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Short Form Order

SUPREME COURT STATE OF NEW YORK
CRIMINAL TERM - PART K-25 QUEENS COUNTY
125-01 QUEENS BLVD., KEW GARDENS, N.Y. 11415

P R E S E N T:

HON. STANLEY B. KATZ
Justice

	X	
THE PEOPLE OF THE STATE OF NEW YORK	:	Ind. No. <u>1833/96</u>
	:	
-against-	:	Motion <u>Vacate Judgment</u>
	:	
MOHAMMED MOHSIN,	:	
Defendant.	:	
	X	Submitted <u>March 14, 2000</u>

The following papers numbered
1 to 7 submitted in this motion.

Stephen J. Singer, Esq.
For The Motion

HON. RICHARD A. BROWN, D.A.
Sharon Y. Brodt, ADA
Opposed

	Papers Numbered
Notice of Motion/Affidavits/Exhibits _____	<u>1 - 2</u>
District Attorney's Affirmation in Opposition _____	<u>3 - 4</u>
Defendant's Reply Affirmation _____	<u>5</u>
District Attorney's Supplemental Memorandum _____	<u>6</u>
Defendant's Reply Affirmation _____	<u>7</u>

Upon the foregoing papers, and in the opinion of the court herein, defendant's motion to vacate judgment is denied in all respects (see the accompanying memorandum decision).

GLORIA D'AMICO
Clerk

Date: July 5, 2000

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STANLEY KATZ, J.S.C.

MEMORANDUM

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS : CRIMINAL TERM : PART K-25

X
THE PEOPLE OF THE STATE OF NEW YORK : BY: STANLEY B. KATZ, J.
: :
-against- : DATE: JULY 5, 2000
: :
MOHAMMED MOHSIN, : INDICT. NO. 1833/96
: :
Defendant. :
X

Defendant moves to vacate the judgment of conviction.

The defendant was indicted on May 23, 1996 and charged with attempted murder in the second degree, and two counts of assault in the first degree. These charges arose out of a fire which occurred on September 13, 1995 and seriously injured complainant.

A jury found him guilty on all three counts and on August 26, 1999, the Court sentenced defendant to concurrent indeterminate terms of from six to eighteen years on the attempted murder charge and from three to nine years on each of the assault charges.

Defendant now moves pursuant to CPL 440.10 (b), (c), (g), and (h) to vacate the judgment.

I.
BACKGROUND

The defendant and the victim in this case were boyfriend and girlfriend for approximately three years prior to the incident. The victim, a twenty-two year old resident of

Bangladesh, lived in a basement apartment on 175th Street, Queens. In the early morning of September 13, 1995, a fire broke out in the apartment, which caused serious burns to the young woman. She was hospitalized at the Cornell Medical Center Burn Unit for approximately two and a half months.

Since the cause of the fire was unknown, fire marshals investigated. They learned that the fire started in the kitchen and interviewed defendant and the victim.

The defendant stated that he had left the basement apartment just prior to the fire, but when he got outside, he realized that he had forgotten his beeper and returned to the entrance of the apartment in the rear of the house. Once at the door, he heard screams from the apartment. He tried to open the door but it was blocked by a chain. Defendant then kicked the door in, rescued his girlfriend and pulled her outside, shouting to the landlord for assistance. A fire marshal interviewed the victim at the burn center and she stated in one word answers that the fire had been caused by an accident. The fire marshals ultimately concluded that the fire was accidental.

The police also made an independent investigation. Detective Miriam Piretti handled the investigation and made several unsuccessful attempts to contact the victim through the defendant. Finally, on November 22, 1995 he brought the victim to the station house. The Detective interviewed the victim who stated that the fire was an accident, caused when the stove exploded as she was cleaning paint off herself with gasoline.

On February 29, 1996 the victim showed up at the precinct unexpectedly, requesting to speak to Detective Piretti. She told the Detective that the fire was not an accident and the defendant had, in fact, thrown gasoline on her and ignited it with a match. The victim signed a statement to that effect. The defendant was arrested soon after.

Defendant now seeks to vacate judgment on two grounds. It is alleged:

(1) that a recent investigation has produced newly discovered evidence;

(2) that the judgment was secured by prosecutorial abuse and fraud.

II.

THE TRIAL EVIDENCE

The indictment charged defendant with attempted murder by intentionally setting Syeda Sufian on fire. A lesser count of assault accused the defendant of seeking to cause physical injury by means of dangerous instruments, to wit: gasoline and a match. A second assault count charged the defendant, with intent to disfigure, of causing such injury. All three counts revolve about the nature of the kitchen fire. Was it caused by the victim herself or deliberately set by the defendant?

The victim testified as follows:

She came to this country at sixteen and married defendant in a religious ceremony at seventeen. The marriage was

kept secret from defendant's family because the family would not have approved of her. The defendant assured her that ultimately, he could persuade his family to accept her and would make their marriage public. Defendant rented the apartment for her, but only stayed there occasionally.

The evening before the incident, she and defendant had an argument because she had learned that defendant's family was seeking to arrange a marriage between him and a "suitable" women. The victim stated that she would expose their marriage and defendant threatened to kill her. At approximately 3:00 A.M., she woke up and noticed a container of gasoline in the bathroom. Defendant stated that it was for his job.

At approximately 6:40 A.M., she awoke and got up. She and defendant continued the previous night's argument. Once again she threatened to expose their marriage. Defendant went to the bathroom, returned with the gasoline, stood to her right - between her and the door to the apartment - away from the stove and splashed her with the fluid. He then backed out the door and lit the fire.

At the hospital, defendant threatened her. He told her she would be deported if the crime was reported. He instructed her to say that the burns were the result of a coffee pot exploding on the stove which caused a flash fire. She complied. Some time later, defendant told her to explain the pattern of her burns by saying that she had used some paint given by their

landlord and as she was washing the paint off herself with gasoline, the stove caught fire. Once again, she did so.

After she left the hospital, defendant rented a room for her, but grew more distant in their relationship. Eventually, he agreed to meet her at his job. Upon arrival, she found that defendant had filed a harassment suit against her. Hurt and humiliated by defendant's behavior, she went to Detective Piretti and told her the true story.

In addition to defendant's detailed testimony, a series of witnesses took the stand and testified as to the fire, the victim's injuries and her relationship with the defendant. Among the witnesses were:

1. Police Officer Kane who first responded to the fire scene. He testified as to the lack of soot on defendant, the victim's pain and also observed that the stove, which allegedly exploded, was untouched by fire.

- (2) The Landlord, Mohindram Seerattan, stated that he observed both parties together and the rent was paid by the defendant. He also testified to the working condition of the stove before and after the fire. Additionally, he stated that he and two Hispanic men rescued the victim and while taking her out of the apartment, he was covered with soot from the fire. Meanwhile, he observed the defendant outside of the apartment and he was free of soot. Finally, Mr. Seerattan noted that the chain lock on the door was frequently falling out and that he had never given them any paint for use in the apartment.

3. A tenant, Mr. Khan, testified that he was covered by soot due to his physical contact with the victim after the fire, but defendant was soot-free.

4. Lieutenant Fred Scholl, a supervisor in the New York City Fire Department, stated that the stove was undamaged and the fire occurred inside the apartment between the sink and the door, not near the stove. He also noted the strong smell of gasoline, the presence of a gasoline container in the apartment and the lack of fire damage to the apartment.

5. and 6.

Fire Marshals Roger Echert and Dykeman also testified. Marshal Echert stated that defendant told him that he was the victim's boyfriend and saved her from the fire. Marshal Dykeman interviewed the victim at the burn center where she stated that the fire was an accident.

7. Fire Chief Hingerton took the stand, testifying that he deemed the fire suspicious and referred the matter to Fire Marshall Echert. He also corroborated Lieutenant Scholl's testimony.

8. William Buchiam, a New York City Police Laboratory Chemist stated that the elements from the burned debris were consistent with the accelerant gasoline.

9. Dr. Roger Yurt, Head Surgeon at Cornell Medical Center, Director of the Burn Center and an expert on burns, appeared on behalf of the People. He testified that the victim's burn pattern was consistent with her being splashed with gasoline

by another and then set on fire. This conclusion was based upon the placement, configuration and pattern of the burns. His expert opinion was that the burn patterns were inconsistent with a flash fire or explosion. Furthermore, the burns were inconsistent with the victim having poured gasoline on herself, whether by accident or on purpose.

10. Detective Miriam Piretti, the case Detective, testified how she made several unsuccessful attempts to contact the victim through the defendant who told her that he did not know where the victim was or how to reach her. The Detective finally interviewed the victim in November 1995 who told her that the fire was an accident, caused when the stove exploded as she was cleaning paint off herself with gasoline. Detective Piretti also told of her meeting in March 1996, at which time the victim told her what had really taken place.

11. Joyce Scheimberg, a Social Worker at the Cornell Medical Burn Unit testified that she observed singes to the eyebrows and burns to the fingertips of defendant.

12. Gene West, Vice President, Guardian Investigation Group, Inc., and a former fire marshal, testified as an expert on the cause and origin of fires. He stated that singed eyebrows and burned fingertips were consistent with one who was present at the time the fire was ignited. Conversely, these effects were inconsistent with a person who rushed in after the fire started for the purpose of pulling the victim out of the apartment. Further such a rescuer would have been covered with soot. Also,

Mr. West testified that the burn patterns were inconsistent with either a flash fire, or with the victim having set the fire by pouring gasoline on a cloth at the door, or by pouring gasoline on herself. Rather, they were consistent with the victim having gasoline splattered on her by someone or something from her right side.

The defendant maintained that the burns were accidental or self-imposed and that he made an attempt to rescue her. However, the defendant called no witnesses or presented no evidence to support such contentions. It is to be noted that the defendant's counsel had an expert witness on scientific issues, whose availability to testify was discussed with the Court, but whom counsel never chose to call.

III
NEWLY DISCOVERED EVIDENCE
A.

The test for newly discovered evidence is well established and must satisfy the following requirements: 1. It must be such as will probably change the result if a new trial is granted; 2. It must have been discovered since the trial; 3. It must be such as could not have been discovered before the trial by the exercise of due diligence; 4. It must be material to the issue; 5. It must not be cumulative to the former issue; and, 6. It must not be merely impeaching or contradicting the former evidence." (People v Salemi, 309 NY 208, 216; People v Bravo, 243 AD2d 640).

The newly discovered evidence advanced by defendant is that the chain lock on the apartment door, which trial evidence indicated was broken, had, in fact, been fixed prior to the fire. The submitted evidence consists of:

(A) an affidavit from the victim recanting her trial testimony.

(B) an affidavit from Snighdha Khondpkea, a friend of the victim, remembering that the landlord's son had made the lock very secure.

(C) a statement from the former employer of the complainant, Manirul Islam, who was present when she purchased the gasoline in a yellow antifreeze container at a gas station shortly before the fire. This statement was made to defendant's investigator, Benjamin Feliciano.

(D) a tape recorded conversation between the son of the landlord, Ghopal Seerattan, witnessed by investigator Benjamin Feliciano, in which the son stated that he had repaired the chain lock on the front door "a long time before the fire".

(E) two tape recorded conversations between the son of the landlord and the investigators wherein the landlord's son reaffirmed that he had indeed repaired the chain lock before the fire.

(F) Two tape recorded conversations between the landlord and investigator Feliciano in which Mr. Seerattan admitted that his son repaired the lock prior to the fire and ADA Singh was aware that the lock was in good working order.

B
THE COMPLAINANT'S RECANTATION

The defendant has submitted an affidavit from the victim, who has now recanted her trial testimony, alleging that the chain lock was working at the time of the fire and that the defendant is innocent of all charges.

In considering such an affidavit, it is well settled that "there is no form of proof so unreliable as recanting testimony (People v Shilitano, 218 NY 262, 270). The record indicates that the victim in this case initially told the fire marshals that her injuries were accidental. The same story was told to Detective Miriam Piretti in November 1995. In March 1996, defendant reversed her self and told the detective that she was deliberately burned by defendant and this was the true story. The victim repeated these facts before the Grand Jury and at trial. Defendant has now recanted a third time by her current affidavit. Each successive change of story has a tendency to cause confusion which leads to a loss of credibility. The defendant justifies her present affidavit on the grounds that her trial testimony was motivated by anger over defendant's treatment of her based on his terminating their friendship. However, their relationship was known to the jury and this does not furnish fresh information which would justify setting aside the judgment on the grounds of newly discovered evidence. Further, it is to be noted that alleged recantations by a victim in connection with a previously known acquaintance-defendant has been deemed to be "inherently suspect" (see, People v Davenport, 233 AD2d

771, 773) since such prior familiarity could furnish an invalid reason for recantation.

Thus, defendant's recantation affidavit is no basis to vacate judgment.

C.
STATEMENTS OF FRIEND AND EMPLOYER

Snighdna Knondakea remembered that on one occasion the landlord's son had repaired the chain lock and made it very secure. However, since no date was given, this information is not material to the time of the fire and it also could have been discovered before the trial with due diligence.

Similarly, the statement of Manirul Islam that the victim purchased gasoline in a yellow antifreeze container shortly before the fire could also have been discovered prior to trial. The indictment clearly charged defendant with setting the victim on fire by means of gasoline. Thus, defendant's recantation had no significance on securing gasoline.

D.
THE TAPE RECORDINGS

The final items advanced as newly discovered evidence deal with the existence of audiotapes. Two of these tapes purported to show that the victim had made statements to defendant that exonerated him. However, since these two tapes were known prior to trial and never offered at trial, they cannot now qualify as newly discovered evidence.

Also, defendants moving papers mentions two tapes made by the victim which concerned conversations with the landlord and his

son. These tapes, never heard by the court, existed prior to trial and thus could not be deemed newly discovered evidence.

As regards the other tapes, the Court listened to the three which were submitted for inspection. They were found to be brief, barely audible and none indicted the condition of the chain lock immediately at the time of the fire. These tapes, reduced to affidavit form, were recorded by the defendant's private investigator, Benjamin Feliciano. Two of these tapes were recordings of two interviews with Ghopal Seerattan, the landlord's son and the landlord Mohindram Seerattan (designated as Paul Seratin and Mohon Seratin in the affidavit). The affidavit of the investigator stated that the son said he "fixed" the chain lock in the front door before the fire, though the tape reveals he said he "just tightened a screw"; the father indicated that he was aware that his son had completely repaired the lock prior to the fire. Also, the investigator's affidavit states that when the landlord testified at trial that the lock was broken on the day of the fire, he meant it was broken by someone "breaking into the apartment because of the fire".

As regards these statements, since no date was given when the lock was fixed, there is no relevancy as to the condition of the chain lock at the time of the fire. The lock may have been fixed six months prior to the fire and broken again in the intervening period. However, the record indicates that the physical layout of the apartment, including the door, the chain lock and stove were

explored at length by the People. The defendant offered no expert testimony to challenge the condition of the apartment or door.

Nor could it be said that the defendant was not aware of the chain lock issue until the victim recanted since he spent the evening there and would have known of the condition of the lock when he left the apartment in the early morning. Thus, the condition of the lock was known to defendant at trial and does not qualify as newly discovered evidence (see, People v Salemi, supra, 216).

In summary, the defendant has focused his contentions on the victim's recantation and the chain lock. However, it would appear that the investigation tapes only indicated that the lock was once repaired. No mention is made as to the status at the time of the fire. This being the case, Assistant District Attorney Singh was not deliberately withholding exculpatory information or utilizing perjured testimony since neither the landlord nor his son told the investigator anything about the condition of the door prior to the fire. Thus, there is no basis to vacate judgment on the ground of prosecutorial fraud or false evidence (CPL 440.10 [b], [c]).

In conclusion, the People have presented forensic evidence based on the victim's burns and the physical nature of the apartment which established that the fire could only have been caused by the victim having had gasoline splattered on her by someone or something from her right side. The defendant presented no scientific refutation of this physical evidence which was sufficient to establish guilt, so even if the defendant's "newly discovered

evidence" was of value, it clearly would not have been of such a nature as would "probably change the result if a new trial is granted".

The application to vacate judgment is therefore denied in all respects.

Order entered accordingly.

The clerk of the court is directed to mail copies of this decision and order to the attorney for the defendant and to the District Attorney.

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STANLEY B. KATZ, J.S.C.