

A.F.R.

**HIGH COURT OF JUDICATURE AT ALLAHABAD
(LUCKNOW)**

Neutral Citation No. - 2024:AHC-LKO:60968-DB

Reserved on :- 06.03.2024
Pronounced on :- 05.09.2024

Court No. - 3

Case :- GOVERNMENT APPEAL No. - 306 of 1993

Appellant :- State of U.P.

Respondent :- Ishaq And 5 Ors.

Counsel for Appellant :- Govt. Advocate

Counsel for Respondent :- Sri Kr. Shanti

Prakash,S.Malik-E-Ashtar Rizvi,Syed Ahmad Jamal,Syed
Fazal Abbas Rizvi

Hon'ble Mrs. Sangeeta Chandra,J.

Hon'ble Ajai Kumar Srivastava-I,J.

(Per :- Sangeeta Chandra, J.)

1. Heard Shri Pawan Kumar Mishra, learned A.G.A.-I for the State-appellant, Shri S. Malik-E-Ashtar Rizvi, learned counsel for the respondent nos.1 and 3 and perused the material available on record.

2. By means of the present government appeal, after seeking leave to appeal under Section 378 (3) of Cr.P.C., the State has assailed the impugned judgment and order dated 13.04.1993 passed by IInd Additional Sessions Judge, Barabanki in Sessions Trial No.120 of 1989 as well as Sessions Trial No.29 of 1991, under

Sections 147 and 302/149 of the Indian Penal Code¹, Police Station Mawai, District Barabanki, whereby the accused/ respondents were acquitted of the charges under Sections 147 and 302/149 I.P.C.

3. From a perusal of record, it transpires that the instant Government Appeal was filed against six accused-respondents, namely, Ishaq, Ishtiaq, Rahan, Nasiuddin, Saleem and Ishtiaq Khan, out of which, respondent nos.2, 4, 5 and 6, namely, Istiaq, Nasiruddin, Saleem and Ishtiaq Khan, have died. The instant appeal in respect of respondent nos., 2, 4, 5 and 6 has already been abated. Therefore, the appeal survives only with regard to the respondent nos.1 and 3, namely, Ishaq and Rehan Khan, respectively.

4. The case of the prosecution in nutshell is that on 13.06.1987 at about 6:45 P.M., the deceased, Mohammad Arif Khan along with one Aiyooob s/o Latif was coming back from his tubewell. As soon as they reached near the dry Naala of Village Mawai, the accused-respondents, namely, Ishaq and Ishtiaq, sons of Jannu Nanihar, Rehan and Ishtiaq Khan, sons of Iqbal Khan, and Nasiruddin appeared from behind a bush carrying lathis and dandas in their hands and, committed murderous assault on Arif Khan on the exhorting of the accused-respondent, Saleem. On alarm being raised by Aiyooob, Khalil Pathan, Newaz, Phalau and other villagers reached the place of incident, who saw the assailants. Arif Khan fell down after receiving a

¹ hereinafter referred to as "I.P.C."

number of injuries. On being challenged by the witnesses, the assailants ran away towards the Eidgah. The informant, Mohammed Rashid Khan, S/o Arif Khan also reached the crime scene. The witnesses and the deceased, Arif Khan told him about the occurrence. He took Arif Khan on a cot to the grove of one Imam Ali, where on the basis of details given by injured Arif, Rashid Khan dictated the F.I.R. to his younger brother. The informant then reached the Police Station Mawai along with other villagers carrying injured Arif Khan on a cot and got an first information report, Ext. Ka-6 lodged on the basis of written report, Ext. Ka-1.

5. On the basis of the aforesaid written report, Ext. Ka-1, first information report as Case Crime No.52 of 1987, under Sections 147, 323, 307 I.P.C. came to be registered against the accused-respondents at Police Station Mawai, District Barabanki.

6. P.W.-5, Dr. P. K. Tiwari, the In-charge Medical Officer, Primary Health Centre, Ramsanehi Ghat, Barabanki had examined the deceased, Arif Khan at about 10:30 P.M. on 13.06.1987, when Arif Khan was alive. The following injuries described by P.W.-5, Dr. P. K. Tiwari were found on the body of the deceased, Arif Khan :-

1.	Lacerated wound 3.0 cm x 2.0 cm muscle deep on the left side of scalp, about 13 cm above the left ear.
2.	Lacerated wound 2.5 cm x 0.5 cm on the back of left side of scalp, about 8 cm below the behind left ear.

3.	Lacerated wound 2.0 cm x 1.0 cm on the left side of chin below the right tip X muscle deep.
4.	Contusion swelling 9.0 cm x 3.0 cm on the Rt. side of face just below the right eye.
5.	Contusion 5.0 cm x 3.0 cm on the back of left forearm, just behind the elbow joint.
6.	Lacerated wound 2.0 cm x 0.5 cm muscle deep on the right lower leg about 7.0 cm above the Rt. ankle joint.
7.	Contusion traumatic swelling on the right side upper leg 5.0 cm x 3.0 cm, painful and tender advice X-Ray.

7. The postmortem of the deceased, Arif Khan was conducted by P.W.-4, Dr. Dinesh Chandra and the report has been duly proved by him as Ex. Ka-2.

8. According to postmortem report of the deceased, Arif Khan, Ex. Ka-2, the cause of the death is reported to be shock and haemorrhage as a result of ante mortem injuries and following ante mortem injuries were reported on the body of the deceased :-

1.	Abraded contusion 2.5 cm x 2 cm on Lt. side of head, 6.5 cm above from Lt. ear.
2.	Stitched wound 3 cm x 1 cm on left side of forehead, 6 cm above from upper margin of left eye.
3.	Abrasion 5 cm x 3 cm on Rt. side of face just below Rt. lateral margin of Rt. eye.
4.	Abrasion 2.5 cm x 2 cm on Rt. side of chin.
5.	Multiple linear contusion on back of chest and abdomen size ranging from 21 cm x 2.5 cm x 1 cm about.
6.	Abrasion 5 cm x 1 cm on Lt. arm just above Lt. elbow joint on lateral aspect.
7.	Abrasion on back of Lt. forearm 6 x 1 cm, 5 cm above Lt, erist.

8.	Abrasion 2 cm x 1 cm on tip of Lt. ring finger.
9.	Stitched wound 2 cm x 0.5 cm on Rt. lower leg 6 cm above from Rt. medial Malleolus.
10.	Multiple contusion on back of Rt. leg size ranging from 6 cm x 2 cm to 2 x 2 cm in calf region.

9. The Investigating Officer recorded the statements of witnesses under Section 161 Cr.P.C. He also visited the place of occurrence and prepared site plan as Ext. Ka-10. Upon conclusion of the investigation, he submitted charge sheets as Ext. Ka-12 and Ext. Ka-18 against the accused-respondents.

10. In order to prove its case, the prosecution has examined ten prosecution witnesses i.e. P.W.-1, Rashid Khan, P.W.-2, Khalil Pathan, P.W.-3, Newaz, P.W.-4, Dr. Dinesh Chandra, P.W.-5, Dr. P. K. Tiwari, P.W.-6, Santosh Kumar Upadhyay, P.W.-7, Atar Singh Yadav, P.W.-8, A. K. Bajpai, P.W.-9, R. P. Saroj and P.W.-10, Mohd. Aiyooob Khan.

11. The accused-respondents were charged under Sections 147 and 302/149 I.P.C., who denied the charges and claimed to be tried.

12. Ram Tirath has been examined as D.W.-1 from the side of defence.

13. After the conclusion of prosecution evidence, the statements of accused-respondents were recorded under Section 313 Cr.P.C., wherein they have stated the

prosecution story to be false and concocted and also stated themselves to be innocent, who have been falsely implicated in this case.

14. The learned trial Court vide impugned judgment and order dated 13.04.1993 has acquitted the accused-respondents of all the charges.

15. Aggrieved by the aforesaid impugned judgment and order whereby the accused-respondents were acquitted, the State has sought to leave to appeal as aforesaid.

16. P.W.-1, Rashid Khan has stated that about four years ago his father was returning from the tubewell and when he reached near the Naala, the accused-respondents, namely, Salim, Ishaq and Ishtiaq, sons of Jannu, Rehan and Ishtiyaq sons of Iqbal and Nasiruddin had assaulted his father with lathis. On alarm being raised by Aiyooob and his father, P.W.-2, Khalil Pathan, Phalau and P.W.-3, Newaz had reached there and accused-respondents had run away. P.W.-1, Rashid Khan admitted that he had not seen the occurrence but was told about it by the witnesses and his father when he reached there.

17. P.W.-2, Khalil Pathan has stated that about four and half years ago at about 7:00 P.M., he was returning from Digambarapur and when he reached near the Naala, he heard shouts. Phalau and Newaz were also with him, and Aiyooob was following them. They saw that

Arif Khan was being assaulted by the accused-respondents. When they challenged the accused-respondents, they ran away. In the meantime, P.W.-1, Rashid Khan also reached there with Arif's other son, namely Saleem. Arif Khan was taken on a cot to the grove where Saleem had written the report on the dictation of Rashid Khan.

18. P.W.-3, Newaz, who is said to be an eye witness of the occurrence, has stated that the murder of Arif Khan had not taken place in his presence. He also stated that he had seen nothing and was declared hostile.

19. P.W.-4, Dr. Dinesh Chandra conducted the autopsy on the body of the deceased, Arif Khan, at about 3:30 P.M. on 14.06.1987. He prepared the post-mortem report and proved its genuineness in Court. The details of the injuries sustained by the deceased were mentioned in the statement of P.W.-4, Dr. Chandra, who only stated that the death of the deceased was caused due to ante-mortem injuries. The injuries were described by P.W.-4, Dr. Dinesh Chandra and also by P.W.-5, Dr. P. K. Tiwari, the In-charge Medical Officer, Primary Health Centre, Ramsanehi Ghat, Barabanki, who had examined Mohammed Arif Khan at about 10:30 P.M. on 13.06.1987, when Arif Khan was alive.

20. P.W.-5, Dr. P. K. Tiwari also stated that the deceased died in hospital at about 10:40 P.M. and he

had sent the information to the Station House Officer, Police Station Ramsanehi Ghat immediately thereafter.

21. P.W.-6, Constable, Santosh Kumar Upadhyay is a formal prosecution witness. Atar Singh Yadav, Sub Inspector posted at Police Station Mawai, who had conducted the investigation and who stated that after receipt of the F.I.R. at the police station, he had immediately started the investigation and recorded the statement of the deceased, Arif Khan under section 161 Cr.P.C. was examined as P.W.-7. The true copy of the statement recorded by him is Ext. Ka-9. He also prepared the site plan of the place of occurrence and collected blood-stained and plain soil from the place of the occurrence. On 22.06.1987, the investigation was transferred to Station House Officer, Sri Hari Shankar Singh, who submitted the charge sheet against the accused-respondents, Ishtiaq S/o Januu, Ishaq S/o Januu, Rehan, Nasirudin and Saleem.

22. P.W.-8, A. K. Bajpai, the then Station House Officer of Ramsanehi Ghat, who prepared the Punchnama and P.W.-9, R. P. Saroj, the then Station House Officer of Police Station Mawai, who submitted the charge sheet against the accused-respondents, Ishtiaq Khan S/o Iqbal Khan were all examined as official witnesses.

23. Mohammad Aiyoob Khan, who was stated to have accompanied the deceased, Arif Khan at the time of occurrence was examined under section 311 of the

Cr.P.C. as P.W.-10. He stated that on the day of the occurrence, he had gone to Mawai and was returning at about 7:30 P.M., and on the way, there was a tubewell of Arif Khan, where he had seen Arif Khan and then proceeded towards his village. When he had crossed the Naala, he heard some shouts on his backside and returned to the Naala. It was around 8:30 P.M. at the time. He found Arif lying in the Naala in an injured condition and unconscious. He did not see anybody either hitting Arif Khan or present on the spot. He went to the village and informed P.W.-1, Rashid Khan and returned along with P.W.-1, Rashid Khan and other persons of the village to where Arif Khan was lying unconscious. Arif Khan was taken to the police station and PW 10 then went back to his house.

24. Ram Tirath Pradhan of village Mawai was examined as D.W.-1. D.W.-1 has stated that in the year 1987, the accused-respondent, Ishaq was the Block Pramukh of Mawai. On 13.06.1987, he had gone to the Block, at about 5:00 P.M., but was informed that the Block Pramukh had gone to Lucknow. He went to the old market and by that time the Block Pramukh had arrived at about 6:00 P.M. He along with the Block Pramukh and other persons sat on a cot in the Islamia school and discussed up to 8:30 P.M. At 8:30 P.M., Rashid Khan came shouting and told that his father had been killed by somebody.

25. It has been argued by the learned A.G.A., Shri Pawan Kumar Mishra that trial court has committed manifest and patent illegality in summoning and examining as a witness P.W.-10, Mohammed Aiyooob Khan under section 311 of the Cr.P.C., in spite of the fact that the said witness was already discharged by the prosecution and it was mentioned in the discharge application dated 05.08.1992 that the said witness, Mohammad Aiyooob Khan had turned hostile to the prosecution, and that is why his discharge was necessary. The accused persons had not raised any objections against the discharge of Mohammad Aiyooob Khan as a witness, but due to reasons best known to the trial court, the said witness was summoned all of a sudden after fixation of date for announcement of judgement and also after adjournment of the case once for the purpose of delivery of judgement. Mohammad Aiyooob Khan damaged the whole prosecution case after submission of evidence of the prosecution.

26. Also, the trial court failed to consider the evidence of witness P.W.-2, Khalil Pathan, who proved the whole prosecution case. The trial court failed to appreciate that Arif Khan was carried to the police station on a cot and he was present during lodging of the F.I.R. by the informant and his statement under section 161 Cr.P.C. was recorded in the presence of witnesses i.e. P.W.-1, Rashid Khan and P.W.-2, Khalil Pathan. Such statement was in fact, a dying declaration as Arif Khan died soon thereafter. On the basis of said

dying declaration and the deposition of two prosecution witnesses, the finding of guilt and consequent conviction alone was possible and the trial court committed a patent error in not accepting the evidence already on record and believing the evidence of two hostile witnesses i.e. P.W.-3 Newaz, and P.W.-10, Aiyooob Khan.

27. It has also been argued that the trial court seriously prejudiced the prosecution case by summoning Mohammad Aiyooob Khan as court witness under section 311 Cr.P.C. suo Moto as no application on behalf of the prosecution was filed. The trial court compelled the prosecution to examine the said witness as P.W.-10.

28. Per contra, learned counsel for the surviving accused-respondents has vehemently submitted that the appellate court possesses power to re-appreciate the evidence available on record while dealing with an appeal against acquittal. However, such power of appellate court is circumscribed by the fact that while re-appreciating evidence available on record, the appellate court is expected to bear in mind that the presumption of innocence gets strengthened by the judgment of acquittal recorded in favour of the accused-respondents.

29. His further submission is that the prosecution has miserably failed to establish its case beyond reasonable doubt against the surviving accused-respondents. The trial Court has rightly disbelieved the testimonies of witnesses of facts, namely, P.W.-1, Rashid

Khan, P.W.-2, Khalil Pathan and P.W.-3, Newaz and P.W.-10, Aiyooob Khan.

30. His next submission is that the impugned judgment and order dated 13.04.1993 is well discussed and reasoned which is based on proper appreciation of evidence available on record which cannot be said to be perverse. Therefore, no interference with the same is warranted in exercise of power of this Court under Section 386 Cr.P.C.

31. His further submission is that after careful analysis of prosecution evidence, the trial Court has recorded the finding of acquittal of accused-respondents which is the only possible view which could be formed on the basis of evidence available on record. Therefore also, no interference with the impugned judgment and order dated 13.04.1993 is warranted by this Court.

32. We have gone through the judgement and order under appeal and carefully examined the record of the case, including statement of the deceased, Ext. Ka-9 and also the F.I.R., Ext. Ka-6 and matched the same with written report by P.W.-1, Ext. Ka-1. We have also examined carefully the post-mortem report, Ext. Ka-2 and the injury report, Ext. Ka-4.

33. A careful perusal of impugned judgment and order dated 13.04.1993 reveals that the trial court after summarizing the evidence of the prosecution witnesses and the defence witnesses and the accused examined

the report of the occurrence, Ext. Ka-1 which was submitted by P.W.-1, Rashid Khan, S/o the deceased, Arif Khan. The trial judge has noted that P.W.-1 had stated that he had not seen the occurrence, but he was told by other villagers and when he reached there, the assailants had already run away. The report that was submitted by him in the police station was on the basis of details given to him by his father and other witnesses. It was not stated by P.W.-1 that which part of the occurrence as mentioned in the report, and the F.I.R. had been told to him by his father, and which part was told by the witnesses. Unless there was a specific description by P.W.-1, as to what was told to him by his father, the written report of Rashid Khan could not be treated to be a dying declaration. Moreover, Ext. Ka-1 did not mention anywhere that P.W.-1 was told about the occurrence by Arif Khan, the deceased.

34. The trial court noted the judgement cited by the prosecution, namely, **1. Narayan versus state of UP, 1984, Allahabad law journal 1241 ; 2. Harez Ali versus state of Assam, 1981 criminal law journal 1745 ; 3. Aziz Ahmed versus state 1982, Allahabad Law journal 140** and has observed that in all these cases, it has been held that where, after making the statement before the police, the victim succumbed to his injuries, his statement could be treated as a dying declaration and was admissible under section 32 (1) of the Indian Evidence Act and would be protected by section 162 (2) of the Cr.P.C. and accepted

the legal position that a statement recorded under section 161 of the Cr.P.C. can be read as a dying declaration if the maker of the statement dies soon afterwards, but looking into the facts and circumstances of the case, the trial judge was doubtful if any such statement as had been proved to be Ext. Ka-9 was recorded by the Investigating Officer, Atar Singh Yadav. When the statement itself was doubtful, it could not be relied upon to convict the accused persons.

35. The trial judge has also noted the judgements of the Supreme Court in **Balak Ram Vs. State of UP, 1974 Criminal Law Journal 1486; Manno Raja Vs. state of M.P., 1976 Criminal Law Journal 1718; Dilip Singh Vs. State of Punjab, AIR 1979, SC 1173; Mohar Singh and others Vs. State of Punjab, 1981 SCC (Crl.) 638 and Darshan Singh and Others Vs. State of Punjab, AIR 1983 SC 554** and noted that in all such cases, the Supreme Court had observed that the investigating officers are keenly interested in fruition of their case and although no assumption can be made against their veracity, it is not prudent to base the conviction on a dying declaration made to an Investigating Officer. It was observed that if an Investigating Officer thought that the victim was in a precarious condition, he ought to have requisitioned the services of a Magistrate for recording the dying declaration or tried to get a certificate from the Medical Officer treating the patient that he was in a fit condition to make such a statement once such procedure is not

followed, it is better to leave such a dying declaration out of consideration until and unless the prosecution satisfies the court as to why it was not recorded by a Magistrate or by a doctor. The practice of the Investigating Officer himself recording a dying declaration during the course of investigation is not to be encouraged. It is not that such dying declarations are always untrustworthy, but better and more reliable methods of recording dying declaration of an injured person should be taken recourse to and the one recorded by the police officer may be relied upon if there was no time or facility available to the prosecution for adopting any better method.

36. The trial court noted the observations made by the Supreme Court that a very detailed and coherent dying declaration recorded by the investigating officer without attestation of the same by the witnesses present should not be ordinarily relied upon. When it is said that a conviction can rest on a dying declaration, it is implied that it must inspire confidence so as to make it safe to act upon it. Hence, when from the medical evidence on record, it was found that the vital organs of the deceased were completely smashed, he could not be said to be in a fit state of mind and body to make any kind of coherent or credible statement relating to the circumstances which resulted in his death. Therefore, his dying declaration could not be relied upon for any purpose and had to be excluded from consideration.

37. The learned trial court thereafter has quoted section 32 of the Indian Evidence Act and also section 162 of the Cr.P.C. and the Exception carved out regarding any statement falling within the provisions of clause (1) of section 32 of the Indian Evidence Act. A statement recorded under section 161 of the Cr.P.C. can be read in evidence under section 162 (2) of the Cr.P.C. if it falls within the provisions of clause (1) of section 32 of the Indian Evidence Act. The trial judge examined the statement of the deceased recorded under section 161 Cr.P.C. marked as Ext. Ka-9, and noted that it mentioned serially the names of the accused, which serial numbers matched with the serial numbers of the accused as given in the FIR.

38. It also noted that the statement under section 161 Cr.P.C. was recorded by Atar Singh Yadav, the Investigating Officer, purportedly at the police station in the presence of P.W.-1, Rashid Khan, P.W.-2, Khalil Pathan, and also several other villagers, at a time when the deceased was seriously injured and in an extremely precarious condition. The statement was a detailed and coherent narration of the occurrence running into two pages. The Sub Inspector, however, did not take care to follow the provisions of para 115 of the Police Regulations and did not try to get such statement recorded by learned Magistrate. He also did not try to get a certificate from a Medical Officer regarding the fitness of the injured to get his statement recorded. The Investigating Officer did not also get the thumb

impression of the deceased or of any other witnesses present at the police station at the time of recording of such statement under section 161 Cr.P.C., knowing fully well that the condition of the deceased was precarious/very serious as mentioned at the very beginning of such statement by the Investigating Officer in his own handwriting. The Investigating Officer in such alleged statement under section 161 Cr.P.C. has mentioned the names of the accused in exactly the same order, at the same serial numbers as mentioned in the FIR. Not only the procedural niceties were not followed by the investigating officer while recording such statement under section 161 Cr.P.C., the trial court has also noted that the medical condition of the injured, Arif Khan was not such as would allow him to make such a detailed and coherent statement under section 161 Cr.P.C.. The trial court has noted that injury report showed at least two very serious injuries on the back of the head of the deceased and several other injuries on his body. The temporal bone was fractured. The membranes of the brain were congested.

39. It was also noted that when the deceased was brought on a cot to the Police Station Mawai at about 7:30 P.M. and his statement recorded soon thereafter, he was referred to the Primary Health Centre at Ramsanehi Ghat, Barabanki, where the doctor on duty, P.W.-5, Dr P. K. Tiwari has recorded that the patient was brought at 10:30 P.M. and he died at about 10:45 P.M. The trial judge noted that the deceased died within three

hours of being injured. His medical condition was precarious. His speech, would not have been so clear as has been mentioned by the sub inspector Attar Singh in Ext. Ka-9.

40. The trial judge has noted the observations made by Dr R. M. Jhala in his book on Medical Jurisprudence, (Fourth Edition at page 200) that speech is affected or lost after injury to the wind pipe, larynx or to the brain in the area covering speech. In case of injuries to the heart, the size and direction of the injuries entering the heart prove helpful in arriving at a conclusion. The injury report, Ext. Ka-4 showed that the deceased had sustained injuries on his head, besides other parts of his body. His temporal bone had been fractured, his brain membranes were congested with haematoma on the left temporal region and observed that the brain of the deceased was congested and he had two wounds on the head and his temporal bone was fractured, and in these circumstances, it was impossible to give a long detailed and coherent statement as has been recorded by the Investigating Officer. The trial judge, found that the deceased was not in a fit condition to make any statement.

41. The trial judge noted that the Investigating Officer, Atar Singh Yadav may have copied the F.I.R. in the Case Diary as a statement under section 161 of the Cr.P.C. He has further observed that he was fortified in such a conclusion by careful examination of the

statements of the prosecution witnesses. The ocular testimony on record of P.W.-1, Rashid Khan, the son of the deceased stated that P.W.-10, Aiyooob Khan was accompanying the deceased when the occurrence had taken place. It was P.W.-10, Aiyooob Khan, who had shouted out/raised an alarm and on hearing him, P.W.-2, Khalil Pathan and P.W.-3, Newaz had reached the spot. On the other hand, P.W.-10, Aiyooob Khan had stated that he was not accompanying the deceased but was going alone to his village and when he had crossed the Naala, he had heard some noises and had turned back and when he reached the place of the occurrence, Arif Khan was lying unconscious in an injured condition. No one else was present there. He was the first person to have reached the place of occurrence. If Aiyooob Khan did not see the assailants, there was no question of any other witness seeing the occurrence. P.W.-3, Newaz had also stated that he did not see the assailants injuring Arif Khan and he had reached there only once an alarm was raised by Aiyooob Khan. P.W.-2, Khalil Pathan had also stated that he had reached the place of occurrence on hearing the shouts of Aiyooob Khan. P.W.-10, Aiyooob Khan, having already mentioned in his statement that he had not seen the assailants and also that he did not see anyone injuring the deceased, there was a reasonable doubt regarding the correctness of the statements of P.W.-2 and P.W.-3 alleged witnesses. P.W.-2 had also stated that there was a heavy growth of Sarpat and Moonj, (high wild grasses) almost in the form of a jungle near the Naala. The trial judge

therefore did not believe the ocular testimony of P.W.-2 and P.W.-3. P.W.-1 had admitted that he had reached the place only after sometime that is after Mohammad Aiyooob Khan, Khalil Pathan, Newaz and Phalau , had already reached the place of occurrence.

42. The trial court also noted that in his statement under Section 313 Cr.P.C. the accused-respondent, Ishtiyaq Khan had stated that he was the Block Pramukh of Mawai Block, and one Marhoob Ahmad was the M.L.A. of the same area and the case had been fabricated against him at the instance of Marhoob Ahmad out of political enmity. Tariq Khan, the real nephew of Marhoob Ahmad had contested the election of Block Pramukh against Ishtiaq Khan, but Ishtiaq Khan had won the same. One Shifat Ahmad Khan, who is an advocate and also nephew of Marhoob Ahmad Khan was also found to have accompanied Mohammed Rashid Khan to the police station. P.W.-1 and P.W.-2 had not mentioned the names of Tariq Khan and Shifat Ahmad Khan amongst the villagers who accompanied them to the police station, but the General Diary of the police spoke otherwise showing that both Shifat Ahmad Khan and Tariq Khan nephews of Marhoob Ahmad Khan had accompanied Rashid Khan to the police station when he went there to lodge the report. It was evident that P.W.-1, Rashid Khan and P.W.2, Khalil Pathan had intentionally spoken lies and suppressed the fact that both nephews of Marhoob Ahmad Khan MLA, had also gone to the police station with them to lodge the report. The possibility of the case

having been framed, against the accused, under the influence of Marhoob Ahmad Khan could not be ruled out.

43. Before we undertake appreciation of prosecution evidence as discussed above in the light of submissions advanced by learned counsel for the parties, we deem it appropriate to refer to judgments rendered by Hon'ble Supreme Court in **Ramesh and others vs. State of Haryana** reported in **(2017) 1 SCC 529** and **Anwar Ali and another vs. State of Himachal Pradesh** reported in **(2020) 10 SCC 166** pertaining to appreciation of evidence in an appeal against an acquittal.

44. The Hon'ble Supreme Court in **Ramesh and others (Supra)**, in paragraphs 24 and 26, has held as under:-

*"24. We have duly appreciated the submissions advanced by the counsel for the parties on both sides. No doubt, the High Court was dealing with the appeal against the judgment of the trial court which had acquitted the appellants herein. The scope of interference in an appeal against acquittal is undoubtedly narrower than the scope of appeal against conviction. Section 378 of the Code of Criminal Procedure, 1973 confers upon the State a right to prefer an appeal to the High Court against the order of acquittal. At the same time, sub-section (3) thereof mandates that such an appeal is not to be entertained except with the leave of the High Court. **Thus, before an appeal is entertained on merits, leave of the High Court is to be obtained which means that normally judgment of acquittal of the trial court is attached a definite value which is not to be***

ignored by the High Court. In other words, presumption of innocence in favour of an accused gets further fortified or reinforced by an order of acquittal. At the same time, while exercising its appellate power, the High Court is empowered to reappraise, review and reconsider the evidence before it. However, this exercise is to be undertaken in order to come to an independent conclusion and unless there are substantial and compelling reasons or very strong reasons to differ from the findings of acquittal recorded by the trial court, the High Court, as an appellate court in an appeal against the acquittal, is not supposed to substitute its findings in case the findings recorded by the trial court are equally plausible.

26. This legal position is reiterated in *Govindaraju v. State* [*Govindaraju v. State*, (2012) 4 SCC 722 : (2012) 2 SCC (Cri) 533] and the following passage therefrom needs to be extracted: (SCC p. 732, paras 12-13)

"12. The legislature in its wisdom, unlike an appeal by an accused in the case of conviction, introduced the concept of leave to appeal in terms of Section 378 CrPC. This is an indication that appeal from acquittal is placed on a somewhat different footing than a normal appeal. But once leave is granted, then there is hardly any difference between a normal appeal and an appeal against acquittal. The concept of leave to appeal under Section 378 CrPC has been introduced as an additional stage between the order of acquittal and consideration of the judgment by the appellate court on merits as in the case of a regular appeal. Sub-section (3) of Section 378 clearly provides that no appeal to the High Court under sub-section (1) or (2) shall be entertained except with the leave of the High Court. This legislative intent of attaching a definite value to the

judgment of acquittal cannot be ignored by the courts.

13. Under the scheme of CrPC, acquittal confers rights on an accused that of a free citizen. A benefit that has accrued to an accused by the judgment of acquittal can be taken away and he can be convicted on appeal, only when the judgment of the trial court is perverse on facts or law. Upon examination of the evidence before it, the appellate court should be fully convinced that the findings returned by the trial court are really erroneous and contrary to the settled principles of criminal law."

(Emphasis supplied by us)

45. The Hon'ble Supreme Court in **Anwar Ali (Supra)**, in paragraphs 14(1), has held as under:-

"14.1. *In Babu [Babu v. State of Kerala, (2010) 9 SCC 189 : (2010) 3 SCC (Cri) 1179] , this Court had reiterated the principles to be followed in an appeal against acquittal under Section 378 CrPC. In paras 12 to 19, it is observed and held as under : (SCC pp. 196-99)*

"12. This Court time and again has laid down the guidelines for the High Court to interfere with the judgment and order of acquittal passed by the trial court. The appellate court should not ordinarily set aside a judgment of acquittal in a case where two views are possible, though the view of the appellate court may be the more probable one. While dealing with a judgment of acquittal, the appellate court has to consider the entire evidence on record, so as to arrive at a finding as to whether the views of the trial court were perverse or otherwise unsustainable. The appellate court is entitled to consider whether in arriving at a finding of fact, the trial court had failed to take into

consideration admissible evidence and/or had taken into consideration the evidence brought on record contrary to law. Similarly, wrong placing of burden of proof may also be a subject-matter of scrutiny by the appellate court. (Vide Balak Ram v. State of U.P. [Balak Ram v. State of U.P., (1975) 3 SCC 219 : 1974 SCC (Cri) 837] , Shambhoo Missir v. State of Bihar [Shambhoo Missir v. State of Bihar, (1990) 4 SCC 17 : 1990 SCC (Cri) 518] , Shailendra Pratap v. State of U.P. [Shailendra Pratap v. State of U.P., (2003) 1 SCC 761 : 2003 SCC (Cri) 432] , Narendra Singh v. State of M.P. [Narendra Singh v. State of M.P., (2004) 10 SCC 699 : 2004 SCC (Cri) 1893] , Budh Singh v. State of U.P. [Budh Singh v. State of U.P., (2006) 9 SCC 731 : (2006) 3 SCC (Cri) 377] , State of U.P. v. Ram Veer Singh [State of U.P. v. Ram Veer Singh, (2007) 13 SCC 102 : (2009) 2 SCC (Cri) 363] , S. Rama Krishna v. S. Rami Reddy [S. Rama Krishna v. S. Rami Reddy, (2008) 5 SCC 535 : (2008) 2 SCC (Cri) 645] , Arulveluv. State [Arulvelu v. State, (2009) 10 SCC 206 : (2010) 1 SCC (Cri) 288] , Perla Somasekhara Reddy v. State of A.P. [Perla SomasekharaReddy v. State of A.P., (2009) 16 SCC 98 : (2010) 2 SCC (Cri) 176] and Ram Singh v. State of H.P. [Ram Singh v. State of H.P., (2010) 2 SCC 445 : (2010) 1 SCC (Cri) 1496])”

13. In Sheo Swarup v. King Emperor [Sheo Swarup v. King Emperor, 1934 SCC OnLine PC 42 : (1933-34) 61 IA 398 : AIR 1934 PC 227 (2)] , the Privy Council observed as under : (SCC Online PC : IA p. 404)

‘... the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact

that he has been acquitted at his 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.'

14. *The aforesaid principle of law has consistently been followed by this Court. (See Tulsiram Kanu v. State [Tulsiram Kanu v. State, 1951 SCC 92 : AIR 1954 SC 1] , Balbir Singh v. State of Punjab [Balbir Singh v. State of Punjab, AIR 1957 SC 216 : 1957 Cri LJ 481] , M.G. Agarwal v. State of Maharashtra [M.G. Agarwal v. State of Maharashtra, AIR 1963 SC 200 : (1963) 1 Cri LJ 235] , Khedu Mohton v. State of Bihar [Khedu Mohton v. State of Bihar, (1970) 2 SCC 450 : 1970 SCC (Cri) 479] , Sambasivan v. State of Kerala [Sambasivan v. State of Kerala, (1998) 5 SCC 412 : 1998 SCC (Cri) 1320] , Bhagwan Singh v. State of M.P. [Bhagwan Singh v. State of M.P., (2002) 4 SCC 85 : 2002 SCC (Cri) 736] and State of Goa v. Sanjay Thakran [State of Goa v. Sanjay Thakran, (2007) 3 SCC 755 : (2007) 2 SCC (Cri) 162] .)*

15. *In Chandrappa v. State of Karnataka [Chandrappa v. State of Karnataka, (2007) 4 SCC 415 : (2007) 2 SCC (Cri) 325] , this Court reiterated the legal position as under : (SCC p. 432, para 42)*

'(1) An appellate court has full power to review, reappreciate 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.'

16. In *Ghurey Lal v. State of U.P.* [*Ghurey Lal v. State of U.P.*, (2008) 10 SCC 450 :

(2009) 1 SCC (Cri) 60] , this Court reiterated the said view, observing that the appellate court in dealing with the cases in which the trial courts have acquitted the accused, should bear in mind that the trial court's acquittal bolsters the presumption that he is innocent. The appellate court must give due weight and consideration to the decision of the trial court as the trial court had the distinct advantage of watching the demeanour of the witnesses, and was in a better position to evaluate the credibility of the witnesses.

17. In State of Rajasthan v. Naresh [State of Rajasthan v. Naresh, (2009) 9 SCC 368 : (2009) 3 SCC (Cri) 1069] , the Court again examined the earlier judgments of this Court and laid down that : (SCC p. 374, para 20)

'20. ... An order of acquittal should not be lightly interfered with even if the court believes that there is some evidence pointing out the finger towards the accused.'

18. In State of U.P. v. Banne [State of U.P. v. Banne, (2009) 4 SCC 271 : (2009) 2 SCC (Cri) 260] , this Court gave certain illustrative circumstances in which the Court would be justified in interfering with a judgment of acquittal by the High Court. The circumstances include : (SCC p. 286, para 28)

'(i) The High Court's decision is based on totally erroneous view of law by ignoring the settled legal position;

(ii) The High Court's conclusions are contrary to evidence and documents on record;

(iii) The entire approach of the High Court in dealing with the evidence was patently illegal leading to grave miscarriage of justice;

(iv) The High Court's judgment is manifestly unjust and unreasonable based on erroneous law and facts on the record of the case;

(v) This Court must always give proper weight and consideration to the findings of the High Court;

(vi) This Court would be extremely reluctant in interfering with a case when both the Sessions Court and the High Court have recorded an order of acquittal.'

A similar view has been reiterated by this Court in Dhanapal v. State [Dhanapal v. State, (2009) 10 SCC 401 : (2010) 1 SCC (Cri) 336] .

19. Thus, the law on the issue can be summarised to the effect that in exceptional cases where there are compelling circumstances, and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the trial court's acquittal bolsters the presumption of his innocence. Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference."

(Emphasis supplied by us)

46. A close scrutiny of testimonies of P.W.-1, Rashid Khan, P.W.-2, Khalil Pathan and P.W.-3, Newaz would reveal that P.W.-3, Newaz, who is also stated to be an eye-witness of the occurrence, has not supported the prosecution case and who, therefore, was declared hostile. It thus leaves us with the testimonies of two

prosecution witnesses, namely, P.W.-1, Rashid Khan, who is the first informant and P.W.-2, Khalil Pathan.

47. P.W.-1, Rashid Khan, who is the first informant and son of the deceased, Arif Khan, has stated that he had not seen the incident himself rather whatever he has stated in his examination-in-chief was based on the information provided to him by his father, the deceased, Arif Khan and the witnesses, who had witnessed the incident. However, he did not disclose names of such witnesses, who had informed him about the said incident.

48. As stated above, P.W.-3, Newaz, who was sought to be projected as an eye-witness of the occurrence has not supported the prosecution case and has been declared hostile. P.W.-10, Aiyoob Khan has not supported the prosecution case in its entirety who was summoned by the trial Court in exercise of power under Section 311 Cr.P.C. Now we come to testimony of P.W.-2, Khali Pathan, who has stated in his testimony that about four and a half year ago at about 7:00 P.M., he was returning from Digambarapur and when he reached near the Naala, he heard shouts. Phalau and Newaz were also with him, and Aiyoob was following them. They saw that Arif Khan was being assaulted by the accused-respondents. When they challenged the accused-respondents, they ran away. In the meantime, P.W.-1, Rashid Khan also reached there with Arif's other son, namely Saleem. P.W.-3, Newaz has stated that written

report, Ext. Ka-1 was scribed by Saleem on the dictation of P.W.-1, Rashid Khan.

49. It, thus, does not make it clear as to who had seen the occurrence in its entirety and on whose specific information, P.W.-1, Rashid Khan had dictated the written report, Ext. Ka-1, which was scribed by Saleem, who has not been examined by the prosecution. Though, no specific number of witnesses is required to prove the prosecution case beyond reasonable doubt, it is trite that the prosecution has to prove its case beyond reasonable doubt on the basis of cogent and reliable testimony (s) of prosecution witness (s).

50. Much emphasis has been laid on the statement of the deceased, Arif Khan, which was recorded under Section 161 of Cr.P.C. and was proved by P.W.-7, Attar Singh Yadav, Ext. Ka-9.

51. While appreciating its veracity we notice that in the statement recorded under Section 161 Cr.P.C. the deceased, Arif Khan before his death has given names of accused persons in the same seriatum in which they were mentioned in the first information report.

52. Such a mechanical similarity lends support to the contention of learned counsel for the accused-respondents that the said statement was not the outcome of own volition of the deceased, rather perhaps it was the Investigating Officer himself, who had

reproduced the names of accused persons from the first information report.

53. Having regard to the various injuries reported on the body of the deceased, who was examined on 13.06.1987 at about 10:30 P.M. and who, according to P.W.-5, Dr. P. K. Tiwari, died at about 10:40 P.M. on the same day because of injuries reported on his body, the time of incident, according to written report, Ext. Ka-1, is about 6:45 P.M. and the report was lodged at 7:30 P.M. In absence of any medical evidence to the effect that the deceased was in a position to understand and give, his statement as recorded under Section 161 Cr.P.C. by the Investigating Officer, therefore, the same cannot be attached any extra weightage that too akin to dying declaration.

54. So far as the testimony of P.W.-10, Aiyoo Khan is concerned, we do not find any substance in contention of learned counsel for the State that once he was discharged by the prosecution, it was not open to the learned trial Court to have summoned him and examined him as prosecution witness. In this regard, the wide import of Section 311 Cr.P.C. particularly its concluding part is to be seen.

55. For ready reference, Section 311 of Cr.P.C., being relevant, is quoted herein below :-

***"Section 311 - Power to
summon material witness, or
examine person present -Any Court***

*may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and **the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.***"

56. Power of such summoning of any material witness is vested with the courts power under Section 311 Cr.P.C.. Summoning of P.W.-10, Aiyooob Khan in the facts of this case in our considered view is strengthened by a judgment rendered by Hon'ble Supreme Court in **Zahira Habibulla H. Sheikh and another vs. State of Gujarat and others** reported in **(2004) 4 SCC 158**.

57. Thus, we notice that if P.W.-10, Aiyooob Khan had not seen any incident himself then it is difficult to believe the testimony of P.W.-2, Khalil Pathan also, who is said to have reached the place of occurrence on hearing shouts of Aiyooob Khan, P.W.-10.

58. Having considered the matter in its entirety in the light of evidence adduced by the prosecution and in view of the law laid down by Hon'ble the Supreme Court in **Ramesh and others (supra), Anwar Ali (supra) and Zahira Habibulla H. Sheikh (supra)**, we find that the learned trial court's findings regarding acquittal of surviving accused/respondents herein, are based on proper appreciation and analysis of evidence available on record which do not, in any manner, appear to be improbable or perverse. The order of acquittal of the

surviving accused/ respondents on the face of evidence appears to be probable view which does not suffer from any infirmity.

59. In the light of what has been discussed above, we are of the considered view that the appeal lacks merit, which deserves to be dismissed and the same is hereby **dismissed**.

60. The accused/ respondent nos.1 and 3 are on bail. Their bail bonds are cancelled. Sureties are discharged.

61. In compliance with the provision contained in Section 437-A Cr.P.C. the accused/ respondent nos.1 and 3 are directed to furnish the personal bonds and two sureties each to the satisfaction of the court concerned within a period of eight weeks from today.

62. Let the trial court record along with a copy of this judgment be transmitted forthwith to the learned trial Court for information and necessary compliance.

(Ajai Kumar Srivastava-I, J.) (Sangeeta Chandra, J.)

Order Date :- 05.09.2024
N. Pal/ Mahesh