

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Reserved on: 24.05.2017

Delivered on: 29.05.2017

+ CRL.A.589/2015

ABID

..... Appellant

versus

THE STATE (GOVT. OF NCT OF DELHI) Respondent

Advocates who appeared in this case:

For the Appellant : Mr.Shrikant Tyagi.

For the Respondent : Ms.Neelam Sharma, APP.

+ CRL.A.820/2015

IMTIYAZ @ TOE

..... Appellant

versus

STATE

..... Respondent

Advocates who appeared in this case:

For the Appellant : Mr.Sitab Ali Chaudhary.

For the Respondent : Ms.Neelam Sharma, APP.

CORAM:-

HON'BLE MR JUSTICE ASHUTOSH KUMAR

JUDGMENT

ASHUTOSH KUMAR, J

1. Both the criminal appeals have been heard together and are being disposed of by this common judgment.

2. Appellants Abid and Imtiyaz @ Toe have been convicted under Sections 395 and 397 of the IPC and have been sentenced to undergo RI for 7 years, fine of Rs.5000/- and in default of payment of fine, SI for six months under both the counts by judgment and order dated 16.04.2015/20.04.2015 passed by the Special Judge, NDPS-2, Central District, Tis Hazari Courts, Delhi in S.C No.82/2011 arising out of FIR No.96/2011 (P.S.Timarpur) instituted for the offences under Sections 392/397/412 and 34 of the IPC read with Section 27 of the Arms Act. The sentences have been ordered to run concurrently.

3. On 04.05.2011 at about 5 AM, Munna Prasad (PW-1) and Sandeep Kumar (PW-3) were divested of their belongings including wallet containing money and other documents on point of knife by the miscreants. FIR was lodged by Munna Prasad (PW-1) alleging that while he and PW-3 were going to distribute newspapers, they were intercepted by three miscreants. They were caught hold of and on point of knife, they were divested of their belongings. The miscreants were riding a motorcycle but were not wearing helmets and, therefore, it was stated by PW-1 that if shown to him, he could identify them.

4. Munna Prasad (PW-1) has supported the prosecution version but has stated that after the incident of robbery, while the three unknown miscreants were making efforts to make good their escape, two more persons arrived and all five of them, together left the place of occurrence.

5. Sandeep Kumar (PW-3) also supported the prosecution version but with a different set of facts. He, however, has not identified appellant Abid and two others who were at trial along with the appellants and who have since been acquitted. He has identified only the appellant Imtiyaz.

6. SI Arun Kumar (PW-7) has deposed that on 08.05.2011 he along with SI Vikram (PW-8), ASI Jagdish and IO, SI Lalit Kumar (PW-10) went to Seelampur for the investigation of the case. At about 6.30 pm, appellant Imtiyaz @ Toe was apprehended from a jhuggi in Seelampur at the instance of a secret informer. On the formal arrest of Imtiyaz @ Toe, a Nokia make mobile phone was recovered and seized (seizure memo Exh.PW-7/A). Appellant Imtiyaz @ Toe was thereafter arrested. It has been deposed that Imtiyaz @ Toe made a disclosure statement (Exh.PW-7/D), on the basis of which appellant Abid was apprehended and arrested (Memo Exh.PW-7/E). Appellant Abid is also said to have made a disclosure statement and he got recovered a knife. At the instance of Abid, a wrapper of a SIM card of Airtel was also recovered and seized. Thereafter, it has been stated that the appellants led the police party to somewhere near the Engineering College situated at Gautam Puri where they identified the place where they had left their motorcycles after the occurrence.

7. Vikram Dhaiya (PW-8) has deposed that on 11.05.2011, one Shahzad was arrested who also gave his disclosure statements. During the investigation, it has been stated, PW-8 arrested co-accused Zahir who also made a disclosure statement.

8. SI Lalit Kumar, IO (PW-10) who is a material witness of this case has stated that on 04.05.2011, on receipt of DD No.9A (Exh.PW-2/A), he along with Constable Sunil Dutt (PW-4) went to the place of occurrence where he met PW-1 and PW-3. The statement of PW-1 was recorded by him. He kept two mobile numbers namely 9953462739 and 9013404515 belonging to PW-3, on surveillance. The CDR of the aforesaid numbers

were collected on 07.05.2011. From the CDR of mobile number 9953462739, IMIE Number was ascertained as 357662013686470. The CDR revealed that two mobile numbers of Airtel were being used in the aforesaid telephone. On analysis of the identity, it was found that those numbers were registered in the name of one Gaffar and Abhishek respectively.

9. R.K.Singh (PW-5), Nodal Officer, Bharti Airtel Ltd has deposed that as per record, the mobile number of Abhishek was used in one of the telephone of PW-3. Sh.Israr Babu, Alternate Nodal Officer, Vodafone Services (PW-6) has confirmed that the other mobile was used by one Gaffar.

10. One Anis @ Nafis (PW-9) has stated that he had purchased one Nokia make mobile from appellant Imtiyaz @ Toe for Rs.600/- and he used his own SIM in the aforesaid telephone. However, since he was getting many calls on his SIM from different persons, he returned the mobile to appellant Imtiyaz @ Toe.

11. Neither Gaffar nor Abhishek who are said to have used the mobile with different SIMs have been examined at the trial. On behalf of the defence, 5 witnesses have been examined namely Mohd.Ismail, Nisar Ahmed, Azad Singh, Smt.Shakeena and Smt.Parveen.

12. Mohd.Ismail (DW-1) has deposed that one Azad who is the brother of co-accused Shahzad was taken away by the police officers and he was pressurised to bring Shahzad to the police station. Similarly, Nisar Ahmed (DW-2) has stated that on 07.05.2011, 2-3 police officials came to the residence of appellant Abid and took him on some pretext and thereafter arrested him. Similar statements have been made by the other

defence witnesses.

13. The Trial Court on finding that Shahzad and Zahir who were put on trial as accused Nos.3 & 4 were neither identified by public witnesses nor by PWs.1 & 3, and no recovery having been effected from them, acquitted them.

14. With respect to the appellant Imtiyaz @ Toe, it was argued before the Trial Court that one Nokia mobile was recovered from him but the IMIE number mentioned in the seizure memo and in the CDR were found to be different. There was no proof of the ownership of the mobile of PW-3. In the absence of any public witness, it was highly unsafe, it was argued, to record conviction on such recovery. However, the Trial Court, merely on the basis of the recovery of mobile phones without properly linking it with the looted mobiles, a knife without any specific mark, a wrapper of SIM and discovery of a place where motorcycles were allegedly kept after the occurrence, convicted the appellants under Section 395 and 397 of the IPC and sentenced them to undergo RI for 7 years and to pay a fine of Rs.5000/-. From the records it appears that even though PW-1 had offered that he could identify the miscreants but he was not shown any one of them. In that event, the identification of the appellants by PW-1 is absolutely doubtful. There is nothing on record to suggest that the appellants were shown to either PW-1 or PW-3 or were put on test identification parade. It is quite impossible for anybody to have seen some unknown in the wee hours and remember the facial contours after many years to identify them. Even the recovery of the mobile phones cannot be linked to the looted mobiles as Abhishek and Gaffar who had used such mobiles by putting different SIMs have not

been examined by the Trial Court. There is no specific proof of the fact that the mobile which was recovered from the possession of the appellants belonged to PW-3. There are so many other vital contradictions in the prosecution version that it appears to be rather difficult to sustain the conviction.

15. Thus the reasoning given by the Trial Court for convicting the appellants, does not seem convincing. There is practically no evidence to connect the appellants with the crime.

16. As such the conviction and the sentence of the appellants dated 16.04.2015/20.04.2015 are set aside and the appeal is allowed.

17. The appellants are directed to be released from custody forthwith, if not wanted in any other case.

18. The judgment be communicated to the Superintendent of the concerned jail.

ASHUTOSH KUMAR, J

MAY 29, 2017

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