

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

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Reserved on: 11.07.2017

Delivered on: 04.08.2017

+ CRL.A. 560/2015

ASIF ALI KHAN @ SUFIYAN ALI Appellant

versus

THE STATE (GOVT OF NCT OF DELHI) Respondent

Advocates who appeared in this case:

For the Appellant : Mr.F.A.Banisrael.

For the Respondent : Mr.Ashish Dutta, APP.

+ CRL.A. 561/2015

RAHIS AHMED @ ARSH Appellant

versus

THE STATE (GOVT OF NCT OF DELHI) Respondent

Advocates who appeared in this case:

For the Appellant : Mr.F.A.Banisrael.

For the Respondent : Mr.Ashish Dutta, APP.

+ CRL.A. 1010/2015

SHAMSHAD AHMAD Appellant

versus

STATE Respondent

Advocates who appeared in this case:

For the Appellant : Mr.Puneet Singhal, Adv. (DHCLSC)
with Mr.Shyam Phool Bhati &
Mr.Ankur Chaudhary.
For the Respondent : Mr.Ashish Dutta, APP.

CORAM:-

HON'BLE MR JUSTICE ASHUTOSH KUMAR

JUDGMENT

ASHUTOSH KUMAR, J

1. All the aforesaid appeals have been taken up together for hearing and a common judgment is being delivered in all such appeals.
2. Appellants Asif Ali Khan @ Sufiyan Ali; Rahis Ahmed @ Arsh and Shamshad Ahmad have been convicted under Section 394 read with Section 397 IPC and have been sentenced to undergo RI for seven years, to pay a fine of Rs.20,000/- each and in default of payment of fine to suffer SI for a period of 90 days.
3. Appellant Shamshad Ahmed has been convicted under Section 307 of the IPC and has been sentenced to undergo SI for a period of five years, to pay a fine of Rs.7000/- and in default of payment of fine to undergo SI for a period of 45 days. He is also convicted under Section 27 of the Arms Act and has been sentenced to undergo SI for a period of three years, to pay a fine of Rs.5000/- and in default of payment of fine to undergo SI for a period of 30 days. The sentences have been ordered to run concurrently. An amount of Rs.15,000/- was

also directed to be released to PW-1/victim as compensation as per the provisions under Section 357 Code of Criminal Procedure, out of the fine recovered from the appellants.

4. The appellants have been charged under Sections 394 and 397 read with Section 34 of the IPC for committing robbery on 29.06.2007 at about 8.45 pm in Seelampur of one mobile phone and Rs.5500/- from one Rahis Ahmed (PW-1) on point of knife and country made pistols and also causing hurt to PW-1 in that connection.

5. Since two of the witnesses/police officials namely HC Radhey Shyam (PW-3) and HC Surender Pal (PW-19) had also arrived at the scene of the occurrence and had been obstructed by the appellants in discharge of their public function, charges against the appellants were also framed under Section 186/353 and 34 of the IPC. All the appellants had fired at the police party and therefore they were charged under Section 307/34 of the IPC also. Out of the accused persons appellants Shamshad Ahmad and Rahis Ahmed were also charged under Section 27 of the Arms Act for being in possession of firearm weapon.

6. The case of the prosecution is that on 29.06.2007, Rahis Ahmad (complainant) was robbed of his mobile phone and Rs.5500/- by three miscreants. The occurrence is alleged to have taken place at 8.45 pm in Seelampur. While taking away the belongings of PW-1, he was also stabbed by one of the assailants on his left thigh by means of a knife. It was at that time that PWs.3 & 19 arrived at the scene and stopped the miscreants. The miscreants thereafter tried to run away and in that process, fired at the police personnels which did not hit them. Since

the motorcycle of PWs.3 & 19 fell down, the miscreants ran away from the place of occurrence. On the basis of the statement given by Rahis Ahmad/complainant/PW-1, FIR No.368/2007 was registered for investigation under Sections 394/397/186/353/307 and 34 of the IPC read with Section 27 of the Arms Act.

7. The appellants were arrested in connection with another FIR No.377/2007 (P.S.Seelampur) on 05.07.2007. In the disclosure statement made by the appellants in the aforesaid case, their involvement in the present case was also discerned. There was a recovery of one country made pistol each from appellants Shamshad Ahmad and Rahis Ahmad @ Arsh and a knife was recovered from appellant Asif Ali Khan @ Sufiyan Ali. From the possession of Asif Ali Khan, a mobile phone also was recovered. The appellants were thereafter arrested in this case in Tihar jail on 10.07.2007 and were produced before the learned M.M on 11.07.2007.

8. The prosecution has examined 24 witnesses to bring home the charges against the appellants.

9. Rahis Ahmed who is the complainant of the case has been examined as PW-1 whereas the two police witnesses namely HC Radhey Shyam and HC Surinder Pal who are said to have witnessed the robbery have been examined as PWs.3 & 19 respectively.

10. Constable Pratap Singh, HC Rajkumar, Constable Rajiv and SI Ravi Shanker who are witnesses to the arrest of the appellants and recovery of weapons and mobile phone from them have been examined as PWs.10, 11, 15 & 22 respectively.

11. On behalf of the defence, two witnesses viz. Smt.Sajida Begum (DW-1) who is the aunt of appellant Rahis Ahmed and Pyare Nabi (DW-2) who is the employer of appellant Asif Ali Khan have been examined.

12. PW-1, though has supported the prosecution version but does not claim to have identified the accused persons because of darkness. He also did not identify the accused persons in presence of police officials. The appellants were not identified in Court as well. He has clearly stated that he could not see the assailants as it was dark at that time.

13. PW-3 has deposed that he did not name the appellants before the IO nor did he ascribe any role to them. He claims to have seen the occurrence from a distance of about 2 feet where he had stopped his motorcycle after reaching at the place of occurrence. He has also stated that the accused persons/appellants managed to escape because of darkness. The person who had fired, as has been deposed by PW-3 was at a distance of 20 feet. PW-19 has also testified about the occurrence having taken place but has stated that on 11.07.2007 he was called at the police station by the IO of this case. When he reached there, he saw that one person was being interrogated by the IO. He was identified as the same person who was involved in the occurrence and had fired upon him and PW-3. His name was revealed to him as appellant Shamshad Ahmad. He has further stated that on 25.07.2007 he was called to the Karkardooma Courts by the IO. There at about 3 pm he saw that the appellants who were in police custody were being brought to the concerned Court and on seeing them he

identified them to be the persons who were involved in the occurrence. The firing was resorted to, it has been alleged by the witness, from a distance of about 10 to 15 feet.

14. PWs.7, 11, 15 and 22 claim to have witnessed the arrest of the appellants and the recovery of mobile phones from them. The appellants were said to have been arrested on 05.07.2007 in connection with another case and from their possession incriminating materials namely mobile phone and weapon were recovered.

15. Thus from the deposition of PW-1, it becomes very clear that he did not identify any one of the appellants either at the time of the occurrence or while they were arrested in a different case and were being produced in the Court. Such non identification because of darkness has given a death knell to the prosecution version. Seen in this background, the deposition of PWs.3 & 19 also do not inspire confidence, especially when both PWs.3 & 19 have deposed that the miscreants managed to flee away because of darkness. If this be the situation, then it is difficult to expect that the appellants were identified by the aforesaid three witnesses for them to be put on trial and convicted.

16. The Trial Court has taken a peculiar view regarding the genuineness of the statement made by PW-1. The Trial Court has disbelieved PW-1 for his not identifying the appellants. The reason assigned by the Trial Court is that for robbing PW-1, per force the miscreants/appellants would have come very near to him and in that case, it does not appear to be plausible that PW-1 would not identify them.

17. It's a matter of common knowledge that when somebody is put in the fear of death and robbery, the only intention of that person would be to extricate himself or to save himself from the attack. To expect that he would identify the miscreants and that also when it was dark and there was no means of identification, is demanding too much from a witness. That apart, no witness can be attributed with same level of cognition as has been expected by the Trial Court. The statements of PWs.3 & 19 also clearly establish that they were made to see the appellants in the police station while they were being interrogated in connection with another case.

18. It has been argued on behalf of the appellants that no incriminating article was recovered from appellant Rahis Ahmad and only one mobile phone was allegedly recovered from appellant Asif Ali Khan at the time of his arrest in another case namely FIR No.377/2007. It has further been argued that the trial of the appellants in FIR No.377/2007 has ended in their acquittal.

19. The appellants refused to join the TIP proceedings as they were shown to the prosecution witnesses and they also claim that their photographs were taken while they were arrested in connection with FIR No.377/2007. There is no evidence on record to suggest that their faces were covered after their arrest on 05.07.2007 in FIR No.377/2007 or when they were produced before the Court on 07.07.2007. The prosecution witnesses have clearly stated that they had seen the appellants in the police station when the appellants were interrogated and at the time when they were produced before the Court.

20. Inspector Arjun Singh (PW-24) who is the IO of the case has stated that on 06.07.2007 he received information from AATS Crime Branch, R.K.Puram, New Delhi that three accused persons of FIR No.377/2007 have been arrested and during the investigation of that case they had given disclosures about their involvement in the present case. PW-24 contacted the IO of FIR No.377/2007 and obtained the disclosure statements (Exh.PW-11/A, PW-11/B and PW-11/C respectively). In that case, two country made pistols and a knife were recovered. On permission having been granted by the Court, the appellants were arrested by him on 10.07.2007 in Tihar Jail and were interrogated by him. This evidence does not link the recovery of the weapons and incriminating materials in the present case. The disclosure statement cannot be relied upon and the recovery simplicitor, even if so admissible, cannot at all be linked to this case.

21. The story of alleged firing from a distance of 15 feet also does not appear to be trustworthy. There is no corresponding evidence of the accused persons having opened fire. No empty cartridges have been recovered. Whether the weapon which was recovered from the possession of appellant Shamshad Ahmad was the same weapon which was used in the present occurrence is also not certain. It does not appear to be probable that two police officers would not be able to apprehend three of the miscreants who were trying to run away from the place of occurrence.

22. Thus the identification of the appellants is highly doubtful.

23. The deposition of PWs.3 & 19 read with the testimony of PW-24 clearly establishes that the appellants were arrested in another case

and were shown to the aforesaid persons. In that view of the matter the identification of the appellants is of no consequence.

24. Thus, in totality of the circumstances, it would be difficult to sustain the conviction of the appellants.

25. For the reasons stated above the appellants are given the benefit of doubt and are acquitted of all charges.

26. The appellants shall be released forthwith, if in custody and not wanted in any other case.

27. The appeals stand disposed of accordingly.

28. A copy of the judgment be sent to the concerned jail Superintendent for information and necessary action.

29. LCR be sent back along with the copy of this order.

Crl.M.B. No.1889/2016 (Suspension of Sentence) in Crl.A.561/2015

1. In view of the appeals having been allowed, the instant application has become infructuous.

2. Application is disposed of accordingly.

ASHUTOSH KUMAR, J

AUGUST 04, 2017

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