

Shokeen and anr. Vs. State

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Court : Delhi

Decided On : May-02-2011

Judge : Mukta Gupta, J.

Acts : Indian Penal Code (IPC) - Sections 307, 114, 34; Arms Act; Code of Criminal Procedure (CrPC) - Section 313

Appeal No. : Crl. Appeal No. 608/2000 & Crl. M.B. 88/2011

Appellant : Shokeen and anr.

Respondent : State

Advocate for Def. : Mr. Manoj Ohri, Adv.

Advocate for Pet/Ap. : Mr. R.N. Mittal; Mr. Manoj Kumar; Mr. Rahul Mangla; Mr. Anup Kumar Sharma, Adv.

Judgement :

1. Briefly the prosecution case is that on the complaint of one Nadeem Ahmed FIR No. 365/1998 under Section 307/114/34 IPC was registered at P.S. Gokulpuri alleging that on 5th June, 1998 at about 7:45 P.M. in Gali No. 22, A-Block, Sri Ram Colony, Delhi, Appellants Tasleem, Yamin @ Shokeen, and co-accused Frahim and Salim(since P.O.) on the abetment of one Mohsin who also came at the spot, in furtherance of their common intention caused injuries on the person of PW2 Nadeem Ahmed by opening fire at him with country-made pistols with an

intention to cause his death. After investigation, a charge-sheet was filed. The Appellants Tasleem, Shokeen and one Frahim were charged for offences under Section 307/34 IPC whereas Mohsin was charged for offences punishable under Section 114 read with Section 307 IPC. After recording the prosecution witnesses, statements of the accuseds and the defence witnesses the learned trial court convicted the Appellants and Frahim for offences punishable under Section 307/34 IPC and awarded a sentence of Rigorous Imprisonment for a period of five years and a fine of `2000/- each and in default of payment of fine to undergo further Rigorous Imprisonment for a period of two months. Accused Mohsin was convicted for offences punishable under Section 114 read with Section 307 IPC and awarded a sentence of Rigorous Imprisonment for a period of four years and a fine of Rs.2000/- and in default of payment of fine to further undergo Rigorous Imprisonment for a period of two months.

2. Tasleem and Shokeen have filed the present appeal whereas Crl. Appeal No. 441/2000 was filed by Frahim and Mohsin. In the said appeal, Frahim and Mohsin did not challenge their conviction and only sought modification of the sentence for imprisonment to the period already undergone. This Court vide its judgment dated 14th September, 2000 held that the provision of Probation of Offenders Act could not be extended, however, in view of the facts and circumstances of the case since the Appellants were not previous convict and showed exemplary behaviour during the period of incarceration, modified the order on substantive sentence and reduced it to the period already undergone while maintaining the sentence of fine and imprisonment in default thereof.

3. Learned counsels for the Appellants, at the outset, pray that they should be released on the period already undergone in terms of the order dated 14 th September, 2000 passed by this Court in Crl. Appeal No. 441/2000. On behalf of the Appellant Tasleem, it is stated that the evidence against Tasleem is same as that is against Frahim and since he has also served more that fifty per cent of the sentence, he should be released on the period already undergone. Learned counsel for the Appellant Yamin @ Shokeen contends that the role assigned to all the Appellants and the co-convicts is of firing and on parity he should also be granted the benefit of the order passed by this Court in Crl. Appeal No. 441/2000.

In the alternative, it is submitted that PW2 Nadeem Ahmed, the injured in his testimony has not named Shokeen as the person who caused firearm injury on the right side of his chest. This fact is also not stated by PW 4 Rashid Ahmed and PW 5 Shammi Alam. PW6 and PW7 have turned hostile and have not supported the prosecution case. In view of such a hazy evidence, it cannot be said that the prosecution has proved that the Appellant Shokeen caused injury to PW2 by firearm. The Appellant's defence is that they were running an NGO named All India Crime Prevention Society and they had lodged complaints against PW2 Nadeem Ahmed and due to this animosity, they were falsely implicated by the complainant and the witnesses. The MLC of PW2 Ex.PW8/A is neither thumb marked nor signed by him. The MLC even does not bear the stamp of the hospital. The bullet recovered from the body of the injured has not been sent to CFSL. So, it cannot be said that the bullet was a used or an unused bullet. Moreover, the bullet recovered from the body has not even been exhibited. The defence of the Appellant has not been considered and the conviction is liable to be set aside.

4. Learned APP for the State on the other hand contends that PW 2 is an injured witness and he has stated that the first shot was fired by the Appellant Shokeen. Immediately thereafter, he ran away from the spot and all the others also started firing. PW3 Mansoor has categorically stated that Shokeen first fired the shot which hit Nadeem on the right side of his chest. Thereafter, he ran and all other accused started firing resulting in a second gunshot injury to Nadeem. This version of PW 3 is corroborated by the testimony of PW4 and PW5. Even though PW6 and PW7 have turned hostile, however the testimony of PW2, PW3, PW4 and PW5 is duly corroborated by the MLC of PW2 the injured Ex.PW8/A which showed that there were gunshots injuries. It is contended that as far as Appellant Shokeen is concerned, there is clear evidence on record which proves that he inflicted the gunshot injury at the right side of the chest. Even the Appellant Tasleem has fired the shot and even in the absence of evidence whether the shot fired by him has hit the injured or not, the ingredients of Section 307 IPC are made out. Moreover, both the Appellants along with Frahim have been convicted for offences under Section 307/34 IPC and in a case of gunshot injury, the Appellants cannot be let off by merely undergoing an imprisonment for a period of three years. Thus, the appeal be dismissed being devoid of merit.

5. I have heard the learned counsel for the parties and perused the record. PW3 in his testimony has stated that on 5th June, 1998 around 7:30 - 7:45 P.M. when the sun was about to set, he was standing at a short distance from Nadeem who was sitting on the plot of one Mustkeen along with Rasheed, Shammi Alam and Javed. At that time, Mohsin, Tasleem, Frahim, Shokeen and Salim who are residents of Sri Ram Colony came and Mohsin while abusing asked the other four to fire at Nadeem. On this, first of all Shokeen fired the shot which hit on the right side of the chest of Nadeem. As the Complainant ran others also fired shots and one more bullet hit him, however he could not identify as to whose bullet hit him for the second time. He has further stated that as far as he knows Mohsin had an old enmity with Nadeem as Mohsin was arrested under the Arms Act in the year 1992 and he suspected that Nadeem had got him arrested. PW4 Rashid Ahmed has also stated that on Mohsin asking to shoot Nadeem, the other accused who were armed with country-made pistols open fired on Nadeem. The first bullet was fired by Shokeen on which Nadeem tried to run away and thereafter the second bullet was fired, which he could not see as to who fired it. This version is further corroborated by PW5 Shammi Alam who has stated that on Mohsin asking the other accused person to kill Nadeem, the accused persons took out the country-made pistol and accused Shokeen first fired at Nadeem and due to which he tried to run away and he sustained bullet injuries on the right side of his chest. When he ran away, accused persons followed him and again opened fired on him. PW2 Nadeem the injured witness in his testimony stated that when he was sitting on the cot at the plot of Mustkeen along with Rafiq, at that time accused Shokeen, Tasleem, Frahim, Moshin and Salim reached there. All the accused persons except Mohsin had pistols in their hands. Mohsin said 'fire the shot', on which Shokeen fired a shot. At that time, he ran away and all the four accused fired shots at him. One shot hit him on the right side of the chest and the second on the left side of his stomach. While running, he reached the STD booth from where the police was called and on the police reaching there, he was taken to the hospital. PW2 has clarified that the first shot which hit him on the right side of the chest was fired by the Shokeen. This fact is further corroborated by the testimony of PW3, PW4 and PW5. The testimony of PW2 the injured witness is clear and trustworthy as he has not been able to state as to whose shot hit him on the stomach as he

could not have perceived each and every action of the accuseds because he immediately ran to save himself. Thus, the prosecution has proved beyond reasonable doubt that the Appellants in furtherance of their common intention caused gunshot injuries to PW2 Nadeem. The contention of learned counsel for the Appellant that they have been falsely implicated because they were making complaints against the witnesses since they were running the NGO loose ground in view of the decision of the Hon'ble Supreme Court in *Kallu @ Masih and others v. State of M.P.* 2006 (10) SCC 313 wherein the Hon'ble Supreme Court held:-

"The trial court was of the view that the absence of an independent eyewitness in the background of previous enmity was a serious lacuna. But what the trial court failed to notice is that previous enmity was not denied and the prosecution case is that Kallu and the other accused came in a group to Sadruddin's house specifically to beat him up. Therefore, the mere fact that there was enmity between Sadruddin and Kallu cannot be a ground to reject the clear evidence of the eyewitnesses - PWs 4,6,7,9 and 10 who were the injured, and PW 3."

The Hon'ble Supreme Court in *Bhagirath and others v. State of Haryana* AIR 1996 3431 held:-

"In a case of this nature, all that is required is to scrutinise the evidence of such witnesses very carefully. Motive is a double edged weapon. It is also well settled that when prosecution relies upon the evidence of the eye-witnesses to prove the incident, motive assumes a secondary role. In the present case, the testimony of eye-witnesses is found acceptable and, therefore, adequacy of motive is not relevant. In our considered view, the motive sought to be relied upon by the appellants in no way affects the credibility of the injured witnesses. We, therefore, see no substance in the first contention."

6. Thus, in view of the settled legal principles, relying on the testimony of PW2, injured eye witness corroborated by the testimonies of PW3, PW4 and PW5, it can be safely held that the Appellants had fired gunshots on PW2 in furtherance of their common intention intending to cause his death. The offence committed was clearly a pre-meditated act. Both sides have stated about the enmity against each other and thus proved the motive for commission of the offence.

7. There is no merit in the contention of the learned counsel for the Appellant that the MLC is not signed nor thumb marked by Nadeem and thus it is not connected to PW2. In this regard, PW8 Dr. Anand Aggarwal, CMO, GTB Hospital has been examined who has stated that he examined the patient Nadeem and has proved the MLC Ex. PW 8/A. No question has been put to this witness that the MLC Ex. PW8/A does not relate to the injured Nadeem. I do not find any merit in the contention that the bullet has not been sent to the CFSL and thus it cannot be said that it is a used or unused bullet. The very fact it is recovered from the body of the injured it is proved that it was a used bullet.

8. Learned counsel for the Appellants have strenuously claimed parity on the ground that the co-accuseds of the incident has been released on the period undergone. In the order passed by this Court in Criminal Appeal No. 441/2000, no challenge was laid to the conviction and thus this Court held that it need not go in the nitty-gritty of law as regards the conviction. It was also held that the benefit of Probation of Offenders Act was not available as the punishment attracted for the alleged offence was upto life sentence. In view of no previous conviction and exemplary behaviour, this Court reduced the period of imprisonment. In the present case, Appellant Tasleem was aged about 19 years when he was examined under Section 313 Cr. P.C. on the 25th November, 1999. Thus, on the date of incident i.e. 5th June, 1998 Tasleem was allegedly less than 18 years old. Though, the learned counsel for the Appellant has not raised any plea seeking benefit of juvenility but this Court is duty bound to look into the said aspect.

9. In the view of the discussion above, the conviction of the Appellants for the offences punishable under Section 307/34 IPC is upheld. The age of the Appellant Tasleem has to be ascertained, therefore, the order on sentence qua the

Appellants is deferred. The State is directed to get the age of Appellant Tasleem ascertained and file a report in this regard before the next date. The matter be listed on 6th July, 2011.

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