

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

+ **Crl.M.A No.10232/2008 & Crl. LP No.182/2008**

% **Date of Decision: 21.10.2010**

State Petitioner

Through Mr. Saleem Ahmed, APP

Versus

Badrul & Ors. Respondent

Through Nemo

CORAM:

HON'BLE MR. JUSTICE ANIL KUMAR

HON'BLE MR.JUSTICE S.L.BHAYANA

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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.10232/2008

This is an application seeking condonation of 41 days delay in filing the leave petition.

For the reasons stated in the application delay is condoned.

Crl. LP No.182/2008

1. The petitioner/state has challenged the order dated 27th February, 2008 passed by the Additional Sessions Judge in sessions Case No. 242/2006, 155/2007, 156/2007 & 157/2007 titled as State

Vs. Badrul, Milad Sheikh, Akhtar Sheikh and Shaheed Khan, arising out of FIR No. 1061/2003 under Sections 394/397/302/34 of IPC; FIR 1104/2003 under Section 25 Arms Act, 1959, FIR No. 1105/2003, under Section 25 of Arms Act, 1959 and FIR No. 1106/2003 under Section 25 Arms Act, 1959.

2. The allegations against the respondents are that on 2nd December, 2003, Balbir Singh and Rakesh were returning to their house on a two wheeler scooter bearing No. DL-4SS-1962, being driven by Balbir Singh. When Balbir Singh and Rakesh reached Ranhola Mundka Road, near Samadhi, three persons armed with 'dandas' and knives signaled them to stop. When Balbir Singh, who was driving the two wheeler scooter did not stop, then one 'danda' blow was given on the head of Balbir Singh resulting into falling of the scooter and there after Balbir Singh and Rakesh were attacked with 'dandas' and knives and Rs. 20,000/- in his possession and his other belongings were taken. The belongings of Rakesh were also taken after he too was attacked by 'dandas' and knives. After the attack and dispossessing Rakesh and Balbir of their belongings, they were left bleeding on the road. Passersby who had come after some time intimated the police and the injured were removed to SGM Hospital.

3. At the hospital, Rakesh remained unconscious, however, Balbir Singh was in a conscious state and his statement was recorded.

The injured Rakesh was removed from SGM Hospital to Maharaja Agarsain Hospital by his relatives, however, he succumbed to his injuries and died on 15th December, 2003 at Maharaja Agarsain Hospital. In the meantime, on 12th December, 2003, the respondents were apprehended while they were allegedly travelling in a TSR bearing DL-1-RF-5288 during checking at police picket Mundka, Ran Hauila Road. At the time of apprehending the respondents, Badrul, Milad Sheikh and Akhtar Sheikh were sitting on the rear seat of the TSR and each was found in possession of a button actuated knife. They were booked under Section 25 of the Arms Act, 1959 and FIRs No. 1104,1105 and 1106/2003 were registered against them. During the course of interrogation, their involvement in the incident of robbing of Balbir and Rakesh also became apparent and another FIR No. 1061/2003 was also registered. According to prosecution, it was disclosed by the respondents that they used to go to different places in the TSR driven by Shaheed Khan in order to commit offences and after committing robberies they used to escape from the scene of crime in the TSR of Shaheed Khan.

4. Pursuant to the alleged disclosure statement, Badrul, Akhtar Sheikh and Milad Sheikh disclosed about the daggers allegedly hidden by them in a rented room at Prem Nagar-III, Gori Shanker Enclave, Delhi and the knives were allegedly recovered. At the time of arrest Badrul was also found in possession of Rs.567/- which was

alleged to be a part of the amount robbed from Balbir. Akhtar Sheikh was found to be in possession of Rs.700/- alleged to be part of the robbed amount. Accused Shaheed was found to possess Rs.400/- which was also claimed to be from the robbed amount and Milad Sheikh was found in possession of Rs.550/- and a purse out of the robbed cash and articles.

5. All the accused were charged in FIR No.1061/2003 for the offences under Sections 302/394/411/34 of IPC whereas in FIR Nos. 1104, 1105 and 1106/2003 the charges were framed against Akhtar Sheikh, Milad Sheikh and Badrul for the offence under Section 25 of Arms Act, 1959. All the cases were taken up by the Court of Sessions because they were inter-linked. The accused/respondents pleaded not guilty and so the trial was conducted and prosecution examined 23 witnesses in FIR 1061/2003 and three witnesses each in FIR No. 1104, 1105 and 1106/2003. No defense evidence was led by the accused/respondents and after hearing the counsel for the parties, the Sessions Judge by his order dated 27th February, 2008 acquitted all of them of all the offences under Section 25 of the Arms Act, 1959 and in FIR No.1061/2003 for offences under Sections 394/397/302/34.

6. The present petition for leave to appeal was filed by the petitioner dated 8th July, 2008 and notices were issued to the respondents. On 17th February, 2010, pursuant to the statement given

by the counsel for the State, Mr. Saleem Ahmed, Advocate, respondent No. 4, Shaheed Khan was deleted from the array of respondents for the reason that it was admitted that the offence against the respondent No. 4, Shaheed Khan who had allegedly driven the scooter was insufficient to infer any case against him.

7. The learned additional public prosecutor has taken us today through the relevant testimonies of the witnesses from the Trial Court record which has been perused by this court along with the relevant documents. The main contention of the learned counsel for the petitioner for seeking leave to appeal is that the statement of PW-2 Sh. Balbir Singh, who was also robbed of his belongings, is consistent and has remained un-rebutted, which has been ignored by the Sessions Court and the order impugned is unsustainable in the facts and circumstances. The leave to appeal is also sought on the ground that recovery cannot be disbelieved merely because the landlord of the premises has not been examined as the recovery was done at the instance of the accused from the property which was a rented property though it was unlocked at the time of recovery. It has also been contended that the Sessions Judge has ignored the facts relating to the attempts of the police official to join the public witnesses at the relevant time and despite their best efforts, they could not get any public witness and consequently no adverse inference could be taken with regard to the said facts.

8. 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 on 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.

9. 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 their 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. The view taken by the trial Court has an advantage of looking at the demeanor of witnesses and observing their conduct in the Court. Such a view 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=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 favorable 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.

10. From the record it is apparent that the acquittal of Shaheed Khan, the alleged scooter driver from whom Rs.400/- was allegedly recovered, has not been challenged. On 17th February, 2010, it was admitted on behalf of the prosecution/petitioner that there is no sufficient evidence against him and he was dropped as a party in the present appeal and consequently the order of acquittal dated 27th February, 2008 became final against the said accused. This also

cannot be disputed that though the allegation is that Balbir Singh was robbed of Rs. 20,000/-, only very small amounts were allegedly recovered from the respondents/accused Badrul, Milad Sheikh and Akhtar Sheikh. The alleged recovery of small amounts will also not be of much help to the petitioner as this was not the case of the prosecution that the currency notes which were recovered, their numbers were noted by Balbir or anyone else. In the circumstances it cannot be said conclusively that the amounts recovered from the accused were their own money or formed part of the amount allegedly robbed from Balbir Singh.

11. The recoveries of the daggers allegedly in possession of accused from the room on rent under the respondents, has not been established. The learned additional public prosecutor is unable to show any document produced and proved by the prosecution from which it can be established that the room from where the alleged recoveries were made was under possession of the respondent. No rent note or lease deed has been produced or any other agreement to show that the landlord or the owner of the house, where the room is situated, had given the possession of the room to three respondents or any one of the accused. In the absence of any document showing or establishing that the possession of the room was given to the three accused, the testimony of the owner or the landlord of the house where the room is situated becomes very material. In the circumstances, not examining

the owner or landlord of the room is not without consequences and the plea of the learned additional public prosecutor that non-examination of the landlord is irrelevant is not sustainable. From the room from where the alleged recovery of two daggers was allegedly made, a VCD was also recovered. However, no cogent evidence has been pointed out by the prosecution to establish that the said VCD belonged to the respondents or that it was purchased from the amount which was allegedly robbed from the complainant. Nothing else was recovered from the room which can be linked to the respondents or on the basis of which it can be established that they were in possession of that room. This is also admitted that the room was lying unlocked at the time of recovery.

12. From the perusal of testimonies of PW-4 and PW-23, Constable Rajesh Kumar and SI Hari Kishan, it is apparent that no serious effort was made by them to involve the public witnesses. On perusal of the testimony of PW-23 IO/SI Hari Kishan, it has been observed by the Sessions Judge that he was oblivious of the requirement of Section-100 of the Criminal Procedure Code. On perusal of the testimony of the said witness, even this Court is of the opinion that efforts were made by the said police officials to involve any independent witnesses. There are inherent contradictions regarding the efforts made by them to join public independent witnesses. The statement of PW-4, constable Rajesh does not seem to be reliable as he was unable to depose whether the house, where the room was situated,

was a single storied house or had many other stories. He could not depose about the location of the house as to whether it was at the end of the road or in the middle of the road or the 'gali'. The observation of the Trial Court is that his testimony does not inspire confidence as he was unable to depose as to whether other rooms in the house were occupied by other persons or not nor could he depose whether the room, from where the recovery was made, was found to be locked or not cannot be held to be sustainable. In the circumstances, inference of the Trial Court that the testimonies of these two witnesses PW-4 and PW-23 are unreliable cannot be held to be unsustainable or perverse which would require reconsideration and for which purpose, leave should be granted to the petitioner. In the circumstances, the inference of the Trial Court that it appears that these two witnesses may not have even visited the room is a probable inference in the facts and circumstances and the prosecution has failed to prove that the said room was in possession of the respondents and thus, disbelieving the recovery of daggers from the respondents cannot be faulted or held to be suffering from any illegality.

13. The recovery of alleged VCD from the said room has also not been established. The said VCD allegedly recovered from the said room cannot be linked to the respondents on the basis of the evidence on record. In the circumstances, it cannot be believed that pursuant to

the alleged disclosure statement, recoveries were made from the respondents.

14. On the basis of FSL report and the testimony of PW-20 Dr. V.K. Jha also, it cannot be inferred conclusively that the injuries on PW-2 Balbir and the deceased Rakesh were inflicted by the daggers allegedly recovered pursuant to the disclosure statement of the respondents. The case of the prosecution is that the respondents were arrested on 12th December, 2003 on account of possession of button actuated knife in possession of each of them and after interrogation they made alleged disclosure statement about their involvement in the case of robbery of PW-2 Balbir and deceased Rakesh and consequently, they were arrested even in FIR 1061/2003. The respondents were put up for test identification parade, which was held on 23rd December, 2003. The Sessions Court has observed after perusing the statement of Ld. MM Ms. Archana Sinha that the respondents were not produced with muffled faces during the course of these proceedings. The learned additional public prosecutor is unable to show any evidence or any record on the basis of which it can be inferred that the observation of the Sessions Court is incorrect or unsustainable or perverse. If the respondents were produced without muffled faces then they were justified in not participating in the TIP proceedings and no adverse inference can be taken against them. Reliance can be placed on State of Maharashtra Vs. Sukhdev Singh, (1992) 3 SCC 700=AIR 1992 SC

2100 and State of UP Vs. Charles Gurmukh Sobhraj, (1996) 9 SCC 472 and these findings do not require any interference or leave to appeal as no perversity has been made out by the learned public prosecutor.

15. From the perusal of the evidence on record and also the statement of PW-2 Balbir Singh, one of the injured, it is apparent that he had not identified the respondents till 27th August, 2004, i.e., till nine months after the incident. Such identification after nine months and the fact that it was a winter evening when the alleged incident had taken place and PW-2 Sh. Balbir himself was wearing a helmet and was moving on a two wheeler scooter when he was attacked and he had fallen down, the probability that he could not have identified, cannot be termed to be perverse. It was held by the Supreme Court that great care must be exercised before acting on a belated identification in Court by a witness who cannot be said to be an independent and unbiased person. It is not safe to place implicit reliance on the evidence of the witness who has just fleeting glimpses on the person identified. In absence of proper test identification parade it would be extremely risky to place implicit reliance on identification made for the first time in Court after a long lapse of time without proper corroboration.

16. In the circumstances, the testimony of PW-2 about the identification of the accused as has been held by the Trial Court to be unreliable, cannot be termed unsustainable or perverse in the opinion

of this Court also. On perusal of the entire testimonies and the documents and the record of the trial court, this Court also concurs with the finding of the trial court that prosecution has failed to establish the guilt of the respondent. Though the High Court has the power to assess the evidence and reach its own conclusion which power is as extensive as in appeal against the order of conviction, yet as a Rule of Prudence, the High Court should always give proper consideration to matters such as (i) the views of the Trial Judge as to the credibility of the witnesses; (ii) the presumption of innocence in favor of the accused; a presumption which certainly is not weakened by the fact that the accused has been acquitted at his trial; (iii) the right of the accused to the benefit of any doubt, and (iv) the slowness of an Appellate Court in disturbing a finding of the fact arrived at by a Judge who had the advantage of seeing the witnesses and noticing their demeanor. On the analysis of facts and circumstances and the evidence of the prosecution, this Court does not differ with the conclusions of the Trial Court acquitting the respondents. The recoveries against the accused have been disbelieved and there is no reliable medical evidence corroborating the version of the prosecution in the facts and circumstances. In the facts and circumstances from the testimony of PW-2 Sh. Balbir, it cannot be held that prosecution has been able to establish its case against the respondents.

16. No other ground has been raised by the learned additional public prosecutor entitling the petitioner for leave to appeal against the order dated 27th February, 2008 acquitting the respondents of the charges made against them in the case as detailed herein above.

17. From the perusal of the relevant testimonies and the documents, another view contrary to the view taken by the Trial Court is not possible and cannot be reasonably taken. However, even if another view is possible, this Court is not to substitute its view with the view of the Trial Court so long as the view taken by the Trial Court is reasonable and plausible. In the circumstances, the order of the Trial Court cannot be termed to be unsustainable or perverse and there are no grounds made out by the petitioner to grant leave to petitioner to appeal against the order dated 27th February, 2008 acquitting the respondents of all the charges against them. The petition is therefore without any merit and it is, therefore, dismissed.

ANIL KUMAR, J.

S.L.BHAYANA, J.

OCTOBER 21, 2010

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