

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

Date of Decision: 30.04.2014

+ CRL.A. 788/2013

MOHD. ARIF

..... Appellant

Through: Mr Wajeeh Shafiq, Adv.

versus

STATE OF NCT OF DELHI & ORS.

..... Respondent

Through: Mr Feroz Khan Ghazi, APP

+ CRL.A. 866/2013

SHAHBAZ ALAM

.....Appellant

Through: Mr Wajeeh Shafiq, Adv.

versus

STATE NCT OF DELHI

.....Respondent

Through: Mr Feroz Khan Ghazi, APP

+ CRL.A. 789/2013

ASIF BABU KHAN alias CHHOTA PRTHAN alias SALMAN

..... Appellant

Through

versus

STATE & ORS.

..... Respondent

Through: Mr Feroz Khan Ghazi, APP

CORAM:
HON'BLE MR. JUSTICE V.K. JAIN

JUDGEMENT

V.K. JAIN, J.

On 24.11.2009, Police Control Room received an information from one Shahbaz that he had been shot in his house in Gali No. 2, Kabir Nagar. The information, when conveyed to Police Station Jyoti Nagar, was recorded vide DD No 22A, a copy of which was given to ASI Subhash Chand for investigation. When the police officer reached the spot, he came to know that the injured has been taken by his brother to GTB Hospital. When the police officer reached the hospital, the injured Shahbaz was found admitted there and was fit for making statement. In his statement to police officer, the complainant Shahbaz *inter alia* stated that at about 12.30 AM, when he reached his house in Zafrabad, Shahnawaz, resident of Gali No. 21, Zafrabad, Chhota Pathan @ Babu, Arif, resident of Gali No. 132 and Shahbaz, who were previously known to him, came out of his house and started beating him. Shahnawaz, who were carrying a country-made pistol in his hand, fired a shot and the bullet hit his left side arm. Shahbaz gave an iron rod on his head, whereas Chhota Pathan held him and exhorted others

to kill him saying he (the witness) was an informer of police. Arif, who was carrying a sword in his hand, gave a blow on his back. The complainant further stated that his wife Shaheen, his niece Gulistan, Shabuta as well as his younger brother Shekhu were present in the house at that time. The hands of Shekhu had been tied by the above-referred persons. When his wife Shaheen tried to rescue him, she was pushed by the aforesaid persons. On alarm being raised by his wife and niece, the aforesaid persons started running away. When he (the witness) tried to catch hold of Shahnawaz, he was able to get himself released, but the country-made pistol which he was carrying with him fell on the spot. An FIR under Section 452/324 and 342 of IPC read with Section 34 thereof as well as under Sections 25 and 27 of Arms Act was registered on the aforesaid statement.

2. The appellants Mohd.Arif, Shahbaz Alam, Asif @ Babu @ Chhota Pathan and Shahnawaz @ Samir were charge-sheeted and later charged by the Trial Court under Section 307, 452, 323 and 342 read with Section 34 thereof. Since they pleaded not guilty to the charges, as many as 21 witnesses were examined by the prosecution. One witness, Rahat Ali, was examined in defence.

3. Smt. Shaheen, wife of the complainant came in the witness box as

PW1 and *inter alia* stated that in the night intervening 24/25.11.2009, when she was present in the house along with the daughters of her sister-in-law, namely Shagufta and Gulista and her neighbour Shibu, someone knocked the door at about 12:00 midnight. The door was opened by her brother-in-law. Shahnawaz, (juvenile), Arif, Chhota Pathan and Asif came inside and enquired about her husband. When she informed them that her husband was not present in the house Shahnawaz and Shahbaz both slapped her brother-in-law. They also threatened them with dire consequences in case alarm was raised by them. The volume of the TV was increased by Shahnawaz, who took out a country made pistol. Shahbaz at that time had a sword in his hand. She claimed that Shahbaz was previously known to her since he was doing the work of rag picker with her late husband and used to come to their house to enquire about him. According to her Arif and Asif were also known to her since they had visited her house enquiring about her husband. According to the witness their hands were tied by the above-referred persons. After about half an hour when her husband entered the house the aforesaid four (4) persons started beating him and Shahnawaz fired at him with a country made pistol injuring his left arm, whereas Arif hit her husband on his waist, with the sword he was carrying. Chhota Pathan @

Asif hit on the head of her husband with the iron rod, whereas Shahbaz exhorted the other accused to kill her husband, saying that he was an informer of police. The witness further stated that when she tried to save her husband, she was pushed aside. On alarm being raised by her niece Shagufta and Gulista, the accused persons started running from there and in the scuffle, while they were running, the country made pistol fell from the hands of Shahnawaz. Later the country made pistol was handed over to the police officials who also recovered one live cartridge, one bullet coin and one bullet case from the street near their house.

4. Gulista, niece of the complainant came in the witness box as PW15 and stated that when they were present in the house, someone knocked at the door which then was opened by their maternal uncle Shekhu. Four (4) persons, who had covered their face with cloth entered the house. One of them was carrying a country made pistol with him. Those persons started beating her maternal uncle Shekhu. She also claimed that since the cloth by which one of the persons had covered his face got opened she saw Shahnawaz who was previously known to her, he being a friend of her maternal uncle. She further stated that thereafter those persons left the house, bolting door from the outside and when alarm was raised by them her

maternal uncle Shahwaj, who was sitting with the landlord on the first floor, got down. She heard her maternal uncle saying *MAAR DIYA MAAR DIYA* as also the voice of the assailants. When the door was opened by some neighbours she found that Shahbaz had bullet injuries on the shoulder. She claimed that she could not see the face of the assailants other than Shahnawaz. The witness was cross-examined by the learned Additional PP and during cross-examination she admitted that the assailants had tied their legs and hands besides threatening to kill in case they raised alarm and increasing the volume of TV.

PW16 Shagufta is the other niece of the complainant. She deposed on the lines of the deposition made by PW15 Gulista.

The complainant could not be examined as a witness since he was murdered on 6.3.2011.

5. PW7 Dr. Naresh identified the signatures of Dr. Animesh Basak on the MLC Ex.PW6/A.

PW13 Dr. Garima Srivastava examined the X-Ray plate of the complainant Shahbaz and found no bone injury on his body.

PW17 Dr. Sumeet identified the signatures of Dr. Kamini Chauhan on the X-Ray report Ex.PW17A.

6. PW10 Head Constable Pawan Kumar stated that in the night intervening 24/25.11.2009, he, while he was on duty at PCR Van, went to Gali No.2, outside C Block, Kabir Nagar, where he came to know that the injured had already been taken to hospital. In the meanwhile ASI Subhash, Constable Satyanaraian also reached there. One live cartridge lying in front of House No.13 and one coin (lead) of bullet lying in front of House No.15A was seized. They also found one empty case of cartridge and an iron rod lying near the electric pole in the same street. He claimed that Smt. Shaheen also produced one country made pistol to the IO and the said pistol was seized after preparing its sketch. The witness also identified the iron rod Ex.PW1/Article1, country made pistol Ex.PW1/Article2, cartridge Ex.PW1/Article3, fired cartridge Ex.PW1/Article4 and bullet lead Ex.PW1/Article5 were seized in the manner stated hereinbefore.

PW20 S.I. Subhash Chand is the Investigating Officer of this case who went to the spot along with Constable Satyanarain. He deposed with respect to recovery of iron rod, empty case of cartridge and lead of the fired cartridge. He also stated that Smt. Shaheen, wife of the injured had produced one country made pistol which was seized by him after preparing its sketch. This witness also identified the articles Ex.PW1/Article1 to

Ex.PW1/Article5.

PW2 Constable Sanjay Kumar is the photographer who went to the spot on the said date and took photographs Ex.PW1/A1 to PW1/A6.

In their respective statements under Section 313 of Cr.P.C., the appellants denied the allegations against them and claimed to be innocent.

DW1 Rahat Ali *inter alia* stated that accused Shahbaz Alam had a good moral character and has been falsely implicated in the present case.

7. Vide impugned judgement dated 8.4.2013, all the three (3) appellants were convicted under Sections 307/452/342 of IPC read with Section 34 thereof. Vide impugned Order on Sentence dated 18.4.2013, they were sentenced to undergo RI for seven (7) years each and to pay fine of Rs.1,000/- each or to undergo SI for one month under Section 307 of IPC. They were further sentenced to undergo RI for three (3) years each and to pay fine of Rs.500/- each or to undergo RI for fifteen (15) days each in default under Section 452 of IPC. They were also sentenced to undergo RI for one (1) year each under Section 342 of IPC.

Being aggrieved from their conviction and sentence awarded to them, the appellants are before this Court by way of the present appeals.

8. The learned counsel for the appellants have challenged the conviction

of the appellants on the following grounds:

- i. Neither PW15 nor PW16, both of whom were present in the house when the incident is alleged to have taken place has supported the case of the prosecution and that conviction is based solely upon the deposition of PW1 Smt. Shaheen.
- ii. Shekhu, brother of the complainant was not examined as a witness.
- iii. The injuries sustained by the complainant were found to be simple and, therefore, no offence under Section 307 of IPC is made out.
- iv. It was opined by the FSL that it was not possible to say whether the exhibit bullet mark EB1 was fired through exhibited pistol or not.

9. As noted earlier, only one eye witness Smt. Shaheen has identified the appellants. Neither PW15 Gulishta nor PW16 Shagufta identified any of the appellants before this Court. In her statement under Section 161 Cr.PC, Smt. Shaheen did not name either the appellant Shehbaz Alam or the appellant Asif. It has come in the deposition of the aforesaid witness that Shehbaz was previously known to her since he was doing the work of rag-picking along with her husband and used to come to their house to enquire about her husband. If that be so, the witness ought to have disclosed his name in her statement under Section 161 CrPC or she would atleast have

stated that one the intruders was previously known her on account of his doing the work of rag-picking with her husband and coming to their house to enquire about him. It appears to me that the appellant Shahbaz was not previously known to PW1 and that was the reason he was not named nor described in her statement under Section 161 Cr.PC. In the facts and circumstances of the case, it was necessary for the Investigating Officer to get him identified in a judicial TIP from PW1 Smt.Shaheen. Though identification for the first time during trial is legally admissible evidence, the Courts in the absence of special circumstances of a case look for corroboration of identification for the first time during trial when the accused is not previously known to the witness. In the present case, there is no corroborative evidence produced by the prosecution which would link the appellant Shahbaz with the commission of the crime.

10. As regards the appellant Asif, PW1 Smt.Shaheen claimed that he used to come to their house to enquire about her husband and that she had enquired about their names and come to know their names. She also claimed that he was known to her prior to the incident. Again there is no explanation for neither naming Asif nor describing him in the statement made under Section 161 Cr.P.C. In these circumstances, when the

appellants Shahbaz and Asif have not been identified by PW15 Gulishta and PW16 Shagufta who claimed that the assailants had covered their respective faces with cloth and it was only the face of juvenile Shahnawaz which they were able to see, they were neither named nor described in the statement of PW1 under Section 161 Cr.P.C. and there is no corroborative evidence which would link the aforesaid appellants with the commission of the offence, they are entitled to benefit of doubt and consequently are liable to be acquitted.

11. As regards, the appellant Arif, PW1 Smt. Shaheen claimed that he was armed with a sword when he entered their house and he had given a sword blow on the waist of her husband. I find that when PW1 was cross examined, she admitted that there was no cut mark on the entire back side of the jacket of her husband. A perusal of the MLC of the deceased complainant, Ex.PW6/4, would show that he had absolutely no wound on his back. Had the appellant Arif given a sword blow to the deceased complainant, a cut would have come on the jacket he was wearing and an injury also would have been found on his back, when he was examined in the hospital. It would, therefore, be difficult to accept the deposition of PW1 as regards the appellant Arif having given a sword blow to her late

husband.

12. The next question which arises for consideration is as to what offence, if any, is made out against the appellant Arif. Though it has come in the evidence that one of the accused was armed with a country made pistol and he had also fired a bullet which hit the left arm of the deceased complainant, no bullet was found in the house of the complainant where the incident is alleged to have taken place. A perusal of the seizure memo Ex.PW1/A would show that a fired bullet and an empty cartridge were found in the street, under the electricity pole whereas a live found was found at another spot in the street. It has come in the cross examination of PW20 S.I. Subhash Chand that an empty case of the cartridge and the iron rod were lying at one place whereas the live cartridge and the lead were lying at some distance. Considering that the lead of the fired cartridge was found in the street and not in the house, there is a serious doubt as to whether bullet was actually fired in the house of the complainant or not. A perusal of the MLC of the deceased complainant would show that when he was brought to the hospital, he complained of assault but made no complaint of having been shot. Moreover, it was found that he had as many as three lacerated wounds besides one wound on the flexo aspect of left midarm and another wound on

extensor aspect of the left midarm. The lacerated wound could not have come from a bullet, which according to PW1 had hit the arm and not the skull of the deceased complainant. The wounds on the left pit arm have not been described as gunshot injury in the MLC and there is absolutely no evidence which would show that the aforesaid wound could have been caused from a bullet. In these circumstances, it would be difficult to accept that shot was fired on the complainant in his house. In any case, considering that one of the intruders is alleged to have shot at the arm, and not at a vital part of his body, it would be difficult to say that the intruders wanted to commit murder of the complainant.

13. Since the appellant Arif was one of the persons who had entered the house of the complainant on the fateful day and one of the intruders was armed with an iron rod while the other one was armed with a countrymade pistol, it can be safely said that he along with his accomplices committed criminal trespass in the house of the complainant having made preparations for causing hurt to him or for assaulting him or for putting him in fear of hurt, or of assault. Therefore, conviction of the Arif under Section 452 IPC read with Section 34 IPC cannot be faulted with.

14. Since at least one of the assailants was armed with a country made

pistol as is evident from the seizure of the said pistol and a live and a fired cartridge and one of the them, according to PW1 was armed with an iron rod, it can be said with a fair amount of certainty that the appellant Arif shared a common intention along with his accomplices to cause hurt to the deceased complainant using iron rod and country made pistol. The country made pistol undisputedly is an instrument of shooting and is also likely to cause death if used as a weapon of offence. Therefore, the appellant Arif in my view is also liable to be convicted under Section 324 IPC read with Section 34 thereof.

14. For the reasons stated hereinabove, while acquitting the appellant Arif of the other charges, he is convicted under Section 452 and 324 IPC read with Section 34 thereof. He is sentenced to RI for two years and to pay fine of Rs.25,000/- or to undergo S.I. for six months, in default under Section 452/34 of IPC. He is also sentenced to undergo RI for two (2) years under Sections 324/34 of IPC. Out of the fine if realized from the appellant Arif, Rs.25,000/- be paid to the widow of the deceased complainant as compensation. The appellants Asif and Shahbaaz are given benefit of doubt and are acquitted.

The appeals stand disposed of.

One copy of this order be sent to concerned Jail Superintendent for necessary information and compliance.

LCR be sent back along with a copy of this judgment.

APRIL 30, 2014
BG/b'nesh/KS

V.K. JAIN, J.