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IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgement reserved on: 14th March, 2019

Judgment pronounced on: 29th March, 2019

+ **CRL.LP. 126/2018**

STATE

....Appellant

Through: Mr. Tarang Srivastava, APP for State with
SI Raju Yadav, PS Sultan Puri .

Versus

JOSHIM

...Respondent

Through: Mr. Ashish Dutta, Advocate.

CORAM:

SANGITA DHINGRA SEHGAL, J.

1. By the present Leave Petition filed under Section 378(1) of the Code of Criminal Procedure (hereinafter referred as '*Cr.P.C.*') the State seeks leave to appeal against the order/judgment dated 27.09.2017 passed by the learned Special Judge (NDPS), North West District, Rohini Courts, in Sessions Case No. 53084/16, whereby the respondent (accused before the Trial Court) was acquitted of the offences punishable under Section 458/380/397/411 read with Section 34 of the Indian Penal Code (hereinafter referred as '*IPC*').
2. Brief facts of the case, as noticed by the learned Trial Court, are as under:-

"The FIR has been registered on the complaint of Sanjay Ex.PW1/A wherein, he has alleged that he resides at the address as mentioned in his complaint Ex.PW1/A and he is running a shop of repairing the mobile phone at F-5/133, Sultan Puri, which is situated on the walking distance of two minutes of his house and on 11.12.2015, at

about 9.00 PM, he closed his shop and on the intervening night of 11/12.12.2015 at 3.00 AM, owner of his shop had telephonically informed that some noises of breaking were coming out of his shop and the owner of his shop resides at the upper floor of the said shop and this complainant without wasting time had taken his neighbour Sapan with him and arrived at his shop and found that three boys were standing outside of the said shop and they asked to their fourth companion to come out of the said shop and the fourth boy came out from the broken shutter of the said shop and all the four boys ran towards one direction and when, this complainant and his neighbour Sapan tried to apprehend this accused Joshim near Government toilet, this accused took out knife and threatened to kill the complainant and his neighbour, but, anyway, they succeeded in nabbing this accused and on hearing the noise, many people gathered at the spot and this accused, who was apprehended by them, had revealed his name as Joshim, son of Vicky @ Kanatulla R/o F-7/W-49, Jhuggi No. 176, Sultan Puri, Delh and this accused was handed over along with knife recovered from him to police and on searching one mobile phone maker of which Gild of brown colour was recovered from the pocket of his pant and this complainant has also alleged that this mobile phone came to his shop for repairing and also alleged that 25 mobile phones and Rs.20000/- were found to be stolen from the shop of this complainant and all these mobile phones were to be repaired by him and alleged that all the four boys had broken the shutter of his shop and stolen away his 25 mobile phones and Rs.20000/-, and on such complaint FIR No. 1187/2015 was registered under Section 458/360/411/34 of IPC and 27 of Arms Act. The disclosure statement of the accused was also written by the IO, wherein, he has disclosed the name of co-accused Deepak S/o Ramesh R/o F-7, W-49, Jhuggi No. 160, Sultan Puri Kwin @ Manwa S/o Om Prakash R/o F-131, Sultan Puri, Kadu R/o Bengali Park, F Block, Sultan Puri. But none of them was apprehended by the police and the

IO had filed the charge sheet under Section 458/380/397/411/34 of IPC against this accused Joshim only.”

3. To bring home the guilt of the respondent, the prosecution examined 06 witnesses in all. Statement of the respondent was recorded under Section 313 of Cr.PC by the learned Trial Court wherein he pleaded not guilty and denied all prosecution charges. The respondent did not lead any evidence in his defence.
4. Mr. Tarang Srivastava, APP for State contended that the impugned judgment dated 27.09.2017 is based on conjectures and surmises, the same was against the facts and law and the same be set aside, acquitting the respondent for the offences punishable under Section 458/380/397/411 read with Section 34 of the Indian Penal Code, 1860; that the learned Trial Court while passing the impugned judgement has failed to appreciate that the respondent was apprehended red handed while committing theft along with his three other accomplices; that the learned Trial Court has failed to appreciate the testimony of prosecution witness including that of the complainant which supports the prosecution theory; that the learned Trial court has placed undue weightage on the minor discrepancies/contradictions in the statements of the prosecution witnesses, contrary to which all the statements are consistent and corroborative in nature and there are no major omissions and contradictions in the aforesaid testimonies; that the learned Trial Court has failed to consider that the knife along with the money stolen was recovered from the accused on the spot.

5. Per contra, Mr. Ashish Dutta, learned counsel for the respondent contended that there is no infirmity in the impugned judgment passed by the learned Trial Court and the same does not call for any interference by this court. Learned counsel for the state further contended that the testimonies of PW-1 and PW-2 are inconsistent and there are various material contradictions in the statements of PW-1, PW-2 and PW-5 which go to the root of the prosecution case.
6. I have heard the learned counsel for the parties and perused the material on record.
7. At the outset, I deem it appropriate to peruse the testimonies of relevant witnesses examined by the prosecution. Landlady of the complainant was examined as PW-5, who deposed as under:-

“I made a telephone call on the mobile phone of Mr. Sanjay but he did not take up. Thereafter, I made a call on the mobile phone of Mr. Suresh, brother of Mr. Sanjay. Mr. Suresh picked up and I informed that I heard some noise of shutter of the shop of Mr. Sanjay.”

Mr. Sanjay Kumar (Complainant) was examined as PW-1 and during his examination-in-chief dated 21.03.2016, he deposed as under: -

“On 11.12.2015 at about 9.00 pm I closed my shop and went to my house. During the night of 11.11.2015 and 12.11.2015 at about 3.00 pm a call was received on the mobile phone of my brother that some voices

were coming from my shop and probably the shutter of the shop was broken.”

Mr. Suresh Kumar, brother of the complainant (PW-1) was examined as PW-6 who deposed that:

“In the meantime, I received the call on my mobile phone from Ms. Asha, landlady of the shop of my brother Sanjay. She informed me that she has heard some noise of shutter if the shop of Mr. Sanjay.”

PW-2 Mr. Sapan Kumar, friend of the complainant, who accompanied the complainant (PW-1) to his shop, deposed as under:-

“During the night at about 3 A.M I received a telephone call on my mobile phone from landlady of the shop of my friend Mr. Sanjay..... She further informed that she was making call on the mobile of Mr. Sanjay but the same was reported to be switched off so she made call on my mobile phone. I also tried to contact Sanjay on his mobile phone but the same was reported to be switched off.”

8. The foundation of the theory of prosecution is very shaky as it is difficult to ascertain the truth. From the perusal of the testimonies of PW-1 (Complainant), PW-2 (Complainant's Friend), PW-5 (Landlady) and PW-6 (Complainant's Brother) it is apparent that testimonies are contradictory and all the witnesses have given

different version with regard to the receipt of the information about the alleged incident. According to PW5 (Landlady) she informed PW-6 (Complainant's Brother) about the alleged incident as PW-1 (Complainant) was not responding to her calls. To the contrary, PW-2 (Complainant's Friend) claimed that PW-5 (Landlady) informed him about the alleged incident.

9. The case of the prosecution is that 25 mobile phones and Rs. 20,000/- were stolen from the shop of PW-1 (Complainant) and the accused was apprehended at the spot. It is pertinent to note that no such recovery was effected from the accused though he was apprehended at the spot. To add, PW-1 (Complainant) who has a mobile repairing shop, failed to bring any evidence on record to show the names of his customers to whom the phones belonged. Only one phone make - GILD was allegedly recovered from the accused. The prosecution failed to procure the names of the customers to whom the phone belonged. No register or diary barely mentioning the details of the customers to whom the phone belonged was maintained by the complainant. Even vague details were not given by the complainant which creates a doubt on the story of the prosecution.
10. Besides the above gaps in the case of the prosecution the conduct and behaviour of the PW-5 (Landlady) and PW-6 (Complainant's Brother) also seems to be unnatural. PW-5 (Landlady) who noticed that the shop of the complainant was being ransacked did not come out of her house and PW-6 (Complainant's Brother) who told about the alleged incident by PW-5 (Landlady) did not accompany his real brother PW-1. Moreover, as per the testimony of PW-1

(Complainant) and PW-2 (Complainants Friend), many people gathered at the spot but none has been examined by the Investigation Agency as public witness which further shatters the story of the prosecution. The investigation in the present case is also shoddy and doubtful. The accused in the present case gave the names, addresses of three other accused persons who were also involved in the commission of the crime, however, neither those accused persons were apprehended by the investigation officer nor any recovery has been effected from them.

11. It is a settled law that while deciding a leave to appeal petition filed by the State, in case two views are possible, the High Court must not grant leave, if the trial court has taken one of the plausible views, in contrast thereto in an appeal filed against acquittal. In *Arulvelu and Anr. vs. State represented by the Public Prosecutor and Anr.*, reported in **2009 (10) SCC 206**, while referring with approval the earlier judgment in *Ghurey Lal vs. State of Uttar Pradesh*, reported in **(2008) 10 SCC 450**, the Supreme Court reiterated the principles which must be kept in mind by the High Court while entertaining an Appeal against acquittal. The principles are:-

1. *The accused is presumed to be innocent until proven guilty. The accused possessed this presumption when he was before the trial court. The trial court's acquittal bolsters the presumption that he is innocent.*
2. *The power of reviewing evidence is wide and the appellate court can re-appreciate the entire evidence on record. It can review the trial court's conclusion with respect to both facts*

and law, but the Appellate Court must give due weight and consideration to the decision of the trial court.

3. *The appellate court should always keep in mind that the trial court had the distinct advantage of watching the demeanour of the witnesses. The trial court is in a better position to evaluate the credibility of the witnesses.*
 4. *The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so.*
 5. *If two reasonable or possible views can be reached - one that leads to acquittal, the other to conviction - the High Courts/appellate courts must rule in favour of the accused.*
 6. *Careful scrutiny of all these judgments lead to the definite conclusion that the appellant court should be very slow in setting aside a judgment of acquittal particularly in a case where two views are possible. The trial court judgment cannot be set aside because the appellate court's view is more probable. The appellate court would not be justified in setting aside the trial court judgment unless it arrives at a clear finding on marshalling the entire evidence on record that the judgment of the trial court is either 'perverse' or wholly unsustainable in law.*
12. Applying the principles laid down by the Apex Court to the present case, I am of the considered view that there is no any illegality or perversity in the impugned judgment and the prosecution miserably failed to prove its case beyond reasonable doubt against the

respondent. Accordingly, no ground to interfere with the impugned judgment is made and the Criminal Leave Petition preferred by the prosecution is dismissed.

Order Accordingly.

SANGITA DHINGRA SEHGAL, J

MARCH 29th, 2019

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