

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on: August 05, 2010
Judgment delivered on: December 07, 2010

+ **CRIMINAL APPEAL NO.27/2005**

MOHD. FURKAN

....APPELLANT

Through: Mr.Ajay Mehrotra with Mr.S.P.Singh and
Mr.K.K.Tiwari, Advocates.

Versus

THE STATE OF N.C.T. OF DELHI

.....RESPONDENT

Through: Mr.Pawan K.Bahl, APP.

CORAM:

HON'BLE MR. JUSTICE AJIT BHARIHOKE

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

AJIT BHARIHOKE, J.

1. This appeal is directed against the impugned judgment dated 10.11.2004 in case FIR No.142/2003 P.S. Kalkaji as also the consequent order on sentence dated 18.11.2004 whereby the appellant has been convicted for the offences punishable under Sections 398 and 307 IPC as well as under Section 27 of the Arms Act and sentenced accordingly.

2. Briefly stated, case of the prosecution is that on the night intervening 15th and 16th February 2003 at 1.45 A.M., lady Constable Rajbala of PCR informed Police Post Govind Puri that a person has been shot near liquor vend Govind Puri near the roundabout. Information was recorded in daily diary maintained at Police Post Govind Puri dated 15th /16th February 2003(Ex.PW-5/A). Copy of the DD report was forwarded to ASI Attar Singh through Constable Rajpal for necessary action, who reached at the spot. In the meanwhile, on the same night at about 1.48 A.M. S.I. Girjesh Singh, In-charge Police Post Govind Puri, on receipt of this information left police post for the spot of occurrence along with Constable Mahavir after making departure entry No.39 in daily diary maintained at the police post. S.I. Girjesh Singh and the Constable reached at the place of occurrence near Punjabi Park camp, B Block, Transit Camp, Govind Puri where a PCR van was already present. He was informed that injured had already been removed to AIIMS by another PCR VAN No.E-35. One scooter No.DL 3S-AB 0533 was there at the spot of occurrence. S.I. Girjesh then went to AIIMS along with ASI Attar Singh and Constable Mahabir Singh and collected the MLC of the injured complainant Mahesh Nand, who was certified fit for statement. S.I. Girjesh recorded the statement of injured Mahesh Nand who stated that on the fateful night while he was returning home, his scooter No. DL 3S-AB 0533 ran out of petrol at Anand Mai Marg near the roundabout of

Okhla, Phase-I and he proceeded towards his house on foot. When he reached near round about near B Block, Punjabi Camp at around 1.00 A.M., one young boy aged 20-25 years struck him on the back of his head with the butt of a country made pistol (*katta*). As a result, his grip on the scooter loosened and the scooter fell down. Thereafter, said boy asked him to hand over his belongings. Complainant Mahesh Nand claimed that instead of handing over his belongings to that boy, he grappled with him and in the process, said boy fired a bullet from "*katta*" which hit him on his right hand after grazing his abdomen. Thereafter, said young boy ran away towards Okhla Phase-I. Complainant claimed in his statement that he was able to see the face of said boy in the street light and was in position to identify him.

3. S.I.Girjesh Singh appended his endorsement Ex.PW-10/C on the aforesaid statement of the complainant Ex.PW-1/A and sent it to the police station through constable Mahavir Singh for the registration of the case. On the basis of the said *rukka*, FIR No.142/2003 was registered at police station on 16th February 2003 at 3.50 a.m.

4. Clothes of the complainant and the bullet retrieved therefrom were sealed by the seal of AIIMS and the sealed packet along with sample seal was handed over to the I.O. which were seized vide memo Ex.PW-10/D. Scooter found at the spot was seized vide memo Ex.PW-3/A. I.O. also

prepared rough site plan of the place of occurrence with the help of the complainant.

5. On 10th March 2003, the appellant was arrested in case FIR No.215/2003 pertaining to P.S. Kalkaji. His police custody remand in this case was obtained. During interrogation, the appellant made a disclosure statement regarding the incident and stated that he could get recovered the "*katta*" used in the occurrence and pursuant to the said disclosure statement, he led the police party to the bushes near Okhla roundabout and from there he got recovered the "*katta*" and a bullet. On checking, empty shell was found stuck in the barrel of the "*katta*". Investigating Officer measured the "*katta*", prepared its sketch as well as the sketch of live cartridge and the empty shell and took them into possession vide seizure memo Ex.PW-4/C. The sketch of "*katta*", live bullet and empty cartridge is Ex.PW-4/B. An application for conducting Test Identification Parade (T.I.P.) to fix the identity of the appellant was moved on 13th March 2003. The appellant, however, declined to participate in T.I.P. on the ground that he had already been shown to various persons before applying for T.I.P. I.O. also sent the case property to the CFSL and obtained the report of ballistic expert Ex.PW-10/E. On completion of investigation, the appellant was charge sheeted and send for trial.

6. Learned Additional Sessions Judge charged the appellant for the offences punishable under Sections 307 and 398 IPC as also for the

offence under Section 27 of the Arms Act. The appellant pleaded not guilty to the charge and claimed to be tried.

7. In order to bring home the guilt of the appellant, prosecution has examined 14 witnesses. PW-1 Mahesh Nand is the star witness of the prosecution. He has testified that on 16th February 2003 while he was returning on his scooter from Sangam Vihar, his scooter ran out of petrol. Since the nearby petrol pump was closed, he decided to drag his scooter to his house at Kalkaji. While he was going on foot and reached near roundabout of Okhla, Phase-I, the appellant came from behind and hit him on his head with the butt of a pistol. Thereafter, the appellant faced him and asked him to hand over whatever belongings he was carrying. The complainant claimed that instead of handing over his belongings, he grappled with the appellant and the appellant after wriggling out of his grip, fired a pistol shot at him. The bullet hit him on his hand and abdomen. Thereafter, the appellant ran away. He thereafter dialed telephone No.100 from his mobile phone and a PCR van came and took him to the hospital. He claimed that his statement (Ex.PW-1/A) was recorded by the police at the hospital. He identified his shirt (Ex.P-1), sweater (Ex.P-2) and T-Shirt (Ex.P-3) with bullet holes. PW-9 Dr.Sunil Kumar has proved the MLC of the complainant Ex.PW-9/A prepared by Dr.Pareenita by way of secondary evidence by identifying her signatures and handwriting on the same.

8. Statement of the accused under Section 313 Cr.P.C. was recorded wherein he has denied the prosecution version and claimed that he has been falsely implicated in this case. As regards T.I.P., he claimed that he had insisted for holding T.I.P. but his request was declined. Though the appellant expressed his wish to lead evidence in his defence but no witness was produced by him.

9. The learned Additional Sessions Judge, on consideration of the evidence, found the appellant guilty on all the counts and convicted and sentenced him for the offences under Sections 398 and 307 IPC and Section 27 of the Arms Act.

10. Learned Mr. Ajay Mehrotra, Advocate appearing for the appellant submitted that the appellant is innocent and he has been falsely implicated by the police to solve a blind case. He argued that the case of the prosecution rests mainly only on the testimony of the complainant Mahesh Nand (PW-1) who is not a reliable witness for various reasons. Dilating on the argument, learned counsel submitted that as per the version of the prosecution detailed in complaint Ex.PW-1/A and the statement of the complainant, he was initially hit by the appellant on the back of his head with the butt of a pistol. This version of the complainant stands belied by his MLC Ex.PW-9/A wherein there is no mention of any injury found on the back of head of the complainant. Secondly, it is contended that as per the case of prosecution, the bullet was fired by the

appellant from an 8 mm pistol and the said bullet was found entangled with the sweater of the complainant, which is an impossibility. From this, learned counsel for the appellant has urged that it is not safe to base conviction of the appellant on the unreliable testimony of the complainant.

11. I am not convinced with the submissions made by learned counsel for the appellant. Complainant Mahesh Nand in his testimony in the court has fully supported the prosecution story. His version finds corroboration from the MLC Ex.PW-9/A which reveals that he was taken to the hospital by Head Constable Rameshwar of PCR at 1.57 A.M. on 16th February 2003 and on examination, the doctor found bullet wound on the upper abdomen as well as right arm of the complainant. This circumstance is sufficient to establish that the incident in question did happen in which the complainant sustained injury. Now the only question for determination is about the identity of the appellant, who was not caught at the spot. In this regard, PW-1 Mahesh Nand has identified the appellant as the culprit who shot him with a “*katta*”. As per the testimony of PW-10 S.I. Girjesh Singh, an application for holding T.I.P. to fix the identity of the appellant was moved before the Magistrate but the appellant refused to participate in the T.I.P. PW-14 Ms.Kamini Lau, the then Metropolitan Magistrate, Patiala House Courts conducted T.I.P. proceedings. She has categorically stated that the appellant Mohd.

Furkan was produced before her along with the application requesting for holding of T.I.P. marked to her by the link Magistrate. She explained the purpose of T.I.P. and consequence of refusal to participate in T.I.P. to the appellant but the appellant refused to participate in the T.I.P. and gave his explanation in the form of a statement. She has proved the T.I.P. proceedings as Ex.PW-14/A. On perusal of T.I.P. proceedings, it transpires that despite of warning, the appellant refused to participate in T.I.P. on the ground that he had been shown to various persons. The appellant, when examined under Section 313 Cr.P.C. pertaining to his refusal to participate in T.I.P., came out with an entirely contradictory explanation by stating that he insisted for holding of T.I.P. but his request was declined despite of the fact that he was willing to participate in T.I.P. This circumstance clearly shows that the explanation given by the appellant before M.M. for refusing to participate in T.I.P. was incorrect. Thus, in my view, learned trial Judge was right in drawing adverse presumption against the appellant on account of his refusal to participate in T.I.P. and he was right in accepting the testimony of the complainant Mahesh Nand regarding the identity of the appellant as the culprit.

12. Next submission on behalf of the appellant is that the prosecution story is highly improbable. Learned counsel for the appellant contended that as per the case of prosecution, the bullet shot from the “*katta*” was found entangled with the sweater of the complainant, which is an

impossibility, particularly when the shot was fired from a close range. Learned APP has refuted the contention by stating that it is based upon surmises and conjectures and that there can be many reasons for the bullet getting entangled with the sweater of the complainant.

13. As per the MLC, the bullet grazed against the abdomen of the complainant and stuck on his right arm. Thus, a possibility cannot be ruled out that after hitting the bone of right arm of the complainant, the bullet might have got deflected and got entangled with the sweater of the complainant. Therefore, this circumstance cannot be taken as a reason to suspect the otherwise reliable testimony of the complainant.

14. Learned counsel for the appellant further submitted that as per the case of prosecution, the appellant shot only one bullet which resulted in injury on abdomen and right arm of the complainant and thereafter he ran away. From the aforesaid conduct, it cannot be inferred that there was any intention on the part of the appellant to commit murder of the complainant. Thus, he has contended that conviction of the appellant under Section 307 IPC is unwarranted.

Section 307 IPC reads thus:-

"Section 307. Attempt to murder

Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty or murder, shall be punished with imprisonment of either description for a term

which may extend to ten years, and shall also be liable to fine, and is hurt is caused to any person by such act, the offender shall be liable either to [imprisonment for life], or to such punishment as is hereinbefore mentioned.”

15. On bare reading of the above provision, it is apparent that essential ingredients of Section 307 IPC are

- (i) an intention of or knowledge relating to commission of murder;
- (ii) The doing of an act towards it.

16. As per the testimony of the complainant, it stands established that in an attempt to rob the complainant, the appellant shot him with a “katta” from a close range. The act of the appellant in firing a shot on the complainant was so dangerous that if the bullet had struck against some vital part of the body, the complainant would have died. Therefore, I find nothing wrong in the learned trial Judge inferring that the appellant had knowledge that the act committed by him was so dangerous that it could have caused death of the complainant. As such, I find no fault in the conviction of the appellant under Section 307 IPC.

17. Lastly, learned counsel for the appellant has prayed for a lenient view. The appellant has been convicted for the offences punishable under Section 307 IPC and Section 398 IPC. As regards Section 307 IPC, he has been sentenced to undergo imprisonment for a period of 3 years

whereas for the offence under Section 398 IPC, he has been sentenced to undergo R.I. for a period of 7 years, which is the minimum punishment provided for the offence under the Act. Therefore, I find no scope of any further leniency in the matter.

18. The result of the above discussion is that the appeal is devoid of merit. It is accordingly dismissed.

19. The appellant be taken into custody to undergo the remaining period of his sentence.

(AJIT BHARIHOKE)
JUDGE

DECEMBER 07, 2010

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