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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CRL.L.P. 361/2012**

STATE

..... Petitioner

Through: Ms. Richa Kapoor, Additional
Public Prosecutor for the State

versus

LAKHAN @ RAJU @F GAJINDER Respondent

Through: Mr.G.S. Sharma, Advocate for
Respondent with Respondent in
person.

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

HON'BLE MR. JUSTICE G.P. MITTAL

ORDER

10.02.2014

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KAILASH GAMBHIR, J. (ORAL)

Crl. M.A. No. 12904/2012 (condonation of delay)

By this application filed under Section 5 of Limitation Act read with Section 482 of Cr.P.C., the petitioner is seeking condonation of delay of 91 days in filing the accompanying criminal leave to appeal. For the reason stated in the application, the same is allowed and the delay of 91 days in filing the accompanying petition seeking leave to appeal against the impugned judgment is condoned.

Application stands disposed of.

Crl.L.P.No. 361/2012

1. By this petition filed under Section 378 Cr.P.C., the petitioner is seeking leave to appeal against the order dated 2nd December 2011 passed by learned Additional Sessions Judge, Fast Track Court, Rohini, Delhi, thereby acquitting the respondent from the charges framed against him under Sections 396/412 & 302/34 IPC.

2. As per the prosecution case, on the intervening night of 15/16.09.1996, Kumari Diksha was sleeping in her house with her parents and younger brother in the same bed room. At about 3.00 a.m. she heard noise of her mother and woke up and saw someone beating her father. One of the assailants was beating her father with a wooden balli and the other assailants were putting the stolen property in a bag. It was due to the beating by the assailants that her parents were killed. It was stated by Kumari Diksha that she saw one of the assailants standing at the door of the bedroom of their house.

3. To prove its case, the prosecution examined 22 witnesses and on completion of prosecution evidence, the statement of accused under Section 313 of Cr.P.C. was recorded wherein the accused/respondent pleaded his innocence and false implication. In defence, accused-

Respondent had examined Manohar (DW-1).

4. Addressing arguments on behalf of the appellant – State, Ms. Richa Kapoor, Additional Public Prosecutor for the State submits that the learned trial court committed grave illegality in acquitting the respondent for the offences committed by him under Sections 396/412 & 302/34 of IPC, despite the fact that the prosecution has successfully established its case against the respondent based on clear and cogent evidence. Learned APP for the State further argued that there was no reason for the learned trial court to disbelieve the testimony of PW-3, who was an eye witness to the crime and who had clearly identified the accused as one of the robbers, standing at the door of the room, when the other four assailants were involved in committing the robbery and murder of her parents. Learned APP for the State further submitted that other four accused persons have already been convicted by the learned trial court and they were identified by PW-3, but the identification made by PW-3, so far as the present respondent was concerned, was disbelieved by the learned trial court. Learned APP for the State also argued that the learned trial judge has failed to appreciate that PW-3 had no animus or motive to falsely implicate the present respondent who was totally stranger to her

before the said incident.

5. Based on the aforesaid submissions, learned APP for the State strongly urged for granting leave to appeal to the State to challenge the impugned judgment of the learned trial court.

6. Per contra, learned counsel appearing for the respondent strongly refuted the submissions made by learned APP for the State and submitted that no judicial test identification parade was conducted for identifying this accused although judicial test identification parade was conducted so far as other four assailants were concerned. Learned counsel for the respondent argued that as per the own case of PW-3, in all, there were four assailants and this theory of appellant being 5th assailant was introduced by PW-3 later, while deposing in the court. Learned counsel for the respondent also submitted that there is no incriminating evidence produced or proved on record by the prosecution to nail the present accused, connecting him with the commission of the said crime. Counsel for respondent, thus, pleaded that the judgment passed by the learned trial court be upheld by this court.

7. We have heard learned counsel for the parties at considerable length and given our thoughtful consideration to the arguments advanced

by them. We have also perused the records of the learned Trial Court.

8. It is a settled legal position that in an appeal against an order of acquittal, the Appellate Court should not normally interfere with the findings of fact arrived at by the learned Trial Court unless the reasoning given by the learned Trial Court is perverse or illegal on the very face of it. The Appellate Court should also bear in mind that with the acquittal of the accused person by the learned Trial Court, the presumption of innocence of the accused persons has been given the legitimacy. It is also a settled legal position that where there is possibility of arriving at two different conclusions on the basis of the evidence on record, the Appellate Court should not disturb the finding of acquittal arrived at by the Lower Court merely because the other possible view is a preferred view. It is useful here to refer to the judgment of the Hon'ble Apex Court in the matter of ***Rangaiah vs. State of Karnataka*** reported in **AIR 2009 SC 1411**. Relevant paras of the same are reproduced as under:-

"From the above decisions, in our considered view, the following general principles regarding powers of appellate Court while dealing with an appeal against an order of acquittal emerge:

- (1) An appellate Court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded;*
- (2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law;*
- (3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted*

conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasize the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

(4) An appellate Court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

9. In the present case, PW-3 – Kumari Diksha is the star witness of the prosecution as she has witnessed as to what had happened on the intervening night of 15th/16th September 1996 while she was present in her house along with her parents as well as her brother in the same bed room.

10. As per the prosecution, the murder of the parents of the Complainant-Diksha and robbery from their house had taken place on the intervening night of 15th/16th September 1996. As per the first statement of Complainant – Diksha, based on which rukka was sent for registration of FIR, the complainant mentioned about the presence of four assailants and not five. The four assailants have already been convicted by the learned trial court and we have been informed that their appeals are

already pending consideration before the High Court. Surprisingly, there was no reference of any assailant being present outside the room when the actual incident with regard to the robbery and murder had taken place. It is also an admitted fact that no judicial test identification parade was conducted for identifying the present accused by the said eye witness – Diksha and she wrongly stated in her cross-examination that she had identified the accused – Lakhan @ Raju @ Gajinder in the test identification parade conducted in Tihar Jail.

11. Learned trial court has rightly placed reliance on the judgment of the Apex Court in *Raju @ Rajendra vs. State of Maharashtra*, reported in **1997 (3) CC Cases 103(SC)**, wherein the Apex Court took a view that in the absence of any test identification parade proceedings held for identification of accused immediately after his arrest, it is difficult to solely rely upon the identification by witness for the first time in court and that too after a lapse of almost one and half year of the incident and in such circumstances, benefit of doubt can be given to the accused.

12. In the facts of the present case also, no test identification parade proceedings to identify the accused-respondent has taken place after his arrest on 30.04.2001, and the accused was first identified by PW-3,

during the trial on 28.03.2007 i.e. after a long gap of almost six years and therefore the ratio laid down in the case of ***Raju @ Rajendra (supra)*** is fully attracted to the facts of the present case.

13. We have also been informed that that this complainant in the previous trial against four assailants, never introduced the name of fifth person as the assailant, standing near the gate of the room, when the crime was committed.

14. In the aforesaid background of the legal position and on appreciation of the material on record, we do not find any illegality, perversity or infirmity in the impugned judgment passed by the learned trial court acquitting the respondent herein. Consequently, we find no merit in the contentions raised by learned APP for the State and no case is made out for grant of leave to appeal against the impugned judgment.

15. Accordingly, the present petition seeking criminal leave to appeal is dismissed.

KAILASH GAMBHIR, J

G.P. MITTAL, J

FEBRUARY 10, 2014
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