A.F.R.

Neutral Citation No. - 2023:AHC-LKO:56233

Court No. - 15

Case :- CRIMINAL APPEAL No. - 335 of 1999
Appellant :- Itwari And 3 Others.
Respondent :- State of U.P.
Counsel for Appellant :- A.R.Khan,Vimal Kishore Singh,Vishwa Nath Singh
Counsel for Respondent :- Govt Advocate

Hon'ble Shamim Ahmed,J.

1. List of cases has been revised and the case is being taken up in the revised call for hearing.

2. Heard learned counsel for the parties and perused the record.

3. As per report of the Chief Judicial Magistrate, Bahraich dated 11.12.2018, the appellant no.1 Itwari had already expired during pendency of this appeal, as such, the appeal on his behalf stands abated. This Court is proceeding in respect of appellant no.2 Nabi Ullaha, appellant no.3 Rafi Ullaha and appellant no.4 Mulzim.

4. The instant Criminal Appeal under Section 374(2) Cr.P.C. has been moved on behalf of the appellants against the order dated 30.07.1999 passed by learned Additional Sessions Judge, Bahraich in Sessions Trial No.327 of 1994, under Sections 323/34, 504, 506, 308/34 I.P.C., Police Station Risiya, District Bahraich, whereby appellants have been convicted and sentenced for six months rigorous imprisonment under Section 323/34 I.P.C., two years rigorous imprisonment under Section 506 I.P.C. and two years rigorous

imprisonment under Section 308/34 I.P.C. All the sentenced were directed to be run concurrently.

5. The prosecution case in brief is that on 04.05.1993, the complainant, Abdul Mannan had given a written report in Police Station Risiya, District Bahraich wherein it had been stated that accused Itwari was fixing his son's (Nabi Ullaha) marriage in the complainant's family. The complainant's relative asked the Itwari about his land and property, therefore, he told the truth. As such, the complainant's relative denied for the marriage and due to this, Itwari got angry with relatives of the complainant. On the date of incident at about 07:00 A.M., when the uncle (Ashraf Ali) and brother (Ibrahim) of the complainant were coming from market, the accused persons caught them and abused them in filthy languages and even assaulted them with lathi and danda, as such, Ashraf Ali and Ibrahim got severely injured. Due to injury, Ibrahim got unconscious. On seeing the incident, the nearby villagers Aliullaha and Sabder Ali rescued the injured persons.

6. On the basis of written report, submitted by the first informant, Abdul Mannan, the first information report was lodged as Case Crime No.43 of 1993, under Sections 308, 323, 504, 506 I.P.C. at Police Station Risiya, District Bahraich.

7. The case was handed over to Investigating Officer, who visited the place of occurrence, recorded the statement of the witnesses and prepared the site plan and after completing the investigation, submitted the charge sheet against the appellants under Sections 308, 323 I.P.C.

8. On the basis of Charge-sheet appellant-accused were summoned by the Court and charges were framed against them under Sections 323/34, 504, 506, 308/34 I.P.C. The appellants-accused denied the charges and claimed to be tried.

9. Prosecution in order to substantiate the charges against appellants-accused examined P.W.-1 Ali Ullaha, an eye witness,, P.W.-2 Safder Ali, an eye witness, P.W.-3 Abdul Mannan, the complainant, PW-4 Head Moharrir Chhavi Lal, who had scribed the written complaint, PW-5 Ibrahim, the injured, P.W.-6 Ashraf Ali, the injured, P.W.-7 Dr. Dharmvir Kumar, who medically examined the injured, P.W.-8 Sub Inspector Satya Narain Tiwari, who investigated the case.

10. Apart from above oral evidences, the following documentary evidences were also marked as follows. Written report as Ex. Ka-1, Chik F.I.R. as Ex. Ka-3, Nakal G.D. as Ex. Ka-4, Injury Report of Ibrahim as Ex. Ka-5, Injury Report of Ashraf as Ex. Ka-6, Site Plan as Ex. Ka-7 and Charge Sheet as Ex. Ka-8.

11. After closing of the evidence, statement of accused / appellants under section 313 Cr.P.C. was recorded by the trial court explaining the entire evidence and other circumstances, in which the appellants denied the prosecution story and the entire prosecution story was said to be wrong and concocted.

12. In order to substantiate the defence case, accused appellants examined Mohley as D.W.-1 before the trial court.

13. After having heard the rival submissions of parties, the Trial Court found appellants-accused guilty, therefore, convicted and sentenced them for six months rigorous imprisonment under Section 323/34 I.P.C., two years rigorous imprisonment under Section 506 I.P.C. and two years rigorous imprisonment under Section 308/34 I.P.C.

14. Feeling aggrieved by the judgment of conviction and sentence passed by Trial Court, the appellants-accused have preferred this appeal.

15. Learned Counsel for the appellants has contended that the judgment and order passed by the Trial Court is wrong both on facts and law. The learned trial court had misread and misconstrued the statements of prosecution witnesses. The learned trial court had wrongly held that the complainant Abdul Mannan, who lodged the F.I.R., was a witness, had been declared hostile and in the cross-examination he admitted that the parties had compromised the matter, thus, a part of his statement could be relied upon. Other witnesses have also not supported the prosecution case.

16. Learned counsel for the appellants has further contended that the learned trial court had wrongly relied upon that when a witness has been declared hostile, his statement could be relied upon with some extent. As such, he submits that the learned trial court has erred in law and passed the impugned order, therefore, the same is liable to be set aside and the instant appeal is liable to be allowed.

17. Opposing the contention of learned Counsel for the appellant-accused, the learned A.G.A. has contended that sufficient evidence was given by the prosecution to prove the factum of assaulting the injured by the accused persons. The F.I.R. was also immediately lodged and the prosecution witnesses have also proved the commission of offence, as such, the impugned order does not require any interference by this Court and the appeal is liable to be dismissed.

18. Through out the web of the Criminal Jurisprudence, one golden thread is always seen that it is the duty of the prosecution to prove the guilt of the accused. This burden of proof on prosecution to prove guilt is also known as presumption of innocence. The presumption of innocence, sometimes refer to by the latin expression "*ei incumbit probatio qui dicit, non qui negat*" (the burden of proof is on one who declares, not to one who denies) is the principle that one is considered innocence unless proven guilt. In criminal jurisprudence every

accused is presumed to be innocent unless the guilt is proved. The presumption of innocence is a human right. The prosecution may obtain a criminal conviction only when the evidence proves the guilt of accused beyond reasonable doubt.

19. In the present case, almost all the prosecution witnesses have turned hostile. It is based on testimony of hostile prosecution witnesses from which guilt of accused may be inferred.

20. Witnesses may be categorized into three distinct categories. They may be wholly reliable. Similarly there may be witnesses who can be considered wholly unreliable. There is no difficulty in placing reliance or disbelieving his evidence when an evidence is wholly reliable or wholly un-reliable, but difficulty arises in case of third category i.e. where witness is neither wholly reliable nor wholly unreliable. Hostile witness ordinarily falls in category of those witnesses who are neither wholly reliable nor wholly un-reliable. Hon'ble Apex Court in **Khujji @ Surendra Tiwari Vs. State of M.P. AIR 1991 SC page 1853** was pleased to observe as under :-

> *"The evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether, but the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof."*

21. The term "hostile witness" does not find place in Evidence Act 1872 (here-in-after referred as Act of 1872 for brevity). It is a term borrowed from English Law. Though in English Law to allow a party to contradict its own witness was not acceptable view. The theory of contradicting its own witness was resisted on the ground that party should be permitted to discard or contradict his own witness, which turns unfavorable to party calling him, however, this rigidity of rule

was sought to be relaxed by evolving a term "hostile" or "un-favourable witness" in common law.

22. It is relevant to quote Section 154 (1) of the Act of 1872, which reads as under:-

> *"the Court may, in its discretion, permit the person who calls a witness to put any question to him, which might be put in cross examination by the adverse party".*

23. Sub-Section (2) of Section 154 of Act of 1872, further provides that :-

> *"Nothing in this section shall disentitle the person so permitted under sub-section (1), to rely on any part of evidence of such witness".*

24. Thus discretion is vested in Court to permit a person to put such question, which may be put by adverse party, if Court deems it appropriate. Thus the term "hostile witness" has been borrowed from English Law and developed in through case Laws.

25. The principle of "**falsus in uno falsus in omnibus"** (false in one thing, false in everything) has no application in India. It is duty of Court to separate grain from chaff. Keeping in view the above principles Hon'ble Apex Court in the case of **Sucha Singh v. State of Punjab, AIR 2003 SC 3617** was pleased to observe as under :-

> *"even if major portion of the evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, it is the duty of the court to separate grain from chaff. Falsity of particular material witness or material particular would not ruin it from the beginning to end. The maxim falsus in uno falsus in omnibus (false in one thing, false in everything) has no application in India and the witness cannot be branded as a liar. In case this maxim is applied in all the cases it is to be feared that administration of criminal justice would come to a dead stop. Witnesses just cannot help in giving embroidery to a story,*

> *however, truth is the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of credence, and merely because in some respects the court considers the same to be insufficient or unworthy of reliance, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well."*

26. Similarly in **Paramjeet Singh v. State of Uttarakhand; AIR 2011 SC 200** also Hon'ble Apex Court was pleased to observe as under:-

> *"When the witness was declared hostile at the instance of the public prosecutor and he was allowed to cross examine the witness furnishes no justification for rejecting embloc the evidence of the witness. However, the court has to be very careful, as prima facie, a witness who makes different statements at different times, has no regard for the truth. His evidence has to be read and considered as a whole with a view to find out whether any weight should be attached to it. The court should be slow to act on the testimony of such a witness; normally, it should look for corroboration to his testimony".*

27. Perusal of the statement of eye witness P.W.-1 Ali Ullaha reveals that he clearly stated during his examination in chief that the complainant had lodged the F.I.R. about 3 – 4 years ago, wherein he was kept as an eye witness but he don't know why the complainant made him an eye witness as he had not seen the incident nor he was present at the time of incident.

28. Similarly P.W.-2 Safder Ali, an eye witness also reiterated the same as P.W.-1 Ali Ullaha. He also stated that he don't know why the complainant made him an eye witness as he had also not seen the incident in question.

29. Further P.W.-3 Abdul Mannan is the complainant and in his testimony in examination in chief, he has totally reiterated the version

of F.I.R. and had supported the prosecution story, whereas he was not the eye witness of the alleged incident.

30. PW-4 Head Moharrir Chhavi Lal had stated in his testimony before the learned trial court that he has scribed the written report into first information report and at the time of scribing, Ibrahim and Ashraf were present.

31. P.W.-5 Ibrahim, the injured had also reiterated the version of F.I.R. and had supported the prosecution case. He also stated that he was sent to Bahraich for his medical examination.

32. P.W.-6 Ashraf Ali, the injured had also reiterated the version of F.I.R. and had supported the prosecution case.

33. P.W.-7 Dr. Dharmveer Dubey, Orthopedic Surgeon, District Hospital, Kanpur had stated in his examination-in-chief that he had examined the injured Ibrahim and injured Ashraf Ali on 04.05.1993 at about 08:30 A.M. The injured persons were brought by Constable CP 218 Ramesh Kumar Yadav. He had also prepared medical report of the injured Ibrahim as well as Ashraf Ali.

34. P.W.-8 Sub Inspector Satya Narain Tiwari, Reader Superintendent of Police, Allahabad had stated in his examination of chief that on 04.05.1993 he was posted as Station House Officer of Police Station Risiya, District Bahraich. He was entrusted with the investigation of present case, thereafter, he concluded the investigation.

35. D.W.-1 Mohley had stated in his testimony before the trial court that he knew the accused persons as well as the injured persons and he further stated that no such incident as alleged by the prosecution took place.

36. Perusal of statement of P.W.-1 Ali Ullaha as well as P.W.-2 Safder Ali show that they have supported the prosecution case while

their statements were recorded under Section 161 Cr.P.C. by the Investigating Officer, however, at the time of their examination-in-chief, they had totally denied the prosecution story. There can be no two opinion that these witness turned hostile on account of pressure exerted upon them by the accused persons. They refused to state truth about the occurrence, and therefore, they were declared hostile. They were required to submit their explanation regarding their previous statement given under Section 161 Cr.P.C. supporting the prosecution case.

37. It feels pain to observe that in our present system of trial despite having sufficient power to the judge to ask questions to the witnesses in order to find out truth, most of them do not ask questions to the witnesses to shift the grain from the chaff. Practice of leaving witnesses to the Advocates, when a witness becomes hostile, is not un-common in the trial Courts. Time and again Hon'ble Apex Court has reminded that a Judge does not preside over a criminal trial merely to see that no innocent man is punished, but a Judge also presides to see that a guilty man does not escape. Both are public duties, which the Judge has to perform. Therefore, the trial Court must shed their inertia and must intervene in all those cases where intervention is necessary for the ends of justice.

38. No proper explanation of injuries on the person of injured witnesses have been given. Mere suggestion is not sufficient. Moreover it itself indicates a false case. All the witnesses being the close relatives, it is beyond apprehension that they instead of naming out real culprit, they would falsely implicate the accused persons knowing them innocent.

39. This Court has gone through the impugned judgment and evidence on record. The trial court relying on the testimony of witnesses, even though who were declared hostile, has concluded that

the accused had assaulted the injured persons. Looking into the totality of statement of witnesses, the conclusion drawn by the trial court cannot be said to be reasonable.

40. It is established principle of law of evidence that statement of witness is to be read as a whole and conclusion should not be drawn only by picking up a single sentence of the statement of a witness. Thus the trial court has overlooked the material evidence available on record with regard to guilt of accused and to that extent conclusion drawn by the trial Court suffers with patent infirmity and perversity and therefore, liable to be reversed and set aside.

41. Thus in view of above, after analysis of circumstances of present case in the light of aforesaid settled legal principles, I come to the conclusion that the trial court has erred passing the impugned judgment and order, therefore, this appeal succeeds and is **allowed**. The judgment and order dated 30.07.1999 passed by learned Additional Sessions Judge, Bahraich in Sessions Trial No.327 of 1994, under Sections 323/34, 504, 506, 308/34 I.P.C., Police Station Risiya, District Bahraich is **set aside and reversed**. The appellants, namely, appellant no.2 Nabi Ullaha, appellant no.3 Rafi Ullaha and appellant no.4 Mulzim are **acquitted** of charges under Sections 323/34, 506, 308/34 I.P.C. Their personal bonds and surety bonds are canceled and sureties are discharged.

42. Let record of lower Court be sent back to Court concerned along with copy of judgment and order for information.

Order Date :- 23.8.2023

Saurabh

Digitally signed by :-
SAURABH VERMA
High Court of Judicature at Allahabad,
Lucknow Bench