

(2016) 03 AHC CK 0079

In the Allahabad High Court

Case No : Criminal Appeal No. 1540 of 2014 and Criminal Appeal Defective No. 1003 of 2015

Badri Prasad Upadhyay and Others

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 18-03-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 156(3), Section 313, Section 374, Section 386, Section 437-A
Penal Code, 1860 (IPC) — Section 120-B, Section 201, Section 302, Section 34, Section 364

Citation : (2016) 03 AHC CK 0079

Hon'ble Judges : Surendra Vikram Singh Rathore and Pratyush Kumar, JJ.

Bench : Division Bench

Advocate : Suresh Kumar Upadhyay, for the Appellant;

Final Decision : Allowed

Judgement

Pratyush Kumar, J.—1. Both the appeals arise out of the same judgment and orders dated 31.10.2014 passed in Sessions Trial No. 485 of 2010 [State v. Suryabhan Jha and two others], they have been heard together and decided by a common order.

2. In the aforesaid appeals, appellants, namely, Badri Prasad Upadhyay, Hausila Prasad Upadhyay and Suryabhan Jha, have been convicted and sentenced as under:

3. In these appeals facts of the prosecution case may be summarized as under:

"That on 03.12.2009 Ayodhya Prasad Upadhyay, resident of Village Shivpur, P.S. Chanda, District Sultanpur gave a written report at the police station stating therein that on 02.12.2009, his son Ganesh Upadhyay @ Bholu had gone to the house of Ramjeet Upadhyay to participate in the Bramhabhoj but he did not come back. He was searched for at nearby places but could not be found.

Thereafter he gave applications to police authorities but no step was taken, then on 05.01.2009 he moved an application under Section 156(3) of the Code of Criminal Procedure before the concerned magistrate mentioning therein that his son Ganesh Upadhyay @ Bholu, student of class-6th aged about 12 years on 02.12.2009 was called by Suryabhan Jha through Rohit but he did not go. After sometime in the evening his son had gone to participate in the Bramhabhoj, there Suryabhan Jha at 6.00 PM had sent him to the shop of Sanjay Upadhyay to get his mobile recharged. After short span of time i.e. at about 7.00 PM he had gone to the house of Ramjeet Upadhyay for his son and asked Suryabhan about him but he told him that after giving him recharged mobile he had gone somewhere. On 03.12.2009 he was told by Shambhu that (yesterday) at 6.30 PM he had seen Suryabhan Jha with Ganesh Upadhyay @ Bholu going towards Sarpatahi. Police did not search for his son, on mobile he was several times threatened and asked to pay Rs. 2,00,000/-. He was afraid of that his son had been kidnapped and murdered by Suryabhan Jha."

4. On the basis of this application on 24.02.2010 Case Crime No. C-86 of 2010 under Section 364 IPC was registered at police station Chanda. Chick FIR was scribed, Investigation was entrusted to Sub Inspector Satendra Kumar Pandey, who started the investigation, inspected the spot. After recovery of skeleton of kidnapped boy Ganesh Upadhyay @ Bholu under Sections 302, 201 and 120-B IPC were added and investigation was taken over by Sub Inspector Fazrullah Khan, inquest proceedings were held by Sub Inspector Sant Kumar. During investigation names of Badri Prasad and Hausila Prasad also came into light showing the complicity in the murder of the deceased by way of narbali, charge-sheet was submitted against all the accused persons.

5. The accused persons stood trial before the Court of Session, where they were charged under Sections 364, 302/120-B and 201/34 IPC. They denied the charges and claimed to be tried.

6. In order to prove the charges on behalf of the prosecution documentary evidence was filed and nine witnesses were examined. Thereafter statements of the accused persons were recorded under Section 313 Cr.P.C.. They denied the facts stated by the prosecution witnesses and claimed false implication on account of enmity. In the defence no evidence was given.

7. After hearing the arguments, the learned trial Judge found the prosecution evidence trustworthy and held the appellants guilty of kidnapping of Ganesh Upadhyay @ Bholu, in order to observe human sacrifice and murdered him and to cause disappearance of evidence concealed his body in the earth. The appellants were convicted and sentenced as above.

8. Feeling aggrieved both the appellants have preferred separate appeals.

9. Both the appeals have been listed for orders but with the consent of parties" counsel we have proceeded to hear the appeals finally.

10. Heard Sri Suresh Kumar Upadhyay, learned for the appellants, Sri Chandra Shekhar Pandey, learned Additional Government Advocate for the State-Respondent and perused the record.

11. Before we propose to deal with the arguments submitted by the respective parties, we would like to recollect the manner in which appeal against conviction is required to be considered by this Court and scope of jurisdiction conferred on the Court by Sections 374 and 386 Cr.P.C. Further we would like to refresh the observation made by the Apex Court in the case of *Ishvarbhai Fuljibhai Patni v. State of Gujarat* [, 1995 Supreme Court Cases (Cri) 222]. Para-4 of the judgment reads as under:

"4. Since, the High Court was dealing with the appeal in exercise of its appellate jurisdiction, against conviction and sentence of life imprisonment, it was required to consider and discuss the evidence and deal with the arguments raised at the bar. Let alone, any discussion of the evidence, we do not find that the High Court even cared to notice the evidence led in the case. None of the arguments of the learned counsel for the appellant have been noticed, much less considered and discussed. The judgment is cryptic and we are at loss to understand as to what prevailed with the High Court to uphold the conviction and sentence of the appellant. On a plain requirement of justice, the High Court while dealing with a first appeal against conviction and sentence is expected to, howsoever briefly depending upon the facts of the case, consider and discuss the evidence and deal with the submissions raised at the bar. If it fails to do so, it apparently fails in the discharge of one of its essential jurisdiction under its appellate powers. In view of the infirmities pointed out by us, the judgment under appeal cannot be sustained."

12. In the case of *Lal Mandi, Appellant v. State of West Bengal, Respondent* [, 1995 CRI.L.J. 2659 (Supreme Court), 2659], the Apex Court in para-5 of the report has given the caution to the High Court reminding its duty in the matter of hearing of appeal against conviction. It would be gainful to reproduce the observation made in para-5 of the report, extracted below:

"5. To say the least, the approach of the High Court is totally fallacious. In an appeal against conviction, the Appellate Court has the duty to itself appreciate the evidence on the record and if two views are possible on the appraisal of the evidence, the benefit of reasonable doubt has to be given to an accused. It is not correct to suggest that the "Appellate Court cannot legally interfere with" the order of conviction where the trial court has found the evidence as reliable and that it cannot substitute the findings of the Sessions Judge by its own, if it arrives at a different conclusion on reassessment of the evidence. The observation made in *Tota Singh's* case, which was an appeal against acquittal, have been misunderstood and mechanically applied. Though, the powers of an appellate court, while dealing with an appeal against acquittal and an appeal against conviction are equally wide but the considerations which weigh with it while dealing with an appeal against an order of acquittal and in an appeal

against conviction are distinct and separate. The presumption of innocence of accused which gets strengthened on his acquittal is not available on his conviction. An appellate court may give every reasonable weight to the conclusions arrived at by the trial court but it must be remembered that an appellate court is duty bound, in the same way as the trial court, to test the evidence extrinsically as well as intrinsically and to consider as thoroughly as the trial court, all the circumstances available on the record so as to arrive at an independent finding regarding guilt or innocence of the convict. An Appellate Court fails in the discharge of one of its essential duties, if it fails to itself appreciate the evidence on the record and arrive at an independent finding based on the appraisal of such evidence."

13. Very briefly on behalf of the appellants, it has been argued that the impugned judgment is against the evidence available on record. The appellants have been convicted on the basis of conjectures and surmises. No reliable evidence could be produced by the prosecution against them. The impugned judgment deserves to be set aside.

14. On behalf of the State-respondents, these arguments have been repelled and it has been argued that this case is based on circumstantial evidence, all links in the chain of circumstantial evidence have been proved by the prosecution successfully.

15. Dr. Ramesh Chandra P.W. 6 is the doctor, who on 17.08.2010 at 4.15 PM made medical examination of skeleton alleged to be of Ganesh Upadhyay @ Bholu. He had noted 12 pieces of bones stained with mud. During cross-examination, he has admitted that he could not say whether the person to whom skeleton belonged sustained any injury or not. According to him, the skeleton was in unidentified state and he could not say whether the person to whom it belonged was murdered or not.

16. Thus, evidence of Dr. Ramesh Chandra P.W. 6 is not determinative or indicative of culpable homicide. The bones alongwith serum of the first informant and his wife were sent for scientific examination to State Forensic Science Laboratory where the bones were found to be stained with human blood and they were found to be of human origin but in the DNA test, DNA of the bones did not match with the samples of serum belonging to the first informant and his wife, the father and mother of the kidnapped boy. In this way, we notice that the skeleton did not belong to Ganesh Upadhyay @ Bholu son of the first informant, therefore, charges under Sections 302/120-B, 201/34 IPC stand not proved.

17. Now remains charge of kidnapping the boy of the first informant. On this point prosecution has examined Ayodhya Prasad P.W. 1 whose testimony is based on hearsay, therefore, is of no consequence.

18. Smt. Anju Devi P.W. 2 is the mother of the kidnapped boy, who deposed that Rohit came to her house on 02.12.2009 and told her that Suryabhan Jha was calling Ganesh Upadhyay @ Bholu but he did not go there. In the evening he had

gone to attend the Bramhabhoj, rest of her evidence is based on hearsay and her evidence only proves the disappearance of the boy and nothing else.

19. Devi Prasad Upadhyay P.W. 3 is the younger brother of Ganesh Upadhyay @ Bholu. He had accompanied the kidnapped boy to the house of Ramjeet. He had seen Suryabhan Jha talking with boy in the field. Since the skeleton did not belong to Ganesh Upadhyay @ Bholu, his evidence cannot be treated to be evidence of last seen. During cross-examination he admits that after taking food at the house of Ramjeet, he came back to his house and went to sleep. In view of this, we do not think he had opportunity to see his brother in the company of Suryabhan Jha.

20. Kamlapati Upadhyay P.W. 4 is the grand-father of the kidnapped boy. He is witness of the fact that all the appellants on 02.12.2009 were conversing about making human sacrifice. His evidence is only indicative but in view of DNA report it proves nothing.

21. Sanjay Upadhyay C.W. 1 is the shopkeeper, at whose shop Ganesh Upadhyay @ Bholu had gone to get the mobile of Suryabhan Jha recharged. His evidence in itself does not prove anything because till that Suryabhan Jha admits that he had sent the boy for that particular work.

22. Falrullah Khan P.W. 7 is the second Investigating Officer. Sub Inspector Satyendra Kumar Pandey P.W. 8 is the Ist Investigating Officer. Sub Inspector Sant Kumar P.W. 9, conducted the inquest proceedings of the skeleton, their evidence has lost its evidentiary value because of DNA report. Constable Ashok Kumar Singh P.W. 5, is merely formal witness. He has proved chick FIR and copy of the report of the general diary wherein case crime number was registered.

23. When the arguments on behalf of the appellants are considered in the light of the discussions made above, we find much substance in them. The learned trial Judge has picked up isolated sentences from the evidence of the prosecution witnesses and on their basis has recorded a finding that the appellants kidnapped Ganesh Upadhyay @ Bholu, murdered him and hidden his dead body in the earth. What we find surprising is the fact that report of State Forensic Science Laboratory was also read in piece meal, the part which concluded that bones were of human origin of 12 years person was taken into consideration but part containing the DNA analysis was ignored. Such approach has resulted in the present matter in miscarriage of justice. Findings recorded by the learned trial Judge are full of factual and legal infirmities, based on no evidence, they deserve to be set aside.

24. The conviction of the appellants and sentences awarded pursuant thereto are not warranted, they also deserve to be set aside. The appeals have substance, they deserve to be allowed.

25. Accordingly, both the appeals are allowed and the conviction and sentence awarded by the learned trial Judge vide judgment and orders dated 31.10.2014

passed in Sessions Trial No. 485 of 2010 [State v. Suryabhan Jha and two others] are set aside. The appellants, namely, Badri Prasad Upadhyay, Hausila Prasad Upadhyay and Suryabhan Jha are acquitted from the charges levelled against them. The appellants are in jail. They be released forthwith, in case, they are not wanted in some other case, provided they file their personal bond and two sureties each in the like amount to the satisfaction of the Court concerned in compliance of Section 437-A Cr.P.C.

26. Office is directed to certify this order to the court concerned forthwith for compliance and to send back the lower court record.