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

+ CRL.L.P. 447/2013

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Judgment dated 02.09.2013

STATE

..... Petitioner

Through : Mr.Dayan Krishnan, Adv. SI Mohinder
Singh, Special Cell.

versus

RAJ KUMAR@ DHANWANT & ORS

..... Respondents

Through : NEMO.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE G.P. MITTAL

G.S.SISTANI, J (ORAL)

CRL.M.A.12943/2013.

1. This is an application filed by the petitioner seeking condonation of 347 days' delay in filing the present leave to appeal petition.
2. Heard counsel for the petitioner. For the reasons stated in the application, the same is allowed. Delay in filing the present leave to appeal is condoned.
3. Application stands disposed of.

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4. Present petition for leave to appeal has been filed by the State under Section 378(1) of the Code of Criminal Procedure against the judgment dated 17.5.2012 rendered by Additional Sessions Judge, Delhi, in Sessions Case No.47/2009, arising out of FIR No.11/2009 lodged under Sections 186/353/307/402/467/468/120B/34 IPC & 25 of the Arms Act, P.S. Special Cell, whereby the respondents have been acquitted by the

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trial court.

5. The case of the prosecution, as set out in the judgment passed by the trial court is as under:

1. *Case of the prosecution as per charge sheet is that Spl. Cell was in the lookout of robbers on account of increased incidents of robberies in 2009. On 8.3.09 at 2.50pm a source working for HC Amit Kumar told him telephonically that one person involved in several robberies is roaming around in Rohini Area in Santro Car No. DL-3C-AP-6338. Informer invited police team at Rohini West Metro Station. HC Amit shared the input with Inspector Pankaj Sood and lodged DD No.3 Ex.PW1/A to that effect. Inspector shared the input with ACP, Spl. Cell and as directed a team was prepared under the Inspector consisting of SI Harbir, HC Amit, HC Suresh, HC Ramesh and HC Dharambir. The raiding party left Spl. Cell Office, North range at 3.00 pm in vehicle No. DL-1C-A-3566 vide DD No.4 Ex.PW1/B. They reached Rohini West Metro Station at 3.05 pm and met the secret informer.*
2. *At around 3.15pm, Santro car with two occupants passed the road which was followed by the Police Team . After around 2.5 kms near the road close to Sector 24-25, Rohini, the occupants parked the Santro on the road side for urination. After easing themselves when the two occupants turned towards the Santro, SI Harbir stopped the police vehicle in front of the Santro and raiding party members came out. The two boys were asked by the raiding party to stop. Upon this the two boys shouted at Police to stop or else they would fire and they started running towards Service Lane going to Rithala. The raiding party members chased them. HC Amit and HC Suresh chased Raj Kumar whereas HC Ramesh and HC Dharambir*

chased Gajender. Raj Kumar kept on running and took out the pistol. He was warned by the police officials but he turned towards the chasing party and fired towards them. He lost his balance and fell on the ground and his pistol fell at some distance . Raj Kumar was over powered and pistol was seized by the police.

- 3. HC Ramesh and HC Dharambir caught Gajender and both were brought to the police vehicle. The pistol carried by Raj Kumar was produced by HC Amit to SI Harmeet who sealed it into a pulinda which was seized vide memo Ex.PW1/D, its sketch along with six live cartridges and magazine Ex.PW1/C and fired cartridge Ex.PW1/E . The fired cartridge was seized vide memo Ex.PW1/F. Santro car was seized vide memo Ex.PW1/G. Site plan Ex.PW16/A was prepared. SI recorded statement of HC Amit Ex.PW15/A and sent ruqqa and got FIR Ex.PW4/A registered along with endorsement on ruqqa Ex.PW4/B U/s 186/353/307/34 IPC & 25/27 Arms Act.*
- 4. SI recorded disclosure statement of Raj Kumar Ex.PW1/K on the basis of which at his instance vide memo Ex.PW1/L four police uniforms with three belts, one pagri and two caps were recovered and seized from house No.422, Shakurpur. Accused Raj Kumar was arrested vide Ex.PW1/H and personal search Ex.PW1/J . He pointed out Oriental Bank of Commerce, Minto Road, Kamla Market as the place where he attempted to commit robbery vide memo Ex.PW1/A. He also gave disclosure and pointed out Bikaner and Jaipur Bank at Industrial Area , Bawana as the place of robbery vide memo Ex.PW1/P. Report of I-card in the name of Raj Kumar is Ex.PW11/B. Supplementary disclosure statement of accused Raj Kumar was also recorded vide Ex.PW16/C. Accused*

Gajender was arrested vide memo Ex.PW1/L , personal search Ex.PW1/M and he gave disclosure statement Ex.PW16/B, his supplementary disclosure statement Ex.PW16/D, crime dossier Ex.PW14/A.

- 5. Production warrant for arrest of accused Baljinder was issued and he was arrested vide memo Ex.PW1/Q , his disclosure was recorded vide Ex.PW1/R and supplementary disclosure Ex.PW16/E. He got recovered bag containing pistol, papers and clothes from house no.252, Vir Nagar, Meerut, UP vide memo Ex.PW1/T , sketch of the pistol is Ex.PW1/S, copy of the document is Ex.P1, P2, P3, P4.*
- 6. Accused Sachin Kumar was arrested on 19.3.09 vide memo Ex.PW15/A, personal search Ex.PW15/B, disclosure statement Ex.PW15/C. He got recovered a bag containing pistol, 7 live cartridges, passport and papers from his inlaws house at Gokulpuri, Delhi vide memo Ex.PW15/E, passport Ex.PW16/H, the land documents are Ex.PW16/G. Intimation of detaining Sachin Kumar from Rail Bhawan is Ex.PW13/A & B. Railway Ministry pass it in the name of Harbir and two other persons is Ex.PW16/F.*
- 7. Malkhana entry and road certificate are Ex.PW7/A to E, RC Ex.PW18/A. Seizure memo of Rhino Vehicle UP-15AJ-9022 and affidavit are Ex.PW1/U and Ex.PW8/A. It was said to have been purchased out of cash robbed from State Bank of Bikaner and Jaipur, Samaypur, Delhi after Rs.2.96 lac was given by Baljinder to Anand Parkash through Rambiri and Jitender. FSL report is Ex.PW3/A. Sanction for prosecution under Arms Act is PW2/B, C and D and complaint U/s 195 Cr.P.C. is Ex.PW2/A. Letter for freezing of Bank Account and withdrawal of freezing application in*

the name of Anil Saraswat are Ex.PW16/A, J, L&M.

6. The prosecution, in all, has examined 18 witnesses. Respondent no.2 led evidence in his defence and examined his wife as DW-1. Statements of the respondents were recorded under Section 313 Cr.P.C.
7. Learned counsel for the petitioner submits that the trial court has erred in not appreciating the evidence of PW-1, HC Amit Kumar, wherein he has explained that because of the increasing incidents of robberies and looting, sources were deployed to identify the culprits and to trace them. On the basis of secret information received on 8.3.2009, respondent no.1, Raj Kumar, and respondent no.2, Gajender, were arrested, who further led to the recoveries and the discovery of two other persons namely, Baljinder, and respondent no.3, Sachin Kumar. Counsel further submits that the learned trial court has further erred in not appreciating the settled position of law as laid down in the case of *State v. Jayapauli*, reported at 2004 (5) SCC 223 wherein the Apex Court has clarified that there is no proposition of law which prevents a competent police officer, who on the basis of the information received, enters his name in the FIR as the complainant, from participating in the investigation. The said position of law has been further supported in *S. Jeenatham v. State*, reported at 2004 (5) SCC 230. Counsel next submits that all the FIR details are available on all the documents, such as seizure memo, sketch, etc., in the same ink which shows no interpolation. Counsel also submits that the absence of public witness is not fatal to the admissibility of evidence.
8. We have heard learned counsel for the petitioner and carefully perused the judgment passed by the learned trial court. The learned trial court has observed that the entire investigation is not only aimless but it is superfluous in many respects and all necessary safeguards required were

thrown to the winds. The learned trial court has observed that the first amongst them is that even though the said raiding party is claimed to have been led by Inspector Pankaj Sood right from the time of receipt of said secret information upto the time of arrest of the accused persons, yet the investigation of this case is shown to have been cracked by an officer junior to him i.e. Sub-Inspector. It is a settled legal proposition and a principal of natural justice as well, that a Junior Official cannot have an independent outlook towards a case assigned to him by his senior superior officer as a complainant. There is no explanation as to why the Inspector did not assign the investigation of this case to an officer who is either equivalent or superior to him. This casual approach deserves to be deprecated.

9. The trial court has observed a decision rendered in the case of ***Ram Jatan Vs. State***, reported at III (1995) Current Criminal Reports 737, wherein the High Court has held as under:

“if the investigation of the case has been entrusted to a subordinate officer by the Station Officer of the Police Station, the investigation in such a case cannot be fair. Being a subordinate he is not in a position to come to an independent finding and such an investigation can be treated as tainted and no reliance can be placed on it. Investigation regarding acts of senior officers should not be done by the junior officer. This is another glaring mistake and lacuna in the prosecution case which makes this case a doubtful one.”

10. The trial court has found it extremely unusual that an officer, who is a party of the raiding team and a complainant was given investigation of the case. The trial court also found that with regard to Charge under Section 186 IPC both, Baljinder and Sachin, could not have been charged as they were not present at the time of the alleged offence. The trial court has further observed that there was no allegation that Raj Kumar and

Gajender had in any manner obstructed the police officers from doing their business.

11. The trial court has noticed the observations made by the Supreme Court in the case of *C. Muniappan and others Vs. State of Tamil Nadu*, reported at 2010 (9) SCC 567, wherein the Apex Court has observed as under:

“Thus, in view of the above, the law can be summarized to the effect that there must be a complaint by the public servant whose lawful order has not been complied with. The complaint must be in writing. The provisions of Section 195 Cr.P.C. are mandatory. Non-compliance of it would vitiate the prosecution and all other consequential orders. The Court can not assume the cognizance of the case without such complaint. In the absence of such a complaint, the trial and conviction will be *void abinitio* being without jurisdiction.”

12. Relying on the law laid down by the Apex Court, the trial court has rightly come to the conclusion that the respondents could not be convicted for the offence punishable under Section 186 of the IPC. The trial court has also rightly returned the finding with regard to the accusations under Sections 353/307 IPC that since Baljinder and Sachin were not present at the spot, they could not have been accused of commission of the offences, nor Raj Kumar and Gajender could have been accused for the said offences as even as per the own case set up by the prosecution, it was Raj Kumar, who had fired a gun shot and Gajender was unarmed.
13. As per the prosecution the accused persons were urinating and upon seeing the police party they started running and were also shouting that the police should stop or else gun-shot would be fired. It is strange that not a single member of the raiding party had deposed that respondent no.1, Raj Kumar, fired the gun aiming at him or any individual member of the raiding party. In the absence of any specific averment that an attempt was made on the life of any particular person, it cannot be held that a gun

shot was fired to kill any member of the police party.

14. In the case of *Durgo Bai Vs. State of Punjab*, reported at 2004 VIII AD SC 88, the Supreme Court while acquitting the said appellant under Section 307 IPC has held as under:

“ the evidence of PW1 appears to be vague and scanty and it is not safe to convict him on the basis of this evidence. Apart from the fact that the lead / empties were not recovered or attempted to be recovered, there is no definite evidence that the accused targeted the members of the patrolling party. The direction in which the shot from the revolver traveled and the details relating to the logistic are not forthcoming.”

15. We may notice that the alleged incident of firing took place in broad day light at a metro station near B.R. Ambedkar Hospital. It has been observed by the learned trial court that despite the availability of public persons as well as public servants at the hospital, no sincere efforts were made to join any independent witness which could have added credence to the testimonies of prosecution witnesses. In our view, this lapse on the part of investigation further weakens the case of prosecution. The learned trial court has also observed that it is quite strange that the alleged shoot out does not find mention in the detailed disclosure statement. The trial court has rightly held that if the respondents were involved in the alleged firing incident, then this fact would have been mentioned in their disclosure statement.
16. Further, the learned trial court has noticed the incident of firing to be suspicious in light of the fact that no attempt was made to lift or preserve the finger prints of the respondent Raj Kumar after the weapon allegedly used by him had fallen on the ground. The finding of the FSL also does not support the case of prosecution as there was no opinion in the report

whether the fired cartridge had similar pin marks which could connect the said cartridge to the allegedly recovered weapon.

17. Moreover, there is an unexplained delay of sixteen days in sending the recovered weapon to the Forensic Science Laboratory. On this aspect of delay in sending the case property to laboratory, it has been held by a constitutional bench of the Honorable Supreme Court in the case of **Santa Singh v. State of Punjab** reported at AIR 1956 SC 526, more particularly paras 12 & 14 which read as under:

“**12.** There is another element in the case which creates even greater difficulty. An empty cartridge case is alleged to have been recovered from the place of occurrence by the police on the 10th of September when they went there for investigation after receipt of the first information from Uttam Singh (PW 16); so also some bloodstained earth. They were carefully packed and sealed in two separate packets and despatched to the Police Station. The sealed parcel of the earth was sent to the Chemical Examiner at Kasauli on 11-10-1954, and the sealed parcel of the empty cartridge case was sent to Dr Goyle as late as 27-10-1954. Even if we accept the explanation given by the Sub-Inspector of Police that the empty cartridge case had to be kept at the police station till the rifle used was recovered so that both might be sent to the expert for his opinion, nothing has been stated why after the rifle was recovered on 26-9-1954, along with 24 cartridges from the house of the accused, it was incumbent for the police to retain the parcels of rifle and empty cartridge case with them till 11-10-1954. Naturally this inordinate delay, raises much suspicion and has given rise to the suggestion on the part of the accused made in the course of the cross-examination of the Sub-Inspector that the empty cartridge case ultimately sent to the expert relates to a cartridge that was fired by them at the Police Station and is not the one recovered at the spot. The memo relating to the recovery of the empty cartridge case is not attested by any independent witness but only by Uttam Singh and Mohinder Singh (PW 16 and PW 17).

14. Thus, in the face of the medical evidence the testimony of the eyewitnesses cannot be safely accepted; the suspicious delays that have occurred as regards important steps in the course of the

investigation render it unsafe to hold that the case of the prosecution has been established beyond reasonable doubt.”

18. Although it is settled law that the delay in sending the case property to the FSL is not fatal to the prosecution case per se, but in the instant case, the prosecution has not been able to explain the reasons for delay which casts a shadow on the bona fides of the investigation. The unexplained delay further shakes the credibility of the prosecution case.
19. Another circumstance which casts doubt on the prosecution case is that various documents such as seizure memo of pistol and live cartridges (Ex.PW1/D), its sketch (Ex.PW1/C), seizure memo of fired cartridges (Ex.PW 1/F), its sketch (Ex.PW1/E) and seizure memo of Santro Car Ex. PW1/G, which were prepared before the registration of FIR also bear the specific FIR number and other details over them.
20. The trial court has observed a decision rendered in the case of **Zofar v. State** reported at 2000 CriLJ 1589, wherein the High Court held as under:

“The number of the FIR (Ex. P.W. 1/B) given on the top of the aforesaid documents is in the same ink and in the same handwriting which clearly indicates that these documents were prepared at the same time. The Prosecution has not offered any Explanation whatsoever as to under what circumstances number of the FIR (Ex. P.W. 1/B) has appeared on the top of the aforesaid documents, which were allegedly prepared on the spot before registration of the FIR. This gives rise to two inferences that either the FIR (Ex. P.W. 1/B) was recorded prior to the alleged recovery of the contraband or number of the said FIR was inserted in these documents after its registration. In both the situations it seriously reflects upon the veracity of the prosecution version given by the aforesaid witnesses and creates a good deal of doubt about recovery of the contraband in the manner alleged by the prosecution.”
21. In the instant case, the trial court has held that this circumstance of documents bearing FIR number is indicative of ante timed FIR which consequently puts the entire investigation into poor light. We agree with

the view taken by the trial court and we are not inclined to take a different view on this aspect.

22. Further, as per the prosecution case, the fire arm was recovered on the pointing out of respondent no.3 Sachin from the house of his in-laws at Gokul Puri on 19.03.2009. However, there was no mention in his disclosure statement to this effect. For applicability of Section 27 of the Evidence Act, it is a mandatory requirement that the fact discovered must be in consequence of information from accused and not merely by an act of accused. The trial court has relied on the judgment delivered by the Apex Court in the case of **Bhimappa Jinappa Naganur v. State of Karnataka** reported at 1993 Supp (3) SCC 449, the relevant portion which reads as under:

“The only evidence recording the disclosure is "come with me" and thereafter the accused proceeded towards Harugeri and stopped near the stream situated at a distance of about 2 kms away and the accused took out the axe from inside the nallah (stream). In the absence of any disclosure statement recovery of axe itself becomes meaningless.”

23. The learned trial court has further noticed that the recovery of firearm does not inspire confidence as the investigation officer did not make any attempt to join any independent witness in order to comply with the safeguards provided by Section 100 Cr.P.C. Section 100 sub-section 4 of the Code of Criminal Procedure, 1973 casts a mandatory duty upon the investigators to call upon two or more independent and respectable inhabitants of the locality where the search is to be conducted. The object of this provision is to ensure that searches are conducted fairly and squarely and that there is no “planting” of articles by the police.
24. In the case of **Pradeep Narayan Madgaonkar v. State of Maharashtra** reported at (1995) 4SCC 255 it has been held by the Apex Court:

“11. ... Indeed, the evidence of the officials (police) witnesses cannot be discarded merely on the ground that they belong to the police force and are, either interested in the investigating or the prosecuting agency but prudence dictates that their evidence needs to be subjected to strict scrutiny and as far as possible corroboration of their evidence in material particulars should be sought. Their desire to see the success of the case based on their investigation, requires greater care to appreciate their testimony. We cannot lose sight of the fact that these police officials did not join any *independent* witnesses of the *locality* and made an attempt to create an impression on the courts that both PW 2 and PW 5 were *witnesses of locality and were independent*, knowing fully well that PW 2 was a witness who was under their influence and ‘available’ to them, as he had been joining the raids earlier also and PW 5 was a close associate of PW 2, their friendship having developed during the days of gambling when admittedly the police never conducted any raid at their gambling den.

12. The very fact that the police officers joined PW 2 and PW 5 in the raid creates a doubt about the fairness of the investigation. Coupled with this is the manner in which the confessional statement of A-1 and A-2 was recorded by Hemant Karkare PW 3, which has been rightly discarded by the Designated Court itself. Even if we were to ignore the tell-tale discrepancy in the number of the room i.e. 3323 or 3334, from where the appellants were arrested, accepting the explanation of the prosecution that it was as a result of typographical error, it looks to us rather strange that the discrepancy should have come to the notice of the investigating officer only when he filed his affidavit in the Supreme Court in the special leave petition filed by the absconding accused, yet in the totality of the circumstances of the case and after a careful analysis of the evidence on the record we find it rather unsafe to rely upon PW 1, PW 4 and PW 6 only without there being any independent corroboration of their testimony, to uphold the conviction and sentence of the appellants. We cannot lose sight of the fact that since the mere possession of an arm, as specified in the schedule, without a licence, in a notified area, attracts the provisions of Section 5 of TADA with stringent punishment, the quality of evidence on which the conviction can be based has to be of a much higher order than the one we find available in the present case. Our independent appraisal of the evidence on the record has created an

impression on our minds that the prosecution has failed to bring home the charge to the appellants beyond a reasonable doubt.”

25. Relying on the law laid down by the Apex Court and considering the fact that no efforts were made by the police officials to join any independent witness, we are of the opinion that the learned trial court has rightly disbelieved the recoveries effected at the instance of respondent no.3 Sachin.
26. It is well settled that leave to appeal is to be granted in exceptional cases where the judgment under appeal is found to be perverse. The court must take into account the presumption of innocence of the accused and the acquittal by trial court adds to the presumption of his innocence.
27. We do not find any reasons for interference in the present case. Accordingly, no grounds are made out and the leave to appeal petition stands dismissed.

G.S.SISTANI, J

G.P.MITTAL, J

SEPTEMBER 02, 2013

msr