SUPREME COURT OF INDIA

Mallappa Siddappa Alakanur

Vs.

State of Karnataka

Crl.A.No.1055 of 2002

(V.S. Sirpurkar and R.M. Lodha JJ.)

07.07.2009

JUDGMENT

V.S. SIRPURKAR, J.

1. Three appellants who were original accused Nos. 2, 3 and 4 have come up against the conviction for the offences under Section 302 read with Section 149, Indian Penal Code. They were acquitted by the Sessions Judge. However, the High Court allowed the appeal against their acquittal. As many as six accused persons were tried before the Principal Sessions Judge, Bijapur on the basis of the charge-sheet filed by the police on the allegation that on 22.06.1996 at about 5 p.m. they were the members of unlawful assembly in prosecution of the common object thereof and committed murder of one Malakari Sidda S/o Kariyappa Alakanur. They were also named in the charge-sheet for the offences under Sections 148, 302, 504 read with 149, IPC.

2. The First Information Report was given by one Ningappa Mudakappa Kamari complaining therein that the complainant's sister's husband was involved in a murder case and was in jail. The complainant had put up a hut in the land of Kariyappa Alakanur situated at Yaragatti and started cultivating it. It was further alleged that Kariyappa had three sons and the eldest was Malakari Sidda. The father of Kariyappa was involved in the murder of one Maruti Alakanur and on this account the accused persons who were the relatives of the said Maruti nurtured a grudge against Kariyappa Alakanur. It is stated that on 22.06.1996 the deceased and the son of complainant were attending to the work of preparing jaggery from sugarcane. When the work was over, his son

Mahadev Ningappa Kamari and deceased Malakari Sidda went to have a bath in the canal by the side of the land of Dattapant Kulkarni. Since they did not return early the complainant went towards the said canal and saw all the accused persons near the canal who were armed with various weapons. They lifted the said Malakari Sidda and carried him for some distance and committed his murder. This was seen by his son Mahadev and he being a friend ran towards their garden hut and, thereafter, this witness came on a bicycle along with Arjun Ishwar Honamore and Sanjeev Mahadev Honamore. He also mentioned that the accused persons had gone away along with blood stained sickles in their hands towards Yaragatti village. He had found that Malakari Sidda was dead and his head was almost completely severed from the trunk. The police reached the spot and found the body and conducted the necessary investigation. The dead body was sent for post-mortem where 10 serious wounds were found in it. The weapons were seized from the accused they being M.Os. 8 and 10. On the basis of the investigation the charge-sheet followed and the accused persons were charged as aforesaid.

3. At the stage of evidence, the complainant turned hostile. However, his son Mahadev Ningappa Kamari, PW-7 stood firmly and deposed against the accused, though he was about 13-14 years old. PWs-5 and 6 were also examined in support of the prosecution. The Sessions Judge accepted the evidence of PW-5, the complainant, in part. However, commented that the evidence of PW-7 who was the star witness, was unnatural. The Trial Court commented that his evidence did not match with the medical evidence regarding the time of death of the deceased as according to this witness the deceased had not eaten anything during the day. However, the reminiscences of food were found which suggested that his time of death would be about 11 O'clock or 12 O' clock in the noon and not at 5 p.m. as deposed by the witness. Again the learned Sessions Judge also found favour with the fact that though this witness was available on the night when police visited the spot, his statement was not recorded under Section 161 Cr. P.C. The Sessions Judge also found that there were material contradictions in the evidence of this witness and his father PW-5. Insofar as PW-6, Ningappa is concerned, he had seen the accused persons proceeding towards the garden land at about 4:30 p.m. and at that time the accused having blood stained sickles in their hands and the sickles of the accused were also blood stained.

4. The Sessions Judge discussed the evidence of Siddappa, PW-2 who was a panch witness of the seizure of the blood stained clothes of the accused persons as also on the discovery effected by the accused No. 2 in pursuance whereof the sickle was recovered on the basis of the information given by the accused No.2. The Sessions Judge also discussed the evidence of PWs-3 and 4, Arjuna Iswhara and Muttappa respectively, who had turned hostile. After discussing the evidence of the investigating officers the Sessions Judge came to the conclusion that the prosecution had failed to prove the evidence and, therefore, awarded the benefit of doubt to all the accused persons.

5. In appeal against the acquittal filed by State of Karnataka against all six accused persons, the High Court allowed the same only in case of A-1, A-2, A-3 and A-4, namely, Pradhani Siddappa Alakanur, Mallappa Siddappa Alakanur, Dundappa Yamanappa Kabbur and Siddappa Yamanappa Kabbur, respectively.

6. Since A-1 Pradhani Siddappa Alakanur died during the criminal proceedings before the High Court this appeal abated against him. The present appeal, therefore, has been filed only by A-2, Mallappa Siddappa Alakanur, A-3, Dundappa Yamanappa Kabbur and A-4, Siddappa Yamanappa Kabbur. We are, therefore, concerned only with these three accused.

7. The learned senior counsel appearing on behalf of the appellants severally criticized the approach adopted by the High Court in setting aside the acquittal recorded by the Sessions Judge. In that, the learned senior counsel claimed that the High Court had completely ignored the principles laid down by this Court while dealing with appeal against acquittal. It was then pointed out by the learned senior counsel that though the High Court had power to re-appreciate the evidence in appeal against acquittal, in this particular case the High Court, while appreciating the evidence of the child witness and the other witnesses was not alive to the fact that the demeanour of the witnesses was seen by the Trial court which had chosen to disbelieve the witnesses. It was suggested that the evidence of PW-5 was of no use because he was declared hostile and the evidence of PW-7 was that of a child witness who could be influenced by the prosecution. Further, it was suggested that the High Court had not given any explanation for the inherent weakness of a child's testimony and even on merits the evidence of PW-7 could not be accepted. It was pointed out that the fact that, though available, the statement of this witness was not recorded immediately, was left unconsidered by the High Court. Further, the discrepancy of medical evidence with the prosecution case was also ignored by the High Court.

8. Lastly, almost a desperate argument was made that even if the prosecution evidence could be believed, accused Nos. 3 and 4 deserved to be treated differently then accused No.2 as they could not be said to have any intention to commit murder of the deceased.

9. As against this, the learned counsel for the State refuted the arguments and pressed into service a few reported decisions suggesting that even in an appeal against acquittal, the High Court's power to re- appreciate the evidence and to come to the conclusion independently of the judgment of the acquittal remained undeterred. The State counsel has supported the judgment and criticized the judgment of the Sessions Judge that the appreciation of evidence by the Trial court was not only perfunctory but whole approach was perverse and, therefore, the High Court had rightly set aside the said judgment.

10. On these conflicting claims we have to decide as to whether the High Court was right in upsetting the finding of acquittal reached by the Trial Court and convicting the three appellants herein.

11. The course to be taken by the High Court in dealing with the appeal against acquittal is now well established. It is not and can never be that the High Court is bound by the finding of the Sessions judge and cannot re-appreciate the evidence. The only requirement of law is that the High Court should be sufficiently mindful of the presumption of innocence of the accused which presumption is reiterated by the finding of acquittal recorded by the Trial Court. The High Court, therefore, must come to the conclusion that the finding of acquittal by the Trial court is totally unsustainable and further that the appreciation of the evidence of the Trial Court tends to be perverse and as such cannot be supported. If the High court comes to these conclusions, then the whole appeal is open to the High Court and the High Court is justified in re-appreciating the evidence and also to come to a different finding.

12. The High Court, firstly, found fault with the Trial Court's approach in rejecting the testimony of the witness on immaterial and unsubstantial contradictions not relating to vital and relevant aspects. The High Court also reiterated the law laid down by this Court in Ramesh S/o Laxman Gawli Vs. State of M.P. Ors.Etc. reported in 2000 (1) SCC 243 to the effect that the contradictions, inconsistencies, exaggerations or embellishments, minor discrepancies or variance in the evidence

do not make the prosecution doubtful. On the other hand they lend credibility to the prosecution version. Even as regards the principles of dealing with the judgment of acquittal, the High Court relied on the judgment reported as Allarakha K. Mansuri v. State of Gujarat [2002 (3) SCC 57] wherein this Court has reiterated the duty to avoid miscarriage of justice arising from acquittal of guilty. Therefore, it cannot be said that the High Court was not alive to the fact that it was dealing with the judgment of acquittal. The high court has correctly proceeded to consider the evidence.

13. PW-7 is a star witness in this case. He was all through with the deceased on that fateful day, since they were working together on jaggery plant. He had also, as usual, gone for taking bath along with the deceased and when they finished bath, he suddenly found A-3 and A-4, calling the deceased and whisking him away to the distance of about 100 yards. The third accused held the legs of the deceased, while the fourth accused held the hands and thus, completely overpowered him and in that state, A-1 and A-2 assaulted at the neck of the accused. The other accused persons were provoking not to leave the deceased. All this time, the deceased was making hue and cry, which was most natural. The witness being a boy of 13 or 14 years, obviously got frightened and ran away from that spot and where he met his father PW-5 and told him what had happened. This witness has graphically described the shirt worn by the deceased, his towel and identified the clothes in the Court. He even identified the pant of the deceased. The waist thread of the deceased was also identified, which was blood stained. He had further identified the clothes worn by A-3, as also the sickles used by A-1 and A-2, who committed the murder. The green shirt of A-3 (M.O. 7) and sickles used by A-1 and A-2 (M.Os. 8 and 10 respectively) were also identified by the witness. He was mostly cross examined on persons present on the spot, which was of no consequence, because the incident did not take place at the jaggery land.

14. The major reason why this witness was disbelieved was because of the food articles found in the stomach of the deceased, which could only be if the deceased had eaten something 3 or 4 hours before the death. From this, the Trial Court jumped to the conclusion that the boy must have been done to death not at 4 or 5' O clock in the evening as claimed by the witness, but at about 11 or 12` O clock in the morning, since he had eaten his food at 8'O clock according to PW-7. Now, one sentence in the cross examination that the deceased did not take lunch in the farm land, was reiterated by the Trial Court to hold that the whole story of PW-7 was unnatural. It was got admitted in the cross examination that he was sitting near the dead body of the deceased. He also reiterated that his father again came to the spot at about 9 p.m. alongwith PSI. However, he was interrogated at 12 pm next day. From this, the Sessions Judge came to the conclusion that the boy must have been influenced and that there was no explanation for not recording his statement at night itself. Both the circumstances about the food, as well as, late recording are most insignificant circumstances and the High Court has correctly rejected the same. Insofar as the medical aspect about the food is concerned, the High Court has considered the same while considering the medical aspect. The High Court has also considered the criticism that the number of injuries on the body of the deceased did not tally with the account given by this witness. The High Court has relied on the judgment in Masjit Tato Rawool Vs. State of Maharashtra reported in AIR 1971 SC 2119, Shivaji Sahebrao Vs. State of Maharashtra reported in AIR 1973 SC 2622 and P. Venkaiah Vs. State of A.P. reported in AIR 1985 SC 1715 and held that too much reliance could not be placed on such slippery steps regarding the reminiscences of food articles found in the stomach of the deceased. The High court has attributed that discrepancy to the fact that PW-7 might not have noted that the deceased had eaten something or that being a young children they had the habit of eating something between the meals and only such undigested food must have been found in the stomach of the deceased.

15. Similarly, the High Court has discussed the number of injuries which did not tally with the eye-witness' account, holding that it may be that the witness might not have seen the other injuries being inflicted and further in a conflict between the ocular evidence and the medical evidence, if the testimony is acceptable, trustworthy and reliable, the same should be preferred to the medical evidence. We feel the approach of the High Court on these aspects was absolutely correct and the Trial Court was totally wrong in recording the finding of acquittal on such insignificant circumstances. A doubt by the criminal Court should not be that of doubting Thomas, it should be a real and tangible doubt. A doubt regarding the veracity of the evidence of the witness should be a reasonable doubt and the evidence cannot be simply brushed aside on such minor aspects, as has been done by the Sessions Judge. Same thing can be said about the other circumstance that his submission was not recorded on the same day. The Trial Court has led stress on this insignificant aspect. True it is that the statement should have been recorded in the same night, however, one can imagine a situation of a young boy, who had seen a ghastly murder having been committed and then his being subjected to an ordeal of giving the statement in the dead of the night. The delay in recording the submission is undoubtedly a circumstance which has to be taken into consideration, but at the same time, the Courts must be reasonable in this aspect also and should see as to whether the late recording of the statement in the dead of the night of a tender aged boy of 13 was possible and feasible. The further thing which has to be considered is as to whether such delay has affected his testimony or whether there was any real apprehension of the boy being influenced by any other person or the police. In the absence of any such possibility, the evidence of the boy could not be thrown out, more particularly, when the boy had faced the ordeal of the cross examination in a very efficient manner. The usual police apathy to record statements in the late hours can also be another factor to be considered.

16. We have, ourselves, seen the cross examination and very strangely, the witness was asked the questions about the actual assaults in his cross examination, thereby actually admitting his presence at the spot. He explained in his cross examination that A-3 and A-4 attacked the boy and threw him down on the ground and he identified the accused even at that time. His not shouting can also be explained that he was feeling extremely apprehensive on account of such dastardly attack on the deceased, who was his friend. Graphic description as to how the attack was made by A-1 and A-2 with the help of A-3 and A-4 has come in para 7, in his cross examination. The omissions brought out in para 9 are also of miniscule nature. His story that A-3 and A-4 whisked away the deceased and thereafter, overpowered him and A-1 and A-2 committed the dastardly attack on the helpless boy, however remained unshaken throughout the cross examination. The reasons given by the Sessions Judge to reject the evidence appear to be non-existent. In fact, the Trial Court started with an expression of doubt, holding that the evidence appears to be unnatural. There was nothing unnatural in the evidence. His presence at the spot was well explained. The story that he went alongwith the deceased to take bath after the work at the jaggery plant, also remained unshaken and ultimately his story as to how the attack occurred has also remained unshaken in his cross examination. Very strangely, the Sessions Judge calls him an interested witness. In our opinion, his evidence could not be rejected on that ground. If he was actually the cousin of the deceased, he could not change that situation. There is neither evidence nor any suggestion that this boy was tried to be influenced either by his father or the relations of the deceased. We have already stated that the omissions proved at Exhibits D1(A) and D1(B) are most insignificant and, therefore, we are quite satisfied with the finding of the High court that the evidence of this witness was credible.

17. The High Court has then discussed the evidence of PW-5, the father of PW-7. We completely fail to understand as to why PW-5 was declared hostile. He was perhaps declared hostile because he

refused to state that he had seen the murder and stuck to the story that he was told by his son about it. In his evidence, he reiterated that his son, i.e., PW-7 and the deceased left for taking the bath after the completion of work as per their practice and since they did not turn up for a long time, he went and saw that his son was running at a distance of 150-250 ft. from the said chamber. He had stated that he had not seen the accused persons cutting the neck, however, he had actually seen all the accused persons, who ran away towards the Yaragatti. Great stress was led on the fact that in Exhibit P-8 FIR, he had stated that when he went near the land, the six accused persons attacked the boy and committed his murder. During his evidence, however, he had stated that the accused persons had already assaulted and murdered the deceased before he and his son reached the spot. He had also very specifically stated that he had not seen the accused persons cutting the neck of the deceased. In our opinion, this was no reason to declare him hostile. It may be that during his narration, the person taking down the report may have committed this mistake. That, however, will not be fatal to his evidence. In his cross examination, he reiterated that he had stated that his son had seen the whole incident. One very significant sentence in Exhibit P-8 is missed by the Trial Court. That sentence is:-

seeing this situation, my son Mahadev apprehended and ran towards our crushing house and immediately I made hue and cry.

Therefore, it is clear that the witness has referred and corroborated the testimony of PW-7 that he ran towards his father and thereafter, the father and son, PW-5 and PW-7 respectively, went towards the spot, where the deceased was lying, and at that time, the accused persons fled away from the spot. In our opinion, the witness was truthful and his evidence should not have been rejected by the Trial Court for such small and insignificant thing. After all, he is a villager and there is every possibility of the person who took down the report on his dictation, committing the mistake. Otherwise, the evidence of this witness has remained unshaken. Much was said of the fact that in para 8 of his evidence, he said that his son was near the dead body and on that day, the police interrogated his son Mahadev at night, whereas PW-7 had said that his submission was recorded on the next day at 12' O clock. Both the things can be true. It may be that though PW-7 was interrogated at night, his statement came to be recorded on the next day. We do not find any such discrepancy, so as to reject the evidence of both. The other omissions brought in the cross examination of this witness are wholly insignificant. In our opinion, the High Court has correctly appreciated the evidence and in recording a finding that there was no opportunity to this witness to concoct any false case, no error is committed. We must note that this witness was not treated as hostile, on the other hand only a permission to cross-examine him was sought. Even if he was declared to be hostile, the law is now clear that that by itself does not wash out his evidence. It is not correct to say that the high Court has not considered the evidence in a fair and correct manner. On the other hand, all the points argued before us seem to have been considered by the High Court with great care.

18. Similar thing has happened about the evidence of PW-6. He was the one, who had seen the accused persons running away with the sickles and the clothes of A-1 to A-4 being blood stained. He had also identified the blood stained weapons and the clothes. We do not find anything unnatural in the evidence of this witness.

19. We have seen the medical evidence of Dr. Shobha PW-15, who had conducted the Post mortem and had took the ten injuries suffered by the deceased. Much was said that the eye-witness PW-7 had not described the assault, so that it could suggest causing ten injuries. A fact cannot be forgotten

that here was a witness of the tender age and he was not expected to explain each and every injury. He has deposed about the participation of A-1 and A-2 and the crucial part played by A-3 and A-4. The cross examination of the Doctor is absolutely perfunctory. The evidence of Investigating Officer supports the evidence of PWs 1 and 2, who are the panch witnesses. PW-2 has proved the discovery at the hands of A-1, who is dead, as also the discovery made by A-4. In his evidence, the Investigating Officer has also said about the articles being sent to the Chemical Examiner at Bangalore and had also referred to the queries seeking the opinion of the Doctor as to whether the external injuries could be caused by the aforementioned weapons seized by him. Lastly, the other Investigating officer PW-18 Gurrapagouda also suggested that he had arrested the A-1 and A-2, apart from the fact that he had referred to the various panchanamas including the seizure panchanama of the blood stained clothes etc. There is nothing in the cross examination of this Investigating Officer either. Therefore, we ourselves are satisfied that the offence was completely and totally proved as against the four accused persons. We are fully satisfied that this was a case, where the appreciation of the evidence at the hand of the Trial court was erroneous and faulty and that by the High Court was correct.

20. We need not reiterate on the case law in Dila Anr. Vs. State of U.P. reported in 2002 (7) SCC 450. The three Judge Bench of this Court has held that in an appeal against the acquittal, the High Court has same powers which the Trial Court has in examining the evidence and if it comes to the conclusion that the view taken by the Trial Court was unreasonable or against the weight of evidence, it could reject the finding recorded by the Trial Court. In this case, the High Court has not rejected the findings by the Sessions Court, merely because it could come to the other findings. The High Court has given adequate reasons in coming to the findings that it did. The two Judge Bench of this Court in Bhagwan Singh Ors. Vs. State of M.P. reported in 2002(4) SCC 85 has held that the paramount consideration of the Court is to ensure that miscarriage of justice is avoided.

21. We are, therefore, convinced that the High Court has acted correctly in setting aside the judgment. The Learned Senior Counsel Shri Rangaramanujam, appearing on behalf of the appellants, however, by way of his last submission reiterated that the case of A-3 and A-4 is different from the case of A-1 and A-2. We do not think so. In fact, A-3 and A-4 have played a very major role in the whole affair. They were the one, who started the assault on the poor boy, nobbed him down, carried him away and overpowered him. Therefore, there may not be any dispute about the role played by them. They are equally guilty as A-1 and A-2. In short, there is no merit in this appeal and it is dismissed accordingly.

(V.S. Sirpurkar and R.M. Lodha JJ.)
07.07.2009