# IN THE HIGH COURT OF MADHYA PRADESH

## AT INDORE

**BEFORE**

**HON'BLE SHRI JUSTICE PREM NARAYAN SINGH**

**CRIMINAL APPEAL No. 1065 of 2001**

***VINOD***

*Versus*

***THE STATE OF M.P.***

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**Appearance:**

Shri Kshitij Vyas, learned counsel for the appellant.

Shri Surendra Gupta, learned Government Advocate for the respondent/State.

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**WITH**

**CRIMINAL APPEAL No. 1141 of 2001**

***SANTOSH***

*Versus*

***THE STATE OF M.P.***

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**Appearance:**

Shri Arpit Kumar Oswal, learned counsel for the appellant.

Shri Surendra Gupta, learned Government Advocate for the respondent/State.

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**Heard on : 22.08.2024**

**Pronounced on : 03.09.2024**

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These criminal appeals having been heard and reserved for judgment, coming on for pronouncement this day, the court passing the following :

**JUDGMENT**

This judgment shall govern the disposal of these appeals as they are arisen out of same crime of same session trial, hence, they are heard analogously and are being decided by this common order.

2. The present appeals have been preferred by the appellants being crestfallen by the judgment of conviction and sentence dated 29.08.2001, passed by learned XVIII Additional Session Judge, District Indore in Sessions Trial No.20/1999, whereby the appellant Vinod has been convicted for the offence punishable under Section 392 of Indian Penal Code, 1860 (hereinafter referred to as "IPC") and sentenced to undergo 03 years R.I. with fine of Rs.500/- and usual default stipulation while appellant Santosh has been convicted for the offence punishable under Section 392 read with Section 397 of IPC and sentenced to undergo 07 years R.I. with fine of Rs.500/- and usual default stipulation.

3. As per the prosecution case, on 05.08.1998 one Dilip @ Guddu lodged a report stating that when he was sitting at his shop situated in Dwarkapuri (on the main road), Indore some unknown persons had assaulted him and robbed his shop. It is further alleged

that at the time of incident Devendra (PW-2) and Bhagirath (PW-3) were also sitting in the shop. On the basis of the said report, the police registered an offence under Section 394 of IPC. Consequently, the police arrested six persons in connection with the said crime and after completion of investigation charge sheet was filed against them, under Sections 294, 394, 395 read with Section 397 of IPC.

4. The police after following the due procedure, prepared the spot map, recorded the statements of the witnesses, seized the articles, arrested accused persons and recorded their memorandum statements. After due investigation, the police has filed the charge-sheet under Section 394, 395 read with Section 397 of IPC. The matter was committed to the Court of Sessions and made over to the learned trial Court where upon the charges were framed under Sections 392 read with Section 397 of IPC. The appellants abjured their guilt and took a plea that they have been falsely implicated and prayed for trial.

5. The prosecution on its behalf has examined as many as 10 witnesses namely Dilip Kumar Chouhan, complainant (PW-1), Devendrasingh Chouhan, (PW-2), Gautam (PW-3), Prem Chouhan (PW-4), Kamal, (PW-5), Pushrajsingh, Constable (PW-6), Devkaran, Head Constable (PW-7), Jitnedra Singh Pawar, Nayab Tehsildar (PW-8), Dr. B.K. Dwivedi, Assistant Surgeon, (PW-9) and Harjeetsingh Sudan, Inspector (PW-10). No witness has been adduced in defence by the appellants.

6. Learned trial Court, on appreciation of the evidence and argument adduced by the parties, pronounced the impugned judgment on 29.08.2001 and finally concluded the case and convicted the appellants as per aforementioned para No. 1.

7. Being aggrieved by the order of learned trial Court, the appellants have preferred this criminal appeal stating the fact that the impugned order is against law and facts. The appellants have been falsely implicated in this case. He further submitted that initially FIR got registered on 05.08.1998 as against four unknown persons, of whom no whereabouts were known either to the victim or to the police authorities, thereafter statements of witnesses were recorded on 06.08.1998, which also does not give any lead to the police authorities as to the identity of the accused persons, but surprisingly on 11.08.1998 police arrested five accused persons from Gangwal Bus Stand at about 5:15 AM.

8. The question arises here that, how the police came to know about the identity of accused persons and on what grounds there joint arrest has been made, because all the memorandum under Section 27 of the Indian Evidence Act, 1872 are subsequent to the arrest. It infers that when there is absolutely no evidence or confessions or statements of any accused person available with the police authorities so as to link them in connection with the present crime, how, crime number came to be mentioned on the arrest memo so prepared on 11.08.1998. This itself raises a serious doubt about the implication of

the accused persons in the present matter. The prosecution has to establish the link and has to complete the chain to connect the accused persons with the crime.

9. Learned counsel has drawn attention of this Court towards the judgment viz. **Sharad Birdhichand Sarda vs. State of Maharashtra , (1984) 4 SCC 116** and **Sailendra Rajdev Paswan vs. State of Gujarat etc., AIR 2020 SC 180**. The prosecution has completely failed to prove the case and failed to explain as to how arrest of accused persons being made on 11.08.1998 without there being any linking evidence.

10. It is contended that when there is similar or identical evidence against two accused persons by ascribing them the same or similar role, the conviction of one accused and acquittal of the other is contrary to the legal principle. Hon'ble the Apex Court held that in such cases both the accused will be governed by the principal of parity. In the present case, the learned trial Court has stated in para No. 10 and 13 that two contradictory views are being followed by the learned Sessions Court while acquitting the accused Jitu and at the other instance convicted the appellant Santosh. Counsel has also placed reliance upon the case of **Allaudin Vs. State of Assam, 2024 SCC OnLine SC 760** regarding statement recorded under Section 161 of Cr.P.C. and Dehati Nalisi. Also by placing reliance upon the judgment **Budhsen & Anr. Vs. State of UP, (1970) 2 SCC 128**, he has stated that Hon'ble Apex Court has set aside the conviction

imposed on the appellant therein, on the ground that no conviction can be based by solely relying on the identification made in TIP. While holding that a 14 days delay by itself in conducting the TIP may not cause prejudice to the accused, it observed that there is a high chance of accused being seen by the identifying witnesses outside the jail premises. That apart, there are omissions and contradictions on material point in the statement of complainant as well as eye witnesses and police witnesses. As such the learned trial Court has erred in passing the order of conviction and therefore, learned counsel prays for setting aside the impugned judgment.

11. Learned counsel for the respondent opposing the contentions submitted that the judgment of learned trial Court is passed after proper appreciation of evidence hence it does not deserve any interference. So also looking to the heinousness of the offence punishment is also not warranting any interference. Finally, learned Govt. Advocate bearing out the finding of the learned trial Court requested to dismiss the appeal.

12. In the back drop of the rival contentions, the point of determination is that as to whether the finding of learned trial Court regarding conviction and sentence under Section 392 read with Section 397 is correct in eyes of law and facts?

13. Before dwelling upon the aforesaid point for determination, it is also worth mentioning that out of six accused Golu expired during

the trial and accused Vikas absconded. In remaining four accused Ranjeet S/o Madanlal and Jitu @ Jitendra S/o Rajendra Prasad have been acquitted by the learned trial Court and no appeal against acquittal is pending before this Court. Thus, the appeal regarding conviction of appellants Santosh and Vinod is considered herein.

14. At the outset, the testimonies of complainant Dilip Kumar Chouhan (PW-1), eye witness of the incident, Devendra Singh Chouhan, (PW-2) is required to be considered. As per prosecution case, neither any accused has been identified by these eye witnesses nor their names has been mentioned in Dehatinalisi (Ex.-P/1) and FIR (Ex.P/10). In spite of that Dilip Kumar Chouhan, complainant (PW-1) has narrated the name of accused Santosh. Dilip Kumar Chouhan (PW-1) stated that when he has received Rs.30,000/- from a person and sat with Devendra and Bhagirath at approximately 8:00 to 8.30 pm, all accused persons came with knife in their hands. One of them assaulted Devendra Singh Chouhan and accused Santosh assaulted him. He has try to fled away but in the way he was caught by four of them and thereafter, he has given them Rs.7,000/- to Rs.8,000/-. He has also stated that accused persons had taken all of Rs.30,000/- from his accumulated amount (*galla*).

15. In this regard, the eye witness Devendra Singh Chouhan (PW-2) supports the statement of complainant to the extent that he was dashed by one of accused and further one of the accused has assaulted Guddu Bhaiya (Dilip Kumar Chouhan, the complainant).

However, in cross-examination conducted on next day on 27.06.2001 in presence of accused Santosh, this witness has not identified the accused Santosh in Court. Rest of the prosecution case has also not been borne out by this witness in his examination. Actually the prosecution has not based its case on the testimonies of eye witnesses but rather it has based its case on identification parade and seizure of the articles.

16. So far as the identification parade is concerned, the complainant, Dilip Kumar Chouhan (PW-1) in para 4 of his cross-examination stated that police has got identified the accused persons by complainant in jail which is (Ex.P/3) whereupon, his signature is on 'A' to 'A' part. However, in the whole chief examination, he has neither named the appellant Vinod nor identified him in Court. Here, it is pertinent to mention that identification memo (Exhibit P/3) is related to appellant Vinod while identification memo (Ex-P/11) is related to appellant Santosh. Now the question is as to when complainant did not identify the appellant Vinod in Court, what is the value of the identification parade and identification memo (Ex-P/3). Actually, without substantial identification in Court the said identification memo has no value. As such, prosecution case regarding appellant Vinod is found suspicious.

17. Now, coming to the identification of appellant Santosh, having gone through the whole testimony, the complainant Dilip has not stated anything regarding identification memo related to appellant

Santosh (Ex.-P/11). Although, complainant Dilip has stated the name of appellant Santosh that he has assaulted him with knife but his statement are merely omissions and exaggeration. This witness has admitted in para 11 of his cross-examination that it is true to say that in dehati nalisi (Ex-P/1) and in his police statement (Ex.-D/1), he has not mentioned the fact as to appellant Santosh had assaulted him. So far as the identification parade regarding appellant Santosh conducted in jail is concerned, complainant himself stated that the identification was conducted by SDM in presence of two jail officers. In this way the said identification parade which has not been exhibited by complainant Dilip Kumar Chouhan is also having no significant value regarding accused Santosh. From the face of record, it also emerged that both identification parade (Ex.-P/3) and (Ex-P/11) were conducted on 21.08.1998 i.e. after 16 days of the incident. The identification parade (Ex-P/3) was corroborated by the complainant to the extent of his signature only while the identification parade (Ex-P/11) was not mentioned by the complainant in his Court statement. In this regard, learned counsel for the appellant relying upon **Budhsen & Anr. Vs. State of UP, (1970) 2 SCC 128** submitted that no conviction can be based solely relying upon the identification parade which is conducted after 16 days from the incident.

18. Virtually, in this case, both identification parades were not properly authenticated by complainant. With regard to identification parade (Ex-P/3), he has acknowledged his signature on identification memo but has not identified the appellant Vinod in Court. Likewise,

he identified the appellant Santosh in Court but didn't exhibited the identification memo (Ex-P/13) which is related to appellant Santosh. As such, on the basis of identification parade, the appellants cannot be convicted. In addition to that, the said identification parade was conducted in presence of police officers. On this aspect, a three Judge Bench decision of Hon'ble the Apex Court rendered in **Chunthuram vs. State of Chhattisgarh, 2020 LawSuit (SC) 673** has been relied upon. Para 10 of the judgment is worth to refer here :-

> "10. The infirmities in the conduct of the Test Identification Parade would next bear scrutiny. The major flaw in the exercise here was the presence of the police during the exercise. When the identifications are held in police presence, the resultant communications tantamount to statements made by the identifiers to a police officer in course of investigation and they fall within the ban of section 162 of the Code."

19. Learned counsel has also vehemently contended that prosecution is unable to establish as to how they have arrested six persons from Bus Stand without any information. It is a staggering fact that the accused persons (in number five) have been arrested jointly on 11.08.1998 through arrest memo (Ex-P/13) while the memorandum statements of Vinod (Ex-P/4) and Santosh (Ex.P/14) were recorded on 13.08.1998 No explanation has been adduced by the prosecution in this regard. It is also worth mentioning that in arrest memo the crime number was mentioned. Now the question is

arisen that on what basis appellants alongwith other accused persons arrested. This circumstance also weakens the prosecution case.

20. So far as the seizure is concerned, Rs.5,000/- has been seized from Santosh alongwith a knife and Rs.1,400/- alongwith Scooter number MP09 JF 6268 costing Rs.20,000/- has been seized from appellant Vinod. The said scooter is owned by appellant Vinod. Here it is noticeable fact that police has also seized Rs.1,500/- and a scooter bearing registration No. MP09 JD 3201 through seizure memo (Ex.P/6). However, accused Jitu @ Jitendra has been acquitted by the learned trial Court. Actually, only on the basis of seizure of cash money, no one can be attributed for the offence of loot.

21. Learned counsels for the defence also pointed out that on the same set of evidence when two accused have been acquitted, the present appellants cannot be convicted. On this aspect, the law laid down by Hon'ble the Apex Court in the case of **Javed Shaukat Ali Qureshi Vs. State of Gujarat, (2023) 9 SCC 164,** relevant paragraphs of the judgment is condign to quote here :-

> **"15. When there is similar or identical evidence of eyewitnesses against two accused by ascribing them the same or similar role, the Court cannot convict one accused and acquit the other. In such a case, the cases of both the accused will be governed by the principle of parity. This principle means that the Criminal**

**Court should decide like cases alike, and in such cases, the Court cannot make a distinction between the two accused, which will amount to discrimination."**

22. Nevertheless, the aforesaid law laid down by Hon'ble Apex Court is having different aspect and it only applies when the evidence and circumstances are the same and identical. In this case, the evidence regarding memorandum and seizure memo of acquitted the accused Jitu @ Jitendra are similar to the present appellants. However, these appellants have some different case regarding identification parade and their dock identification in Court.

23. Since the said identification parade and dock identification of the appellants are also found suspicious and doubtful. Thus, the conviction on sole identification also doesn't appear to be sustainable. Moreover, the complainant has tried to name appellant Santosh in the Court whereas in dehatinalisi and FIR and also in his police statement under Section 161 of Cr.P.C. the name of appellant Santosh has not been mentioned. This is a material omission amounting to exaggeration which highly damages the prosecution case.

24. In this way, the prosecution case is neither properly supported by complainant alongwith eye witness, nor supported by circumstantial evidence like identification memo and dock identification in Court, nor it is supported by any of the seizure memo regarding cash money. Under these conditions, a person

cannot be convicted for offence which has minimum punishment of 7 years R.I. In this respect, the following extract of the judgment of Hon'ble Apex Court rendered in **Makhan Singh Vs. State of Haryana, (2015) 12 SCC 247** is also worth to be referred as under :-

> "…….It is a well-settled principle of the criminal jurisprudence that more stringent the punishment, the more heavy is the burden upon the prosecution to prove the offence…..."

25. Now, coming to the fundamental principles of the criminal jurisprudence, the Hon'ble Supreme Court in the case of **Kailash Gour v. State of Assam, (2012) 2 SCC 34** has held as under:-

> "39. It is one of the fundamental principles of criminal jurisprudence that an accused is presumed to be innocent till he is proved to be guilty. It is equally well settled that suspicion howsoever strong can never take the place of proof. There is indeed a long distance between the accused "may have committed the offence" and "must have committed the offence" which must be traversed by the prosecution by adducing reliable and cogent evidence. Presumption of innocence has been recognised as a human right which cannot be wished away. See Narendra Singh v. State of M.P. [(2004) 10 SCC 699 : 2004 SCC (Cri) 1893] and Ranjitsing Brahmajeetsing

Sharma v. State of Maharashtra [(2005) 5 SCC 294 : 2005 SCC (Cri) 1057].

40. To the same effect is the decision of this Court in S. Ganesan v. Rama Raghuraman [(2011) 2 SCC 83 : (2011) 1 SCC (Cri) 607] where this Court observed:-

> "39. Every accused is presumed to be innocent unless his guilt is proved. The presumption of innocence is a human right. Subject to the statutory exceptions, the said principle forms the basis of criminal jurisprudence in India."

The above views were reiterated by this Court in State of U.P. v. Naresh [(2011) 4 SCC 324 : (2011) 2 SCC (Cri) 216]."

26. Further, it is time honorned principle of law that where two views are possible then view pointing to the innocence of the accused should be adopted. (See:- Kalyan v. State of U.P., (2001) 9 SCC 632 and Kali Ram v. State of H.P., (1973) 2 SCC 808). Conviction cannot be made on the basis of suspicion. There is indeed a long distance between the words 'might have committed the offence' and 'must have committed the offence'.

27. On this aspect, the law laid down in the case of **Kaliram Vs. State of Himachal Pradesh, AIR 1973 SCC 2773** wherein Hon'ble Full bench of Supreme Court has observed as under :-

> "Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted….."

28. At this juncture, it is poignant to point out here that the Hon'ble Supreme Court in the case of **Digamber Vaishnav v. State of Chhattisgarh, (2019) 4 SCC 522** has held as under:-

> "14. One of the fundamental principles of criminal jurisprudence is undeniably that the burden of proof squarely rests on the prosecution and that the general burden never shifts. There can be no conviction on the basis of surmises and conjectures or suspicion howsoever grave it may be. Strong suspicion, strong coincidences and grave doubt cannot take the place of legal proof. The onus of the prosecution cannot be discharged by referring to very strong suspicion and existence of highly suspicious factors to inculpate the accused nor falsity of defence could take the place of proof which the prosecution has to establish in order to succeed, though a false plea by the defence at best, be

considered as an additional circumstance, if other circumstances unfailingly point to the guilt.

15. This Court in Jaharlal Das v. State of Orissa [Jaharlal Das v. State of Orissa, (1991) 3 SCC 27 : 1991 SCC (Cri) 527] , has held that even if the offence is a shocking one, the gravity of offence cannot by itself overweigh as far as legal proof is concerned. In cases depending highly upon the circumstantial evidence, there is always a danger that the conjecture or suspicion may take the place of legal proof. The court has to be watchful and ensure that the conjecture and suspicion do not take the place of legal proof. The court must satisfy itself that various circumstances in the chain of evidence should be established clearly and that the completed chain must be such as to rule out a reasonable likelihood of the innocence of the accused."

29. In conspectus of the aforesaid legal propositions, the facts and evidences has already been scrutinized. The impugned judgment of conviction of present appellants, when tested on the anvil of the aforesaid factual matrix and the standard of proof required in criminal trial to hold the accused persons guilty of offence, cannot be given stamp of approval.

30. Consequently, the judgment of conviction under appeal dated 10.09.2022 passed in S.T. No. 250/2021 is set aside. The appellants

Vinod and Santosh are liable to be acquitted for the offence punishable under Section 392 and Section 392/397 of the I.P.C, 1860 respectively by giving benefit of doubt. Accordingly, the appellant Vinod stands acquitted for the offence under Section 392 of IPC and appellant Santosh stands acquitted for the offence under Section 392 read with Section 397 of the I.P.C. The fine amount, if any, deposited by the appellants shall be returned to them.

31. Resultantly, the appeals are allowed in the above terms. The appellants are on bail, their bail bonds would be discharged accordingly.

32. The order of learned trial Court regarding disposal of the seized property stands confirmed.

33. A copy of this order be send to the learned trial Court for necessary compliance.

34. Pending application, if any, stands closed.

35. The appeals are allowed to the extent indicated above.

Certified copy, as per rules.

**(PREM NARAYAN SINGH)**

**JUDGE**

Vindesh