

Court No. - 16

Case :- APPLICATION U/S 378 No. - 14 of 2013

Applicant :- State of U.P.

Opposite Party :- Sewakram And Another

Counsel for Applicant :- Govt. Advocate

Hon'ble Mohd. Faiz Alam Khan,J.

1. Heard Mr. Rajesh Kumar Singh, learned Additional Government Advocate for the State and perused the record.

2. By means of the instant application moved under Section 378 (3) of Cr.P.C., the State has requested for grant of leave to appeal against the impugned judgment and order dated 30.10.2012 passed by the Additional Sessions Judge, Court No.3, Lakhimpur Kheri in Sessions Trial No.66 of 2007 arising out of Case Crime No.511 of 2006, under Sections 363, 366 I.P.C., Police Station Pasgawan, District Kheri whereby the accused persons/respondents namely Sewakram and Maniram have been acquitted of all the charges framed against them.

3. Learned A.G.A. while drawing attention of this Court towards the impugned judgement and order passed by the trial court of date 30.10.2012 submits that the trial court has committed manifest illegality in appreciating the evidence available on record as trial court has not considered the fact that the age of the victim/prosecutrix as shown in her educational credential is 05.12.1988, whereby she was minor at the date and time of the incident and the manner in which she has been enticed away by the accused persons, it was evident that she was not having any connivance with them and simply as no alarm has been raised by the victim after seeing some of the prosecution witnesses, it was wrongly inferred by the trial court that the prosecutrix/victim was a consenting party, which is not supported by the evidence available on record.

4. It is further submitted that reliable evidence has been given by the father of the victim, who has been testified as P.W.-1 and the other prosecution witnesses namely P.W.-2 Bechelal, P.W.-2 Sarvesh and statement of these witnesses have also been corroborated by medical evidence i.e. P.W.-5 Dr. Sangeeta Tandon as well as by Dr. S.C. Verma, who has been testified as P.W.-6 and they have also noticed two injuries on the person of the victim/prosecutrix.

5. It is vehemently submitted that the trial court has passed the judgement on surmises and conjectures without taking into account that the prosecutrix/victim was minor and moving her from the lawful custody of her parents would itself be an offence under Section 366 I.P.C., however, this aspect of the matter has not been considered by the trial court. It is submitted that leave to appeal be granted to the State and the respondents be summoned.

6. Having heard learned A.G.A. for the State and having perused the record, it is evident that the F.I.R. of the instant case has been lodged by father of the prosecutrix/victim alleging therein that in the intervening night of 28/29.05.2006 his son Aditya Pratap Singh was critically ill and his family members were busy in looking after him, however, in the morning his daughter aged about 15 years were cleaning the house and thereafter disappeared and could not be traced. On 02.06.2006 victim/prosecutrix was recovered from the custody of the accused persons and she was medically examined and after conclusion of the investigation, charge sheet was submitted by the investigating officer against the respondents.

7. The trial court framed charges against the accused persons/respondents under Sections 363, 366 I.P.C. to which the respondents denied and claimed trial.

8. The prosecution in order to prove its case before the trial court has probed informant P.W.-1 Rajendra Prasad, P.W.-2 Bechelal, P.W.-3 Sarvesh, P.W.-4 H.C.P. Ram Prakash, P.W.-5 Dr. Sangeeta Tandon, P.W.-6 Dr. S.C. Verma and P.W.-7 S.I. Ram Autar Singh.

9. By passing the impugned judgement and order of date 30.10.2012, the trial court while discussing the evidence available on record has recorded the finding of acquittal on following grounds:

(i) That the prosecutrix appears to be aged about 19 years at the date and time of the incident.

(ii) The prosecutrix appears to be a consenting party as she has been seen in the company of accused persons by P.W.-2 Bechelal and P.W.-3 Sarvesh at a petrol pump and even after seeing them, she did not raise any alarm or asked them to help her.

(iii) Nobody has seen the prosecutrix being taken away or enticing away by the accused persons.

(iv) She was major and was a consenting party.

10. The question as to how the application for grant of leave to appeal made under Section 378(3) of the Code should be decided by the High Court and what are the parameters which this Court should keep in mind remains no more 'res integra'. This Issue was examined by the Hon'ble the Apex Court in the case of **Ajmer Singh v. State of Punjab**, 1953 SCR 418 wherein it has been held that the accused was acquitted by the trial Court but was convicted by the High Court in an appeal against acquittal filed by the State. The aggrieved accused approached Apex Court. It was contended by him that there were 'no compelling reasons' for setting aside the order of acquittal and due and proper weight had not been given by the High Court to the opinion of the trial Court as regards the credibility of witnesses seen and examined. It was also commented that the High Court committed an error of law and the court found substance in the argument that when a strong 'prima facie' case is made out against an accused person it is his duty to explain the circumstances appearing in evidence against him and he cannot take shelter behind the presumption of innocence and cannot state that the law entitles him to keep his lips sealed. It is further held that in an appeal the High Court had full power to review the evidence upon which the order of acquittal was founded.

Upholding the contention, it has also been held in para 6 as under;

"We think this criticism is well-founded. After an order of acquittal has been made, the presumption of innocence is further reinforced by that order, and that being so, the trial court's decision can be reversed not on the ground that the accused had failed to explain the circumstances appearing against him but only for very substantial and compelling reasons."

11. In the case of **Sanwat Singh v. State of Rajasthan**, AIR 1961 SC 715 after placing reliance on the judgment given by Privy Council in **Sheo Swarup v. R. Emperor** AIR 1934 PC 227 (2) and many other authorities Hon'ble the Apex Court on the point in issue held as under :-

"Para 9- The foregoing discussion yields the following results :

(1) an appellate court has full power to review the evidence upon which the order of acquittal is founded; (2) the principles laid down in Sheo Swarup's case afford a correct guide for the appellate court's approach to a case in disposing of such an

appeal; and (3) the different phraseology used in the judgments of this Court, such as, (i) "substantial and compelling reasons", (ii) "good and sufficiently cogent reasons", and (iii) "strong reasons" are not intended to curtail the undoubted power of an appellate court in an appeal against acquittal to review the entire evidence and to come to its own conclusion; but in doing so it should not only consider every matter on record having a bearing on the questions of fact and the reasons given by the court below in support of its order of acquittal in its arriving at a conclusion on those facts, but should also express those reasons in its judgment, which lead it to hold that the acquittal was not justified".

12. Hon'ble the Apex Court in the case of **Sadhu Saran Singh Vs. State of Uttar Pradesh and Others** reported in (2016) 4 SCC 357 has considered this difference and has observed in paragraph nos.20 and 21 as under:

"20. Generally, an appeal against acquittal has always been altogether on a different pedestal from that of an appeal against conviction. In an appeal against acquittal where the presumption of innocence in favour of the accused is reinforced, the appellate court would interfere with the order of acquittal only when there is perversity of fact and law. However, we believe that the paramount consideration of the Court is to do substantial justice and avoid miscarriage of justice which can raise by acquitting the accused who is guilty of an offence. A miscarriage of justice that may occur by the acquittal of the guilty is no less than from the conviction of an innocent. This Court, while enunciating the principles with regard to the scope of powers of the appellate court in an appeal against acquittal, in *Sambasiva V. State of Kerala* 1998 SCC (Cri) 1320 has held:

"7. The principles with regard to the scope of the powers of the appellate court in an appeal against acquittal, are well settled. The powers of the appellate court in an appeal against acquittal are no less than in an appeal against conviction. But where on the basis of evidence on record two views are reasonably possible the appellate court cannot substitute its view in the place of that of the trial court. It is only when the approach of the trial in acquitting an accused is found to be clearly erroneous in its consideration of evidence on record and in deducing conclusions therefrom that the appellate court can interfere with the order of acquittal."

21. The Court, in several cases, has taken the consistent view that the appellate court, while dealing with an appeal against acquittal, has no absolute restriction in law to review and

relook the entire evidence on which the order of acquittal is founded. If the appellate court, on scrutiny, finds that the decision of the court below is based on erroneous views and against settled position of law, then the interference of the appellate court with such an order is imperative."

13. In ***State of Maharashtra vs. Sujay Mangesh Poyarekar (supra)***, Justice C.K. Thakker speaking for the Bench held in paras 19, 20, 21 and 24 as under:-

"19. Now, Section 378 of the Code provides for filing of appeal by the State in case of acquittal. Sub-section (3) declares that no appeal "shall be entertained except with the leave of the High Court". It is, therefore, necessary for the State where it is aggrieved by an order of acquittal recorded by a Court of Session to file an application for leave to appeal as required by sub-section (3) of Section 378 of the Code. It is also true that an appeal can be registered and heard on merits by the High Court only after the High Court grants leave by allowing the application filed under sub-section (3) of Section 378 of the Code.

20. In our opinion, however, in deciding the question whether requisite leave should or should not be granted, the High Court must apply its mind, consider whether prima facie case has been made out or arguable points have been raised and not whether the order of acquittal would or would not be set aside.

21. It cannot be laid down as an abstract proposition of law of universal application that each and every petition seeking leave to prefer an appeal against an order of acquittal recorded by a trial Court must be allowed by the appellate Court and every appeal must be admitted and decided on merits. But it also cannot be overlooked that at that stage, the Court would not enter into minute details of the prosecution evidence and refuse leave observing that the judgment of acquittal recorded by the trial Court could not be said to be 'perverse' and, hence, no leave should be granted.

24. We may hasten to clarify that we may not be understood to have laid down an inviolable rule that no leave should be refused by the appellate Court against an order of acquittal recorded by the trial Court. We only state that in such cases, the appellate Court must consider the relevant material, sworn testimonies of prosecution witnesses and record reasons why leave sought by the State should not be granted and the order of acquittal recorded by the trial Court should not be disturbed. Where there is application of mind by the appellate Court and reasons (may be in brief) in support of such view are recorded,

the order of the Court may not be said to be illegal or objectionable. At the same time, however, if arguable points have been raised, if the material on record discloses deeper scrutiny and re-appreciation, review or reconsideration of evidence, the appellate Court must grant leave as sought and decide the appeal on merits. In the case on hand, the High Court, with respect, did neither. In the opinion of the High Court, the case did not require grant of leave. But it also failed to record reasons for refusal of such leave."

14. From the above decisions some general principles which may emerged out are that the appellate court is having full power to review or re-appreciate or reconsider the evidence upon which the order/judgment of acquittal has been based and there is no limitation, restriction to exercise of such power by the appellate court and the appellate court may reach at its own conclusion on the same set of evidence, both on question of facts as well as on law. However, it is to be kept in mind that in case of acquittal, the presumption of innocence which was initially with the accused persons has fortified, reaffirmed, strengthened and also the golden principle which runs through the Web of criminal jurisprudence is that if two reasonable and logical conclusions can be derived on the basis of evidence on record the appellate court should not normally disturb the finding of the trial court, but simultaneously it is also to be kept in mind that the benefit of only a reasonable doubt can be given to accused persons of criminal trial. The accused persons cannot claim the benefit of each and every doubt. To get the benefit of a doubt the same has to pass the test of reasonableness and a reasonable doubt is which emerges out of the evidence itself.

15. So far as first limb of argument of learned A.G.A. that the trial court has committed illegality in assessing the age of the prosecutrix as 19 years is concerned, according to the evidence tendered before the trial court, the age of the prosecutrix was 17 and half years as her date of birth has been shown as 05.12.1988, the trial court appears to have discussed this aspect of the matter at page nos.7 and 8 of judgement and while considering the medical report of the prosecutrix based on the ossification test, wherein the age of the prosecutrix has been assessed as 19 years and also taking in view the evidence of father of the prosecutrix wherein he has stated that though age of the victim as recorded in her educational credential is correct but has simultaneously stated that if age of the prosecutrix is about 20 years that would also be 'ok', came to the conclusion that at the date and time of the incident, the prosecutrix was major.

16. It is to be recalled that source of recording of age of a

person in the school record is also relevant and the age of a person as recorded in the school record may not be the be all and end all of the matter. It is evident that it has been rightly discussed by the trial court at page nos.7 of its judgement that the father of the prosecutrix has categorically stated that the prosecutrix may also be of the age of 20 years at the date and time of the incident and as per ossification test the age of the prosecutrix has been assessed as 19 years. It is also evident to be an admitted situation that in the certificate issued by the Principal of the school, date of birth of the victim/prosecutrix though has been shown as 05.12.1988, but the Principal of the school has not been produced/tendered as prosecution witness before the trial court and the accused appears to have been deprived of cross examining the Principal of the school concerned in order to know the basis, on which, the date of birth of the prosecutrix was recorded in the school.

17. Thus, in absence of the evidence of the Principal of the school before the trial court, I do not find any illegally so far as the observation of the trial court with regard to the age of the prosecutrix is concerned. It also appears to be an admitted fact that two prosecution witnesses namely Bechelal and Sarvesh have claimed to have seen the prosecutrix while in the company of the accused persons and it is also admitted that they also inquired as to why the prosecutrix is with them and it also appears to be an admitted fact that they in their statement recorded before the trial court have not stated anything which suggests that either the prosecutrix was not easy while accompanying the accused persons or has made any gesture or any alarm so that it may be inferred that she is being carried by the accused against her will. Thus what is evident from the record is that the trial court has held that the prosecutrix was major at the relevant point of time and was not taken away against her will and rather she accompanied the accused persons on her own. This finding of the trial court appears to be on the basis of evidence available on record.

18. It is to be recalled that the judgement and order of the trial court may only be interfered by this Court, if the same is against the evidence available on record or the view adopted by the trial court is not a plausible or probable view or is erroneous.

19. Having regard to all the facts and circumstances of the case and the evidence produced before the trial court, I do not find the view adopted by the trial court as erroneous or is not based on evidence available on record rather the same is a plausible and probable view.

18. Thus, having regard to all the facts and circumstances of the case and keeping in view the reasons given herein-before, I do not find any illegality or to say any irregularity committed by the trial court while exonerating the accused/respondents.

19. In the result, the prayer for grant of leave to appeal is hereby rejected and the application for grant of leave to file appeal is **rejected**.

20. Since application for grant of leave to appeal has been rejected, the appeal also does not survive. Consequently, the appeal is also **dismissed**.

Order Date :- 1.4.2024

Anupam S/-