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

% *Judgment dated 2nd March, 2016*

+ **CRL.L.P.544/2015**

STATE (GNCT) OF DELHI

..... Petitioner

Through : Mr.Ramesh Mahajan, ASC with Ms.
Aasha Tiwari, APP for the State, Ms.
Parul Jamwal, Advocate and SI Pankaj,
Police Station – Kotwali.

Versus

NAND KISHORE JHA @ KISHORE & ANR.

..... Respondents

Through : Mr. Vijay Pal Sharma, Advocate.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S.SISTANI, J. (ORAL)

1. Present leave to appeal arises out of a judgment dated 16.02.2015 passed by the Trial Court by which the respondents were acquitted for the offence under Section 302 read with Section 34 of the Indian Penal Code.
2. As per the prosecution, on the intervening night of 10.07.2011 and 11.07.2011 at the ground of Shanti Desai Sports Club, both accused Nand Kishore and Karan along with Manish (Juvenile) in furtherance of their common intention caused the death of Manoj Suman @ Pawwa by beating him with stones. Case was registered on the basis of endorsement made by the I.O. on the DD itself. No eye witness was present at the spot on 11.07.2011. On seeing the photographs of the deceased, Sarfrazuddin, made his statement before the I.O. that he had seen accused persons, giving beatings to the deceased.
3. The prosecution has examined 17 witnesses in all. No evidence was led by the defence.
4. The statement of the accused persons were recorded under Section 313 of

the Code of Criminal Procedure to which they pleaded that they have been falsely implicated and claimed trial.

5. Ms. Aashaa Tiwari learned APP for the State submits that the trial court has failed to appreciate the testimonies of PW-8 being the eye-witness i.e. Sarafrazuddin, who has fully supported the case of the prosecution and has categorically deposed that he had seen accused persons beating the deceased. PW-8 has correctly identified the accused persons during the course of trial, Moreover accused persons were arrested in his presence.
6. It is also contended that the evidence of PW-8 is trustworthy and should have been relied upon by the trial court for convicting the accused persons, after taking into account the totality of the facts and the circumstances of the case. It is also submitted that the prosecution has failed to establish as to why PW-8 would falsely implicate the respondent, neither any previous enmity between PW-8 and respondents have been established.
7. Counsel for the State further contends that as far as the date and time of occurrence is concerned, there is no contradiction in the testimony of PW-8. Moreover, the time of death as given in the post-mortem report, corresponds with the case of prosecution.
8. Counsel submits that the trial court has unnecessarily highlighted the minor contradictions which do not go to the root of the matter. The judgment of the trial court being perverse, unjustified and not free from conjectures and surmises, is liable to be set aside.
9. Per contra, learned counsel for the respondents submits that the petitioner has failed to point out the discrepancy in the view taken by the trial court and the judgment of the trial court is not perverse. It is based on clear understanding of law and further the trial court has taken into account the settled position of law and applied the same correctly to the facts of this case.

10. We have heard learned counsel for the parties and have carefully examined the judgment of the trial court.
11. Since the testimony of PW – 8 has been strongly relied upon by the learned counsel for the State, we deem it appropriate to discuss the evidence of the witness in detail.
12. PW – 8 Sarafrazuddin, eye-witness deposed before the court that : -

“on 11.07.2011, the police officials during one inquiry showed him photographs and on seeing the same, he told that he had seen that person on the previous night along with three persons when they were quarreling with the person and thereafter, all those four persons entered the park from Metro Gate no. 4 side while jumping the iron gate. He saw that the three persons were beating the fourth one. They were beating him with the bricks and stones and he was crying and making noise. Both the accused are the same persons who alongwith third one were beating the fourth person i.e the deceased, whom he had identified in the photograph Ex.PX. In the night, due to fear, he ran away towards his Dhaba. He has further deposed that on the intervening night of 10/11.07.2011 he was returning to his above said Ashok dhaba after seeing the film at Moti cinema in the night show i.e. 09 to 12 PM. On 13.07.2011 he was called at the police station and from there he alongwith police staff reached Old Delhi railway station in search of accused. On receiving secret information from one secret informer accused Nand Kishore was apprehended from platform no. 13 . Accused Nand Kishore was arrested and his personal search was conducted vide memos respectively Ex PW 8/A and Ex PW 8/B. Disclosure statements of accused Nand Kishore is Ex PW 8/C and Ex PW 8/D. Accused Nand Kishore thereafter led the police party to Shanti Desai Park and pointed out the place where he alongwith his associates committed the murder. Pointing out memo in this regard is Ex PW 8/E. Two accused namely Karan and Manish were apprehended by the police from near the Loha Pul and he identified both of them as the persons who alongwith Nand Kishore had committed the murder in the intervening night of 10/11.7.2011 of deceased, ie the person whose photograph he had identified as Ex PX. Disclosure statements of accused Manish and Karan were recorded and same are Ex. PW 8/F and Ex PW 8/G respectively. The shirts which accused Manish and Karan were wearing at that time were also seized by the police after preparing two separate pulandas and after sealing the same with the seal of Inspector Vishwajeet vide seizure

memo Ex PW 8/J and Ex PW 8/K respectively. Both the accused Manish and Karan were arrested and their personal search were conducted, arrest memo and personal search memo of accused Karan are Ex PW 8/L and Ex PW 8/M respectively. Pointing out memo of the spot by accused Karan is Ex PW 8/N.”

13. The prosecution has relied on the testimony of PW-8, Sarfrazuddin, who claimed to be an eye-witness. The testimony of PW-8 has been extracted in paragraph 12 foregoing. The trial court has noticed that PW-8 was firstly examined on 16.10.2012 and thereafter on 16.1.2014 i.e. after a gap of almost one year. Despite the gap, the trial court was of the view that certain basic events would remain embedded in the memory of a person. The trial court has taken note of various contradictions made by this witness. In his examination-in-chief, PW-8 has testified that he was returning on the night of the incident after seeing the movie at Moti Cinema. The trial court has also noticed that when the cross-examination of the witness was conducted, he appeared to have lost the track of his statement made by him earlier and had started giving contradictory statements. The trial court has further noticed that in the cross-examination conducted by Sh.Vijay Pal Sharma, learned counsel for the accused Nand Kishore Jha, he had stated that “*On 12.07.2011 I pulled rickshaw from 9 a.m. to 8.30 p.m. I deposited the rickshaw with the rickshaw owner at his garage near Library on Town Hall Road and thereafter I washed my hands and face and left the garage at about 8.45 p.m. and went to see the film.*” Thereafter again, in the same cross-examination, he had stated that “*he left the Moti Cinema at about 12 mind night and reached at his rickshaw garage via Sisganj Gurdwara but by that time the rickshaw garage was already closed and he came back to Kodia Pul by Police Station Kotwali.*”
14. In the cross-examination conducted on 16.1.2014 on behalf of Nand Kishore, this witness has testified as under:

“I went to take dinner at about 12.20 in the night and thereafter went to sleep. I had seen the occurrence before I took my dinner.”

15. The learned trial court has observed that from the above statement, it is clear that as per the statement of PW-8, Sarfarazuddin, he had seen the occurrence before taking dinner, which means after seeing the occurrence, he had gone to take dinner at about 12.20 mid night and then he went to sleep. Whereas in the very next sentence of his cross-examination he had stated as under:

“I had seen the occurrence at 12.10 a.m in the night on that day near gate no 4 Metro Station, Chandni Chowk, I remained there for about one hour, meaning thereby I remained there till 1.15 in the night.”

16. A careful analysis of the evidence of this witness would only show that this witness was a tutored witness and a planted witness. If this witness is to be believed then he had gone for dinner at 12.20 a.m. in the mid night while on the other hand he has stated that he stayed at the place of the incident till 1.15 a.m.
17. The explanation rendered by this witness for not informing the Police is that he had become unconscious upon witnessing how brutally the deceased was hit by stones and regained consciousness only in the morning, which is also highly unusual. But what is not explained is that even thereafter he did not report the matter to the Police. It may also be noticed that during cross-examination conducted by Sh.Vijay Pal Sharma, learned counsel for the respondent Nand Kishore, PW-8 had again changed his stance and stated that after regaining consciousness, he went to the Police Station and informed Inspector Vishwajeet about the incident of accused persons hitting the deceased on the previous night. This fact, as per the case of the prosecution, is incorrect. The prosecution story is that on receipt of call, Police reached at the place of the incident, found the

unidentified body of a male there and called PW-2 Sh.Deepak Mathur, Photographer, who took the photographs of place of occurrence along with position of dead body from different angles.

18. As per the prosecution, the picture of the deceased was shown to PW-8 and PW-8 had identified the deceased as the person who was quarrelling with the respondents in the previous night. This was also the stand taken by PW-8 in his examination-in-chief. But in the cross-examination, he has deposed that he reported the matter to the Police by going to the Police Station.

19. Some of the contradictions of PW-8 are highlighted as under:-

- In his cross examination, he had stated that he went to rickshaw garage before going to see the movie whereas in the same breath he had stated that after the movie he went to rickshaw garage.
- Earlier he had stated that after the movie he had gone to take dinner at muslim dhabha at Kodia Pul but in the immediate succeeding sentence he had stated that from Moti Cinema he came back to rickshaw garage.
- Again in his cross examination he gave a statement that he had seen the occurrence before taking dinner and had dinner at around 12:20 mid night and then he went to sleep. In the very next sentence he had stated that he had seen the occurrence at 12:10 am and he remained there for about one hour, meaning thereby he remained there till 1:15 am in the night.
- Again he had stated to the police that he had lost his consciousness after seeing the manner by which accused persons brutally hit the deceased with stones and he regained his consciousness in the morning meaning that he had remained outside the park whole night without being noticed by any person or accused.
- There are various other contradictions in the testimony of PW-8 as

compared to testimony of PW-13 and PW-16 with regard to the presence of trees as well as electric pole at the spot where dead body was found.

20. It is settled law that contradictions, which do not go to the root of the matter should be ignored, however, in our view the testimony of PW-8, who claims to be an eye-witness is full of contradictions and improvements.
21. In the case of ***Kuria and Anr. V. State of Rajasthan: (2012)10 SCC 433***, the Apex Court has held as under:

“...This Court has repeatedly taken the view that the discrepancies or improvements which do not materially affect the case of the prosecution and are insignificant cannot be made the basis for doubting the case of the prosecution. The courts may not concentrate too much on such discrepancies or improvements. The purpose is to primarily and clearly sift the chaff from the grain and find out the truth from the testimony of the witnesses. Where it does not affect the core of the prosecution case, such discrepancy should not be attached undue significance. The normal course of human conduct would be that while narrating a particular incident, there may occur minor discrepancies. Such discrepancies may even in law render credential to the depositions. The improvements or variations must essentially relate to the material particulars of the prosecution case. The alleged improvements and variations must be shown with respect to material particulars of the case and the occurrence. Every such improvement, not directly related to the occurrence, is not a ground to doubt the testimony of a witness. The credibility of a definite circumstance of the prosecution case cannot be weakened with reference to such minor or insignificant improvements. Reference in this regard can be made to the judgments of this Court in Kathi Bharat Vajsur and Anr. v. State of Gujarat: (2012) 5 SCC 724, Narayan Chetanram Chaudhary and Anr. v. State of Maharashtra: (2000) 8 SCC 457, D.P. Chadha v. Triyugi Narain Mishra and Ors.: (2001) 2 SCC 205, Sukhchain Singh v. State of Haryana and Ors.: (2002) 5 SCC 100.”

22. In ***Prabhat Singh vs. State: Crl. A. 926 and 1010/2009, 422 and 452/2010, 192/2011 and 230/2014***, this Court observed as under:

“71.The principle that can be culled out from the aforesaid decisions are that minor discrepancies and inconsistencies cannot be given undue importance. The Court has to see whether inconsistencies go to the root of the matter and affect the truthfulness of the witnesses, while keeping in view that discrepancies are inevitable in the statement of witnesses who speak them after long lapse of time.”

23. In the present case, we find that there are material contradictions in the testimony of PW-8 and we find that it would be highly unsafe to convict the respondents based on the testimony of such a witness.
24. We may also notice that it is the case of the prosecution that the respondent, Nand Kishore, had thrown his clothes in Yamuna river whereas the accused Karan was found wearing the same shirt on 14.7.2011, which he was wearing at the time of the incident. This is another aspect, which is highly improbable that the accused Karan would continue to wear same clothes with blood stains for three or four days.
25. In the case of ***Khalil Khan v. State of Madhya Pradesh***, reported at AIR 2003 Supreme Court 4670, the Supreme Court of India has held as under:

“...We find it extremely difficult to believe that a person who is involved in such a serious crime like murder would still be wearing clothes which are blood-stained even four days after the murder which fact we find is opposed to normal human conduct.....”

26. In a recent case titled as ***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.”
27. We find no illegality, infirmity in the judgment of the Trial Court which would call for interference in these proceedings. Resultantly, we do not find any merit in the petition.
28. The leave to appeal is accordingly dismissed.

G.S.SISTANI, J

SANGITA DHINGRA SEHGAL, J

MARCH 2nd 2016 msr