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IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
V. RAMASUBRAMANIAN; J., PANKAJ MITHAL; J.
CRIMINAL APPEAL No.2251 & 2265 OF 2010; April 18, 2023
FEDRICK CUTINHA *versus* **STATE OF KARNATAKA**

Code of Criminal Procedure, 1973; Section 235(2) - Appellate court reverses acquittal of two accused in murder case - However imposes sentences on them without hearing them on sentence as per Section 235(2) - Supreme Court sets aside the sentence finding it to be *ex-facie* illegal as accused were not heard - In view of sub Section (2) of Section 235 of CrPC, the court is obliged to hear the accused persons after their conviction on the quantum of sentence before passing a sentence against them - The principle of according opportunity of hearing to the convict before sentencing him is equally applicable where the sentencing is done by the appellate court.

For Appellant(s) Ms. N. Annapoorani, AOR Ms. Anuradha Mutatkar, AOR Mr. Tarun Kumar Thakur, Adv. Ms. Parvati Bhat, Adv. Mrs. Anuradha Mutatkar, Adv.

For Respondent(s) Mr. Shubhranshu Padhi, AOR Mr. Vishal Banshal, Adv. Ms. Rajeshawari Shankar, Adv. Mr. Niroop Sukrithy, Adv. Mr. Jai Nirupam, Adv.

J U D G M E N T

PANKAJ MITHAL, J.

1. All eleven accused persons pursuant to the FIR registered as Crime No.109/1999 dated 11.09.1999 were acquitted by the trial court for offences under Sections 143, 147, 148, 323, 324, 307, 302 read with Section 149 of the Indian Penal Code, 1860 ("the IPC"), Police Station: Puttur Town Circle, District: Dakshina Kannada, Mangalore. The acquittal of nine of them has been affirmed by the High Court except for accused Nos.1 and 3, i.e., Krishnappa Naika @ Kittu Naika and Fedrick Cutinha, who have been convicted under Section 302 read with Section 34 of the IPC with life imprisonment and under Section 326 read with Section 34 of the IPC for causing grievous injuries with imprisonment of five years.

2. Aggrieved by the above conviction, the accused – A1 and A3 have preferred separate appeals as above. The main appeal is that of A3, i.e., Fedrick Cutinha.

3. We have heard Mr. S.N. Bhat, learned Senior Counsel on behalf of the appellant/accused A3 in the main appeal and Ms. N. Annapoorani, learned counsel for the appellant/accused A1 in criminal appeal no.2265 of 2010 as well as the State counsel.

4. The story as set out in the FIR, lodged by one Honnappa Gowda reveals that the incident occurred at 12 noon on 11.09.1999, which happened to be a polling day for the Lok Sabha and Assembly Elections in the District. According to the informant, on the said date, he along with his brother – Jagdish, father – Poovani Gouda, his neighbours – Umanath Naika, Lingappa Naika and Balachandra were going towards Zila Parishad Higher Primary School, Kodipady to cast their votes. He himself, his father and his brother had casted their votes and reached the shop of Abdul Khadar. Then Umanath Naika asked them to stay there to enable him to cast his vote. After, he was returning from the polling booth and was about to reach the shop, an autorickshaw came from the Puttur side and stopped in front of the shop. Krishnappa Naika, Fedrick Cutinha, Laxman Naika, Dheeraj Gowda, Inas Veigas, Cyril Veiga, Maurice Veigas, Shivappa Naika and Padmanabha

Gowda got down from the said autorickshaw and came towards them. Laxman Naika and Fedrick Cutinha threw chili powder on the face of Umanath Naika. When Umanath Naika tried to escape, Krishnappa Naika (who is none other than the brother of Umanath Naika) came out from the autorickshaw, stabbed him on his left shoulder with a sharp knife. He then stabbed him on the left eyelid and the left eyebrow. Krishnappa Naika also stabbed the right portion of the chest of Lingappa Naika, who was by the side of Umanath Naika, with the same knife. Laxman Naika, who was accompanying Krishnappa Naika, stabbed his father – Poovani Gowda on the back with the knife. Fedrick Cutinha assaulted on the head of Balachandra with an iron rod. He then kicked Jagdish on the left thigh. Fedrick Cutinha also assaulted on his head by rod. The others also joined them in assaulting. Upon raising an alarm, all of them returned to the autorickshaw, in which they had come and fled.

5. Lingappa Naika, who had sustained injuries, ran towards the school and fell down at a short distance. A home-guard at the Election Booth lifted Lingappa Naika and sent him and Umanath Naika, Poovani Gowda and Balachandra to the Government Hospital, Puttur for treatment in an autorickshaw. Thereafter, the informant and his brother – Jagdish also went for treatment to the Government Hospital, where they came to know that Lingappa Naika had succumbed to the injuries. The doctors attended to them. All injured – Umanath Naika, Balachandra and Poovani Gowda were admitted in the hospital, but the informant and his brother – Jagdish were discharged after treatment.

6. The reason behind the above incident was a property dispute between Umanath Naika and his brother – Krishnappa Naika. It was on account of the property dispute between the two and the past enmity that Krishnappa Naika caused an unlawful assembly and attacked all of them stabbing Lingappa Naika with knife causing his death.

7. It is apparent from the narration of facts, as stated in the FIR, that there were two factions; one consisting of the informant Honnappa Gowda, his father – Poovani Gowda, his brother – Jagdish and his neighbours – Umanath Naika with Lingappa Naika, in all five persons; and the other which came in an autorickshaw consisting of eight persons headed by A1 - Krishnappa Naika including A3 – Fedrick Cutinha. In other words, the attacking party of eight persons was headed by Krishnappa Naika and included Fedrick Cutinha. The victim's side had five persons headed by Umanath Naika and the informant – Honnappa Gowda and others. Thus, the two brothers, i.e., Krishnappa Naika and Umanath Naika were in the rival groups.

8. The judgment and order of the trial court reveals that the Inspector of Police, Puttur, submitted charge sheet in C.C. No.4444/99 against 11 persons. Since some of the accused persons were not traceable despite issuance of non-bailable warrant, the case was split up. Two Session Cases Nos.18/2000 and 130/2000 came to be registered before the Court of II Additional Sessions Judge, Dakshin Kannad, Manglore. Both the aforesaid cases were decided by common judgment and order dated 21st August, 2001. The trial court recorded that the only independent witness PW-19 Abdul Khadar had turned hostile and that the evidence of the star witnesses lacked neutrality. The Court upon consideration of the entire evidence recorded that the prosecution had failed to prove its case beyond all reasonable doubts and as such all are entitled to benefit of doubt. Accordingly, all were acquitted.

9. In the criminal appeals preferred by the State, as stated earlier, the acquittal of all accused was affirmed except for accused Nos.1 and 3. It is, therefore, that both the above accused/convicts have preferred these appeals.

10. In the appeals before us against the conviction of A1 and A3, it is submitted that in a case for acquittal of all accused by the trial court, the High Court ought not to have overturned the acquittal of any of the accused much less, i.e., of A1 – Krishnappa Naika and A3 – Fedrick Cutinha, until and unless, there was any perversity in appreciating the evidence by the trial court. The High Court as an appellate court in convicting and sentencing the accused A1 and A3 ought to have given both of them an opportunity of hearing on the quantum of punishment before sentencing them to life imprisonment and imprisonment for five years for offences under Sections 302 and 326 of the IPC respectively read with Section 34 of the IPC. Lastly, A3 had not assaulted the deceased. He had only been assigned the role of assaulting and kicking some of the other persons of the victim's side and throwing of chili powder on the face of Umanath Naika and as such do not warrant the above punishment.

11. The High Court accepts most of the observations made by the trial court that the evidence of several witnesses was in the nature of interested testimony which does not find corroboration by any independent witness. The testimony of PW-9 was disbelieved as a setup witness whose presence at the place of incident was held to be doubtful. The independent witness PW-19 was reported to have turned hostile. However, solely on the evidence of PW-5, Mr. K. Dheeraj Gowda, the High Court recorded a finding that the participation of A1 and A3 is convincingly proved and as such ordered for their conviction and imprisonment.

12. The High Court in recording the above conviction has not assigned any good reasons from deviating with the findings returned by the trial court and at the same time has not even stated that the findings so recorded by the trial court in acquitting all the accused, including A1 and A3 are in any way perverse.

13. There is no room to doubt the powers of the appellate court and that it has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded. However, the appellate court has to bear in mind that in case of acquittal there is double presumption of innocence in favour of the accused. First, the presumption of innocence is available to all accused under the criminal jurisprudence as every person is presumed to be innocent unless proved to be guilty before the competent court of law. Secondly, the accused having secured the acquittal, the presumption of their innocence gets further reinforced and strengthened. Therefore, the appellate court ought not to lightly interfere with the order of acquittal recorded by the trial court unless there is gross perversity in the appreciation of the evidence and even if two views are possible, it should follow the view taken by the trial court rather than choosing the second possible version.

14. In Rohtash vs. State of Haryana, (2012) Vol.6 SCC 589, the Apex Court held as under:

"The High Court interfered with the order of acquittal recorded by the trial court. The law of interfering with the judgment of acquittal is wellsettled. It is to the effect that only in exceptional cases where there are compelling circumstances and the judgment in appeal is found to be perverse, the appellate court can interfere with the order of the acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the trial court's acquittal bolsters the presumption of innocence. Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference."

15. In view of the above settled legal position and the fact that the trial court has recorded acquittal of all accused upon careful appreciation of the entire evidence on record with which the High Court had not found fault with, we are of the opinion that the appellate court committed an error of law in recording conviction of A1 and A3 merely for

the reason that their presence and participation in the crime was proved by the evidence of one of the witnesses.

16. The case of the A3 stands on altogether a different pedestal insofar as neither the allegations in the FIR nor the evidence establishes his role in the killing of the deceased. As stated earlier, his role is confined to kicking, hitting and throwing chili powder rather than assaulting any of the injured persons or the deceased with the knife.

17. This Court in Darshan Singh & others vs. State of Punjab (2009) 16 SCC 290 ruled that accused have to be convicted on the basis of their individual acts and where an accused inflicted simple injuries with lathis etc., he is ordinarily not to be convicted for the offence of murder.

18. This apart, in view of sub-Section (2) of Section 235 of CrPC, the court is obliged to hear the accused persons after their conviction on the quantum of sentence before passing a sentence against them. Even otherwise as a general rule, the trial court is duty bound to adjourn the matter to a future date after recording the conviction so as to call upon both the sides to hear on the question of sentence before sentencing the accused persons.

19. The principle of according opportunity of hearing to the convict before sentencing him is equally applicable where the sentencing is done by the appellate court. It may be true that opportunity of hearing may not have a bearing, if minimum of the sentence is being imposed. It may also not be necessary in every case to fix a future date after conviction for the purpose of sentencing but the convicts are entitled to opportunity of hearing on sentence.

20. In the case at hand, the trial court had acquitted A1 and A3 but they were convicted by the appellate court. Therefore, the appellate court was obliged under law to hear them on the quantum of sentence in accordance with the mandate of subSection (2) of Section 235 of CrPC before pronouncing any sentence against them. The appellate court has *ex-facie* failed to follow the said procedure.

21. It is to be noted that convict A1 Krishnappa Naika @ Kittu Naika has already spent over 11 years in actual custody as is reflected by order of this Court dated 02.12.2022 passed in his bail application.

22. In view of the above facts and circumstances, we are of the opinion that the High Court in exercise of its appellate jurisdiction could not have interfered with the acquittal of the accused persons so as to convict A1 and A3. Accordingly, the conviction of A1 and A3 is hereby set aside and the judgment and order of the High Court dated 28.06.2008 is also set aside.

23. The appeals are allowed.