

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.1310 OF 2007**

The State of Maharashtra)
(through Sangola Police Station))..Appellant

V/s.

1 Dattu Vithoba Galave)
Age 35 years)

2 Arjun Vithoba Galave)
Age 30 years)

3 Bhausahab Baji Galave)
Age 18 years)
All R/o Galavewadi)
Tal. Sangola District Solapur)

..Respondents
(Ori. Accused nos.1 to 3)

Mrs. Anamika Malhotra, APP for State
Mr. V. S. Talkute for Respondents

**CORAM : K.R.SHRIRAM, J.
DATED : 4th JANUARY 2021**

ORAL JUDGMENT

1 This is an appeal impugning an order and judgment dated 21-12-2005 passed by Learned JMFC, Sangola, acquitting the accused for the offence punishable under Section 324 (*Voluntarily causing hurt by dangerous weapons or means*) and Section 504 (*Intentional insult with intent to provoke breach of the peace*) read with Section 34 (*Acts done by several persons in furtherance of common intention*) of the Indian Penal Code.

2 With the assistance of the Learned APP, I have considered the evidence, documents and the impugned judgment. I do not see any reason to interfere with the impugned judgment.

3 In the present case, prosecution has not adduced any evidence to indicate that the accused or anyone of them intentionally insulted PW-5 – Bhanudas Galave. PW-3-complainant has stated that all the accused were abusing PW-5. PW-7 also states that the accused appeared at the house of PW-5 showering abuse. But both these witnesses do not state specific words of abuse uttered by the accused or anyone of them. PW-5 himself has not stated that the accused or any one of them intentionally insulted PW-5 with intention to break public peace or to commit any other offence. Therefore charge under Section 504 has to fail.

4 Prosecution also inspite of availing sufficient opportunity has failed to examine Investigating Officer to show that any such notification was publicly promulgated. Therefore, the accused cannot be held guilty for the offence punishable under Section 37(A) read with Section 135 of the Bombay Police Act 1951.

5 Considering the charge under Section 324, prosecution has not examined Digambar, who allegedly rescued PW-5 from the accused. The Investigating Officer also has not been examined in order to prove recovery of weapons panchnama.

6 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.

7 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

¹ AIR 1954 SC 51

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.

8 Moreover, Panch witness for recovery – Prakash Gaikwad (PW.-1) has turned hostile. PW.-1 has denied that he had been to police station, that he knew the contents of panchnama or that during the custody of the accused, the accused stated in his presence that he had concealed one axe and two sticks in his dung hill and he would produce the same. PW.-1 had also denied that he has even signed the panchnama or that he went in the police jeep to retrieve two axe and two sticks.

9 PW.-6 in his cross-examination has stated that blood stained clothes of PW.-5 were seized by police but those are not produced on record.

10 So far as the injuries nos.2 to 4 are concerned, PW.-3 and PW.-5 are all talking about blow with an axe on the right hand of PW.-5. However, injury no.2 in medical evidence is on the base of right thumb, injury no.3 on right middle finger and injury no.4 on left base of thumb. Even though medical evidence says regarding injury no.4 on left base of thumb, no witness including injured himself has stated either in his statement before the police or in the evidence before the court that he had sustained the said injury.

11 Considering these points, Trial Court acquitted the accused. I have no reason to find fault with the conclusion arrived at by the Trial Court.

12 The Apex Court in ***Ghurey Lal V/s. State of U.P.***² has culled out the factors to be kept in mind by the Appellate Court while hearing an appeal 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";

2. (2008) 10 SCC 450

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.

13 The Apex Court in many other judgments including ***Murlidhar & Ors. V/s. State of Karnataka***³ has held that unless, the conclusions reached by the trial court are found to be palpably wrong or based on erroneous view of the law or if such conclusions are allowed to stand, they are likely to result in grave injustice, Appellate Court should not interfere with the conclusions of the Trial Court. Apex Court also held that merely because the appellate court on re-appreciation and re-evaluation of the evidence is inclined to take a different view, interference with the judgment of acquittal is not justified if the view taken by the trial court is a possible view.

We must also keep in mind that there is a presumption of innocence in favour of respondents and such presumption is strengthened by the order of acquittal passed in their favour by the Trial Court.

The Apex Court in ***Ramesh Babulal Doshi V/s. State of***

3. (2014) 5 SCC 730

*Gujarat*⁴ has held that if the Appellate Court holds, for reasons to be recorded that the order of acquittal cannot at all be sustained because Appellate Court finds the order to be palpably wrong, manifestly erroneous or demonstrably unsustainable, Appellate Court can reappraise the evidence to arrive at its own conclusions. In other words, if Appellate Court finds that there was nothing wrong or manifestly erroneous with the order of the Trial Court, the Appeal Court need not even re-appraise the evidence and arrive at its own conclusions.

14 I do not find anything palpably wrong, manifestly erroneous or demonstrably unsustainable in the impugned judgment. From the evidence available on record, there is nothing to substantiate the charge leveled against the accused.

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

16 In the circumstances, in my view, the opinion of the Trial Court

4. 1996 SCC (cri) 972

cannot be held to be illegal or improper or contrary to law. The order of acquittal, in my view, cannot be interfered with. I cannot find any fault with the judgment of the Trial Court.

17 Appeal dismissed.

(K.R. SHRIRAM, J.)

Meera
M.
Jadhav

Digitally signed
by Meera M.
Jadhav
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