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Court : Delhi

Decided On : Jan-27-2004

Reported in : 111(2004)DLT495; 2004(74)DRJ460

Judge : D.K. Jain and; A.K. Sikri, JJ.

Acts : Code of Criminal Procedure (CrPC) , 1973 - Sections 378 and 378(3); ; Indian Penal Code (IPC), 1860 - Sections 302; Evidence Act - Sections 118

Appeal No. : Crl.M.A No. 45/2002

Appellant : State

Respondent : Holi Ram

Advocate for Def. : Rajdipa Behura, amices Curiae

Advocate for Pet/Ap. : Akshay Bipin, Adv

Disposition : Application dismissed

Judgement :

D.K. Jain, J.

1. In this leave to appeal under Section 378(3) of the Code of Criminal Procedure, 1973 (Cr.PC for short), the State seeks to question the legality of the judgment of the learned Additional Sessions Judge, Delhi in sessions case No.55/2001. By the

impugned judgment, the learned Judge has held that the respondent was innocent and entitled to acquittal from the charge framed against him for alleged commission of offence punishable under Section 302 of the Indian Penal Code, 1860 (for short 'the IPC').

2. The case set up by the prosecution was that on receipt of information that a lady tenant of one Nanhe lal had died in a quarrel, the investigating officer reached the spot and found that in one room, adjoining the main gate, one lady with strangulation/ligature marks on her neck, was lying dead on a folding bed. Her name was disclosed to be Kamla (hereinafter referred to as 'the deceased'). She was stated to be the wife of the respondent namely, Holi Ram. In his statement to the investigating officer, made at the spot, the said Nanhe Lal, stated that about 8/10 days ago, one person, namely, Anjora had taken one room on rent and was living there with two other boys; all of them were working in a hotel; on 26 July 1999 one lady, namely, the deceased, came there and informed him that she was the wife of Anjora and had come from the village; thereafter the other two persons, who were living with Anjora left that place and the deceased and Anjora started living in the said room as husband and wife; on 30 July 1999 one person, namely, the respondent came there and told him that the deceased was his wife and she had come from the village in Madhya Pradesh after leaving behind her children; long discussions between the deceased, Anjora and the respondent took place as the deceased was adamant on her living with Anjora; ultimately it was settled that Anjora shall leave the place on the same day and the deceased and the respondent will live in the said room; as agreed Anjora left the place around 11:00 PM with his bag and baggage; he locked the main gate of the house from inside; the respondent the deceased and their four year old son Bablu slept in the said room; on the next morning at about 6:00 AM, the respondent called him and told him that the deceased was not speaking, whereupon he and his wife Nirmala went to the said room and saw that the deceased was lying dead on the folding bed with marks on her neck and her son Bablu was sleeping on the floor. Nanhe Lal thus, informed the police that he was convinced that the respondent had killed his wife on account of her infidelity. On the basis of the statement of Nanhe Lal, a formal FIR was registered against the respondent for an offence punishable under Section 302 IPC and he was arrested. After investigation, charge sheet was filed

against the respondent.

3. In support of its case, the prosecution examined 14 witnesses, including Nanhe Lal-PW6, his wife Nirmala-PW5, Ashok Kumar-PW12, real brother of the deceased. In defense, the respondent examined one witness-DW1, namely, his son Bablu.

4. The evidence of PW5 and PW6 is on similar lines, wherein they have reiterated what Nanhe Lal had stated before the investigating officer. PW12-Ashok Kumar, inter alia, stated in his evidence that on 30 July 1999 the respondent had come to his house at Sonia Vihar, Delhi and stayed with him for the night. DW1, who admittedly was present in the room where the incident had taken place, was not examined by the prosecution. As a defense witness he has stated in his evidence that on the night of 30 July 1999 only he was with his mother in the room as his father, the respondent-herein, had gone to the house of Pappu Mama, namely, PW12 and had not come back during that night; the same night when his mother, the deceased, was telling him a story, two fat persons came there, abused his mother and then strangulated her with a saree; he was given slap and was threatened and thereafter his Mama had taken him away to his house.

5. In the light of the evidence of PW12 and DW1, the learned trial Court has come to the conclusion that the testimony of these two witnesses raises a doubt about the truthfulness of the prosecution case that the respondent stayed with the deceased on the night of 30 July 1999 and had committed the crime as no one else was present in the room and consequently the respondent was entitled to the benefit of doubt. Accordingly, the respondent was acquitted. Hence the present leave to appeal.

6. Mr. Akshay Bipin, learned counsel for the State has strenuously urged that the learned trial Court has erred in rejecting the testimony of PW5 and PW6, which conclusively proves that except for the respondent and his son no one else was present in the room and, thereforee, only he had murdered his wife because he was unhappy about her living with Anjora. It is asserted that there was no ground to discard the evidence of the said two witnesses on the basis of the statements of PW12 and DW1, who was admittedly a young child at the time of incident as well

as at the time of recording of his statement.

7. Per contra Ms. Rajdipa Behura, who appeared amices Curiae for the respondent has submitted that in view of the evidence of PW12 and DW1, the trial Court was justified in coming to the conclusion that testimonies of PW5 and PW6 were not free from doubt and thus giving the benefit of doubt to the respondent. It is also submitted that the scope for interference by this Court against an order of acquittal being limited, no ground for interference is made out in the present case.

8. We have given our careful consideration to the entire matter in the light of the material evidence on record.

9. It is well settled that there is no embargo on the power of the High Court to review the evidence upon which the order of acquittal is founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed. In Sheo Swarup v. Emperor 0043/1934 , a leading case on the issue, it was said that while exercising the power conferred by the Cr.PC, the High Court should and will always give proper weight and consideration to such matters as : (i) the views of the trial Judge as to the credibility of the witnesses; (ii) the presumption of innocence in favor of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his 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. Theses principles were approved by the Supreme Court in Ramabhupala Reddy v. State of Andhra Pradesh, : 1971 CriLJ422 .

10. Explaining the scope and powers of the High Court under Section 378 Cr.PC, to disturb the findings of acquittal, in Bhagwan Singh & Ors. v. State of M.P., : 2003 CriLJ1262 , their Lordships of the Supreme Court observed thus:

'The settled position of law regarding the powers of the High Court in an appeal against an order of acquittal is that the court has full powers to review the evidence upon which an order of acquittal is based and generally, it will not interfere with the order of acquittal because by passing an order of acquittal, the presumption of innocence in favor of the accused is re-inforced. The golden thread

which runs through the web of administration of justice in criminal case is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favorable to the accused should be adopted. Such is not a jurisdiction limitation on the appellate court but a judge made guidelines for circumspection. The paramount consideration of the court is to ensure that miscarriage of justice is avoided. A miscarriage of justice which may arise from the acquittal of guilty is no less than from the conviction of an innocent. In a case where the trial Court has taken a view ignoring the admissible evidence, a duty is cast upon the High Court to reappreciate the evidence in acquittal appeal for the purposes of ascertaining as to whether all or any of the accused has committed any offence or not. Probable view taken by the trial Court which may not be disturbed in the appeal is such a view which is based upon legal and admissible evidence.'

11. Recently, in State of Rajasthan v. Rajaram, 2003 (6) Scc 11; State of Punjab v. Phola Singh : 2003 CriLJ5010 ; State of Punjab v. Karnail Singh, : 2003 CriLJ3892 and Suchand Pal v. Phani Pal & Anr. : 2004 CriLJ628 , while taking note of the aspects highlighted by the Supreme Court in its earlier decisions, their Lordships of the Supreme Court have observed that principle to be followed by the appellate Court, considering the appeal against a judgment of acquittal, is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable and relevant and convincing materials have been unjustifiably eliminated in the process, it is a compelling reason for interference.

12. It has, thus, been held that the High Court should be slow to interfere with the judgment of acquittal because it is the trial Court who had the advantage of seeing the demur of presumption of innocence, verified by the judgment of acquittal. But if the reasoning for acquittal is perverse or no other view point is possible, the High Court may take note of the totality of circumstances of the case and interfere.

13. Testing the validity of the impugned judgment on the touchstone of the afore-noted broad principles, we are of the view that the instant case does not warrant any interference.

14. As noticed by the learned trial Court, though PW5 and PW6 have stated in their evidence that the respondent had spent the fateful night of 30-31 July 1999 with the deceased and their four year old son, but PW12 in his statement has also categorically stated that on the said night the respondent was with him. It is also in evidence of DW1, a seven year old son of the deceased that on the said night respondent was not with them because he had gone to the house of Mama for night stay. In his cross-examination by the public prosecutor, DW1, while denying the suggestion that the respondent had stayed with them on that night, has also stated that till his father was in the room no quarrel had taken place between his father and mother. thereforee, the only other question for consideration is with regard to the competency, credibility and acceptability of the testimony of DW1, who was about five years of age at the time of incident, because his age at the time of deposition before the trial Court in the year 2001 has been taken to be seven years.

15. It is well settled that the evidence of a child witness cannot be rejected per se, but the Court, as a rule of prudence, is required to consider such evidence with close scrutiny and only on being convinced about the quality of the statements and reliability, base conviction by accepting the statement of child witness. The fact that the witness is a child witness, would require the Court to scrutinise his or her evidence, with care and caution. If the child witness is shown to have stood the test of cross-examination and there is no infirmity in his evidence, the prosecution can rightly claim a conclusion based upon his testimony alone. Corroboration of the testimony of a child witness is also not a rule but a measure of caution and prudence. It has been held in various decisions of the Apex Court that the evidence of the child witness must be followed more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus an easy prey to tutoring. The evidence of the child witness may find adequate corroboration before it is relied upon, as rule of corroboration is of practical wisdom than a law. (See: Panchhi & Ors. v. State of U.P., : 1998 CriLJ4044 ; State of U.P. v. Ashok Dixit & Anr., : 2000 CriLJ1436 ; and Suryanarayana v. State of Karnataka, : 2001 CriLJ705 .)

16. In Dattu Ramrao Sakhare v. State of Maharashtra, : (1997)5SCC341 , the Supreme Court observed that even in the absence of oath the evidence of a child can be considered under Section 118 of the Evidence Act, provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. While assessing the evidence of a child witness, what has to be borne in mind is that the witness must be reliable and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored.

17. To the same effect are the observations of the Apex Court in a recent decision in Ratansinh Dalsukhbhai Nayak v. State of Gujarat, : 2004 CriLJ19 , wherein their Lordships of the Supreme Court said that the decision on the question whether the child witness has sufficient intelligence, primarily rests with the trial Judge, who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as understanding of the obligation of an oath. It has also been observed that though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaken and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the Court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.

18. Reverting to the facts in hand, in the instant case the learned trial Court has very elaborately analysed the evidence of PW5 and PW6, PW12 and DW1 on a question of fact whether the respondent had spent his night in the room with his wife and son or not, and, as noted above, has come to the conclusion that the testimony of PW5 and PW6 on the one hand and PW12 and DW1 on the other is contradictory on this vital aspect of the matter. The evidence of DW1 the child witness stands corroborated in all material particulars by the evidence of PW12. Nothing favoring the prosecution could be extracted out of his cross-examination conducted at length. He denied the suggestion that 'my father had stayed there in the said room on the night' and stuck to his statement in examination-in-chief. We are, thereforee, of the considered view that the trial Court was justified in placing

reliance on the testimony of DW1. That being so, we do not find any infirmity in the view taken by the learned trial Court to the effect that the evidence of PW12 and DW1 casts a serious doubt on the truthfulness of the evidence of PW5 and PW6, regarding the presence of the respondent in the room of the deceased at the time of incident and thus giving benefit of doubt to the respondent.

19. For all these reasons, we do not find it to be a fit case for grant of leave to the State to file the appeal. Consequently, Criminal Misc. A No.45/2002 is dismissed.

20. Before parting with the case, we record our appreciation for the valuable assistance rendered by Ms. Rajdipa Behura, Advocate, who appeared as amices curiae for the respondent.

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