

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

Date of decision: 19.08.2011

+ **CRL.L.P. 150/2009**

STATE OF NCT OF DELHI Petitioner
Through : Sh. M.N. Dudeja, APP.

Versus

PARVEZ & ORS. Respondents
Through : Nemo.

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 (OPEN COURT)

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Crl. M.A. 9613/2009 (Under Section 5 of the Limitation Act) in CRL.L.P. 150/2009

For the reasons mentioned in the application, the application deserves to be

allowed. Crl. M.A. 9613/2009 is accordingly allowed.

CRL.L.P. 150/2009

1. The State, by the present petition seeks leave to appeal against a judgment and order of the learned Addl. Sessions Judge dated 30.01.2009 in S.C. No. 95/2007, whereby the respondents were acquitted of the charges of having committed offences punishable under Sections 302/34 IPC read with Sections 27/54/59 of the Arms Act.

2. The prosecution allegation was that on 10.04.2003, to an information, recorded as D.D. No. 6/A, policemen proceeded towards a school Khadde Wala, Gali No. 11, Chauhan Banger, where they found a body of an unknown male on a Takhat. The police noticed marks of dragging of body and foot prints; the dead body had stab wounds. On subsequent inquiry, it was discovered that the dead body was that of Kamruddin; it was identified by his father and cousin. The police collected material evidence in the form of blood samples, earth trail etc. and prepared a site plan and carried-on investigation. The police alleged that further investigation was done by the Station House Officer (SHO) on 12.04.2003 in the morning with SI Ajay Kumar. One Yaseen was interrogated. It transpired that he was a complainant in a pending case against the deceased. The police alleged that in the evening, one HC Ram Niwas came from Banda, UP along with Chowkidar Maan Singh, who deposed in the case as PW-7, and his brother-in-law Jagroop and engineer Gajraj Singh. Their statement was recorded under Section 161 Cr.PC. On the basis of these statements and the identification by Maan Singh, the respondents/accused were arrested and charged of the offence. The prosecution alleged that certain recoveries were made pursuant to the Disclosure Statements made by the accused.

3. On the basis of the investigation and report furnished to the Court, the respondents were charged with having committed the offences; they denied the charges and claimed trial.

4. After going through the materials placed on the record and the testimonies of the prosecution witnesses, the Court concluded that the circumstantial evidence as well as the allegation of “last seen” had not been proved beyond reasonable doubt and accordingly

acquitted the respondents.

5. The State seeks leave alleging that the evidence on record, particularly, the testimonies of PWs-5 and 7 were sufficient to return a finding of conviction. In this regard, it is submitted that even though PW-7 was declared partly hostile, his examination-in-chief was sufficient to implicate the respondents for having committed the offence. It was urged that the totality of circumstances, which unraveled themselves before the Court showed that the respondents were seen first by PW-5 around 09.30 pm and subsequently PW-7 was able to testify that he was last in the company of the accused. Learned APP urged that these are sufficient grounds for the Court to conclude that there are substantial and compelling reasons.

6. We have carefully considered the impugned judgment as well as the records of the Trial Court. The prosecution relied on two witnesses, who claimed to have seen the deceased together with the respondents. Crucially, PW-7 was the witness to the last seen circumstance alleged by the prosecution. He did not fully support the prosecution story. The Trial Court, on this aspect, reasoned on this aspect as follows:

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9. *PW7 Maan Singh is the most material witness in this case being eye witness. For the sake of brevity and convenience, let his testimony be re-produced verbatim which is as under:-*

“I had come to Delhi for work prior to two months of this incident and I stayed in Delhi with my Jija – Jagroop. My Jija used to work as chowkidar in Tewatiya Company. Tewatiya Company had appointed my Jija as chowkidar in Khadde wali building to look after the goods lying in the building which was under construction at that time. On 20.03.2003, my Jija had got job for me in Khadde Wala School as he had gone to village and thereafter I started to work as chowkidar in Khadde wala school. In the said school, there was a big ground and children used to play cricket, gulli danda etc. I did not allow to play the children but despite this they used to play in the playground. Children who used to play in the ground were known to me.

On 9th, the month and year I do not remember, there was a party in school between Kamruddin, Naushad and many other persons had attended the party in day time and after finishing the party, they all had left the school. I was on duty on that day, so I remained in the school. On 09.04.2003, Abid, Naushad, Kamru and Parvez came to the school. I objected to it. I told them not to enter in the school. At that time I was near the gate of the school and that persons had gone towards the rooms. They raised the alarm in the school. I went into the room. Naushad was holding the back (kamar) of Kamruddin, Abid was giving knife blow at that time to Kamruddin and Parvez had also caught hold the deceased. When I raised the alarm then Abid also tried to give knife blow to me. Thereafter, I ran away from the spot. On the next day at about 8 am I telephoned to Gajraj Singh, who was the Engineer and told him about the incident. Thereafter, I went to my house due to fear.

On 11.04.2003, I was brought by Gajraj Singh and police official from my village and enquiries were made from me. In the PS, I reached about 6 am and my statement was recorded by the police. All the three accused persons are present in the Court (correctly identified)."

On careful perusal of his testimony it reveals that he is the most material witness being eyewitness in this case who was working as Chowkidar in the premises where the incident took place on 09.04.03. This witness is the direct testimony to the incident. This witness has been got declared partly hostile by ld. APP. This witness has been cross-examined by the defence counsel. In the cross-examination of this witness I found major contradictions as at one occasion he identified the accused persons in the examination-in-chief and at other occasion in cross-examination he denied to identify the accused persons just after 17 days.

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7. The Trial Court recollected the law applicable while considering the prosecution based on substantial evidence, and analysed the materials and the depositions presented before it. After discussing the law and the testimonies of individual witnesses, the Trial Court held as follows:

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34. I have given careful consideration to the submissions of ld. APP and ld. counsel Sh. N.K. Tyagi for accused Abid, Sh. Mohd. Iqbal for accused Naushad and Abdul Sattar, Advocate – amicus curiae for accused Parvej. Perusal of the case file reveals that most material witness in this case is PW7 Maan Singh who was working as Chowkidar in the premises where incident took place on the night of 09.04.2003. This witness is the direct testimony to the incident in question. Careful analysis and evaluation of this witness testimony reveals that his testimony is most significant which would reflect the vide implications regarding the proof of guilt and non proof of guilt of the accused persons. Having perused the statement of this witness it comes on record that this witness in his examination-in-chief he has identified all the three accused persons and deposed that as soon as he heard the voice he raised an alarm in the school he went into room where he saw that Naushad was holding the back (kamar) of Kamruddin, Abid was giving knife blow to Kamruddin and Parvez also caught holding the deceased. In the cross-examination of this witness I found major contradictions as at one occasion he identified the accused persons in examination-in-chief and at other occasion in cross-examination he denied to identify the accused persons. He testified that statement made in examination-in-chief was at the instance of police. This state of affairs goes to indicate that statement of this witness is to be qualified by some other considerations if his statement considered to be true in terms of the statement made in examination-in-chief. In this regard Hon'ble Supreme Court in **Tahsildar Singh and another Vs. State of UP** explaining the object of Section 162 Cr.PC held that:-

“Para 11- It is, therefore, seen that the object of the legislature throughout has been to exclude the statement of a witness made before the police during the investigation from being made use of at the trial for any purpose, and the amendments made from time to time were only intended to make clear the said object and to dispel the cloud cast on such intention. The Act of 1898 for the first time introduced an exception enabling the said statement reduced to writing to be used for impeaching the credit of the witness in the manner provided by the Evidence Act. As the phraseology of the exception lent scope to defeat the purpose of the legislature by the Amendment Act 1923, the section was redrafted defining the limits of the exception with precision so as to confine it only to contradict the witness in the manner provided under Section 145 of the Evidence Act. If one could guess the intention of the legislature in framing

the section in the manner it did in 1923, it would be apparent that it was to protect the accused against the user of the statements of witnesses made before the police during investigation at the trial presumably on the assumption that the said statements were not made under circumstances inspiring confidence. Both the section and the proviso intended to serve primarily the same purpose i.e., the interest of the accused.”

After explaining Section 162 Cr.PC regarding contradicting witness which confronting with previous statement procedure indicated that:

“Para 13- The learned Counsel’s first argument is based upon the words “in the manner provided by S. 145 of the Indian Evidence Act 1872” found in S. 162 of the Code of Criminal Procedure. Section 145 of the Evidence Act, it is said, empowers the accused to put all relevant questions to a witness before his attention is called to those parts of the writing with a view to contradict him. In support of this contention reliance is place upon the judgment of this Court in Bhagwan Singh Vs. State of Punjab (1), 1952 SCR 812: (AIR 1952 SC 214). Bose J. describes the procedure to be followed to contradict a witness under S. 145 of the Evidence Act thus at p. 819 (of SCR) at p. 217 of AIR):

“Resort to section 145 would only be necessary if the witness denies that he made the former statement. In that event, it would be necessary to prove that he did, and if the former statement was reduced to writing, then S. 145 requires that his attention must be drawn to these parts which are to be used for contradiction. But that position does not arise when the witness admits the former statement. In such a case all that is necessary is to look to the former statement of which no further proof is necessary because of the admission that it was made.”

It is unnecessary to refer to other cases wherein a similar procedure is suggested for putting questions under S. 145 of the Indian Evidence Act, for the said decision of this Court and similar decisions were not considering the procedure in a case where the statement in writing was intended to be used for contradiction under S. 162 of the Code of Criminal Procedure. Section 145 of the Evidence Act is in two parts: the first part enables the accused to

cross-examine a witness as to previous statement made by him in writing or reduced to writing without such writing being shown to him; the second part deals with a situation where the cross-examination assumes the shape of contradiction: in other words, both parts deal with cross-examination by way of contradiction only. The procedure prescribed is that, if it is intended to contradict a witness by the writing, his attention must, before the writing can be proved be called to those parts of it which are to be used for the purpose of contradicting him. The proviso to S. 162 of the Code of Criminal Procedure only enables the accused to make use of such statement to contradict a witness in the manner provided by S. 145 of the Evidence Act. It would be doing violence to the language of the proviso if the said statement be allowed to be used for the purpose of cross-examining a witness within the meaning of the first part of S. 145 of the Evidence Act. Nor are we impressed by the argument that it would not be possible to invoke the second part of S. 145 of the Evidence Act without putting relevant questions under the first part thereof. The difficulty is more imaginary than real. The second part of S. 145 of the Evidence Act clearly indicates the simple procedure to be followed. To illustrate: A says in the witness-box that B stabbed C: before the police he had stated that D stabbed C. His attention can be drawn to that part of the statement made before the police which contradicts his statement in the witness box. If he admits his previous statement, no further proof is necessary, if he does not admit the practice generally followed is to admit it subject to proof by the police officer. On the other hand, the procedure suggested by the learned counsel may be illustrated thus: If the witness is asked "did you say before the police office that you saw a gas light?" and he answers "yes" then the statement which does not contain such recital is put to him as contradiction. This procedure involves two fallacies: one is it enables the accused to elicit by a process of cross-examination what the witness stated before the police officer. If a police officer did not make a record of a witness's statement his entire statement could not be used for any purpose whereas if a police officer recorded a few sentences by this process of cross-examination the witness's oral statement could be brought on record. This procedure, therefore, contravenes the express provision of S. 162 of the Code. The second fallacy

is that by the illustration given by the learned counsel for the appellants there is no self-contradiction of the primary statement made in the witness box, for the witness has yet not made on the stand any assertion at all which can serve as the basis. The contradiction, under the section, should be between what a witness asserted in the witness box and what he stated before the police officer, and not between what he said he had stated before the police officer and what he actually made before him. In such a case the question could not be put at all; only questions to contradict can be put and the question here posed does not contradict; it leads to an answer which is contradicted by the police statement. This argument of Id. Counsel based upon S. 145 of the Evidence Act, is therefore, not of any relevance in considering the express provisions of S. 162 of the Code of Criminal Procedure.”

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8. The Court also considered the relevant law which was relied upon by the prosecution, to state that the examination-in-chief testimony alone ought to be considered in the present case, and discarded the submission.

9. We are of the opinion that the reasoning adopted by the Trial Court – found in paras 31 to 35 of the impugned judgment is not only plausible but reasonable one.

10. It has been often said that the Court, while considering objections for grant of leave to appeal against the order of acquittal by the criminal Courts, should adopt a varying and circumspect approach. The High Court is expected to grant permission to appeal only where the judgment of the Trial Court discloses substantial and compelling reasons in that regard. These include gross misappreciation of law or evidence and the adoption of an approach that has manifestly led to miscarriage of justice. On an overall conspectus of circumstances, we are of the opinion that the Trial Court has painstakingly gone through the judgment and each of its findings are well-reasoned. This is a case which, in our opinion, does not demand any view other than which has been taken by the Trial Court in the impugned judgment. Consequently, there are no reasons for us to second-guess the findings and reappraise the entire evidence. For these reasons, the

petition has to fail and it is unmerited. It is accordingly dismissed.

S. RAVINDRA BHAT
(JUDGE)

G.P. MITTAL
(JUDGE)

AUGUST 19, 2011
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