

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CRA-D-1066-DB-2015 (O&M)

Date of Decision : 04.02.2019

Umardeen

... -Applicant/Appellant

Versus

State of Haryana and others

.....Respondents

**CORAM:HON'BLE MR. JUSTICE RAKESH KUMAR JAIN
HON'BLE MR. JUSTICE HARNARESH SINGH GILL**

Present: Ms. Sarabjit Kaur, Advocate for the applicant.

HARNARESH SINGH GILL, J.

Earlier the complainant had filed the present case as a Criminal Appeal. However, the learned counsel for the applicant-appellant had sought and was granted permission to file an application under Section 378 (4) Cr.P.C. seeking leave to appeal. Thereafter, vide order dated 5.7.2018, application seeking leave to appeal was permitted to be taken on record. Accordingly, office is directed to treat this appeal as an application seeking leave to appeal.

The complainant has preferred the present application under Section 378(4) Cr.P.C. for grant of leave to appeal against the judgment dated 04.03.2015 passed by the learned Additional Sessions Judge, Palwal, whereby respondent Nos. 2 to 4 stood acquitted of the charges framed against them under Sections 323, 325, 506, 307 read with Section 34 IPC in case bearing FIR No. 285 dated 21.8.2010.

Brief facts of the case are that prosecution was set into motion upon the statement of complainant-Umardeen son of Tundal, recorded to the effect that on 07.08.2010 at about 5.30 P.M., his niece Habiba daughter of Sagru Khan had gone to fetch the water from the tap and as she reached near

her house, Wajim son of Iqbal hit her. The girl fell down alongwith the pitcher. Meanwhile, his sister-in-law (Bhabhi) Rahisan wife of Sagru reached the spot and asked the boy as to why he had given a push to the girl. However, the mother of the boy came to the spot and apologized for the act of the boy. The matter was settled and all of them amicably returned to their home. They were sitting in their house when Hamid son of Sule Khan, Aarish son of Hamid Khan, Sagir son of Sule Khan, Sahab Khan son of Jeevan Khan, Sule Khan son of Medi and Iqbal son of Deenu with sticks and stones in their hands, came to the spot. They in furtherance of their common object entered their house and attacked them, damaging the goods. In the presence of complainant, Sahab Khan and Sagir gave stick blows to his brother Sagru on his back. His brother fell down, whereupon Hamid son of Sule Khan gave him stone blows on his forehead. Aarish son of Hamid gave a stone blow below the right eye of the complainant's brother. Thereafter, Abas son of Kalu with a country made pistol came to the spot. He extended a threat to them (complainant's side) to eliminate them. Iqbal and Sule Khan had also pelted stones. Several persons had gathered on the spot. The matter was tried to be diffused but in vain. The complainant's brother was got admitted in General Hospital, Palwal from where he was referred to B.K.Hospital, Faridabad, but he was not fit to make the statement.

On the statement of complainant-Umardeen, ASI Sultan Singh, did not find commission of any cognizable offence. He made his endorsement on the statement of the Umardeen to the effect that the action could be taken after receiving X-ray and C.T. scan reports of the injured. On 21.08.2010, Umardeen had produced the C.T. scan and X-ray reports of

Sagru (PW5) as also the statement dated 16.08.2009. Rukka was sent by the police on the basis of which, FIR No. 287 dated 24.08.2010 under Sections 148, 149, 325, 452 and 506 of IPC, was registered.

During investigation, it was found that as a matter of fact the respondents were involved in the occurrence, whereas Hamid, Sagir, Sahib and Abaas were found innocent and were put in Column No.2 of the challan. Copies of the documents were supplied to the accused in compliance with Section 207 Cr.P.C.

Charges were framed against the respondents under Sections 323, 325, 307, 506/34 IPC. In order to prove its case, the prosecution had examined 13 witnesses, including SI/SHO Surender Singh as PW1, who had recorded the FIR (Ex.P-1). The MLR of the injured Sagru was received by ASI-Sultan Singh, who was examined as PW-2. Injured/witness Sagru had appeared as PW-5 and complainant-Umardeen was examined as PW-11.

Statement of the respondent Nos. 2 to 4 were recorded under Section 313 Cr.P.C. All the incriminating material was put to the said respondents. The accused pleaded not guilty and claimed trial. In defence, respondents No.2 to 4, examined one Anuj Kumar, Criminal Ahlmad from the Court of Judicial Magistrate Ist Class, Palwal as DW1. This witness had brought the record of the case titled as State versus Umarddin, bearing FIR No. 287 dated 24.08.2010 under Sections 148, 149, 452, 323, 506 IPC, registered at Police Station Hathin.

The learned counsel for the applicant, at the outset, has argued that the learned trial Court, while passing the impugned judgment has ignored the evidence on record. It is submitted that the complainant's brother Sagru had been given a stone blow by Aaris on his face, which hit

on his right eye. Sagir had inflicted a lathi blow on the waist of Sagru, as a result whereof he fell down on the ground. Hamid gave another stone blow on the forehead of Sagru. The C.T. Scan report of injured Sagru was proved on record as Ex.P-10 and Ex.P-11. Even as per Dr. Sandeep Aggarwal, Medical Officer, who appeared as PW-10 had deposed in his evidence that the nature of injury was dangerous to life as depicted in Ex.P-12. It has been further argued by the learned counsel for the applicant that the versions of complainant-Umardeen-PW11 and injured eyewitness Sagru-PW5, have totally been ignored by the trial Court, while acquitting respondents No.2 to 4.

It has been prayed by the learned counsel for the applicant that the impugned judgment passed by the court below be set aside and respondents No.2 to 4 be convicted for the charges framed against them.

After hearing the learned counsel for the applicant and going through the judgment of acquittal passed by the learned trial Court, we do not find any merit in the present application.

There is inexplicable delay in lodging of the present FIR. The incident in question occurred on 07.08.2010 whereas, the complainant Umardeen-PW11 gave statement to the police on 16.08.2010 and thereafter, FIR was registered on 21.08.2010. Even the learned counsel for the applicant has not been able to explain such delay.

As per the record, it has been found that there are material contradictions in the testimonies of witnesses examined by the prosecution, especially regarding the place of occurrence. Moreover, Sagru who appeared as PW-5 and Rojdar, who appeared as PW-13 got their statements recorded under Section 161 Cr.P.C. after the registration of the FIR.

Regarding said aspect as well there is no explanation as to why the statements were not recorded without wasting any time. Thus, testimony of Sagru-PW5, Umardeen (Complainant), PW-11 and Rojdar PW-13 does not inspire any confidence. Even the ocular evidence is based on probabilities and is inconsistent inasmuch as the witnesses have deposed about different versions while examined as witnesses.

Sagru, who appeared as PW-5, in his cross examination had admitted that the criminal case lodged by Sulekha against them is pending in the court of Judicial Magistrate, Hathin for inflicting injuries to Sulekha, Sahib and Bilal.

Thus to the mind of this Court, the present FIR has been lodged as a counterblast to the criminal proceedings pending against the complainant and Sagru (PW-5). Even on the delay part, it is settled principle of law that though the delay in lodging the FIR is not fatal, yet it is to be seen by the Court whether this delay has given time to the informant for consultations and deliberations so as to fabricate and put up a false story. It has been seen that occurrence took place on 07.08.2010 and after the delay of 9 days, the statement was recorded before the police by the complainant-Umardeen and thereafter, FIR was registered on 21.08.2010. The facts and circumstances of the instant case, to our mind, are not such that the delay in lodging the FIR can be ignored. Even the ocular evidence is inconsistent as the witnesses, especially complainant-Umardeen-PW11, Sagru eye witness/injured(PW-5) and Rojdar another eye-witness (PW-13) have given different versions in their statements. In the cross examination testimony of these witnesses, has been seriously shaken.

The Supreme Court of India in the case titled as *A.Shankar*

Versus State of Karnataka reported in 2011(6) SCC 279 in paras 17 and 19 held as under:-

"17. In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. The court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence. "Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility." Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. "Irrelevant details which do not in any way corrode the credibility of a witness cannot be labelled as omissions or contradictions." The omissions which amount to contradictions in material particulars, i.e., materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited. [Vide: ***State Represented by Inspector of Police v. Saravanan & Anr.***, AIR 2009 SC 152; ***Arumugam v. State***, AIR 2009 SC 331; ***Mahendra Pratap Singh v. State of Uttar Pradesh***, (2009) 11 SCC 334; ***Dr. Sunil Kumar Sambhudayal Gupta & Ors. v. State of Maharashtra***, JT 2010 (12) SC 287; ***Vijay @ Chinee v. State of M.P.***, (2010) 8 SCC

191; State of U.P. v. Naresh & Ors., (2011) 4 SCC 324; and Brahm Swaroop & Anr. v. State of U.P., AIR 2011 SC 280].

Where the omission(s) amount to a contradiction, creating a serious doubt about the truthfulness of a witness and other witness also make material improvements before the court in order to make the evidence acceptable, it cannot be safe to rely upon such evidence. (Vide : State of Rajasthan v. Rajendra Singh, (2009) 11 SCC 106).

18. xxx xxx xxx xxx

19. *It is settled legal proposition that in exceptional circumstances the appellate court under compelling circumstances should reverse the judgment of acquittal of the court below if the findings so recorded by the court below are found to be perverse, i.e., the conclusions of the court below are contrary to the evidence on record or its entire approach in dealing with the evidence is found to be patently illegal leading to miscarriage of justice or its judgment is unreasonable based on erroneous law and facts on the record of the case. While dealing so, the appellate court must bear in mind the presumption of innocence of the accused and further that acquittal by the court below bolsters the presumption of his innocence. (Vide: Abrar v. State of U.P., (2011) 2 SCC 750; and Rukia Begum & Ors. v. State of Karnataka, (2011) 4 SCC 779)."*

The Division Bench of this court in the case titled as ***State of Haryana and Suresh and others*** reported in 1996(3) R.C.R. (Criminal) 169 in paras 10 and 12 held as under:-

10. *It is well settled by the authoritative pronouncements of the Apex Court that an appeal against acquittal is a re-hearing of the case. The High Court, however, in such cases, has to bear in mind that the case of an accused person starts with the initial presumption of innocence and this presumption, if not reinforced is in no way weakened by his*

acquittal by the trial judge. Further the High Court should carefully examine each and every reason given by the trial judge in support of the acquittal and has to effectively repel it before it can convert the acquittal into a conviction. Thus we proceed to examine the reasons given by the learned Additional Sessions Judge in support of the conclusions arrived at by him. Broadly he has given the following reasons in acquitting the accused :-

- 1. Delay in lodging the First Information Report.*
- 2. As accused were unknown to the complainants, their test identification parade was thus necessary. In the absence of test identification parade the prosecution case becomes doubtful.*
- 3. Absence of injuries on the body of the accused as according to the prosecution story one of the accused had gagged the mouth of the injured and the other two had caught hold of her before oil was sprinkled on her and her body was set on fire.*

11. xxx xxx xxx xxx

12. Rajesh (P.W. 9) and Kamla (P.W. 8), the alleged two eye witnesses have stated that they saw the accused for the first time in the court after the occurrence. Azad the other alleged eye witness has not been examined. These two witnesses have only given the name of Suresh but they have not named the other two accused. Even Kamla in her statement Ex. PG before the Magistrate (P.W. 6) has stated that when Suresh asked her that he would sleep in her house, she had refused on the ground that she did not know him. In the same statement she has narrated that two more persons accompanying Suresh were also unknown to her. The two other witnesses, Rajesh and Azad who had not been examined did not know the other two accused earlier. Even they did not know the parentage and residence of Suresh accused. Thus merely knowing the name of Suresh is not sufficient to identify the accused Suresh as there

can be many persons of the same name. Of course, Suresh was a Sarpanch, Lambardar or any other important personality of the village. Ram Dhan (P.W. 5), on whose statement the FIR was lodged was not an eye witness of the occurrence. He did not give full description of the three accused and even names of the other accused were not told to him by Suresh and Azad before he actually got the case registered. In view of our discussion above, test identification parade was necessary in this case in order to establish the identity of the accused persons. Not holding the test identification parade has thus also damaged the prosecution story. If any ruling is needed in this case, the following are the ones :-

1979 SCC (Crl.) 621 (Kanan and others v. State of Kerala).

1988(2) Recent Criminal Reports 58 (Jaimal Singh v. State of Haryana).

Thus, taking into considerations the contradictory statements of the prosecution witnesses and the admission of the eye-witnesses regarding pendency of criminal case against them, we do not find any infirmity in the well reasoned judgment passed by Additional Sessions Judge, Palwal dated 04.03.2015.

Consequently, the application is dismissed, leave to appeal is declined.

(RAKESH KUMAR JAIN)
JUDGE

(HARNARESH SINGH GILL)
JUDGE

04.02.2019

pooja saini

Whether speaking/reasoned?

Yes/No

Whether reportable?

Yes/No