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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of hearing and decision: 9th September, 2011

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CRL.L.P. 109/2008

STATE

..... Petitioner

Through: Mr. Dayan Krishnan, Addl. Standing Counsel.

versus

PARMOD KUMAR & ORS

..... Respondents

Through: None.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE G.P.MITTAL

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

J U D G M E N T

S. RAVINDRA BHAT (OPEN COURT)

1. The State seeks leave to appeal against a judgment and order of learned Addl. Sessions Judge dated 14.03.2008 in SC No.318/2006 whereby Respondents, charged for having committed offences under section 147/ 148/ 486/ 353/ 332/ 307/ 436 and 149 IPC, were acquitted.
2. The prosecution case was that the Supreme Court order directing sealing of premises, which did not comply with municipal bye-laws and other local laws applicable in the city of Delhi, led to 'Delhi Bandh' in the year 2000 as a mark of protest. It was further alleged that on 20.11.2000 at 10:30 A.M., PS Gokal Puri received a wireless message that DTC buses and police motorcycles were set on fire at the T point, Maujpur Chowk, Delhi. Pursuant to this information K. G. Tyagi, SHO and SI

Jagmohan as well as other police officials reached the spot. It was alleged that 3 – 4 motorcycles of the Delhi Police were burnt besides two DTC Buses. The mob was pelting stones at the police party and had turned aggressive. Inspector Tyagi warned the mob and ordered them to disperse but they did not obey and continued to attack the police party. The police party apparently resorted to lathi charge, which further enraged the mob. Thereafter, police resorted to tear gas shells. The mob threatened to destroy public property as they were rendered jobless. It was alleged that ACP M. S. Sapra with an additional force reached the spot to disperse the mob, which continued its aggression and then the situation went out of control. Inspector K.G. Tyagi and ACP M. S. Sapra fired a few rounds in air to disperse the crowd. The police party was then cornered by the mob at which stage Constable Prakash and Sohanbir fired shots on being directed to do so. The crowd dispersed and two amongst them were found lying on the ground. They were taken to the hospital. It was alleged that the injured, Ajab Singh and Irfan later died in the Hospital. The police alleged that 27 persons, who led the mob, were apprehended. After the arrest, one Yashin was also arrested along with Hasan Abbas, Luvlesh, Naushad and Afsar. The latter were sent to Juvenile Justice Board. After investigation of offence the Trial Court framed charges. The Respondents pleaded not guilty and claimed trial.

3. After considering the evidence, (which included the version of the official witnesses i.e. PW-1 Satpal, PW-3 Pradeep, PW-6 Sohanbir and PW-7 M.S. Sapra) the court concluded that the prosecution was unable to establish its allegations and accordingly the accused were acquitted of the charge. In view of the judgment the court directed that some police officers should be prevented for using force, after overruling their argument of private defence. We have considered the materials on record as well as the submissions of learned Addl. Standing Counsel. We have also benefit of considering the Trial Court record, which was requisitioned for this purpose. The court analyzed the evidence and the testimonies of the prosecution witnesses Pradeep, Dharmender, Sohanbir, Ominder and ACP M.S. Sapra and concluded that the identity of the alleged rioters has not been established and that the Respondents could not be

proved to be the offenders beyond the reasonable doubt. The relevant part of the discussion in this regard is extracted below: -

“26. K. G. Tyagi, Inspector, deposed facts in the same vein as testified by witnesses referred above. He reached spot along with his team and found 3-4 motorcycles, belonging to police officials, burning. Two DTC buses were also burning. There was a gathering of 1000-2000 persons at the spot. Mob was pelting stones on the police party. Public persons were shouting to kill police men and burn vehicles. ACP Sapra ordered him to fire towards rioters. Consequently, he ordered Constable, namely, Prakash and Sohanbir to fire. Both of them fired four rounds each. Mob dispersed to some extent and he noticed two persons lying on the ground in injured condition. They were removed to hospital. Near injured persons, a country made pistol was lying. One used cartridge was found installed in its barrel. 29 persons, who were leading the mob, were apprehended by police. During course of his cross-examination, he details that he was not in a position to identify accused persons by their names. He tells that he reached spot around 10:30 am and found crowd of 1000-2000 persons present there. Facts projected by this witness are in contradiction to facts testified by witnesses, referred above. As noticed, aforesaid witnesses found a gathering of 300-400 persons at the spot, who had swollen to 1000-1200 persons. However, Inspector, Tyagi does not narrate picture in that vein. He nowhere tells that accused persons were leading their respective group of 20-25 persons. According to Sh. Tyagi, persons arrested at the spot were leading a mob of 2000 persons and that too from all directions. This testimony of Sh. Tyagi is unworthy of credence. He nowhere tells as to from which direction accused persons came at the spot. Accused persons, standing in the dock, were observed by the Court for about 18 months. None of them has depicted leadership qualities. All of them are persons, who can move in herd. Therefore, contention of Sh. Tyagi that all accused persons were leading crowd has no legs to stand. When Tyagi reached spot by that time, the gathering had turned violent. He was not in a position to notice public persons reaching the spot with their respective group. In such a situation, one does not find any substance in facts testified by Sh. Tyagi to the effect that accused persons were leading crowd of 2000 persons. He had not testified that it were accused persons, who were shouting to kill police officials and burn Government vehicles. He nowhere testified that when a bus reached there, accused persons exhorted the mob to put that bus to fire. Consequently, it is evident that facts unfolded by Sh. Tyagi are farther from truth. In case facts projected by Sh. Tyagi are read in between lines, it emerges that the accused persons were present at the spot due

to idle curiosity, without entertaining the common object of the said assembly. It would be highly unsafe to accept uncorroborated testimony of Sh. Tyagi on its face value to adjudge accountability of accused persons.

27. *Shiv Shankar SI reached spot. By that time 29 persons were present in the custody of Sh. Tyagi, Inspector. Therefore, this witness was not in a position to detail role played by respective accused persons in commission of crime. He admits that accused persons had not pelted any stones or brickbats over police party in his presence. He had not seen them as members of unlawful assembly, nor he saw them armed with any deadly weapons. He clarified that no weapon of offence was recovered from their possession. Therefore, it is crystal clear that Shiv Shankar SI had not observed accused persons, joining the unlawful assembly, knowing well about its common object, continued in it and taking steps in prosecution of common object of said unlawful assembly.*

28. *To attack case of prosecution, defence projects that accused Ali Hasan appeared before Sh. Talwant Singh, ASJ, Karkardooma Courts, Delhi, on 20.11.2000. Case was called in morning hours, at which juncture four accused persons were not present. Case was taken up again at 12:15 pm, at that juncture Ali Hasan appeared before the Court. He was shown to have been arrested in the case on that day at about 12:15pm, as testified by Sh. K. G. Tyagi, Inspector. How Ali Hasan could be at two places simultaneously on that day at about 12:15pm? This fact demolishes edifice of prosecution. It seems that when Ali Hasan was on his way to his house, he was overpowered and framed in this case.*

29. *In view of foregoing reasons, it is emerging over record that evidence brought simply raises suspicion that accused persons were present in the crowd. It has not come over record in clinching manner that accused persons were members of unlawful assembly and took steps in prosecution of common object of the said unlawful assembly. On mere suspicion, accountability of accused persons cannot be adjudged. For a crime of rioting prosecution has to show that accused persons took active part in the crime. It has not been established that accused persons had done something or omitted to do something, which would make them a member of unlawful assembly. It has not been shown by the prosecution that accused persons were aware that crowd had turned into an unlawful assembly and thereafter they intentionally joined that assembly or continued in it. It has also not been established that any of the accused persons had used force and*

caused injuries to police officials, with intent to prevent or deter them from discharge of their duties as such public servants. It has also not been proved that accused persons made an attempt on lives of the police officials and caused injuries to them. No evidence worth name was brought over record that it were accused persons, who put vehicles No.DL21CG 6402, DL1LA 1506, DL1PA 6481 and DL1PA 2400 to fire. No evidence worth name has been brought over record to show that accused persons knew that offence committed was likely to be committed in prosecution of common object of said unlawful assembly, to attribute constructive accountability on them. Consequently, it is evidence that evidence brought over record is not sufficient to adjudge accountability of the accused persons for crime charged. Prosecution has miserably failed to prove its case against accused persons.”

4. We are of the opinion that having regard to the standard, which High Court has to apply while considering petitions for leave to appeal against orders of acquittal that there exists or otherwise for substantial or compelling reasons. The State in this case, at least, has not been able to make out any ground for an appellate review. The Trial Court in our opinion has noticed infirmities which led it to form an opinion, which perhaps could be the only one under the circumstances of the case.
5. Learned Addl. Standing Counsel urged during the course of his submission that the direction to register a case against concerned police officers was not only expedient but was contrary to law. He relied on provisions of Sections 129 and 132 of the Code of Criminal Procedure contending that once the Trial Court found that there was an unlawful assembly in this case comprising of around 1000-12000 people, which could not be brought under control despite exercise of reasonable force, the police were left with no alternative but to resort to fire. Apart from it, he relied on the statute *Nagraj v. State of Mysore*, 1964 SCR (3) 671. The Supreme Court had noticed that the procedural requirement of having to secure sanction is necessary and that the Court has to be satisfied after registration of an appropriate case or at the relevant stage itself that the action, which led to death or other bodily injuries involved use of force that was not proportionate in the facts of the case. The observations of the Supreme Court in this regard are as follows: -

“17. The next question and the real question to decide then is to

determine what the accused has to show in order to get the benefit of the provisions of S. 132 of the Code in the case. To get such a benefit and to put off a clear decision on the question whether his conduct amounts to an offence or not, the appellant has to show (i) that there was an unlawful assembly or an assembly of five or more persons likely to cause a disturbance of the public peace; (ii) that such an assembly was commanded to disperse; (iii) that either the assembly did not disperse on such command or, if no command had been given, its conduct had shown a determination not to disperse; and (iv) that in the circumstances he had used force against the members of such assembly. He has to establish these facts just in the same manner as an accused has to establish any other exception he pleads in defence of his conduct in a criminal case. It is sufficiently well settled that it is for the prosecution to prove the offence in the sense that the offence was committed in the circumstances in which no recourse to an exception could be taken and, therefore, if the accused establishes such circumstances which either conclusively establish to the satisfaction of the Court or make the Court believe them to be probable that the case comes within the exception that would be sufficient compliance on the part of the accused with respect to his proving the exception to prove which the onus was on him. In the present case, therefore, the accused has to show to the Court that the alleged offences were committed during the performance of his duties in the circumstances narrated above. On his so showing, it would be the duty of the Court to hold that the complaint could not have been entertained without the sanction of the Government under S. 132 of the Code. To show this is not equivalent to the accused establishing facts which would be necessary for him to take advantage of the provisions of S. 79 of the Indian Penal Code as had been thought in some of the cases cited to us. Section 79, I.P.C. deals with circumstances which, when proved makes acts complained of not an offence. The circumstances to be established to get the protection of S. 132, Criminal P. C. and not circumstances which make the acts complained of no offence but are circumstances which require the sanction of the Government in the taking of cognizance of a complaint with respect to the offences alleged to have been committed by the accused. If the circumstances to be established for seeking the protection of S. 132 of the Code were to make the alleged conduct no offence, there could be no question of a prosecution with the sanction of the State Government. This distinction had not been considered in the cases we were referred to. It is not necessary to refer to those cases which were ultimately decided on the basis that the allegations either in the complaint or taken together with what had appeared from the evidence on record justified the conclusion that the action complained of came

under Ss 127 and 128 of the Code and that no prosecution in connection with such an action could be instituted in the Court without the sanction of the State Government.”

6. In this case, we noticed that the Trial Court in fact concluded that the prosecution had been able to establish that the mob, which had gathered at Maujpur was in fact unlawful assembly and had turned violent. It was also noticed that mob committed mischief as well as destroyed public property. This is discernable from a reading of the impugned judgment, particularly, para 13. The mob was showing intense aggression and attacking public property; it had turned violent. The record further shows that several warnings were given to the mob, which was subjected to lathi charge, and later teargas shelling, despite which it could not be controlled. Only when the situation went out of hand, did the police resort to firing, which having regard to the background of the case, was not a disproportionate response.
7. We are of the opinion that the directions given by the Trial Court to register a case against the concerned police officers at least in this incident was not called for. We are accordingly strike off the said direction from the impugned judgment.
8. In view of the above findings, we are of the opinion that the petition is unmerited. It is dismissed subject to directions made in the preceding paragraph.

S. RAVINDRA BHAT
(JUDGE)

G. P. MITTAL
(JUDGE)

SEPTEMBER 9, 2011

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