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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 17th October, 2014

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CRL.A. 1195/2011

MOHD. AMIR

..... Appellant

Through: Mr. Vineet Mehta, Advocate

versus

STATE

..... Respondent

Through: Ms. Ritu Gauba, Additional Public
Prosecutor for the State along with SI
Padam Singh, Police Station Kamla
Market.

CORAM:

HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. The challenge in this appeal is to the judgement dated 1st September, 2011 vide which the appellant was convicted under Section 308 IPC and order on sentence dated 3rd September, 2011 vide which he was sentenced to undergo rigorous imprisonment for a period of two years in addition to payment of fine of Rs.2000/- in default to undergo simple imprisonment for three months in Sessions Case No.05/10 arising out of FIR 109/2009 u/s 307 IPC Police Station Kamla Market.

2. Prosecution case lies in a narrow compass. On 22nd August, 2009, Mohd. Arshim was flying kite when accused Amir raised objection regarding flying kite from his roof. He started abusing the injured and pushed him due to which Mohd. Arshim fell down from the roof. He was removed to hospital where his MLC was prepared. During the course of investigation, accused was arrested. After completion of investigation, charge sheet was submitted under Section 307 IPC.

3. Charge for offence under Section 307 IPC was framed against the accused to which he pleaded not guilty and claimed trial.

4. In order to substantiate its case, prosecution examined in all 11 witnesses. The accused denied the case of prosecution and took a plea of *alibi* by stating that he had gone for training at Institute of Driving, Training & Research, Wazirabad Road adjoining Loni Road Flyover, Delhi where he was undergoing training from 22nd August, 2009 to 24th August, 2009 along with his brother Mohd. Mustaq and returned to his house after training at 8-8:30 PM. He examined himself besides examining his brother Mohd. Mustaq and Dy. Director of the Institute Naresh Kush. Vide impugned judgment, learned Additional Sessions Judge convicted the appellant by observing that the

prosecution had succeeded in establishing that due to act of the accused, the injured sustained dangerous injuries. The accused had failed to prove the plea of *alibi*.

5. Challenging the findings of the learned Trial Court, the present appeal has been preferred.

6. Assailing the findings of the learned Trial Court, learned counsel for the appellant submitted that as per the initial version given by the complainant, the accused objected as to why the injured was flying kite from his roof. However, the complainant PW-1 in his cross-examination by learned Additional Public Prosecutor for the State admitted that injured was not flying kite from the roof of the accused. As such, there is no reason as to why the accused would object to the flying of the kite from the adjoining roof. Moreover, according to PW1-Mohd. Rashid, Mohd. Danish and Mohd. Rahil were also flying kites with injured. His testimony does not find corroboration from PW2-injured who does not say that Mohd. Danish and Mohd. Rahil were also flying kite with him. Presence of the complainant at the spot was also doubtful because if he had seen his brother falling from the roof, he would have been the first person to remove him to hospital but as per his own version, the injured was

removed to hospital by neighbours. Referring to the testimony of PW4-Mohd. Danish, it was submitted that he does not speak about the presence of PW1 at the spot and according to him, complainant reached the spot when the incident had already taken place. Moreover, according to this witness, the injured was taken to the hospital by the complainant which fact is belied by the complainant himself who deposed that he became perplexed and neighbours removed the injured to hospital. Moreover, according to this witness, he thereafter left the spot and his statement was recorded subsequently on 17th January, 2010, however, according to the complainant, police recorded the statement of Mohd. Rahil and Mohd. Danish in his presence in the hospital itself. Even this witness admits that the roof from where injured was flying kite was not belonging to the accused but to one Titoo, therefore, no motive could be attributed to the appellant. He also referred to the site plan Ex.PW10/B to show that the injured had not fallen from the roof of the accused. Reference was also made to the MLC to show that initially, when patient was brought to the hospital, it was recorded that it was a case of 'fall from roof'. It was only subsequently at the instance of PW5 maternal uncle of the injured that it was converted into a case of MLC. As per the

Doctor, the injured was conscious and oriented but he never disclosed to the Doctor that he was pushed by the accused. It was submitted that as per the testimony of PW5 he was informed by Rafia regarding the incident but she was never examined. It was further submitted that the injuries sustained by the injured were accidental inasmuch as it has come in the evidence that there was no staircase for going to the roof and for going to the roof, support of a wooden ladder or bricks used to be taken. Therefore, while going to the roof, the injured accidentally fallen down and sustained injuries. Lastly it was submitted that by cogent and convincing evidence, the appellant had proved that he was not present at the spot. Besides himself, he had also examined his brother and the Dy. Director of the Institute but their testimony was brushed aside by the learned Trial Court only on the ground that there was no mention in the document that the training was from 9:00 AM to 5:00 PM. Director of the Institute was an independent witness and there was no reason to discard his testimony. As such, it was submitted that the impugned judgment is liable to be set aside and the appellant be acquitted of the offence alleged against him.

7. Per contra, it was submitted by Ms. Ritu Gauba, learned Additional Public Prosecutor for the State that the case depends on ocular testimony of PW1, PW2, PW4 and PW5 which find corroboration from the medical evidence adduced by PW3. Due to previous enmity, there was intention on the part of the accused to kill the injured as he wanted to resist PW2 from flying kite from his roof and thereafter pushed him from the roof. As per the report of the Doctor N.K. Barman, the injuries were dangerous. Charge sheet was filed by the police under Section 307 IPC and charge was also framed under Section 307 IPC but the learned Additional Sessions Judge converted the case into a minor offence by convicting the accused under Section 308 IPC. It was submitted that the Court has ample power under Section 386(e) Cr.P.C. to enhance the sentence *suo motto* after giving right of hearing to the accused. It was further submitted that the injury was so grave that the injured became unconscious on the spot itself. Lastly, it was submitted that the compensation be awarded to the injured under Section 357(3) Cr.P.C. to the tune of Rs.2 lacs.

8. I have given my considerable thoughts to the respective submissions of learned counsel for the parties and have carefully perused the record.

9. There is no dispute that injured Arshim was flying kite on 22nd August, 2009 at the roof and had fallen from the roof as a result of which he sustained injuries, which were opined to be dangerous. The sole question for consideration is whether the injuries sustained by him were accidental or due to pushing by the accused.

10. The material witnesses are PW1-Mohd. Rashid, PW2-Arshim, PW4-Mohd. Danish and PW5-Mohd Akhlaq. Besides that as regards the medical evidence, there is the testimony of PW3-Dr. N.K. Barman and PW9-Dr. Arvind Mohan.

11. As per the testimony of PW9 Dr. Arvind Mohan, on 23rd August, 2009, a patient, namely, Arshim, S/o Rafi aged about 19 years was brought by his uncle Akhlaq. He was first brought to the Casualty with alleged history of “fall from roof” at 5:30 PM and was attended in the Casualty at 7:00 PM. He was thereafter referred to Neuro-Sugery Emergency for further management. Condition of the patient at the time of arrival was “conscious oriented”. Later on it was revealed by “brought by uncle” that patient fell from roof during

a fight with his neighbours so the case was converted into MLC at 12:00 AM on 23rd August, 2009.

12. According to PW5-Mohd. Akhlaq, maternal uncle of Arshim, on 22nd August, 2009 at about 6-6:30 PM, he received telephone call from his niece Rafia that Amir had thrown Arshim from the roof and Arshim had been taken to LNJP hospital and his condition was critical. On receipt of this information, he went to LNJP hospital and found that no treatment was given to Arshim. Thereafter, he was informed by the Doctor that it was a police case, then he made a call at 100 number and informed the police.

13. On receipt of information, DD No. 29-A, Ex.PW10/A was recorded at Police Station Kamla Market which was assigned to PW10, SI Jaipal Singh who along with Constable Surender reached at LNJP Hospital where he found injured Arshim admitted in the hospital who was declared unfit for statement but by that time, his MLC was not prepared. Mohd. Rashid, brother of the injured was present in the hospital whose statement Ex.PW1/A was recorded. After recording the statement, endorsement Ex.PW10/A was made and as per the endorsement the place of occurrence was "House No. 2648 Mohalla Niharia, Delhi". The time of incident was alleged to be

6:30 PM and the FIR Ex.PW6/A was recorded at 11:50 PM. Thereafter during the course of investigation, site plan Ex. PW10/B was also prepared. As per this site plan, the place of incident was “3rd floor of house No. 2601”, the house of the accused was 2602 while the house of the complainant/injured was 2648 which was at the back of the aforesaid two houses.

14. During the course of deposition, PW1-Mohd. Rashid/complainant deposed that on 22nd August, 2009, he was sitting on the roof of his house. His younger brother Mohd. Arshim was flying kite from the roof of the neighbouring house. Mohd. Amir asked his brother as to why he was flying kite from the roof of the neighbouring house and abused him then the accused pushed his brother from the roof who fell down on the ground and became unconscious. He got perplexed. Mohalla people took his brother to the hospital. He informed the relatives and also went to the hospital where he came to know that MLC of his brother was not prepared by that time. His maternal uncle Mr. Akhlaq got prepared MLC of his brother. His statement Ex.PW1/A was recorded by the police. The witness was declared hostile by the prosecution and in cross-examination, he deposed that the roof from where his brother was

flying kite was not belonging to the accused and that this roof from where his brother was flying kite was adjoining the roof of the house of accused. The presence of the witness and narration of the incident given by him seems to be doubtful, inasmuch as, as per his own version, he was sitting on the roof of his house bearing 2648, Mohalla Niharia whereas his brother Mohd. Arshim was flying kite from the roof of house No. 2601. As per the site plan, House No. 2648 is at the back of house No.2601, therefore, it seems highly improbable that the conversation which allegedly took place between the accused Amir and his brother would be heard by this witness. Moreover, he being the real brother of the injured would be the first person to remove him to the hospital but that was not done, instead, the injured was removed, as per his version, by the mohalla persons. Furthermore, a suggestion was given to this witness that the relation between the parties were not cordial inasmuch as the house in which the complainant along with his injured brother and family members used to reside, belonged to the *nanihal* of the accused and accused and his family members used to go to his house for realising rent and there used to be altercation between the elder members of the family of the complainant and the accused which was denied by the witness,

meaning thereby that according to this witness, there was no previous enmity between the complainant and the accused. Furthermore, as per his own version, his brother was not flying kite from the roof of the accused but the roof was of somebody else, therefore, it is not understandable as to what objection the appellant would have if Arshim was flying kite from the house of neighbour.

15. According to PW2-Arshim, who is the injured, when he was flying kite from the roof of the neighbouring house at about 5:30 PM, accused came on the roof and abused him as to why he was present over there and threatened to kill him. When he objected, then accused pushed him from the roof as a result of which he fell down and became unconscious. He regained consciousness in the hospital. He admitted in cross-examination that his brother was on the roof of his house. There is no staircase for going to the roof and for going to the roof one has to take support of a wooden *fatta*. He, however, denied the suggestion that while trying to climb the roof with the help of wooden *fatta*, which became unbalanced, he fell down and sustained injuries.

16. PW4-Mohd. Danish was alleged to be present at the roof from where Arshim was flying kite. According to this witness, on 22nd

August, 2009, at about 6:00 PM, he along with Rahil and Arshim was flying kite on the roof of one Titoo. In the meanwhile, accused came on the roof and started abusing Arshim which was objected by him. Thereafter accused slapped Arshim and pushed him from the roof and Arshim fell down on the roof of adjoining house and became unconscious. He sprinkled water on Arshim in order to regain his consciousness but in vain. Brother of Arshim arrived and took him to hospital. He thereafter left. This witness also admitted in cross-examination that the roof on which they were flying kites was not of accused Amir. He also admitted that there is no permanent staircase for going to the roof and they used to climb the roof with the help of wooden plank or by holding bricks. According to him, his statement was recorded by the police on 17th January, 2010. He admitted that he did not accompany Arshim to hospital.

17. Mohd. Rahil who was also allegedly flying kite with Arshim on the roof has not been examined by the prosecution.

18. A perusal of the testimony of these witnesses goes to show that the same lack corroboration, inasmuch as, neither the complainant nor his brother Amir speaks about presence of Mohd. Danish or Mohd. Rahil when Arshim was flying kite on the roof. Further, according to

the complainant, statement of Mohd. Danish was recorded by the police in the hospital itself whereas according to Mohd. Danish, it was recorded on 17th January, 2010. Even if it is considered that these are minor contradictions and should not be given undue credence, even then, the medical evidence coming on record raises a suspicion as to whether the sequence of events projected by the prosecution regarding the complicity of the accused in the crime is credible or not, inasmuch as, while according to complainant, the injured was removed to hospital by the mohalla persons, however, none of the mohalla persons has been examined by the prosecution. On the other hand, as per the testimony of PW9 Dr. Arvind Mohan, the injured was brought to the hospital by his uncle Akhlaq. At that time, the alleged history of “fallen from roof” was given. That being so, even the MLC of the injured was not prepared. It was only subsequently that the uncle of the injured disclosed that the patient fell from roof during a fight with his neighbours and, as such, it was converted into an MLC and thereafter police machinery swung into action. Even at that time, although as per the testimony of PW5, Mohd. Akhlaq, he was informed by his niece that Arshim had been thrown from the roof by Amir, yet his name was not disclosed to the doctor. The

circumstances that the complainant himself was at the roof of his own house and, therefore, the possibility of his witnessing the incident or at least hearing the conversation between the accused and the injured was quite remote coupled with his conduct that he himself did not remove the injured to the hospital cast a serious doubt regarding his presence at the roof. Furthermore, presence of Danish at the roof is again doubtful in view of the fact that testimony of injured is completely silent regarding his flying kite along with Amir and Rihal. Moreover, angle of enmity which was tried to be set up by the accused has been denied by the complainant and his brother. Therefore, motive on the part of the accused is not proved. It is true that in a case based on direct evidence, motive does not assume much significance but in the factual scenario of the present case, when the testimony of the prosecution witnesses is not consistent and cogent, motive assumes significance which is lacking.

19. Admittedly, there was no permanent staircase for going to the roof and a temporary ladder or bricks were used for accessing the roof. Dr. N.K. Barman has also not denied the possibility of fall if a person tried to climb on a wooden plank.

20. Last but not the least, there is delay in lodging FIR which has not been satisfactorily explained. The incident allegedly took place at about 5:30 PM but FIR came to be recorded only at 11:50 PM. In criminal trial, one of the cardinal principle is registration of earliest information as FIR.

21. In *Lalita Kumari vs. Govt. Of Uttar Pradesh and Ors.*, (2014) 2 SCC 1, Hon'ble Supreme Court observed that the object sought to be achieved by registering the earliest information as FIR is inter alia two fold:- One, that the criminal process is set into motion and is well documented from the very start; and second, that the earliest information received in relation to the commission of a cognizable offence is recorded so that there cannot be any embellishment, etc., later. In case there is delay in lodging the FIR, the Court looks for plausible explanation for the delay in lodging the report. The reason is obvious. Delay sometimes affords opportunity to the complainant to make deliberation upon the complaint and to make embellishment or even make fabrications. Delay defeats the chance of the unsoiled and untarnished version of the case to be presented before the Court at the earliest instance. That is why if there is delay in either coming to the police or before the Court, the Court always views the allegations

with suspicion and looks for satisfactory explanation. If no such explanation is found, the delay is treated as fatal to the prosecution case.

22. In *Thulia Kali v. The State of Tamil Nadu*, (1972) 3 SCC 393, it was held that the delay in lodging the first information report quite often results in embellishment as a result of afterthought. On account of delay, the report not only gets bereft of the advantage of spontaneity, but also danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation.

23. In *Ram Jag and Ors. v. The State of U.P.*, (1974) 4 SCC 201, the position was explained that whether the delay is so long as to throw a cloud of suspicion on the seeds of the prosecution case must depend upon a variety of factors which would vary from case to case. Even a long delay can be condoned if the witnesses have no motive for implicating the accused and/or when plausible explanation is offered for the same. On the other hand, prompt filing of the report is not an unmistakable guarantee of the truthfulness or authenticity of the version of the prosecution.

24. In the case of *Jai Prakash Singh v. State of Bihar & Anr.*, 2012

CRI.L.J.2101 the Supreme Court held:

“The FIR in criminal case is vital and valuable piece of evidence though may not be substantive piece of evidence. The object of insisting upon prompt lodging of the FIR in respect of the commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of actual culprits and the part played by them as well as the names of eye-witnesses present at the scene of occurrence. If there is a delay in lodging the FIR, it loses the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of large number of consultations/deliberations. Undoubtedly, the promptness in lodging the FIR is an assurance regarding truth of the informant’s version. A promptly lodged FIR reflects the first hand account of what has actually happened, and who was responsible for the offence in question.”

25. The cumulative effect of all the circumstances narrated above raises a suspicion regarding the prosecution version that it was due to pushing by accused that the injured fell down and sustained injuries and that it was not a case of accidental fall.

26. Furthermore, the accused has taken a plea of *alibi* on the ground that he was not present at the spot on the date of incident as he had gone for training at Institute of Driving, Training and Research at Wazirabad Road on 22nd August, 2009 and 24th August, 2009 and he used to return home at about 8:00-9:00 PM. In order to substantiate this plea, he examined himself as DW2 and deposed that he had undergone the training of First Aid requisite for the post of conductor

from Red Cross Bhawan, Golf Links, New Delhi-110003 from 25th June, 2009 to 2nd July, 2009. After completion of training and after clearing test, he was awarded certificate, Ex.DW2/A from St. John Ambulance Association, Delhi Centre on 3rd July, 2009. He further deposed that he applied for the post of conductor at the institute of Driving, Training and Research at Wazirabad Road and undertook the said training from 22nd August, 2009 to 24th August, 2009. After completion of training, he was issued certificate Ex.DW2/C. He underwent the said training along with his brother Mohd. Mushtaq. The training was from 9:00 AM to 5:00 PM. They used to return home from the training institute by 8:30-9:00 PM. In support of his defence, he examined his brother DW1 Mohd. Mushtaq who also deposed that he along with his brother had undergone Conductors' Training at Institute of Driving, Training and Research at Wazirabad Road, Delhi from 22nd August, 2009 to 24th August, 2009. The training was from 9:00 AM to 5:00 PM. He also proved the certificate Ex.PW1/A awarded to him after completion of training. Accused also examined DW3-Sh. Naresh Kush who was working as Dy. Director at the Institute of Driving, Training & Research managed by Maruti Suzuki at Wazirabad Road, Delhi. According to him, the

certificate Ex.DW1/A and Ex.DW2/C were issued by Mr. Mahesh Rajoria, the Director of the aforesaid Institute. He further deposed that the training was from 9:00 AM to 5:00 PM. However, although on the second day of training, the training finished by 1:30 PM but the candidates were asked to wait till 4:00-4:30 PM when their certificates were to be handed over to them. On the basis of certificates, he deposed that Mohd. Amir and Mohd. Mushtaq had undergone badge training on 22nd August, 2009 and 24th August, 2009 at the Institute (23rd August, 2009 was a holiday being Sunday). Although it was rightly observed by learned Additional Sessions Judge that when a plea of *alibi* is taken by the accused, same is required to be proved by the accused. However, according to learned Additional Sessions Judge, the appellant failed to prove the plea of *alibi* as there was no documentary evidence to show that the training used to continue till 5:00 PM or that he was not present in his house on the date of incident. From the certificates which were duly proved from the testimony of DW3-Naresh Kush, Dy. Director of the Institute of Driving, Training and Research, it was proved that the appellant and his brother were undergoing training at the aforesaid Institute. Although it is true that there is no documentary proof to

show that the training continued till 5:00 PM. At the same time, testimony of DW3-Sh. Naresh Kush who is a totally independent witness and was working as Dy. Director in the institute cannot be lightly brushed aside. That being so, if the accused was undergoing training at the institute which was upto 5:00 PM at Wazirabad, then the possibility of his presence at Mohalla Niharia, Kamla Market at 5:30 PM is highly doubtful.

27. It is true that circumstances alleged by the prosecution give rise to a suspicion against the appellants but suspicion howsoever strong it may be, is not enough to justify conviction of the appellant. There is a long distance between 'may have' and 'must have' which distance must be traversed by the prosecution by producing cogent and reliable evidence.

28. As far back as in the year 1957, Hon'ble Supreme Court in *Sarwan Singh Rattan Singh v. State of Punjab*, AIR 1957 SC 637 observed that there may be an element of truth in the version of prosecution against accused and considering as a whole, the prosecution story may be true; but between 'may be true' and 'must be true' there is inevitably a long distance to travel and the whole of this distance must be covered by legal, reliable and unimpeachable

evidence before the accused can be convicted. It was further observed that degree of agony and frustration may be caused to the families of the victim by the fact that heinous crime may go unpunished but then the law does not permit the Courts to punish the accused on the basis of moral conviction or on suspicion alone. The burden of proof in criminal trial never shifts and it is always the burden of the prosecution to prove its case beyond reasonable doubts on the basis of acceptable evidence and in case of doubt, accused is entitled to get benefit of the same. This view was reiterated in *Kavinder and Ors vs. State (NCT of Delhi)* 2005 (1) Acquittal 262; *Mohd. Sahid vs. State* 2014(2) JCC 1305 and *Sukh Charan and Hargovind @ Pappu vs. The State* MANU/DE/3353/2009.

29. Accordingly, the appeal is allowed and the impugned judgment dated 1st September, 2011 and order on sentence dated 3rd September, 2011 are set aside. Appellant is acquitted of the offence alleged against him.

30. The sentence of the appellant was suspended vide order dated 26th September, 2011. His personal bond is cancelled and the surety stands discharged.

Trial Court record along with the copy of the judgment be sent back.

(SUNITA GUPTA)
JUDGE

OCTOBER 17, 2014

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