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

+ CRL.A. 489/2023

RASHID@MONU

.....Appellant

Through: Ms. Rebecca M. John, Sr. Adv. with
Mr. Archit Krishna, Mr. Chinmoy
Kanojia, Ms. Tamanna Pankaj, Ms.
Priya Vats, Advs.

versus

STATE OF NCT OF DELHI

.....Respondent

Through: Mr. DK Bhatia, SPP with SI Ajit
Krishna, PS Gukulpuri

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

ORDER

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13.11.2024

CRL.M.(BAIL) 879/2023

1. This is an application filed under Section 389 read with Section 482 Cr.P.C. seeking suspension of sentence imposed on the appellant *vide* order dated 09.05.2023 passed by the Ld. Additional Sessions Judge-03, North-East District, Karkardooma Courts and consequently, release the appellant on bail.
2. The appellant has been held guilty for the offences punishable under section 147/148/380/427/436 read with section 149 of IPC as well as under section 188 of IPC with a maximum sentence of 7 years and fine of Rs. 20,000/-.
3. As per the Nominal Roll of 26.07.2024, the appellant has undergone a period of 2 years 4 months 4 days of sentence, remission of 5 months 11 days. As of today, another period of about 3 months 17 days have elapsed making the total undergone period approx. 3 years 1 month 2 days out of



maximum 7 years of sentence.

4. It is stated by Ms. John, learned senior counsel appearing for the appellant that the conviction is solely based on the testimony of 2 eye witnesses i.e. PW-6 and PW-7 being HC Hari Babu and Const. Vipin respectively. Further, the testimony of HC Hari Babu is neither trustworthy nor credible and has wrongly formed the basis of conviction of the appellant.

5. Mr Bhatia, learned counsel for the State opposes the present application and states that the testimony of both the eye witnesses are clear. The learned ASJ has rightly appreciated the facts and circumstances of the case.

6. Heard learned counsel for the parties.

7. Para Nos. 22 and 23 of the impugned judgment read as under:-

“22. Defence challenged the credibility of PW6 on the basis of his previous testimony recorded in FIR No.40/20 and 83/20, PS Goklapuri on 28.03.2022. Certified copy of those testimonies is Ex.A-26. At that time this witness could not identify the accused persons in FIR 40/20, taking plea of lapse of long time. However, he had stated that he had seen some persons in the mob and identified them. He had disclosed names of those persons as Shahrukh, Parvez and Azad. In that case, he was talking about the riotous act of the mob as taken place on Main Brijpuri Road on 25.02.2020 at about 01-02 PM. He was cross-examined by ld. Special PP at that time also and in that process, he admitted that the person identified by him was Shahnawaz and not Shahrukh. Ld. defence counsel made contentions that this witness identified the accused persons in FIR 83/20, subsequent to his examination in FIR No.40/20 only because of tutoring. His other argument was that since this witness had not seen any accused, therefore, he could not identify any accused during his examination in FIR No.40/20. In this respect, ld. Special PP submitted that at the time



of examination in FIR No.40/20, this witness was not in fit condition. He argued that ideally this witness should not have been examined at that time, because of his poor medical condition. 23. When PW6 was cross-examined in the present case he admitted the suggestion that during his examination in previous case he had stated before the court that due to passage of long time, he could not identify accused Shahnawaz, Parvez and Azad. PW6 did not remember the FIR of such case, but it was in reference to FIR No.40/20. In response to the query of the court, PW6 further explained that at that time, his memory was not in fit condition and he was taking medicine for mind, but now he was in fit state of mind. He was further cross-examined by defence on this aspect and then he stated that he took medicine for about five months from Jain Hospital, Anand Vihar and his medical prescriptions were lying at home, which could be produced by him. Accordingly, as per demand made by ld. defence counsel he was directed to produce the relevant medical document before the court. Since these medical documents have been produced as per demand of defence and defence did not raise any challenge to authenticity of these documents, therefore the same can be read into evidence. The defence counsels took plea that these medical documents do not show any mental illness of the witness. Hence, the plea of memory loss due to medical problems as taken by PW6, is not sustainable. It is correct that these medical documents show that PW6 was suffering from problem related to his ear, which included the problem of vertigo. However, for the purpose of not being able to recollect any fact or face of a person correctly, it is not necessary that the person concerned would be suffering from some sort of mental illness. In fact, even without suffering from any particular illness, it is a normal tendency of any person that he does not recollect an incident taken place in the past completely and very accurately. If I compare the condition of PW6 with such normal person, then apparently his condition was



worse than others. As per alleged history mentioned in his medical documents, he was admitted in the hospital on 12.01.2022 with complaint of high-grade fever with vertigo. He was discharged on 15.01.2022 and was found suffering from acute vertigo with cervical spondylosis with Covid-19. Thereafter also he remained under treatment in Garg hospital. On 21.01.2022, he again visited Jain hospital with complaint of dizziness, nausea and his sleep was also reported to be disturbed. His medical prescriptions show that he continued taking medical advice and the last prescription produced is dated 21.03.2022, wherein again complaint of dizziness was reported. As per common knowledge of medical science, the problem of vertigo does make a person unstable and very uncomfortable because of severe giddiness etc. In that state of mind, it can be possible with anyone that he does not recollect all the things very correctly and accurately. I am in agreement with the contention of ld. Special PP that it was not ideal decision of prosecution to examine PW6 in such peculiar situation at that time. They should have waited for recovery of PW6 completely, before examining him in any case. However, it seems that probably because PW6 could not afford to remain on medical leave on such ground for a longer period and he reported for his duty, he was produced as witness in routine manner, thereby compelling him to depose before the court.”

8. A perusal of the above paras indicates that PW-6 in earlier FIRs was unable to identify any of the accused persons presumably on the basis of his medical condition. The learned ASJ has assumed the role of a medical expert, analysed the medical prescription and come to a finding that vertigo, cervical spondylosis along with COVID-19 would render PW-6 in a condition so as he would not remember facts of an earlier incident but subsequently remember facts of a subsequent event. The findings of learned ASJ are based without any medical corroboration or expert witness in this



regard.

9. Learned senior counsel for the appellant has relied upon the judgment of *Masalti v. State of U.P., 1964 SCC OnLine SC 30* and more particularly para 16 which reads as under:-

“16. Mr Sawhney also urged that the test applied by the High Court in convicting the appellants is mechanical. He argues that under the Indian Evidence Act, trustworthy evidence given by a single witness would be enough to convict an accused person, whereas evidence given by half a dozen witnesses which is not trustworthy would not be enough to sustain the conviction. That, no doubt is true; but where a criminal court has to deal with evidence pertaining to the commission of an offence involving a large number of offenders and a large number of victims, it is usual to adopt the test that the conviction could be sustained only if it is supported by two or three or more witnesses who give a consistent account of the incident. In a sense, the test may be described as mechanical; but it is difficult to see how it can be treated as irrational or unreasonable. Therefore, we do not think any grievance can be made by the appellants against the adoption of this test. If at all the prosecution may be entitled to say that the seven accused persons were acquitted because their cases did not satisfy the mechanical test of four witnesses, and if the said test had not been applied, they might as well have been convicted. It is, no doubt, the quality of the evidence that matters and not the number of witnesses who give such evidence. But sometimes it is useful to adopt a test like the one which the High Court has adopted in dealing with the present case.”

10. A perusal of the said judgment shows that in incidents of mob violence and conviction under Section 149 of IPC, there must be atleast two or three independent witnesses giving consistent account of the incident.

11. *Prima facie*, on perusing the impugned judgment, though, in the



present case PW-7 i.e. Const. Vipin has given clear testimony, the testimony of PW-6 i.e. HC Hari Babu does not inspire confidence. In addition, the appellant has already undergone more than 3 years of the maximum sentence of 7 years and the appeal is of the year 2023, hence it will take some time to be taken up for hearing.

12. For the said reasons, it is directed that sentence of the appellant shall remain suspended during the pendency of appeal on his furnishing a personal bond in the sum of Rs.20,000/- with one surety in the like amount to the satisfaction of the learned trial court and subject to the following further conditions:-

- (i) The appellant shall provide his mobile number to the concerned Investigating Officer on which he shall remain available during the pendency of the present appeal.
- (ii) The appellant will furnish his permanent address to the IO and in case he changes his address, he will inform the IO concerned.
- (iii) In case of change of residential address or contact details, the appellant shall promptly inform the same to the concerned Investigating Officer as well as to this Court.
- (iv) The appellant shall regularly appear before the Court as and when the appeal is taken up for hearing.
- (v) The appellant shall not leave the country and if the appellant has a passport, he shall surrender the same to the concerned Jail Superintendent.

13. Needless to add that this order has been passed only for deciding the present application and the observations made hereinabove will not come in



the way of final adjudication of the main appeal.

14. A copy of this order be communicated electronically to the concerned Jail Superintendent for information.

15. With these directions, the present application is disposed of.

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16. List the present appeal in due course.

JASMEET SINGH, J

NOVEMBER 13, 2024/DM

Click here to check corrigendum, if any