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

+ **CRL.L.P. 636/2015**

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*Judgment dated 21.01.2016*

STATE ( GOVT OF NCT OF DELHI)

..... Petitioner

Through : Ms. Aashaa Tiwari, APP for State with SI  
Jagbir Singh, PS – New Usman Pur.

versus

HARI KANT SHARMA & ANR

..... Respondent

Through : Mr. Naman Raj Thakur and Mr. Anuj  
Kumar Ranjan, Advocates.

**CORAM:**

**HON'BLE MR. JUSTICE G.S.SISTANI**

**HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL**

**G.S.SISTANI, J (ORAL)**

1. The present leave to appeal has been filed by the State under Section 378(1) of the Code of Criminal Procedure being aggrieved by the order of acquittal dated 25<sup>th</sup> April, 2015.
2. Counsel for the State submits that the trial court has ignored the testimony of the injured eye witness PW-1 being the wife of the deceased which unerringly points towards guilt of the respondents. Counsel submits that the trial court has failed to take into account that the commotion started at about 4.25 pm and lasted about half an hour and only thereafter PW-1 called the police at number 100 which would explain the delay in informing the police by PW-1. Counsel further contends that the learned trial court has failed to take into account the testimony of PW-6, ambulance driver who took the deceased and the injured eye witness PW-1 to the GTB Hospital from the spot of the incident which would clearly establish the presence of PW-1 at the spot of the incident. Counsel

contends that there are glaring errors of facts and law which has led to the conclusion of the acquittal of the respondents.

3. Counsel for the respondents submits that the trial Court has correctly applied the law to the facts of the present case and threadbare discussed the testimony of the witnesses. Counsel submits that suspicion, however strong, cannot take the place of proof.
4. We have heard learned counsel for the parties, examined the trial court record and considered their rival submissions. The case of the prosecution as noticed by the trial court is as under:-
5. On 28.3.2009 at about 4.00 p.m., Smt.Poonam received a telephone call on her mobile no.9891878043 and the caller stated that “*main Hari Kant bol rha hu. Yadi apne pati ki khairiyat chahti hai to gali no.6, Jai Prakash Nagar main 2 lakh rupay le kar aa jao*”. On receiving this call, PW1 Poonam went to Gali no.6, Jai Prakash Nagar and saw that three persons had caught hold of her husband. Accused Hari Kant was giving fist blows to her husband Bhure. Accused Lalit @ Kallu had caught hold of the legs of husband of PW1. Accused Hari Kant was also having a katta in his hand and was saying *Äaj mere paisa wapas de do nahi to jaan se bhure ko khatam kar dunga.*” Thereafter, Hari Kant fired shots from the katta on husband of PW1. When PW1 tried to save her husband, she also received a gun shot injury on her right hand. Husband of PW1 fell on the ground and accused Hari Kant told his associates to put the cartridges in pocket of husband of PW1. At about 04.25 pm, PW 13 W/Ct.Preeti received an information through phone number 9811952061 that at Gali no.6, Hotel Wali Gali, Chhote Puste Ke Pass, Jai Prakash Nagar, New Usman Pur *yahan par goliyan chal rahi hai, do ladko ko lagi hai*’. PW13 recorded this information in PCR from Ex.PW13/A. On the same day, at about 05.10 pm, PW-14 recieved information to the effect that at the 5<sup>th</sup>

Pushta, Gamri Village, Usmanpur “*mujhe aur mere husband ko goli lagi hai*” and he recorded this information vide Ex.PW 14/A. On receiving this information from CATS Control Room, PW6 along with his ambulance reached at the spot where he found one male and one female and transported them to GTB Hospital. PW9 Ct.Naresh Kumar, on receiving this information reached at the spot and saw lot of blood lying at the spot. He also saw three empty cartridge cases and two bullet leads lying at the spot.

6. PW-1 Smt.Poonam wife of the deceased claims to be the eye witness. She has testified that on 28<sup>th</sup> March, 2009 at about 4 pm when she was present at her house, a telephone call was received on her mobile no.9891878043. The caller told her that “*main Hari Kant bol rha hu. Yadi apne pati ki khairiyat chahti hai to gali no.6, Jai Prakash Nagar main 2 lakh rupay le kar aa jao*”. After receiving the call, she immediately went to Gali no.6, Jai Prakash Nagar and saw that three persons had caught hold of her husband and respondent Hari Kant was giving fist blows to her husband. Respondent Lalit @ Kallu had caught hold of the legs of her husband. Respondent Hari Kant was also having a katta in his hand and was saying “*Äaj mere paisa wapas de do nahi to jaan se bhure ko khatam kar dunga.*” Thereafter, respondent Hari Kant fired shots from the katta on her husband. When she tried to save her husband, she also received a gun shot injury in her right hand. Her husband fell on the ground. Thereafter, respondent Hari Kant told the co-accused to put the cartridges in the pocket of her husband and ran away from there. Someone made a call on number 100. PCR reached the spot and removed her and her husband to GTB Hospital in the PCR van. In the hospital, her husband was declared brought dead and she was discharged from the hospital at about 6.30 pm. Police had met her in the hospital. She was

brought to the spot by the police. She had identified the spot of the incident. An extract of her deposition made to the court is as under:-

*“... When I reached the spot after receiving the telephone call of Hari Kant, I saw that my husband was caught hold by three persons and while accused Hari Kant was giving leg blows to my husband. One of them was saying Desi isse kas ke pakad le and that person replied Raghav maine isse kas ke pakad liya hai. My husband was trying to save himself from the clutches of the accused persons. When my husband was trying to release himself from them on this Raghav and Desi caught hold the hands of my husband and Lalit @ Kallu present in the court today caught hold the legs of my husband and then Hari Kant fired katta shots on my husband.*

*On 21.04.09, I was called in Tihar Jail to identify the accused persons. Since I was in shock due to death of my husband and was nervous as I had gone first time in Tihar and face such circumstances first time, I could not identify Raghav and Desi. However, I had identified accused Lalit @ Kallu there. Since first time I was nervous and tears developed in my eyes so first time I could not identify Raghav and Desi and lastly I had identified Lalit @ Kallu..... ”*

7. As per testimony of PW-1 after receiving phone call at about 4 pm asking her to produce Rs.2 lakhs, it took her 10 minutes to reach the spot where three persons had caught hold of her husband and Hari Kant was giving leg blows to her husband. The other persons had also caught hold of her husband. Further, according to the testimony of PW-1, the entire incident lasted for about 30 minutes. The testimony of PW-1 has been disbelieved by the trial court. Further, as per her testimony, she was removed to GTB Hospital in the PCR van and she was discharged from the hospital at 6.30 pm. In her testimony, she has deposed that on 21<sup>st</sup> April, 2009, she was called in Tihar Jail to identify the accused persons. As she was in shock

due to death of her husband and was nervous, she could not identify Raghav and Desi in the TIP. However, she had identified accused Lalit @ Kallu and that she could not identify Raghav and Desi as tears had developed in her eyes.

8. PW-1 despite being injured was conscious and oriented as per MLC, in which case she should have immediately called the police but the first PCR call was made by someone at 4.25 pm. The second PCR call was made by her from her mobile at 5.10 pm i.e., after a gap of 45 minutes. This is the first aspect which casts a doubt on the testimony of this witness and also creates a doubt about her presence at the place of the incident. The delay of 45 minutes has not been explained by PW-1. Secondly, according to PW-1 she accompanied her husband in the CATS ambulance to the hospital.
9. While exercising power under section 165 of the Evidence Act, with a view to seek clarification, the trial court called the Incharge of the PCR van Baker 43 who had got PW-1 admitted in the hospital. The incharge of the PCR Baker 43 ASI Bhagwan Sahai was summoned by the court as CW-1. The testimony of this witness would leave no doubt that PW-1 Poonam was not present at the place of the incident. CW-1 has deposed that when he reached the spot, two PCRs were already present. CATS ambulance had already taken the deceased to the hospital. In case, PW-1 was present at the place of the incident, she would have accompanied her husband to the hospital and not reach the hospital after a gap of one hour and 15 minutes.
10. We may add that PW-6 Yudhishtar who was Assistant Ambulance Officer in Ambulance CATS Alpha 16 testified that on 28.03.2009 at about 4.20 pm, he had received an information from the CATS control room that one person had been shot at Gali no.6, Kartar Nagar, Hotel Wali Gali, Jai

Prakash Nagar. On reaching the spot, he found one male person and one female in an injured condition. He transported both of them to GTB Hospital. The male person was declared brought dead. The MLC of both the injured were prepared in GTB Hospital. There is also a doubt with regard to the testimony of PW-6 Yudhishtar as in the MLC of the deceased Bhure it is stated that he was brought in CATS ambulance and the time of arrival was about 5.48 pm. On the contrary, MLC of the PW1 Poonam shows that she was brought to the hospital by Head Constable Bhagwan Sahai and the time mentioned was 7 pm. MLC of PW-1 read with the testimony of CW-1 can only lead to the conclusion that PW-1 Poonam had not accompanied her husband to the hospital in the CATS ambulance. The documentary evidence in the form of her MLC would show that she reached the hospital almost about one hour and fifteen minutes later than her husband.

11. We also find the evidence of PW-1 unreliable as according to her, commotion and beating of her husband lasted for more than 30 minutes. We found it unusual that in a crowded gali, not a single person intervened in the fight nor any public person has been associated by the prosecution.
12. It is settled law that an appellate court should not interfere with the judgment of acquittal passed by the trial court, who is at an advantage to see the witnesses unless there are compelling reasons to believe that the judgment of the acquittal suffers from grave miscarriage of justice.
13. In the case of ***Chelloor Mankkal Narayan Ittiravi Nambudiri v. State of Travancore-cochin***, reported at [1954] CrIj 102, wherein it was held as under:

*“It cannot be disputed that the High Court even though it was hearing an appeal from an order of acquittal, had full powers to review the entire evidence on the record and reach its own conclusion that the acquittal order*

*should be set aside. But as the Privy Council pointed out in Sheosarup v. Emperor, AIR 1934 P.C. 227 in exercising these powers the High Court should and will always give proper weight and consideration to such matters as: (1) the views of the trial court as to the credibility of witnesses; (2) presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he had been acquitted at the 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.”*

14. It has also been held in *Shyamal Saha & Anr. v. State of West Bengal*, 2014(2) Scale 690 as under:

*“18. Aggrieved by their conviction and sentence, Shyamal and Prosanta have preferred this appeal. The primary submission made on their behalf was to the effect that the High Court ought not to have interfered in the acquittal by the Trial Court particularly, in a case of circumstantial evidence. It was also submitted that the evidence on record points to the fact that they were made scapegoats by the prosecution. Of course, this was opposed by learned counsel for the State.*

*19. The crucial issue for consideration, therefore, relates to interference by the High Court in an acquittal given by the Trial Court. Recently, in Joginder Singh v. State of Haryana<sup>3</sup> it was held, after referring to Sheo Swarup v. King Emperor<sup>4</sup> that “Before we proceed to consider the rivalised contentions raised at the bar and independently scrutinize the relevant evidence brought on record, it is fruitful to recapitulate the law enunciated by this Court pertaining to an appeal against acquittal. In Sheo Swarup (supra), it has been stated that the High Court can exercise the power or jurisdiction to reverse an order of acquittal in cases where it finds that the lower court has "obstinately blundered" or has "through incompetence, stupidity or perversity" reached such "distorted conclusions as to produce a positive miscarriage of justice" or has in some other way so conducted or misconducted himself as to*

*produce a glaring miscarriage of justice or has been tricked by the defence so as to produce a similar result.” Unfortunately, the paraphrasing of the concerned passage from Sheo Swarup gave us an impression that the High Court can reverse an acquittal by a lower court only in limited circumstances. Therefore, we referred to the passage in Sheo Swarup and find that what was stated was as follows:*

*“There is in their opinion no foundation for the view, apparently supported by the judgments of some Courts in India, that the High Court has no power or jurisdiction to reverse an order of acquittal on a matter of fact, except in cases in which the lower Court has "obstinately blundered," or has "through incompetence, stupidity or perversity" reached such "distorted conclusions as to produce a positive miscarriage of justice," or has in some other way so conducted itself as to produce a glaring miscarriage of justice, or has been tricked by the defence so as to produce a similar result.” The legal position was reiterated in Nur Mohammad v. Emperor<sup>5</sup> after citing Sheo Swarup and it was held:*

*“Their Lordships do not think it necessary to read it all again, but would like to observe that there really is only one principle, in the strict use of the word, laid down there; that is, that the High Court has full power to review at large all the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed.” We are mentioning this only to dispel the possibility of anyone else getting an impression similar to the one that we got, though nothing much turns on this as far as this case is concerned.*

*20. The entire case law on the subject was discussed in Chandrappa v. State of Karnataka [6] beginning with perhaps the first case decided by this Court on the subject being Prandas v. State. 7 It was held in Chandrappa as follows:*

*“(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."*

*21. The principles laid down in Chandrappa were generally reiterated but mainly reformulated in Ganpat v. State of Haryana[8] though without reference to Chandrappa and by referring to decisions not considered therein. The reformulation of the principles in Ganpat is as follows:*

*“(i) There is no limitation on the part of the appellate court to review the evidence upon which the order of acquittal is founded and to come to its own conclusion.*

*(ii) The appellate court can also review the trial court's conclusion with respect to both facts and law.*

*(iii) While dealing with the appeal preferred by the State, it is the duty of the appellate court to marshal the entire evidence on record and by giving cogent and adequate reasons may set aside the judgment of acquittal.*

*(iv) An order of acquittal is to be interfered with only when there are "compelling and substantial reasons" for doing so. If the order is "clearly unreasonable", it is a compelling reason for interference.*

*(v) When the trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of ballistic experts, etc. the appellate court is competent to reverse the decision of the trial court depending on the materials placed. (Vide Madan Lal v. State of J&K [9] , Ghurey Lal v. State of U.P.[10] , Chandra Mohan Tiwari v. State of M.P.[11] and Jaswant Singh v. State of Haryana[12.]”*

*22. Undoubtedly, we are suffering from an overdose of precedents but be that as it may, from the principles laid down, it appears at first blush that the High Court is entitled to virtually step into the shoes of the Trial Court hearing submissions of learned counsel and then decide the case as a court of first instance. Perhaps this is not what is intended, notwithstanding the broad language used in Chandrappa and Ganpat. Otherwise, the decision of the Trial Court would be a meaningless exercise and this Court would become a first appellate court from a decision of the High Court in a case of acquittal by the Trial Court. Realistically speaking, although the principles stated are broad, it is the obligation of the High Court to consider and identify the error in the decision of the Trial Court and then decide whether the error is gross enough to warrant interference. The High Court is not expected to merely substitute its opinion for that of the Trial Court only because the first two principles in Chandrappa and Ganpat permit it to do so*

*and because it has the power to do so – it has to correct an error of law or fact significant enough to necessitate overturning the verdict of the Trial Court. This is where the High Court has to exercise its discretion very cautiously, keeping in mind the acquittal of the accused and the rights of the victim (who may or may not be before it). This is also where the fifth principle laid down in Chandrappa and Ganpat comes into operation.”*

15. We find no infirmity in the judgment passed by the learned trial court. Accordingly, no grounds are made out to interfere in the impugned judgment. Consequently, the criminal leave to appeal petition is dismissed.

**G.S.SISTANI, J**

**SANGITA DHINGRA SEHGAL, J**

**JANUARY 21, 2016**

ssb/msr