

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ CRIMINAL LEAVE PETITION No. 346/2014

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Date of decision: 4th March, 2015

STATE (GOVT. OF NCT OF DELHI) **Appellant**
Through : Mr. Feroz Khan Ghazi, APP for the State.
versus
RAJ KUMAR & ANR. **Respondents**
Through : Mr. I.A. Khan, Advocate.

CORAM :
HON'BLE MR. JUSTICE G. S. SISTANI
HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

SANGITA DHINGRA SEHGAL, J.

1. By the present leave petition filed under section 378 of the Code of Criminal Procedure, the state seeks leave to appeal against the judgment dated 25.04.2013 passed by the learned Additional Sessions Judge, Delhi in sessions case No. 83/2010, whereby the respondents (accused before the trial court) were acquitted of the charges punishable under section 302/392/120B/411/34 of the Indian Penal Code.
2. The facts of the case, as noticed by the learned trial court, are as under:

“ DD No. 16 A was lodged on 22.04.10 at 6:45 PM in PS Vivek Vihar regarding the dead body of aged female drenched in blood lying at house No. D-2, Vivek Vihar. IO Inspector Drall (PW20) on receiving information regarding this DD reached at

the spot. From the toilet on the ground floor at D-2 Vivek Vihar dead body of Pushpa Seim was recovered. Articles in the adjoining room were scattered as if the house was ransacked. PW3 Vinay (who was a tenant in the house of deceased) met police at the spot and he gave number of mobile phone of PW1 Darpan Wadhwa, nephew of the deceased. PW1 was called at the spot and the IO recorded his statement. IO PW20 prepared Rukka and after doing endorsement on the statement of PW1, got FIR registered under section 302 IPC. IO PW20 seized various articles at the spot including blood stained knife and another blood stained knife with broken handle. Crime team was called at the spot. The dead body was shifted to Subzi Mandi Mortuary and was got postmortemed.

3. On 23.04.2010 respondent no.1 Raj Kumar was arrested from his house. During interrogation he made a disclosure statement and got arrested his co accused respondent no.2 Satish Pal. Further respondent no.1 Raj Kumar got recovered his blood stained clothes from the almirah of his room, which he was wearing at the time of the murder. He also got recovered a mobile phone make Nokia without SIM Card belonging to the deceased.
4. After investigation a chargesheet was filed against the respondents under Section 302/392/120B/411/34 IPC to which they pleaded not guilty and claimed trial.
5. To prove its case and to bring home the guilt of the respondents, the prosecution examined 22 witnesses. The material witnesses are PW3 Vinay and PW 17 Mehmooda as they are the witnesses of last seen who had seen both the respondents in the house of the deceased Smt.

Pushpa Seim sometime prior to the incident. PW3 Vinay in his testimony deposed that he is residing as a tenant of the deceased for the last two years and on 22.04.2010 at about 5:30 PM, he returned back to his rented room from his job and started waiting for Smt. Pushpa Seim (deceased). After waiting for about 30 minutes, he entered into the portion of the deceased Smt. Pushpa Seim and on entering the bedroom, found all the articles of the room lying scattered and boxes lying open. PW3 further deposed that on coming out of the bedroom, he opened the door of the bathroom and saw blood on the floor and dead body of Smt. Pushpa Seim lying in the bathroom. PW3 next deposed that he informed Sh.Wadhwa, brother of the deceased from his mobile phone and the police recorded his statement on 24.04.2010 wherein he told the police that he had seen both the respondents for the first time on 18.04.2010 at about 8 pm in the house of the deceased.

6. PW17 Mehmooda deposed that she is working as a part time maid and had come to the house of Smt. Pushpa (deceased) on 22.4.2010 at about 11:30 AM and at that time Smt. Pushpa was present with her tailor who was taking measurements for the curtains. PW17 further deposed that on 24.04.2010 she came to know from police officials that someone had murdered Smt. Pushpa, her statement was recorded and she identified respondent no.1 Raj Kumar as the same person who was taking measurements for the curtains in the house of the deceased when she had last worked in her house.

7. The learned Trial Court while rejecting the testimonies of PW 3 Vinay and PW17 Mehmooda as last seen witnesses observed that PW3 Vinay does not fit in the category of last seen witness as he had seen both the respondents in the house of the deceased Smt. Pushpa first and last time on 18.04.2010 at about 8pm and not any time after that. Further Trial Court observed that PW17 Mehmooda cannot be a witness of last seen as she had seen respondent no.1 Raj Kumar on 22.04.2010 taking measurements in the house of the deceased at about 11:30 AM on the day of the incident after which he left.
8. Regarding the time of death, Trial Court observed that there is contradiction when the deceased Smt. Pushpa was murdered because as per post mortem report Ex.PW15/A the time of death of the deceased is between 8:00 PM to 2:00 AM on the intervening night on 21-22.04.2010, but as per PW3 Vinay, time of death of deceased was before 5:30 PM when he returned back to his rented room in the house of the deceased.
9. With regard to recovery of mobile phone the learned Trial Court has observed that no explanation has been given by the prosecution as to why the mobile phone recovered from the possession of respondent no. 1 was not put to test identification parade, also there is no evidence that the mobile phone recovered was the one owned or possessed by the deceased Smt. Pushpa. Further, with regard to the recovery of blood stained clothes of respondent no. 2 which were sent to FSL for examination the Trial Court observed that FSL report Ex.

PW22/A and B is inconclusive as it was found having human blood, but no reaction was found regarding the grouping of the blood.

10. The learned counsel for the State submits that the judgment dated 25.04.2013 of acquittal passed by the learned Trial Court is contrary to law and facts of the case, thus the same is liable to be set aside
11. Mr. Feroz Khan Ghazi, the counsel for the State contended that the case of the prosecution is based on last seen theory, but the learned Trial Court failed to appreciate the 'last seen' evidence produced by PW3 Vinay and PW17 Mehmooda who are independent witnesses and identified the respondents.
12. The Counsel for the State argued that the Trial Court erred in disbelieving the recovery of the mobile phone from respondent no.2 Satish Pal at the instance of respondent no.1 Raj Kumar merely because a test identification parade (TIP) of the mobile was not done for the same . Reliance was placed by the counsel for the *State on Malkan Singh & Ors. V. State (203) 5 SCC 746* wherein it was held that the evidence of identification in court even without insisting on TIP or other corroboration is held to be good and admissible in evidence.
13. The Counsel for the State contends that the learned Trial Court erred in not appreciating that there is recovery of blood stained clothes at the instance of respondent no.1 and FSL report confirms the presence of human blood.
14. The counsel for the State contends that the learned Trial Court failed to consider and appreciate the fact that both the respondents conspired

together to commit the offence as the call details of the respondents prove their presence near the place of the crime and on the day of incident they had exchanged 39 phone calls.

15. The counsel for the State further submits that the learned Trial Court erred in stating that the motive is not proved. Elaborating his argument further counsel for the State contends that the testimonies of the prosecution witnesses and the photographs of the scene of the crime prove that the crime was committed with the motive of robbery. Hence counsel urged that the order of acquittal passed by the learned trial court be set aside.
16. We have heard the learned counsel for the State and perused the impugned judgement along with the evidence placed on record. We are of the view that the Trial Court rightly rejected the depositions of last seen witnesses Vinay PW3 and Mehmooda PW17 as statement of Vinay PW3 is silent if he had seen the respondents in the house of the deceased after 18.04.2010. Similarly the statement of Mehmooda PW17 does not inspire confidence because PW17 is not sure if it was 22.04.2010 when she last worked in the house of the deceased and saw respondent no.1 Raj Kumar and during cross examination, PW17 stated that she had left job of the deceased 4-5 months prior to the incident. Thus the testimonies of PW3 Vinay and PW 17 Mehmooda cannot be relied upon.
17. Also there is no evidence led by the prosecution to establish that the deceased was murdered around noon time. The time gap when Mehmooda PW17 saw respondent no.1 Raj Kumar in the house of the

deceased and when deceased Smt Pushpa was murdered was ranging to more than 3 to 4 hours. Thus it cannot be said that the time gap is small and this makes the last seen theory redundant. Thus, the prosecution failed to prove circumstances of last seen against the respondents.

18. In the case of in ***Bodhraj v. State of Jammu and Kashmir (2002) 8 SCC*** it was observed that:

'The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased was 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 in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons 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.'

19. With regard to the blood stained clothes recovered at the instance of respondent, the FSL report is not helpful in connecting the respondents with the alleged crime as the blood group has not been matched. Also the fingerprints lifted from the scene of the crime have not been matched with those of the deceased. As to the recovery of the mobile phone of the deceased from respondent no.2, mere identification of the mobile phone by the nephew of the deceased is insufficient, especially given that no judicial TIP was conducted, nor

were the particulars of the recovered mobile phone matched with those of the deceased.

20. The counsel for the State raised the contention that the motive of the crime is said to be the conspiracy to loot and kill, but there is no clinching evidence on record to prove the existence of such a conspiracy between the respondents as no item other than the mobile phone of the deceased was missing from her house, even the jewellery which the deceased was wearing was intact. In ***Rishi Pal v. State of Uttarakhand (2013)12SCC551*** it was held that:

‘..It is fairly well-settled that while motive does not have a major role to play in cases based on eye-witness account of the incident, it assumes importance in cases that rest entirely on circumstantial evidence..’

21. We find that the learned Trial Court has rightly acquitted the respondents as the prosecution has failed to establish the guilt of the respondents. Further, in the case of ***Swaran Singh Ratan Singh Vs. State of Punjab AIR 1957 S.C. 637***, it was held that in criminal cases mere suspicion, however, strong, cannot take place of proof.
22. The court must take into account the presumption of innocence of the accused and the acquittal by the trial court adds to the presumption of his innocence. In ***Ramanand Yadav v. Prabhunath Jha 2004CriLJ640***, this Court observed :

"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 accused 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 accused and the other to his innocence, the view which is favourable to the accused 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 accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not".

23. In the present case, the prosecution relied on certain chain of circumstances to bring home the guilt of respondents. The law with regard to circumstantial evidence has been discussed by the Apex Court in the case of ***Sharad Birdhichand Sarda v. State of Maharashtra 1984 (4) SCC 116*** wherein it was held that a case based on circumstantial evidence must satisfy, the following tests:

- (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, 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.

24. After careful examination of the sequence of events narrated and relied by the prosecution we are of the opinion that trial court has rightly disbelieved the prosecution version as it failed to complete the chain of evidence in proving the guilt of the respondents.
25. 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. 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.

26. 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 the trial court has given detailed reasons for disbelieving the prosecution version of 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 petition. This petition for leave stands dismissed.

SANGITA DHINGRA SEHGAL, J

G.S. SISTANI, J

MARCH 4 , 2015

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