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

+ **CRL. L.P. 73/2016 & Crl. M A No. 1716/2016**

% *Date of Judgment: 9th November, 2016*

STATE Appellant

Through: Mr. Varun Goswami, Advocate.

Versus

DINESH KUMAR @ MASTER & ORS. Respondents

Through: Mr. Anupam Sharma, Advocate

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE VINOD GOEL

G.S.SISTANI, J. (ORAL)

1. The present leave to appeal has been filed by the State under Section 378 (1) of the Code of Criminal Procedure, being aggrieved by the judgment dated 27.04.2015 passed by the Sessions Judge in Sessions case No. 127/13 by virtue of which the respondents were acquitted for the offence punishable under Section 302/120B of the Indian Penal Code (hereinafter referred to as 'IPC').
2. The facts of the present case as noticed by the trial court are as under:
"2. The facts in brief, as stated in the charge sheet are that on 16.01.2013 vide DD No. 11 A an information was recorded about one person having been shot at Railway line between

Delhi Cantt to Sagarpur at Palam. The investigations were carried out by SI Ramji Pandey who immediately visited the spot where he came to know that the injured has already been taken to DDU hospital. No eye witness was found available on the spot. SI went to DDU hospital where he came to know that the injured had suffered gunshot injuries and had been taken to operation theatre for operation. An FIR under section 307 IPC and 27/54/59 Arms Act was registered. Thereafter, the doctor informed that the injured Ashok Kumar has expired. The FIR was converted from 307 IPC to 302 IPC. During the investigation, the crime team was called at the scene of incident where the crime team inspected the spot and took the photographs. SI Jitender Singh who along with one Vinay Aggarwal, had taken the deceased to DDU hospital from the spot, was found present. At his instance, the site plan was prepared. The Investigating Officer lifted the blood and earth control and also the blood stained bricks and seized them after sealing them in a 'pulinda.'

3. On 17.01.2013, the post-mortem of the deceased was conducted at DDU hospital. His clothes and the bullet recovered from his body, were sealed in separate pulinda and handed over to the Investigating Officer. The statement of Smt. Seema, wife of the deceased and of the parents, Shri Harish Chander and Smt. Gudia were recorded from where it was revealed that Smt. Seema belonged to Thakur caste, while the deceased belonged to Harijan (SC) caste. Smt. Seema and deceased Ashok Kumar had a love marriage, about which the accused Satpal father of Smt. Seema was not pleased and had been threatening the deceased. On 19.01.2013, Sh. Satpal Singh had come to his daughter Smt. Seema and was interrogated by the police. He admitted his guilt and disclosed that he had suffered defamation in his community on account of marriage of his daughter with the deceased. Therefore, he engaged accused Kunwar Neeraj for killing Ashok Kumar on payment of Rs. 2 lacs. Part payment was made to Neeraj who along with Ankit and his friends, committed the murder of Ashok Kumar.

4. During the investigations, it was found that Smt. Seema as well as deceased were pursuing B.Ed. course from Meerut University in 2010. They had a love marriage. Smt. Seema had one daughter. Accused Satpal, in order to gain sympathy, starting talking to Smt. Seema and on an excuse of coming to meet her in Delhi, took her address of Delhi. He even paid Rs. 25,000/- in advance to accused Neeraj, who on 24.12.2012, along with Ankit Sharma and Dinesh @ Master went to the office of the deceased to confirm his address. Accused Dinesh @ Master stood in the lane to keep an eye, while accused Neeraj and Ankit went inside the house where Seema alone was present. Accused Neeraj and Ankit inquired about Ashok and Neeraj gave a missed call to Ashok from his mobile no. 9350763902, but the mobile phone was left by the deceased in his house itself. After some time, the deceased reached his home. Accused Neeraj and Ankit also entered into the room of the deceased and tried to bolt it from inside. Smt. Seema objected and threatened to call the landlord, on which accused Neeraj and Ankit made an excuse and left the house. Smt. Seema informed about this incident to her 'Muhbola' brother Yogesh. Accused Satpal gave Rs.15,000/- to accused Neeraj etc. on 27/28.12.2012.

5. As per the conspiracy, on 16.01.2013, accused Neeraj, Dinesh @ Master and Ankit Sharma came on motorcycle No. DL4S AK6736 while the other accused Yogesh @ Rinku, Puneet and Amit came on another motorcycle to East Sagarpur. They parked their motorcycles at a distance. Accused Neeraj was having a country made pistol and cartridge, accused Dinesh @ Master had an airgun and accused Amit Gupta and Puneet @ Lambu were having a dragger each. At around 8.45 a.m., accused Neeraj, Dinesh @ Master, Amit Gupta, Puneet @ Lambu and Yogesh took their positions near the scene of crime while accused Ankit stood on alert near the motorcycles. At about 9.15 a.m. when the deceased Ashok Kumar was returning after leaving his wife, Smt. Seema at CVD Delhi Cantt. and was

crossing the railway line, the accused Dinesh, Yogesh, Amit and Punit started giving beatings to the deceased.

6. When the deceased tried to free himself from their clutches and started proceeding towards the lane, accused Neeraj shot fire from his country made pistol and the bullet hit the deceased in his chest. The deceased shouted for help and ran towards the CVD Delhi Cantt and collapsed near its gate. Accused Ankit was standing ready on the motorcycle on which Neeraj, Dinesh and Ankit escaped. The other three accused escaped on the other motorcycle.”

3. After completion of the investigation, charge sheet was filed under Section 302 IPC read with Section 120B IPC and 25/27/54/59 of the Arms Act against all the accused persons. A charge under Section 302/120B IPC was framed against all the accused persons on 09.01.2014 to which they pleaded not guilty. Additional charge under Section 25/27 of the Arms Act was also framed against the accused Kunwar Neeraj on 12.03.2014.
4. To bring home the guilt of the accused persons the prosecution examined sixteen witnesses in all. The statement of the accused persons were recorded under section 313 of the Code of Criminal Procedure wherein they pleaded their innocence.
5. Learned trial court while acquitting the respondents herein made the following observation:

“84. In so far as the other accused namely, Dinesh @ Master, Ankit, Amit and Punit are concerned, there is not an iota of evidence except the disclosure statement of the accused Satyapal, Ex. PW14/D. There are some phone calls between accused Ankit and accused Satyapal, but that in itself, is not sufficient to conclude that accused Ankit Sharma was also a part of the conspiracy. The prosecution had claimed that

accused Kunwar Neeraj along with Dinesh @ Master and Ankit had visited the house of the deceased in the month of December 2012 for the purpose of recce but the sole witness to their visit was PW-1 Smt. Seema who had failed to identify any of these accused persons. Except this, there is no incriminating evidence against the accused Dinesh @ Master, Ankit, Amit and Punit. The benefit of doubt has to be extended to these four accused persons as there is no incriminating evidence brought forth to commit murder of Ashok Kumar against them.”

6. Mr. Goswami, learned counsel for the State submits that the order of acquittal and judgment dated 27.04.2015 by which all the four respondents herein have been acquitted is bad in law and has caused grave miscarriage of justice.
7. Mr. Goswami submits that in the present case, one Seema had married deceased Ashok against the wishes of her parents. Ashok and Seema belong to different castes. The father of Seema had engaged Kunwar Neeraj for killing Ashok and Kunwar Neeraj upon receiving of payment, along with Ankit and other three friends, respondents herein, murdered Ashok.
8. The counsel also submits that the trial court has not appreciated the fact that all the respondents had a specific role to play and thus, the order of the trial court is liable to be set aside. Counsel further contends that the case of the prosecution is based upon circumstantial evidence which unequivocally points towards the guilt of the accused persons which could not have been brushed aside.
9. It is contended by the counsel for the State that the call records of respondent No.2 accused Ankit Sharma shows that he was in instant touch with the accused Satyapal Singh and accused Kunwar Neeraj on

phone. It is further contended that the trial court had failed to appreciate that the respondents were found in the same car from where convict Kunwar Neeraj was apprehended and they were also found with knives and air guns at that point of time.

10. It is also the case of the State that trial court has gravely erred while convicting the accused Kunwar Neeraj under the Arms Act for possessing knives and air guns, but although, the knives and air guns were also recovered from the respondents, they were not convicted.
11. It is also the case of the State that the acquittal of the respondents is without any basis and the trial court has not taken into consideration the evidence on record.
12. On the converse, Mr. Anupam Sharma, learned counsel appearing for the respondents submits that there is no infirmity in the judgment passed by the trial court. The trial court has examined the entire evidence on record. There is no evidence on record which can link the respondents to the commission of the crime.
13. We have heard learned counsel for the parties and carefully examined the judgment passed by the trial court and statements of the witnesses which were handed over in court by the counsel.
14. Before delving into the merits of the submissions made by the learned counsel for the State, it would be relevant to discuss the testimony of PW-1 as relied by the prosecution to prove its case.
15. PW-1 Seema is the wife of the deceased Ashok Kumar. Although, this witness has testified that she and the deceased belong to different communities and the marriage has been solemnized against the wishes of her parents, she is not an eye-witness to the incident. PW-1 has

testified that on 16.01.2013, her husband accompanied her to her office at around 9:00 A.M and as she entered in the office, she was called to the gate by the guard and she saw her husband who was bleeding profusely surrounded by four guards. Her husband was taken to the DDU hospital, where he died subsequently.

16. It may be noticed that during cross-examination, PW-1 denied that Ankit and Kunwar Neeraj were the same persons, who had visited her house and deposed as under:

“72. PW-1 Smt. Seema in her cross-examination by learned APP for State has further stated that her husband had come up stairs and she had informed him about two persons having come from Kanpur to meet them, but he suspected their claim as he did not know them. Her husband asked her to come downstairs but by the time, she came down, those persons had left and she could not see those persons. The learned APP for the State had suggested that those two persons were accused Ankit and Neeraj, but the witness expressed her inability to identify them as the same persons who visited their house on 24.12.2012. she had given the names of the accused as Ankit and Neeraj in her statements to the police, but in her testimony, she failed to identify the accused Ankit and Neeraj. She, however, admitted that one Yogesh who used to work with her father in Meerut, used to treat her as his sister and was in regular touch with her. She admitted that she had called up Yogesh and informed him about the incident of certain persons visiting their house. These admissions made by PW-1, Smt. Seema in her cross examination by learned APP for the State fully corroborates the testimony of PW-10 that there were two persons, who had visited their house on 24.12.2012. this clearly shows that two persons had been sent by the accused Satyapal to do the recce of the house of the deceased and to identify him with the objective of committing his murder.”

17. PW-9 and PW-10 are the parents of the deceased. They have also not made any statements with regard to the respondents herein.
18. Counsel for the State has also relied on formal witnesses i.e. PW-5 Jitender Singh (Store Keeper), PW-13 Retired Naib Subedar Kalyan Dutt, PW-6 Head Constable Satish Kumar, who received information about the incident from a mobile phone on the basis of which, he recorded the information on the PCR form Ex.PW-6/A.
19. PW-2 ASI Sarla, who registered the DD No. 11A, PW-3 ASI Vishnu Prasad (the Duty Officer), PW-14 SI Madan Lal. Testimony of PW-7 Israr Babu, Nodal Officer, Vodafone Mobile Services Limited to prove the Customer Application Form pertaining to the mobile number, which was in the name of Satya Pal Singh. PW-8 Rajiv Sharda, Nodal Officer, Reliance Communications Ltd to prove the Customer Application Form of Kunwar Neeraj and Ankit Sharma.
20. Admittedly, in this case, there is no eye witness. By convicting Satpal Singh and Kunwar Neeraj, the trial court has relied upon various incriminating evidence against the said persons.
21. Learned counsel for the respondents has also drawn the attention of the Court to the charge which was framed under Section 25/27 only against Kunwar Neeraj and not against the present respondents.
22. The submission of learned counsel for the State that the respondents have been wrongly acquitted under the Arms Act is without any force as the trial court has observed that though the respondents were found in possession of knives and air guns, but the same did not fall in the category of '*Weapon*' under Section 25/27/54/59 of the Arms Act and there was no other offence made out against the accused.

Furthermore, the trial court has further observed that in fact, no charge was framed against the accused persons under the Arms Act.

23. From the aforesaid evidence, it is apparent that the prosecution story with regard to involvement of the respondents is doubtful and cannot be relied upon for convicting them for the offences charged with. It is a settled principle of criminal jurisprudence that the burden of proof lies on the prosecution and the prosecution has to prove a charge beyond reasonable doubt. 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.
24. In our view, the law with regard to the leave to appeal by the State is well settled in the case of ***Tota Singh and Anr. Vs. State of Punjab*** reported in ***AIR 1987 SC 108***, the Hon'ble Supreme Court made the following observation:

“6. The jurisdiction of the Appellate Court in dealing with an appeal against an order of acquittal is circumscribed by the limitation that no interference is to be made with the order of acquittal unless the approach made by the lower Court to the consideration of the evidence in the case is vitiated by some manifest illegality or the conclusion recorded by the Court below is such which could not have been possibly arrived at by any Court acting reasonably and judiciously and is, therefore, liable to be characterised as perverse. Where two views are possible on an appraisal of the evidence adduced in the case and the Court below has taken a view which is a plausible one, the Appellate Court cannot legally interfere with an order of acquittal even it is of the opinion that the view taken by the Court below on its consideration of the evidence is erroneous.”

25. In ***State of Rajasthan Vs. Raja Ram*** reported in ***AIR 2003 SC 3601*** the Hon'ble Supreme Court held as under:

“7. There is no emerge 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 accused 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 accused and the other to his innocence, the view which is favourable to the accused 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 accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not. The principle to be followed by appellate Court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable, it is a compelling reason for interference.”

26. In ***Sudershan Kumar v. State of Himachal Pradesh 2014 (14) SCALE 276*** the Hon'ble Supreme Court reiterated the view taken by the Apex Court in ***Chandrappa and Ors. v. State of Karnataka*** reported in ***(2007) 4 SCC 415***, wherein it was held as under:

“(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.*

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 demeanor 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 judgment of the trial court which would call for interference in the proceedings. Resultantly, we do not find any merit in the petition."*

27. Keeping in view the above settled law, we find that there is no evidence against the respondents herein by any of the material witnesses being PW-1, wife of the deceased, PW-9 and 10 being parents of the deceased, there is nothing on record or pointed out by the counsel for the State to show that the respondents were in any way connected or conspired for the murder of Ashok. Furthermore, the

faint argument with regard to the call records cannot be entertained as there is no corroborating evidence to show that any of the respondents had any connection to the murder of Ashok. Resultantly, we find no illegality or infirmity in the judgment of the trial court impugned before us which would call for any interference.

28. Accordingly, the leave to appeal is dismissed.

G. S. SISTANI, J.

VINOD GOEL, J.

NOVEMBER 09, 2016

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