

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **Crl.M.A Nos.14330-31/2010 & CRL.LP No.313/2010**
% **Date of Decision: 09.09.2010**

State of NCT of Delhi Petitioner
Through Mr.Sanjeev Bhandari, Additional Standing
Counsel (Criminal)

Versus

Javed @ Sonu & Another Respondents
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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Crl.M.A No.14330/2010

Allowed subject to just exceptions.

Crl.M.A No.14331/2010

This is an application seeking condonation of delay of 108 days in filing the leave petition.

For the reasons stated in the application, delay is condoned.

CRL.LP No.313/2010

1. The petitioner/state has sought leave to appeal against the Judgment dated 16.11.2009 passed by the Additional Sessions Judge in S.C.No.36 of 2007 pertaining to FIR No.281/2007, under Sections 302 & 34 of Indian Penal Code, PS Ashok Vihar, titled as 'State v. Javed @ Sonu & Another' acquitting the respondents of the said charges.

2. The case of the prosecution in brief is that on 25th April, 2007 deceased Om Prakash was taken to Sunder Lal Jain Hospital where he was declared brought dead by the doctors. A DD No.27 PP Wazirpur J.J. Colony was recorded on 25th April, 2007 pursuant to which ASI Dev Raj along with constable Shish Ram, PW-9 also reached the hospital. On inspecting the dead body, Sub Inspector Pradeep Kumar, PW-11 had observed some scratches on the neck of the dead body and the cause of death was not clear at that time. The DD No.27 was kept pending for further investigation till the receipt of the post mortem report.

3. Sh.Roshan Lal, PW-3, father of the deceased had disclosed that he is residing with other son at Wazirpur, J.J.Colony and he had stated that he has four daughters and his granddaughter, namely, Poonam is unmarried who was aged about 17 years. On 23rd April, 2007, she had not come back till 8:00 p.m. and on enquiry by him, it had transpired

that she had gone with a boy, named, Sonu residing in their neighbourhood.

4. On enquiry in the neighbourhood, one person, namely Firoz son of Hamid disclosed that his brother is Sonu @ Javed Khan. On being intimated that Sonu had taken his granddaughter Poonam, Firoz talked to Sonu @ Javed on his phone, and it was disclosed that she was staying at the house of the friend of Javed. It was disclosed that Poonam was at Kashmiri Gate Metro Station, therefore, Sh.Roshan Lal, PW-3 the complainant went along with his daughter Smt.Radha to Kashmiri Gate Metro Station where they met Poonam with Javed. The accused Javed insisted on marrying Poonam, however, she was brought home.

5. On 24th April, 2007, the complainant, Sh.Roshan Lal again did not find Poonam, and on enquiry from the mother of the Javed @ Sonu who also talked to Javed on phone, it was revealed that Poonam was left in a park at Rithala Metro Station. The complainant, Sh.Roshan Lal, PW-3 went with the mother of Javed @ Sonu and his son to Rithala Metro Station and Poonam was brought back.

6. On these facts being revealed to the father of the Poonam, deceased Om Prakash, he had arguments with Javed @ Sonu and his brother. It was also revealed by Sh.Roshan Lal, father of deceased Om

Prakash that his son was a habitual drinker and on 25th April, 2007 when he came back, he was under influence of liquor and had some scratches near his ear. On enquiry, it was revealed to him that Firoz younger brother of Javed @ Sonu along with 2/3 boys injured him at Tikona Prak, C-115 Bus Stand. Since he was under the influence of liquor, therefore, he was advised to go to sleep, however, after sometime when his granddaughter, namely, Arti went up stairs to give water to deceased Om Prakash, she found him lifeless, and therefore, she came back and disclosed to Sh.Roshan Lal who went up stairs and immediately called the doctor who advised him after coming, to take him to the hospital. Thus deceased Om Prakash was taken to the hospital, however, he was declared brought dead.

7. After post mortem and the statement of Sh.Roshan Lal, PW-3 a case under Sections 302 & 34 of Indian penal Code was registered against the Javed @ Sonu and Imran, and the respondents were charged under Sections 302 & 34 of Indian Penal Code. The respondents pleaded not guilty, and therefore, during trial the prosecution examined 12 witnesses, whereas the respondents did not examine anyone. The statement of accused was also recorded under Section 313 of Criminal Procedure Code who denied the allegations made against them and stated that they had been falsely implicated.

8. After considering the testimonies on record, the trial court has relied on the statement of sister of the deceased, Smt.Radha (PW-2) who was told by the deceased that he was beaten up by the accused Javed @ Sonu and Imran at Tikona Park, C-115 Bust Stand, and the injuries on his neck were on account of being beaten up. Father of the deceased PW3, Sh.Roshan Lal also stated that he was told that he was beaten by Javed @ Sonu and Imran. However, Poonam did not state anything about the beating of deceased Om Prakash by Javed @ Sonu or anyone else. She only stated that her father was beaten up by Javed @ Sonu and Imran and later on he had died.

9. The prosecution had produced only one eye witness to the alleged incident of beating by Javed @ Sonu and Imran to deceased Om Prakash, namely, PW-10 Sehdev, but PW-10 Sehdev in the court stated that he does not know anything about this case, and nothing happened in his presence, and he never made any statement to the police. The said witness was declared hostile, however, nothing material came out of his cross-examination. The alleged eye witness PW-10 Sehdev rather deposed that Om Prakash was addicted to liquor which fact was also admitted by PW-3 Sh.Roshan Lal, father of the deceased.

10. The trial court also noticed the injuries to the deceased on the basis of testimony of the doctor Mohd.Arshad (PW-1) who had deposed that no active bleeding was found except two injuries behind the right

ear of the injured that is two lacerated wounds 2 inches below and behind the right lobule ear. One of the injuries was one inch in length and another was two inch in length. According to the doctor, there were no blood stains on his clothes. He proved the MLC as PW1/A.

11. The trial court while acquitting the accused relied on testimony of the PW-2, Smt.Radha, sister of the deceased who had deposed that the blood was oozing out from the injury of deceased Om Prakash whereas the doctor Mohd.Arshad, PW-1 had stated that no active bleeding was found in the body of the patient. Smt.Radha (PW-2), sister of the deceased had stated that the collar of the shirt which the deceased wore was stained with blood. Smt.Radha (PW-2), sister of the deceased rather stated that injuries did not seem to be serious, therefore, her injured brother was not taken to the hospital. The trial court has also observed that even if the blood was coming out of the alleged injuries, as have been noticed by Smt.Radha (PW-2), sister of the deceased, still the family members did not consider it serious enough to take the deceased to the hospital, rather they advised him to go to the first floor of the house, and rest there.

12. The trial court also has held that according to Smt.Radha (PW-2), sister of the deceased though number of people had heard about the injuries to deceased and as to who had injured him, however, she did not disclose about any of such people in the locality. Contradiction in

the statement of Smt.Radha (PW-2), sister of the deceased as to when her statement was recorded by the police was also observed. She also contradicted as to whether the doctor was called before her deceased brother was taken to the hospital. Rather according to her no doctor was called for, nor any doctor came to her house to examine the condition of her brother, whereas father of the deceased, Sh.Roshan Lal had stated that doctor Yasin from the neighbourhood had been called who advised them to take the deceased to the hospital at once. Doctor Yasin was however, not examined by the prosecution.

13. According to the trial court, there were improvements in the statement of PW-2 Smt.Radha, and also contradictions in the statement of other witnesses in respect of accused Javed @ Sonu and Imran. Smt.Radha (PW-2), sister of the deceased had stated that he was not under influence of liquor which fact was not believed because the father of the deceased had told categorically in his deposition that his son came back injured on the back of his neck and he was under the influence of liquor which fact was also established from the FSL report, EX. PW-12/A stipulating that the blood sample was found to contain Ethyl Alcohol 78.4 mg by 100 ml of blood. Contradictions in the statement of father of the deceased was also referred while acquitting the accused as, though he told that his son was addicted to liquor, however, he denied this during the cross-examination, when he was confronted with his statement recorded under Section 161 Cr.P.C.

14. From the testimonies of the witnesses, it was inferred that though at the time of alleged fight other persons from the Mohalla had collected, however, when the deceased went home he was alone. Complainant in the first statement given to the police under Section 161 Cr.P.C. did not name accused and only later on in the supplementary statement under Section 161 Cr.P.C. had named the respondents Javed @ Sonu and Imran.

15. It was also held that if daughter Poonam was taken prior to the date of incident on 23rd April, 2007, his name should have been disclosed by the complainant to the police. The complainant even denied giving the name of Firoz and 2-3 boys to the police while deposing in the court, and also denied that he did not tell the police that an old lady near Tikona Park had seen the quarrel taking place near the wall of the park. The trial court also found the version regarding Poonam unacceptable as if she was taken by the accused against her wishes despite having an opportunity she did not raise any alarm, nor did she try to contact her family members rather she agreed to go with the accused. If the accused wanted to marry Poonam, it is strange that he will leave her at a park near Metro Station Rithala. Since she did not inform her family members despite having a phone at her residence, it was inferred that she went with the accused Javed @ Sonu on her own. It was also noticed by the trial court that if she was

taken forcibly on 23rd April, 2007, then she would not have gone again with the accused on 24th April, 2007. In the circumstances, it has been inferred that the versions of PW-2, PW-3 and PW-4 have inherent contradictions and even the injuries to the deceased noticed in post mortem, were not in consonance with the injuries mentioned in MLC to the deceased disclosed by the PW-1 (Dr.Mohd.Arshad).

16. In the post mortem report which has been proved as Ex.PW-7/A, more injuries were found by the doctors which were scratches, abrasions along with swelling with haematoma and the cause of death is given as diffuse cerebral damages consequent upon herniation of territorial cerebella, as a result of acceleration and deceleration injuries over head which were caused by blunt force and are consistent with assault. The trial court, however, held that the person who is alleged to have seen the incident of beating to the deceased has not supported the case of the prosecution and on the basis of the statement of the PW-2, Smt.Radha, Sister of the deceased, PW-3 father of the deceased and PW-4, it cannot be established that accused had beaten the deceased Om Prakash. The plea that accused was given beating by striking his head against the wall of Tikona Park was also not established as no such evidence has been produced. Even the deceased did not tell his sister and father PW-2 and PW-3 that while beating his head was banged against the wall by the accused.

17. While holding that prosecution has failed to establish the guilt of the accused, the trial court has also noticed the contradictions in the statement of PW-2 Smt.Radha, sister of the deceased and PW-3 Sh.Roshan Lal, father of the deceased regarding whether the blood was oozing from the injuries of the deceased at the time he came back home. In the circumstances, on the basis of inherent contradictions in the testimonies of the relatives of the deceased and there being no eye witness and alleged eye witness PW-10 Sehdev having become hostile, the trial court has held that prosecution has failed to establish the charges against the respondents. The trial court also relied on the fact that if the injuries were serious on account of banging the head of the deceased with the wall of the Tikona park then he could not have walked back on foot and therefore, the whole version of the prosecution is doubtful and the prosecution has failed to prove its case beyond the shadow of doubt.

18. The learned counsel for the petitioner has contended that the contradictions in the statement of witnesses are minor imperfections and cannot be the ground for rejection of their testimonies or holding that there are not major contradictions.

19. It is no more res integra that the High Court has the power to reconsider the whole issue, reappraise the evidence and come to its own conclusion 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 finding 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 and not subscribing to the view of the trial Court that the accused is entitled to acquittal.

20. This also cannot be disputed that in reversing the finding 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, if 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. Reliance for this can be placed on 2009(1) JCC 482, Prem Kumar 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.

21 This Court has gone through the testimonies of PW-2, PW-3, PW-4 and PW-10. Perusal of these testimonies, reveals that the contradictions noticed by the trial court are not contrary to the depositions of the witnesses. What was stated by the deceased on coming back to his sister and to his father, their versions have inherent contradictions. In the circumstances, it cannot be held that these are some imperfections only. Even the father of the deceased did not disclose the name of the accused in the statement before the police and the names were divulged only in the supplementary statement. However, before the court he denied that he had not given the name which was found to be contrary to his statement before the police. The testimonies of the witnesses regarding blood oozing out from the wounds of the deceased also has major contradictions. The observation that the injuries were found to be not so serious as deceased was asked

to go to the first floor of the house and rest and they were not thought to be serious enough to take the deceased to the hospital cannot be faulted in the facts and circumstances. The version of Poonam that she was taken forcefully by Javed@ Sonu also cannot be believed as, if she was taken against her consent on 23rd April, 2007, she would not have gone on 25th April, 2007 with accused/respondent No.1. There is no eye witness to the alleged beating by accused to the deceased Om Prakash. Merely on the statement of PW-2, PW-3 & PW-4, it will not be appropriate in the facts and circumstances to infer that the deceased was beaten by the accused because of which he died later on. On the basis of alleged circumstantial evidence also it cannot be inferred that the accused had assaulted the deceased. In the circumstances, on the perusal of the testimonies of the witnesses in detail along with documents, this Court also concurs with the finding of the trial court that the prosecution has not been able to establish the charges against the respondents.

22. The learned Additional Public Prosecutor has raised no other point except that the testimonies of the prosecution are consistent and they have only minor variations. There is no evidence that the deceased was assaulted by the respondent and on the basis of the testimonies of Pw2, Pw3 and Pw4, on account of inherent contradiction in their depositions, it cannot be held that the deceased was assaulted by the accused leading to his death. The learned Additional Public Prosecutor

has failed to make out a case that the findings of the trial Court are unsustainable or perverse on any of the grounds. In the circumstances on perusal of the testimonies of the witnesses and the material on the trial Court record, this Court is also of the opinion that the prosecution has failed to make out any such perversity in the judgment of the trial Court which will entitle prosecution/petitioner for leave to appeal against the impugned judgment dated 16.11.2009 acquitting the respondents of the charges against them. In the circumstances the leave to appeal petition is without any merit and the leave is declined and the petition is, therefore, dismissed.

ANIL KUMAR, J.

SURESH KAIT, J.

SEPTEMBER 09, 2010

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