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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL No. 457 OF 2014

- | | | | |
|----|--|----------------|--|
| 1. | Mohd. Rafik Mohd. Hanif Khan |) | |
| | Age 19 years, Occupation |) | |
| | R/o. Building No. 21A/102, |) | |
| | 1 st Floor, Mankhurd Lalabhai |) | |
| | Compound, Mankhurd, |) | |
| | Mumbai |) | |
| | (Central Jail, Mumbai) |) | |
| | | | |
| 2. | Mohiddin @ Tipu Babumiya |) | |
| | Age- 20 years, Occ: |) | |
| | R/o. Plot No.27, Govandi, |) | |
| | Shivaji Nagar, Hori Masjid, |) | |
| | Govandi, Mumbai |) | |
| | (Central Jail, Mumbai) |)...Appellants | |
| | | (Org. Accused) | |

Versus

The State of Maharashtra	)	
(At the instance of Nehru Nagar Police	)	
Station)	)...Respondent	
	(Org. Complainant)	

Mr. N.M. Nadar i/b. Mr. Omkar	Gopal Nagwekar for
Appellants	
Mr. S.H. Yadav, APP for the State	

CORAM : SMT.SADHANA S. JADHAV, J.
DATE : DECEMBER 17, 2018

JUDGMENT:

1. Heard. The Appellants herein are convicted for the offences punishable under Section 392 of the Indian Penal Code and they are sentenced to suffer rigorous imprisonment for five years each and to pay fine of Rs.5,000/- each, in default, to suffer further R.I. for one year each. They are also convicted for the offences punishable under Section 397 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for seven years each and to pay fine of Rs.5,000/- each, in default, to suffer further R.I. for one year each. Both the substantive sentences of both the accused are to run concurrently. Both the Appellants are acquitted of the offences punishable under section 364(A) of IPC. The Accused/ Appellants are in custody since 2nd October, 2012 till today.

2. It is the case of the prosecution that on 24th September, 2012, the police from Vikhroli Police Station were on patrolling duty and at about 2.45 a.m., when they were patrolling at Eastern Express Highway, they have seen Santro taxi and had suspected some foul play and, therefore, they had apprehended the said taxi. The driver of the taxi had stopped the car and then the persons, who

were in the car had abandoned the car and fled into the jungle. Thereafter they had noted the registration number 'MH02-BQ-5111'. They had taken search of the taxi and had noticed a person, whose hands and legs were tied. They had released the said person and upon inquiry, had learnt that he happens to be the driver of the taxi and the said taxi belongs to one Mr. Rajendra Mishra. They had taken the said person to the police station. He had disclosed his name as Govind Bind. He had disclosed to the police that on that day, 4 persons had boarded his taxi as passengers and after traveling for some distance, had threatened him, brandished a chopper on him, tied his legs and hands and gagged his mouth and, thereafter, had taken his cell phone and cash amount. Govind Bind had also disclosed that the said persons had also robbed one other person and abandoned him on the road after causing him injury. Certain incriminating articles such as nylon rope, handkerchief and two choppers were found in the search. On the basis of report of Govind Bind, Crime No. 00/12 was registered under section 364(A), 394 r/w. 34 of IPC and the said report was sent to Nehru Nagar Police Station as the offence had taken place within the jurisdiction of Nehru Nagar Police Station.

3. At Nehru Nagar Police Station, Crime No. 189/2012 was

registered against unknown persons. After completion of investigation, the charge-sheet was filed, the case committed to the Court of Sessions and registered as Sessions Case No.119/2013. The prosecution examined six witnesses to bring home the guilt of the accused.

4. PW1- Pratap Dagdu Jawale was on patrolling duty. He was attached to Sakinaka Police Station on that day. He along with the other police personnels had released the Complainant – Govind Bind from fetters and had taken him to the police station. It is pertinent to note that Govind Bind has not been examined by the prosecution.

5. PW2- Pratik Kaluram Valte, happens to be an independent witness, who allegedly was victimized at the hands of the same accused persons. According to him, at about 11.20 pm. when he was at Cadbury Bus Stand, he saw a Santro Taxi which was stuck in drainage. The persons from the taxi had requested him to help them to push the car. He along with one accused person i.e. Mainuddin Shaikh @ Tipu had pushed the car. The said persons had offered him a lift upto Anjur Fata. After traveling for some distance, he was threatened by the inmates. They had assaulted him and had snatched his wallet. They had removed the SIM cards

from his cell phone and returned it to him. They had taken Rs.500/- from his wallet. Since there was an ATM card, they had taken him upto ATM and they had tried to withdraw money from his account but they could not succeed. Thereafter they had cut his vein and abandoned him on the road. At that time they had caused the driver of the taxi, to sit beneath the rear seat. In fact they had inquired about his house and had wanted to rob him of his money from the cupboard. They had to cross Toll Plaza and, therefore, they were scared. They tied handkerchief to his eyes and abandoned him on the road. He had approached to Rabodi Police Station to lodge a report. It appears from the record that no report was lodged by him and no complaint was lodged at his behest. Soon after, Nehru Nagar Police Station called PW2 to identify the accused. He had narrated the incident to Nehru Nagar Police Station. He had identified the accused at Nehru Nagar Police Station. In fact, he had stated that some of the accused had covered half of their faces with handkerchief. He has admitted in the cross examination that he had not given the description of the accused persons while reporting to the police station, nor he had given the description to Nehru Nagar Police Station. It is elicited in the cross examination that he had attended the Court on the previous

day in the course of trial and on that day, the accused was brought to the Court and he was shown the accused by the police.

6. At this stage, it is pertinent to note that the report of PW2 was not reduced into writing. No separate offence is registered either at Vikhroli Police Station or Nehru Nagar Police Station. PW2 has not stated the registration number of the taxi. PW2 has stated that the driver of the taxi was made to sit beneath the rear seat. However, he has neither interacted with the driver nor had personally seen that the driver's hands or legs are tied or that his mouth was also tied. He has not mentioned the location of the ATM Centre to which the accused persons had taken him. The accused were shown to him in the police station. The test identification parade was not conducted although the accused were unknown. Identification at the police station has been deprecated by this Court in a catena of decisions. Moreover, there is an admission that the accused were shown to the witness by the police on the previous day.

7. PW-3 Irshad Shaikh had acted as a panch. He was called by the Detection Branch of Kurla Police Station. It appears that the Accused Mohd. Rafik Khan had taken panchas and police patil to his house and there was recovery of one cell phone which was of

Nokia make. In fact, the first information report would indicate that the cell phone, which was stolen was of Samsung make. They had then seized the Santro Taxi at the behest of the accused. It is pertinent to note that in the substantive evidence, the registration number of the taxi has not been mentioned. They had seized a Santro Motor Taxi. The registration number of which is MH-01-AT-7170. In fact Govind Bind was rescued from Santro taxi No. MH-02-BQ-5111 and, therefore, the seizure panchnama caused on the basis of the memorandum of the accused is at variance with the facts that were disclosed in the first information report. At this stage, it is pertinent to note that the original complainant Govind Bind has not been examined.

8. PW-4 Chetan Mahadeo More was attached to Vikhroli Police Station and he had recorded the statement of Govind Bind and registered the crime.

9. PW-5 Dr. Chandrasen Kadam had examined the Complainant Govind Bind and had noticed that he had sustained injuries on his chest. His left incisor tooth had fallen and blood was oozing from the said injury. He has proved the injury certificate i.e. M.L.C. register at Exhibit 31. It is admitted that there is no mention in the MLC that the injuries were grievous in

nature.

10. PW-6 Santosh Dnyaneshwar Bhandare is the investigating officer. It appears that the original accused Nos. 1 and 2 were transferred from DCB CID Unit VI, Chembur and arrested in the present crime. He has deposed before the Court the steps taken by him in the course of investigation. It is to be noted that the said Santro Taxi was involved in a crime at Vashi Police Station and, therefore, the car was handed over to API Koli, who has not been examined by the prosecution.

11. It is doubtful as to whether the car which was apprehended by the patrolling staff and the car which was seized is one and the same. Prima facie it appears that the instances as narrated had occurred. However, the non-examination of the complainant is fatal to the prosecution in the facts of the present case. Similarly, the inherent inconsistencies in the evidence of PW2 and PW3 are also fatal to the prosecution. The accused were unknown persons. The test identification parade was not conducted. _

12. It is in these circumstances the accused appellants deserve benefit of doubt due to serious lacunas in the investigation. The witnesses are eyes and ears of the Court. The Court cannot travel beyond the papers of investigation i.e. the charge-sheet and the

provisions of Indian Evidence Act which is to be complied with strictly. It is in these circumstances, the accused deserve to be acquitted on the ground of benefit of doubt. Hence, following order:

ORDER

- (i) The appeal is allowed.
- (ii) The Appellants be released forthwith, if not required in any other offence.
- (iii) The amount of fine, if deposited, be refunded.

[SMT.SADHANA S. JADHAV, J.]