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

+ **CRL.L.P.No. 8/2016**

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Judgment dated : 2nd June, 2016

STATE OF NCT OF DELHI

..... Petitioner

Through : Ms. Aashaa Tiwari, APP with SI
Pawan Kumar, P.S Harsh Vihar

versus

SUDHIR KUMAR @ BUNTI

.....Respondent

Through : Ms. Jhum Jhum Sarkar, Amicus
Curiae

CORAM:

HON'BLE MR. JUSTICE G. S. SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

SANGITA DHINGRA SEHGAL, J. (ORAL)

CRL.M.A.57/2016

1. This is an application filed by the State seeking condonation of 23 days delay in filing the present leave to appeal petition.
2. Having regard to the submissions made and in the interest of justice, delay is condoned.
3. Application stands disposed of.

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4. Respondent had appeared from jail on 01.06.2016. Prayer was made for appointing an amicus curiae in this matter. Ms. Jhum Jhum Sarkar who is present in court is appointed as an amicus curiae in this matter.

5. The State by this Criminal Leave Petition, under Section 378(3) of the Code of Criminal Procedure, seeks leave to appeal against the judgment dated 14.08.2015 passed by Sh. Devender Kumar, Additional Sessions Judge-03, Karkardooma Courts, Delhi in Sessions Case No. 180/10 thereby acquitting the respondent under Section 364/302/34 of the Indian Penal Code.
6. The necessary and relevant facts, as projected by the prosecution are as under

“On 15.10.2008, a DD entry no. 28A, at about 6.51 pm, was lodged with PS Harsh Vihar that a boy had been stabbed. ASI Bhupender Singh alongwith Ct. Kiran Pal went to the spot at, 20 feet road, Gali no. 5, Partap Nagar, Delhi and it was revealed that the injured had been taken to some unknown hospital. On enquiry, it was revealed that the injured was removed to GTB Hospital by PCR and IO visited GTB Hospital and collected the MLC of injured Birju with the alleged history of stabbing. It is further revealed that one Bunti was also hospitalized with alleged history of knife injury on right side of his chest and was 'fit for statement', but under observation. During investigation, IO recorded the statement of Smt. Pinki who disclosed that on 15.10.2008 at about 6.00 pm, friends of Birju namely Bunti and two juveniles came to her house and forcibly took her husband towards railway line. It is further alleged that she alongwith her parents-in-law chased the accused, but they inflicted knife injuries on the stomach of deceased and ran away. Police lodged the FIR and arrested the accused Sudhir @ Bunti and chargesheeted him. Other co-accused were juvenile and they were referred to trial before J.J.B.”

7. Upon Committal of the case to the court of Sessions, the respondent was charged with having committed the offences under Sections 364,

302 and 34 of the Indian Penal Code. The respondent pleaded not guilty to the aforesaid charges and accordingly prosecution was called upon to lead evidence.

8. The prosecution in all examined 20 witnesses. The statement of the respondent was recorded under Section 313 of the Code of Criminal Procedure wherein he denied the allegations made against him and alleged false implication in the case. However, the respondent did not lead any evidence in his defence.
9. Upon consideration of oral and documentary evidence the Trial Court opined that the prosecution has not been able to prove its case beyond reasonable doubt and accordingly acquitted the respondent. Additionally, the Trial Court after taking into account the financial condition of the family of the deceased granted compensation under Victim Compensation Scheme of Rs.4,00,000/-.
10. Ms. Aashaa Tiwari, counsel for the State submitted that the order of the Trial Court is based on mere presumptions, conjectures and surmises and as such cannot stand the scrutiny of law and therefore is liable to be set aside.
11. Counsel for the State further contended that there were no inconsistencies in the testimonies of PW2 and PW4 and the Trial Court erred in not relying and emphasizing on the testimony of the witness PW5.
12. The learned counsel for the state also submitted that the trial court has failed to appreciate that there are no major contradictions in the testimonies of the witnesses warranting acquittal of respondent and

the minor contradictions, discrepancies, variations and improvements are bound to occur in detailed narration of facts by a witness.

13. Per Contra, supporting the impugned judgment, it was submitted by Ms. Jhum Jhum Sarkar, Amicus Curiae appearing for the respondent that while recording the findings of acquittal in favour of the respondent very sound and cogent reasons have been assigned by the trial court.
14. She further contended that the testimonies of the witnesses suffered from serious contradictions and inconsistencies and they could not be said to be reliable.
15. We have given our thoughtful consideration to the contentions urged by the counsel for the parties and perused the impugned judgment and material on record.
16. PW2 Smt. Pinki, wife of deceased victim in her examination in chief deposed as under:

“On 15th day of a month Kartik of the year 2008, my husband was present at the house. At about 6.00/6.30 p.m Ganesh, Gautam, and Bunty came to our house. They asked about my husband. My husband was not present at that time. Thereafter all the three above persons went away. After about ½ an hour Ganesh, Gautam and Bunti came again to our house and took my husband by catching hold of his hand. My husband resisted. The above persons had used force for taking my husband away from the house. My in- laws were also residing separately in neighbourhood. I informed my in- laws that my husband Birju has been taken away by Bunty, Ganesh and Gautam. My father in-law and mother-in-law also came out but by that time my husband has already been taken away towards the side of railway line. My father-in-law and mother-in-

law went there and I also followed them. My husband was given stab blows with knife and thereafter, the accused persons ran away from there. It was little dark time at that time. We brought Birju to our house in injured condition and laid him down in front of door of our house. Then he was taken to hospital in police vehicle. My husband had become unconscious at that time.

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After three days of the above incident, all the accused persons were arrested by the police and the police brought them to my house. I identified them to be the same persons i.e Bunty, Ganesh and Gautam who had taken my husband forcibly and stabbed him and killed him.”

17. PW2 in her cross examination stated as under:

“It is correct that it was dark at the time of the incident. I did not see the wearing clothes of the accused persons as they had run away. I did not raise any alarm when the accused persons visited first time our house on the day of incident. My husband did not raise any alarm when he was taken away by the accused persons.”

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“I did not notice any weapon in the hands of the accused persons while they took away my husband as it was dark at that time. I do not know who had called the police after the incident...”

18. PW4 Ram Veer Singh, father of the deceased in his examination in chief deposed as under:

“On 15.10.08 at about 6.30 pm I was sitting on a slab outside my house as the construction work was in progress. I saw my son Birju was being taken by three boys namely Bunty who is present today in the court and correctly identified by the witness, Ganesh and

Gautam (both these juveniles accused are being facing trial before JJB), towards railway line. I stopped them and tried to inquire from them. Accused Bunti abused me in filthy language and told that he will teach lesson to Birju ('Aaj to Birju ko majha chakha denge') and dragged him towards railway line. In the meantime, the wife of Birju deceased namely Pinki who had recently delivered a baby also came there and the accused Bunti along with two persons (juveniles) forcibly took away my son Birju towards railway line. I heard noise of brawl coming from the side of railway line. Myself, my wife namely Urmila, my daughter in law Pinky and some persons from neighbourhood went there. My son was stabbed by the accused persons and all the accused fled away leaving my son behind there while my son was bleeding profusely from the stomach. I put my son on a cot and was waiting for some vehicle to take him to the hospital."

19. This witness in his cross examination stated as under:

"...Birju had never introduced his friends to me. The occurrence had taken place sometimes between 6 P.M to 6.30 P.M. At the time of incident, I was sitting on a slab just three houses away from the place of occurrence and the incident had taken place opposite me. I do not remember now since when I was sitting on the slab. The accused persons had come on a motorcycle but I cannot tell the description as I am illiterate. The accused persons had parked their motorcycle just near my house. Deceased was not taken on a motorcycle. I had seen the accused coming on the spot once only. It was not a dark time."

20. In ***Dr. Sunil Kumar Sambhudayal Gupta and Ors. Vs. State of Maharashtra*** :(2010) 13 SCC 657 the Apex Court discussed the

relevancy of contradictions in the testimony of the witness. Relevant paras of the judgment is reproduced as under:

“14Material Contradictions:

While appreciating the evidence, the court has to take into consideration whether the contradictions/omissions had been of such magnitude that they may materially affect the trial. Minor contradictions, inconsistencies, embellishments or improvements on trivial matters without affecting the core of the prosecution case should not be made a ground to reject the evidence in its entirety. The Trial Court, after going through the entire evidence, must form an opinion about the credibility of the witnesses and the appellate Court in normal course would not be justified in reviewing the same again without justifiable reasons. (Vide: State Represented by Inspector of Police v. Saravanan and Anr. : AIR 2009 SC 152).

15. Where the omission(s) amount to a contradiction, creating a serious doubt about the truthfulness of a witness and other witness also make material improvements before the court in order to make the evidence acceptable, it cannot be safe to rely upon such evidence. (Vide: State of Rajasthan v. Rajendra Singh (2009) 11 SCC 106).

16. The discrepancies in the evidence of eye-witnesses, if found to be not minor in nature, may be a ground for disbelieving and discrediting their evidence. In such circumstances, witnesses may not inspire confidence and if their evidence is found to be in conflict and contradiction with other evidence or with the statement already recorded, in such a case it cannot be held that prosecution proved its case beyond reasonable doubt. (Vide: Mahendra Pratap Singh v. State of Uttar Pradesh: (2009) 11 SCC 334).

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21. While deciding such a case, the Court has to apply the aforesaid tests. Mere marginal variations in the

statements cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. The omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited."

21. In case of **Mritunjoy Biswas Vs. Pranab @ Kuti Biswas and anr.**, reported at (2013) 12 SCC 796, the Apex Court held as under:

"As is evincible, the High Court has also taken note of certain omissions and discrepancies treating them to be material omissions and irreconcilable discrepancies. It is well settled in law that the minor discrepancies are not to be given undue emphasis and the evidence is to be considered from the point of view of trustworthiness. The test is whether the same inspires confidence in the mind of the court. If the evidence is incredible and cannot be accepted by the test of prudence, then it may create a dent in the prosecution version. If an omission or discrepancy goes to the root of the matter and ushers in incongruities, the defence can take advantage of such inconsistencies. The omission should create a serious doubt about the truthfulness or creditworthiness of a witness. It is only the serious contradictions and omissions which materially affect the case of the prosecution but not every contradiction or omission (See Leela Ram vs. State of Haryana and another, Rammi alias Rameshwar v. State of M.P. and Shyamal Ghosh v. State of West Bengal)."

22. Perusal of the testimony of PW2 goes to show that according to her "they had visited our house first time on the day of incident." PW4 also deposed on the same lines and stated that "Birju had never introduced his friends to me." It is ascertained from the statement from both the witnesses that they have seen the respondent for the first

time. Both PW2 and PW4 deposed that respondent took the deceased forcibly. Had these witnesses seen the deceased go forcibly with the respondent they should have called the police right away if on raising an alarm nobody attended. Being wife and father of the deceased the conduct of these witnesses seems highly unnatural. According to PW2 the deceased sustained three knife blows on his body by the respondent and thereafter fled but did not see the clothes worn by the respondent as it was dark. PW4 in his deposition before court stated "*I was little bit behind my son at a little distance. I had seen all three accused persons while killing my son. I cannot tell very specifically as to which accused had assaulted my son on which part of his body.*" Again their testimony lacks confidence as both of them failed to point out as to who gave the knife blow to the respondent. Deposition of PW2 again raised suspicion as she stated that when the deceased was forcibly taken by the respondent she had informed her father in law and her mother in law however, to the contrary PW4 deposed that when he was sitting nearby his house he saw that the deceased was taken forcibly by the respondent and on stopping the respondent from taking away his son, the respondent abused him and later on PW2 came there.

23. PW2 deposed that she lifted her husband with the help of her mother in law. But to establish this fact the mother of the deceased was never produced as a witness in this case. PW4 claimed that the respondent came on a motorcycle however this aspect was also not established as prosecution failed to recover the motorcycle used in the commission of crime.

24. Prosecution introduced PW5 as an independent witness to prove its case. PW5 in his deposition before the court stated as under:

“It is correct that the police chowki is situated at Loni Border to which I had taken the accused Bunty. The accused was lying injured about 50-60 meters from the police chowki Loni Border and the distance of railway track from there is about half kilometers. The accused Sudhir @ Bunty was lying injured and he was not in a position to walk. There were eight or nine persons accompanying me when the accused was taken at police chowki Loni Border and on reaching the police chowki all the persons except me went away. We admitted the accused Sudhir @ Bunty in emergency of GTB hospital. One blank paper was signed by me at the instance of police as I had got admitted the accused Sudhir @ Bunty. I had never asked for any statement by the police after admitted the accused Sudhir @ Bunty at any point of time. It is correct that there is a 2 kms distance where the injured Sudhir @ Bunty was lying from Pratap Nagar railway track...”

25. This witness when recalled for further cross examination on application under Section 311 of Code of Criminal Procedure stated as under:

“I had seen the accused lying injured at about 5-5.15 p.m. He was bleeding and he was looking unconscious (behoshi ki haalat main tha). The place where he was lying falls in the area of society colony. I might have taken about 1 ½-2 hours in taking the accused to police chowki and the doctors in the area.”

26. Perusal of the testimony of this witness also does not inspire confidence as there were contradictions and improvements in his testimony. The narration of the incident emerged from his testimony

is hard to believe as according to PW5 the respondent was lying injured at about 2 kilometers distance from Pratap Nagar railway track and was not in a position to walk.

27. On careful analysis of the aforesaid testimonies, we find a large number of contradictions and omissions, inconsistencies and improvements in the statements which materially affect the case of the prosecution, and thus find it difficult to place reliance on the evidence of prosecution witnesses as the same has corroded the credibility of the case of the prosecution.
28. Postmortem was conducted by Dr. Raghvender Baghla in the presence of PW9 Dr. Anil Kohli who stated that:

“In our opinion the time since death was about $\frac{3}{4}$ of a day. The cause of death was hemorrhagic shock due to antemortem injury to femoral blood vessels produced by sharp edged weapon. Injury no.7 was sufficient to independently cause death in ordinary course of nature.” Injury 7 was the “Incised stab wound place obliquely over left inguinal region 6 cm left of midline and 5 cm below and medial to the left anterior superior iliac spine...”

29. As per the postmortem report the death of the deceased occurred due to an injury caused by a sharp edged weapon. The recovered alleged knife was sent to the FSL for examination. The result of analysis of FSL report Ex.PB showed that blood could not be detected on exhibit ‘9’ which was *"One all metallic knife having rusty brown stains."* From the perusal of the postmortem and the FSL report, the prosecution failed to establish that the alleged knife recovered was the same knife which was used in the commission of the crime.

Moreover, the alleged knife was recovered at the instance of the juvenile and not the respondent.

30. It is pertinent to note herein that Section 364 of the Indian Penal Code provides imprisonment for life or rigorous imprisonment for a term which may extend to 10 years to a person who kidnaps or abducts any person in order that such person may be murdered or may be so disposed as to be put in danger of being murdered. There is no convincing evidence on the record to make out the prosecution case. No case had been made out against the respondent for an offence punishable under Section 364 or Section 302 of Indian Penal Code inasmuch as ingredients of both the Sections have not been established by the prosecution. We have perused the evidence on record and find no evidence to suggest that the deceased victim was kidnapped or murdered by the respondent.
31. In ***Sunil Kundu and Anr. Vs State of Jharkhand*** reported in (2013) 4 SCC 422, Hon'ble Apex Court held as under:

"....When the prosecution is not able to prove its case beyond reasonable doubt it cannot take advantage of the fact that the accused have not been able to probablise their defence. It is well settled that the prosecution must stand or fall on its own feet. It cannot draw support from the weakness of the case of the accused, if it has not proved its case beyond reasonable doubt".

32. It is a cardinal principle of criminal jurisprudence that the prosecution is supposed to prove its case beyond reasonable doubt by leading reliable, cogent and convincing evidence. Similarly, it is established principle that the prosecution is supposed to stand on its

own legs and cannot derive benefits whatsoever from the weakness, if any, in the defence of accused. The burden of proof of the version of prosecution in criminal trial, throughout trial lies upon prosecution and never shifts to accused who is entitled to the benefit of every reasonable doubt in the prosecution story and any such doubt entitles him to acquittal.

33. Considering the totality of the facts and circumstances of the case, we are of the considered view that it cannot be held that the circumstances proved in the case are incompatible with the innocence of the respondent. Even if we take these circumstances at their face value they do not exclude the possibility of innocence of the respondent.
34. In ***Mrinal Das and Ors. Vs. The State of Tripura*** reported in ***AIR 2011 SC 3753***, the Hon'ble Apex Court held that :

“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."

35. In the case of ***State of Madhya Pradesh v. Dal Singh & Ors.***, reported in **2013 (8) SC 625**, the Hon'ble Supreme Court has held that the appellate court while considering the appeal against the judgment of acquittal shall interfere 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.
36. While deciding the present leave to appeal, the aforestated principles culled out by the Apex Court are to be kept in view. In the present case from the evidence which has emerged on record, we conclude that the learned Trial Court rightly observed that the prosecution failed to prove its case against the respondent beyond reasonable

doubt, the prosecution has not made out a case to grant the leave to appeal and the view taken by the learned Trial Court for acquitting the respondent was possible and plausible.

37. In totality of the facts and circumstances, we do not find any infirmity in the impugned judgment. Accordingly, no grounds are made out to interfere in the impugned judgment passed by learned Trial court and the leave to appeal petition is dismissed.

SANGITA DHINGRA SEHGAL, J

G.S.SISTANI, J

JUNE 02, 2016
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