

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 10.10.2019

+ **CRL.A. 916/2016**

ISLAM

..... Appellant

versus

STATE

..... Respondent

Advocates who appeared in this case:

For the Petitioner: Mr Rajender Sharma.

For the Respondents: Ms Kusum Dhalla, APP for State with
Inspector Ratnesh Kumar and ASI Suresh
Kumar, PS New Usman Pur.

CORAM

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The appellant has filed the present appeal under Section 374 of the Code of Criminal Procedure (hereafter 'CrPC') against a judgment dated 27.08.2016 passed by the learned Additional Sessions Judge, whereby the appellant was convicted for offences under Sections 393/397/457/34 of the Indian Penal Code, 1860 (hereafter 'IPC'). The appellant impugned an order dated 31.08.2016, whereby he was sentenced to seven years rigorous imprisonment and a fine of ₹5,000/- under Section 393 of the IPC read with Section 397 of the IPC. The appellant was also directed to serve a further period of six

months simple imprisonment if he defaulted in payment of the fine. The appellant was also sentenced to five years rigorous imprisonment and a fine of ₹5,000/- under Section 457 of the IPC. Both the sentences were to run concurrently. The appellant was granted the benefit of the period already served under Section 428 of the CrPC.

FIR

2. The impugned judgement dated 27.08.2016 and the order dated 31.08.2016 were rendered in a case relating to FIR bearing No.1005/2015 registered with New Usmanpur Police Station.

3. The information of the incident was received by Ct. Sarfaraz Ahmed (PW4) from wireless operator on 10/11.09.2015, at around 10:13 PM. DD.No.100/B (Ex.PW-4/A) was prepared and assigned to HC Sita Ram (PW7) at about 10:15 PM. HC Sita Ram (PW-7) along with Ct. Pradeep Sharma (PW-3) reached the spot and after conducting the formalities, PW-3 was sent to the police station with the *rukka*, which was presented before ASI, Jagvir Singh (PW-6) at about 12:45 AM who endorsed it and lodged the FIR. Thereafter, the investigation was assigned to SI Yashbir Singh (PW-8).

4. The FIR in question records that the complainant is an advocate, resident of T-395, 24, 2nd Floor, Gautumpuri, New Delhi and was present at home on the intervening night of 10/11.09.2015 when, at 9:45 PM, he heard knocking on his door. When he opened it, two persons barged inside the house wherein, one had a knife and the other had a pistol-like object. The person holding the pistol-like object held

it on him and they tried to take things from his pocket. At this point, a scuffle ensued; the third associate of the two persons, near the staircase fired a shot. The sound made the public gather and with their help, one person was apprehended (the appellant herein) and the other two ran away. The pistol-like object was recovered from him and the knife was also found lying at the place. The accused was beaten by the public and as a result, he suffered injuries. The complainant dialled 100. Thereafter, the complainant handed over the accused along with the knife and pistol like object.

5. After investigation, a chargesheet was filed and the trial court framed charges against the appellant on 08.02.2016. The appellant was charged with entering House No. T-395, Second Floor, Gali No.24, Gautumpuri, New Delhi, along with his two associates (Javed and Wasim), in furtherance of a common intention and had committed an offence punishable under Section 457 read with Section 34 of the IPC. The appellant was also charged for committing an offence punishable under Section 393 read with Section 34 of the IPC, on account of an attempt to commit robbery on a point of knife and a toy pistol along with his two other associates. The appellant was charged for using a toy gun while attempting to commit the aforesaid robbery and thereby, committing an offence punishable under Section 397 of the IPC.

Impugned Judgment

6. The prosecution examined police officials as well as the complainant (PW-5). The prosecution also produced several documents that were stated to have been prepared at the material time, including the statement of the complainant (Ex.PW-5/A). The trial court observed that the police officials had deposed as witnesses in support of the case of the prosecution. Although, the deposition of the complainant (PW-5) was inconsistent with his statement stated to have been recorded at the material time (Ex.PW-5/A), the trial court nonetheless, accepted the facts as stated in the said statement on the ground that PW-5 had admitted his signatures on the same. The appellant's statement had been recorded under Section 313 of the CrPC and he claimed that he had been picked up by the police officials and had been framed for committing the alleged offence.

Submissions

7. The learned counsel appearing on behalf of the appellant has challenged the impugned judgement on several grounds. Firstly, that the Trial Court failed to appreciate the fact that the complainant, PW-5 did not support the prosecution's case and had failed to identify the appellant before the Court. Secondly, the prosecution version is improbable in its assertion that the appellant had a toy gun in one hand and dagger in the other. The prosecution failed to prove its case beyond reasonable doubt, especially since no public persons were examined at the time of taking weapons from the house of the complainant. Thirdly, the IO reached the spot after all the documents had been prepared; preparation of these documents in the absence of

the IO and taking possession of weapons involved in the incident, in the absence of independent witnesses, is not relevant. Fourthly, there is material discrepancy with respect to the testimony of PW-3 wherein the weapons, that is, toy gun and dagger were stated to be found lying in the room (house of complainant). In view of these discrepancies, it was submitted by the learned counsel that the appellant has been falsely implicated and the weapons were planted on him.

Reasons and Conclusion

8. At the outset, it is noted that certain facts mentioned in the appellant's pleadings depart from the facts mentioned in the FIR. Therefore, they are wrongly claimed to be part of the prosecution story. For instance, the claim that the appellant suffered a fracture on account of being beaten by the public. Neither such averments were made by the prosecution nor any MLC in this respect was produced. The pertinent departure is with respect to one of the grounds of appeal, wherein it is stated that the accused was carrying a toy gun in one hand and dagger in the other. However, the FIR, chargesheet and the initial statement of complainant mention that one person (the appellant) was carrying the toy gun and other person was carrying a dagger. It is not the case of the prosecution that the appellant was holding both the toy gun and dagger in each hand.

9. Having stated above, this Court also finds that there are several discrepancies and inconsistencies in the testimonies of various witnesses with regard to the timelines; facts relating to apprehension of

the appellant and recovery of the weapons; and time and place of preparation of the documents that have been produced in evidence.

10. Admittedly, the place of incidence is about 1-1.25 kms away from the police station and DD100/B was assigned to PW-7 at about 10:15 PM, who reached the spot around 10:30 PM along with Ct. Pradeep Sharma (PW-3). In his testimony, PW-3 whilst admitting that he took the *rukka* to the police station around 12:30 AM (after which point, investigation was assigned to PW-8), claimed that PW-1 and PW-8 reached the spot within fifteen minutes of him and PW-7 reached the spot at 10:30 PM. In light of the time at which *rukka* was endorsed and FIR lodged, PW-8 could not have reached the spot at 10:45 PM. PW-3 had deposed that documents (PW-3/C and PW-3/D, sketches of toy gun and the dagger respectively) were prepared at about 11/11:30 PM. These documents are stated to have been prepared at the spot. However, PW-3 also deposed that all of them left the spot at about 10:45/11:00 PM along with the accused, to the Police Station. These timings are at variance with the timings stated by Ct. Manoj Kumar (PW-1) and IO, SI Yashbir Singh (PW-8). PW-1 had deposed that he, along with SI Yashbir Singh (PW-8), had reached the place of incidence together on motorcycle, at 1:15 AM on 11.09.2015. PW-8 had deposed that they had reached the spot at about 1:30 AM. The time of preparation of documents, according to PW-8, was about 2:00 AM. The arrest memo of the appellant (Ex. PW-1/A) mentions the time of arrest at 2:30 AM. Therefore, testimony of PW-3 is

inconsistent with the testimony of PW-1 and PW-8, as well as the contents of the arrest memo placed on record.

11. This Court is of the view that the said inconsistencies are material considering that it is the appellant's case that he had been framed by the police officials.

12. Insofar as the apprehension of the appellant is concerned, none of the eye witnesses (apart from the complainant – PW-5) have been examined.

13. It is the prosecution's case that the complainant (PW-5) had apprehended the appellant. HC Sita Ram (PW-7) had deposed that PW-5 had overpowered the accused and had produced him with a toy gun. PW-5's statement (Ex.PW-5/A), as recorded at the material time, also records that PW-5 had apprehended the appellant with the help of the public that had gathered at the spot.

14. PW-3 (along with PW-7), in his cross-examination, stated that he had reached the spot at about 10:30 PM and 20-30 persons from the public, besides 2-3 PCR officials, were already present at the site. He stated that the accused had been caught by the PCR officials.

15. It is material to note that none of the said PCR officials were examined by the prosecution as witnesses and the evidence led by the prosecution also does not disclose their names. Interestingly, PW-7 (who was accompanied by PW-3) also does not mention the presence of PCR officials at the spot of the alleged incident.

16. PW-5 was alleged to have apprehended the appellant and had deposed that he had tried to overpower the persons who had come into his house but did not succeed and the said persons had run away. He did not identify the complainant and deposed that the complainant was not known to him.

17. The testimony of PW-3, coupled with the fact that PW-7 had testified that he had not apprehended the complainant, raises serious doubts as to the case set up by the prosecution.

18. In addition to the above, there is material discrepancy in the testimony of PW-7 and PW-3, in respect of the place where the toy gun and dagger were found and by whom. The FIR and the chargesheet state that PW-5 handed over the appellant along with the toy gun and dagger to PW-7. According to this version, PW-7 got the custody of both the weapons together. This version has been supported by PW-1, and partly by PW-8. However, during his cross-examination, PW-3 stated that the toy gun was lying inside the house and upon its seizure, public persons also produced one knife/churra which was stated to be lying there. These *public persons* have not been examined and their signatures are absent on the seizure memo. PW-5 in his (hostile) statement before the court has not mentioned the toy gun and dagger at all, let alone handing them over to PW-7. He has merely stated that he saw two men present in the gallery in front of his house with some objects in their hands.

19. Further, in relation to the relevant documents, facts with respect to the time and place at which they were made; by whom; and in whose presence, are unclear. As mentioned previously, the testimonies of the witnesses with regard to the time of reaching the spot as well as preparation of documents, are at variance. PW-1, Ct. Manoj Kumar had deposed that IO, SI Yashbir Singh (PW-8) had arrested the appellant vide arrest memo (Ex.PW-1/A) and conducted his personal search. He testified that the personal search memo (Ex.PW-1/B) bears his signatures at Point A; signatures of PW-5 at point B and the signatures of the IO at point C. However, during cross-examination, PW-1 could not remember if documents were already prepared or whether they were prepared in his presence. If PW-8 had prepared these documents as per his deposition, and both PW-1 and PW-8 reached the spot together, these documents could not have been prepared before their arrival. Interestingly, PW1 did not recall the floors of the house where the incident occurred (second floor) and stated in his cross examination that 'they' did not enter inside the house of the complainant. This is also in variance to the statement of PW-8 who deposed that he inspected the premises along with the complainant.

20. According to the testimony of PW-3, HC Sita Ram (PW-7) prepared the seizure memo for toy gun and dagger (Ex. PW-3/A and Ex. PW-3/B) respectively. He also prepared their sketches Ex.PW-3/C and Ex.PW-3/D respectively, bearing his signatures along with those of PW-5 and PW-7. However, during cross-examination, PW-3 could

not recall *where* the sketches of toy gun and knife/churra were prepared. He also could not remember where the *rukka* was prepared even though he was admittedly the one who had taken the same to the police station. He could not remember which documents were prepared by PW-7 and which documents were prepared by PW-8.

21. PW3, during cross-examination, deposed that the statement of complainant was recorded at the police station. According to the FIR, PW7 took the statement of the complainant at the spot. Again in variance to this, PW5 testified that police came to his flat and recorded the statement (Ex.PW-5/A). In variance to these versions, (PW-7) deposed that he recorded the statement of the complainant (Ex.PW-5/A) at the spot. PW7 also prepared the sketches and seized the weapons that were exhibited separately. He also made the endorsement Ex.PW-6/A to get the FIR registered and it was at this point that PW-3 was sent with a copy of *rukka* to the police station.

22. Details with respect to the recording of disclosure statement are also unclear wherein Ct. Manoj Kumar, PW-1 during his cross-examination stated that no documents were prepared in his presence and statement of accused was recorded by the IO, that is, PW-8 in the police station. However, PW-8 deposed that the disclosure statement was prepared at the spot in presence of Ct. Manoj Kumar. These two testimonies are inconsistent with each other. The testimonies of these two witnesses are also inconsistent in terms of the presence of public persons when they reached the spot; whereas PW-1 had deposed that 4-5 public persons were present, PW-8 denied presence of any public

persons at the time of their arrival at the spot.

23. This Court is of the view that inconsistencies and the discrepancies as mentioned above are material and create a significant doubt regarding the case set up by the prosecution.

24. In addition to the above, there is no explanation as to why persons from the public, who were present during the time of the alleged incident, have not been examined. As noticed above, the PCR officials were stated to be present at the site along with the public and they too have not been examined. There is no eye witness to the incident except the complainant (as was examined) and he too has resiled from his statement stated to have been recorded at the material time. While, it is settled law that absence of public witness would not be fatal to the case of the prosecution, nonetheless, it has been observed in several cases that joining public witnesses inspires confidence in the case of the prosecution. In absence of such witnesses, the court is required to bear a greater scrutiny on the testimony of the prosecution's witnesses.

25. In this case, the testimonies of the prosecution witnesses – who apart from PW-5 are police officials – this Court is unable to accept that the prosecution has established its case beyond reasonable doubt. The standard of proof required for convicting the appellant has clearly not been met in this case. In this view, this Court is unable to concur with the impugned judgment. The same is, accordingly, set aside. Consequently, the order dated 31.08.2016 is also set aside. The appeal

is allowed and the appellant is acquitted of the charge framed against him. The appellant is directed to be released from custody subject to not being involved in any other case.

VIBHU BAKHRU, J

OCTOBER 10, 2019
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