

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

Judgment Reserved on: September 11, 2017

% *Judgment Delivered on: September 14, 2017*

+ **CRL.A. 669/2017**

MOHD JAMIL

..... Appellant

Through: Mr.Anwesh Madhukar,
Advocate with Mr.Pranjal
Shekhar, Advocate

versus

STATE

..... Respondent

Through: Mr.Kewal Singh Ahuja, APP
for the State

CORAM:

HON'BLE MS. JUSTICE PRATIBHA RANI

JUDGMENT

1. The appellant has preferred the instant appeal assailing the judgment dated 21st April, 2017 whereby he has been convicted for committing the offence punishable under Section 307 IPC and under Section 25 & 27 of Arms Act and order on sentence dated 25th April, 2017 whereby he has been sentenced as under:-

- (i) U/S 307 IPC : to undergo RI for ten years with fine of ₹10,000/- and in default of payment of fine to undergo RI for two years.
- (ii) U/S 25(1) of Arms Act : to undergo RI for three years with fine of ₹8,000/- and in default of payment of fine to undergo RI for seven months.
- (iii) U/S 27(1) of Arms Act : to undergo RI for three years

with fine of ₹8,000/- and in default of payment of fine to undergo RI for seven months.

2. In brief the prosecution case is that the complainant Mohd.Raees was well known to the appellant Mohd.Jamil as both belong to Shikarpur, Distt.Bullandshehar, U.P. About 1½ - 2 years prior to this occurrence dated 8th March, 2009, the appellant had requested the complainant to accompany him to the parental house of his wife At Khajuri Khas and to help him in bringing her back to the matrimonial home. The complainant accompanied the appellant to his 'Sasural' i.e. at his in-laws' house but his wife refused to return taking the plea that she had been divorced. The appellant by swearing in the name of Quran stated before *Panchayat* that he has not divorced her. The complainant made it clear to the appellant that he would not support him on this issue and at that time he was threatened by the appellant that he will see him later. Thereafter the appellant sold his properties i.e. house and shop in Delhi and settled at his native place in Shikarpur, Distt. Bullandshehar, U.P.

3. While narrating the incident dated 8th March, 2009 the complainant stated that on that date at about 7:00 pm the appellant came to his house and threatened to teach him a lesson for misguiding his wife and after taking out a country pistol (*desi katta*) from his jacket fired towards him. The complainant ducked and the bullet after touching his right ear, hit the wall. He raised noise/alarm and somebody informed the PCR. With the help of neighbours, he apprehended the appellant Mohd. Jamil along with his countrymade

pistol and three live rounds were recovered from the pocket of his jacket. When the PCR vehicle arrived at the spot he with the help of public persons handed over the appellant Mohd.Jamil along with *desi katta* with three live rounds to the police.

4. The complainant Mohd.Raees was taken to GTB Hospital by the PCR officials and the appellant Mohd.Jamil was arrested in this case. The recovered *desi katta* and live cartridges were seized and sealed. After obtaining the necessary sanction under Section 39 Arms Act charge-sheet was filed.

5. To bring home the guilt of the appellant, the prosecution examined 15 witnesses. Appellant has also been examined under Section 313 CrPC to enable him to explain the incriminating evidence appearing against him.

6. After trial, the appellant has been convicted for committing the offence punishable under Section 307 IPC and under Section 25 & 27 of Arms Act and sentenced in the manner stated above.

7. Mr.Anwesh Madhukar, learned counsel for the appellant has submitted that the testimony of the injured witness PW-2 Abdul Raees suffer from various infirmities going to the root of the matter and not creditworthy for the following reasons:

(i) PW-2 Mohd.Raees the injured has admitted that the accused Mohd.Jamil was well known to him for ten years much prior to this incident.

(ii) The motive for the assault attributed to the accused is in respect of the incident that had happened about 1½ / 2 years prior to this occurrence when intervention of PW-2, the injured, was sought by the

accused to bring back his wife but she refused to come on the plea that she had been divorced by accused Mohd.Jamil.

(iii) PW-2 Mohd.Raees scolded the accused for taking a false oath by holy Quran that he had not divorced his wife and at that time accused stated that he would see PW-2 Mohd.Raees later.

(iv) PW-2 Mohd. Raees had admitted that when his wife refused to return, Mohd.Jamil - the accused sold his shop and house and settled in his village Shikarpur, Bulandshehar about two years prior to this incident.

(v) It is highly improbable that on the issue of scolding by PW-2 Mohd.Raees over the issue of divorce to the wife of appellant, after about two years leaving Delhi permanently, the appellant would visit his house in Delhi armed with *desi katta* and fire at him.

(vi) The nature of injuries suffered is simple.

(vii) The statement of PW-2 Mohd. Raees - the injured is full of material contradictions/improvements on all vital aspects. The real dispute was over money which the injured owed to the accused and there was a quarrel on that issue.

(viii) No public witness and even the family members of PW-2 Mohd.Raess - the injured have been cited or examined as eye witness to prove the incident.

(ix) The DD entry about the incident was about a thief being caught and there was no information given to the police about firing incident.

(x) The accused Mohd.Jamil himself suffered injuries which were attributed to the beatings given by public persons. Neither his MLC was placed along with the charge-sheet nor injuries on the person of

Mohd.Jamil were explained or the doctor who examined Mohd.Jamil, was cited as a witness.

(xi) The FSL report negated the theory of bullet injury.

8. Learned counsel for the appellant has submitted that there are two DD entries Ex.PW-11/A & Ex.PW-15/A recorded in respect of the incident both giving different versions. He has further submitted that PW-3 Rehmatullah – the informant in DD Ex.PW15/A did not state about the information being given by him but stated that somebody took his mobile phone to inform and that even his statement under Section 161 Cr.P.C. was not recorded by the IO face-to-face but on telephone.

9. Mr.Kewal Singh Ahuja, learned APP for the State has submitted that in an injury case, the statement of the injured is sufficient to base the conviction and some improvements made by the star witness i.e. PW-2 Mohd.Raees do not *per se* render the prosecution version vulnerable. At the most, it requires careful analysis which has been done by the learned Trial Court before holding the appellant guilty for committing offence punishable under Section 307 IPC and under Arms Act.

10. I have considered the rival contentions and carefully gone through the record.

11. The question that needs consideration in this appeal is whether the solitary statement of the complainant/injured Mohd. Raees is worthy of reliance to base the conviction in view of the settled legal position that evidence of an injured witness must receive credence as he would not ordinarily screen the real offender and implicate an

innocent person.

12. PW-2 Mohd. Raees in his first version i.e. complaint Ex.PW2/A did not state about any injury being suffered on any part of the body and stated that the bullet just touched above his right ear and hit the wall. However, his MLC Ex.PW7/A records the following injury :-

‘Alleged A/o gunshot injury

(1) Lacerated wound right frontal scalp 1 cm X 3 cm

(2) Abrasions with lacerated wound superficial 2 cm X 2.5 cm on right chest and multiple petechiae tattooing.’

13. The scientific evidence also does not corroborate the version of the complainant PW-2 Mohd. Raees. As per the FSL report Ex.PW13/A, one Kurta Ex.C1 with brown stains and having some holes on the front side (collectively marked as H1) and few small holes on the front lower portion of right sleeve (collectively marked as H2) was examined and no gun shot residue (GSR) particles were detected around the smalls holes marked H1 and H2 on the kurta Ex.C1, hence no opinion could be given whether the holes marked H1 and H2 have been caused due to discharge of bullet or not.

14. As per the complaint Ex.PW2/A, the accused Mohd. Jamil alongith the *desi katta* was apprehended by the complainant with the help of his neighbours. PW-2 Mohd. Raees has stated during his cross examination that his wife and children were present alongwith him at the time of incident. Surprisingly, neither his family members i.e. wife or children have been cited as eye witnesses nor any neighbour who happened to reach his house on the first floor to assist the complainant in overpowering the appellant, has been cited as a

witness. It is relevant to mention here that PW-3 Sh.Rehmatullah - informant of DD Ex.PW15/A did not claim to have witnessed the occurrence though he has been named as informant in the record maintained by the PCR. Thus, PW-3 Sh.Rehmatulla neither claimed that he informed the police nor stated about the incident except that the Investigating Officer questioned him on phone and that his mobile was taken by someone whom he did not know to inform the PCR.

15. First of all, PW-3 Sh.Rehmatulla would not have parted with his mobile phone to a stranger and secondly the stranger would not have come to know the name, address and mobile number of PW-3 Rehmatulla so as to inform the PCR about the complete personal details of PW-3.

16. There are many loopholes in the entire story of the prosecution not only in respect of the two DD entries Ex.PW11/A and Ex.PW15/A, there are different versions about the nature of occurrence and there are material contradictions in the testimony of the prosecution witnesses i.e. police officials on one side and PW-2 Mohd. Raees – the complainant on the other hand as to what happened immediately after the PCR reached.

17. The endorsement Ex.PW12/A on the rukka/statement of the complainant Ex.PW2/A records the following facts:-

- (i) The police reached the spot on receipt of DD Ex.PW11/A about apprehension of a thief.
- (ii) PW-2 Mohd. Raees handed over appellant Mohd. Jamil alongwith *desi katta* and three life cartridges to the police.
- (iii) The injured Mohd. Raees was sent to GTB Hospital in PCR van

and thereafter proceedings regarding seizure and sealing of arms and ammunition were conducted and a private photographer i.e. PW-1 Sh.Rahul was called to get the spot photographed.

(iv) The rukka was sent through PW-5 Ct.Vijay No.438/NE to get the case registered whereas PW-12 SI Har Prasad remained busy in the investigation at the spot.

18. As per the MLC Ex.PW7/A of the complainant PW-2 Mohd.Raees, the date and time of his examination is 8th March, 2009 at 9.20 pm. As per PW-2 Mohd. Raees, after his discharge from the hospital on the same day at about 10.45 pm, he reached Police Station Gokal Puri where his statement was recorded and other proceedings were conducted. PW-2 Mohd. Raees has also stated that the police did not visit his house on the date of incidence.

19. The question that arises for consideration is as to how the seizure memos in respect of the arms and ammunition Ex.PW2/B to E are bearing the thumb impression of PW-2 Mohd. Raees if after handing over the appellant and the weapon to the Investigating Officer PW-12 SI Har Prasad, the injured left for the hospital in PCR van and the Investigating Officer was conducting the proceedings at the spot.

20. There is another angle which creates a doubt in the entire prosecution case. The appellant in his statement under Section 313 CrPC stated about the purpose of his visit to the house of the complainant was to recover the money due from him and there was quarrel between them. The appellant also stated that he was given beatings and he became unconscious. When he regained consciousness, he found himself in police station with his hands tied

with ropes. Neither the complainant nor the police officer who visited the spot and conducted the investigation, disclosed about the injuries on the body of the appellant nor he was sent immediately for medical aid. Even the MLC of the appellant was not placed on record. During hearing of this appeal, State on being questioned about the medical examination of the appellant, photocopy of the MLC of the appellant has been placed on record which reveals that he was sent for medical examination on 8th March, 2009 at 11.30 pm alongwith Ct.Rohtash, No.931/NE, PS Gokul Puri. The MLC of the appellant records the injures as under:-

‘Alleged H/o beaten by public.

C/o : Pain in B/L shoulder, left thigh, left leg, chest, abdomen and pain in upper jaw.

*L/E : Abrasion on right cheek, left cheek.
Bruises – right forearm, right knee.’*

21. When the PCR and local police reached the spot, seeing the injured condition of the appellant, he was also required to be sent for his medical examination and his MLC should have been placed on record explaining the circumstances under which he had suffered injuries and who caused the injuries. The place of incident was a room in the house of PW-2 Sh.Mohd. Raees on the first floor and not a public place. There is no mention on the MLC of the appellant as to who has given the alleged history of ‘beaten by public’. PW-2 Mohd. Raees – the complainant nowhere explained in his complaint Ex.PW2/A as to how accused suffered injuries. The neighbour with whose help PW-2 Mohd. Raees claimed to have

apprehended/overpowered the appellant with his weapon was not even named by PW-2 either in his complaint Ex.PW2/A or during his deposition before the Court. The complainant/injured was residing at the first floor. The incident had taken place in his room. None of his family member who were admittedly with him and present there, have come forward to support his version nor they suffered any pellet injury. PW-2 Mohd. Raees – the complainant did not even disclose at the time of lodging the FIR about having suffered any injury on his chest. The testimony of the prosecution witnesses create a serious doubt in the prosecution version.

22. In the decision reported as Ram Narain Singh v. State of Punjab 1975 Cri.L.J. 1500, it was held that where the evidence of the witnesses for the prosecution is totally inconsistent with the medical evidence or the evidence of the ballistic expert, this is a most fundamental defect in the prosecution case and unless reasonably explained, it is sufficient to discredit the entire case. Further, it was observed that where the direct evidence is not supported by the expert evidence, then the evidence is wanting in the most material part of the prosecution case and it would be difficult to convict the accused on the basis of such evidence.

23. In the case reported as Mohan Lal @ Tony & Ors. vs. State (NCT of Delhi) 174 (2209) DLT 399 it was observed as under:-

‘It is no doubt true that a great weight is to be given to the testimony of an injured witness. The reason being that such a witness would not ordinarily screen the real offender and involve in his place an innocent person. But this principle, that

a person can be convicted on the basis of the sole testimony of an injured witness, would apply to a witness whose testimony is trustworthy and wholly reliable. If it is shown that there is material infirmity and falsehood impregnated in the evidence of such a witness, it would not be safe to convict an accused solely on the evidence of an injured witness without independent corroboration by material evidence. See observations in Hari Har v. State of U.P. MANU/UP/0358/1971 : 1971 Cri. L.J. 1578 (All.) paragraph 5 at page 1580; Vijai Shanker Misra v. State 1984 All. L.J. 1316 paragraph 22 at page 1323; L.L. Kale v. State of Maharashtra and Ors. MANU/SC/0743/1999 : (2000) 1 SCC 295 paragraph 8 & 9 at page 298-300; and Desraj v. State 1969 ALJ 784. In the present case, it is clear that the testimony of the injured Jaswinder Kaur (PW8) is not reliable.'

24. All the material contradiction pointed out by learned counsel for the appellant before the learned Trial Court have been rejected by the learned Trial Court by observing that same were not material and that no motive was required to be proved as it was a case of direct evidence. It was also observed that the oral testimony of PW-2 is corroborated by the facts mentioned in the MLC which was prepared immediately after the incident. The learned ASJ failed to appreciate that the deposition of PW-2 Mohd. Raees is not in consonance with his version given in Ex.PW2/A and that the medical and scientific evidence falsified his version.

25. PW-2 Mohd.Raees in his cross examination has admitted that the only cause for annoyance between him and the appellant, who was well known to him, was that he refused to help the appellant in bringing his wife back as she claimed that she had been divorced. It is admitted by PW-2 Mohd. Raees that after that incident i.e. visit to 'sasural' of the appellant which happened about two years prior to

this occurrence, after selling his house and shop the appellant had left Delhi and settled at his native place i.e. Shikarpur, Distt. Bullandshehar, U.P. In that situation, it is highly improbable that the appellant would have travelled from his native place in Bullandshehar with a countrymade piston in his possession thereby inviting risk of being apprehended under Arms Act as mere possession of the countrymade pistol is an offence. Merely because he happened to be present in the house of the complainant, in itself was not a ground to convict him on the solitary statement of the complainant/injured whose testimony cannot be termed as creditworthy and is not of the quality or character on which implicit reliance could have been placed by the learned Trial Court without the same being corroborated either by medical or scientific evidence.

26. I am of the considered view that prosecution has failed to prove the guilt of the appellant beyond reasonable doubt and the appellant deserves to be acquitted.

27. The impugned judgment and order on sentence are set aside. The appellant is acquitted of the charges.

28. The appeal is allowed. The appellant be set at liberty forthwith if not wanted in any other case.

29. LCR be sent back alongwith copy of this order.

30. A copy of this order be sent to the concerned Jail Superintendent for information and compliance.

**PRATIBHA RANI
(JUDGE)**

SEPTEMBER 14, 2017/‘st’