

Neutral Citation No. - 2023:AHC-LKO:54570-DB

Government Appeal No.244 of 1996

State of U.P.	----	Appellant
Vs		
1. Aziz Khan		
2. Azmat Khan		
3. Nadim Khan		
4. Insad Khan @ Irshad Khan		
5. Kalimullah @ Kallu Khan	---	Respondents

For Appellant	:	Ms. Meera Tripathi, AGA
For Respondents	:	Sri Amit Kumar Awasthi

Hon'ble Pritinker Diwaker, CJ.
Hon'ble Rajan Roy, J.

Per: Pritinker Diwaker, CJ.

1. Challenge in the present Government Appeal is to the impugned judgment and order dated 15.3.1996 passed by Special/Additional Sessions Judge, Kheri in Sessions Trial No. 196 of 1990 (State Vs. Aziz Khan and others), acquitting all the respondents of the offence under Sections 148, 302 read with Section 149 of IPC.
2. In the present case, name of deceased is Zahroon Khan, brother of PW-1 (Rauf Khan). It is alleged that on account of previous enmity, on 1.7.1989, at about 06.00 pm, accused persons caught hold the deceased; there were some altercations between them and then it is alleged that accused Aziz Khan and Insad Khan @ Irshad Khan, had caused firearm injuries to the deceased, resulting his death.

Incident is said to have been witnessed by PW-1 (Rauf Khan), brother of the deceased, PW-2 (Habeeb Khan) and PW-3 (Jaleel Khan). F.I.R. was

lodged by PW-1 (Rauf Khan) on the next day i.e. 02.07.1989 at about 10.30 am, under Sections 147, 148, 149, 302, 201 of IPC. Dead body of the deceased was sent for postmortem and as per Autopsy Surgeon, following injuries were found on the body of the deceased.

“(1) Incised wound 20 cm x 3 cm x cranial cavity deep obliquely faced over left side of head, forehead, base of nose & Rt eye ball, left frontal bone, nasal bone, maxillary bone cut along with cut Rt eye ball. Brain coming out through the wound.

(2) Incised wound 9 cm x 3 cm x bone deep over left side of face, extending from left eye, cheek and nostril, left maxillary bone cut, along with left nasal bone floor of orbit of left eye ball.

(3) Incised wound 8 cm x 2 cm x bone deep over right angle of mouth & upper lip, upper incisor and premolar cut.

(4) Fire arm wound of entry on the Rt side of neck adjacent to Rt angle of mandible, 3 cm x 1.5 cm x bone deep. Margins inverted, irregular, blackening and tattooing present.

(5) Fire arm wound of exit 11 cm x 4 cm x bone deep communicating to injury No. 4 at the base of left mandible (at base), margins everted, irregular, underlying mandible bone fractured.

(6) Incised wound 10 cm x 2 cm x bone deep over front & left side of neck. Trachea, oesophagus, vessels & nerves cut irregular.

(7) Multiple firearm wound of entry, in an area of 7 cm x 5 cm, over front & left side of chest 3 cm above left nipple, measuring 0.5 cm x 0.4 cm x cavity deep, margin inverted & irregular and with clotted blood.”

3. While framing charge, the trial Court has framed charge against the accused-respondents under Sections 148, 302 read with Section 149 IPC.

4. So as to hold the accused-respondents guilty, prosecution has examined six witnesses. Statements of accused respondents were also recorded u/s 313 Cr.P.C. in which, they pleaded their innocence and false implication.

5. By the impugned judgment, the trial court, after considering all the evidence, has acquitted all the accused-respondents of all the offences. Hence this appeal by the State.

6. Learned counsel for the appellant-State submits:

- (I) that the prosecution has examined PW-1 (Rauf Khan), brother of the deceased, PW-2 (Habeeb Khan) and PW-3 (Jaleel Khan), and they have supported the prosecution case; and
- (II) that disbelieving the statements of the eye-witnesses, the trial Court has erred in law in acquitting the accused-respondents.

7. On the other hand, supporting the impugned judgment, counsel for the accused-respondents has argued:

- (I) that the acquittal of the accused persons is in accordance with law;
- (II) that there is an inordinate delay of about 12 hours in lodging the FIR and the said delay has not been explained by the prosecution, as required under the law, while the distance of police station from the place of occurrence is about 9 kilometers.
- (III) that accused-respondent no. 1 is aged about 70 years, whereas accused-respondent nos. 2, 3, 4 and 5 are aged about 67, 70, 65 & 80 respectively.
- (IV) that considering the contradictions in the statements of PW-1 (Rauf Khan), brother of the deceased, and PW-3 (Jaleel Khan), these witnesses are totally unreliable and, therefore, the trial Court was fully justified in acquitting the accused respondents;
- (V) that either the incident has not been seen by PW-1 (Rauf Khan), brother of the deceased, PW-2 (Habeeb Khan), and PW-3 (Jaleel Khan) or subsequently they have been planted as eye-witnesses to the incident; and
- (VI) that the postmortem report of the deceased also does not support the prosecution case because as per the statements of eye-witnesses, as many as three firearm injuries have been caused to the deceased but the postmortem report reflects that

only two gunshot injuries have been found on the body of the deceased and no *Gadasa* injury was found on the body of the deceased as alleged by PW-1 (Rauf Khan) and PW-3 (Jalil Khan).

8. We have heard counsel for the parties and perused the record.

9. PW-1 (Rauf Khan), while supporting the prosecution case, has stated that the incident occurred at 6:00 pm and at the time of incident, he was present there and saw the incident. He states that there was an old enmity between the two families. He states that on the date of occurrence, deceased had gone to Lakhimpur for attending a criminal case and when he was returning to his house, near the garden of Ram Asre, accused Azmat Khan and Nadim Khan caught hold the deceased and then accused Aziz Khan caused a gunshot injury with his 12 bore country-made pistol and thereafter, accused Insad Khan @ Irshad Khan also caused gunshot injury to the deceased by his licency double barrel gun, which hit the deceased, and as a result of gunshot injuries, he fell on the ground. He states that accused Kalimullah @ Kallu Khan, who was carrying a *Gadasa*, also caused injury by the said *Gadasa* to the deceased. He states that accused persons with the help of packing-needle (*Sooja*), took out both the eyes of the deceased. He states that immediately after the incident, report could not be lodged by him, as he was scared of being assaulted by the accused persons by the deadly weapons. He has categorically stated that after returning from other village, he had gone to work in his field at 3:00 pm. He states that he saw his brother coming out from the bus at Achhania bus stand.

This witness was subjected to lengthy cross-examination by the defence and there is a lot of variation in his statements in regard to the incident. This witness has further failed to explain as to why he could not lodge the prompt report and hide himself in the house of one of his relatives.

10. PW-2 (Habib Khan) has not supported the prosecution case and turned hostile.

11. PW-3 (Jaleel Khan) has been examined as an eye-witness to the incident but, according to him, it was after the incident, when PW-1 (Rauf Khan), Haneef Khan (not examined), Irshad Khan (not examined) and PW-2 (Habib Khan) also came there and after the commission of offence, they all fled away from the spot. He states that on account of fear, he too had gone to his house.

In the cross-examination, this witness has not fully supported the prosecution case and there are material contradictions in his statements and there is further inconsistency between the statements of PW-1 (Rauf Khan) and PW-3 (Jaleel Khan) and reading the entire statements of these witnesses, creates a doubt as to whether they have seen the incident or not. While narrating the incident, he has changed his version on many places and the factum of taking out the eyes of the deceased also becomes doubtful because, though the witnesses have stated the same but the autopsy report does not support the same.

12. PW-4 (Ram Kishore Bajpai) registered a chik FIR and PW-5 (J.K. Rai) is an Investigating Officer, who conducted the investigation.

13. PW-6 (Dr. R.P. Srivastava) conducted the postmortem on the body of the deceased and noticed two firearm injuries. He has not stated anything about the alleged injury caused by the accused persons by using packing-needle (Sooja) and took out the eyes of the deceased.

14. Close scrutiny of the evidence makes it clear that there was previous dispute between the two families and on account of that, some incident might have taken place. In the statements of PW-1 (Rauf Khan), brother of the deceased and PW-3 (Jaleel Khan), there is a lot of variation and the evidence does not clearly reflect the fact that these witnesses were present at the time of occurrence and saw the incident. PW-2 (Habeeb Khan) has not supported the prosecution case and likewise, statement of PW-3 (Jaleel Khan) appears to be doubtful where he has stated that both the eyes were taken out by the accused persons. Further, there is no plausible explanation regarding the inordinate delay in lodging the FIR, and the statements of PW-1 (Rauf Khan), brother of the

deceased and PW-3 (Jaleel Khan) do not appear to be natural, where after seeing the evidence, they simply hide themselves and the report was lodged on the next day at 10:30 am.

15. After considering all the evidence as adduced by the prosecution, the Court below has reached to the conclusion of acquitting the accused persons. The view taken by the trial court is one of the possible and plausible view and it cannot be said to be perverse.

16. While considering the scope of interference in an appeal or revision against acquittal, it has been held by the Supreme Court that if two views of the evidence are reasonably possible, one supporting the acquittal and other indicating conviction, the High Court should not, in such a situation, reverse the order of acquittal recorded by the trial Court. In the matter of **State of Karnataka vs. K. Gopalkrishna** reported in (2005) 9 SCC 291, the Hon'ble Supreme Court, while dealing with an appeal against acquittal, observed as under:

"In such an appeal the Appellate Court does not lightly disturb the findings of fact recorded by the Court below. If on the basis of the same evidence, two views are reasonably possible, and the view favouring the accused is accepted by the Court below, that is sufficient for upholding the order of acquittal. However, if the Appellate Court comes to the conclusion that the findings of the Court below are wholly unreasonable or perverse and not based on the evidence on record, or suffers from serious illegality including ignorance or misreading of evidence on record, the Appellate Court will be justified in setting aside such an order of acquittal."

17. In **Sudershan Kumar v. State of Himachal** reported in (2014) 15 SCC 666 the Hon'ble Supreme Court observed thus;-

"31.It has been stated and restated that a cardinal principle in criminal jurisprudence that presumption of innocence of the accused is reinforced by an order of the acquittal. The appellate court, in such a case, would interfere only for very substantial and compelling reason. There is plethora of case laws on this proposition and we need not burden this judgment by referring to those decisions. Our purpose would be served by

referring to one reasoned pronouncement entitled *Dhanapal v. State* which is the judgment where most of the earlier decisions laying down the aforesaid principle are referred to. In para 37, propositions laid down in an earlier case are taken note of as under: -

"37. In ***Chandrappa v. State of Karnataka***, this Court held: (SCC p. 432 para 42), (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 emphasis 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."

32. Thereafter, in para 39, the Court curled out five principles and we would like to reproduce the said para hereunder:

"39. The following principles emerge from the cases above:

1. The accused is presumed to be innocent until proven guilty. The accused possessed this presumption when he was before the trial court. The trial court's acquittal bolsters the presumption that he is innocent.

2. The power of reviewing evidence is wide and the appellate court can re- appreciate the entire evidence on record. It can review the trial court's conclusion with respect to both facts and law, but the Appellate Court must give due weight and consideration to the decision of the trial court.

3. The appellate court should always keep in mind that the trial court had the distinct advantage of watching the demeanor of the witnesses. The trial court is in a better position to evaluate the credibility of the witnesses.

4. The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so.

5. If two reasonable or possible views can be reached - one that leads to acquittal, the other to conviction - the High Courts/appellate courts must rule in favour of the accused."

18. In **Dilawar Singh v. State of Haryana**, (2015) 1 SCC 737, the Supreme Court reiterated the same in paragraphs 36 and 37 as under :

"36. The court of appeal would not ordinarily interfere with the order of acquittal unless the approach is vitiated by manifest illegality. In an appeal against acquittal, this Court will not interfere with an order of acquittal merely because on the evaluation of the evidence, a different plausible view may arise and views taken by the courts below is not correct. In other words, this Court must come to the conclusion that the views taken by the learned courts below, while acquitting, cannot be the views of a reasonable person on the material on record.

36. In Chandrappa v. State of Karnataka, the scope of power of appellate court dealing with an appeal

against acquittal has been considered and this Court held as under: (SCC p.432 para 42) "42....(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."

Unless there are substantial and compelling reasons, the order of acquittal is not required to be reversed in appeal. It has been so stated in State of Rajasthan v. Shera Ram."

19. Considering the above legal position and the factual aspects of the case, we are of the view that the trial Judge was justified in acquitting the accused respondents.

20. The appeal has no substance and the same is, accordingly, **dismissed.**

Date: 17.8.2023

RK/RKP

(Rajan Roy,J) (Pritinker Diwaker, CJ.)