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

% *Judgment dated 25th February, 2016*

+ **CRL.L.P.98/2016**

VIRENDER KUMAR

..... Petitioner

Through : Mr.Sandeep Arya with Mr. Bhawani
Shankar, Advocates

Versus

STATE OF NCT OF DELHI & ORS.

..... Respondents

Through : Ms. Aashaa Tiwari, APP for the State
with SI Karamvir, P.S. Narela

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S.SISTANI, J (ORAL)

CrI.M.A.2544/2016(delay)

1. There is a delay of 573 days in filing the present leave to appeal. Though the delay has not been satisfactorily explained, since we have examined the matter on merits, we deem it appropriate to condone the delay. The application is accordingly allowed. Let the criminal leave to appeal petition be taken on record. Application stands disposed of.

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2. Present leave to appeal petition has been filed by the brother of the deceased assailing the judgment of the Trial Court dated 07.07.2014 by which both the respondents no.2 and 3 were acquitted.
3. Learned counsel for the petitioner submits that learned Trial Court has failed to appreciate the testimonies of various witnesses, whose testimonies point towards the guilt of the respondents no.2 and 3. Counsel further submits that once the Trial Court has reached a conclusion and held respondents no.2 and 3 guilty for the offence punishable under Sections 25 and 27 of the Arms Act and convicted them, they were also liable to be

convicted under Section 302 IPC. Counsel further submits that the Trial Court has ignored the FSL report as per which the bullets were fired from the country-made pistol which was recovered at the instance of respondents no.2 and 3. It is also submitted that the Trial Court has also observed that there was shoddy investigation on the part of the State and, thus, the present leave to appeal petition should be allowed. Counsel also submits that the learned Trial Court has failed to consider the fact that the mother of the deceased had pointed out to respondents no.2 and 3 having committed the crime.

4. Learned counsel for the State has also endorsed the submissions made by the counsel appearing for the petitioner/complainant.
5. We have heard the learned counsel for the parties, considered their submissions and also examined the judgment rendered by the learned Trial Court.
6. In this case, on 13.07.2011 at 9.02 a.m. a DD entry was made bearing no.29B to the effect that a person has been shot by two boys in front of Ramdev Chowk, Nai Basti, Pana Mamurpur, Narela, Delhi. The police reached the spot and learnt from the crowd that the injured had been taken to SRHC Hospital. MLC was collected with the history of bullet injury on head. The injured person was unfit for making a statement. Neither any eye witness was present at the spot nor at the hospital. FIR under Section 307 IPC and Section 25 and 27 of the Arms Act was registered. Meanwhile, it was learnt that the injured present had succumbed to his injuries and died. DD no.44B was registered and Section 302 IPC was invoked. After conducting of the post mortem, the bullet recovered from the dead body was handed over and seized. Statement of Rajbala, wife of the deceased was recorded wherein she had stated that accused Lalit had given an iron rod blow on her husband and when he fell

down accused Neeraj fired a bullet on his back. According to Rajbala, the motive was a dispute over a land situated at Singhu Border, Delhi.

7. Based on this information, both the accused persons were apprehended. From respondent no.2, Neeraj, a pistol was recovered from his right dub which was loaded with a live round and another live cartridge was found in his pant pocket. Respondent no.3, Lalit was found in possession of a live cartridge.
8. In support of its case, the prosecution has examined 27 witnesses in all. No evidence was led by defence. It would be useful to examine the material witnesses relied upon by the prosecution.
9. PW-23, Dr.Naveen Kumar, examined the injured at SRHC Hospital at 9:25 a.m. and found the following injuries:

- “i. Two punctured wounds with laceration around 2.0 x 2.0 cm over left parietal region.*
- ii. There was bleeding and brain matter was coming out from left nostril.*

He prepared MLC Ex.PW23/A and referred that patient to SR Surgery. The injured was taken to Maharaja Agarsen hospital where he was examined by PW-24 Dr.Sanjay Kaushik. At that time the patient was unconscious and BP was not recordable. ECG was in straight-line and hence Ravinder was declared dead at 11.15 AM. On examination, Dr. Sanjay Kaushik found following injuries:

- i. One wound at parietal occipital region and one wound at parietal region;*
 - ii. Deep wound at gluteal region;*
 - iii. Deep wound at parional region.*
- He prepared MLC Ex.PW24/A.*

PW1 Dr. Bheem Singh conducted post-mortem in BJRM hospital on 13-07-2011 and found following injuries:

External Injuries:

1. *Fire arm entry wound, oval shape, 2 cm x 1.5 cm cavity deep, middle of left buttock with surrounding abrasion collar, more on lower end, margin inverted, no blackening, burning, singeing and tattooing present.*
2. *Lacerated wound six in number over left parietal temporal and occipital region having (A) 2cm x 0.2 cm x bone deep over left parietal region, 6 cm above from the ear lobule (B) 3 cm x 1.5 cm x bone deep, situate 2 cm above and back from injury no.A, (C) 3 cm x 1 cm x bone deep middle of head on left side (D) 4.5 cms x 2.5 cms x bone deep, left temporal region <(angle) shaped, (E) 2.4 cm x 0.5 cm x bone deep situated 4 cm away back of injury no.D, (F) 2 cm x 1.5 cm x bone deep over left occipital region.*

Internal Injuries:

Head-effusion of blood in scalp layer over left side vertex, parieto temporal and occipital region. Skull showed depressed fracture committing, (3 cm x 2.5 cm) left temporal bone, 3cm x 3 cm, 3 cm, 2.5 cm. Left occipital bone upto middle cranial and posterior cranial fossa. Brain showed sub-dural hemorrhage and sub-arachnoid over left cerebral hemisphere with contusal blow fractures.

Abdomen and Pelvis- *Abdominal cavity was full of blood about 2 liters, organs were pale. One metallic rifled bullet measuring 5.6 cm in length and 0.7 cms in width was present in front of right kidney. Track of the wound after piercing gluteal muscles, skin vessels in left side was that it entered into pelvic cavity between L five (5) and S-one(1) vertebra lodged in front of right kidney, damaging mesentery and vessels. Direction was from left to right and upwards. Approximate track of the wound was 30 cms.*

Spinal Column- *Spinal sacral plexes was damaged on left side of sacral vertebra. Stomach was empty.”*

10. The police witnesses have testified with regard to recording of statements, the arrest of the respondents no.2 and 3, the seizure of the country-made

pistol and the cartridges which were recovered from the possession of the said respondents. The site plan was also prepared by PW-16, SI Manohar Lal.

11. PW-2, Virender, being the real brother of the deceased, testified that on 13.07.2011 he had left the house for his job at 8:45 a.m. He heard the sound of blast when he reached near Ramdev Chowk. When he went to the spot of the sound, he saw his brother lying on the ground, smeared with blood and his wife was sitting near him. On his raising an alarm, people gathered there for help. His brother was taken to the SRHC Hospital by him and Subhash. The Doctors at SRHC Hospital advised them to take Ravinder to some other hospital. The injured was taken to Maharaja Agrasen Hospital, where he was declared dead at 11.10 a.m. This witness has further testified that after cremation of the dead body, Rajbala had told him that accused Neeraj and Lalit had murdered her husband Ravinder. PW-2 has also testified with respect to the motive being a property dispute over a piece of land of approximately Rs.1.5 crores which was pending in the Court of SDM since the year 2000 and the case was being pursued by the deceased Ravinder.
12. PW-3, Subhash Chand, brother of the deceased, had also deposed on the same lines of the testimony of PW-2.
13. PW-18, Rajbala, wife of the deceased, who claimed to be an eye-witness, has testified that she did not know any of the accused persons, but had seen the photographs of the accused persons in the newspaper 18-20 days after the death of her husband. She has further testified that she was at home on 13.07.2011. Her husband left the house at 9:00 a.m. for his work of tyre trading which he used to do at Samaipur Badli. She had heard a noise at 9:45 a.m. from the street. When she inquired, she was told that her husband had been fired at and he had been taken to Maharaja Agarsen Hospital. She

had become unconscious after hearing the bad news. She was then informed by her brother that her husband had died due to bullet injury. She also testified that she learnt from the family members of her husband that he has been murdered by the party with whom her husband has a land dispute with regard to the land at Singhu border. This witness was declared hostile.

14. The Trial Court while taking into consideration the testimonies of the witnesses reached a conclusion that there was no sufficient evidence to convict the respondents no.2 and 3 herein for the offence under Section 302 IPC.
15. The case of the prosecution primarily revolved around the testimony of PW-18, Rajbala. The testimony of PW-18, which has been discussed in the paragraphs aforesaid, would show that she had not at all supported the case of the prosecution in as much as that her testimony would show that she did not know the respondents no.2 and 3 prior to the date of the incident and she had seen their photographs only in the newspapers 18-20 days after the death of her husband. Her testimony would also show that her husband had left the house at 9:00 a.m. and she had heard the noise at 9.45 a.m. from the street, which means that she was not present at the spot and further she was told by the ladies of the neighbourhood and by the family members of her husband about the death of her husband. In no way, based on this can it be said that PW-18 was an eye witness. No doubt in her statement under Section 161 Cr.P.C. on 13.07.2011, she had deposed that she had seen Lalit giving a rod blow on her husband and accused Neeraj had fired a bullet, but her statement under Section 161 is not admissible in evidence.
16. Also it is to be noted that there are contradictions with regards to testimony of PW-2 and PW-18. PW-2 has stated that when he came to the spot where the incident took place, he saw PW-18 sitting over there with the dead body

of her husband whereas PW-18 has stated that she was informed by others that her husband had passed away. Further, PW-2 has stated that after cremation, PW-18 told her that she saw the respondents no. 2 and 3 killing her husband whereas PW-18 has stated that she saw the Respondents when their photographs appeared in newspaper after 18-20 days of her husband's death.

17. The Trial Court also negated her statement with respect to pointing out the place of the murder and since no discovery of any fire arm was made pursuant to the pointing out of the place of murder, the Trial Court held that pointing out memos are not incriminating circumstances against the accused persons. This decision was rightly reached by the Trial Court as both the IOs were aware of the place of murder prior to it being pointed out by both the accused persons.
18. Although, as per the case of the prosecution, the iron rod was recovered at the instance of respondent Lalit from the corner of a road at Mammurpur forest area of Pocket B which was kept concealed behind the bushes and this iron rod had blood but as per the FSL report, Ex.PY, the rod was not stained with blood. Thus, there was no question of matching of the deceased blood group with the blood on the rod.
19. In this case, on 29.7.2011 the accused persons were taken to DDA Ground, Nai Basti, Mammurpur, and empty shell was recovered by the Police in their presence after a gap of 16 days. This recovery was doubtful due to delay of 16 days and for the reason that it was lying in open space. All these facts were noticed by the Trial Court. The empty shell was sent to FSL to ascertain whether it had been fired from the fire arm recovered from the respondent Neeraj. Since the empty shell, which was recovered, could not be connected with the fire arm, it cannot be held to be incriminating circumstance which could point towards the guilt of respondents no.2 and

- 3.
20. It may also be noticed that the bullet, which was recovered from the body of the deceased by the Doctor, was sent to the FSL. As per the FSL report, Ex.PY, the bullet was found stained with blood, but as per another report Ex.PZ, it was not found stained with blood group 'B' of the deceased. Also report of the Ballistic Expert, Ex.PX, suggests that no definite opinion can be given with regard to the fact that whether the deformed bullet mark, Ex.EB1, had been discharged through the country made pistol of .315 bore, which was recovered from the accused Neeraj.
21. Thus, as rightly held by the Trial Court, the prosecution failed to prove that the bullet recovered from the dead body was fired from the fire arm recovered from the accused respondent Neeraj. Since neither the eye witness supported the case of the prosecution nor the scientific evidence pointed towards the guilt of the respondents, thus the only view possible was taken by the Trial Court and based on the recovery of the country-made pistol from the possession of the respondents, they were rightly convicted under Sections 25 and 27 of the Arms Act and sentenced imprisonment of three years each.
22. In the case of ***Sudershan Kumar Vs. State of H.P.*** reported in **2014 (14) SCALE 276**, the Hon'ble Supreme Court discussed the law while dealing with appeals against acquittal in the following words:

*“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, re-appreciate 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 culled 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."

23. It is well settled that the appellate court may for the reason or otherwise disturb the Trial Court finding of acquittal if it has substantial and compelling reasons or where the conclusions of the Trial Court are palpably wrong or based on erroneous view of law. Having examined the judgment rendered by the learned Trial Court, we find no illegality and infirmity therein which would call for interference in these proceedings. Resultantly, we do not find any merit. The leave to appeal petition is accordingly dismissed.

G.S.SISTANI, J

SANGITA DHINGRA SEHGAL, J

FEBRUARY 25, 2016 pst