

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 29.07.2015

CORAM:

THE HONOURABLE MR. JUSTICE B.RAJENDRAN

Criminal Revision Case No. 244 of 2009

S.Shankar .. Petitioner/Defacto Complainant

versus

1.Balaji @ Yamaha

2.Gnanasekaran @ Gnanam

3. State by Inspector of Police,

K-2 Ayanavaram Police Station .. Respondents /Accused

Complainant

Criminal Revision filed against the order of acquittal passed by the Additional District Sessions Judge, Chennai, Fast Track Court No.1, Chennai in S.C.No.291 of 2008 dated 30.1.2009.

For petitioner : Mr.Thanga Vadhana Balakrishnan

For respondents : No appearance for respondents 1 and 2

Mr.V.Arul, Government Advocate, for R-3

ORDER

This criminal revision is filed against the order of acquittal passed by the learned Additional District Sessions Judge, Fast Track Court No.1, Chennai, in S.C.No.291 of 2008, dated 30.1.2009, by which the accused 1 and 2 were acquitted from the criminal prosecution for the offence under Sections 341, 326, 307 r/w 34 IPC.

2. The prosecution case in brief is as follows :-

(a) The revision petitioner is the defacto complainant. Due to previous enmity, on 7.8.2007 around 1.30 a.m., when he went to shop to purchase cigarette, he was attacked by the accused near Ayanavaram K.K.Nagar 5th street. The revision petitioner suffered severe head injuries and injuries on stomach. The injuries of the petitioner were so severe that dying declaration of the petitioner was recorded by the learned XX Metropolitan Magistrate. However, the petitioner later recovered.

(b) Meanwhile, the police conducted investigation and arrested the accused and

recovered material objects. After conclusion of investigation, final report was taken on file in S.C.No.291 of 2008 and the case was transferred to the Additional Sessions Judge, Fast Track Court No.1. On the side of prosecution, 10 witnesses were examined and 14 documents were exhibited and 6 material objects were produced. After trial, the learned Judge acquitted the accused by judgment dated 30.1.2009 in S.C.No.291 of 2008. Aggrieved over the same, the present revision has been filed.

3. The main ground of attack by the revision petitioner is that the lower Court has failed to take into consideration that the injury was so grievous in nature that even dying declaration was recorded. But now that the petitioner has survived, it cannot be treated as dying declaration. The lower Court has observed that there is a discrepancy in the evidence of P.W.1 in court and the statement recorded as dying declaration. The petitioner has stated in the dying declaration that two other persons were also involved. But when he was examined in court, he has not stated so. The learned counsel submitted that this is not a major discrepancy and the lower Court has erred in acquitting the accused on this ground.

4. The learned counsel further submitted that the lower Court has taken into consideration that P.Ws. 1 to 4 are relatives and therefore, they are interested witnesses and eschewed the same. According to the learned counsel, merely because they are relatives, their evidence cannot be disbelieved. As regards non recovery of weapons, the learned counsel submitted that merely because weapons were not recovered, that cannot be a reason to disbelieve the evidence of P.W.1. This Court has time and again stated that non production of weapons alone cannot be a ground to acquit. In fact, the petitioner would point out that weapons have been seized and mahazar witness has been prepared and produced from the scene of occurrence. Therefore, the conclusion of the Court below that since weapons were not recovered from the accused, it cannot be a ground to discharge the accused is wrong. Further, the very injuries were severe in nature, including cut injury on the left side of the head. It was a near fatal injury. Therefore, the Court should have given more importance to the injury also. Hence, the learned counsel would submit that the order of acquittal should be set aside by this Court.

5. The accused/respondents 1 and 2 herein were represented by an advocate for the last two hearings. In fact, the learned counsel for the accused/respondents 1 and 2 commenced his argument in this case and some time to make his submissions in detail. However, for the past two hearings none represented the accused/respondents 1 and 2. Today, the matter is posted for orders. Today also there is no representation for

the accused/respondents 1 and 2. As per the judgment of the apex Court reported in 2013 (3) SCC 721, K.S.Panduranga vs. State of Karnataka, if the party did not appear there is no necessity for the Court to issue warrant or special notice or appoint an amicus curie to argue the case on his behalf and the Court is empowered to deal with the matter on merits and dispose of the same.

6. The learned Government Advocate would contend that the lower Court was carried away only on the concept that P.Ws. 1 to 4 were relatives. But that cannot by itself give rise to a conclusion that the accused are innocent. Totality of the circumstance should be taken into consideration. Therefore, he would contend that in rarest of rare case, this Court may consider in remanding the matter for fresh trial and this is one of the rarest cases.

7. Heard both parties. On a careful reading of the order of the Court below, it could be seen that the lower Court has acquitted the accused mainly on the following grounds :-

(i) There is a discrepancy in the statement of the petitioner recorded as dying declaration and his evidence given as P.W.1;

(ii) The lower Court has disbelieved the evidence of P.Ws.1 to 4 since they are relatives.

(iii) Weapons were not recovered from the accused.

8. As regards the first ground, viz. alleged discrepancy in the statement of the revision petitioner in Court and statement recorded as dying declaration, the same cannot be treated as discrepancy. It could at best be termed as mistake. This mere mistake will not alter the essence of the entire evidence of other witnesses and also shadow the injuries sustained by the petitioner. This Court does not want to go into those details because it will affect the trial, suffice it to state that even the differences pointed out between the statement given before the Magistrate as dying declaration and the deposition given before the Court are slightly different, which will also be considered by the Court below. However, the benefit of doubt as given by the Court below to acquit the accused cannot be accepted.

9. The second ground for acquitting the accused is that P.Ws.1 to 4 are close relatives. Therefore, the lower Court felt that there is every chance for implicating the accused due to previous enmity. It has to be noted that PW1/victim is an auto driver. PW2 is the brother of PW1/victim and he had witnessed the incident. PW3 and 4 are neighbours. On the basis of such relationship between the prosecution witnesses, the trial court held that they are interested witnesses and their evidence is not trustworthy to base an order of

conviction against the accused. Further, the victim/PW1, accused and the prosecution witnesses 2 to 4 are all residing in the same locality. It has to be pointed out that merely because the prosecution witnesses are relatives and/or neighbours, their testimony cannot be simply brushed aside. The trial Court ought to have examined the reliability or otherwise of their evidence without being driven by the fact that they are residing in the same locality and due to previous enmity they have deposed against the accused. Even the small discrepancy with respect to the occurrence spot cannot be a reason to brush aside the prosecution evidence. Merely because the prosecution witnesses are related to each other, that by itself will not be a reason to reject their testimony. Therefore, the findings rendered by the trial court that the prosecution evidence are not trust worthy cannot be accepted.

10. The trial court has taken lot of pains to narrate the evidence with regard to recovery of weapons as well as the evidence let in to speak about the recovery of weapon. In fact, the statement of the victim/PW1 does not specifically state as to when the police have come to the spot and the manner of recovery of weapon. Whereas, it is stated by the investigation officer that the weapon was recovered at the direction of the first accused under the bridge. In such circumstances, the conclusion of the trial court that there is no specific evidence let in for recovery of the weapon cannot be accepted. The fact remains that the accused have confronted the accused and caused him bleeding injuries by using the weapon, thus, the accused have caused injuries to the victim/PW1 by using a weapon. The further fact remains that the weapon was recovered as per the confession statement of A-1 by the investigation officer. It is also to be noted that the injuries caused to the victim/PW1 are such that dying declaration was recorded from him, however, he survived.

11. It is well settled proposition of law enunciated by the Honourable Supreme Court and this Court that merely because the prosecution witnesses happened to be relatives or neighbours, their evidence cannot be ignored and it has to be examined with caution. In the present case, the lower Court has failed to take into consideration the evidence of P.W.1 in his cross examination, wherein he has deposed as follows :-

“4வது தெருவுக்கு பின்னர் 5வது தெரு வரும் தான் குறுக்கு வழியாக 5வது தெருவுக்கு மார்கெட்டுக்கு சிகரெட் வாங்க சென்றேன். எம்.எம்.கே தெரு தான் 5வது தெரு. அந்த இடத்தில் தான் சம்பவம் நடந்ததென தெரிவித்துள்ளார்.”

12. The Investigation Officer, who was examined in this case, has deposed as follows :

“இந்நிலையில் புலனாய்வ, அதிகாரியின் சாட்சியத்தில் சம்பவமிடம் பற்றி காண்கையில், எம்.எம்.கே தெரு என்பதும்

5வது தெரு என்பதும் வேறுவேறு தெரு தான்”

13. On the basis of such deposition of the investigation officer, the trial Court observed that there is difference with regard to the scene of occurrence.

14. A careful reading of the evidence shows that it should not be interpreted as done by the Court below. In fact, P.W.1 has only stated in his cross examination that he went in a short route, through the 5th street, to the market to buy cigarette. No where he has stated that there is a difference between the place of occurrence nor has the Investigation Officer deposed that the place mentioned by him differs from the place mentioned by P.W.1. Therefore, the conclusion arrived at by the Court below is factually not correct.

15. As regards the third ground, the lower Court has observed that, in his confession statement, A-1 has not stated anything about the recovery of weapons. Therefore, the learned counsel has come to the conclusion that it has not been proved by the prosecution where and from whom the weapons were recovered. But on going through the entire evidence it is clear that the weapons were recovered from the scene of occurrence. This fact has not at all been taken into consideration by the Court below. Since the weapon has been allowed to be marked, the Court should have considered this angle also. Unfortunately, that has not been done.

16. The Supreme Court in *Putchalapalli Naresh Reddy vs. State of Andhra Pradesh and others*, 2014(2) SCC 457, held that an order of acquittal is liable to be interfered with only in exceptional cases where there are compelling circumstances and judgment in appeal is found to be perverse. The relevant paragraphs are as under :

9. Shri Altaf Ahmed and Shri Mahabir Singh, learned senior counsel, appearing for the accused Nos. 1, 2 and 3 respectively, relied on the decisions of this Court in *Rohtash vs. State of Haryana*, (2012) 6 SCC 589 and *Murugesan vs. State*, (2012) 10 SCC 383, for the principles reiterated by this Court for interfering with an order of acquittal. In *Rohtash* (supra) to which one of us (Dr. B.S. Chauhan, J.) was a party, this court held that an order of acquittal is liable to be interfered with only in exceptional cases where there are compelling circumstances and the judgment in appeal is found to be perverse. Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference. In *Rohtas* (supra) this Court observed:

"27. The High Court interfered with the order of acquittal recorded by the trial court. The law of interfering with the judgment of acquittal is well settled. It is to the effect that only in exceptional cases where there are compelling circumstances and the judgment in appeal is found to be perverse, the appellate court can interfere with the order of the 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 innocence. Interference in a routine manner where the other view if possible should be avoided, unless there are good reasons for interference. [Vide State of Rajasthan v. Talevar (2011) 11 SCC 666 and Govindaraju v. State (2012) 4 SCC 722]."

10. In Murugesan (supra), this Court has observed as under:

"21. A concise statement of the law on the issue that had emerged after over half a century of evolution since Sheo Swarup is to be found in para 42 of the report in Chandrappa and Ors. v. State of Karnataka : 2007 (4) SCC 415. The same may, therefore, be usefully noticed below:

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

(1) An appellate court has full power to review, reappraise and reconsider the evidence upon which the order of acquittal is founded. (2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to 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. (Emphasis supplied)"

21. In State of U.P. vs. Anil Singh, A.I.R. 1988 SC 1998, this Court observed as follows:

"In an appeal against acquittal, in the great majority of cases, the prosecution version is rejected either for want of corroboration by independent witnesses, or for some falsehood, stated or embroidery added by witnesses. In some cases, the entire prosecution case is doubted for not examining all witnesses to the occurrence. The indifferent attitude of the public in the investigation of crimes could also be pointed. The public are generally reluctant to come forward to depose before the Court. It is, therefore, not correct to reject the prosecution version only on ground that all witnesses to occurrence have not been examined. It is also not proper to reject the case for want of corroboration by independent witnesses if the case made out is otherwise true and acceptable. With regard to falsehood stated or embellishments added by the prosecution witnesses, it is well to remember that there is a tendency amongst witnesses in our country to back up a good case by false or exaggerated version. It is also experienced that invariably the witnesses add embroidery to prosecution story, perhaps for the fear of being disbelieved.

But, that is no ground to throw the case overboard, if true in the main. If there is a ring of truth in the main, the case

should not be rejected. It is the duty of the Court to cull out the nuggets of truth from the evidence unless there is reason to believe that the inconsistencies of falsehood are so glaring as utterly to destroy confidence in the witnesses. It is necessary to remember that a Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties which the Judge has to perform."

22. In *State of Punjab v. Karnail Singh*, (2003) 11 SCC 271, this Court held as follows:

"There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to re-appreciate the evidence even where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not."

17. It is evident from the above decision of the Honourable Supreme Court that an order of acquittal can be interfered with only in exceptional cases where there are compelling circumstances and the judgment in appeal is found to be perverse. However, interference in a routine manner where the other view is possible should be avoided. In the present case, on analysis of the evidence on record, this Court can conclude that this is not a case where benefit of doubt has to be extended to the accused when the evidence adduced on behalf of the prosecution is cogent, clear and corroborated by each other. Even assuming that there is a failure on the part of the prosecution to adduce evidence specifically with reference

to recovery of weapon, it will not be a ground to acquit the accused. In my view, in the interest of justice, the matter has to be remanded back to the trial court for fresh consideration. This Court feels that this is one of the rarest of rare case where justice has not been done properly and one more opportunity should be given to the prosecution to prove its case. Accordingly, the order of acquittal passed by the learned Additional District Sessions Judge, Fast Track Court No.1, Chennai, in S.C.No.291 of 2008, dated 30.1.2009, is set aside and the matter is remanded back to the Trial Court. This criminal revision is allowed. The lower Court shall issue notice to the parties and dispose of the case as expeditiously as possible.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

tar/rsh

To

- 1.The Additional District Sessions Judge, Fast Track Court No.1, Chennai
- 2.The Public Prosecutor, Madras High Court
- 3.The Inspector of Police,
K-2 Ayanavaram Police Station

+lcc to Mr.Thanga Vadhana Balakrishnan, Advocate, S.R.No.39018

kk(CO)
kra(11/01/2016)

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