

\$~12

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

+ **CRL. L.P. 632/2015**

%

Judgment dated: 26th April, 2016

STATE OF NCT OF DELHI

..... Petitioner

Through: Ms. Aashaa Tiwari, APP for State and Ms.
Parul Jamwal, Advocate for Mr. Rajesh
Mahajan, ASC for State.

Versus

OM PRAKASH

..... Respondent

Through: Mr. Dinesh Malik, Mr. Gurpreet Singh and
Mr. Akash Saini, Advocates.

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 petition has been filed by petitioner under Section 378 (3) of the Code of Criminal Procedure against the judgment dated 15.04.2015 passed by learned Additional Sessions Judge, Delhi, in Sessions Case No. 12/13, by virtue of which the respondent herein stands acquitted of the charges framed against him under section 302 of the Indian Penal Code.
2. The brief facts of the case as noticed by the trial court are that on 07/12/2011 at about 7:30 p.m. at Kela Ghat, Ring Road near Vyayamshala, Om Prakash @ Shamsher, respondent herein, committed the murder of Pardeep @ Sonu. It is the case of the prosecution that Shamsher as well as deceased Pardeep were seen quarreling with each other at Somdutt Vyayamshala and while quarreling, under the influence of liquor, Pardeep fell in a pit, which was dug due to electricity work being done in the area, and Shamsher picked up a stone lying there and caused injury to him. Thereafter, PW-1 Rajesh

(eyewitness to the incident) went and called PW-2 Ajay who then gave a call at 100 number. The deceased Pardeep was taken to trauma center. He succumbed to his injuries and died on the next day of the incident. After about one year, the police apprehended Om Prakash.

3. After completion of investigation, the charge for the offence under Section 302 of the Indian Penal Code was framed against the respondent.
4. To bring home the guilt of the respondent, the prosecution has examined as many as 18 witnesses. The statement of the respondent was recorded under Section 313 of the Code of Criminal Procedure wherein he denied the accusations levelled against him and claimed trial. One defence witness was examined by the respondent in his defence.
5. Ms.Aashaa Tiwari, learned Additional Public Prosecutor, contends that the impugned judgment rendered by the trial court is contrary to facts and law. It is further contended that the trial court has committed grave error in holding the respondent not guilty of the offence punishable under Section 302 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. Counsel also submits that the findings recorded by the trial court are not based on proper appreciation of the evidence on record and, in fact, they are perverse and totally untenable.
6. Ms.Aashaa Tiwari, learned Additional Public Prosecutor, has also contended that the learned trial court has failed to appreciate that the FIR was lodged by an eye witness Rajesh, who named the accused as the perpetrator of the offence soon after the offence was committed. Hence, gap of one year in arresting the accused by the police would not affect the case of the prosecution.
7. It is further submitted by learned counsel for the petitioner that the trial court

has failed to appreciate the testimony of the eye witness, PW-1, wherein he clearly described the role attributed to the respondent in inflicting injuries on the deceased and the injuries explained by PW-1 clearly corroborate with the MLC of the deceased. It is further contended that the learned trial court has failed to appreciate the testimony of PW-11 in the right perspective.

8. Learned counsel for the respondent with all force countered the arguments addressed by learned counsel for the State. Counsel has specifically contended that the trial court has appreciated the material on record by taking due care and caution and by giving equal importance to the evidence of the prosecution witnesses as also the defence witness. The trial court has also appreciated the evidence considering the improvements and contradictions that are serious in nature elicited during the course of cross-examination of the witnesses proved through the evidence of other witnesses.
9. Counsel for the respondent while supporting the impugned judgment passed by the learned trial court has submitted that the trial court has rightly canvassed the acquittal of the respondent by concluding that the prosecution has failed to prove its case beyond reasonable doubt. It is further submitted that while dealing with the judgment of acquittal, the appellate court must be very careful in reversing the judgment unless the judgment passed by the trial court is so erroneous, illegal or it shocks the conscience of the court. Therefore, it is contended that there is no room for this Court to interfere with the well-reasoned judgment of the trial court. Hence, it is pleaded that the impugned judgment of acquittal passed by learned trial court may be confirmed.
10. We have heard learned counsel for the parties, considered their rival submission and also examined the impugned judgment. Before discussing

the merits of the case, we find it necessary to examine the testimonies of prosecution and defence witnesses.

11. PW-1, Rajesh (eyewitness to the incident), in his testimony has deposed that respondent, Shamsher, and the deceased, Pardeep, used to visit Vyayam Shala in the evening. On 07.12.2011 both of them were present there and consuming liquor. PW-1 has further deposed that while consuming liquor, they started quarreling with each other due to which PW-1 asked Shamsher and Pardeep to leave. As per the testimony of PW-1, both Shamsher and Pardeep went away but they continued quarrelling with each other. PW-1 further stated that there was a pit, measuring three feet, outside the vyayamshala as the work of electric wiring was going on. Pradeep while quarelling with the respondent fell down in the pit. Thereafter the respondent took advantage of the situation, picked up a stone lying there and caused injury on the head of Pardeep with the said stone. PW-1 immediately raised an alarm but no one came forward to help him. In order to save the life of Pradeep, PW-1 went to the railway station and called Ajay. Thereafter he reached the spot along with Ajay. Ajay informed the Police after arranging a mobile phone from a public person. PW-1 added that the Police had reached the spot, removed the deceased to the hospital and had taken into possession the said stone and also lifted the blood and blood stained earth from the spot.
12. PW-2, Ajay, a rickshaw puller, has deposed that he has been residing in Som Dutt Vyayamashala, Kela Ghat, and respondent, Shamsher, and the deceased, Pradeep, were also residing at Akhara along with him. It has further been deposed that on 07.12.2011, he was present at Old Delhi Railway Station and at about 7:15–7:30 pm, PW-1(Rajesh) reached at Hamilton Road where he was waiting for passengers. PW-1 informed him that Shamsher caused injury with stone on the person of Pardeep. Thereafter, he went to the Vyayamshala along with PW-1 and found that

Pardeep was lying inside the pit and blood was oozing out from his injury. PW-2 has further testified that he had then made a call at number 100, after sometime the Police came, they removed the injured to the hospital and also lifted the stone, blood and blood stained earth from the spot.

13. PW-11, Vijay Kumar, has deposed that he knows Ajay Singh @ Lambu (PW-2) as he used to run his rickshaw on hire basis. PW-11 has further deposed that he also knows Pardeep and Shamsher as on the assurance of Ajay Singh @ Lambu, he had given rickshaw nos.38 and 39 to Pardeep and Shamsher, respectively, as both used to run his rickshaws on hire basis. PW-11 has further testified that he did not witness the incident and later on came to know that quarrel had taken place between Pardeep and Shamsher and Shamsher caused injury to Pardeep and since then Shamsher was at large along with his rickshaw. PW-11 has further added that after one year, he identified Shamsher and stated before the Police that Shamsher is the same person who had taken his rickshaw on hire and did not return the same to him.
14. DW-1, Vasanti Devi, is the mother of Om Prakash, respondent herein. DW-1 has deposed that the name of her son is Om Prakash and for his identification she had produced his election card. She has further stated that her son is not known by the name of Shamsher and he has been falsely implicated in this case.
15. While acquitting the respondents, the trial court has taken note of various contradictions in the testimonies made by PW-1 and PW-11.
16. The trial court has noticed that in the statement made by PW-11, he has stated that he had given his rickshaw nos.38 and 39 to Pardeep and Shamsher, respectively, on the assurance given by Ajay (PW-2) but in the statement made by PW-2, he had nowhere stated that PW-2 was instrumental in providing rickshaw to Shamsher from PW-11.

17. It may also be noticed that PW-11 had stated in his testimony that after the date of the incident, Shamsher ran away with his rickshaw and did not return the same to him but there is not an iota of evidence, which suggests that PW-11 had ever made any complaint to the Police either regarding stealing of his rickshaw by the Shamsher or for not returning his rickshaw to him. The trial court has also noticed that nothing has been placed on record to prove that that rickshaw no.39, which was allegedly given to Shamsher by PW-11, was either found abandoned at any place in Delhi or still was PW-11.
18. It may further be noticed that the learned trial court has observed that as per the prosecution, PW-1 Rajesh was present at the time when the respondent was apprehended from Town Hall, but in his cross-examination PW-1 has stated that he was called to Police Station after the respondent was arrested, which falsifies the case of prosecution that the respondent was identified by PW-1.
19. The law with regard to contradictions in the testimony of material witness is well settled. In ***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.”

20. In **Prabhat Singh vs. State, Crl. A. 926/2010 and another connected appeals**, this Court has 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.”

21. The principle that can be culled out from the aforesaid decision is that minor discrepancies and inconsistencies cannot be given undue importance, however, 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 depose them after a long lapse of time.
22. The trial court has rightly taken into account that PW-1 and PW-2 both knew Shamsher. Even PW-11, who is stated to be rickshaw owner providing rickshaws on hire to PW-2, the deceased and the respondent had named the respondent as Shamsher. None of these witnesses have mentioned the name of respondent as Om Prakash. The incident took place on 07.12.2011 and Om prakash was arrested on 17.11.2012. It has been admitted that Om Prakash was plying rickshaw in the area of Townhall and PW-1, PW-2 and PW-11 have admitted that all the rickshawalas plying in the area of Chandni

Chowk, Townhall, Kela Ghat were almost same and they knew each other by name and face. Even though PW-1, PW-2 and PW-11 knew the respondent, he was not pinpointed by anyone or arrested by the Police for a period of one year. State has failed to explain this gap of one year.

23. Further the trial court has rightly observed that PW-1, PW-2 and PW-11 have stated that they knew all the rickshaw walas of the locality by their name and face but nobody was able to recognize the accused Om Prakash as 'Shamsher' for complete one year.
24. Thus, as rightly held by the Trial Court, the prosecution has failed to prove that Shamsher and Om Prakash are the one and same person.
25. It may also be noticed that PW-11 in his statement has stated that at the time of arrest Shamsher was driving the rickshaw of one person but that person was not examined by the prosecution to prove the identity of the accused.
26. The testimony of PW-8 Ct Sonu Kumar would show that PW-1 and PW-2 were not the eye witnesses of the case and not present at the spot after the incident. He has further stated that he firstly went to trauma centre with PW-17, SI Om Prakash, and from trauma centre he returned to the spot of the incident and found that no public person was present there. The testimony of PW-17, SI Om Prakash, corroborates the testimony of PW-8, Ct.Sonu Kumar. This raises doubt about the presence of PW-1 and PW-2 at the spot as their testimonies are completely silent about their whereabouts in the night of 7/12/2011.
27. As per the deposition of PW-1(Rajesh), Pradeep (deceased) had fallen in the pit and then Shamsher (accused) picked up stone lying there and caused injury on the head of the deceased with a stone but after considering the MLC, we are of the opinion that it is quite possible that while the deceased fell in the pit, his head may have struck against the stones which were present in and around the pit. Thus, it appears that the injuries suffered by

the deceased were due to fall in the pit and the said injuries could not have been caused by throwing a stone on the head of the deceased. Neither the IO asked the Doctor, PW-16, nor had the Doctor explained as to whether the injuries sustained by the deceased were on account of throwing a stone from the height of 5 ft. on the head of the deceased.

28. In the present case, on a cumulative reading and appreciation of the entire evidence on record, we are of the considered view that the learned trial Court has not fallen into any error of law in appreciating the evidence in accordance with law.
29. The law with regard to dealing with leave to appeal petition is well-settled.
30. In the case of ***State of Madhya Pradesh v. Dal Singh & Ors.***, reported at 2013 (8) SC 625, the Supreme Court of India has held that an order of acquittal is to be interfered with only when there are compelling and substantial reasons for doing so and if the judgment is unreasonable and relevant materials have been unjustifiably ignored, it would be a compelling reason for interference.
31. Further in the case of ***Mrinal Das and Ors. Vs. The State of Tripura*** reported at AIR 2011 SC 3753, the Apex Court has held as under:

“It is clear that in an appeal against acquittal in the absence of perversity in the judgment and order, interference by this Court exercising its extraordinary jurisdiction, is not warranted. However, if the appeal is heard by an appellate court, being the final court of fact, is fully competent to re-appreciate, reconsider and review the evidence and take its own decision. In other words, law does not prescribe any limitation, restriction or condition on exercise of such power and the appellate court is free to arrive at its own conclusion keeping in mind that acquittal provides for presumption in favour of the accused. The presumption of innocence is available to the person and in criminal jurisprudence every person is presumed to be innocent unless he is proved guilty by the competent court. If two reasonable views are possible on the basis of the evidence on record, the appellate court should not disturb the findings of acquittal. There is no limitation on the part of the appellate

court to review the evidence upon which the order of acquittal is found and to come to its own conclusion. The appellate court can also review the conclusion arrived at by the trial Court with respect to both facts and law. While dealing with the appeal against acquittal preferred by the State, it is the duty of the appellate court to marshal the entire evidence on record and only by giving cogent and adequate reasons set aside the judgment of acquittal. An order of acquittal is to be interfered with only when there are "compelling and substantial reasons for doing so". If the order is "clearly unreasonable", it is a compelling reason for interference. When the trial Court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of ballistic experts etc., the appellate court is competent to reverse the decision of the trial Court depending on the materials placed."

32. Keeping in view the above settled law and in totality of the facts and circumstances, we do not find any reason to interfere with impugned judgement passed by the learned trial court. Accordingly present leave to appeal petition, being devoid of merit, is dismissed.

G. S. SISTANI, J

SANGITA DHINGRA SEHGAL, J

April 26, 2016

msr