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IN THE HIGH COURT OF DELHI AT NEW DELHI

DECIDED ON: 23.12.2011

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CRL.L.P. 475/2011
CRL.M.A.12078/2011

STATE OF NCT OF DELHI Petitioner
Through: Mr. Rajesh Mahajan, ASC.

versus

FARUKH & ORS. Respondents
Through: None.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MS. JUSTICE PRATIBHA RANI

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

% The State seeks leave to appeal against a judgment and order of the learned Additional Sessions Judge dated 28.03.2011 whereby the respondents/accused were acquitted for the offences punishable under Section-302/147/148/149/307, IPC.

2. It is alleged that the police was informed at 10:58 PM on 5.4.1995 through PCR intimation about an incident in Muslim colony

Chatterpur by which several people were injured. The concerned SHO reached the spot; the intimation was handed over to PW-11 SI Dharamvir who proceeded to the place of incident in the street opposite Farukh's shop. It was stated that the police were unable to find any eye witness and were told that the injured had been taken to AIIMS. The police met the injured i.e. Gulshan, Niazuddin, Momin and Qayyum, who received serious injuries; he was declared unfit for making the statement; the others, however, were fit to record statements. Momin's statement was recorded as Ex.PW-1/A which forms the basis of the FIR.

3. It was the prosecution's case that Momin used to reside in Chatterpur; on 4.4.2005 i.e. a day prior to the altercation, an exchange of abuses had taken place with Farukh; apparently the matter was resolved with the intervention of Niyamuddin, Momin's elder brother along with others. Momin stated that at 10:30 PM, on the day of incident, i.e.5.4.1995 after ending work, he was passing by Farukh's shop and that on seeing him, the latter started hurling abuses. Momin apparently objected and Farukh told him that he was lucky that he was let off the previous day but that he would not let him off that day and then allegedly took out a "saria" from his shop and assaulted Momin on the head. PW-1 stated that Farukh's brother Iqbal went out with a danda in his hand and inflicted a blow on Momin's hand. Apparently, Momin cried for help, upon which, Qayyum, his maternal uncle's son reached there to separate the attackers. It was alleged that

the other accused reached the spot with lathi and saria. The accused Chammu hit Nimaju's head with a saria which resulted in his falling down and losing consciousness. Momin stated that his elder brother came to save him, he too was given a danda and saria blow after which they managed to escape the clutches of the attackers, and in the process of ran towards their house. Four of the accused i.e. Chammu, Kakan, Leela and Sabuddin pelted bricks and stones on them. Subsequently, Qayyum died on 5.4.1995.

4. After completion of investigation, the police filed the chargesheet; the respondents were charged with having committed the offences mentioned in the earlier part of this judgment. They pleaded not guilty and claimed trial.

5. During the course of the proceedings before the Trial Court, the prosecution examined 11 witnesses including the testimony of the Doctor who conducted the postmortem and also relied upon the documents.

6. After considering all of these, the Trial Court held that the prosecution was unable to establish the accused' guilt and consequently acquitted them.

7. Learned APP urges that the Trial Court fell into the error in acquitting the respondents. He emphasized that the testimony of PW-1 was unambiguous as to the role played by each of them. He further contended that the witness withstood the test of cross examination by the respondents. Counsel also urged that so far as the Trial Court's

approach, believing the testimonies of other witnesses particularly PW-3 is concerned, that witness appeared for cross-examination more than 5 years after he had deposed in examination-in-chief. The Court, therefore, juxtaposed his deposition with PW-1's testimony since the latter supported the prosecution both with regard to the time of occurrence and manner of attack. He also submitted that the Trial Court fell into the error in opting to accept one version given by the PW-7 - the Doctor, about the possibility of the injury not being the result of the attack.

8. We have carefully considered the submissions and also gone through the Trial Court's records which were requisitioned for the purpose of this proceeding.

9. The Trial Court primarily went by the inconsistencies which it perceived in the testimonies of the eye witness - PW-1, PW-2 & PW-3. The relevant portion of the Trial Court's findings are extracted below: -

"30. In the course of his cross examination, PW1 Momin admitted that accused Iqbal, Kakan and Farukh had received injuries but he stated that he did not know who had hit the saria on the head of Kakan and of Farukh. PW1 clarified that PW2 Niazuddin, Islamuddin, Sheru, Qayyum, the deceased and PW3 Gulshan had reached at the spot in about five minutes time after his talk with Farukh started and amongst them initially Qayyum, thereafter PW2 Niazuddin and then Sheru and thereafter Gulshan came. The span of time and manner of arrival of these accused, PW2 and PW3 have been deposed by

PW1 in contradiction to the version of PW2, elicited above. PW1 further stated that Islamuddin was already with him from the beginning. PW1 made considerable improvements, accordingly, by deposing aforesaid facts and by saying that the accused persons excepting Farukh reached at the spot at the same time when Niazuddin PW2 and others had reached.

31. PW1 was also contradicted with his previous statement Ex PW1/A where it was not mentioned that Sheru, Gulshan, and Islamuddin had come to rescue PW1. PW1 admitted that he had not told to the police that Islamuddin had received injuries in his head. In Ex PW1/A, PW1 had also not stated to the police that accused Iqbal and Farukh had given lathi blow on Islamuddin for which he was confronted and contradicted with his previous statement Ex PW1/A. PW1 stated that quarrel took place for about 20/25 minutes. PW1 further admitted that the police had taken him with Kakan, Farukh and Iqbal to the hospital. PW1 clarified that injured Gulshan and Qayyum had gone to the police station to lodge the report and voluntarily added that he had gone to the police station from the hospital. PW1 also admitted that the accused had no enmity with Qayyum and also that no enmity with them also. PW1 stated that on the day of occurrence, quarrel ensued at the spur of moment though there had been a dispute a day earlier to quarrel between him and Farukh which was got settled with the intervention of his brother PW2 and accused Kakan, father of accused Farukh.

32. As the cross examination of PW1 progressed, he voluntarily deposed that no such occurrence of quarrel, as alleged, had taken place at the shop of Farukh saying they were in their street where there is only their house in the street and the quarrel had taken place there. It is again reiterated that the house of PW1 is situated in the street which is different and on the back side of the street/road in front of shop of Farukh as

shown at point A in the site plan Ex PW11/F. Qayyum, now deceased, had arrived at AIIMS Hospital in the night of 05/04/95 at 23:44 hours, as per MLC Ex PW10/A, with alleged history of assault and injury on his head opined as grievous by blunt object, though the size of injury was not mentioned in the MLC. In terms of the postmortem report Ex PW7/A, the external injuries on the person of deceased have been elicited in the receding paragraphs. The material witnesses examined have testified in contradiction with each other and presented case of prosecution as to how deceased sustained injuries and who assaulted him.

33. In the course of his examination, PW1 stated that all the accused persons started throwing stones and bricks on him and they all sustained injuries. There is no specific mention of any fact of assault by any weapon including sarias, dandas, bricks, or stones by any or all accused on the person of Qayyum. PW2 stated that he had gone inside his house after about 15/20 minutes of the incident, while Qayyum, now deceased, and Gulshan, the injured, had reached at the spot much later in time when he went inside his house and PW2 could not say as to how Qayyum and Gulshan had received injuries.

34. In his examination in chief, PW3 Gulshan stated that accused Farukh gave saria blow on the head of Qayyum on which fact he was confronted and contradicted with his previous statement Ex PW3/DA given in the course of investigation where there was no mention of such fact. Even in his cross examination, PW3 stated of having not seen the occurrence and was giving hearsay version of occurrence as told to him by a boy at 11.15 pm at his residence, upon which he arrived at the scene of crime. PW3 stated that he as well as Qayyum, now deceased and the injured persons namely PW1 Momin and PW2 Niazuddin had sustained injuries due to pelting of stones by the crowd which had collected at the place

of occurrence, names of such persons who held pelted stones were not known.

35. DW2 Sh Yusuf Khan deposed of being resident of F83, Chatterpur and that quarrel had taken at about 10.30 pm on 05/04/95 at Chatterpur between accused Farukh, Kakan and Iqbal on one side and Sheru, Niazuddin PW2 and Momin PW1 on the other side. DW2 stated of having intervened between them and advised them not to quarrel. Such advice was not heard by those quarreling persons, upon which DW2 left for his house but came to know later that both the parties had received injuries.

36. In terms of discussion above, it is explicit on face of record that there is no cogent evidence as to who had caused injury on the head of Qayyum, resulting in his death and as to by which weapon of offence it was so caused."

10. The Trial Court noted additionally that according to the report Ex.PW-1/A, the crime scene faced the accused Farukh's shop. PW-1 Momin's house was in the other lane somewhere in the back of that shop. The impugned judgment also noticed that PW-1&2 deposed that all accused had not gone together and attacked them. It concluded that the assault was neither pre-concerted nor planned. The Trial Court doubted the version of the material witness regarding the sequence of the arrival of each accused, the place of occurrence, and their return. It noticed that the testimonies differed and were contradictory at several points. Furthermore, the Trial court noticed more discrepancies with regard to the time or arrival of the injured in

AIIMS having regard to the first intimation received by the police i.e. at 10:58 PM.

10. The Court thereafter proceeded to hold as follows: -

“40. If for the sake of arguments, the case projected by any of the injured persons is taken as gospel truth, then in the process of separation of the grain from the chaff from the testimonies of the material witnesses, an absolutely new case has to be reconstructed by divorcing essential details presented by the prosecution case completely different from the context and the background against which they are made, the only available course which can be resorted here is to discard their evidence in toto. The elicited discrepancies have corroded the credibility of the material witnesses and henceforth the presented case of prosecution.

41. In the back drop of the opinion of PW7 that the injuries on the head of deceased Qayyum were possible by fall, his head striking on the hard surface and/or also possible by brick striking the head in the course of brick bating, going to the hospital at the belated stage resulting in continuous internal haemorrhage which may lead to disaster and there being certain chances of saving of life had such injured reported in hospital at earlier point of time; non seizure of medical treatment papers of deceased Qayyum showing treatment given and surgeries performed during his four day admission in hospital; coupled with the discussions of circumstances brought on record and the shaken testimonies of PWs 1,2 and 3 which are neither wholly reliable nor wholly unreliable, not confirming with collateral circumstances as well as probabilities but shrouded with grave suspicion and serious doubts, narrating even the scene of crime in contradiction with each other and with the presented case of prosecution, lead me to conclusion that it would be extremely hazardous to place

implicit reliance on such shaken testimonies of PWs 1,2 and 3 and thereon to convict the accused in the absence of corroboration in material particulars from reliable testimony, direct or circumstantial, for the serious offences in question. The prosecution has not been able to prove its case against the accused persons, beyond reasonable doubt. Accused persons are given benefit of doubt and are accordingly acquitted for the offences charged. Their bail bonds are cancelled and sureties are discharged. File be consigned to the record room.”

11. An overall conspectus of the above circumstances would reveal that the Trial Court considered the depositions of each material witnesses i.e. PW-1, 2 & 3. It had set out the material inconsistencies in their version *inter se* as well as the internal contradictions discernable from the record. Furthermore, this Court notices that though PW-1 withstood the test of cross-examination, yet there were certain improbabilities in his deposition in the Court. The other important aspect which persuaded the Court to conclude that the respondents were not guilty was that PW-7 deposed that a probable cause of injury to the deceased was fall and not an assault, as alleged.

12. Having regard to the well settled parameters which the High Courts have to follow while examining Petitions for leave to appeal against the orders of acquittal i.e. the existence of substantial or compelling reasons in the impugned judgment, this Court is of the opinion that the Trial Court adopted one of the two possible views. The view so chosen by it favours the defence which is neither, palpable improbable nor so unreasonable as to persuade this Court to

hold that there are compelling or substantial reasons to invoke the jurisdiction and grant leave.

13. The petition - Crl.L.P.475/2011 - therefore, being unmerited is dismissed.

**S. RAVINDRA BHAT
(JUDGE)**

**PRATIBHA RANI
(JUDGE)**

DECEMBER 23, 2011
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