

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

Date of Hearing & Decision: 27th May 2011

+ **CRL.L.P.No.42/2011**

STATE ... PETITIONER.
Through : Mr. Lovkesh Sawhney, APP for the State.

Versus

JITENDER ... RESPONDENT
Through : None.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE G.P.MITTAL

- | | |
|---|----|
| 1. Whether reporters of local papers may be allowed to see the Order? | No |
| 2. To be referred to the Reporter or not? | No |
| 3. Whether the Order should be reported in the Digest? | No |

J U D G M E N T

G.P. MITTAL, J. (OPEN COURT)

1. This is a petition under section 378 (3) of the Code of Criminal Procedure (Cr.P.C.) filed by the State seeking leave to file an Appeal against the judgment and order dated 26.08.2010 passed by the learned Additional Sessions Judge whereby the Respondent-Jitender Anand @ Jatin was acquitted of the offence punishable under Section 302/34 IPC for committing the murder of deceased Deepak @ Deepu.
2. In brief, the prosecution case is that on 22.03.2008 at about 1:30/2:00 p.m. deceased Deepak s/o PW-1 Rajbala was having his meal at his house. Respondent-Jitender and one Suraj (juvenile) called upon the deceased (Deepak). Thereafter deceased (Deepak @ Deepu) left his house along

with Suraj and the Respondent-Jitender Anand @ Jatin informing his mother that he would return in about five minutes.

3. PW-1, Rajbala being a mother got worried when Deepak (deceased) did not return even by 7:00 p.m./8:00 p.m. She along with her husband Randhir Singh left the house in search of her son. They met Suraj and asked him about her son's whereabouts. It is alleged that Suraj boasted in front of them (PW-1 Rajbala and her husband Randhir Singh) that he along with Jitender Anand (Respondent) had killed Deepak.
4. PW-1 Rajbala and her husband reached Police Station Burari and lodged a report on the basis of which DD Entry No.35A (Ex.PW-10A) was recorded in the Police Station.
5. PW-12 ASI Mohd.Saleem and PW-9 Constable Sanjeev accompanied Rajbala (PW-1) and Randhir Singh to find out the whereabouts of Deepak (deceased). They sighted Suraj in Sant Nagar Market where he was apprehended. On interrogation Suraj disclosed that the dead body of Deepak was lying in the bushes in an open plot behind Sedu Baba's Temple in Burari, Delhi. PW-12 ASI Mohd.Saleem sent information to the police station. The SHO, Addl.SHO Inspector J.S.Mishra reached the spot and the Crime Team was requisitioned. Inspector J.S.Mishra (IO) sent rukka to the police station on the basis of which the FIR was recorded. Blood soaked soil and other articles were lifted from the spot. Disclosure statement (Ex.PW-12/B) of Suraj (juvenile) was recorded and he (Suraj) got recovered his blood stained clothes containing razor blades and thereafter led the police to the house of Respondent-Jitender. Jitender was apprehended and on interrogation he got recovered his blood stained clothes which were taken into possession from his house by memo Ex.PW-12/C.
6. It is alleged that Respondent-Jitender also led the police party to the spot and got recovered two broken pieces of wooden baseball bat. On Serological examination of the bloodstained clothes (alleged to be

recovered at the behest of the Respondent), the shirt was found to be stained with “B” group blood while there was no reaction on the pant which belonged to the deceased.

7. On completion of investigation, a report under section 173 Cr.P.C. was filed against the Respondent-Jitender.
8. In order to bring home the guilt of the Respondent the prosecution examined 20 witnesses.
9. The Respondent-Jitender was examined under Section 313 Cr.P.C. He denied the prosecution version and pleaded his false implication in a blind murder case. He took up the plea that the day of occurrence happened to be a Sunday, therefore, instead of going to his place of work at Methapur, Badarpur where he was working as a mechanic, he went to see his relative at Shahdara. He produced DW-1 Nand Kishore, DW-2 Dinesh Kumar, DW-3 Vijay Kumar in addition to his parents as DW-4 Sunita and DW-5 Sunil Kumar in support of his plea of alibi.
10. The case of the prosecution rests solely on circumstantial evidence. The prosecution relied upon three circumstances to connect the Respondent-Jitender with the offence with which he was charged. These are as follows:-
 - (a) Last seen evidence in the shape of testimony of PW-1 Smt.Rajbala (mother of the deceased)
 - (b) Recovery of bloodstained clothes in pursuance of disclosure statement by the Respondent i.e. shirt *Ex.P-7* found to be containing “B” Group blood of the deceased.
 - (c) Recovery of broken pieces of wooden baseball bat at a distance of 15 paces from the dead body.
11. On the last seen evidence the prosecution examined PW-1 Rajbala who deposed that the deceased left in the company of the Respondent-Jitender and Suraj at about 1:30/2:00 p.m. saying that he would be back in five

minutes. The deceased, however, did not return. As a result of which PW-1 (mother of the deceased) got restless and went in search of the deceased at 7:00/8:00 P.M. According to the prosecution the dead body of the deceased was recovered from an open plot at the instance of co-accused Suraj (juvenile). The post mortem examination of the dead body was performed on the next date at about 2:40 p.m. The doctor opined the time since death to be about 18-24 hours. Thus according to post mortem examination, the death of the deceased would have taken place between 2:40 p.m. to 8:40 p.m. The prosecution has not produced any evidence other than that of PW-1 to prove this piece of evidence. No evidence has been led as to the exact time when the deceased was found dead. In *Bodhraj and Ors. v.State of Jammu and Kashmir*, (2002) 8 SCC 45 it was held as under:

“.....that the last seen theory comes into play when the time gap between the point of time when the accused and deceased were last seen alive and when the deceased is found dead is so small that the possibility of any person other than the accused being the author of the crime becomes impossible. Further, it would be hazardous to come to a conclusion of guilt in cases where there is no positive evidence to conclude that the accused and the deceased were last seen together.”

The finding of the Trial Court on this piece of evidence, therefore, cannot be faulted with.

12. The Trial Court disbelieved the recovery of the bloodstained clothes and the broken pieces of wooden baseball bat in pursuance to the disclosure statement alleged to have been made by the Respondent. The reasoning of the Trial Court as contained in paras 15-17 of the impugned order is extracted hereunder:

“15. At the cost of repetition, the prosecution evidence led on record goes to suggest that recovery of blood stained shirt and pant Ex.-6 and P-7 besides blade Ex.P-8 were made at the instance of accused Suraj Singh (Juvenile) vide memo Ex. PW 11/D and thereafter the police party went to the house of present accused Jitender Anand @ Jatin. PW-

12 ASI Mohd.Saleem besides PW-18 Inspector Hari Kishan and PW-19 Inspector J.S.Mishra deposed that accused Jitender Anand @ Jatin was interrogated and at his instance blood stained jeans and shirt Ex.P-9 and P-10 was seized vide memo Ex.PW 12/C. I am afraid the recovery is doubtful on more than one count. First, while PW-12 Mohd. Saleem deposed that the house of accused Jitender Anand @ Jatin was located just after 2-3 gali nearby the house of co-accused Suraj Singh (Juvenile), PW-18 Inspector Hari Kishan deposed that the distance between house of the co-accused and accused Jitender Anand @ Jatin was about one k.m. whereas PW-19 Inspector J.S.Mishra deposed that the distance was hardly 400 meters. Secondly, while PW-18 Inspector Hari Kishan deposed that the jeans Ex.P-9 and shirt Ex.PW-10 were recovered from an almirah in front of room of the house of the accused Jitender Anand @ Jatin, PW-19 Inspector J.S.Mishra deposed that it was recovered from a cavity behind almirah from a room falling in the rear portion of the house.

16. Be that as it may, the blood stained shirt and pant Ex.P-9 & P-10 were sent for FSL examination and as per report Ex.PW-19/1-3 blood was detected on the same and a Serological Report indicates that blood on the shirt was "B" Group but "no reaction" on the pant was found. This report is inconclusive and it does not help the prosecution case since assuming that the deceased was having blood group "B", there is no document evidence on the record which would show as to what was the blood group of the present accused Jitender Anand @ Jatin and whether blood group of accused was different from the deceased.

17. The prosecution case as per the postmortem report further is that deceased was badly smashed with the base ball bat with severe head injuries and was also attacked with a sharp object and in this connection the recovery of baseball Ex.PW-5 and the blade Ex.P8 becomes significant. The other evidence that the prosecution has brought against the present accused is that he was taken to the vacant plot where at his instance pieces of broken baseball bat Ex.P-5 were recovered and seized vide memo Ex.PW 12/D. If the evidence of PW-18 Inspector Hari Kishan and PW-19 Inspector J.S. Mishra is believed it appears that accused Jitender Anand @ Jatin was taken to the vacant plot at about 12 mid night. The Mobile Crime Team as per evidence of police witnesses had come to the spot at 10:30 p.m. and it had taken as many as 28 photographs of the

place of occurrence. The baseball bat as per PW-12 ASI Mohd. Saleem was found lying at a little distance from the dead body. It may be indicated that the vacant plot of land shown in scaled site plan Ex.PW 14/A was a big one nearly about 2500 to 3000 sq.yards as per evidence of PW-18. PW-18 Inspector Hari Kishan also deposed that the dead body was lying on the western side near boundary wall and PW-15 HC Naresh deposed that the dead body was lying hardly 2-3 ft. from the boundary wall. The position of the dead body is clearly depicted in the photograph near boundary wall which is Ex.PW 15/A-9 to A-12. As per PW-12 the baseball bat was recovered about 15 steps ahead from the direction of head of the dead body. Similar is the evidence of PW-18 and PW-19 that the baseball bat was recovered at a little distance from the dead body. Well, it is not fathomable that the Members of the Mobile Crime Team were not able to find the broken pieces of baseball bat when they were scanning the whole scene of crime and it could only be recovered later at the instance of accused Jitender Anand @ Jatin. It is in evidence that the police party had brought search light in order to scan the entire area. The result is that there is grave doubt if the recovery of baseball bat Ex.P-5 was effected at the instance of accused Jitender Anand @ Jatin.

13. We are in complete agreement with the reasoning given by the Trial Court that there were discrepancies in the testimony of the two witnesses as to the recovery of the bloodstained clothes. The Trial Court reasoning that the blood group of the Respondent did not match with the blood group noticed on the clothes also cannot be faulted. Otherwise also recovery of blood stained shirt by itself is a very weak type of evidence.
14. As observed by the Trial Court in para 17 of the impugned order the recovery of the two pieces of wooden baseball bat from near the dead body is doubtful. Admittedly the dead body was already recovered at the instance of co-accused Suraj (juvenile). The area was thoroughly scanned with search lights by the local police as well as the crime team. It was, therefore, not possible that the two pieces of wooden baseball bat would escape the discerning eyes of a large number of police officials including some from the crime team.

15. The law does not allow the State to file an Appeal against an order of acquittal. Under Section 378 (3) Cr.P.C., the State has to seek leave to file an Appeal. The powers of an Appellate Court are not limited, while hearing an Appeal against the acquittal and it has the same powers as it has while hearing an Appeal against an order of conviction. Yet, the fact remains that the presumption of innocence which is attached to every accused, unless proven guilty, is strengthened and reinforced by an order of acquittal. Thus, the Courts interfere in an order of acquittal where the finding of the Trial Court is perverse or there is gross mis-application of law. The Appellate Court can interfere with the order of acquittal where there are compelling and substantial reasons.

16. The Supreme Court in ***Syed Peda Aowlia v. The Public Prosecutor, High Court of A.P., Hyderabad***, (2008) 11 SCC 394, summed up the law after referring to various earlier decisions as under:-

*“5. There is no embargo on the appellate Court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the Court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate Court to re-appreciate the evidence where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused really committed any offence or not. See ***Bhagwan Singh and Ors. v. State of Madhya Pradesh***, (2002) 4 SCC 85. The principle to be followed by appellate Court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable and relevant*

and convincing materials have been unjustifiably eliminated in the process, it is a compelling reason for interference.”

17. In view of the foregoing discussion we are not inclined to interfere with the order of acquittal passed by the Trial Court. The Appeal, therefore, fails and it is accordingly dismissed.

(G.P. MITTAL)
JUDGE

(S. RAVINDRA BHAT)
JUDGE

MAY 27th, 2011
sa