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IN THE HIGH COURT OF DELHI AT NEW DELHI

**RESERVED ON: 01.06.2011
PRONOUNCED ON: 25.07.2011**

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CRL.L.P.188/2011
CRL. M. A.4747/2011

STATE

..... Appellant

Through: Mr. Jaideep Malik, APP.

versus

SALIM KABARI @ SANTOSH KUMAR
Through: None.

..... Respondent

**CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE G.P. MITTAL**

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | YES |
| 2. | To be referred to Reporter or not? | YES |
| 3. | Whether the judgment should be reported in the Digest? | YES |

MR. JUSTICE S.RAVINDRA BHAT

% This judgment will dispose of a petition by which the State seeks leave to appeal against the judgment of the learned ASJ dated 9.12.2010 in SC No.93/2009 by which the respondent was acquitted of the charge of having committed an offence punishable under Section 302 IPC.

2. The prosecution story is that on 16/17.8.2009, a daily diary (DD) entry was

received at Police Post Sangatrashan stating that two injured persons were lying under the “Pul” (bridge) NDLS, Pahar Ganj. It was further alleged that two police personnel reached the spot and were informed that the injured had been taken to the Hospital. The police personnel went to Lady Harding Medical College (LHMC) and secured the MLC of an unknown person. The MLC (pertains to one injured Ramesh) contained an endorsement that he had been attacked by Salim Kabari. The endorsement was written by the doctor, allegedly, at the behest of the patient, i.e., Ramesh. There was no eye witness to the incident. The prosecution further alleged that subsequently an eye witness Rajender Kumar Jaiswal was found; he claimed to be residing at Ranjit Nagar and was doing kabari work. He stated that the incident occurred on 16.08.2009 at 10:00 PM when he was present in his shop. He witnessed the respondent quarreling with one Vinod @ Lambu and Ramjane (i.e. Ramesh Sharma). The said Rajender Kumar Jaiswal, PW-21, further stated that the respondent did kabari work in the day time and also engaged in loading and unloading, and putting kabaar on the vehicle in the evening time. He claimed to know the injured Lambu and Ramjane. He claimed to have witnessed the incident whereby the respondent was quarreling with Lambu and Ramjane; Rajender Kumar Jaiswal stated before the police that he tried to intervene after reaching the chowk. Apparently, he was unsuccessful, because, according to him, Salim had given the knife blow to both, i.e., Lambu and Ramjane. They both fell down and were profusely bleeding from the stomach. This statement formed the basis of the intimation which ultimately culminated in the lodging of the FIR in the present case later on 17.08.2009.

3. The statement of PW-21 also formed the basis of the respondent’s arrest, and

subsequent investigation, during which the statements of several others including PW-5 & PW-8 - who are police personnel, as well as PW-22, were recorded. PW-6, the wife of the deceased Ramesh Sharma also joined the investigation. The injured, Ramesh Sharma and Vinod @ Lamboo, had, in the meanwhile, died.

4. On the basis of the evidence collected, the respondent was charged with the offence punishable under Section-302 IPC, the murder of Vinod @ Lambu and Ramesh Sharma. He entered the plea of not guilty and claimed trial.

5. The prosecution relied upon the testimonies of 28 witnesses and also produced several exhibits. After considering them, the Trial Court, by the impugned judgment, concluded that the respondent's guilt has not been proved beyond reasonable doubt and accordingly acquitted him.

6. Learned APP argued that the Trial Court fell into error in not appreciating the depositions of PW-5 in its proper perspective. He urged that this witness, although a police personnel, had had occasion to talk to the injured Ramesh Sharma who clearly revealed the identity of his assailant, i.e., Salim Kabari @ Santosh Kumar. The learned APP urged that there was no cross examination of this witness and the Trial Court ought not to have disbelieved him merely on the assumption that the testimony was not corroborated by any public witness. It was contended that it is not always possible for the police to secure a public witness, more so, when the incident occurs at an isolated place or where people are unwilling to come forward.

7. Learned counsel urged that MLC - Ex.19/B in respect of the deceased Ramesh Sharma, clearly revealed the name of the respondent whose identity was known to him as the assailant. This was corroborated by PW-5. Having regard to the peculiar

circumstances whereby PW-21 was incapacitated from deposing and supporting the previous statement recorded by him to the police, it was urged that the prosecution had produced several materials on the record to establish the respondent's guilt.

8. In this case, the prosecution relied principally on the testimonies of PW-5 who claimed to have taken the injured Ramesh Sharma to the Hospital in a TSR. He also claimed that the other injured Vinod was taken to the Hospital in a PCR at that time. The Trial Court noted that neither the TSR Driver nor the Constable who drove the PCR had been examined or even joined in the investigation. PW-5 Rajender Kumar Jaiswal no doubt deposed having been told by the injured Ramesh Sharma about the attack and the identity of the assailant i.e. the respondent. This testimony had to be seen in the light of the surrounding circumstances. PW-21 had, in the course of the investigation, recorded the statement implicating the respondent. He had claimed to be an eye witness. Similarly, PW-22 was of vital importance. Unfortunately, for the prosecution, both these witnesses were unable to support its case. PW-21 was a victim of a road accident and, therefore, suffered brain damage. As a result of this development, he was unable to make any coherent statement in the Court. His medical records were also produced before the Trial Court and are part of the record. So far as PW-22 is concerned, record would reveal that he is a juice shop owner who claimed to be present near the place of incident till 8:00 PM. In his Court deposition, he had stated that he has left for his home soon thereafter. At that time, the two deceased persons were drinking at the chowk in front of his shop. He resiled from his previous statement recorded before the police, where he had mentioned the scuffle between the respondent and the two deceased and his attempt to pacify them. Having regard to this development, it was incumbent that the

material presented before the Trial Court were sufficiently credible and strong so as to implicate the accused/respondent.

9. The Trial Court analyzed the information revealed to the Constable Rajender Singh, PW-5. The relevant part of its discussion in this regard is as follows: -

“36. In such circumstances, the only testimony that remains on record regarding dying declaration of the deceased is that given to Ct. Rajender Singh. Ct. Rajender Singh is a beat officer of beat no.19 of police station Pahar Ganj. He stated that he himself offered the PCR officials to take second injured to hospital and the he took the second injured i.e. Ramesh Sharma in TSR to the hospital but that TSR person has not been made witness in this case by IO. No efforts have been made by the prosecution to summon that TSR driver who could depose that the injured was taken by Ct. Rajender Singh to the hospital in his TSR. He is an important link witness and would have corroborated the case of the prosecution regarding the condition of the injured also that he was conscious, speaking coherently and was in fit condition to give statement but no such efforts have been made by the prosecution. PW5 is a police official and in the absence of the his testimony being corroborated by any other independent witness, it is highly unsafe to convict the accused only on the sole testimony of PW5, particularly when both the eye witnesses of the case have not supported the case of the prosecution.”

10. The important circumstance which appeared on the record is that the Doctor who allegedly recorded the MLC, Ms. Dilpreet Kaur did not step into the witness box and support the prosecution case. The prosecution had heavily relied upon on the MLC Ex.PW-19/B which mentioned the respondent's name as the assailant with further endorsement that his identity was revealed by the patient himself. The Trial Court even made attempt to secure the attendance of the said Ms. Dilpreet Kaur, however, she had left the country and was staying in United States of America. For these reasons, she could not be present and support the prosecution version about the deceased Ramesh Sharma having mentioned the attack to her. This would have lent considerable weight to

the prosecution case.

11. This Court had called for the Trial Court records. A careful consideration of the records reveals that besides the infirmities noted by the learned Additional Sessions Judge, the MLC of Vinod, prepared at Ex.19/A, did not reveal his identity. However, the FIR which was recorded subsequently on 17.8.2009 recorded his name - presumably on the basis of the statement of PW-5. However, that was the correct position, the judicial file will further reveal the brief facts of the case and the other inquest papers Ex.PW-14/D which were prepared only on 21.08.2009. The post mortem was conducted on the same day. Neither the post mortem, nor the request for post mortem - made on 21.8.2009, bear the FIR number. Another intriguing aspect in this case is that though the death occurred at the time when the FIR was recorded, no intimation appears to have been sent to the Magistrate concerned in accordance with the provision of Section-157 Cr.P.C. It has been often reiterated that in order to eliminate, the possibility of manipulation, such special reports have to be sent to the concerned Magistrate at the earliest opportunity. None of the prosecution witness appears to have testified nor brought on record special report in terms of Section-157 Cr.P.C.

12. It has been repeatedly reiterated that the standards to be applied by the High Court while considering the petitions for leave to appeal against acquittals is one where the prosecution establishes substantial and compelling reasons, which by and large are confined to serious or grave mis-appreciation of evidence, wrong application of law and an approach which would lead to complete miscarriage of justice. In the present case, the Trial Court has listed various grounds on which it acquitted the respondents/accused. All of them, to our mind, are reasonable and none of them can be termed as

misapplication of law or wrongful appreciation of the evidence placed before the Court by the prosecution.

13. Applying the standards while hearing leave petition, we are satisfied that the acquittal recorded by the Trial Court is based on sound reasoning and analysis which does not call for interference.

.14. In view of the above, we are satisfied that there are no substantial or compelling reasons to grant leave to appeal to the State against the impugned judgment. In the circumstances, the petition is unmerited and is consequently dismissed.

S. RAVINDRA BHAT, J

G. P. MITTAL, J

JULY 25, 2011

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