

\$~01.

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

+ CRL.L.P. 93/2016

% *Judgment dated 18th March, 2016*

STATE OF NCT OF DELHI Petitioner
Through : Ms.Aashaa Tiwari, APP for the State.

versus

SANDEEP & ORS Respondents
Through : NEMO

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

CRL.M.A. 2440/2016

1. By the present application, the petitioner seeks condonation of 45 days' delay in filing the present criminal leave to appeal petition.
2. Heard. For the reasons stated in the application and in the interest of justice, present application is allowed. Delay in filing the present criminal leave to appeal petition is condoned. Let criminal leave to appeal petition be taken on record. Application stands disposed of.

CRL.L.P. 93/2016

3. By the present criminal leave to appeal petition, filed under section 378 of the Code of Criminal Procedure, the state seeks leave to appeal against the judgment dated 15.09.2015 passed by learned Additional Sessions Judge, Tis Hazari Courts, Delhi, in Sessions Case No. 26/3/14, whereby the respondents (accused before the trial court) were acquitted of the charges punishable under section 302/392/411/34 of the Indian Penal Code.
4. The facts of the case, as noticed by the learned trial court, are as under:

“On 04.08.2009 after receiving DD No. 14A, Insp. Ghanshyam alongwith Ct. Ashok reached at H-3/305, Himgiri Construction Office, 3rd floor, Lal Market, Vikar Puri. There, he met with ASI Prem Singh alongwith Ct, Surrender and Jitender Gujral and

complainant was also present there. A dead body of his peon namely Nandan Yadav @ Chotu was also lying on the Northern side of the office near a chair and the neck of Nandan Yadav was strangulated with rope/wire. The statement of complainant Jitender Gujral Ex.PW-1/A was recorded who stated that he is a contractor by profession having his office at H-3/305, Lal Market, Vikar Puri and 10-12 persons are working over there including Nandan Yadav @ Chotu as Peon. Complainant stated that Nandan Yadav used to Open the office in the morning and used to close in the evening and on 03.08.2009, Jitender Gujral left the office at about 05.00 p.m. and his cousin Pritam Chand Arora left the office at 07.00 p.m. after directing Nandan Yadav to close the office. He stated that at 09.25 p.m., Amit who is working in his office made a telephone call and told him that the office was open and after receiving this call, he reached his office and found that peon Chotu was murdered by someone by strangulating him. He checked his office and found Rs.1,28,000/- and Rs.30,000-35,000/- missing from his office.”

5. On 20.08.2009, all three respondents, namely, Sandeep, Manish Tulli and Mithun, were arrested. Based upon a disclosure statement, the locker, which was stolen from the office of the complainant, was got recovered. Further a total sum of Rs.41,000/- was recovered at the instance of all the three respondents herein. After investigation a chargesheet was filed against the respondents under Section 302/392/411 of the Indian Penal Code read with Section 34 of the Indian Penal Code to which they pleaded not guilty and claimed trial.
6. To prove its case and to bring home the guilt of the respondents, the prosecution has examined 15 witnesses. The respondents opted to lead evidence in their defence and examined 4 witnesses. The material witnesses are PW-1, Jitender Gujral, and PW-12, Amit Kumar, as according to the prosecution they had last seen the deceased, Nandan Yadav @ Chotu, in the company of all the three respondents sometime prior to the incident.
7. Ms. Aashaa Tiwari, learned Additional Public Prosecutor, contended that

the Trial Court had committed a grave error in holding the respondents not guilty of the offence under section 302/392/411 read with Section 34 of the Indian Penal Code. Counsel further contends that the impugned judgment is erroneous and unsustainable, which would result in miscarriage of justice and, thus, the same is liable to be set aside.

8. Learned counsel for the state further contends that the case of the prosecution is based on the theory of last seen, but the learned Trial Court failed to appreciate the last seen evidence produced by PW-1 Jitender Gujral and PW-12 Amit, who identified the respondents.
9. The counsel for the State has argued that the Trial Court has wrongly held that there were material improvements in the deposition of PW-1 on the point of his returning to the office at about 08/08.30 p.m. on 03.08.2009, which was not stated by him in his complaint being Ex.PW1/A. In fact, this fact was stated by PW-1 to the I.O. during his supplementary statement dated 04.08.2009 and this was also asserted by PW-1 during his cross-examination.
10. Reliance was placed by counsel for the State on ***Rohtash Kumar V. State of Haryana***, reported at (2013) 14 SCC 434, wherein it was held by the Apex Court that it becomes the duty of the accused to explain the circumstances under which the death of the victim occurred if there is last seen evidence. The court must consider the evidence of the witness as a whole ignoring minor discrepancies.
11. Ms.Tiwari further contends that the learned Trial Court has failed to consider and appreciate the fact that PW-4 Dr. Kamal Singh, who conducted the Post-Mortem of the deceased, specifically deposed that strangulation could be possible by the recovered wire of the LG charger and in this regard he had given his opinion during investigation on 16.11.2009.

12. Learned counsel for the State further contends that the learned trial court has wrongly held that the witnesses to the recovery have failed to tell the specific place from where the locker was recovered. In fact, PW-14 SI Yogesh Tyagi and I.O. PW-15 Insp. Ghanshyam Meena have categorically stated that the respondents got recovered the locker from under the bushes in the jungle area at Vikas Puri. Hence counsel urged that the order of acquittal passed by the learned trial court be set aside.
13. We have heard learned counsel for the State and examined the impugned judgement together with the evidence.
14. PW1, Jitender Gujral, in his testimony has testified that the deceased, Nandan Yadav, was working in his office at DDA Complex, Lal Market, as a peon, he was maintaining his office and also the keys of the office remained with him as he used to open and close the office. PW-1 has further deposed that on 03.08.2009, at about 05.00 p.m., he left his office while his cousin brother, Pritam Chand Arora i.e. PW-2, remained in his office till 07.00 p.m. Before leaving the office, PW-2 told the deceased, Nandan Yadav, to close the office and go home. On the same day, at about 08-08.30 p.m., PW-1 returned to the DDA Complex, Lal Market, for some work but he did not go to his office on the 3rd floor. In the staircase leading to his office at 3rd floor, he saw Nandan Yadav @ Chotu sitting with three boys. He has further testified that he had asked Nandan Yadav as to why he was sitting there to which he replied that he was about to close the office and thereafter he would go home with his three friends. PW-1 has also stated that he saw Nandan Yadav getting up from the staircase and going with his three friends towards the office. PW-1 further deposed that on the next day, early in the morning at about 09-09.30 a.m., he received a telephone call from Amit i.e. PW-12, one of his employees, who informed him that the dead body of Nandan Yadav was

lying in his office. Thereafter PW-12 called the Police. PW-1 reached his office and saw the dead body. PW-1 further deposed that he checked his office and found one small locker missing, which was containing Rs.1,28,000/- in cash. He also checked the other articles and found Rs.30,000-35,000/-missing, which were kept in an envelope separately. PW-1 further deposed that one charger of LG mobile phone was found lying broken near the dead body and the wire of the said charger, was found missing.

15. PW-12, Amit Kumar, in his testimony has deposed that he was working in Himgiri Constructions. On 03.08.2009, he returned to his office at about 09/09.30 p.m. to pick up his motorcycle and saw the deceased Nandan Yadav in the company of his three friends in the office.
16. The learned Trial Court while rejecting the testimonies of PW-1 Jitender Gujral and PW12 Amit as last seen witnesses observed that PW-1 does not fit in the category of last seen witness as neither did he give any document in investigation to the Police with regard to his appearance at the spot at about 08/08.30 p.m., nor did the prosecution examine the photocopier person, to whom PW-1 went to make the photocopies, to corroborate the statement of PW-1 in this regard. Further the Trial Court has observed that PW12 Amit cannot be a witness of last seen as there are contradictions in the statements made by this witness. PW-12 in his testimony has testified that when he returned to his office at around 09/09.30 p.m., the deceased was strolling in the market along with Manish, Pradeep and Mithun whereas in the statement recorded before the court, PW-12 stated that he saw the deceased Nandan Yadav @ Chotu sitting in their office with his three friends.
17. With regard to recovery of money and currency notes the learned trial court has observed that recovery from all the three respondents is highly

doubtful as no explanation has been given by the prosecution as to from where and at whose instance the locker was recovered. Further in all three cases of recovery of currency notes at the instance of three respondents, although their parents and public persons were present but their signatures were not obtained. Also the prosecution has failed to prove that the recovered currency notes were same notes which were robbed from the shop of PW-1 as they were not shown to PW-1 for identification and also no specification was provided by PW-1 with regard to robbed money. Further with regard to recovery of the wire which was recovered at the instance of respondent no.2, no expert was examined in order to prove that the same wire was used in the murder of deceased.

18. We are of the view that the Trial Court has rightly rejected the depositions of last seen witnesses PW-1 Jitender Gujral and PW-12 Amit Kumar as it is not established that the respondents were present with the deceased on 03.08.2009. Further the story made up by PW-1 about his appearance at the spot at about 08/08.30 p.m. is highly doubtful for the reason that it is highly improbable that PW-1 would go to his office complex to get papers photocopied between 08.00 p.m. and 08:30 p.m. at night and in case his getting photocopies was important he would have certainly stated about his visit in his statement to the Police. Also PW-1 did not produce any document in support to show that he went to the said photocopy shop on the ground floor under his office. Furthermore, PW-1 deposed that on 04.08.2009 in the early morning at about 09/09:30 a.m., he received a call from PW-12 informing him about the incident, and in cross-examination PW-1 stated that he reached his office at about 10.00 a.m. whereas the travelling distance from PW-1's house to his office is one and a half hour.
19. Similarly, the statement of PW-12 does not inspire confidence because in his testimony he deposed that he was working in the office of PW-1 and

had gone out of office at about 04.00 p.m. and returned at about 09.00 p.m. when he saw deceased Nandan Yadav sitting with his friends who are respondents herein while he was standing in the parking. Thereafter, in his cross-examination he explained that he had never seen the respondents prior to 03.08.2009 that is why he was unable to give the description of clothes which the respondents were wearing. Further PW-12 deposed that on 03.08.2009, he purchased some material for the workers from Azad Market but no document has been produced by him in order to support his story with regard to his presence at the spot at around 09/09.30 p.m. where he saw the respondents with the deceased.

20. With regard to the currency notes recovered at the instance of respondents, the prosecution has failed to prove that the recovered currency notes were same notes, which were robbed from the shop of PW-1, as they were not shown to PW-1 for identification and also no specification of the currency notes was provided by PW-1 at the time of complaint. As far as the charger wire is concerned, which was recovered at the instance of respondent no.2 after almost two weeks, no expert was examined in order to prove that the same wire was used in committing the murder of the deceased. Moreover, it cannot be believed that after committing the crime respondent no.2 would keep the same with him.
21. It is well settled that leave to appeal is to be granted in exceptional cases where the judgment under appeal is found to be perverse. The High Court cannot entertain a petition merely because another view is possible or that another view is more plausible. In *Arulvelu and Anr. vs. State 2009 (10) SCC 206*, while referring with approval the earlier judgment in *Ghurey Lal vs. State of Uttar Pradesh, (2008) 10 CRL.L.P.No.764/2013 Page 6 of 7 SCC 450*, the Supreme Court reiterated the principles which must be kept in mind by the High Court while entertaining an Appeal against

acquittal. The principles are:

“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.

22. While deciding the present leave to appeal, the aforesaid principles culled out by the Apex Court are to be kept in view. In the present case the trial court has given detailed reasons for disbelieving the prosecution version of the case and we are not inclined to take a different view. We find no infirmity in the judgment of the trial court. The acquittal recorded by the trial court is based on reasoning and, thus, there are no grounds to grant leave to petition. This petition for leave stands dismissed.

G.S.SISTANI, J

SANGITA DHINGRA SEHGAL, J

MARCH 18, 2016 msr