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

+ CRL.A. 630/2019

JAI NARYAN

Through

.... Appellant

Mr. Pritish Sabharwal and
Mr. Sanjeet, Advocates

versus

STATE & ORS.

Through

..... Respondents

Ms. Neelam Sharma, APP for the
State with SI Satender Kumar, P.S.
KNK Marg.
Mr. Ravin Rao, Advocate for R-2,3
and 4 with R-2, 3 and 4.

Reserved On: 24th January, 2020

Date of Decision: 31st January, 2020

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CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

J U D G M E N T

MANMOHAN, J:-

1. Present appeal has been filed by the appellant (father of the deceased), challenging the judgment dated 5th February 2019 passed by the Additional Sessions Judge, Pilot Court, North District, Rohini Courts, Delhi in Sessions Case No. 623/2018 arising out of FIR No. 158/2018 registered with Police Station KNK Marg, whereby all the three accused-respondents were acquitted of the charges under Sections 302/ 201/ 34 IPC, but respondent no.2 was convicted under Sections 323 and 342 IPC.

2. The facts of the present case, as noted by the Trial Court, are reproduced hereinbelow:-

“1. On 10.05.18 at about 11.40 AM information was received that a dead body has reached at Haiderpur Water Treatment Plant. On this information DD no.21 A was recorded at PS KNK Marg. The body was found in white colour plastic bag. It was of 20-25 years male. The body was later on identified as of Kuldeep. On 21.05.18 Jai Narayan, father of deceased told that on 06.05.18 his son left home at about 4 PM to search for work. In the night his son did not return. On 07.05.18 at about 7 PM a person made a call on his mobile phone number 8813098565 from his mobile number 9213778189 and informed that his son (Kuldeep) had stolen sariya worth Rs.1 lac from Bharat Mata School, Narela and asked him to bring Rs.1 lac. That boy also made him to talk with his son. On 09.05.18 he reached Bharat Mata School, Narela. The person who had made call to him met him there, who disclosed his name as Paswan. Kapil also met him there. They both told him that they had let off Kuldeep in the evening after giving beatings to him.

2. During investigation Rajesh Paswan working as Watchman at Bharat Mata School, Narela was apprehended, who confessed about the commission of crime and also told that dead body was dumped in the kachi nahar in vehicle no.DL1LX 3945 with the help of Ranjay Tiwari and Vijay Paswan. They were also arrested. Vehicle was also recovered. After completion of investigation, the charge sheet against the accused persons was filed. Ld. MM after complying with the provisions of Section 208 Cr.PC committed the case to the Sessions Court as the offence punishable under Sec.302 IPC is exclusively triable by the Sessions Court.”

3. The conclusions of the Trial Court are reproduced hereinbelow:-

“117. Keeping in view this testimony of PW-5, it is clear that deceased left the company of accused and also Bharat Mata Public school when he was still alive. It is also important to note that according to the post mortem report and the subsequent opinion Ex.PW-14/P-91 Kuldeep has not died due to beatings. The onus was

upon the prosecution that deceased was lastly seen in the company of accused and thereafter no one had seen him alive but PW-5 stated that deceased left the school alone when he was alive, therefore in my opinion the circumstance of last seen is not established. The onus which was on the prosecution has not been discharged.

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120. After hearing the arguments and going through the record, I found that the call detail records establish that the call was made from the mobile phone no.921378189 which is in the name of Rajesh Paswan on the mobile phone no.8813098565 which is in the name of Santra, the mother of deceased at 19:07:06 hours. The fact that a call was made by Rajesh Paswan on the mobile phone of father of Kuldeep i.e. Jai Narayan is also corroborated by PW-5 when he appeared in the witness box, therefore, so far as the factum of making a call is concerned that has been established by the prosecution but it is also important to note that this fact is not inconsistent with any hypothesis of innocence of accused as according to PW-5, he has seen Kuldeep leaving the school alive and that also not in the company of the accused.

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124. After hearing the arguments and going through the record I found that there are two witnesses examined by the prosecution to prove the factum of recovery of the photocopy of Aadhar card Ex.MO7 from a heap of garbage lying outside school. The two witnesses examined are PW-32 and PW-33 they stated that efforts were made to join public witnesses but no public witness could be joined. So far as their testimonies are concerned both are consistent. But it is important to note that none of the witness that is PW-2, PW-25 and PW-26 stated that deceased was carrying the photocopy of his Aadhar Card. So far as presence of Kuldeep in school concerned i.e. established by PW-5 examined and also by the call detail record. PW-5 has also stated that he has seen deceased going out of the gate of the school. Therefore, the presence of Kuldeep in school itself does not point towards the guilt of accused.

Keeping in view all these facts in my opinion though the circumstance of recovery is established but it does not point towards the guilt of the accused and is in consistent with any hypothesis of innocence of accused.

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127. After hearing the arguments and going through the record I found that the prosecution alleges the recovery of the clothes of the accused persons which they were wearing at the time of commission of offence. No public witness was joined at the time of alleged recovery, despite availability on all the 3 occasions. This fact itself creates doubt regarding the trustworthiness of the alleged recovery. Further, it was for the prosecution to show and link the accused persons with the commission of offence with the alleged recovery. The clothes were sent to FSL for analysis, report has been proved as Ex.PW33/P83. According to the report no blood was detected on the clothes of any of the accused. As mentioned above the onus was upon the prosecution to prove this fact which the prosecution has failed. Keeping in view all these facts in my opinion the prosecution has not been able to prove and establish the circumstance it also does not link the accused persons with the commission of offence or point towards their guilt.

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130. After hearing the arguments and going through the record I found in this case there is recovery of vehicle No.DL 1L X 3945 as per the prosecution case. Prosecution examined Mithilesh Singh as PW-30 to establish that this vehicle was used for throwing the dead body and destroying the evidence. PW-30 has not supported the prosecution case. He was cross-examined by Ld. APP, despite that he has not supported the case. From the vehicle no such evidence has been lifted which can link the accused persons with the commission of offence. No blood or any biological material could be recovered. There is also no other evidence to prove and establish that this vehicle was used by any of the accused for throwing Kuldeep in canal.

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132. Keeping in view the above discussion and opinion on the circumstances it is clear that the circumstances are not proved and established. The chain is not complete. Onus is not discharged therefore accused Rajesh Paswan is acquitted of the offence punishable u/s 302 IPC. However, in view of testimony of PW-5 who is a reliable independent witness, it is clear that accused Rajesh Paswan had tied that boy and has also been beaten him. Therefore, accused Rajesh Paswan is held guilty and convicted for the offence punishable u/s 342 IPC and 323 IPC. So far as accused Ranjay Tiwari & Vijay Paswan are concerned their statements u/s 313 Cr.PC were dispensed with for want of incriminating evidence. They are therefore, acquitted.....”

ARGUMENTS ON BEHALF OF THE LEARNED COUNSEL FOR APPELLANT

4. Mr. Prithvi Sabharwal, learned counsel for the appellant emphasized that the Post Mortem Report and the deposition of Dr. Mahesh Chand Meena (PW14) had confirmed the presence of sub-scalpel extravasation of blood in the right occipital region of the skull along with a contusion over the anterior lateral aspect on the deceased's left leg. He pointed out that the accused-respondents had admitted to physically beating the deceased Kuldeep.

5. Learned counsel for the appellant stated that the Trial Court had erroneously rejected the circumstance of last seen on the basis of the testimony of Kapil Bharadwaj (PW5). He pointed out that Kapil Bharadwaj (PW5), who had been declared hostile by the prosecution, in his deposition, had stated that the deceased had walked upto the school gate; whereas the trial court had wrongly understood the statement to mean that the deceased had left the school premises. He contended that the version of Kapil Bharadwaj's (PW5) that the deceased Kuldeep appeared to be under the

influence of some drug, was incorrect as the Post Mortem Report did not indicate the presence of any psychotropic or narcotic substance in the blood sample or viscera of the deceased Kuldeep. He submitted that since the deceased Kuldeep was last seen with the accused-respondents before he was found dead, the onus of proof had shifted to the accused-respondents under Section 106 of Indian Evidence Act, 1872. He contended that in the statements recorded under Section 313 Cr.P.C., accused-respondents had failed to discharge their liability of stating as to how the deceased Kuldeep was found dead in the canal and therefore they should be held guilty of the offence of murder. In support of his submission, he relied upon ***Trimukh Maroti Kirkan vs. State of Maharashtra, (2006) 10 SCC 681*** and ***Satpal vs. State of Haryana, (2018) 6 SCC 610***.

6. Learned counsel for the Appellant stated that the trial court failed to appreciate that the recovery of the deceased Kuldeep's Aadhar card from a heap of garbage next to the boundary wall of Bharat Mata School at the instance of accused-respondent no.2 was admissible evidence under Section 27 of the Indian Evidence Act, 1872.

7. Learned counsel for the appellant further contended that the conduct of accused-respondent no.2 was evasive inasmuch as a ransom call for a sum of Rs.1 lac was made by accused-respondent no.2 to the appellant. He stated that the Call Detail Record (CDR) of accused-respondent no.2 corroborated the testimony of appellant-Jai Narayan (PW25) that on 07th May, 2018 at 7.07 p.m. a call was made by accused-respondent no.2 to the appellant that lasted for 69 seconds. He pointed out that after the initial call was disconnected, upon calling back, the appellant was informed by accused-respondent no.2 that the number was that of a STD Booth in

Azadpur. He also stated that the CDR of the accused-respondents not only confirmed the two calls made by accused-respondent no.2 to Ravinder Goyal (PW-24) on 07th May, 2018, first at 6.52 p.m. and then at 9.31 p.m., but also reflected that numerous calls were exchanged between the accused-respondents inter se. The CDR also reflected the location of the accused-respondents at the time of the crime in the same vicinity. He submitted that in view of the aforesaid facts, the conduct of accused-respondent no.2 is relevant under Section 8 Indian Evidence Act, 1872.

8. He lastly submitted that the recovery of vehicle with registration No. DL 1LX 3945 (Tata Ace) at the instance of accused-respondent nos. 3 and 4, was admissible evidence under Section 27 of the Indian Evidence Act, 1872. He pointed out that the vehicle was registered in the name of Hare Ram (PW29) but purchased by Mithlesh (PW30) who had deposed that accused-respondent no.3 used to drive the said vehicle about one year ago. Learned counsel for the appellant stated that since Mithlesh (PW30) was unaware that his vehicle had been impounded prior to being informed by the police, he may also have been unaware that the vehicle was used by the accused-respondents to dispose of the body of the deceased Kuldeep.

ARGUMENTS ON BEHALF OF THE LEARNED COUNSEL FOR ACCUSED-RESPONDENTS

9. Mr. Ravin Rao learned counsel for accused-respondents pointed out that while Kapil Bharadwaj (PW-5) had deposed that he had seen the deceased Kuldeep walk upto the gate of the school, Ravinder Kumar Goyal (PW-24) had deposed that around 9:15/ 9:30 p.m. he had received a call from accused-respondent no.2's mobile number informing him that he had

driven the alleged thief out of the school premises. Consequently, according to the learned counsel for accused-respondents the onus of proof was on the prosecution to prove its case beyond reasonable doubt and the accused-respondents in their Section 313 Cr.P.C. statements were not required to explain how the deceased Kuldeep was found dead in the Haiderpur Water Treatment Plant.

10. Learned counsel for accused-respondents also contended that though the calls mentioned in the CDR were a matter of record, yet there was no proof with regard to the contents of the said calls. He stated that the accused-respondents had known each other for a long time and had been in constant touch over the mobile as well as in person even prior to the date of the alleged incident as they were engaged in the business of selling scrap. He contended that one had to cross the canal in order to go to Bawana from Bharat Mata School and on the date of the incident accused-respondent no. 2 had crossed the canal in the morning, afternoon and in the evening. He emphasized that the location where the body was thrown into the canal had not been proved by the prosecution.

11. Learned counsel for the accused-respondents stated that there was no evidence that the deceased Kuldeep was carrying a copy of his Aadhar card. He pointed out that there were no public witnesses to the said recovery of the Aadhar card at the instance of accused-respondent no. 2. He stated that the finding of the same may be due to the presence of the deceased Kuldeep at the spot or it might have fallen there during the alleged beating incident.

12. He emphasized that Mithlesh (PW30), the owner of the vehicle with registration No. DL 1LX 3945 (Tata Ace) in his testimony had stated that on the date of the incident he had neither given the said vehicle to anybody nor

was it missing. He further stated that the prosecution had been unable to prove that the said vehicle was used by the accused-respondents to dispose of the body.

13. With regard to the conduct of accused-respondent no.2, learned counsel for the accused-respondents, stated that accused-respondent no. 2 was always present at Bharat Mata School and that on no occasion had he run away from there and had instead informed the investigating authority about his presence at the school on the date of occurrence.

COURT'S REASONING

DECEASED KULDEEP HAD DIED DUE TO ASPHYXIA CONSEQUENT TO ANTE MORTEM DROWNING AND NOT DUE TO PHYSICAL BEATING ADMINISTERED BY THE ACCUSED-RESPONDENTS.

14. Having heard the learned counsel for the parties, this Court is of the view that in the present case the deceased Kuldeep had died due to asphyxia consequent to ante mortem drowning and not due to physical beating administered by the accused-respondents. For physically beating the deceased Kuldeep, accused-respondent no.2 has been held guilty and punished with a sentence which he has already undergone.

SECTION 106 OF THE INDIAN EVIDENCE ACT, 1872 IS NOT ATTRACTED TO THE PRESENT CASE AS THE PROSECUTION HAD FAILED TO PROVE THAT THE DECEASED KULDEEP WAS LASTLY SEEN IN THE COMPANY OF ACCUSED AND THEREAFTER NO ONE HAD SEEN HIM ALIVE.

15. Further, Section 106 of the Indian Evidence Act, 1872 Act does not shift the burden of proof in a criminal trial, which is always upon the

prosecution. It lays down a rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the Court can consider his failure to adduce any explanation, as an additional link which completes the chain. The Supreme Court in *Nizam & Anr. vs. State of Rajasthan*, (2016) 1 SCC 550 has held as under:-

“15. Elaborating the principle of “last seen alive” in State of Rajasthan vs. Kashi Ram, (2006) 12 SCC 254, the Apex Court held as under:-

“23. It is not necessary to multiply with authorities....Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the court can consider his failure to adduce any explanation, as an additional link which completes the chain. The principle has been succinctly stated in Naina Mohamed, In re. [1959 SCC OnLine Mad 173 : AIR 1960 Mad 218] ”

16. Consequently, to attract Section 106 of the Indian Evidence Act, 1872 in the present case, the prosecution had to prove that the deceased Kuldeep was lastly seen in the company of accused and thereafter no one had seen him alive. However, in the present case, no witness has deposed that he/she had seen the deceased Kuldeep lastly in the company of the accused-respondents. Even if the appellant's interpretation of evidence of Kapil Bharadwaj (PW5) is accepted, then also it does not prove that the deceased Kuldeep was lastly seen in the company of accused-respondent no.2 as there is nothing to suggest that the deceased had returned to the School or that the

accused-respondents had again caught hold of the deceased and dumped his body in the Haiderpur Water Treatment Plant.

THOUGH THE CIRCUMSTANCE OF RECOVERY OF AADHAR CARD IS ESTABLISHED, YET IT DOES NOT POINT TOWARDS THE GUILT OF THE ACCUSED-RESPONDENT NO.2 AS THE PRESENCE OF DECEASED KULDEEP AT BHARAT MATA SCHOOL IS AN ADMITTED FACT.

17. Further, the recovery of photocopy of deceased Kuldeep's Aadhar Card only proves the presence of deceased Kuldeep at Bharat Mata School—which is an admitted fact. However, this fact in itself does not point towards the guilt of accused-respondents. Consequently, this Court is in agreement with the finding of the Trial Court that though the circumstance of recovery of Aadhar Card is established, yet it in no manner incriminates the accused-respondents.

THE FACTUM OF EXCHANGE OF TELEPHONE CALLS MENTIONED BY LEARNED COUNSEL FOR APPELLANT DOES NOT PROVE THE GUILT OF THE ACCUSED-RESPONDENTS AS NONE OF THE WITNESSES HAD DEPOSED THAT THEY HAD LASTLY SEEN THE DECEASED KULDEEP IN THE COMPANY OF THE ACCUSED-RESPONDENT NO.2.

18. Further, the factum of exchange of telephone calls between appellant and accused-respondent no.2 as well as between Ravinder Kumar Goyal (PW24) and accused-respondent no.2 does not prove the guilt of the accused-respondents as none of the witnesses have deposed that they had lastly seen the deceased Kuldeep in the company of the accused-respondent no.2.

THERE IS NO EVIDENCE TO PROVE AND ESTABLISH THAT THE VEHICLE IN QUESTION WAS USED BY ANY OF THE ACCUSED FOR THROWING DECEASED KULDEEP IN THE CANAL.

19. From the vehicle in question no evidence had been lifted which could link the accused persons with the commission of offence. In fact, no blood or biological material was recovered from the said vehicle by the FSL. There is also no other evidence to prove and establish that the vehicle in question was used by any of the accused for throwing deceased Kuldeep in the canal.

AN ACQUITTAL ORDER CANNOT BE LIGHTLY INTERFERED WITH BY THE APPELLATE COURT, THOUGH IT HAS WIDE POWERS TO REVIEW THE EVIDENCE AND TO COME TO ITS OWN CONCLUSION.

20. It is settled law that any acquittal order cannot be lightly interfered with by the Appellate Court, though it has wide powers to review the evidence and come to its own conclusion. The power to grant leave must be exercised with care and caution because the presumption of innocence is further strengthened by the acquittal of the accused. In similar circumstances, in *State v. Kaishar Ali [CRL.L.P. 188/2018, decided on 30th August, 2019]*, we have held as under:-

“13. The Apex Court in Ghurey Lal vs. State of Uttar Pradesh, (2008) 10 SCC 450 has held as under:-

“69. The following principles emerge from the cases above:

1. The appellate court may review the evidence in appeals against acquittal under Sections 378 and 386 of the Criminal Procedure Code, 1973. Its power of reviewing evidence is wide and the appellate court can reappreciate the entire evidence on record. It can review the trial court's conclusion with respect to both facts and law.

2. The accused is presumed 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.

3. Due or proper weight and consideration must be given to the trial court's decision. This is especially true when a witness' credibility is at issue. It is not enough for the High Court to take a different view of the evidence. There must also be substantial and compelling reasons for holding that the trial court was wrong.

70. In light of the above, the High Court and other appellate courts should follow the well-settled principles crystallised by number of judgments if it is going to overrule or otherwise disturb the trial court's acquittal:

1. 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.

A number of instances arise in which the appellate court would have “very substantial and compelling reasons” to discard the trial court's decision. “Very substantial and compelling reasons” exist when:

(i) The trial court's conclusion with regard to the facts is palpably wrong;

(ii) The trial court's decision was based on an erroneous view of law;

(iii) The trial court's judgment is likely to result in “grave miscarriage of justice”;

(iv) The entire approach of the trial court in dealing with the evidence was patently illegal;

(v) The trial court's judgment was manifestly unjust and unreasonable;

(vi) *The trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/report of the ballistic expert, etc.*

(vii) *This list is intended to be illustrative, not exhaustive.*

2. *The appellate court must always give proper weight and consideration to the findings of the trial court.*

3. *If two reasonable 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.*

71. *Had the well-settled principles been followed by the High Court, the accused would have been set free long ago. **Though the appellate court's power is wide and extensive, it must be used with great care and caution.***”

(emphasis supplied)

14. *One of us, (Manmohan, J) in **Niraj vs. Ramesh Pratap Singh, 2012, SCC OnLine Del 3813** has held as under:-*

*“6. It is also well settled that the Appellate court should reverse an acquittal only for very substantial and compelling reasons. In the event, two views are possible on the evidence adduced before the trial Court and the view taken by the trial Court is a plausible view, the Appellate Court should not interfere and substitute its own view against the plausible view taken by the trial Court. In fact, the Supreme Court in **Chandrappa & Ors. Vs. State of Karnataka, (2007) 4 SCC 415** while referring to previous cases laid down the following general principles regarding the powers of appellate court while dealing an appeal against an order of acquittal:-*

“42. From the above decisions, in our considered view, the following general principles regarding powers of appellate Court while dealing with an appeal against an order of acquittal emerge;

(1) An appellate Court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded;

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law;

(3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasize the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

(4) An appellate Court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

7. The Supreme Court in a subsequent judgment in *Arulvelu & Anr. Vs. State Represented by the Public Prosecutor & Anr.*, (2009) 10 SCC 206 has held as under:-

"40. Unquestionably, the Appellate Court has power to review and re-appreciate the entire evidence on record. The

appellate court would be justified in reversing the judgment of acquittal only if there are substantial and compelling reasons and when the judgment of the trial court is found to be perverse judgment. Interfering in a routine manner where other view is possible is contrary to the settled legal position crystallized by aforementioned judgments of this Court. 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. This fundamental principle must be kept in view while dealing with the judgments of acquittal passed by the trial court."

(emphasis supplied)

CONCLUSION

21. For the abovementioned reasons, this Court is of the view that the prosecution has failed to prove its case beyond reasonable doubt and is consequently of the view that no interference is called for. Accordingly, the present appeal, being bereft of merit, is dismissed.

MANMOHAN, J

SANGITA DHINGRA SEHGAL, J

JANUARY 31,2020

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