

Neutral Citation Number 2023/DHC/000454

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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
BEFORE
HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV

+ **CRL. A. No. 381 of 2017**

Between:-

**STATE OF NCT OF DELHI
THROUGH DCP (NORTH EAST)
NEW DELHIAPPELLANT**

*(Through: Shri Pradeep Gahlot, Additional Public Prosecutor
for the State.)*

AND

**ASGAR ALI
S/O SH. MOHD MUSTAKEEN
R/OA-82/28, BULAND MASJID SHASTRI
PARK
DELHIRESPONDENT**

(Through: None.)

% Pronounced on : 18.01.2023

J U D G M E N T

1. The instant appeal under Section 378 of the Code of Criminal Procedure, 1973 (In short "Cr.P.C.") is directed against the judgment of acquittal dated 16.04.2015 passed in Sessions Case No.12/13 by the learned Additional Sessions Judge - 03, North-East, Karkardooma Courts, New Delhi, acquitting the accused/respondent in a case arising out of FIR No.24/2012 under Section 304 of the Indian Penal

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Code, 1860 (In short "IPC") registered at Police Station Seelampur, Delhi.

2. Learned counsel appearing for the appellant states that the impugned order passed by the learned ASJ is perverse, palpably wrong, manifestly erroneous, and demonstrably is not sustainable in the eyes of law. Further, it is against the basic provision of law. He further submits that the order of learned ASJ is based on conjectures and surmises and as such cannot stand the scrutiny of law and thus, deserves to be quashed.

3. The case of the respondent is that the learned trial court has rightly concluded that the prosecution has failed to prove the case beyond reasonable doubt. According to him, the reasoning given by the learned trial court for the acquittal of the respondent is based on the sound legal principle that the accused cannot be convicted unless the prosecution proves the case beyond reasonable doubt. In the instant case, he submits that evidence has been created falsely to implicate the respondent and there is no reason to believe the prosecution story.

4. I have heard the learned counsel appearing for the parties and perused the record.

5. The case of the prosecution is that on 22.01.2012 at around 12 or 1 noon, near Shastri Park Red Light, Delhi, a quarrel/verbal exchange took place between Mohd. Rizwan @ Rizvi and respondent Asgar Ali. During that quarrel, accused Asgar Ali hit the head of Mohd. Rizvi with a stick (*danda*) which resulted in injuries to his head. PW-1 Naushad, who was the brother of Mohd. Rizwan @ Rizvi, on coming to know about the incident, reached the spot and informed the PCR. The information about this quarrel was recorded in Police Station Seelampur *vide* DD No.33B (Ex.PW9/A). In the meantime,

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the PCR van reached the spot and Mohd. Rizwan was moved to GTB Hospital where his MLC Ex.PW6/A was prepared. Rizwan, after his treatment, came back home. On the next day, PW-1- Naushad went to Police Station Seelampur and gave his statement which is Ex.PW1/A and on the basis of the said statement, SI Mukesh Kumar prepared a *rukka* Ex.PW14/1, and produced it for registration of FIR. On the basis of the *rukka*, PW-9 W/ASI Mary Rose recorded the FIR Ex.PW9/B. However, on 23.01.2012, the condition of Rizwan deteriorated and PW-1 Naushad called a doctor namely Dr. Ansari. On examining Rizwan, Dr. Ansari informed PW-1 Naushad, that Rizwan had expired and this information was then communicated by PW-1 to the police. Police then took the dead body of Rizwan to GTB Hospital.

5.1 On 24.01.2012, PW-3 Dr. Neha Gupta conducted the autopsy on the dead body of Rizwan and submitted her report Ex.PW3/A. She, however, did not give any opinion regarding the cause of death and decided to wait for chemical analysis of the viscera. On 03.02.2012, after receiving the chemical analysis report of viscera, PW-3 Dr. Neha Gupta, *vide* her subsequent opinion Ex.PW3/C dated 17.09.2012, opined the cause of death to be asphyxia as a result of antemortem aspiration consequent upon injury to the head produced by blunt force impact. She also opined that the deceased had consumed alcohol before his death. Thereafter, on 24.01.2012, the respondent was arrested near Shastri Park Red Light, Bulland Masjid, Delhi and made a disclosure statement which is Ex.PW1/F. Pursuant to this disclosure, at the instance of the accused, from the North-East corner of DDA Park of Shastri Park, one *bamboodanda* (stick) was recovered. *Vide* opinion dated 03.02.2012 which is Ex.PW3/B, PW3 Dr. Neha Gupta, had opined that injuries No.1 and 2 as mentioned in

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the autopsy report which is Ex.PW3/A were produced by blunt force impact and could have been caused by the *danda* recovered at the instance of the accused or any other weapon of similar nature. After completion of the investigation, the accused was chargesheeted and on 01.06.2013, charge under Section 304 of the IPC was framed against the respondent.

6. Respondent/accused pleaded not guilty and claimed trial. The prosecution has examined 14 witnesses to prove its case. The list of prosecution witnesses is mentioned herein: -

PARTICULAR	NAME	ROLE
PW1	NAUSHAD	COMPLAINANT
PW2	MOHD. GUDDU	EYE WITNESS
PW3	DR. NEHA GUPTA	DOCTOR
PW4	HAIDER	NEIGHBOUR OF ACCUSED
PW5	MOHD. ALAM	FATHER OF VICTIM
PW6	DR. MUNESH KUMAR GAUR	DOCTOR
PW7	MD. RIHAN	NEIGHBOUR OF ACCUSED
PW9	W/ASI MARY ROSE	W/ASI
PW10	CT. ANIL KUMAR	CONSTABLE
PW11	HC. NARAYAN SINGH	INVESTIGATING OFFICER
PW12	CT. VINOD	CONSTABLE
PW13	CT. JAGBIR SINGH	CONSTABLE
PW14	SI. MUKESH KUMAR	SUB-INSPECTOR

7. The learned ASJ after taking into consideration the entire material available on record, acquitted the respondent/accused.

8. PW-1 is the complainant in the present case, who had not only made the complaint but had stated in the complaint that he had witnessed the incident. It was, at his instance, the site plan Ex.PW1/H was prepared, accused was arrested *vide* memo Ex.PW1/D, the personal search of the accused was conducted, and he was the witness to the alleged recovery of *danda* (stick) from DDA Park, Shastri Park, Delhi.

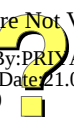
9. Relevant portion of the testimony of PW-1 is reproduced herein below: -

“On 22.1.2012, I was present at my shop. Somebody informed me that a quarrel was going on between his brother Mohd. Rizwan @ Rizvi and Asgar Ali and his sons in the DDA Park, near red light. Accordingly, I rushed to the spot. I saw that several persons had gathered there. I saw that my brother was having head injury on his head and was smeared with blood. Asgar Ali and his sons had escaped from the spot. I enquired from my brother as to what had happened, then he informed that a quarrel had taken place between him and Asgar Ali and Asgar Ali had assaulted him with danda and bat. I informed the police on 100 number. Police officials reached there and my brother Rizwan was removed to GTB Hospital. At that time my brother Rizwan was little bit drunk. I went to P.S. and lodged the report. My statement was recorded by the police which is Ex.PW1/A which bears my signature at point A. The condition of my brother became deteriorated. I called a local doctor namely Dr. Ansari. He checked my brother and informed me that my brother was no more. I further informed the police regarding death of my brother. My brother Rizwan died around 10.00 a.m. at my home. Accused Asgar Ali was arrested by the police in my presence on 24.1.2012 vide arrest memo Ex.PW1/D and his personal search was conducted vide memo Ex.PW1/E. Both the memos bear my signatures at point A. Disclosure statement of accused Asgar Ali was also recorded by the police in my presence which is Ex.PW1/F and bears my signature at point A. Police had recovered at the instance of accused Asgar Ali. I was shown the danda by the police in P.S.-de Seizure memo of danda was prepared by the police which is Ex.pw1/G and bears my signature at point A. I had shown the place of occurrence to police and the site plan of the spot was prepared by the police at my instance which is

Ex.PW1/H and bears my signature at point A. I can identify the danda if shown to me."

10. A careful pursual of the testimony of PW-1 clearly shows that he had not witnessed the incident by himself. However, in the complaint Ex.PW1/A, he stated that he had seen the incident with his own eyes and seen the accused assaulting his brother *i.e.*, Mohd. Rizwan and respondent hit Mohd. Rizwan on his head with a *danda*. This fact was further reinforced in his examination in chief when in response to a leading question of the learned APP, he stated that he had not seen the accused assaulting his brother with *danda* and if this fact was mentioned in statement Ex.PW-1/A, it may not be correct. Even in his cross-examination, PW-1 admitted that he had not seen anybody assaulting his brother. Thereafter, PW-1 deposed that he had shown the place of occurrence to the police and the site plan Ex. PW-1/H was prepared by the police at his instance. However, Ex.PW-1/H is the site plan of the alleged place of recovery of the alleged weapon of offence at the instance of the accused. During the examination-in-chief, PW-1 did not even point at the site plan which was prepared at his instance. The next role of PW-1 was in the arrest of the accused and the alleged recovery of *danda* at the instance of the accused.

11. In this regard, the deposition of PW-14 SI Mukesh Kumar is vital where he states that on 24.01.2012, he alongwith Constable Anil went to Shastri Park and met PW-1 Naushad and at the instance of Naushad, the accused was arrested from Shastri Park Red light *vide* arrest memo Ex.PW1/D and personal search of accused was conducted *vide* memo Ex.PW1/E. The disclosure statement of the accused was recorded by him *vide* Ex.PW1/F and at the instance of the accused, one bamboo *danda* was recovered from the north-east corner of DDA Park, Shastri Park. After taking measurements, he kept this *danda* in a



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cloth *pulanda*, sealed it with the seal of MK and seized it *vide* memo Ex.PW1/G. In this regard, PW-1 had deposed that the accused was arrested in his presence *vide* arrest memo Ex.PW1/D and Ex PW1/E. In his presence, the disclosure statement of the accused was recorded *vide* Ex. PW1/F. He further deposed that he was shown a *danda* by the police in the police station. A seizure memo of the *danda* was prepared by the police which is Ex.PW1/G and it has his signatures at point A. When the sealed parcel of the *danda* was opened, he identified the *danda* Ex. P-1 to the same which was shown to him by the police in the police station and seized in his presence. During the cross-examination of PW-1 *i.e.*, admitted that the accused was present at the police station when the accused was arrested. He admitted that recovery of the *danda* was not effected in his presence, the police had shown him the *danda* and told him that the *danda* would be produced in the court and it was kept in the police station. He further deposed that pool of blood was lying at the spot and no other material was lying at the spot while leaving for the hospital.

12. Therefore, from the aforesaid, it can be observed that PW-1 falsified the entire story regarding the arrest of the accused and recovery of the alleged weapon of offence at his instance. This fact becomes more probable from the cross-examination of PW-2, stated to be an eyewitness, where he stated that the PCR officials had taken the *danda* with them. Therefore, the testimony of PW-1 does not bring out anything incriminating against the accused.

13. In this regard deposition of PW-2 Mohd. Guddu and the relevant portion of his testimony are reproduced herein below: -

“On 12.1.2012, it was about 12 or 1.00 noon, I was present near Shastri Park red light and was watching a cricket match being played in the ground. I know the

accused Asgar Ali, present before the court today, as he is a resident of the same colony where I reside. On that day, a quarrel took place between Rizvi and accused Asgar Ali in the Shastri Park playground. Asgar Ali gave a danda blow on the head of Rizvi due to which blood started. I telephonically informed Nawab, the brother of Rizvi concerning the incident. Nawab reached the spot within 10-15 minutes. PCR officials came there and removed Rizvi from the hospital. Rizvi had reached home from the hospital. On the following day, I came to know about the death of Rizvi. I narrated the facts before the police also.”

Thereafter, in his cross-examination he deposed that: -

“On 22.1.2012 and it was my off day. There were about 40-50 persons present in the park who were watching the match. Rizvi was also present in the park. Rizvi was playing gambling on that day in the park and there were three more persons who were playing gambling with Rizvi. Those persons were not known to me. There were about 23-24 persons who were playing cricket in fielding as well as in batting. I was at a distance of about 50 feet from the place where persons were gambling. I reached the place at about 11.00 a.m. or 11.30 a.m. where a cricket match was being played. When I reached the spot at that point of time no quarrel was going on. I had gone near the accused prior to the incident. The incident occurred between the period 12 noon to 1 p.m., I cannot tell the exact time of the incident. I heard the noise of a quarrel which was going on between Asgar Ali and Rizvi and then I proceeded towards them. I tried to intervene between the two. Other persons also intervened, but I do not know their names. Accused and Rizvi were grappling (hatha pai ho rahi thi). Both the persons were separated by me. After separation accused Asgar Ali ran towards the road and returned the spot with a danda and then hit Rizvi on his head.”

14. The aforesaid testimony of the witness is credible and valid explanation of his presence at the place of the incident; however, no FIR was registered on the basis of his statement despite his narrating

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the incident to the police. It is observed that according to PW-2 Guddu, he had never met the police; however, the record shows that his statement under Section 161 of the Cr.P.C was recorded by IO on 23.01.2012. In his examination, he stated that he never met the police. Further, the site plan was not prepared at his instance, when the police were well aware and the complainant was also well aware that PW-2, is an eyewitness to the incident. This creates a doubt about the story of the prosecution and no valid explanation is provided by the prosecution in this regard.

15. In the present case, lodging of FIR by the complainant claiming himself to be an eye witness despite not being an eye witness; the preparation of the site plan at the instance of PW-1, who had no idea where the incident might have happened; and the planting of a weapon of offence upon the accused raise serious doubts about the truthfulness of the case of the prosecution. Therefore, the benefit of doubt given to the accused/respondent by the learned trial court is well justified.

16. The Hon'ble Supreme Court in the matter of *State of Maharashtra v. Sujay Mangesh Poyarelar*¹ while considering its earlier pronouncements including the decision in the case of *Chandrappa & Ors. v. State of Karnataka*² has held that the power of the appellate court in an appeal against acquittal cannot be said to be restrictive and the High Court has full power to re-appreciate, review and reweigh at large the evidence on which the order of acquittal is relied and to reach its own conclusion on such evidence. Both questions of fact and of law are open to determination by the appellate court. It has also been held that nonetheless it is not correct to say that

¹ 2008 9SCC475

² (2007)4 SCC415

unless the appellate court in an appeal against acquittal under challenge is convinced, that the finding of acquittal recorded by the trial court is 'perverse', it cannot interfere. If the appellate court on re-appreciation of evidence and keeping in view the well established principles, comes to a contrary conclusion and records a conviction, such conviction cannot be said to be contrary to law.

17. The Supreme Court in the matter of *Hakeem Khan & Ors v. State of M.P.*³ has again considered the powers of the appellate court for inference in cases where acquittal is recorded by the trial court. In the said decision it has been held that if the 'possible view' of the trial court is not agreeable for the High Court, even then such 'possible view' recorded by the trial court cannot be interdicted. It is further held that so long as the view of the trial court can be reasonably formed, regardless of whether the High Court agrees with the same or not, the verdict of the trial court cannot be interdicted and the High Court cannot be supplanted over the view of the trial court.

18. Learned ASJ while passing the impugned judgement has made observations in para 46 with regard to the conduct of the investigation officer and lapse in the investigation. In light of the fact and circumstances of the present case, it is pertinent to peruse the position of the law in this regard.

19. In the decision of *State of West Bengal v. Mir Mohammad Omar & Ors.*⁴, the Hon'ble Supreme Court has directed the courts to ordinarily desist from castigating the investigation even while ordering acquittal.

19.1. In the decision of *Testa Setalvad v. State of Gujarat*⁵, the Hon'ble Supreme Court in para 9 has observed that the courts should not make remarks against individuals or authorities unless they are absolutely required for the matter to be decided. Para 9 of the aforesaid judgment is reproduced here below:

“9. Observations should not be made by courts against persons and authorities, unless they are essential or necessary for the decision of the case. Rare should be the occasion and necessities alone should call for its resort. Courts are temples of justice and such respect they also deserve because they do not identify themselves with the causes before them or those litigating for such causes. The parties before them and the counsel are considered to be devotees and pandits who perform the rituals respectively seeking protection of justice; parties directly and counsel on their behalf. There is no need or justification for any unwarranted besmirching of either the parties or their causes, as a matter of routine.”

20. For the reasons stated above and relying on the observation of the Hon'ble Supreme Court, the remarks against the investigation agency at paragraph No.46 of the impugned judgement dated 16.04.2015 passed by the Additional Session Judge are not necessary and, therefore, the same are hereby expunged.

21. Having considered the aforesaid facts and circumstances, this court finds that the prosecution has not been able to successfully prove the charge beyond a reasonable doubt. On examination of the material available on record, this court is not inclined to take a different view other than the view which has already been taken by the court below. Accordingly, the appeal is dismissed.

(PURUSHAINDRA KUMAR KAURAV)
JUDGE

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JANUARY 18, 2023

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