

Court No. - 13

Case :- APPLICATION U/S 482 No. - 7722 of 2024

Applicant :- Pankaj Kumar Shukla

Opposite Party :- State Of U.P. Thru. Secy. Home Lko And 2 Others

Counsel for Applicant :- Mujtaba Kamal Sherwani

Counsel for Opposite Party :- G.A.

Hon'ble Saurabh Lavania,J.

1. Heard counsel for the applicant and Sri Nirmal Kumar Pandey, learned A.G.A. for the State.

2. By means of the present application, the applicant has sought the following main reliefs:—

"(i) To quash the impugned summoning order passed by the learned Additional Chief Judicial Magistrate-II, Sitapur in Case No. 454 of 2019, filed under Section 323, 504 of IPC, dated 24.11.2020 (Annexure No. 1);

(ii) To quash the impugned Charge Sheet dated 28.11.2019 (Annexure No. 2), which was filed in the above stated Case Crime No. 454 of 2019."

3. The applicant has assailed the impugned order on the sole ground that the applicant was not present at the situs/ place of crime, as appears from the submissions advanced by the counsel for the applicant, as also from the averments made in Para 6 of the affidavit filed in support of the application. The same are extracted hereunder:-

"...6. That, the Investigation Officer was appointed and the inquiry was set up, as such, the Applicant, before the Investigation Officer, had submitted the proof of the Hotel receipts which shows that at the time of offence, the Applicant was in Lucknow and not in Sitapur. Copies of the Hotel Receipts (showing the Applicant was in Lucknow at the time of offence) are annexed as Annexure No.4."

4. From the aforesaid, it is apparent that the case of the applicant is based on the plea of 'Alibi'.

5. Sri Nirmal Kumar Pandey, learned A.G.A. for the State also stated that the plea of 'Alibi' is a question of fact to be entertained and decided only after evidence of the prosecution takes its

evidence to prove the incident, and the participation of the accused as well.

6. The Latin word 'Alibi' means 'elsewhere'. Plea of 'Alibi' is a rule of recognized in Section 11 of the Evidence Act. The plea of Alibi disputes the case of prosecution. Thus plea of 'Alibi' is question of fact. It is settled law that when an accused raises plea of 'Alibi', the burden is on accused to prove the same. A plea of 'Alibi' is a question of fact which is required to be proved by the accused at the stage of trial to show that he/ she was elsewhere and was falsely implicated and the accused is also required to prove the same by adducing appropriate evidence.

7. Under Section 103 of the Evidence Act the burden rests on the accused who raises the plea of 'Alibi'. Section 103 of the Evidence Act provides:—

"103. The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Illustrations

(b) B wishes the court to believe that, at the time in question, he was elsewhere. He must prove it."

8. In **Binay Kumar Singh v. State of Bihar [(1997) 1 SCC 283]**, the Hon'ble Apex Court observed as under:

"23. The Latin word alibi means "elsewhere" and that word is used for convenience when an accused takes recourse to a defence line that when the occurrence took place he was so far away from the place of occurrence that it is extremely improbable that he would have participated in the crime. It is a basic law that in a criminal case, in which the accused is alleged to have inflicted physical injury to another person;

(i) the burden is on the prosecution to prove that the accused was present at the scene and has participated in the crime.

(ii) The burden would not be lessened by the mere fact that the accused has adopted the defence of alibi.

(iii) The plea of the accused in such cases need be considered only when the burden has been discharged by the prosecution satisfactorily.

(iv) But once the prosecution succeeds in discharging the burden it is incumbent on the accused, who adopts the plea of alibi, to prove it with absolute certainty so as to exclude the possibility of his presence at the place of occurrence.

(v) When the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the court would be slow to believe any counter-evidence to the effect that he was elsewhere when the occurrence happened.

(vi) But if the evidence adduced by the accused is of such a quality and of such a standard that the court may entertain some reasonable doubt regarding his presence at the scene when the occurrence took place, the accused would, no doubt, be entitled to the benefit of that reasonable doubt. For that purpose, it would be a sound proposition to be laid down that, in such circumstances, the burden on the accused is rather heavy. It follows, therefore, that strict proof is required for establishing the plea of alibi. This Court has observed so on earlier occasions (vide *Dudh Nath Pandey v. State of U.P.* [(1981) 2 SCC 166 : 1981 SCC (Cri) 379]; *State of Maharashtra v. Narsingrao Gangaram Pimple* [(1984) 1 SCC 446 : 1984 SCC (Cri) 109 : AIR 1984 SC 63]).

9. In *Rajendra Singh v. State of U.P.*, (2007) 7 SCC 378 the Hon'ble Apex Court has held as under:—

"8. That apart, the plea taken by the respondent Kapil Dev Singh in his petition under Section 482 CrPC was that of alibi. Section 103 of the Evidence Act says that the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is proved by any law that the proof of that fact lie on any particular person. The second illustration to Section 103 reads as under:

"B wishes the Court to believe that at the time in question, he was elsewhere. He must prove it."

This provision makes it obvious that the burden of establishing the plea of alibi set up by Respondent 2 in the petition filed by him under Section 482 CrPC before the High Court lay squarely upon him. There is hardly any doubt regarding this legal proposition. (See *Gurcharan Singh v. State of Punjab* [AIR 1956 SC 460 : 1956 Cri LJ 827], *Chandrika Prasad Singh v. State of Bihar* [(1972) 4 SCC 140 : AIR 1972 SC 109] and *State of Haryana v. Sher Singh* [(1981) 2 SCC 300 : 1981 SCC (Cri) 421 : AIR 1981 SC 1021].) This could be done by leading evidence in the trial and not by filing some affidavits before the High Court. In such a case the prosecution would have got an opportunity to cross-examine those witnesses and demonstrate that their testimony was not correct. Learned counsel for the appellant has submitted that in fact no affidavits were filed in the High Court but what was filed were copies of two or three affidavits which were given by some persons before the Superintendent of Police, Allahabad. Thus, there was absolutely no legal evidence in support of the plea of alibi of Kapil Dev Singh, which the High Court chose to rely upon and accept for the purpose of quashing the order passed by the learned Sessions Judge.

13. Having considered the submissions made by learned counsel for the parties, we are of the opinion that the statements of the witnesses under Section 161 CrPC being wholly inadmissible in evidence could not at all be taken into consideration. The High Court relied upon wholly inadmissible evidence to set aside the order passed by the learned Sessions Judge. That apart, no finding on a plea of alibi can be recorded by the High Court for the first time in a petition under Section 482 CrPC. As mentioned above, the burden to prove the plea of alibi lay upon the accused which he could do by leading evidence in the trial and not by filing some affidavits or statements purported to have been recorded under Section 161 CrPC. The whole procedure adopted by the High Court is clearly illegal and cannot be sustained."

10. In Shaikh Sattar v. State of Maharashtra [(2010) 8 SCC 430], the Hon'ble Apex court has observed as under:-

"35. Undoubtedly, the burden of establishing the plea of alibi lay upon the appellant. The appellant herein has miserably failed to bring on record any facts or circumstances which would make the plea of his absence even probable, let alone, being proved beyond reasonable doubt. The plea of alibi had to be proved with absolute certainty so as to completely exclude the possibility of the presence of the appellant in the rented premises at the relevant time. When a plea of alibi is raised by an accused it is for the accused to establish the said plea by positive evidence which has not been led in the present case. We may also notice here at this stage the proposition of law laid down in Gurpreet Singh v. State of Haryana [(2002) 8 SCC 18 : 2003 SCC (Cri) 186] as follows : (SCC p. 27, para 20)

"20. ... This plea of alibi stands disbelieved by both the courts and since the plea of alibi is a question of fact and since both the courts concurrently found that fact against the appellant, the accused, this Court in our view, cannot on an appeal by special leave go behind the abovenoted concurrent finding of fact."

13. It is the prosecution to prove its case by adducing evidence. The petitioner is at liberty to take the plea of alibi as his defence and to establish the same with positive evidence. Before prosecution adduce evidence to establish the incident, and to prove participation of the accused, there is no scope for entertaining a defence plea of alibi."

11. From the observations made by the Hon'ble Apex Court in the judgments referred above, what appears is as under:

(i) The prosecution has to prove its case including the role of the accused in that incident.

(ii) Only when prosecution succeeds in discharging the burden by establishing its case including participation of the accused in the crime/incident, the plea of 'Alibi' put up by the accused needs to be considered.

(iii) The burden is on the prosecution to prove that the accused was present at the scene and has participated in the crime.

(iv) The burden would not be lessened by the mere fact that the accused has adopted the defence of 'Alibi'.

(v) The plea of 'Alibi' of the accused in such cases need be considered only when the burden has been discharged by the prosecution satisfactorily.

(v) It is incumbent on the accused, who adopts the plea of alibi, to prove it with absolute certainty so as to exclude the possibility of his presence at the place of occurrence.

(vii) When the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the court would be slow to believe any counter-evidence to the effect that he was elsewhere when the occurrence happened.

(viii) If the evidence adduced by the accused is of such a quality and of such a standard that the court may entertain some reasonable doubt regarding his presence at the scene when the occurrence took place, the accused would, no doubt, be entitled to the benefit of that reasonable doubt. For that purpose, it would be a sound proposition to be laid down that, in such circumstances, the burden on the accused is rather heavy.

(ix) Strict proof is required for establishing the plea of 'Alibi'. [vide: **Dudh Nath Pandey v. State of U.P. (1981) 2 SCC 166 : 1981 SCC (Cri) 379; State of Maharashtra v. Narsingrao Gangaram Pimple (1984) 1 SCC 446 : 1984 SCC (Cri) 109 : AIR 1984 SC 63]**"].

12. Section 482 of CrPC (Now repealed) and Section 528 of BNSS, enforced w.e.f. 01.07.2024, are *pari mareria*. This Court in exercise of jurisdiction under the said provisions should not meticulously examine the evidence filed along with charge-sheet by the Investigating Officer, as the same is an issue relating to appreciation of evidence and the same can be gone into by the concerned court during trial when the entire evidence is adduced by the parties. The power exercised by this Court is discretionary in nature. This Court in exercise of its inherent powers cannot go

into the disputed question of facts. In exercise of power under the said provisions, this court is required to consider the case set up by the prosecution/ complainant for coming to the conclusion as to whether the criminal proceedings are required to be quashed at the initial stage. The accused person during trial is required to place and prove/ establish its defence in accordance with the law of evidence. The defence of the accused is required to be taken note of in the trial by the trial Court. At this stage, a mini trial is not permissible. At the stage of framing of charge as also while exercising power under the said provision, the material/ evidence collected during investigation by the Investigating Officer and in the case of complaint the documents and evidence produced by the complainant before the court concerned can only be considered. [See: **Mohd. Allauddin Khan Vs. The State of Bihar And Others (2019) 6 SCC 107**]; **R. P. Kapur Vs. State of Punjab AIR 1960 SC 866**; **State of Haryana And Others Vs. Ch. Bhajan Lal And Others 1992 Supp. (1) SCC 355**; **State of Bihar & Anr. Versus P. P. Sharma & Anr.; 1992 Supp (1) SCC 222**; **Zandu Pharmaceuticals Works Ltd. & Ors. Versus Mohammad Shariful Haque & Anr.; 2005 (1) SCC 122**; **M. N. Ojha Vs. Alok Kumar Srivastava; 2009 (9) SCC 682**; **Rajeev Kourav Vs. Baisahab & Others (2020) 3 SCC 317**; **State of U.P. Vs. Akhil Sharda & Others 2022 SCC OnLine SC**; **Salib alias Shalu alias Salim Vs. State of U.P. and Others**]. The defence which is irrefutable/ indisputable/ undeniable/ unquestionable/ irrefragable/ beyond suspicion may be considered in exceptional circumstances in the peculiar facts of a given case by this Court while exercising its power/ jurisdiction under the said provisions. [See: **Harshendra Kumar D. Vs. Rebatilata Koley and Others, (2011) 3 SCC 351**; **G. N. Mishra And Another Vs. Smt. Divya Awasthi And Another, MANU/UP/1879/2012**].

13. Learned counsel for the applicant has not shown any material to establish that the evidence, which to the view of this Court is not beyond suspicion, relied upon in this application was verified by the Investigating Officer during investigation. In this view of the matter, the same cannot be considered at this stage.

14. Having considered the aforesaid facts as also the observations made by the Hon'ble Apex Court in the judgments, referred above, this Court is of the view that no interference is required in this case on the basis of plea of 'Alibi' taken by the applicant.

15. Accordingly, the present application is **dismissed**. No order as to costs.

Order Date :- 02.09.2024/Manoj K.