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IN THE HIGH COURT OF DELHI AT NEW DELHI

DECIDED ON: 22.02.2011

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CRL.L.P. 418/2010
CRL. M.A.17363/2010

STATE

..... Petitioner

Through: Mr. Sanjeev Bhandari, Addl. Standing Counsel.

versus

MOHD. SWALIN

..... Respondent

Through: None.

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 (OPEN COURT)

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1. This order will dispose of the State's petition for leave against the judgment and order of a learned Additional Sessions Judge dated 30.03.2010, acquitting the respondent (hereafter referred to as "Swalin") in this case.
2. The prosecution's allegations were that on 10.11.2004, information was received about a stabbing incident in House No.490, Gali No.22, Jafrabad at P.S. Seelam Pur and recorded in D.D. No.27A. On reaching the spot, ASI Subhash Chand along with Constable Upender came to know that the injured has been taken to G.T.B. Hospital. The said policemen reached that hospital and obtained a copy of a Medico Legal Certificate (MLC) bearing No.84069/04 of injured Abdul Wali. According to the certificate, injured was fit to make a statement; he was kept under observation. The MLC indicated that the injury was caused by a blunt object.

Apparently, there was no eye witness to the incident.

3. On 14.11.2004, Inquiry Officer (hereafter referred to as IO), PW-7 recorded the statement of injured Abdul Wali who deposed later as PW-2. The said witness stated that he was permanent resident of Nai Basti, Jilla Badau and presently residing in House No.490, Gali No.22, Jafrabad on rent. He further stated that he was running a shop and engaged in selling jackets at Road no.66, near Welcome Bridge. According to him on 10.11.2004 at about 9:00 PM, he had gone to the factory of Khalid Bhai at Gali No.22, Jafrabad for collecting jackets. He alleged that some boys were misbehaving with Khalid Bhai, when he intervened, one of them, (whose identity was known and revealed by Khalid Bhai as “Kabutarwale Ka Ladka” residing in Gali No.23, Jafrabad), threatened him and also demanded money upon which Abdul Wali intervened. The accused then took out a “churi” and inflicted a blow on PW-2 and removed Rs.7500/- from his pocket and fled from the spot. PW-2 also deposed that he could identify other three boys if they were shown to him. He claimed to have been admitted in G.T.B. Hospital and, therefore, gave his statement on 14.11.2004 as he was perturbed and unwell before that. The prosecution alleged that after considering the Medico Legal Opinion, an FIR under Section 394/397/34 IPC was registered on 18.11.2004. It was further alleged that upon enquiry, it was revealed that the respondent was the “Kabutarwale Ka Ladka” referred to in PW-2’s statement. It was further claimed that despite search, the accused could not be arrested and on 24.11.2004, Swalin surrendered in Court. Charges were framed on the basis of the report furnished by the police, on 4.8.2005.

4. The prosecution relied upon depositions of seven witnesses. The principal witnesses examined were PW-2, the injured Abdul Wali and PW-3 Khalid Bhai. The Trial Court on an overview of the evidence including the testimony of PW-2, (the injured) and PW-3 observed that their depositions did not inspire much confidence as there were several vital contradictions. The Trial Court also observed that the prosecution failed to explain the cause of inordinate delay in recording the statement of injured despite the fact that PW-2 was fit to make the statement on the date of the incident itself i.e. 10.11.2004. The Trial Court apparently based this conclusion on a reading of the MLC which indicated that the relevant medical parameters of the injured PW-2 were normal. The Trial Court by its impugned judgment has recorded the following findings: -

“17. In view of the aforesaid testimony of all the PW's it has become crystal clear that statement of PW2 injured and PW3 public witness does not inspire confidence as they both contradicted with their statements. IO

also failed to explain cause of delay in recording the statement of injured despite of the fact that injured was fit for making statement on the date of incident itself. In such circumstances it is requested that accused has become entitled to be given him benefit of doubt and requested for acquittal of accused."

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21. After hearing arguments I also carefully perused the testimony of all the PW's and the observation given by their lordships in all the decided cases upon which both the parties placed their reliance wherein it is established that offence was allegedly committed on 10.11.04 and case was registered on 18.11.04 despite of the fact that injured had seen the assailant at the time of commission of offence. This fact was neither disclosed by PW2 injured nor by PW3 at whose premises the alleged offence was committed. No satisfactory explanation for causing the delay in lodging the FIR is brought forth however, contradictory pleas in explaining the cause of delay in lodging the FIR is brought on record. It is also placed on record during cross examination of PW3 that PW3 was running a factory of manufacturing jacket and jean pant and 7-8 workers were working in the said factory and PW2 stated all the workers were resided in the factory but PW3 denied the same and PW3 admitted that house of uncle (Tau) Haji Suleman is situated at across the gali on one end which is opposite to house of PW3. There was a shop on the ground floor of Haji Suleman and his family members were residing on the first floor above the shop and gave suggestion that workers of PW3 used to run radio/tape recorder in loud voice and when Haji Suleman requested PW3 to restrain their workers not to run radio or tape in loud voice but PW3 has not taken care of it and due to that there were some inimical relations between PW3 and accused. However, these suggestions were denied by PW3 during examination of accused u/s 313 Cr.P.C. he also took the same plea and no satisfactory explanation was placed on record by the prosecution on this aspect.

22. In view of the aforesaid discussion coupled with the fact that prosecution failed to brought on record the satisfactory explanation of lodging the FIR after eight days of the incident I am of the considered view that accused has become entitled to gave him the benefit of doubt. Accordingly, benefit of doubt be given to accused Mohd. Swalin s/o Mohd. Yamin. He be acquitted for the offence u/s 394/397/34 IPC. His bail bond cancelled. Surety be discharged. File be consigned to the Record Room."

5. Learned APP argues that leave ought to be granted to the State to appeal in this case because the Trial Court erroneously acquitted the accused on the mere ground that there was delay in recording FIR. It is argued that the depositions of PWs 2 and 3 taken together support

the prosecution allegations in all the material particulars. In this regard, the learned APP argues that PW-2 was an injured witness and there was no reason for the Trial Court to disbelieve his testimony particularly when he furnished an explanation that the statement could not be recorded because he was undergoing medical treatment and also because of the pressure of the people from the vicinity. It was further argued that the testimony of PW-3 in whose premises the attack and robbery took place supported PW-2 and the Court overlooked this aspect while proceeding to hold that there were material contradictions.

6. By the order dated 19.11.2010, this Court called for the Trial Court records. What emerges from a reading of the depositions is that D.D. entry was made on the day of the alleged assault. The time of this D.D. entry was not known; however, it is a matter of record that information of the assault was recorded on the same day i.e. 10.11.2004. The M.L.C. is a part of the record as Ex.PW-4/A. The Doctor concerned who attended to the injured i.e. Dr. Vinod Kumar, however, was not examined. Instead, PW-4, another doctor testified in the proceedings and identified the signatures of Dr. Vinod Kumar. The observations in the M.L.C. indicate that the injured suffered a lacerated wound and there was bone exposure at the left elbow. The M.L.C. also indicated that patient was fit to make a statement and that his B.P. was 106/72 at the time of his examination i.e. 9.50 PM. As against the column “the kind of weapon used or poison suspected in case of poisoning”, the observation is “blunt”. This obviously implies that the weapon of offence was a blunt instrument. The X-Ray is also a part of the record.

7. PW-2's version is that when he was present in the premises of PW-3, Mohd. Swalin along with three others reached there and started misbehaving with PW-3 and started demanding money. PW-2 clearly stated that when he tried to intervene, Mohd. Swalin inflicted a knife injury and fled the spot after relieving him of Rs.7500/-. In this case, there is no recovery of any knife. Furthermore, a significant aspect which appears from the record is that injury upon the PW-2 was, according to M.L.C. PW-4/A inflicted with a blunt weapon. Now, in this case PW-2 had deposed in Court about his inability to make a statement to the police because he was hospitalized for about a week. He further stated that he was feeling uneasy and was bleeding at that time as well as nervous and scared of the incident and that he could give the statement to the I.O. on 14.11.2004 in the hospital. He also deposed that he had to undergo surgery. Now, there is nothing on the record in support of these facts. The statement recorded,

Ex.PW-2/A nowhere reflects that the I.O. visited PW-2 in the hospital and recorded his statement.

8. PW-3's deposition was used to corroborate the statement of PW-2. He admitted owning a factory and manufacturing jackets and jeans as well as employing 7-8 workers. He denied a suggestion that his workers used to switch on the radio or tape recorder loudly and that one Haji Suleman had requested a number of times to restrain them. He also denied the suggestion that Mohd. Swalin had once requested that PW-3's workers should not go to the roof top of the factory or tease family members of his (Mohd. Swalin's) family. He also denied the suggestion about having been enraged at the statement to teach him a lesson.

9. The respondent in his statement recorded under Section-313 Cr.P.C., in answer to the question as to why the prosecution witness had deposed against him, stated as follows and also later on alleged false implication in the case: -

"Q. 5 Why the PW's/Complainant deposed against you?"

Ans. House of Hazi Suleman (my Tau) is in front of house of Khalid Bhai, who had been running a factory of making jackets at his tenanted premises. The Karigar of Khalid Bhai used to go on the roof of the factory and used to tease the daughters of my Tau who were residing in their house in front of the factory of Khalid Bhai. Two/three months prior to this incident, I objected the Karigar of Khalid Bhai on account of creating nuisence with my cousin sisters and due to this reason Khalid Bhai was having grudge and enemical relations with me and family members of my Tau and therefore, in connivance with police officials and PW Abdul Wali, I was falsely implicated in this case. Injury on the left hand of Abdul Wali was caused by Khalid Bhai."

10. Upon an overall consideration of entire material of record, this Court is un-persuaded to interfere with the findings of acquittal recorded by the Trial Court. It is a matter of record that despite having received information that the incident occurred in the latter part of 10.11.2004 and having proceeded to make a diary entry, no action towards recording the statement of the injured was taken for four days. PW-2's MLC indicates that he was normal and could make a statement. Though PW-2 stated that he was hospitalized, there is no supporting evidence in the form of a discharge summary or certificate etc in this regard. The prosecution's version is also not free from doubt because in the M.L.C., it is suggested that the weapon of offence was a blunt instrument as against the explicit version of PW-2&3 that the respondent Mohd. Swalin had

inflicted a knife blow. In this case, the weapon of offence itself has not been recovered. Curiously enough, even if it is presumed that PW-2 for some reason was unable to record his statement, the prosecution has not been able to establish why there was inordinate delay in both registering the F.I.R. having regard to the gravity of the offence and also proceeding to record the statement of the other material witness i.e. PW-3 in whose premises the incident is alleged to have occurred. It was not as if PW-3 was injured or otherwise unavailable. One more aspect which cannot be lost sight of is that both PW-2 and PW-3 clearly point to the presence of 7-8 other workers in the factory at the time of the incident. The prosecution did not make any attempt to involve them in the investigation; their identities too have not been revealed. The last aspect is that the respondent, during the trial, consistently maintained being falsely implicated; he attributed this to some kind of grudge by PW-3. This is evident from the suggestion given to the witnesses and even in the statement made under Section 313 Cr.P.C.

11. The acquittal recorded by a criminal Court is an affirmation of the innocence of a person charged with having committed a punishable offence. The Code has advisedly not allowed an appeal to the State against such findings leading to acquittal. Instead, the State has to seek leave of the Court through a petition, to appeal. The authorities have established that in order to apply for leave successfully, the High Court has to be satisfied that the impugned judgment reveals substantial and compelling errors. The grounds on which such substantial or compelling reasons may rest could include, the Trial Court overlooking material evidence; mis-appreciating the law, or its findings resulting in manifest miscarriage of justice. This Court is satisfied that none of these elements are present in this case. The petition, therefore, has to fail and is accordingly dismissed.

**S. RAVINDRA BHAT
(JUDGE)**

**G. P. MITTAL
(JUDGE)**

FEBRUARY 22, 2011

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