

\$~R-20 & 21.

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

+ **Date of Decision: 16.04.2018**

% **CRL.A. 977/2013**

MOHD NADIM

..... Appellant

Through: Mr. Jivesh Kumar Tiwari &
Ms.Suman Chauhan, Advocates.

versus

STATE

..... Respondent

Through: Mr. Rajat Katyal, APP for the State.

% **CRL.A. 632/2013**

MOHD. HAIDER

..... Appellant

Through: Mr. Sumer Sethi & Ms. Dolly
Sharma, Advocates.

versus

STATE

..... Respondent

Through: Mr. Rajat Katyal, APP for the State.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE P. S. TEJI

VIPIN SANGHI, J. (ORAL)

1. The aforesaid two appeals have been preferred by the appellants named above to assail their respective conviction by the Trial Court under Section 307 read with Section 34 IPC. The appellant Mohd. Nadim has also

assailed his conviction under Section 25/ 27 of the Arms Act. Whereas the appellant Mohd. Nadim stands sentenced to life imprisonment with fine of Rs.10,000/-, and in default of payment of fine to further undergo Simple Imprisonment for two months for the offence under Section 307 IPC; he has been sentenced to undergo Rigorous Imprisonment for three years for the offence under Section 25/ 27 of the Arms Act. His sentences are to run concurrently. The appellant Mohd. Haider has been sentenced to ten years Rigorous Imprisonment for the offence under Section 307 IPC with fine of Rs.3,000/- and in default of payment of fine, to further undergo Simple Imprisonment for one month. The benefit of Section 428 Cr.P.C. has been given to the appellant convicts.

2. We may at this stage itself observe that there was a third accused, namely Naimuddin, who was also convicted for the offence under Sections 307/ 34 IPC. However, during pendency of the appeal, it was found that he was juvenile, and consequently, he was released.

3. The relevant facts of the case, taken note of by the Trial Court, are as follows:

“2. The facts of the prosecution case in brief are that on receipt of DD No. 27-A, on 20.11.2008, SI B.D. Meena alongwith Ct. Sheesh Pal, reached at H. No. 864, Gali No. 9, near APN School, Old Mustafabad, Delhi, where Beat Staff HC Surendra No. 1883/NE and Ct. Rajendra Kumar No. 680/NE were already present. On inquiry, SI came to know that injured had already been removed to GTB Hospital. Blood was lying on the spot. Leaving the beat staff on spot to guard the same, SI alongwith Ct. Sheesh Pal left for GTB Hospital and collected MLC No. C-6596/08 of injured Sajid S/o Shaukat Ali, R/o H.

No. 587, Gali No. 6, Old Mustafabad, Delhi, with alleged history of assault (gun shot injury) and patient/injured was unfit for statement. IO received parcel containing blood stained shirt and baniyan of injured. One Wakil Ahmed S/o Shaukat Ali, R/o H. No. 587, Gali No. 6, Near Kuen Wali Masjid, Old Mustafabad, Delhi-94, aged 19 years, met IO and got his statement recorded as under :-

"I am residing at aforesaid address alongwith my family and do a private job. Today dated 20.11.2008, the engagement ceremony of my brother Khalid was being solemnized and our whole family was busy in the said function, at about 04.30 PM, my younger brother Sajid received a call on his mobile phone and left the function saying that he will be back soon. At about 05.15 PM, one boy came and told me that someone has shot my brother Sajid at Gali No. 9, Old Mustafabad. I alongwith my elder brother Liyakat Ali immediately reached there and saw that my brother Sajid was lying there (khoon se lathpath) and with the help of my brother Liyakat, I took my brother injured Sajid to GTB Hospital in an auto and on our way to hospital, I inquired him about the incident on which Sajid told that Nadim s/o Istkar had called him at Gali No. 9, Old Mustafabad where Mohd. Haider of neighborhood and one other boy not known to him were already standing. As the Sajid reached there, Nadim started abusing him and said that he (Sajid) had beaten him on the day of Eid and today he will not leave Sajid and told Mohd. Haider and other boys to catch hold of Sajid so that Sajid cannot run away on which Haider and other boy caught hold Sajid and Nadim shot Sajid on his back and Sajid saw that Haider was also having a desi Katta. Thereafter, my brother was screaming in pain who was got admitted in GTB Hospital for treatment.

Nadim, Haider and his one associate have shot my brother with the intention to kill him. Legal action be taken against them. I have heard my statement which has been reduced in writing, same is correct."

3. On the basis of the above-statement of complainant, MLC of injured, and the circumstances, commission of offence U/s 307/34 IPC and 25/27/54/59 Arms Act was made out and accordingly, SI B.D. Meena got the FIR registered through Ct. Sheesh Pal. Crime Team was called. Crime scene was got inspected and photographed by the Crime Team. Blood stained earth-control and simple earth-control besides desi katta loaded with cartridge were lifted from the spot and were seized. IO recorded the statements of witnesses. On 21.11.2008, IO recorded the statement u/s 161 [Cr.PC](#) of injured Sajid who disclosed the name of Naimuddin as third associate of accused Haider and Nadim. Accused Mohd. Haider was arrested at the instance of complainant. Disclosure statement of accused Mohd. Haider was recorded and pointing out memo of spot was prepared at his instance and he was sent to JC. On 22.11.2008, at the instance of complainant. Accused Naimuddin was arrested, his disclosure statement was recorded and pointing out memo of spot was prepared at his instance. On 29.11.2008, third accused Nadim was arrested at the instance of his maternal uncle Nasir Hussain, his disclosure statement was recorded and pointing out memo of spot was prepared. Police custody remand of accused Nadim was obtained and during the remand, he got recovered, from Muzaffar Nagar, U.P., one desi katta, one live cartridge and one fired cartridge which were used in the commission of the offence. Case property was sent to FSL. Final result on the MLC of injured was obtained wherein 'dangerous/grievous injury' was opined by the doctor. Crime Team report and photographs were obtained. On completion of investigation, charge-sheet was filed awaiting FSL result. However, later on, FSL result from FSL (Ballistics Division), Rohini, Delhi was obtained and same was filed through supplementary challan".

4. The prosecution, to prove the charge, examined as many as 18 witnesses. The most important witness examined by the prosecution was the injured victim Sajid, who was examined as PW-1.

5. The Trial Court has convicted the appellants by believing the testimony of the injured witness PW-1 on the premise that during his cross-examination, the defence was not able to establish any reason why he would spare the real culprits and falsely implicate the appellants in the case.

6. The submission of learned counsel for the appellant, firstly, is that though it was claimed by the prosecution that the appellant Mohd. Nadim had called the victim Sajid on his mobile phone while the engagement ceremony of his younger brother was in progress, and in response to the said call, Sajid had gone to meet Mohd. Nadim at Gali No.9, Mustafabad, which was about 400 steps from his house, the particulars of the mobile phone numbers and the Call Detail Records (CDRs) of neither the appellant Mohd. Nadim, nor the injured Sajid were produced and led in evidence.

7. Learned counsel further submits that though it was claimed by the prosecution that the incident had been witnessed by a crowd which had gathered at the place of occurrence, no independent witness had been examined by the prosecution.

8. The further submission is that appellant Mohd. Nadim was arrested nine days after the incident and the Arrest Memo does not mention the place of his arrest.

9. He further submits that the alleged weapon of offence, allegedly used

by Mohd. Nadim, was recovered from Muzaffar Nagar. However, the bullet recovered from the body of the victim could not be matched with the recovered firearm.

10. Learned counsel further submits that as per the case of the prosecution, Mohd. Haider was also carrying a firearm which had fallen after the shot had been fired by Mohd. Nadim and when the assailants were in the process of escaping from the site of occurrence. However, the said weapon was never sent to FSL for its examination.

11. On the other hand, the submission of Mr. Katyal is that the injured witness Sajid (PW-1) is a completely reliable witness and there is no reason brought out by the defence to probablise false implication of the appellants by the victim. He submits that the testimony of an injured eye-witness stands on a higher pedestal, since he is not likely to spare the real culprits and to falsely implicate innocent persons. He submits that the assailants were known to the victim. He further submits that the victim has been rendered disabled on account of the bullet injury received by him in his vertebrae.

12. We have carefully perused the testimony of both-the victim Sajid (PW-1), and his brother Vakil Ahmed (PW-3). We may observe that PW-3 was not an eye-witness and had reached the spot with his cousin brother and they had taken the victim to the hospital in a TSR.

13. The victim Sajid (PW-1) has narrated the entire incident. In his testimony he, inter alia, stated as follows:

“On 20.11.08 my elder brother Khalid was having his engagement ceremony and I was present in my house at about 4/4:30 p.m and I received a telephonic call on my mobile phone from Nadim. (The accused present today in Court correctly pointed out by the witness) who called me in a nearby gali in Mustfabad itself. Accused Nadim was living near to my house. I on receiving the phone from Nadim reached gali no.9 Mustfabad. Accused Naeemudin and Mohd. Haider were present outside the gali who also accompanied me to the place where Nadeem was standing in gali no.9. Accused Nadeem started abusing me and stated that he would take revenge of incident of idh which had taken placed about 1 and half month prior to the said incident. Thereafter accused Nadeem asked accused Naiumuddin and Mohd. Haider to catch hold of me and accordingly both the accused Naidumuddin and Mohd. Haider caught me and accused Nadeem fired a shot on me with katta on my back. Accused Haider was also having katta with him. Accused Haider and Naimuddin had been correctly identified by the witness today in the Court. Immediately after the gun shot injury I fell down and all the accused persons fled away from the spot. While fleeing the katta of Mohd. Haider was fell down on the spot. Few persons from the locality collected there. I told them about the incident and someone informed my family members regarding the incident. My brother Wakil Ahmed and my cousin brother Liyakat Ali immediately rushed to the spot and took me to GTB hospital in an auto. I told to my brother regarding the incident. Police reached the hospital and conducted inquiries from me. My statement was recorded by the police. Witness has come to the Court while sitting in the wheel chair and is unable to stand even. Witness has stated that because of the above said incident he is still under the treatment of the doctors and is unable to stand/ walk. At the time of incident I was wearing jeans and white strip shirt. In the hospital I had got unconscious. My clothes were seized. I do not know whether the same were seized by the doctor or police as I was unconscious but I can identify my shirt if shown to me. At this

stage case property produced from malkhana PS Gokul Puri. Parcel A duly sealed with the seal of CFSL having particulars of the case is opened which contains one white shirt having black strips and one baniyan both fully blood stained. Same are shown to the witness. Witness has duly identified the same being the worn by him at the time of incident. The shirt is Ex. PW1/P1 and baniyan is Ex. PW1/P2”.

14. He was cross-examined on behalf of the accused. In his cross-examination, he stated that he knew all the three accused persons prior to the incident and that he was on talking and visiting terms with the said persons. He stated that when his brothers reached the spot of occurrence after the occurrence he was still conscious. He had also disclosed the name of the three accused persons to his brother Vakil Ahmed (PW-3).

15. At this stage, we may observe that PW-3 stated in his testimony that he had been informed by PW-1 that the assailants were Mohd. Nadim, Mohd. Haider and one other person. He had further stated that he had given the description of the three accused, and also the place where they reside in the neighbourhood, and on that basis, the third accused Naimuddin @ Naimu (the juvenile) was also apprehended.

16. PW-1 further stated that he had become unconscious after he had reached the hospital. He stated that he could not tell the name of the persons who had gathered at the spot, or the name of the persons who had informed about the incident at his house. He denied that there was any proposal of his marriage with Saima when the incident took place. It appears that during his cross-examination, it was suggested to him by the accused persons that the accused Mohd. Haider and Mohd. Nadim used to object to his marriage with

Saima. The said suggestion was given to indicate a motive for false implication of the accused. He denied the suggestion that the shot had been fired at him from a long distance and he volunteered to state that it may have been fired from a distance of one pace, or less, or more.

17. We do not find any merit in the submission of learned counsel for the appellants insofar as they have sought to rely upon the failure of the prosecution in establishing through the CDR of the mobile phone of the victim and the accused Mohd. Nadim, that Mohd. Nadim had called the victim on the fateful day. The said call, whether or not made, did not form an essential ingredient of the offence. The background in which the victim Sajid went to the place of occurrence is not relevant in the facts of the present case.

18. It has come in evidence of PW-1 that he did not know the persons who had gathered after the shooting had taken place. Thus, the non-examination of other witnesses is not fatal to the case of the prosecution. It is well-settled that, by and large, the public persons do not wish to get embroiled and offer themselves as witnesses in such like cases.

19. The failure of the arresting officer to mention the place of arrest of the appellant Mohd. Nadim in the Arrest Memo is also not fatal to the case of the prosecution. It has come in the evidence of SI B.D. Meena (PW-17) – the I.O. of the case, that on 29.11.2008, on information being received from one Nasir Hussain, the appellant Mohd. Nadim was arrested from the house of Nasir Hussain vide Arrest Memo Ex. PW-2/A.

20. Learned counsel for the appellant Mohd. Haider has also raised a similar issue with regard to the place of arrest of Mohd. Haider. We are of the view that there is no merit in the submission of Mohd. Haider, as the said aspect has no bearing on the case of the prosecution.

21. No doubt, the recovery of firearm – which was recovered on the disclosure statement made by the appellant Mohd. Nadim has not been established to have been the one used in the commission of the offence. As per the FSL Report, bullet recovered from the body of the victim Ex. “EB1” which was contained in parcel “A2” was found to be a deformed bullet and the same corresponded to bullet of 8 mm – .315” bore cartridge. The FSL Report (Ex.16/F) further states that the individual characteristics of striations present on deformed bullet marked “EC1” are insufficient for comparison and opinion whether it has been discharged through the country-made pistol .315” bore marked exhibit ‘F2’ above or not.

22. In our view, the aforesaid aspect, by itself, is not sufficient to raise a doubt on the case of the prosecution. We have consciously set out hereinabove the statement of Sajid (PW-1), who is the injured victim. We have also paraphrased the relevant portions of his cross-examination. We have undertaken this exercise, being conscious of the law laid down with regard to the admissibility of evidence of an injured witness. In ***Abdul Sayeed Vs. State of Madhya Pradesh***, (2010) 10 SCC 259, the Supreme Court had this to say with regard to the weight of the evidence of an injured witness:

“28. *The question of the weight to be attached to the evidence*

of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. "Convincing evidence is required to discredit an injured witness." [Vide Ramlagan Singh v. State of Bihar [(1973) 3 SCC 881 : 1973 SCC (Cri) 563 : AIR 1972 SC 2593] , Malkhan Singh v. State of U.P. [(1975) 3 SCC 311 : 1974 SCC (Cri) 919 : AIR 1975 SC 12] , Machhi Singh v. State of Punjab [(1983) 3 SCC 470 : 1983 SCC (Cri) 681] , Appabhai v. State of Gujarat [1988 Supp SCC 241 : 1988 SCC (Cri) 559 : AIR 1988 SC 696] , Bonkya v. State of Maharashtra [(1995) 6 SCC 447 : 1995 SCC (Cri) 1113] , Bhag Singh [(1997) 7 SCC 712 : 1997 SCC (Cri) 1163] , Mohar v. State of U.P. [(2002) 7 SCC 606 : 2003 SCC (Cri) 121] (SCC p. 606b-c), Dinesh Kumar v. State of Rajasthan [(2008) 8 SCC 270 : (2008) 3 SCC (Cri) 472] , Vishnu v. State of Rajasthan [(2009) 10 SCC 477 : (2010) 1 SCC (Cri) 302] , Annareddy Sambasiva Reddy v. State of A.P. [(2009) 12 SCC 546 : (2010) 1 SCC (Cri) 630] and Balraje v. State of Maharashtra [(2010) 6 SCC 673 : (2010) 3 SCC (Cri) 211] .]

29. While deciding this issue, a similar view was taken in *Jarnail Singh v. State of Punjab* [(2009) 9 SCC 719 : (2010) 1 SCC (Cri) 107] , where this Court reiterated the special evidentiary status accorded to the testimony of an injured accused and relying on its earlier judgments held as under: (SCC pp. 726-27, paras 28-29)

"28. Darshan Singh (PW 4) was an injured witness. He had been examined by the doctor. His testimony could not be brushed aside lightly. He had given full details of the incident as he was present at the time when the assailants reached the

tubewell. In Shivalingappa Kallayanappa v. State of Karnataka[1994 Supp (3) SCC 235 : 1994 SCC (Cri) 1694] this Court has held that the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies, for the reason that his presence on the scene stands established in case it is proved that he suffered the injury during the said incident.

29. In State of U.P. v. Kishan Chand [(2004) 7 SCC 629 : 2004 SCC (Cri) 2013] a similar view has been reiterated observing that the testimony of a stamped witness has its own relevance and efficacy. The fact that the witness sustained injuries at the time and place of occurrence, lends support to his testimony that he was present during the occurrence. In case the injured witness is subjected to lengthy cross-examination and nothing can be elicited to discard his testimony, it should be relied upon (vide Krishan v. State of Haryana[(2006) 12 SCC 459 : (2007) 2 SCC (Cri) 214]). Thus, we are of the considered opinion that evidence of Darshan Singh (PW 4) has rightly been relied upon by the courts below.”

30. The law on the point can be summarised to the effect that the testimony of the injured witness is accorded a special status in law. This is as a consequence of the fact that the injury to the witness is an inbuilt guarantee of his presence at the scene of the crime and because the witness will not want to let his actual assailant go unpunished merely to falsely implicate a third party for the commission of the offence. Thus, the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein”.

23. In view of the aforesaid position of law, in our view, the testimony of

injured witness Sajid (PW-1) does not suffer from any weakness or infirmity, and does not create any doubt in our mind with regard to its trustworthiness and credibility. The defence was not able to puncture the testimony of PW-1 by probablising any reason for their false implication in the case. Pertinently, in his defence the accused Mohd. Nadim had stated that it was a case of false implication, because the victim had enmity with the accused regarding the victims plan to marry one Saima. The said defence was, firstly, not probablised by the accused. Secondly, the plea of enmity, if any, is a double edged tool inasmuch, as, the same also could be the motive with the accused to commit the crime.

24. Pertinently, the statement of PW-3 was recorded even before the statement of the injured eye-witness (PW-1) could be recorded. The injured victim (PW-1) was taken to the hospital by PW-3 in a TSR. At the time when the victim reached the hospital, he was not fit for giving his statement. Consequently, the Rukka was prepared on the statement of Vakil Ahmed (PW-3). The same was on the basis of the contemporaneous narration made by the victim PW-1 to PW-3. Pertinently, in the FIR, name the two appellants herein (since they had been identified by PW-3 to PW-1 before he became unconscious) have been given. The FIR came to be registered on the date of the incident, i.e. 20.11.2008 at 2040 hours on the basis of the aforesaid Rukka (Ex.17/A). Thus, the story narrated by PW-3, as heard from PW-1 was in existence, and the statement of PW-1 which was recorded subsequently, and was consistent with the Rukka.

25. Consequently, we find that the Trial Court was justified in returning

the finding of guilt of the appellants.

26. As noticed hereinabove, the appellant Mohd. Nadim has been sentenced to life imprisonment with fine for the offence under Section 307 read with Section 34 IPC, whereas the appellant Mohd. Haider has been sentenced to ten years Rigorous Imprisonment for the same offence. The reason for this distinction is that the injured victim (PW-1) had narrated that the shot had been fired at him by the appellant Mohd. Nadim, whereas the other two accused Mohd. Haider and Naimuddin @ Naimu had caught the injured from two sides to facilitate the shooting of the victim by Mohd. Nadim.

27. Learned counsel for the appellant Mohd. Nadim has submitted that the punishment inflicted upon him is extremely harsh, considering that the victim has survived. He submits that the appellant has no other involvements. The appellant Mohd. Nadim had undergone 4 years, 3 months and 4 days of incarceration and earned remission of 11 months as on 06.04.2016. The appellant Mohd. Nadim has remained in custody since then. Learned counsel for the appellant Mohd. Nadim submits that his sentence has not been suspended ever since.

28. Keeping in view the facts and circumstances, we are of the opinion that the sentence of life imprisonment inflicted upon the appellant Mohd. Nadim is on the higher side. We, accordingly, substitute the same with Rigorous Imprisonment for ten years. The fine imposed by the Trial Court shall, however, continue to remain the same. He shall be entitled to the benefit of Section 428 Cr.P.C. We also maintain the punishment inflicted

upon the appellant Mohd. Nadim under Section 25/ 27 of the Arms Act. However, the sentences shall run concurrently.

29. So far as the appellant Mohd. Haider is concerned, learned counsel for the appellant has submitted that the role attributed to the appellant Mohd. Haider is that he facilitated the commission of the offence by the appellant Mohd. Nadim, but he had not fired the shot. He further submits that the sentence of Mohd. Haider was suspended by this Court on 11.05.2017 on the ground that he had completed more than five years' incarceration. He submits that during the period of his remaining on bail, he has not misused the same and it is not reported that he is involved in any other offence. Learned counsel further submits that in the meantime, the appellant Mohd. Haider has got married and his wife is pregnant. Learned counsel, therefore, submits that this Court may show leniency to the said appellant.

30. Having considered the aforesaid submissions and the role played by the appellant Mohd. Haider, we are inclined to reduce his sentence as well, since the punishment inflicted upon him by the Trial Court also appears to be harsh. Accordingly, his sentence is reduced from ten years to seven years Rigorous Imprisonment. The fine imposed upon him shall continue to remain the same. The appellant Mohd. Haider is, accordingly, directed to surrender within the next two weeks before the Jail Superintendent concerned to undergo the remaining sentence. He shall be entitled to the benefit of Section 428 Cr.P.C.

31. The appeals stand disposed of in the aforesaid terms.

32. A copy of this judgment be sent to the Trial Court and the concerned Jail Superintendent for compliance.

VIPIN SANGHI, J.

P. S. TEJI, J.

APRIL 16, 2018

B.S. Rohella

