

State of Madhya Pradesh Vs. Arvind Joshi

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Court : Madhya Pradesh

Decided On : Jan-17-2008

Reported in : 2008(3)MPHT424

Judge : Abhay Gohil and ;Abhay M. Naik, JJ.

Appellant : State of Madhya Pradesh

Respondent : Arvind Joshi

Disposition : Appeal dismissed

Judgement :

Abhay Gohil, J.

1. The State of Madhya Pradesh has filed this appeal, after obtaining leave from this Court under Section 378 of Cr.P.C., against the judgment of acquittal dated 28/12/93 in Sessions Trial No. 279/91 by which, the respondent was tried for the offence under Section 302 of I.P.C.

2. As per prosecution story, on 10/4/91, deceased Kallu @ Mukesh, son of the complainant Jagannath (PW-1) had gone to 'Khatik Mohalla'. Complainant Jagannath, who is father of the deceased, had received an information that some quarrel took place with his son. So, he also went there and had seen that Arvind Joshi was carrying a sword in his hand and his father Ashok was carrying a Lathi

and near 'Hanuman Temple', both the accused Ashok Joshi and his father, assaulted the deceased and inflicted many blows by their respective weapons and the deceased was having several injuries on the head and bleeding. After receiving blows, he fell down. Complainant Jagannath (PW-1), Pappu Nadariya (PW-6), Anil Kumar (PW-2) and Premraj (PW-5), those who were present on the spot, tried to save the deceased but they could not save him. Deceased Kallu, in an injured condition, was taken to the police station. He was unconscious and was not even in a position to speak and therefore, he was referred to medical examination. Thereafter, his father Jagannath (PW-1) lodged the FIR (Ex.P/1), on which crime was registered, matter was investigated and the charge-sheet was filed.

3. During trial, the prosecution examined as many as twenty witnesses out of which, six were eye-witnesses but the remaining three eye-witnesses, namely, Anil Kumar (PW-2), Premraj (PW-5) and Pappu Nadriya (PW-6), have not supported the prosecution case. As per prosecution, only three eye-witnesses namely, Jagannath (PW-1), father of the deceased, Totaram (PW-3), who is real brother of the deceased and Nairayan (PW-16), one of the neighbours of the deceased, have supported the prosecution case. But the trial court has not placed reliance on their testimony and found that complainant Jagannath (PW-1) in his cross-examination has admitted that he reached on the spot after the incident was over. The statement of Totaram (PW-3) who is real brother of the deceased, was recorded after 1 and 1/2 months and his presence on the spot was neither shown in the FIR nor disclosed by his own father Jagannath (PW-1). The evidence of Narayan (PW-16) was also not found reliable because he has narrated a different story and stated that one more person namely, Papeeta was also there and he had also caused stone blows to the deceased. The trial court also found omission of this fact in his case-diary statement (Ex.D/3) that one more person Papeeta was present on the spot and he was also involved in beating the deceased. The statement of Narayan (PW-16) was also recorded after five days, Though, Narayan (PW-16) was not declared hostile but he has admitted that the incident took place in night at 9 p.m. and he had seen the incident from a distance of 60 ft. but this fact was also found omitted in his case-diary statement. In the examination-in-chief, this witness stated that he had seen the incident from Nala

though his house is 300 ft. away from Nala, but the prosecution has not explained about the distance between Nala and the place of occurrence nor this fact was got verified from this witness. Therefore, the trial court has not placed reliance on the evidence of all the aforesaid three eye-witnesses. The trial court was of the view that they were not present on the spot and they had not seen the incident. Court has also found that on the day of incident, it was a dark night and source of light was not available on the spot and this fact was also not mentioned in the spot-map.

4. So far as the evidence relating to memorandum (Ex.P/9) under Section 27 of the Evidence Act is concerned, the sword was recovered at the instance of accused Arvind Joshi from his house but the aforesaid memorandum (Ex.P/9) was not proved by Ashok (PW-10), who deposed that in the presence of Mathura (PW-4) no information was given that where the sword is lying. However, in this regard, the statement of complainant Jagannath (PW-1) was considered who has admitted that the sword was lying on the spot itself, which has made the recovery completely doubtful. Even otherwise, the evidence of memorandum is a very weak type of evidence and the conviction cannot be solely based on it. Further, there was non-compliance of the provisions of Section 157 of Cr.P.C. There is no evidence on record that when the copy of the report was forwarded to the Magistrate. The trial court has also considered that there was an enmity between the parties and the deceased was a person of criminal background and so many criminal cases were registered against him, therefore, it was found that the possibility of false implication on account of enmity between the parties cannot be ruled out. The trial court after considering the aforesaid aspects of the matter, has acquitted the respondent against which the State has filed this petition.

5. In this case, the respondent is absconding for last 20 years and the police could not serve the warrants upon him despite repeated opportunities. Therefore, we have heard this appeal in the light of the decision in the case of Bani Singh v. State of U.P. : 1996 CriLJ3491 and directed Shri Atul Gupta, to assist the court and appear as Amicus- curiae for the respondent/accused.

6. We have heard learned Counsel for the parties and perused the evidence on record.

7. There is no dispute that the evidence of the remaining three eye-witnesses namely, complainant Jagannath (PW-1), who is father of the deceased, Totaram (PW-3), who is real brother of the deceased and Narayan (PW-16) who is one of the neighbours of the deceased, is not at all reliable and was not sufficient to record the conviction of the respondent. Complainant Jagannath (PW-1) has clearly admitted that he reached on the spot after the incident was over and from his cross-examination it is clear that he had not seen the assailants on the spot. The incident took place at around 9 p.m. in the night and no source of light was available on the spot. The statement of Totaram (PW-3) was recorded after 1 and 1/2 months though he is real brother of the deceased. The statement of Narayan (PW-16) was recorded after five days and he has also rescinded from his earlier version recorded in case-diary and he also implicated one more person Papeeta in assaulting the deceased, which was not the prosecution case. Thus, it is clearly proved that none of the witnesses has narrated the true version of the prosecution case to the court. It is a case where exaggerated and contradictory statements have been made by the witnesses before the court. Therefore the court was unable to find truth as to who were the assailants. In a case under Section 302 I.P.C., there must be clinching evidence against the respondent for committing the murder of the deceased. If the evidence is shaky, unreliable and the version of the witnesses is not truthful then it is always difficult to reverse the findings in an appeal against acquittal.

8. The provisions of Section 157 of Cr.P.C. are also mandatory in nature. It is the duty of the police to forward the copy of FIR to the Magistrate concerned. Though, the compliance of the said provisions is mandatory but it may not always be fatal to the prosecution when there is clearcut and ocular evidence available on record. In a case where the prosecution evidence is doubtful, witnesses are not coming forward to give truthful version of the incident then in such a situation, to get the prosecuted story corroborated by other prompt action by the police, it is necessary and rather mandatory to the police to prove that the copy of FIR was forwarded to the Magistrate concerned so that there may not be any shadow of doubt in the

prompt action taken by the Investigating Officer. Ramhet Chaurasiya (PW-13) was unable to show to the court that when the copy of the FIR was forwarded to the Magistrate. The same is the version of Gayadin (PW-15), who was the Investigating Officer. The recovery of sword which was used in commission of crime, was also not found proved. When the weapon was lying on the spot as stated by the complainant Jagannath (PW-1) then there was no occasion for the I.O. to recover and seize the same and that too at the instance of the accused and to prepare the memorandum under Section 27 of the Evidence Act. When the sword was available on the spot and direct evidence was available to that effect then why such an attempt was made to create the false evidence of memorandum, this is not clear from the evidence on record.

9. It was also pointed out by the learned Counsel for the respondent that the statement of complainant Jagannath (PW-1) is not corroborated by the medical evidence. He has clearly stated that he had seen three wounds of sword on the head of the deceased but the doctor has not found any such injury on the head of the deceased. Therefore, the statement of the complainant creates doubt. The enmity between the parties is also found proved in this case. It has come in the evidence that the deceased was a person of criminal background and that the respondents/accused lodged the report against complainant-party for throwing bombs at their house and on the report of the respondents, the deceased and two other witnesses were facing criminal trial. Therefore, it was argued that there is a reasonable ground for the witnesses to make false statements against accused Arvind Joshi as he was a witness against them in some other criminal case.

10. Thus, the court has found that the prosecution has failed to prove the charges and allegations against the respondent by producing evidence beyond reasonable doubt. After considering the evidence as well as the findings of the trial court, we are also of the view that the prosecution evidence is doubtful and with a firmness it cannot be held that the evidence of all the remaining three eye-witnesses is reliable or that they made the truthful version of the incident or narrated the story correctly in the court or that the findings of acquittal are liable to be reversed merely on their evidence. According to us, the trial court has not committed any illegality in recording the findings of acquittal against the respondent.

11. It is settled principle under law that normally unless the finding of acquittal is totally perverse and wholly unreasonable, the appellate court should not interfere in the finding of acquittal simply on the ground that other views is also possible from the same set of evidence.

12. In a case of State of Goa v. Sanjay Thakran and Anr. (2007) 2 Supreme Court Cases (Cri) 162 the Hon. Supreme Court has held that:

While exercising the powers in an appeal against the order of acquittal the court of appeal would not ordinarily interfere with the order of acquittal unless the approach of the lower court is vitiated by some manifest illegality and the conclusion arrived at would not be arrived at by any reasonable person and, therefore, the decision is to be characterized as perverse. Merely because two views are possible, the court of appeal would not take the view which would upset the judgment delivered by the court below. However, the appellate court has a power to review the evidence if it is of the view that the view arrived at by the court below is perverse and the court has committed a manifest error of law and ignored the material evidence on record. A duty is cast upon the appellate court, in such circumstances, to re appreciate the evidence to arrive at a just decision on the basis of material placed on record to find out whether any of the accused is connected with commission of the crime he is charged with.

13. In a case of Peerappa and Ors. v. State of Karnataka (2006) 1 Supreme Court Cases (Cri) 586, their Lordships recalled the observations made by His Lordship of the Supreme Court, in a case of Kashiram v. State of M.P. (2002) 1 SCC 71, as observed, thus:

Though the High Court while hearing an appeal against an acquittal has powers as wide and comprehensive as in an appeal against a conviction and while exercising its appellate jurisdiction the High Court can reappraise the evidence, arrive at findings at variance with those recorded by the trial court in its order of acquittal and arrive at its own findings, yet, the salutary principle which would guide the High Court is -if two views are reasonable possible, one supporting the acquittal and the other recording a conviction, the High Court would not interfere merely because it feels that sitting as a trial court its view would have been one of

recording a conviction. It follows as a necessary corollary that it is obligatory on the High Court while reversing an order of acquittal to consider and discuss each of the reasons given by the trial court to acquit the accused and then to dislodge those reasons. Failure to discharge this obligation constitutes a serious infirmity in the judgment of the High Court.

That obligation has not been discharged by the High Court in the instant case. On the reasons given by the trial court while appreciating the evidence have not been dealt with by the High Court.

14. In a case of Kanju Muhammed alias Khumani and Anr. v. State of Kerala 2004 SCC(Cri)1425 , the Apex Court has held that in case of an appeal against acquittal, reversal of acquittal by High court, propriety and finding of Sessions Court should neither be perverse nor such that it could not be arrived at by a reasonable person. That apart, the view taken by the trial court was the only possible view. Hence, the High court ought not have interfered with the order of acquittal.

15. Similarly in the cases of Joseph v. State of Kerala (2003) SCC (Cri) 356 and Shailendra Pratap Singh and Anr. v. State of U.P. (2003) SCC (Cri) 432 the Hon. Supreme Court has laid down that in case of an appeal against acquittal when the trial Court gave cogent reasons for acquittal, interference by the Appellate Court is not permissible unless the order of acquittal is found to be perverse. The same principle is again reiterated in the catena of cases of Dilip and Anr. v. State of M.P. : 2001 CriLJ4721 , Ramdas and Ors. v. State of Maharashtra : AIR 2007 SC155 and Awadesh and Anr. v. State of Madhya Pradesh : 1988 CriLJ1154 . In an appeal filed by the appellant/State under Section 378 of Cr.P.C against judgment of acquittal, although the powers of the High Court to reassess the evidence and reach its own conclusion are as extensive as in an appeal against the order of conviction, yet, as a rule of prudence, the High Court should always give proper, weight and consideration to the matters e.g. (i) the view of the trial Judge as to the credibility of the witnesses' (ii) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at the trial; (iii) the right of the accused to the benefit of any doubt, and

(iv) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses. If on appraisal of the evidence and on considering the relevant attending circumstances it is found that two views are possible one as held by the trial Court for acquitting the accused, and the other for convicting the accused in such a situation the rule of prudence should guide the High Court not to disturb the order of acquittal made by the trial Court. Unless the conclusions of the trial Court drawn on the evidence on record are found to be unreasonable, perverse or unsustainable, the High Court should not interfere with the order of acquittal.

16. This Court should take guidance from the pronouncement of the judgment rendered in the case of *Halluand Ors. v. State of Madhya Pradesh* AIR 1974 SC 1936 in which the Apex Court has observed that:

5. These, in our opinion, are weighty reasons on the strength of which the learned Sessions Judge was reasonably entitled to come to the conclusion that the charge against the accused was not proved beyond a reasonable doubt. At worst, it may perhaps be possible to say that two views of the evidence were reasonably possible. It is well established that in such circumstances the High Court ought not to interfere with the order of acquittal.

17. In the case of *Tota Singh and Anr. v. State of Punjab* : 1987 CriLJ974 , the Apex Court also observed as under:

The mere fact that the Appellate Court is inclined on a re-appreciation of the evidence to reach a conclusion which is at variance with the one recorded in the order of acquittal passed by the Court below will not constitute a valid and sufficient ground for setting aside the acquittal. The jurisdiction of the Appellate Court in dealing with an appeal against an order of acquittal is circumscribed by the limitation that no interference is to be made with the order of acquittal unless the approach made by the lower Court to the consideration of the evidence in the case is vitiated by some manifest illegality or the conclusion recorded by the Court below is such which could not have been possibly arrived at by any Court acting reasonably and judiciously and is, therefore, liable to be characterized as perverse. Where two views are possible on an appraisal of the evidence adduced

in the case and the Court below has taken a view which is a plausible one, the Appellate Court cannot legally interfere with an order of acquittal even if it is of the opinion that the view taken by the Court below on its consideration of the evidence is erroneous.

18. After considering the evidence as well as cogent reasons assigned by the trial court for acquittal, we are of the view that neither the reasons assigned by the trial court are unreasonable nor perverse nor unsustainable. It is true that the evidence of the family members cannot be discarded simply on the ground that they are interested witnesses but their evidence has to be scrutinized with great care and caution whether they are trying to implicate the accused-persons falsely or not. On the background of the aforesaid principles, if we would scrutinize the evidence of complainant Jagannath (PW-1), Totaram (PW-3) and Narayan (PW-16), we find that their evidence is not consistent and it is not clear from their evidence that they had seen the incident but it seems that they have introduced themselves as if they are eye-witnesses of the incident. In that context, the trial court was fully justified in holding that their evidence does not lend any support to the prosecution as they have not given the truthful version of the incident nor had seen the incident. Thus, we are of the view that the trial court has not committed any illegality in recording such findings and we do not find any scope of interference therein. Even looking to the evidence of Jagannath (PW-1), Totaram (PW-3) and Narayan (PW-16), the finding of acquittal cannot be reversed by this Court. Thus, considering the aforesaid infirmities in the prosecution case, we find no merit in this appeal. Accordingly, it is dismissed.

19. At this juncture, we would like to record our appreciations for Shri Atul Gupta, a young Advocate practicing in this High Court on criminal side, who appeared as Amicus curiae, prepared and argued the matter very well, assisted the Court ably with sense of responsibility.