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State vs.narender & Ors.

State vs.narender & Ors.

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Court : Delhi

Decided On : Aug-24-2017

Appellant : State

Respondent : Narender & Ors.

Judgement :

$~1 * + IN THE HIGH COURT OF DELHI AT NEW DELHI Date of Decision:

24. h August, 2017 CRL.L.P. 174/2017 .....

... Petitioner
STATE Through Ms. Radhika Kolluru, APP for the State with SI Jai Chand, P. S. Mukherjee Nagar versus CORAM: HON'BLE MR. JUSTICE G.S.SISTANI HON'BLE MR. JUSTICE CHANDER SHEKHAR NARENDER & ORS. Through: None .....

... RESPONDENTS
CHANDER SHEKHAR, J.(ORAL) CRl. M. A. 4952/2017 1. This is an application filed by the State seeking condonation of 124 days delay in filing leave to appeal.

2. Heard. For the reasons stated in the application, the delay in filing the leave to appeal is condoned.

3. The application stands disposed of. Crl.L.P.174/2017 4. The present leave to appeal has been filed by the State under Section 378 of the Code of Criminal

Procedure, 1973 (Cr.PC) against the judgment dated 04.06.2016 passed by the Additional Sessions Judge, Rohini Courts, New Delhi in SC No.
titled State v. Narender & Ors. under Sections Crl.L.P.174 of 2017 Page 1 of 13
302/307/394/395/396/397/120-B/34, Indian Penal Code, 1860 (IPC) and Sections 25/27, Arms Act, 1959 (Arms Act), whereby all the respondents were acquitted of all the charges framed against them.

5. The case of the prosecution, as noticed by the Trial Court, is that, on on 05.09.2010, at about 9.00 pm, Rahul Chauhan (the complainant), along with his father Sohan Lal, after closing his shop, proceeded for his house at Mukherji Nagar on a two wheeler bearing No.DL4SAW-6788. The moment they reached in front of Tagore Park Gurudwara, they were surrounded by two motorcycles, carrying three persons each, i.e., total six persons, of which one was red in colour, with fancy letters number plate. The driver of red motorcycle hit the scooter. Consequently, the complainant stopped and alighted from the scooter and attacked the motorcyclist by his helmet. The person, who was sitting in the middle on the said motorcycle, gave a knife blow on the stomach of the complainant, whereas the person who was sitting at last gave a punch blow on the face of father of the complainant. That time, the complainant heard the noise of fire shot. The person, who was sitting at the back, pulled the bag containing water bottle, electricity bill, voter card etc. from the hand of complainants father. Three persons, who were sitting on the second motorcycle, shouted Do fast and Shot a fire. The valuable articles kept in the dickey were untouched. Sohan Lal, father of the complainant, succumbed to the injury. On secret information and on the identification of the complainant, the respondent No.5 (Sandeep s/o Sudama) was arrested on 18.09.2010. The motorcycle bearing number DL7SAY9501 used in the said incident was seized. The respondent No.5 made a disclosure statement and named rest of the respondents. During Crl.L.P.174 of 2017 Page 2 of 13 investigation, Investigating Officer (IO) came to know that respondent No.1 (Narender), respondent No.2 (Rajesh Gautam), respondent No.3 (Sandeep S/o Ram Kishan) and respondent No.6 (Vijay @ Sonu) had already been arrested in FIR No.2
lodged at PS: Adarsh Nagar u/s 186/353/352/3
IPC and u/s 25 & 27 Arms Act. Following the due process, the respondent Nos. 1,

2, 3 and 6 were arrested in the present case on 20.09.2010. In the Test Identification Parade (TIP) conducted on 22.09.2010, the complainant identified the respondent No.1, whereas respondent No.3 refused to participate in TIP. The complainant could not identify the respondent Nos.2 and 6 in TIP. On 28.09.2010, the police took remand of the respondent Nos. 1, 2 and 3 and prepared pointing out memos at their instance. No recovery could be made at their instance. On 29.09.2010, the complainant identified the respondent Nos. 1, 2 and 3 in the police station and on 03.10.2010, the respondent No.4 was arrested.

6. We have heard the learned APP for the State, considered her submissions and gone through the Trial Court records. Learned APP for the State submits that the learned Trial Court has passed the judgment and order without properly appreciating the testimony of PW-2, i.e. the injured witness, who is also the complainant in the present matter, while acquitting the respondents. The learned APP has also submitted that the learned Trial Court has erred by observing that PW-2 had sufficient occasion to ascertain the description of the assailants, hence opined that PW-2 ought to have given a description of the assailants at the time of recording of his statement; that the learned Trial Court ought to have taken into consideration the state of mind of the injured witness and the fact that the assailants were Crl.L.P.174 of 2017 Page 3 of 13 previously unknown to him, coupled with the incident occurring at night; that the contradictions/improvements in the testimonies of the prosecution witnesses were not sufficient enough to warrant acquittal of the respondents. Even otherwise, the learned Trial Court has failed to appreciate the testimony of PW-2 regarding the TIP as well as erred in doubting the recovery of weapon at the instance of the respondent. The learned APP further submitted that the learned Trial Court erred in giving the benefit of minor inconsistencies to the respondents; that the judgment and the order of the learned Trial Court is based on presumptions and surmises, hence the same is liable to be set aside. The case of the prosecution is primarily based on the testimony of PW-2.

7. We deem it proper and appropriate to analyse the statement of PW-2 at the first instance and also analyse the reasons, rejecting the testimony of PW-2 and other witnesses given by the learned Trial Court. The testimony of PW-2 in Court

demonstrates that PW-2 has stated in his statement to police (PW-2/A) that two motorcycles were involved in the incident and three persons were riding on each motorcycle. PW-2 had not disclosed registration number of any of the motorcycles nor colour of the second motorcycle. Accordingly, the statement of PW-2 to police demonstrates that total six persons on two motorcycles were involved in the incident. However, the testimony of PW-2 in Court demonstrates that there were three motorcycles (Ex.P-1, P-2 and P-3). In his statement (PW-2/A), PW-2 had not mentioned about 3rd motorcycle nor its colour (P-3). However, PW-2 in his deposition before the Court deposed that the said motorcycle was of black colour, that had stopped behind his scooter. However, the description Crl.L.P.174 of 2017 Page 4 of 13 of the motorcycle (Ex.P-3), as found mentioned, was red in colour and the upper portion of the tail light was black. The involvement of motorcycle (Ex.P-3) in the incident is held to be really doubtful, inasmuch as PW-2 saw the motorcycle from the front and he could only observe the colour of the motorcycle as red and the upper portion of the tail light of the motorcycle could not be in his view to say that the said motorcycle was black in colour, as there was no occasion for him to observe so. PW-2 has introduced in his deposition the third motorcycle without any basis and justification. The change regarding the number of motorcycles from two to three by PW-2 in his testimony and the change in number of assailants from six to seven persons involved in the incident is having no justification and is material improvement in his testimony. PW-2, in view of the evidence on record, had the opportunity to observe the description of the assailants, however, despite that, PW-2 in his statement (PW-2/A), had not given any description of any of the assailants. The description of the assailants is very fatal to case of the prosecution. It has also come on record that respondent No.5 was arrested on 18.09.2010 on the basis of secret information and at the instance of PW-2. PW-2 testified and identified respondent No.5 as well as the motorcycle (Ex.P-1) being involved in the incident and stated that it was this motorcycle which stood just ahead of his scooter. However, in the Court, on 05.09.2011, PW-2 identified respondent No.3 as the assailant who was arrested on his identification on 18.9.2010. When PW-2 was recalled for his examination on 06.09.2011, he tried to justify the wrong identification given by him on 05.09.2011. The learned Trial Court correctly recorded in this regard, held that the said justification given by

PW-2 is not sustainable. We find the inference in this regard drawn by the learned Trial Court, to be correct that Crl.L.P.174 of 2017 Page 5 of 13 PW-2 was not sure about the identity of respondent No.5 and later, when the prosecution realised the said mistake, then on being provided an opportunity, PW-2 changed his statement on 06.09.2011 regarding the identity of respondent No.5. The identity of respondent No.5 is also doubtful since PW-2 in his first statement (Ex. PW2/A) had not mentioned of any motorcycle, which stopped ahead of the remaining two motorcycles and his scooter i.e. motorcycle (Ex. P-1). According to the testimony of PW-2, the respondent No.5 was sitting on that motorcycle and stated after the incident Goli Lag Gai Bhago. In view thereof, it can be held that PW-2 vide his testimony not only introduced the motorcycle (Ex.P-1) but also the respondent No.5 (as the seventh assailant) and assigned him the role that he shouted after the incident on firing.

8. Similarly, the justification given by PW-2 for non-identification of respondent Nos.2 and 6 is contrary to the TIP proceedings and, therefore, is also not sustainable in law. The identification of respondent Nos. 2 and 6 by PW-2 in the Court does not inspire confidence. The justification given by PW-2 for non-identification of respondent Nos. 2 and 6 is contrary to TIP proceedings. Similarly, for the reasons recorded by the learned Trial Court for identification of respondent No.3 by PW-2 in the Court is also doubtful. Hence, reading together statement of PW-2 (Ex.PW-2/A) and his testimony in the Court reveal that motorcycle (Ex. P-3) was at last and was driven by the respondent No.6. The respondent Nos.1 and 2 were also sitting on that. The respondent No.4, who was on motorcycle (Ex. P-2), stabbed him and one Bitta hit the deceased and tried to snatch the bag from him. That time, he heard the noise of fire shot and three persons, i.e. the respondent Nos.1, 2 Crl.L.P.174 of 2017 Page 6 of 13 & 6 on motorcycle (Ex.P-3) shouted "be hurry and fire". As such, it can be held that PW-2 had not seen the assailants who had fired shot on his father, i.e., the deceased; and the only role assigned to the persons who were sitting on motorcycle (Ex.P-3) was that they shouted. However, PW-2 in his testimony before the Court introduced a fact that the respondent No.6 exhorted and in response thereto, the respondent Nos.1 and 2 fired shot. As such, PW-2 assigned the role to the respondent Nos.1, 2 and 6 in his testimony before the Court. Therefore, identification of the respondent Nos. 1 and 2 as the

assailants, who fired shot, is doubtful.

9. Similarly, the statement of PW-2 is completely silent as to the identification of respondent No.4 and his identification by PW-2 in the Court also does not inspire confidence.

10. Even otherwise, the three motorcycles (Ex. P-1, P-2 and P-3) involved in the said incident, as discussed hereinabove, were recovered from the presence of the respondents, the number of bikes involved in the said incident, their description and identity of the same and accordingly the specific recovery of the same from the respondents is also doubtful and contrary to the record. In this case, the recovery of the knife used is also highly doubtful. PW-18, PW-24, PW-25 and PW-2 deposed that, on 03.10.2010, the respondent No.4 got recovered the knife used by him to stab PW-2 in the said incident from a bag kept in his house. As revealed from FSL report (Ex. PW-11/A), no blood was detected on the said knife. Further, it is highly improbable that the respondent No.4 would have kept that weapon of offence from 05.09.2010 to 03.10.2010 in his house, only to give a chance to the police to implicate him in the present case. Therefore, the Crl.L.P.174 of 2017 Page 7 of 13 said recovery of knife and its use in the subject incident do not inspire confidence. PW-24 and PW-25 deposed that the respondent Nos.1, 2, 4, 5 and 6 got recovered the clothes worn by them at the time of incident. As per FSL report (Ex. PW-11/A), no blood was detected on the said clothes. According to the prosecution, on T-shirt (Ex. P-16/A) recovered at the instance of the respondent No.5, light brown stains were found. Firstly, as per FSL report, there was no reaction to the same. Secondly, according to PW-2, the respondent No.5 was alone on the motorcycle (Ex.P-1), which was ahead of his scooter as well as remaining two motorcycles. Therefore, there was no occasion to have the blood stains either of deceased or injured on the said T-shirt. Hence, the said recoveries are of no consequence. In view of the foregoing discussions, it was held that recovery of the motorcycles (Ex. P-1 to Ex. P-3) and the knife (Ex. P-4) do not inspire confidence of the Trial Court. Prosecution examined PW-8 to prove that in the evening on the date of incident, all the respondents met at Olympic Gym and conspired to commit the offence. However, PW-8 turned hostile. As such, the prosecution has failed to prove the meetings of the mind between the respondents

prior to the date of incident. According to PW-3, one bullet was recovered from the body of the deceased and his death had resulted because of firearm injury. However, as per MLC (Ex. PW-4/B) of the deceased, the injury was the result of some blunt weapon. But PW-4 has not given any specific and satisfactory answer to the nature of the injury. Hence, it can be held that the death of the deceased was caused due to fire shot injury. But the question arises as to which of the respondent fired the fatal shot and whether the firearms recovered from the possession of the respondent Nos. 1 and 2 were used in the said incident or not. Prosecution Crl.L.P.174 of 2017 Page 8 of 13 has shown the recovery of firearms (Ex. P-10 and Ex. P-13) in FIR No.234/10. As per ballistic report (Ex. PW-6/A), the bullet recovered from the body of the deceased had been discharged through the improvised pistol 7.65 mm caliber seized in the said FIR. But, as held above, the recovery of the pistols is itself doubtful. Further, PW-2 deposed that he was not sure as to who fired the fatal shot. In view of the foregoing discussions, it can be held that the prosecution has failed to prove beyond reasonable doubt that the respondent Nos. 1 and 2 used the firearms in the said incident and which of the accused fired the fatal shot which hit on the deceased and resulted in his death. According to PW-2, the respondent No.4 was sitting in the middle of the respondent No.3 and one Bitta on the motorcycle (Ex. P-2) and gave the stab injury on his stomach vide knife (Ex. P-4). As per MLC (Ex. PW- 4/A), PW-2 had sharp incised wound approximately 3cm X1m over iliac region of abdomen and the same was dangerous in nature. However, as per FSL report (Ex. PW-11/A), no blood was found on that knife. Further, PW- 25 has not obtained any opinion as to whether the said injury was the result of the said knife. In view thereof, the prosecution has failed to show the connection between the injury sustained by PW-2, the cause of the injury, weapon of offence and the respondent No.4.The respondent Nos.1, 2 and 4 were charged u/s 397 IPC for using the deadly weapon in the incident while committing dacoity. In view of the following discussion, it can be held that the prosecution has failed to prove beyond reasonable doubt that the respondent Nos.1,2 & 4 used the deadly weapon in the subject incident. Further, as held above, recovery of knife (Ex. P-4) is itself doubtful. Therefore, it can be held that the prosecution has failed to prove beyond reasonable doubt that the respondent No.4 gave knife blow to PW-2. Crl.L.P.174 of 2017 Page 9 of 13

Reading together the statement (Ex. PW-2/A) and testimony of PW-2, reveal that the motorcycle (Ex.P-2) hit/obstructed the scooter of PW-2 and was driven by the respondent No.3. In the middle, the respondent No.4 was sitting, who stabbed him. At last, one Bitta was sitting and snatched the bag from the hands of PW-2. The respondent No.4 also snatched the back which was on the footrest. However, according to statement (Ex. PW-2/A), only one bag was snatched and the goods kept in the dickey of the scooter were saved. As such, PW-2 introduced one more bag also in his testimony. Further, no recovery of the robbed article was effected.

11. On a careful analysis of the evidence on record and the discussions hereinabove, we are of the view that the learned Trial Court was correct in coming to a conclusion and holding that the prosecution has failed to prove the charges carefully against all the accused persons beyond reasonable doubt and therefore holding that all the accused persons cannot be held guilty and accordingly all the accused for the offences they were charged with.

12. Hence, in the above facts, it can be held and summarized that PW-2s testimony was full of material contradictions and therefore not reliable. He did not disclose the registration number nor the color of motorcycles used in the incident. According to him, 3 motorcycles were involved in this incident. The involvement of 3rd motorcycle (Ex. P-1) is doubtful. He also increased the number of assailants from six to seven without any explanation. PW-2, in his cross-examination, deposed that there was sufficient light at the crime scene and also that the respondents were not wearing helmet. Hence, it can be assumed that PW-2 had the opportunity to observe the description of the Crl.L.P.174 of 2017 Page 10 of 13 accused persons. On 05.09.2011, PW-2 in the Trial Court identified respondent No.3, as the accused who was already arrested on his identification on 18.09.2010. The said identification is contrary to the case of prosecution because it was respondent No.5, who was arrested on 18.09.2010 and not respondent No.3. Therefore, the inference can be drawn that PW-2 was not sure of the identification of respondent No.5. The justification of PW-2 for not identifying of respondent Nos. 2 and 6 is contrary to TIP proceedings and therefore not sustainable in law. The recovery of the knife at the instances of the accused persons does not inspire confidence. FSL Report (Ex.PW-11/A), prove that there

was no blood detected on the said knife and also it is highly improbable that the respondent No.4 would have kept the weapon of offence in his house only to give a chance to police to implicate him. No medical record was filed to prove any injuries caused to respondents while they were attempting to escape. It was also observed that first motorcycle skid although there were no such skid marks on the road. As per Ex. PW4/B, injury was a result of some blunt weapon. PW-4 has not given any specific answer to the nature of injury. PW-2 neither named nor mentioned which respondent fired the gunshot. In his testimony dated 06.09.2011, he deposed that it were respondent Nos. 1 and 2 who had fired, however he failed to explain if he was aware of the same on 05.09.2011 and if yes, then why he had not specifically named before. As per Ex. PW2/C (Site Plan), prepared at the instance of PW-2, the position of PW-2 is not shown to ascertain whether he had the opportunity to see the assailants, who had actually fired. The prosecution failed to show the connection between the injuries sustained by PW-2, the cause of the injury as well as the connection between the weapon Crl.L.P.174 of 2017 Page 11 of 13 of offence and respondent No.4. According to statement (Ex.PW-2/A), only one bag was snatched, however, PW-2 introduced one more bag in his testimony.

13. It is held in the matter of State of Rajasthan v. Chandu & Ors., JT2002(10) SC427as under: 6The aforesaid rule that the conviction can be based on the sole testimony of an interested eye-witness is subject to the limitation that the testimony of such a witness is trustworthy and consistent and court finds it safe to fully rely upon the deposition of such a witness in regard to the nature of the occurrence and the involvement of the accused. In present case, however, it was prudent to look for corroboration on material particulars. 14. It is held in the matter of Public Prosecutor High Court of AP v. Thota Seshu & Anr. in Crl. A. 661/1992 as under: 2..There were material inconsistencies and contradictions in the testimony of complainant-PW1 compared with his statement under Section 161 Cr.P.C. Thus, the trial court was left with the sole and singular testimony of PW-1, which too was found to be infirm and not wholly reliable. 15. To conclude, none of the contentions urged by the learned APP for the State pursue us to take a different view than the learned Trial Court. The prosecution has not been able to prove its case beyond reasonable doubt. In view of the testimonies on record and

the discussions hereinabove, the appeal is accordingly dismissed. Crl.L.P.174 of 2017 Page 12 of 13 16. Even otherwise, it is settled law that the appellate court may only interfere in an appeal against acquittal when there are substantial and compelling reasons to do so [See Sheo Swarup v. King-Emperor, AIR 1934 PC227(2); M.G. Agarwal v. State of Maharashtra, AIR 1963 SC200(paragraph 16 and 17); Tota Singh and Anr. v. State of Punjab, AIR 1987 SC108 (1987) 2 SCC529(paragraph 6); State of Rajasthan v. Raja Ram, (2003) 8 SCC180(paragraph 7); Chandrappa v. State of Karnataka, (2007) 4 SCC415(paragraph 42); Ghurey Lal v. State of U.P., (2008) 10 SCC450(paragraph 73); and Muralidhar @ Gidda v. State of Karnataka, (2014) 5 SCC730(paragraph 12)]..

17. Accordingly, we find no ground to interfere with the judgment of the Trial Court. The personal bonds and the sureties under Section 437-A Cr.P.C. are discharged.

18. The leave to appeal is dismissed. CHANDER SHEKHAR, J G.S.SISTANI, J AUGUST24 2017/////tp Crl.L.P.174 of 2017 Page 13 of 13

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