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

+ CRL.L.P. 519/2013

STATE

..... Petitioner

Through: Mr. Pawan Sharma, Standing Counsel
(Crl.), with Mr. Sahil Mongia, Ms.
Priyanka Kapoor & Mohd. Adnan,
Advocates for the State

versus

SALIM @ ANWAR &ORS

..... Respondents

Through: None.

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

HON'BLE MS. JUSTICE INDERMEET KAUR

ORDER

20.09.2013

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**Crl. M.A. No. 14253/2013 (Condonation of delay in filing the
accompanying leave petition)**

By this application filed under Section 5 of Limitation Act read with
Section 482 of Cr.P.C., the appellant is seeking condonation of delay of 5
days in filing the accompanying criminal leave to appeal. For the reason
stated in the application, the same is allowed and the delay of 5 days in
filing the accompanying appeal against the impugned judgment is condoned.

Application stands disposed of.

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1. By this petition filed under Section 378 (3) of Cr.P.C., petitioner is

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seeking leave to appeal against the judgment/order dated 20th April 2013 passed by learned Additional Sessions Judge, thereby acquitting the respondents-accused from the charge of murder framed against them under Section 394/302 of IPC.

2. Addressing arguments for seeking leave to appeal, Mr. Pawan Sharma, Standing Counsel for the State submits that the learned trial court has completely glossed over the clinching incriminating evidence of recovery of the robbed money from the possession of the accused persons, which even contained the Indian currency notes leaving no manner of doubt about genuineness of the recoveries. Learned Standing Counsel (Cri) for State further submits that the learned trial court has also overlooked the fact that not only the recovery of currency notes but recovery of articles which were belonging to deceased have come from the possession of the accused person soon after the incident certainly brings home the guilt to the accused persons. Learned Standing Counsel (Cri) for State further submits that the accused person's failure in not offering any explanation to explain as to how they were in possession of the stolen articles and the robbed money and in the absence of any such explanation, the learned trial court ought not to have drawn the presumption under Section 114 of the Indian Evidence Act. Based

on the above submissions, learned Standing Counsel (Cri) for State has urged for grant of criminal leave to appeal to challenge the impugned judgment.

3. We have heard Learned Standing Counsel (Cri) for State and perused the trial court record.

4. The case of the prosecution in brief is as follows:-

" On 12.05.2010 an information was received by the Police Control Room that somebody has entered in house no. 4/1, Kalkaji Extension, New Delhi. The information was reduced in writing and the investigating officer/ inspector B.S. Rana reached at the spot. Sh. Anil Kumar Likhi s/o Sh. Janak Raj Likhi in the mean time informed inspector B.S. Rana that the hands, legs and of his father are tied with clothes and is lying on the bed. IO enetered the premises of the house and opened the clothes of Mr. Janak Raj Likhi and immediately shifted him to the Holy Famliy Hospital where he was brought dead. IO returned to the place of occurrence for inspection and found that iron boxes and almirah were opened and the house was ransacked and around Rs.6000/- to Rs.7,000/- which the deceased was having were missing. Further on the statement of Mr. Anil Likhi, a FIR No. 240/2010 u/s 394/302 IPC was registered with at Police Station Kalkaji.

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Further accused Salim @ Anwar and Sonu were arrested on 14.05.2010. accused Debu Dass @ Bengali, Prem Babu and Sunny Kumar were arrested on 17.05.2010, ` 2,715/- out of which ` 115/- (i.e. 1 note of ` 100, one note of ` 10/- and one of ` 5/-) were old Indian currency notes were recovered from the possession of the accused Sonu. Accused Debu Dass @ Bengali got recovered two keys of Car, one remote, 1 pan shape locket and ` 32/- old currency notes. From the accused Prem Babu, a bunch of keys having three lock from Hans Raj Sethi Park and ` 115/- and ` 16/- were recovered and from accused Sunny, ` 13/- were allegedly recovered."

5. In order to prove its case, the prosecution had examined 19 witnesses. No defence evidence was adduced by the accused persons and in their statements recorded under Section 313 of Cr. P.C., they pleaded their innocence and false implication.

6. An aged person of 86 years was found murdered on 12th May 2010 and his house was found ransacked and an amount of Rs.6,000 to 7,000 was missing as per the report lodged by his son Mr. Anil Kumar Dickey, based on which the FIR No. 240/2010 was registered under Section 394/302 of IPC. The only incriminating evidence against the accused persons is the

recovery of the currency and some other articles. The finding of the learned Trial Court with regard to the recovery of the currency notes and the other recovered articles from the accused persons especially the old currency notes and one cap is that such similar types of currency notes and the cap were easily available in the market and this fact was duly admitted by all the prosecution witnesses. Learned Trial Court thus found that recovery of incriminating articles from the accused persons is highly doubtful. Learned Trial Court has also held that no serial number of currency notes was mentioned in the seizure memo and therefore it could not be held beyond doubt that the recovered currency notes and articles exclusively belonged to the deceased. With regard to the cap also, PW-18 as well as PW-19 duly admitted in their respective testimonies that cap recovered by the police could also be prepared or one could get it procured from the market. Learned Trial Court also placed reliance on the judgment of the Apex Court in the case of *Surjit Singh vs. State of Punjab, AIR 1994 SC 110*, wherein the view taken was that the recovery by itself does not connect the accused person with the murder of the deceased. Learned Trial Court also referred to a decision in the case of *Prabhoo vs. State of UP, AIR 1963 SC 1113*, wherein the Apex Court took a view that by mere production of blood

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stained articles by the accused one cannot come to the conclusion that the accused committed the murder inasmuch as it was quite possible that someone else committed the murder and kept the blood stained articles in the house of the accused. Learned Trial Court also discussed the scope of section 114 of Indian Evidence Act in relation to the facts of the present case and held that the court 'may' presume and not that the court 'shall' presume and if it appears that the recovery is doubtful, then the court is not entitled to raise such a presumption.

7. Recovery of any of the articles at the instance of the accused persons during their disclosure statement undoubtedly is a piece of evidence in the chain of circumstantial evidence but it will be quite hazardous to sustain the conviction of the accused persons merely based on the recovered articles. Recovery of the articles becomes more doubtful where the prosecution fails to connect the recovered articles with the deceased and in the facts of the present case also the alleged recovery of the currency notes and cap from the accused persons nowhere connects such recovery with the deceased or the complainant. In a case based upon circumstantial evidence, certain circumstances from which the conclusion of guilt is drawn should be fully proved and there should be no gap left in the chain of evidence. The Apex

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Court in the case of *Sharad Birdichand Sarda v. State of Maharashtra*, (1984) 4 SCC 116, the following five golden principles in a case based on circumstantial evidence:-

(1) The circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved as was held by this Court in Shivaji Sahebrao Bobade v. State of Maharashtra, 1973 CriLJ 1783 where the following observations were made:

Certainly, it is a primary principle that the accused must be and not merely may be guilty before a Court can convict, and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions.

(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

(3) The circumstances should be of a conclusive nature and tendency.

(4) They should exclude every possible hypothesis except the one to be proved, and

(5) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

8. Relying upon the aforesaid legal principles, we do not find any irregularity, infirmity or perversity in the order passed by the learned Trial Court. The prosecution miserably failed in bringing home the guilt to the

accused persons just based on the recovery of currency notes and other articles, which recovery was held to be doubtful and in the absence of description of currency notes especially in connection with the recovered articles that the deceased or the accused through any cogent evidence.

9. Accordingly, the present application seeking grant of criminal leave to appeal against the order of acquittal dated 20th April 2013 passed by learned Additional Sessions Judge, thereby acquitting the respondents-accused from the charge of murder framed against them under Section 394/302 of IPC is hereby dismissed. It is ordered accordingly.

KAILASH GAMBHIR, J

INDERMEET KAUR, J

SEPTEMBER 20, 2013

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