

*** IN THE HIGH COURT OF DELHI AT NEW DELHI
+ CRIMINAL LEAVE PETITION No. 221/2015**

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Date of decision: 8th April 2015

STATE (NCT OF DELHI)

..... Petitioner

Through : Ms.Rajdipa Behura, ASC for the State along
with ACP Nayam Pal Singh, Inspr.Jagbir
Singh and Inspr.Mohan Singh, P.S. Badli.

versus

RAJ KUMAR@RAJU & ANR.

.....Respondents

Through : None

CORAM :

HON'BLE MR. JUSTICE G. S. SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

SANGITA DHINGRA SEHGAL, J.

CRL.M.A. 4948/2015.

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

CRL.M.A. 4947/2015.

3. This is an application filed by State/petitioner seeking condonation of 130 days' delay in filing the present leave to appeal petition.
4. Although we are not satisfied with the grounds urged in this application seeking condonation of 130 days' delay in filing the present leave to appeal, since we have heard the matter on merits we allow the present application. Accordingly, delay in filing the present leave to appeal petition is condoned. Let leave to appeal petition be taken on record.

5. Application stands disposed of.

CRL.L.P. 221/2015

6. The State seeks leave to file an appeal under Section 378(1) of Code of Criminal Procedure (CrPC) to challenge the judgment dated 20.08.2014, passed by the learned Additional Sessions Judge, in Sessions Case No. 72/2010, whereby the accused Raj Kumar and the accused Pushpa were acquitted of the charges under Section 302/201/34 of Indian Penal Code.
7. To appreciate the contention raised by learned counsel for the petitioner/State, a brief summary of the prosecution case is given below:-

“On 15-12-2004, at 4:56 p.m an information was received at P.S. S.P. Badli vide DD No. 16 A that two human legs were lying in a vacant plot in gali No. 4 Sardha Nand Colony. Station House Officer Police Station SP Badli along with the staff reached at the spot and found two human legs in the said vacant plot and on the search of the said plot one decomposed human skull was also found. On digging the plot one thigh, intestine and underwear were found under the earth. No eye witness was found at the spot. Then Inspector Shees Ram Station House Officer Police Station S.P. Badli prepared the rukka on DD No. 16 A and FIR bearing No. 634/04, was registered at P.S. S.P. Badli. During the course of investigation accused Raj Kumar and Pushpa were arrested but accused Ghanshyam could not be arrested and was declared a proclaimed offender. Accused persons made their disclosure statements. As per the case of the prosecution accused Raj Kumar used to live in the house of deceased Ramesh Rathore who was his distant Mama and used to give tuitions to the children of deceased Ramesh Rathore at Majlis Park. Accused Raj Kumar and accused Pushpa developed illicit relations in pursuance of which they murdered Ramesh Rathore and dismembered his body and threw his body parts. According to the prosecution accused Raj Kumar got recovered body parts of

deceased Ramesh Rathore and davs (knives). It is also the case of the prosecution that accused Raj Kumar got money from accused Pushpa and gave Rs. 20,000/- to his mother who then gave Rs. 10,000/- to one jeweller for making jewellery. The amount as per the prosecution was recovered.”

8. After completion of investigation final report u/s 173 CrPC was prepared on 03.08.2005 and charges u/s 302/201/34 IPC were framed against accused Raj Kumar and Pushpa to which they pleaded not guilty and claimed trial.
9. In order to prove the guilt of the accused and to prove its case, the prosecution examined 33 witnesses. Also the statements of the respondents were recorded u/s 313 of the Code of Criminal Procedure.
10. PW 9 in his testimony deposed that the vacant plot belonged to one Ramesh Yadav and he had just constructed the four walls on the said vacant plot so he was believed to be the owner of the said plot. PW9 further deposed that on 16.12.2004, Station House Officer called him to the vacant plot and obtained his signature on one paper.
11. Trial court observed that the Investigating Officer had failed to make any efforts to examine the owner of the plot and gave no explanation as to why the owner of the plot Mr Ramesh Yadav was not made a witness. It was incumbent upon the prosecution to conclusively prove from whose plot the body parts were recovered and also to examine the owner of the plot. Further Trial Court observed that PW 9 has stated in his examination in chief that he had constructed four walls around the plot but it is not clear when four walls were built outside the plot, how one could enter in the plot.
12. Regarding the recovery of body parts, prosecution examined witnesses. PW-31 SI Rajesh Kumar in his testimony deposed that in a vacant plot two legs of human body, one thigh, one underwear and one skull with torso

were lying. In his cross examination he stated that he had not mentioned about the details of the body parts recovered from the crime scene in his crime team report Ex. PW31/A. Thus, the Trial court observed that the perusal of the crime team report shows that no details of the body parts have been mentioned in it and it is really surprising that no clarification has been given with respect to as to why the details of the body parts found were not mentioned by the crime team in - charge in his report. The trial court further observed that the body parts which were recovered on 15.12.2004, no seizure memo was prepared by the IO. Thus there is no plausible and honest explanation by the prosecution with respect to as to why no seizure memo of the body parts recovered from the crime scene was prepared on 15.12.2004.

13. With respect to the recovery of two davs (weapon of offence) from the vacant plot prosecution examined PW-25 SI Dhananjay Gupta, PW-27 Arvind Mishra and PW-28 Inspector Jagbir Singh. Pw-25 who was one of the witnesses of recovery of davs in his testimony deposed that on 28.12.2004, accused was arrested and he made a disclosure statement Ex. PW 20/C pursuant to which accused led the police party to a vacant plot where accused dug out two davs (weapon of offence) from near the boundary wall of the plot where he had buried them. PW-25 further deposed that at the time of the recovery of davs, the photographs were taken and the sketches (Ex. PW20/E and Ex. PW 20/F) of both the davs were prepared. PW-25 in his cross examination stated that the blood stains were not visible on the davs .

PW-27 Arvind Mishra deposed that on 28.12.2004 at the instance of the accused Raj Kumar two davs were recovered and both the davs were seized vide memo Ex. PW 20/I. However in the cross examination PW-27 stated

that the IO (PW-28) told him that the accused Raj Kumar had buried the davs in the plot. PW-27 further stated in his cross examination that he cannot tell the direction in which the plot is situated and that the Murari (PW9) was present at the time of recovery from the plot.

PW-28, IO (Inspector Jagbir Singh) deposed that PW-27 Arvind Mishra voluntarily joined the investigation and there after accused Raj Kumar dug out the davs which were seized vide Ex. PW 20/I. PW-28 in his cross examination stated that the plot was not found sealed on the date(28.12.2004) on which the recovery of davs was affected

14.Trial Court while pointing out the material contradictions in the depositions made by PW-25, PW-27 and PW-28 observed that PW-28 in his testimony has not uttered a single word about the presence of Murari (PW-9) at the time of recovery as stated by PW-27. Similarly PW-25 has also not stated about the presence of Murari (PW-9) and about the presence of PW-27 at the time of recovery of davs. Further Trial Court observed that according to the testimony of PW-25 and PW-28,crime team had taken the photographs of the accused while digging out the davs but no such photographs were shown to the IO and the photographs which were shown to the IO were the ones in which the accused was seen holding two davs. Trial Court also made this observation that the Ct. Dalbir Singh (PW-5) was the one who took the photographs but PW5 nowhere in his testimony deposed that on 28.12.2004 i.e. the day on which recoveries were made; he visited the plot and took the photographs of the accused digging out the davs.

15.The case of the prosecution is that Ramesh Rathore (deceased) and accused Raj Kumar were related and the deceased was the distant mama of the accused Raj Kumar and that there was an illicit relation between the accused Raj Kumar and the wife of the deceased (accused Pushpa) and

because of this illicit relationship, both the accused murdered the deceased to do away with him. Trial Court relied upon the depositions of PW-1 Putti and PW-2 Nanhi. PW-1 Putti who is the brother- in –law of deceased in his examination in chief has not stated that accused Raj Kumar stayed at the house of Ramesh Rathore (deceased) or that accused Raj Kumar used to give tuition to the children of the deceased. Further PW-1 has also not spoken about any illicit relationship between the accused persons Raj Kumar and Pushpa. Also PW-1 has not stated that deceased was the mama or distant mama of the accused Raj Kumar.

Deposing on the similar lines PW-2 Nanhi who is the real sister of the deceased has nowhere stated that accused Raj Kumar belonged to the native village of the deceased or that accused Raj Kumar is related to her brother (deceased) or that there was any illicit relationship between Raj Kumar and Pushpa.

Relying upon the depositions of PW-1 and PW-2 Trial Court observed that the prosecution has failed to prove that the deceased and the accused Raj Kumar were from the same village and there is no evidence on record to prove that accused Raj Kumar had an illicit relationship with the wife (accused Pushpa) of the deceased. Trial court further observed that there is no evidence to show that the accused Raj Kumar used to give tuition to the children of the deceased. Also the Investigating Officer (PW-28) has not examined any child of the deceased to prove this fact.

16. The case of the prosecution is that the accused Raj Kumar paid Rs.20,000 to his mother (PW-11Jaimati) out of which she gave Rs.10,000 to a jeweller(PW-7 Bimlesh Soni) for making jewellery. Trial Court observed that the prosecution has not been able to prove the recovery of Rs.20,000 as PW7 and PW11 did not support the case of the prosecution as PW-7

nowhere deposed that PW-11 made any monetary payment to him for making jewellery and PW-11 made the similar deposition and further stated the accused Raj Kumar never gave any money to her.

17. Arguing against acquittal, counsel for the state submits that learned trial court has failed to appreciate the testimony of PW-20, PW-25, PW-28 and PW-30 with respect to the recovery of body parts pursuant to disclosure statement made by the respondents. In support of his submission, reliance is placed by the counsel in the case of ***Gokakonda Venkateshwara Rao v. State of Andhra Pradesh*** wherein Apex Court held that:

“The provision of section 27 of the Evidence Act are based on the view that if a fact actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true and consequently the said information can safely allowed to be given in evidence because if such an information is further fortified and confirmed by the discovery of articles or the instrument of crime and which leads to the belief that the information about the confession made as to the articles of crime cannot be false”.

18. Learned counsel for the state further contends that the learned trial court erred in disbelieving the testimony of PW- 8 who conducted the post-mortem of the deceased and deposed that the body parts belong to the same person and that the injuries found on the body of the deceased could be caused by the weapon of offence recovered at the instance of the accused. Reliance is placed by the counsel in the case of ***State of Uttar Pradesh Vs. Rashid. 2010 CrLJ 1415*** wherein Supreme Court observed and held:

“the knowledge of the medicine and human body is a matter of science. A court of law which has not acquired special knowledge and skill in medical science, would not be

justified in brushing aside opinion of a medical officer, who has performed post mortem of a dead body, without any evidence on record to the contrary supported by the opinion of learned authors of standard books”.

19. The next contention raised by the learned counsel for the state was that the learned trial court failed to appreciate that the DNA report Ex. PW-33/A proved the identity of the deceased as Ramesh Rathore based on the blood sample of his son Dinesh (PW-32) and the report therefore depicted that he was the biological son of the deceased.

20. Counsel for the state further submits that the learned trial court has erred in giving undue importance to minor contradictions and discrepancies which do not go to the root of the matter. It is a settled proposition of law that even if there are some omissions, contradictions and discrepancies, the evidence cannot be disregarded. To support his submission, counsel relied upon the case of ***Bharwada Bhoginbhai Hirjibhai Vs. State Of Gujrat, 1983 AIR 753***, wherein Supreme Court held:

“that the discrepancies which do not go to the root of the matter and shake the basic version of witness therefore cannot be annexed with undue importance. Even when all the important “probabilities-factor” echoes in favor of the version narrated by the witnesses. The reasons are: (1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video is replayed on the mental screen”.

21. On the basis on aforesaid submissions, it has been strongly urged by the counsel for the state that the impugned judgment be set aside as it has caused a grave miscarriage of justice.

22. We have heard the learned counsel for the petitioner/State and carefully examined the impugned judgment, evidence placed on record and the submission so made. Having gone through the record we are of the opinion that the conclusion reached by the trial court cannot be termed as unreasonable or erroneous in any material detail. On perusal of the trial court record and the evidence of all the witnesses it is apparent that the prosecution has not been able to prove its case beyond reasonable doubt. PW-9 (Murari) did not support the case of the prosecution and no effort was made by the Investigating Officer (PW28) to examine the owner of the plot. Also due to contradictions in the depositions of PW-25, PW-27 and PW-28 and the fact that no blood was found on davs as per the FSL, the recovery of the weapon of offence (davs) is highly suspicious.

23. In our view, the conclusion reached by the trial court with regard to the recovery of parts of dead body is just and proper. The prosecution has failed to prove the recovery of the parts of the dead body as the two crime team reports (Ex. PW30/A and Ex. PW31/A) are not supporting the case of the prosecution and the reports prove that the prosecution is itself confused as to what was recovered on 15.12.2004 and what was recovered on 28.12.2004. Also, perusal of the FSL Report Ex. PW-26/E shows that none of the articles recovered from the house of the deceased could be connected with the crime because the prosecution has not been able to show that the blood on exhibit 11 and exhibit 13 in the FSL Report was that of the deceased.

24. Thus the trial court has given valid and substantial reasons for disbelieving the prosecution version. Further the prosecution has failed to prove any relationship between the deceased Ramesh Rathore and the accused Raj Kumar. The prosecution has also failed to prove that the accused Raj

Kumar used to live in the house of the deceased and used to give tuitions to the children of the deceased. Also no cogent evidence has been produced by the prosecution to prove that the accused Raj Kumar had an illicit relationship with the accused Pushpa.

25. It is well settled 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 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.

26. In another case of ***Ramanand Yadav v Prabhunath Jha 2004CriLJ640***, 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".

27. 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".

28. 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 the view taken by the trial court for acquitting both the accused was possible and plausible. Thus trial court has rightly acquitted both the accused. 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.

29. 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.

SANGITA DHINGRA SEHGAL, J

G. S. SISTANI, J

APRIL 8, 2015
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