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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CRL.A. 426/2001**

Date of Decision: 3rd October, 2013

LAXMAN & ANR.

..... Appellants

Through: Mr. S.C. Phogat, Advocate with
appellants in person.

versus

STATE GOVT. OF N.C.T. OF DELHI

..... Respondent

Through: Ms. Fizani Husain, APP for the State.

CORAM:

HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

:SUNITA GUPTA, J.

1. Challenge in this appeal is to the judgment dated 10.05.2001 and the order of sentence dated 14.05.2001 vide which the appellants were convicted for offence punishable u/s 307/34 IPC and sentenced to undergo simple imprisonment for 3 years and fine of Rs.5,000/- each, in default of payment of fine, to undergo simple imprisonment for 5 months.

2. The prosecution case as revealed from report u/s 173 of the Cr.P.C, 1973 is that on 15.11.1995, on receipt of DD No.82B dated 01.11.1995, SI Surender Kumar Guliya reached Maharaja Agrasen Hospital where Kamal Kumar was found admitted in the hospital. He gave a statement, inter alia, to the effect that he is doing white washing and painting work. For last one

month he was working with Contractor Laxman and his brother Tejpal, resident of DDA Flats, Ranjit Nagar, near Satyam cinema. In the month of October 1995, he was doing white washing work at Ranjit Nagar, DDA Flats on the asking of the aforesaid contractors. On 29.10.1995, he demanded his dues of Rs.1,400/-. However, they told him to pay the amount whenever the same will be available, as such he did not go for work on 30/31.10.1995. On 01.11.1995, both the brothers came to his house and told him that they will settle his dues and as such he should report there for work. He along with his associate Surender Kumar Yadav who used to reside in his house and was also doing white wash work went along with the Contractors to DDA flats, Ranjit Nagar. At about 5 p.m he demanded his payment, then they asked him to paint the *garder*. However, he told them that since the duty hours are over, therefore, he will finish the work on the next day. But they insisted, on which he told them that in order to paint the *garder*, there is need of stairs otherwise it will be dangerous. However, Laxman insisted him to do the painting work by holding the railing. Despite his refusal, they did not agree and under compulsion, he started doing the painting work. At about 6 p.m, Tejpal gave a kick blow on the railing as a result of which he lost his balance. *Saria* of the railing got broken as a result of which, he fell down from the third floor and became unconscious. On the basis of this statement, FIR u/s 288/337 IPC was registered.

3. During the course of investigation, both the accused were arrested and a charge-sheet was submitted u/s 288/338/307 IPC. Charge for offence u/s 307/34 IPC was framed against both the appellants to which they pleaded not guilty and claimed trial.

4. In order to substantiate its case, prosecution examined seven witnesses. All the incriminating evidence appearing against the accused was put to them. They pleaded their innocence and alleged that due to strained relations, this false case has been foisted upon them. They have examined two witnesses in support of their defence. After hearing learned counsel for the parties, vide impugned judgment, both the appellants were convicted for offence u/s 307/34 IPC and sentenced as stated above. Feeling aggrieved by the same, the present appeal has been preferred by them.

5. I have heard Mr.S.C.Phogat, learned counsel for the petitioner and Ms. Fizani Hussain, learned APP for the State and have perused the record. Learned counsel for the appellant submitted that although the incident is alleged to have taken place on 01.11.1995, however, the FIR has been registered only on 15.11.1995. No satisfactory explanation has come on record for delay in lodging the FIR. It was submitted that Ex.PW6/DA and Ex.PW6/DB are the first statement of injured and his father wherein they have stated that while painting the *garder*, accidentally, his leg slipped as a result of which Kamal fell down and sustained injuries. Therefore, when on receipt of information, the SI went to the hospital, he recorded in DD No.91B

that the incident had taken place accidentally and the DD was kept pending. After 15 days of deliberation, a fresh statement was given by the injured implicating the appellants. No reliance can be placed on the testimony of PW3 Surender Kumar Yadav who is a planted witness. He was not present at the spot. In fact he is the tenant of father of injured and at his behest he has given the statement, that too on 16.11.1995. It was further submitted that the statements, Ex. PW6/DA and Ex.PW6/DB were intentionally suppressed and were not supplied to the accused while supplying copies of the documents u/s 207 Cr.P.C. It was only during cross examination of PW6 that these documents could be placed on record from police file. The father of the injured who had taken the injured to hospital has not been examined by the prosecution. The accused are related to the injured and the relations between them are strained, as such, in order to take revenge and to extort money from them, they have been falsely implicated in this case after 15 days of the incident. Furthermore, as regards accused Laxman is concerned it was submitted that Section 34 IPC has no applicability, inasmuch as the allegations, at best, are that he was present at the spot but no overt act is attributed to this accused as the allegations are confined to Tejpal that he gave a kick blow on the railing as a result of which he lost his balance and the *sariah* got broken and he fell down, as such, he otherwise could not have been convicted u/s 307 IPC with the aid of Section 34 IPC. As such, it was submitted that the impugned judgment is liable to be set aside and both the

appellants are entitled to be acquitted. Reliance was placed on *State v. Ramesh*, 1998(1) JCC (Delhi) 130; *Sajjad Ali Khan @ Sanjay @ Sajjan v. State of Delhi*, 2000(1) JCC(Delhi) 109 and *Kanhai Mishra alias Kanhaiya Misra v. State of Bihar*, 2001(2)JCC(SC)5.

6. Learned Public Prosecutor on the other hand supported the judgment of the learned Trial court and submitted that there is no infirmity in the impugned order which calls for interference and as such, appeal is liable to be dismissed.

7. I have given my considerable thoughts to learned counsel for the parties and have perused the record.

8. PW2 Kamal Kumar is the star witness of prosecution. He unfolded that he is related to the accused persons who are *phoofas* of his wife. In October 1995, he started working with them. He was doing white washing work while they were Contractors. In the month of October, he demanded his balance amount of Rs.1,400/- which they refused on the pretext that whenever the amount will be available, they will pay the same. Therefore, on 30.10.1995 and 31.10.1995, he did not go for his work. On 01.11.1995, both the accused came to his house and assured him to settle his dues. Therefore, he along with Surender Yadav, went to House No.411, Ranjit Nagar belonging to Sh. Ashok Talwar for doing white washing. After finishing his work, he demanded his dues at about 5 p.m but they told him that they will make the payment after he paints the iron *garder* which was in the balcony.

He told them that since duty hours are over, therefore, he will do work on the next day but they insisted that they will make the payment only when he will finish the work. He expressed his inability to paint the *garder* without stairs. But accused Laxman asked him to paint the *garder* after holding the railing. As such, at their insistence, he started painting the *garder* while standing on the railing. When he again insisted for stairs then they started abusing him. Under their threat he started painting the *garder*. At about 6 p.m, accused Tejpal asked him to finish the work quickly and gave a kick blow on the railing as a result of which the *saria* of the railing got broken and he fell down as a result of which he sustained injuries. Laxman brought him to his house. His father took him to the hospital. Accused Tejpal also came and they did not allow him to get admitted in RML hospital. He was taken to AIIMS by Inspector Surender. He was made to sign certain blank papers on the pretext that they will get him admitted in AIIMS. However, the hospital authorities at AIIMS did not admit him. Thereafter he went to Safdarjung hospital where after giving first aid he was discharged. Then he got himself admitted in Maharaja Agrasen hospital, Punjabi Bagh. Thereafter he narrated the entire incident to his family members who informed the police. Police came and recorded his statement Ex.PW2/A. Due to sustaining injuries, he has become 90% handicapped. He made a complaint against Insp.Surender Kumar Gulia. In cross examination he denied that he was got admitted in AIIMS by his father or that he was inquired by the duty constable in the

hospital as to how he sustained injuries and then he informed duty constable Amin Mehek that he fell down accidentally while doing white washing or that his father also confirmed this fact to the duty constable. He also denied that on receipt of information from Duty Constable, SI Surender Kumar Gulia and Ct. Rajesh came from P.S. Patel Nagar or that SI Gulia sought the information from the Doctor regarding his fitness for making the statement and thereafter his statement was recorded. He admitted his signatures at Point A on the statement dated 01.11.1995, Ex.PW-2/DA and went on stating that his signatures were obtained on blank paper. According to him he was taken to RML hospital by contactor Laxman and his father. He denied the suggestion that since he informed the official at RML hospital that he had sustained injuries by falling accidentally from a height, therefore, his MLC was not prepared at RML hospital. He admitted that he was taken to AIIMS. However, he denied that any inquiry was made by the Doctor at AIIMS as to how he sustained injuries. He also denied that inquiries were also made from his father by the doctor, who also reported that due to fall from stairs he accidentally sustained injuries. He admitted that since no bed was available at AIIMS, as such he was shifted to Safdarjung hospital. He denied the suggestion that he lodged the complaint on 15.11.1995 under the pressure of Labour Union or that in order to take revenge from the accused persons, he got them falsely implicated in this case.

9. PW3 Surender Kumar Yadav has deposed that on 01.11.1995, he along with Kamal Kumar had gone to the house of Sh.Ashok Talwar at New Ranjit Nagar for doing white washing along with contractors Laxman and Tejpal. After finishing duty hours, Kamal demanded payment but Laxman insisted that he paint the *garder* first. Kamal declined by saying that neither staircase nor *jhula* was available and, therefore, it will not be possible to paint the *garder* but Tejpal abused and threatened to throw him from upstairs. Under pressure Kamal started painting the *garder*. Tejpal gave a kick blow as a result of which *saria* got broken and due to imbalance Kamal fell down and became unconscious. He provided milk to Kamal, then he gained consciousness. By that time Tejpal had left the spot. He with the help of Laxman removed Kamal to a private hospital. Police came and he informed about the incident. In cross examination he admitted that he was residing as a tenant with the father of the injured at the time of incident. He admitted that after the incident he neither informed the police at 100 no. nor called the PCR nor went to the police station to lodge the report.

10. PW4 Dr. D.N.Bhardwaj proved the MLC Ex.PW-4/A of injured Kamal Kumar dated 01.11.1995 prepared by Dr. Elengo. In cross examination he admitted that whatever is told about the cause of injury either by the patient or by the person bringing him is recorded in the MLC. He admitted that in the MLC Ex.PW 4/A, the cause of injury is written as “history of fall from a

height around 6 p.m today”. He also certified the opinion, Ex.PW4/B given by the doctor declaring Kamal Kumar to be “fit for statement”.

11. PW5 Dr.Prem Kumar from AIIMS has deposed that as per the casualty card Kamal Kumar was brought to the casualty of AIIMS with a history of fall from height around 6 p.m on 01.11.995. The patient was advised admission in Ortho in the emergency ward. Because of non-availability of vacant bed in the said ward, the case was referred to Safdarjung hospital.

12. PW-6 SI Manoj Kumar was handed over the investigation of the case on 01.12.1996. He recorded the supplementary statement of Kamal Kumar and Surender Kumar Yadav. Thereafter, he prepared the charge-sheet. In cross examination, he deposed that original signed statement of mark B and Ex.PW2/A were not handed over by the Investigating Office SI Surender Kumar Guliya when the investigation was handed over to him. Although he denied the suggestion that original statement of these witnesses was in the police file, however, on seeing the police file, he admitted that original statement of Kamal Kumar and Kanhiya Lal were available which were exhibited as PW 6/DA and Ex.PW6/DB. He denied the suggestion that deliberately he did not place on record these documents as these were favourable to the accused. He admitted that in DD Ex.PW6/DD it is mentioned that the statement of injured Kamal Kumar as well as his father were recorded and both of them had stated that injured had fallen due to slip of his foot while doing white washing.

13. PW7 SI Surender Kumar Guliya is the first Investigating Officer of the case. He has deposed that on 01.11.1995, on receipt of DD No.82B, he along with Constable Rajesh went to AIIMS where injured Kamal Kumar was found admitted in the hospital and his father Kanhaiya Lal was also present there. He made enquiries and recorded statement of Kamal Kumar and Kanhiya Lal, Ex.PW6/DA and Ex.PW 6/DB respectively to the effect that while doing white washing at Ranjit Nagar, Kamal Kumar fell down from the second floor due to slip of his foot, as such the DD entry was kept for enquiry. On 14.11.1995 Kanhiya Lal came to the Duty Officer and got recorded the DD entry wherein he told that his son was admitted in Maharaja Agrasen hospital and he wanted to give his second statement as his son had not fallen accidentally but had been pushed while white washing. On 15.11.1995, he went to Maharaja Agrasen hospital and recorded the statement of Kamal Kumar, Ex.PW2/A and then made endorsement Ex.PW7/A for registration of case u/s 288/337 IPC and got the case registered. Thereafter he along with Surender Kumar Yadav went to Ranjit Nagar and at his instance, prepared the site plan Ex.PW7/B. He arrested both the accused. On the instructions of SHO on 09.01.1996, he added Section 307 IPC and further investigation was handed over to SI Manoj Kumar. In cross examination, he admitted that vide DD No.82B dated 01.11.995, P.S. Patel Nagar, Ex.PW6/DC, Duty Constable Amin Ul Haq from AIIMS had informed P.S. Patel Nagar that son of Kanhiya Lal had fallen from a height while doing

white washing and had been admitted by his father. He admitted that this information was recorded at 11.30 p.m and the DD was marked to him, as such, he along with Ct. Rajesh Kumar went to hospital. He collected MLC of injured Kamal Kumar. He made a request vide Ex.PW 4/B seeking permission of the doctor to record the statement of injured Kamal Kumar and the doctor declared the injured fit for statement. Thereafter he recorded statement of Kamal Kumar PW 6/DA and his father Ex. PW6/DB. In view of the statement of the injured and his father, since the injuries had been sustained by Kamal Kumar accidentally and no one was at fault, therefore, he made a noting "*Mamla Itfakiya Payaa Jaata Hain*". He admitted that from 02.11.1995 to 15.11.1995, he did not receive any intimation from the authorities of Maharaja Agrasen hospital or the Duty Constable of the said hospital regarding admission of injured Kamal Kumar and his subsequent treatment.

14. Accused Tejpal in his statement recorded u/s 313 Cr.P.C has denied the case of prosecution. According to him, he never undertook any job at flat No.419, Ranjit Nagar and is unconnected with the said site. Sh. Bal Kishan, father-in-law of injured Kamal Kumar is his brother-in-law. He was a mediator in getting Kamal Kumar married with Gita, daughter of Balkishan. Gita was harassed by her husband Kamal Kumar and her father-in-law Kanhiya Lal. He advised injured Kamal Kumar and his father not to harass Gita on account of demand of money, on which he was advised by Kamal

Kumar and his father not to visit them. He and his brother were falsely implicated in this case due to enmity.

15. Accused Laxman also took the same plea that due to inimical relations, he has been falsely implicated in this case. He further stated that he is a daily wager and used to sit at Shankar Road Chowk. He along with injured Kamal Kumar was engaged in the morning on 01.11.1995 from Shankar Road Chowk as daily wage earner by one Ashok K. Talwar for white washing his house. He worked till 5 p.m. After taking his wages from Ashok Talwar he went to his house. At about 5.45/6 p.m, one person came to his house and informed him that his relative had fallen while white washing the house. He rushed to the said flat of Ashok Talwar and found Kamal Kumar sitting on the ground floor below the flat and Ashok Talwar was also standing there. Ashok Talwar informed that Kamal Kumar had fallen while white washing and he should take Kamal Kumar to his house. He took Kamal Kumar in a taxi to the house of Kanhaiya Lal where Kamal Kumar informed his father that he had fallen while doing white washing as his foot had slipped. Kanhiya Lal asked him to accompany him to Wellington hospital. Kanhiya Lal took the injured inside R.M.L.Hospital. Thereafter Kamal Kumar was taken to AIIMS by Kanhiya Lal. Thereafter Kanhaiya Lal came out and informed that since there was no bed available, as such Kamal Kumar was to be shifted to Safdarjung hospital. After Kamal Kumar was taken to Safdarjung hospital he

returned back to his house. He has been falsely implicated in this case at the instance of Kanhiya Lal, Kamal Kumar and Labour Union.

16. They examined DW1 Jaswant Singh, Record Clerk from RML hospital who brought the record pertaining to Kamal Kumar with the alleged history of fall and, therefore, it was a non-MLC case. DW2 J.B.Bhardwaj, Medical Record Technician from Safdarjung hospital also brought the register. At sl.no.21071 dated 01.11.1995, Kamal was brought for treatment in the hospital and there is a mention that the patient was brought with history of fall from first floor.

17. The aforesaid evidence coming on record clearly reflects that two sets of evidence are forthcoming, inasmuch as after Kamal Kumar sustained injuries initially he was taken to R.M.L.hospital. However as deposed by DW1 it was a case of non-MLC as the patient was brought to the hospital with history of fall only. Thereafter the injured was taken to AIIMS where vide DD No.82B Ex.PW6/DC Duty Constable Amin Ul Haq informed P.S. Patel Nagar that one Kamal Kumar, son of Kanhaiya Lal had fallen from a height while doing white washing and had been admitted by his father. On receipt of this information, DD No.82B was recorded and assigned to SI Surender Kumar Guliya who went to AIIMS where he found injured Kamal Kumar admitted in the hospital and he also met his father Kanhaiya Lal. SI Surender Kumar collected MLC of injured Kamal Kumar. At the same time in order to record statement of injured, he moved an application Ex.PW 4/B

seeking permission of the doctor to record his statement. After the doctor declared the injured fit for statement, he recorded statement of injured Kamal Kumar Ex.PW6/DA wherein he stated that while doing white washing wok, he accidentally fell from top and sustained injuries. Similar statement was made by his father Kanhiya Lal, Ex.PW6/DB. Since nobody was found at fault, therefore, the DD was kept pending. Since no bed was available in AIIMS, as such, as deposed by Dr. Prem Kumar PW5, the injured was referred to Safdarjung hospital. It is the case of injured himself that after giving first aid and putting plaster, he was discharged from Safdarjung hospital. Therefore, he got himself admitted in Maharaja Agrasen hospital, Punjabi Baagh. During the period 02.11.1995 till 14.11.1995, no information was given to the police station regarding admission of Kamal Kumar in Maharaja Agrasen hospital. It was only on 14.11.1995 Kanhaiya Lal went to police station and informed the Duty Officer regarding admission of his son in Maharaja Agrasen hospital and that he wanted to give another statement then SI Surender Kumar Guliya went to Maharaja Agrasen hospital and recorded statement of Kamal Kumar, Ex.PW 2/A where for the first time he levelled allegations against the accused persons to be responsible for his fall from third floor. As such, there is substantial delay in lodging the FIR.

18. In *Sajjad Ali Khan*(supra), reference was made to *Mehraj Singh v. State of M.P*, 1994 SCC(Crl.)1390 where it was held:

“that the object of insisting upon prompt lodging to the F.I.R is to obtain the earliest information regarding the circumstances in which the crime was committed. Delay in lodging the F.I.R often results in embellishments, which is a creature of an afterthought. On account of delay, the F.I.R not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story”.

19. Relying upon this authority, in *Sajjad Ali Khan*(supra), delay of one day in lodging the FIR was considered to be fatal in the absence of furnishing any explanation by prosecution about the delay in lodging the FIR. It was observed that this circumstance to a great extent probablises the case of defence that FIR was lodged after due deliberation. In *State v Ramesh*(supra), delay of 13 hours in lodging the FIR was considered to be fatal by observing that possibility of lodging FIR after consultation cannot be brushed aside. Similarly in *Kanhai Mishra*(supra), delay of two hours in lodging FIR was considered to be an inordinate delay which was fatal to the prosecution case.

20. In the instant case, there is delay of about 14 days in lodging the FIR for which no satisfactory explanation is given. Learned Trial Court observed that since as per the deposition of injured Kamal Kumar, he was satisfied with the treatment in Maharaja Agrasen hospital, therefore, lodging of FIR at that stage cannot be considered to be fatal. The mere fact that the injured was satisfied with the treatment cannot be made a ground for not lodging the complaint at the earliest available opportunity, more particularly when, it is not the case of the injured that he was not fit for making statement prior

thereto. Rather it has come on record that on the day of incident itself the patient was fit for statement and, therefore, SI Surender Kumar Guliya recorded his statement after obtaining the requisite certificate from the doctor wherein he stated that due to accidental fall from a height he sustained injuries and nobody was at fault. Similar statement to this effect was made by his father. Although a plea has been tried to be taken by the injured that his signatures were obtained on blank paper but there is nothing on record to show that at the earliest available opportunity any complaint was made either by the injured or his father that their signatures were obtained on blank paper by the Investigating Officer of the case. As such, possibility of the delay of 14 days in lodging the FIR after due deliberation cannot be ruled out. The plea of the accused that the same was due to inimical relations between the injured and the accused cannot be brushed aside. It is not in dispute that the injured and the accused persons are distantly related to each other. In fact, accused Laxman was mediator to the marriage of Kamal Kumar with Gita who was the daughter of Bal Kishan, his brother-in-law. According to the accused, since Gita used to be harassed by Kamal Kumar and his father Kanhaiya Lal, therefore, he had advised them not to harass Gita whereupon Kamal and his father asked him to not visit their house again. This has been attributed as the reason for false implication of the accused in this case. The fact that after making the initial statement Ex.PW6/DA and PW 6/DB wherein, neither the injured nor his father levelled any allegations against the

appellant and it was only after 14 days of the incident that their names figured in the statement Ex.PW2/A which culminated in registration of FIR against the accused persons, possibility of manipulation and embellishment cannot be ruled out.

21. As regards testimony of PW3 Surender Kumar, same does not inspire confidence inasmuch as, according to this witness, he was present along with Kamal Kumar on the day of the incident. However, admittedly, neither he informed the police nor went to police station to lodge any report. In fact till 15.11.1995 he did not give statement to the police. It is not in dispute that he was a tenant in the house of Kanhaiya Lal, father of the injured and even on the day when he came to depose before the Court he had come with Kanhiya Lal only. That being so, his presence at the spot is not proved beyond reasonable doubt. Father of injured Kanhiyalal whose statement Ex.PW6/DB was recorded by the Investigating Officer of the case and who took his son to hospital, has not been examined by prosecution for reasons best known to them.

22. In fact two sets of evidence are forthcoming. One is the initial statement made by the injured and his father where they did not level any allegations against anybody and in fact alleged that it was an accidental fall due to which reason, the DD was kept pending. On the other hand, after a gap of 14 days, the injured gave a statement implicating the accused persons. The very fact that two sets of evidence are forthcoming makes it clear that

prosecution has not proved the guilt of accused beyond reasonable doubt and the accused is entitled to get benefit of the same. It is the settled principle of criminal jurisprudence that the burden of proving the guilt of accused is squarely upon the prosecution and in case of any doubt, accused is entitled to get benefit of the same.

23. In *State of Uttar Pradesh vs. Nandu Vishwakarma*, 2009(4) JCC 2525, Supreme Court held:

“23. It is settled principle of law that when on the basis of evidence on record two views could be taken- one in favour of the accused and the other against the accused- the one favouring the accused should always be accepted.”

24. Similar view was taken in *K.P.Thimmappa Gowda v. State of Karnataka*, AIR 2011 SC 2564, where it was held that in criminal case, the rule is that the accused is entitled to the benefit of doubt. If the Court is of the opinion that on the evidence two views are possible, one that the appellant is guilty, and the other that he is innocent, then the benefit of doubt goes in favour of the accused.

25. In view of the aforesaid legal position, since in the instant case, two views are possible, one favouring the appellant and another against them, as such, in view of the established principles of criminal jurisprudence, the appellants are entitled to the benefit of doubt.

26. The submission of learned counsel for appellant that accused Laxman, even otherwise, could not have been convicted u/s 307 IPC with aid of

Section 34 IPC has force inasmuch as no overt act has been attributed to him. If accused Tejpal gave a kick blow to the railing, resulting in *saria* to be broken and falling of injured from top, this accused cannot be said to share common intention with co-accused Tejpal. Therefore, he could not have been convicted u/s 307/34 IPC.

27. In any case, since in the instant case, prosecution cannot be said to have established its case beyond shadow of doubt, both the accused are entitled to benefit of doubt. That being so, the appeal is allowed. The impugned order of conviction u/s 307/34 IPC and the sentence imposed upon them for that offence is set aside. The appellants are acquitted of the offence alleged against them. Their bail bonds are discharged. Fine, if paid, shall be refunded to them. Copy of this order along with trial Court record be sent back.

**SUNITA GUPTA
(JUDGE)**

October 03, 2013
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