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Court : Kolkata

Decided On : Jun-28-2011

Judge : Kanchan Chakraborty, J.

Acts : Indian Penal Code (IPC) - Sections 149, 325, 326, 302; Code of Criminal Procedure (CrPC) (Cr.P.C) - Sections 161, 401

Appeal No. : C.R.R.822 of 2003.

Appellant : Mahatab Ali.

Advocate for Pet/Ap. : Mr. Bidyut Kr. Roy, Adv

Judgement :

1. The challenge in this revisional application is to the judgment of acquittal dated 16.1.2003 passed by the learned Additional Sessions Judge, 3rd Court, Murshidabad in Sessions Sl. No.284 of 1992 (Sessions Trial No.4th August, 2001). The legality, validity and propriety of the judgment impugned has been challenged on the following grounds;

- a) that the learned Trial Court failed to appreciate the evidence of eye witnesses in its proper and true perspective;
- b) that the learned Trial Court erred in discarding evidence of witnesses thereby miscarriage of justice occasioned;

c) that the learned Trial Court ought to have relied on the evidence of P.Ws.1 to 5, P.W.7 and P.W.8 as well as the evidence of the Doctor who conducted the post mortem on the dead body;

d) that the judgment impugned being otherwise bad in law, is liable to be set aside.

2. The case before the learned Trial Court, in short, is that on 12.4.1989 at about 10.45 hours, one Mahatab Ali lodged an F.I.R. in Jalangi Police Station alleging therein that there was a long standing dispute between Nurul Islam and Abdus Sattar over business transaction which was ultimately settled by the interference of the covillagers. But, soon thereafter, the dispute started at about 9.00 A.M.

3. Sattar hit Nurul Islam on his head with a piece of brick. At that time, Lokman appeared there in order to help Nurul Islam. Jillar Sk. hit Lokman on his chest with a Fala causing his death instantly. When the fighting was going on, Haru Sk. hit Intaz Ali with a 'Kuch'. Muqtar Ali hit Rabban and Mahatab hit Hazarat with a lathi.

4. On the basis of the F.I.R., Jalangi Police Station Case No.55 dated 12.4.1989 was started. In course of investigation, the Investigating Officer collected the copy of post mortem report, medical documents of the injured and finally submitted a charge sheet against the accused persons under Section 149/325, 326, 302 of the Indian Penal Code. The opposite parties/accused were arrayed to face the trial under Section 325/149, 326/149 and 302/149 of the Indian Penal Code.

5. Upon consideration of the evidence on record, oral and documentary, the learned Trial Court came to a conclusion that the prosecution failed to bring home the charges levelled against the opposite parties/accused beyond all reasonable doubts. Accordingly, the learned Trial Court recorded the order of acquittal of the opposite parties/accused. Mehetab Ali, the lodger of the F.I.R. has come up with this revisional application challenging the legality, validity and propriety of the judgment of acquittal on the grounds stated earlier.

6. The point to be considered in this revisional application is whether the judgment impugned is sustainable in law.

7. In the instant case, Mr. Bidyut Roy, learned Advocate of this Court was appointed as amicus curiae on behalf of the petitioner as none appeared on behalf of the petitioner since 2003. Mr. Roy contended that the learned Trial Court overlooked the important and material evidence on record while recording the order of acquittal under challenge. Mr. Roy contended further that the learned Trial Court completely erred in not placing reliance on the evidence of the eye witnesses. According to him, the incident had taken place in presence of the lodger of the F.I.R., Mahatab Ali. Mahatab Ali who was examined as P.W.4. Mr. Roy had taken me to the deposition of the P.W.4, Mahatab Ali and contended that Mahatab Ali had given vivid description of the incident which was rightly reflected in the F.I.R.

8. lodged by him. Mahatab Ali stated that Sattar assaulted Nurul with one brickbat on the forehead while Jillar assaulted Lokman with a Fala on his chest. Mahatab and Muktar assaulted Rabban with a lathi and Haru assaulted Intaj with 'Kush'. Thereafter, Mahatab left the place of occurrence and lodged the F.I.R. in Jalangi Police Station. Mr. Roy contended that simply the P.W.4 Mehetab Ali did not report the incident in detail to the I.O. at the time of investigation, his evidence in Court should not have been discarded by the learned Trial Court.

9. According to the F.I.R. and the statement of the P.W.4, the lodger of the F.I.R., Nurul was hit on his head by Sattar and as a result, Nurul fell on the ground unconscious. I find that the learned Trial Court considered this aspect and observed that since Nurul fell on the ground unconscious, he was not in a position to witness the incident happened thereafter. Nurul has been examined as P.W.1 in the learned Trial Court. According to his statement, he witnessed the entire incident. Therefore, the learned Trial Court did not find it safe to rely on the evidence of P.W.1 and P.W.4. He also contradicted the story of the F.I.R. The evidence of P.W.1 as well as the F.I.R. together indicates that there was a mutual fighting in between two groups. In the statement under Section 161 of the Code of Criminal Procedure, according to the I.O. of the case, the P.W.2 stated that Nurul was struck with a piece of brick and thereafter, Lokman out of anger chased Sattar to assault and fell down and thereafter the P.W.2 fled away out of fear. He subsequently came to the place of occurrence and found Lokman lying dead

there. The learned Trial Court did not believe the statement of P.W.2 because he contradicted his earlier statement made before the I.O. Had the P.W.2 left the place seeing Lokman chasing Sattar and fell down in doing so, how could he see the incident of hitting Lokman with a Fala on his chest by Jillat. Again, opposite party/accused Royed alleged to have hit Lokman with a sabal which was not corroborated either by the P.W.1 and the facts stated in the F.I.R.

10. P.W.3 contradicted his statement made to the I.O. in course of his examination at the time of investigation regarding chasing of Sattar by Lokman and his felling down on the ground at that time. The learned Trial Court, has taken all these contradictions into account while passing the judgment impugned. The P.W.1, according to the learned Trial Court, made different statements at different times and the learned Trial Court found it unsafe to rely on his statements. Mr. Bidyut Roy drew my attention to the statement of the P.W.5, wife of deceased Lokman and contended that she had made a reliable and consistent statement which ought to have been accepted by the learned Trial Court. I find that the learned Trial Court considered the evidence of P.W.5 elaborately. The statement made by the P.W.5 in course of examination in Court was not made by her at the time she was examined by the I.O. immediately after the incident.

11. The learned Trial Court found material inconsistencies in her statement. Mr. Roy has also drawn my attention to the evidence of P.W.8 and contended that the P.W.8 was an ocular witness and had seen the entire incident. Therefore, the learned Trial Court ought to have believed the statement made by the P.W.8.

12. I find that the learned Trial Court while discussing the evidence adduced on behalf of the prosecution, had taken care of the evidence of P.W.8 who categorically admitted in his cross examination that he stated the I.O. that he along with others had been to the place of occurrence and found Lokman lying dead. If so, he cannot be said to be an ocular witness.

13. Mr. Saswata Gopal Mukherjee, learned Counsel appearing on behalf of the State and Mr. Sandipan Ganguly, learned Counsel appearing on behalf of the private opposite parties reminded this Court as to the scope of this Court in exercising its revisional jurisdiction against an order of acquittal invoked by a

private party. The following decisions relied on by them.

- 1) Pakalapati Narayana Gajapathi Rau & Ors., reported in (1975) 4 SCC 477;
- 2) Bindeshwari Prasad Singh alias B. P. Singh & Ors. Vs.State of Bihar (Now Jharkhand) & Anr., reported in 2002 Cri. L. J. 3788;
- 3) Mithu Sardar v. The State of West Bengal & Ors., reported in 2011 (1) CLJ (Cal);
- 4) Johar & Ors. v. Mangal Prasad & Anr., reported in (2008) 2 SCC (Cri) 89;
- 5) Jagannath Chowdhary & Ors. v. Ramayan Singh & Anr., reported in 2002 SCC (Cri) 1181; and
- 6) Sheetala Prasad & Ors. v. Sri Kant & Anr., reported in (2010) 2 SCC (Cri) 1002, (2010) 2 SCC 190.

14. It has been contended by them that the learned Court disbelieved the prosecution case mainly on the grounds that a) there was contradictory statement of witnesses; b) the presence of eye witnesses in the place of occurrence was doubtful; c) that the witnesses claimed themselves to be eye witnesses made different statement to the I.O. at the time they were examined by him and when their statement were recorded under Section 161 of the Code of Criminal Procedure; d) that some of the witnesses stated categorically that Lokman chased Sattar and while doing so, he fell down; e) that some of the witnesses stated in Court that Lokman fell down when he was re-treating; f) that Answr and Asgar Ali whose name were mentioned in the F.I.R. as witnesses were not examined in Court and withholding their examination in trial was fatal to the prosecution; g) only one Iajuddin was examined as prosecution witness amongst others whose name only has been mentioned in the charge sheet as a witness; h) that the injured persons also did not mention the name of the assailants to the Doctor who examined them; i) that the learned Trial Court found exaggeration and embellishment regarding the incident and variation in between the facts stated in the F.I.R. and testimonies of the eye witnesses.

15. I have carefully gone through the evidence recorded by the learned Trial Court and the judgment impugned. It may not be said that there is no incriminating evidence against the petitioners. At the same time, it cannot be said also that those incriminating evidence which appeared contradictory and inconsistent with earlier statement made by them was sufficient and satisfactory enough to inspire confidence of the learned Trial Court. On the contrary, I find that the learned Trial Court came to a finding that the case of the prosecution was doubtful regarding participation of the opposite parties/accused in the alleged crime. However, no doubt the post mortem report indicates clearly that the death of Lokman was ante mortem and homicide in nature. His death was caused due to hammeorrhage inflicted on his person. It is not denied that there was an incident between two groups on the relevant date and time but it was not clear before the learned Trial Court that who hit whom and in what manner. Whether the death of Lokman was caused to assault with a Fala or not is a question before the learned Trial Court and the learned Trial Court, upon consideration of the evidence on record found that Lokman might have died due to fall when he was chasing Sattar. There were two stories - one supporting the case of the prosecution and another was not supporting the prosecution. The learned Court found it unsafe to rely on the story supporting the case of the prosecution and ignored the story which did not support the case of the prosecution. It is settled principle of law in the matter of appreciation of evidence is that when two stories are possible, one which does not support the prosecution case, but creates doubt on the prosecution case, is to be accepted and the accused persons are to be given benefit of that.

16. In the instant case, no doubt, there are contradictions, exaggeration and embellishment in the prosecution case which was rightly detected by the learned Trial Court while recording the judgment impugned. It is not the case that the learned Trial Court ignored material/ important relevant evidence and put much stress or unnecessary stress on irrelevant or immaterial evidence in order to record acquittal.

17. The Hon'ble Apex Court has taken a consistent view since the *D. Stephens v. Nosibolla*, reported in A.I.R. 1951 SC 196 till this date, in the matter of exercising of power of revisional jurisdiction by High Court against an order of acquittal when

invoked by a private party.

18. The decision of Stephen's case (Supra) was reiterated subsequently in Logendra Nath Jha's v. Polai Lal Biswas, reported in A.I.R. 1951 SC 316, K. Chinnaswamy Reddy v. State of A.P., reported in A.I.R. 1962 1788, Mahendra Pratap Sing v. Sarju, reported in A.I.R. 1968 SC 707, Janata Dal v. H. S. Chowdhary, reported in 1993 SCC (Cri.) 36, Thakur Das v. State of M.P., reported in 1978 SCC (Cri.) 21, Bindeswary Prasad Singh alias B. P. Singh & Ors. v. State of Bihar (Now Jharkhand) & Anr., reported in 2002 Cr. J. J. 3788, Akalu Ahir v. Ramdeo Ram, reported in 1973 Cr. L. J. 1404.

19. Recently, in Shetala Prasad v. Srikant & Ors., reported in (2010) 2 SCC 190, the Hon'ble Apex Court set out the following cases wherein this Court may exercise its revisional jurisdiction against an order of acquittal when invoked by a private party:-

- a) where the trial court has wrongly shut out evidence which the prosecution wishes to produce;
- b) where the admissible evidence is wrongly brushed aside as inadmissible;
- c) where the trial court has no jurisdiction to try the case and has still acquitted the accused;
- d) where the material evidence has been overlooked either by the trial court or the appellate court or the order is passed by considering irrelevant evidence, and
- e) where the acquittal is based on the compounding of the offence which is invalid under the law.

20. In the case in hands, the learned Trial Court did not shut out evidence which the prosecution wished to produce. The admissible evidence was not wrongly brushed aside. The learned Trial Court had jurisdiction to try the case. The learned Trial Court has not overlooked material and relevant evidence on record and put reliance on immaterial or irrelevant evidence for the purpose of recording acquittal.

Therefore, the judgment under challenge cannot be categorised as a perverse one. It cannot also be said that it is an extraordinary case where the learned Court made patent error in law or in fact and thereby caused miscarriage of justice necessitating interference of this Court by exercising revisional jurisdiction. This does not appear to be a proper case where this Court should re-appreciate the evidence which is the exclusive domain of the Appellate Court and set aside an order of acquittal by exercising revisional jurisdiction and pass an order of retrial of the acquitted accused or re-hearing of the matter.

21. In my estimate, the learned Trial Court appraised the evidence on record properly in its true perspective. There is no necessity to upset the judgment impugned.

22. Accordingly, the revisional application fails and is disposed of.

23. There will, however, be no order as to costs.

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