

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

Judgment reserved on: January 21, 2011
Judgment delivered on: January 24, 2011

+ **CRIMINAL APPEAL NO.103/2010**

FAREED @ BABLOO

....APPELLANT

Through: Mr. Manoj K. Srivastava, Advocate with
Mr. A.K. Sharma, Advocate

Versus

STATE OF NCT OF DELHI

.....RESPONDENT

Through: Mr. R.N. Vats, 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 24.11.2009 and the consequent order on sentence dated 25.11.2009 in Sessions Case No.48/09 FIR No.182/05 under Section 307 IPC P.S. Krishna Nagar, whereby the appellant Fareed @ Babloo has been convicted of attempt to commit murder punishable under Section 307

IPC and sentenced to undergo rigorous imprisonment for a period of five years and also to pay a fine of Rs.3,000/-, failing which to undergo SI for further period of three months.

2. Briefly stated, facts giving rise to this appeal are that on 02.05.2005 at about 6:25 pm, complainant Adabmir Khan (PW2) was brought to SDN Hospital by his mother Shafeena with alleged history of stab injury. This information was conveyed to the police post Old Seelampur, P.S. Krishna Nagar by the duty constable. Information was recorded as DD No.20 dated 02.05.2005 P.S. Krishna Nagar and copy of the DD report was entrusted to SI Anil Kumar Sharma (PW13).

3. On the receipt of the DD report, SI Anil Sharma (PW13) reached SDN Hospital and obtained the MLC of the complainant. He recorded statement of the complainant Ex.PW2/A wherein the complainant stated that he had taken a loan of ₹450/- from the appellant Fareed @ Babloo about two months back. On 02.05.2005 at around 5:50 pm, the appellant came to his house and called him outside. When he came outside, he noticed that the appellant was carrying a "*churi*" (knife) in his hand. The appellant asked as to why he had not repaid the loan and why he was troubling him by calling again and again at his residence. He also said that "*Aaj Tujhe Tapaka Kar Hi Dam Loonga*". Complainant further claimed in his statement that he tried to pacify the appellant, but the appellant, while abusing, attacked him with the "*churi*". When he raised alarm, several public persons collected at the

spot and on seeing them, appellant ran away with the churi. His mother and one Hawaldar who was passing through the place of occurrence took him to the Hospital in a three-wheeler scooter. Complainant stated that he had sustained injuries on his face, nose, back of neck and chest.

4. SI Anil Sharma, after obtaining signatures of the complainant on his statement Ex.PW2/A, sent it to the Police Station along with his endorsement Ex.PW13/A for registration of the formal FIR.

5. The Investigating Officer thereafter visited the place of occurrence and prepared rough site plan Ex.PW13/B. He, however, did not find blood-stains at the spot of occurrence. After some time, SI Anil Sharma came to know that the appellant has been apprehended by PW4 Neeraj Sharma and PW9 Constable Pawan Kumar at Maharana Pratap Park, Gali No.12, West Kanti Nagar with a dagger in his right hand. SI Anil Sharma measured the dagger and prepared its sketch Ex.PW4/A and took it into possession after converting the same into a sealed packet vide memo Ex.PW4/B. During investigation, Investigating Officer also took into possession the blood-stained clothes of the complainant, which were handed over to Constable Jai Prakash by the Doctor concerned in a sealed packet with the seal of CMO, SDN Hospital. Statements of the witnesses were also recorded and on completion of formalities of the investigation, the appellant was

challaned for the offence of attempt to commit murder of the complainant and sent to the court.

6. Learned Additional Sessions Judge charged the appellant for the offence under Section 307 IPC. Appellant pleaded not guilty to the charge and claimed trial.

7. In order to bring home the guilt of the appellant, prosecution has examined 13 witnesses. The case of prosecution is essentially based upon the evidence of PW1 Shafeena, mother of the complainant, PW2 Adabmir Khan (complainant), PW4 Neeraj Sharma and PW9 Constable Pawan Kumar. Out of these witnesses, though examination-in-chief of PW4 Neeraj Sharma was recorded, he was not cross-examined and was discharged with the observation "Nil, opportunity given, as defence counsel Shri Satbir came during examination of witness but left without examining him", from the record, it transpires that subsequently the trial court allowed the request of the appellant for recalling PW4 Neeraj Sharma for cross-examination, but thereafter Neeraj Sharma could not be produced as a witness as his whereabouts were not known. Thus, it can be said that his testimony, in absence of cross-examination, is incomplete and cannot be read in evidence.

8. PW2 Adabmir Khan, in his testimony, has fully supported the version in the complaint. He testified that he had borrowed a sum of ₹450/- from the appellant. On 02.05.2005, the appellant came at his house at 5:50 pm and called him outside. He was carrying a "*churi*" in

his right hand and said that you have not returned my money and harassed me by calling me again and again, so I will kill you today. *“(Aaj Tujhe Tapaka Kar Hi Dam Loonga)”*. PW2 further testified that he tried to pacify the appellant, but the appellant started abusing him and attacked him with the churi and inflicted several stab injuries on his person. He raised alarm on which people from locality gathered and on seeing them, the appellant fled away with the churi. His mother also came downstairs on seeing the incident and she, with the help of one Constable, removed him to the Hospital in a three-wheeler scooter. He further stated that he sustained injuries on his head, knee, left cheek, chest and neck. Police visited the Hospital and recorded his statement Ex.PW2/A. He claimed that his T-Shirt was stained with blood which was seized in the Hospital. He identified his aforesaid T-Shirt as well as the churi with which he was stabbed. PW1 Shafeena has also deposed to almost similar effect.

9. PW9 Constable Pawan Kumar has testified that on 02.05.2005, he was posted as a Constable in police Post Old Seelampur, P.S. Krishna Nagar. On that day, one public person visited the police post and informed him that one person had been injured near House No.4929A, Old Seelampur. He, therefore, reached there and met an eye witness Neeraj Sharma, who informed him that the appellant, after inflicting injuries to the complainant had gone towards Kanti Nagar. Thereafter, he along with Neeraj Sharma went to Maharana Pratap Park in search of the accused and found him there with a blood-stained ‘churi’ in his

hand. He apprehended the accused and sent one public person to the police post to inform the police officials about the apprehending of the accused in the park. On this, SI Anil Kumar along with Constable Jaibeer reached there and he handed over the appellant and the '*churi*' to SI Anil Kumar. SI Anil Kumar prepared a sketch of the knife and took the '*churi*' into possession after converting it into a sealed packet vide memo Ex.PW4/B. Witness stated that the appellant was arrested vide memo Ex.PW9/A and his personal search was conducted vide memo Ex.PW9/B. He also stated that he took the appellant to SDN Hospital and on his medical examination, he collected the MLC and handed it over to the Investigating Officer. He has identified the *churi* recovered from the appellant as Ex.P2.

10. Appellant Fareed, in his statement under Section 313 Cr.P.C. denied the prosecution story in totality. He claimed that PW4 Neeraj was having an affair with the sister of PW2 and therefore, he has falsely deposed against him. He also claimed that the complainant had borrowed ₹ 450/- from him and when he demanded the money back from him, the complainant quarrelled with him and inflicted a *lathi* blow on his head. He was also given beating by other persons accompanying the complainant. Subsequently, he sustained fractures on his left hand and in the back portion of his left knee. As a result of the beating, he fell down and one witness Momin took him to an STD booth from where he telephoned his mother to call her.

11. Appellant, in his defence, has examined one Momin as DW1. He has stated that on 02.05.2005 at around 04.00/05.00 p.m., he was going to his house along with his wife on a rickshaw. When he reached near pulia of Kanti Nagar, he noticed a crowd and saw one Gabbar hitting the appellant with a wooden '*fatti*' and the appellant fell down and he took the appellant to an STD booth from where the appellant made a call to his house. Thereafter, he went to his house along with his wife. Witness stated that the appellant had sustained injuries at the hands of Gabbar and his associates.

12. Learned Additional Sessions Judge, on consideration of the evidence on record, found the evidence of prosecution witnesses reliable and convicted the appellant for the offence under Section 307 IPC and sentenced him accordingly.

13. Learned Sh.Manoj K. Srivastava, advocate appearing for the appellant has submitted that the appellant is innocent and the impugned judgment is the result of wrong appreciation of the facts. He has assailed the impugned judgment on several counts.

14. Firstly, it is contended that that the case of the prosecution is essentially based upon the testimony of the complainant Adabmir Khan (PW2) and his mother Shafeena (PW1), who are not reliable witnesses. Dilating on the argument, learned counsel for the appellant submitted that it is admitted case of the prosecution that the occurrence took place at a public place i.e. a residential locality and public persons had

collected at the spot of occurrence on hearing the alarm raised by the complainant. Despite that, there is no independent witness to corroborate the version of the complainant (PW2) and his mother Shafeena(PW1), who are interested witnesses and this circumstance make their testimony suspect.

15. I am not impressed with this argument. Section 134 of the Evidence Act 1872 categorically provides that no particular number of witnesses shall, in any case, be required for proof of any fact. This imply that reliance can be based on the evidence of a solitary witness if the court comes to the conclusion that said statement is worthy of credence. As a matter of caution, the Investigating Officer is expected to try and examine independent witnesses if available to seek corroboration to the version of the complainant, but this does not mean that absence of independent witnesses would render the evidence of the complainant or his relations unworthy of credit. In the instant case, PW2 Adabmir Khan @ Gabbar has fully supported the case of the prosecution by reiterating the facts narrated in his complaint Ex.PW2/A, which was recorded by the Investigating Officer on the day of occurrence within two hours of the incident. This is evident from the rukka Ex.PW13/A, which records that the incident took place on 02.05.2005 at 5:50 pm and the rukka based upon the complaint Ex.PW2/A was sent to the Police Station for registration of case at 7:50 pm. Further, version of PW2 Adabmir Khan is fully corroborated by his mother Ms. Shafeena (PW1). Both these witnesses have been cross-

examined at length, but the appellant has not been able to point out any material inconsistencies in their testimony which may cast aspersions on their credibility. Not only this, the version of the complainant stands corroborated by his MLC (though proved by PW6 Dr. Manoj Kumar, exhibit mark has not been put on the document). This MLC records that the complainant was brought in injured condition to the Hospital by his mother Shafeena on 02.05.2005 at 6:35 pm with alleged history of stab injury. According to PW6 Dr. Manoj Kumar, CMO, SDN Hospital, he had examined the complainant on 02.05.2005 and found following injuries on his person:

“Injury No. 1 CIW 10 to 15 cm, extending from left nose to left submandibular area. Nose injury is through and through, buccal mucosa intact bleeding from margin present.

Injury No. 2 CIW of 3 cm x .5 cm upto periosteal deep parallel to injury No. 1 in left side of cheek bleeding from margin present.

Injury No. 3 CIW of 1.5 cm x 1 cm upto rib deep on left side of chest, 8 cm below the left mid clavicle bleeding present.

Injury No. 4 CIW of 10 cm x 1 cm upto periosteum deep over occipit and vertex bleeding present.

Injury No. 5 CIW of 3 cm x .5 cm upto periosteum deep in transverse direction in occipital region bleeding present.

Injury No. 6 CIW of 3 cm x 2 cm upto muscle deep in right hand near base of thumb, palmar aspect.”

16. It is unconceivable that the complainant would have self inflicted aforesaid six injuries on his person. There is no explanation as to why

the complainant would falsely implicate the appellant only with a view to avoid repayment of ₹450/- taken as a loan from him and allow the real culprit to go scot free. Thus, I have no reason to doubt the correctness of the version of the complainant which stands corroborated by the testimony of his mother PW1 Shafeena as well as his MLC Ex.PW6/A.

17. It is pertinent to note that this is not a case in which the Investigating Officer did not join any independent witness. Actually, apart from PW1 and PW2, the prosecution had also cited one Neeraj Sharma as an independent witness. He was examined as a witness on 07.04.2006, but he had to be discharged without cross-examination as learned counsel for the appellant, during trial, left the court room without cross-examining him. The appellant did not care to move an application for recalling said witness for the purpose of cross-examination till the trial came to an end and the matter was listed for final arguments. Despite that, on the application of the appellant under Section 311 Cr.P.C., the learned trial Judge allowed his request for recalling PW4 Neeraj Sharma for cross-examination, but unfortunately he could not be produced for cross-examination as he had shifted his residence and his whereabouts were not available with the prosecuting agency. Under these circumstances, the prosecution cannot be faulted for non-production of independent witness Neeraj Sharma (PW4) for cross-examination and it is the consequence of the negligent conduct of defence on the part of the appellant. Thus, the

argument regarding absence of public witnesses to corroborate the version of the complainant is of no avail to the appellant.

18. Learned counsel for the appellant further submitted that this is a case of unfair investigation and the arrest of the appellant as well as recovery of weapon of offence from his possession is shrouded in mystery. In this regard, learned counsel submitted that according to Constable Pawan Kumar (PW9), on 02.05.2005, one public person visited the police post and informed that a person had been stabbed by someone near House No.4929A, Old Seelampur and the injured had been removed to the Hospital. On this, he reached at the spot of occurrence where he met Neeraj Sharma (PW4), who informed that the accused, after causing injury to the victim had fled away towards Kanti Nagar. On this, he along with Neeraj Sharma went to Maharana Pratap Park, Kanti Nagar and found the appellant there with bloodstained '*churi*' Ex.P-2 in his hand. Learned counsel contended that aforesaid version of PW9 is highly unnatural to be believed. He contended that if Constable Pawan Kumar is to be believed, then the appellant, till he was apprehended by Constable Pawan Kumar, was carrying the weapon of offence Ex.P-2 in his hand, which is not expected of a normal person. Thus, the evidence of the prosecution regarding the arrest of the appellant with the weapon of offence is suspect and a possibility of fabrication of case against the appellant cannot be ruled out.

19. There appears to be merit in this contention. Above story of the prosecution as given by PW9 Constable Pawan Kumar is highly unnatural to be true. Under the natural course of circumstances, first instinct of an offender after committing an offence like stabbing is to get rid of the incriminating evidence i.e. the weapon of offence. Therefore, it is highly improbable that the appellant would have carried the blood-stained '*churi*' in his hand to a public place, like Maharana Pratap Park and waited for the police to come and apprehend him with the churi. Thus, the version of PW9 Constable Pawan Kumar is doubtful. But, this by itself is of no help to the appellant. If the Investigating Officer had done some padding in the case, this cannot be taken as a ground to discard the testimony of injured Adabmir Khan, which is otherwise reliable and fully corroborated by the testimony of his mother Shafeena (PW1) and the MLC Ex.PW6/A.

20. Learned counsel for the appellant has referred to the order on sentence passed against the appellant and pointed out that in the said order, learned Additional Sessions Judge has observed that "benefit of Section 428 Cr.P.C., if any, be extended to each of the convicts". From this, learned counsel has urged this court to infer that there was more one culprit in this case and submitted that the impugned judgment is bad for the reason that the trial court has not discussed the case of the other accused persons. He also argued that the trial court has failed to

refer to the dimensions of the weapon of offence used by the appellant and this also goes in favour of the appellant.

21. Above contention of learned counsel for the appellant is misconceived. Perusal of the charge sheet as well as the record of the court reveals that only one person i.e. the appellant was put to trial. Therefore, it is obvious that the discrepancy pointed by learned counsel for the appellant in the order on sentence is the result of typographical error and does not come to the rescue of the appellant. Further, failure of the learned Additional Sessions Judge to refer to the dimensions of the weapon of offence in the impugned judgment by itself cannot be a reason to reject the otherwise reliable of the prosecution witnesses.

22. Learned counsel for the appellant further submitted that the conviction of the appellant under Section 307 IPC is untenable for the reason that there is no evidence on record to show that the appellant inflicted injuries on the complainant with such intention or knowledge and, under such circumstances that if the aforesaid act resulted in death of victim, he would have been guilty of murder. In support of this contention, learned counsel argued that there is no medical opinion on record to show that the injuries caused to the complainant

were so dangerous that they could have resulted in death of the complainant.

23. PW2 Adabmir Khan (complainant) and PW1 Shafeena have categorically stated that on the fateful evening, the appellant visited the house of the complainant and called him outside. He was carrying a '*churi*' in his right hand and before inflicting injuries on the person of the complainant, he uttered the words "*Aaj Tujhe Tapaka Kar Hi Dam Loonga*". From the MLC of the complainant Ex.PW6/A and the testimony of PW6 Dr. Manoj Kumar, it is apparent that the appellant inflicted as many as six knife injuries on the person of the complainant. Injury No.3, as per the MLC was CIW 1.5 cm x 1 cm rib deep on left side of the chest, which is a vital part of the body. Thus, there is no doubt left that the appellant had visited the house of the complainant with the intention to cause him dangerous injuries and under such circumstances that in the event of death of the complainant, he would have been found guilty of murder. Thus, in my view, learned Additional Sessions Judge has rightly convicted the appellant under Section 307 IPC. In view of the discussion above, I do not find any infirmity in the impugned judgment of the learned Additional Sessions Judge convicting the appellant under Section 307 IPC, which may call for interference by this court.

24. Learned counsel for the appellant has prayed for reduction of the sentence awarded to the appellant. He submitted that the appellant is a young man with clean antecedents having no previous criminal background. He has a family, to look after, comprising of his aged parents and children. Otherwise also, he is HIV positive and is a patient of Hepatitis B and C virus infection and Disseminated Tuberculosis of Category I. His physical condition is precarious and, therefore, he deserves to be treated leniently. In support of this contention, learned counsel for the appellant has referred to the nominal roll dated 31.05.2010 sent to the court by Superintendent, Jail No.8, Tihar, New Delhi as also the report of the Senior Medical Officer, Central Jail Tihar, New Delhi.

25. Learned APP, on the other hand, has submitted that considering the gravity of the offence committed by the appellant, he does not deserve any leniency or indulgence by the Court.

26. On perusal of the latest nominal roll dated 31.05.2010, it transpires that out of 05 years rigorous imprisonment awarded to the appellant, he has undergone incarceration for a period of 01 year 02 month and 05 days (actual) as on 31.05.2010. This imply that till date, he has undergone imprisonment for a period of approximately 01 year and 10 months. It is reported by Superintendent Jail that earlier

also the appellant was booked in an Arms Act case at Police Station Anand Vihar in case FIR No.16/2003. Therefore, it cannot be said that the appellant has a clean past record. In view of this and taking into consideration the totality of circumstances, I do not find any reason for reducing the sentence of the appellant only on the ground of his medical condition, particularly when as per the report sent by Senior Medical Officer, Central Jail Hospital, Tihar, the appellant is undergoing treatment at DDU Hospital, HIV Clinic and G.B. Pant Hospital as well as Lok Nayak Hospital and his condition is improving with all the prescribed medication.

27. Result of above discussion is that the appeal fails. It is accordingly dismissed.

(AJIT BHARIHOKE)
JUDGE

JANUARY 24, 2011
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