

IN THE HIGH COURT OF DELHI AT NEW DELHI

+ CRIMINAL LEAVE PETITION No. 11/2015

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Date of decision: 28th May, 2015

STATE

.....APPELLANT

Through: Mr. Sunil Sharma, APP for State.

Versus

SONU SHARMA & ANR.

.....RESPONDENT

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 of the Code of Criminal Procedure, the State seeks leave to appeal against the judgment dated 05.09.2014 passed by the learned Trial Court in Session Case No. 94/1, whereby both the respondents (accused before the Trial Court) were acquitted of the charge punishable under Sections 452/34 of the Indian Penal Code and respondent no. 2 Suresh @ Suri was also acquitted of the charge punishable under Sections 307/34 of the Indian Penal Code and the respondent no. 1 was convicted under Section 307 of the Indian Penal Code.
2. The facts of the case, as noticed by the learned trial court, are that DD No. 6-A was recorded at Police Station Maurya Enclave on 31.07.2012 at about 06.20 a.m. quarrel at GP Block Jhuggi, Pitampura and the contents of that DD were telephonically

informed to SI Kuldeep for taking necessary action; that accordingly SI Kuldeep collected the MLC of the injured Ranjay from Baba Ambedkar Hospital and he was opined to be unfit for statement; that on the statement of the informant i.e. Durga Devi who claimed to be an eye witness to the incident, rukka was prepared and a case was registered under Sections 307/452/34 of the Indian Penal Code; that on 01.08.2012, accused Ashok and Akash were apprehended in the presence of their parents as they were found to be juveniles and thereafter they made their statements and were produced before the Learned Principal Magistrate, JJB and were sent to Observation Home; that on 29.08.2012, respondent no. 1 Sonu Sharma @ Chikna had surrendered before the court in some other case FIR No. 42/06, PS Paschim Vihar under Section 25 of Arms Act and thereafter he was arrested in the present case FIR No. 195/12, PS – Maurya Enclave under Sections 307/452/34 of the Indian Penal Code; that thereafter respondent no. 1 made disclosure statement and pointed out the place of occurrence and weapon of offence i.e. the knife was recovered by him; that respondent no. 2 also surrendered before the court on 28.09.2012, thereafter he was arrested and made disclosure statement; that on completion of investigation, the prosecution filed chargesheet under Sections 307/452/34 of the Indian Penal Code against both the respondents.

3. To bring home the guilt against the respondents, the prosecution examined 13 witnesses in all. Statements of both the respondents were recorded under Section 313 of Code of Criminal Procedure by

the learned trial court wherein they pleaded not guilty and claimed trial.

4. Mr. Sunil Sharma, APP argued the case on behalf of the State and opened his submissions by contending that the impugned judgment dated 05.09.2014 was based on conjectures and surmises, the same was against the facts and law; and the same be set aside to the extent the same acquits both the respondents for offence under Sections 452/34 of the Indian Penal Code and further acquits the respondent no. 2 for the offence under Sections 307/34 of the Indian Penal Code and both respondents be accordingly convicted for the above mentioned offences; that the learned trial court placed undue weightage on the minor discrepancies in the statements of the prosecution witnesses which had supported the case of the prosecution; that the learned trial court overlooked that PW1 Durga Devi, mother of injured Ranjay, PW2 Injured Ranjay and PW4 Janki Kumari, sister of injured Ranjay had consistently stated that the respondent no. 1 attacked PW2 with a knife and respondent no. 2 and other associates attacked PW2 with other weapons inside the house of PW2; that the learned trial court overlooked the fact that the presence of both the respondents and their two associates in the jhuggi of PW2 at such early hours of the morning was proved by the testimonies of the prosecution witnesses as the respondent no. 2 also gave beatings to PW2 and the same could only have been in furtherance of a pre-meditated plan and thus common intention was proved.

5. The learned APP for State relied upon the case of *Suresh and Another v. State of UP, Reported in Criminal Appeal No. 821 of 2000*, wherein the Hon'ble Supreme Court held that :

“For the applicability of Section 34 to a co-accused, who is proved to have common intention, it is not the requirement of law that he should have actually done something to incur the criminal liability with the aid of this section. It is now well settled that no overt act is necessary to attract the applicability of Section 34 for a co-accused who is otherwise proved to be sharing common intention with the ultimate act done by any one of the accused sharing such intention”.

In the case of *State of U.P. Vs. Iftikhar Khan and Ors. Reported in (1973) 1 SCC 512*, the Hon'ble Supreme Court held that :

“It is not necessary, to attract Section 34, that any overt act must be done by the particular accused. The section will be attracted if it is established that the criminal act has been done by anyone of the accused persons in furtherance of the common intention”.

6. We have heard the learned counsel for the State and carefully examined the impugned judgment, evidence placed on record and the submissions so made.
7. Before proceeding further, we shall discuss Section 452 of the Indian Penal Code.

452. House-trespass after preparation for hurt, assault or wrongful restraint.—Whoever commits house-trespass, having made preparation for causing hurt to any person or for assaulting any person, or for wrongfully restraining any person, or for putting any

person in fear of hurt, or of assault, or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

8. Further, to sustain the conviction Under Section 452 of the Indian Penal Code, the following essential ingredients are to be established:

In order that this section may apply :

1. The accused should have committed house-trespass;
 2. He should have committed it having made preparation for :
 - (a) causing hurt to any person or
 - (b) assaulting any person or
 - (c) for wrongfully restraining any person or
 - (d) for putting any such person in fear of hurt, assault or wrongful restraint.
9. It is well settled law that before a person could be convicted under Section 452 of Indian Penal Code, it is necessary that the person should have entered into a building, tent or vessel used as a human dwelling.
10. The learned APP for the State argued that though there were minor discrepancies in the statements of the prosecution witnesses but in spite of the same they supported the case of the prosecution to a large extent.
11. Injured Ranjay was examined as PW2 and he deposed that in the midnight of 30.06.2012 at about 12.00 a.m. one person namely Ashok @ Tanya came and attempted to break-open the locks of his shop, which is looked after by his mother and he caught hold of Ashok @ Tanya and gave him 2-3 slaps in the presence of his mother and sister Janki. He further deposed that on 01.07.2012 at

about 6:15 a.m. Ashok (Juvenile) carrying one sharp edged and sharp pointed weapon along with respondent Sonu @ Chikna who was carrying a knife, respondent Suresh who was carrying a wooden danda and one more boy (Ballam) who was also carrying a danda came inside his Jhuggi. PW 2 further deposed that when he was sleeping, he was given four knife blows on the different parts of his body and when he woke up, he saw respondent Sonu @ Chikna inflicting knife injuries upon him. He further deposed that the other three persons were inflicting blows with dandas and other weapons carried by them as a result of knife injuries on his stomach, his intestine came out. He further deposed that thereafter both the respondents and their other two associates ran away from the spot and he himself called the police on which PCR officials came and took him to Baba Ambekdar Hospital where his statement under Section 161 of the Code of Criminal Procedure was recorded.

On being cross-examined by the learned APP, PW2 deposed that being illiterate he was not sure whether the incident of inflicting injuries took place on 31.07.2012 or 01.07.2012 and the incident of breaking open of lock was of 30.07.2012 and not of 30.06.2012. He further deposed that he was not sure whether the doctor had taken his blood stained clothes in the hospital whereas PW2 later in court identified his shorts as Ex.P1 which he was wearing at the time of inflicting injuries upon him by the respondents and also identified the knife as Ex. P2 with the help of which injuries, were inflicted upon him by accused Sonu @ Chikna.

12. PW1 Durga Devi, mother of injured Ranjay in her testimony deposed that she did not remember the exact date, month but during the rainy month last year 2011 at about 6.00 a.m. respondent Sonu and Suri along with Tanya and one more boy started beating her son PW2 who was sleeping inside the jhuggi from where he was taken out by the respondents and their associates and they started inflicting injuries to her son with the help of one sharp edged knife like article and lathi. She further deposed that she saw the incident by herself and when started screaming, the respondents and other assailants ran away from the spot. She further deposed that her son had sustained injuries on his stomach and part of his intestine came out and the blood of oozing out from his stomach. She further deposed that she took her son to Baba Ambedkar Hospital by hiring a TSR where police came and recorded her statement Ex.PW1/A. She further deposed that she had no knowledge of any previous enmity between her son and the respondents and their associates.
13. PW4 Janki Kumari, sister of injured Ranjay in her testimony deposed that that on 31.07.2012 at 6.00 a.m. she was sleeping on the ground floor of her house whereas her brother was sleeping on the first floor. She further deposed that four people came inside their house and took her brother outside the house forcibly where Tanya and Suri were holding her brother whereas Gora @ Sonu inflicted 4-5 knife blows on the body of her brother. She further deposed that she did not enter the room due to fear but she had seen the respondent inflicting injuries upon her brother.

PW4 further deposed that she called the PCR and the part of the intestine of her brother came out of the wound inflicted on stomach. Thereafter the wound of her brother was covered with the help of towel and he was taken to Police Station Maurya Enclave from where the police took him to Baba Ambedkar Hospital and her statement was record by the Investigating Officer.

14. From the close examination of the testimony prosecution witnesses, it has emerged on record that there are contradictory statements of the prosecution witnesses about the removal of injured Ranjay to the hospital as according to PW1 Durga Devi, her son was taken to the hospital by her whereas the MLC of the injured Ranjay Ex.PW6/A shows that he was taken to the hospital by PCR as name of Durga Devi did not appear in the column of friends and relative in the MLC Ex.PW6/A whereas PW4 Janki Kumari deposed that injured was firstly removed to the police station and from there he was removed to the hospital by the PCR. In view of the above, it is established that there are contradictions in the testimonies of PW1 & PW4 as who took the injured Ranjay to the hospital.
15. It is also doubtful whether the injuries caused to injured Ranjay by the respondents were caused inside the house or outside the house or somewhere else as reflected in their statements as PW2 injured Ranjay deposed that respondents and their associates caused him injuries with knife while he was sleeping inside the house whereas PW4 deposed that respondents with their associates took PW2 outside the house and caused him injuries. It is doubtful from the statements of PW2 and PW4 whether PW2 sustained injuries inside

or outside the house or somewhere else. Moreso, no blood stains were found inside or outside the house as it was alleged that the injured sustained injuries in his stomach and his intestine came out and he was bleeding also and there must be every possibility of falling blood from the wounds at the place of occurrence. Therefore, the prosecution failed to establish offence under Section 452/34 of the Indian Penal Code against the respondents beyond reasonable doubts.

16. On careful examination of the testimony of PW2, it is evident that respondent Sonu @ Chikna was carrying a knife which was later on recovered from his possession on his pointing out whereas according to the MLC Ex.PW6/A of injured Ranjay, no danda injuries were found but only incised wounds caused by knife/sharp edged weapon were found. PW2 Ranjay in his testimony nowhere deposed that while respondent Sonu @ Chikna was giving him knife blows, respondent Suresh @ Suri had caught hold him therefore the common intention of causing injuries to the injured Ranjay on the part of respondent Suresh @ Suri was not proved. The only fact which was proved was that respondent Suresh @ Suri was accompanying respondent Sonu @ Chikna and other accused persons (Juveniles). Therefore, the prosecution failed to prove offence under Section 307/34 of the Indian Penal Code against respondent Suresh @ Suri beyond reasonable doubt. Though it was established that Sonu @ Chikna caused injuries to the injured Ranjay with knife, therefore we are of the view that this is a clear case of intention to attempt to commit the murder of PW2 as

respondent Sonu @ Chikna acted in concert and committed an offence under Section 307 Indian Penal Code.

17. 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.

18. In an another case of **Ramanand Yadav v Prabhunath Jha (2003)** 12 SCC 606, Apex Court observed that

"19. 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".

19. In ***Kallu v. State of M.P. (2006) 10 SCC 313***, it was observed by the Hon'ble Court that;

"8. 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".

20. 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 learned trial court for acquitting both the respondents under Sections 452/34 of the Indian Penal Code and for acquitting respondent no. 2 Suesh @ Suri under Section 307/34 of the Indian Penal Code was possible and plausible.

21. In the circumstances, the findings and the observations of the learned 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.

MAY 28, 2015

SC