

(2016) 01 DEL CK 0318
In the Delhi High Court
Case No : Crl. L.P. 745/2014

State (Govt. of NCT of Delhi)

APPELLANT

Vs

Suresh Kumar

RESPONDENT

Date of Decision : 18-01-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, Section 278(i)

Citation : (2016) 2 ADDelhi 370 : (2016) 227 DLT 27 : (2016) 1 JCC 435

Hon'ble Judges : G.S. Sistani and Sangita Dhingra Sehgal, JJ.

Bench : Division Bench

Advocate : Anita Abraham, APP and Dherender Nath, Inspector, for the Appellant; Sunita Arora and Krishan Kumar, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

G.S. Sistani, J.—1. The State seeks leave to appeal under Section 278(i) of the Code of Criminal Procedure filed against the judgment dated 07.10.2014 passed by the Additional Sessions Judge by which the respondents stand acquitted.

2. Counsel for the petitioner submits that the learned Trial Court has failed to consider that PW-3, Javed, the injured had fully supported the case of the prosecution and identified the respondents in Court. She further submits that the eye witness PW-4, Asif Hussain fully corroborated the testimony of PW-3, victim. The counsel has also contended that the oral evidence stands duly corroborated by the medical evidence. Ms. Abraham also contends that merely because PW-4, who was present at the time of the incident did not intervene in the quarrel cannot, by itself, lead to the conclusion that he was a planted witness. Counsel submits that the Trial Court has wrongly reached the conclusion that since the respondents were not calling each other by name, the victim could not have identified them, as PW-4 previously knew the respondents. Additionally, the counsel contends that there would not be any reason as to why the victim would falsely implicate innocent persons and allow the actual culprits to go scot free. Counsel also contends that the minor contradictions in the statement of the

witness cannot be a ground to shake their credibility as the said contradictions do not go to the root of the matter.

3. Counsel for the respondents submits that the prosecution has not been able to prove its case beyond reasonable doubt. Ms. Arora submits that the place of the incident has not been proved. Attention of the Court is drawn to the testimony of PW-9, SI Ram Narayan, the Investigating Officer who has deposed in his cross-examination "when I reached the spot, nothing was found to me which may show that any incident had taken place. No blood was found at the spot. Since nothing was found at the spot, I could not ascertain whether any incident had taken place or not..." Counsel contends that having regard to the fact that PW-3 sustained as many as six injuries on his abdomen, head, face and hands and was profusely bleeding, in every possibility there would have been blood stains present at the spot or at least near the place of incident. She contends that in view of the evidence of PW-9, the testimony of PWs-3 and 4 cannot be taken as credible. Counsel also contends that the respondents have been falsely implicated which is also evident from the fact that as per the version of the prosecution, respondent Dharemender assaulted PW-3 in his abdomen. He was arrested on 12.12.2011 and pursuant to the disclosure statement, the knife Ex.PW8/H was allegedly recovered at his instance from a shop. However, the FSL report Ex.PW10/A negates the fact as there was no blood stains on the knife. Reliance is also placed on the testimony of PW-10, Indiresk Kumar Mishra, Senior Scientific Officer(Biology), FSL who has deposed that no blood could be detected on the exhibit, i.e., the knife. Counsel thus, contends that respondent Dharmender could not be connected with the alleged offence. It is improbable that the knife would not contain blood stains, the spot of incident would not have blood, thus the testimony of PWs-3 and 4 are liable to be discarded. Counsel has also contended that as per the case of the prosecution and the injured, the respondent Suresh @ Sunny gave knife blows on the head and face of the victim, however, no knife was recovered from him or from the possession of Kamal @ Badshah.

4. Counsel also contends that there are various infirmities and contradictions in the testimony of PW-4 which belies his version that he witnessed the incident. First, PW-4 in his examination in chief dated 26.10.2012 deposed "Two persons were going ahead of us whereas one was coming from behind. The person who was coming from behind had given a push to my brother Javed." Contrary to this testimony, PW-3 (injured) in his examination in chief deposed "At about 12.30 a.m. three boys came from front side and started robbing me and my brother.". This shows that both of them are not sure about the position of the respondents which casts doubts about the presence of PW-4 at the spot. Counsel contends that PW-3 in his cross examination dated 09.04.2013 deposed "..During the said period, I did not move from the spot. Asif met me at the spot itself.." However PW-4 in his examination in chief deposed "..We saw that my brother Javed was coming towards factory side holding his hands on the wound at abdomen" This fact also creates a doubt about the presence of PW-4 at the spot. Counsel

contends that falsity of presence of PW-4 at the spot is further proved from the fact that in his examination in chief PW-4 deposed ".Accused Kamal had also given the blow of knife to my brother" whereas as per PW-3, only the respondents Dharmender and Suresh gave knife blows on him. To buttress her argument further that PW-4 has not witnessed the incident, attention of this Court is drawn to the testimony of PW-3. In his cross examination dated 22.07.2013, PW-3 deposed "..I had seen the face of the assailants who had given the blow of knife to me. Accused Dharmender present in the court had stabbed me. When the accused stabbed me, my brother ran towards factory to call other persons for help.." This witness has specifically stated that when respondent Dharmender stabbed him, his brother PW-4 ran towards factory. Therefore, by no means PW-4 would have seen respondent Suresh @ Sunny stabbing PW-3. To further establish that PW-4 had not witnessed the incident, counsel contends that PW-4 in his examination in chief dated 26.10.2012 deposed "Two persons were going ahead to us whereas one was coming from behind.." Contrary to this version, PW-4 took a somersault in his cross examination dated 21.12.2012 and deposed ".The assailants came from behind. They were all under influence of liquor or intoxicant" PW-4 is not sure from where the respondents were coming. To further prove that PW-4 had not witnessed the incident, counsel contends that that PW-4 in his cross examination dated 26.10.2012 deposed ".The real intention of accused persons was to rob my brother and to give a push was their modus operandi. The accused persons did not try to rob me. I was standing at the distance of 5 paces when they were robbing my brother.." However PW-3 (Injured) in his entire testimony has nowhere stated that the respondents robbed anything from him. Even the prosecution has not recovered anything from the respondents. This also proves that PW-4 had not witnessed the incident and the police have planted him as eye witness just to cover up the case and falsely implicate the respondents.

5. Counsel contends that apart from the above infirmities, PW-4 in his cross examination dated 26.10.2012 deposed "..I did not accompany to the hospital. I went to the police station. After reaching the police station, I reported the matter to the police station at Nabi Karim. I might have reached the police station at about 1.30 am" Counsel contends that PW-9 sent rukka through PW-2 Ct. Harish pursuant to which FIR (Ex.PW1/B) was registered at 3.30 a.m. on 08.12.2011. Counsel contends that had PW-4 had gone to the police station Nabi Karim and reported the matter to the police at about 1.30 a.m., then the details of the respondents would have been mentioned in the FIR whereas there is nothing as such in the FIR. This proves that PW-4 has not visited the police station to lodge the report and belies his version of having witnessed the incident and reported the matter to the police. Counsel contends that it is highly improbable that a person whose brother is being stabbed by the assailants would not come forward to save his brother or even raise hue & cry for help. It is beyond comprehension that PW-3 did not try to save his own brother due to fear of his being harmed by them. This also casts doubt about his presence.

6. Counsel also contends that the site plan is also very doubtful in the present case. Counsel submits that a careful perusal of the site plan shows the place of occurrence as "XA" i.e. the place where PW-3 was assaulted. But PW-4 in his examination in chief dated 26.10.2012, deposed "At about 12.30/12.45 am when we reached opposite Choti Hatti, two persons were going ahead of us whereas one was coming from behind" The place of occurrence shown in the site plan Ex. PW-9/B is point "XA" but as per PW-4 point "XA" was not the place where PW-3 was allegedly assaulted, rather, it was opposite point "XB" shown in the site plan. PW-3 in his cross examination dated 22.07.2013 deposed "..I did not notice whether there is any electric pole during the said paces. There was electricity near the place of occurrence." But the site plan nowhere depicts the electric pole. Thus, in absence of any electric pole at the spot, neither PW-3 nor PW- 4 could have identified the respondents.

7. Another argument raised by Ms. Arora is that it is common practice in medico-legal cases that doctor attending the patient preserve and hand over the clothes and other articles of the injured to the investigating officer. But strangely in the present case, PW-11 Dr. Md. Abu Masud Ansari who conducted the medical examination of PW-3 handed over the clothes of PW-3 to Nurul Bhai who in turn handed over the same to PW-9 on the next day at his house. The shirt worn by PW-3 at the time of incident has neither been seized by police nor ever produced before the learned Trial Court. This shirt is a crucial piece of evidence as the doctor could have given an opinion regarding any blood stains on the said shirt or not and whether it was the same shirt which PW-3 was wearing at the time of incident. Counsel contends that PW-9 in his cross examination dated 21.04.2014 deposed "During investigation, no evidence surfaced to show that the clothes produced by Nurul Bhai bear the blood stains of injured Javed.." Even though PW-9 seized the pant and underwear of PW-3 which had blood stains, yet blood group of injured PW-3 has not been ascertained. Therefore, all these infirmities cast a serious doubt about the clothes seized by PW-9 and non-seizure of the shirt of PW-3.

8. Counsel contends that although it is settled law that the testimony of the injured witness has to be kept on a higher pedestal. However, such witness should be of sterling quality. In view of the inconsistencies and contradictions, the testimony of PW-3 cannot be said to be of sterling quality. PW-3 in his cross examination dated 09.04.2013 deposed ".Police met me in the hospital in the morning at about 8/9 am. Police made inquiry about the incident and recorded my statement." This statement U/s. 161 Cr.P.C. was never part of judicial record. He improved his statement in his cross examination dated 22.07.2013 and deposed "..First time, police official met me after one week in the hospital. Police recorded my statement." None of these statements are part of judicial record rather his statement under Section 161 Cr.P.C. was recorded on 26.03.2012. Counsel contends that when PW- 3 was declared "fit for statement" on 08.12.2011 itself by the doctor as is evident from the MLC (Ex. PW-11/A) on the top right side of MLC, yet his first statement (as available on judicial record) was

recorded only on 26.03.2012 after a substantial delay of over 3 months. PW-3 in his examination in chief dated 26.10.2012 deposed "...At about 12.30 am, three boys came from front side and started robbing me and my brother..." Contrary to his version, PW-4 in his testimony stated that two persons were coming ahead of him and one person was coming from behind. PW-3 in his examination in chief dated 26.10.2012 deposed "...I do not recollect whether accused persons were calling to each other by their names or not..." However contrary to his version, PW-4 (Javed) in his testimony deposed that the accused persons were calling each other by names. Neither PW-3 nor PW-4 could either tell the exact position of the respondents as to who was coming from which side and as to whether the respondents were calling each other by names. PW-3 even could not identify his own clothes worn at the time of incident. Attention of this Court is drawn to the further examination in chief dated 09.04.2013 wherein PW-3 deposed "...On opening the same, one brown colour pant, one brown colour underwear along with one white cloth having the particular of the case and seal impression of RNT. After seeing the same, witness states that he was wearing the same pant and shirt at the time of incident. The same are marked Ex. P1 and Ex. P2 respectively..." It would not be out of place to mention that Ex. P1 and P2 are the pant and underwear of PW-3 whereas PW-3 identified them to be pant and shirt. Further, PW-2 (Constable Harish) who was the attesting witness of Ex. P1 and P2 in his examination in chief has categorically deposed "...At the spot, one witness Nurul Bhai, who was brother of the injured met there and produced one half pant, one shirt, colour I do not remember and one underwear..." This shows that even the recovery of clothes of PW-3 cast serious doubt.

9. We have heard the learned counsel for the parties, examined the judgment passed by the learned Trial Court and also examined the Trial Court record. We find no infirmity in the judgment passed by the Trial Court for the reason that the prosecution has failed to prove its case beyond any shadow of doubt. The testimony of PW-9 would show that he had deposed that no blood was found at the spot despite the fact that there were as many as six injuries on the abdomen, head, face and hands of PW-3 and he was bleeding profusely. Thus, the prosecution has failed to give any reason as to why the shirt of the injured was not seized as, in our view, the shirt would have been a crucial proof of evidence in case there was blood on the shirt.

10. We also find that although according to the prosecution, a knife was recovered at the instance of Dharmender, but as per the FSL report and testimony of PW-10, Indiresk Kumar Mishra, Senior Scientific Officer(Biology), FSL, no blood was found on the knife and thus the knife cannot be connected to the commission of the offence. We also find that there are material contradictions in the evidence of PW- 3(injured) and PW-4 who claim to be an eye witness. We also find that there is contradiction with regard to the directions the respondents were approaching in the testimonies of PW-3 and his brother, an eye witness (PW-4). It is also unclear with regard to the spot of the incident based on the site plan which has been prepared. 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."

11. 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 Haryana³ it was held, after referring to Sheo Swarup v. King Emperor⁴ 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*⁵ 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, reappraise 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."

12. It is well settled that the appellate court may for the reason or otherwise disturb the Trial Court finding of acquittal if it has substantial and compelling

reasons or where the conclusions of the Trial Court are palpably wrong or based on erroneous view of law. For the reasons stated above, we find no grounds to interfere with the order passed by the Trial Court.

13. The leave to appeal is accordingly dismissed.