

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

**RESERVED ON: 11.08.2011
PRONOUNCED ON: 24.08.2011**

+ **CRL.A. 499/2011**

ASHOK KUMAR APPELLANT
Through : Sh. Saurabh Soni, Advocate.

versus

JOGINDER @ JOGGI & ORS. RESPONDENTS

Through : Sh. Dinesh Mathur, Sr. Advocate with
Sh. D.K. Mathur, Advocate.

CRL.L.P. 389/2011 & Crl. M.A. 9454/2011 (U/S 5 of Limitation Act)

STATE PETITIONER

Through : Shri Pawan Sharma, PP.

versus

JOGINDER @ JOGGI & ORS RESPONDENTS

Through: Shri Dinesh Mathur, Sr. Advocate with
Shri D.K. Mathur, Advocate.

CORAM:

**MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE G.P. MITTAL**

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

MR. JUSTICE S.RAVINDRA BHAT

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Crl. M.A. 9454/2011 (U/S 5 of Limitation Act) in Crl.L.P.389/2011

This is an application for condonation of delay in filing criminal leave petition.

For the reasons stated in the application, the delay is condoned and the application is allowed.

CRL.A. 499/2011 & Crl.L.P.389/2011

1. The informant/complainant has preferred an appeal under Section 372, Code of Criminal Procedure against the judgment and order of the Learned Sessions Judge, dated 25th January, 2011 in SC No.161/2008 acquitting the respondents of the charge framed against them, for having committed offences punishable under Sections 302/34 IPC.

2. Briefly, the prosecution story is that on 27.08.2008, at about 08:50 PM., near House No. 272, Gali No.7, Rao Nihal Singh Marg, Kapashera, both the respondents, in furtherance of their common intention inflicted gun-shot injury on Sunita Yadav, wife of Late Sh. Ravinder Yadav, with the intention to kill her. The injured Sunita Yadav died later; both the respondents were accused of committing the offence punishable under Section 302 read with section 34 IPC. The prosecution (which too has filed a petition, seeking leave to appeal against the impugned judgment) alleged that on 27.08.2008, at about 08:50 P.M, to screen the real offender, the respondent Narender eliminated evidence of the offence of murder committed in furtherance of common intention by him with his co-respondent Joginder i.e. he abandoned/eliminated the pistol which was used in commission of the said offence, and therefore, respondent Narender is alleged to have committed an offence punishable under section 201 IPC. The prosecution case further is that on 27.08.2008, at about 08:50 P.M., at or near House No. 272, Gali No.7, Rao Nihal Singh Marg, Kapashera, within the jurisdiction of PS Kapashera, respondent Joginder was in possession of an unlicensed pistol and he used the same in contravention of the Arms Act, and thus, made himself liable for an offence punishable under Section 27 of the Arms Act.

3. The report filed after investigation alleged that *prima facie*, a case under section 302 IPC read with Section 34 IPC was made out against both the respondents; under Section 201 IPC against respondent Narender and a case under Section 27 of Arms Act was also made out against respondent Joginder @ Joggi. Charges, were therefore, framed against both the respondents to which they pleaded not guilty and claimed trial. The prosecution, to prove its case examined thirty witnesses. After going through the testimonies and material placed before it, the Trial

Court held that the prosecution had been unable to prove its allegations, and acquitted the respondents of all charges. The State seeks leave to appeal against the impugned judgment; the complainant appeals against the findings resulting in acquittal.

4. We have considered the submissions of the APP as well as the arguments of the complainant Appellant. The Trial Court records too were requisitioned; we had the benefit of going through them. Counsel for the respondents also made submissions in these two matters.

5. Counsel for the Appellant as well as the APP urged that the impugned judgment has overlooked several material aspects. It was argued that the Court fell into error, in disbelieving the testimonies of PW-1, PW-2, PW-3 and PW-14, all of whom had witnessed the incident. It was urged that one of the principal grounds which weighed with the Trial Court, in acquitting the accused was that the statements of most of the witnesses was recorded after 24 hours. It was submitted that the history of this case reveals that the injured Sunita Yadav was first taken to the hospital, where the priority of all concerned was to ensure timely and proper treatment. In the process, being a private institution, the police – who were unacquainted with the witnesses, could not locate them. The delay in recording their statements under these circumstances was not fatal to the case. Counsel for the Appellant as well as the Standing Counsel urged that the earliest point when the incident was recorded, i.e. Ex. PW-13/A clearly stated the circumstances whereby Sunita Yadav was shot and was taken to the hospital for treatment.

6. It was urged that the ocular testimony of PW-1, brother of the deceased was corroborated by PW-3 and PW-14. The latter had no axe to grind against the respondents, and were able to identify them. The Trial Court materially overlooked this aspect, in acquitting both the accused. Learned counsel emphasized that one of the accused was related to the deceased, being the brother in law (brother of the deceased's late husband) and the prosecution was able to establish a motive that impelled him to commit the offence. The Trial Court, according to counsel, fell into error in not exploring this aspect, and in acquitting them.

7. It was also submitted that the Trial Court baselessly suspected the investigation of introducing false evidence. It was submitted that having regard to the nature of bullet injuries suffered by Sunita Yadav, it was too much to expect her to be able to record a statement, during the time she was in hospital. Learned counsel submitted that the material on record, in the form of deposition of PW-22 as well as Ex. PW-22/A to 22/D clearly showed that the deceased was unfit to make a statement, and she was later put on a ventilator.

8. The Trial Court, in this case, disbelieved the testimonies of each of the eyewitnesses. So far as PW-1 was concerned, it was noticed that the witness did not meet the police prior to recording of the FIR and his statement was recorded a day later. It was held that this cast a doubt and suspicion that the witness was not telling the truth and was later on introduced as an eye witness to show that the case had been worked out. The court noticed that:

“55. Further, this witness deposed that at the relevant time, he was coming out of his sister's house and reached at the end of the gali but had not reached Rao Nihal Singh Marg and that at that time his sister (deceased) had reached near the gate of her house and was about to enter it.

56. He further deposed that when for the first time he saw his sister on that day, the distance between them was about two feet. That the motorcycle in question halted just behind her sister, say at a distance of about 2½ feet. He has specifically stated that motorcycle halted when the deceased was just about to enter the gate [this again is contradicted by the prosecution story and other ocular witnesses cited and examined by the prosecution, in as much as, it is the prosecution story that when she was about to take a turn to the lane leading to her house that she was hit by a bullet]. Had PW1 actually witnessed the occurrence, he would have not deposed in this contradictory manner.

61. In cross-examination, PW1 Ashok contradicted his own deposition by deposing that Kirshna did not accompany them to the hospital in the car whereas earlier he deposed that Krishna was supporting the deceased in the car.

62. This witness has stated that after 27.08.2008, the police met him for the first time on 28.08.2008 in the hospital. He admitted that police had not taken him to the spot between 27.08.2008 to 14.09.2008. This is again contrary to his earlier deposition that he came back at the spot on the next day at 12 noon.”

Now, if the prosecution story about the incident having taken place and PW-1, a relative as close as the brother being present is correct, there is absolutely no explanation why the *rukka* does not name him. If he had gone to the hospital, the police would not have missed him; in any case, he would have gone to the police at the earliest opportunity, and named the accused. This delay casts grave doubts about the reliability of PW-1's deposition. The other aspect noticeable from the prosecution case was that concededly, this witness was not taken to the spot till 14th September, 2008. The reason for this lapse is mystifying; in any case it assumes an ominous aspect when seen from the angle of delay in recording the witnesses' statement. It could well be said that these were contributory for drawing a reasonable inference that the prosecution story was unreliable, if not downright false, in this respect.

9. As regards PW-2, the prosecution stated that his statement was recorded by the police in the hospital on 28.08.2008. The Trial Court noted that:

“The witness in cross examination has deposed that he did not make any statement in the hospital. This is a major contradiction.”

The Trial Court also noticed a discrepancy about the time; PW-2 has deposed that on 27.08.2008, he went to the village around 11 AM whereas in his statement Ex.PW2/A to the police he has stated that he, while going to Sunita, at about 08:45 P.M., saw the occurrence. This contradiction in the statement made the court doubtful that he was at the spot at the time of the occurrence. Further, PW-2, in his cross-examination, contradicted his earlier deposition, where he deposed that he was standing at the corner of Delhi – Gurgaon Main Road, which was at a distance of 70 feet from the house of Sunita. The Court surmised that if this was correct, he could not have witnessed the incident. Speaking about PW-2’s testimony, the Trial Court further stated that:

“73. This witness further deposed in his cross-examination that before he reached the alleged spot, no neighbour was there. He was confronted with the statement Ex.PW2/A where it was very much recorded. He further deposed that he had not stated to the police that in the meanwhile his nephew Ashok also reached there. It is very much contained in Ex.PW2/A. He was, thus, confronted wherein he contradicted his version, materially.

74. This witness has admitted that he was available in the hospital on 27.08.2008 for the police. That after twenty minutes of their reaching the hospital, police came there. This is contrary to the case of the police, in as much as, police did not meet any eye witness either at the spot or in the hospital on the date of occurrence.

75. This witness has further contradicted his own deposition when he stated in cross-examination that he did not make any statement in the hospital. ”

10. The Trial Court also doubted the testimony of PW-3, in the following terms:

“85. He has deposed that his statement was recorded by the police only once on the following date of the occurrence in the hospital at about 09/09:15 a.m. He admitted that he alongwith PW Ashok and Shekhar were in the hospital on the date of occurrence throughout the night and that police met him in the hospital on 27.08.2008. The case of the police is, however, that no eye witness met them in the hospital on 27.08.2008.

86. He further deposed that he told to the attending doctor in the hospital that 'devar' of Sunita had fired, at her. Again he said that it was fired by Joginder. He again said that when the doctor asked, he told them that devars of Sunita had caused bullet injuries to her. This deposition of this witness, however, do not find any corroboration, in as much as, neither the MLC, vide which, the deceased was admitted in the said hospital indicated this nor any of the doctor confirmed this.

90. From the site plan placed on record, if Bhim Singh was standing at his gate, the spot alleged by him could not be seen. The two site plans proved on record by the prosecution, therefore, fully contradicts the deposition of this witness.

The claim of PW-14 (wife of PW-3) about witnessing the incident was also disbelieved. It was noticed by the Trial Court that PW-14 admitted that on the date of occurrence i.e. 27.08.2008, and thereafter, on 28.08.2008 to 30.08.2008, she was available at her house. Despite this the police chose to interrogate her after more than a month. She also admitted that the police kept on visiting the spot for two/three days. The court analyzed the evidence in this regard as follows:

“... That police came to her after two days and she made her statement (no such statement is on record). That thereafter, she made no statement to the police nor police met her, thereafter. The alleged statement, recorded by the police of this witness, is of date 29.09.2008.

154. This witness, therefore, has completely thrown overboard the case of the prosecution. It only demonstrates the concoction and fabrication of her statement by the police later i.e. on 29.08.2008. Even otherwise, if she had witnessed the occurrence, and was the wife of PW Bhim Singh, whose statement allegedly was recorded by the police on the next day of the occurrence, it is not understandable as to why the police could not have recorded her statement earlier. It appears that she was inducted, subsequently, after due deliberations only as a cover up. In any case, even otherwise, there are striking and marked contradictions in the story of the prosecution and the deposition of this witness.”

11. While there cannot be a hard and fast rule about the recording of statements under Section 161, Cr. PC, since in given cases, witnesses may not be available, there can be no gainsaying the fact that when their presence can be easily ascertained, and they are- as in this case, neighbours and close relatives, who saw the incident, any unreasonable delay in recording their version gives rise to doubt and suspicion. The earliest document, i.e. *rukka*, as well as the MLCs and other contemporaneous police records do not mention the name of the respondents. However, the identity of the deceased was recorded in the MLC. If the relatives were with her, the police would have known about the identity of the assailant. If they were not with her at the time she was taken to the hospital, *her* identity could not have been known by the police, unless she was conscious and oriented to disclose it, in which case the identity of the attacker too would have been disclosed. These aspects are important, and provide a backdrop in which the delay in examining the eyewitnesses during investigation, has to be viewed. The Trial Court, in our opinion, correctly surmised that the testimonies of the four eyewitnesses could not be given credence in this case.

12. Discussing the medical evidence about fitness of the deceased to record her statement regarding the attack, and identity of the assailant, the Trial Court held that:

“168. He has placed on record the relevant extract of the medical record consisting of 32 pages and collectively proved the same as Ex.PW15/B. Perusal of this record indicates that there are over writings at several places on record. He admitted that as per record there was nothing in the record that when the injured was brought to the hospital she was conscious and oriented having blood pressure 130/99. This also contradicts the prosecution version as narrated by the other witnesses and as is contained in the record.

169. PW16, Dr. Ruchi Mishra deposed that on 27.08.08, at about 9.10 p.m., an injured, by the name of Sunita Yadav, was admitted in the hospital by one Ashok Yadav with the alleged history of gun shot injury (caused by whom is not contained in the alleged history). That the injured was examined by her and detailed MLC, Ex.PW16/A was prepared. The same is in her handwriting and bears her signatures at point A.

170. PW16 has agreed that she was the first to examine the patient. That the patient was conscious and oriented at that time. That the patient was unable to tell as to what has happened. She admitted overwriting in the causality card on the original of first page of Ex.PW15/B, proved collectively.”

A consideration of the evidence, on this score, i.e. PW-15/B which contains several pages including the daily history sheet of the patient, would show that she was oriented, and able to respond to commands, as on 29th, i.e. two days after the incident. The other vitals, such as blood pressure, pulse, etc were within normal parameters. After this date, she was kept on a ventilator, and she succumbed to her injuries. The prosecution’s inability to explain why no attempt was made to record her brief statement, as to who had attacked her, is a serious infirmity. The Trial Court also noticed that there were inconsistencies in the prosecution version, as regards testimony by doctors on medical issues, including the cause of death. They chose to depose in discordant voices, could not agree on the precise cause. While this aspect itself may be insignificant, again, seen in the totality of circumstances, it assumes importance.

13. The Supreme Court, in *Ganesh Bhavan Patel v State of Maharastra* 1978 (4) SCC 371 and *State of Madhya Pradesh v Amar Singh* AIR 1994 SC 650 held that unexplained delay in recording the testimony of eyewitnesses during an investigation into a crime can be fatal to the prosecution during the trial.

14. Time and again, the scope of appellate review of the High Court in considering judgments acquitting accused, in criminal trials have been reiterated and applied. The High Court does not exercise jurisdiction to correct mere or inconsequential errors; there has to be something more glaring, more fundamental in the approach and findings of a Trial Court, inviting the High Court’s jurisdiction- there are to be “substantial and compelling” circumstances. What precisely

are those substantial and compelling circumstances that can drive High Courts to exercise appellate jurisdiction too are fairly well settled; the Trial Court's judgment ought to have overlooked vital and material evidence, or misappreciated it; or the impugned judgment should have applied the law on a completely erroneous understanding. *Sans* these, the High Court would not be justified in exercising its power of appellate review, and seeking to upset a finding of acquittal with the endorsement of the presumption of innocence which every citizen has a right to claim, as a matter of right. We find none of these elements in the impugned judgment, which has discussed the materials and evidence led, in a threadbare and painstaking manner. The Trial Court has also analyzed the legal position correctly. We concur with its views, and are of the opinion that the Appeal and leave petition are devoid of substance or merit. The Appeal and criminal leave petition therefore, fail and are dismissed.

S. RAVINDRA BHAT, J

G. P. MITTAL, J

AUGUST 24, 2011