
(2013) 03 DEL CK 0076
In the Delhi High Court
Case No : Crl. A. 1012/2012

Lala @ Shamim

APPELLANT

Vs

The State (NCT of Delhi)

RESPONDENT

Date of Decision : 18-03-2013

Acts Referred:

Citation : (2013) 03 DEL CK 0076

Hon'ble Judges : S.P. Garg, J

Bench : Single Bench

Judgement

S.P. Garg, J.—Lala @ Shamim (A-1) and Furkhan @ Raju (A-2) impugn judgment dated 28.04.2012 and order on sentence dated 04.05.2012 in Sessions Case No. 128/2010 arising out of FIR No. 529/2008 registered at Police Station Sarita Vihar by which they were held guilty for committing offence punishable under Sections 307 /34 IPC and sentenced to undergo RI for six years with fine Rs. 1,000/- each. Daily Diary (DD) No. 35A (Ex. PW-5/A) was recorded on 16.10.2008 at around 22.45 hours at Police Station Sarita Vihar on getting information from Constable Neeraj Kumar (PW-2) that two boys who arrived on motorcycle fled the spot after firing at Saleem s/o Yasin at village Jasola. The investigation was assigned to SI Padam Singh Rana who went to Apollo hospital. Injured Mustakin @ Saleem was fit to make statement and the investigating officer recorded his statement. He disclosed that on 16.10.2008 at about 09.30 P.M. when he was sitting outside his shop A-1 and A-2 came and demanded Rs. 5,000-7,000/- from him. When he told that he was not having money, A-2 exhorted A-1 to fire at him (maar saale ko goli). A-1 took out a katta and fired on his neck. He fell down. After hearing his cries, Constable Neeraj arrived and admitted him at Apollo hospital. He further disclosed that earlier also A-1 and A-2 had demanded money from him and had extended threats for which he had lodged report with the police. SI P.S. Rana lodged First Information Report with the police. Necessary proceedings were conducted at the spot. Efforts were made to find out the assailants but in vain. During the course of investigation, the accused were arrested. The crime weapon was recovered by the police of P.S.

Pisawa, Aligarh, U.P. from A-1 in case FIR No. 182/2009. Statements of witnesses conversant with the facts were recorded. On completion of investigation, charge-sheet was submitted against the accused. They were duly charged and brought to trial. The prosecution examined 17 witnesses. In their 313 statement, the accused pleaded false implication. On appreciating the evidence and considering the rival contentions of the parties, the Trial Court, by the impugned judgment, held both the accused guilty u/s 307 /34 IPC and sentenced them. Being aggrieved, the appellants have preferred the appeals.

2. Learned counsel for the appellants urged that the Trial Court did not appreciate the evidence in its true and proper perspective. No independent public witness was associated at any stage. Adverse inference is to be drawn against prosecution for not examining Latori who arrived the spot. The police did not examine any neighbor to ascertain if fire shot was heard by any of them. The doctor who opined the nature of injuries as "dangerous" was not examined despite his availability in Apollo hospital. The prosecution could not establish that the crime weapon was recovered at A-1's instance. The victim has given inconsistent version and made vital improvements in his deposition. A-1 was not known to the victim and he had no motive to inflict injury on his neck. He was arrested after one year of the incident. Section 307 IPC is not made out or proved as the injuries suffered by the victim were not sufficient to cause death in the ordinary course of nature. Forensic Science Laboratory Report does not establish appellants' involvement. Learned Additional Public Prosecutor urged that the victim had no ulterior motive to falsely implicate the accused. There is no conflict between the ocular and medical evidence.

3. I have considered the submissions of the parties and have examined the record. The occurrence took place at 09.30 P.M. Injured Mustakin @ Saleem was taken to Apollo hospital by Constable Neeraj at 10.08 P.M. MLC (Ex. PW 4/A) records the alleged history of "gun shot" at around 09.45 P.M. at village Jasola on 16.10.2008. It further records that the patient sustained injuries on neck. DD No. 35A (Ex. PW 5/A) was registered at Police Station Sarita Vihar at 22.45 hours. Investigation was assigned to SI Padam Singh Rana who reached Apollo hospital and recorded injured's statement after he was declared fit for making statement at 11.40 P.M. First Information Report was lodged on the night intervening 16/17-10-2008 at around 00.15 hours. There was, thus, no delay in lodging the report with the police. The prompt and early reporting of the occurrence to the police gives an assurance regarding truth of the informant's version. A promptly lodged FIR reflects the first hand account of what has actually happened, and who was responsible for the offence in question. It rules out introduction of coloured version, exaggerated account or concocted story as a result of large number of consultations/deliberations. In the statement Ex. PW 16/A to the police at first instance, the victim gave vivid description of the assailants and attributed specific role to each of them. He gave detailed account as to how and under what circumstances both the accused reached the spot and fired at him. While appearing as PW-16 the victim proved the version stated to

the police soon after the occurrence without variation. He deposed that when he was sitting outside his shop at about 9.30 P.M. A-1 and A-2 came and demanded Rs. 5,000-7,000/- from him. When he told that he was not having money, they made him to fall (gira diya). A-2 told A-1 "Maar Saale ko goli". Thereafter, A-1 fired from his katta at him which hit him on his neck. He started crying with pain. Both the assailants fled the spot. Constable Neeraj, beat constable, arrived and took him to Apollo hospital. He lodged complaint with the police (Ex. PW-16/A). In the cross-examination, he disclosed that A-2 was earlier working with him for about 6/7 years. Constable Neeraj arrived after 8-10 minutes. He called one or two neighbours and took him to the hospital. He recollected that Latori had reached the spot at Neeraj's request. He denied that he owned Rs. 3 lacs to Raju (A-2) and falsely implicated him to settle the score. He fairly admitted that before the incident he had not met A-1. He elaborated that he had conversation with A-1 number of times on telephone. He further disclosed that he remained admitted in Apollo hospital for four days. Thereafter, his son admitted him in Bansal hospital, New Friends Colony and he get treatment for one month.

4. On scrutinizing the testimony of the victim, it transpires that no material discrepancies have emerged to disbelieve him. Injuries suffered by him on neck were not challenged. The accused did not deny their presence at the spot. Material facts deposed by the victim remained uncontroverted in the cross-examination. No ulterior motive was proved to force the victim to falsely rope in the accused. His testimony is consistent with the medical evidence. PW-4 (Dr. Ambuj Kumar Singh, CMO, Apollo Hospital) proved MLC (Ex. PW-4/A). He had medically examined the injured. On local examination, lacerated wound around 1 cm over left side of the neck (mid neck) was found. He further deposed that the bullet was taken out by Dr. Harsh Bhargav from the neck of the injured during operation. The accused did not opt to cross-examine him. Nature of injuries was given as "dangerous" on MLC (Ex. PW-4/A) by Dr. Harsh Bhargav.

5. PW-16 (Mustakin @ Saleem) is an injured witness. He sustained dangerous injuries on vital organ i.e. neck by a fire bullet. He remained admitted in Apollo hospital for four days. Thereafter, he was admitted in Bansal hospital and was confined there for about one month. There are no good reasons to discard his testimony. Normally, an injured witness would enjoy greater credibility because he is the sufferer himself and there will be no occasion for such a person to state an incorrect version of the occurrence or to involve anybody falsely and in the bargaining protect the real culprit. In Abdul Sayeed Vs. State of Madhya Pradesh, the Supreme Court held as under:

The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order

to falsely implicate someone. "Convincing evidence is required to discredit an injured witness."

6. PW-2 Constable Neeraj Kumar (beat constable) was on patrolling duty at Jasola Village. During patrolling, he reached the spot at about 10.00 P.M. On hearing the noise, he saw that Mustakin had got gunshot wound on the left side of the neck and was lying at the spot. He informed the Police Station and took him to Apollo hospital. MLC (Ex. PW. 4/A) records his name as the person who brought the injured to Apollo hospital. Contents of DD No. 35A (Ex. PW-5/A) further corroborate that on his intimation on phone the police machinery came into motion.

7. A-2 was acquainted with the victim and was named by him in the FIR. A-1 was also known to him and both used to have conversation on telephone. He was also named in the FIR and precise role was assigned to him. Since both A-1 and A-2 were named in the FIR and they were identified without any hesitation by the victim in the court, no adverse inference can be drawn for not moving any application for the Test Identification Parade for A-1. It is true that the prosecution failed to establish beyond doubt that the bullet recovered from the neck of the deceased was fired with the country made pistol recovered and produced in the court. The said country made pistol was recovered by the police of P.S. Pisawa, Aligarh, U.P. However, the prosecution did not examine any witness from that police station to prove recovery of country made pistol from A-1's possession. It is also true that no independent public witness was associated during investigation. However, there is nothing on record to show if the incident was witnessed by any such independent public witness. Presence of Latori at the spot was not certain. Moreover, non-examination of independent witness by itself may not give rise to adverse inference against the prosecution, if the witnesses already examined are reliable and the testimony coming from their mouth is unimpeachable. It is the quality and not the quantity of evidence that matters. There is lapse on the part of the prosecution not to examine Dr. Harsh Bhargav who had opined the nature of injuries suffered by the victim as "dangerous" despite his availability in Apollo hospital. However, to justify a conviction u/s 307 IPC, it is not essential that bodily injury capable of causing death should have been inflicted. It is not necessary that the injury actually caused to the victim of the assault should be sufficient under ordinary circumstances to cause the death of the person assaulted. What the court has to see is whether the act irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in this Section. Section 307 may apply even if no harm is caused. The causing of hurt is merely an aggravating circumstance and it cannot be reasonably argued that unless the injury sufficient in the ordinary course of nature to cause death is inflicted on the victim, the intention contemplated by this Section cannot be presumed. The determinative question is intention or knowledge as the case may be and not nature of the injury.

8. Contradictions/improvements highlighted by the counsel are minor in nature and are not sufficient to shake the prosecution case as a whole. While appreciating the evidence, the court has to take into consideration whether the contradictions/omissions had been of such magnitude that they may materially affect the trial. Minor contradictions, inconsistencies, embellishment or improvements on trivial matters without effecting the core of the prosecution case should not be made a ground to reject the evidence in its entirety. The conviction of the appellants based upon fair appraisal of the evidence and needs no interference. Both the accused went to spot together and participated in the crime. On the exhortation of A-2, A-1 fired with a country made pistol on the vital organ of the victim. They both fled the spot together. Complainant assigned motive to the accused to inflict injury when he expressed his inability to meet their demand of payment of Rs. 5000-7000/-. From the facts and circumstances it can be inferred that both the accused shared common intention and attempted to murder the victim.

9. The appellants have been sentenced to undergo RI for six years each. A-1's nominal roll reveals that he had already undergone two years, nine months and 14 days incarceration as on 01.11.2012. He also earned remission for one month and fourteen days. His jail conduct is satisfactory. He is not a previous convict. He has two minor children, wife and old parents to look after. A-2 has undergone sentence for three years, eight months and five days as on 05.07.2012. He also earned remission for five days. His jail conduct is satisfactory. He is not involved in any other criminal case and is not a previous convict. Considering these facts and circumstances, the order on sentence is modified and their substantive sentence is reduced to RI for five years each. Other sentences are left undisturbed.

10. The appeals are disposed of in the above terms. Trial court record be sent back forthwith.