

38

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

+ CRIMINAL LEAVE PETITION No. 428/2012

%

Date of decision: February 23, 2015

STATE (GOVT. OF NCT OF DELHI)

..... Appellant

Through : Mr. Sunil Sharma. APP for the State
with Inspector Mohinder Singh,
SI Dinesh Kumar, PS – Nariana.

Versus

RAJEEV KUMAR @ RAJ KUMAR & Anr. Respondents

Through : Mr. S.N. Pandayidu, Advocate

CORAM :

HON'BLE MR. JUSTICE G. S. SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G. S. SISTANI, J.

1. By the present petition filed under section 378(4) of the Code of Criminal Procedure, the State seeks leave to appeal against the judgment dated 31.05.2011 passed by the learned Additional Sessions Judge in Sessions Case No. 29/1/09 acquitting the respondents of the charges punishable under Section 304/34 of the Indian Penal Code.
2. The facts of the case, as noticed by the learned trial court, are as under:

"On receipt of DD No. 59 B with regard to some quarrel near COD Army/50 Kismo Building near Red Light at Kriby Place, ASI Ashok Kumar alongwith Ct. Bijender reached the spot where blood was found and on enquiry it was revealed that injured had been removed to hospital by PCR van. In the meantime, another DD No.

Crl. L.P No.428/2012

Signature Not Verified

Digitally Signed
By:AMULYA

Page 1 of 16

77D was received from PS Naraina to the effect that one unknown person aged about 25 years was admitted in injured condition at Safdarjung Hospital vide MLC No. 22107/09. On receipt of the aforesaid DD, ASI Ashok Kumar proceeded to the hospital leaving Ct. Bijender at the spot. The doctor had declared the injured to be unfit for statement. No eye witness was found in the hospital. ASI Ashok returned to the spot, where one eye witness namely, Anmol son of Kailash met him and he recorded his statement to the effect that he is working as labourer with contractor Pulkit s/o Rameshwar Shah Contractor who had undertaken iron work in the building and that he had given jhiggi to him for living. That he had brought there his wife Phoolmani 15 days ago from his native village. He was earlier also working with Pulkit and thus he asked for arrears of Rs.2,275/- from Pulkit, on which he told him that no arrears were there and that he could ask Ajay in this regard. That Ajay was also working earlier with Pulkit. On 13.2.2009, Ajay alongwith one of his friends came to Jhiggi of Anmol and they all were having alcohol. In the meantime, Pulkit and his brother in law Rajeev @ Raj Kumar s/o Ramdhani Shah came and Ajay told Pulkit to pay arrears of Anmol. At this Pulkit asked them as to why they were having drinks in Jhiggi and told them to vacate the jhiggi. On which he and his wife vacated the Jhiggi and while they reached nearby water enclosure they found Rajeev & Pulkit standing there, Rajeev @ Raj Kumar was having Saria in his hand and told him that he would teach him a lesson and he gave a saria blow, however, Anmol saved himself and ran away but Ajay's friend (Anurag) who was standing there was given two blows on his head. Thereafter, he along with his wife ran away and someone informed the

police. On the basis of aforesaid statement of Anmol, case FIR No. 28/09 was registered with the PS Naraina under section 308 IPC and necessary investigation was carried out. The statements of witnesses were recorded, site plan was prepared, photographs of the spot were got clicked. The case property and weapon of the offence were seized and deposited in the Malkhana. Both the accused were arrested. On 19.2.2009, the injured succumbed to the injuries and section 304 IPC was added to the case. Further investigation was carried out by inspector Dhirender Nath. The postmortem was got conducted on the dead body of the deceased on 21.2.2009. The exhibits were collected from the hospital. Subsequent opinion was obtained from the autopsy surgeon with regard to the use of weapon. The exhibits were sent to the FSL Rohini and it was undertaken to file FSL report in the court later on. After completion of the investigation charge sheet was filed before the court against both the accused Rajeev @ Raj Kumar and Pulkit Shah under section 304/34 IPC."

3. The prosecution examined 18 witnesses to bring home the guilt of the respondents. The respondents were examined under Section 313 Cr. P.C. wherein they denied all the incriminating evidence led by prosecution and submitted that they had been falsely implicated in this case. Four witnesses were examined by the respondents in their defence.
4. Mr. Sunil Sharma, learned counsel for the State vehemently argued that the judgment dated 21.05.2011 passed by the learned trial court acquitting the respondents is contrary to the facts and law and is liable to be set aside; that the learned Trial Court has overlooked the testimonies of material witnesses, who have supported the case of the prosecution,

particularly the eye witnesses PW13 Phoolmani and PW14 Anmol, who categorically deposed that the injuries on the deceased were caused by the respondent No. 1 in furtherance of his common intention with his brother-in-law respondent No. 2 Pulkit; that learned Trial Court has also failed to appreciate that the medical evidence duly supports the prosecution version and the recovery effected at the instance of the respondents connects them to the offense in question; that though some discrepancies and/or contradictions are found in the testimony of the witnesses but they are natural phenomenon and not fatal to the case of the prosecution.

5. We have heard the counsel for the State and examined the material available on record.
6. In the instant case, the material eye witnesses in whose presence the entire sequence of events took place are PW13 Phoolmani (wife of PW14) and PW14 Anmol, the complainant.
7. PW13 Phoolmani deposed:

"On 13.02.2009, at about 2 p.m., I was present at my house, my husband namely Anmol was also present. At that time, two/three friends of my husband came to our house. They took liquor in our house i.e. in Jhuggi. The Contractor Pulkit and his brother in law namely Rajiv reached at our Jhuggi when my husband and his friends were taking liquor. The Contractor namely Pulkit asked my husband why they were taking liquor in the jhuggi. Some amounts approximately Rs.2200/- was due on the contractor Pulkit of my husband. When my husband asked for the same, the contractor and his brother in law started quarrelling with my husband. Thereafter, the Contractor Pulkit asked to vacate the jhuggi as the jhuggi was belonged to contractor. At about 7 p.m., we vacate the jhuggi with the bag and baggage. When we reached hardly ten/fifteen steps away from our jhuggi the

u✓

accused Rajiv hit a iron rod to my husband but my husband had been succeed to rescue himself and unfortunately that blow hit on the head of friend of my husband, whose name I do not remember. The injured fell down on the spot. My husband and myself left them at the spot and when we proceed towards the main road and when were on the way the accused Rajiv took us back after sometime, police officer reached at the spot. The injured was taken to the Hospital by police officers. Today both accused namely Rajiv and Pulkit are present in the Court. The witness correctly identified the. I can identify the iron rod if shown to me. The length of the rod was about 2 feet."

8. PW14 Anmol Biraj Khakha deposed

"On 13.02.2009, at about 7:00/8:00 p.m. an altercation took place between myself and Pulkit over money transaction. I was working with Pulkit in the year of 2008 as a labourer and Rs.2275/- was due on Pulkit. When I asked of the same amount Pulkit told me that he had already paid the same amount to Ajay. Thereafter, I made a telephonic call to Ajay. After some time Ajay along with one boy reached there. When I asked from Ajay regarding the same amount, Ajay told me that he did not receive the same amount from Pulkit. At that time, Pulkit also asked me to vacate the Jhugi where I alongwith my wife was residing. After vacating the Jhugi where I along with my wife was went to Naraina my friend Ajay and his friend whose name I do not know also accompanied us. When we reached near water tank Army Camp. Pulkit along with Rajeev also reached there and Pulkit exhorted by saying that "In Salo Ko Mar Doo Dubara Paisa Mangne Layak Nahi Rahega.". Rajeev picked up a iron rod, which was lying there, and the same tried hit on our head but I myself and my friend saved ourself but the accused Rajeev succeed to hit the same on the head of Ajay's friend. I also sustained injury during that process. I along with Ajay and myself fled from the spot due to fear. Someone called police by

43

dialling No. Thereafter, one PCR van reached there and the injured was shifted to the hospital by PCR Van. After some time one another PCR also reached there and I along with my wife Phoolmani and my friend were taken to police station PS : Naraiyna by PCR Van. Police Officer made enquiry from me and my statement was recorded in the police station. The same is Ex.P/A, which bears my signature at point 'A'. Today both the accused are present in the Court. The witness correctly identified. I have nothing more to say."

9. On comparing the sequence of events as narrated by PW13 Phoolmani and PW14 Anmol, we find that each one has given a different version of the entire incident. According to PW13 Phoolmani, the fight between respondents and PW 14 and his friend Ajay took place around 2:00 p.m., thereafter they were asked to vacate the Jhuggi, which they did at 7:00 p.m. She further deposed that when they had reached around 10 to 15 steps away from their jhuggi, respondent No.1 upon the instigation of respondent No. 2 attacked her husband PW14 Anmol, whereas per the deposition of PW14 Anmol, the incident took place when he along with PW13 Phoolmani, his friend Ajay and Anurag, another friend of Ajay reached near the water tank Army Camp. In the scaled site plan Ex.PW1/A the spot of blood marked at point A is separated by a 30 feet wide drain from the water tank. PW16 ASI Ashok Kumar has deposed that the accused were arrested based on the complaint of PW14 Anmol and the scaled site plan was prepared at the instance of PW14 Anmol. PW14's denial that the arrest of the respondents and the preparation of site plan at his instance only makes these discrepancies more glaring.
10. PW14 Anmol in his deposition states that he and Ajay were apprehended by the police on 13.02.2009 and taken to Police Station-Naraina where they remained throughout the night. He also stated that PW13 Phoolmani

mm

was brought along with him to the police station on the night of incident and that he was shown the weapon of offense i.e. the iron rod for the first time on 14.02.2009 in the police station and that the respondents Pulkit and Rajeev were also brought in 14.02.2009 at 10:00 am. PW13 Phoolmani deposed that her statement under Section 161 of Code of Criminal Procedure was recorded by the police on the day after the incident i.e. 14.02.2009 at Police Station Naraina. She said that her husband PW14 Anmol and Ajay were taken to the Police station in the PCR Van on the night of 13.02.2009. Thus, we find glaring contradictions in the deposition of PW13 Phoolmani and PW14 Anmol. The testimonies PW16 ASI Ashok Kumar the investigating Officer and PW6 Constable Bijender are also relevant in understanding the sequence of events.

11. When we examine the testimonies of PW6 Constable Bijender Singh and PW16 ASI Ashok Kumar, we notice glaring discrepancies in their statements as well. PW16 ASI Ashok Kumar is the initial Investigating Officer. He testified that on 13.2.2009, at about 8:30 p.m. on receipt of DD No. 59B Ex.PW 2/A he alongwith PW6 Constable Bijender reached at the spot and found no eye witnesses there. He further deposed that at about 10:30 pm he received a telephone call from the Police Station Naraina that injured had already been removed to Safdarjung Hospital. Leaving Ct. Bijender at the spot, PW 16 ASI Ashok Kumar went to Safdarjung hospital and obtained the MLC of the injured but he was declared unfit for the statement. He testified that the injured was in the operation theatre. Thereafter, he returned at the spot at about 12 midnight. The duty officer of PS Naraina informed him over telephone that the PCR van had taken two persons to the Police Station

MS

who were involved in the incident and he requested the duty officer to bring both persons to the spot. That both the persons were brought to the spot in a Gypsy from police station Naraina. He stated that he made enquiry from Ajay and Anmol who were brought from the police station on his request and that he recorded the statement Ex.PW14/A of Anmol on which he prepared rukka Ex.PW16/A and sent the same through Constable Bijender for registration of the case at the police station.

12. PW16 ASI Ashok Kumar in his deposition stated that he called PW14 Anmol and his friend Ajay to the spot of the offence from the Police station for recording their statements. PW13 Phoolmani is also said to have arrived at the scene at around 3:00 am, and her statement recorded at 5:30 am, but this is found contradictory to the statement of PW14 Anmol who states that he and Ajay were in the lockup the whole night and that PW13 Phoolmani was in the police station along with them as she had also been brought along with them in the PCR. The learned Trial Court finds that the name of the deceased has not been mentioned in the Rukka prepared by PW16 ASI Ashok Kumar, which seems improbable as, according to PW16 ASI Ashok Kumar all three eyewitnesses were present at the spot while the rukka was prepared. It must also be noted that Ajay who was an eye witness to the incident and was friends with the deceased Anurag was not examined by the prosecution.
13. PW6 Constable Bijender accompanied PW16 ASI Ashok Kumar to the spot of the incident and in his presence the weapon of offence i.e. iron rod Ex.P1 was recovered and sealed, earth control blood and earth control were lifted and sealed. PW6 testified that the respondents were taken to the police station at around 3:00 am after their arrest. He further

4.6

states that the iron rod was recovered from the jhuggi of respondent No. 1 Rajeev.

14. The learned Trial Court has noted that in the initial charge sheet important details such as the arrest of PW13 Anmol and Ajay, the two drunkards who had caused the injury upon the deceased is missing. DW1 Rajender Kumar Shukla deposed that on his asking the PCR van took the deceased to the hospital and Anmol and Ajay were also taken in the PCR Van. DW1 further deposed that no police officials came to the spot thereafter and respondents were arrested on the next day. The fact that DW1 Rajender Kumar Shukla had reported the said incident was also ignored.
15. The learned Trial Court has taken note of the testimony of DW2 Nand Kishore Paswan who deposed to be near the water tank at COD Cantt. Base Hospital when PW13 Phoolmani, PW14 Anmol and two of their friends were going with their belongings after vacating the jhuggi. He further deposed that PW14 Anmol asked the deceased to carry his luggage but when the deceased refused PW14 Anmol hit the deceased with a brick which resulted in his fall, PW14 Anmol then tried to pull him and beat him. DW2 Nand Kishore also deposed that the next day the police officials of Police Station-Naraina came and threatened the inhabitants of the jhuggies not to disclose anything about the incident.
16. The information about the incident was recorded in PCR form Ex. DW 3/A and call book of PCR Zebra 61 Ex.CW 1/A mentions "*Do Ladko Ne Mouth Par Eet Mar Rakhi Hai, injured Safdarjung Hospital Lekar Ja Rahe Hai. Eet Marne Wale Do Ladke Jisne Sharab Pee Rakhi Hai, Z61 Ke Pass Chhodkar Injured Ko SJH Lekar Ja Rahe Hai, Injured Serious*

Aur Behosh Hai". As per the PCR record the injuries were caused by a brick and the perpetrators of the offence were drunk.

17. It is stated in Ex.DW3/A and Ex.CW1/A as well as by PW8 ASI Rajnath posted at PCR Zebra 47 on the night of 14.02.2009 that at about 8.03 p.m. a call was received regarding a quarrel at Chresto Builders, COD 505, Near Kirby Place. It has further come on record that when they reached the spot and found one person in injured condition lying on the ground with blood on his face and mouth and was not responding. PW8 ASI Rajnath further deposed that 10/15 public persons handed over two drunk persons who had injured the deceased, to the police. Another PCR Van Zebra 61 was called at the spot and apprehended persons were taken to PS Naraina and the injured was admitted to Safdarjung Hospital by Zebra 47.
18. According to Ex.CW1/A the call record of PCR Zebra 61, at 8:50 pm two drunkards, later identified to be PW14 Anmol and his friend Ajay were taken to Police Station Naraina and at 9:45 pm they were handed over in the custody of PW16 ASI Ashok Kumar at PS Naraina.
19. DW3 ASI Jagat Singh proved PCR form Ex.DW3/A the first information according to which an intimation was made to Zebra 61 expressly stating that the injury was caused by a brick and that the two assailants were drunk. He further deposed that he was informed that the officials of PCR Zebra 61 had handed over the assailants to PW16 ASI Ashok Kumar.
20. PW16 ASI Ashok Kumar deposed that he called PW14 and his friend Ajay to the spot of the offence from the Police station for recording their statements and recovery of the weapon of offence ie. the iron rod which is contradictory to the testimony of PW14 who stated that he along with

28

Ajay and his wife PW13 Phoolmani were in police station with him the whole night.

21. The testimonies of DW1 Rajender Kumar Shukla , DW2 Nand Kishore Paswan , and DW3 ASI Jagat Singh when juxtaposed with the narration of events by PW13 Phoolmani and PW 14 Anmol present a contrasting version of events.
22. From the Trial Court findings and evidence on record, we gather that PW10 Dr. Sumit Tellewar performed the post mortem of the deceased and proved his report vide Ex.PW10/A and gave the details of the injuries as follows:
 1. A star shape, stitched, partially healed, lacerated wound measuring 3.5 cm x 3.3 cm X bone deep present over the left parieto occipital region, nine cm away from and slightly above left ear. The underneath parietal bone had a depressed fracture with a linear fracture line extending on to left posterior cranial fossa.
 2. A stitched, partially healed lacerated wound measuring 4cm x 0.3 cm x bone deep present on the left parito occipital region, 1.3 cm below injury no.1 and 10.5cm away from the midline.
 3. Brownish scabbed grazed abrasion measuring 4cm x 4.5cm present on the right side of forehead, 3 cm from midline and 2 cm above mid of right eyebrow.
 4. Brownish scabbed abrasion 10.5 cm x 0.1 cm present on the midline frontal scalp extending to the centre of the forehead.
 5. Brownish scabbed abrasion 2 cm x 2.2cm present on the right cheek, 1 cm lateral and just below the lateral canthus of the right eye.
 6. Brownish scabbed abrasion 1.5 cm x 0.5 cm present on the right side of face, 2.5cm below outer canthus of right eye and 3.8 cm lateral to ala of nose.

4.3

7. Brownish scabbed grazed abrasion 7.5cm x 4cm present on the left side of face extending on to the left temple area.
8. Brownish colour bruise measuring 2.2 cm x 1cm present on left elbow joint.

23. A subsequent opinion Ex.PW10/C was given by PW10 Dr. Tellewar, who determined that there were 8 antemortem injuries on the body of the deceased. Injuries Nos. 1 and 2 were held to be sufficient to cause death in the ordinary course of nature. According to the prosecution the weapon of offence was Ex.P-1 i.e. iron Rod/Saria. In the opinion of PW10 Dr. Tellewar an iron rod may have caused the injuries. PW10 Dr. Tellewar during his cross examination stated that injury No. 1 was star shaped and the edges of the injuries were crossed i.e. having multiple dimensions. PW10 admitted that injury No.1 and 2 may be caused by objects like lathi, stone, rod, bricks etc. In the opinion of PW10 injury No. 2 could be possible if one is forcibly thrown or pushed on the ground on the posterior aspect of the body and hit by a blunt object and injury No. 1 could be caused by an object like a brick being hit on the head of the deceased. PW10 Dr. Tellewar further opined that injury Nos. 3 and 7 could be possible due to rubbing or dragging of body parts against a hard surface or object and injury Nos. 4, 5, 6 and 8 were all caused by impact of blunt force. The prosecution failed to explain how the deceased sustained injuries No. 3, 4, 5, 6, 7 and 8.
24. As per the case of the prosecution the weapon of offence used in the present case is an 'Iron Rod' whereas in opinion of PW10, the injuries Nos. 1 & 2 may be caused by an object like lathi, stone, rod, brick etc. PW10 Dr. Tellewar also did not differ with the possibility that injury No.1 could be caused by an object like a brick. Rather keeping in mind

the testimony of DW2 Nand Kishore Paswan, the nature of injuries sustained by the deceased are best explained, who deposed that *"They were highly drunk and they were unable to hold their belongings. Anmol asked his friend to carry his (Anmol's) luggage which he refused. On that Anmol hit his friend (whose name I later on came to know as Anurag) with brick. The injured fell down and Anmol tried to pull and beat him further."*

25. The FSL report Ex. PW 17/A states that no blood was found in the earth sample from the spot of incident and on the iron rod and further the blood grouping result has not been elaborated upon. Given that in Ex.DW 3/A PCR form and record of call book of Zebra 61, it was explicitly stated that the injured has been hit with a brick on the mouth, the collection of blood stained brick surrounding the scene of crime would have been imperative and that no such sample of brick was collected or examined and the same is found to be detrimental to the case of the State.
26. The law with regard to the grant of leave is well settled by a catena of judgments. Leave to Appeal can be granted only where it is shown that the conclusions arrived at by the Trial Court are perverse or there is misapplication of law or any legal principle. The High Court cannot entertain a petition merely because another view is possible or that another view is more plausible. In *Arulvelu and Anr. vs. State 2009 (10) SCC 206*, while referring with approval the earlier judgment in *Ghurey Lal vs. State of Uttar Pradesh, (2008) 10 CRL.L.P.No.764/2013 Page 6 of 7 SCC 450*, the Supreme Court reiterated the principles which must be kept in mind by the High Court while entertaining an Appeal against acquittal. The principles are:

"1. The accused is presumed to be innocent until proven guilty. The accused possessed this presumption when he was before the trial court. The trial court's acquittal bolsters the presumption that he is innocent.

2. The power of reviewing evidence is wide and the appellate court can re-appreciate the entire evidence on record. It can review the trial court's conclusion with respect to both facts and law, but the Appellate Court must give due weight and consideration to the decision of the trial court.

3. The appellate court should always keep in mind that the trial court had the distinct advantage of watching the demeanour of the witnesses. The trial court is in a better position to evaluate the credibility of the witnesses.

4. 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.

5. If two reasonable or possible 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.

27. In ***Sohrab and Another v. The State of Madhya Pradesh AIR 1972 SC***

2020, the Apex Court has opined that

'.. under the Code of Criminal Procedure, the High Court has full power to review at large the evidence upon which the order of acquittal is founded and to reach the conclusion that on proper appreciation of the evidence, the order of acquittal should be reversed. No limitation should be placed upon that power unless it is expressly stated in the Code. After so stating, the two-Judge Bench expressed thus: -....But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court, should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a

52

presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses...'

In ***Harijana Thirupala v. Public Prosecutor, High Court of A.P., Hyderabad 2002 CriLJ 3751***, the Court held;

"Doubtless the High Court in appeal either against an order of acquittal or conviction as a court of first appeal has full power to review the evidence to reach its own independent conclusion. However, it will not interfere with an order of acquittal lightly or merely because one other view is possible, because with the passing of an order of acquittal presumption of inn decree in favour of the Respondent gets reinforced and strengthened. The High Court would not be justified to interfere with order of acquittal merely because it feels that sitting as a trial court would have proceeded to record a conviction; a duty is cast on the High Court while reversing an order of acquittal to examine and discuss the reasons given by the trial court to acquit the Respondent and then to dispel those reasons. If the High Court fails to make such an exercise the judgment will suffer from serious infirmity".

In an another case of ***Ramanand Yadav v Prabhunath Jha 2004 Cri. L.J. 640***, this Court observed that

"There is no embargo on the appellate Court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the Respondent is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the Respondent and the other

to his innocence, the view which is favourable to the Respondent should be adopted. The paramount consideration of the Court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate Court to re-appreciate the evidence in a case where the Respondent has been acquitted, for the purpose of ascertaining as to whether any of the Respondent committed any offence or not".

28. 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. We are of the view that the trial court has given detailed reasons for disbelieving the prosecution case and we are not inclined to take a different view. We find no infirmity in the judgment of the trial court. The acquittal recorded by the trial court is based on reason and thus, there are no grounds to grant leave to appeal. Consequently, the leave petition is dismissed.


G. S. SISTANI, J.


SANGITA DHINGRA SEHGAL, J.

FEBRUARY 23, 2015

gr