

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

RESERVED ON : 3RD JANUARY, 2013

DECIDED ON : 21st JANUARY, 2013

+ CRL.A.370/2011

KAMAL SINGH @ KALU Appellant

Through : Mr.Anupam Sharma, Advocate

versus

STATE OF DELHI Respondent

Through : Mr.M.N.Dudeja, APP.

AND

+ CRL.A.551/2011 & CRL.M.B.1289/2012

MAHENDER @ LAMBOO Appellant

**Through : Mr.Mukesh Kalia with Mr.Hari Sharan
Singh, Advocates.**

versus

THE STATE Respondent

Through : Mr.M.N.Dudeja, APP.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Appellants- Kamal Singh @ Kalu (A-1) and Mahender @ Lamboo (A-2) have preferred the present appeals against the judgment dated 29.01.2011 and order on sentence dated 01.02.2011 of learned CRL.A.Nos.370/11 & 551/2011

Additional Sessions Judge in Sessions Case No.348/2007 by which they were held guilty and convicted for committing offences punishable under Section 186/353/307/34 IPC. A-2 was further convicted under Section 27 of the Arms Act. Both the appellants were sentenced to undergo RI for three months under Section 186; RI for two years under Section 353 and RI for four years under Section 307 IPC with fine of ₹5,000/-, each and in default of payment of fine to undergo SI for five months each. A-2 was further sentenced to undergo RI for three years with fine of ₹3,000/- and in default of payment of fine to undergo SI for three months under Section 27 of the Arms Act. All the sentences were directed to run concurrently.

2. On 04.11.2005, HC Sushil Kumar and Const.Virender Kumar were on patrolling duty near railway lines Industrial Area, Phase-I Mangol Puri. Allegations against the accused are that they were present with their motorcycle No.DL-8S AF-0471 there. At about 06.45 P.M. when HC Sushil Kumar and Const.Virender reached the spot, A-2 took out a katta from the dub of the pant and asked them to hand over what they had. When they (HC Sushil Kumar and Const.Virender) told that they were police officials and the katta should be handed over to them, A-1 exhorted A-2 to fire at them. A-2 thereupon fired at HC Sushil Kumar. However, he managed to escape and over-powered A-2. The katta was snatched from

him. A-1 was overpowered by Const.Virender. ASI Krishan Chandra reached the spot and conducted necessary proceedings. He recorded statements of the witnesses conversant with facts. Sanction under Section 39 of the Arms Act was obtained. He sent the exhibits to Forensic Science Laboratory and collected reports. After completion of the investigation, a charge-sheet was submitted against the appellants for the commission of the offences described previously.

3. The prosecution examined nine witnesses in all to prove the charges against the appellants. They pleaded not guilty and claimed that they were falsely implicated in this case. After appreciating the evidence on record and considering the rival contentions of the parties, the Trial Court by the impugned judgment convicted the appellants. Being aggrieved the appellants have preferred the appeals.

4. Learned counsel for the appellants while assailing the impugned judgment of the Trial Court has urged that it did not appreciate the evidence in its true and proper perspective and fell into grave error in relying upon the testimonies of PW-2 (HC Sushil Kumar) and PW-3 (Const.Virender) who were police witnesses without ensuring their credibility. A-1 was known to the police officials and they were witnesses against him in many cases. It was highly unbelievable that the accused

would dare to rob police officials known to them. No injury was sustained by the police officials. Lead of the fired bullet could not be recovered at the spot. The ballistic report was not even tendered/exhibited during trial. There are various discrepancies in the testimonies of the prosecution witnesses. Sanction under Section 195 Cr.P.C. was not legal.

5. Learned APP has while supporting the judgment urged that PW-2 (HC Sushil Kumar) and PW-3 (Const.Virender) fully supported the prosecution case and no material discrepancies emerged in their statements. The accused were involved in number of cases and were BCs of the area. The motorcycle belonging to PW-6 (Kamran) was recovered from their possession. PW-6 (Kamran) has deposed that the said motorcycle was borrowed by A-1 in the morning from him. The ballistic report is per se admissible and demonstrates that the weapon recovered from A-2 was in working order.

6. I have considered the submissions of the parties and have examined the Trial Court record. At the outset, it may be mentioned that the entire case of the prosecution is based upon the testimonies of PW-2 (HC Sushil Kumar) and PW-3 (Const.Virender) who were police officials and victims in the incident. No independent public witness was associated at any stage of the investigation. The police officials claimed that they

remained present at the spot for about four hours. There were many houses near the spot. No efforts were made by the Investigating Officer to join any independent public witness. Since the case of the prosecution is based entirely upon the testimonies of the police officials, their version requires to be perused with great care and caution.

7. Examination-in-chief of PW-2 (HC Sushil Kumar) was recorded and cross-examination was deferred on 30.11.2007. Examination-in-chief of PW-3 (Const.Virender) was also recorded on the said date. It appears that instead of recording statement of PW-3 (Const.Virender) on oath, the Trial Court adopted 'copy and paste' approach and copied PW-2 (HC Sushil Kumar)'s examination-in-chief as examination-in-chief of PW-3 (Const.Virender). Even necessary consequential modifications/corrections were not carried out. No sanctity can be attached to such deposition. In examination-in-chief of PW-2 (HC Sushil Kumar), it is recorded : *'After that I over-powered accused Mahender and snatched katta from his hand and accused Kamal Singh @ Kallu was overpowered by Const.Virender'*. In the examination-in-chief of PW-3 (Const.Virender) again it finds *'After that I overpowered accused Mahender and snatched katta from his hand and accused Kamal*

Singh @ Kallu was over powered by me'. Whose version is to be considered?

8. It is unexplained as to why the Investigating Officer did not register the case against the accused persons for attempt to rob when allegations against them were that initially they attempted to rob the police officials using country-made pistol. No charge for attempt to robbery was framed against the accused. Initially, there was no obstruction to the police officials in the discharge of their official duties. No injury was suffered by any police official during the alleged firing incident. It is alleged that A-2 was found in possession of one live cartridge in his pocket. No attempt was made by A-2 to reload the pistol with the live cartridge in his possession. It is not clear if the police officials were having any service weapon. It is also unclear if they were in civil dress or police uniform. When they had departed for patrolling duty, it was expected that they must be in police uniform. PW-2 and PW-3 did not depose if any robbed/stolen golden chain was recovered from the possession of the accused or at their instance. PW-9 (SI Krishan Chander) deposed that two gold chains were recovered in A-2's personal search. A-2 also recovered another gold chain from the motorcycle parked there. He further deposed that A-1 recovered two chains. PW-2 and PW-3 are silent

on this aspect. There are variations in the testimonies of the prosecution witnesses as to till what time they remained present at the spot. The accused were allegedly apprehended at the spot and did not flee. No explanation has been offered as to why the lead could not be recovered at the spot. The story presented by the prosecution does not inspire confidence as PW-2 and PW-3 were witnesses against them in many cases. PW-2 admitted in the cross-examination that he knew A-1 being the BC (Bad Character) of the area and was a witness in five cases against him. It is unbelievable that at the time of incident they would not be able to recognise /identify the accused.

9. The report of the ballistic expert was not tendered in evidence and was not even exhibited. It was also not put to the accused in their 313 Cr.P.C. statements. It reveals that there were two reports dated 30.01.2006 prepared by Sh.Puneet Puri with different contents. Another report is dated 14.03.2006 prepared by Sh.K.C.Varshney. It is not clear which report was considered by PW-4 (Sh.Sagar Preet, DCP, Outer District, Delhi) while granting sanction under Section 39 of the Arms Act.

10. Considering the vital infirmities/lacunas and serious lapses in the investigation, the impugned judgment cannot be sustained. The

appellants deserve benefit of doubt. Their conviction and sentence are set aside. The appeals are allowed.

11. The appellants be released forthwith, if not required in any other case. Trial Court record be sent back forthwith along with a copy of this order.

CRL.M.B.1289/2012 in CRL.A.551/2011

The application stands disposed of being infructuous.

**(S.P.GARG)
JUDGE**

JANUARY 21, 2013

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