

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

+ CRL.L.P. 581/2016 & Crl.M.A.No.17056/2016

Judgment reserved on : 7th December, 2016

Date of decision : 21st December, 2016

STATE (NCT of Delhi)

..... Petitioner

Through: Ms.Aashaa Tiwari, APP for State.

versus

RAJESH @ GAPPU

..... Respondent

Through: Nemo.

CORAM:

HON'BLE MS. JUSTICE GITA MITTAL

HON'BLE MS. JUSTICE ANU MALHOTRA

JUDGMENT

ANU MALHOTRA, J.

Crl.M.A.No.17056/2016

1. Crl.L.P.No. 581/2016 along with Crl.M.A.No.17056/2016 seeking condonation of 150 days delay in seeking leave to appeal was filed by the State on 21.10.2016. The State has sought to submit that in view of procedural delay the criminal leave petition seeking to assail the impugned judgment and order of sentence dated 04.02.2016 of the learned ASJ (FTC) North West, District Rohini in FIR No. 1350/2015, P.S. Mangolpuri could not be filed in time. It was, *inter alia*, submitted through the Crl.M.A.No. 17056/2016 that the decision to file the criminal leave petition seeking to assail the impugned judgment and

impugned order on sentence has to pass through several stages of the Department of Prosecution, i.e. through the Addl. P.P., Sr. P.P., Chief Prosecutor, Private Secretary Law and Justice, Director of Prosecution, GNCTD and Standing Counsel (Criminal) High Court of Delhi and then requires the approval of the concerned DCP.

2. Reliance was also placed on behalf of the State on the verdicts of the Hon'ble Supreme Court in the case of ***Collector Land Acquisition vs. Katiji*** **1987(2) SCC 107** and the State of ***Nagaland vs. Lipok*** **2005(3) SCC 752** to contend that refusal to condone the delay can result in a meritorious matter being thrown out at the very threshold and cause justice being defeated and that if the delay is condoned, the maximum that could take place is that a case would be decided on merits after hearing the parties. It was also further submitted on behalf of the State whilst placing reliance on the verdicts of the Hon'ble Supreme Court referred to hereinabove, that when substantial justice and technical considerations are pitted against each other, the cause of justice deserves to be preferred for the other side cannot claim to have a vested right in injustice being done because of non-deliberate delay.

3. Taking into account the factum that through CrI.L.P.581/2016, the State at the outset in terms of Section 378 (1) of the Code of Criminal Procedure, 1973 (hereinafter referred to as Cr.P.C.) merely seeks leave to appeal, which

appeal cannot be entertained except with the leave of this Court in terms of Section 378(3) of Cr.P.C., and the verdicts of the Supreme Court relied upon on behalf of the State, delay in the institution of CrI.L.P. No.581/2016 is thus condoned in the interest of justice, so that the prayer the made by the State seeking leave to appeal against the impugned judgment and order on sentence can be considered on the merits of the case rather than on technicalities. CrI.M.A.17056/2016 is thus allowed.

CrI.L.P.No. 581/2016

4. Vide the impugned judgment and order on sentence dated 04.02.2016 in relation to Sessions Case No. 35/1/15 qua FIR No. 1350/2015 PS Mangol Puri, registered under Section 302 of Indian Penal Code, 1860 (hereinafter referred to as “IPC”) in relation to which the accused Rajesh @ Gappu, S/o Sh. Tare was, vide the charge of allegations dated 04.09.2015 charged with the commission of an offence punishable under Section 304 IPC only, was acquitted in relation to the alleged commission of the offence punishable under Section 304 IPC but was held guilty under Section 323 IPC. Vide the impugned order on sentence the accused was sentenced to the period of detention already undergone by him i.e. from 06.07.2015 till 04.02.2016 qua the offence punishable under Section 323 IPC where the offence is punishable with the maximum term of imprisonment of one year and alternatively may also be punished with a fine

which may extend to Rs.1000/- or to both a term of imprisonment extended upto one year and to a fine that may extend to Rs.1000/-. The convict was, however, directed to submit a personal bond and a surety bond in the sum of Rs.10,000/- under Section 437A of Cr.P.C. which bonds stand submitted and accepted. The learned trial Court also recommended and referred the matter to the District Legal Services Authority, North West, New Delhi for awarding the suitable compensation under Section 357-A Cr.P.C. to the legal representatives of the deceased Sonu. The trial Court record has been requisitioned and received and perused.

Reasons for framing charge under Section 304 IPC, 1860 as per trial Court

5. A perusal of the trial Court record indicates that the charge sheet was instituted on 04.09.2015 and vide order dated 15.09.2015, the learned trial Court after a perusal of the statement of the alleged eye-witnesses Om Prakash @ Babloo, Nathu Ram and Baba Mohan Giri and the post-mortem report of deceased Sonu observed to the effect that the facts alleged brought forth

- *that it was a case of a sudden quarrel and that the accused was not armed with any weapon much less a deadly one;*
- *that the external injuries were found to be only two in number, i.e.*

- *(i) Lacerated wound of size 3 x 0.5 cm over left parieto temporal region. (ii) Abrasion present over right side of the nose of size 1 x 1 cm.*
- *that the case did not fall within the scope and ambit of culpable homicide amounting to murder and;*
- *that the State too had conceded fairly that the case falls within the parameters of Section 304 of IPC;*

6. Thus, the charge of allegations was framed against the accused under Section 304 IPC on 15.09.2015 to the effect that on 06.07.2015 at about 7.15 a.m. in front of Shahid Bhagat Singh Stadium, Shiv Shakti Mandi, J-Block, Mangol Puri, Delhi within the jurisdiction of PS Mangol Puri, the accused had committed culpable homicide not amounting to murder by causing the death of Sonu. The accused pleaded not guilty to the said charge of allegations and claimed trial.

PROSECUTION VERSION AS PER FIR

7. The prosecution version set forth in the charge sheet through the FIR registered on the statement of Om Prakash @ Babloo, a stated eye-witness (PW-13) was to the effect that on the date 06.07.2015 at about 6:30 a.m. he had gone to the Shiv Shakti Mandir J-Block Mangol Puri situated near his house (his house being J-46, Mangol Puri, Delhi) where he used to go daily. According to

Om Prakash @ Babloo s/o Hari Ram, Sonu (since deceased) s/o Mool Chand whose house had already been sold, used to live in the temple and used to have his meals here and there, was seated in the temple. As per the FIR, Sonu asked Om Prakash @ Babloo for a cup of tea and so Om Prakash @ Babloo gave him some money to bring milk and bread and then Om Prakash @ Babloo went to his house. As per the FIR, Sonu brought the milk and bread to the house of Om Prakash @ Babloo after some time and gave the same to Om Prakash @ Babloo and after 10-15 minutes at about 7:15 a.m. when Om Prakash @ Babloo again went to the Shiv Shakti temple, Sonu was seated there and soon **a neighbour of Om Prakash @ Babloo i.e. Rajesh @ Gappu, i.e. accused/the respondent herein, R/o J-76, Mangol Puri, came to the main gate of the temple and started abusing Sonu and asked him to return his money to which Sonu said that he had to return Rs.100 which he would return by evening, on which Rajesh @ Gappu, i.e., the accused/the respondent herein abused him and told him that he would then take double the amount to which Sonu said he had borrowed Rs.100 and he would return Rs.100 only on which Rajesh @ Gappu, the accused/ the respondent herein got very angry and immediately assaulted Sonu with repeated slaps and kicks as a consequence of which Sonu fell down.** As per the FIR, Om Prakash @ Babloo attempted to apprehend Rajesh @ Gappu, accused/the respondent herein and tried to

persuade him to desist from assaulting Sonu, but the accused/the respondent herein did not listen to him, whereupon, he PW-13 went to call other persons and came back to the temple with Chhotu R/o J-95, Mangol Puri and saw that the Sonu was lying dead on the ground and that Gappu was seated with him.

8. **As per the FIR Om Prakash @ Babloo and his associates told Rajesh @ Gappu, the accused/the respondent herein as to what he had done and that he had killed Sonu to which Rajesh @ Gappu, the accused/the respondent herein, responded that it did not matter that he had died “*koi baat nahi saala mar gaya*”. As per the FIR, people started coming towards the temple and thus the accused fled from the spot.**

INVESTIGATION CONDUCTED

9. The investigating agency in the instant case is indicated to have been set into motion on receipt of DD No. 14B from the Control Room, that a man was lying dead at the Shiv Shakti Mandir, J-Block, Shahid Bhagat Singh Park , Mangol Puri and that the police be sent. This telephonic information was received by Ct.Ravinder No. 7759 from mobile no. 9211959127. DD No. 14B was entrusted to SI Robin who along with Ct. Rajesh reached the spot. The charge sheet indicates that SI Robin on reaching the spot found the dead body of Sonu S/o Late Mool Chand aged 32 years lying near a wooden slab (takht) with minor marks of injuries on the head and face. As per the charge sheet Om

Prakash @ Babloo who was the eye- witness met SI Robin who recorded his statement, made his endorsement there on and sent the same through Ct. Rajesh to the PS Mangolpuri for registration of the FIR. After registration of the FIR No.1350/2015, the further investigation was entrusted to Inspector Rajpal Singh.

10. The charge sheet further indicates that the IO recorded the statement of Nathu Ram S/o Gyan Chand who is indicated to have reached the spot after having been informed by Om Prakash @ Babloo that the accused Rajesh @ Gappu, the respondent herein was assaulting Sonu S/o Mool Chand. As per the statement of this witness recorded during investigation, Sonu was lying in an unconscious condition and Rajesh @ Gappu, the respondent herein was seated within the temple. As per the statement of this witness recorded under Section 161 Cr.P.C. 1973, **the accused on being questioned by Sh. Nathuram @ Nathuli as to what he had done, told him to leave saying that he had no connection with the matter and that he/the accused i.e. the respondent herein had killed him, i.e Sonu. The said witness as per his statement under Section 161 Cr.P.C. was informed by the accused Rajesh @ Gappu, the respondent herein that Sonu had not returned his money for a long time and thus, he, Rajesh @ Gappu, the respondent herein had beaten him with kicks and blows and Sonu had fallen down on the ground and that he**

was pretending to be unconscious. According to the said statement recorded during the course of investigation, soon a crowd collected and Chhotu S/o Mam Raj another resident of the area i.e. J-95, Mangol Puri telephoned the police at No. 100 and thus the accused Rajesh @ Gappu, the respondent herein, ran away from the spot.

11. A statement of Hira Lal S/o Mool Chand, brother of deceased is indicated to have been recorded by the investigating agency who is stated to have identified the clothes of his deceased brother at the Sanjay Gandhi Memorial Hospital (SGMH) which clothes were handed over to him after the post-mortem.

12. The statement of Baba Mohan Giri, pujari of the Shiv Shakti Temple J-Block Mangol Puri was also stated to have been recorded during investigation who stated that there were altercations previously also between Rajesh @ Gappu, the respondent herein and Sonu (the deceased) in relation to money transactions and that even on the evening of 05.07.2015 Rajesh @ Gappu, the respondent herein had quarrelled with Sonu for a sum of Rs.100/- and when he, Baba Mohan Giri, had persuaded them to desist, Rajesh @ Gappu, the respondent herein had left saying that if the money was not given to him the next morning then Sonu would have to bear the consequences. **This witness is further indicated to have stated during the course of investigation that on**

06.07.2015 at about 7:00 a.m. Rajesh @ Gappu, the respondent herein had demanded his Rs.100/- from Sonu to which Sonu said that he would give the same in the evening but Rajesh @ Gappu, the respondent herein said that then he would take double amount in the evening and had started assaulting Sonu and Om Prakash @ Babloo had tried to intervene but Rajesh @ Gappu, the respondent herein scolded him and assaulted Sonu with kicks and fist blows and had also hit the head of Sonu on to the ground.

13. According to the statement under Section 161 Cr.P.C. of the witness Baba Mohan Giri, he saw all this, whilst he was lying down in the verandah of his tin-shed because he was unwell and that after some time he came to know that Sonu had died and that Rajesh @ Gappu, the respondent herein had also run away. Another witness Vijay Kumar S/o Gurbachan Singh, a photographer, is indicated to have been examined by the investigating agency who stated to having conducted the videography of the post-mortem being conducted on the body of the deceased and to have handed over the C.D. to the I.O.

14. The statement of Om Prakash @ Chhotu is also indicated to have been recorded by the investigating agency who stated to the effect that when he had learnt of the quarrel between the accused and Sonu as informed by Om Prakash @ Babloo he had gone to the spot i.e. Shiv Shakti Temple at the Bhagat Singh

Stadium Park and had found Sonu lying unconscious and motionless and that the accused Rajesh @ Gappu, the respondent herein was seated there whereupon he had asked the accused as to what had he done to which the accused had responded that Sonu was not returning his money and he had thus killed him, upon which Om Prakash @ Chhotu had telephonically informed the police by mobile no. 9211959127 which was registered on his father's name.

15. A supplementary statement of Om Prakash @ Babloo, the first informant is also indicated to have been recorded by the IO who prepared the site plan at the pointing out of Om Prakash @ Babloo and conducted the inspection of the crime spot, inter alia, Photographs of the spot and videography of the post-mortem is also reported to have been conducted. The clothes and blood gauze of the deceased were received by the IO in a sealed pullanda at the SGM hospital and the accused was arrested on 06.07.2015 itself at 7:10 p.m. at 901 the bus stand, Mangol Puri, Delhi on the identification of the complainant.

16. **As per the charge sheet the post-mortem report in the instant case indicates that it had been opined by the doctor that death was due to cerebral damage as a result of blunt force and that all injuries were ante-mortem in nature and possible in the manner as alleged.**

EVIDENCE LED DURING TRIAL

17. During the trial, the prosecution examined 17 witnesses. The said

witnesses examined were :

Public witnesses

- (i) PW-2 Om Prakash @ Chhotu
- (ii) PW-7 Nathu Ram
- (iii) PW-8 Baba Mohan Giri (eye-witness)
- (iv) PW-13 Om Prakash @ Babloo (eye-witness)

Witnesses to investigation

- (i) PW-3 Vijay Kumar (who videographed post-mortem examination)
- (ii) PW-4 HC Surender Singh (Duty Officer)
- (iii) PW-5 SI Sasi Kumar (PCR official)
- (iv) PW-6 Rajeev Ranjan (Nodal Officer)
- (v) PW-9 Inspector Mahesh Kumar (Draftsman)
- (vi) PW-11 Ct. Birju Singh (DD Writer)
- (vii) PW-12 Ct. Ravinder (PCR official)
- (viii) PW-14 SI Ajeet Singh (Crime team in-charge)
- (ix) PW-15 HC Prem Singh MHC(M)
- (x) PW-16 SI Robin Tyagi
- (xi) PW-17 Inspector Rajpal (Investigating officer)

Doctors

- (i) PW-1 Dr. Manoj Dhingra (Autopsy surgeon)
- (ii) PW-10 Dr. M.Dass (who proved MLC of deceased)

DEFENCE VERSION

18. The accused i.e. the respondent herein through his statement under Section 313 Cr.P.C. claimed innocence and stated that he had been falsely implicated and also denied any financial transaction with Sonu, the deceased. *Inter alia*, the accused also denied that he had any quarrel with Sonu. The accused led no defence evidence. Whilst claiming innocence the accused also

stated that he was not responsible for the death of the deceased and even otherwise the death of the deceased was due to injuries received by a fall.

OCULAR EVIDENCE

19. Om Prakash @ Babloo on whose statement the FIR is indicated to have been registered has been examined as PW-13 before the trial Court. It is essential to advert to his testimony which is to the effect

*“At about 7:00/7:15 a.m. I again went to temple to tell him that tea was ready. I saw that accused present in Court today i.e. Gappu was quarrelling with Sonu. I know accused Gappu as he was also resident of our area (correctly identified). Accused was demanding Rs.100 from him and Sonu was saying that he would return the same in the evening. Accused, however kept on insisting to give that amount then and there. Accused also claimed that if the payment was to be made in the evening then he would take the double amount but Sonu retorted saying that why he must pay double of the amount. **Then Gappu started beating up Sonu. He gave two slaps and one fist blow towards the neck region. Due to such blows, Sonu fell down. I immediately rushed to call for more help. I brought Chhotu with me. Then Chhotu called up the police by dialing 100.**”*

On being cross-examined by the learned Public Prosecutor/PW-13 stated that *“it is correct that I had seen the accused giving continuous blows with legs*

and fists to Sonu.” On being cross-examined on behalf of the accused it was, inter alia, stated by this witness “it is wrong to suggest that Sonu had fallen down on the ground of his own and had received injuries on his head and due to the said injuries, he died.”

20. Though the State had sought to put forth Baba Mohan Giri, the pujari of Shiv Shakti Mandi, J-Block, Mangol Puri, PW-8 as an eye-witness, this witness has categorically denied during his testimony on oath that he had seen the accused beating Sonu with kicks and he also denied that he had seen the accused lifting Sonu and throwing him on the ground due to which his head banged on the ground. Significantly, the testimony of PW-13 Om Prakash @ Babloo also nowhere stated that the accused had lifted the deceased and banged his head on to the ground.

MEDICAL EVIDENCE

21. All other prosecution witnesses examined by the State are only towards the circumstances forming a chain of events. The testimony of PW-1 Dr. Manoj Dhingra In-charge of the mortuary SGM hospital, Mangol Puri, Delhi, who testified to having conducted the post-mortem on the body of the deceased vide post-mortem report Ex.PW-7/A which details external injuries and who testified to the effect that the cause of death was cerebral damage as a result of blunt

force impact. A specific Court query to the effect was put to PW-1, Dr. Manoj Dhingra, In-charge, Mortuary, SGM Hospital, Mangolpuri, Delhi.

“ Court Q: You have stated that injuries were possible in the manner as alleged. In the post-mortem report, it is mentioned that during physical assault, the person had a fall and such history had been given by IO. Is it correct that therefore the injuries in question are possible due to fall?”

The witness answered:

These injuries are possible by fall.”

22. The testimony of Dr. M. Das, CMO, SGM hospital who prepared the MLC Ex.PW10/A shows that the patient was declared brought dead.

ANALYSIS

23. The learned trial Court vide the impugned judgment has carefully analyzed the entire prosecution evidence led and the statement of the accused under Section 313 Cr.P.C. and the arguments addressed.

24. It is essential to observe that even if for a moment the entire prosecution version as set forth in the charge sheet and as brought forth through the testimony of the complainant Om Prakash @ Babloo Pw-13 is accepted in toto, all that could be said to be brought forth is that a quarrel took place between Sonu (since deceased) and the accused Rajesh @ Gappu, the respondent herein who demanded his money from Sonu, the deceased who insisted that he would

return the same in the evening on which the accused claimed that if the payment was made in the evening he would take double the amount, on which Sonu said why he would pay the double amount and then the accused Rajesh @ Gappu, the respondent herein gave him repeated/continuous slaps and one fist blow towards the neck region and then Sonu fell down and received injuries on his head due to which he died.

25. The testimony of PW-1 Dr. Manoj Dhingra who conducted the post-mortem on the body of the deceased and the post-mortem report Ex.PW-1/A indicated that the following injuries were sustained by the deceased :

- (i) Lacerated wound of size 3 x 0.5 cm over left parieto temporal region.
- (ii)(ii) Abrasion present over right side of the nose of size 1 x 1 cm

In relation to these injuries, the doctor i.e. PW-1 has already testified to the effect that these injuries were possible due to a fall. This evidence coupled with the history recorded in Ex.PW-1/A, the post-mortem report as informed by the IO to the doctor of alleged history of physical assault (during physical assault the person had a fall for which he had sustained injuries on 06/07/2015 vide MLC No.12469), all make it apparent that even if the entire prosecution evidence is accepted in toto, the intent of the accused Rajesh @ Gappu, the respondent herein was at the most to cause simple hurt especially as the accused Rajesh @ Gappu, the respondent herein was not even

armed with any weapon and merely assaulted the deceased with slaps, fists blows and kicks. The observations of the learned trial Court thus that the act of the accused was merely to cause simple injuries with no intention to kill anyone and that the accused could not have imagined that the victim would fall down due to the assault given by him by slaps and kicks and an assault on his neck which would cause cerebral damage, do not suffer from any legal infirmity, nor is there any non-consideration, nor misappreciation of evidence on the record.

CONCLUSION

26. An Appellate Court has full powers to review and reappreciate and reconsider the evidence upon which an order of acquittal is founded and the Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on the exercise of such powers and an Appellate Court on the evidence before it, may reach its own conclusion both on question of conviction and law as laid down in *Chandrappa vs. State of Karnataka & Ors.* 2007(4) SCC 415 and *Prandas vs. The State* AIR 1954 SC 36. However, it cannot be overlooked that the verdict of the Supreme Court in *Chandrappa vs. State of Karnataka & Ors.* 2007(4) SCC 415 also lays down categorically that:

“(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.”

27. In the case of **Ghurey Lal Vs. State of U.P. 2008(10) SCC 450** the Supreme Court has laid down the following guiding principle, to be adhered to before leave to appeal against an order of acquittal may be granted:

“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."

28. To the similar effect is the verdict of the Supreme Court in ***State of Madhya Pradesh Vs. Dal Singh & Ors.*** JT 2013(8) SC 625.

29. In the circumstances, the submission made on behalf of the State through the petition filed seeking leave to appeal to contend that the learned ASJ had misappraised the evidence cannot be accepted on the basis of the entire prosecution evidence led on oath during trial, even if accepted to be wholly true. The evidence and the entire available record establishes that the accused Rajesh @ Gappu, the respondent herein had no culpable knowledge nor culpable intent of inflicting injuries capable of causing the death of the deceased by manner of assault.

30. In view thereof, as there is nothing on the record to indicate that the learned trial Court had ignored the evidence or misread the material evidence, there is no ground to grant any leave to appeal against the impugned judgment

and order on sentence dated 04.02.2016 in relation to the acquittal of the accused Rajesh @Gappu, the respondent herein in FIR No. 1350/2015, PS Mangol Puri, under Section 304 IPC and conviction of the accused/respondent herein under Section 323 IPC, 1860 and the sentence imposed vide the impugned order on sentence dated 04.02.2016.

RESULT

31. In view of the above discussion, CrI.L.P. No.581/2016 is thus dismissed.

The trial Court record be returned forthwith.

ANU MALHOTRA, J

GITA MITTAL, J

DECEMBER 21, 2016/mr

