



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 283 OF 2005

Daud Khan s/o Habib Khan Pathan

Age : 36 years, Occ: Agril.

R/o. Ovhar, Tq. Dist. Aurangabad.

... Appellant

Versus

The State of Maharashtra

... Respondent

.....

Mr. S. G. Ladda, Advocate for the Appellant.

Mr. K. K. Naik, APP for Respondent-State.

.....

CORAM : ABHAY S. WAGHWASE, J.

Reserved on : 19.09.2024

Pronounced on : 07.10.2024

JUDGMENT :

1. In this appeal, there is challenge to the judgment and order of conviction dated 30.03.2005 recorded by learned 1st Adhoc Additional Sessions Judge, Aurangabad, holding appellant guilty of offence under Section 344 of the Code of Criminal Procedure [Cr.P.C.].

CASE IN BRIEF IS AS UNDER

2. On charge of commission of offence under Section 302 r/w 34 of the Indian Penal Code [IPC] and in the alternative, for offence

under Sections 147, 302 r/w 149 of IPC, four accused namely, Mukhtar, Rafiqkhan, Shakirkhan, and Rahamatkhan were made to face trial before learned 1st Adhoc Additional Sessions Judge, Aurangabad vide Sessions Case No. 16 of 2005. At trial, prosecution examined as many as 10 witnesses and also sought reliance on documentary evidence. After analyzing the oral and documentary evidence, learned trial Judge, by judgment and order dated 30.03.2005, acquitted all four accused from above charges. However, by same order, informant-present appellant Daud Khan was held guilty for commission of offence under Section 344 of Cr.P.C. and sentenced to suffer simple imprisonment for two months and to pay fine of Rs.200/-, in default to suffer simple imprisonment of 10 days. Above judgment and order recording guilt for perjury is the subject matter of the instant appeal.

SUBMISSIONS

On behalf of the appellant :

3. Learned counsel for the appellant pointed out that four accused were chargesheeted by learned trial Judge for above sections, but they were acquitted. He pointed out that prosecution could not establish the case beyond reasonable doubt. That, complainant/

present appellant himself has not supported prosecution. He also emphasized that along with appellant/original complainant, other witnesses were also examined, but none of them had supported prosecution. However, according to him, only present appellant is singled out by learned trial Judge and questioned for giving false evidence.

4. Criticizing the procedure adopted by learned trial Judge in trying original complainant for perjury, he submitted that distinct procedure is provided in Cr.P.C. Such summary proceedings were not adopted by learned trial Judge. That, directly same court issued show cause notice and without considering the explanation, straightway guilt has been recorded. That, even above procedure was carried out and concluded on the same day. There was no proper and fair trial. According to learned counsel, for holding a person guilty of giving false evidence, there has to be a full-fledged trial. Appellant has not been given opportunity to cross-examine the Investigating Officer. Therefore, according to learned counsel, there being complete deviation from the established procedure, impugned judgment does not stand in the eyes of law to be legal and valid. In the alternative, he submitted that even otherwise, almost two decades have passed since rendering the judgment. At that time, complainant was of 36

years of age. As on today, he is almost 56 years of age. Therefore, considering such facts, he prays for either letting off the appellant by imposing fine, or extending benefit of probation.

On behalf of the State :

5. While opposing the above, learned APP submitted that appellant is original complainant. He set law into motion, claiming himself to be an eye witness. He retracted and only because of such resilement, judgment of acquittal was required to be rendered. That, his version in substantive evidence is contrary to his own report, on the basis of which crime was registered. He has admittedly given false evidence on oath and therefore, after getting convinced to that extent, learned trial court had initially issued him show cause notice and thereafter, considering his reply and say, conviction has been rendered. There is no deviation or infirmity in said procedure and so, learned APP prays to dismiss the appeal for want of merits.

ANALYSIS

6. Admittedly, present appellant was the original complainant on whose report, crime was registered for offence punishable under Section 302 r/w 34 of IPC and four accused named therein were

tried, but were acquitted by learned trial Judge vide judgment dated 30.03.2005. It seems from the operative part of the judgment that vide clause (4), order as under was also passed :

“4. The complainant, Daud Khan Pathan r/o Ovher, is separately proceeded u/s 344 of the Cr.P.Code.”

7. The source of above order seems to be the observations of learned trial Judge in para 19 and 20 of the judgment and learned trial Judge seems to have opined that complainant Daud Khan i.e. present appellant, in his zest to support the accused and damage the prosecution case, was bent upon to give false evidence. In para 21, learned trial Judge has discussed the object and scope of Section 344 of Cr.P.C. and then observed that in the trial case, offence was under Section 302 of IPC, which was a serious offence. That, on complaint of present appellant, wheels of investigation were set into motion. That, in a serious offence, complainant had volte-faced his story. Therefore, no formal complaint of the court was required while trying the offender under Section 344 of the Code, as was the case with the provisions of Section 340 of the Code, and considering all the facts together, it was found that complainant had intentionally given false evidence before the court and so, it was expedient and in the interest

of justice to proceed against him under Section 344 of Cr.P.C., and consequently show cause notice was issued.

8. It is also emerging that by virtue of Exhibit 55 in the same Sessions Case, show cause notice is issued calling upon appellant to show reason as to why he should not be prosecuted under Section 344 of Cr.P.C. for giving false evidence on oath before the court. Learned trial Judge has noted that above allegations were explained to the offender in Marathi. The offender replied that he had not given any false evidence and he begged to be excused if committed any wrong and therefore, on the same day, learned trial Judge has observed that appellant had given evidence before the court intentionally and also with knowledge that whatever he stated in the court was false. Learned trial Judge further observed that considering the gravity of the offence, it was expedient to proceed against him under Section 344 of Cr.P.C. and thereby passed following order :

“The offender/complainant, Daud Khan s/o Habib Khan Pathan, is sentenced to suffer simple imprisonment for two months and to pay a fine of Rupees 200/-, in default to suffer S.I. for ten days.”

9. What transpires from above material is that, informant himself is prosecuted by learned trial Judge under Section 344 of Cr.P.C., accusing him for giving false evidence. There is no doubt that, giving false evidence gravitates offence, more particularly when it is given on oath. Section 191 of IPC deals with offence of such kind.

10. Here, admittedly, Section 344 of Cr.P.C. is invoked by learned trial Judge. For the sake of convenience and clarity, Section 344 Cr.P.C. is reproduced as under :

“344. Summary procedure for trial for giving false evidence. -

(1) If, at the time of delivery of any judgment or final order disposing of any judicial proceeding, a Court of Session or Magistrate of the first class expresses an opinion to the effect that any witness appearing in such proceeding had knowingly or willfully given false evidence or had fabricated false evidence with the intention that such evidence should be used in such proceeding, it or he may, if satisfied that it is necessary and expedient in the interest of justice that the witness should be tried summarily (emphasis laid) for giving or fabricating, as the case may be, false evidence, take cognizance of the offence and may, after giving the offender a reasonable opportunity of showing cause why

he should not be punished for such offence, try such offender summarily and sentence him to imprisonment for a term which may extend to three months, or to fine which may extend to five hundred rupees, or with both.

(2) In every such case the Court shall follow, as nearly as may be practicable, the procedure prescribed for summary trials.

(3) Nothing in this section shall affect the power of the Court to make a complaint under section 340 for the offence, where it does not choose to proceed under this section.

(4) Where, after any action is initiated under sub-section (1), it is made to appear to the Court of Session or Magistrate of the first class that an appeal or an application for revision has been preferred or filed against the judgment or order in which the opinion referred to in that sub-section has been expressed, it or he shall stay further proceedings of the trial until the disposal of the appeal or the application for revision, as the case may be, and thereupon the further proceedings of the trial shall abide by the results of the appeal or application for revision.”

11. Above provision goes to show that at the threshold, court invoking such provision has to first record opinion that witness has given false evidence, and upon noting and recording such satisfaction

on the strength of reasons assigned therein, it is further to be gauged and ascertained that, it is also expedient in the interest of justice that the witness, who gave false evidence, needs to be tried.

. It is fairly settled and dealt time and again in numerous cases that, formation of opinion is not a mere empty formality. It is expected of the court to draw conclusion that there is deliberate attempt on the part of the witness to give false evidence. Hence, there has to be element of *mens rea* in doing so.

12. At this juncture, it would be fruitful to reproduce the observations of the Hon'ble Apex Court in the case of ***Santokh Singh v. Izhar Hussain*** AIR 1973 S.C. 2190, which read as under :

“Every incorrect or false statement does not make it incumbent on the court to order prosecution. The court has to exercise judicial discretion in the light of all the relevant circumstances when it determines the question of expediency. The court orders prosecution in the larger interest of the administration of justice and not to gratify the feelings of personal revenge or vindictiveness or to serve the ends of a private party. Two frequent prosecutions for such offences tend to defeat its very object. It is only in glaring cases of deliberate falsehood where conviction is highly likely, that the court should direct prosecution.”

13. Further, the court so taking *suo motu* action, is expected to adopt prescribed summary procedure and one finds reference to this extent in the provision of Section 344 Cr.P.C. itself, which is reproduced herein-above. Once, the court is expected to adopt distinct procedure as provided above, then stages provided in summary trial are expected to be adhered to and followed, i.e. recording of plea, offering choice to accept guilt and then sufficient time is required to be given to the accused to answer the charge i.e. in order to given fair trial. Fair trial contemplates sufficient opportunity to contest and answer the indictment.

14. The wording of Section 344 Cr.P.C. contemplates *prima facie* drawing conclusion that false evidence has been given; secondly, it was deliberately, willingly, knowingly, and last but not least, that it is expedient in the interest of justice to proceed against the witness for giving false evidence. But again, for proceeding under Section 344 of Cr.P.C., as stated above, summary procedure is to be undertaken.

15. Here, what is emanating from the above judgment is that firstly, prosecution case in trial court was rested on the testimony of in all 10 witnesses. Out of those, 6 witnesses have not supported prosecution. Therefore, here, it is clear that out of such witnesses,

only present appellant/original complainant has been chosen and picked up to face the charge of perjury i.e. without specifically assigning reason as to why he alone is required to be proceeded against. The fundamental ground raised before this Court by learned counsel for the appellant is precisely on such count and he has posed a question as to why only present appellant is singled out.

16. It is also noticed that when a distinct procedure is contemplated for dealing with a person giving false evidence on oath, coupled with existence of pre-condition for initiating proceedings viz. *prima facie* opinion about giving false evidence and secondly, it is expedient in the interest of justice to inquire into by assigning sound reasons, scrupulous adherence to the procedure is mandated. Here, however, record shows that on the day of judgment itself, learned trial Judge formed opinion that false evidence has been given and further, trial court on same day, put appellant to show cause, followed by recording his explanation and pronouncing his guilt. Plea, as expected and mandated under summary procedure was not recorded. No breathing or sufficient time was offered to the complainant, who is a layman, to face the charge. He had been denied opportunity to be represented by a legal expert. Therefore, it is clear that in a hurried manner, learned trial Judge on the same day, formed opinion, issued

show cause notice, noted explanation and even recorded guilt, followed by passing sentence. Therefore, in the considered opinion of this Court, the trial Judge circumvented procedure in conducting the proceedings and recording guilt. In fact, procedure contemplated has not been adopted or adhered to. Hence, such judgment not being good in the eyes of law, cannot be allowed to be sustained. Hence, I proceed to pass the following order :

ORDER

- I. The appeal is allowed.
- II. The conviction awarded to the appellant by learned 1st Adhoc Additional Sessions Judge, Aurangabad in Sessions Case No. 16 of 2005 under Section 344 of Cr.P.C. on 30.03.2005 stands quashed and set aside.
- III. The appellant stand acquitted of the offence punishable under Section 344 of Cr.P.C.
- IV. The bail bonds of the appellant stand cancelled.
- V. Fine amount deposited, if any, be refunded to the appellant after the statutory period.

[ABHAY S. WAGHWASE, J.]