

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ CRIMINAL LEAVE PETITION No. 560/2014

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Date of decision: 20th April 2015

STATE

..... Petitioner

Through : Mr. Feroz Ghazi, APP for the State,
along with SI Ramesh Kumar, P.S.
Sultan Puri.

versus

USHA DEVI ETC

.....Respondents

Through : Mr. Saurabh Tiwari, Adv. for respondents
no. 1, 2 and 4.
Ms. Karuna Chhatwal, Amicus Curiae for
respondent no.3
Mr. Amit Chadha, Mr. R.K Kohli and
Mr. Vinit Virmani, Advs. for respondent
no.5

CORAM :

HON'BLE MR. JUSTICE G. S. SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G. S. SISTANI, J.

1. Present leave to appeal petition has been filed by the State under Section 378(3) of Code of Criminal procedure against the judgment and order of acquittal dated 26.04.2014 passed by learned ASJ, Rohini Courts, Delhi in Sessions Case No. 58/2010 thereby acquitting the respondents/accused under section 304/34 of Indian Penal Code.
2. The facts of this case, as noticed by the learned Trial Court in the judgment, are as under:
“On 19.09.2009 at 3:00pm one Om Prakash was sitting in front of his Jhuggi No. 270, F-7 Block, Sultan Puri, Delhi when one Sanjay @ Ganji (since deceased) came there with a katta, pointed on the head of Om Prakash and fired a bullet. Om Prakash bent down and the bullet grazed left portion of his head and then it hit Prem Devi who was standing about

four feet away from Om Prakash. Krishan Kumar s/o Om Prakash came out and rushed both of them to the hospital. FIR No. 307 u/s 307 of IPC and Arms Act was registered against Sanjay @ Ganji on the statement of Om Prakash.

On 24.10.2009, complainant Satyawan made a statement to SI Jaspal Singh that Sanjay @ Ganji came to his house and on their way to Nangloi on rickshaw, at about 2:30pm respondent Pushpa @ Usha and her sons Ballu and Bhola came running and over turned their rickshaw and started beating Sanjay. In the meantime, Krishan s/o Om Prakash and Vicky s/o Prem Devi also reached the spot armed with lathi and sariya and joined other respondents and started beating Sanjay @ Ganji and then ran away. PCR took Sanjay @ Ganji to the hospital where he died the next day. On the basis of the statement of the complainant Satyawan, FIR no. 340 was registered on 24.10.2009 under section 304/34 of IPC.”

3. Charge under section 304/34 of IPC was framed against respondent Usha Devi, Satish @ Ballu, Vicky and Sanjeev @ Bhola on 28.07.2010 and charge against Krishan was framed on 26.08.2010 to which they pleaded not guilty and claimed trial.
4. To bring home the guilt of the accused, the prosecution examined as many as 20 witnesses.
5. Statement of respondents was recorded under section 313 CrPC wherein they refused to have made any disclosure statement before the police and claimed that their signatures were obtained on blank papers.
6. PW7 Dr Manoj Dhingra identified the handwriting and signatures of Dr Ish Gupta (who prepared MLC Ex.PW7/A), Dr Deepak (who prepared the post-mortem report), Dr Puneet Kumar, Dr Vikram and after going through the Post Mortem Report Ex.PW7/D and FSL viscera report Ex.PW7/E, PW7 opined the cause of death was head injury.

7. Trial court observed that opinion of PW7 about cause of death is doubtful on two counts:
- (i) No head injury was noticed by doctors who prepared MLC and Post Mortem Report as in MLC Ex.PW7/A as many as ten injuries are mentioned on left knee, left leg, bilateral knee, left elbow etc but the Doctor who prepared MLC did not find any injury on the head.
 - (ii) Also twelve injuries are mentioned in post-mortem report on left leg, right knee joint, right leg etc but no injury on head has been mentioned and there was no fracture in the head. Had head injury been the cause of death it might have been opined by Dr Deepak who prepared the post mortem report.
8. As per the prosecution, PW1 Smt Kailash, PW2 Sh. Satyawar and PW20 Sh. Vinod are eye witnesses. PW1 is the mother of PW2 and PW20 is his brother in law.
9. PW1 Smt Kailash deposed that on 19.09.2009 while returning home from duty at 2:30pm she noticed respondent Billu armed with sariya, respondent Bhola with a brick, respondent Vicky with a hockey and respondents Krishan and Usha with lathis beating deceased Sanjay @ Ganji. She further deposed that respondents ran away before the arrival of police. PW2 Sh.Satyawar in his testimony deposed that on 19.09.2009 he along with the deceased Sanjay @ Ganji hired a rickshaw for Nangloi at 2:30-3:00pm when respondents Usha, Ballu and respondent Bhola armed with lathi and sariya overturned their rickshaw and started beating the deceased Sanjay @ Ganji. He further deposed that in the meantime respondents Krishan and Vicky armed with lathi and brick also joined the other respondents but respondent Krishan did not beat the deceased Sanjay @ Ganji. PW20 Vinod deposed that on 19.09.2009 at 2:30-

2:45pm he saw respondent Usha, Ballu and Bhola beating the deceased Sanjay @ Ganji with iron rods and lathis.

10. Trial Court observed that PW1 Smt Kailash and PW2 Sh Satyawan have made complaints marked PW1/DA and PW2/DA respectively to the police on 20.09.2009 however they are irreconcilable with the depositions made by them in court. Highlighting the inconsistencies in the statement made to the police and made in the court by the eye witnesses, the trial court observed that in the complaint made by PW1 marked as PW1/DA to the police, PW1 stated that respondent Vicky pushed the rickshaw, respondent Bhola inflicted rod blows on the deceased Sanjay @ Ganji and Ballu was armed with an iron rod but in the witness box PW1 deposed that Vicky hit the deceased Sanjay @ Ganji with the hockey and Bhola hit the deceased Sanjay @ Ganji with the brick. In the complaint made by PW2 to the police marked as PW2/DA, trial court observed that PW2 stated that respondent Vicky pushed the rickshaw and respondents Usha, Bhola and Ballu attacked the deceased with the iron rods. Whereas in the witness box PW2 deposed that respondent Vicky hit the deceased with the brick whereas respondents Bhola, Ballu and Usha used brick, saria and lathi respectively to cause injuries to the deceased Sanjay @ Ganji. With regard to the deposition of PW3 that deceased Sanjay @ Ganji was beaten up by all the respondents with iron rods and lathis, trial court observed that PW3 is not talking of any saria or brick so there are glaring inconsistencies in their statements and hence the testimonies are unreliable.
11. The trial court further made this observation that PW1 Smt Kailash did not depose that at the time of incident her son PW2 Sh Satyawan and PW20 Vinod were present and neither PW20 deposed in his examination in chief that when deceased Sanjay @ Ganji was being beaten up by the respondents, that PW1 and PW2 were present. Also PW2 did not state in

his testimony that PW1 and PW20 were present at the spot but during cross examination categorically deposed that he left the spot ten minutes after the police arrived and his mother (PW1 Smt Kailash) reached the spot when the police had arrived and his brother in law (PW20 Vinod) reached the spot when the deceased Sanjay @ Ganji was being removed to the hospital by the police, hence PW1 and PW20 are not eye witnesses.

12. Trial court also observed that incident took place on 19.09.2009 but the FIR was registered on 24.10.2009 i.e after 35 days after the incident despite the fact that the statement was made by PW1 Smt Kailash and PW2 Sh Satyawar to the police on 20.09.2009.
13. The trial court further observed that the police did not recover any weapon of offence. Trial court also observed that pointing out memos are of no value for the prosecution case and placed reliance upon ***Vijay Singh vs. State and Ors Crl Appeal no. 819/2012*** dated 03.09.2012 wherein Hon'ble High Court did not rely upon the pointing out memo holding that it was not admissible in evidence as it did not fall within the scope and ambit of section 27 of the Indian Evidence Act because the place of occurrence was already known to the police.
14. Learned counsel for the petitioner/state submits that the learned trial court while passing the impugned judgment has failed to appreciate that minor discrepancies and inconsistencies in eye witnesses' account, especially when witnesses are deposing after a considerable gap from the date of occurrence cannot form the basis of acquittal of the respondents.
15. Counsel further submits that the trial court has ignored the fact that in the present case, oral and ocular evidence was in absolute consonance with the medical evidence i.e the post mortem report, the opinion qua cause of death and also the opinion regarding the fatal injuries received by the deceased as given by the Doctor.

16. It is also contended by counsel for the state that the trial court failed to appreciate that the complaints qua the incident dated 19.09.2009 were made by PW1 and PW2 on 20.09.2009 to the police and thereafter FIR was registered only on 24.10.2009 and the delay in registration of FIR was only on account of the conduct of the police.
17. Learned counsel for the state laid considerable force on his argument that it is settled proposition of law that if eye witness account and other corroborations are intact, the non recovery of the weapon of offence will not give benefit to the accused/respondents especially when the medical evidence is in sync with the ocular evidence given by the prosecution witnesses.
18. The next contention raised by learned counsel for the state is that the trial court has acquitted the respondents on conjectures and surmises and the judgment so passed has caused gross injustice to the victim, hence it is liable to be set aside.
19. We have heard the learned counsel for the State and have carefully perused the impugned judgment and the testimonies of the material witnesses relied upon by the State. With regard to the cause of death we are of the opinion that the prosecution did not examine the Doctors who prepared the MLC and the post mortem report. There is no explanation as to why Dr Ish Kumar, Dr Puneet Kumar, Dr Vikram and Dr Deepak were not examined. In our view the trial court has given valid and substantial reasons for disbelieving the prosecution version as the prosecution failed to prove the MLC and the post-mortem report and consequently it has failed to prove the injuries and failed to prove the cause of death of the deceased Sanjay @ Ganji. Also the statement made by eye witnesses are inconsistent as they have not deposed about any firing by the deceased Sanjay @ Ganji, so they have suppressed the genesis of the crime. Further because of the glaring inconsistencies in the depositions of

material witnesses, we are of the view that false depositions were made by them and the presence of the eye witnesses (PW1, PW2 and PW20) at the time of incident is itself doubtful. Hence we agree with the conclusion drawn by the trial court that PW1 and PW20 are not the eye witnesses as they reached the spot of incident after the police arrived, hence their testimonies cannot be relied upon. Further no explanation has been offered by the prosecution as to why the FIR was lodged on 24.09.2009 i.e after a delay of 35 days when the written complaint was submitted on 20.09.2009. This indicates that delayed FIR is a result of an afterthought and the respondents can be given benefit of doubt as prosecution failed to prove the charges levelled against the respondents.

20. It is settled law that the High Court cannot entertain a petition merely because another view is possible; there has to be some substance in the grounds urged either in the appreciation of evidence or in material omission of consideration, certain factors or mistaken application of law or any legal principle. The principles are well settled by catena of judgments of the Supreme Court and were reiterated in the case of ***Prem Kanwar v. State of Rajasthan (2009) 3 SCC 726*** stated as under:

1. In an appeal against an order of acquittal, the High Court possesses all the powers and nothing less than the powers it possesses while hearing an appeal against an order of conviction.

2. The High Court has the power to reconsider the whole issue, reappraise the evidence and come to its own conclusion and findings in place of the findings recorded by trial Court, if the said findings are against the weight of the evidence on record, or in other words, perverse.

3. Before reversing the finding of acquittal, the High Court has to consider each ground on which the order of acquittal was based and to record its own

reasons for not accepting those grounds not subscribing to the view expressed by the trial court that the accused is entitled to acquittal.

4. In reversing the finding of acquittal, the High Court has to keep in view the fact that the presumption of innocence is still available in favour of the accused and the same stands fortified and strengthened by the order of acquittal passed in his favour by the trial court.

5. If the High Court on a fresh scrutiny and re-appraisal of the evidence and other material on record, is of the opinion that there is another view which can be reasonably taken, then the view which favors the accused should be adopted.

6. The High Court has also to keep in mind that the trial court had the advantage of looking at the demeanor of witnesses and observing their conduct in the Court especially in the witness box.

7. The High Court has also to keep in mind that even at that stage, the accused was entitled to benefit of doubt. The doubt should be such as a reasonable person would honestly and conscientiously entertain as to the guilt of the accused.

21. 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".

22. On an application of the aforesaid principles, we are satisfied that in the present case, the prosecution has not made out a case to grant the leave to appeal and trial court has rightly acquitted all the respondents. Even though we are of the opinion that in an appeal against acquittal, powers of appellate Court are as wide as that of the trial Court and it can review, re-appreciate and reconsider the entire evidence brought on record by the parties and can come to its own conclusion on fact as well as on law, in the present case, the view taken by the trial court for acquitting the respondents was possible and plausible. Also it is well-established that if two views are possible on the basis of evidence on record and one favourable to the accused has been taken by the trial Court, it ought not to be disturbed by the appellate Court.
23. In the circumstances, the findings and the observations of the Trial Court in this regard cannot be held to be unsustainable or perverse or contrary to record so as to require further consideration and to grant leave to appeal for this purpose. The petition is therefore without any merit and it is, therefore, dismissed.

G. S. SISTANI, J

SANGITA DHINGRA SEHGAL, J

APRIL 20, 2015

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