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

Date of decision: 18th February, 2022

\+ CRL.L.P. 55/2021

STATE ..... Petitioner

Through: Mr. Ashish Dutta, APP for the State.

versus

SAMEER @ ALLAUDIN ..... Respondent

Through:

CORAM:
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL
HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

J U D G M E N T

ANUP JAIRAM BHAMBHANI J.

The present petition under section 378(1)(b) read with section 378(3) of the Code of Criminal Procedure, 1973 ('Cr.P.C.') has been filed by the State (NCT of Delhi) seeking grant of leave to appeal against judgment dated 31.01.2020 rendered by the learned Additional Sessions Judge-03, North East, Karkardooma Courts, Delhi in SC No. 03/2017 arising from case F.I.R. No. 625/2016 registered under section 302 of the Indian Penal Code, 1860 ('IPC') and sections 25 and 27 of the Arms Act, 1959 ('Arms Act') at P.S.: Khajuri Khas, Delhi. By way of the impugned judgment, the learned trial court has been pleased to acquit the accused/respondent of all charges, being of the opinion that the prosecution had failed to prove its case against the accused beyond reasonable doubt.

2. Mr. Ashish Dutta, learned Additional Public Prosecutor, appearing on behalf of the State has taken us through the impugned judgment as also through the evidence, both oral and documentary, that has come on record during the course of the trial. The essential case of the prosecution against the accused respondent was that on 24.08.2016 the accused shot at one Firoz in a factory; and the latter subsequently died.

3. We have carefully examined the evidence on record and we find that :

i. The principal ocular witnesses in the case were : PW-9 Arshad Ali *alias* Lakki; PW-10 Sonu Verma; PW-16 Amit Kumar and PW-17 Abid Ali. A perusal of the testimony of the said ocular witnesses shows that *all of them turned hostile* on all critical and material aspects of the allegations against the respondent;

ii. Also, the medical evidence brought on record by PW-1 Dr. Vishwajeet Singh, who had conducted the post-mortem examination of the deceased, was to the effect that death was a consequence of *haemorrhagic shock as a result of antemortem injury to chest produced by projectile from a firearm*, which was sufficient to cause death in the ordinary course. The firearm, which was stated to be a country-made pistol, was alleged to have been recovered at the instance of the accused. However, the ballistics expert, PW-21 Ms. Babita Gulia, said in her report, that no opinion could be formed to link the cartridge recovered from the crime-scene with the country-made pistol,

alleged to have been recovered at the instance of the respondent;

iii. Furthermore, it also transpires that while cross-examining the post-mortem doctor, the prosecution did not put the country-made pistol to him; and the investigating officer also did not seek any subsequent opinion from the doctor, as to whether the country-made pistol allegedly recovered could have been the weapon of offence.

4. Now before proceeding further, we must remind ourselves of the position of law, as laid down by the Hon'ble Supreme Court, as to grant of leave to appeal against a judgment of acquittal under sections 378 and 386 Cr.P.C. To begin with, it would be in context to extract the relevant portions of the said two provisions, for ease of reference. Section 378(1)(b) reads as under :

> ***"378. Appeal in case of acquittal. -*** *(1) Save as otherwise provided in sub-section (2), and subject to the provisions of sub-sections (3) and (5),—*
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> * * * * *
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> *(b) the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of an acquittal passed by any Court other than a High Court [not being an order under clause (a)] or an order of acquittal passed by the Court of Session in revision.*
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> * * * * *
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> *(3) No appeal to the High Court under sub-section (1) or sub-section (2) shall be entertained except with the leave of the High Court."*

Section 386 (a) Cr.P.C. reads as under :

> *"**386. Powers of the Appellate Court.—**After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor if he appears, and in case of an appeal under section 377 or section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may—*
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> *(a) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;*
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> * * * * * * "

5. The very fact that under section 378(3) Cr.P.C. the Legislature has mandated that leave of the High Court is required before an appeal against acquittal is entertained *on behalf of the State*, makes it clear that a certain sanctity is to be attached to an accused being acquitted after trial. This additional stage introduced by the Legislature, namely the stage *requiring the State* to obtain leave to appeal against an acquittal, is of significance; and the court must apply its mind before allowing the State to cross this threshold. If, upon careful consideration of the evidentiary basis and reasoning of the trial court, the High Court finds no infirmity as would warrant interference with the judgment of acquittal, leave to appeal should be declined.

6. In ***Babu vs. State of Kerala***[1], the Hon'ble Supreme Court has summarised the position of law for the High Court to interfere with a judgment of acquittal passed by the trial court. This is what the Hon'ble Supreme Court says :

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[1] (2010) 9 SCC 189

"12. This Court time and again has laid down the guidelines for the High Court to interfere with the judgment and order of acquittal passed by the trial court. ***The appellate court should not ordinarily set aside a judgment of acquittal in a case where two views are possible, though the view of the appellate court may be the more probable one****. While dealing with a judgment of acquittal,* ***the appellate court has to consider the entire evidence on record, so as to arrive at a finding as to whether the views of the trial court were perverse or otherwise unsustainable****. The appellate court is entitled to consider whether in arriving at a finding of fact, the trial court had failed to take into consideration admissible evidence and/or had taken into consideration the evidence brought on record contrary to law. Similarly, wrong placing of burden of proof may also be a subject-matter of scrutiny by the appellate court. (Vide Balak Ram v. State of U.P.[1], Shambhoo Missir v. State of Bihar[2], Shailendra Pratap v. State of U.P.[3], Narendra Singh v. State of M.P [4], Budh Singh v. State of U.P[5], State of U.P. v. Ram Veer Singh[6], S. Rama Krishna v. S. Rami Reddy[7], Arulvelu v. State[8], Perla Somasekhara Reddy v. State of A.P.[9] and Ram Singh v. State of H.P.[10])*

"*13. In Sheo Swarup v. King Emperor[11] the Privy Council observed as under : (IA p. 404)*

" ... the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses.

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"15. In Chandrappa v. State of Karnataka[19] this Court reiterated the legal position as under : (SCC p. 432, para 42)

"(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 emphasise 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 is 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**."*

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"17. In State of Rajasthan v. Naresh [21] the Court again examined the earlier judgments of this Court and laid down that : (SCC p. 374, para 20)

*"20. ... an order of acquittal should not be lightly interfered with **even if the court believes that there is some evidence pointing out the finger towards the accused**."*

(emphasis supplied)

7. In *Babu* (supra) the Hon'ble Supreme Court also referred to an earlier judgment, to illustrate circumstances in which the Supreme Court would be justified in interfering with a judgment of acquittal by the High Court, which circumstances, we think, would applied equally when the High Court is assessing whether to interfere with a judgment of acquittal passed by the Trial Court. In paras 18, 19 and 20 of *Babu* (supra) the Hon'ble Supreme Court said this :

"18. In State of U.P. v. Banne[22] this Court gave certain illustrative circumstances in which the Court would be justified in interfering with a judgment of acquittal by the High Court. The circumstances include : (SCC p. 286, para 28)

"(i) The High Court's decision is based on totally erroneous view of law by ignoring the settled legal position;

(ii) The High Court's conclusions are contrary to evidence and documents on record;

(iii) The entire approach of the High Court in dealing with the evidence was patently illegal leading to grave miscarriage of justice;

(iv) The High Court's judgment is manifestly unjust and unreasonable based on erroneous law and facts on the record of the case;

(v) This Court must always give proper weight and consideration to the findings of the High Court;

(vi) This Court would be extremely reluctant in interfering with a case when both the Sessions Court and the High Court have recorded an order of acquittal."

A similar view has been reiterated by this Court in Dhanapal v. State[23].

"19. Thus, ***the law on the issue can be summarised to the effect that in exceptional cases where there are compelling circumstances, and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of acquittal****. The appellate court should bear in mind the presumption of innocence of the accused and further that the trial court's acquittal bolsters the presumption of his innocence. Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference.*

"20. The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. The finding may also be said to be perverse if it is "against the weight of evidence", or if the finding so outrageously defies logic as to suffer from the vice of irrationality. (Vide Rajinder Kumar Kindra v. Delhi Admn. [24], Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons[24], Triveni Rubber & Plastics v. CCE[26], Gaya Din v. Hanuman Prasad[27], Aruvelu[8] and Gamini Bala Koteswara Rao v. State of A.P. [8])"

(emphasis supplied)

8. Since the present case is one of circumstantial evidence, it would also be necessary to consider what the Hon'ble Supreme Court has said in *Babu* (supra) for cases based on circumstantial evidence. Para 23 of *Babu* (supra) reads as under :

> *"23. In Sharad Birdhichand Sarda v. State of Maharashtra[32] while dealing with circumstantial evidence, it has been held that the onus was on the prosecution to prove that the chain is complete and the infirmity or lacuna in prosecution cannot be cured by false defence or plea. The conditions precedent before conviction could be based on circumstantial evidence, must be fully established. They are : (SCC p. 185, para 153)*
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> *(i) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The* ***circumstances concerned "must" or "should" and not "may be" established****;*
>
> *(ii) the facts so established should be* ***consistent only*** *with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;*
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> *(iii) the circumstances should be of a conclusive nature and tendency;*
>
> *(iv) they should exclude every possible hypothesis except the one to be proved; and*
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> *(v) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.*
>
> *A similar view has been reiterated by this Court in State of U.P. v. Satish[33] and Pawan v. State of Uttaranchal[34]."*
>
> (emphasis supplied)

9. If there is any doubt that guilt must be established with certainty beyond the threshold of reasonable doubt, the following observation of the Hon'ble Supreme Court in ***Shivaji Sahabrao Bobade vs. State of Maharashtra***[2] may be re-read :

> *"19 ... Certainly, it is a primary principle that the accused* ***must be*** *and not merely* ***may be*** *guilty before a court can convict and the mental distance between "may be" and "must be" is long and divides vague conjectures from sure conclusions."*
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> (emphasis supplied)

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2 (1973) 2 SCC 793

10. Accordingly, while considering whether or not leave to appeal is to be granted under section 378(3) Cr.P.C. to impugn a judgment of acquittal, this court must assess whether, in light of the principles laid down in *Babu* (supra), which principles have also since been reiterated and relied upon by a 3-Judges Bench of the Hon'ble Supreme Court in its recent decision in ***Anwar Ali vs. State of Himachal Pradesh***[3], the case warrants grant of such leave; paying special attention to the fact that the present case is one of circumstantial evidence.

11. We find that the learned trial court has acquitted the respondent on the basis *firstly*, that all material witnesses in the matter had turned hostile; *secondly*, that forensic evidence did not unequivocally connect the country-made pistol, allegedly recovered at the instance of the accused, with the cartridge recovered from the crime-scene; *thirdly*, that there were material contradictions in the testimonies of the prosecution witnesses on various aspects of recovery of the country-made pistol at the instance of the accused; and *lastly*, that no public witness was joined in the investigation, although from the testimonies of prosecution witnesses, it was evident that several public witnesses were present at the crime-scene as also at the time of arrest of the accused; all of which did not inspire confidence.

12. Having closely examined the evidentiary basis and the reasoning on which the learned trial court has acquitted the respondent, we do not find any infirmity, muchless any perversity, in the conclusions and inferences drawn in the impugned judgment of acquittal. Since upon

[3] (2020) 10 SCC 166

examining the evidence on record, we are inclined to agree with the conclusions reached by the learned trial court in acquitting the respondent and there is nothing that would warrant reconsideration by us, we do not find any ground to grant of leave to appeal in the present case.

13. Accordingly, the petition seeking leave to appeal is dismissed.

14. Pending applications, if any, also stand disposed of.

SIDDHARTH MRIDUL, J

ANUP JAIRAM BHAMBHANI, J

FEBRUARY 18, 2022
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