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

CRIMINAL APPEAL NO.385 OF 1997

MOHAMMED IQBAL MANGU ISMAIL ANSARI ..APPELLANT
VS.
THE STATE OF MAHARASHTRA ..RESPONDENT

Adv. Megha Bajoria for the appellant.
Mr. A. R. Patil, APP for the State.

CORAM : M. S. KARNIK, J.

DATE : JANUARY 12, 2024

ORAL JUDGMENT :

1. The challenge in this Criminal Appeal is to the order of conviction rendered by the 1st Additional Principal Judge and Additional Sessions Judge, Greater Mumbai in Sessions Case No.304 of 1995 convicting the appellant Mohammed Iqbal Maganu Ismail Ansari for the offence punishable under Sections 367 read with 34 of the Indian Penal Code (hereafter 'IPC' for short), thereby sentencing him to suffer rigorous imprisonment for two years and to pay fine of Rs.1,000, in default of payment of fine, to undergo two months rigorous imprisonment. The appellant is also convicted for the offence punishable under Sections 393

read with 34 of the IPC and sentenced to undergo two years rigorous imprisonment and to pay fine of Rs.1,000/-, in default of payment of fine, to undergo further rigorous imprisonment for two months. The appellant was found not guilty of the other charges.

2. The prosecution case in brief is thus :-

PW-1 is the proprietor of a jewellery shop. On 08.03.1991 at about 10.45 p.m., PW-1 left his shop to meet his acquaintance. As he came out of peru compound, two persons (accused) stopped PW-1. One of them was holding a knife in his hand. He pointed out the knife to PW-1 and asked him not shout otherwise he will be killed. The other accused put his hand on PW-1's shoulder and said "Saheb Ke Pass Chalo". A taxi was standing near the spot. The taxi driver was occupying the driver's seat and another person-accused No.1 (present appellant) was sitting on the front seat next to the taxi driver. The accused who threatened PW-1 asked him to sit on the rear seat in the middle. The two accused sat on the either side of PW-1. The accused persons who were sitting on the rear seat uttered the words

"Chalo". The taxi headed in the direction of Bharat Mata Cinema. The accused sitting on the rear seat asked PW-1 as to how much money he was carrying. They asked him to take out the money. PW-1 kept quiet. As the taxi proceeded ahead one police jeep intercepted it. The person (appellant) sitting on the front seat as well as the two accused who were sitting next to the PW-1 on the rear seat started running away. The taxi driver remained seated in the taxi. The appellant was caught by the police with the help of the public. Thereafter, PW-1 and the appellant were taken to the police station. The FIR came to be registered. The appellant was searched in presence of panchas. One knife was found on his person. PW-1 identified the appellant in the Court.

3. PW-2 who is examined at Exhibit 8 is the wireless operator of the police vehicle which intercepted the taxi. PW-2 deposed that he noticed the activities of the passengers sitting on the rear seat suspicious and therefore the police party decided to intercept the taxi. The appellant who was sitting in front started running away when the taxi

was intercepted by the police. PW-2 says that even the accused sitting on the rear seat ran away. PW-2 with the help of the public nabbed the appellant who is the accused No.1.

4. So far as PW-4 is concerned, he was examined at Exhibit 11. PW-4 is the Inspector of the Traffic Department who was also in the police vehicle. PW-2 informed PW-4 about the activities of the accused in the taxi which PW-2 found to be suspicious. The evidence of PW-3 is not relevant as he is a panch witness in respect of the test identification of the co-accused.

5. PW-5, examined at Exhibit 13 is the panch witness in respect of the search of the person of the appellant at the police station. PW-5 has turned hostile. In any case the trial Court has returned a finding that the case against the appellant about possession of knife at the time of attempt to commit robbery or at the time of his search is not proved beyond reasonable doubt and the accused cannot found guilty of those offences. PW-6 examined at Exhibit 14 is a Police Havildar, his evidence is not relevant. PW-7 examined

at Exhibit 19 is the Investigating Officer.

6. Learned APP submitted that the appellant was apprehended at the spot. It is submitted that the appellant was in the taxi at the time when PW-1 was asked to sit on the rear seat by the co-accused. It is submitted that the appellant was carrying a knife. Learned APP further submitted that when the police vehicle intercepted the taxi, the appellant started running away. It is his submission that the appellant's presence in the taxi, the conduct of running away when the police vehicle intercepted the taxi and the knife found on his person is sufficient to demonstrate that the appellant is guilty of the alleged offence and hence the conviction recorded by the trial Court be sustained. My attention is invited by learned APP to the findings recorded by the trial Court to submit that the appeal is without any merit.

7. With the assistance of learned counsel for the appellant and learned APP I have perused the paper book, the depositions of the witnesses and the impugned order. I have heard learned counsel for the appellant and learned

APP and perused the materials on record.

8. The prosecution case against the appellant is mainly based on the evidence of PW-1 - the complainant and that of PW-2 - wireless operator of the police vehicle which intercepted the taxi. A careful perusal of the evidence of PW-1 would reveal that no overt act is attributed to the appellant. PW-1 was forced to sit in the taxi by the co-accused. It is the co-accused who threatened PW-1 at the point of a knife. Nothing is seen from the evidence of PW-1 to indicate that there was any communication between the co-accused who forced PW-1 to sit in the taxi by threatening him and the appellant who was sitting in front seat of the taxi. According to learned APP, the incriminating circumstances against the applicant is (a) he was sitting on the front seat of the taxi when PW-1 was forcibly made to sit in the taxi by the co-accused and (b) that the appellant tried to make good his escape when the police vehicle intercepted the taxi. The learned APP was at pains to point out that these circumstances are enough to sustain a conviction against the appellant.

9. Apart from this there is absolutely no material on record to indicate that the co-accused shared a common intention with the appellant to commit the aforesaid offence. The Hon'ble Supreme Court in the case of **Gadadhar Chandra Vs. The State of West Bengal¹**, in paragraph 9 has observed that the common intention contemplated by Section 34 of IPC pre-supposes prior concert. It requires meeting of minds. It requires a pre-arranged plan before a man can be vicariously convicted for the criminal act of another. The criminal act must have been done in furtherance of the common intention of all the accused. In a given case, the plan can be formed suddenly.

10. In the present case, the taxi driver has not been examined. There is nothing on record to show that there was any communication between two accused sitting on the rear seat of the taxi and the appellant or for that matter any other evidence to form an opinion that the co-accused shared a common intention with the appellant. To convict the appellant only on the basis of him sitting in the taxi on the front seat coupled with his conduct of trying to run

1 Criminal Appeal No.1661 of 2009 dated 15.03.2022

away when the police intercepted the taxi, will be highly unsafe. In my opinion the evidence on record falls short in proving the guilt of the appellant beyond reasonable doubt.

11. I have perused the judgment and order of the trial Court. As indicated earlier, the trial Court has found that so far as the case against the appellant about possession of knife at the time of attempt to commit robbery or at the time of his search is not proved beyond reasonable doubt and hence the accused has not been found guilty of those offences. However, the trial Court while holding that there is sufficient evidence against the accused to hold the appellant guilty for the offences punishable under Section 367 read with 34 of the IPC has observed that there is every reason to believe that he shared a common intention with the other two accomplices of kidnapping PW-1 and putting him in fear of death, attempted to rob him. The observation that when the demand for money was made by other two persons who were sitting besides the victim, the appellant played a role of keeping a watch over the driver of the taxi is an inference which is without any basis. For arriving at the conclusion

that the appellant shared a common intention with the other accused, in my opinion there is hardly any material to indicate the existence of a prior concert or pre-arranged plan. In the absence of any cogent materials against the appellant, the impugned judgment and order dated 10/11.04.1997 of the 1st Additional Principal Judge and Additional Sessions Judge, Greater Mumbai so far as the appellant is concerned needs to be set aside. The appellant is acquitted for the charges against him.

12. The Criminal Appeal is allowed in the above terms. The fine amount if paid be refunded to the appellant.

13. I appreciate the able assistance rendered by Advocate Megha Bajoria appearing on behalf of the appellant appointed by the Legal Aid Services Authority.

(M. S. KARNIK, J.)