

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

Judgment reserved on: April 28, 2010
Judgment delivered on : May 06, 2010

+ **CRIMINAL APPEAL NO. 1028/2009**

USMAN

....APPELLANT

Through: Mr. Javed Hashmi, Advocate

Versus

STATE(N.C.T. OF DELHI)

.....RESPONDENT

Through: Mr.Lovkesh Sawhney, APP

CORAM:

HON'BLE MR. JUSTICE A.K. SIKRI

HON'BLE MR. JUSTICE AJIT BHARIHOKE

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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 ? | Yes |
| 3. | Whether the judgment should be reported in Digest ? | Yes |

AJIT BHARIHOKE, J.

1. This appeal arises from the conviction of appellant Usman on the charge under Section 302 IPC and Section 25/27 of the Arms Act in Sessions Case No.66/2008, FIR No.408/2007 Police Station Sarita Vihar in terms of the impugned judgment of the Additional Sessions Judge dated 13.10.2009. The appellant has been sentenced to undergo imprisonment for life and also to pay fine of Rs.5,000/-, in default to undergo simple imprisonment for a period of six months.

2. Briefly stated, case of the prosecution is that on 30.05.2007 at 3.24 p.m. information was received at P.S. Sarita Vihar from Constable Rameshwar of PCR that one boy has been shot at B-Block, Kacchi Colony, Madanpur Khadar. This information was recorded in Daily Diary register maintained at P.S. Sarita Vihar as DD No.18 dated 30.05.2007(Ex.PW-14/A). Copy of the DD report was forwarded to A.S.I. Satbir Singh through Constable Mam Chand and the information was also conveyed to the Incharge police post, who proceeded for the spot of occurrence.
3. On the receipt of the DD report, the Incharge Police Post S.I. R.Y. Pandey(PW-8) along with Constable Prakash Chand (PW-11) proceeded for the spot of occurrence. When they reached near Samosa Chowk, they found the appellant being chased by some public persons. He was holding a pistol in his hand. In the meanwhile, PCR van Eagle 27 also arrived there in which Head Constable Shakti Chand and Constable Hari Babu Meena were present. S.I. R.Y.Pandey along with the said police officials apprehended the appellant and seized the pistol from his hand. On checking, the pistol was found to contain one live cartridge in its magazine. S.I. R.Y.Pandey prepared sketch of the cartridge as well as the pistol and, thereafter, converted them into sealed *pullandas* and seized

the same. The appellant was sent to the police post in the PCR van and S.I. R.Y.Pandey went to the spot of occurrence where he met A.S.I. Satbir Singh (PW-1) and Constable Mam Chand. Some blood was there on the ground. Injured had been taken to the hospital. S.I. R.Y.Pandey, therefore, went to All India Institute of Medical Sciences (AIIMS), New Delhi where he met complainant Ms.Josphina (PW-3), mother of the child Ashish who had been declared dead. S.I. R.Y.Pandey recorded the statement of Ms.Josphina (Ex.PW-3/A) and came back to the spot. From there he sent the said statement along with his endorsement to the police station for the registration of FIR. S.I. R.Y.Pandey, during investigation, lifted the blood stained earth as well earth control and also recorded the statements of the witnesses. When the appellant was apprehended, his pant was found stained with blood which was also seized. The case property was sent to FSL for examination and the dead body of the deceased was sent for post mortem examination. After collecting the reports of FSL examination and post mortem examination and completing the investigation, charge sheet was filed under Section 302 IPC against the appellant.

4. The appellant was charged under Section 302 IPC to which he pleaded not guilty and claimed trial. Subsequently, a

supplementary challan against the appellant under the Arms Act was filed on 02.08.2008. Thus, he was also charged under Section 25/27 Arms Act to which also the appellant pleaded not guilty and claimed to be tried.

5. The prosecution, in order to bring home the guilt of the appellant, examined 24 witnesses. However, the important witnesses for the purpose of this appeal are PW-2 Sitara, PW-3 complainant Ms.Josphina, PW-4 Ram Mohan Roy and PW-7 Abdul Bari who, as per the charge sheet, are the eye witnesses to the occurrence. Besides the above four witnesses, other important witnesses are PW-8 S.I. R.Y.Pandey, PW-9 Constable Hari Babu Meena, PW-11 Prakash Chand and PW-19 Head Constable Shakti Chand who are claimed to be the witnesses of recovery of the weapon of offence i.e. pistol (Ex.PW-8/1) loaded with a live cartridge(Ex.PW-8/2), from the appellant when he was allegedly apprehended near Samosa Chowk.

6. The appellant Usman, when examined under Section 313 of the Code of Criminal Procedure (CrPC), claimed that he has been falsely implicated in this case. The appellant stated that he was present outside the shop of a lady when he heard a cracker sound and saw that the child had sustained injury and

his mother had fainted. He, thus, picked up the child and took him to a nearby doctor but his clinic was closed and he came back to the spot. By that time, the mother of the child had regained consciousness, who took the child from him and went to the bus stop along with 2/3 persons from where the child was taken to the hospital. He was arrested by the police from the bus stop and falsely implicated in this case. In defence, the appellant examined DW-1 Mukhtiyar Singh.

7. Before adverting to the rival contentions of the parties, we may note some admitted facts. It is not disputed that the child Ashish suffered fatal bullet injury on his head at the spot of occurrence. It is also not disputed that the appellant Usman was present near the spot of occurrence at the relevant time. What is disputed is that the appellant did not fire the fatal shot. The defence of the appellant is that he has been falsely implicated on suspicion by planting the pistol Ex.PW-8/1 loaded with a live cartridge Ex.PW-8/2.

8. The prosecution has endeavoured to prove its case by examining the purported eye witnesses as well as the witnesses to the recovery of weapon of offence i.e. pistol Ex.PW-8/1 from the possession of the appellant shortly after the occurrence while he was found being chased by the public

and also the report of ballistic examination linking the recovered pistol with the empty cartridge found at the spot of occurrence.

9. PW-2 Ms.Sitara, PW-3 Ms.Josphina, mother of the deceased, PW-4 Ram Mohan Roy, father of the deceased and PW-7 Abdul Bari are the purported eye witnesses examined by the prosecution. All of them turned hostile and have failed to support the case of prosecution. PW-3 Ms.Josphina, the mother of the deceased testified in the Court that when, on the fateful day she had gone to the shop of PW-2 Sitara, somebody fired a shot which hit her son and on seeing the blood of her son, she fainted. She was attended to by the mother of PW-7 Abdul Bari and one neighbour and on regaining consciousness, she along with those two neighbours initially went to a local hospital, but the hospital authorities refused to admit the child. Therefore, she took him to a big hospital where the child was declared dead. She has proved her statement Ex.PW-3/A. In her cross examination by learned APP, she denied the suggestion that the appellant had fired the fatal shot or that he thereafter ran away from the spot of occurrence with the pistol. Similarly, the other eye witnesses, namely, PW-2 Ms.Sitara, PW-4 Ram Mohan Roy and PW-7 Abdul Bari have also failed to support the prosecution case. They were also cross examined at length by learned APP, but

they denied the prosecution case. From this, it is apparent that the eye witnesses examined by the prosecution are of no assistance to prove the charge against the appellant.

10. Now we are left with the circumstantial evidence regarding purported conduct of the appellant as well as the public persons immediately after the occurrence and the alleged recovery of the weapon of offence i.e. pistol Ex.PW-8/1 from the possession of the appellant.

11. Learned counsel for the appellant, while assailing the impugned judgment, submitted that the learned Trial Court has failed to appreciate that the evidence of the prosecution regarding the arrest of the appellant and the recovery of weapon of offence is full of embellishments. He submitted that the Trial Court, while analysing the evidence pertaining to the apprehending of the appellant and recovery of the pistol Ex.PW-8/1 from his possession immediately after the occurrence, has failed to appreciate that the aforesaid version cannot be true in view of certain observations recorded in the MLC of the deceased Ex.PW-5/A as also the testimony of PW-6 S.I. Naveen Kumar of the Crime Team which inspected the spot of occurrence and prepared the report Ex.PW-6/A. We

are not elaborating the arguments of learned counsel for the appellant in detail for the sake of brevity.

12. Learned counsel for the State, on the other hand, has submitted that the Trial Judge has rightly relied upon the testimony of PW-8 S.I. R.Y. Pandey, PW-9 Constable Hari Babu Meena, PW-11 Constable Prakash Chand and PW-19 Head Constable Shakti Chand regarding the apprehending of the appellant by the police while he was being chased by the public and the recovery of the weapon of offence Ex.PW-8/1. Learned counsel for the State has further submitted that from the aforesaid recovery coupled with the conduct of the appellant in trying to escape from the spot of occurrence with the weapon of offence in his hand and the report of ballistic expert Ex.PW-24/A, the guilt of the appellant is amply proved, irrespective of the eye witnesses turning hostile. Thus, he has strongly urged for the dismissal of the appeal.

13. In order to appreciate the rival contentions on this aspect, it is necessary to have a look upon the testimony of the relevant witnesses relating to the recovery of weapon of offence from the possession of the appellant. PW-8 S.I. R.Y. Pandey is the officer who conducted initial investigation of this case. He testified that on 30.05.2007 at around 3.20 p.m. while on

patrol duty, he received the information about a child having been shot. Thus, he along with the motorcycle rider proceeded towards the spot of occurrence. When he reached near Samosa Chowk, he saw the appellant coming running from the side of B-Block, who was being chased by the public. In the meanwhile, a PCR van also arrived there and he, with the help of PCR officials, apprehended the appellant who was carrying a pistol Ex.PW-8/1 in his hand. He seized the pistol and on checking, it was found to contain a live cartridge Ex.PW-8/2. He, thereafter, sent Usman (appellant) to the Police Post in the PCR van and went to the place of occurrence where he found that the injured child had been taken to AIIMS Hospital. Then he went to the AIIMS Hospital where the child had been declared dead. He met PW-3 Ms.Josphina, mother of the child in the hospital and recorded her statement Ex.PW-3/A which statement he sent to the police station along with his endorsement for the registration of the FIR. Subsequent investigation of the case, as per this witness, was conducted by PW-22 Inspector Subodh Kumar. PW-11 Prakash Chand was the motorcycle rider along with PW-8 S.I. R.Y.Pandey and PW-9 Constable Hari Babu Meena and PW-19 Head Constable Shakti Chand were the officials of the PCR Van Eagle 27. All of them have also deposed about the apprehending of the

appellant and recovery of the pistol in more or less similar manner.

14. On careful consideration of their evidence, we do not find the testimony of the above four witnesses trustworthy and reliable for several reasons. Firstly, if these witnesses are to be believed, then after the recovery of pistol the appellant was sent to the Police Post along with the PCR officials. Had this been true, there ought to have been some DD entry at the Police Post regarding handing over the custody of the appellant Usman by the PCR officials to the officials of the Police Post. No such DD report is placed and proved on record. Secondly, PW-8 S.I. R.Y.Pandey in his cross examination has stated that he reached at AIIMS Hospital at 4.30 p.m. and he recorded the statement of PW-3 Ms.Josphina (Ex.PW-3/A) at 4.45 p.m. It is also the stand of PW-8 S.I. R.Y.Pandey that he had sent the said statement to the police station after appending his endorsement for the registration of the case. This endorsement is Ex.PW-8/A. On perusal of said endorsement, it transpires that S.I. R.Y. Pandey while sending the statement of Ms.Josphina to the police station for registration of the case has recorded in his endorsement that on reaching AIIMS Hospital, he collected the MLC No.62880/07 of the deceased Ashish and that there he met Ms.Josphina,

mother of the deceased and recorded her statement. If this sequence of events is to be believed, then the MLC was collected first and statement of Ms.Josphina was recorded thereafter. PW-3 Ms.Josphina or the persons who had accompanied her to the hospital were not aware about the apprehending of the appellant and recovery of the pistol. Therefore, they could not have given any information in that regard to the doctor concerned at the time of preparation of the MLC. However, perusal of MLC Ex.PW-5/A reveals that the concerned doctor Era Chopra, while preparing the MLC at 4.30 p.m. has recorded thus:

“Alleged h/o Bullet Injury to the Head around 1 ½ hours back at Madanpur crossing N.D.

The patient was dyspnic and was gasping.

No pulses were felt.

The child had Bradycardia and was intubated.

CPR was done But the child could not be Resuscitated and was declared dead.

The weapon used was a 6 inch Revolver ‘katta’. The weapon is seized by the police.”

15. It is a mystery as to how Dr.Era Chopra came to know about the nature of the weapon used for killing the child and about the seizure of the weapon by the police. Unfortunately, Dr.Era Chopra has not appeared as a witness as she had left AIIMS Hospital before she could be examined as a witness. This circumstance has left a serious gap in the prosecution

evidence because the aforesaid entry regarding the nature of weapon used and the seizure of weapon in the MLC remains unexplained with regard to on whose information aforesaid facts were recorded in the MLC.

16. Thirdly, case of the prosecution is that the deceased was taken to the hospital by his mother Ms. Josphina (PW-3) before the arrival of the police. If that is so, then the MLC ought to have recorded that the deceased was brought to the casualty of the hospital by PW-3 Ms. Josphina. This, however, is not the case and as per the MLC, the deceased was brought to the hospital by one Head Constable Abdul Qayum who has not been examined as a witness. Thus, it remains unexplained as to how he came into picture. From the fact that the deceased was brought to the hospital by Head Constable Abdul Qayum, it can be safely inferred that the police party on arriving at the spot of occurrence found the injured child there and it casts a strong doubt on the version of PW-8 S.I. R.Y. Pandey and the other three police officials, namely, PW-9 Constable Hari Babu Meena, PW-11 Constable Prakash Chand and PW-19 Head Constable Shakti Chand regarding recovery of the weapon of offence Ex. PW-8/1 from the possession of the appellant in the manner in which the witnesses have deposed.

17. The doubt against the story of the prosecution regarding recovery of the weapon of offence from the possession of the accused in the manner projected by the above referred witnesses is further compounded by the report of mobile Crime Team Ex.PW-6/A proved by S.I. Naveen Kumar(PW-6). The Crime Team Report Ex.PW-6/A records that the spot of occurrence was inspected by the team on 30.05.2007 at about 5.15 p.m. In the column of "advice to the I.O.", it is, inter alia, recorded "weapon of offence be recovered from the accused". This implies that till the preparation of the Crime Team Report Ex.PW-6/A, the weapon of offence was not recovered, otherwise there was no occasion for such an advice by the Crime Team.

18. Learned counsel for the State has tried to explain this infirmity by commenting that as per the Crime Team report, the I.O. was A.S.I. Satbir Singh and a possibility cannot be ruled out that when this inspection was being carried out, A.S.I. Satbir Singh might not have been even aware that PW-8 S.I. R.Y.Pandey had already apprehended the appellant and recovered the weapon of offence from him.

19. We do not find any substance in this argument for the reason that according to A.S.I. Satbir Singh, he reached at the spot of

occurrence pursuant to the receipt of a call at 3.24 p.m. vide DD No.18. He has also stated that S.I. R.Y. Pandey also reached at the spot who directed him to protect the spot of occurrence and went to AIIMS Hospital. According to PW-8 S.I. R.Y.Pandey before reaching at the spot of the occurrence, he had apprehended the appellant while he was being chased by the public and recovered the weapon of offence. If the story of recovery of weapon of offence and apprehending of the appellant is true, then it is highly improbable that S.I. R.Y.Pandey might not have told A.S.I. Satbir Singh about those facts. Thus, we find that the prosecution evidence regarding the manner of arrest of the appellant and recovery of pistol Ex.PW-8/1 from him is highly suspect.

20. It is the case of the prosecution that when the appellant was apprehended by S.I. R.Y. Pandey (PW-8) and police party with pistol Ex.PW-8/1 in his hand, he was being chased by public persons. Despite that, there is no independent witness to corroborate the prosecution version regarding the arrest of the appellant and the recovery the pistol from his possession. PW-8 R.Y. Pandey in his cross-examination has tried to explain the absence of public witnesses to recovery of the pistol from the possession of the appellant by stating that he tried to record the statements of public persons who were chasing the

appellant, but none of them came forward to become a witness. The above explanation given by the Investigating Officer S.I. R.Y. Pandey is not acceptable because of the reason that if those 10/15 persons had guts to chase the appellant who was carrying a pistol in his hand, it is unfathomable that they would decline to be the witnesses to the recovery of the weapon of offence from the possession of the appellant.

21. The result of the above discussion is that the prosecution evidence pertaining to the recovery of weapon of offence from the possession of the appellant is highly suspect, as such we do not find it safe to rely upon the prosecution evidence and find that the prosecution has failed to establish the recovery of weapon of offence from the possession of the appellant beyond reasonable doubt.

22. Since the purported eye witnesses including the parents of the deceased child have not supported the case of the prosecution and the prosecution story regarding the recovery of weapon of offence from the possession of the appellant is also not reliable, we find it difficult to sustain the conviction of the appellant on the charge under Section 302 IPC. We accordingly accept the appeal and set aside the impugned

judgment of conviction as also the consequent order on sentence and acquit the appellant, giving him benefit of doubt.

23. The appellant is in judicial custody. He be released forthwith, if not required in any other case.

24. The appeal is disposed of.

AJIT BHARIHOKE, J.

MAY 06, 2010
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A.K. SIKRI, J.