

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

CRL. A. 505/2020 and CRL. M. (BAIL) 8171/2020

Reserved on : 04.12.2020

Date of Decision : 08.12.2020

IN THE MATTER OF:

FAHIM

..... Appellant

Through: Mr. Badrinath B., Advocate

Versus

THE STATE (GOVT OF GNCT DELHI)

.... Respondent

Through: Dr. M.P. Singh, APP for State.

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

(VIA VIDEO CONFERENCING)

JUDGMENT

MANOJ KUMAR OHRI, J.

1. By way of the present appeal, filed under Section 374(2) Cr.P.C., the appellant has assailed the judgment on conviction dated 25.10.2019 and order on sentence dated 23.11.2019 passed in Sessions Case No. 44/2017 arising out of FIR No. 835/2016 registered under Section 307 IPC at P.S. Seelampur, passed by the learned ASJ-03, Karkardooma Courts, Delhi whereby he was convicted for the offence punishable under Section 307 IPC and sentenced to undergo RI for a period of 7 years along with payment of fine of Rs.15,000/- to be paid to the injured/victim and in default thereof, to further undergo SI for 6 months.

2. For the sake of felicity, the brief facts as noted by the Trial Court are reproduced below:-

“It is the case of the prosecution that on 23.10.2016, investigation of the case was assigned to ASI Data Ram

(PW-11) and earlier the case was investigation by SI Monu Chauhan of P.S. New Usmanpur and thereafter, investigation was transferred to PS Seelampur. On 25.10.16, PW-11 ASI Data Ram and Ct. Charan Pal had joined the investigation with HC Vidhya Dhar and during search of accused, they reached at DDA Flats, Shastri Park, Delhi and on the pointing out of secret informer, accused was arrested vide arrest memos Ex. PW4/A-1 and Ex. PW4/A-2 and his disclosure statement Ex. PW9/A was recorded and in pursuance of disclosure statement, accused led them for recovery at Lohe ka pul towards Old Delhi Railway Station. Dagger was taken out from the heap of stones lying near the railway track and produced the same by saying that it had been used in the crime. He has proved sketch of the dagger as Ex. PW4/C, seizure memo as Ex. PW4/B, site plan of place of recovery as Ex. PW9/B, pointing out memo as Ex. PW4/E. Thereafter, ASI Data Ram prepared site plan at the instance of eye witness Shanky Kumar as Ex. PW6/A. PW-11 thereafter collected copy of TIP refusal Ex. PW11/A and deposited the clothes of injured with MHC(M), which were got collected from PS New Usmanpur as same has been seized by the previous IO vide memo Ex. PW7/A through Ct. Charan Pal. Expert opinions Ex. PW11/B-1 and Ex. PW11/B-2 were collected along with forwarding letter Ex. PW11/C. After completion of investigation, ASI Data Ram PW-11 prepared the chargesheet against accused which was sent to court for trial.”

3. Mr. Badrinath B., learned counsel for the appellant, contended that the testimonies of the material witnesses are contradictory and not reliable. It was also contended that the presence of the public witness *Shanky Kumar* on the spot at the time of the incident, was highly doubtful. He contended that the victim admitted in his testimony that at the time of the incident, he was under the influence of drugs and as such, his identification of the appellant ought to have been disbelieved by the Trial Court. Further, the injured in spite of being conscious and oriented,

as observed in the MLC, did not name the appellant as the assailant. Lastly, it was contended that the prosecution failed to connect the weapon of the offence i.e., *churi* with the injuries as the same was not shown to the concerned Doctor for taking an opinion if the injuries were possibly caused by it.

4. Dr. M.P. Singh, learned APP for the State, on the other hand, has supported the impugned judgment. It was submitted that the injuries suffered by the injured were duly corroborated not only by his own testimony but also by his MLC as well as the testimony of the public witness *Shanky Kumar*.

5. I have heard learned counsels for the parties and perused the entire material on record including the TCR as well as the written submissions filed on behalf of the appellant.

6. From a perusal of the case records, it is apparent that on 20.10.2016, an information was received through the PCR that at about 6:32 p.m., one person had suffered a knife injury near the red light of Shastri Park. The said information was recorded as DD No. 44A (Ex.PW1/A). Later, the FIR came to be registered at the instance of SI *Monu Chouhan* as the victim was stated to be admitted in the hospital with an alleged history of physical assault and was declared unfit for the statement.

7. During trial, the injured deposed that on the day of the incident, he under the influence of smack, was going towards DDA flats. When he reached a *Mazar*, the appellant, who was already known to him, met him. He deposed that the appellant was already known to him as he used to quarrel and demand money from him for consuming smack. On the day of the incident, the appellant, with an intention to kill, gave knife blow

on his stomach. After causing injury, the appellant ran away from the spot. He regained consciousness in the hospital where he remained admitted for 9/10 days and was also operated upon. He admitted giving statement to the I.O. and identified his thumb impression on the same (Ex. PW10/A). He also identified his clothes i.e., shirt, *baniyan* and underwear, which were collectively exhibited as Ex.P2. The shirt and *baniyan* had the cut marks. He also identified the *churi*, as the weapon of offence, with which the appellant had caused injuries to him. The same was exhibited as Ex.P1.

8. In cross examination, the injured denied the suggestion that the injuries were not caused by the appellant. He reiterated that the appellant was known to him prior to the incident. He also denied the suggestion that two months prior to the incident, he had caused injuries to the appellant and that the appellant had forgiven him. He also denied the suggestion that being under the influence of drugs, some other person had caused injuries to him.

9. The public witness *Shanky Kumar* was examined as PW6. He deposed that on 20.10.2016 at about 6/6:15 p.m., he was present at his shop when he saw some children running towards the DDA flats. On being enquired, the children told him that stab injuries had been caused to one person. He reached the spot and found the appellant holding a knife and an injured person holding his belly with his hand. He saw that the blood was oozing out from the belly of the injured person. He also identified the appellant. He further deposed that after about 4/5 days of the incident, the police came to his shop and recorded his statement.

In cross-examination, he stated that the spot was about 20/30 meters away from his shop. He reiterated that he reached the spot and

saw the appellant as well as the injured. The injured had put his hands on his injury. He also stated that he had not seen the appellant causing injuries to the injured. He denied the suggestion that he did not see the weapon in the hand of the appellant.

10. Dr. *Kunal Kishor*, who proved the MLC of the injured, was examined as PW2. He stated that the injured was brought to the hospital by ASI *Madan Mohan*. During medical examination, he noticed following injuries on the person of the injured:-

- “i) Omental prolapse was present on left lower abdomen of size 2x2 cm and right side to umbilicus of size 2x2 cm.*
- ii) CLW over left chest of size 3x2 cm.*
- iii) Scrotal swelling present*
- iv) Left thigh swelling present.”*

He deposed that after administration of the first aid, the injured was referred to GTB Hospital for further management and opinion. He also deposed that the injuries were caused by a sharp object and at that time, the injured was unfit to make a statement. The injured was declared fit to make a statement only on 21.10.2016 at about 11:25 a.m. He also deposed that the blood-stained shirt and undergarments of the injured were handed over to the police. The witness was not cross-examined.

11. Dr. *Prerit*, Department of Surgery, GTB Hospital, was examined as PW3. He proved the discharge summary of the injured as Ex.PW3/A. As per the discharge summary, the injured was admitted and hospitalized from 20.10.2016 to 29.10.2016. The witness also identified the signatures of Dr. *Manish* who had declared the injured fit for statement. He further deposed that the nature of injuries was in the category of ‘dangerous’, as the injured had multiple penetrated wounds over the left side of chest and abdomen with prolapse of the internal viscera through

one of the wounds. Intra operatively, there were two perforations in the small intestine, laceration over the spleen as well as diaphragmatic tear.

12. Ms. *Preeti Agarwala*, learned Metropolitan Magistrate, was examined as PW8. She deposed that on 26.10.2016, the appellant had refused to join the TIP proceedings. It is relevant to note that the judicial TIP proceedings were conducted for the identification of the appellant by the public witness *Shanky Kumar*.

13. SI *Monu Chouhan* who reached the spot after recording of DD No. 44A, was examined as PW12. He deposed that after receiving the information, he along with Const. *Kuldeep Ujjwal* (PW7), had visited the spot and thereafter, went to *Jag Parvesh Chandra Hospital* where the injured was admitted. He collected the MLC of the injured. The injured was declared unfit to make a statement.

The testimony of Const. *Kuldeep Ujjwal* is cumulative to the testimony of SI *Monu Chouhan*.

14. ASI *Madan Mohan*, who took the injured to *Jag Parvesh Chandra Hospital*, was examined as PW5. He deposed that on the date of the incident, he was posted with the PCR and on receiving a call from the Control Room, he reached at the spot and saw the injured lying on the footpath. Blood was oozing out from his injuries. On the way to the hospital, the injured after telling his own name, became unconscious.

In his cross-examination, the witness admitted that on the way to the hospital, the injured had not disclosed the name and description of the appellant to him.

15. ASI *Data Ram*, the Investigating Officer, was examined as PW11. He deposed that on 25.10.2016, on the basis of secret information, he arrested the appellant and recorded his disclosure statement. He also

deposed that during investigation, the appellant got recovered the weapon of offence i.e., *churi* from under the heap of stones near a railway line. Later, he also sent the samples to the FSL. In cross-examination, the witness stated that during recovery proceedings, no public person could be joined as none had agreed.

16. So far as the presence of the public witness *Shanky Kumar* at the spot is concerned, it is relevant to note that the witness himself admitted that he did not witness the incident. As per his testimony, he reached the spot only after coming to know of the incident from some of the children. On reaching the spot, he saw both the injured as well as the appellant. He also saw that the appellant was having a knife in his hand. However, he neither made any PCR call nor helped the injured in any manner. He simply returned to his shop. After 4/5 days of the incident, the police came to his shop to enquire about the incident.

17. The public witness, in his cross-examination, admitted that when he reached at the spot, he did not see the face of the injured properly and as such, was not in a position to identify him. He further stated that he had seen the appellant at a distance of 5/6 meters at the spot. In cross-examination, he also admitted that neither he remembered the color of the clothes of the injured nor he could identify the knife. A perusal of the testimony of the public witness *Shanky Kumar* would further reveal that this witness has neither seen the incident nor has taken any step by either helping the injured or informing the police. The conduct of the public witness appears unnatural and casts a doubt on his testimony. Concededly, his statement was recorded after 4/5 days of the incident. As such, the presence of this public witness at the spot is highly doubtful

and his evidence is unreliable. The case of the prosecution needs to be appreciated by eschewing the testimony of this public witness.

18. The date, time and place of the incident are proved not only by the testimony of the injured but also by the testimony of ASI *Madan Mohan*. In his testimony, ASI *Madan Mohan*, stated that on 20.10.2016, he was posted with the PCR and on receiving a call, he reached the red light of Shastri Park and found the injured lying there. He took the injured to the hospital. In the MLC of the injured recorded on 20.10.2016 at 18:53, it finds mention that the injured was brought to the hospital by ASI *Madan Mohan*. Even as DD no. 44A, the information regarding the incident was received at 6:32 p.m.

19. The injured in his testimony deposed that he was a rag picker and used to consume smack. He also deposed that prior to the incident, the appellant was already known to him as earlier also, the appellant used to ask for money for consuming smack, which also led to quarrels between them. Even on the day of the incident, a quarrel ensued between them as the injured had refused to give smack to the appellant. The injured also identified the appellant as the one who had caused injuries to him. The testimony of the injured finds corroboration from his MLC which was recorded within an hour of the incident and mentions the injuries, which are in line with his testimony.

20. Coming to the contention of learned counsel for the appellant that despite being conscious and oriented, the injured did not disclose the appellant's name at the time of giving 'history of assault' during his medical examination. In this regard, the testimony of Dr. *Kunal Kishor*, who had medically examined the injured on the day of the incident, is relevant. Dr. *Kunal* deposed that though the general condition of the

injured was normal but he was not fit to make statement at the time of examination. He categorically stated that the injured was declared fit to make statement only on 21.10.2016 at about 11:25 a.m. Resultantly, this Court finds no merit in the contention raised.

21. The next contention raised by learned counsel for the appellant was that the *churi* could not be connected with the injuries as, in the FSL examination, no human blood was found on it. In this regard, it is noteworthy that the *churi* was recovered at the instance of the appellant, in pursuance to his disclosure statement, from under the heap of stones lying near a railway track. The same is admissible under Section 27 of the Indian Evidence Act. The injured during his testimony also identified the *churi* as the same which was used by the appellant in causing injuries to him. Merely because no grouping could be obtained on the *churi* though blood of human origin was found on it, does not in any manner, accrue to the appellant's advantage. The contention raised is rejected in view of the recent decision of the Supreme Court in Balwan Singh v. State of Chhattisgarh & Anr. reported as (2019) 7 SCC 781, where while rejecting such an argument, it was held as follows:

“22. The cases discussed above highlight the burden that the prosecution would ordinarily have to discharge, depending on the other facts and circumstances of the case, for the evidence relating to recovery to be considered against the accused. At the same time, as mentioned above, we are conscious of the fact that it may not always be possible to inextricably link the bloodstains on the items seized in recovery to the blood of the deceased, due to the possibility of disintegration of bloodstains on account of the time lapse in carrying out the recovery. For this reason, in Prabhu Dayal v. State of Rajasthan [Prabhu Dayal v. State of Rajasthan, (2018) 8 SCC 127 : (2018) 3 SCC (Cri) 517] , where one of us (Mohan M. Shantanagoudar, J.) had the occasion to author the judgment, this Court, relying on Teja Ram [State of Rajasthan v. Teja Ram, (1999) 3 SCC 507 : 1999 SCC (Cri) 436]

, had held that the failure to determine the blood group of the bloodstains collected from the scene of offence would not prove fatal to the case of the prosecution. In Prabhu Dayal case [Prabhu Dayal v. State of Rajasthan, (2018) 8 SCC 127 : (2018) 3 SCC (Cri) 517] , although the FSL report could not determine the blood group of the bloodstains on account of disintegration, the report clearly disclosed that the bloodstains were of human origin, and the chain of circumstantial evidence was completed by the testimonies of the other witnesses as well as the reports submitted by the ballistic expert and the forensic science laboratory regarding the weapon used to commit murder.”

22. On a careful perusal of the testimonies of the injured, ASI Madan Mohan as well as the MLC proved on record, this Court is of the opinion that the testimony of the injured is credible and reliable. The appellant was already known to the injured. The statement of the injured qua the injuries suffered by him stood corroborated by the MLC.

23. Looking at the seat of the injury, which is on the vital parts of the body being chest and the abdomen, as well as the period of hospitalization of the injured, this Court is of the opinion that the injuries were caused by the appellant with an intention to kill the injured. The prosecution was successful in proving its case against the appellant. Accordingly, I find no ground to interfere with the conclusion arrived at by the Trial Court.

24. During the course of arguments, learned counsel for the appellant also made an alternative submission. It was submitted that in the alternative, the appellant's prayer seeking his release on the period already undergone be considered.

25. It has come on the record that both the injured and appellant were drug addicts and the incident occurred on account of refusal by the injured to give smack to the appellant.

26. As per the Nominal Roll, the appellant has undergone a sentence of about four years and five months including the period of remission. The Nominal Roll also mentions that the fine has not been paid and that the appellant has no previous involvements.

27. Looking at the facts and circumstances of the case and the above mitigating circumstances as well as the period of custody already undergone by the appellant, this Court is of the opinion that the end of justice would be met if the appellant's sentence for the offence punishable under Section 307 IPC is reduced to RI for 4 years. The appellant's sentence, in default of payment of fine, is also reduced to SI for 5 months.

28. Accordingly, while upholding the conviction of the appellant for the offence punishable under Section 307 IPC, his substantive sentence as well as sentence in default of payment of fine, is reduced to the aforementioned period. The appellant is directed to be released, if not required in any other case.

29. The appeal is disposed of in the above terms. Miscellaneous application is disposed of as infructuous.

30. Copy of the judgment be communicated electronically to the Trial Court as well as the concerned Jail Superintendent.

(MANOJ KUMAR OHRI)
JUDGE

DECEMBER 08, 2020

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