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

+ CRL.L.P. 31/2016

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Judgment dated 15.01.2016

STATE (GOVT OF NCT OF DELHI)

....Appellant

Through : Ms.AashaaTiwari, APP for the State
with SI Somil, PS-Nand Nagri.

Versus

AJAY & ANR.

....Respondents

Through: None.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

SANGITA DHINGRA SEHGAL, J.

CRL.MA.709/2016

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

CRL.MA.708/2016

3. This is an application under Section 5 of Limitation Act read with Section 482 of the Code of Criminal Procedure filed by the Appellant/State seeking condonation for delay of 27 days in filing the present leave to appeal petition.
4. Heard. Delay in filing the present leave to appeal petition is condoned.
5. Application stands disposed of.

CRL.L.P. 31/2016

6. Present leave to appeal petition has been filed by the State under Section 378 (3) of the Code of Criminal Procedure against the judgment dated 28.08.2015 passed by Sh. Sanjay Sharma, Additional Sessions Judge-01(North East), Karkardooma Courts, Delhi in Session's Case No. 13/2010, acquitting the respondents under Section 302/34 of the Indian Penal Code.

7. The brief facts of this case, as noticed by the learned Trial Court in the judgment are enumerated as under:

“On 12.11.2009, a dead body was found in the gallery of MCD closed toilets, Sunder Nagri, in semi naked condition. Information to this effect was sent to the police on which SI Ashok Kumar reached the spot. Lot of blood and blood stains were found near the body and its face was found to have been crushed. Nothing could be recovered from the search of the body to establish its identity. The deceased was identified as Aslam only on 14.11.2009 by his brother Shabir and Nasir. During investigation it was revealed that one Ajay and Dharamvir were last seen with the deceased.

On 16.11.2009, accused Ajay had called Julfikar and confessed that he alongwith his co-accused Dharamvir had committed the murder of the deceased. Thereafter, both the accused were arrested who got recovered certain belongings of the deceased.

After completion of investigation, charge sheet was filed against both the accused for the offences punishable under Section 302/34 IPC.”

8. To bring home the guilt against the respondents, the prosecution examined 25 witnesses in all. Statement of the respondents were recorded under section 313 of the Code of Criminal Procedure wherein they claimed to be innocent and denied all prosecution charges. However, no evidence was led by respondents in their defence.
9. The learned Trial Judge, after scrutiny of the evidence found that the prosecution had utterly failed to prove its case against either of the respondents beyond reasonable doubt and accordingly, both the respondents namely Ajay and Dharamvir were acquitted under Section 302/34 of the Indian Penal Code.
10. Ms. Aashaa Tiwari, Additional Public Prosecutor for the State opened her submissions by contending that the impugned judgment was erroneous in law, suffered from serious infirmities and the view taken by the learned Trial Court is contrary to the established principle of law laid down by the Hon'ble Apex Court.

Learned counsel for the APP for the State further argued that the learned Trial Court failed to appreciate that it is the quality of evidence which is of prime importance and not the quantity of evidence and in this regard all the testimonies were duly corroborated by other surrounding circumstances. It is argued that the Extra-judicial Confession made by respondent No. 1 before PW4 Julfikar Qureshi, is enough to indict the respondents. Despite the fact that material witnesses turned hostile, their testimonies should not be discarded in totality and should have been relied upon to secure the

conviction of the respondents. It is further argued that once the statement given by the witness to the police under Section 161 of the Code of Criminal Procedure is used to contradict the testimony of the said witness in the Court, the statement given to the police can be taken into consideration under the Proviso to Section 162 (1) of the Code of Criminal Procedure and has relied upon the case of ***Bhagwan Dass Vs State of Delhi : 2011 (6) SCC 396.***

It is further contended that the deceased Aslam was last seen in the company of both the respondents which emerged from the deposition of PW3 Pravesh (younger brother of deceased) and PW8 Rinku Nagpal. It is further argued that in a case of circumstantial evidence, the evidence has to be appreciated as a whole and not in pieces. Even though, there is no eye-witness to the actual crime, yet the prosecution has been able to bring home the guilt of the respondents by proving the complete chain of circumstances beyond reasonable doubt.

11. We heard Ms. Aashaa Tiwari, APP for the State and perused the testimonies of the witnesses as well as the relevant documents placed on record.
12. The present case registered on the basis of an information recorded vide DD No. 2A at Police Station Nand Nagri that a dead body was found in the gallery of MCD closed toilets, Sunder Nagri in semi naked condition on 12.11.2015. Investigating Officer Inspector Satish Sharma examined as PW23 reached the spot and found a dead body in a pool of blood with crushed face. The dead body was identified by

brother of deceased after two days. It is necessary to mention at the threshold that in the present case there is no eye witness to connect the respondents with the alleged offence and the prosecution rests its case primarily upon extra judicial confession, "last seen together" theory and circumstantial evidence.

13. The prosecution primarily rests upon the extra judicial confession made by the respondent No.1 before PW4 Julfikar Qureshi wherein respondent No. 1 told him on the phone that "On 16.11.2009 that he and his associate Dharamveer had murdered Aslam (Deceased) and that I had passed on this information to police through my phone immediately." When this witness was examined before the Court, he categorically deposed that "On 16.11.2009 or on 16.12.2009, I am not confirmed about the date and month. Again said, as far as I remember on 16.11.2009 in the evening time I received a telephone call from one number which I do not remember. At that time, accused Ajay had talked with me on phone. Ajay told me on phone about the presence of accused Dharamveer in the area of General Hospital, except this nothing was told to me by Ajay on phone."
14. An extra-judicial confession can be accepted and can be the basis of conviction, if it passes the test of credibility. The extra-judicial confession should inspire confidence and the court should find out whether there are other cogent circumstances on record to support it. Extra-judicial confession must be established to be true and made voluntarily and in a fit state of mind. The words of the witnesses must be clear, unambiguous and should clearly convey that the accused is

the perpetrator of the crime. In *Vijay Shankar Vs State of Haryana 2015 (3) ACR 2544*, the Apex Court has discussed whether the Court can rely on an extra-judicial confession and to what extent, which is reproduced as under:

“Extra-judicial confession is a weak piece of evidence and the courts are to view it with greater care and caution. For an extra-judicial confession to form the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities.”

15. So far as the extra judicial confession purported to have been made before the PW4 Julfikar Qureshi is concerned, we may notice that the said witness has retracted therefrom. This sole witness of the alleged extra judicial confession has not supported the prosecution case and turned hostile. Being a weak piece of evidence, the testimony of PW4 Julfikar suffers from material discrepancies and inherent improbabilities and thus, the case of prosecution does not stand proved on the basis of extra judicial confession.
16. Further, we are concerned with the contention of the prosecution as to whether the 'last seen together' theory is applicable in the given facts and circumstances of the present case and also whether the links in the chain of circumstances cogently established towards the guilt of the respondents beyond reasonable doubt. It is well settled law that it would be difficult in some cases to positively establish that the deceased was last seen with the accused when there exists a long gap and there is possibility of other persons coming in.

17. In order to prove the theory of 'last seen together', the prosecution examined PW3 Pravesh (the younger brother of the deceased), PW8 Rinku Nagpal and PW11 Satish Kumar as witnesses during the trial of the case. PW3 Pravesh deposed that :

"On 11.11.09, I had seen my brother Aslam with Dharamvir and Ajay at about 8:00 p.m. at CNG Pump, Near Gagan Cinema, Delhi."

PW8 Rinku Nagpal entered into witness box and deposed that:

*"About three years prior, in the summer season, I was present at the rickshaw garage of Julfikar @ Julfi, Near Public Convenience in the area of N-Block, Sunder Nagri at about 01:30 pm. Accused Ajay was also present there along with one Satish. We had been gambling there. I lost 80-90 rupees and Satish lost 150 rupees in that gambling. Thereafter, accused Ajay had taken me and Satish at Sharab-ka Theka, Near Gagan Cinema, Nand Nagri, Delhi. There, we consumed quarter bottle each. Accused Dharamveer along with Aslam(deceased) were standing near the aforesaid Theka when we reached there. After consuming liquor I along with Satish reached at the garage of Julfikar. **We had left accused-Ajay, Dharamveer and deceased Aslam between 3:30 to 4:30pm at the aforesaid Theka.** On the same day I had gone to aforesaid garage to park my rickshaw at about 6:30pm or 6:45pm. I had seen standing accused-Ajay and Dharamveer at the red light point, near Gagan Cinema. I and both accused persons started gambling, near a dustbin at aforesaid red light and I again lost Rs.40/-. Thereafter, I went to my house and accused-Ajay and Dharamveer again went to aforesaid Theka. I do not know other facts of this case."*

During cross examination, this witness turned turtle and while giving an opposite version deposed that:

"“It is incorrect to suggest I had seen accused Ajay and Dharamveer while going with deceased Aslam at about 08:15pm on 11.11.2009”.

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It is wrong to suggest that today I am deposing falsely on the facts of lastly seen of deceased with accused persons at about 8:15 p.m.. Vol. I had seen lastly deceased Aslam at about 6:45 pm or 7:00 pm on that day when we had consumed liquor."

The Trial Court referred to the testimony of PW11 Satish Kumar, who deposed:

"On 11.11.2009, at about 6:00 pm or 7:00 pm, he had seen accused Ajay gambling with Rinku and Satish at Sunder Nagri in which Rinku won some money from Ajay and thereafter, he along with Satish, Rinku and accused Ajay went to the wine shop, Gagan Cinema where he saw accused Dharamvir and the deceased sitting in a rickshaw near the wine shop. He further deposed that he, Satish, Rinku and accused Ajay consumed liquor and then Ajay joined accused Dharamvir and the deceased while he returned back with others to his house."

18. The settled law with respect to 'last seen theory' has been reiterated in various cases and has been succinctly elucidated in *State of*

Karnataka Vs. Chand Basha : 2015 (3) ACR 3439, wherein the Hon'ble Apex Court has observed :

"This Court has time and again laid down the ingredients to be made out by the prosecution to prove the 'last seen together' theory. The Court for the purpose of arriving at a finding as to whether the said offence has been committed or not, may take into consideration the circumstantial evidence. However, while doing so, it must be borne in mind that close proximity between the last seen evidence and death should be clearly established."

19. In ***Mahavir Singh Vs. State of Haryana : 2015 (4) SCJ 161***, the Hon'ble Apex Court has observed :

"Undoubtedly, it is a settled legal proposition that last seen theory comes into play only in a case where the time gap between the point of time when the accused and the deceased were seen alive and when the deceased was found dead. Since the gap is very small there may not be any possibility that any person other than the accused may be the author of the crime."

20. In ***State of UP Vs Satish (2005) 3 SCC 114*** the Apex Court has observed on last seen theory as under:

"23. The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the

accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases....”

21. Keeping in view the above cited judgments, it is settled law that 'last seen theory' comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible.

Perusal of the testimonies of the witnesses mentioned above shows that PW3 Pravesh had seen his brother Aslam with the respondents at about 8:00 pm at CNG Pump, Near Gagan Cinema, Delhi whereas PW8 Rinku Nagpal deposed that he left respondents and deceased Aslam between 03:30 pm to 04:30 pm at the Theka, Near Gagan Cinema, Nand Nagri, Delhi. PW8 further deposed that at about 06:30pm or 06:45pm he saw the respondents at the red light, Near Gagan Cinema where PW8 and both the accused persons started gambling near the dustbin where he lost Rs.40. PW11 Satish Kumar deposed that he saw respondent No. 1 at about 6:00 pm or 7:00 pm gambling with Rinku and Satish at Sunder Nagri in which Rinku won some money from respondent No. 1 and thereafter, he along with Satish, Rinku and respondent No. 1 went to the wine shop, Gagan Cinema where he saw respondent No. 2 and the deceased sitting in a rickshaw near the wine shop. He further deposed that he, Satish,

Rinku and accused Ajay consumed liquor and then respondent No. 1 joined respondent No. 2 and the deceased while he returned with others to his house. On close scrutiny, the testimonies of these witnesses who turned hostile are wholly contradictory, discrepant and do not support the case of the prosecution. The improbabilities in their testimonies neither inspire confidence nor lead to a conclusion that the respondents were last seen with the deceased. Furthermore, as per the post mortem report, the deceased died sometime late in the night of 11.11.2009 whereas as per the deposition of the witnesses the deceased was last seen in the company of the respondents much earlier since his death and there is a long gap when the deceased was seen alive with the respondents. The place where the respondents and deceased were seen together is at a distance from the place of alleged offence. None of these prosecution witnesses claimed to have seen the respondents with deceased in Sunder Nagri or for that matter going towards Sunder Nagri where the alleged murder was committed. The contradictions observed in the testimonies of these witness cannot be considered as minor, rather they amount to material contradictions and cannot be reliable and trustworthy and 'last seen together' theory adduced by the prosecution does not hold ground.

22. So far as **circumstantial evidence** is concerned, Law is well settled that when the prosecution relies upon circumstantial evidence, all the links in the chain of circumstances must be complete and should be proved through cogent evidence. In *Padala Veera Reddy Vs State of Andhra Pradesh and others : AIR 1990 SC 79*, it was observed that:

“...this Court in a series of decisions has consistently held that when a case rests upon circumstantial evidence such evidence must satisfy the following tests:

(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

23. In case of **Dr. Sunil Clifford Daniel**
Vs. State of Punjab : (2012) 11 SCC 205, the Hon'ble Apex Court
has held :

"In a case of circumstantial evidence, the prosecution must establish each instance of incriminating circumstance, by way of reliable and clinching evidence, and the circumstances so proved must form a complete chain of events, on the basis of which, no conclusion other than one of guilt of the accused can be reached. Undoubtedly, suspicion, however grave it may be, can never be treated as a substitute for proof. While dealing with a case of circumstantial evidence, the court must take utmost precaution whilst finding an

accused guilty, solely on the basis of the circumstances proved before it."

24. The circumstances must be firmly established and the chain of circumstances must be completed from the facts. In case of circumstantial evidence, court has to examine the entire evidence in its entirety and ensure that the only inference that can be drawn from the evidence is the guilt of the accused. There are material inconsistencies in the testimonies of the material witnesses being PW3, PW4 and PW8, which cannot be relied upon and thus, the chain of circumstances is incomplete.
25. As discussed above, the circumstances relied upon by the prosecution have not been established by convincing evidence and they do not form a complete chain pointing towards the guilt of the respondents.
26. Returning to the contention of learned counsel for the appellant/State that though the witnesses turned turtle in their cross examination, their entire testimonies cannot be discarded in toto. Reference is being made to the said law in **Attar Singh Vs State Of Maharashtra : (2013) 11 SCC 719**, the Hon'ble Apex Court has observed that :

"We have meticulously considered the arguments advanced on this vital aspect of the matter on which the conviction and sentence imposed on the Appellant is based. This compels us to consider as to whether the conviction and sentence recorded on the basis of the testimony of the witness who has been declared hostile could be relied upon for recording conviction of the accused-Appellant. But it was difficult to overlook the relevance and value of the evidence of even a hostile witness while considering as to what extent their evidence could be allowed to be relied upon and used

by the prosecution. It could not be ignored that when a witness is declared hostile and when his testimony is not shaken on material points in the cross-examination, there is no ground to reject his testimony in toto as it is well-settled by a catena of decisions that the Court is not precluded from taking into account the statement of a hostile witness altogether and it is not necessary to discard the same in toto and can be relied upon partly. If some portion of the statement of the hostile witness inspires confidence, it can be relied upon. He cannot be thrown out as wholly unreliable. This was the view expressed by this Court in the case of ***Syed Akbar v. State of Karnataka*** reported in ***AIR 1979 SC 1848*** whereby the learned Judges of the Supreme Court reversed the judgment of the Karnataka High Court which had discarded the evidence of a hostile witness in its entirety. Similarly, other High Courts in the matter of ***Gulshan Kumar v. State : (1993) Cri.L.J. 1525*** as also ***Kunwar v. State of U.P. : (1993) Cri.L.J. 3421*** as also ***Haneefa v. State : (1993) Cri.L.J. 2125*** have held that it is not necessary to discard the evidence of the hostile witness in toto and can be relied upon partly. So also, in the matter of ***State of U.P. v. Chet Ram*** reported in ***AIR 1989 SC 1543 : (1989) Cri.L.J. 1785***; it was held that if some portion of the statement of the hostile witness inspires confidence it can be relied upon and the witness cannot be termed as wholly unreliable. It was further categorically held in the case of ***Shatrughan v. State of M.P. (1993) Cri.L.J. 3120*** that hostile witness is not necessarily a false witness. Granting of a permission by the Court to cross-examine his own witness does not amount to adjudication by the Court as to the veracity of a witness. It only means a declaration that the witness is adverse or unfriendly to the party calling him and not that the witness is untruthful. This was the view expressed by this Court in the matter of ***Sat Paul v. Delhi Administration : AIR 1976 SC 294***. Thus, merely because a witness becomes hostile it

would not result in throwing out the prosecution case, but the Court must see the relative effect of his testimony. If the evidence of a hostile witness is corroborated by other evidence, there is no legal bar to convict the accused. Thus testimony of a hostile witness is acceptable to the extent it is corroborated by that of a reliable witness. It is, therefore, open to the Court to consider the evidence and there is no objection to a part of that evidence being made use of in support of the prosecution or in support of the accused."

As already discussed above, the testimonies of PW3 Pravesh, PW4 Julfiqar, PW8 Rinku Nagpal and PW11 Satish are neither trustworthy nor convincing and casts serious doubt.

27. The law with regard to 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 conceivable.
28. In ***Sudarshan Kumar Vs. State of H.P. : 2014 (14) SCALE 276***, the Hon'ble Apex Court observed that :

"29. It has been stated and restated that a cardinal principle in criminal jurisprudence that presumption of innocence of the accused is reinforced by an order of the acquittal. The appellate court, in such a case, would interfere only for very substantial and compelling reason. There is plethora of case laws on this proposition and we need not burden this judgment by referring to those decisions. Our purpose would be served by referring to one reasoned pronouncement entitled ***Dhanapal v. State by Public Prosecutor, Madras : (2009) 10 SCC 401*** is the judgment where

most of the earlier decisions laying down the aforesaid principle are referred to. **In Para 39**, propositions laid down in an earlier case are taken note of as under:

39. In *Chandrappa and Ors. v. State of Karnataka* : (2007) 4 SCC 415, this Court held:

(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly,

the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.

30. Thereafter, **in Para 41**, the Court curled out five principles and we would like to reproduce the said para hereunder:

41. The following principles emerge from the cases above:

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."

29. Keeping in view the above settled law and in totality of the facts and circumstances, we do not find any reason to interfere with the impugned judgment passed by learned Trial Court. Accordingly, present leave petition being devoid of merit is dismissed.

SANGITA DHINGRA SEHGAL, J

G.S.SISTANI, J

JANUARY 15, 2016

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