

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
WRIT PETITION NO. 4122 OF 2017**

Abdul Rehman Jummanali Khan & Ors.Petitioners.
Vs.
The State of MaharashtraRespondent.

Mr. Amarendra Mishra for the Petitioners.
Ms. Veera Shinde APP, for the Respondent-State.

**CORAM : A. S. GADKARI, J.
DATE : 24th AUGUST, 2018.**

P.C.:-

The Petitioners have assailed the Order dated 16th September 2017 passed below Exhibit 3 in Sessions Case No. 44 of 2016 by the learned Ad-hoc and Additional Sessions Judge, Dindoshi, Borivali Division, Mumbai thereby, rejecting the Application of the Petitioners for their discharge under Section 395 of the Indian Penal Code in Crime No. 388 of 2015, registered with Dahisar Police Station, Mumbai.

2 Heard Mr. Mishra, the learned counsel for the Petitioners and the learned APP. Perused the charge-sheet.

3 The prosecution case in brief is that, the first informant Shri Nitesh Mane, along with other witnesses had been to a Scrape Dealer's shop, situated at Dahisar East, for collecting donation for Ganesh festival. There were altercations between the first informant

and his friends on one side and the owner of the said shop and the Petitioners herein on the other side, towards the payment of the said donation. The first informant along with his friends therefore, proceeded to other shop for collecting the donation. At that time, it is alleged that, the Petitioners along with other 10 to 15 accused persons, accosted the first informant and his friends and assaulted them with Bamboo sticks and iron rods. During the said assault, one of the accused person snatched a chain made up of gold metal from the person of the informant Mr. Nitesh Mane.

During the course of investigation, the Petitioners came to be arrested by the police and after completion of investigation, police have submitted charge sheet.

4 The Petitioners thereafter filed the afore-stated Application below Exhibit-3, for their discharge from Section 395 of the Indian Penal Code which has been rejected by the Trial Court by the impugned Order dated 16th September 2017.

5 Mr. Mishra, the learned counsel appearing for the Petitioners submitted that, no case to apply Section 395 of the Indian Penal Code has been made out from any of the statements of the witnesses. He submitted that, in the present case, the prime intention

of the Petitioners was to assault the first informant and his associates over a quarrel which ensued due to the demand of donation of the Ganesh Festival by the first informant and therefore, there was no intention at the behest of the Petitioners to commit robbery at the first instance and therefore, Section 395 of the Indian Penal Code cannot be applied at all.

He further submitted that, the said chain made up of gold metal is not recovered by the Police till date and therefore, the contention of the first informant Mr. Nitesh Mane needs to be viewed with a doubt in the mind. He further submitted that, the Trial Court has failed to appreciate these vital aspects of the matter and therefore, the impugned Order may be set aside by allowing the present Petition.

6 It is to be noted here that, apart from the first informant Mr. Nitesh Mane, who in categorical terms, has stated that, in the assault by the Petitioners, one of the accused persons robbed a chain made up of a gold metal weighing approximately 5 to 6 Tolas from his person. The eye-witness Smt. Pratibha Afandkar, has also corroborated the version of the first informant about the said aspect. The statements of other witnesses also duly corroborates the version of the first informant.

It is further to be noted here that, though at the inception it might not be the intention of the Petitioners to commit robbery, but during the assault, they have gathered common intention and as per the allegations one of the accused persons committed robbery of the said gold chain from the person of the first informant. It is the settled principle of law that, common intention can be gathered even at the last spur of moment and likewise the intention to commit a particular offence, which may be an off shoot of the principle offence which can be formed at the last spur of moment. Initially after assaulting the informant and his friends during the said assault, one of the accused persons robbed the chain made up of gold metal of the first informant Mr. Nitesh Mane and therefore, in view of this Court, the Application under Section 395 of the Indian Penal Code to the present crime is right and proper.

7 After perusing the charge-sheet, this Court is of the opinion that, the Trial Court has not committed any error either in law or in facts, while rejecting the Application under Section 395 of the Indian Penal Code.

8 Writ Petition is accordingly rejected.

S S
Mashalkar

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(A.S. GADKARI, J.)