

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

**RESERVED ON: 02.05.2011
PRONOUNCED ON: 28.07.2011**

+ CRL.L.P. 388/2010

STATE

..... Petitioner

Through: Mr. Jaideep Malik, APP.

versus

DHARAMVIR @ DHIRAJ & ORS.

..... Respondents

Through: None.

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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1. The state seeks leave to appeal against a judgment and order of the learned Additional Sessions Judge, dated 27.03.2010 in SC No. 354/2007 acquitting the accused respondents of the charge of having committed offences punishable under Sections 302/34 IPC.

2. The prosecution case was that on 22.02.2007 the dead body of an unknown male was found lying at the DTC bus stop opposite B.D.O Office at PS Alipur. It was sent to BJRM hospital and was preserved for 72 hours for its identification. Thereafter on 25.02.2007, the body was identified by Birbal, elder brother of Dinesh Singh s/o Sh. Satya Narain Singh (hereafter "the deceased") who worked as a driver of the Tempo bearing no. DL 1 LE 2938, engaged by Sony India Ltd's warehouse at Badarpur. On interrogation by the IO the helper of the canter Ujjar Rai allegedly disclosed that on 21.02.2007 the aforesaid canter was parked in

the parking of B.K Dutt market by the deceased; he also pointed out the place where one Dwarika Prasad, security guard of Lord Krishna Bank met them. He informed that two persons, who quarrelled with the aforesaid canter driver on 21.02.2007 were present near the Lal building and accordingly at his pointing out, the respondent, accused Dharamvir alias Dhiraj and Nitin Kumar were apprehended. Allegedly, on interrogation, they disclosed about their involvement in the commission of the offence. Dharamvir alias Dhiraj also allegedly assisted in the recovery of one Sony WEGA T.V.

3. The prosecution also alleged that during the investigation, accused Prakash was also found to be involved in the commission of the offence; and on 05.03.2007 he surrendered before the court concerned. After taking permission from the court, the IO interrogated and arrested accused Prakash, who disclosed his involvement in the present case. On completion of the investigation, charge sheet was filed. Arguments on the point of charge were heard and charge for committing offences punishable u/s 392/394/43 IPC and u/s 201 IPC were framed against the accused Dharamvir alias Dhiraj, Prakash and Nitin Kumar. Charge for committing the offence punishable u/s 411 IPC was also framed against accused Dharamvir alias Dhiraj. The accused persons pleaded not guilty and claimed trial.

4. The prosecution mainly relied upon two material witnesses i.e. PW-1 Dwarika Prasad and PW-9 Ujjar Rai. Of these, PW-1 Dwarika Prasad resiled from his earlier statement and did not support the prosecution. The Trial court held that the testimony of PW-9 did not inspire confidence, since there were material discrepancies which had not been explained by the prosecution, and that such contradictions and discrepancies in his testimony were fatal to the prosecution case.

5. The learned APP argued that the Trial court failed to see that even though PW-9 did not support his previous statement, yet, his deposition taken as a whole, considered together with recovery of the articles pursuant to the disclosure statement of the accused, was sufficient to implicate them for the crimes they were charged with. It was submitted that once the prosecution established, through credible materials, that the accused were connected with the articles, and the scene of crime, by virtue of Section 106, Evidence Act, the respondent accused were under an obligation to discharge the onus, that lay upon them to explain these adverse circumstances. They did not do so, either in their statement under Section 313, Cr.

PC. or by leading evidence. Therefore, their acquittal was erroneous, and the state had to be given leave to appeal.

6. As noticed previously, PW-1 completely resiled from his statement made to the police, during investigation. So far as the testimony of PW-9 was concerned, in his cross examination the witness admitted to not having stated to the police that he could identify the person, whom he had seen in the parking. He also admitted that police apprehended the accused Dharamvir @ Dhiraj in his presence and that is why he has identified him. This gave a blow to the prosecution version about Dharamvir being caught/apprehended in the manner alleged by it. The Trial court held that Dharamvir @ Dhiraj was apprehended by the police and was later on shown to PW-9. However the testimony of PW-9 to this effect is contradicted by the testimony of the watchman i.e. PW-1 Dwarika Prasad, who specifically denied in his evidence that he saw the accused persons going towards the Lal Building side on 27.02.2007 or he accompanied the police or saw Dhiraj and Nitin in the parking. PW-1 also denied that he pointed the police towards accused Nitin and Dhiraj or that both the accused were apprehended in his presence. In fact, he specifically denied the suggestion that accused Nitin and Dhiraj were apprehended by the police in his presence. It was held that in these circumstances, PW-9 Ujjar Rai does not appear to be a credible or trustworthy witness and it would be unsafe to rely upon his testimony to record a conviction against the accused. This was also in view of the fact that his testimony was not corroborated by the material on record or by the testimony of independent material witness.

7. Dealing with the other depositions, it was held that the remaining witnesses' testimonies were not of much use to the prosecution as they did not depose about the incident of robbery or murder. The prosecution was mainly relying upon the testimonies of PW- 1 Dwarika Prasad and PW-9 Ujjar Rai to prove the guilt of the accused persons for committing the offences punishable u/s -392/394/34 IPC & u/s- 302/34 IPC and u/s- 201 IPC, however, out of these two material witnesses, PW-1 Dwarika Prasad resiled from his earlier statement and does not support the case of the prosecution and as far as the testimony of PW-9 Ujjar Rai is concerned, his testimony does not inspire confidence as there are material contradictions /discrepancies in his testimony, which are fatal to the case of the prosecution.

8. The prosecution, in this case, relied upon the last seen and circumstantial evidence. It is well settled that in order to convict the accused on the basis of the last seen and

circumstantial evidence, it is essential that the circumstances from which the inference of guilt is sought to be drawn must be cogently and firmly established on record by the prosecution and those circumstances should be of a definite tendency, unerringly pointing towards guilt of the accused and 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 none else. The Trial court concluded that no such proof of all circumstances, or the link of the chain of each circumstance, was established by the prosecution.

9. As regards recovery of the TV from the accused Dharamvir @ Dhiraj, the Trial court held that such circumstance appeared doubtful in the facts of the case. For the alleged recovery of the TV, PW-7 HC Parveen Kumar and PW-21 SI Dalbir Singh are the attesting witnesses. Both were police witnesses; it was not explained on behalf of the prosecution why no public witness was joined at the time of alleged recovery of TV from the house of accused. In fact, PW-7 HC Parveen Kumar in his testimony specifically stated that the IO did not ask the neighbours of the accused Dharamvir to join the investigation at M-422, Raghubir Nagar, Delhi. He also stated that the door of the house of accused Dharamvir was found open and no one was found at that time. Similarly, PW-21 SI Dalbir Singh also admitted that the house of accused was surrounded by the other houses and they did not inquire as to who was living on the ground floor of the said house. Similarly, PW-25 Insp. Mahesh Meena, who is the IO of this case, also admitted that no public witness was present at the time of recovery of Sony TV and preparation of its seizure memo. In addition to this, it is admitted by the prosecution that there were several TVs in the aforesaid Canter and as such it was not explained on behalf of the prosecution why the respondent-accused would rob only one TV and leave the remaining TVs and articles in the Canter when they had the opportunity to rob those articles too, if their motive was indeed to rob. Further, it has been stated that the TV in question belongs to Sony India. Yet, PW-25 admitted in his cross examination that Mukund Lal (owner of the Canter) moved an application for getting the aforesaid TV released on Superdari and stated that he did not remember whether in his report dated 12.03.2007 pertaining to the said superdari application he stated that he (PW-25) had no objection to release the said TV on superdari and despite the said report, the aforesaid superdari application was withdrawn by Mukund Lal on 12.03.2007. In these circumstances, even the ownership of the aforesaid TV was doubtful. The case of the prosecution was that the TV in

question belonged to Sony India. However, the application for release of the same was moved by Mukund Lai, owner of the Canter.

10. This court further notices that the above recovery from the house of accused Dharamvir also becomes doubtful as PW-9 Ujjari Rai deposed about his presence at the time of alleged recovery. However PW-25 Insp. Mahesh Meena specifically stated that no public witness was present at the time of recovery of the TV and preparation of its seizure memo. In these circumstances, in view of the material on record, the prosecution has failed to prove the recovery of TV in question at the instance of Dharamvir beyond reasonable doubt.

11. The High Court's jurisdiction, while considering a petition for leave to appeal, by the prosecution, is narrow and limited. The court does not examine the impugned judgment as an appellate court; it has to be alive to any exceptional features in the Trial court's judgment, which compel the exercise of its discretion to grant leave, and hear the appeal. Mere errors, in the Trial Court's order are insufficient; the legislature has advisedly not permitted appeals, a factor which has led the courts to say that a judgment of acquittal is an affirmation of the accused's innocence, which should not be lightly interfered with by the High Court, except for substantial and compelling reasons. As to what constitute such reasons, has been 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."

12. On a careful scrutiny of the Trial Court's record, and having regard to the nature of evidence presented before it, we are unpersuaded that the petition has disclosed any substantial or compelling reasons for us to grant leave to the State to prefer an appeal against the judgment, which we are in agreement with. The material contradiction in the testimonies of witnesses, failure to prove the recoveries, and inability to prove all the circumstantial evidence alleged to incriminate the respondents, led the Trial Court to acquit them of the charges. For these reasons, we find the petition unmerited, and accordingly dismiss it.

(S.RAVINDRA BHAT)

JUDGE

JULY 28, 2011

(G.P. MITTAL)

JUDGE