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

+ **CRIMINAL APPEAL No.514/2015 & CRL.M.A. 6349/2015**

Date of decision: 2nd September, 2015

MOHD. HASMULLAH

..... Appellant

Through Mr. Piyush Jain, Advocate along with
appellant in person.

versus

GOVT OF NCT OF DELHI & ANR.

..... Respondents

Through Ms. Aashaa Tiwari, APP along with
Inspector Harendra Singh, SHO Dabri.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE R.K.GAUBA

SANJIV KHANNA, J. (ORAL):

The complainant and informant Mohd. Hasmullah, who had also deposed as PW-1 before the trial court, has filed this appeal under Section 372 of the Code of Criminal Procedure, 1973 for setting aside finding of acquittal recorded in the impugned judgment dated 19th August, 2013 passed in Sessions Case No. 21/2013 arising out of charge sheet filed in FIR No. 203/2010, Police Station Dabri.

2. The respondent-accused, i.e., Sunil has been acquitted of charges under Sections 307/506 of the Indian Penal Code, 1860 (IPC, for short) and Sections 27/54/59 of the Arms Act, 1959 (Arms Act, for short). The trial court while acquitting the respondent-accused in paragraph 27 of the

impugned judgment has given the following reasoning:-

“27. Now the question arises as to whether the testimony of PW-4, PW-5 and PW-8 including that of PW-1 is corroborated by other pieces of evidence. It is relevant to note here that PW-1 stated that police was informed on 100 number and police party came but empty cartridge could not be traced by police party at the spot but his nephew traced the said cartridge later on i.e. after about ½ hour and PW-1 along with other persons went to PS and in the meantime Javed informed him about recovery of empty cartridge and said empty cartridge was handed over to IO/PW-12 Akbar Ali who seized the same. Other interested witnesses namely PW-5, PW-8 and PW-4 also stated on the same line regarding recovery and handing over of the empty cartridge. But this part of testimony of PW-1, PW-4, PW-5 and PW-8 is contrary to the testimony of official witnesses in as much as PW-7 Ram Kishan SHO PS Dabri and PW-11 Const. Birender and PW-12 ASI Akbar Ali have deposed that they went to the spot of incident but no empty cartridge was found on the spot and PW-12 has further deposed that he went to spot on 30.6.2013 as PW-1 had refused to make a statement on 29.06.2013, and he recorded statement of PW-1 vide Ex. PW1/A and PW-1 produced one empty cartridge by stating that his nephew PW Javed had recovered the empty cartridge. As such, there is a material contradiction in the testimony of PW-1 as PW-1 has stated that PW-12 had not recorded his statement on 29.6.2010 whereas PW-12 has deposed that PW-1 refused to give his statement by stating that he will give his statement after consideration. Similarly PW-1 contradicted PW-12 so far as recovery and handing over of empty cartridge as PW-1 stated that he handed over empty cartridge to the IO on 29.06.2010 whereas PW-12 stated that he recovered empty cartridge as the same was handed over to him by PW-1 when he again went to spot on 30.06.2010 and testimony of PW-12 is further corroborated by documentary evidence in the shape of Ex. PW1/A and PW8/A and PW8/B which bears the date of 30th June, 2010 which documents bears signature of PW-1, PW-8 Javed and PW-11 Birender meaning thereby that these documents were prepared on 30th June, 2010. In the same way, PW-1 has stated that he went to PS but stated that his son Zuber made a complaint in writing but

PW-5 Zuber stated that his uncle Sayyad Ali wrote a complaint. In the same way, PW-1 stated that on next day, he went to PS in the morning and remained upto 12:00 pm whereas PW-12 stated that he went to spot and recorded the statement of PW-1, complainant at the spot. These contradictions are material contradictions which prosecution failed to reconcile and as such these contradictions have caused a dent in the story of prosecution. Otherwise, also, all PWs namely PW-1, PW-4, PW-5, PW-8 and interested witnesses and no other independent witness is examined by prosecution and it is settled law that conviction can be recorded on the testimony of interested witnesses if the same is found reliable and trustworthy but in the present case, the testimony of PWs is unreliable and is not credit worthy.”

3. We have heard learned counsel for the appellant and gone through the testimonies of Mohd. Hasmullah (PW-1), Shamiullah (PW-4), Zuber Hussain (PW-5), Javed Ali (PW-8) and the police officers, Constable Monika Rani (PW-6), Inspector Ram Kishan, SHO Police Station Dwarka (PW-7), SI Jagdish Kumar (PW-10), Constable Birender (PW-11) and SI Akbar Ali (PW-12), the Investigating Officer. We are inclined to accept the findings of acquittal recorded by the trial court, but would like to elaborate and give our reasons.

4. Monika Rani (PW-6) has deposed that on 29th June, 2010 at about 11.20 P.M. information was received regarding firing and quarrel near Rate Delhi Restaurant, Druga Park, Dabri. The PCR form, Exhibit PW-6/A records that the information was marked to PCR van Zbr-20 to report to the spot. The PCR form in the trial court record but not exhibited, mentions that the caller Mohd. Hasmullah had met the SHO on the spot and had

claimed that respondent-Sunil who stayed opposite his house came and had slapped him, while he was sitting in front of his house with his brother. Thereafter, Sunil proceeded to his house and returned with a pistol and had fired at him. The PCR form specifically records that there was no sign of firing at the spot and no injured person was present.

5. It is an admitted case that Mohd. Hasmullah (PW-1) was not injured. This is a true and admitted fact. We, however, accept that for an offence under Section 307 IPC, sufferance and presence of an injury is not mandatory. The question is whether firing had taken place, or the assertion and claim is sham and false. SHO Inspector Ram Kishan (PW-7) has stated that on 29th June, 2010 at 11.30 P.M. he had received information regarding firing in Dabri area and on reaching the spot Zebra-20 and Tiger were found to be present. A thorough search was made on the spot, but no cartridge was found. Constable Birender (PW-11), who had also reached the spot, has similarly stated that no empty cartridge was found at the spot and the DD remained pending. Identically, SI Akbar Ali (PW-12) has deposed that they had tried to trace the empty cartridge but the same could not be found. Thereafter, they had returned to the police station. It is clear from the aforesaid testimonies that no empty cartridge or sign of firing could be found at the spot immediately and soon after the alleged occurrence though a search was made.

6. Mohd. Hasmullah (PW-1) claims that when they were at the police station, he had received a telephone call from his nephew Zuber Hussain,

who had found the fired cartridge at the spot. PW-1 had then narrated the said facts to ASI Akbar Ali, who had asked Zuber to lift the cartridge from the spot and bring the same to the police station. After some time, Zuber reached the police station and had handed over the same to ASI Akbar Ali. For the sake of completeness, we reproduce the said version given by PW-1 in his examination-in-chief.

“While I was in the police station, I received a phone call from my nephew namely Zuber Hassan, who told me that he has found the cartridge on the spot. ASI Akbar Ali asked me to tell Zuber to lift the cartridge from the spot and bring the same to the police station. I conveyed the direction to Zuber. After sometime, Zuber brought the cartridge to the police station and handed over the same to ASI Akbar Ali. Thereafter I returned home. But no FIR was registered at that time. I was asked to come to police station again in the morning at 8 am.”

In his cross-examination, PW-1 accepted that the police had made “little search for the cartridge at the spot and it could not be found”. He denied the suggestion that the cartridge had been planted in the case by Zuber. He also claimed that no neighbour came to the house after the incident, though the vehicles were plying on the road. On the question of his relations with the respondent-Sunil, Mohd. Hasmullah (PW-1) had stated as under:-

“The relations between myself and the accused were strained before the incident as he used to demand money illegally from me as I had purchased a plot in front of his house and I had not told him about the same. I did not lodge any complaint in this regard against the accused.”

Thus, as per PW-1 motive for committing the said offence was

illegal demand of money by the respondent-accused from PW-1 as latter had purchased a plot in front of the respondent's house.

7. Shamiullah (PW-4) testified that they had gone to the police station and had remained there for some time, but the police did not register the FIR. Thereafter, his son Zuber had given a written complaint and they came to the house. Shamiullah (PW-4) has not deposed about any telephone call by Zuber or the fact that Zuber or any other person had found an empty cartridge at the spot, which was taken by the said person to the police station at midnight. In his cross-examination, Shamiullah (PW-4) has deposed that Hasmullah (PW-1) and his son Zuber and 2 or 3 others had also gone to the police station. In other words, PW-4 had stated that Zuber had also gone with them to the police station. If that be so, then the question of Zuber making a telephone call to Mohd. Hasmullah (PW-1) regarding recovery of the cartridge at the spot would not arise and is not possible.

8. Zuber (PW-5) has accepted that he had gone to the police station along with his father, i.e., Shamiullah (PW-4) and his uncle Mohd. Hasmullah (PW-1). He claimed that his brother Javed had made a call regarding recovery of the cartridge and thereafter Zuber (PW-5) had conveyed this information to ASI Akbar Ali (PW-12). Thereupon, ASI Akbar Ali had asked Zuber to lift the cartridge from the spot and bring it to the police station. Thus, there is material contradiction in the statement of Zuber Hussain (PW-5) and Mohd. Hasmullah (PW-1) on the question who had recovered the fired cartridge and who had informed Mohd. Hasmullah (PW-1).

9. Javed Ali (PW-8) has deposed that the police had come to their house and that his father, i.e., Shamiullah (PW-4), his uncle Mohd. Hasmullah (PW-1) and his brother had gone to the police station. PW-8 claims that after the police had left the spot, he had found an empty cartridge and had taken photographs of the same on his mobile phone. He had telephonically informed his brother about the same and thereafter had taken the empty cartridge and handed it to ASI Akbar Ali. However, PW-8 was unable to show the videograph clip from his mobile phone, claiming that he had misplaced the instrument.

10. It is clearly noticeable that there is a change in the stand and stance on who had found and recovered the empty cartridge. Initially, Mohd. Hasmullah (PW-1) in his statement recorded on 3rd May, 2012 had claimed that the cartridge was recovered by Zuber Hussain. This fact was not disturbed or disputed by Mohd. Hasmullah (PW-1) when he was cross-examined on 26th November, 2012. Shamiullah (PW-4) remained quiet on this aspect, but had accepted that Zuber, his son, was at the police station and not at the place of occurrence. Zuber Hussain (PW-5) in his statement on 26th November, 2012 claimed that it was Javed, who had found the empty cartridge. Statement of Javed Ali recorded on 6th February, 2013 reiterates the said stand contradicting Mohd. Hasmullah (PW-1). In his cross-examination, Javed Ali (PW-8) has accepted that the neighbours had gathered at the spot after hearing the gun shot fire, contrary to what Mohd.

Hasmullah (PW-1) had stated in his cross-examination. Neighbours have

not come forward and narrated that firing had taken place.

11. Javed Ali (PW-8) asserts that he had found the empty cartridge at about 12.15 A.M. on 30th June, 2010 and within 15-20 minutes had reached the police station. Constable Birender (PW-11), on the other hand, states that on the next day one Javed, nephew of the complainant had come to the police station and produced one empty cartridge before ASI Akbar Ali. In his cross-examination, he has stated that they, i.e., Javed Ali (PW-8) and Hasmullah (PW-1) had come at about 11.30 A.M., which means the next day. SI Akbar Ali (PW-12) in his cross-examination has stated that the complainant had come with an empty cartridge in the afternoon of 30th June, 2010. The testimony of Constable Birender (PW-11) and SI Akbar Ali (PW-12) thus negates and contradicts the version given by Zuber (PW-5) and Javed (PW-8) that the cartridge was handed over to the police shortly after midnight at about 1 A.M. in the night intervening between 29th and 30th June, 2010.

12. These contradictions, which are numerous, are material and go to the core of the prosecution version that a firearm was used by the respondent-Sunil. It is noticeable that the firearm allegedly used could not be recovered and exhibited.

13. We also find that Javed Ali (PW-8) has contradicted Mohd. Hasmullah (PW-1) on the question of motive. In fact, Javed was cross-examined by the Additional Public Prosecutor on the question of motive,

has stated as under:-

“ Q. Whether the accused Sunil had previous enmity with your uncle Hasmullah on the issue of a plot of land which was purchased by your uncle Hasmullah?

Ans. My uncle Hasmullah has never purchased a plot.

Q. Whether the accused Sunil was demanding Rs.10 lacs or a shop in lieu of a plot for which accused was refused by your uncle for the same?

Ans. No such demand was made by the accused to my uncle in my presence. ”

Pertinently, the following suggestions were given to Mohd.

Hasmullah (PW-1) in his cross-examination:-

“It is wrong to suggest that the accused has been implicated falsely in this case. It is wrong to suggest that the accused has filed any complaint against me in the MCD and Health Department, Govt. of NCT of Delhi, regarding any illegal factory. It is wrong to suggest that the accused did not fire upon me.”

14. In view of the aforesaid discussion, we do not find any merit in the present appeal. We notice that an application for condonation of delay of 546 days has been filed. We are, however, not inclined to issue notice on the said application as we find that the appeal is without merit. Hence, as a sequitur said application is dismissed for the appeal lacks merit.

(SANJIV KHANNA)
JUDGE

(R.K. GAUBA)
JUDGE

SEPTEMBER 02, 2015
VKR