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IN THE HIGH COURT OF DELHI, AT NEW DELHI

Pronounced on : 19.08.2011

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CRL.L.P. No.217/2011

STATE

..... PETITIONER

Through: Mr. Saleem Ahmed, Addl. Standing Counsel.

Versus

NISHA MISHRA & ORS.

.....RESPONDENTS

Through: None.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE G. P. MITTAL

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| 1. | Whether reporters of local papers may be allowed to see the Order? | Yes |
| 2. | To be referred to the Reporter or not? | Yes |
| 3. | Whether the Order should be reported in the Digest? | Yes |

Mr. Justice S. Ravindra Bhat (Open Court)

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1. The State seeks leave to appeal against a judgment and order of the Learned Additional Sessions Judge, dated 23.10.2010, in SC No.3/2008, whereby the respondents were acquitted of the offences they were charged with.

2. Briefly, the prosecution case was that on 08.05.2006, DD No. 32 – A was recorded in Kirti Nagar Police Station, after which the police went to Jhuggi No. 5321, Jawahar Camp Delhi, where a blood stained bed was found. The injured had been taken to Deen Dayal Upadhyay Hospital. It was later discovered that the injured, Om Prakash was bought dead to the hospital. The police recorded statements of the deceased person and Janardhan Mishra and Golu Mishra. They were staying with the deceased and were sleeping outside the jhuggi when the incident occurred. Janardhan Mishra, in his statement under Section 161, Cr. PC said that Nisha Mishra, the deceased's wife, woke him up and when went inside the jhuggi; he saw blood oozing out of Om Prakash Mishra's right ear. He rushed him to the hospital. On this basis, a case under Section 302/34 IPC was registered. After investigation both the

respondents along with two others were arrested. All the four, i.e. Nisha Mishra, i.e., the deceased's wife, Sugreev Pandey and Maheshwari Prakash Tripathi and Samru (Lallan Mistri) were accused and charged with committing the offence. They pleaded not guilty, and claimed trial. After considering the evidence, including testimonies of witnesses, and the materials relied on as exhibits, the Trial Court acquitted the accused.

3. The prosecution's case was based on circumstantial evidence. Reliance was placed on the testimonies of Janardhan Mishra (PW – 6); Golu Mishra (PW – 13) and Jaleswar Mishra (PW – 7).

4. The learned APP contended that leave has to be given to the State, to appeal against the impugned judgment. It was argued that the said judgment completely absolving the accused of the charges amounted to ignoring incriminating evidence which surfaced on the record. Submitting that the Trial Court overlooked vital evidence, in acquitting the accused, the APP submitted that the motive for the murder, i.e., extra marital relationship between Nisha Mishra and Sugreev, testified by PW – 13 Golu Mishra and PW – 7 Jaleswar Mishra, was proved by the prosecution. It was submitted that no direct evidence could be reasonably forthcoming, in the circumstances, and the prosecution had discharged the burden of proof. Counsel argued that a combined reading of the testimonies of PW-7 and PW-13 established this circumstance, which constituted motive, strong enough to implicate the accused.

5. The APP urged that the prosecution had also discharged its burden of proving the extra judicial confession made by Sugreev; PW – 7 Jaleswar Mishra stated that Sugreev, who was his tenant, had telephoned him and told him that he had committed the murder of the deceased, and that he was having an illicit affair with his wife Nisha Mishra, and that the deceased was a hurdle in their relationship. Similarly, PW – 6 Janardhan Mishra in his statement to the police stated that Nisha Mishra and Sugreev showed unusual conduct after the incident. He and PW 13 were woken up 10 – 15 minutes after the incident and upon being asked Nisha Mishra stayed mum. This has not been denied by the accused. The APP submitted that the Trial Court erred in not appreciating that pursuant to his disclosure statement, Sugreev Pandey led the police party to his jhuggi and got recovered country made pistol, Katta, provided by recovery witness. Similarly, it was stated that undue importance was given to the fact that only 18 pellets were sent for examination out of the 106 pellets, recovered at the time of post mortem. Counsel urged that the prosecution was able to form a

complete chain of events suggesting that there was no escape from the conclusion that in all human probability, Sugreev Pandey and Nisha Mishra committed the murder of deceased OM Prakash Mishra with the katta at his instance. Nor have the testimonies of PW – 6, PW – 7, PW – 8, PW – 13, PW – 14, PW – 15, which point to the guilt of the accused been appreciated.

6. We have considered the submissions on behalf of the State, as well as the Trial Court records, which were summoned for the purpose of considering this leave petition. As noticed earlier, the prosecution, in every case based on circumstantial evidence, has to prove certain essentials. These were outlined in the judgment reported as *Padala Veera Redy V. State of AP and Ors* (AIR 1990 SC 79) as follows:

1. The circumstances, from which an inference of guilt is sought to be drawn, must be cogently and firmly established. Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused.
2. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else.
3. The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but be consistence with his innocence.

7. The prosecution had relied on an illicit relationship between Sugriv and Nisha Mishra (the latter being the deceased's wife) as the motive for the offence. It also relied on alleged unnatural conduct of Nisha, the extra judicial confession by Sugriv and recovery of a *katta*. The Trial Court disbelieved all these.

8. So far as motive goes, we notice that apart from the testimonies of two witnesses, the Trail Court also took into consideration other materials, which negative the prosecution version. PW – 6 Janardhan Mishra, brother of the deceased, did not testify to anything with regard to his personal knowledge about any such affair. Another prosecution witness, Golu Mishra, nephew of the deceased, who was living with Nisha for 8 years did not depose about

any such affair. Furthermore, the recovery of ` 11,400 from Sugreev Pandey when he was arrested was alleged to implicate and show that Nisha Mishra had given him money for his *pairvi*. There was no evidence on record to show that Nisha gave the amount to Sugreev. Lastly the ownership details of the two mobile phones 9811172912 and 9899502671 alleged to have been used were not proved and the call records did not establish criminal conspiracy.

9. As regards extra judicial confession, the prosecution undoubtedly relied on such extra judicial confession by Sugreev Pandey. PW – 7 Jaleshwar Mishra stated that Sugreev Pandey, who was his tenant, telephoned him and said that he has committed the murder of the deceased and he was having an illicit affair with his wife Nisha Mishra and the deceased was a hurdle in their relationship. The testimony of PW-6 and PW-13 was also pressed into service, to say that Nisha and Sugreev showed unusual conduct after the incident. Both were woken up 10 – 15 minutes after the incident and upon being asked Nisha Mishra stayed silent. This was not denied by the accused. An extra judicial confession, like any other incriminating evidence has to be proved beyond reasonable doubt. The Trial Court was wary of accepting this circumstance, and sought corroboration, which was not forthcoming. It was held by the Court that the prosecution witnesses' version was unbelievable, as they were not familiar with the family, personal lives, relationships etc. of each other. The Court held that before 12.05.2006 PW-7 had no conversation on mobile with Sugreev Pandey. No evidence was produced by prosecution to prove that Sugreev Pandey was a tenant of Jaleshwar.

10. The Trial Court also discounted the next circumstance, i.e., the alleged unnatural conduct of Nisha. This allegation made by PW – 6 Janardhan Mishra become doubtful as they did not find mention in his first statement to the police Ex PW 6/A with which he was confronted or in the statement recorded on 09.05.2006. It was also held that the testimony of the witness became doubtful, as he claimed that he was sleeping in the verandah, but according to the site plan Ex PW 33/A he was sleeping in the open space outside the *jhuggi*. Also he had claimed that Om Prakash was sleeping inside the *jhuggi* and was not clear if he was sleeping on his right side or left. If, as per the claim of the witness, Om Prakash was sleeping in the verandah, any one could have access to him. The Trial Court held that as per the statement of PW- 13 Golu Mishra, Om Prakash was sleeping in the verandah, ten steps away from him, contrary to the site plan, which shows Om Prakash sleeping inside the *jhuggi*. Also there was no *verandah* shown in the site plan. Nisha Mishra was crying when she woke up Janardhan Mishra. As per the MLC she accompanied Om Prakash to the

hospital. PW – 16 Jyoti Mishra, daughter of Om Prakash and Nisha Mishra, testified to having been woken up by the cries of her mother. This conduct, it was held did not prove her guilt.

11. Dealing with the recovery of the *katta*, the Trial Court held that the only independent witness in that regard turned hostile and the statements made by the witnesses and the police witnesses did not corroborate with each other. Further, the Court also noticed that some pellets were missing, and the shell casing brought into evidence did not match the number of pellets found in the venue of the murder. As regards the evidence against Maheshwari, Prakash Tripathi and Samru (Lallan Mishra), the Trial Court held that nothing was brought on the record to prove this allegation except for the disclosure statements made by Sugreev, Maheshwari Prakash Tripathi and Samru @ Lallan Mishra which were inadmissible in Court by virtue of as per Section 25 of the Indian Evidence Act, 1872.

12. While hearing a petition for leave to appeal against an order of acquittal, the High Court is normally slow to interfere with it. The High Court disturbs the finding of acquittal when there are very substantial and compelling reasons to do the same. What those substantial and compelling reasons are, was spelt out in *Chandrappa & Others v. State of Karnataka*, (2007) 4 SCC 415 as follows: -

“In light of the above, the High Court and other appellate Courts should follow the well settled principles crystallized by number of judgments if it is going to overrule or otherwise disturb the Trial Court's acquittal:

1. The appellate Court may only overrule or otherwise disturb the Trial Court's acquittal if it has "very substantial and compelling reasons" for doing so.

A number of instances arise in which the appellate Court would have "very substantial and compelling reasons" to discard the Trial Court's decision. "Very substantial and compelling reasons" exist when:

(i) The Trial Court's conclusion with regard to the facts is palpably wrong;

(ii) The Trial Court's decision was based on an erroneous view of law;

(iii) The Trial Court's judgment is likely to result in "grave miscarriage of justice";

(iv) *The entire approach of the Trial Court in dealing with the evidence was patently illegal;*

(v) *The Trial Court's judgment was manifestly unjust and unreasonable;*

(vi) *The Trial Court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/report of the Ballistic expert, etc.*

(vii) *This list is intended to be illustrative, not exhaustive.*

2. *The Appellate Court must always give proper weight and consideration to the findings of the Trial Court.*

3. *If two reasonable views can be reached - one that leads to acquittal, the other to conviction - the High Courts/ appellate Courts must rule in favour of the accused.*

Had the well settled principles been followed by the High Court, the accused would have been set free long ago. Though the appellate Court's power is wide and extensive, it must be used with great care and caution."

Applying the above standards, we are of the view that the Trial Court's findings are based on correct appreciation of law and facts and, therefore, do not call for any interference. The State, in the circumstances, is not entitled to the grant of leave. The leave petition is accordingly dismissed.

S. RAVINDRA BHAT
(JUDGE)

G.P.MITTAL
(JUDGE)

August 19, 2011