

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Ajay Kumar Gupta

C.R.A. 676 of 2011
Rizwan Ali
-Vs-
State of West Bengal

With

C.R.A. 392 of 2011
Md. Jamshed
-Vs-
State of West Bengal

With

C.R.A. 600 of 2011
Abdul Gaffar @ Gaiyum
-Vs-
State of West Bengal

**For the Appellant
In CRA 676/2011**

: Mr. Dipanjan Chatterjee, Adv.
Mrs. Shaila Afrin, Adv.
Ms. Rafat Jahan, Adv.

**For the Appellant
In CRA 392/2011**

: Mr. Sandipan Ganguly, Id. Sr. Adv.,
Mr. Dipanjan Dutta, Adv.

**For the Appellant
In CRA 600/2011**

: Mr. Avishek Sinha, Adv.
Mrs. Anasuya Sinha, Adv.

For the State

: Mr. Neguive Ahamed, Ld. A.P.P.,
Ms. Faria Hossain, Adv.
Ms. Ayantika Ray, Adv.

Heard on

: 12th & 20th December, 2022.

Judgment on

: 20th December, 2022.

Joymalya Bagchi, J. :-

1. Appeals are directed against the judgment and order dated 27.05.2011 in S.T. No. 2(9) of 2008 arising out of Sessions Case No.9(8) of 2009 convicting the appellants for commission of offence punishable under Sections 392/397 of the Indian Penal Code and sentencing them to suffer rigorous imprisonment for eight years each and pay fine of Rs.2,000/- each, in default, to suffer simple imprisonment for five months each for the offence punishable under Section 392 of the Indian Penal Code and to suffer rigorous imprisonment for seven years each and pay fine of Rs. 2,000/- each, in default, to suffer simple imprisonment for five months more for the offence punishable under Section 397 of the Indian Penal Code; both the sentences to run concurrently.

2. At 16.20 hours, one Sourabha Kumar Halder (P.W. 2) came to Beniapukur Police Station and alleged on 24.05.2008 at 09:10 PM, he had boarded a Tata Indica car at the crossing of Beckbagan and A.J.C. Bose Road in order to return to his residence at Karunamoyee, Salt Lake. He sat on the rear seat between two persons. Another person was sitting on the front seat. After he boarded the car, it proceeded towards Lady Brabourne College instead of Bridge No.4. He expressed surprise. Thereupon the person sitting beside the driver told him he would be dropped at the appropriate place. Then the car proceeded along Darga Road and Huges Road crossing via Bridge No. 4. When he raised alarm

the person on his right side pointed a pistol and another on his left side took out a razor. They slapped him. Thereafter, the persons took Rs.1000/- from his purse and his mobile phone bearing IMEI No. 359545018103011. Then the vehicle proceeded towards ATM counter of ICICI Bank situated at Padmapukur. The miscreants forcibly took his ATM-cum-Debit Card and Shoppers Stop Credit Card bearing No. 2210911500427844. They compelled him to disclose his PIN number. They withdrew a sum of Rs. 9,000/- from the ATM counter. Thereafter, they dumped him in front of Don Bosco School and fled away. He returned home and disclosed the incident to his father. On the next day, he went to Beniapukur Police Station. S.I. Pratap Biswas (PW21) attached to Beniapukur Police Station reduced his statements into writing and Beniapukur Police Station Case No.156 of 2008 dated 25.05.2008 under Sections 392/397 of the Indian Penal Code and Sections 25(1B)(a) and 27 of the Arms Act was registered for investigation.

3. During investigation, PW21 took the de-facto complainant to the place of occurrence. Bikash Chandra Majee (PW1) prepared a rough sketch map as per the instruction of the de-facto complainant. PW21 made attempts to apprehend the miscreants but failed. On 04.06.2008 investigation was handed over to DD, Lalbazar.

4. PW22, SI Prabir Kumar Saha attached to ADRS Lalbazar took up the investigation. On the basis of source information, he proceeded to

Ramlila Maidan. He arrested the appellants. From Jamshed, Nokia mobile phone was recovered. Appellants were remanded to police custody. Rizwan Ali made a statement (Ext.15) that he would be able to identify the driver of the vehicle viz., Bhusan Kumar Mondal (PW3) and the Tata Indica car. Rizwan took the police party to 14, Jogesh Mitra Road. There he identified Bhusan Kumar Mondal. Bhusan led the police party to the Indica car bearing registration No. WB 02 0914. The car along with its papers were seized in presence of the owner Manoj Kumar Singh (PW5). On the next day, statement of Bhusan Kumar Mondal was recorded under Section 164 of the Code of Criminal Procedure. On the leading statement of Abdul Gaffar (Ext.17), ATM-cum-Debit card, Shoppers Stop credit card and razor were recovered. Md. Jamshed also made a statement (Ext.16). Pursuant to his statement, a sum of Rs.600/- was recovered. Rizwan Ali made another statement (Ext.19) leading to the recovery of Rs. 1500/- and a golden chain from his residence at Alam Mistry Lane, Howrah.

5. Prayer for T. I. Parade was made on 17.06.2008. PW 12, Syed Dilwar Hossain conducted T. I. Parade on 27.06.2008. PW2 identified the appellants in the course of T. I. Parade. In conclusion of investigation, charge-sheet was filed.

6. Charges were framed under Sections 392/397 of the Indian Penal Code against the appellants. Appellants pleaded not guilty and claimed

to be tried. Prosecution examined 22 witnesses and exhibited a number of documents to prove its case.

7. In conclusion of trial, trial Judge by the impugned judgment and order convicted and sentenced the appellants, as aforesaid.

8. Nobody appears for the appellant viz., Md. Jamshed. Mr. Sandipan Ganguly, learned Senior Advocate with Mr. Dipanjan Dutta empanelled with High Court Legal Services Authority are requested to appear on behalf of the appellant.

9. Learned Advocates for the appellants argues PW2 is an unreliable witness. No document showing that he was in his office till 9.00 PM was placed on record. There is delay in lodging first information report. It is unclear how the witness disclosed the registration mark of the Tata Indica car during his deposition. He is a tutored witness. It is strongly argued Bhusan Mondal (PW3) was an accomplice but was cited as a witness. He deposed under duress. His evidence ought to be discarded. Identification of the appellants is doubtful. There was delay in holding Test Identification Parade. Appellants were in police custody and had been taken out for the purpose of recovery. During T. I. Parade, they told the Magistrate (PW12) they had been shown to the witnesses in police custody. Hence, the appeals may be allowed. Recovery of stolen articles from the appellants have not been proved.

10. In rebuttal, Mr. Nequive Ahamed, learned Additional Public Prosecutor submits PW2 is the victim and the most natural witness. He

has described the incident in graphic details. Features of the appellants were disclosed at the earliest opportunity in the FIR. Appellants were arrested on 05.06.2008. They were taken into police custody till 17.06.2008. Immediately, thereafter prayer was made for T. I. Parade. There is no delay in holding T. I. Parade. PW2 is corroborated by the driver (PW3). Submission that PW3 was under police pressure is a figment of imagination. Recoveries of mobile phone, ATM-cum-Debit card, Shoppers Stop credit card of the victim, razor and stolen cash on the leading statements of the appellants have been proved. Hence, the prosecution case is proved beyond doubt.

11. PW2 is the victim and the de-facto complainant. He has disclosed the incident in details both in FIR and in Court. He disclosed how he boarded the vehicle around 9.00 PM at Circus Avenue in order to proceed to his residence at Karunamoyee, Salt Lake. Failure to produce documents with regard to his duty hours during trial does not improbabilise his presence at the place of occurrence. PW2 further stated the manner in which the appellants who were sitting inside the car threatened him with a pistol and a razor. They snatched Rs. 1,000/- from his purse. They also took away his Nokia mobile phone, ATM-cum-Debit card and Shoppers Stop credit card. He was compelled to give out his PIN number and the appellants withdrew Rs. 9,000/- from the ATM counter at Padmapukur.

12. After the incident PW2 was forced out of car in front of Don Bosco School. He proceeded to his residence and narrated the incident to his father. On the next day, he went to Beniapukur Police Station and lodged FIR. PW2 was stunned by the unfortunate incident. Out of fear, he rushed to his residence at Salt Lake. On the next day, he lodged FIR. Delay in lodging FIR is explained. Conduct of the witness is most natural and does not militate against the truthfulness of the prosecution case.

13. PW6, Rajdeep Banerjee corroborated PW2 and deposed there was an ATM counter at Padmapukur. Evidence has also come on record that at the relevant time a sum of Rs.9.000/- was withdrawn from the account maintained by PW2 at ICICI Bank.

14. Version of the de-facto complainant (PW2) is also corroborated by PW3, driver of the car. He deposed the car was owned by one Manoj Kumar Singh (PW5), proprietor of M/s. Puspa Travels. He was employed under Debasish Bose (PW7), Lands down Automobiles. He used to work as a part time/trainee employee at Puspa Travel. Manoj Kr. Singh had handed over the car to him for repairs. Appellants met him and compelled him to drive the vehicle on the fateful night. PW 3's version finds corroboration not only from his father PW4 (Shatrughna Mandal) but also from his employer Manoj Kumar Singh (PW5) and Debasish Bose (PW7). Defence has criticised their versions on the ground that no documentary evidence with regard to employment of Bhusan Kr. Mondal under Debasish Bose (PW7) or Manoj Kumar Singh (PW5) has been

produced. One cannot lose sight of the fact that Bhusan was a young person and was employed on an informal basis under the aforesaid employers. Under such circumstances, it is unlikely they would maintain official records with regard to his employment.

15. It is also argued he was an accomplice in the robbery and had been initially detained by police. His father admitted during cross, he had gone to Sealdah Court to appoint a lawyer. Defence, however, failed to adduce any material to show Bhusan had been initially arrested. On the other hand, PW22 (2nd IO) deposed prayer was made to record his statement under Section 164 of the Code of Criminal Procedure. This circumstance wholly improbabilises the defence plea that Bhusan (PW3) was initially arrested and later on compelled to depose as a prosecution witness under duress. On the contrary, Bhusan's deposition in Court is consistent with his earlier statements before Magistrate. Hence, I am of the opinion Bhusan Mondal is a truthful witness and wholly corroborates the deposition of the victim, PW2.

16. In addition thereto, recoveries of stolen articles were made from the appellants. At the time of arrest a black Nokia mobile phone was recovered from Md. Jamshed. Recovery was made in the presence of independent witnesses viz., Gopal Shaw (PW8) and Binod Roy (PW9). Ext.14 produced by PW.16 (Subir Kumar Deb), Assistant Nodal Officer, Vodaphone shows that the said mobile phone bearing IMEI No.359545018103011 was used for the SIM card bearing

No.9732518823 which belonged to PW2. This establishes the recovery of the stolen mobile phone from Md. Jamshed belonged to PW2.

17. On the leading statement of Abdul Gaffar (Exbt. 17), ICICI ATM cum Debit Card and Shoppers Stop credit card and razor were recovered from his residence. Recovery was witnessed by Peter Samuel (PW11) and Md. Kamal (PW19). Ext 13/1 produced by Amit Kr. Lunia (PW15), manager of ICICI bank proved the ATM Debit Card recovered from Abdul Gaffar belonged to PW2.

18. Statement of Md. Rizwan (Ext. 15) led to the identification of Bhusan Kr. Mondal, driver of the vehicle who in turn led the police team to the Tata Indica car. The car was thereafter seized in presence of its owner PW15 and other witnesses. Rizwan made a further statement (Ext. 19) leading to recovery of Rs.1500/- and a gold chain. The aforesaid evidence leading to recovery of stolen articles particularly mobile phone, ATM debit card, Shoppers Stop card of the victim (PW2) and a razor clearly proves the prosecution case beyond doubt.

19. In the light of the aforesaid discussion, I uphold the conviction of the appellants.

20. Coming to the issue of sentence, balancing the aggravating and mitigating factors, I modify the sentence imposed on the appellants and direct they shall suffer rigorous imprisonment for seven (7) years and pay a fine of Rs. 2000/- each, in default to suffer simple imprisonment for five months each for the offence punishable under section 392 of the

Indian Penal Code. Sentence on the score of section 397 of the Indian Penal Code remains unaltered. Both the sentences shall run concurrently.

21. With the aforesaid modification as to sentence, the appeals are disposed of.

22. Period of detention suffered by the appellants during investigation, enquiry and trial shall be set off from the substantive sentence imposed upon them in terms of section 428 of the Code of Criminal Procedure.

23. In view of disposal of the appeals, connected applications, if any, also stand disposed of.

24. Lower court records along with copies of this judgment be sent down at once to the learned trial Court as well as the Superintendent of Correctional Home for necessary compliance.

25. Photostat certified copy of this judgment, if applied for, be given to the parties on priority basis on compliance of all formalities.

I agree.

(Ajay Kumar Gupta, J.)

(Joymalya Bagchi, J.)