

(2010) 10 DEL CK 0205

In the Delhi High Court

Case No : Criminal L.P. No. 205 of 2008 and Criminal M.A. No. 11205 of 2008

State of NCT of Delhi

APPELLANT

Vs

Chanderpal and Others

RESPONDENT

Date of Decision : 26-10-2010

Acts Referred:

Arms Act, 1959 — Section 27
Criminal Procedure Code, 1973 (CrPC) — Section 161, 313, 378(1), 482
Limitation Act, 1963 — Section 5
Penal Code, 1860 (IPC) — Section 307, 34, 398, 452, 460

Citation : (2010) 10 DEL CK 0205

Hon'ble Judges : S.L. Bhayana, J; Anil Kumar, J

Bench : Division Bench

Advocate : Ranjit Kapoor, ASC, for the Appellant; Ankur Sharma, for the Respondent

Final Decision : Dismissed

Judgement

Anil Kumar, J.

Crl. M.A. No. 11205/2008

1. This is an application u/s 482 of the Criminal Procedure Code, 1973 read with Section 5 of the Limitation Act, 1963 seeking condonation of delay in filing the criminal leave petition.

2. The applicant has contended that there is a delay of 55 days in filing petition for leave to appeal. Reasons for delay are detailed in the application. An additional affidavit dated 1st October, 2008 of Sh. Atul Katiyar, Deputy Commissioner of Police, Outer District, Delhi Police, has also been filed giving the details as to when the certified copy of the judgment was applied and when the comments were received and the persons who handled the file at various stages on various dates.

3. Neither any reply to the application has been filed nor any affidavit refuting

the depositions made in the affidavit dated 1st October, 2008 has been filed on behalf of the respondents.

4. In the circumstances, the pleas and contentions raised seeking condonation of delay in filing the petition for leave to appeal after 55 days of the expiry of the limitation period have remained unrebutted. The pleas disclosed in the application constitute sufficient cause in the facts and circumstances for condoning the delay in filing petition for leave to appeal.

5. Consequently, the application is allowed and 55 days delay in filing the petition for leave to appeal is condoned.

Crl. L.P. No. 205/2008

6. This is a petition u/s 378(1)(b) of the Code of Criminal Procedure, 1973 seeking leave to appeal against the order and judgment dated 23rd April, 2008 passed by the Sessions Court in Sessions Case No. 227/2006 arising out of FIR No. 258/2003 u/s 452/307/34 of IPC as well as u/s 27/54/59 of the Arms Act, 1959 acquitting the respondents giving them benefit of doubt and granting liberty to the petitioner to revive the case against accused Roopram, Khilona and Rajender who were declared as proclaimed offenders as and when those other accused persons are apprehended.

7. Brief case of the prosecution is that on the night intervening 30th /31st July, 2003 Naresh Kumar, complainant was sleeping along with his wife and son in his house at Village Akbarpur, Majra, Delhi. He along with his wife woke up on hearing some noise of breaking of lock and when he opened the door he found three persons in the courtyard. These three persons who were in the courtyard had "desi kattas" with them. Naresh Kumar is alleged to have picked up a "danda" to deal with the three persons and seeing Naresh Kumar picking up the "danda", they fired at him and three bullets hit him in the chest and stomach and he fell down. In the meantime, son of Naresh Kumar namely, Sh. Arun Kumar had also come after waking up and he also received pellet injuries.

8. On receiving pellet injuries Naresh Kumar became unconscious and his wife took Naresh Kumar and her son Arun Kumar to BJRM Hospital from where they were referred to LNJP Hospital. A case was registered u/s 452/307 of IPC on the statement of injured persons and the efforts were made to trace out the accused persons.

9. The version of the prosecution is that on 26th August, 2003, the present respondents were arrested under the Arms Act and different cases bearing FIR Nos. 510, 511 and 512 of 2003 were registered against them. On interrogation, the respondents who were arrested in cases under the Arms Act made a disclosure statement and also admitted their guilt in respect of the incident of 30th/31st July, 2003 where Naresh Kumar and his son were fired upon resulting into pellet injuries to both of them. They had disclosed about the involvement of three other persons also namely Roopram, Khilona and Rajender, however, these

three other persons have remained untraced. After preparing the necessary documents, challan was filed against the present respondents for the offences u/s 452/307/34 IPC read with offence u/s 27 of the Arms Act, 1959. The cases of the respondents were committed to the Sessions Court and they were charged u/s 460 of IPC and for the offences u/s 307/398 and 34 of IPC and a separate charge u/s 27 of Arms Act, 1959 was also framed against respondent No. 1 Chanderpal for using the country made pistol in causing injuries. The respondents pleaded not guilty. During the trial witnesses were examined by the prosecution and accused persons were also examined u/s 313 of the Criminal Procedure Code, 1973. The respondents, however, did not lead any evidence.

10. After hearing the parties and considering the deposition of witnesses, especially the eye witnesses, PW3 Naresh Kumar, PW4 Arun Kumar, the Sessions Court gave benefit of doubt to the respondents as Arun Kumar and Smt. Beermati w/o Naresh Kumar had not identified the accused and even the testimony of Naresh Kumar was not relied upon as there were improvements in the deposition of Naresh Kumar in his statement recorded u/s 161 of the Criminal Procedure Code, 1973. The statement of Naresh Kumar was not recorded at any earlier point of time by the investigating officer before 10th September, 2003 whereas the incident had allegedly occurred on the night of 30th/31st July, 2003. The trial Court also took into consideration that accused/respondents were not taken in muffled faces when they were taken to the place of incident.

11. This is no more res integra that unless the conclusions of the Court drawn on the evidence on record are unreasonable, perverse or unsustainable, the High Court should not interfere with the order of acquittal, although the power of the High Court to reassess the evidence and reach its own conclusions are as extensive as in an appeal against the order of conviction, yet as a rule of prudence, the High Court should always give proper consideration to matters such as (i) the views of the Trial Judge as to the credibility of witnesses; (ii) the presumption of innocence in favor of the accused, a presumption certainly not weakened by the fact that he has been acquitted at the trial; (iii) the right of the accused to the benefit of any doubt and (iv) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had advantage of seeing the witnesses. In the entirety of facts and circumstances this Court does not find that the conclusions of the Trial Court are unreasonable, perverse or unsustainable. In reversing the finding of acquittal, the High Court has to keep in view the fact that the presumption of innocence is still available in favour of the accused which is rather fortified and strengthened by the order of acquittal passed in his favour. Even if on fresh scrutiny and reappraisal of the evidence and perusal of the material on record, if the High Court is of the opinion that another view is possible or which can be reasonably taken, then the view which favours the accused should be adopted and the view taken by the Trial Court which had an advantage of looking at the demeanour of witnesses and observing their conduct in the Court is not to be substituted by another view which may be

reasonably possible in the opinion of the High Court. Reliance for this can be placed on Prem Kanwar Vs. State of Rajasthan, ; 2008 (3) JCC 1806, Syed Peda Aowlia v. the Public Prosecutor, High Court of A.P., Hyderabad; Bhagwan Singh and Ors. v. State of Madhya Pradesh 2002 (2) Sup 567; Shivaji Sahabrao Bobade and Another Vs. State of Maharashtra, ; Ramesh Babu Lal Doshi v. State of Gujarat (1996) 4 Sup 167; Jaswant Singh v. State of Haryana 2000 (1) JCC (SC) 140. The Courts have held that 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 the conviction of an innocent. The High Court has the power to reconsider the whole issue, reappraise the evidence and come to its own conclusions and findings in place of the findings recorded by the Trial Court, if the findings are against the evidence or record or unsustainable or perverse.

12. This Court has heard the learned Additional Standing Counsel for the State, Sh. Ranjit Kapoor in detail and has perused the testimonies of the witnesses and the relevant record and has also heard the counsel for the respondent Nos. 1 to 3. Learned Additional Standing Counsel has not been able to raise any cogent ground as to why the testimony of Naresh Kumar be believed in the facts and circumstances when there are major improvements made by him in his statement in comparison to his statement recorded u/s 161 of the Criminal Procedure Code, 1973. The learned Counsel is also unable to give any cogent reason for preparing the pointing out memos and disclosure statement of the present case referring it as of FIR No. 258/2003 in place of FIR No. 308/2003. The plea that this was on account of inadvertence cannot be accepted. This does not appear to be by inadvertence as constable Rajender Singh and constable Jogender Singh are alleged to be two witnesses to the preparation of disclosure statement and the pointing out memos by ASI Jai Kumar at the instance of the respondents. ASI Jai Kumar as PW11 had stated in the cross examination recorded on 26th February, 2008 as under:

...It is correct that when I had taken the police custody remand of the accused persons then they were not kept in muffled faces. We had not gone inside the house of the complainant Naresh Kumar.... The said house was towards the end of the said gali. About one house prior to the house of complainant the accused persons had pointed out the place of incident to me. I did not go the house of accused persons as some law and order could have arisen if the accused persons could have been seen and identified by some other persons. There were 2/3 other police constables were with me. We all were in uniform. Some public persons had gathered over there. I did not join any public person in the proceedings. The house of Naresh Kumar was two storeyed house. I had not mentioned anything in the memos that the accused persons had pointed out the place of occurrence from at a distance of about one or two houses away

13. This becomes more profound as these proceedings do not find any mention in the statements recorded u/s 161 of the Criminal Procedure Code, 1973. Another surprising thing which has been noticed by the Trial Court is that ASI Jai Kumar had prepared the pointing out memos without going to the place of incident. In the circumstances, the findings and the observations of the Trial Court in this regard cannot be held to be unsustainable or perverse or contrary to record so as to require further consideration and to grant leave to appeal for this purpose.

14. The respondents can be convicted in case there is sufficient evidence about their identification. The learned Additional Standing Counsel for the State has not disputed that out of the three eye witnesses namely Naresh Kumar PW3, Arun Kumar PW4 and Smt. Beermati PW-5, PW4 Sh. Arun Kumar, son of Naresh Kumar and PW5 Smt. Beermati, widow of Naresh Kumar, have not identified the accused persons and have clearly stated that they were unable to identify the accused persons who had intruded in their house and had robbed them. PW4 Arun Kumar rather stated that he cannot identify accused persons, if shown to him, as he had reached the spot and saw them for a very short period

15. This leaves with the deposition of Naresh Kumar, PW3 only. Though the evidence of Test Identification Parade only has corroborative value as substantive piece of evidence is the identification in the Court, however, where suspect is already shown to the witnesses before the Test Identification Parade, his identification in the Court becomes valueless and the accused cannot be convicted on the basis of such identification. The Supreme Court in 1998 SCC 1276, Shaikh Umar Ahmed Shaikh and Anr. v. State of Maharashtra on account of strong probability in that case that the suspects were shown to the witnesses had held that their identification in the Court by the witnesses was meaningless. The Supreme Court had further held that the statement of witnesses in the Court identifying the accused in the Court lost all its value and could not be made the basis for recording the conviction against the accused and had set aside the convictions which were passed on such unreliable evidence. In this case on strong probability that the suspect were shown, their subsequent identification was held to be valueless. In the present case it was categorically admitted by PW3 Naresh Kumar that the police had shown the accused to him on 10.9.2003 and he had identified them. The Supreme Court in another case (1998) SCC (Cri.) 201, Ganpat Singh and Anr. v. State of Rajasthan had also held that where the accused were shown to the sole witnesses in the police station who later identified them in the Test Identification Parade, the evidence of such persons in the Court after considerable time was held to be not reliable and could not be the basis for conviction. From the evidence of ASI Jai Kumar, a relevant part of which is reproduced above, it is apparent the accused persons were not in muffled faces when he had taken them to the place of incident and when they were taken for police remand. PW3 has also deposed that the police had shown them to him. In the circumstances, if the accused refused to participate in the Test Identification Parade, no adverse inference can be drawn against the accused

and in the circumstances only on the testimony of PW3 Naresh Kumar in the Court identifying the accused, they cannot be convicted. The findings of the Trial Court in the facts and circumstances cannot be held to be unsustainable or perverse nor the learned Counsel for the State has made out any such ground on which the leave to appeal should be granted to the petitioner.

16. The learned Counsel for the State is also unable to explain satisfactorily the fact that on 10th September, 2003 the statement of Naresh Kumar was recorded u/s 161 of the Criminal Procedure Code, 1973 and not just after the incident on 30th/31st July, 2003. Though Sh. Naresh Kumar had received the pellet injuries and was admitted to the hospital, however, it is not the case of the petitioner that he was not in a fit state upto 10th September, 2003 to give the statement.

17. The Trial Court has also doubted the version of the petitioner that the witnesses visited the police station on their own to enquire about their case and found the accused persons sitting over there and identified them to be the alleged robbers who had robbed and had intruded in their house. From the perusal of the evidence and other facts and circumstances the observations and findings of the trial Court cannot be construed to be unsustainable or perverse and on this ground the order of acquittal cannot be faulted nor the petitioner is entitled for leave to appeal in the facts and circumstances.

18. The statement of Naresh Kumar before the Court had improvement, is apparent from his statement u/s 161 of the Criminal Procedure Code, 1973 where he had deposed that he had grappled with the accused and other persons. This statement was also reiterated by Smt. Beermati and her son, Arun Kumar, u/s 161 of the Criminal Procedure Code, 1973. However, before the Trial Court, Naresh Kumar did not depose about grappling with one of the intruders and catching hold of him. Rather the deposition of Sh. Naresh Kumar is that on being injured by the intruders his wife, Smt. Beermati fell down and became unconscious and he also became unconscious on receiving pallet injuries. Taking all these facts cumulatively makes the deposition of Sh. Naresh Kumar about identifying all respondents as the persons who had intruded in his house and robbed him, unreliable and only on the basis of the same, the accused cannot be convicted.

19. In the circumstances this Court also does not find any illegality, irregularity, unsustainability or perversity in not relying on the testimony of Sh. Naresh Kumar regarding identification of the respondents. Though this is not disputed and cannot be disputed that the persons had intruded and had robbed Sh. Naresh Kumar and his family members, however, this has not been established beyond reasonable doubt that the said accused persons were the three respondents as has been reasoned out hereinabove.

20. Regarding the recovery also the evidence produced by the prosecution is not cogent and reliable. PW4, Arun Kumar had deposed when shown the cartridge in the Court that the shown cartridge was not the cartridge which was recovered as

the recovered cartridge was somewhat bigger. During recording of deposition of PW8, Dharampal, the Trial Court had observed that the cartridge produced in the Court was the front bullet head containing the lead at the top of it and is not an empty cartridge and it was not the fired cartridge. In Ex PW7/A which was the figure of the cartridge drawn, head was shown to contain lead. Regarding other article which allegedly contained the blood stains, it was observed by the Trial Court that all the articles had some black mark upon them and without chemical examination it could not be stated that they had blood stains. In the cross examination of PW8 on 20th November, 2007 it was admitted by the said witness that no recovery of any incriminating article was effected by the said witness at the instance of the accused persons.

21. No other ground has been raised by the learned Additional Standing Counsel for the State entitling the petitioner for leave to appeal against the order dated 23rd April, 2008 acquitting the respondents of the charges made against them in the case as detailed herein above.

22. From the perusal of the relevant testimonies and the documents, another view contrary to the view taken by the Trial Court is not possible and cannot be reasonably taken. However, even if another view is possible, this Court is not to substitute its view with the view of the Trial Court so long as the view taken by the Trial Court is reasonable and plausible. In the circumstances, the order of the Trial Court cannot be termed to be unsustainable or perverse and there are no grounds made out by the petitioner to grant leave to petitioner to appeal against the order dated 23rd April, 2008 acquitting the respondents of all the charges against them. The petition is therefore without any merit and it is, therefore, dismissed.