
(2014) 10 BOM CK 0032
In the Bombay High Court
Case No : Criminal Appeal No. 48 of 2012

Roque Cardozo

APPELLANT

Vs

Caetano Esteibeiro

RESPONDENT

Date of Decision : 01-10-2014

Acts Referred:

Constitution of India, 1950 — Article 134(1)(a), 134(1)(b)
Criminal Procedure Code, 1973 (CrPC) — Section 313, 379
Penal Code, 1860 (IPC) — Section 143, 147, 149, 304, 323

Citation : (2015) ALLMR(Cri) 1128 : (2015) 1 BomCR(Cri) 5

Hon'ble Judges : F.M. Reis, J

Bench : Single Bench

Advocate : A. Agni, Senior Advocate and Ashwini Agni, Advocate for the Appellant; Sidhesh Suresh Shet, Advocate for the Respondent

Judgement

F.M. Reis, J.—Heard Mrs. Agni, learned Senior Counsel appearing for the Appellant and Shri Shet, learned Counsel appearing for the Respondent nos. 1, 2, 3 and 5.

2. The parties shall be referred to in the manner as they appear in the cause title in the Judgment of the learned J.M.F.C., at Margao.

3. The above Appeal challenges the Judgment dated 03.11.2010 passed by the learned Addl. Sessions Judge, South Goa, at Margao, in Criminal Appeal no. 87 of 2009 whereby, an Appeal preferred by the Respondents against the Judgment of conviction passed by the learned J.M.F.C., was allowed and the Respondents were acquitted of offences punishable under Sections 143, 147 and 323 read with Section 149 of the Indian Penal Code passed by the learned JMFC at Margao.

4. Briefly, the facts of the case are that it is the case of the Appellant who was the complainant before the learned Magistrate that on 13.10.1996, at about 12.30 p.m., the accused nos. 1 and 2 had come to his house and finding that he was not there, had gone back and again returned at about 3.00 p.m. when they forcibly entered into his house and started giving bad words and when he was

about to enter into the house they started assaulting him with fist blows and kicks and abusing him with filthy language. It is further his case that they started giving fist blows on his stomach, chest, back and head and dragged him for about 50 metres from the house with an intention to throw him into the canal. It is further his case that the water at the canal was at the knee level and he had shouted for help and that the accused nos. 7 and 8 started telling other accused to throw him into the canal. It is also his contention that he lost consciousness and he was thereafter admitted to the Hospicio Hospital at Margao, and subsequently transferred to the Goa Medical College where he took treatment for a period of ten days. Consequently, a private complaint was filed contending that the accused had committed the offences referred to herein above. The accused upon being summoned, disputed and denied any commission of any offences as alleged by the complainant. The learned JMFC by Judgment dated 31/10/2009/19.11.2009, came to the conclusion that the accused nos. 2, 3, 4, 5 and 7 had committed offences punishable under Section 143, 147 and 323 read with Section 149 of the Indian Penal Code and, consequently, sentenced the accused for simple imprisonment for a period of three months and to pay a fine of Rs. 3,000/- each and in default to undergo imprisonment for a period of two weeks.

5. Being aggrieved by the said Judgment, the accused/Respondents herein preferred an Appeal before the learned Sessions Judge which came to be disposed of by Judgment dated 03.11.2010 thereby acquitting the accused-respondents herein of all the aforesaid offences. Being aggrieved by the said Judgment passed by the learned Addl. Sessions Judge, the Complainant-Appellant has preferred the present Appeal.

6. Mrs. Agni, learned Senior Counsel appearing for the Appellant, in support of her submissions, has pointed out that the learned JMFC has rightly examined and appreciated the evidence on record by discarding the minor contradictions in the evidence of Pw. 2 to come to the conclusion that the complainant had proved beyond reasonable doubt the accusations and, consequently, convicted the Accused for commissioning of the offences. The learned Senior Counsel thereafter pointed out that there was previous enmity between the Complainant and the Accused and, as such, the reasons or the motive of the assault has been duly established by the Complainant. Learned Senior Counsel has thereafter pointed out that as the Accused were known to the Complainant and as this has not been disputed by the Accused, the identity of the accused has been duly established by the Complainant. The learned Senior Counsel has thereafter pointed out that the Complainant has also examined an eye witness Pw. 2 who has corroborated the case of Pw. 1 to establish that the accused had committed the offences punishable under Sections 143, 147 and 323 read with Section 149 of the Indian Penal Code. The learned Senior Counsel has thereafter pointed out that P.w. 3 who was a Doctor, had categorically established the fact that there was a rupture of the spleen of the Complainant on account of fist blows and assault which was committed by the accused and as the accused have not

established the circumstances in which such injuries have occurred, the learned Addl. Sessions Judge was not justified to come to a conclusion that the Complainant had failed to establish that the injuries sustained by he Complainant were not on account of the assault by the Accused-Respondents herein. The learned Senior Counsel has taken me through the Judgment of the learned JMFC and pointed out that the learned Judge has rightly appreciated the evidence on record and considering the evasive replies given by the accused in the statement under Section 313 of the Cr.P.C., and rightly come to the conclusion that there was enough material on record to convict the Accused. The learned Senior Counsel has thereafter taken me through the Judgment of the learned Addl. Sessions Judge and pointed out that the learned Judge has in fact created a new case for the accused which was not even suggested or put forward to any of the witnesses of the Complainant. The learned Senior Counsel has thereafter pointed out that the learned Judge has erroneously come to the conclusion that the injuries which have been sustained on the body of the Complainant could have occurred on account of a fall from a height merely on the basis of an innocuous statement by Pw. 3 upon a suggestion by the learned Counsel appearing for the Accused. Learned Senior Counsel has thereafter taken me through the Judgment of the learned Addl. Sessions Judge and pointed out that the learned Judge has erroneously appreciated the evidence on record and has wrongly come to the conclusion that the Accused have not committed the assault on the Complainant. The learned Senior Counsel as such submits that the impugned Judgment passed by the learned Addl. Sessions Judge deserves to be quashed and set aside and the conviction by the learned JMFC be upheld. Learned Senior Counsel has relied upon the Judgment of the Apex Court reported in Mahtab Singh and Another Vs. State of U.P., .

7. On the other hand, Shri Shet, learned Counsel appearing for the Respondent nos. 1, 2, 3 and 5, has supported the impugned Judgment. Learned Counsel has pointed out that the star witness of the Complainant is Pw. 2 who has been rightly found to be untrustworthy by the learned Addl. Sessions Judge. Learned Counsel further pointed out that the name of Pw. 2 was not even disclosed by Pw. 1 at the time of the filing of the complaint. Learned Counsel further pointed out that the learned Addl. Sessions Judge has rightly noted the contradictions between the case put forward by Pw. 1/Appellant herein and Pw. 2 to come to the conclusion that the complainant has failed to establish his case that the accused had committed the offences. Learned Counsel further pointed out that it was the case of the Complainant that after some fist blows given on the stomach at the residence of the Complainant, he was dragged to a distance of 50 metres to the canal near his house which is admittedly located in a crowded locality. Learned Counsel further pointed out that if this is an admitted position, it was incumbent upon the Complainant to examine the other neighbours if at all such offences were in fact committed. Learned Counsel further pointed out that in fact Pw. 2 has contradicted Pw. 1 in stating that the assault had taken place near the Canal when, on the contrary, it was the case of the Pw. 1 itself that the initial

assault had taken place at the residence of the Complainant. Learned Counsel further pointed out that the learned Addl. Sessions Judge has rightly noted that Pw. 1 has not even disclosed which are the accused who had in fact inflicted fist blows on the stomach of the Complainant. The learned Counsel has taken me through the Judgment of the learned Addl. Sessions Judge and pointed out that the evidence has been rightly appreciated by the learned Judge and, consequently, there is no case made out for any interference in the impugned Judgment.

8. Upon hearing the learned Counsel and on going through the records, it would be appropriate to note the observations of the Apex Court in a recent Judgment reported in Govindaraju @ Govinda Vs. State by Srirampuram P.S. and Another, thus :

"13. Under the scheme of Cr.P.C., acquittal confers rights on an accused that of a free citizen. A benefit that has accrued to an accused by the judgment of acquittal can be taken away and he can be convicted on appeal, only when the judgment of the trial court is perverse on facts or law. Upon examination of the evidence before it, the appellate court should be fully convinced that the findings returned by the trial court are really erroneous and contrary to the settled principles of criminal law.

14. In State of Rajasthan v. Shera Ram, a Bench of this Court, of which one of us (Swatanter Kumar, J.) was a member, took the view that there may be no grave distinction between an appeal against acquittal and an appeal against conviction but the court has to keep in mind the value of the presumption of innocence in favour of the accused duly endorsed by order of the court while the court exercises its appellate jurisdiction. In this very case, the Court also examined various judgments of this Court dealing with the principles which may guide the exercise of jurisdiction by the appellate court in an appeal against a judgment of acquittal.

15. We may usefully refer to the following paragraphs of that judgment: (Shera Ram case, SCC pp. 608-12, paras 8-13)

"8. The penal laws in India are primarily based upon certain fundamental procedural values, which are right to fair trial and presumption of innocence. A person is presumed to be innocent till proven guilty and once held to be not guilty of a criminal charge, he enjoys the benefit of such presumption which could be interfered with only for valid and proper reasons. An appeal against acquittal has always been differentiated from a normal appeal against conviction. Wherever there is perversity of facts and/or law appearing in the judgment, the appellate court would be within its jurisdiction to interfere with the judgment of acquittal, but otherwise such interference is not called for.

9. We may refer to a recent judgment of this Court in State of Rajasthan v. Abdul Mannan, wherein this Court discussed the limitation upon the powers of the appellate court to interfere with the judgment of acquittal and reverse the same.

This Court referred to its various judgments and held as under: (SCC pp. 70-73, paras 12-17)

"12. As is evident from the above recorded findings, the judgment of conviction was converted to a judgment of acquittal by the High Court. Thus, the first and foremost question that we need to consider is, in what circumstances this Court should interfere with the judgment of acquittal. Against an order of acquittal, an appeal by the State is maintainable to this Court only with the leave of the Court. On the contrary, if the judgment of acquittal passed by the trial court is set aside by the High Court, and the accused is sentenced to death, or life imprisonment or imprisonment for more than 10 years, then the right of appeal of the accused is treated as an absolute right subject to the provisions of Articles 134(1)(a) and 134(1)(b) of the Constitution of India and Section 379 of the Code of Criminal Procedure, 1973. In light of this, it is obvious that an appeal against acquittal is considered on slightly different parameters compared to an ordinary appeal preferred to this Court.

13. When an accused is acquitted of a criminal charge, a right vests in him to be a free citizen and this Court is very cautious in taking away that right. The presumption of innocence of the accused is further strengthened by the fact of acquittal of the accused under our criminal jurisprudence. The courts have held that if two views are possible on the evidence adduced in the case, then the one favourable to the accused, may be adopted by the court. However, this principle must be applied keeping in view the facts and circumstances of a case and the thumb rule is that whether the prosecution has proved its case beyond reasonable doubt. If the prosecution has succeeded in discharging its onus, and the error in appreciation of evidence is apparent on the face of the record then the court can interfere in the judgment of acquittal to ensure that the ends of justice are met. This is the linchpin around which the administration of criminal justice revolves.

14. It is a settled principle of criminal jurisprudence that the burden of proof lies on the prosecution and it has to prove a charge beyond reasonable doubt. The presumption of innocence and the right to fair trial are twin safeguards available to the accused under our criminal justice system but once the prosecution has proved its case and the evidence led by the prosecution, in conjunction with the chain of events as are stated to have occurred, if, points irresistibly to the conclusion that the accused is guilty then the court can interfere even with the judgment of acquittal. The judgment of acquittal might be based upon misappreciation of evidence or apparent violation of settled canons of criminal jurisprudence.

15. We may now refer to some judgments of this Court on this issue. In *State of M.P. v. Bacchudas*, the Court was concerned with a case where the accused had been found guilty of an offence punishable under Section 304 Part II read with Section 34 IPC by the trial court; but had been acquitted by the High Court of Madhya Pradesh. The appeal was dismissed by this Court, stating that the

Supreme Court's interference was called for only when there were substantial and compelling reasons for doing so. After referring to earlier judgments, this Court held as under: (SCC pp. 138-39, paras 9-10)

"9. There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. 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 from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to reappreciate the evidence where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused really committed any offence or not. (See *Bhagwan Singh v. State of M.P.*) The principle to be followed by the appellate court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable and relevant and convincing materials have been unjustifiably eliminated in the process, it is a compelling reason for interference. These aspects were highlighted by this Court in *Shivaji Sahabrao Bobade v. State of Maharashtra*, *Ramesh Babulal Doshi v. State of Gujarat*, *Jaswant Singh v. State of Haryana*, *Raj Kishore Jha v. State of Bihar*, *State of Punjab v. Karnail Singh*, *State of Punjab v. Phola Singh*, *Suchand Pal v. Phani Pal and Pal 13* and *Sachchey Lal Tiwari v. State of U.P.*

10. When the conclusions of the High Court in the background of the evidence on record are tested on the touchstone of the principles set out above, the inevitable conclusion is that the High Court's judgment does not suffer from any infirmity to warrant interference."

16. In a very recent judgment, a Bench of this Court in *State of Kerala v. C.P. Rao* decided on 16-5-2011, discussed the scope of interference by this Court in an order of acquittal and while reiterating the view of a three-Judge Bench of this Court in *Sanwat Singh v. State of Rajasthan*, the Court held as under: (C.P. Rao case, SCC p. 453, para 13)

"13. In coming to this conclusion, we are reminded of the well-settled principle that when the court has to exercise its discretion in an appeal arising against an order of acquittal, the court must remember that the innocence of the accused is further reestablished by the judgment of acquittal rendered by the High Court. Against such decision of the High Court, the scope of interference by this Court in an order of acquittal has been very succinctly laid down by a three-Judge Bench of this Court in *Sanwat Singh v. State of Rajasthan*. At SCR p. 129, Subba Rao, J. (as His Lordship then was) culled out the principles as follows: (AIR pp. 719-20,

para 9)

"9. The foregoing discussion yields the following results: (1) an appellate court has full power to review the evidence upon which the order of acquittal is founded; (2) the principles laid down in Sheo Swarup case afford a correct guide for the appellate court's approach to a case in disposing of such an appeal; and (3) the different phraseologies in the judgments of this Court, such as (i) "substantial and compelling reasons", (ii) "good and sufficiently cogent reasons", and (iii) "strong reasons", are not intended to curtail the undoubted power of an appellate court in an appeal against acquittal to review the entire evidence and to come to its own conclusion; but in doing so it should not only consider every matter on record having a bearing on the questions of fact and the reasons given by the court below in support of its order of acquittal in its arriving at a conclusion on those facts, but should also express those reasons in its judgment, which lead it to hold that the acquittal was not justified.""

17. Reference can also be usefully made to the judgment of this Court in Suman Sood v. State of Rajasthan, where this Court reiterated with approval the principles stated by the Court in earlier cases, particularly, Chandrappa v. State of Karnataka. Emphasising that expressions like "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail the extensive powers of an appellate court in an appeal against acquittal, the Court stated that such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with the acquittal. Thus, where it is possible to take only one view i.e. the prosecution evidence points to the guilt of the accused and the judgment is on the face of it perverse, then the Court may interfere with an order of acquittal."

10. There is a very thin but a fine distinction between an appeal against conviction on the one hand and acquittal on the other. The preponderance of judicial opinion of this Court is that there is no substantial difference between an appeal against conviction and an appeal against acquittal except that while dealing with an appeal against acquittal the Court keeps in view the position that the presumption of innocence in favour of the accused has been fortified by his acquittal and if the view adopted by the High Court is a reasonable one and the conclusion reached by it had its grounds well set out on the materials on record, the acquittal may not be interfered with. Thus, this fine distinction has to be kept in mind by the Court while exercising its appellate jurisdiction. The golden rule is that the Court is obliged and it will not abjure its duty to prevent miscarriage of justice, where interference is imperative and the ends of justice so require and it is essential to appease the judicial conscience.

11. Also, this Court in Abdul Mannan case had the occasion to state the principles which may be taken into consideration by the appellate court while dealing with an appeal against acquittal. There is no absolute restriction in law to review and relook the entire evidence on which the order of acquittal is founded. If, upon

scrutiny, the appellate court finds that the lower court's decision is based on erroneous views and against the settled position of law then the said order of acquittal should be set aside. [See State (Delhi Admn.) v. Laxman Kumar, Raj Kishore Jha v. State of Bihar and Inspector of Police v. John David.]

12. To put it appropriately, we have to examine, with reference to the present case whether the impugned judgment of acquittal recorded by the High Court suffers from any legal infirmity or is based upon erroneous appreciation of evidence.

13. In our considered view, the impugned judgment does not suffer from any legal infirmity and, therefore, does not call for any interference. In the normal course of events, we are required not to interfere with a judgment of acquittal."

9. Taking note of the said observations of the Apex Court, it is now well settled that once the view taken by the Court below is one of the plausible views it is not open for this Court to substitute its own view to convert an acquittal into conviction especially when the findings arrived at are based on the evidence on record and not perverse. In the present case, it is not in dispute that immediately after the alleged offences had taken place on 13.10.1996, there was a NC complaint which was lodged before the concerned Police Station. Though there was a controversy during the course of the hearing as to whether the Complainant had in fact signed the NC complaint, but however, the learned Addl. Sessions Judge whilst passing the impugned Judgment has noted the contradictions between the statements which were recorded in the NC complaint and the private complaint filed before the learned JMFC. No doubt, Mrs. Agni, learned Senior Counsel, has pointed out that such statement on 14.10.1996 could never have been signed or given by the Complainant as he was subjected to medical treatment on the said date, nevertheless, there is no explanation of any kind by the Complainant-Appellant to explain the circumstances in which such NC complaint was filed. Having failed to explain the said aspects, the learned Addl. Sessions Judge was justified to note the contradictions in the said NC complaint and the private complaint while passing the impugned Judgment. Apart from that, the records reveal that the only eye witness apart from the Complainant himself who was examined was Pw. 2. The name of Pw. 2 as a witness was not cited at the time of filing of the private complaint nor there is any corroborative evidence to show his presence at the time of the incident. The learned Addl. Sessions Judge whilst examining such evidence has taken note of the contradictions between the version of Pw. 1 and Pw. 2. Taking note of the said contradictions, I find that there is no infirmity committed by the learned Addl. Sessions Judge whilst passing the impugned Judgment. As rightly pointed out by the learned Counsel appearing for the Respondents-Accused, as per the case of the Complainant, after inflicting the fist blows on the stomach at the residence of the Complainant, he was dragged to a distance of 50 metres from outside the house to the canal in a location which is habitable at about 3.30 p.m. In such circumstances, it is always possible that there could be better evidence

which could be adduced by the Complainant to establish the said incident if at all such incident had in fact occurred. Apart from that, Pw. 2 himself states that he was along with some other persons when he heard the shouts at the residence of Pw. 1. No other person has in fact been examined by the Complainant. On the background of such facts and the findings of the learned Addl. Sessions Judge cannot be said to be perverse or not plausible in view of the facts and circumstances of the case. On perusal of the impugned Judgment passed by the learned Addl. Sessions Judge, the learned Judge has also taken note of the fact that Pw. 3 in his deposition had also accepted that the injuries found on the Appellant can be caused if the person falls from a long height on the rough surface. The learned Judge further noted that there is nothing in the deposition of Pw. 3 to indicate that the injuries could have been caused by any assault with blows and sticks. In such circumstances, inferences drawn by learned Addl. Sessions Judge cannot be faulted in the context of the deposition of Pw. 2 that the Appellant-complainant had fallen down on the culvert over the canal. As pointed out herein above, the learned Addl. Sessions Judge had also noted that though the names of five witnesses were given, the name of Pw. 2 was not included therein which creates a doubt whether Pw. 2 was in fact present at the time of the alleged incident. There was no material on record to suggest that any unlawful assembly with a common object was established as alleged by the Appellant herein. Having failed to establish the said aspect by any cogent evidence on record, the learned Addl. Sessions Judge was justified to come to the conclusion that the learned J.M.F.C., had erred in holding that the Appellant had established that the Respondents have committed the offences alleged against him. The failure on the part of the Appellant to examine any of the witnesses cited would itself suggest that the Appellant has failed to establish the accusations levelled against the Respondents. The Judgment relied upon by learned Senior Counsel appearing for the Appellant in the case of *Mahtab Singh & anr. vs. State of Uttar Pradesh (supra)*, in fact clearly provides the circumstances in which the Appellate Court can reverse a Judgment of acquittal. As pointed out herein above, the inconsistencies in the evidence of the Appellant have been clearly spelt out by the learned Addl. Sessions Judge whilst passing the impugned Judgment. The circumstances have also been stated in the Judgment which show that no reliance can be placed in the testimony of Pw. 2. In such circumstances, as pointed out herein above, the view taken by the learned Addl. Sessions Judge in the impugned Judgment is a possible and plausible view which does not call for any interference by this Court in the present Appeal.

10. Consequently, the Appeal stands rejected.