

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
% *Date of Judgment: 15.7.2013*

+ CRL.L.P. 385/2012

STATE OF NCT OF DELHI

..... Petitioner

Through: Mr. Rajesh Mahajan, Addl.
Standing counsel (Crl.) for the
State.

versus

JAMIL @ KALU

..... Respondent

Through: Mr. Satya Pal, Advocate.

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J. (Oral)

CRL.M.A. No.13360/2012 (for condonation of 85 days delay in filing the petition)

1. In view of the averments made in the application, the delay of 85 days in filing the petition is condoned. Application stands disposed of.

CRL.L.P. 385/2012

2 This criminal leave to appeal has been filed by the State seeking to lay a challenge to the judgment of acquittal dated 31.01.2012 vide which both the accused persons Jamil @ Kalu and Sunil Bihari (being tried as the other two co-accused had not been arrested) had been acquitted of the charge under Section 302 IPC levelled against them for having committed the murder of deceased Santosh @ Guttar.

3 Briefly stated the version of the prosecution as unfolded appeared in the testimony of Mohd. Shamshad @ Tisari who being a rag-picker along with accused had witnessed the incident. As per his version at 6.00 AM on the morning of 08.04.2010 he saw four persons beating Santosh mercilessly with dandas and they were shouting “*Aaj Sale ka kam Tamam kar dete hai. Hamare kam mein roda atkata jai*”. Multiple blows were given upon the victim. The assailants thereafter fled away. On noting the injuries upon the deceased, Mohd. Samshad informed the police; FIR was registered on his statement. Crime team was summoned. Exhibits were picked up from the site and sent to the FSL. The dead body of the deceased was sent to the mortuary. Post-mortem of the deceased was conducted on 15.4.2010.

4 Statement of the witnesses was recorded. On the following day i.e. on 09.4.2010 the accused Jamil was arrested. Pursuant to the disclosure statement of accused Jamil, he got recovered one blood stained danda from the bushes located at the railway track leading towards Sadar Bazar. The doctor had opined that the danda could have caused the fateful injuries upon the victim. The danda was also sent to the FSL. Another circumstance against the accused was the blood stained clothes of Jamil (worn by him at the time of the incident) and the DNA detected on these clothes matched the DNA of the deceased. The second accused Sunil Bihari was arrested on 20.5.2010 pursuant to a disclosure statement made by him in another case (FIR No.71/2010).

5 The prosecution had heavily relied upon the testimony of two witnesses i.e. Mohd. Samshad (who had set the investigative machinery in motion) examined as PW-5 and another eye witness PW-4 Raj Kumar. Their statements had been recorded under Section 164 of the Cr. P.C. They, however, did not support the version of the prosecution while deposing on oath in court wherein they turned turtle. Prosecution thus did not place any reliance upon their version and rightly so. Even before this court arguments have been addressed dehors the version of PW-4 and PW-5.

6 Trial Judge had relied upon two circumstances which had been pitched by the prosecution:

- i. recovery of the blood stained danda pursuant to the disclosure statement of accused Jamil;
- ii. the blood stained clothes of the accused Jamil which he was wearing on the date of the incident matching with the DNA profile of the victim.

7 Qua the first circumstance i.e. the recovery of the danda, testimony of PW-11 H.C. Ramesh and PW-20, investigating officer, Anil Jaitely was relied upon. Disclosure statement of accused Jamil which had been recorded on 09.4.2010 i.e. one day after the date of incident had led to the recovery of the aforementioned danda. It was recovered from the bushes located at the railway track leading to Sadar Bazar which was 100 meters away from the place of occurrence. Trial

judge after discussing the law of Section 27 of the Indian Evidence Act noted that the recovery falls within the aforementioned parameters. However, the testimony of PW-11 and PW-20 coupled with the report of the FSL (Ex.PW-8/A) could not establish the connectivity of the danda with the commission of offence.

8 Both PW-11 and PW-20 had deposed that there was blood on the danda at the time when it was recovered. The report of the FSL Ex. PW-8/A had not noted any blood on the danda (exhibit 4). Court had noted that even presuming that the blood marks had been destroyed in the aforementioned period, the testimony of PW-20 to the effect that the danda had been wrapped in a cloth but no blood was noted even on the inner side of the cloth had led the court to disbelieve this version. It thus could not be established that this was the same danda which was used in the commission of offence. The opinion of the doctor PW-7 on this count that such a danda could have inflicted such a fateful injury was thus of little worth.

Trial court had discussed this circumstance in the below noted paras:

“29. Prosecution version is that when the danda was recovered it had blood-stained marks. To prove this fact, prosecution has relied upon the testimony of PW11 and PW20. Both the witnesses in their deposition categorically deposed that when it was recovered, there was blood on the one side of the danda. After seizure, danda was sent to FSL Rohini for analysis. As per FSL report Ex. PW8/A, danda was given exhibit 4 and no blood could

be detected on the said danda. Even after seeing the FSL report, PW20 deposed that when danda was recovered, it had blood-stained marks. When question was put to him, did it mean that the danda which was recovered at the instance of accused, was not sent to FSL? PW20 retorted that it appeared that the blood marks had been destroyed in handling the danda. He further deposed that to preserve blood marks on the danda, he wrapped the danda in cloth, but admitted that there was no sign of blood in the inner side of the said cloth. Thus, it becomes crystal clear that there was no blood on the danda, when it was seized at the instance of accused. Had there been any blood on the danda, it would have been detected during examination at FSL. Thus, the testimony of PW11 and PW20 to the extent that danda Ex. P-1 had blood-stained marks at the time of recovery is not trustworthy. Since, no blood of deceased is found on the recovered danda, prosecution has failed to connect the danda with the commission of offence.

30 *Since, learned Additional Public Prosecutor vehemently relied upon the report Ex. PW7/A, I have perused the same as well as the testimony of PW7. As per prosecution version, opinion of PW7 was sought to ascertain as to whether the injuries found on the dead body of deceased could be caused by the recovered danda. After examining the danda and injuries mentioned in the autopsy report, PW7 opined that the injuries (1) to (16) mentioned in the autopsy report could be possible to cause by the danda produced before him. Before discussing the testimony of PW7, it is pertinent to state here that it is admitted case of the prosecution that four persons had beaten the deceased by the means of dandas and lathis. It means during the commission of offence at least four dandas/lathis were wielded as weapon of offence. If it was so, then it is next to impossible to cause all the injuries by the recovered danda. If we*

examine the testimony of PW7 in this aspect, PW7 only deposed that the injuries found on the dead body of deceased could have also been possible to cause by the recovered danda. PW7 had not given any opinion with certainty that the inflicted injuries were caused by only the recovered danda. It only means that the inflicted injuries could have been possible to cause by the recovered danda as well as other dandas similar to the recovered dandas. Had blood of deceased been detected on the recovered danda, prosecution would have been in a better position to connect the danda with the commission of crime. In view of the above, I am of the opinion that testimony of PW7 is not helpful to the prosecution to establish beyond doubt that the inflicted injuries were caused by the recovered danda only.

31. Pondering over the ongoing discussion, I am of the opinion that recovery of danda Ex. P-1 is not helpful to the prosecution to connect the accused with the murder of Santosh @ Gutter.

9. No fault can be found in this reasoning.

10. The second circumstance relied upon by the prosecution was the purported blood stained clothes worn by the accused on which the blood of the deceased had fallen while he was inflicting injuries upon him. On this count it is only version of the police witnesses which was relied upon by the prosecution i.e. the testimony PW-11 and that of the investigating officer PW-20.

11 The case of the prosecution is that offence was committed on 08.4.2010 at 8.00 AM and the arrest of the accused was effected on the following day i.e. 09.4.2010. This is evident from the arrest memo

Ex.PW-4/C. Apart from the fact that there appears to be an overwriting in the time of the arrest; whether it was 8.00 AM or 8.00 PM on 09.4.2010, yet even ignoring this discrepancy if the version of the prosecution is accepted, the accused was arrested on the following day at 8.00 AM i.e. after 24 hours. It would be impossible to imagine that the accused would continue to be wearing the same blood stained clothes for twenty four hours when admittedly he had fled away from the scene and he was otherwise endeavoring to hide his crime. The first natural conduct on the part of such a person would be to change his clothes to wash away the evident traces of the crime purported to have been committed by him. However, this was not so. The arrest memo evidences that the arrest was witnessed by PW-11 and PW-20 alone. No public witness was joined.

12 It was in this background that the versions of PW-11 and PW-20 were weighed by the trial court to conclude that the blood stained clothes appear to have been planted upon the accused; so also were the suggestions given by the learned defence counsel to both the aforementioned witnesses i.e. to PW-11 and PW-20. In this background the matching of the DNA profile of the blood on the aforementioned alleged pant of the accused with the DNA profile of the deceased would be of little consequence.

13 The trial judge had discussed this circumstance in detail and this discussion finds mention in the below noted paras.:

“34. To prove the recovery of blood stained clothes, prosecution has relied upon the testimony of PW11 HC Ramesh Singh and PW20 Insp. Anil Jaietly.

35. PW11 in his examination-in-chief categorically deposed that when accused was arrested on April 9, 2010, he had noticed blood on his pant and shirt. He further deposed that the shirt was of white colour having yellow strips whereas colour of pant was Bhuri (brown). He further deposed that after reaching police station, said pant and shirt were sealed in a pullanda with the seal of AJ and the pullanda was seized vide memo Ex. PW11/C and thereafter seal was handed over to him. The shirt and pant are exhibited as Ex. P-2 and Ex. P-3 and same were identified by PW11. In his cross-examination, PW11 deposed that when the clothes of accused were seized, other clothes were given to him but deposed that he did not remember the colour of said clothes. Though suggestion was given to the witness that the clothes were planted on the accused, yet the same was denied by the witness.

36. PW20 corroborated the testimony of PW11 by categorically deposing in his examination-in-chief that at the time of arrest of accused Jamil @ Kallu, he had seen blood on his pant and shirt and during investigation, it was revealed that the blood of deceased had fallen on his clothes. He further deposed that after reaching police station, he had seized white colour shirt having yellow lines and brown colour pant having golden lining, which accused was wearing and having blood stained marks. He also corroborated the testimony of PW11 by deposing that the said clothes were sealed in a pullanda with the seal of AJ and said pullanda was seized vide memo Ex. PW11/C and thereafter seal was handed over to HC Ramesh. He also identified the seized clothes, which were exhibited as Ex. P-2 and P-3. In his cross-examination, he deposed that when the clothes of accused were seized,

old clothes were given to him in the police station and stated that he could not tell the colour of the said clothes. He denied the suggestion that he had not mentioned this fact in the case diary because no clothe was given to the accused.

37. From the testimony of PW11 and PW20, it becomes crystal clear that the blood stained clothes were not seized at the place from where accused was arrested at the pointing out of PW5 Mohd. Shamshad and PW4 Raj Kumar but were seized subsequently after reaching the police station. I do not find any illegality in seizing the blood stained clothes after reaching the police station, if it was seized to avoid nudity of the accused provided prosecution succeeds to establish that there was blood on the clothes of accused at the time of his arrest.

38. It is admitted case of the prosecution that accused was arrested in the presence and pointing of PW4 & PW5 but both the witnesses turned hostile and did not corroborate the prosecution version that there was any blood on the clothes of accused Jamil @ Kallu, when he was arrested. During investigation statement of both the witnesses were got recorded under Section 164 Cr.P.C which have already been exhibited as Ex. PW4/G and PW5/A. Perusal of the same reveals that both the witnesses had not disclosed therein that there was any blood on the clothes of accused Jamil @ Kallu when he was arrested. Both the witnesses in their deposition categorically denied the suggestion put by learned Additional Public Prosecutor that there was any blood on the clothes of accused when he was arrested. Thus, the testimony of PW11 & PW20 does not get any corroboration either from the deposition of PW4 & PW5 or from their statement got recorded under Section 164 Cr.P.C.

14. There is no fault finding in this conclusion either.

15 In a case of circumstantial evidence great care must be taken in evaluating the pieces of evidence. The guilt of the accused must be fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of the guilt of the accused. Complete chain of circumstances has to be established before the accused can be nailed.

16 This court is sitting in appeal over the judgment of acquittal by the trial judge. The powers of the court in an appeal against an order of acquittal are limited. In Ghurey Lal vs. State of U.P. 2008 4 CCC SC 49 it has been held that the principles to overrule a judgment of acquittal by a trial court should be strictly followed; the said principles over the years have been crystallised and the rules have to be strictly adhered to. The following rules had been enunciated in this case:-

“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."*

17 The law as enunciated above is an undisputed proposition. It is on this touch stone that the judgment of the trial court has been appreciated.

18 No case is made out for grant of leave to appeal. Dismissed.

INDERMEET KAUR, J

KAILASH GAMBHIR, J

JULY 15, 2013

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CrI.L.P No.385/2012

Page 11 of 11