

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

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Date of Judgment : 20.07.2015

Crl. Appeal No. 265/2015

ASIF

Through Appellant
Appellant with his counsel
Mr. Masood Hussain, Adv.
versus

THE STATE & ORS

Through Respondents
Mr. Pramod Saxena, APP for the
State.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J. (Oral)

1 This appeal has been filed against the impugned judgment dated 26.11.2014 wherein the respondents Aslam and Ruksana Bano (husband and wife) had stood acquitted.

2 The present FIR i.e. FIR No.275/2013 registered at PS Sangam Vihar was on the complaint of Asif, the brother of respondent. The trial Judge had examined the evidence both oral and documentary. There were seven witnesses who had given their ocular testimonies. The Court

had noted that the parties are closely related but this by itself was not sufficient to discredit the testimony of PW-2 (brother of respondent No. 2). The father of the parties (i.e. father of PW-2 and respondent No. 1) Kurshid Ahmad was examined as PW-1.

3 A great scrutiny was attached to their testimonies. The Court while evaluating the evidence of the aforementioned witnesses had arrived at the following finding. They read herein as under:-

“14 There are anomalies in the testimony of the witnesses on the point of the incident itself in as much as PW-2 injured Asif says that he was caught hold by his nephew i.e. the son of Aslam (JCL) and hammer was handed over to Aslam by Ruksana and after hitting the victim, the accused persons ran away from the spot with the hammer. On this very aspect, PW-1 Khursheed says that he saw Asif was caught by Ruksana, Aslam and their son (JCL) and Aslma was having a hammer in his hand. It is further stated by him that the son of Aslam and Ruksana (JCL) had also given beatings to Asif by fist and kick blows. Incidentally, the victim himself is silent on this aspect that he was assaulted by fist and kicks by anybody. Similarly, PW-1 says that ASif was unconscious when the PCR arrived whereas the victim himself says that at the time of arrival of PCR, he was not unconscious, as can be inferred from the testimony and has clearly stated in his cross-examination that police gypsy took him to the hospital and then he fell conscious.

15 The presence of other witnesses is again under cloud inasmuch as it can be seen and inferred from the testimony of PW-1 Khursheed where he says that none other than victim Asif, PW-1 Khursheed Ahmad and his another son Arif were present at the time of assault whereas PW-2 Asif says that at the time of incident, his father Khursheed Ahmad, mother Noornisha, sister Zahida and neice Mainaz were

also present. Incidentally none of these persons has been made a witness except the father and therefore there presence at the spot becomes doubtful that in turn puts a question mark on the whole story of the prosecution's case.

16 Similarly, who made a PCR call is also not clear inasmuch PW-1 says that Arif, his another son made a call on the 100 number whereas victim has also stepped in and says that he too had made a call to the PCR.

17 After the incident, it has been stated by the witness that the accused persons had run away from the spot. However, PW-1 has categorically stated that after the assault, accused persons ran away from the spot whereas PW-2 says that accused persons first went to their home and thereafter ran away from the spot, as has come in his cross-examination.

18 As per the case of the prosecution, the victim was given a single blow by the hammer and in these circumstances, there should not be any injury on any other part of his body but Dr.Sajid Khan examined as PW-5 has enumerated 3 injuries, one is the right parietal wound, second was abrasion on the left lower chest and swelling on the right little finger. With a single blow, all these injuries are not possible. More so abrasion on the lower left chest of the dimension of 5 x 0.5 and swelling on the right little finger has not been explained. He has also admitted that injury NO. 1 is possible to be caused by a sharp edged weapon. A hammer as we all know, is not a sharp object. Thereafter the version put forth on behalf of the accused persons becomes possible that the injuries might have been sustained by fall or through a piece of the brick.

19 It is asserted on behalf of the accused persons that they were regular visitors of Makhdoom Khidmat Society, J.J. Camp, Tigri where they used to visit between 09:00 PM to 10:00 PM in the night invariably everyday. This fact has been admitted and endorsed by PW-1 Khursheed Ahmad. Although PW-2 has also in a way admitted this fact but implicitly where he says that Aslam and his family used to return in night, but no fixed time was there for coming and going back to the said society. The father of the accused examined as PW-1 whereas has clearly admitted

that the accused persons were regular visitors to the said society. Defence evidence has been brought on record by the accused persons and it has been deposed by Pradeep Kumar that the family of the accused were regular visitors of the Makhdoom Khidmat Society, as is there in the testimony of DW-2 Raees ahamd too.

20 *The time of the incident, accordingly to the prosecution, is 09:30 PM when the accused and his family were supposed to be present at the aforesaid property. This again puts a question mark on the case of the prosecution. PW-2 while pleading ignorance about the visiting time of the accused and his family by saying that he used to come back home between 04:00 PM to 06:00 PM to 10:00 PM to 11:00 PM. Apparently, it is not possible that PW-2 was not aware of this fact since the parties are part of one family and he being aware that the accused and his family used to visit the society regularly. Therefore the time of visit and return cannot escape the notice of PW-2.*

21 *Although the inconsistencies and discrepancies discussed hereinabove may not appear to be very strong and vital, but when the case and its facts are appreciated in the totality of circumstances where there are previous litigations between the parties, the witnesses/the complainant came during the Court proceedings with the active assistance of a counsel and some of the facts discussed hereinabove are such which cannot go hand in hand and qua which there can't be two versions, persuades me to conclude that the case put forth by the prosecution is questionable. The victim had sustained an injury is a fact but then the injury was caused by the accused persons that too in the manner deposed by the witnesses is not trustworthy. Accordingly, both accused Aslam and Ruksana Bano are given the benefit of doubt and acquitted of the charges."*

4 While evaluating the testimony of PW-1 and PW-2, the discrepancies and contradiction in their testimonies qua one another had

been noted. Who had made the PCR call was not clear. The MLC did not corroborate the oral version of PW-1 who stated that he had received only a single hammer blow; the MLC had noted three injuries upon his person. The fact that there were other cases brewing between the two brothers which was a ground of enmity between them had been admitted by PW-2. The time of the incident was also not correct.

5 Noting all these facts, the trial Judge had found it fit to acquit the accused persons as the prosecution had failed to establish its case to the hilt.

6 This Court while dealing with a judgment of acquittal is bound by the rigors of law contained upon it. The powers of an Appellate Court while dealing with appeals against an order of acquittal are well established.

7 In Kalu @ Masih and Ors. v. State of M.P. I (2006) CCR 28(SC) while dealing with this proposition the Supreme Court had inter alia held:

“While deciding an appeal against acquittal, the power of the Appellate Court is no less than the power exercised while hearing appeals against conviction. In both types of appeals, the power exists to

review the entire evidence. However, one significant difference is that an order of acquittal will not be interfered with, by an Appellate Court, where the judgment of the trial Court is based on evidence and the view taken is reasonable and plausible. It will not reverse the decision of the trial Court merely because a different view is possible. The Appellate Court will also bear in mind that there is a presumption of innocence in favour of the accused and the accused is entitled to get the benefit of any doubt. Further if it decides to interfere, it should assign reasons for differing with the decision of the trial Court.”

8 The arguments addressed by the learned counsel for the appellant in fact highlight the conflicting testimonies of PW-1 and PW-2 and even on a specific query put to the learned counsel for the appellant, he has failed to justify, answer or explain these inconsistencies.

9 Noting the legal proposition as also the reasoned judgment passed by the trial Judge, this Court finds no ground to interfere.

10 Appeal is without any merit. Dismissed.

INDERMEET KAUR, J

JULY 20, 2015/A