

\$~4 & 5

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

+ **CRL.L.P. 245/2018**

STATE GOVT OF NCT OF DELHI Petitioner
Through: Mr. Hirein Sharma, APP
for State.

versus

MOHD. KASIM @
KHAN SAHEB & ANR. Respondents
Through: None.

+ **CRL.L.P. 301/2018**

STATE GOVT OF NCT OF DELHI Petitioner
Through: Mr. Hirein Sharma, APP
for State.

versus

SAJID Respondent
Through: None.

**CORAM: JUSTICE S. MURALIDHAR
JUSTICE VINOD GOEL**

ORDER
% **23.07.2018**

1. By these petitions, the State seeks leave to appeal against two judgments of the Special Judge NDPS-2 (Central), Tis Hazari Courts, Delhi dated 8th November 2017 and 8th February 2018 in SC No.27958/16 arising out of FIR No.56/07 registered at PS Civil Lines, whereby Kasim @ Khan Saheb, Abdul Rehman and Sajid @ Sahil, have been acquitted of the offences punishable under Section 411 IPC, Sections 186/353/307 IPC read with Section 34 IPC, and Sections 25/27 Arms Act.

2. At the outset, it requires to be noticed that, in all, there were four accused. One of them, Sharafat Ali @ Mama, has been declared as a Proclaimed Offender ('PO'). Sajid @ Sahil was absent during trial and therefore, a separate judgment was passed against him subsequently.

3. The case of the prosecution is that secret information was received at PS Civil Lines on 12th March 2007 regarding the movement of a gang who had allegedly committed robbery. On the basis of this information, police parties were constituted comprising Inspector Bhagwati Prasad (PW-32), ASI Ravinder Singh, HC Rajiv Mohan, HC N.K. Pavitran, HC Raghvender and four constables, i.e. Constable (Ct.) Bijender, Ct. Devender, Ct. Bhagat and Ct. Sanjay Sen.

4. At 11.55 pm, a car bearing registration DL-8C-RV-8231 which was carrying four people was signaled to stop near the Trauma Centre Hospital at Civil Lines. According to the prosecution, Abdul Rehman was driving the car. When he stopped the car, Kasim and Sharafat Ali (PO) alighted from it and started running in different directions while Sajid continued to remain sitting in the car. The two of them i.e. Kasim and Sharafat Ali, are stated to have opened fire at the police party. Sajid is further stated to have tried to attack one of the police officials with a knife. Sajid is stated to have been apprehended by HC Raghvender and Ct. Devender.

5. The further case of the prosecution is that one pistol of 7.62 mm loaded with two live cartridges was recovered from Kasim. He was

also found in possession of 400 gm of jewellery which was part of the stolen property of the case FIR No.103/2007.

6. The further case of the prosecution is that Abdul Rehman was found in possession of one pistol of 7.62 mm with one fired cartridge stuck in its chamber and four live cartridges in the magazine. He too was found in possession of 430 gm of jewellery. Sharafat Ali (PO) was found in possession of 400 gm of gold jewellery. Sajid was also found in possession of 400 gm of gold jewellery. All of this jewellery together purportedly formed part of the stolen property in FIR No. 103/2007.

7. According to the prosecution, from the spot, the aforesaid car and one cartridge were recovered and seized. The case property was ultimately transferred to PS Srinivaspuri where the case under Section 302 IPC had already been got registered. The four accused were arrested on production warrants in the said case being issued. The material exhibits were got dispatched to Forensic Science Laboratory (FSL) for analysis.

8. After the charge sheet was filed against the accused for the offence aforementioned, charges were framed against all of them for the offences punishable under Section 411 IPC, Sections 186/353/307 IPC read with Section 34 IPC, and Sections 25/27 Arms Act.

9. Initially, by a judgment dated 14th August 2012, the trial Court convicted the two accused and sentenced them by an order dated

5th September 2012. Thereafter, three criminal appeals, viz. Crl.A.1313/2012, Crl.A.39/2013, and Crl.A.367/2013 were filed in this Court. By the order dated 9th December 2014, the aforementioned judgment and order on sentence of the trial Court were set aside by this Court and the matter was remanded to the trial Court with directions to the trial Judge to pass appropriate orders in the application to be filed by the accused persons for recalling witnesses for the purpose of cross-examination.

10. After remand, applications were filed under Section 311 Cr PC on behalf of Abdul Rehman and Sharafat Ali and both these applications were allowed. On 3rd August 2015, the prayer for an additional charge to be framed under Section 411 IPC against all the accused was allowed.

11. The trial Court, in the impugned judgments, has first noted that according to the police, on receipt of secret information, they left the PS at around 10 pm in two vehicles, one government vehicle and one private Qualis taxi. The trial Court further noted that although the PWs talked about the taxi being hired, there was no proof produced in support of it. Even the number of the private taxi was not mentioned in the DD entry while at the same time the number of the government vehicle was mentioned.

12. The accused are stated to have been travelling in an Indica car when they were flagged down at around 11.45 pm. However, the

registration number of the said Indica car found no mention in the statement of HC N.K. Pavitran (PW-1) recorded under Section 161 Cr PC. In his cross examination, PW-1 feigned ignorance as to whether he had earlier spoken about a secret informer pointing out towards some vehicle or drawing the attention of the police to it. The trial Court rightly noted that “had this witness been present at the spot, he could not display ignorance about this significant fact”.

13. The trial Court next dealt with the case of the prosecution about the accused having attempted to attack the police party. According to PW-1, Abdul Rehman took out a pistol and tried to fire but he was pushed by HC Rajiv Mohan (PW-4). According to PW-4, Abdul Rehman tried to open fire but could not succeed and was caught by an unspecified police official. SI Bhagwati Prasad (PW-32) stated that Sajid tried to escape by attacking HC Raghvender and Ct. Devender by using a knife. However, Ct. Devender managed to overpower Sajid. Further, according to PW-2, two rounds were fired at the police party from the Indica car. In retaliation, PW-32 and ASI Ravinder also fired at the car with their service weapons.

14. The trial Court noted that despite the above narration, no service weapons of the police officials were seized or sealed or sent for analysis. There was no explanation forthcoming for this lapse. There was also a contradiction about who overpowered whom. According to PW-4, Sajid was apprehended by ASI Ravinder and HC Bijender whereas Sharafat Ali @ Mama was overpowered by Ct. Raghvender

and Ct. Devender. PW-4 also made a contradictory statement about the recoveries made from the accused. According to him, Sajid was found in possession of a *katta*, whereas Sharafat Ali @ Munna was found in possession of a knife. The trial Court noted that Ct. Devender (PW-11) did not support the prosecution's narration of events. He stated that Sajid tried to attack him with a knife but he succeeded in snatching away the knife from him. Therefore, the prosecution witnesses were themselves at variance over the material aspects of the case.

15. Most importantly, as regards the recoveries of the weapons of offence, the seizure memo for the seizure of the pistols from Kasim and Abdul Rehman did not bear the attestation of Inspector K.P. Singh but only ASI Ravinder. Therefore, the presence of Inspector K.P. Singh at the spot was in itself doubtful. According to PW-4, it was Sajid who was found in possession of a pistol and cartridge and Sharafat in possession of the knife. This contradicted the version of PW-32.

16. PW-1 admitted in his cross-examination that none of the documents had his attestation. Therefore, even his presence at the time of recovery was doubtful. As regards the recovery from Sajid, there was no attestation of HC Raghvender thereon but only of Constable Devender Singh. Even the presence of HC Raghvender was therefore doubtful.

17. Adding to the confusion, ASI Ravinder (PW-35) stated that all four occupants of the Indica car started running after it was stopped, whereas the other two PWs state that Sajid kept on sitting in the vehicle and three or four persons started running away.

18. The seizure memo in respect of Sharafat Ali (Ex.PW-25/A) did not have the attestation of HC Bijender but only of ASI Ravinder Singh. Therefore, the presence of HC Bijender at the time of recovery was also doubtful.

19. No attempt was made to recover any chance-prints from any of the weapons used. This was indeed a serious lapse, particularly since both accused were charged with having opened fire at the police party and the pistols were recovered purportedly at the spot soon after their respective arrests.

20. The trial Court then discussed the site plan of the place of encounter and the recoveries therefrom. It is noticed, however, in the site plan (Ex.PW-32/E), none of the eight points marked on the site plan showed the place from where any of the four accused attacked the police. The trial Court also held that no evidence was led to show that after sealing of the case property seized, the seal was delivered to anyone.

21. As regards the recovery of jewellery from the various accused persons, the seizure memo bore the attestation of PW-4 and not of PW-1. It is PW-1 who spoke about the recovery of jewellery from

Abdul Rehman but not of the recovery of jewellery from the other accused. PW-32 stated that Kasim was in possession of gold of 400 gm. The said jewellery was supposed to have been seized and sealed and thereafter, the seal was supposed to have been handed over to ASI Ravinder. However, ASI Ravinder did not state about delivery of any seal to him by PW-32.

22. A significant aspect of the case is that at no point was any public witness joined in the proceedings of the case. No notice was served upon any public person for non-joining the proceedings.

23. Furthermore, Naresh Kumar (PW-8), the concerned officer from the Ashok Vihar Authority has deposed that the said car used by the accused which was purported to have been registered with the said authority, was not in fact registered there. The trial Court noted that “there is no evidence as to whom the vehicle actually belonged, and as to how and when it came in possession of the accused persons”.

24. The disclosure statements of the accused persons again had the attestation of PW-4 but in his deposition, he nowhere spoke about the disclosure by Abdul Rehman. In the absence of any evidence as to what was actually told by the accused at the time of their arrest, the discovery of facts pursuant to such disclosure would lose all sanctity.

25. The learned APP pointed to the fact that the recovered articles were identified subsequently by the persons to whom they belonged. Nevertheless, in the absence of any tangible and credible evidence as

regards the actual involvement of the accused in the so called robbery, the mere fact that some witnesses might have identified the stolen articles will not be as sufficient to connect the accused to the crime.

26. Having carefully perused the trial Court record, this Court is unable to find any apparent error in either of the two judgments of the trial Court. The Court is not persuaded that sufficient grounds for appeal have been made out.

27. The Court may also observe that since the evidence in this case is common to Sharafat Ali (PO), no further action is warranted qua him either. The petitions are dismissed. No order as to costs.

S. MURALIDHAR, J.

VINOD GOEL, J.

JULY 23, 2018

"shailendra"/dkb