

A.F.R.

Neutral Citation No.:-2024:AHC-LKO:22797

Reserved on 12.02.2024

Delivered on 15.03.2024

Court No. - 16

Case :- CRIMINAL APPEAL No. - 414 of 2000

Appellant :- Mohd.Nabi @ Munna

Respondent :- State of U.P.

Counsel for Appellant :- Murli Manohar Srivastava,Nadeem

Murtaza,Praveen Kumar Yadav,Qazi Sabihur Rahman,Rajesh Mishra

Counsel for Respondent :- Govt Advocate

Hon'ble Shamim Ahmed,J.

1. Heard Sri Nadeem Murtaza, learned counsel for the appellant and Sri Ashok Srivastava, learned A.G.A. for the State as well as perused the record.

2. By means of the instant criminal appeal, the appellant has challenged the judgment and order dated 26.04.2000 passed by learned Second Additional Sessions Judge, Lucknow in Sessions Trial No.192 of 1995, convicting and sentencing the appellant under Section 436 I.P.C. for three years rigorous imprisonment.

3. The prosecution story as narrated in the First Information Report registered as Case Crime No.27 of 1991, under Sections 436 I.P.C. at Police Station Kaiserbagh, Lucknow on 23.04.1991 by one Shiv Das alleging therein that his son has been allotted a canteen in the compound of American Library Court where the informant was present on 23.01.1991 alongwith his two workers. At about 08:30 AM, the appellant who is an employee of Civil Court, allegedly came and asked for Suraj (Son of the informant), upon which, the informant told the appellant that he will come to canteen at about 11:00 A.M., hearing this, the appellant allegedly poured kerosene oil over the

canteen and set the same on fire, due to which, not only the canteen was burnt but chamber of an advocate was also burnt.

4. Pursuant to the registration of the First Information Report, the police carried out investigation and submitted chargesheet against the appellant under Section 436 I.P.C. on 17.05.1991. The matter being triable by the court of sessions, was committed to the Sessions Court for trial where charge under section 436 IPC was framed against the appellant, who pleaded not guilty to the aforesaid charge and claimed to be tried.

5. In order to bring home the charge under section 436 IPC against the appellant, the prosecution produced following four persons as prosecution witnesses:-

(i) P.W.-1 Shivdas, Informant (alleged eye witness)

(ii) P.W.-2 Constable Girdhar Singh (Proved chik FIR and General Diary entry)

(iii) P.W.-3 Vijay Kumar, Employee of the Canteen (Alleged Eye Witness)

(iv) P.W.-4 Durgesh Kumar Tiwari, Investigating Officer.

6. The appellant in his statement under section 313 CrPC denied the case of prosecution and produced following two witness in his defence;-

(i) DW-1 Ajeet Singh Yadav, Clerk of Advocate whose chamber was burnt

(ii) DW-2 Mahendra Pratap Singh, Advocate

7. After having heard the rival submissions of parties, the Trial Court found appellant-accused guilty, therefore, convicted and sentenced him under Section 436 I.P.C. for three years rigorous imprisonment.

8. Feeling aggrieved by the judgment of conviction and sentence passed by Trial Court, the appellant-accused has preferred this appeal.

9. Learned counsel for the appellant submitted that the learned trial court has convicted the accused on the testimonies of the prosecution witnesses ignoring that their testimonies are full of infirmities and contradictions. PW-1 failed to assign any motive for the alleged offence throughout the entire prosecution story. Even he fails to recall the date, time and year of the alleged incident. PW-1 also failed to explain as to why he did not try to stop and catch the appellant. Moreover, his version that an Advocate went to police station along with him belied by PW-2, namely, constable Girdhar Singh, thus, making him unreliable witness.

10. Learned counsel for the appellant further submitted that same is the case with PW-3 whose testimony inspires no confidence.

11. Learned counsel for the appellant further submitted that on the other hand the defence witnesses are more reliable and their version seems to inspire much more confidence than that of prosecution. DW-1 who happens to be the clerk of an Advocate, whose seat got burnt, clearly stated that fire accident in the instant case was the result of the carelessness of the child employee of the Canteen who was trying to fill the Air in the stove.

12. Learned counsel for the appellant further submitted that likewise DW-2 who happens to be an Advocate stated that the fire accident corroborates the version of DW-1 effectively and confirms that the fire accident was the result of the carelessness of the child employee of the Canteen who was preparing the stove in order to make tea.

13. Learned counsel for the appellant further submitted that clearly the prosecution story appears to be a wholly unreliable and the the prosecution has completely failed to prove its case beyond the realm of reasonable doubt and the learned Trial Court has erroneously neglected the entire defence version.

14. Learned counsel for the appellant further submitted that the judgment and order passed by the Trial Court is wrong both on facts and law. The learned trial court had misread and misconstrued the statements of

prosecution witnesses and even other witnesses have also not supported the prosecution case.

15. Learned counsel for the appellant has further contended that the learned trial court had wrongly relied upon that when a witness has been declared hostile, his statement could be relied upon with some extent. As such, he submits that the learned trial court has erred in law and passed the impugned order, therefore, the same is liable to be set aside and the instant appeal is liable to be allowed.

16. Opposing the contention of learned Counsel for the appellant-accused, the learned A.G.A. has contended that sufficient evidence was given by the prosecution to prove the factum of committing the crime i.e. burning of canteen wherein a chamber of an Advocate was also burnt. The F.I.R. was also immediately lodged and the prosecution witnesses have also proved the commission of offence, as such, the impugned order does not require any interference by this Court and the appeal is liable to be dismissed.

17. After hearing the argument advanced by learned counsel for the parties, this Court is of the view that through out the web of the Criminal Jurisprudence, one golden thread is always seen that it is the duty of the prosecution to prove the guilt of the accused. This burden of proof on prosecution to prove guilt is also known as presumption of innocence. The presumption of innocence, sometimes refer to by the latin expression "*ei incumbit probatio qui dicit, non qui negat*" (the burden of proof is on one who declares, not to one who denies) is the principle that one is considered innocence unless proven guilt. In criminal jurisprudence every accused is presumed to be innocent unless the guilt is proved. The presumption of innocence is a human right. The prosecution may obtain a criminal conviction only when the evidence proves the guilt of accused beyond reasonable doubt.

18. In the present case, almost all the prosecution witnesses have turned hostile. It is based on testimony of hostile prosecution witnesses from which guilt of accused may be inferred.

19. Witnesses may be categorized into three distinct categories. They may be wholly reliable. Similarly there may be witnesses who can be considered wholly unreliable. There is no difficulty in placing reliance or disbelieving his evidence when an evidence is wholly reliable or wholly un-reliable, but difficulty arises in case of third category i.e. where witness is neither wholly reliable nor wholly unreliable. Hostile witness ordinarily falls in category of those witnesses who are neither wholly reliable nor wholly un-reliable. Hon'ble Apex Court in **Khujji @ Surendra Tiwari Vs. State of M.P. AIR 1991 SC page 1853** was pleased to observe as under :-

“The evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether, but the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof.”

20. The term “hostile witness” does not find place in Evidence Act 1872 (here-in-after referred as Act of 1872 for brevity). It is a term borrowed from English Law. Though in English Law to allow a party to contradict its own witness was not acceptable view. The theory of contradicting its own witness was resisted on the ground that party should be permitted to discard or contradict his own witness, which turns unfavorable to party calling him, however, this rigidity of rule was sought to be relaxed by evolving a term “hostile” or “un-favourable witness” in common law.

21. It is relevant to quote Section 154 (1) of the Act of 1872, which reads as under:-

“the Court may, in its discretion, permit the person who calls a witness to put any question to him, which might be put in cross examination by the adverse party”.

22. Sub-Section (2) of Section 154 of Act of 1872, further provides that :-

“Nothing in this section shall disentitle the person so permitted under sub-section (1), to rely on any part of evidence of such witness”.

23. Thus discretion is vested in Court to permit a person to put such question, which may be put by adverse party, if Court deems it appropriate. Thus the term “hostile witness” has been borrowed from English Law and developed in through case Laws.

24. The principle of “falsus in uno falsus in omnibus” (false in one thing, false in everything) has no application in India. It is duty of Court to separate grain from chaff. Keeping in view the above principles Hon'ble Apex Court in the case of **Sucha Singh v. State of Punjab, AIR 2003 SC 3617** was pleased to observe as under :-

“even if major portion of the evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, it is the duty of the court to separate grain from chaff. Falsity of particular material witness or material particular would not ruin it from the beginning to end. The maxim falsus in uno falsus in omnibus (false in one thing, false in everything) has no application in India and the witness cannot be branded as a liar. In case this maxim is applied in all the cases it is to be feared that administration of criminal justice would come to a dead stop. Witnesses just cannot help in giving embroidery to a story, however, truth is the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of credence, and merely because in some respects the court considers the same to be insufficient or unworthy of reliance, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well.”

25. Similarly in **Paramjeet Singh v. State of Uttarakhand; AIR 2011 SC 200** also Hon'ble the Supreme Court of India was pleased to observe as under:-

“When the witness was declared hostile at the instance of the public prosecutor and he was allowed to cross examine the witness furnishes no justification for rejecting en bloc the evidence of the witness. However, the court has to be very careful, as prima facie, a witness who makes different statements at different times, has no regard for the truth. His evidence has to be read and considered as a whole with a view to find out whether any weight should be attached to it. The court should be slow to act on the

testimony of such a witness; normally, it should look for corroboration to his testimony”.

26. Before proceeding further, it would be necessary to discuss all the prosecution witnesses as well as the defence witnesses alongwith their testimonies, which are being discussed as under:-

PROSECUTION WITNESSES

27. PW.1-Informant Shivdas :- A perusal of the star witness of the prosecution case namely PW-1 Shivdas shows that although in the FIR he had stated that the chamber of an Advocate was also burnt due to fire caused by the appellant, however surprisingly, in his statement recorded before the trial court, he has stated that only a portion of the takhta of one Advocate was burnt. This witnesses further stated that FIR was scribed by one clerk of the Court however surprisingly he failed to name the said scribe. According to this witness many people gathered after the canteen was set on fire but not even a single independent witness was produced by the prosecution to prove its case.

In his Cross Examination, the PW-1 has stated that he went to lodge the First Information Report with one Advocate, however, no such advocate was produced as a witness by the prosecution. This witness stated to have known the appellant from past 7 years from the alleged date of incident and he stated that the appellant was a regular customer of the canteen and he never used to keep any dues.

The entire testimony of the PW-1 is silent about any motive which the appellant might have for the commission of the alleged offence.

28. PW-2 Girdhar Singh:- The aforesaid witness i.e. PW-2 Girdhar Singh, although is a formal witness who has proved the Chik FIR as well as G.D. Entry regarding the registration of the First Information Report, however, the aforesaid witness has stated that PW-1 came alone for registration of FIR and no advocate accompanied him. The said fact totally contradicts the version of

the PW-1 wherein he has stated that he went to the police station along with one Advocate.

29. PW-3 Vijay Kumar:- PW-3 Vijay Kumar is alleged to be one of the employee of the canteen and has claimed to have seen the incident, however, his testimony is also full of contradictions and, as such, the same is unworthy of any credit. PW-3 has also claimed to have accompanied the informant to the police station for registration of FIR, however, the said claim is totally contradictory to the statements of PW-1 who has stated to have visited police station along with one Advocate. Version of PW-3 is also contrary to the testimony of PW-2 Constable Girdhar Singh who has stated that the informant came alone for the registration of FIR.

This witness stated in his testimony that he has come to testify on the instructions of his Employer Suraj, thus, making his entire version infirm and unworthy of credit.

30. PW-4 Durgesh Kumar Tiwari:- PW-4 Durgesh Kumar Tiwari happens to be the Investigating officer of the instant case who stated that he was assigned the investigation on 23.01.1991 itself. The witness stated to have recovered burnt ashes from the alleged place of incident. This witness further stated that he submitted the chargesheet under section 436 of IPC against the appellant in the court on 3.01.1996.

In the Cross Examination this witness stated that he fails to recall that the seat of Advocate Bhola Prasad was situated near the said canteen and he also failed to recall whether the seat was burnt or not.

It is pertinent to mention here that Cross examination of the P.W.-4 reveals that he did not record the statement of the Canteen Owner, namely, Suraj. He further stated that he failed to record the statement of any Advocate and he also stated that he failed to record the statement of anyone who could have been the eye witness of the said incident. This witness also failed to recognize the location of the alleged place of incident.

DEFENCE WITNESSES

31. DW-1 Ajit Singh Yadav:- This witness happens to be the clerk of an Advocate whose seat got burnt. This witness stated that the appellant was neither present at the place of incident nor he committed the offence. He further stated that the fire was the result of the mistake of one child employee of the canteen, who was filling the air in the stove. He further stated that as soon as the child employee lit the matchstick to light the stove, whole canteen as well as his seat caught fire.

32. DW-2 Mahendra Pratap Singh:- He is an Advocate and stated that on the fateful day at about 8:20 AM, he reached the canteen and asked its owner Suraj for a cup of tea. Suraj instructed his worker to make the tea and while his worker was trying to light the stove to make the tea, the whole canteen caught fire and the whole canteen was reduced to ashes. This witness also stated that subsequently Shivdas (PW-1) who happens to be the proprietor of the Canteen started inquiring from the appellant and it ultimately led to the heated argument between the two. Thereafter, the PW-1 lodged the First Information Report against the appellant due to animosity arising out of the said scuffle.

33. Hon'ble the Supreme Court of India in the case of Mahendra Singh and Others Versus State of Madhya Pradesh; (2022 7 SCC 157) was pleased to observe at para 20 as under:-

"20. It is a settled law that same treatment is required to be given to the defence witness(es) as is to be given to the prosecution witness(es)."

34. Further, Hon'ble the Supreme Court of India in the case of Vadivelu Thevar v. State of Madras; 1957 SCR 981: AIR 1957 SC 614 was pleased to observe at para 11 & 12 as under:-

"11.....it is a sound and well-established rule of law that the court is concerned with the quality and not with the quantity of the evidence necessary for proving or disproving a fact. Generally speaking, oral testimony in this context may be classified into three categories, namely:

(1) Wholly reliable,

(2) *Wholly unreliable*

(3) *Neither wholly reliable nor wholly unreliable.*

12. In the first category of proof the court should have no difficulty in coming to its conclusion either way it may convict or may acquit on the testimony of a single witness if it is found to be above reproach or suspicion of interestedness, incompetence, or subornation. In the second category the court equally has no difficulty to its conclusion. It is in the third category of cases that the court has to be circumspect and has to look for corroboration in the material particulars by reliable testimony direct or circumstantial....."

35. After a careful perusal of all the testimonies of prosecution witnesses as well as defence witnesses, this Court finds that the learned trial court had failed to circumspect the material on record carefully.

36. Further, a Division Bench of this Court in the case of **Suresh Narain Tripathi and others versus State of Uttar Pradesh and Others; 2005 Cril LJ 2479**, granted acquittal for the offence under section 436 of IPC where the star witnesses were unreliable and was pleased to observe at para 13 as under:-

"13. Certainly, it is the primary principle that the accused must be and not merely may be guilty before a court can convict and a mental distinction between 'may be' and 'must be' is long and divided vague conjectures from sure conclusions."

37. It feels pain to observe that in our present system of trial despite having sufficient power to the judge to ask questions to the witnesses in order to find out truth, most of them do not ask questions to the witnesses to shift the grain from the chaff. Practice of leaving witnesses to the Advocates, when a witness becomes hostile, is not un-common in the trial Courts. Time and again Hon'ble Apex Court has reminded that a Judge does not preside over a criminal trial merely to see that no innocent man is punished, but a Judge also presides to see that a guilty man does not escape. Both are public duties, which the Judge has to perform. Therefore, the trial Court must shed their

inertia and must intervene in all those cases where intervention is necessary for the ends of justice.

38. No proper explanation of injuries on the person of injured have been given. Mere suggestion is not sufficient. Moreover it itself indicates a false case. All the witnesses being the close to each other, it is beyond apprehension that they instead of naming out real culprit, they would falsely implicate the accused persons knowing them innocent.

39. This Court has gone through the impugned judgment and evidence on record. The trial court relying on the testimony of witnesses, even though who have not supported the prosecution case, has concluded that the accused had burnt the canteen. Looking into the totality of statement of witnesses, the conclusion drawn by the trial court cannot be said to be reasonable.

40. In the present case, the learned trial court has also failed to consider the fact that the alleged incident is said to have taken place in the court compound at 11:00 A.M. and the prosecution has failed to produce any Advocate or any other staff of court to prove its case. Further, on the other hand, the presence of D.W.-1 and D.W.-2, who were clerk and advocate respectively and their presence is quite natural in the court premises. The defence witnesses ought to have been considered by the trial court. Thus, this Court finds that the prosecution failed to establish that appellant in all probability has committed the said offence.

41. It is also an established principle of law of evidence that statement of witness is to be read as a whole and conclusion should not be drawn only by picking up a single sentence of the statement of a witness. Thus, the trial court had overlooked the material evidence available on record with regard to guilt of accused and to that extent conclusion drawn by the trial Court suffers with patent infirmity and perversity and, therefore, liable to be reversed and set aside.

42. Thus in view of above, after analysis of circumstances of present case in the light of aforesaid settled legal principles, I come to the conclusion that

the trial court has erred passing the impugned judgment and order, therefore, this appeal succeeds and is **allowed**. The judgment and order dated 26.04.2000 passed by learned Second Additional Sessions Judge, Lucknow in Sessions Trial No.192 of 1995, convicting and sentencing the appellant under Section 436 I.P.C. for three years rigorous imprisonment, is **set aside and reversed**. The appellant, namely, Mohd.Nabi @ Munna is **acquitted** of charge under Section 436 I.P.C. His personal bond and surety bonds are canceled and sureties are discharged.

43. Let record of Trial Court be sent back to the Court concerned along with copy of judgment and order for information.

(Shamim Ahmed,J.)

Order date :- 15.03.2024
Saurabh