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

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Date of Judgment: 26th of July, 2017

+ **CRL.L.P. 417/2017**

STATE (NCT OF DELHI)

..... Appellant

Through: Mr.Rajat Katyal, APP for the State
along with SI Pankaj Kumar, P.S.
Vasant Kunj(South)

versus

ARUN KUMAR PANDEY

..... Respondent

Through: *Nemo*

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE CHANDER SHEKHAR

G.S.SISTANI, J. (ORAL)

Crl.M.A. 11888/2017 (Exemption)

1. Exemption allowed, subject to all just exceptions.
2. Application is disposed of.

Crl.M.A. 11889/2017 (Delay in refiling) & Crl.M.A.11887/2017 (delay)

3. This is yet another leave to appeal which has been filed seeking condonation of 219 days delay in filing the leave to appeal and 24 days delay in refiling.
4. While the delay in refiling is condoned, we do not find sufficient reasons to condone the delay in filing the leave to appeal. The application is devoid of material particulars. It does not give any cogent reasons which led to the delay in filing the leave to appeal. The application is mechanical in nature. Additionally, there is no

explanation for the delay between the period 03.12.2016 to 17.05.2017. The judgments referred to in this application are not applicable to the facts of the present case. Since we have heard the matter on merits we condone the delay.

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5. The present leave to appeal has been filed by the State under Section 378 (3) of the Code of Criminal Procedure, 1973 ('hereinafter referred to as *Cr.P.C.*') against the order of acquittal dated 23.07.2016 passed by the Additional Sessions Judge, Patiala House Courts in Sessions case No. 19/3/14 by virtue of which the respondent Arun Kumar Pandey was acquitted for the offence punishable under Section 307 of the Indian Penal Code (hereinafter referred to as '*IPC*') and under Section 27 of Arms Act.
6. Briefly stated, the case of the prosecution as noticed by the learned Trial Court reads as under:

"On 30.11.2011 at about 1.45 pm PW1 Sh Jagbir Singh Malik (complainant) and PW2 Sh Sunder Singh were going to Kishangarh from Gurgaon by Esteem car of PW1 bearing registration no. Hr 28 A 8888 for engagement of his daughter and at that time, PW2 (maternal uncle of PW1) was also seated in the said car with PW1. On the said date and time, when PW1 was taking a U-turn from red light at Church road, T-point, Vasant Kunj, New Delhi, a car make Hyundai i10 bearing registration no. DL 2C AE 4397 being driven by accused Arun Kumar Pandey came from the side of Mehrauli and touched the back / rear side of the above said car of PW1 as a result of which the front side number plate of car of PW1 got detached and the car of the accused after coming in front of the car of PW1 blocked its way. Thereafter, PW1 and PW2 got out of their car, the accused who was driving the other car also came out and an altercation ensued between them. All of a sudden, the

accused took out a pistol Ex Plaintiff-1 (F-1), fired it at PW1, the bullet struck the steel buckle of the belt of PW1 piercing it and into the body of PW1. Under deep stress and problem, PW1 sat down on the road at the same spot and did not know what happened thereafter since he was under stress and pain. At that time, PW2 tried to grab the accused and in that process, the accused fired again, the bullet hit the back side of the left hand of PW2 and thereafter he fired third time in the air. In the meanwhile, a traffic jam occurred at the spot, some public persons informed the police and PCR arrived at the spot. Some public persons apprehended the accused, in that process he was beaten up as well by the public and the PCR officials took him into custody. AT that time, PW7 HC Jagdish Prashad was incharge of PCR van with driver ASI Lal Singh. PW7 freed the accused from the crowd, snatched a pistol from the hand of accused, also found three rounds within a distance of 10-20 ft. from the vehicle and also found both the above said vehicles at the spot. PW7 informed the SHO, the accused was taken away from the spot by him in the PCR van and was later on handed over to SHO concerned.”

7. The criminal machinery was set into motion when DD No. 21A (Ex PW14/A) was received at PS Vasant Kunj (South). The said DD was assigned to PW14 SI Bhagwan who along with PW8 Const. Ashok Kumar reached the spot i.e in front of church towards road at Andheria more, Vasant Kunj where they met PW7 HC Jagdish Prashad (Incharge of PCR van) along with Const. Vijay Kumar and the respondent herein. PW7 handed over one pistol along with three empty cartridges to PW14. The respondent Arun Kumar Pandey, PW1 and PW2 were also present at the spot. The statement of PW1 Jagbir Singh Malik (complainant) was recorded which resulted in the registration of present case. PW1 also handed over his belt which was kept in a plastic container and was seized vide seizure memo Ex PW1/B.

8. FIR was registered on the basis of *rukka* which is Ex PW14/B. PW5 HC Dharmender Singh received the said *rukka* on 30.11.2011 at about 4.15 pm which resulted in registration of FIR under Section 307 of IPC. The respondent was medically examined on 30.11.2011 as well as on 01.12.2011.
9. After investigation, chargesheet was filed under Section 307 of IPC against the respondent Arun Kumar Pandey. On 17.04.2013 charges under Section 307 of IPC and under Section 27 of Arms Act were framed against the respondent, to which he pleaded not guilty and claimed to be tried.
10. To bring home the guilt of respondent the prosecution examined 14 witnesses in all. No witness was examined by the respondent in his defence. The statement of the respondent was recorded under Section 313 of Cr.P.C. wherein he stated that it was infact PW1 and PW2 who while driving their car hit his car and stopped it by putting their car in front of the respondent's car. He further stated that it was PW1 and 2 who got down from their car pulled him out and started abusing and hitting him. Subsequently, some other persons who were probably accompanying them also joined and gave beatings to the respondent which resulted in injury to his eye. During the scuffle, his licensed pistol fell down on the road and was lifted by some public persons who started firing with it. He further stated that a false case was registered against him at the behest of ACP Surender Singh who was working as ACP operation-South West and was also *Samdhi* of PW1. He further stated that his pistol was not taken by PW7 but the same was recovered from some public persons by PW7. He was medically examined vide MLC (Ex PW9/A) and further alleged that there are overwriting/cuttings on the MLC to falsely implicate him in the

present case. The respondent denied all the incriminating circumstances against him and claims to be falsely implicated in the present case.

11. Mr. Rajat Katyal, learned counsel for the State submits that the judgment of the Trial Court is not sustainable in law as the Trial Court has failed to properly appreciate the evidence on record and is based on non application of judicial mind. It is submitted that the Trial Court has acquitted the respondent on the basis of imagined doubts which are against the factual matrix of the case.
12. Learned counsel for the State submitted that there are no material contradictions in the testimonies of PW1 Jagbir Singh and PW2 Sunder Singh who had fully supported the case of the prosecution and also identified the respondent in Court. The MLC of PW1 and PW2 along with FSL results duly corroborates the case of prosecution.
13. The counsel further submitted that the Trial Court has failed to appreciate the complete testimony of PW7 HC Jagdish Prashad (PCR in-charge) who has not completely turned hostile and has supported the case of prosecution on all material particulars. Thus, Mr. Katyal prays that the impugned judgment be set-aside and the respondent be convicted for the offence charged with.
14. We have heard learned counsel for the State and have carefully examined the judgment of the Trial Court and the testimonies available on record.
15. The case of the prosecution is based on the eyewitness account of PW1 Jagbir Singh Malik and PW2 Sunder Singh (maternal uncle of PW1). At the outset, it would be necessary to analyse their testimonies to decide the present leave petition.

16. PW1 Jagbir Singh Malik is a material witness of the prosecution being the complainant/injured of the case in hand. It was on the basis of his statement dated 30.11.2011, the FIR was registered in the present case. He deposed that his belt with the steel buckle was seized by the police vide seizure memo Ex PW1/B. The pistol of the respondent along with three empty cartridges were seized by the police vide seizure memo Ex PW1/C. PW1 has correctly identified the aforementioned pistol and the black leather belt with the buckle in Court and was worn by him at the time of incident. He further deposed that on 30.11.2011 at about 1.45 PM to 2.00 PM, he was going to Kishangarh from Gurgaon in his Esteem car for the engagement of his daughter along with PW2 Sunder Singh (maternal uncle of PW1). The said car was being driven by PW1. When he took a U-turn from the red light at Church Road, T-point, Vasant Kunj, a car being driven by the respondent came from the Mehrauli side and touched the rear side of the vehicle of PW1. As a result, the front side number plate of the car got detached. Subsequently, an altercation ensued between the two parties and suddenly the respondent brandished a pistol and fired at PW1 which hit the buckle of his belt and pierced through his body. After the said incident, PW1 was traumatised and he sat down on the road at the spot. As he was under severe pain and stress he did not know what happened thereafter. Thereafter, he was told by PW2 that when PW2 attempted to stop the respondent he fired again and the bullet hit the back side of the left hand of PW2. He was also told by PW2 that the respondent fired for a third time in the air.
17. PW2 Sunder Singh (maternal uncle of PW1) deposed on similar lines as deposed by PW1 with regard to the occurrence. He deposed in his

examination-in-chief that on the fateful day, he was travelling from Kishangarh to Gurgaon with his nephew (PW1) for the engagement of his maternal granddaughter. He deposed that when they were taking a U-turn from the red light at Church Road, T-point, Vasant Kunj a car came from the Mehrauli side and grazed their car, touching the rear side as a result of which the front side number plate got detached and the said car came in front of their car and blocked their way. He also deposed that he did not remember the registration number of the aforementioned car; however, he identified it as a silver coloured i-10. Subsequent to the collision a verbal spat occurred and the respondent hurled abuses at PW1 and PW2. Thereon, the respondent took out a pistol and fired at PW1. PW2 further deposed that he immediately tried to grab the respondent but in the process the respondent fired again and the bullet hit the back side of his left hand. Thereafter, the respondent fired third time in the air. He further deposed that a traffic jam occurred and some public persons assembled at the spot. Someone from the crowd informed the police regarding the incident and the PCR also arrived. The public persons had apprehended the respondent and in the process the respondent was beaten up and was taken into custody by the PCR officials. It is noteworthy to mention that PW2 in his cross-examination denied the suggestion that the respondent was beaten up by some public persons or that he was badly thrashed. PW2 further denied the suggestion that during the scuffle the licensed pistol of the respondent fell down on the road and somebody from the public randomly fired from the pistol.

Medical Evidence:

18. PW4 Dr. Kamran Faizal, Medical Officer, Department of Endocrinology, Safdarjung Hospital, New Delhi proved the MLC of PW2 Sunder Singh and has proved the same as Ex.PW4/A. PW4 categorically admitted in his cross-examination that in MLC Ex PW4/A that there were no remarks to the effect that PW2 had suffered any injury arising out of a fire arm.
19. PW9 Dr. Ali Nahdi Yashin, who was working as a Junior Resident in Safdarjung Hospital on 30.11.2011 examined PW2 Sunder Singh vide MLC Ex. PW4/A. On 01.12.2011, he also examined the respondent Arun Kumar and has proved the same as Ex. PW9/A. It would be useful to discuss the cross-examination of PW9 which reads as under:

“It is correct that there is no mention about gunshot injuries on the person of the injured Sunder Singh. It is also correct that injured Sunder Singh also did not disclose about such gunshot injury to me at the time of his examination. It is correct that the injuries mentioned at point A can be possible by in any scuffle or can also be self inflicted injuries. It was a minor abrasion on the left wrist.”

(Emphasis Supplied)

20. The above fact was corroborated by the testimony of PW12 Dr. Shiveta Razdan who was working as a Senior Resident at Safdarjung Hospital. She deposed that on 30.11.2011 both PW2 Sunder Singh and PW1 Jagbir Singh Malik were brought to the hospital and were examined vide MLC Ex. PW4/A and Ex. PW12/A respectively. The relevant part of her cross examination reads as under:

“It is correct that in the MLC Ex. PW12/A there is no mentioning of any gunshot injuries. It is correct that since the patient had no gunshot injuries, the same was not mentioning in the MLC.

It is correct that injuries mentioned in MLC Ex. PW4/A and Ex. PW12/A can be caused in a scuffle between two persons. It is correct that injured Sunder Singh had not stated anything about the gun shot injury ever caused to him during the scuffle as per MLC Ex. PW4/A.

It is correct that there are cuttings in the MLC Ex. PW12/A at encircled portion B, but the same were not done by me. (Vol. The said cutting was done by the JR who had prepared the MLC.)

When I had signed the MLC at point A, the cuttings were already there on the MLC. Therefore, there was no occasion for me to read the contents already cut by the JR doctor.”

21. PW13 Dr. Irfan Yusuf Jamie who was posted as a Junior Resident in Safdarjung Hospital on 30.11.2011 examined PW1 Jagbir Singh Malik and prepared his MLC Ex. PW12/A. It is relevant to discuss the cross-examination of PW13 which reads as under:

“It is correct that in PW12/A there is cutting at point Y on the column of injuries. (Voltd.) I have initialled the same. At that time I was only a junior resident and after consulting with Dr. Shweta Sr. (surgery), I had done the above said cutting at point Y. The said cutting was done prior to the putting my putting of signatures by Dr. Shweta on Ex. PW12/A.

*.....
I also cannot tell if the injuries as mentioned in MLC Ex PW12/A are in actual gun shot injuries or not. (Voltd.) the same can be describe only by Dr. Shweta, Sr at that time.*

At this stage, photocopy of one MLC no. 1203 dated 30.11.2011 with time 04.21 p.m pertaining to patient Arun Kumar Pandey (accused) stated to be of SJ Hospital (original copy stated to be on the public file) is placed on record by the ld. Defence counsel and is shown and put to the witness. The witness has deposed that he had prepared it. The same is now Ex PW13/DA.

It is correct that following injuries have been mentioned in it:

Tenderness over left shoulder.

Swelling present over left shoulder.

Swelling tenderness over left eye.

Abrasion over back.

Abrasion over right finger.

Subsequently the patient was referred to medicine, ophthalmology, neurosurgery and surgery.”

22. PW9 Dr. Ali Nahdi Yashin, Junior Resident, DDU Hospital, New Delhi examined PW2 Sunder Singh on 30.11.2011. It was deposed by PW9 that on 01.12.2011, he also examined the respondent Arun Kumar Panday and had proved the same as Ex.PW9/A. Similarly, it was deposed by PW9 in his cross-examination with regard to the gunshot injury that there was no mention about any gunshot injury on the MLC of PW2 (Ex PW4/A) as he did not disclose any gunshot injury at the time of his examination.
23. Besides the aforementioned medical evidence, the next important witness to decide the present leave petition is PW7 HC Jagdish Prasad who was posted in South Zone PCR from 8 am to 8 PM as in-charge of the PCR Van on 30.11.2011. He deposed that at about 1.45 PM, some public person informed him that one person was beaten by several other persons near Church Road, Kishangarh Village. Thereafter, he reached the spot and saw a crowd and heard the noise of a gunshot when he was at a distance of 30-40 meters from the spot. After reaching the spot, he saw one person was being beaten by fist and blows. There were about 25-30 person present in the crowd. He further deposed that the respondent was freed from the crowd and

after making enquiry his name was revealed as Arun Kumar Pandey. A pistol was handed over to him by someone in the crowd. He found three rounds within a distance 10-20 feet from the vehicle. The relevant part of cross examination of PW7 reads as under:

“I have not stated that accused Arun Kumar Pandey present in the court today was having a pistol in his hand and I had snatched it from his hand, Confronted with statement Ex. PW7/P-1 from point A-1 to A-2 where it is so recorded.

.....

I do not remember if I stated to the police that one leather belt with buckle of Jagbir Singh had been seized by the IO at the spot.”

(Emphasis Supplied)

FSL Results:

24. PW3 Krishan Chandra Varshney, Deputy Director, FSL, Govt. of NCT of Delhi examined two parcels. Parcel No. 1 contained a pistol of 7.65 mm caliber and three cartridge cases of 7.65 mm which were marked as Ex. F-1 and EC-1 to EC-3 respectively. Parcel No. 2 contained one black belt having dent on buckle marked as Ex. C-1. He opined that the empty fired cartridge cases Ex. EC-1 to EC-3 had been fired through the same pistol which was marked as Ex. F-1. PW3 deposed in his examination-in-chief that the dent on the buckle of the belt marked Ex. C-1 may have been caused by a bullet discharged through a fire arm. In his cross-examination, PW3 stated that there was a degree of probability that the dent on the buckle was caused by a bullet discharge. PW3 stated that he found gunshot residue on the buckle. He further stated that he could not tell as to what was the possible range of firing from the said fire arm. He also stated that he could not opine with regard to the direction from which the bullet was

fired and whether it was fired in a sitting or standing posture. PW3 also stated that there was no blackening or tattooing on the metallic buckle and that he was not sent any hand wash or clothes of the offender. After observing the metallic buckle, he stated that he could not give opinion as to whether the bullet penetrated or pierced through it to enter the body. It was also stated that after opening the parcels, he found that all the contents i.e. Pistol, empty cartridges were packed in the same packet.

25. In the case of ***Baliraj Singh v. State of Madhya Pradesh*** reported at ***2017 SCC OnLine SC 476***, whereby the Division Bench of the Hon'ble Supreme Court has discussed the value of medical evidence when it is found to be in contradiction with ocular testimony. In the facts of the case the doctor in his post-mortem report had opined that the fatal injury was caused by a sharp or pointed object. However, as per the eye-witnesses account, the injuries were the result of the lathi blows. Thus, there was an incongruency between the medical evidence and the ocular evidence. The Apex Court while appreciating the evidence observed in para 13 which reads as under:

“13It is settled proposition in criminal jurisprudence that ordinarily, the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more. The use which the defence can make of the medical evidence is to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eyewitnesses. In this case the nature of injury, contradiction about the time of arrival of the witnesses, contradictions between the ocular and medical evidence, non-examination of Police officer who conducted seizure and subsequent improvement by one of the eye witness casts a serious doubt on the prosecution's case.”

(Emphasis Supplied)

26. It is settled law that a degree of probability cannot take the place of proof or evidence and the accused cannot be convicted on the basis of mere probabilities. We concur with the view taken by the learned Trial Court wherein it was observed that there was every possibility of contamination of the buckle with gunshot residue (GSR) of pistol and cartridge cases as they were packed in the same packet for the forensic examination which lasted for days. Therefore, we are of the considered view that as per the evidence of PW3 Krishan Chandra Varshney, there is nothing conclusive which brings home the guilt of the respondent.
27. In the light of the judgment mentioned in foregoing para and in view of the deposition available on record, we find that the medical evidence does not support the case of the prosecution. The MLCs of PW-2 Sunder Singh and PW-1 Jagbir Singh Malik belie and falsify their testimony regarding the existence of gun-shot injuries as the Doctor, who examined them have categorically deposed that they did not receive gun-shot injuries. PW-4 Dr. Kamran Faizal has stated in his cross-examination that in the MLC Ex.PW-4/A, there are no remarks to the effect that PW-2 had suffered any gun-shot injury. Similarly, PW-9 Dr. Ali Nahdhi Yashin corroborates this by saying that at the time of examination of PW-2, no information regarding gun-shot wound was revealed. Dr. Ali Nahdhi Yashin further admitted that the said injuries could be caused by any scuffle or could possibly be self-inflicted injuries. PW-12 Dr. Shiveta Razdan also deposed that on 30.11.2011, PWs-1 and 2 were medically examined at Safdarjung Hospital. She stated that in MLC Ex.PW-12/A, there was no mention of any gun-shot injuries.

28. With regard to the contradiction in the arrest of the respondent, it would be relevant to para 15 of the impugned judgment which reads as under:

“15. The arrest memo of the accused Ex PW8/C would show that the time of arrest in it has been mentioned as 06.30 PM. There is an apparent cutting / over writing in the time of arrest. In cross-examination, PW14/IO has however deposed that the accused was arrested at the spot at about 05.30 PM i.e. the arrest memo was prepared at about 05.30 PM PW14 has admitted that there was some over writing at the time of arrest in the arrest memo Ex PW8/C. He also deposed that the accused was arrested at the spot and the arrest memo was also prepared at the spot. During cross examination of PW14, ld defence counsel placed on record one application dated 12.08.2013 under Right to Information Act, 2005 as filed by one Mr. Yajnapati Upadhyaya to the PIO, DCP Hauz Khas, New Delhi along with other documents with copy of DD no. 21A, DD no. 24A and DD no. 63 B dt. 30.11.2011. PS Vasant Kunj (South) and the said documents were proved as Ex PW14/DX2 collectively. Ld. Defence counsel put DD no. 63 B dated 30.11.2011 PS Vasant Kunj (S) to the witness/PW14/IO upon which PW14 admitted that the time of arrest of the accused as mentioned in the said DD is 09:05 PM. PW14, however, denied the suggestion that the arrest memo Ex PW8/C was fabricated and at the time of arrest was also fabricated on the said memo at point D. The overwriting and admitted change of time of arrest in the arrest memo Ex PW8/C would cast a serious doubt on the case of the prosecution and the testimony of the witnesses including PW14/IO.”

29. In the light of the observation made by the learned Trial Court in aforegoing para, we find that the over-writing and discrepancies with respect to the time of the arrest of the respondent further casts a shadow of doubt in the case of the prosecution. Furthermore, we also find that PW7 Head Constable Jagdish Prasad, who was the first police officer to arrive at the spot of incident, has not supported the

case of the prosecution with respect to the seizure of the alleged weapon of offence. PW7 has categorically deposed that he arrived at the spot on the basis of a complaint that a person was being beaten and that he was handed over the pistol by someone from the crowd. This is contrary to the case of the prosecution wherein it has been alleged that the pistol was seized from the respondent by PW7. We may also note that it was the case of the defence before the Trial Court that the respondent was being badly beaten by a lot of persons and in the melee, his licensed pistol fell down and someone from the public fired from it. This is corroborated by the testimony of PW7. We are also persuaded with the observation of the learned Trial Court whereby the testimony of PW7 was relied to conclude that if the respondent was being beaten up by the crowd, he would not have had the opportunity to fire any shots. On a conjoint reading of the medical evidence, FSL report, contradictions in the arrest memo and eye-witnesses accounts we do not find any infirmity in the view taken by the Learned Trial Court.

30. Even otherwise, it is settled law that the appellate court may only interfere in an appeal against acquittal when there are substantial and compelling reasons to do so [See *Sheo Swarup v. King-Emperor*, AIR 1934 PC 227 (2); *M.G. Agarwal v. State of Maharashtra*, AIR 1963 SC 200 (paragraph 16 and 17); *Tota Singh and Anr. v. State of Punjab*, AIR 1987 SC 108: (1987) 2 SCC 529 (paragraph 6); *State of Rajasthan v. Raja Ram*, (2003) 8 SCC 180 (paragraph 7); *Chandrappa v. State of Karnataka*, (2007) 4 SCC 415 (paragraph 42); *Ghurey Lal v. State of U.P.*, (2008) 10 SCC 450 (paragraph 73); and *Muralidhar @ Gidda v. State of Karnataka*, (2014) 5 SCC 730 (paragraph 12)].

31. Accordingly, we find no ground to interfere in the judgment of the Trial Court. The personal bonds and the sureties under Section 437-A Cr.P.C. are discharged.
32. The leave to appeal is dismissed.

G. S. SISTANI, J.

CHANDER SHEKHAR, J.

JULY 26, 2017

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