in all seven witnesses. It is to be noted here that other two accused person who were accompanying the appellant could not be arrested by the police and the trial pertaining to the present case proceeded only against the appellant.

PW-1 Mr. Vijay Giri is the victim/complainant who has narrated the facts pertaining to the robbery committed by the appellant. PW-1 in his testimony has stated that the said incident took place at about 3.00 a.m. at platform no.9 of Kurla railway station. PW-1 could not identify the knife as he was confused at the time of incident. PW-1 in his cross-examination has admitted that the police did not take into custody the bill pertaining to purchase of the mobile handset. He has further admitted that the incident took place at about 3.00 to 3.20 a.m. and some people were sleeping at the side of the said platform. That there was RPF office near the said platform. He has further admitted that he saw the accused/appellant only once before the date of recording of his substantive evidence. It is to be noted here that Mr. Vijay Giri (PW-1) has nowhere stated in his

deposition that there was sufficient light to identify and/or observe the appellant in the wee-hours on 15.10.2009 and particularly about 3.00 a.m.

PW-2 Radhesham Yadav is the panch/witness to the recovery of knife alleged to have been used by the appellant at the time of commission of offence. That in pursuance of memorandum statement (Exh.12) given by the appellant when he was in the custody to the police, the appellant led the police to the spot where he had concealed the weapon. The appellant thereafter took out a weapon from the bushes near the platform No.9 of Kurla railway station. The said recovery panchanama is at Exh.13. Perusal of the said panchanama, reveals that after effecting the recovery at the instance of the appellant, neither the thumb impression nor the signature of the appellant was taken on the said panchanama. The Supreme Court in the case of **Jackaran Singh Vs. State of Punjab reported in 1995 Cri. L.J. 3992** has held that, in the absence of signature or the thumb impression of an accused on the disclosure statement recorded under Section 27 of the Evidence Act, detracts materially from the authenticity and the reliability of the disclosure statement, therefore the recovery at the instance of the appellant needs to be kept aside from consideration.

The prosecution has further examined PW-5 Usman Golandaj

to establish the recovery of the mobile handset which was alleged to have been robbed from the complainant Vijay Giri by the appellant. It is the case of the prosecution that after robbing the said mobile phone, the appellant sold it to Sunil L. Pradhan and the said Sunil L. Pradhan subsequently gave the said mobile phone for its use to Usman Golandaj (PW-5). That when Usman Golandaj (PW-5) inserted his SIM card in the said mobile handset, the said handset which was already kept under the observation, came to the notice of the police and police after connecting the said link, seized the same from Sunil L. Pradhan. It is to be noted here that said Sunil L. Pradhan is not examined by the prosecution to establish link through which police were able to seize the said handset.

PW-3 Ramesh Sankpal is the police officer who after collecting the information had kept the mobile handset on observation. PW-4 is Parshuram Kale, Tahasildar, who conducted test identification parade at Byculla Jail wherein the victim Vijay Giri (PW-1) identified the appellant. PW No.6 is Kisan Gavit is the Investigating officer who had conducted the investigation pertaining to the present crime.

6 The learned counsel for the appellant submitted that none of the witnesses have stated about the presence of any light at the spot of incident and in the absence of any specific averment to that effect, there

cannot be any presumption of availability of sufficient light for identification of the appellant. In support of her contention, she relied upon the decision of this Court in the case of **Bala Pandurang Kesarkar & Anr. Vs. The State of Maharashtra reported in 1999 0 Bom CR (Cri) 884 : 1999 3 Mh L.J. 1992**. The Division Bench of this Court in the said case has held that in the absence of definite evidence adduced by the prosecution to establish that the street lights were burning when the incident took place, no presumption can be drawn that they were burning. In the present case, as stated earlier, Mr. Vijay Giri (PW-1) in his cross-examination has admitted that the incident occurred at about 3.20 a.m. and some people were sleeping at the site of the said platform. However, neither her nor any witness has stated that there was sufficient light at the spot of incident which was sufficient for the victim to observe the appellant and subsequently identify him in the test identification parade at the first instance and subsequently while recording the substantive evidence before the Court. In view of the ratio laid down by this Court in the case of **Bala Pandurang Kesarkar & Anr. (supra)**, no presumption can be drawn that there was sufficient light at the place of scene of offence and that the complainant had sufficient opportunity to observe or see the appellant at the time of incident. This observation is further fortified by the admission

given by Mr. Vijay Giri (PW-1) in his examination-in-chief that he could not identify the knife used in the crime as he was confused at that time. The appellant therefore is entitled to have benefit of doubt about his identification.

7 Thus in the present case the recovery of knife at the instance of the appellant cannot be taken into consideration in view of the aforesaid settled legal position. According to me the prosecution has also failed to establish the fact that there was sufficient light at the spot of incident to enable the complainant (PW-1) to observe the appellant at the relevant time and identify him subsequently.

8 The last and only circumstance which is adduced by the prosecution against the appellant is the seizure of mobile phone handset from Sunil L. Pradhan. The victim Vijay Giri in his substantive evidence admitted that he did not give IMEI number of the handset to the Investigating Officer. That the police did not take the receipt of said mobile phone from him. He had also not given any specific features of the handset to the police to recognize and identify it. The prosecution has not brought on record the connecting link of the fact that, how the prosecution came to know about IMEI number of the handset of the victim. No witness has deposed about it. The evidence adduced by the prosecution to establish the

link in the alleged seizure of the mobile phone from Sunil Pradhan is very weak in nature and particularly in view of the fact that the said person i.e. Sunil L. Pradhan has not been examined by the prosecution to substantiate its claim. Apart from the said fact, as stated earlier, in view of the earlier two circumstances mentioned above, it is to be noted that the prosecution has failed to establish the guilt of the appellant beyond reasonable doubt in the present case. It is therefore not necessary to further elaborate the circumstance of seizure of mobile phone from Sunil L. Pradhan as it lacks in material particulars. I find that the evidence adduced by the prosecution is not consistent, cogent and trustworthy and the appellant deserves to be given benefit of doubt for the same. In view of the evidence on record, I am of the considered view that the prosecution has failed to prove beyond reasonable doubt the guilt of the appellant under Section 392 read with 397 of the Indian Penal Code.

9 It is to be noted here that though the Trial Court had framed charge below Exh.2 for the offence punishable under Section 392 read with 397 read with 34 of Indian Penal Code, the learned Trial Court while convicting the appellant has convicted him separately for the offence punishable under Section 392 and 397 of the Indian Penal Code instead of convicting him under Section 392 read with Section 397 of the Indian

Penal Code. The learned Trial Court has also imposed separate sentences on both the said counts on the appellant. This Court in the case of **Mohan Girdhar Singh Vs. State of Maharashtra reported in 2007 0 ALL MR (Cri) 2299 : 2007 0 Cr LJ. 3855** in para-16 held as under:

“Before concluding it may be noted that the learned trial court convicted the accused and sentenced him for the offence under section 392 and 397 IPC separately. It is well settled position of law that section 397 of IPC does not create any substantive offence. Sec. 397 merely regulates the punishment provided for the offence of robbery or dacoity by fixing the minimum term of the imprisonment of 7 years, if the offender while committing robbery or dacoity used a deadly weapon or caused grievous hurt or attempted to cause grievous hurt or death. When the accused is charged for the offence of robbery and it is alleged that he has also used deadly weapon charge should be framed under section 392 read with sec. 397 and not under section 392 and 397 IPC independently. If the guilt of the accused is proved he is to be convicted and sentenced u/s. 392 r/w 397. He cannot be convicted and sentenced separately under s. 392 as well as s.397 IPC. This is supported by an authority of this court in Philip Bhimsent Aind v. The State of Maharashtra 1995 Criminal Law Journal 1694. The learned trial court did not consider the legal position correctly and convicted and sentenced the accused under section 392 as well as sec. 397 IPC. This was not correct.”

10 Thus the conviction of the appellant otherwise also under Section 392 and 397 separately is not within the conformity of the settled position of law.

As a result, the appellant succeeds in the appeal. Appeal is allowed. The impugned Judgment and Order dated 4th September 2010 passed in Sessions Case No.134 of 2010 by the learned Ad-Hoc Additional Sessions Judge, Sewree, Mumbai is hereby quashed and set aside. The appellant is acquitted from charges framed against him in Sessions Case No.134 of 2010. Fine, if any, paid by the appellant be refunded to him after completing formalities.

11 Before parting with the Judgment, it is necessary to place on record the word of appreciation for the able assistance rendered by the learned Amicus Curiae Miss. Lakshmi Raman who was thoroughly prepared and ably conducted the matter.

(A.S. GADKARI,J.)