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

+ CRL.L.P. 638/2013

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Judgment dated 12th February, 2016

STATE

..... Petitioner

Through : Ms.Anita Abraham, APP for the State.
Inspr.Ramesh Kumar, S.P. Badli.

versus

SURENDER @ SUNDER

..... Respondent

Through

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S.SISTANI, J (ORAL)

CrI.M.A.16647/2013

1. Present application has been filed by the petitioner/State seeking condonation of 845 days' delay in filing the present leave to appeal petition.
2. Learned counsel for the petitioner submits that the delay was not intentional and it was on account of *bonafide* reasons.
3. Heard. We may notice that the application filed along with leave to appeal petition does not give reasonable and cogent grounds to condone the delay. The application is casual in nature, lacks material particulars and the grounds for delay cannot be termed as *bonafide*.
4. A perusal of the order sheets reveals that the matter was adjourned from time to time to enable the State to explain the delay. To explain the delay, various affidavits have been filed by the concerned Police officials including the Joint Commissioner of Police, Northern Range. The purpose

appears to be that the Court wanted to streamline the procedure as repeatedly appeals and leave petitions were being filed beyond the period of limitation without explaining the delay. However, since, we have examined the matters on merits as well, the delay in filing leave to appeal petition is condoned. Let leave to appeal petition be taken on record.

5. Application stands disposed of.

CRL.L.P. 638/2013

6. The present leave to appeal arises out of the judgment dated 22.03.2011 passed by learned trial court by which the respondent stands acquitted.
7. As per the prosecution, DD No.90B was recorded on 15.7.2006 on the statement made by the complainant, Sh.Ramesh Jaiswal, with regard to his four years' old son, who was missing since 7.30 p.m. Sh.Ramesh Jaiswal did not raise any suspicion over any person. On 19.7.2006, Sh.Ramesh Jaiswal again approached the Police Station, got his statement recorded and an FIR under Section 363 of the Indian Penal Code was registered. On the same day i.e. 19.7.2006 at about 1.50 p.m. an information, vide DD No.44B, was received at the Police Station that hands and legs of a boy were visible inside a well near H.No.K-346, Gali No.5, Kushak Road Road, Swarup Nagar. The dead body of the child was floating on the surface of the water inside the well. The body was identified by the complainant as that of his son, Vishal.
8. The prosecution in support of its case has examined as many as 17 witnesses. Statement of the accused (respondent herein) was recorded under Section 313 Cr.P.C.
9. Learned counsel for the petitioner/State submits that the learned trial court while passing the impugned order has failed to properly assess the facts and also failed to judicially appreciate the vital circumstances in the case, which has led to miscarriage of justice. Counsel further submits that the

impugned judgment was passed on hypothetical presumptions, conjectures and surmises, and the order is perverse, besides it lacks legality. It has further been submitted by the learned counsel that the learned trial court has erred in deciding that there was lack of motive for the respondent in committing the murder, whereas it has been clearly proved by the prosecution through the evidence on record and the statement duly recorded to the effect that the father of the deceased had taken a loan of Rs.20,000/- from the respondent, which he was unable to repay and the respondent had also been rebuked by his wife, PW-6, Smt, Mahalaxmi, for making advances towards her. However, the learned trial court has failed to observe that the accused had a vendetta against the father and mother of the deceased due to which he killed their child in order to take his revenge and to teach them a lesson. Thus, the impugned judgment is liable to be set aside.

10. It has also been contended by learned counsel for the petitioner that the learned trial court has erred in disbelieving the extra-judicial confession made by the respondent before PW-3, Shabbir Raza, who is the Imam, for want of corroboration despite the fact that the dead body of the deceased child had been recovered only after the clue given by PW2 to the parents of the deceased to look for his body in the well situated behind their house, as the respondent had confessed before PW-2 that he had thrown the deceased child in the well.
11. Counsel further contends that the learned trial court has erroneously disbelieved the last seen evidence brought forth by the prosecution through the statement of PW-5, Banwari Lal, who has clearly stated that he had last seen the deceased in the company of the respondent at about 7.30 p.m. on 15.7.2006 and had seen them going towards the lane adjacent to the house of the deceased. However, the learned trial court has

disbelieved the last seen evidence as it erroneously held that PW-5 was a prosecution ploy to strengthen a weak case on circumstantial evidence, and, thus, the impugned judgment is liable to be set aside.

12. In this case, the prosecution had based its entire case on an extra judicial confession made by the respondent herein before PW-3, Mohd. Shabbir Raza, who was working as an Imam in the local masjid. The prosecution has also relied upon the evidence of PW-5, Banwari Lal, brother-in-law of the complainant. Relevant portion of the testimonies of PW-3 and PW-5, as noticed by the learned trial court, read as under:

“13. PW3 Mohd. Shabbir Raza deposed that on 15.07.2006, he was residing at Madina Mosque, Gali No.2, Khadda Colony, Kushak Road, Swarup Nagar, Delhi, and was working as Imam for the last about 10 months and that he was also working as Imam in the said Masjid in the year 1996-97 and that on 15.07.2006, Ramesh (the PW1), his wife Maha Laxmi along with accused Surender, present in court, in search of the child of Ramesh and Maha Laxmi namely Vishal, aged about 4 years, had come to him and he told them that he did not see the child and thereafter they left the premises. He further deposed that on 19.07.2006, all the aforesaid along with one more lady came to him again at about 8.30 a.m in search of the said child Vishal and asked him to tell about the whereabouts of the child through astrology but he showed his inability and advised them to contact Naeem Baba at Azadpur, Masjid Kabristan Wali, Delhi, to know about the whereabouts of the child and thereafter they left his premises and went away. He further testified that on the same day i.e 19.07.2006, accused Surender came to him alone and asked him about the whereabouts of the child and when he saw his (accused's) face, he found that accused Surender was in fear and he suspected him that the accused would be knowing about the whereabouts of the child and on this accused told him as to why he (accused) be implicated. He further deposed that he again reiterated that accused Surender was knowing the whereabouts of the child and on this accused told him that he had thrown the alive child in the well behind the house near the temple in the fields on 15.07.2006 and accused further told him that he could not see the miserable condition of the parents of the child, therefore, he was

disclosing all the things to him and that accused further told him not to disclose his name to anyone and asked him to tell the name of some other person, if inquired from him. He further deposed that on 19.07.2006 itself, he was to go somewhere for some work and in the way at the tea shop, parents of the child Vishal and one old lady met him and he told them that the child was lying in the well behind the house near the temple in the fields and asked them to trace the child in the well and thereafter he went away. He further testified that on 20.07.2006 police officials came to him and recorded his statement and he told the police that the accused Surender had committed the murder of child Vishal after throwing him in the well and that the accused admitted his guilt before him.

14. In his cross examination on behalf of the accused, PW3 replied that Maha Laxmi and Ramesh were not known to him prior to 15.07.2006 but he knew accused Surender prior to 15.07.2006 as he came to him for getting some Tabiz (a device in the form of locket given by a sorcerer) from him. He further answered that on 15.07.2006 he came to know about the missing of the child Vishal at about 8.30 p.m when the parents of the child along with accused came to him for searching the child and at that time he was alone in the Masjid and that he was doing the work of preparing Tabiz for the last about ten years. He further replied that even after accused had told him about his involvement in the present incident, he did not inform the matter to the police but he informed about it to the parents of the missing child. He further replied that he himself did not go to the well to check the said information given by the accused. He admitted it as correct that his statement was recorded at the PS but he again said that it was recorded in the room of his Masjid. He further answered that he had not seen the said well ever. He further replied that neither he had asked accused Surender as to why he did so nor the accused told him any reason for his said act of killing Vishal. He further replied that he had no knowledge about some illicit relations between the accused and mother of the child nor he had any knowledge regarding loan of Rs.20,000/ given by the accused to the parents of the deceased child.

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17. PW5 Banwari Lal deposed that complainant Ramesh Jaiswal was his brother in law and his wife Maha Laxmi was his sister and their son Vishal was kidnapped and was subsequently found dead

and he identified his dead body at BJRM hospital mortuary and that IO had recorded his statement to that effect which is Ex.PW5/A. He further deposed that accused Surender, present in the court, was residing as a tenant on the first floor of the house of his sister Maha Laxmi and his sister had three children including Vishal who was aged about 4 years in the year 2006. He further testified that on 15.07.2006, it was a Saturday and at around 5.30 p.m, he had gone to the house of his sister and at about 7.30 p.m, he had seen accused Surender going along with Vishal, the son of his sister, in the gali and that he had earlier also seen said child going along with the accused so he did not feel anything suspicious even on that day in accused Surender taking along with him the said child and subsequently he went back to his house. He further stated that on the next day, i.e. 16.07.2006, he received a phone call from his brother in law Ramesh Jaiswal that Vishal was not traceable and that he along with all other relatives and friends started searching for Vishal and that after 2/3 days he came to know that the dead body of Vishal was recovered from a well. He further deposed that he was told that accused Surender was also assisting his sister and brother in law in tracing out the missing child and that on 20.07.2006, he told his sister Maha Laxmi in the BJRM hospital that on 15.07.2006 he had seen accused Surender along with Vishal.

18. In his cross examination, he replied that Vishal was having affection towards accused. He admitted it as correct that accused was helping his brother in law and sister in tracing out the Vishal. He further answered that he had seen the accused taking away Vishal from the shop.”

13. PW-6, Smt.Maha Laxmi, who is the mother of the deceased, has alleged that the respondent was a tenant in her house, he used to constantly bring his friends to his room and drink liquor. It has also been alleged that the respondent had an evil eye on her. PW-6 has also testified that she, her family members and children were familiar with him and in fact they had even borrowed Rs.20,000/- from him.
14. As far as the testimony of PW-5 with regard to the last seen is concerned, the same has been disbelieved by the trial court on the ground that despite

PW-5, being a close family relation, neither in the DD No.44B this fact was brought to the notice of the Police nor on 19.7.2006, when the FIR was registered, the father of the deceased had disclosed that the child was last seen in the company of the respondent herein.

15. The trial court has taken into account that PW-5, Banwari Lal, came to know about the missing child on 16.7.2006, as testified by PW-1, but according to the testimony of PW-1, PW-5, Banwari Lal, did not come to the house of the complainant after hearing the sad news of the child being missing, neither PW-5 disclosed to PW-1 that the child was lastly seen in the company of the respondent.
16. The trial court after analysing the testimony of PW-5 found it strange that on the one hand PW-5 has claimed that he had joined the relatives in search of the deceased, which fact is also admitted by PW-1, but on the other hand there is no explanation as to why he did not disclose that he had seen the child in the company of the respondent herein.
17. The testimony of PW-6, mother of the deceased, also shows that they were having good relations with the respondent and her children were very close to the respondent. She further testified that her brother, PW-5, Banwari Lal, had told her on 20.7.2006 at the BJRM hospital about the respondent taking the deceased with him on 15.7.2006 at about 7.00 p.m. The explanation rendered by her for not disclosing this fact is again unrealistic as she has stated that she was perturbed and, thus, did not inform this fact nor the fact about the ill intention of the respondent towards her to her husband.
18. The trial court has found the testimony of PW-5 with regard to the deceased having last seen in the company of respondent to be unreliable. We are also of the view that the respondent could not have been convicted taking the theory of last seen evidence as one of the circumstance for his

conviction.

19. Additionally, the prosecution has placed strong reliance on the extra-judicial confession as another link in the chain of circumstances. The extra-judicial confession was made to PW-3, Imam of the Masjid. PW-3 has testified that on 19.7.2006 the respondent came to him alone and disclosed that he had thrown the child in the well behind the house near the temple in the fields on 15.7.2006. He had asked the Imam not to disclose his name to anyone. The Imam claims that he had learnt about the child being missing on 19.7.2006. The Imam was told that the child was lying in the well behind the house near the temple in the fields.
20. It may be noticed that while passing the impugned judgment, the learned trial court has made the following observations with regard to the testimony of PW-3, which read as under:

“51. Admittedly the Masjid was situated in the same colony where PW1 along with PW6 was residing. It can also be safely inferred that the said Masjid where PW3 was the Imam, was at a walking distance from the house of the complainant PW1 and PW6, which is proved on record that they went to the said Masjid in search of the deceased. PW3 did not tell us as to when accused Surrender second time came alone to make his extra judicial confession on 19.07.2006. PW3 is further silent about the fact that as to when at the said tea stall he disclosed about the dead body of the deceased lying in the said well to the parents of the deceased on 19.07.2006. However, DD No.44B Ex.PW13/B (inadvertently exhibited twice as Ex.PW8/C also) tells us that at about 1.50 p.m the information had reached to the PS that dead body of the deceased was lying in the said well.

52. The said story put forth by PW3 that he was to go somewhere for some work and on the way he met the parents of the deceased and informed them about the dead body in the said well, is totally uprooted and contradicted by PW1, the complainant Ramesh, who deposed in his examination in chief that he received a call from Maulvi Shabbir Raza (PW3) who informed him that his son would

be found and asked him to search for his son in the well situated behind his house. PW6 again sided with the PW3 when she deposed that PW3 had personally come to them and told them about the dead body lying in the said well.

53. Coming to the cross examination of PW3, to whom alleged extra judicial confession was made. PW3 came to know about missing of the child on 15.07.2006 at about 8.30 p.m (inadvertently the time was written as 8.30 a.m which was not possible because as per the prosecution case the child was found missing at 7.30 p.m on 15.07.2006, so the PW3 coming to know of the missing of the child on 15.07.2006 at about 8.30 a.m was not possible.). He further admitted that even after accused had told him about his involvement in the present case, he did not inform the matter to the police. He further replied that police had come to him on 20.07.2006 at about 1 p.m. He further replied that he himself did not go to the well to check the said information given by the accused. He had not seen the said well ever. Neither he asked accused Surrender as to why he did so nor accused Surrender told him any reason for his said act of killing the deceased.”

21. It has repeatedly been held that extra-judicial confession is a very weak form of evidence.
22. In ***Balwinder Singh v. State of Punjab 1995 Supp. (4) SCC 259***, the Hon’ble Supreme Court observed the principle that an extra judicial confession, by its very nature is rather a weak type of evidence and requires appreciation with a great deal of care and caution. Where an extrajudicial confession is surrounded by suspicious circumstances, its credibility becomes doubtful and it loses its importance.
23. In ***Pakkirisamy v. State of T.N. (1997) 8 SCC 158***, the Apex Court held that it is well settled that it is a rule of caution that the court would generally look for an independent reliable corroboration before placing any reliance upon such extra judicial confession.
24. In the case of ***Aloke Nath Dutta v. State of W.B. (2007) 12 SCC 230***, the Hon’ble Supreme Court, while holding the placing of reliance on extra

judicial confession by the lower courts in absence of other corroborating material, as unjustified, observed as under:

"87. Confession ordinarily is admissible in evidence. It is a relevant fact. It can be acted upon. Confession may under certain circumstances and subject to law laid down by the superior judiciary from time to time form the basis for conviction. It is, however, trite that for the said purpose the court has to satisfy itself in regard to: (i) voluntariness of the confession; (ii) truthfulness of the confession; (iii) corroboration.

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89. A detailed confession which would otherwise be within the special knowledge of the accused may itself be not sufficient to raise a presumption that confession is a truthful one. Main features of a confession are required to be verified. If it is not done, no conviction can be based only on the sole basis thereof."

25. In this case, there is no other evidence to corroborate the extra-judicial confession, which is sought to be relied upon. Even otherwise, we find the testimony of the Imam, PW-3, to be unreliable.
26. The law with regard to convicting a person based on circumstantial evidence is clear. In ***Ramreddy Rajesh Khanna Reddy and Another v. State of A.P.***, reported at (2006) 10 SCC 172, the Apex Court while reiterating the settled legal position, observed as under:

"It is now well settled that with a view to base a conviction on circumstantial evidence, the prosecution must establish all the pieces of incriminating circumstances by reliable and clinching evidence and the circumstances so proved must form such a chain of events as would permit no conclusion other than one of guilt of the accused. The circumstances cannot be on any other hypothesis. It is also well settled that suspicion, however grave it may be, cannot be a substitute for a proof and the courts shall take utmost precaution in finding an accused guilty only on the basis of the circumstantial evidence. At this stage, we also deem it proper to

observe that in exercise of power under Article 136 of the Constitution, this Court will be extremely loath to upset the judgment of conviction which is confirmed in appeal. However, if it is found that the appreciation of evidence in a case, which is entirely based on circumstantial evidence, is vitiated by serious errors and on that account miscarriage of justice has been occasioned, then the Court will certainly interfere even with the concurrent findings recorded by the trial court and the High Court Bharat vs. State of M.P. [(2003) 3 SCC 106]. "

27. It is settled law that in a case based on circumstantial evidence, the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete, forming a chain and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused totally inconsistent with his innocence. The principle of circumstantial evidence has been reiterated by the Hon'ble Apex Court in plethora of cases. [See ***Bodhraj @ Bodha and Ors. v. State of Jammu & Kashmir: (2002) 8 SCC 45***). The same principles were reiterated in ***Sunil Clifford Daniel v. State of Punjab: (2012) 11 SCC 205***, ***Sampath Kumar v. Inspector of Police, Krishnagiri: (2012) 4 SCC 124*** and ***Mohd. Arif @ Ashfaq v. State (NCT of Delhi): (2011) 13 SCC 621***].
28. Considering the deposition of the said prosecution witnesses, all the links in the chain of circumstantial evidence are shattered.
29. The Apex Court in the case of ***Ghurey Lal vs. State of U.P.***, reported at 2008 (10) SCC 450 has laid down the following principles before granting leave to appeal against an order of acquittal:

“1. 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.

A number of instances arise in which the appellate court would have 'very substantial and compelling reasons' to discard the trial court's decision. 'Very substantial and compelling reasons' exist when:

- i) The trial court's conclusion with regard to the facts is palpably wrong;*
- ii) The trial court's decision was based on an erroneous view of law;*
- iii) The trial court's judgment is likely to result in "grave miscarriage of justice";*
- iv) The entire approach of the trial court in dealing with the evidence was patently illegal;*
- v) The trial court's judgment was manifestly unjust and unreasonable;*
- vi) The trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/report of the Ballistic expert, etc.*
- vii) This list is intended to be illustrative, not exhaustive.*

2. The Appellate Court must always give proper weight and consideration to the findings of the trial court.

3. If two reasonable 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.”

30. In the case of ***Md.Faizan Ahmad @ Kalu v. State of Bihar***, reported at (2013) DLT (CRL.) 914 (SC), the Supreme Court of India has observed as under:

“10. We have no manner of doubt that the offence is grave; the children were abducted and kept in a tunnel for over five months and anonymous calls were made for ransom. Accused

whose involvement in such crimes is proved must be dealt with with a firm hand, but the seriousness or gravity of the crime must not influence the Court to punish a person against whom there is no credible evidence. The trial Court, therefore, erred in convicting the appellant.

11. Criminal Courts recognize only legally admissible evidence and not farfetched conjectures and surmises. The High Court's observation that there was a preconceived plan to abduct the children would not be applicable to the appellant because there is nothing on record to establish that the appellant met the co-accused and planned a strategy to abduct the children and demand ransom. His case stands on a different footing from that of other accused. The case of the other accused will have to be dealt with on its own merit. The High Court was carried away by the heinous nature of the crime and, in that, it lost sight of the basic principle underlying criminal jurisprudence that suspicion, however grave, cannot take the place of proof. If a Criminal Court allows its mind to be swayed by the gravity of the offence and proceeds to hand out punishment on that basis, in the absence of any credible evidence, it would be doing great violence to the basic tenets of criminal jurisprudence. We hope and trust that this is just an aberration."

31. We are of the view that the trial court has analysed the testimonies of all the material witnesses in great detail and rightly reached the conclusion of acquittal of the respondent herein. Accordingly, we do not find that there is any illegality or perversity in the impugned judgment.
32. Resultantly, no grounds are made out. Leave to appeal petition stands dismissed.

G.S.SISTANI, J

SANGITA DHINGRA SEHGAL, J

February 12th, 2016 msr