A.F.R.

Court No. - 37

Case :- GOVERNMENT APPEAL No. - 198 of 2020
Appellant :- State of U.P.
Respondent :- Anil Kumar Jaisal
Counsel for Appellant :- G.A.

Hon'ble Dr. Kaushal Jayendra Thaker,J.
Hon'ble Ajai Tyagi,J.

(Per : Ajay Tyagi, J.)

1. Heard learned A.G.A. for the State and perused the record.

2. This appeal under Section 378 (3) of Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.'), at the behest of the State, has been preferred against the judgment and order dated 29.02.2020 passed by learned Additional Sessions Judge/F.T.C., Varanasi acquitting accused-respondent who have been tried for commission of offence under Sections 376, 504 & 506 of Indian Penal Code, 1860 (hereinafter referred to as 'IPC').

3. Brief facts as culled out from the record are that on 6.2.2014 the prosecutrix was alone at her home and at about 9.00 p.m., when the children were sleeping, the accused who was known to the family entered the house, closed the door from inside and had sexual intercourse with the prosecutrix against her will. The prosecutrix tried to lodge complaint on 10.2.2021 but the police did not record the same and, therefore, on 10.2.2021 she moved concerned Magisterial Court who directed investigation under Section 156 (3) of Cr.P.C. The First Information Report was lodged as 114 of 2014 on 21.3.2014.

4. The accused was nabbed and on 8.7.2015, the case was committed to the Court of Sessions. The prosecution examined about five witnesses. P.W.1 was the prosecutrix, P.W.2 was Ram Lal, Sub

Inspector, P.W.3 was Ramesh Yadav, P.W.4 was Mohd. Alamgir & P.W.5 was Dr. Sakshi Gupta who medically examined the prosecutrix. The prosecution relied on eight documents which are sought to be proved by the oral testimony of the witnesses. After the prosecution evidence was completed, the accused was put to question under Section 313 of Cr.P.C. and accept stating that he was falsely implicated and no such incident had occurred, the accused did not lead any evidence nor he examined any witness.

5. The learned Sessions Judge raised two points of determination namely; (a) whether the First Information Report was belated & (b) whether the victim was forced to enter into sexual intercourse against her will and wish.

6. Before we embark on testimony and the judgment of the Court below, the contours for interfering in Criminal Appeals where accused has been held to be non guilty would require to be discussed.

7. The principles which would govern and regulate the hearing of an appeal by this Court, against an order of acquittal passed by the trial Court, have been very succinctly explained by the Apex Court in catena of decisions. In the case of "**M.S. NARAYANA MENON @ MANI VS. STATE OF KERALA & ANR", (2006) 6 S.C.C. 39**, the Apex Court has narrated the powers of the High Court in appeal against the order of acquittal. In para 54 of the decision, the Apex Court has observed as under:

> *"54. In any event the High Court entertained an appeal treating to be an appeal against acquittal, it was in fact exercising the revisional jurisdiction. Even while exercising an appellate power against a judgment of acquittal, the High Court should have borne in mind the well settled principles of law that where two view are possible, the appellate Court should not interfere with the finding of acquittal recorded by the Court below."*

8. Further, in the case of "**CHANDRAPPA Vs. STATE OF**

KARNATAKA", reported in (2007) 4 S.C.C. 415, the Apex Court laid down the following principles;

> *"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate Court while dealing with an appeal against an order of acquittal emerge:*
>
> > *[1] An appellate Court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.*
> >
> > *[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.*
> >
> > *[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 curtain extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasis 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.*
> >
> > *[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.*
> >
> > *[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."*

9. Thus, it is a settled principle that while exercising appellate powers, even if two reasonable views/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.

10. Even in the case of "**STATE OF GOA Vs. SANJAY THAKRAN & ANR**.", reported in **(2007) 3 S.C.C. 75**, the Apex Court has reiterated the powers of the High Court in such cases. In para 16 of the said decision, the Court has observed as under:

> "*16. From the aforesaid decisions, it is apparent that while exercising the powers in appeal against the order of acquittal the Court of appeal would not ordinarily interfere with the order of acquittal unless the approach of the lower Court is vitiated by some manifest illegality and the conclusion arrived at would not be arrived at by any reasonable person and, therefore, the decision is to be characterized as perverse. Merely because two views are possible, the Court of appeal would not take the view which would upset the judgment delivered by the Court below. However, the appellate Court has a power to review the evidence if it is of the view that the conclusion arrived at by the Court below is perverse and the Court has committed a manifest error of law and ignored the material evidence on record. A duty is cast upon the appellate Court, in such circumstances, to re-appreciate the evidence to arrive to a just decision on the basis of material placed on record to find out whether any of the accused is connected with the commission of the crime he is charged with."*

11. Similar principle has been laid down by the Apex Court in cases of "**STATE OF UTTAR PRADESH VS. RAM VEER SINGH & ORS.", 2007 A.I.R. S.C.W. 5553** and in "**GIRJA PRASAD (DEAD) BY L.R.s VS. STATE OF MP", 2007 A.I.R. S.C.W. 5589**. Thus, the powers, which this Court may exercise against an order of acquittal, are well settled.

12. In the case of "**LUNA RAM VS. BHUPAT SINGH AND ORS**.", reported in **(2009) SCC 749**, the Apex Court in para 10 and 11 has held as under:

> "*10. The High Court has noted that the prosecution version was not clearly believable. Some of the so called eye witnesses stated that the deceased died because his ankle was twisted by an accused. Others said that he was strangulated. It was the case of the prosecution that the injured witnesses were thrown out of the bus. The doctor who conducted the postmortem and examined the witnesses had categorically stated that it was not possible that somebody would throw a person out of the bus when it was in running condition.*

> *11. Considering the parameters of appeal against the judgment of acquittal, we are not inclined to interfere in this appeal. The view of the High Court cannot be termed to be perverse and is a possible view on the evidence."*

13. Even in a recent decision of the Apex Court in the case of "**MOOKKIAH AND ANR. VS. STATE, REP. BY THE INSPECTOR OF POLICE, TAMIL NADU"**, reported in **AIR 2013 SC 321**, the Apex Court in para 4 has held as under:

> "*4. It is not in dispute that the trial Court, on appreciation of oral and documentary evidence led in by the prosecution and defence, acquitted the accused in respect of the charges leveled against them. On appeal by the State, the High Court, by impugned order, reversed the said decision and convicted the accused under Section 302 read with Section 34 of IPC and awarded RI for life. Since counsel for the appellants very much emphasized that the High Court has exceeded its jurisdiction in upsetting the order of acquittal into conviction, let us analyze the scope and power of the High Court in an appeal filed against the order of acquittal. This Court in a series of decisions has repeatedly laid down that as the first appellate court the High Court, even while dealing with an appeal against acquittal, was also entitled, and obliged as well, to scan through and if need be reappreciate the entire evidence, though while hoosing to interfere only the court should find an absolute assurance of the guilt on the basis of the evidence on record and not merely because the High Court could take one more possible or a different view only. Except the above, where the matter of the extent and depth of consideration of the appeal is concerned, no distinctions or differences in approach are envisaged in dealing with an appeal as such merely because one was against conviction or the other against an acquittal. [Vide State of Rajasthan vs. Sohan Lal and Others, (2004) 5 SCC 573]"*

14. It is also a settled legal position that in acquittal appeals, the appellate Court is not required to rewrite the judgment or to give fresh reasonings, when the reasons assigned by the Court below are found to be just and proper. Such principle is laid down by the Apex Court in the case of "**STATE OF KARNATAKA VS. HEMAREDDY", AIR 1981, SC 1417**, wherein it is held as under:

> "*...This Court has observed in Girija Nandini Devi V. Bigendra Nandini Choudhary (1967) 1 SCR 93:(AIR 1967 SC 1124) that it is not the duty of the Appellate Court on the evidence to repeat the narration of the evidence or to reiterate the reasons given by the trial Court expression of general agreement with the reasons given*

> *by the Court the decision of which is under appeal, will ordinarily suffice."*

15. In a recent decision, the Hon'ble Apex Court in "**SHIVASHARANAPPA & ORS. VS. STATE OF KARNATAKA", JT 2013 (7) SC 66** has held as under:

> *"That appellate Court is empowered to reappreciate the entire evidence, though, certain other principles are also to be adhered to and it has to be kept in mind that acquittal results into double presumption of innocence."*

16. Further, in the case of "**STATE OF PUNJAB VS. MADAN MOHAN LAL VERMA", (2013) 14 SCC 153**, the Apex Court has held as under:

> "*The law on the issue is well settled that demand of illegal gratification is sine qua non for constituting an offence under the 1988 Act. Mere recovery of tainted money is not sufficient to convict the accused when substantive evidence in the case is not reliable, unless there is evidence to prove payment of bribe or to show that the money was taken voluntarily as a bribe. Mere receipt of the amount by the accused is not sufficient to fasten guilt, in the absence of any evidence with regard to demand and acceptance of the amount as illegal gratification. Hence, the burden rests on the accused to displace the statutory presumption raised under Section 20 of the 1988 Act, by bringing on record evidence, either direct or circumstantial, to establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as referred to in Section 7 of the 1988 Act. While invoking the provisions of Section 20 of the Act, the court is required to consider the explanation offered by the accused, if any, only on the touchstone of preponderance of probability and not on the touchstone of proof beyond all reasonable doubt. However, before the accused is called upon to explain how the amount in question was found in his possession, the foundational facts must be established by the prosecution. The complainant is an interested and partisan witness concerned with the success of the trap and his evidence must be tested in the same way as that of any other interested witness. In a proper case, the court may look for independent corroboration before convincing the accused person."*

17. The Apex Court recently in ***Jayaswamy vs. State of Karnataka, (2018) 7 SCC 219***, has laid down the principles for laying down the powers of appellate court in re-appreciating the evidence in a case where the State has preferred an appeal against acquittal, which read

as follows:

> *"10.It is by now well settled that the Appellate Court hearing the appeal filed against the judgment and order of acquittal will not overrule or otherwise disturb the Trial Court's acquittal if the Appellate Court does not find substantial and compelling reasons for doing so. If the Trial Court's conclusion with regard to the facts is palpably wrong; if the Trial Court's decision was based on erroneous view of law; if the Trial Court's judgment is likely to result in grave miscarriage of justice; if the entire approach of the Trial Court in dealing with the evidence was patently illegal; if the Trial Court judgment was manifestly unjust and unreasonable; and if the Trial Court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of the ballistic expert etc. the same may be construed as substantial and compelling reasons and the first appellate court may interfere in the order of acquittl. However, if the view taken by the Trial Court while acquitting the accused is one of the possible views under the facts and circumstances of the case, the Appellate Court generally will not interfere with the order of acquittal particularly in the absence of the aforementioned factors.*
>
> *.....It is relevant to note the observations of this Court in the case of Ramanand Yadav vs. Prabhu Nath Jha & Ors., (2003) 12 SCC 606, which reads thus:*
>
> *"21.There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to re-appreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not."*

18. The Apex Court recently in ***Shailendra Rajdev Pasvan v. State of Gujarat, (2020) 14 SC 750***, has held that the appellate court is reversing the trial court's order of acquittal, it should give proper weight and consideration to the presumption of innocence in favour of accused, and to the principle that such a presumption sands reinforced,

reaffirmed and strengthened by the trial court and in ***Samsul Haque v. State of Assam, (2019) 18 SCC 161*** held that judgment of acquittal, where two views are possible, should not be set aside, even if view formed by appellate court may be a more probable one, interference with acquittal can only be justified when it is based on a perverse view.

19. We have scrutinized the evidence as read by Sri N.K. Srivastava, learned A.G.A. appearing for the State who has taken us through the entire record. The whole testimony of the prosecutrix has been threadbare discussed by the learned Sessions Judge. While going through the deposition of the prosecutrix, the settled legal position of law is that she cannot be treated to be accomplish and her evidence is to be seen with non microscopic eyes. The learned Sessions Judge has threadbare discussed that the F.I.R. was not only belated but it was highly belated, namely, the incident took place on 6.2.2014 and the F.I.R. was lodged on 21.3.2014. Even if we did not agree with the learned Sessions Judge on this aspect, the second aspect would be more important for our purpose. The learned Sessions Judge has considered the the decisions in **Ravindra Mahto Vs. State of Jharkhand, 2006 (54) ACC 543 (SC) & Ravi Kumar Vs. State of Punjab, 2005 (02) ACJ 505.**

20. Learned Sessions Judge has very categorically come to the conclusion that there was no rape committed by the accused. The testimony of prosecutrix has not been believed by the learned Sessions Judge. It can be said that when the door was open, the accused was there for 20-25 minutes and her children were there, she could have started shouting. When the accused is said to have removed his trousers and went to bathroom that time also she could have raised alarm but the same was not raised.

21. The medical evidence goes to show that there was no internal injuries. The spermatozoa which belong to the accused was not present in the vaginal swab. Had it been a rape, some internal injuries could have possible.

22. Hence, in view of the matter & on the contours of the judgment of the Apex Court, we have no other option but to concur with the learned Sessions Judge. The appeal sans merits and is dismissed. The record and proceedings be sent back to the Tribunal.

23. We are thankful to Sri N.K. Srivastva, learned A.G.A. for ably assisting the Court.

Order Date :- 23.10.2021
DKS