SUPREME COURT OF INDIA

State of Rajasthan

Vs.

Firoz Khan @ Arif Khan

Crl.A.No.750 of 2006

(Abhay Manohar Sapre and Ashok Bhusan,JJ.,)

17.05.2016

JUDGMENT

Abhay Manohar Sapre,J.,

1This appeal is filed by the State of Rajasthan against the final judgment and order dated 28.10.2005 passed by the High Court of Judicature for Rajasthan at Jodhpur in D.B. Criminal Leave to Appeal No. 227 of 2005 whereby the Division Bench of the High Court dismissed the application filed by the appellant herein seeking leave to file appeal under Section 378(3) of the Criminal Procedure Code, 1973 (hereinafter referred to as "the Code") against the judgment dated 13.08.2004 passed by the Sessions Judge, Jaisalmer in Sessions Trial Case No. 48 of 2002.

2. Keeping in view the short point involved in the appeal, it is not necessary to state the facts in detail except few to appreciate the grievance of the appellant.

3. The respondent (accused) was prosecuted and tried for commission of an offence of murder of one Liley Khan aged around 11 years under Section 302 of the Indian Penal Code, 1860 (hereinafter referred to as "IPC") pursuant to lodging of FIR No 44/2002 in Police Station Ramgarh, District Jaisalmer in Sessions Trial Case No. 48 of 2002 in the Court of District and Sessions Judge, Jaisalmer. The prosecution adduced evidence in support of their case.

4. By judgment dated 13.8.2004, the Session Judge on appreciating the evidence adduced by the prosecution acquitted the respondent of the charge of murder by giving him benefit of doubt.

5. The State of Rajasthan, felt aggrieved of respondent's acquittal, filed application for leave to appeal before the High Court under Section 378 (3) of the Code.

6. By impugned order, the High Court declined to grant leave and accordingly rejected the application made by the State. It is against this order, the State has filed this appeal by way of special leave petition.

7. Notice of lodgment of petition of appeal was served on the respondent but despite service of notice, the respondent has not appeared.

8. Heard learned counsel for the State of Rajasthan.

9. Learned counsel for the appellant-State has made only one submission. According to him, the High Court while dismissing the application for leave to appeal did not assign any reason and hence the impugned order is rendered bad in law. It was his submission that there were several discrepancies and errors in the judgment of the Sessions Judge against which the leave to appeal was sought and, therefore, this was a fit case where the High Court should have granted leave to appeal for further probing into the case by the appellate court. In support of his submission, he placed reliance on the decision of this Court in *State of Maharashtra vs. Sujay Mangesh Poyarekar*[1],

10. We are inclined to agree in part with the submission urged by the learned counsel for the appellant.

11. The question as to how the application for grant of leave to appeal made under Section 378 (3) of the Code should be decided by the High Court and what are the parameters which the High Court should keep in mind remains no more res Integra. This issue was examined by this Court in *State of Maharashtra vs. Sujay Mangesh Poyarekar (supra).* Justice C.K. Thakker speaking for the Bench held in paras 19, 20, 21 and 24 as under:

> "19. Now, Section 378 of the Code provides for filing of appeal by the State in case of acquittal. Sub-section (3) declares that no appeal "shall be entertained except with the leave of the High Court". It is, therefore, necessary for the State where it is aggrieved by an order of acquittal recorded by a Court of Session to file an application for leave to appeal as required by sub-section (3) of Section 378 of the Code. It is also true that an appeal can be registered and heard on merits by the High Court only after the High Court grants leave by allowing the application filed under sub-section (3) of Section 378 of the Code.
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> 20. In our opinion, however, in deciding the question whether requisite leave should or should not be granted, the High Court must apply its mind, consider whether a prima facie case has been made out or arguable points have been raised and not whether the order of acquittal would or would not be set aside.
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> 21. It cannot be laid down as an abstract proposition of law of universal application that each and every petition seeking leave to prefer an appeal against an order of acquittal recorded by a trial court must be allowed by the appellate court and every appeal must be admitted and decided on merits. But it also cannot be overlooked that

at that stage, the court would not enter into minute details of the prosecution evidence and refuse leave observing that the judgment of acquittal recorded by the trial court could not be said to be "perverse" and, hence, no leave should be granted.

24. We may hasten to clarify that we may not be understood to have laid down an inviolable rule that no leave should be refused by the appellate court against an order of acquittal recorded by the trial court. We only state that in such cases, the appellate court must consider the relevant material, sworn testimonies of prosecution witnesses and record reasons why leave sought by the State should not be granted and the order of acquittal recorded by the trial court should not be disturbed. Where there is application of mind by the appellate court and reasons (may be in brief) in support of such view are recorded, the order of the court may not be said to be illegal or objectionable. At the same time, however, if arguable points have been raised, if the material on record discloses deeper scrutiny and reappreciation, review or reconsideration of evidence, the appellate court must grant leave as sought and decide the appeal on merits. In the case on hand, the High Court, with respect, did neither. In the opinion of the High Court, the case did not require grant of leave. But it also failed to record reasons for refusal of such leave."

12. Coming now to the facts of this case, it is apposite to reproduce the impugned order in verbatim infra.

"Heard.
No case for grant of leave is made out. Accordingly, the leave to appeal stands dismissed."

13. We are constrained to observe that the High Court grossly erred in passing the impugned order without assigning any reason. In our considered opinion, it was a clear case of total non application of mind to the case by the learned Judges because the order impugned neither sets out the facts nor the submissions of the parties nor the findings and nor the reasons as to why the leave to file appeal is declined to the appellant. We, therefore, disapprove the casual approach of the High Court in deciding the application, which in our view is against the law laid down by this Court in the case of *State of Maharashtra vs. Sujay Mangesh Poyarekar* (supra).

14. In the light of foregoing discussion, the impugned order deserves to be set aside. The appeal thus succeeds and is accordingly allowed and the impugned order is set aside. The case is remanded to the High Court for deciding the application made by the appellant for grant of leave to appeal afresh on merits in accordance with law keeping in view the law laid down by this Court in *State of Maharashtra vs. Sujay Mangesh Poyarekar (supra).*

15. It is made clear that we have not applied our mind to the merits of the case and remanded the case having noticed that it was an unreasoned order. The High Court will accordingly decide the application on merits uninfluenced by any of our observations made in this order.

16. Since the case is old, we request the High Court to decide the matter within three months from the date of receipt of this order. Since no one appeared in this Court for the respondent despite notice to him, the High Court will issue a fresh notice of the application for grant of leave to the respondent and then decide the application as directed.

Judgment Referred.

[1]*(2008) 9 SCC 0475*