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

Date of Judgment: 12th September, 2017

+ **CRL.L.P. 526/2017**

INDIRA DEVI

..... Petitioner

Through: Mr. Avadh Kaushik, Advocate

Versus

STATE (NCT OF DELHI) & ORS.

..... Respondents

Through: Mr. Rajat Katyal, APP with SI
Jasmer Singh, PS Jahangir Puri
Mr. Chetan Lokur, Advocate for
respondent No.2 and 3
Mr. Vishal Raj Sehijpal, Advocate
for respondent No.4

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE CHANDER SHEKHAR

G.S. SISTANI, J. (ORAL)

1. The present leave to appeal has been instituted by the wife of the deceased (who was employed as a Constable with the Delhi Police) under Section 372 of the Code of Criminal Procedure (hereinafter referred to as 'Cr.P.C.') challenging the judgment dated 15.10.2014 passed by the learned Trial Court, arising out of FIR No. 149/2009, whereby all the three respondents herein stand acquitted for the charges framed against them.
2. The case of the prosecution, as noticed by the learned Trial Court, reads as under:

“1. As per the allegations, on or before the intervening night of 1-2.3.2009 at A-254, Gali No.12-13, Saroop Vihar, Near Nathupura, Delhi all the accused namely Sanjeev Kumar @ Sonu, Rajender Kashyap @ Johny and Kuldeep @ Tyagi entered into a criminal conspiracy to kidnap Constable Vijay in order to commit robbery of his service pistol with magazine and to commit his murder. Further, on 1-2.3.2009 in pursuance to the above criminal conspiracy the accused Kuldeep @ Tyagi kidnapped Constable Vijay Singh after which all the accused committed robbery of mobile No.9971620985 belonging to the deceased Constable Vijay Singh, government pistol of 9 mm with magazine containing rounds, uniform with badge, shoes, diary, I-Card and ATM Card of Constable Vijay Singh. It has been alleged that on the intervening night of 1-2.3.2009 at A-254, Gali No. 12-13, Saroop Vihar, near Nathupura, Delhi the accused Rajender Kashyap @ Johny and Kuldeep @ Tyagi in pursuance of criminal conspiracy committed the murder of Constable Vijay. Also, as per the allegations, after committing the murder of Constable Vijay the accused Sanjeev @ Sonu and Kuldeep @ Tyagi took the dead body of the deceased after wrapping the body in a bed sheet and quit in Maruti 800 car and threw the same in front of 7/25 & 7/26, Loni Road, Site 11, Industrial Area, Sahibabad, Ghaziabad, Uttar Pradesh and then parked the car in the fields of Murad Nagar with the intention to cause the evidence of crime to disappear.

2. It has also been alleged that on 2.4.2009 at open ground in front of Gate No.1, MCD Flats, Jahangir Puri, Delhi the accused Sanjeev Kumar @ Sonu was found in possession of one country made pistol with one live round without any permit or license. On 5.4.2009 at A-254, Gali No.12-13, Saroop Vihar near Nathupura, the accused Sanjeev Kumar @ Sonu was found in possession of an I-Card of Constable Vijay and one Badge of Delhi Police of Constable Vijay which was robbed from him on the intervening night of 1-2.3.2009 which the accused retained knowingly or having reasons to believe the same to be the stolen property.

3. Further, as per the allegations on 2.4.2009 at open ground in front of Gate No.1, MCD Flats, Jahangir Puri Delhi the accused Kuldeep @ Tyagi was found in possession of one pistol with magazine and two live rounds without any permit or license, which pistol he had used in committing the murder of Constable Vijay Kumar. On the same day the accused Kuldeep @ Tyagi was found in possession of 9 mm service pistol with magazine and two rounds of Constable Vijay which were robbed from him on the intervening night of 1-2.3.2009 which the accused retained knowingly or having reasons to believe the same to be the stolen property.

4. In so far as the accused Rajender @ Johny is concerned, it is alleged that on 3.4.2009 at A-254, Gali No.12-13, Saroop Vihar near Nathupura, Delhi he was found in possession of one diary of Constable Vijay which was robbed from him on the intervening night of 1-2.3.2009 which the accused retained knowingly or having reasons to believe the same to be the stolen property.”

3. The criminal machinery was set into motion when the information was received from Police Station Sahibabad to the *chowki* at Hindon Air Force, Ghaziabad, Uttar Pradesh that one dead body was lying in the Industrial Area which was registered vide DD No.13 which was marked as PW12/A. DD No.13 was recorded by PW12 SI Neelu Saxena, who was posted on 02.04.2009 as *chowki* in-charge at Hindon Air Force, Ghaziabad, Uttar Pradesh. Thereafter, she along with the SHO Sahibabad Yogesh pathik, Const. Veer Daman and other police staff reached at the aforesaid place and found one dead body of an unknown person.

4. Charge under Sections 120-B, Section 392 read with Section 120-B and Section 411 of IPC was framed against all the respondents. Additionally, the following charge was framed against the respondents:

Sr. No.	Name of the respondent	Sections under which charged
1.	Sanjeev and Kuldeep	Section 201 read with Section 34 of IPC
2.	Rajender and Kuldeep	Section 302 read with Section 120-B of IPC
3.	Sanjeev	Section 25/54/59 of the Arms Act
4.	Kuldeep	Section 25/27/54/59 of the Arms Act

5. In order to prove its case, the prosecution examined 38 witnesses in all. The statement of all the respondents was recorded under Section 313 of Cr.P.C. whereby it was stated by the respondents Sanjeev Kumar and Rajender that they were lifted by the Police officials from their houses at Swaroop Vihar and were detained illegally for two to three days and were not produced before any Court. Both the respondents further alleged that they were compelled to sign some blank papers after their illegal detentions which were converted to various memos and nothing was recovered from them or at their instance. However, it was stated by the respondent Kuldeep that he was lifted from Dehradun and was kept in the illegal detention for a day and was also compelled to sign some blank papers after his

illegal detention which were converted to various memos and nothing was recovered from him or at his instance. All the respondents denied the entire incriminating material against them and pleaded innocence and claimed to be falsely implicated in the present case. No witness was examined by the respondents in their defence.

6. Mr. Avadh Kaushik, learned counsel for the petitioner submits that the judgment of the acquittal passed by the learned Trial Court is contrary to the law and facts established on record. It is contended that despite the fact that the prosecution was able to prove its case beyond any shadow of doubt, the learned Trial Court has acquitted the respondents herein. It is contended before us that the prosecution established and proved its case on the basis of strong and well-corroborated evidence and unbroken chain of events. Thus, the respondents are liable to be convicted. It is also the case of the petitioner that the judgment of the learned Trial Court is perverse, unjust and contrary to the scheme of criminal jurisprudence, as the learned Trial Court has ignored the settled proposition of law that once a complete chain of events is established, there would be no scope with the learned Trial Court to return a finding of acquittal. Learned counsel submits that the learned Trial Court has failed to take into account the settled proposition of law that the testimonies of witnesses, who had turned hostile, cannot be ignored in totality. It is submitted that Sushil (PW3) and Kuldeep (PW4) resiled from their earlier statements made to the Police. They turned hostile as they were won over by the respondents. It is also submitted that HC Miraz

Alam (PW2) had supported the case of the prosecution. PW2 had testified in Court that the deceased was lastly seen in the company of the respondent Kuldeep and thus there are no cogent reasons for the learned Trial Court to have disbelieved the testimony of PW2. It is also contended that the learned Trial Court has given due weightage to the fact that there was an inordinate delay on the part of the Police in registering the missing report, as the Police was under a bonafide belief that the deceased would have gone on long leave or on some unapproved leave. Therefore, investigation started post filing of a Writ Petition (Crl.), seeking a writ of *habeas corpus* by the brother of the deceased. Learned counsel submits that Leela Krishna (PW8) has deposed that the respondent Sanjiv @ Sonu had threatened him on 30.03.2009, stating that he had already committed a murder and PW8 would meet the same fate. Learned counsel submits that it is also well-settled law that in every case it is not possible to establish motive, but in the present case, the motive has been established by the fact that Const. Phool Kumar (PW7) had testified that the deceased had slapped the respondent Kuldeep and that was the motive for him to eliminate the deceased. Similarly, motive has been established on the basis of the testimony of Leela Krishna (PW8) and Nanak Chand (PW9). Learned counsel has also laboured hard to urge before this Court that the service pistol of the deceased was recovered from the respondent Kuldeep, however, the identity card and the badge of the deceased were recovered from the respondent Sanjeev Kumar @ Sonu. It is thus contended that in view of the aforesaid

recoveries, it leaves little or no room for doubt that the respondents were responsible for the murder of the deceased.

7. *Per contra*, learned counsels appearing for the respondents submit by relying on the judgment of ***Tota Singh and Anr. vs. State of Punjab*** reported at ***AIR 1987 SC 108*** that the scope for interference in a leave to appeal is narrow and only if the Court reaches the conclusion that the judgment of the learned Trial Court is unreasonable, patently against the settled proposition of law and is perverse, only then the Court would interfere with the acquittal recorded by the Trial Court. It is further submitted that the learned Trial Court has passed a detailed and well reasoned judgment and all the issues raised stand dealt with and thus there is no reason for this Court to take a view different from the one taken by the learned Trial Court. Learned counsel contends that the learned Trial Court has rightly considered that there was an unexplained delay in registration of the FIR. It is further contended by the learned counsels that the evidence of last seen sought to be relied upon by the prosecution has been disbelieved by the learned Trial Court, in view of the fact that PW3 and PW4 turned hostile and no part of their evidence was considered by the learned Trial Court and the legal proposition sought to be urged by the learned counsel for the petitioner would not apply in view of the testimony of PW3 and PW4. It is strongly urged before us that the testimony of PW2 is unreliable and was rightly disbelieved by the learned Trial Court for the reason that in his statement under Section 161 of Cr.P.C., no such incident was narrated by PW2 and it was

rightly held by the learned Trial Court that the testimony of PW2 in Court was an improvement which had far reaching consequences. Learned counsels submit that in the deposition of PW2, there was no mention of this fact that the deceased was lastly seen in the company of the respondent Kuldeep. Learned counsels further submits that, although the motive may not have been established in every case and only because a motive has not been established, that cannot be a ground to acquit a person, but in the present case, the prosecution had sought to establish a motive. According to the prosecution, the motive for the respondent Kuldeep was to take revenge from the deceased as the respondent Kuldeep was slapped by the deceased after some public persons had complained to him that the respondent Kuldeep was threatening them by impersonating himself as a police official. It is also pointed out by the counsel for the respondents that even as per the case of the prosecution, all the respondents had entered into a criminal conspiracy to kidnap Constable Vijay in order to commit robbery of his service pistol with magazine and to commit his murder. It is further contended that with respect to the respondents Sanjeev and Rajender Kashyap, the story put forward by the prosecution was that Sanjeev required a pistol to use it upon his opponents. Learned counsels have also urged that it would be highly unbelievable that even after one month of the murder, the respondent Kuldeep would keep the service pistol of the deceased in his possession and the respondent Sanjeev would keep the identity card

and badge of a deceased police constable, which has no financial value.

8. We have heard learned counsel for the parties, carefully examined the detailed judgment passed by the learned Trial Court and also considered the rival submissions. The arguments of learned counsel for the petitioner can be summarised as under:

- (i) The prosecution has been able to establish the motive;
- (ii) The service pistol of the deceased was recovered from the respondent Kuldeep;
- (iii) The identity card and the badge of the deceased were recovered from the respondent Sanjeev Kumar;
- (iv) The deceased was lastly seen in the company of the respondent Kuldeep;
- (v) Delay in recording of the FIR has been satisfactorily explained;
- (vi) No used bullets have been recovered from the site as the incident was investigated into after more than a month.

9. The arguments of learned counsel for the respondents can be summarised as under:

- (i) The motive sought to be established by the prosecution is not believable and does not stand to reason;
- (ii) The theory of last seen has not been established in the present case as PW3 and PW4 have turned hostile, however, PW2 was termed as a planted witness and was not relied by the learned Trial Court;
- (iii) The service pistol, the identity card and the badge of the

deceased have been planted on the respondents.

- (iv) The FSL report does not connect the car in which the dead body was allegedly carried.

10. We have heard learned counsels for the parties and considered their rival submissions and also given our thoughtful consideration to the matter. The learned Trial Court while acquitting the respondents made the following observations which read as under:

“154. Applying the settled principles of law to the facts of the present case, I may observe that the identity of the accused Sanjeev @ Sonu, Rajender Kashyap and Kuldeep @ Tyagi stands established. The accused Kuldeep @ Tyagi was previously working in Civil Defence and was on friendly relations with the deceased Constable Vijay Singh. It has been established that the death of the deceased Constable Vijay was due to firearm injury to vital organs i.e. brain and cutting of big vessels of neck and that the death of the deceased had taken place on the intervening night of 1st and 2nd of March 2013 which is compatible to the prosecution version.

155. However, the prosecution has not been able to prove and establish the motive so attributed either to the accused Kuldeep Tyagi or to the accused Sanjeev and Rajender. The Ballistic Report does not connect the accused with the offence nor the Biological/ Serological Report conclusively establishes that the Maruti 800 car bearing no. DL8C-5140 was used in shifting the dead body of the deceased to Sahibabad, Uttar Pradesh where it was abandoned nor the use of Kirpan allegedly got recovered by the accused Rajender has been established. Further, the Electronic Record does not assist the prosecution in any manner nor it confirms the prosecution version nor connect the accused Sanjeev Kumar, Rajender and Kuldeep with the alleged offence.

156. The witnesses of last seen i.e. Sushil and Kuldeep have not supported the prosecution version and have totally resiled from

their earlier statements and hence it would not be safe to rely upon the uncorroborated testimony of HC Miraz Alam (PW2) more so when his statement was recorded after 12 days of the incident. Further, the recovery of car from near the wall of vacant plot situated near Super Teen Factory at Meerut Ghaziabad Road, Muradnagar and that too in the absence of public witnesses who could have been joined without difficulty, is not convincing.

157. This being the background, I hereby hold that the circumstances reflected from the material on record do not stand conclusively established. The facts are also are not consistent only with the hypothesis of the guilt of the accused. The chain of evidence is not so much complete so as not to leave any reasonable ground for the conclusion consistent with the guilt of the accused persons. The materials brought on record by the prosecution are insufficient so as to hold that each of the accused was guilty beyond reasonable doubt. Further, each circumstance has not been proved beyond reasonable doubt. The prosecution has also not established a conclusive link connecting each individual circumstance with the other, and the accused namely Sanjeev Kumar @ Sonu, Kuldeep @ Tyagi and Rajender. Crucially, the material and evidence on the record do not bridge the gap between “may be true” and “must be true” so essential for a court to record a finding of guilt of an accused, particularly in cases based on circumstantial evidence. Therefore, I hereby hold that the prosecution has not been able to prove and substantiate the allegations against the accused Sanjeev Kumar @ Sonu, Kuldeep @ Tyagi and Rajender, beyond reasonable doubt and hence, benefit of doubt is being given to them who are acquitted of the charges under Section 120-B IPC, 394/120-B and 411 Indian Penal Code. The accused Sanjeev Kumar @ Sonu and Rajender are also acquitted of the charge under Section 201/34 IPC; the accused Kuldeep @ Tyagi and Rajender are acquitted of the charges under Sections 302 IPC read with 120-B IPC; the accused Sanjeev Kumar @ Sonu is also acquitted of the charges under Sections 25/54/59 of Arms

Act and the accused Kuldeep @ Tyagi is acquitted of the charges under Section 25/27/54/59 of Arms Act.”

11. The following circumstances were relied upon by the prosecution which were summarized by the learned Trial Court and read as under:
 - (i) The respondent Kuldeep and the deceased were last seen together by PW3 Sushil, PW4 Kuldeep and PW2 HC Miraz Alam;
 - (ii) Motive of the crime stands proved;
 - (iii) Medical evidence;
 - (iv) Forensic evidence;
 - (v) Biological/Serological Reports;
 - (vi) Ballistic Report;
 - (vii) Electronic evidence; and
 - (viii) Arrest of the respondents and recoveries made at their instance.
12. On a careful analysis of all the incriminating circumstances aforementioned, the learned Trial Court acquitted all the respondents for the offences charged with.
13. At this stage, we deem it appropriate to deal with the circumstances under separate heads.

LAST SEEN THEORY

14. The prosecution has relied upon the testimonies of PW3 Sushil, PW4 Kuldeep and PW2 HC Miraz Alam to prove the circumstance of last seen of the deceased in the company of the respondent Kuldeep.

15. PW3 Sushil testified in his examination-in-chief that he was a driver by profession and used to deal in the business of *rodi*, *badarpur* at MCD Flats, Jahangir Puri. PW3 further testified that he did not know anything about the present case and was not aware as to why he had been called in the Trial Court. PW3 deposed that he did not know the respondents who were found present in the Trial Court. Learned APP for the State sought permission to cross-examine this witness in the Trial Court whereby it was deposed by PW3 that his statement was not recorded by the police in the instant case. PW3 denied the suggestion that on 01.03.2009 at about 11.00 PM, while he was going from MCD flats to his home on his motorcycle, a collision was averted between his motorcycle and another motorcycle. PW3 further denied that the other motorcycle was being driven by a boy namely Kuldeep, who was the accused or the deceased who was in uniform, was sitting on the pillion seat of the said motorcycle. It was also denied by PW3 that the respondent Kuldeep started misbehaving with PW3 or that PW3 asked the respondent Kuldeep as to why he was getting annoyed with him or that PW3 had called his friend Kuldeep (PW4). It was further denied by PW3 that his friend (PW4) reached there after sometime or that the deceased or the respondent Kuldeep were well known to his friend (PW4). PW3 further denied that on the intervention of PW4, the matter was sorted out and PW4 requested the deceased to accompany him but the respondent Kuldeep told them that he would take the deceased or that thereafter PW3 and PW4 went away or that the respondent Kuldeep took the

deceased with him. It is noteworthy to mention that all the facts denied by PW3 in his deposition in Court were stated by him in his statement to the Police (Ex.PW3/A). PW3 had voluntarily explained that no such incident took place in his presence and he gave no such statement to the police. PW3 further denied that he had seen the respondent Kuldeep taking the deceased with him on his motorcycle and had also denied that he had deposed falsely to save the respondent Kuldeep out of fear or that he had been won over by the family members of the respondents.

16. The next witness of the last seen relied upon by the prosecution was PW4 Kuldeep who testified in his examination-in-chief that he used to give TSR on rent and he did not know anything about the present case and was not aware as to why he had been called in the Trial Court. PW4 deposed that he did not know the respondents who were found present in the Trial Court. Learned APP for the State sought permission to cross-examine this witness in the Trial Court whereby it was deposed by PW4 that he gave no statement to the police and had voluntarily deposed that about 2-3 years prior to his deposition in Court, PW4 was called at the Police Station and his name and address was noted and was told to appear in the Court on receipt of summons. PW4 further deposed that he knew Sushil (PW3), who was his friend and was running a *rodi, badarpur* shop at MCD flats. PW4 denied that on 01.03.2009, at about 11.00-11.30 PM, he was telephonically called by his friend Sushil and when PW4 reached near the MCD flats, he found Sushil standing outside the gate alongwith the

deceased and the respondent Kuldeep. PW4 further denied that he came to know that the respondent Kuldeep had misbehaved with PW3 Sushil or that PW4 and the deceased then sorted out the matter. It was further denied by PW4 that he asked the deceased to drop him at the Police Station but the respondent Kuldeep stated that he would drop him and thereafter, PW4 and PW3 came back from there. However, on confrontation with the statement of PW4 which was recorded by the police, the abovestated facts were not found mentioned in it. PW4 further denied that he had been threatened and won over by the family members of the respondents due to which he had deposed falsely to save the respondents.

17. Reading of the testimony of PW3 Sushil and PW4 Kuldeep would show that they had resiled from their statement made to the Police and did not support the case of the prosecution and had turned hostile.
18. The next witness relied upon by the prosecution in support of the last seen evidence was the Police witness PW2 HC Miraz Alam who was staying in the barrack of the Police Station Jahangi Puri since 1995. The deceased was also staying with him for the last two years and two months in the same barrack and was his friend. PW2 testified in his examination-in-chief that on 01.03.2009, he was undergoing training at PTC and was sent for duty at Qutub Minar at Mehrauli. PW2 further testified that on 01.03.2009 at about 8.30 PM, he was taking tea outside the Police Station Jahangir Puri and saw the deceased coming out from the Police Station on blue motorcycle of

make Pulsar. PW2 asked him about the food, to which the deceased replied that there was a marriage in the area and he would take food in the Police Booth D Block, Jahangir Puri and also asked him to reach there. PW2 reached the Police Booth D Block Jahangir Puri on his motorcycle of make LML Freedom at 9.00 PM. Thereafter, he had dinner with the deceased at the Police Booth. PW2 deposed that after sometime, the respondent Kuldeep who was friend of the deceased also came at the Police Booth to meet him. Thereafter, PW2 came back to the Police Station from the Police Booth at 10.00 PM. It was deposed by PW2 that the respondent Kuldeep had come to the Police Booth on his motorcycle of make CT 100 whose number was stated as DL8S-AF-4014. PW2 also deposed that when he left the Police Booth only respondent Kuldeep and the deceased were present there. The motorcycle was identified by him which was bearing No. DL8S-AF-4014.

19. A careful analysis of the testimonies of PW2, PW3 and PW4 does not prove the case of the prosecution beyond reasonable doubt. In the absence of which, we need to look for other material relied upon by the prosecution.

Motive:

20. The case of the prosecution is that the respondent Kuldeep who was a Civil Defence Official was in grudge against the deceased having felt insulted after the deceased publicly rebuked and slapped him. It is further the case of the prosecution that on 01.03.2009 not only the

deceased made certain objectionable remarks against the sister of the respondent Kuldeep but also slapped him after the deceased received some complaints against the respondent Kuldeep from the local residents of the area regarding extortions made by him. As far as the motive imputed by the prosecution on the respondents Sanjeev and Rajender is concerned, they both were friends with the respondent Kuldeep and were engaged in a civil dispute over a property and wanted a firearm to scare the witnesses in the civil case due to which they assisted the respondent Kuldeep in killing of the deceased and took the official firearm to use for their own purpose. In this regard, the testimony of PW7 Const. Phool Kumar (who was on beat duty with the deceased), PW8 Leela Kishan and PW9 Nanak Chand assume importance.

21. PW7 Const. Phool Kumar testified that on 01.01.2009, he was posted at Police Station Jahangir Puri. At about 3.00 PM, he alongwith the deceased and the respondent Kuldeep were sitting in the D Block Police Booth. It was deposed by PW7 that the respondent Kuldeep was working in Civil Defence and was duly identified by him in the Trial Court. PW7 further deposed that some public persons came at the Police Booth and complained that the respondent Kuldeep was threatening public by impersonating as Police Official. PW7 further deposed that after hearing this, the deceased gave a slap to the respondent Kuldeep and as a result of which the respondent Kuldeep left the police post.

22. PW8 Leela Krishna testified that he was dealing in the trade of sports goods and he knew the respondent Sanjeev Kumar as he was his distant relative. PW8 further testified that he had given Rs. 80,000 to the respondent Sanjeev as a loan and had also sold his house No. A-254, Swaroop Vihar to the respondent Sanjeev, on the payment of Rs.50,000 in advance, with an assurance that he would pay the remaining amount of Rs.3,75,000 and also the loan amount of Rs.80,000 to him later. PW8 deposed that on the assurance of the respondent Sanjeev, he handed over the possession of the aforesaid house to him, but the respondent Sanjeev did not make the payment and instead, filed a civil case against him, which was later on dismissed by the Court. PW8 further deposed that he had filed a suit for possession against the respondent Sanjeev. On 30.03.2009 at about 4.00 PM, the respondent Sanjeev made a telephone call from his mobile No. 9213152941 and threatened him by saying that he had already committed one murder and that he would murder him and his associate Dimple @ Rajan Rao, who was doing the *Pairavi* of the civil case. It was further deposed by PW8 that the respondent Sanjeev also told him that the punishment for single murder was the same as that of the triple murder. PW8 further deposed that he made a complaint after calling at number 100 and on the next day, he made a complaint at the Police Station Subzi Mandi and handed over the copies of the documents including suit for possession, loan agreement.

23. The next witness relied upon by the prosecution to prove motive was the testimony of PW9 Nanak Chand who testified that he was working as a *Daftari* in the Ministry of Finance, North Block. In the year 2006, he had purchased the house from the mother of the respondent Sanjeev where he was staying at that time. PW9 further deposed that the respondent Sanjeev had asked him three or four times to be a witness with regard to Rs. 80,000 given by him to some other person for the purchase of a house, however, he refused the same stating that he would not give false evidence. PW9 further deposed that on 31.03.2009 at about 7.00 AM, the respondent Sanjeev came at his house and put a pistol on his forehead and threatened him that if PW9 would not give the evidence, he would kill him. PW9 further deposed that the respondent Sanjeev had also shown him the magazine of the pistol while saying that it was a real pistol. The incident was also witnessed by his wife. It was further deposed by PW9 that the respondent Sanjeev threatened him while leaving the house and also bolted the door of the house from outside pursuant to which PW9 had lodged an FIR No. 174/09 against him. PW9 identified the pistol in the Trial Court which was put on him by the respondent Sanjeev.
24. Reading of the testimony of PW7 Const. Phool Kumar would show that the slapping incident took place on 01.01.2009 i.e. two months prior to the death of the deceased. The public persons who came to the Police Booth and complained regarding the threats extended by the respondent Kuldeep while impersonating himself as a police

official were not examined by the prosecution. Furthermore, there is no evidence which can provide strength to the allegation that the deceased Vijay made certain loose comments on the sister of the deceased which raised his temper immensely. On reading the testimony of Leela Krishna (PW8) whereby it was deposed by him that the respondent Sanjiv had threatened him on 30.03.2009 while stating that he had already committed a murder and PW8 would meet the same fate. We do not believe the testimony of PW8 in the absence of other evidence corroborating it. In this background, we reject the motive imputed on the respondents Sanjeev and Rajender that they required pistol of the deceased to threaten their opponents in a civil case filed against them.

Medical Evidence:

25. PW6 Dr. Vipin Chander Gupta, Senior Consultant (Pathology) MMG District Hospital, Ghaziabad, Uttar Pradesh testified in his examination-in-chief that on 02.03.2009 at 4:30 PM, he conducted post-mortem of the deceased. His detailed report was proved as Ex.PW6/A wherein the following external injuries were mentioned:

“1. Incised wound, 17 x 2 cms bone deep on front and side of left side neck on thyroid cartilage cutting the thyroid cartilage, trachea and big vessel of neck.

2. Firearm lacerated wound, 1 x 1 cm brain deep on front and center of forehead 9 cms above the bridge of nose, inverted margin i.e. (wound of entry) passed through the brain and came out as a exit lacerated wound 1.5 x 1 cms from back of head with inverted margins (wound of exit).”

26. As to the cause of death, PW6 opined that the death was due to firearm injury to the vital organs i.e. brain and also cutting of big vessels of neck. Time since death was opined as 12 hours from the post-mortem examination which would signify that the deceased had died on the intervening night of 1/2.03.2013 and supports the case of the prosecution.

Forensic/Biological/Serological Results:

27. PW20 Naresh Kumar, SSO (Biology), FSL, Rohini, Delhi deposed that on 09.04.2009, he was posted as a Senior Scientific Assistant, FSL, Delhi and had examined a white Maruti-800 car. On inspection, blood was found on the back seat of the car and two blood stained pieces of seat cover along with spongy material were handed over to the Insp. J. K. Sharma. In this regard, his detailed report was proved by him as Ex.PW20/A which shows that only Human Blood was found on the car cover (Ex.2), seat cover (Ex.5a) and spongy material (Ex.5b). However, the grouping of the blood found on the above material could not be established. Additionally, the aforementioned exhibits were never sent for the DNA examination to confirm that the same blood belonged to the deceased.

Ballistic Report:

28. As per the Ballistic Report Ex.PX one pistol 9 mm calibre (Ex.F1) with two 9 mm cartridges (Ex.A1 and A2) and one country made pistol .315" bore (Ex.F2) with one 8mm/.315" cartridge (Ex.A3)

were sent to the FSL. It was opined by the Ballistic Expert that both the pistols i.e. pistol of 9 mm calibre and country made pistol .315 bore were firearms and were in working order. It was further opined that the 9 mm cartridges Ex.A1 and A2 were live cartridges and could be fired through the 9 mm calibre firearm and 8 mm/ .315” cartridge Ex. A3 could be fired through the .315” bore firearm.

29. It is evident from the ballistic report mentioned in foregoing para that the cartridges which were found inside the pistols matched with the respective pistols and nothing much flows from it. It would be fruitful if the investigating agency would have recovered the bullets from the place of the occurrence or would have recovered the bullet from the body of the deceased which would be a connecting link in the use of the weapon recovered at the instance of the respondents.

Recoveries:

30. It is the case of the prosecution that a pair of badges of Delhi Police and one I-card in the name of the deceased Const. Vijay Singh which was having a logo of Delhi Police got recovered at the instance of the respondent Sanjeev Kumar. It is further the case of the prosecution that at the time of the incident the deceased was in his uniform the respondent had thrown the uniform and shoes of the deceased in Bhalswa Jheel. In this regard, we may note that it is the general tendency of the accused persons to dispose of the most incriminating material in the first opportunity as it may put them behind bars. In our view, the recoveries so made are highly doubtful and do not stand

to reason as all the recoveries were made one month after the incident. Thus, we find force in the argument of the respondents that it would be highly unbelievable that even after one month of the murder, the respondent Kuldeep would keep the service pistol of the deceased in his possession and the respondent Sanjeev would keep the identity card and badge of a deceased police constable, which has no financial value. The theory of the prosecution has been also negated by the learned Trial Court on the ground that if the requirement of the respondents Sanjeev and Rajender Kashyap was of a pistol, which they had already one and which was used upon the deceased, thus the motive imputed by the prosecution is unbelievable.

31. Further, as per the case of the prosecution, pursuant to the arrest of the respondent Rajender, a *Kirpan* was recovered at his instance from his house which he disclosed that he had used for slashing the neck of the deceased. However, the FSL Report Ex.PX1 establishes that the blood could not be detected on the same.
32. With regard to the recovery of plastic bottle at the instance of the respondent Sanjeev and recovery of *Kripan* at the instance of the respondent Rajender is concerned, the FSL reports show that no blood was found on the *Kripan* and only human blood was detected on the plastic bottle. As far as the recovery of the service pistol issued to the deceased is concerned, as per the case of the prosecution the said pistol was recovered from the possession of the respondent Kuldeep and was used in the commission of the offence. In this regard, we may note that as per the Delhi Police Rules the firearm so

issued to any official is required to be regularly returned/deposited on daily basis and get re-issued again on the following days. On the day of occurrence, the deceased was posted at the Police station Jahangir puri on Beat Duty; we concur with the finding of the Trial Court that in the present case, the record of the Firearms had not been properly maintained which can put some light that the pistol so issued to him was being re-issued to him on daily basis. Additionally, it has emerged from the Ballistic Report the said pistol has not been used in the crime. Thus, it was rightly disbelieved by the learned Trial Court.

33. The law with regard to the leave to appeal is well settled. In the case of ***Tota Singh and Anr. vs. State of Punjab*** reported at ***AIR 1987 SC 108***, the Hon'ble Supreme Court made the following observation:

“6.....The jurisdiction of the Appellate Court in dealing with an appeal against an order of acquittal is circumscribed by the limitation that no interference is to be made with the order of acquittal unless the approach made by the lower Court to the consideration of the evidence in the case is vitiated by some manifest illegality or the conclusion recorded by the Court below is such which could not have been possibly arrived at by any Court acting reasonably and judiciously and is, therefore, liable to be characterised as perverse. Where two views are possible on an appraisal of the evidence adduced in the case and the Court below has taken a view which is a plausible one, the Appellate Court cannot legally interfere with an order of acquittal even it is of the opinion that the view taken by the Court below on its consideration of the evidence is erroneous.”

(Emphasis Supplied)

34. In the case of ***State of Rajasthan Vs. Raja Ram*** reported at ***AIR 2003 SC 3601***, the Hon'ble Supreme Court held as under:

“7. There is no emerge on the appellate Court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the Court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate Court to re-appreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not. The principle to be followed by appellate Court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable, it is a compelling reason for interference.”

(Emphasis Supplied)

35. The counsel for the petitioner contended that there was no delay on the part of the Police in registering the missing report, as the Police was under a bonafide belief that the deceased would have gone on long leave or on some unapproved leave. In this regard, we are of the view that the deceased was a member of the disciplined force and was residing in the Police barracks of the Police Station Jahangir Puri and thus his absence should have immediately led to filing of a complaint. Thus, we do not find force in the argument raised by the

counsel for the petitioner and there was delay in registration of the FIR which remained unexplained.

36. 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. It is evident from the ballistic report that it does not connect the respondents with the offence nor the Serological Report conclusively establishes that the Maruti-800 car bearing No. DL8C-5140 was used in shifting the dead body of the deceased to Sahibabad, Uttar Pradesh where it was abandoned nor the use of *Kirpan* allegedly got recovered by the respondent Rajender has been established.
37. After a careful analysis of all the material available on record, we have found that PW2 is a planted witness, which is evident from the fact that in his statement under Section 161 of Cr.P.C, the witness had not stated that the deceased was last seen in the company of the respondent Kuldeep, the vital fact which could not have been ignored as PW2 was none else but a Head Constable of the Delhi Police and who would understand the importance of a missing person seen lastly in the company of respondent Kuldeep.
38. We concur with the view taken by the learned Trial Court wherein it was observed that the circumstances reflected from the material on record do not stand conclusively established. The facts are also are not consistent only with the hypothesis of the guilt of the respondents. The chain of evidence is not complete so as not to leave any reasonable ground for the conclusion consistent with the guilt of

the respondents. Additionally, no appeal has been filed by the State nor there is any evidence of conspiracy established between the three respondents.

39. In view of the above settled law, we find that there is no evidence against the respondents to show that the respondents were in any way connected to the murder of the deceased. Therefore, we do not find any infirmity in the view taken by the learned Trial Court.
40. Accordingly, the leave to appeal stands dismissed.

G.S.SISTANI, J

CHANDER SHEKHAR, J

SEPTEMBER 12, 2017//tp