

*** HIGH COURT OF DELHI : NEW DELHI**
Judgment reserved on : March 31, 2009
Judgment delivered on : April 09, 2009

+ Crl. Appeal No. 474 of 2006

Nizamuddin	...	Appellant
	Through:	Ms. Anu Narula, Advocate
	versus	
The State	...	Respondent
	Through:	Mr. Amit Sharma, Additional Public Prosecutor for State

CORAM:
HON'BLE MR. JUSTICE SUNIL GAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not?
3. Whether the judgment should be reported in the Digest?

SUNIL GAUR, J.

1. This appeal arises out of trial court judgment of 4th March, 2006 and order on sentence of 7th March, 2006, relating to FIR No. 506 of 2004, under Sections 398/394/34 of the IPC, registered at Police Station Kamla Market, Delhi.
2. The facts emanating from the record of this case are as under:-

On 14.11.2004, on receipt of DD No. 4B (EX. PW3/A), Sub-Inspector Inderpal Singh along with Constable Vijay, reached JPN Hospital where MLC of the injured-Mohd.

Hussain was obtained. Two other friends of the injured- Mohd. Hussain, namely Abdul Ganny and Shahi were also present. Sub-Inspector Inderpal recorded the statement of Abdul Ganny (EX. PW 4/A) who was also injured, who alleged that the auto driver, along with his associates, had looted them at the point of knife and caused injuries on their person, while they were going to their house. Sub-Inspector Inderpal Singh, Investigating Officer of this case, prepared the *Rukka* (EX. PW13/A), registered the case, investigated the matter and at the instance of the complainant, arrested the accused. After completion of investigation, *Challan* was prepared and Charge-Sheet for the offence under Sections 394/398 of Indian Penal Code was filed.

3. The trial court charged the appellant-accused for the offence under Sections 394/398/34 of the IPC, and appellant was put to trial as he had pleaded not guilty to the charge framed against him.

4. Out of the thirteen witnesses examined in this case by the trial court, the material ones are the injured- Abdul Gany (PW-4), Shahid (PW-7) and Mohd. Hussain (PW-9). Sub-Inspector Inder Pal Singh (PW-13) is the Investigating Officer of this case.

5. The appellant, in his statement recorded by the trial court under Section 313 of the Cr.P.C. had claimed that he was innocent and was falsely implicated in this case. Appellant and his co-accused had got one witness each examined in their defence. Appellant's witness- Ram Kishan (DW-1) has certified that appellant bears good

moral character.

6. Vide impugned judgment of 4th March, 2006 and Order on Sentence of 7th March, 2006, the trial court has convicted appellant/accused to RI for seven years and to pay a fine of Rupees one thousand, under Section 394 of the IPC r/w Section 398 of the IPC, and in default of payment of fine, he has been further ordered to undergo RI for three months.

7. The submissions advanced by both the sides in this appeal have been pondered over and the evidence on record has been carefully scanned.

8. Learned Counsel for the appellant contends that the injured persons PW-4 and PW-9 stopped the three wheeler scooter (herein after referred to as TSR) at the roundabout of Minto Road and the said TSR was being driven by the appellant and the aforesaid injured asked the appellant to drop them at the RML Hospital and the appellant had refused as the said hospital was out of way, but the injured persons and his friend (PW-7) forcibly sat in the TSR of the appellant and since the appellant did not want to go to RML Hospital, therefore, he stopped his TSR at the Police Picket/ Check Post under the Minto Bridge Flyover and reported this matter to a Constable, who had asked

the appellant to drop them at Irwin Hospital and he accordingly did it. Learned Counsel for the appellant further contends that the prosecution witnesses could not be confronted with the aforesaid defence plea because of lack of adequate legal assistance.

9. Learned Counsel for the appellant vehemently contends that the Legal Aid rendered to the appellant during the trial was highly inadequate, which has caused great prejudice to the appellant. Learned Counsel relies upon the two decisions i.e. **(1981) 3 SCC 671** and **Criminal Appeal No. 293 of 1999** "*Shyam Sunder V. State*" decided on 6th January, 2009 to contend that free legal representation should be by fairly competent lawyers.

10. The discrepancy pointed out in the prosecution case is that injured-PW-4 has stated in his evidence that the appellant had declared that "*jo kuchh bhi hai nikal do*" whereas his brother- PW-9 is silent about it and their friend PW-7 has stated that the appellant had told injured PW-9 "*maal nikal*" This has been pointed out that MLC of injured PW-9 has not been exhibited by the Doctor -PW-1. Another discrepancy pointed out in the prosecution case is that injured (PW-4) has stated in his evidence that they

had gone to the hospital in a TSR whereas his friend PW-7 has stated in evidence that *Sardar ji* took them to hospital. It is contended on behalf of the appellant that the First Information of this incident received vide DD No. 4-B was of admission of Hussain (PW-9) in injured condition in the hospital. Lastly, it is asserted that material part of the prosecution case has not been put to the appellant in his statement under Section 313 of the Code of Criminal Procedure and this has caused material prejudice to the appellant and therefore, the impugned judgment is unsustainable and it deserves to be set aside. Alternatively, it is urged that offence, if any, made out would be assault only and not the offences, for which appellant has been convicted and appellant has already undergone RI of five years. Nothing else has been urged on behalf of the appellant.

11. On behalf of respondent- State, learned Additional Public Prosecutor submits that the standard of legal assistance is not of the requisite standard even in the case of paid counsels and the adequacy of the free legal assistance rendered, is quite subjective and in the instant case, simply because the defence of the appellant has not been put to the witnesses, it cannot be said that the

cross-examination of the witnesses by the Legal Aid Counsel is not effective. It is pointed out that in the judgments cited on behalf of the appellant, no relief has been granted merely on the ground that the free legal assistance rendered is inadequate. It is next submitted that the discrepancies pointed out in the prosecution case are not material ones and the plea of the appellant, now put forth in appeal, is neither probable nor plausible. Lastly, it is submitted that specific questions regarding inflicting of knife blows by the appellant, has not been put to the appellant in so many words in his statement under Section 313 of the Cr.P.C. but it is not shown as to what prejudice has been caused to the appellant on this account and if the appellant had to say anything on this aspect, nothing stopped him from stating so in the appeal before this court. Thus, it is submitted that aforesaid *bonafide* omission does not cause any prejudice to the appellant and there is no merit in this appeal.

12. The prosecution version as noticed by the trial court, is as under:-

On 14th November, 2004, at about 11:30 p.m., Abdul Gany-Complainant, along with his friends- Shahid and Mohd. Hussain, had gone to Jama

Majid for shopping on the eve of *Eid* and at about 1:30 a.m. and they hired a TSR bearing No. DL-1 RE 7307 to go to *Dhaultan Kuan* in which one person was already sitting and on being assured by the driver that he would get down after some distance, all three of them boarded the TSR. After 10-15 minutes, two more persons boarded the TSR from *Daryaganj* and said that they will get down at Minto Road. Accused-Nizamuddin was driving the TSR. At the tempo stand at Minto Road, when the TSR was stopped for demand of fare, the driver started quarrelling with his associates. While quarrelling they got down from the TSR and went behind and the driver i.e. the appellant/accused herein, also followed them. After a while appellant/accused- Nizamuddin took out a knife from the dickey of the scooter and pointed towards Abdul Gany and asked "*jo kuch bhi hai nikal do*". Though he tried to save himself, he sustained injuries on his little left hand finger. When his brother- Mohd. Hussain tried to intervene, knife blows were given on his palm and head by accused-Nizamuddin. In the meanwhile, two persons on their motorcycles came and on seeing them, accused along with his co-accused fled from the spot.

13. It is settled position in law that prosecution has to stand on its own feet and cannot take advantage of the weaknesses of defence plea. First of all, I would like to deal with the discrepancies pointed out in the prosecution case. This incident was witnessed by Shahid (PW-7) who is friend of complainant – Abdul Ganny (PW-4) and his

brother Hussain (PW-9). Infact, in this incident complainant (PW-4) and his brother (PW-9) had sustained injuries. As per the narration of the complainant (PW-4), at the tempo stand of Minto Road, appellant had stopped his TSR and had demanded the fare from the other passengers who had started quarrelling with the appellant/accused and while doing so they went behind the TSR and after a while, appellant picked up a knife from the dickey of a scooter (TSR) and pointed knife towards complainant (PW-4) and had uttered "*jo kuch bhi hai nikal do*". In the next breath, complainant (PW-4) has deposed that he tried to save himself and had sustained injury on the little finger of his left hand and when his brother, Mohd. Hussain (PW-9) tried to intervene, appellant/accused gave knife blows on his head and both the palms.

14. Eye witness (PW-7) has deposed that appellant/accused took out the knife from the dickey of his scooter (TSR) and had put the said knife on the neck of Mohd. Hussain (PW-9) and had asked "*maal nikal*" and Hussain (PW-9) resisted the appellant, who gave knife blow on his head and when Hussain (PW-9) tried to save himself, appellant gave another knife blow on the palm of his

hand.

15. Now, what Mohd. Hussain (PW-9) had to narrate in his evidence, needs to be noticed. He has stated in his evidence that two more persons had boarded the TSR of the appellant from *Daryanganj* and those passengers were drunk and this witness (PW-9) and his brother (PW-4) had raised objection to boarding of more passengers in the TSR and near Kamla Market, appellant stopped his TSR and talked to those passengers and in the meanwhile complainant (PW-4) and eye witness (PW-7) got down from the TSR to hear their conversation and the appellant took out the knife from the dickey of the TSR and gave knife blows to Shahid and when this witness (PW-9) tried to save Shahid and caught hold of appellant's knife, other person snatched from him and then appellant gave another knife blow on the head of this witness (PW-9) and while he tried to save himself, he received another injury on his left hand. Towards the end of the chief examination of this witness (PW-9), he has stated as under:-

“Nizamuddin and Sarju Lal both accused are present in the court and correctly identified by the witness, asked us to hand over the money which we have”.

16. Although the above deposition is not happily worded but what it intends to convey is that this witness (PW-9) and his companions (PW-4 and PW-7) were asked to hand over the money which they had.

17. Normally the discrepancies which do not go to the root of matter are ignored by the courts while keeping in mind the time lapse and the power of observation of the witnesses, which differs from person to person. However, the aforesaid discrepancies assume importance in the instant case for the reason that the First Information Report (EX. PW2/A) is based upon the initial statement of the Complainant (EX. PW-4/A) and one startling feature noticed in it, is that one line appears to have been squeezed in, which makes all the difference and is as follows:-

“vaih khah ki tumahere paas jo maal hai, vaih hamare hawale kar do, vaih isi bitch auto chalak ne auto ki dickey main ek tez dhar hatiyar nikala”

18. If the aforesaid subsequent addition/ insertion in the initial statement of complainant (PW-4) is excluded, then the offence would be of criminal assault only. In the normal course, the benefit of the aforesaid improvement/ assertion would have accrued to the accused, provided the witness had been confronted with it. Unfortunately, the

cross examination of the star witness i.e. complainant (PW-4) by the Legal Aid Counsel is too brief and leaves much to be desired. In any case, without dwelling any further on this aspect, even if the initial statement of PW-4 is taken as it is, still it creates reasonable doubt in the mind of the court regarding the subsequent addition/ insertion made in his statement.

19. When the discrepancies as highlighted above *inter se* the evidence of material witnesses of this case are considered in the background of the initial statement EX. PW4/A of the complainant (PW-4), they assume importance in view of the fact that the general impression given upon reading of the evidence of these material witnesses i.e. PW-4, PW-7 and PW-9 is that they are not coming out with the true facts. It is so stated because they do not state as to what was their reaction when complainant (PW-4) had allegedly told to hand over whatever they had. The question of assaulting the injured would arise only upon their refusal to part with their belongings. It has not been brought out in the evidence by these material witnesses as to what belongings they were carrying which impelled the appellant/ accused to allegedly state “*maal nikal*”.

20. After minutely examining the evidence of the Complainant (PW-4) his brother (PW-9) and of his friend (PW-7), I find that the

version putforth by them lacks spontaneity and truthfulness so far as the offence under Section 393/398 of the IPC is concerned. There is no doubt that the incident had taken place in which complainant (PW-4) and his brother (PW-9) were injured but the manner in which this incident took place, has not been clearly brought out, which creates a reasonable doubt about the veracity of the prosecution case. The prosecution story is half baked. What has been deliberately withheld by material witnesses, causes grave doubt about authenticity of the prosecution version.

21. The above discussed material discrepancy in prosecution regarding the actual happening of this incident is irreconcilable and strikes at the root of the prosecution case and persuades this court to hold that genesis of this incident is shrouded in mystery, which prosecution fails to unravel.

22. In view of the aforesaid narration, impugned judgment is rendered unsustainable and is accordingly set aside, by extending benefit of doubt to the appellant, who is set free by directing his release from jail, if not wanted in any other case.

23. With the aforesaid directions, this appeal stands allowed.

SUNIL GAUR, J

April 09, 2009

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