AFR

Court No. - 43

Case :- CRIMINAL MISC. APPLICATION U/S 372 CR.P.C (LEAVE TO APPEAL) No. - 150 of 2014

Applicant :- Shriniwas
Opposite Party :- State Of U.P. And 3 Others
Counsel for Applicant :- Bharat Singh
Counsel for Opposite Party :- Govt. Advocate

Hon'ble Vivek Kumar Birla,J.
Hon'ble Subhash Vidyarthi,J.

1. Heard Sri Bharat Singh, learned counsel for the appellant-applicant and Sri Ratan Singh, learned A.G.A. appearing for the State.

2. As already held by this Court in number of cases that leave application filed under Section 378(3) Cr.P.C. is not required in the appeal filed by the victim under Section 372 Cr.P.C. like the present appeal. A reference may be made to the order dated 4.8.2021 passed in Criminal Appeal U/S 372 Cr.P.C. No. 123 of 2021 (Rita Devi vs. State of U.P. and another). As such, the application for leave to appeal stands rejected as not maintainable and / or not required.

3. This appeal has been filed against the order dated 18.2.2014 passed by the Additional Sessions Judge, Court No. 8, Badaun acquitting the respondent nos. 2, 3 and 4 in Session Trial No. 917 of 2011 (State v. Monu Singh and others) arising out of Case Crime No. 539 of 2011, under Sections 302, 34 IPC, P.S. Wazeerganj, District Badaun.

4. According to the first information report the deceased Ramniwas, who was practising as a Doctor in the clinic of Hariom, on 17.5.2011 at about 11:00 A.M. went to Katgaon

on daily routine and at about 9:00-10:00 P.M. son (Anil) of the deceased called the brother (deceased) of the informant and asked for coming home and the deceased informed that he is coming shortly. When at about 10:00 P.M. the deceased did not reach home the informant and Anil went out for searching him. At about 02:00 A.M. they found dead body of the deceased in the field of Babu Singh on the side of road. First information report was registered against unknown persons as Case Crime No. 539 of 2011, under Sections 302, 34 IPC., P.S. Wazeerganj, District Badaun.

5. In support of prosecution case P.W.-1 Sriniwas Sharma (informant), P.W.-2 Smt. Ramsukhi, P.W.-3 S.I. Devi Dayal (Chik Lekhak), P.W.-4 S.I. Mahesh Prasad (Investigating Officer), P.W.-5 S.I. Rameshwar Dayal, P.W.-6 Dr. R.K. Verma, P.W.-7 S.I. Vijaypal Singh were produced.

6. Judgment of acquittal was passed by the trial court on the grounds that although P.W.-1 and P.W.-2 are witnesses of fact but admittedly, they have not seen the incident. They have stated only to the extent that the dead body was found in a field when they had gone out to search the deceased. P.W.-1, Sriniwas Sharma, is the brother of the deceased and P.W-2 is the wife of the deceased. P.W.-2, Smt. Ramsukhi, has stated that her son had called his father and he stated that he is coming home shortly, however, he did not come and when the deceased did not reach home P.W.-1 had gone out with his nephew (Anil) to search him and the dead body of the deceased was found in a field. Although it is alleged that the *darati*, the weapon used in the incident, was recovered on

pointing out of Narendra Singh (one of the accused), however, it was found that the incident was dated 17.5.2011, whereas the weapon was recovered after more than two months on 19.7.2011 and even the F.S.L. report had mentioned that it cannot be ascertained that there was human blood on the weapon used, therefore, it was held that this being case of circumstantial evidence and there was no cogent evidence to complete the chain of circumstances so as to hold that the crime was committed by the accused and none else.

7. Challenging the impugned judgment of acquittal submission of learned counsel for the appellant is that P.W.-1 in his statement had clearly stated that when he had gone out in search of the deceased he had seen the accused persons coming from the side of the spot, where the dead body was found and this clearly connects the accused persons with the offence. It was further pointed out that even the weapon used in the incident was recovered on pointing out of Narendra Singh. Submission, therefore, is that the impugned judgment is liable to be set aside and the accused persons are liable to be convicted in the present case.

8. We have considered the submissions and have perused the record.

9. Before proceeding further it would be appropriate to take note of the law laid down by Supreme Court on the issue involved.

10. In the case of **Babu vs. State of Kerala (2010) 9 SCC 189 : (2010) 3 SCC (Cri) 1179**, the Hon'ble Apex Court has observed that while dealing with a judgment of acquittal, the

appellate court has to consider the entire evidence on record, so as to arrive at a finding as to whether the views of the trial Court were perverse or otherwise unsustainable. The appellate court is entitled to consider whether in arriving at a finding of fact, the trial Court had failed to take into consideration admissible evidence and/or had taken into consideration the evidence brought on record contrary to law. Paragraphs 12 to 19 of the aforesaid judgment are quoted as under:-

> "**12**. This court time and again has laid down the guidelines for the High Court to interfere with the judgment and order of acquittal passed by the Trial Court. The appellate court should not ordinarily set aside a judgment of acquittal in a case where two views are possible, though the view of the appellate court may be more, the probable one. While dealing with a judgment of acquittal, the appellate court has to consider the entire evidence on record, so as to arrive at a finding as to whether the views of the trial Court were perverse or otherwise unsustainable. The appellate court is entitled to consider whether in arriving at a finding of fact, the trial Court had failed to take into consideration admissible evidence and/or had taken into consideration the evidence brought on record contrary to law. Similarly, wrong placing of burden of proof may also be a subject matter of scrutiny by the appellate court. (Vide Balak Ram v. State of U.P. AIR 1974 SC 2165; Shambhoo Missir & Anr. v. State of Bihar AIR 1991 SC 315; Shailendra Pratap & Anr. v. State of U.P. AIR 2003 SC 1104; Narendra Singh v. State of M.P. (2004) 10 SCC 699; Budh Singh & Ors. v. State of U.P. AIR 2006 SC 2500; State of U.P. v. Ramveer Singh AIR 2007 SC 3075; S. Rama Krishna v. S. Rami Reddy (D) by his LRs. & Ors. AIR 2008 SC 2066; Arulvelu & Anr. Vs. State (2009) 10 SCC 206; Perla Somasekhara Reddy & Ors. v. State of A.P. (2009) 16 SCC 98; and Ram Singh alias Chhaju v. State of Himachal Pradesh (2010) 2 SCC 445).
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> **13**. In Sheo Swarup and Ors. King Emperor AIR 1934 PC 227, the Privy Council observed as under:
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> > "...the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial, (3) the right of the accused to the benefit of any doubt, and (4) 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.…"
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> **14**. The aforesaid principle of law has consistently been followed by this Court. (See: Tulsiram Kanu v. The State AIR 1954 SC 1; Balbir Singh v. State of Punjab AIR 1957 SC 216; M.G. Agarwal v. State of Maharashtra AIR 1963 SC 200; Khedu Mohton & Ors. v. State of Bihar AIR 1970 SC 66; Sambasivan and Ors. State of Kerala (1998) 5 SCC 412; Bhagwan Singh and Ors. v. State of M.P. (2002) 4 SCC 85; and State of Goa v. Sanjay Thakran and Anr. (2007) 3 SCC 755).

15. In Chandrappa and Ors. v. State of Karnataka (2007) 4 SCC 415, this Court reiterated the legal position as under:

> "(1) An appellate court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.
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> (2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.
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> (3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.
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> (4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.
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> (5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

16. In Ghurey Lal v. State of Uttar Pradesh (2008) 10 SCC 450, this Court re-iterated the said view, observing that the appellate court in dealing with the cases in which the trial courts have acquitted the accused, should bear in mind that the trial court's acquittal bolsters the presumption that he is innocent. The appellate court must give due weight and consideration to the decision of the trial court as the trial court had the distinct advantage of watching the demeanour of the witnesses, and was in a better position to evaluate the credibility of the witnesses.

17. In State of Rajasthan v. Naresh @ Ram Naresh (2009) 9 SCC 368, the Court again examined the earlier judgments of this Court and laid down that an "order of acquittal should not be lightly interfered with even if the court believes that there is some evidence pointing out the finger towards the accused."

18. In State of Uttar Pradesh v. Banne alias Baijnath & Ors. (2009) 4 SCC 271, this Court gave certain illustrative circumstances in which the Court would be justified in interfering with a judgment of acquittal by the High Court. The circumstances includes:

> i) The High Court's decision is based on totally erroneous view of law by ignoring the settled legal position;
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> ii) The High Court's conclusions are contrary to evidence and documents on record;
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> iii) The entire approach of the High Court in dealing with the evidence was patently illegal leading to grave miscarriage of justice;
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> iv) The High Court's judgment is manifestly unjust and unreasonable based on erroneous law and facts on the record of the case;

> v) This Court must always give proper weight and consideration to the findings of the High Court;
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> vi) This Court would be extremely reluctant in interfering with a case when both the Sessions Court and the High Court have recorded an order of acquittal.
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> A similar view has been reiterated by this Court in Dhanapal v. State by Public Prosecutor, Madras (2009) 10 SCC 401.
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> **19**. Thus, the law on the issue can be summarised to the effect that in exceptional cases where there are compelling circumstances, and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of 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 his innocence. Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference."

11. In **Achhar Singh vs. State of Himachal Pradesh (2021) 5 SCC 543** reiterating the law, Supreme Court held that it is fundamental in criminal jurisprudence that every person is presumed to be innocent until proven guilty and it is obligatory on the prosecution to establish the guilt of the accused save where the presumption of innocence has been statutorily dispensed with, for example, under Section 113-B of the Evidence Act, 1872. It was further held that it is well crystallized principle that if two views are possible, the High Court ought not to interference with the trial court's judgment. However, such a precautionary principle cannot be overstretched. It is well settled that there is no bar High Court's power to reappreciate evidence in an appeal against acquittal. Paragraph 14 to 16 of the aforesaid judgment are quoted as under:-

> 14. It is fundamental in criminal jurisprudence that every person is presumed to be innocent until proven guilty, for criminal accusations can be hurled at anyone without him being a criminal. The suspect is therefore considered to be innocent in the interregnum between accusation and judgment. History reveals that the burden on the accuser to prove the guilt of the accused has its roots in ancient times. The Babylonian Code of Hammurabi (17921750 B.C.), one of the oldest written codes of law put the burden of proof on the accuser. Roman Law coined the principle of actori incumbit (onus) probatio (the burden of proof weighs on the plaintiff) i.e., presumed innocence of the accused. In Woolmington v. Director of Public

Prosecutions , the House of Lords held that the duty of the prosecution to prove the prisoner's guilt was the "golden thread" throughout the web of English Criminal Law. Today, Article 11 of the Universal Declaration of Human Rights, Article 14 of the International Covenant on Civil and Political Rights and Article 6 of the European Convention on Human Rights all mandate presumption of innocence of the accused.

15. A characteristic feature of Common Law Criminal Jurisprudence in India is also that an accused must be presumed to be innocent till the contrary is proved. It is obligatory on the prosecution to establish the guilt of the accused save where the presumption of innocence has been statutorily dispensed with, for example, under Section 113-B of the Evidence Act, 1872. Regardless thereto, the 'Right of Silence' guaranteed under Article 20(3) of the Constitution is one of the facets of presumed innocence. The constitutional mandate read with the scheme of the Code of Criminal Procedure, 1973 amplifies that the presumption of innocence, until the accused is proved to be guilty, is an integral part of the Indian criminal justice system. This presumption of innocence is doubled when a competent Court analyses the material evidence, examines witnesses and acquits the accused. Keeping this cardinal principle of invaluable rights in mind, the appellate Courts have evolved a selfrestraint policy whereunder, when two reasonable and possible views arise, the one favourable to the accused is adopted while respecting the trial Court's proximity to the witnesses and direct interaction with evidence. In such cases, interference is not thrusted unless perversity is detected in the decisionmaking process.

16. It is thus a well crystalized principle that if two views are possible, the High Court ought not to interfere with the trial Court's judgment. However, such a precautionary principle cannot be overstretched to portray that the "contours of appeal" against acquittal under Section 378 CrPC are limited to seeing whether or not the trial Court's view was impossible. It is equally well settled that there is no bar on the High Court's power to reappreciate evidence in an appeal against acquittal11. This Court has held in a catena of decisions (including Chandrappa v. State of Karnataka (2007) 4 SCC 415, State of Andhra Pradesh v. M. Madhusudhan Rao (2008) 15 SCC 582 and Raveen Kumar v. State of Himachal Pradesh (2021) 12 SCC 557) that the Cr.P.C. does not differentiate in the power, scope, jurisdiction or limitation between appeals against judgments of conviction or acquittal and that the appellate Court is free to consider on both fact and law, despite the selfrestraint that has been ingrained into practice while dealing with orders of acquittal where there is a double presumption of innocence of the accused."

12. In **Anwar Ali and another vs. State of Himachal Pradesh (2020) 10 SCC 166** it was held by the Supreme Court that in case of circumstantial evidence, the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else and the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of

the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. Relevant paragraphs 15 to 17 of the aforesaid judgment are quoted as under:-

> "15. It is also required to be noted and it is not in dispute that this is a case of circumstantial evidence. As held by this Court in catena of decisions that in case of a circumstantial evidence, the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else and the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.
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> 16. In the case of Babu (supra), it is observed and held in paragraphs 22 to 24 as under:
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> > "22. In Krishnan v. State (2008) 15 SCC 430, this Court after considering a large number of its earlier judgments observed as follows: (SCC p. 435, para 15)
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> > "15. … This Court in a series of decisions has consistently held that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests:
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> > (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
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> > (ii) those circumstances should be of definite tendency unerringly pointing towards guilt of the accused;
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> > (iii) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and
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> > (iv) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. (See Gambhir v. State of Maharashtra (1982) 2 SCC 351)"
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> > 23. In Sharad Birdhichand Sarda v. State of Maharashtra (1984) 4 SCC 116 while dealing with circumstantial evidence, it has been held that the onus was on the prosecution to prove that the chain is complete and the infirmity or lacuna in prosecution cannot be cured by false defence or plea. The conditions precedent before conviction could be based on circumstantial evidence, must be fully established. They are: (SCC p. 185, para 153)
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> > (i) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned "must" or "should" and not "may be" established; (ii) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

(iii) the circumstances should be of a conclusive nature and tendency;

(iv) they should exclude every possible hypothesis except the one to be proved; and

(v) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused. A similar view has been reiterated by this Court in State of UP v. Satish (2005) 3 SCC 114 and Pawan v. State of Uttaranchal (2009) 15 SCC 259.

24. In Subramaniam v. State of T.N. (2009) 14 SCC 415, while considering the case of dowry death, this Court observed that the fact of living together is a strong circumstance but that by alone in absence of any evidence of violence on the deceased cannot be held to be conclusive proof, and there must be some evidence to arrive at a conclusion that the husband and husband alone was responsible therefor. The evidence produced by the prosecution should not be of such a nature that may make the conviction of the appellant unsustainable. (See Ramesh Bhai v. State of Rajasthan (2009) 12 SCC 603)."

17. Even in the case of G. Parshwanath (supra), this Court has in paragraphs 23 and 24 observed as under:

"23. In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established. Each fact sought to be relied upon must be proved individually. However, in applying this principle a distinction must be made between facts called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to proof of primary facts, the court has to judge the evidence and decide whether that evidence proves a particular fact and if that fact is proved, the question whether that fact leads to an inference of guilt of the accused person should be considered. In dealing with this aspect of the problem, the doctrine of benefit of doubt applies. Although there should not be any missing links in the case, yet it is not essential that each of the links must appear on the surface of the evidence adduced and some of these links may have to be inferred from the proved facts. In drawing these inferences, the court must have regard to the common course of natural events and to human conduct and their relations to the facts of the particular case. The court thereafter has to consider the effect of proved facts.

24. In deciding the sufficiency of the circumstantial evidence for the purpose of conviction, the court has to consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of guilt and if the combined effect of all these facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts by itself or themselves is/are not decisive. The facts established should be consistent only with the hypothesis of the guilt of the accused and should exclude every hypothesis except the one sought to be proved. But this does not mean that before the prosecution can succeed in a case resting upon circumstantial evidence alone, it must exclude each and every hypothesis suggested by the accused, howsoever, extravagant and fanciful it might be. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent

> with the innocence of the accused and must show that in all human probability the act must have been done by the accused, where various links in chain are in themselves complete, then the false plea or false defence may be called into aid only to lend assurance to the court."

13. We find that it is a case of circumstantial evidence and P.W.-2 is witness of fact and that too it is not even a case of last seen evidence. P.W.-2, wife of the deceased, had stated to the extent that her son called his father on which he stated that he will shortly come but he did not reach home and thereafter P.W.-1 gone out in search of the deceased. P.W.-1, brother of the deceased, has stated only this much that the dead body was found in a field and he had seen the accused persons coming from the side of the dead body. The recovery of weapon allegedly used in the incident was recovered after more than two months allegedly on pointing out of one accused Narendra Singh, which was sent to F.S.L. report for forensic report. From perusal of original record the Forensic Report dated 19.11.2012 (Ex. 24Ka) indicates that five articles including *darati* were sent for F.S.L. report on which the finding was given that on item no. 5-*darati* the bloodstained were disintegrated and therefore, were not sufficient to record any finding. In respect of shirt, baniyan (vest) and underwear it was found that the bloodstained were not sufficient / useless for the purpose of classification and although it was stated that insofar as the garments and soil is concerned, human blood was found.

14. We also noticed that the weapon recovered was a *darati* and the P.W.-6, the doctor, who has conducted the postmortem, stated that the nature of injuries could not have been caused by *darati* and it could have been caused only by

sharp edged weapon only. This opinion assumes importance as *darati* is a sharp edged tool having spikes (kantedar) and thus will leave different cut marks on the body.

15. In such view of the matter, we find that the court below has rightly held that the weapon used could not be connected with the offence. We, therefore, in such circumstances, are of the opinion that it is a case of circumstantial evidence, where the chain of circumstances were not so complete so as to arrived at the conclusion that the accused persons have committed the offence by using the weapon allegedly recovered.

16. We also find that the motive attributed is extremely weak, which is stated to be of the year 2003, whereas the incident is of the year 2011, that too in relation to daughter of the informant and niece of the deceased. The other circumstantial evidence are only to the extent that the dead body was found in a field and except the bald statement of P.W.-1 to the extent that the accused persons were coming from the direction of the spot, where dead body was found and recovery of alleged weapon which, infact, could not be connected with the crime, having been made after two months, there is no other evidence, we do not find that the findings recorded by the trial court are perverse in nature so as to warrant any interference by this Court in exercise of the powers under Section 384 Cr.P.C.

17. In the totality of circumstances, we find that the trial court has taken possible view of the matter on appreciation of the evidence and we do not find that it is a fit case for

interference in the judgment of trial court.

18. The appeal is accordingly dismissed.

Order Date :- 11.2.2022
Lalit Shukla

(Subhash Vidyarthi,J.) (Vivek Kumar Birla,J.)