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

+ **CRL.L.P. 614/2011 & CRL.M.A. 20066/2011**

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Judgment dated 12th January, 2015

STATE

..... Petitioner

Through : Mr.Sunil Sharma, APP for the State SI
Sanjiv Kumar, P.S. Bara Hindu Rao.

versus

ASHOK MANDAL & ORS

..... Respondents

Through : Mr.Noor Alam, Adv.for Mr.Usman Chaudhary,
Adv. for respondents no.1, 2, 4 and 6.
Mr.Rakesh Kumar Chaurasia, Adv. for respondent no.5.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

JUDGMENT (ORAL)

1. Present leave to appeal has been filed by the appellant/State under Section 378(1) of the Code of Criminal Procedure against the judgment dated 11.11.2010 passed by learned Additional Sessions Judge-II, North, Delhi, in case FIR No.202/06, registered under Sections 394/397/120B read with Sections 411/34 of the Indian Penal Code at Police Station Bara Hindu Rao, Delhi.
2. It may be noticed that present leave to appeal petition has been filed by the appellant after a delay of 317 days and the appellant has filed an application, being Crl.M.A.No.20066/2011, seeking condonation of delay. It is for the hearing of the application for condonation of delay

that the present leave to appeal has remained pending since June, 2012. Various affidavits have been placed on record.

3. Mr.Sharma, learned counsel for the State, submits that a proper machinery has been put into place and every endeavour shall be made for filing of the criminal leave to appeal petitions within the statutory period of limitation.
4. Although we see no reason to condone the delay in filing the present leave to appeal petition, however, since we have examined the matter on merits, we deem it appropriate to allow the present application for condonation of delay. Accordingly, Crl.M.A. No.20066/2011 is allowed. Delay in filing the present leave to appeal petition is condoned. Let the criminal leave to appeal petition be taken on record.
5. The brief facts of the case, as noticed by the trial court in its judgment dated 11.11.2010, are as under:

“2. The case of the prosecution is that on 12.7.06 at about 6.50 a.m. in the morning DD no.11A Ex.PW4/A was recorded at P.S. Bara Hindu Rao in regard to robbery committed by four offenders at the point of knives and taking away the stolen/robbed goods in a tempo no.DL 1L-0060. The investigation was marked to SI Lajja Ram (PW28) who along with Const. Sita Ram (PW-14) reached the place of occurrence i.e. Godown no.2325 of M/s New India Roadline, Teliwara, Sadar Bazar, Delhi where they found Additional SHO of P.S. Bara Hindu Rao present at the spot and they were told that the two injured persons had been taken to Hindu Rao Hospital; that IO SI Lajja Ram reached Hindu Rao Hospital where injured Ramesh Kaushik (PW8) was lying admitted and declared “*unfit for making statement*” while the other injured Mahesh Yadav (PW3) was declared “*fit for making*

statement”.

3. The case of the prosecution is that statement of PW3 Mahesh Yadav Ex.PW3/A was recorded to the effect that *“He was a Munshi working with M/s New Indian Roadlines and he was sleeping in the office besides another employee Ramesh Kaushik ; that at about 5.45 a.m. somebody bauged at the shutters and when he opened it, he found a tempo tata 407 DL1L – 0060 parked outside their godown; that he thought that either some delivery had come or somebody was there to take delivery of their goods but he did not find anyone nearby ; that as he came inside the shop/godown, all of a sudden four young boys aged between 23-28 years barged into the godown carrying knives and churas ; that the boys threatened him with death and when he called Ramesh from inside, he along with Ramesh Kaushik were taken to an inside corner of the godown and were beaten up and then their hands and legs were tied with a rope ; that they heard sound of goods being moved out of the godown and he managed to untie his hands and also removed the blind fold and dashed outside the godown and raised alarm shouting “chor chor” ; that some people from nearby Tea-shop particularly one Ajay came to his rescue but in the meanwhile the four offenders managed to escape in Tata 407. He also stated to the police that he as well as Ramesh Kaushik were injured in this episode and they were taken to hospital and he would be able to identify the offenders, if shown to him.”*

4. On the basis of the said complaint, rukka Ex.PW28/A was

written and Const. Sita Ram was sent to the P.S. which resulted in recording of present FIR Ex.PW5/A. The case of the prosecution is that the police zeroed in on the owner of the tempo and notice u/s 160 Cr.P.C. was served on Mohd. Sharif (PW2) who gave a statement that the tempo was in possession of his employee/driver Vishwanath @ Nepali. The said driver/accused was arrested on 14.7.06 who made a disclosure statement Ex.PW17/A to the effect that he had carried out robbery/dacoity along with accused Ashok Mandal, Raju @ Shivana, Deepak @ Ashish and Vikas Kumar.

5. On the basis of the said disclosure, the accused Ashok Mandal was arrested on 14.7.06 who made a disclosure statement Ex.PW-17/A which further led to the arrest of accused Ashish @ Deepak besides Vikas Kumar. The accused Raju @ Shivana remained absconding and he was finally arrested on 10.11.06. During the investigation the stolen goods were recovered from the possession of accused Hafiz Mohd. and Liyakat Ali. On completion of investigation, the present police report u/s 173 Cr.P.C. was filed.”

6. The prosecution in all has examined 30 witnesses. Statements of respondents were recorded under Section 313 of the Code of Criminal Procedure. Respondents no.6 and 7 are persons from whose possession the goods have been recovered.
7. In our view, the learned trial court has rightly reached the conclusion that the prosecution has not been able to prove its case beyond reasonable doubt.
8. In this case PW-3 (Mahesh Yadav) was the main witness of the

prosecution. He identified his signatures in the complaint, Ex.PW-3/A and also supported the prosecution regarding the manner in which the robbery was committed. It may, however, be seen that PW-3 did not identify any of the five accused persons as the offenders. The accused persons were also not identified by PW-1, (Ram Kumar) and PW-11 (Suraj Pandit). PW-1 has deposed that he was not able to see the faces of the offenders, due to rain and also as it was quite dark and the offenders ran away from the spot. The only witness, who has identified the persons, is PW-8 (Ramesh Kaushik), but his evidence is full of contradictions. He has also testified that it was dark and his face was covered by the assailants with an empty carton and also that Mahesh Yadav, was also blind folded. In view of the evidence which has come on record that it was a cloudy day and it had been raining since 5:30 a.m. and quite dark; and in the absence of any evidence in the site plan, Ex.PW-3/B, to show that there were sufficient light, to enable the witnesses to have a look at the offenders, it is extremely unsafe to take a different view than the view taken by the learned trial court. It would be unsafe to convict the respondents on the evidence of PW-8.

9. The trial court has also noticed, based on the evidence placed on record, that the incident took place early in the morning; it had rained the previous night; there is nothing in the statements made by the respondents to the Police or in the site plan (Exhibit PW-3/B) that there was a light pole near the spot of the incident.
10. The trial court has also noticed the material improvement made in the testimony of PW-8, the only witness, who supported the case of the prosecution, who had deposed that he had seen Ashok Mandal loitering around the area prior to the incident. PW-8 had also testified in Court that he had seen Ashok Mandal working as a labourer for the first time

6-8 months before the occurrence of the incident. PW-8 had also testified that Ashok Mandal might have taken the goods from his transport company on one or two occasions.

11. In our view and as rightly noticed by the learned trial court, the aforementioned facts are important and material improvements in the testimony of PW-8, which touch the core issue. These facts were not told by PW-8 to the Police in his statement made under Section 161 of the Code of Criminal Procedure.
12. There is also confusion with regard to the registration number of Tata tempo 407, which as per the case of the prosecution was the vehicle used by the offenders, to escape. This finds mention in the evidence of PW-3 (Mahesh Yadav), PW-8 (Ramesh Kaushik), PW-1 (Ram Kumar) and PW-11 (Suraj Pandit). According to the registered owner, the registration number of the tempo was DL 1LC 0060, but as per the registration certificate the number was DL 1LC 0063, which was not explained by the prosecution. What is fatal is that none of the witnesses identified one of the accused Vishwanath, as the driver of the vehicle. The evidence also shows that the I.O. never questioned the true owner of the goods and PW-12 had no knowledge about the shape, nature or character or even weight of the stolen goods nor any documents in this regard were ever seized. It cannot be ignored that the goods i.e. cooper scraps are easily available in the market and the evidence is lacking if the said bags / boras were the same that were stolen / robbed on the date of incident.
13. There is doubt about the identity of the stolen goods and its recovery from Hafiz Mohd. and Liyakat Ali is also not proved. Recovery of none of the goods was effected in the presence of the public witness and PW-6 (Giri Raj) and PW-7 (Ram Avtar), who were cart pullers did not support

the case of the prosecution that the stolen / robbed bags of copper scraps were delivered by them at the shop of Hafiz and Liyakat Ali.

14. It is a settled legal position that the powers of the court in appeal against an order of acquittal are limited. The Apex Court in the case of **Ghurey Lal vs. State of U.P.**, reported at 2008 4 CCC SC 49 has laid down the following principles before granting leave to appeal against an order of acquittal:

“1. 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.

A number of instances arise in which the appellate court would have 'very substantial and compelling reasons' to discard the trial court's decision. 'Very substantial and compelling reasons' exist when:

- i) The trial court's conclusion with regard to the facts is palpably wrong;
- ii) The trial court's decision was based on an erroneous view of law;
- iii) The trial court's judgment is likely to result in "grave miscarriage of justice";
- iv) The entire approach of the trial court in dealing with the evidence was patently illegal;
- v) The trial court's judgment was manifestly unjust and unreasonable;
- vi) The trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/report of the Ballistic expert, etc.
- vii) This list is intended to be illustrative, not exhaustive.

2. The Appellate Court must always give proper weight and consideration to the findings of the trial court.

3. If two reasonable 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.
15. The burden of proof lies on the prosecution and the prosecution has to prove a charge beyond reasonable doubt, a settled principle of criminal jurisprudence. The accused has a right to fair trial and the presumption of innocence is in favour of the accused.
16. We have examined the judgment of the trial court. Upon examining the case in hand on the touch-stone of the aforesaid principles, we do not find that there is any illegality or perversity in the reasoning given by the learned Additional Sessions Judge in disbelieving the case of the prosecution. It cannot be said that the judgment of the acquittal is either based on mis-appreciation of evidence or apparent violation of settled cannons of criminal jurisprudence. This court cannot lose track of the settled law that interference is called for only when there are substantial and compelling reasons for doing so.
17. In view of the aforesaid facts, we do not find that this is a fit case for grant of leave to appeal. Consequently, leave to appeal stands dismissed.
18. The CRL.M.A. 20066/2011 also stands dismissed.

G.S.SISTANI, J

SANGITA DHINGRA SEHGAL, J

JANUARY 12, 2015

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