

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.41 OF 2005**

The State of Maharashtra) ..Appellant

V/s.

Suleman Sultan Mujawar,)
55 Yrs, R/o Mallewadi, Tal. Miraj,)
District Sangli) ..Respondent
(Orig. Accused)

Mrs. Anamika Malhotra, APP for State

**CORAM : K.R.SHRIRAM, J.
DATED : 11th DECEMBER 2020**

ORAL JUDGMENT :

1 This is an appeal impugning an order and judgment dated 6-10-2004 passed by Learned Judicial Magistrate First Class, Miraj, by which, respondent was acquitted for the offence punishable under Sections 354 (*Assault or criminal force to woman with intent to outrage her modesty*) and 452 (*House trespass after preparation for hurt, assault or wrongful restraint*) of the Indian Penal Code.

2 It is the prosecution's case that complainant – Shakuntala Dashrath Kamble (PW.-1) used to reside in the field of one Baburao Shamrao Patil alongwith her husband and six kids as she and her husband (PW.-2) were permanently worked in the field of Baburao Patil as labourers. Accused also used to work with complainant and her husband and hence complainant and accused got acquainted with each other. On 7-1-2002 as usual

complainant got up in the morning but as she was not feeling well she did not go to work, whereas the husband of complainant went to work in the field located near the house. As complainant was not feeling well she took her medicine at about 12 noon and went to sleep. Two of her kids were also with her. After some time, accused went to the house of complainant and enquired about her illness and then he left the house of complainant. At about 1.00 p.m. accused again went to the house of complainant and sat on her person. When complainant tried to free herself from the clutches of accused, accused pressed her mouth by his left hand and also pressed her chest with his right hand. By seeing the resistance, her two kids started crying and complainant also raised an alarm. Hearing the alarm of complainant and the cry of the kids, the husband of complainant went there and complainant narrated the entire incident to him. On 9-1-2002 complainant lodged a complaint at Miraj Rural Police Station. After due investigation charge sheet came to be filed. Defence of accused is of total denial.

3 At the outset, I have to state that even Investigating officer has not been examined. Only two witnesses examined were complainant and her husband as P.W.-1 and P.W.-2 respectively. Complainant has deposed that when accused misbehaved with her she raised an alarm at which time accused left her house and then her husband reached the house. But the husband (P.W.-2) says that he went to the house hearing the cry of his children and he saw that accused was sitting on the person of his wife and

molesting her. P.W.-2 says that thereafter accused went out and threatened him because of which after two days P.W.-2 went with his wife to the police station. Further, if, P.W.-2 husband saw accused sitting on person of his wife and molesting her, one fails to understand why did P.W.-2 not set his wife free from the clutches of accused. One would expect the husband to take some strong action or react effectively when he sees someone committing a heinous crime on his wife. Neither complainant, nor her husband has deposed that they did something to accused or used some force on accused to push him off the body of P.W.-1.

Complainant's explanation for the delay in lodging the complaint is accused had threatened her husband. If accused has threatened her husband, then why did she lodge the complaint after two days because threat is a threat. Trial Court has concluded that the delay in filing the FIR is not properly explained by the prosecution. Even I am satisfied that the evidence of both witnesses are not free from doubt and are unreliable.

4 Interestingly and which is the main dent in the case of prosecution is that the Investigating Officer was never examined. Illustration (g) of Section 114 of the Indian Evidence Act, 1872 provides the Court may presume that evidence which could be and is not produced would, if produced be, unfavourable to the person who withholds it. The fact that the Investigating Officer also has not been examined would show that if examined, his evidence would have been unfavourable to complainant. Non examining the Investigating Officer as a witness in the circumstances of the

case would have caused grave prejudice to accused. The Apex Court in ***Habeeb Mohammad V/s. The State of Hyderabad***¹ observed that it was the bounden duty of the prosecution to examine the Investigating Officer, who is a material witness in the case particularly when no allegation was made that if produced, he would not speak the truth and in any case, the Court would have been well advised to exercise its discretionary powers to examine the witness.

5 Therefore, adverse inference arises against the prosecution's case from its non production of the Investigating Officer as a witness in view of illustration (g) to Section 114 of the Indian Evidence Act. The Investigating Officer is the principal architect and executor of the entire investigation. He is a crucial witness for purposes of establishing that there are omissions and contradictions but more importantly, it is always open to the defence to question the honesty and calibre of the entire process of investigation. It is well settled law that where an investigation is defective, insufficient or dishonest, those factors prove fatal to the prosecution. In the given instance, accused was totally precluded from an opportunity of being able to establish the further infirmities in the prosecution's case and on this ground alone, the order of acquittal will have to be confirmed.

6 The Apex Court in ***Ghurey Lal Vs. State of U.P.***² has culled out the factors to be kept in mind by the Appellate Court while hearing an appeal

¹ AIR 1954 SC 51

² (2008) 10 SCC 450

against acquittal. Paragraph Nos.72 and 73 of the said judgment read as under:

72. The following principles emerge from the cases above:

1. The appellate court may review the evidence in appeals against acquittal under sections 378 and 386 of the Criminal Procedure Code, 1973. Its power of reviewing evidence is wide and the appellate court can reappreciate the entire evidence on record. It can review the trial court's conclusion with respect to both facts and law.

2. The accused is presumed innocent until proven guilty.

The accused possessed this presumption when he was before the trial court. The trial court's acquittal bolsters the presumption that he is innocent.

3. Due or proper weight and consideration must be given to the trial court's decision. This is especially true when a witness' credibility is at issue. It is not enough for the High Court to take a different view of the evidence. There must also be substantial and compelling reasons for holding that trial court was wrong.

73. In light of the above, the High Court and other appellate courts should follow the well settled principles crystallized by number of judgments if it is going to overrule or otherwise disturb the trial court's acquittal:

1. The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so.

A number of instances arise in which the appellate court would have "very substantial and compelling reasons" to discard the trial court's decision. "Very substantial and compelling reasons" exist when:

i) The trial court's conclusion with regard to the facts is palpably wrong;

ii) The trial court's decision was based on an erroneous view of law;

iii) The trial court's judgment is likely to result in "grave miscarriage of justice";

iv) The entire approach of the trial court in dealing with the evidence was patently illegal;

v) The trial court's judgment was manifestly unjust and

unreasonable;

vi) The trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/ report of the Ballistic expert, etc.

vii) This list is intended to be illustrative, not exhaustive.

2. The Appellate Court must always give proper weight and consideration to the findings of the trial court.

3. If two reasonable views can be reached - one that leads to acquittal, the other to conviction - the High Courts/appellate courts must rule in favour of the accused.

7 There is an acquittal and therefore, there is double presumption in favour of accused. Firstly, the presumption of innocence available to the accused 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, accused having secured acquittal, the presumption of their innocence is further reinforced, reaffirmed and strengthened by the Trial Court. For acquitting accused, the Trial Court observed that the prosecution had failed to prove its case.

8 In the circumstances, in my view, the opinion of the Trial Court cannot be held to be illegal or improper or contrary to law. The order of acquittal, in my view, need not be interfered with.

9 Appeal dismissed.

Meera
M.
Jadhav

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(K.R. SHRIRAM, J.)