

AFR

Neutral Citation No. - 2024:AHC:159996-DB

Court No. - 47

Case :- GOVERNMENT APPEAL No. - 443 of 2024

Appellant :- State of U.P.

Respondent :- Balwan Singh And 3 Others

Counsel for Appellant :- G.A.

Counsel for Respondent :- ,Subhash Chandra Tiwari

Hon'ble Rajiv Gupta,J.

Hon'ble Ram Manohar Narayan Mishra,J.

1. Heard Sri Jitendra Kumar Jaiswal, learned A.G.A. for the State/appellant and Sri Subhash Chandra Tiwari, learned counsel for respondent No.1 to 4. We have perused the record and also the impugned judgment under challenge in this appeal.

2. The trial court has acquitted the accused-respondents for charge under Sections 366 and 376 IPC, vide judgment and order dated 08.04.2015 passed by learned Additional District and Session Judge/FTC, Kanpur Dehat in S.T. No.233 of 2010 (State Vs. Balwan Singh and others). This appeal under 378(3) of the Criminal Procedure Code, 1973 (hereinafter referred to as Cr.P.C.) has been preferred at the instance of the State as Government Appeal against the impugned judgment and order.

3. The brief facts of the case as appeared from FIR and other material on record are that the defacto complainant Munna Lal had given a written report on 22.04.2009 at Police Station concerned, on the basis of which Chick FIR (Ext. Ka-2) was drawn by Head Constable Sudhakar Singh on 22.4.2009 at 11:00 hours under Section 363 and 366 IPC at Police Station Rura, District Kanpur Dehat. The informant stated in his written report that on 07.04.2009 his minor daughter whose date of birth was 15.09.1993 had gone with her younger brother Rohit to the market to take medicines, at around 10:00 am accused Balwan Singh and Akhilesh who were

coming by a tractor met them and got his daughter and son sit on the tractor. On some pretext they send his son Rohit to take guthka for them on way and when he returned back to the place where he was dropped by accused persons, he found neither the accused nor tractor nor his sister (victim), thus Rohit came back to home and narrated the incident to the informant. The informant embarked on search of his missing daughter, and in that sequence Akhilesh met him in the evening on the bank of a canal in Ballia and on making a pointed query he told that his brother Siya Ram and his brother-in-law (Bahnoi) who belonged to Panki took away his daughter from Madhauri by making her sit on a Marshal Jeep. The informant raised an apprehension in FIR, if his daughter be not recovered immediately she might be killed by the accused persons.

4. The police carried out investigation in the case and victim was recovered on 03.05.2009 by police. On secret information on 03.05.2009 at 17:15 hours she was recovered alongwith main accused Balwan Singh. Both the accused and victim were apprehended by police near staircase of over-bridge situated towards North of Railway Station Rura. The accused Balwan Singh was taken into custody by police and recovery cum arrest memo was prepared, which is placed on record as Ext. Ka-6. The investigating officer recorded the statement of the victim and other witnesses prepared site plan of place of occurrence, which is marked as Ext. Ka-7. In medico legal examination of victim which was carried out by C.M.O. District Women Hospital, Kanpur Dehat, no mark of injury was seen on private part, hymen was torn and healed, vagina admitted two fingers easily. Referred to Radiologist for Xray, for ossification test for age examination. In the opinion of lady doctor she was found to be used to sexual intercourse and no definite opinion about rape could be given. In age determination report Ext. Ka-5, her age was found to be more than 18 years, on the basis of her radiological examination. The Investigating Officer submitted chargesheet against named accused persons Balwan Singh, Akhilesh, Siya Ram and Vimal Chandra Tiwari for committing and

facilitating the offence of kidnapping and rape. The tractor in which the victim was allegedly kidnapped was taken into custody by police, which is marked as Ext. Ka-9.

5. Learned Additional Chief Judicial Magistrate, Kanpur Dehat committed the case for trial to the court of session, as offence was triable by court of session. Learned Additional Session Judge Court No.3, Ramabai Nagar framed charge under Sections 366 and 376 IPC, against chargesheeted accused Balwan Singh, Akhilesh, Siya Ram and Vimal Chandra Tiwari, charges were read-over and explained to the accused persons who denied the charge and claimed to be tried.

6. The prosecution examined witnesses PW-1 Munna Lal the informant, PW-2 victim, PW-3 SI Sudhakar Singh (then Head Constable) placed before, the author of FIR and GD Entries of registration of this case. PW-4 Pushpa Gurnani who conducted medico legal examination of the victim, PW-5 SID Data Ram the investigating officer. After conclusion of prosecution evidence, the accused were examined under Section 313 Cr.P.C. with a view to seek their explanation regarding evidence and circumstances appearing against them during trial. The accused persons stated in their statement under Section 313 Cr.P.C. that they were falsely implicated in the case, they have committed no offence, the witnesses had deposed against them falsely.

7. Learned trial judge after hearing the submissions of both the sides and appreciating their evidence on record observed that on the basis of evidence on record it is proved that the victim had left her home alongwith accused on her own volition and will. She had attained age of majority as per medical age determination report. She never tried to seek help of any person enroute to her journey. The tractor passed through Madhauri village at 10:00 am, but she had not ask for help from any person as admitted by her. Thereafter she was taken by Marshal Jeep,

even then she did not make any effort to seek help. She resided at the residence of Vimal Tiwari (accused) in Panki, but even there she did not make any complaint to wife of Vimal Tiwari or person in vicinity she even did not try to raise alarm by shouting. All these facts and circumstances which proved that she went along with the accused on her own volition.

8. Learned trial judge placed reliance on a judgment of this Court reported as **Kumabuddin Vs. State of U.P. 2013 (3) JIC 61**. Learned trial court gave a finding that victim was more than 18 years on the date of incident and she left her home on her own volition. Therefore, it is discerned that she was neither taken by the accused against her will, nor was subjected to sexual intercourse against her will. Therefore charge under Section 366 and 376 IPC has not been proved beyond reasonable doubt. Consequently accused persons are acquitted of charges under Sections 363 and 366 IPC.

9. Learned A.G.A. for the State-appellant submitted that the order of acquittal recorded by learned trial court is not justified in the eyes of law, as prosecution established the case against the accused persons. He further submitted that learned additional session judge has misread the evidence adduced during trial. Both the witnesses of facts PW1 informant the father of the victim and PW2 victim have fully proved the guilt of the accused respondents, but the learned trial court has taken erroneous approach while disbelieving the sworn testimony of the complainant as well as victim before the court. The victim has categorically stated in her evidence that the applicant had committed bad work, which implies that she was subjected to rape by her. She has even explained the said bad work in her testimony, but learned trial court has misappreciated the evidence and passed impugned judgment of acquittal, which is liable to be set-aside.

10. Per-contra, learned counsel for the respondent No.2 to 4 submitted that there are number of discrepancies in prosecution evidence. The FIR is highly belated which finds no explanation. The victim and the accused were caught together by police near over-bridge situated in the vicinity of railway station. She never raised alarm to seek assistance of passersby while she was allegedly taken by the accused. She never made complaint to wife or family members of co-accused Vimal Tiwari in whose house she was allegedly confined by main accused Balwan during the period of her kidnapping. She was found major in medico legal examination and her date of birth recorded in school record was not proved by prosecution. Therefore, no reliance can be placed on date of birth relied by prosecution on the basis of her academic records. The star witnesses of the case Rohit who happened to be minor brother of the victim and son of the informant in whose presence she was allegedly kidnapped by accused Balwan and Akhilesh was not produced in any evidence, whose testimony would have thrown some light on actual sequence of events. There is clear contradiction in stand of the informant and victim on one hand and that of investigating officer on the other hand with regard to place of arrest and recovery of the accused and victim.

11. PW-1 and PW-2 have stated in their statement that victim was recovered by police from the house of accused Vimal Tiwari at Panki, whereas the investigating officer has stated that she was recovered on 03.05.1999 near Rura Railway Station. Therefore one thing is certain that either the victim or the investigating officer had taken false stand before the court with regard to recovery of the victim and arrest of the accused Balwan. The learned trial court has rightly extended benefit of doubt in favour of the accused persons and recorded verdict of acquittal, as evidence adduced by prosecution does not inspire confidence.

12. In the present case, if we briefly examine the facts of the case and evidence adduced during trial we find that incident occurred on

07.04.2009. Whereas FIR was lodged after 15 days of the incident, this inordinate delay does not find any plausible explanation either in FIR or in evidence of the witnesses. PW-1 Munna Lal is not an eye witness and only the informant in the case is the father of the victim. The main witness Rohit who is minor son of the informant and brother of the victim was not examined during trial for reasons best known to prosecution. The victim remained in the company of accused Balwan as per her testimony for 25-26 days, but she never raised any alarm to seek assistance of passersby while on journey or made complaint to the wife of family members of accused Vimal Tiwari in whose house she was allegedly confined. Her medico legal examination report does not corroborate the allegations that she was subjected to sexual assault, as no mark of external or internal injury were found on her person. She was found to be aged around more than 18 years in her medical age determination report. No evidence was led to prove the prosecution version that she was below 18 years of age at the time of incident.

13. Learned trial court has rightly observed that she appears to be a consenting party. 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."

14. 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 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.

[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."

15. 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.

16. The Apex Court in "**SHIVASHARANAPPA & ORS. VS. STATE OF KARNATAKA**", JT 2013 (7) SC 66 has held as under:

"That appellate Court is empowered to reappraise 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."

17. The Apex Court recently in **Jayaswamy vs. State of Karnataka, (2018) 7 SCC 219**, has laid 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 acquittal. 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 stands 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 perused the deposition of prosecution witnesses, documents proved during trial, arguments advanced by learned counsel for the parties and meticulously examined the judgment under appeal. The reasoning given by learned Additional Session Judge is logical and legal as well. The finding of learned trial court need not be disturbed in present appeal for reasons stated in foregoing discussion.

20. The factual scenario in the present case does not permit us to take a different view than that of taken by learned trial court. We find no reason to disagree with the reasoning and finding of learned trial court, thus we concur findings of the court below.

21. Consequently keeping in view the facts and circumstances of the case, evidence adduced during trial and reasons given by learned trial court and binding precedent of Apex Court as cited above, we are of the considered view that there is no good ground to grant leave to appeal in the instant case, which accordingly is refused, consequently the government appeal also stands **dismissed**, at the stage of admission itself.

22. Let lower court record be send back immediately for necessary action alongwith certified copy of this judgment.

Order Date :-13.09.2024

Ashish/-