

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

+ CRIMINAL LEAVE PETITION No. 168/2015

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Date of decision: 23rd March 2015

STATE (GOVT. OF NCT OF DELHI)

..... Appellant

Through: Feroz Khan Ghazi, APP for the State

versus

RAVI @ DABBU & ORS.

..... Respondents

Through: None

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(3) of the Code of Criminal Procedure, the state seeks leave to appeal against the judgment dated 17.12.2014 passed by the learned Additional Sessions Judge in Sessions Case No. 96/2011, whereby the respondents (accused before the trial court) were acquitted of the charges punishable under section 302/397/34 of the Indian Penal Code.
2. The facts of the case, as noticed by the learned trial court, are as under:

“On 08.08.2011, information was received at P.S. Timarpur vide D.D.No. 14 A with respect to a person lying in an injured condition near road going from Nehru Vihar towards Camp adjoining the drain. The PCR call was marked to SI Ishwar Singh who along with H.C. Suresh Kumar

reached at the place of occurrence where it transpired that the injured had been taken to the hospital by PCR van. Thereafter S.I. Ishwar Singh reached at Sushruta Trauma Centre and obtained the MLC of injured wherein doctor had declared him unfit for statement. No eye witness to the incident was found despite efforts and therefore DD was kept pending. On 10.08.2011, FIR u/s 308 IPC was registered subsequent to which information regarding death of injured was received. During further investigation of the case, postmortem examination on dead body of deceased was got conducted and dead body was handed over to relatives of deceased. Section 308 IPC was converted into section 302 IPC and during further investigation of the case, IO recorded statements of witnesses, arrested all the accused persons, prepared site plan, recovered the robbed articles belonging to deceased at instance of accused persons, sent the exhibits to FSL for expert opinion and after completion of investigation, instant charge sheet u/s 302/397/411/34 IPC was filed in the court.”

3. The respondents were examined under Section 313 Cr. P.C. wherein they denied all the incriminating evidence led by the prosecution and submitted that they had been falsely implicated in this case.
4. To bring home the guilt of the respondents and to prove its case, the prosecution examined 26 witnesses. PW2 Sh. Vinod Thapar is the Manager of Rhudburg Pharmaceuticals Ltd where the deceased was working as a Field Officer. PW2 in his testimony deposed that on his instructions deceased had gone to the house of PW1 Kasturi Lal Aggarwal to collect the documents of civil suit titled “Abhay Kumar Aggarwal vs. Kamlesh Kumar & Ors.” PW5 is Abhay Aggarwal on

whose request PW2 had sent the deceased to the house of PW1. PW5 deposed that on 08.08.2011, he had sent deceased to the house of PW1 for collecting certain documents and he was in touch with the deceased over phone till 3:00pm but thereafter he had no conversation with the deceased. PW7 Bhupinder Singh is a passerby who found the deceased lying in an injured condition and informed the police.

5. Upon investigation by the police vis-a-vis the IMEI number of the deceased's mobile, it was found that the cell phone of the deceased was sold to PW8 Salman@Aaquil at around 5:00-5:15 PM on 08.08.2011 by the respondents Chintoo@Suraj, Dabbu @Ravi and Dilip. Prosecution relied heavily on the deposition of PW8 Salman @Aaquil. PW8 in his testimony deposed that on 08.08.2011 at about 5/5:15pm, the respondents informed him that they want to sell the mobile phone and PW8 agreed to purchase the same for Rs 500, out of which Rs 300 was paid and remaining balance was to be paid within 1-2 days. PW8 further deposed that PW10 provided him with the sim to be used in the phone but since the mobile phone was not working properly, on 10.08.2011 at about 10pm when the respondents came to take the balance amount of Rs 200, PW8 returned the mobile phone to them. PW8 next deposed that on 12.08.2011, he was approached by police officials and in the police station he identified the respondents from their photographs in the computer as the persons from whom he purchased the mobile phone and further he deposed that he was present during the arrest of respondent no.1Ravi @ Dabbu and respondent no. 2 Suraj @ Chintu at night from Khyber Pass, Civil Lines, Delhi.

6. PW24 SI Arun Tyagi in his testimony deposed that respondent no.1 Ravi @ Dabbu and respondent no. 2 Suraj @ Chintoo, on identification by PW8 were apprehended at about 3:00pm from Khyber Paas, Civil Lines, Delhi and both the respondents admitted their role in commission of the crime and that they had robbed and hit the deceased with a stone piece/malwa. PW24 further deposed that from the search of respondent no.1 Ravi @ Dabbu, identity card and metro card of the deceased was recovered and from the search of respondent no. 2 Suraj @ Chintoo, mobile phone of make Nokia 2300 was recovered which was earlier sold to PW8.
7. With regard to the testimonies of PW8 and PW24, the learned trial court observed that there is contradiction regarding the arrest of the respondents. PW24 in his testimony deposed that respondent no.1 and respondent no.2 were arrested at about 3:30pm on 13.08.2011 whereas PW8 in his testimony deposed that he was taken to the police station for enquiry on 12.08.2011 at 9:30pm and after that both the respondents were arrested during night hours. Because of the glaring contradiction in the testimonies of the material witnesses PW8 and PW24, trial court reached the conclusion that their testimonies cannot be relied upon and are untrustworthy.
8. Regarding recovery of articles like identity card and metro card from respondent no1., trial court observed that the metro card does not have any specific identification mark and hence it cannot be said that it belonged to the deceased. Regarding the recovery of identity card of the deceased, trial court observed that it seems improbable since it is against the normal human conduct to carry the identity card of

deceased even after five days of the incident and which is of no use for the respondent no.1. With respect to the recovery of bag at the instance of respondents' no. 1 and 2, Trial court observed that the recovery was affected from a public place that too after a period of five days from the day of incident, hence it cannot be the sole basis for convicting the respondents.

9. While casting a serious doubt on the case of the prosecution with respect to the recoveries affected, trial court further observed that no public witness was joined at the time of affecting recoveries and no serious effort had been made by the IO to join any public witness before the arrest of the respondents or during the whole proceedings. The trial court relied upon ***Daulat Ram vs State of Haryana, AIR 1995 SC (1998), Sahib Singh vs State of Punjab 1997 Crl. J. 2978, Sompal vs State of Delhi 1999 Crl. J. 19 and State of Rajasthan vs Tej Singh 2001 (II) AD SC 125*** wherein it was held that:

“where no serious attempt was made by the police official to join some independent person who could be easily available, it affects the weight of evidence. It was also observed that by not examining the independent witnesses, the prosecution thereby fails to produce the available independent corroborative evidence to support the evidence of interested witnesses”.

10. The learned trial court further observed that the disclosure statement made by the respondents of its own has no value as it is inadmissible and is hit by Article 23 of Constitution of India since such statement was obtained while the respondents were in the custody of the police.

11. Regarding the weapon of offence i.e Stone which was recovered at the instance of respondent no.2 Suraj @ Chintoo, trial court observed that it was not produced before the Doctor to seek his opinion as to whether the death of the deceased could be possible by the said stone or not. Trial court also made an observation that the blood stains found on the stone showed 'no reaction' and could not be tallied with the blood group of the deceased nor it could be established that the death of the deceased had occurred as he had been hit by the stone, or that deceased was pushed and hit against the stone.
12. We agree with the view taken by the learned trial court that there is nothing on record to establish that the deceased died after being hit by the stone.
13. PW20 Dr. Asitesh Bajwa in the post mortem report Ex. PW 20/A has stated that the body had multiple ante mortem injuries, the cause of death was cranio cerebral damage consequent upon blunt force impact which was sufficient to cause death in the ordinary course of nature but nowhere it has been explained or brought on record that deceased died after being hit by the stone or in a road accident.
14. Acquitting the respondents, Trial court held that even if the testimony of PW8 Salman@ Aaqil is taken as a gospel truth with respect to possession of the mobile phone belonging to the deceased with the respondents, this fact alone is not sufficient to nail the respondents for the offence punishable under section 302 of IPC as respondents could have got the possession of mobile phone belonging to deceased from a nearby spot where the body of the deceased was lying.

15. Mr. Feroz Khan Ghazi, counsel for the State arguing against the acquittal contends that impugned judgment is based on presumptions, conjectures and surmises and is thus liable to be set aside.
16. The counsel for the State further contends that the learned Trial Court failed to take into account the testimonies of PW7 Bhupinder Singh and PW8 Salman@Aaquil. It is clear from the record that after collecting the documents from PW1 K.L. Aggarwal, the deceased left for his office and the time of the incident based on circumstantial evidence has been estimated to be around 4:00-4:15 PM. The counsel for the State further contends that the mobile phone belonging to the deceased was sold immediately thereafter i.e. around 5:00 to 5:15 PM by the respondents to PW8 Salman @ Aaquil, thus proving that the said mobile was snatched from the deceased.
17. The counsel for the State also submits that the learned Trial Court had erroneously concluded that the respondents could have chanced upon the mobile just lying around near the body of the deceased, after he had met with a road accident and failed to appreciate that the respondents had attacked the deceased with full intention of robbing and killing him , thus satisfying the element of mens rea as is also proved by the circumstantial evidence on record.
18. The learned counsel for the state next submits that as the body of the deceased was discovered from the bushes near the Ring Road, this would not have been possible had it been a case of a road traffic accident unless someone had moved the body from the road into the bushes, therefore it cannot be said to be a case of road accident.

19. The learned counsel for state further contends that the recovery of articles was based on the disclosure statement of the respondents, which proves that the respondents had knowledge of the articles in possession of deceased. Further the respondents were unable to explain how they came to be in possession of the belongings of the deceased.
20. We have heard learned counsel for the petitioner/State and carefully examined the impugned judgment, evidence placed on record and the submissions so made. For the purpose of deciding whether leave to appeal deserves to be granted, a few vital facts which weighed with the learned Additional Sessions Judge in acquitting the respondents need to be noted.
21. The case of the prosecution is that the respondents had come across the deceased near the Ring Road at around 4:00 PM on 08.08.2011 and attempted to rob him of his possessions, but when the deceased resisted they hit him with a piece of rock lying nearby, thus killing him in the process, and thereafter they took the deceased's mobile phone and wrist watch while throwing away (into the bushes nearby) the other documents etc which were of no use to them. The prosecution based their theory on the disclosure statement of the respondents, and the recoveries effected on the basis of the said disclosure statements i.e. the blood stained piece of rock from the scene of the crime, the documents, identity card, metro card and other papers belonging to the deceased found near the scene of the incident, the IMEI traced mobile phone of the deceased found in the possession of respondent no.2 Suraj@Chintu, the deceased's Sonata

watch with white dial and golden chain found in the possession of respondent no.3 Dilip.

22. We agree with the view taken by the learned trial court that a disclosure statement by itself is not admissible as evidence, it is merely a guideline for police investigation and admission of guilt in a disclosure statement is not admissible and only a voluntary disclosure made before a magistrate under section 164 of the Criminal Procedure Code may be admissible in a court of law.
23. In the instant case, as observed from the findings of the learned Trial Court, of all the evidence produced by the prosecution the only admissible evidence on record is the recovery of the deceased's mobile phone from respondent no.2 Suraj@Chintoo but that by itself is not sufficient to convict the respondents for the offence punishable under section 302 of IPC. With regard to alleged weapon of offence i.e. the blood stained piece of stone, it needs to be overlooked as it was neither presented before the doctor for his opinion as a possible weapon of offence nor the blood on the stone was matched with that of the deceased.
24. When considering the statements of PW 8 Salman@Aaquil and PW 24 SI Arun Tyagi, we find discrepancies as to the time and sequence of arrests. PW8 Salman has deposed that the respondent no. 1 Ravi@ Dabbu and respondent no. 2 Suraj@Chintu were arrested late at night on the 12.08.2011, but PW 24 SI Arun Tyagi has deposed that respondents 1 and 2 were arrested at 3:30 PM on 13.08.2011 i.e. the next day. While PW8 Salman witnessed the arrest of respondents 1 and 2, there were no independent witnesses

for either the arrest of respondent no. 3 or for the recovery of the belongings of the deceased. As the Trial Court has rightly held, the investigating officer's failure to join any independent public witnesses in such proceedings, especially when they were available casts serious doubts on the investigation proceedings. More so PW24 SI Arun Tyagi in his testimony has deposed that PW8 Salman's statement was taken after the respondents were arrested which is contrary to the deposition of PW8 Salman.

25. In the case of *State (G.N.C.T.) of Delhi Vs. Saqib Rehman @Masood & Ors reported at 2012(3)JCC2127*, Court observed that when there are discrepancies, contradictions and inconsistencies in the statements of prosecution witnesses, the court may be inclined to acquit the accused.
26. In the present case, the prosecution relied on certain chain of circumstances to bring to the fore that respondents have committed the murder of deceased. In our view when the prosecution case rests upon circumstantial evidence, the circumstances should be conclusively proved and point to the guilt of the accused. The circumstances so proved should not be compatible with any hypothesis except the guilt of the accused. Hon'ble Supreme Court in *Hanumant Govind Nargundkar & Anr. Vs. State of M.P. AIR 1952 SC 343*, laid down five principles, extracted as under:-

1. *The circumstances from which the conclusion of guilt is to be drawn should be in the first instance being fully established;*
2. *All the facts so established should be consistent only with the hypothesis of the guilt of the accused;*

3. *The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved;*
4. *In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused; and*
5. *It must be such as to show that within all human probability the act must have been done by the accused.*

27. Also law with regard to the conviction on the basis of circumstantial evidence has been discussed in detail by the Supreme Court in the case of ***Harishchandra Ladaku Thange Vs. State of Maharashtra***, reported at AIR 2007 SC 2957. It would be useful to reproduce the relevant paras:-

8. *It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person.*

9. *We may also make a reference to a decision of this Court in C. Chenga Reddy & Ors. V. State of A.P. 1996 (10) SCC 193, wherein it has been observed thus:-*

21. *In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further the proved circumstances must be*

consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence.

28. It has been observed in ***Vijayee Singh and others Vs.State of U.P.(1990)3SCC190***, that the general burden of establishing the guilt of accused is always on the prosecution and it never shifts. In the present case, there are too many holes in the circumstantial evidence relied upon by the prosecution which would make it quite unsafe to believe the prosecution version. Hence we fully agree with the view taken by the trial court that the prosecution has failed to prove guilt of the accused u/s 302 of the Indian Penal Code.
29. 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.

30. Further, in **Kallu v. State of M.P. 2006CriLJ799**, it was observed by the court that;

"While deciding an appeal against acquittal, the power of the Appellate Court is no less than the power exercised while hearing appeals against conviction. In both types of appeals, the power exists to review the entire evidence. However, one significant difference is that an order of acquittal will not be interfered with, by an appellate court, where the judgment of the trial court is based on evidence and the view taken is reasonable and plausible. It will not reverse the decision of the trial court merely because a different view is possible. The appellate court will also bear in mind that there is a presumption of innocence in favour of the accused and the accused is entitled to get the benefit of any doubt. Further if it decides to

interfere, it should assign reasons for differing with the decision of the trial court".

31. On an application of the aforesaid principles, the legal position is very clear that High Court possesses wide powers and can re appreciate the evidence while hearing an appeal against an order of acquittal. In the present case, chain of circumstances is not complete, there are discrepancies in the testimonies of material witnesses PW8 Salman @ Aaqil and PW24 SI Arun Tyagi and no cogent evidence is produced on record which point towards the guilt of the respondents. Hence we are of the opinion that the finding and conclusion of the trial court are based on correct and proper appreciation of evidence. As there are no substantial and compelling reasons to interfere with the order of acquittal, the leave petition is meritless and is therefore dismissed.

SANGITA DHINGRA SEHGAL, J.

G.S. SISTANI, J.

MARCH 23, 2015
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