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IN THE HIGH COURT OF DELHI AT NEW DELHI

+ CRIMINAL LEAVE PETITION No. 276/2016

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Judgment dated 20th May, 2016

STATE (GOVT. OF NCT OF DELHI)

..... Petitioner

Through : Ms. Aashaa Tiwari, APP for the State

versus

SUSHIL PRASHAD YADAV

.....Respondent

Through : None

CORAM :

HON'BLE MR. JUSTICE G. S. SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G. S. SISTANI, J. (ORAL)

Crl.M.A.8321/2016 (exemption)

1. Exemption allowed subject to all just exceptions.
2. Application stands disposed of.

Crl.M.A.8320/2016 (delay)

3. This is an application under Section 5 of the Limitation Act read with Section 482 of the Code of Criminal Procedure filed by the State seeking condonation of delay of 24 days in filing the present leave petition.
4. Having regard to the submissions made and in the interest of justice, the delay in filing the present leave petition is condoned.
5. Application stands disposed of.

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CRL.L.P.No. 276/2016

6. By the present criminal leave petition filed under section 378 (3) of the Code of Criminal Procedure, the State seeks leave to appeal against the judgment dated 12.01.2016 passed by Ms. Shail Jain, Special Judge, NDPS 02, Central District, Tis Hazari, Delhi in Sessions Case No. 58/2013 whereby the respondent (accused before the trial court) was acquitted of the charge punishable under Section 302 of the Indian Penal Code.
7. The facts of the case, as noticed by the learned trial court, are as under :

"On the intervening night of 09-10/03/2013, Inspector Mahender Kumar Mishra, ATO received a call and thus witness alongwith Insp. Mahender Kumar Mishra, SI Abhishek Ct. Rajbir and Ct. Suresh went in front of House no. F-2, Shastri Nagar, Delhi in Tata-407. They noticed that on the footpath one riksharehri was standing and one dead body of a male person aged about 40-45 yrs was lying in that riksha rehri. One ct. Devender was already present at the spot. IO inquired from Ct. Devender and recorded his statement. IO made his endorsement on the same and handed over the original tehrir to Ct. Suresh for getting the case registered. Thereafter, IO prepared site plan at the instance of Ct. Devender. Crime team officials were also called at the spot who inspected the scene of crime and took the photographs. IO lifted blood on gauge, bloodstained cement and earth control from the spot. On inquiry it was revealed that the name of deceased was Vikram and he used to ply rickshaw and used to sleep near the spot itself. The dead body of deceased Vikram was sent to Mortuary. IO had also taken one bloodstained jute borrry and one piece of coloured plastic, having bloodstain in

possession. Both these articles were also lying in the said rickshaw. IO has also taken the rickshaw rehri into his possession. One person namely Manoj met with the IO and stated that quarrel has taken place between Vikram and Sushil. Thereafter they left the spot in search of accused alongwith eye witness Manoj. When they reached at Indra Park, Manoj pointed towards one person as Sushil and stated that he is the same person who quarreled with deceased Vikram and killed him. Accused Sushil was arrested by the IO vide arrest memo Ex. PW15/A. IO conducted personal search of accused vide memo Ex.15/B."

8. Upon committal of the case to the court of Sessions, the respondent was charged with having committed the offence under Section 302 of the Indian Penal Code to which he pleaded not guilty and accordingly, the prosecution was called upon to lead evidence.
9. To bring home the guilt of the respondent, the prosecution examined 17 witnesses in all. The statement of the respondent was also recorded under Section 313 of the Code of Criminal Procedure wherein he denied all the incriminating evidence led by the prosecution and reiterated his innocence and claimed to have been falsely implicated in the present case. He further stated that no recovery was made at his instance and he was lifted from the main road by the police officials. The respondent chose not to lead any defence witness and claimed trial.
10. Ms. Aashaa Tiwari, learned counsel for the State contended that the acquittal of the respondent on the grounds relied upon by the learned trial court is perverse, unjustified and not free from conjectures and surmises.

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11. Learned Counsel for the State further contended that the trial court has failed to appreciate that there are no major contradictions in the testimonies of the relevant witnesses i.e. PW4, PW15, PW17 warranting acquittal of the respondent and the minor contradictions, discrepancies, variations and improvements are bound to occur in detailed narration of facts by a witness and the testimony of sole eye witness Manoj Kumar PW15 was sufficient to prove the guilt of the respondent.
 12. Learned counsel for the State further contended that the trial court has erred in recorded its findings that the delay of 22 days in conducting the postmortem suggests that there is mischief on the part of the Investigating Officer and time was taken to frame the respondent.
 13. Learned counsel for the State relied upon the arrest of the respondent contending that the arrest was proper and without any coercion or oppression by the Investigating Officer and further relied upon the recovery of wooden plank to prove the guilt of the respondent.
 14. Learned counsel for the State further contended that the trial court has failed to take into notice that the FSL report clearly suggests that there was blood on the weapon of offence i.e. wooden plank/fatta.
 15. We have given our thoughtful consideration to the contentions urged by the counsel for the State and perused the impugned judgment and material placed on record.
 16. Before delving into the arguments raised by the learned counsel for the State, it is relevant to discuss the testimonies of PW4, PW15 and PW17.

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17. PW15 Manoj Kumar, the only eye witness deposed that Sushil and Vikram used to sleep on the footpath of Shastri Nagar along with him and that on the date of incident Sushil and Vikram consumed liquor, after which Sushil demanded money from Vikram on which Vikram gave beatings to Sushil with a wooden plank. Thereafter, Sushil left the spot. After sometime, he again returned and repeatedly gave wooden plank blows on the face of the Vikram and escaped from the spot. PW15 Manoj Kumar deposed that Sushil was apprehended from Indra Park, Shastri Nagar, Delhi on his pointing out.
18. Another public witness PW4 S. K. Sharma deposed that on the date of incident at about mid night Vikram who was a vagabond came to his hotel and he saw that blood was oozing from his head and Vikram had asked him for his mobile phone to make a call.
19. PW16 SI Sushil Kumar deposed that on the intervening night of 9th - 10th March, 2013 it was noticed that a dead body of a male person aged about 40-45 years was lying in the riksha rehri parked on the footpath. Constable Devender was already present there. Inquiry was made from him and his statement was recorded which was sent to the police station for registration of the case. Investigating Officer prepared the site plan on the pointing out of Constable Devender. Crime Team inspected the spot and took the photographs and lifted blood on gauge, bloodstained cement and earth control from the spot. Inquiries revealed that the name of the deceased was Vikram who used to ply rickshaw and sleep on the footpath. According to PW16, an eyewitness namely Manoj PW15 met him on the spot and narrated the entire incident.

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20. On a close scrutiny of the witnesses examined by the prosecution as discussed above, it appears that there are several lacunae in the case of the prosecution which does not inspire confidence and diminish the credibility of the prosecution case.
21. According to PW15 Manoj Kumar, Sushil and Vikram had consumed liquor and thereafter Sushil demanded money from Vikram. Vikram gave beatings to Sushil with a wooden plank consequently, Sushil left the spot. Thereafter, Sushil again returned and inflicted injuries on the face of the Vikram with a wooden plank which resulted in his death. The prosecution has failed to render any explanation as to how PW15 Manoj Kumar failed to report the matter when Vikram had hit Sushil for the first time. No explanation has also come forth as to how PW15 Manoj failed to report the matter to the police when Sushil had returned for the second time and hit Vikram with the wooden plank. Had the story of the prosecution been true then the dead body of the deceased would have been found at the place of incident. However, it is in evidence that the dead body of the deceased was recovered on the rickshaw rehri on the next day by PW 16 in the presence of Ct. Devender. Furthermore, PW4 Sushil Kumar Sharma put forth a different story that Vikram had come to his hotel at about midnight and blood was oozing from his head and he demanded his mobile phone to make a call. It is further noteworthy that PW15 nowhere mentioned that any injury was caused on the head of the deceased by Sushil rather his testimony is contradictory to the deposition of PW4.
22. According to the case of the prosecution, the death of the deceased came to light on 10.03.2013 and even though the respondent had been

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arrested on the same day but the post mortem of the dead body of the deceased was conducted on 21.03.2013. There is a total contradiction in evidence on record as in Crime Report Ex.PW8/A it was mentioned "*Unknown dead body*" whereas PW2 had identified the dead body as of Vikram and the statement of PW15 was recorded on 10.03.2013. Strange enough the prosecution has failed to explain as to how PW15 Manoj Kumar was present at the spot and witnessed the quarrel between Sushil and Vikram. No explanation has come forth as to how the matter was reported to the police. There is no explanation to the fact that PW15 Manoj Kumar witnessed the incident at mid-night and the FIR was recorded after a delay of 10 hours on the next day at about 9:30 a.m. The prosecution further failed to connect that the death of the deceased was caused by wooden plank as the blood on wooden plank does not match with the blood of the deceased. Furthermore, Dr. Akash Jhanjee PW 10 who conducted the post mortem on the body of the deceased failed to give any opinion regarding the injuries suffered by the deceased. It is highly improbable that the respondent was found sitting in blood stained clothes close to the place of incident after he had caused the death of deceased Vikram. Moreso, FSL report Ex.PX does not prove that the clothes belong to the respondent which he was wearing at the time of the incident. Thus, the report of the FSL is inconclusive.

23. In the light of the aforesaid contradictions and lacunae in the prosecution case, we have no hesitation to come to the conclusion that prosecution case does not inspire any confidence to bring home the guilt of the respondent in respect of the charge levelled against

him. The presence of PW15 at the spot casts a serious doubt that he witnessed the alleged incident, rather he appears to be a planted witness.

24. 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.

25. In ***Sadhu Saran Singh Vs. State of UP*** reported in 2016 (2) SCALE 629, the Hon'ble Apex Court observed :

*"18. Generally, an appeal against acquittal has always been altogether on a different pedestal from that of an appeal against conviction. In an appeal against acquittal where the presumption of innocence in favour of the accused is reinforced, the appellate Court would interfere with the order of acquittal only when there is perversity of fact and law. However, we believe that the paramount consideration of the Court is to do substantial justice and avoid miscarriage of justice which can arise by acquitting the accused who is guilty of an offence. A miscarriage of justice that may occur by the acquittal of the guilty is no less than from the conviction of an innocent. This Court, while enunciating the principles with regard to the scope of powers of the appellate Court in an appeal against acquittal, in the case of ***Sambasivan and Ors. v. State of Kerala : (1998) 5 SCC 412***, has held:*

The principles with regard to the scope of the powers of the appellate Court in an appeal against acquittal are well settled. The powers of the appellate Court in an appeal against acquittal are no less than in an appeal against conviction. But where on the basis of evidence on record two views are possible the appellate Court cannot be

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substitute its view in the place of that of the trial Court. It is only when the approach of the trial Court in acquitting an accused is found to be clearly erroneous in its consideration of evidence on record and in deducing conclusions there from that the appellate Court can interfere with the order of acquittal.

19. This Court, in several cases, has taken the consistent view that the appellate Court, while dealing with an appeal against acquittal, has no absolute restriction in law to review and relook the entire evidence on which the order of acquittal is founded. If the appellate Court, on scrutiny, finds that the decision of the Court below is based on erroneous views and against settled position of law, then the interference of the appellate Court with such an order is imperative.

*20. This Court in **Chandrappa v. State of Karnataka : (2007) 4 SCC 415**, after referring to a catena of decisions, has laid down the following general principles with regard to powers of the appellate Court while dealing with an appeal against an order of acquittal:*

42. From the above decisions, in our considered view, the following general principles regarding powers of the 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 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 emphasise 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 is 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.

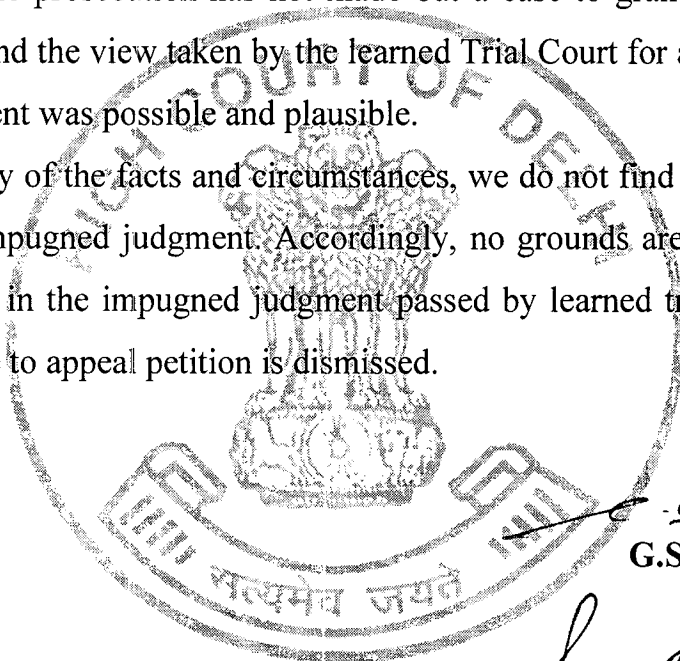
26. In the case of ***State of Madhya Pradesh v. Dal Singh & Ors.***, reported in **2013 (8) SC 625**, the Hon'ble Supreme Court has held that the appellate court while considering the appeal against the judgment of acquittal shall interfere only when there are compelling and substantial reasons for doing so and if the judgment is unreasonable and relevant materials have been unjustifiably ignored, it would be a compelling reason for interference.

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27. In *Mrinal Das and Ors. Vs. The State of Tripura* reported in *AIR 2011 SC 3753*, the Hon'ble Apex Court held that :

"It is clear that in an appeal against acquittal in the absence of perversity in the judgment and order, interference by this Court exercising its extraordinary jurisdiction, is not warranted. However, if the appeal is heard by an appellate court, being the final court of fact, is fully competent to re-appreciate, reconsider and review the evidence and take its own decision. In other words, law does not prescribe any limitation, restriction or condition on exercise of such power and the appellate court is free to arrive at its own conclusion keeping in mind that acquittal provides for presumption in favour of the accused. The presumption of innocence is available to the person and in criminal jurisprudence every person is presumed to be innocent unless he is proved guilty by the competent court. If two reasonable views are possible on the basis of the evidence on record, the appellate court should not disturb the findings of acquittal. There is no limitation on the part of the appellate court to review the evidence upon which the order of acquittal is found and to come to its own conclusion. The appellate court can also review the conclusion arrived at by the trial Court with respect to both facts and law. While dealing with the appeal against acquittal preferred by the State, it is the duty of the appellate court to marshal the entire evidence on record and only by giving cogent and adequate reasons set aside the judgment of acquittal. An order of acquittal is to be interfered with only when there are "compelling and substantial reasons" for doing so. If the order is "clearly unreasonable", it is a compelling reason for interference. When the trial Court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of ballistic experts etc., the appellate court is competent to reverse

the decision of the trial Court depending on the materials placed."

28. While deciding the present leave to appeal, the aforestated principles culled out by the Apex Court are to be kept in view. In the present case from the evidence which has emerged on record, we conclude that the learned Trial Court has rightly observed that the prosecution failed to prove its case against the respondent beyond reasonable doubt, the prosecution has not made out a case to grant the leave to appeal and the view taken by the learned Trial Court for acquitting the respondent was possible and plausible.
29. In totality of the facts and circumstances, we do not find any infirmity in the impugned judgment. Accordingly, no grounds are made out to interfere in the impugned judgment passed by learned trial court and the leave to appeal petition is dismissed.



G.S. Sistani
G.S.SISTANI, J

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SANGITA DHINGRA SEHGAL, J

May 20, 2016
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