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

+ CRL.L.P. 316/2013

STATE

..... Petitioner

Through Mr. Dayan Krishnan, Additional
Standing Counsel (Crl.) with Insp.
Kanchan Lal, PS- Sangam Vihar

versus

PAWAN KUMAR PANDEY & ORS.

..... Respondents

Through None.

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

HON'BLE MS. JUSTICE SUNITA GUPTA

ORDER

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21.01.2014

KAILASH GAMBHIR, J (ORAL)

Crl.M.A. No.9703/2013 (Delay)

1. By this application filed under Section 5 of Limitation Act read with Section 482 of Cr.P.C., the petitioner/ State is seeking condonation of delay of 197 days in filing the accompanying criminal leave to appeal. For the reasons stated in the application, the same is allowed and the delay of 197 days, in filing the accompanying petition seeking leave to appeal against the impugned judgment, is condoned.

2. Application stands disposed of.

CRL.L.P. 316/2013

1. The present Criminal Leave to Appeal has been preferred by the petitioner/State under section 378 (1) Cr.P.C. to challenge the judgment dated 07.06.2012 passed by the learned Additional Sessions Judge-01, New Delhi thereby acquitting the respondents from all the charges framed against them under sections 364/302/201 read with section 34 of the Indian Penal Code, 1806 (hereinafter referred to as 'IPC').
2. To appreciate the contentions raised by the counsel for the petitioner/ State a brief summary of prosecution case is given below:

"The accused Sandeep Sharma, hired an Indica car No. HR-51-S-9172 along with its driver Sanjay, deceased on 05.05.2005 from K. D. Taxi Service, Prahlad Pur, New Delhi, for himself and the accused persons, namely Pawan Kumar Pandey, Sanjay and Pushpender, for attending a marriage near Palwal. The accused Pawan Kumar Pandey, Sanjay, Sandeep and Pushpender took the said vehicle along with the deceased but the vehicle failed to return in the night as was expected. Eventually, a complaint was lodged by Vijay Laxmi, mother of the deceased about her son not having returned back along with the vehicle, on which information DD No. 27 dated 07.05.2005 was recorded at PP Prahlad Pur. Subsequently, an FIR was registered on 10.05.2005 on the complaint of Harish Chand the owner of the Taxi Stand. The investigations were taken over by ASI Umed Singh. During investigations, father of Pushpender @ Rinku informed that after attending the marriage at Palwal, the accused persons had gone to Jhansi, UP to the house of sister of Pushpender @ Rinku. A phone call was made to the house of the sister of the accused, which was answered by a girl, who informed that four boys who were wearing blood stained

clothes had come in a vehicle which also had blood stains and they had gone to the tube-well to wash the clothes and the vehicle. On receipt of this information the police went to Jhansi and the accused Pushpender was identified by the photograph but none of the accused was found present. Thereafter, on 06.05.2005, one Jai Prakash, who was working as a Sweeper in PP Panethi noticed the dead body lying on the Sansi Road, near G. T. Road, of a male, aged about 30-35 years and information was given to police post Panethi. The police reached the said spot and a panchnama of the body was prepared and thereafter it was sent for post mortem to Aligarh, UP. FIR No. 76/05, u/s 302/201 IPC was registered at PS Panethi. SI Umed Singh on 12.05.2005 reached police station Akrabad and came to know about the dead body, which was identified eventually by the mother and the family members of the deceased to be that of Sanjay, the driver. Thereafter, on the basis of secret information accused Sanjay and Pawan were arrested from their house at Saurav Vihar, Jaitpur, Delhi and accused Pawan Kumar Pandey got recovered two original number plates of Indica Car bearing no. HR-51S-9172 from the Taand and house and also got recovered the original documents of the car from a briefcase. lying in the room. The accused Sanjay handed over the wrist watch of make Sonata, which was identified by Jaiveer to have been gifted by him to deceased Sanjay. The accused Pawan Kumar Pandey and Sanjay then led to the arrest of accused Shiv Pujan to whom the vehicle Indica Car had been sold. The Indica car was recovered from the possession of accused Shiv Pujan. The accused Sandeep and Pushpender could not be arrested and they were declared Proclaimed Offenders and the charge-sheet was filed in the Court."

3. Assailing the impugned judgment, Mr. Dayan Krishnan, Additional Standing Counsel (CrI.) appearing for the petitioner/ State, submits that the evidence led by the prosecution sufficiently prove the culpability of

the accused persons in committing the murder of the deceased, Sanjay. Counsel further argues that the prosecution has successfully proved on record all the links in the chain of circumstantial evidence driving home the guilt of the accused persons but yet the learned Trial Court disbelieved the prosecution version on most flimsy grounds. Counsel further argues that the learned Trial Court failed to appreciate the fact that PW-10, Pradeep Sehgal, is a witness of last seen evidence, as accused Sandeep had approached him for hiring a taxi to go to Palaw along with deceased. Counsel further submitted that all the accused persons boarded the said taxi along with the deceased but the said vehicle did not return back. The contention raised by the counsel for the petitioner was that the last seen evidence of PW-10 was a clinching evidence to prove the involvement of all the accused persons in carrying out the murder of deceased, Sanjay, and therefore, the same could not have been brushed aside by the learned Trial Court. Counsel further argues that the car in question was recovered from the possession of the accused- Shiv Pujan and on the failure of the said accused to prove his ownership of the car, being a bona fide purchaser, the offence under Section 411 IPC is also clearly made out against him. Counsel also argues that the learned Trial

Court also failed to appreciate that there is no motive on the part of the complainant or the prosecution to falsely implicate these accused persons. Based on the above submissions, counsel for the petitioner/State strongly urges for the grant of criminal leave to appeal to challenge the impugned judgment on acquittal.

4. We have heard learned counsel for the petitioner/ State at considerable length and given our thoughtful consideration to the arguments advanced by him.

5. Indisputably, there was no direct evidence of the commission of the offence and the case of the prosecution was based on circumstantial evidence. In *Sharad Birdhichand Sarda v. State of Maharashtra*, (1984) 4 SCC 116”, the Supreme Court has laid down five tests to be satisfied in a case based on circumstantial evidence:

- “(1) *The circumstances from which the conclusion of guilt is to be drawn should be fully established.*
- (2) *The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, 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."*

6. The learned Trial Court tested the evidence of the prosecution on the touchstone of the said parameters and has come to the conclusion that the prosecution failed to prove all the links in the chain of the circumstantial evidence which could conclusively drive home the guilt of the accused persons, totally inconsistent with their innocence. After having perused the impugned judgment and the other material on record, we do not find that there is any illegality or perversity in the said judgment and we find no reason to disagree with the findings reached by the learned Trial Court. The learned Trial Court was correct in saying that except the fact that the accused, Sandeep Sharma hired the vehicle from K.D. Taxi Services, Prahlad Pur, New Delhi, there is no evidence to prove that Sandeep Sharma along with other three accused persons in fact had travelled to Ballabhgarh, to conclude beyond reasonable doubt that accused Sandeep Sharma was involved in the murder of deceased Sanjay. Against accused, Pushpender also the finding of the learned Trial Court is that there is no evidence to show that accused, Pushpender travelled in

the Indica car or that he was in any way involved in the commission of the crime. The learned Trial Court also referred to the testimony of PW10, Pradeep Sehgal, who in his cross-examination, deposed that accused, Pushpender @ Rinku was known to him much before the incident and the person who had accompanied Sandeep Sharma on 05.05.2005 was not Pushpender @ Rinku. In the absence of any other evidence proved on record by the prosecution to link the accused Pushpender with the commission of crime, the learned Trial Court has rightly given him the benefit of doubt. The learned Trial Court has also rightly disbelieved the story of the prosecution against accused Pawan Kumar Pandey and accused Sanjay, as the recovery of the number plates and the original documents of the Indica car from Pawan Kumar Pandey during his disclosure statement was effected only after the recovery of the vehicle from the possession of the other co-accused Shiv Pujan and as far as the recovery of a wrist watch, which was purportedly given to deceased, Sanjay by Jaiveer as a gift, at the instance of accused Sanjay is concerned, the reasoning given by the learned Trial Court was that no evidence was produced by the prosecution to show that deceased Sanjay was wearing the said watch when he left Delhi for going to Palwal on

05.05.2005. The learned Trial Court also rightly disbelieved the prosecution story that accused Sanjay would have kept watch of the deceased himself for identification of the same at the time of his search. More so mere recoveries at the instance of these two accused persons cannot be taken as a ground to inculcate them for the commission of such heinous offence. Even as against accused, Shiv Pujan who was found in possession of the Indica car, there is no infirmity in the findings reached by the learned Trial Court as no evidence was placed on record by the prosecution to show that Shiv Pujan had purchased the car knowing it to be a stolen car and therefore, no offence under Section 411 IPC could be attracted against him.

7. Much stress has been laid by the counsel for the petitioner/State on the last seen evidence of PW-10 who had lastly seen deceased Sanjay, having driven Indica car after boarding the accused persons for taking them to attend a marriage near Palwal. It is a settled legal position that last seen evidence is not a direct evidence but is a specie of circumstantial evidence, and thus a conviction cannot be sustained merely on the basis of last seen evidence. Further for the reliability of last seen evidence the time gap between the point of time when the accused and the deceased

were last seen alive and when the deceased is found dead should be so small that possibility of any person coming in between other than the accused becomes impossible.

8. In *State of U.P. vs. Shyam Behari and Anr.* reported in (2009) 15 SCC 548, the Hon'ble Apex Court while elaborating on the last seen theory held as under:

"6...There must be cases where on account of close proximity of place and time between the event of accused having been last seen with the accused and the factum of death a rational mind may be persuaded to reach an irresistible conclusion that either the accused should explain how and in what circumstances the victim suffered the death or should own the liability for the homicide.

7. This Court in Bodhraj @ Bodha and Ors. v. State of Jammu and Kashmir_2002CriLJ4664 held as follows:

The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult to some cases, to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other person coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases"

9. Applying the ratio of the above said decision of the Apex Court, we do not find that the prosecution succeeded even in establishing the

fact that PW-10 was the witness of last seen evidence or that the time gap between the time when the accused and deceased were last seen alive and the death of the deceased ,was so small that there is no possibility of any other person entering into gap to commit the crime.

10. The case in hand is based on circumstantial evidence and as per the finding reached by the learned Trial Court the prosecution has not been able to complete the chain of circumstances to prove the guilt of the accused in committing the murder of the victim Sanjay beyond reasonable doubts. On careful reading of the impugned judgment and the material placed on record including the testimonies and depositions of prosecution witnesses, we do not find that there is any illegality, perversity or infirmity in the order passed by the learned Sessions Judge. The present Criminal Leave to Appeal petition preferred by the petitioner/State to challenge the judgment, dated 07.06.2012, passed by the learned Additional Sessions Judge-01, New Delhi, is therefore dismissed. It is ordered accordingly.

KAILASH GAMBHIR, J.

SUNITA GUPTA, J.

JANUARY 21, 2014/v