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

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+ **CRL.A.333/2018 & CrI.M.(Bail)No.469/2018**

HARISH

..... Appellant

Through: Mr. K. Singhal, Prasanna,
Ms. Vani Singhal and Mr.
Nishant Bhardwaj, Advocates

versus

STATE NCT OF DELHI

..... Respondent

Through: Mr. Hirein Sharma, APP for
State

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+ **CRL.A.336/2018 & CrI.M.(Bail)No.474/2018**

HARKA @ DEEPAK

..... Appellant

Through: Mr. K. Singhal, Advocate

versus

STATE NCT OF DELHI

..... Respondent

Through: Mr. Hirein Sharma, APP for
State

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE I.S. MEHTA

JUDGMENT

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07.05.2018

1. These are two appeals against the common judgment dated 13th February 2018 passed by the learned Additional Sessions Judge, Fast Track Courts, Shahdara convicting both the Appellants for the offence under Section 302/34 IPC and the order on sentence dated 20th February 2018 whereby both the Appellants were sentenced to imprisonment for life and payment of fine of Rs.5,000/- and in default of payment of fine, to undergo

simple imprisonment three months.

2. At the outset, it requires to be noticed that the charge against both the Appellants was that on 14th November 2012, at around 11.30 pm, at the *jhuggi* near Swarnkar Dharmashala, Kailash Colony, East Jyoti Nagar, Delhi both of them, in furtherance of their common intention, committed the murder of Subhash (deceased). The further charge was that both of them, in furtherance of their common intention, voluntarily caused simple injuries to Chander (PW-10), Suresh (not examined), Jyoti (PW-17), Lal Bahadur (PW-1), Ajay Bahadur (PW-7) and Naresh (not examined) by means of blunt objects and thereby committed offence under Section 323/34 IPC. By the impugned judgment, the trial court has acquitted both Appellants of the offence under Section 323/34 IPC.

3. With there being so many injured persons, it was expected that there would be injured eye-witnesses supporting the case of the prosecution. Unfortunately, it two of the injured persons, i.e. Suresh and Naresh, were not even examined by the prosecution. Of the injured eye-witnesses, i.e. PW-10, PW-17, PW-1 and PW7 did not support the prosecution.

4. The only witness the prosecution could bank on was Lal Chand Kumar (PW-2). The trial Court has based the conviction of the two Appellants essentially on his evidence.

5. With the help of learned counsel for the parties, the Court has examined the evidence of PW-2 carefully. He was first examined on 30th May 2013 when he stated that he was a native of Nepal; an auto driver in Delhi and had

studied up to 6th standard. According to him, on 14th November 2012, the day following *Diwali*, at around 8.30 pm, both the Appellants, who he identified in Court and were also natives of Nepal, hurled abuse at the deceased and started quarrelling with him. Harka (A-2) allegedly brought a bamboo stick from the *jhuggi* and gave blows to the deceased on various parts of his body due to which he fell down. Thereafter, A-1 brought a wooden 'serwa' which was burnt from one end and hit the deceased on the back of his head with it. Thereafter, both the Appellants are supposed to have given him further blows with *dandas* and bricks lying nearby. According to PW-2, when he along with Suresh and Chander (PW-10) tried to save the deceased, two or three unknown friends of the accused threw stones at them. Further examination-in-chief was deferred on 30th May 2013, "for want of case property which is not received from FSL".

6. The examination-in-chief of PW-2 continued, thereafter, on 6th August 2014, i.e. one year and two months after the first date of his examination-in-chief. Now, PW-2 failed to identify a wooden cot stick which was allegedly used by A-1 and a concrete stone which was purportedly used to cause injuries. He did, on the other hand, identify the bamboo stick and broken brick which were used during the attack.

7. PW-2 stated that it was correct that the bloodstained clothes of A-1 were seized and he offered to identify them. However, at the stage when Parcel No. C bearing the seal of the FSL was produced, the learned trial Court noted as under:

"After removing the seal some clothes are taken out from the pullanda but the Ld. APP states that they are not the clothes of

accused Harish as per seizure memo Ex.PW9/A.”

8. In other words, the learned APP himself drew the attention of the trial Court to the fact that the clothes produced from Parcel No. C were not the clothes of A-1 as per the seizure memo. Incidentally, it was the bloodstains on these clothes that were found to match the blood group of the deceased as per the DNA Reports. Again, when the black coloured pant and the dust coloured T-shirt were taken out from Parcel No. B, the trial Court noted: “but they also do not tally with the description of clothes mentioned in Seizure memo Ex.PW-9/A.” Likewise, clothes contained in Parcel No. A, which were supposed to be blue coloured jeans and multi-coloured t-shirt, were also stated by the APP himself not to be the clothes of A-1 as per the seizure memo. Therefore, the prosecution failed to prove that the bloodstained clothes belonged to A-1.

9. The further examination of PW-2 was deferred to the following date, i.e. 7th August 2014. Again, the clothes in Parcel A were shown to PW-2. He stated that he was not aware when the clothes were seized by the police and also how they were seized. In his cross-examination by the counsel for the Appellants, PW-2 stated as under:

“The incident had occurred on the day of Govardhan Pooja. On the day of occurrence I had gone to said plot to park my TSR and when I was leaving from my house I was informed by someone that a quarrel had taken place near Surankar Dharamshala, Kailash Colony in front of jhuggies. I came to know this fact from Ganesh, Suresh and Chander. I came to know that at the place of occurrence 30 - 40 persons of locality had collected. First I received missed call regarding the cal on my Mobile No. 9971918454 from one Veeru. I informed Veeru that I will call him. I do not remember the phone number of

Veeru due to lapse of time.”

10. In other words, PW-2 denied having been present and actually witnessing the occurrence although in his statement under Section 161 Cr PC, he allegedly told the police that he was an eye-witness who was injured in the fight. In his cross-examination, PW-2 maintained, “the quarrel was going on when I reached there.” When the Court asked this witness how he could explain the injuries, he simply stated, “I was having injuries prior to the incident.” When PW-2 was again asked by the Court why he had not on the previous date disclosed that he was being pressurized by the police, he simply stated, “I committed the mistake but today what I am saying is true.”

11. What weakens the case of the prosecution is the deposition of PW-1 who states that PW-2 had in fact hit him with a brick on his forehead which caused him to bleed profusely and then lose consciousness. According to PW-1, even when he regained consciousness at GTB Hospital, PW-2 came there and again punched him at the same spot on the forehead where PW-1 was injured. However, this aspect of the case does not appear to have been investigated by the police at all.

12. PW-2 was, therefore, a wholly unreliable witness and his testimony could not form the basis of conviction of the accused.

13. The other injured eye-witnesses PWs-7 and 10 failed to support the prosecution. Jyoti (PW-17) a fourteen year old child also did not support the prosecution. According to her, she was returning from the washroom and while entering the *jhuggi*, a brick struck her on the right side of her face due

to which she suffered an injury.

14. The medical evidence also did not support the prosecution. Dr. Mahesh Kumar (PW-4), when asked whether the injuries on the deceased could be caused by the concrete stone, the wooden stick, or the bamboo stick, answered in the affirmative to all the three possibilities. This was in relation to five out of the ten external injuries noticed on the deceased. With the prosecution trying to attribute a specific role to A-1 and A-2 with particular reference to the weapon of offence, it was important for the doctor who performed the post-mortem examination to explain which of the fatal injuries would have been caused either by the bamboo or the wooden stick. It was not the case of the prosecution that the injuries were caused by a concrete stone. However, the evidence of PW-4 indicated even that as a possibility. The net result was that the prosecution also failed to prove that the injuries were caused by the weapons allegedly recovered at the instance of the two Appellants.

15. The seizure memo of the clothes of A-1 (Ex.PW9/A) shows that it was witnessed by as many as six persons, out of which, four were police witnesses. Strangely even one of these police witnesses, i.e. Ct. Devender (PW26), did not support the prosecution. He maintained that nothing was taken into possession by the IO in his presence. He further stated in his cross-examination by the APP:

“I had not stated to the police in my statement Mark PW26/A that the clothes, i.e. sweater, shirt having black, red and grey colour stripes and blue colour jeans worn by accused Harish at the time of his arrest which were also having blood stained at that time were taken into possession by the IO (confronted with

portion A to A1 of statement Mark PW26/A wherein it is so recorded). I have not stated in my statement Mark PW26/A to the police that after taking the aforesaid clothes into the possession, the same were deposited in the malkhana of the police station or that I have signed the memos in this regard (confronted with portion B to B1 of statement Mark PW26/A wherein it is so recorded).”

16. With the seizure of the clothes of A1 having not been proved, the fact that the bloodstains on those clothes were confirmed by the FSL report to be that of the deceased would not aid the prosecution. As regards the bloodstained clothes of A-2, there was no confirmation by the DNA report that those belonged to the deceased.

17. The Court, therefore, concludes that the prosecution has failed to prove the guilt of the Appellants beyond all reasonable doubt. Consequently, the appeals are allowed and the impugned judgment of the trial Court and the order on sentence are hereby set aside. The Appellants shall be set at liberty forthwith unless wanted in any other case. Each of them will fulfil the requirement of Section 437A Cr PC to the satisfaction of the trial Court at the earliest. The trial Court record along with a certified copy of this judgment be returned to the trial Court forthwith. The appeals are allowed and the applications are disposed of.

S. MURALIDHAR, J.

I.S. MEHTA, J.

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