
(2013) 04 SHI CK 0079

In the High Court Of Himachal Pradesh

Case No : Criminal Revision No. 74 of 2005

Suresh Kumar and Others

APPELLANT

Vs

State of Himachal Pradesh

RESPONDENT

Date of Decision : 03-04-2013

Acts Referred:

Citation : (2013) CriLJ 4860 : (2013) 2 ShimLC 754

Hon'ble Judges : Dharam Chand Chaudhary, J

Bench : Single Bench

Advocate : N.S. Chandel, for the Appellant; Virender Verma, Additional Advocate General, Mr. Pushpender Jaswal, D.A.G. and Mr. Ramesh Thakur, Assistant Advocate General, for the Respondent

Judgement

Dharam Chand Chaudhary, J.—Aggrieved by their conviction for commission of offence punishable under Sections 325 and 506 (II) read with Section 34 IPC and sentence-to undergo rigorous imprisonment for a period of one year and to pay a fine of Rs. 10,000/- each u/s 325/34 IPC and to undergo rigorous imprisonment for a period of six months each* and to pay a fine of Rs. 1,000/- each u/s 506(II)/34 IPC, the appellants, hereinafter referred to as accused No. 1, 2 and 3, have preferred this petition for quashing the same on the grounds inter alia, that the same being against law and facts and based on surmises, hypotheses and conjectures is not sustainable. Also that the judgment and decree Exs. PA and PB, they produced in evidence before learned appellate Court whereby the suit for damages to the tune of Rs. 2,00,000/- filed by the complainant on account of loss of left eye allegedly caused to her in the occurrence was dismissed, is erroneously ignored and the conclusion that standard of proof in a civil case as compared to in a criminal case is different and that in a criminal case rather more strict proof is required is absurd and not legally sustainable. The testimony of the so called eye witness PW-2 Jagdish Chand, who as a matter of fact is neighbour of the complainant, should have not been relied upon. The prosecution story that accused No. 1 inflicted blow on the left eye and nose of the complainant with iron rod Ex. P-1 whereas accused No. 2 and 3 with kicks and

fist blows is not proved from the medical evidence on record as only one injury that too on her left eye could be detected during her medical examination. The medical evidence as has come on record from the testimony of Dr. H.R. Kalia, PW-5 and Dr. M.L. Pandey, PW-6 has not been appreciated in its right perspective. The so called evidence that it is accused No. 1, who inflicted iron rod blow on left eye of the complainant resulting in complete loss of vision or that the ball of her left eye had to be removed on account of the injury so inflicted to her is not at all put to the said accused in his statement recorded u/s 313 Cr.P.C., hence, his conviction and sentence is stated to be not legally and factually sustainable. At the very outset it is pointed out that in the exercise of revisional jurisdiction the scope of interference with the findings recorded by the trial Court and lower appellate Court, on appreciation of the evidence available on record, is very limited as the only thing, which needs adjudication is as to whether the Courts below have misread and misconstrued the evidence available on record leading to erroneous findings or there exists an error apparent on the face of the record, which resulted into miscarriage of justice to the aggrieved party. It is well settled that the findings recorded by the Courts below after appreciating the evidence available on record in its right perspective normally should not be interfered with in the exercise of limited revisional jurisdiction.

2. It is in the light of the above well settled legal parameters, the fate of this petition has to be decided. Although, there is no need to elaborate the facts of the case, yet to sum up the same in a nut shell to appreciate the point in issue brought to this Court in this petition is deemed appropriate.

3. In a nut shell the case of prosecution against the accused-petitioners as disclosed from the FIR Ex. PW-7/A and the Police Report u/s 173 Cr.P.C. is that on 23.11.1997, they came on tractor No. HP-21-0903, being driven by accused No. 1 whereas accused No. 2 and 3 on its board. They allegedly were going to plough the field of one Anant Ram, adjoining to that of the complainant. The complainant who had come to fetch water from the tap and having already ploughed and cultivated crop in her field objected to taking of the tractor to the field of said Shri Anant Ram, through her field. This allegedly enraged accused No. 1, who alighted from the tractor with iron rod (Ex. P-1) in his hand and inflicted a blow thereof on her person and thereby caused injury in her left eye and nose. The remaining accused inflicted kicks and fist blows on her person and as a result thereof she sustained multiple injuries.

4. The trial Court on examining the evidence available on record has arrived at a conclusion that there being complete loss of vision caused to left eye of the complainant and she having been criminally intimidated by threatening to do away with her life by the accused-petitioners, a case for commission of offence punishable under Sections 325 and 506(11) read with Section 34 IPC is made out against them.

5. Learned lower appellate Court, while concurring with the findings of the conviction recorded against the accused, has dismissed the appeal they preferred

vide the judgment impugned before this Court.

6. Before coming to the merits of the case it would be appropriate to examine the question of framing charge against the accused with the aid of Section 34 IPC. In this context it is pointed out that the common intention denotes action in concert and necessarily postulates the existence of a pre-arranged plan implying a prior meeting of minds. There is nothing suggesting that the offence has been committed by the accused persons in furtherance of their common intention because nothing has come on record suggesting that there was meeting of all the accused prior to the occurrence and that they all in such meeting intended to plan to assault the injured PW-1 in the manner as claimed by the prosecution. There is, however, no evidence on record, which suggests that the accused persons had gathered at the place of occurrence with lethal weapons in their hands in furtherance of common intention to assault the complainant. The present at the most could have been said to be a case where the occurrence took place in the spur of moment i.e. on the complainant's having prevented accused No. 1 from taking the tractor through her field already cultivated, had the prosecution been otherwise able to prove its case beyond reasonable doubt. Therefore, in this case from the evidence available on record common intention of the accused persons to assault the complainant cannot be gathered and as such they could have not been convicted for the commission of substantive offence with the aid of Section 34 IPC. As a matter of fact, it is held so by our own High Court in State of Himachal Pradesh and Others Vs. Maheshi alias Mahesh and Others,

7. Otherwise also, accused No. 3 was not initially involved in the commission of the offence and he has been added as an accused during the course of trial u/s 319 Cr.P.C. So far as accused No. 2 is concerned, no doubt, he has been booked in the case with the principal accused i.e. accused No. 1. As per own case of the prosecution, the blow on the left eye and nose of the complainant has been inflicted by accused No. 1 alone. Accused No. 2 and 3 have been involved in this case on the allegations that they inflicted kick and fist blows on the person of the complaint. At the time of her medical examination except for injury on her left eye, no other external injury including on the nose of the complainant could be noticed by PW-5 Dr. H.R. Kalia as is apparent from the perusal of MLC Ex. PW-5/A.

8. Therefore, the own statement of the complainant and that of PW-2 Shri Jagdish Chand that accused No. 2 and 3 administered kicks and fists blows to her and also threatened her to do away with her life also not inspire any confidence.

9. Now, if coming to the controversy, it is seen from the impugned judgment that both the Courts below have placed heavy reliance on the medical evidence as has come on record by way of MLC Ex. PW-5/A, proved by Dr. H.R. Kalia, Medical Officer Incharge, Community Health Centre, Barsar and the report of Dr. M.L. Pandey Ex. PW-6/A on the reverse of the MLC. The MLC Ex. PW-5/A reads as follows:--

Alleged history of injury on 23.11.1997, at 9.00 a.m. Patient is conscious, well oriented to time and place.

Pulse = 70/mt. reg.

BP = 118/80 mm of hg.

No external injury is seen on any part of body, however, patient c/o pain in left eye.

There is swelling of left eye lids, both upper and lower.

Bleeding from left eye positive cornea is ruptured.

Lens of left eye is dislocated forward

antenna Chamber not well defined

Vision of left eye is lost.

Patient is being referred to District Hospital, Hamirpur for ophthalmologist's opinion (eye surgeon's opinion)

As per opinion of eye surgeon District Hospital, Hamirpur & IGMC Shimla, there is total loss of vision in left eye. So injury to left eye is grievous.

10. It is seen that PW-5 had referred the complainant to District Hospital, Hamirpur for Ophthalmologist opinion. The report of eye surgeon deployed in District Hospital, Hamirpur on the reverse of MLC Ex. PW-5/A of the same date reads as follows:--

Alleged history of sustaining injuries at around 9.00 a.m. on 23.11.97.

No P.L. (with torch light)

Bleeding present.

Eye ball is ruptured, uveal tissue bulging forwards (Protruded out).

Past history of D/V following injury to the same eye with wooden stick at the age of 5-6 years is present (As per history given by the patient herself)

Referred to IGMC Shimla for further management (opinion & investigation and treatment) Department of ophthalmology including u/s. & CT scan @ & eye.

11. Since the complainant was referred to IGMC to have further opinion from Ophthalmology Department, she was examined by Asst. Prof. Dr. M.L. Pandey (PW-6) on 25.11.1997 at 6.55 a.m. and the report he made, reads as follows:--

EYE FINDINGS

MRD No. 131376/97, dated 25.11.1997 at 6.55 a.m. Case discussed with and seen by Dr. K.P. Chaudhary, Ass. Professor.

Alleged history of Trauma left eye.

6/6

V

No P.L.

Lid-Mild lid swelling both upper and lower

Conjunctival Chemosis present MP discharge present

Pseudo-proptosis present

Total corneal loss-pseudo-cornea present

Total Uveal tissue prolapse along with lens

Eye brow forehead cheek orbital margin normal

Mild lid swelling

Conjunctival chemosis

Pseudo-cornea with uveal prolapse

Adv. Evisceration.

Since the history of trauma is 5 day and there is possibility of sympathetic ophthalmitis in right eye so evisceration (removal of) left eye is advised. Evisceration done on 27.11.1997.

12. It is seen from the MLC Ex. PW-5/A that no external injury could be seen on any part of the body of the complainant. She, however, complained pain in her left eye. On examination, PW-5 did notice swelling in upper and lower lids of this eye and also bleeding. Cornea was found ruptured and lens dislocated forward whereas antenna chamber found to be not defined well. He also noticed loss of vision of left eye of the complainant.

13. The report of ophthalmologist, District Hospital, Hamirpur referred supra reveals that the complainant herself had given history of injury caused to her left eye at the age of 5-6 years with wooden stick. If coming to the report Ex. PW-6/A of Dr. M.L. Pandey, no doubt, the same speaks about the total corneal loss and removal of left eye-ball, however, while in the witness box he expressed his inability to say something about the prior status of vision of left eye as according to him, the eye was already damaged and as such the status of vision of the eye before injury was not possible to be indicated. Also that there is no test, which helps to find out the status of vision of the eye before it got injured. True it is that PW-5 did notice swelling in lower and upper lids of left eye of the complainant and some bleeding also, but it has not come in the MLC that the eye-ball was found to be divulged or damaged. From the testimony of the expert witness, who is PW-6, Dr. M.L. Pandey, it is not possible to ascertain the status of the vision of left eye of the complainant before occurrence. Therefore for want of clinching and conclusive proof to arrive at a conclusion that the cause of loss of

vision of left eye to the complainant was the so called blow inflicted by accused No. 1 alone and none-else, he cannot be held guilty.

14. Mere preponderance of probability has no place in criminal administration of justice and as per settled legal principles, the required guilt of the accused must be established on record beyond all reasonable doubts, failing which no findings of conviction can be recorded against him.

15. The medical evidence as discussed supra, no doubt, is suggestive of that there was an injury on left eye of the complainant when examined by PW-5, however, whether perpetrator of such crime was accused No. 1 alone and none else, is not established on record beyond all reasonable doubts. Otherwise also, whether the vision of left eye was there before the occurrence or not, no cogent or reliable evidence is available on record as PW-6, Dr. M.L. Pandey, the expert witness has expressed his inability to tell the status of vision of this eye of the complainant prior to the occurrence.

16. The injury caused by accused No. 1 has resulted in permanent privation of the sight of left eye to the complainant within the meaning of Section 320 IPC is thus not proved beyond all reasonable doubt. As noticed supra, her own admission before eye specialist, District Hamirpur rather reveals that she had suffered injury in her left eye from a wooden stick when was 5-6 years old. The evidence in their defence examined by the accused also reveals that she was blind by her left eye since her childhood. Such evidence available on record again leads to the only conclusion that there are two possible views, which can be formed in this case and in such a case it is not safe to record the findings of conviction against the accused.

17. Whether the complainant was blind by left eye since her childhood or not, no opinion in this behalf can be formed in view of the evidence discussed hereinabove. The facts, however, remain that there was injury on left eye of the accused and it is on account of such injury; the ball of that eye had to be removed. This Court has all sympathy with the complainant, however, since either of the accused cannot be connected with causing of the said injury, therefore, they are entitled to the benefit of doubt and no findings of conviction can be recorded against them.

18. If advertent to the ocular evidence, the suggestion that she is getting disability pension put to the complainant in her cross-examination has been admitted to be correct by her. No doubt, in the same breath she clarified that there was no loss of vision to her prior to the occurrence and as per that of PW-2 Jagdish Chand, she is getting widow pension, however, her earlier version that she is getting disability pension is sufficient to create doubt qua the manner, in which the occurrence allegedly took place. The manner in which the injury is claimed to have been caused to her left eye is also not proved and as such the possibility of she having suffered the loss of vision of left eye when was 5-6 years of age and not in the alleged occurrence cannot be ruled out.

19. Not only this, but the own statement of the complainant belies the prosecution case to the extent of the accused were going to plough the field of Shri Anant Ram because she has herself stated that the accused were coming after ploughing the field of said Shri Anant Ram. This contradiction goes to the very root of the prosecution case.

20. Above all in order to remove all doubts qua this aspect of the prosecution story, said Shri Anant Ram has not been associated during the investigation of the case nor examined. Though date of occurrence as disclosed from the record is 23.11.1997, however, at what time, it is not established beyond all reasonable doubts. There is contradictory version because the time of occurrence as reflected in the MLC Ex. PW-5/A is 9.00 a.m. whereas in the FIR and in the report u/s 173 Cr.P.C., the time of occurrence is missing. The information qua this occurrence, however, was received at 1.15 p.m. in the Police Station as find recorded in the FIR Ex. PW-7/A and also the charge framed against each of the accused persons. The non-mentioning of time of occurrence is also fatal to the prosecution case.

21. Interestingly, FIR Ex. PW-7/A has been received by the Illaqua Magistrate i.e. Chief Judicial Magistrate, Hamirpur on 10.12.1997 at 10.30 a.m. i.e. after more than two weeks of the occurrence. The unexplained delay in forwarding the FIR to the Magistrate concerned has caused major dent in the prosecution story and as such false implication of the accused persons on account of manipulation by the complainant and PW-2 Jagdish Chand, who having contested election of Panch against accused No. 2, most probably being inimical to the accused in connivance with the local police, cannot be ruled out. The Courts below should have gone into all these aspects with all care and caution and not to sway merely on account of loss of vision of left eye of the complainant, which in the light of what has been stated hereinabove, is not at all proved to have caused in the alleged occurrence.

22. Surprisingly enough, it is not known as to what was the impact of the so called injury caused on the person of the complainant on account of kicks and fist blows allegedly administered on her person by accused No. 2 and 3 even if her own testimony and that of PW-2, Jagdish Chand to this effect is believed to be true because the doctor did not notice any other and further injury on her person except on her left eye. When the blow was inflicted with iron rod Ex. P-1 on eye and also on her nose, what happened to the injury on nose also remained unexplained as no injury was found to be there on her nose. It is significant to point out that administering the blow with iron rod would have definitely caused the injury more serious in nature to the one noticed by Dr. H.R. Kalia, PW-5, even if it is believed that the iron rod Ex. P-1 was with accused No. 1 and the injury was inflicted therewith by him on her eye and nose. There is, however, no iota of evidence to believe that the rod Ex. P-1 was in the possession of accused No. 1 and that it is he who produced the same before the Police in the manner as claimed in the Police report for the reason that the own version of complainant

reveals that she has nowhere stated that it is accused No. 1, who had produced the iron rod before the police in her presence and rather in her cross examination, she has admitted that the iron rod Ex. P-1 was shown to her by the police in Police station. Not only this, as per her own-testimony, on the rod Ex. P-1, there is no special mark and that such type of rods are common and generally available in the villages. The so called marginal witness Shri Bakshi Ram to seizure memo Ex. PW-1/A vide which the rod was taken into possession has stepped in the witness box as PW-3 and did not support the prosecution case in this behalf. Learned Public Prosecutor could not elicit anything material during his cross examination when allowed to be cross-examined. Therefore, the recovery of rod Ex. P-1 is also manipulated one and not proved to be effected from accused No. 1 as claimed in the police report.

23. The defence of the accused as emerges from the trend of cross-examination of PWs that the complainant, who admittedly hired the tractor trolley of Ashok Kumar for carrying the construction material, like sand, Bajari etc. while her house was under construction and that most probably she had not paid the freight charges i.e. Rs. 9,000/- to the said accused and on asking for this amount she having implicated them in connivance with PW-2 Shri Jagdish Chand, cannot be overlooked and rather renders the prosecution story doubtful because the complainant herself admits that it is the accused, who had transported the construction material of her house in his tractor trolley. No doubt, she states that she had paid the freight charges to the accused, the same however, in the given facts and circumstances not inspire confidence.

24. No doubt, the testimony of an injured witness, if otherwise inspire confidence is sufficient to record findings of conviction against an offender. The present, however, is a case where the prosecution case right from the very initial stage, as pointed out supra, hardly inspire any confidence and as such, it is difficult to rely upon the same to curtail the liberty of the accused and based on such evidence their conviction rather would be violative of Article 21 of the Constitution of India.

25. No doubt, PW-2 Jagdish Chand, her neighbour, had contested the election of Panch of Gram Panchayat against accused No. 2, successfully, however, the possibility of the said witness inimical to the accused party and being neighbour of the complainant she also is his supporter, the possibility of they both in connivance with each other to absolve from the liability to pay the freight charges and also to teach lesson to the accused persons cannot be ruled out.

26. The remaining evidence as has come on record by the testimony of the official witnesses i.e. Police personnel could have been relied upon had the prosecution been able to otherwise prove by way of cogent and reliable evidence the manner in which the occurrence took place.

27. Both the Courts below have thus miserably failed to appreciate the evidence available on record in its right perspective and rather misread and misconstrued

the same. The contradictions in the evidence pointed out hereinabove go to the very root of the prosecution case. The improvements at various stages during the course of investigation coupled with no time of occurrence finds mention in the FIR Ex. PW-7/A and forwarding of the copy of FIR to the Illaqua Magistrate, after a period over two weeks render the prosecution story highly improbable. Irrespective of all this, recording of findings of conviction against the accused by both the Courts below is neither legally nor factually sustainable and rather perverse being based on misreading of the evidence available on record.

28. The present is thus a fit case where this Court while exercising its revisional jurisdiction, deems it appropriate to quash and set aside the impugned judgment of conviction passed against the accused persons by both the Courts below.

29. This Court also finds considerable force in the grounds of challenge that dismissal of suit filed by the complainant for damages to the tune of Rs. 2,00,000/- on account of loss of vision allegedly caused to her in this very occurrence should have been given due weightage and relied upon to reverse the findings of their conviction being supported by the judgment of the Apex Court in V.M. Shah Vs. State of Maharashtra and another, the ratio of this judgment reads as follows:--

11. As seen that the civil Court after full dressed trial recorded the finding that the appellant had not come into possession through the Company but had independent tenancy rights from the principal landlord and, therefore, the decree for eviction was negatived. Until that finding is duly considered by the appellate Court after weighing the evidence afresh and if it so warranted reversed, the findings bind the parties. The findings, recorded by the criminal Court, stand superseded by the findings of the Civil Court get precedence over the findings recorded by the trial Court, in particular, in summary trial for offences like S. 630. The mere pendency of the appeal does not have the effect of suspending the operation of the decree of the trial Court and neither the finding of the Civil Court gets nor the decree becomes inoperative.

30. Learned lower appellate Court no doubt has rightly observed that the standard of proof in a civil case is different to that in a criminal case and that more strict proof is required in criminal case. However, the Court below erred while concluding that the judgment of civil Court has no binding effect in a criminal case for the reason that as per the settled legal principles, the evidence in a civil case shall have precedence in a criminal case. The suit filed by the complainant admittedly stands dismissed vide judgment and decree Exs. PA and PB produced in evidence before the lower appellate Court. She herself has admitted in her statement recorded by the lower appellate Court that no appeal is preferred by her against the same, therefore, the judgment and decree Exs. PA and PB having attained finality, has definitely the bearing in the present case and while placing reliance thereon learned lower appellate Court should have given the benefit of doubt to the accused-petitioners on this score also.

31. The approach of learned lower appellate Court in applying the above legal principles otherwise and contrary to the settled legal principles has definitely resulted into miscarriage of justice to the accused. For all the reasons hereinabove, this petition succeeds and the same is accordingly allowed. Consequently, the impugned judgment dated 31.5.2005, passed by learned Presiding Officer, Fast Track Court, Hamirpur, in criminal appeal No. 16 of 2001/26 of 2004, whereby the judgment dated 24.4.2001 passed by the Additional Chief Judicial Magistrate, Barsar, District Hamirpur, in criminal case No. 71-II/1998 was affirmed, is hereby quashed and set aside. The conviction of all the accused persons under Sections 325 and 506(II) read with Section 34 IPC and sentence awarded against each of them is also quashed and set aside. The amount of fine, if deposited by the accused, be refunded to them on proper identification and receipt. The bail bonds furnished by the accused are cancelled and the surety discharged.