

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

+ **Crl. L.P. No. 209/2010**

% **Date of Decision: 06.10.2010**

State Appellant

Through Mr.Lovkesh Sawhney, APP

Versus

Rakesh Malik & Ors. Respondent

Through Nemo

CORAM:

HON'BLE MR. JUSTICE ANIL KUMAR

HON'BLE MR. JUSTICE SURESH KAIT

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | YES |
| 2. | To be referred to the reporter or not? | NO |
| 3. | Whether the judgment should be reported in the Digest? | NO |

ANIL KUMAR, J.

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1. The petitioner/State has sought leave to appeal against the Judgment dated 15th September, 2009 giving benefit of doubt to the respondents, namely, Rakesh Malik, Mukesh Malik and Sanjeet Malik and absolving them of the charges under Section 307/323/324/341/34 of IPC in Sessions Case No. 92/1/2008 arising out of FIR No. 623/2004 under Section 307/324/34 of IPC, PS Dabri.

2. The Trial Court has held that there are various discrepancies and infirmities in the prosecution case which raised doubts about the truthfulness of the prosecution case and thus giving benefit of doubt to the accused. The Trial Court has noticed over writing in Rukka Ex. PW-8/A about the time of sending Rukka to the Police Station, which is also in different ink and which the prosecution has failed to explain and thus, there is a doubt as to when it was sent to the Police Station.

3. The Trial Court also referred to the fact that the injured, Amit Solanki did not give the details of incident such as time etc. when the statement was given to the SI nor did he give the details to the doctor. Though he has given an explanation that the doctor did not ask him as to who had assaulted him and therefore he did not disclose about the same but this explanation has not been accepted by the Trial Court in the facts and circumstances and other evidence on record. PW-2, Sarwan Kumar the only independent witness did not support the case of the prosecution.

4. The Trial Court has also based the acquittal of the respondent/accused on the ground that PW-3, Shankar who was also injured in the melee had tried to talk to Amit Solanki when he was caught hold of Sanjeet Malik and Mukesh Malik and was attacked by Rakesh Malik, pursuant to which he fell down and he was removed to

the hospital by someone. Even PW-3 who was also injured was declared hostile. The version of PW-3 is not supported by Sh. Amit Solanki, who did not testify that Shankar, PW-3 was assaulted by the accused in his presence. The Trial Court has taken into account non-production of Dharmu, who was allegedly slapped by Mukesh which led to alleged assault on PW-1 Amit Solanki.

5. Reliance was also placed by the Trial Court on non-examination of doctor to prove the MLC of PW-1 Amit Solanki, who was allegedly injured by the respondent/accused. It has also been noticed that PW-1, Amit Solanki and PW-3 Shankar, who were injured have not supported each other's version.

6. It has also been noticed by the Trial Court that though, the number of assailants and their names were not disclosed to the doctor, however, the alleged statement recorded by the Police in the hospital, the description and the names of all the alleged assailants were given. The prosecution also failed to prove the previous incident which led to the alleged attack by the respondent/accused on Amit Solanki nor any person, who was witness to earlier incident, had been examined by the prosecution.

7. Though, PW-7, Dr. Sudhir Solanki has testified that when PW-1, Amit Solanki was admitted to the hospital, he was bleeding profusely and even PW-1 Amit testified that he was bleeding, however, PW-8, SI Sobhan Barriack, the IO of the case had testified that he did not find any blood on the spot. In the circumstances, the Trial Court has reasoned that how it could be that if the injured was bleeding profusely, there was no blood on the spot where the injured was allegedly attacked nor any blood stained clothes were seized. In the circumstances, it was inferred that PW-1 Amit Solanki did not bleed or even did not suffer any such injuries as had been alleged.

8. While acquitting the respondents, the Trial Court has also noticed that there is no explanation as to why statement of Dharmu was recorded under Section 161 of Crl. Procedure Code after more than three months of the alleged previous incident and no satisfactory explanation has been given for his non-production before the Court. Contradiction in the statement of PW-1 Amit Solanki has also been relied on as he had stated during the cross-examination by the defense counsel that he was conscious and if he was conscious, then how did he not see Shankar, PW-3 being beaten up and assaulted by the accused persons in his presence.

9. In the MLC Ex. PW 5/A of PW-3 Shankar, the date of his examination at Kesar Nursing Home is mentioned as 3rd September,

2004 whereas he was admitted there on 2nd September, 2004 and no plausible and acceptable explanation has been given by the prosecution. The Trial Court also relied on the fact that the statement of PW-3 Shankar was not recorded by PW-13, ASI Vijay Kumar at the hospital. If that be so then where was the statement recorded? It was also noticed that PW-13 ASI Vijay Kumar in his examination-in-chief testified that he recorded the statement of PW-3 Shankar at the hospital but when attention was drawn to the endorsement of the doctor in the application Ex. PW13/D-1 that PW-3 Shankar was not present in the hospital, he changed his version and deposed that statement of PW-3 Shankar was recorded at his house at 12 midnight which is also not corroborated from the record showing that the police had visited the house of Shankar, PW-3 at night. In the circumstances, the testimonies of PW-3 and PW-13 have not been relied on.

10. Regarding grant of leave to State against an order of acquittal, it cannot be disputed that the High Court has the power to reconsider the whole issue, reappraise the evidence and come to its own conclusions and findings in place of the findings recorded by the Trial Court, if the findings are against the evidence or record or unsustainable or perverse. However, before reversing the findings of acquittal, the High Court must consider each ground on which the order of acquittal is based and should record its own reasons for accepting those grounds.

11. This also cannot be disputed that in reversing the findings of acquittal the High Court has to keep in view the fact that the presumption of innocence is still available in favour of the accused which is rather fortified and strengthened by the order of acquittal passed in his favour. Even if on fresh scrutiny and reappraisal of the evidence and perusal of the material on record, the High Court is of the opinion that another view is possible or which can be reasonably taken, then the view which favours the accused should be adopted and the view taken by the Trial Court which had an advantage of looking at the demeanour of witnesses and observing their conduct in the Court is not to be substituted by another view which may be reasonably possible in the opinion of the High Court. For this, reliance can be placed on 2009(1) JCC 482=AIR 2009 SC 1242, Prem Kanwar v. State of Rajasthan; 2008 (3) JCC 1806, Syed Peda Aowlia v. the Public Prosecutor, High Court of A.P, Hyderabad; Bhagwan Singh and Ors v. State of Madhya Pradesh, 2002 (2) Supreme 567; AIR 1973 SC 2622 Shivaji Sababrao Babade & Anr v. State of Maharashtra; Ramesh Babu Lal Doshi v. State of Gujarat, (1996) 4 Supreme 167; Jaswant Singh v. State of Haryana, 2000 (1) JCC (SC) 140. The Courts have held that the golden thread which runs through the web of 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. The paramount consideration of the Court is to

ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent.

12. With this settled law regarding the scope of setting aside the order of acquittal, we have heard the learned Additional Public Prosecutor and the learned counsel for the respondent and have also gone through the Trial Court record especially the testimonies of the witnesses and the relevant documents.

13. The learned counsel for the State has contended that PW 1 did not give the details of assailants as the attending doctor had not asked him about the assailants and on that account no adverse inference for non disclosure can be taken. The acquittal by the Trial Court is not based only on disclosure of assailants before the Doctor but on a number of other factors. Perusal of the testimonies of the witnesses reveals that the two injured PW 1 Amit Solanki and PW 3 Shankar has not even supported each other. These two persons who were allegedly attacked by the respondents should have deposed consistently. Their testimonies have major contradictions. No plausible explanation for the same has been given. PW 1 had not become unconscious so as not to know or notice as to who had assaulted PW 3, Shankar but he could not depose about it and his version is unreliable. The concerned doctor has not been examined to prove the MLC of PW 1

to demonstrate as to what injuries were caused to him. Though it has been deposed that Amit Solanki was bleeding profusely when he was admitted but neither his clothes had been stained nor recovered by the police nor the place where incident had taken place, blood was found nor lifted by the police. That makes the version of Amit Solanki about assault on him and such injuries caused to him which led to profusely bleeding, not acceptable.

14. No acceptable explanation has also been given about the contradictions in the MLC of PW 3, Shankar, the date of his examination at Kesar Nursing Home is mentioned as 3rd September, 2004 whereas he was admitted there on 2nd September, 2004. The statement of PW-3 Shankar was not recorded by PW-13, ASI Vijay Kumar at the hospital. Though it has been deposed by the ASI Vijay Kumar PW 13, that it was recorded at his home, but this fact cannot be accepted as it has not be corroborated nor it can be accepted in the present facts and circumstances that the police visited his home at night.

15. The motive for alleged assault has been alleged to be assault on Dharmu few months back. However, Dharmu has not been examined nor any plausible reason has been given for not examining him except that he was not available. What efforts were made to locate him has not been explained or deposed by any witness. Surprisingly the

statement of Dharmu under section 161 of Cr. P.C about the earlier incident when he was allegedly assaulted and slapped by one of the assailants was recorded three months after the earlier incidents. No plausible explanation has been given by the learned Additional Public Prosecutor for not examining any of the witnesses of earlier incident.

16. In the circumstances the injured have deposed inconsistently nor supporting each other and independent witness PW 2 Sarwan Kumar has not supported the version of any one of them. There are other contradictions also. In the circumstances, the learned APP is unable to explain as to how the findings and inferences of the Trial Court are perverse or unsustainable. Even after re-appreciating the evidence this Court does not find sufficient evidence to inculcate the respondents/accused. No other grounds have been raised on behalf of the petitioner which would entitle them for leave to appeal against the order of the Trial Court giving benefit of doubt to the respondents and acquitting them.

17. This is no more res integra that the High Court should give proper considerations to matters such as the views of the trial judge as to the credibility of the witnesses; the presumption of innocence in favor of the accused, a presumption certainly not weakened by the fact that they have been acquitted at the trial; the right of the accused to the benefit of any doubt and slowness of the Appellate Court in disturbing

the finding of fact arrived at by a judge who had the advantage of seeing the witnesses.

18. In the circumstances, we are unable to hold that the judgment of the Trial Court is unsustainable or perverse or the findings are against the evidence or record so as to entail any interference by this Court. The petitioner in the circumstances has failed to make out any grounds to grant leave to appeal to the petitioner against the judgment dated 15th September, 2009 acquitting the respondents by giving him benefit of doubt. In the circumstances, the petition for leave to appeal is without any merit and it is, therefore, dismissed.

ANIL KUMAR, J.

SURESH KAIT, J.

OCTOBER 06, 2010

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