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Court : Jammu and Kashmir

Decided On : Nov-02-1984

Reported in : 1985CriLJ987

Judge : A.S. Anand, Actg. C.J. and; S.M. Rizvi, J.

Appellant : The State

Respondent : Ramzan Wani

Judgement :

A.S. Anand, Actg. C.J.

1. The State of Jammu and Kashmir is aggrieved of the order of acquittal passed by the learned Sessions Judge, Baramulla, on 2-7-1979 acquitting Ramzan Wani, respondent, herein, of the offence under section 302 R.P.C. and has come up in appeal to this Court.

2. Briefly stated the case for the prosecution is that the accused respondent, Ahad Wani P. W. and Abdullah Wani deceased are collaterals holding common road on the rear side of their cow shed. On 1-4-1972 some willow trees were planted near this common road by Ahad Wani P.W.I and on 2-4-1972, the respondent Ramzan Wani fixed certain poles for fencing the road upon which a quarrel ensued between the respondent and Ahad Wani P.W. Meanwhile the deceased Abdullah Wani came on the spot and not only pulled out the poles but also uprooted the willow trees with the object that the quarrel between the two should end. This

action of the deceased enraged the accused who picked up a pole and struck a blow on the head of the deceased upon which he fell down. The deceased was removed to Sopore Hospital on that very day but he succumbed to the injuries on the next day i.e. the 3rd of April, 1972. The matter was reported to the police who registered a case and challaned the accused respondent for an offence under section 302 I. P. C.

3. The prosecution in order to connect the accused-respondent with the crime examined Ahad Wani, Sona Wani, Mohamad Wani, Jammal Wani, Lassa Wani, Khalik Wani, Munawar Ganai, Ghulam Qadir Khan Patwari, Ghulam Qadir Wani Lambardar, and Dr. G. N. Bhat, Mohamad Yussuf Inspector of Police. was examined under Section 540 Cr. P.C. The accused-respondent when examined under section 342 Cr. P.C. denied the allegations against him. No evidence, however, was led on behalf of the accused-respondent.

4. Dr. G. N. Bhat had examined the deceased on his admission to the hospital at Sopore on 2-4-1972 at 2.30 P.M. He had found one small superficial abrasion over the occipital region besides haematoma over the scalp extending from the occipital to the parietal junction of about 6' X 6' in dimension. The doctor had performed the postmortem on the dead body and opined that the cause of the death of the deceased was due to cerebral haemorrhage due to massive laceration of sinuses. The injury found on the deceased, as earlier noticed, was opined to be sufficient in the ordinary course of nature to cause the death of the deceased.

5. The direct evidence consists of Mohamad Wani, Jmmal Wani, Ahad Wani, Sona Wani and Lassa Wani. Out of these, three witnesses, Mohamad Wani, Jammal Wani and Ahad Wani resiled from their statements in the committing court and were declared hostile by the prosecution. Their statements recorded by the committing court were transferred on the file by the learned Sessions Judge under Section 288 Cr. P.C. Sona Wani and Lassi Wani, how, however, gave the eye witnesses' account of the occurrence before the learned Sessions Judge.

6. According to Lassi Wani, Ahad Wani P.W. planted a willow tree behind the cow shed. On the following day, the accused-respondent came and raised a fencing thus obstructing the way. A quarrel ensued between Ahad Wani and Ramzan

Wani. When the deceased Abdullah Wani came there, he advised both Ahad Wani and Ramzan Wani not to quarrel. He then pulled out the poles fixed by the accused-respondent Ramzan Wani who got enraged on this and struck a blow with a stick on the head of the deceased. The witness went on to add that Abdullah Wani was moved to the Sopore hospital where he died. He denied that any seizure had been effected in his presence. He admitted that the deceased and the accused were having heated arguments before the blow was struck and that the deceased was at a distance of about two yards when the accused struck the blow. He went on to add that he did not see the . actual blow having been given to the deceased by the accused. He also feigned ignorance as to whether Abdullah Wani had fixed the poles in the compound or the poles had been fixed by Ramzan Wani. He could not state whether the deceased was wearing any head-gear, and did not know whether the deceased as a result of the blow bled at the spot. He could not state whether the blow was struck with one hand or with both hands. Nor could he state whether the stick used was that of the willow tree or of any other wood.

7. P. W. Sona Wani deposed that Abdullah Wani was his father and Ahad Wani P.W. is his uncle. ,He then gave a narration in the same manner as given by Lassi Wani and went on to add that he lodged FIR Ex. P.A. before the police and the police came on the spot and seized the poles with which the accused had struck the deceased. He added that the land upon which Ahad Wani P.W. had planted the willow trees and which had been obstructed by the accused, is joint between the deceased Abdullah Wani, P.W. Ahad Wani, and Ramzan Wani accused-respondent but there was some litigation going on between them at Sopore. Djuring the cross-examination, the witness conceded that Abdullah Wani was an old man who had very good relations with the accused respondent Ramzan Wani, that the occurrence took place about 6 or 7 in the morning and that he was in his house at that time when the occurrence took place, that he had heard the noise and came to the spot where 50 to 60 persons had collected and he found his father lying on the ground, who, according to him, ostensibly had not received any injury. Neither in his examination-in-chief nor during his cross-examination did the witness state that he had actually seen the blow being struck by the accused on the head of the deceased, but during his re-examination a suggestion was 'put to

him that he had seen the blow being struck on the head of the deceased and he replied in the affirmative.

8. Khalik Wani P.W. who is the son-in-law of the deceased stated that he reached the spot at about 9/10 in the morning of 2nd of April, 1972 when he found the deceased having conversation with his daughter. The deceased was not bleeding at that time. Nor did he see any injury on the deceased, that the deceased told him that Ramzan Wani had struck a blow on his head, but went on to add that there are many persons in the village of the name of Ramzan Wani.

9. Munawar Ganai P.W. is a witness of the seizure Memo Ex. P. B relating to the seizure of the stick at the spot. In the cross-examination, the witness stated that he could not depose whether the contents of the seizure memo Ex. PB were correct or not because the police took down his signatures on a blank piece of paper.

10. Ghulam Qadir Wani P.W. completely denied that the 'Danda' (stick) Ex. PI had been seized in his presence and the witness was declared hostile.

11. The site plan was prepared by Ghulam Qadir Khan Patwari. Mohammad Yousuf Inspector of Police P.W. prepared the Farad Surat Hall Ex. PE, the injury statement Ex. PG, and the seizure memos Ex. PB, Ex. PC, Ex. PF, and Ex. PZ. During his statement recorded under section 540 Cr. P.C. he deposed that the alleged weapon of offence Ex. P. 12 had been seized by him vide seizure memo Ex. PB.

12. Besides the testimony of the above witnesses, the prosecution has relied upon the statements transferred under Section 288 Cr. P.C. of Mohamad Wani, Jammal Wani, and Ahad Wani P.Ws. Before adverting to their statements, it shall be necessary for this Court to examine the scope and ambit of Section 288 Cr. P.C. with a view to determine whether after the statements are transferred under Section 288 Cr. P.C. the accused is entitled to an opportunity to cross-examine the witnesses with respect to the statements so transferred and, if, the accused has been denied such an opportunity, can the statements transferred, under section 288 Cr. P.C. be treated as evidence at the trial.

13. The learned Advocate General, appearing before us, conceded, and, in bur opinion, rightly and fairly, that if the statements of Mohamad Wani, Jammal Wani, and Ahad Wani as recorded by the Committing court are not treated as evidence in the case, the remaining evidence led in the case, is wholly insufficient to connect the respondent with the. crime and the acquittal of the accused-respondent cannot be interfered with. He, however, pleaded that the statements of Mohamad Wani, Jammal Wani, and Ahad Wani, recorded by the committing court and transferred to the file of the learned Sessions Judge, under Section 288 Cr. P.C. be read in evidence. He went on to add that the learned Sessions Judge, fell into an error, not only in holding that the statements transferred under section 288 Cr. P.C. could not be read in evidence, because the respondent had been denied an opportunity to cross-examine the witnesses with regard to those statements, but also that the learned Sessions Judge was not justified in holding that even if those statements are read in evidence, he found the witnesses unreliable, for they had made two different statements, which were contrary to each other, and it was not safe to rely upon the testimony of such witnesses and convict an accused person.

14. Learned Counsel for the accused-respondent Mr. Z. A. Shah on the other hand, urged that the statements transferred under section 288 Cr. P.C. could not be read in evidence because the accused-respondent had been denied the opportunity to cross-examine the witnesses in respect of the statements so transferred. He went on to add that the learned Sessions Judge was perfectly justified in not relying upon the testimony of the hostile witnesses and that since the view taken by the learned Sessions Judge can neither be termed as unreasonable nor perverse, this Court should not in exercise of its powers up-set in order of acquittal, particularly when the trial court which had the chance of examining the demeanour of the witnesses, found it unsafe to rely upon their testimony to convict the accused-respondent.

15. Undoubtedly, from the respective contentions raised at the bar, it is obvious that the first question to be determined by this Court is the scope, ambit and the underlying principle under Section 288Cr. P.C. and to determine the evidentiary value of the statements transferred Under Section 288Cr. P.C. in the facts and

circumstances of the case. Section 288 Cr. P.C. reads as follows:

Evidence given at preliminary inquiry admissible. The evidence of a witness duly recorded in the presence of the accused under Chapter XVIII, may in the discretion of the presiding judge, if such witness is produced and examined, be treated as evidence in the case for all purposes subject to the provisions of the Evidence Act, 1977.

The above Section is similar to Section 288 Cr. P.C. of the Central Code of Criminal Procedure prior to its amendment On its plain reading the Section shows that the Presiding Judge may in his discretion treat as evidence such statement of a witness duly recorded in the presence of the accused if such witness is produced and examined at the trial, subject, of course, to the provisions of the Evidence ACL The expression 'subject to the provisions of the Evidence Act' has come up for consideration before various courts in, the country and there has been divergence of opinion on the interpretation of that expression. Some of the courts in the country took the view that the expression 'subject to the provisions of the Evidence Act' as occurring in the said Section excludes the provisions of Section 145 of the Evidence Act principally on the plea that such a witness is produced, examined, and confronted with his previous statement and, therefore, Section 145 of the Evidence Act, has no application. The other courts in the country took the view that the expression 'subject to the provisions of the Evidence Act', could not be interpreted to imply the exclusion of Section 145 of the Evidence Act from its operation. This expression, however, came up for consideration by the Supreme Court when divergent views of various High Courts were taken notice of. In Tara Singh v. State : [1951]2SCR729 , their Lordships preferred the view that Section 288 Cr. P.C. is subject to the provisions of the Indian Evidence Act and that Section 145 of the Evidence Act is not excluded in its operation. They went on to add that the expression 'subject to the provisions of the ; Indian Evidence Act', occurring in Section 288 Cr. P.C. makes it amply clear that Section 145 Evidence Act, falls fairly and squarely within the meaning of those words. They then opined (Para 35):

This is a fair and proper provision and is in accord with the sense of fairplay to which courts are accustomed. Even the learned Judges who take the first view consider for the most part that though it is not obligatory to confront a witness with his former statement when Section 288 is resorted to, it is always desirable that that should be done if only for the reason that an omission to do so weakens the value of the testimony. I am of opinion that the matter is deeper than that, and, giving effect to the plain meaning of the; words 'subject to the provisions of the Indian Evidence Act' as they stand, I hold that the evidence in the committal court cannot be used in Sessions Court unless the witness is confronted with his previous statement as required by Section 145, Evidence Act.

16. The aforesaid judgment of the Supreme Court came up for consideration by that very court in Bhagwan Singh v. State of Punjab : 1952 CriLJ1131 , when their Lordships distinguished Tara Singh's case (supra) on facts and opined:

That the purpose for which the statement is transferred under Under Section 288 Cr. P.C, is important.

17. Dealing with Section 145 of the Evidence Act, in the said case, their Lordships observed (Para 22):

Resort to Section 145 of the Evidence Act would only be necessary if the witness denies that he made the former statement. In that event, it would be necessary to prove that he did, and as if the former statement was reduced into writing, then section 145 requires that his attention must be drawn to those parts which are to be used for contradiction. But that position does not arise when the witness admits the former statement In such a case all that is necessary is to look to the former statement of which no further proof is necessary because of the admission that it was made.

18. Their Lordships distinguished Tara Singh's case (1951 (52) Cri LJ 1491) holding that in that case there were no two versions in the course of same testimony and the witness was hostile from the start in the Sessions Court and the whole purpose of resorting to Section 288 Cr. P.C, was to contradict what he had said there and no question of corroboration arose. That statement could only be

used in the manner provided by Section 145Evidence Act i.e. by drawing the attention of the witness to that previous statement.

19. In the instant case Mohammad Wani, Jabbar Wani, and Ahad Wani were declared hostile by the prosecution in the court of Session as they had resulted from their earlier statements given by them before the Committing Magistrate. Both the statements were contradictory in nature. An application was made by the prosecution before the court of Sessions to transfer the statements given by these witnesses before the Committing court under Section 288 Cr. P.C. to which strong objection was raised on behalf of the accused-respondent. The learned Sessions Judge thereupon observed that a decision with regard to the objection raised would be given at the 'conclusion of the statement'. Consequently it was at the conclusion of the statements of these witnesses that their depositions recorded by the Committing magistrate were transferred to the Sessions file under Section 288 Cr. P.C. The respondent was afforded no opportunity whatsoever to, question the witnesses or cross-; examine them with regard to the statements transferred to the Sessions file. At no point of time was the attention of the witnesses drawn to those previous statements because the previous statements were transferred to the Sessions file after the conclusion of the statements of the witnesses. Section 145 of the Evidence Act has thus necessarily been violated, for, as held in Tara Singh's case (supra) the evidence in the committal court cannot be used in Sessions Court despite the existence of Section 288 Cr. P.C. unless the witness is confronted with his previous statement as required by Section 145 of the Evidence Act. It was incumbent upon the learned Sessions Judge, after overruling the objection raised by the respondent to transfer the statements to have the witnesses duly confronted with the previous statements transferred under Section 288 Cr. P.C. and afforded an opportunity to the accused-respondent to cross-examine the witnesses with regard thereto. Apart from Section 145 of the Evidence Act, even the principles of natural justice demand that after substantive piece of evidence is brought on the record, the accused should be granted an opportunity to cross-examine the witnesses with regard to that statement. The Advocate General pointed out that the accused had already an opportunity of cross-examining the prosecution witnesses in the committal court but that cannot justify the denial of opportunity to the accused-respondent to cross-examine the witnesses with .

regard to the statements transferred under Section 288 Cr. P.C. The witness could be asked by the accused-respondent the circumstance under which the earlier statement before the committal court had been made. Section 288 Cr. P.C. is an exception to the general rule that only such evidence can se taken into consideration which is given at the trial and the previous statement can only t>e used for purposes of contradiction and corroboration. The object of this Section is to confer a power on the trial judge to treat the evidence given by a witness before a magistrate as substantive evidence, if he is satisfied that the evidence given by the magistrate is true and that given before him is not true. Therefore, with a view to examine which of the two statements, is true, it is necessary that the accused-respondent is granted an opportunity to cross-examine the witnesses with regard to the statement transferred under Section 288 Cr. P.C. irrespective of the fact whether at the time when the previous statement of the witness was recorded the accused had an opportunity to cross-examine him. In case of the three witnesses named above, it transpires from the record that after being declared hostile, during the cross-examination by the Public Prosecutor the witnesses were asked about their previous statements made before the committing magistrate. They alleged that those statements before the committing magistrate were the result of police pressure. Thereafter, the statement of the witness was concluded and after the conclusion the entire statement was transferred by an order of the Sessions Judge Under Section 288 Cr. P.C. The witness was not confronted with the entire statement since it was transferred to the file after his deposition was complete. In view of the assertions of the witnesses during the cross-examination by the prosecution that the earlier statements recorded before the committing magistrate were the result of improper influence or pressure, it was the duty of the Sessions Judge to investigate into the truth of the allegations before coming to the conclusion whether the deposition made in the Sessions court was not true. The learned Sessions Judge, in the instant case, found it unsafe to rely upon the statements transferred Under Section 288 Cr. P.C. not only for the reasons that the accused had been denied the opportunity to cross-examine those witnesses with regard to the previous statements but also for the reasons that the witnesses had not been duly confronted with their previous statements when same were transferred under section 288 Cr. P.C He also found that the witnesses were

unreliable and untrustworthy and he acquitted the accused-respondent. Section 288 Cr. P.C. leaves to the discretion of the Presiding Judge whether or not to admit the evidence and the exercise of that discretion cannot be questioned unless it is found that it is either not judicious or is capricious. In the instant case, we do not find that the discretion exercised by the trial court was in any way not a result of proper exercise of judicious discretion. Unless the court comes to the conclusion that the evidence admitted Under Section 288 Cr. P.C. is of such a nature that it must be accepted as wholly true and there is nothing to shake its veracity that evidence cannot be acted upon to record the conviction.

20. In the instant case, as already noticed, the witnesses were not confronted in the manner required by Section 145 of the Evidence Act with the statements made by them before the Committing Magistrate. The witnesses denied to have voluntarily made those statements and after transferring those statements Under Section 288 Cr. P.C. the learned Sessions Judge did not afford any opportunity to the accused-respondent to cross-examine the witnesses with regard to the transferred statements. The transferred statements, therefore, were not properly brought on the record and the same could not be relied upon in the case. Once those statements are ignored, it is conceded by the learned Advocate General, there is no other evidence on which the order of acquittal passed by the Sessions Judge, can be reversed. In this view of the matter, we do not find any justification to upset a well recorded order of acquittal.

21. Even otherwise assuming, though not admitting, that the statements transferred under Section 288 Cr. P.C- could be looked into, we find it unsafe to rely upon the testimony of these witnesses. A careful perusal of their evidence shows that these witnesses are unreliable. They have made different statements regarding the manner of attack and stand contradicted by the other evidence on record. No corroboration worth the name is available on the record to support the testimony of these witnesses recorded by the committing magistrate. We find it unsafe to rely upon their testimony to upset an order of acquittal

22. It is settled law that the High court in dealing with an appeal against acquittal can I go into all questions of fact and law and reach I its own conclusion on the

evidence provided ft pays due-regard to the fact that the matter had been before the Court of Session and the Sessions Judge had the chance and opportunity of seeing the witnesses deposing to the facts. The High Court in reversing a judgment of acquittal is required to pay due regard to all the reasonings given by the Sessions Judge for disbelieving particular witnesses, and must dispel those reasons effectively before taking a contrary view of the matter. An accused, it is a golden thread passing through the criminal jurisprudence in this country, starts with the presumption of innocence when he is put up for trial and his acquittal in no sense weakens that presumption.

23. After carefully considering the entire evidence, and the other material on the record, we do not find that the reasons given for acquitting the respondent-accused, by the learned Sessions Judge, are either unreasonable or perverse. As a matter of fact we concur with the reasonings advanced by the learned Sessions Judge in disbelieving the witnesses produced by the prosecution. In this view of the matter, we find that the order of acquittal is well merited and the same deserves to be maintained.

24. We accordingly dismiss the appeal

25. The accused-respondent is on bail His bail bonds shall stand discharged.

S.M. Rizvi, J.

26. I agree.

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