

(1997) 12 J&K CK 0015

In the Jammu And Kashmir High Court

Case No : Criminal Acquittal Appeal No. 24/1982

State of Jammu & Kashmir

APPELLANT

Vs

Wali Mohd.& Ors.

RESPONDENT

Date of Decision : 31-12-1997

Acts Referred:

Jammu and Kashmir Criminal Procedure Code, 1989 — Section 154, 157, 374
Ranbir Penal Code, 1989 — Section 302

Citation : (1998) KashLJ 170

Hon'ble Judges : Bhawani Singh, C.J and Arun Kumar Goel, J

Bench : Division Bench

Advocate : S.K.Anand, M.A.Bhat, Gazala Khan , Advocates appearing for the Parties

Judgement

PerBhawani Singh,,:
Chief Justice.

1. This Appeal is directed against the Judgement of Sessions Judge, Poonch in File No. 10/Sessions dated 121982 for offence under Section

302/149 RPC. Briefly, the prosecution case may be narrated now.

2. Mohd. Rashid submitted written report dated 551980 at Police Station, Mandi on 551980 at 6.30 p.m. that on 551980 at about 10.00 a.m.

while he was in his residential house alongwith his parents, brother and sister, accused Wali Mohd, Mohd Hussain and Abdul Aziz came to the

house and asked his father Bhadur (deceased) to accompany them to the land and show the place where from water course (Balan) was to be

taken out. Deceased asked them to proceed ahead and, he would follow them with his cattle. Consequently, deceased took the cattle towards the

grazing land while his mother followed him with some other cattle. When the

deceased reached ahead along with the cattle, accused Wali Mohd, Mohd Hussain and Abdul Aziz, Abdul Hafaiz, Haji Feroz, Mohd Ayub, Haji Noor Mohd and Abdul Gani surrounded his father. All the accused were having lathies in their hands except Haji Noor Mohd, who was holding an axe. They started beating the deceased and his mother Hakem Bi raised alarm that Bhadur was being killed, therefore, he be saved. He also raised alarm and went near the deceased. In the mean time, Abdul Aziz, Mohd Hussain and Jamal Din came to the spot. Wali Mohd. inflicted a blow on the arm of his father with the handle of gainti, while Mohd. Hussain caught the deceased from his beard and gave fist blow on his chest. Abdul Aziz inflicted blow with a stick of loon on his back and Abdul Hafaiz started beating him with a stick of loon on the back. Mohd. Ayub gave a blow on his right leg with a stick of Barain. Haji Feroz gave him a blow on the head with a stick of Reen arid Haji Noor Mohd. inflicted a blow on his ribs with the blunt side of axe and with the edged side of the axe, he gave a blow on the leg causing cutting wound. Abdul Gani gave a blow on the face of the deceased with a stick of loon and breaking the teeth. This occurrence was seen by him, his mother, Abdul Aziz, Jamal Din and Mohd Hussain. With these blows, deceased died on the spot. On account of fear, Jamal Din ran away from the spot while the quarrel was still going on. The accused were nursing old grudge with the deceased on account of litigation and land disputes. The act was committed with common intention and after making preparations, therefore, accused were liable for the commission of murder. It was also reported that the dead body of the deceased was lying on the spot and Mohd Hussain and Kaka had been kept there to keep watch over it.

3. On receiving this information, Police registered case No. 38/1980 for offence under Section 302/34 RPC. In addition to this written report,

Mohd. Rashid also stated to the Police that a month before, Mohd. Bashir son of Karim Baksh of Hari Budah had told the deceased that all the accused were sitting together at the house of Haji Noor Mohd, where he had also been called Haji Noor Mohd. told Mohd. Bashir to inform the villagers that Khan Alam had stated that cases had been registered against them in the Court and on finding appropriate opportunity, would avenge the same. He was asked to join his party, but he refused to do so.

4. Investigation followed which culminated in the trial of accused for offence under Section 302/149 RPC against all accused except Wali Mohd, who was also tried for offence under Section 323 IPC as well in addition to 302/149 RPC. All the accused pleaded not guilty to the charge. The prosecution examined nine witnesses. Thereafter, statements of accused were recorded under Section 342 Code of Criminal Procedure. They also examined seven witnesses in defence. Finally, after hearing the parties and discussing the evidence, the Trial Court said;

I have considered the entire evidence in this case carefully and I find that the statements of the eye witnesses are unreliable from various angles.

Their depositions do not inspire the confidence of being true. Their evidence stands falsified by their own conflicting versions of the occurrence and

the statement of the doctor who conducted the postmortem examination of the deceased gives a total lie to what has been stated by the eye

witnesses Mohd Rashid, Hakim Bi, Abdul Aziz and Mohd Hussain. Jamal Din eyewitness by his statement has materially falsified the case made

out by the eye witnesses in their statements before the court as he excludes the presence of Haji Noor Mohd. accused specifically from the place

of occurrence and those of several accused impliedly. The seizure of the stated weapons of offence has been rendered doubtful and it has been

established that the accused never produced these weapons before the police and the weapons in fact were seen by Nizam Din witness already

with the police in a room of the house of Abdul Aziz witness. The seized axe having been used in causing the injury to the deceased has been

specifically excluded by the medical evidence to have been used on the deceased. Above all the eye witnesses Abdul Aziz and Mohd Hussain

besides being to make false statements against the accused in view of the admitted litigation between them and the accused. Above all also the very

FIR has been suppressed by the Police. I am satisfied that the accused are not in any manner responsible for having caused the death of the

deceased, who are accordingly acquitted of the blame and this challan stands dismissed....

5. The judgement has been challenged by the State through this Appeal. Shri S.K. Anand, learned Government Advocate, contended that there

are eye witnesses to the occurrence. In this regard, reference was made to Hakim Bi, Abdul Aziz and Mohd Rashid. It was also contended that

near relationship is no ground to reject their testimony. They are natural witnesses to the occurrence, therefore, their testimony should be accepted

for connecting the accused with the crime. Since number of accused participated in assaulting the deceased, injuries found on his person are

attributable to them. There is no delay in sending First Information Report to the magistrate and recoveries in this case are dependable, learned

counsel contended. It was also submitted that litigation between the parties was not so serious, which could compel the witnesses to implicate the

accused in a serious offence. The Trial Court did not appreciate the evidence appropriately resulting in contradictory conclusions.

6. For the accused, Shri M. A. Bhat contended that the prosecution case is so weak and undependable that no finding of guilt can possibly be

recorded. Elaborating the contention, it was pointed out that eye witnesses have given conflicting versions of the occurrence suggesting that they

did not see the occurrence: Prosecution associated relation witnesses leaving out material and independent witnesses. Injuries stated to have been

inflicted on the person of deceased are not supported by medical evidence First Information Report is completely undependable since it has been

concocted and improved. That is why there is delay in submitting the same to the magistrate. Recoveries to weapons of offence cannot be

depended and the case against the accused has been the result of inimical relationship between of prosecution are related to family of the

deceased.

7. Having referred to the submissions advanced by learned counsel for parties, we advert to consider and decide some of the fundamental features

of the case, evidence thereon and see whether the finding of acquittal recorded by the Trial Court is correct or deserves to be set aside.

8. First Information Report (Exhibit PW1/A) has been assailed on the ground that is not first in point of time since the Police had received

information through Abdul Aziz, who had been sent to Police Station for giving information of occurrence as per the statement of Mohd Rashid,

Abdul Aziz and Hakim Bi. The Station House Officer sent a Constable to the spot to verify the truth of information given by Abdul Aziz with

Constable Wazir Hussain, When it was found that murder had taken place, this Constable sent a letter to Station House Officer informing that

murder had actually taken place. This letter was carried to the Police Station by Mohd Rashid son of deceased, who on reaching Mandi got

application scribed by Master Ghulam Akhter which alone was presented at the Police Station. Police Station record does not make mention of

report by Abdul Aziz and Wazir Hussain being sent with him to the spot by the Station House Officer. But fact remains that Mohd Rashid, Abdul

Aziz and Kahmi Bi have stated that Abdul Aziz was sent to Police Station for giving information of the occurrence and the Station House Officer

sent Wazir Hussain to verify the information. This defect is further aggravated by the observation of Trial Court that daily register of Police Station

had been maintained against all norms and that a separate paper had been pasted over the original leaf of the register and in the paper below it,

inapt reference were recorded. Fact remains that there is no entry at the Police Station about the visit of Abdul Aziz informing that deceased had

been killed by the accused and that Constable Wazir Hussain was sent to verify the truth of the information given to the Station House Officer,

Police Station Mandi. Obviously, therefore, there are two versions with respect to giving of information of this incident to the Police as discussed

above. Absence of entry at least in the diary plainly demonstrates that the Police did not record the information given to it at the first instance and

delayed it when it was recorded on the basis of application presented by Mohd Rashid scribed by master Ghulam Akhter in the presence of HC

Sakhi Mohd, who later took part in the investigation. Mentioning the incident with such detail demonstrates that after visiting the spot, the Police

collected evidence which formed part of the application submitted to the Police and registered by it as First Information Report in this case (Exhibit

PW1/A). Police had enough time to gather facts, manipulate and manage them suitably to its requirement. That is why, it has been recorded on the

basis of document (Exhibit PW 1/A), which in the context is hit by Section 162 Code of Criminal Procedure. There is another fact to substantiate

the intentional delay in the recording of the report. Incident took place on 551980 at 10.00 a.m. The case is stated to have been registered at 6.30

p.m., but the information to the Chief Judicial Magistrate reaches at 11.15 p.m. during night of 651980, though the distance between Police

Station, Mandi and the house of Chief Judicial Magistrate is only 22 Kms. and there is no record pointing out the person, who took this special

report to Chief Judicial Magistrate, Poonch (Exhibit PW 1/B). It appears that the First Information Report is antedated and antetimed suggesting,

therefore, that it does not reflect the correct version of the occurrence apart from the fact that it is not first in point of time and is hit by Section 162

Code of Criminal Procedure. (See AIR 1979 Supreme Court 135, Ganesh Bhavan Patel and another Versus State of Maharashtra; AIR 1976

Supreme Court 3250, Babu Singh Versus State of Punjab and AIR 1976 Supreme Court 3244, Golla Jail Reddy and others Versus State of

Andhra Pradesh).

9.

9. First Information Report is a very important piece of document in a criminal case, though it may not be a substantive piece of evidence. Being a

previous statement, it can be used by the prosecution to corroborate and by the defence to contradict the author thereof. It assumes significance if

recorded soon after the occurrence without lapse of time and opportunity to embellish the same or before the memory of the author thereof fades.

Undue or unreasonable delay in lodging it legitimately casts a suspicion which puts the Court on guard to look for a plausible motive or explanation

for the delay so as to consider the totality of its effect on the truth or otherwise of the prosecution case. The Legislature by providing in Section

157 of the Code that the Officer in Charge of the Police Station shall forthwith send a copy of the report to the Magistrate concerned provides an

external check for the prompt lodging of the First Information Report. This Section provides a safety valve in cases where First Information Report

assumes importance as to allegation of it being either antetimed or antedated. The receipt of the special report by Magistrate in time lends credence

to the prompt lodging of the First Information Report and bonafides of Investigating Officer entrusted with the investigation of the case. (See: 1989

Criminal Law Journal 2520, Bhagat Ram Versus State of Himachal Pradesh and 1989 Indian law Reports 120(H.R), Gopal Krishan and another

Versus State of Himachal Pradesh. In the later case, I said in para 20 that;

Lodging of First Information Report soon after the occurrence is of fundamental importance. It eliminates attempts of any one fabricating the

incident and trapping innocent person into the case. Moreover, embellishments into the real story can be, to a greater extent, kept at bay.

Otherwise, longer the delay, more the chances of such informations suffering from deficiencies, as discussed, thereby casting a doubt on the whole

prosecution version....

10. This view finds support from catena of cases rendered by the Apex Court (See: AIR 1974 Supreme Court 606, Ram Jag and others Versus

The State of U.P.; AIR 1973 Supreme Court 501, Thulia Kali Versus The State of Tamil Nadu and AIR 1973 Supreme Court 1, Apren Joseph

alias current Kunjukunju and others Versus The State of Kerela).

11. Next it was contended that the Trial Court rejected erroneously the evidence of prosecution on account of relationship with the deceased. It is

well settled that evidence of witnesses should not be rejected simply on the ground they happen to be related to the deceased, if they are otherwise

dependable. But after giving our anxious consideration to this aspect of the matter in the context of the statements given by the witnesses, we are

of the opinion that the conclusion of the Trial Court quoted in the proceeding part of this Judgement is quite correct. These witnesses had discarded

themselves by making conflicting versions of the occurrence and the result is that it is difficult to say that they are eye witnesses of the occurrence.

Further more, their conduct further demonstrates that they have given exaggerated and inconsistent version thereby making it difficult for the Court

to rely on their statements. The way the role has been assigned to different accused suggests that their intention was to involve all the accused in

this incident thereby making it possible to conclude that this attitude was adopted for the reason that they bore animosity against the accused on

account of relationship with the deceased as well as the litigation in which some of them were involved with the accused. In case the story of

animosity of the accused towards the deceased is examined, it is difficult to appreciate that the deceased would follow the accused to the place of

occurrence and be killed. Further more, assuming that he was there of his own for grazing cattle, presence of Hakim Bi and then Abdul Aziz and

Mohd Rashid cannot be there. In case he had taken the cattle as alleged, there was no occasion for her also to take cattle. This means, she has

also been planted as an eye witness by the prosecution intentionally when there were none. They have, therefore, been associated as eye witnesses

to the occurrence simply they happen to be connected with the deceased. The

injuries described by them stand contradicted by the medical evidence. With this background, conclusion of Trial Court rejecting their testimony on various grounds including that of relationship cannot be rejected as contended. We examined other contentions of Shri S.K. Anand, learned counsel for the Appellant. There is no substance in any of them and the same are rejected.

12 Though the power of the High Court with respect to appeals against acquittal is similar to its power in an appeal against conviction, but while dealing with the former, additional burden is placed on it to consider the grounds which prompted the Trial Court to pass the order of acquittal and record its own reasons where it does not agree with the Trial Court. The principles laid down by the Privy Council in *Sheo Swarup Versus King Emperor* (AIR 1934 Privy Council 227(2)) provide correct guidelines for the Appellate Court while disposing of the Appeal against the order of acquittal. The view was considered by the Apex Court in *State of U.P. Versus Samman Dass* (AIR 1972 Supreme Court 677) and *Sanwat Singh Versus State of Rajasthan* (AIR 1961 Supreme Court 715) and said that acquittal creates presumption of innocence in favour of the accused and that if two views of the matter are possible, the view which favours the accused has to be adopted. The Appellate Court has also to keep in view the fact that the Trial Judge had the advantage of looking at the demeanour of the witnesses and that the accused is still entitled to the benefit of doubt. The doubt should be such as a rational thinking person will reasonably, honestly and conscientiously entertain and not the doubt of an irrational mind.

13. In para 11 of *Antar Singh Versus State of Madhya Pradesh* (AIR 1979 Supreme Court 1188), the Apex Court held that:

11. This Court has repeatedly held that although in an appeal against acquittal the powers of the High Court in dealing with the case are as extensive as of the trial court, but before reversing the acquittal, the High Court should bear in mind that the initial presumption of the innocence of the accused is in no way weakened, if not reinforced, by his acquittal at the trial, and further, the opinion of the Trial Court which had the advantage of observing the demeanour of the witnesses, as to the value of their evidence should not be lightly discarded. Where two views of the

evidence are reasonably possible, and the trial court has opted for one favouring acquittal, the High Court should not disturb the same merely on

the ground that if it were in the position of the Trial Court, it would have taken the alternative view and convicted the accused accordingly. In the

instant case, by any reckoning, the view of Diwakar's testimony taken by the Trial Court could not be said to be unreasonable or erroneous.

14. Similar view has been taken in *K Lakshmana Rao Versus Public Prosecutor, State of Andhra Pradesh* and another (AIR 1979 Supreme Court

1324), *Chowdikodlu Asuralli Dyavappa and another Versus State of Mysore* (AIR 1979 Supreme Court 1533) and *Harijan Megha Jesha Versus*

State of Gujarat (AIR 1979 Supreme Court 1566).

15. In para 14 of *Sirajuddin Versus State of Karnataka*, (AIR 1981 Supreme Court 113), it has been held that;

14.....It is well settled that if the view of the evidence taken by the Trial Court is reasonably possible, the High Court should not, as a rule of

prudence, disturb the acquittal. We are therefore, of the opinion that in the circumstances of this particular case, the High Court was not justified in

reversing the acquittal of the appellant.

16. In *Babu and others versus State of Uttar Pradesh* (AIR 1983 Supreme Court 308), the Apex Court said (Para 18 P.311);

18. About the time of occurrence, also the High Court reversed the finding of the Sessions Court that the possibility was that Dhani Ram was

done to death in the early hours of 8th October before he had gone to ease himself. The reasons given by the Sessions Court appear to be more

plausible on the materials on the record. In any case, even if two views were possible, the High Court should not have interfered with the

conclusions arrived at by the Sessions Court unless the conclusions were not possible. If the finding reached by the Trial Judge cannot be said to

be unreasonable, the Appellate Court should not disturb it even if it were possible to reach a different conclusion on the basis of the material on the

record because the Trial Judge has the advantage of seeing and hearing the witnesses and the initial presumption of innocence in favour of the

accused is not weakened by his acquittal. The Appellate Court, therefore, should be slow in disturbing the finding of fact of the trial court and if

two views are reasonably possible of the evidence on the record, it is not

expected to interfere simply because it feels that it would have taken a different view if the case has been tried by it. This Court in *State of U.P. Versus Samman Dass*, (1972) 3 SCR 58: (AIR 1972 SC 677) dealing with a similar situation laid down the following postulates (para 22 of AIR); "There are, however, certain cardinal rules which have always to be kept in view in appeals against acquittal. Firstly, there is a presumption of innocence in favour of the accused which has to be kept in mind, especially when the accused has been acquitted by the Court below; secondly, if two views of the matter are possible, a view favourable to the accused should be taken; thirdly, in case of acquittal by the trial Judge, the Appellate Court should take into account the fact that the Trial Judge had the advantage of looking at the demeanour of witnesses; and fourthly, the accused is entitled to the benefit of doubt. The doubt should, however, be reasonable and....should be such which rational thinking men will reasonably, honestly and conscientiously entertain and not the doubt of a timid mind which fights shy though unwittingly it may be or is afraid of the logical consequence, if that benefit was not given

17. In *Ram Kumar Versus State of Haryana A* (AIR 1995 SC 280), the Apex Court said: (PARA 15 P 284);

15 Learned Counsel for the appellant contended that the Trial Court had recorded the order of acquittal of all the accused person including the appellant giving sound and cogent reasons for disbelieving the prosecution case and, therefore, the High Court should not have interfered with the order of acquittal merely because another view of an appraisal of the evidence on record was possible. In this connection it may be pointed out that the powers of the High Court in an appeal from order of acquittal to reassess the evidence and reach its own conclusions under Ss 378 and 379 Cr.P.C. are as extensive as in any appeal against the order of conviction. But as a rule of prudence, it is desirable that the High Court should give proper weight and consideration to the view of the Trial Court with regard to the credibility of the witness, the presumption of innocence in favour of the accused, the right of the accused to the benefit of any doubt and the slowness of Appellate Court in justifying a finding of fact arrived at by a Judge who had the advantage of seeing the witness. No doubt it is settled law that if the main grounds on which the Court below has based

its order acquitting the accused, are reasonable and plausible, and the same can not entirely and effectively be dislodged or demolished, the High

Court should not disturb the order of acquittal. We shall, therefore, examine the evidence and the material on record to see whether the

conclusions recorded by the Trial Court in acquitting the appellant are reasonable and plausible or the same are vitiated by some manifest illegality

or the conclusion recorded by the Trial Court are such which could not have been possibly arrived at any Court acting reasonably and judiciously

which may in other words be characterised as perverse.

18. In *Ramesh Babulal Doshi Versus State of Gujarat* (AIR 1996 Supreme Court 2035), Court held: (Paras 715 P 2037 and 2040);

7. Before proceeding further it will be pertinent to mention that the entire approach of the High Court in dealing with the appeal was patently

wrong for it did not at all address itself to the question as to whether the reasons which weighed with the Trial Court for recording the order of

acquittal were proper or not. Instead thereof the High Court made an independent reappraisal of the entire evidence to arrive at the above quoted

conclusions. This court has repeatedly laid down that the mere fact that a view other than the one taken by the Trial Court can be legitimately laid

down that arrived at by the Appellate Court on reappraisal of the evidence cannot constitute a valid and sufficient ground to interfere with an order

of acquittal unless it comes to the conclusion that the entire approach of the Trial Court in dealing with the evidence was patently illegal or the

conclusions arrived at by it were wholly untenable. While sitting in Judgement over an acquittal the Appellate Court is first required to seek an

answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the

Appellate Court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the Appellate Court holds, for

reasons to be recorded, that the order of acquittal cannot at all be in view of any of the above infirmities it can then and then only reappraise the

evidence to arrive at its own conclusions. In keeping with the above principles we have therefore, to first ascertain whether the findings of the Trial

Court are sustainable or not.

19. In *Danna, etc. Versus State of Madhya Pradesh* AIR 1996 Supreme Court

2478), the Court said: (Para 11 P 2481);

11. Though the code does not make any distinction between an appeal from acquittal and an appeal from conviction so far as powers of the

Appellate Court are concerned, certain unwritten rules of adjudication have consistently been followed by Judges, while dealing with appeals

against acquittal. No doubt, the High Court has full power to review the evidence and to arrive at its own independent conclusion where the appeal

is against conviction or acquittal. But while dealing with an appeal against acquittal the Appellate Court has to bear in mind; first that there is a

general presumption in favour of the innocence of the person accused in criminal cases and that presumption is only strengthened by the acquittal.

The second is, every accused is entitled to the benefit of reasonable doubt regarding his guilt and when the Trial Court acquitted him, he would

retain that benefit in the Appellate Court also. Thus, Appellate Court in appeals against acquittals has to proceed more cautiously and only if there

is absolute evidence on record, that the order of acquittal is liable to be interfered with or disturbed (*Durgacharan Naik V. State of Orrisa*, AIR

1966 SC 1775; *Caetano Pledade Fernandes V. Union Territory of Goa, Daman and Diu* A IF 1977 SC 135, *Tota Singh V State of Punjab*, AIR

1987 SC 1083; *Awadhesh Vs. State of M.P.*, AIR 1988 SC 1158 and *Ashok Kumar Vs. State of Rajasthan*, AIR 1990 SC 2134)." 20.

Therefore, what emerges out of the aforesaid discussion is that, the Trial Court has considered the evidence quite appropriately and

comprehensively on all material points of the case before coming to the conclusion that the prosecution has not proved the case against the accused

beyond all reasonable doubts. We see no justification on the facts and evidence in this case not to subscribe to the view taken by the Trial Court.

Consequently, this Appeal fails and is accordingly dismissed Bail bonds and surety bonds, if any, executed by the accused are hereby terminated.