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

+ CRL.L.P. 397/2017

SUBHASH ROY & ANR

..... Petitioners

Through: Mr. V.K. Ohri, Mr. Pawan Madan &
Mr. S.S. Bhatia, Advocates.

versus

THE STATE NCT OF DELHI & ANR

..... Respondents

Through: Mr. Rajat Katyal, APP along with SI
Satish Kumar, PS-Govindpuri, for the
State.
Mr. Shivam Sharma, Advocate for
respondent No.2.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE P.S.TEJI

ORDER

05.01.2018

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1. The present leave petition has been preferred by Sh. Subhash Roy – the father of the deceased Shailesh Roy, and Sidharth – the injured (PW-15) to seek leave to appeal against the judgment dated 13.04.2017 rendered by the learned Additional Sessions Judge – 04 & Special Judge (NDPS) Act, South East District, Saket Courts, Delhi in Sessions Case No.52/2011 arising out of FIR No. 475/2011 under Section 302/ 307/ 34 IPC registered at PS – Govindpuri.

2. Two accused were tried by the Court, namely Chetan Chaudhary (respondent No.2 herein) and Vijay Virdhi. The Trial Court found Vijay

Virdhi guilty and convicted him of the offence under Section 304-II IPC and awarded a sentence of 10 years imprisonment with fine of Rs. 5 Lakhs. He was convicted under Section 308 IPC and awarded sentence of 3 years Rigorous Imprisonment with fine of Rs.2 Lakhs. However, the respondent Chetan Chaudhary was acquitted by the Trial Court. It is to challenge the said acquittal that the present leave petition has been preferred.

3. We may observe that the appeal preferred by Vijay Virdhi, being Crl.A. No.448/2017 was disposed of by this Court on 29.05.2017. While dismissing the said appeal, this Court modified the sentence awarded to Vijay Virdhi.

4. Learned counsel for the petitioners states that he has preferred a Special Leave Petition against the said decision before the Supreme Court.

5. So far as the respondent Chetan Chaudhary is concerned, the Trial Court has acquitted him by placing reliance on the testimonies of PW-6, PW-12 and PW-13, who were eye-witnesses to the incident. The Trial Court has also found that though the injured (PW-15) claimed that the accused Chetan Chaudhary had inflicted *dandaa* blows upon him, due to which he fell unconscious, only one *dandaa* was recovered from the site of the incident, which had been used by Vijay Virdhi. The Trial Court also found that the injured (PW-15), i.e. petitioner No.2 herein, had improved his statement. Moreover, PW-6, PW-12 and PW-13 had consistently deposed that Chetan Chaudhary had not handled, much less, given any *dandaa* blow to either the deceased, or PW-15. They have consistently deposed that Chetan Chaudhary had tried to save the deceased by pulling him away, and

he had not held the deceased with a view to disable him from defending himself from the blows being inflicted by Vijay Virdhi.

6. The submission of learned counsel for the petitioners is that the statement of the victim (PW-15) cannot be disregarded. According to PW-15, while Vijay Virdhi had started inflicting *dandaa* blows upon the deceased Shailesh Roy, Chetan Chaudhary had similarly started inflicting *dandaa* blows upon the victim (PW-15). Learned counsel submits that it has also come in evidence of the said independent eye-witnesses that Chetan Chaudhary had caught-held of the deceased. He submits that the statements made by the said three witnesses before the Magistrate under Section 164 Cr.P.C. were at variance with their testimonies recorded by the Court, and PW-6 had stated that he knew Chetan Chaudhary from before since he used to frequent his tea-stall from time to time. Though it was not earlier stated by the said witnesses that Chetan Chaudhary had caught-held of the deceased with a view to save him, while making their depositions before the Court, they had sought to twist their earlier statements by claiming that Chetan Chaudhary was trying to protect the deceased from the *dandaa* assaults being made by Vijay Virdhi.

7. We have carefully gone through the testimonies of PW-6, PW-12 and PW-13, as also the testimony of PW-15. PW-6, PW-12 and PW-13 are independent witnesses and there is no reason to discard their consistent testimonies. Pertinently, it is on the basis of these testimonies that the co-accused Vijay Virdhi has been found guilty. Even from the testimony of PW-15, it is seen that Chetan Chaudhary had adopted a conciliatory approach when a quarrel had initially started between PW-15 and the

deceased on the one hand, and the accused on the other hand. After the first round of quarrel, the accused had left the site and had returned after some time, when the quarrel again erupted. It is seen from the evidence that, at this stage, Vijay Virdhi picked up the *dandaa* and started giving blows to both the victims. The statement of PW-15 that both the accused were armed with *dandaa*, and both of them had used the same on the victims is not substantiated as only one *dandaa* was recovered, and not two. The learned ASJ has appreciated the testimonies of the aforesaid witnesses in the following manner:

“51 PW6 had categorically stated in his examination-in-chief that accused Vijay Virdhi had picked up a wooden stick (danda) from the adjacent fruit shop and had hit the deceased only once with the said danda, whereas accused Chetan Chaudhary was trying to save them. Not only this but also, as per this witness, it was accused Vijay Virdhi, who had also hit the injured Sidharth on one side of his face. Even in reply to the leading question put to him by Ld. Addl. PP for the State, this witness had remained firm on his version that co-accused Chetan Chaudhary was trying to save the person whom accused Vijay Virdhi was trying to assault with a danda. He had further clarified that accused Vijay Virdhi was being addressed by the people of the street (gali) as Anoop Choudhary, hence, he had perceived him as Anoop Chaudhary. It was also admitted by him that both the accused persons had initially left the tea stall after having arguments with the deceased as well as the injured. It was also admitted by him that even the accused persons were also slapped by the deceased and injured on their first visit to tea stall. He had admitted it further that he had told the police that accused Vijay Virthi had hit danda on the head of a boy whose head had got fractured and he had fallen down. He had denied the suggestion that accused Chetan Chaudhary had caught hold of the boy who had received the injuries on his head. It was stated further by this witness that he came to know about the

correct name of accused Vijay Virdhi at the time of his arrest and prior to recording of his statement by the Ld. MM u/s 164 CrPC. However, he had named him as Anoop Chaudhary due to slip of tongue and on this aspect he was never cross-examined any further by the Defence.

52 This witness had also admitted that injured as well as the deceased were under the influence of liquor and accused Chetan Chaudhary had not given beating to those two boys.

53 Similarly, PW12 in his examination-in-chief had also stated that accused Vijay Virdhi had given only one blow with danda to the deceased on his head before indulging into a scuffle with those people by hands and as per this witness, injured Sidharth was not hit with danda rather his face was banged on the car by accused Vijay Virdhi due to which he had started bleeding and in corroboration of the testimony of PW6, even this PW had also stated in reply to the court question that accused Chetan Chaudhary was only trying to save the injured by dragging him from behind and asking accused Vijay Virdhi to leave the spot immediately. He had also admitted the suggestion put to him on behalf of accused Vijay Virdhi as correct that deceased at the time of his being hit by a danda was standing near the Santro car.

54 It was further confirmed by this witness that he had seen accused Vijay Virdhi only giving one blow and had not seen him giving more blows to the injured and he had again specifically stated that accused Chetan Chaudhary had not given any beatings to any one nor he had caught hold of any one.

55 As per this witness, he had not seen either of the accused persons at the shop prior to the date of incident. During his cross-examination by Ld. Defence Counsel, he had admitted it to be correct that name of accused Vijay Virdhi was known to him prior to his recording of statement u/s 164 CrPC by the Ld. MM as disclosed to him by the police but he had further clarified it by saying that he had name Vijay Bhati instead of

Vijay Virdhi. Again, he had categorically stated that accused Chetan Choudhary was only an intervener in the quarrel and he had never caught hold of the victim with an intention of subjecting him to beating by co-accused and he had made this observation on the basis of manner of intervention by accused Chetan Chaudhary that he was trying to save the deceased and not to facilitate his co-accused Vijay Virdhi to commit the crime.

56 Similarly, PW-13 had also deposed that it was only accused Vijay Virdhi, who was seen giving beatings to both injured and the deceased with danda, whereas accused Chetan Chaudhary was trying to save them. In his cross-examination by Ld. Addl. PP for the State, he had stated that he had only seen that a danda was being used by accused Vijay Virdhi, but he had not seen as to on which exact place of body it was hit by him. Danda was stated to be a bamboo stick by which beatings were given.

57 In his cross-examination by Ld. Defence Counsels, he had again corroborated his earlier version that accused Vijay Virdhi had given only one danda blow on the head of the deceased, whereas accused Chetan Chaudhary was trying to save him. It was also admitted by him that name of accused Vijay Virdhi was disclosed to him by the police.

58 PW-15 injured Sidharth Roy, despite claiming about the apologizing behaviour of accused Chetan Chaudhary to him and the deceased at initial stage had gone ahead with deposing that on second occasion, it was accused Chetan Chaudhary who was hitting him with danda, whereas accused Vijay Virdhi had hit the deceased with a danda.

59 This version of PW15 appears to be an improvement made by him before the court to somehow implicate accused Chetan Chaudhary, because his version regarding role of accused Chetan Chaudhary is entirely contrary to the version of 3 independent public eye witnesses. Not only this, but also, he had admitted it clearly that as long as he was conscious,

accused Chetan Chaudhary had neither caught hold of him nor the deceased and further he had gone to admit the fact as matter of record that he had never told the police that he was hit with a danda by accused Chetan Chaudhary. Even the investigating agency in its own case had talked about recovery of only one danda as weapon of offence, hence, his (PW15's) story of use of two dandas is unbelievable.

60 From the aforesaid appreciation of the testimonies of the witnesses though with some discrepancies and minor contradictions which were quite natural to occur due to lapse of considerable time between the date of incident and respective dates of their depositions before the court, it becomes amply clear that presence of the accused persons alongwith the deceased and the injured at the place and time of incident and even occurrence of incident has also been duly proved by the prosecution beyond any reasonable doubt by examination of all its witnesses as well as from their cross-examination conducted by the Ld. Defence Counsels as their testimonies have remained intact and firm on material facts and substantial aspects of the prosecution's case.

61 Now, only question remains to be answered is determination of guilt of the accused persons as to whether they had committed any murder which is made punishable under section 302 IPC or some other offence.

62 Admittedly, there was no previous animosity between the parties which could have given a motive to the accused persons to have caused murder of the deceased. Further more, the fact that accused persons were not armed with any deadly weapon and had come back to the spot empty handed and accused Vijay Virdhi had picked up a danda lying at the nearby fruit shop also negates the possibility of the accused persons either having any intention or motive to cause murder.

63 It is the case of the accused persons that prior to picking up of a danda from the nearby fruit shop by accused Vijay Virdhi, the parties again had a verbal altercation and scuffle

using their hands and this fact further shows that the accused persons had neither any intention nor any motive to cause murder.

64 However, an established fact on record is that accused Vijay Virdhi had caused a danda blow on the head of the deceased and also on the face of the injured, which is sufficient enough to hold that while causing danda blow accused Vijay Virdhi had all the knowledge and reasons to believe that his aforesaid blow could have also proved fatal in respect of the person to whom it was administered. There is however no incriminating evidence available on record against accused Chetan Chaudhary.”

8. Keeping in view the testimonies of the aforesaid witnesses, we are of the view that the guilt of respondent No.2 Chetan Chaudhary has rightly been held not to have been established beyond all reasonable doubt.

9. In these circumstances, we find no reason to interfere with the impugned judgment.

10. Dismissed.

VIPIN SANGHI, J

P.S.TEJI, J

JANUARY 05, 2018

B.S. Rohella