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* IN THE HIGH COURT OF DELHI AT NEW DELHI

DECIDED ON: 05.09.2011

+ CRL.L.P. 8/2011
CRL. M.A. 142/2011

STATE Petitioner

Through: Mr. Kr. Vijayendra, proxy for
Mr. Salim Ahmed, APP with I.O. Mahavir Prasad,
PS Patel Nagar.

versus

MOHD ALI & ORS Respondents

Through: Ms. Charu Verma, Advocate for R-1&4.
Mr. Shiv Charan Garg with Mr. Imran Khan,
Advocates for R-6.,

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)

% Mohd. Ali, Mohd. Sitare and Daya Kishan, respondent nos.1, 2 & 6 respectively -
are present. Respondent nos.3, 4 & 5 are not present. Notice was published in respect of
respondent nos.3&5 as per the previous order. Second respondent is present pursuant to
the directions given on the previous date. In these circumstances, service is complete.

2. In this petition, the State seeks leave to appeal against the judgment and order passed by the Additional Sessions Judge dated 26.05.2010, acquitting the respondents from the charges punishable under Sections 392/394/395/397/307/412 and 34, IPC.

3. The prosecution alleged that in the night intervening 23/24.10.2005, the complainant PW-2, a Security Guard with the Group-4 Security of the Delhi Metro Rail Corporation patrolling its tracks at the Metro Station Kirti Nagar, noticed four boys around 02:30 AM, cutting copper wire which was kept by the side of the track. Upon his questioning them for the identity, the boys claimed to be members of the Metro project staff. PW-2 asked them to produce their identity cards, which they refused. Suspecting them to be thieves, he asked them to leave the spot. He stated that after half an hour, the four boys returned; one was armed with katta, another with a knife, a third with rod and a fourth with saw, used for cutting the wire. One of them abused him saying that now we would show the identity cards and started removing the wire which was cut earlier. When he tried to stop them, the boy armed with katta fired and attempted to take away the wire. He claimed to have been hit on the head with stone by a boy. He fired in the air; the boy placed the katta on him. PW-2 stated that he fired again in defence which hit one of the boys. At this stage, other security guards, (who were joined as witnesses in the investigation and also deposed in the case), reached the spot and witnessed the occurrence. On receiving the shot, the boy died and the others managed to flee with the wire.

4. After concluding the investigation, the police arrested the respondents and charged them with committing offences punishable under Sections 392/394/395/397/307/34 IPC. The police also claimed that a quantity of 310 Kgs. of

copper wire was recovered from one of the respondents - Daya Kishan. The prosecution, during the course of the trial, examined 21 witnesses besides relying upon exhibits. By the impugned judgment, the respondents were acquitted.

5. It is urged that the State ought to be granted leave to appeal having regard to the combined testimony of the eye witnesses i.e. PW-1, 2 and 5 and the recoveries made in this case at the instance of the accused/respondents of the copper wire as well as the katta. Counsel urged that the reasoning which persuaded the Trial Court to acquit the respondents is not tenable having regard to the overall circumstances. The refusal of identification by one of the accused at least ought to have resulted in an adverse inference as far as he was concerned. The other accused, counsel urged, were identified during the T.I.P. proceedings.

6. Learned *Amicus* who was appointed to represent some of the respondents urged in reply that there is no substantial or compelling reasons which warrants the grant of leave. It was urged that the prosecutions' theory about the respondents having committed the offences improbable to show the least. Learned *Amicus* pointed out that according to the prosecution, there were only four boys, one of whom (Sikander) died as a result of the firing by PW-2. In these circumstances, there was a high degree of probability about the identity of the other unknown attackers that the prosecution sought to implicate the present respondents falsely. Learned counsel also emphasized that there were *inter se* contradictions between the witnesses and that the testimony of PW-2 was highly improbable which the Trial Court highlighted in the course of its judgment. It was also urged that PW-10 who witnessed the recovery of all articles turned hostile and the katta alleged recovered at the instance of the accused was not witnessed by any member of the

general public.

7. Learned counsel for respondent no.6 Daya Kishan submitted that he was falsely implicated in this case. It was submitted that this accused had, right from the inception of the investigation, after joining the proceedings, claimed to be dealer in copper wire and had even produced evidence in support of the purchase of the wire and other materials seized from him. Counsel submitted that on overall consideration of the evidence including the testimony of DW-1 who has supported his case, the Trial Court correctly deduced that he was not involved in the offence.

8. We have considered the submissions advanced on behalf of the parties' counsel and also considered the Trial Court's records. At this stage, it would be pertinent to extract the relevant discussion pertaining to the analyses made by the impugned judgment vis-à-vis the credibility of two witnesses which is as follows: -

“28. PW3 Sh. Yogender Kumar who was on duty at platform had given entirely different version which is to the effect that on 23.10.2005 at about 2.30 am four boys came to the track to cut the copper wire and were asked to leave by Sh.Kamakhaya Narain Singh who was on duty at Pole No.68. Thereafter he alongwith Sh. Kamakhaya Narain Singh (PW2) sat with Prem Vallabh Joshi (PW5) and Basant Kumar (PW1) at the entry gate for about 10 minutes and took water there. They again took round of the station and went up. While he went upto the end of the platform, Sh. Kamakhaya Narain Singh went ahead and they saw those boys present again to commit the theft and Sh. Kamakhaya Narain Singh had fight with them. He tried to call his associate Joshi by that time. Thus, this statement also proves that PW3 Sh. Yogender Kumar was not alongwith Kamakhaya Narain Singh at that time. It is further mentioned in his statement that he heard the noise of two fires and when he reached near Kamakhaya Narain Singh (PW2) he told them that one of those boys had suffered bullet injury and others had run away. Thus, as per his version, they were four boys and out of them, one suffered bullet injury and remaining three ran away. PW1 Sh. Basant Kumar, PW2 Sh. Kamakhaya Narain Singh, PW3 Sh. Yogender Kumar and PW5 Sh. Prem Vallabh Joshi were security guards on duty at

different points but none of them could explain as to how the four persons could reach upto the metro track without knowledge of the person on duty at entry gate and at platform and from which route they escaped and entered again on the track. The photographs of the metro track placed on record clearly show that from such a height, it was not possible to jump from the track to the road. None of the security guard had stated that the accused had used some other mode like rope to reach upto the track or get down from there. It is only the IO SI Manoj Kumar (PW13), in his statement, has mentioned that accused persons used iron patta and rope to reach the railway track. At least when the accused persons were escaping from the track, this iron patta and rope could have been noticed by the security personnels and when they had been made to run away by Kamakhya Narain Singh at 2.30 am, if he knew that they were thieves and were likely to return again and even discussed the matter with other security guards on duty, how is that the escape route i.e through rope was not noticed by any of the security personnels so much so that following the same route/mode those persons could reach the metro track again, which is at sufficient height, without they being noticed by any of the security official. The crime team has been called at the spot by the IO and the track as well as the dead body had been photographed. When the thieves knew that one of their associate had been shot dead by security guard Kamakhya Narain Singh, the complainant, was it possible for them to get down from that track from such a height through rope alongwith the weapons which they were carrying and copper wire. In normal circumstances, seeing the fate being meted out to one of their associate, who was shot dead, their mental condition could not have been such as to get down using the rope in presence of four security personnels namely Sh. Bansant Kumar (PW1), Sh. Kamakhya Narain Singh (PW2), Sh. Yogender Kumar (PW3) and Sh. Prem Vallabh Joshi (PW5). It was very easy for the four security guards to overpower the three boys (one of them being already dead) and pull up the rope, if any, used by the thieves for reaching up to the track so as to apprehend them at the track itself. Even otherwise it was not possible for the remaining three thieves to get down through that rope in full view of four security guards alongwith the copper wire (as stated by PW2 Sh. Kamakhya Narain Singh) and also take away the rope from there to enable the IO to recover the same from the jhuggi of Lal Mohd. (juvenile). It is also relevant to mention here that PW1 Sh. Basant Kumar while stating that one of the boy died with bullet injury and the three ran away, could not identify any of the accused stating that it was night time and he was at some distance. He has specifically denied the suggestion given by Id. Addl. PP that Mohd. Ali, Mohd. Sitare, Vipin Kumar, Neel Bahadur and

Mohd. Ansar were the persons involved in this occurrence. This is again a surprising thing that four persons allegedly came to the track to commit the theft, one was shot dead and still five persons (6th accused is charged as receiver) are facing trial before this Court and juveniles are separately facing trial. Even PW3. Sh. Yogender Kumar has also not identified all the accused persons but identified one Mohd. Ali stating that he was leading the group first time as well as second time. Again it remains unexplained as to how he can state about this accused being leading the group first time also when he was not present alongwith PW2 Sh. Kamakhaya Narain Singh on the track at that time and was also not with him on the track when the thieves came for the second time, rather he was on duty at the platform. PW5 Sh. Prem Vallabh Joshi has also not identified the thieves/accused persons stating that it was dark and he was at a distance.

29. So far as complainant Sh. Kamakhaya Narain Singh (PW2) is concerned, his statement is nothing but an attempt to save himself from the offence which he committed. Initially he mentioned four persons who came to the track but subsequently he changed his version to the extent that the persons cutting wire from the track were throwing down the same which was collected by some other persons which is again contrary to the version given by other security guards. It is pertinent to note that even as per the complaint, the moment four persons came to the track and noted by the complainant Kamakhaya Narain Singh and were made to flee from there after making inquiry about their identity, it was nowhere mentioned that they had already cut some wire by that time and left it on the track. So he had made further improvement and his statement that when they came second time, after quarreling with him, tried to take away the copper wire which had already been cut by them which was objected by him and one of them made fire with a katta and other hit on his head with a stone. PW2 Sh. Kamakhaya Narain Singh has not suffered any bullet injury and this version seems to have been given by him just to save himself. It has come in the statement of PW3 Sh. Yogender Kumar that he heard the noise of two fires and even as per the complainant Sh. Kamakhaya Narain Singh, he has made two fires, one in air and other that hit the boy Sikander Ali. So where is the question of fire being made on him by any of the accused persons from the katta.”

9. We notice that besides these aspects, the Trial Court also disbelieved the recovery of the katta from the accused noticing that no independent person had been joined in the

recovery proceedings. The Court further believed the accused' version that they could be identified during the T.I.P. since their photographs were shown to the concerned witnesses after their arrest. The Trial Court also noticed a significant improbability in the testimony of the eye witness PW-2 i.e. that the crime is alleged to have occurred after a previous incident which took place the same day half an hour before the actual offence.

10. The Code of Criminal Procedure does not admit an appeal against an acquittal; the reason being the judgment acquitting accused alleged to have committed an offence is an affirmation of their innocence. In the absence of compelling or substantial reasons (which include gross mis-appreciation of facts or improper understanding of law or its application), the Court would desist from granting leave with the view to interfere with the Trial Court's findings. In this case, the reasons cited by the Trial Court are sound. Besides, the sheer improbability of the accused (four of them consistently being spoken to in respect of both the incidents, one of whom died in the firing incident) being involved in the offence, has been highlighted. If indeed there were four security guards, as the prosecution stated, it defies logic as to why after being turned away, the same people would return and commit the crime. Furthermore, the identity of the four involved in the offences is suspect because one of them had died. Another very gross fact is that the spot of occurrence was at the elevation when the Delhi Metro was being constructed. If the prosecution's version were to be believed, copper wire which was either coiled or in the strip form to the extent of 310 Kg were cut, hoisted, thrown down, and also collected by the accused who were able to successfully flee the spot. This aspect has been mentioned only to highlight the sheer improbability of the allegations.

11. Having regard to the entire conspectus of circumstances, we are satisfied that no

substantial or compelling reasons exists in this case warranting the grant of leave.
CRL.L.P. 8/2011 is, therefore, dismissed.

**S. RAVINDRA BHAT
(JUDGE)**

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

SEPTEMBER 05, 2011
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