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Court : Mumbai Aurangabad

Decided On : Feb-18-2015

Judge : V.M. Deshpande

Appeal No. : Criminal Revision Application No. 379 of 2002

Appellant : Shankar

Respondent : Ishaq and Others

Advocate for Def. : Shri. Nilkanth Pawade

Advocate for Pet/Ap. : Shri. S.G.Chapalgaonkar

Judgement :

Oral Judgment:

1. This is a Revision against the judgment and order of acquittal, passed by the Judicial Magistrate, First Class, Omerga, dated 14.10.2002 in Regular Criminal Case No. 23 of 1999, whereby the learned Magistrate acquitted the present respondent nos. 1 to 5 for the offences punishable under Sections 147, 148, 324, 326 r/w 149 of the Indian Penal Code. The present Revision is preferred by Shankar Shivappa Patale (PW 2), who is the first informant and Shivraj Shankar Patale, the injured (PW 3).

2. I have heard Shri Mohit Deshmukh, advocate holding for Shri S.G.Chapalgaonkar, learned counsel for the applicants, Shri Nilkanth Pawade, learned counsel for respondent nos. 1 to 5 and Shri V.P.Kadam, learned Additional Public Prosecutor or respondent no.6/State.

3. Shankar Shivappa Patale, who was examined as PW 2, lodged report with police station Murum on 4.1.1999. Since, the said report (Exh.37) was disclosing commission of cognizable offence, police authorities registered the same as Crime No. 5 of 1999 for the offences punishable under Sections 147, 148, 324, 326 r/w 149 of the Indian Penal Code. After completion of usual investigation, the investigating officer was of the opinion that there is sufficient material collected during the course of the investigation against the accused persons. Therefore, he filed charge sheet in the court of Judicial Magistrate, First Class, Omerga vide charge sheet no. 11 of 1999 on 15.2.1999.

4. The charge was framed by the learned Magistrate vide Exh.28 in Regular Criminal Case No. 23 of 1999 against the accused/respondent nos. 1 to 5 for the offence punishable under Sections 147, 148, 149, 324, 326 r/w 149 of the Indian Penal Code. All the accused abjured their guilt and claimed for their trial.

5. The prosecution examined in all nine witnesses and also relied upon various documents which were duly proved during the course of the trial. The learned Magistrate vide impugned judgment was pleased to record a finding that the prosecution has failed to bring home the guilt of respondent nos. 1 to 5, and therefore, passed the impugned order of acquittal.

Though the State did not prefer any appeal questioning the correctness of the said judgment of acquittal, the first informant and the injured approached this court in the year 2002 by filing the present Criminal Revision, which was admitted by this court and the record and proceedings were also called.

With the assistance of learned counsel for the parties and the learned Additional Public Prosecutor, I have gone through the record and proceedings.

6. The record reveals that an application was moved by the present applicant no.1 to conduct the proceedings. The application is at Exh.64. Though, the phraseology used in the application may be incorrect, sum and substance of the said application was to assist the learned Public Prosecutor, who was incharge of the case, and the prosecution on 7.12.2001 gave no objection to the said application, and accordingly, learned Magistrate granted the said application and thereby permitted applicant no.1 to assist the Public Prosecutor.

7. The evidence of PW 2 Shankar Patale, the first informant is in consonance with and on the line of the first information report. Cross-examination at the hands of all the accused could not destroy the basic fabric of the evidence. Shivraj Patale (PW 3) and Sharnappa Patale (PW 5), who were injured in the incident in question were also examined by the prosecution. In the evidence of PW 3 Shivraj, it has come on record that accused Younus gave knife blow to him. His evidence would reveal that the said witness withstood searching cross-examination of the learned crossexaminer. The only material omission that the crossexaminer was able to point out is in respect of he having seen accused Asgar giving a knife blow on the stomach of his brother PW 5 Sharanappa. However, the evidence of Sharanappa (PW 5) clearly shows that he was assaulted by accused Asgar. His testimony also withstood searching cross-examination.

8. PW 4 is Dr. Shivshankar Harlyya. He has medically examined (PW 3) Shivraj Patale and Sharnappa Patale (PW 5). Their injury certificates are duly proved by him at Exhs. 44 and 45, respectively. In cross-examination, it is specifically brought on record that at the Rural Hospital, Murum since there was no facility or instrument to check the depth of the injury on the abdomen, the doctor was required to send the injured at Solapur, and accordingly, Shivraj (PW 3) and Sharnappa (PW 5) were sent to Civil Hospital, Solapur. Worth to note is the denial of suggestion given to doctor that the injuries were caused due to fall on the zink sheet. The injuries appearing in injury certificates Exhs. 44 and 45 are as under:

Cut injury on left hypochondarica region 1 x cm. X 1 cm. Bleeding present oblique in nature abdoment tenderness and garding present. Age of injury is within 3 hrs and referred to Civil Hospital Solapur.

Caused by sharp instrument. Nature of injury referred to Civil Hospital Solapur.

Shivraj(PW 3) Exh.45

Cut injury on back, lumbar region 1 x cm. bleeding present caused by sharp instrument, within 3 hrs, referred to Civil Hospital, Solapur for further treatment and opinion regarding nature of injury.

Thus, the injuries mentioned in Exhs. 44 and 45 are completely ruled out due to accident.

9. In spite of overwhelming evidence available on record, the learned trial court has acquitted the accused persons on very flimsy grounds. According to the learned trial court, since the evidence of the doctor does not show the nature of the injury, the accused cannot be convicted. True it is, in the injury certificate or during the course of the evidence, PW 4 Dr. Shivshankar did not specify as to whether the injuries were grievous or not. Merely because he has not stated that the injuries were grievous or not, that does not absolve the liability for the offence punishable under Section 324 of the Indian Penal Code. In spite of said material available on record and in spite of the fact that the accused persons were also charged for the offence punishable under Section 324 of the Indian Penal Code, for no reason the learned trial court has acquitted the accused persons for the offence punishable under Section 324 of the Indian Penal Code.

10. Further disturbing fact emerging from the record is that the learned trial court has acquitted the accused persons for not examining the investigating officer and the doctor from Solapur where the injured persons were referred for further medical examination. The reason given by the learned Magistrate cannot stand to the scrutiny of law.

11. In the present case, the investigating officer is one Shri K.R.Rathod. At the time of evidence Shri K.R.Rathod was posted as Police Sub-Inspector at police station, Tuljapur. The record reveals that summons were issued to Shri K.R.Rathod, Police Sub-Inspector and the said report is available on record at Exh.D-85. The said summons is duly served on Shri K.R.Rathod. In spite of

receipt of the said summons, for the reasons best known to Shri K.R.Rathod, he did not appear before the court.

12. Once the learned Magistrate issued summons to Shri K.R.Rathod and in obedience to the said summons if he is not appearing before the court, it was the duty of the learned Magistrate to procure his presence. The courts, in the present case the Magistrate, cannot remain mute spectator. In an appropriate event, it is the duty of the learned Magistrate to intervene and step-in to administer the criminal justice effectively. Therefore, it was incumbent on the part of the learned Magistrate to see that the person against whom the summons is issued is before the court, and for that, it was for the Magistrate to take suitable steps. The learned Magistrate cannot absolve his duty on the ground that no application is moved by the prosecution for issuing bailable or non-bailable warrant. The learned prosecutor incharge of the file is also officer of the court and is part and parcel in the process of administration of criminal justice. However, ultimately, it is the learned Magistrate, who has to control the situation and deliver the justice to the victim. Therefore, in my view, the learned Magistrate has committed a serious wrong in not issuing appropriate directions to secure the presence of Shri K.R.Rathod, Police Sub-Inspector and ultimately extended benefit in favour of the accused persons.

13. Another reason is non-examination of the doctor from the Hospital at Solapur. The summons was issued to Dr. Godalle, who has examined the injured PW 3 Shivraj and PW 5 Sharnappa at the Civil Hospital, Solapur. The summons is duly served upon Dr. Godalle. In fact, it is the present applicant, who filed an application (Exh.68) for issuance of summons to Dr. Godalle on 7.12.2001 and the learned Magistrate on 19.1.2002 was pleased to allow the said application and issued witness summons to Dr. Godalle. Thus, the first informant who was permitted to participate in the proceedings has done his part by moving appropriate application for securing presence of the witness. However, it appears that it is the learned Magistrate, who has abdicated his duty and has failed in not taking suitable steps, which the Magistrate was obliged to perform and to take necessary steps. It appears that the learned Magistrate remained mute spectator. Therefore, the miscarriage of justice has occurred in the present matter.

14. The impugned order clearly shows that it is the outcome of perverse approach on the part of learned Magistrate, in as much as in spite of the fact that there was evidence available on record in the nature of testimony of PW 3 Shivraj and PW 5 Sharnappa, which clearly states about the assault on them by means of Jambia and knife, the accused were liable for conviction for the offences punishable under Section 324, if not for the offence punishable under Section 326 of the Indian Penal Code.

15. In that view of the matter, present Criminal Revision Application is allowed.

The matter is remanded back to the learned Judicial Magistrate, First Class, Omerga, who is directed to take immediate steps for procuring presence of the Dr. Godalle and K.R.Rathod by taking appropriate steps and also decide the case afresh on the basis of their evidence available on record. The Registrar (Judicial) is directed to remit back the record forthwith.

The matter being old one, it is expected from the Magistrate to show the urgency.

Rule is made absolute in the above terms.

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