

State Of U.P. vs Mohan Pasi & Ors. on 4 April, 2018

Author: Anil Kumar

Bench: Anil Kumar, Daya Shankar Tripathi

HIGH COURT OF JUDICATURE AT ALLAHABAD, LUCKNOW BENCH

A.F.R.

Court No. - 10

Case :- U/S 378 CR.P.C. No. - 50 of 2014

Applicant :- State Of U.P.

Opposite Party :- Mohan Pasi & Ors.

Counsel for Applicant :- Govt. Advocate

Counsel for Opposite Party :- Jay Kumar Soni

Hon'ble Anil Kumar,J.

Hon'ble Daya Shankar Tripathi,J.

Heard learned AGA on behalf of State and perused the material available on record.

By means of the present application under Section 378(3) Cr.P.C., State has sought leave to challenge the judgment and order dated 15.01.2014 passed by Additional Sessions Judge, Court No. 6, Sultanpur in Sessions Trial No. 186 of 2009 (State Vs. Mohan Pasi and others) arising out of Case Crime No. 62 of 2009, under Sections 394, 302, 411 IPC, Sessions Trial No. 423 of 2009 (State Vs. Shakeel and others) arising out of Case Crime No. 62 of 2009, under Sections 394, 302, 411 IPC, Sessions Trial No. 424 of 2009 (State Vs. Shakeel Ahmad) arising out of Case Crime No. 484 of 2009, under Section 4/25 Arms Act, Sessions Trial No. 425 of 2009 (State Vs. Amit Yadav) arising out of Case Crime No. 62 of 2009, under Section 394/120-B IPC and Sessions Trial No. 159 of 2012 (State Vs. Dinesh Kori) arising out of Case Crime No. 420 of 2009, under Section 4/25 Arms Act,

P.S. Kurebhar, District Sultanpur.

The facts in brief, in the present case, are to the effect that on 08.02.2009 one Rajendra Prasad Tiwari had given written report at police station Kurebhar, district Sultanpur that on 08.02.2009, he alongwith his father Sita Prasad Tiwari, aged about 72 years were going on his motorcycle C.D. Delux Registration No. U.P. 44 L 1990 to house of his maternal uncle at Barausa via Sultanpur. When they were coming back at about 6:30 P.M., three unknown persons had stopped his motorcycle and thereafter they snatched the key of motorcycle and also assaulted him and his father by using knife. In this incident, he and his father had received injuries and subsequently his father Sita Prasad Tiwari, who was taken to Primary Health Center at Dhanpatganj for treatment, succumbed to injuries received in the incident.

In view of the above said factual background, on 08.02.2009 at about 20:15 hours, FIR was lodged at Case Crime No. 62 of 2009, under Sections 394, 302 IPC. Investigation of the case was conducted and after investigation charge-sheet was submitted. Accordingly, Sessions Trial No. 186 of 2009, Sessions Trial No. 423 of 2009, Sessions Trial No. 424 of 2009, Sessions Trial No. 425 of 2009 and Sessions Trial No. 159 of 2012 were instituted before the court below.

In order to prove the case, prosecution has produced PW-1 Rajendra Prasad Tiwari (informant), PW-2 Kuldeep Tiwari, PW-3 Shyamlal, PW-4 Constable Hira Lal, PW-5 Dr. A.K. Senger, who prepared postmortem report, PW-6 S.I. S.N. Singh (I.O.), PW-7 Indramani Tiwari, PW-8 S.N. Singh (Circle Officer), PW-9 Harendra Pratap Singh (I.O.), PW-10 Constable Rajendra Prasad Rai and PW-11 Brijendra Nath Shukla.

Statement of accused persons were recorded under Section 313 Cr.P.C., in which they had denied their guilt.

On the basis of the material available on record and evidence adduced before the trial court, by means of judgment and order dated 15.01.2014, respondents-accused were acquitted in the matter in question.

Learned Additional Government Advocate while challenging the impugned judgment and order passed by the learned trial court submits that in the present case on the basis of pointing out of one of the co-accused Mohan Pasi, the motorcycle C.D. Delux Registration No. U.P. 44 L 1990 has been recovered by the police. However, ignoring the said material evidence of the case, learned trial court has passed the judgment of acquittal. She further submits that said act on the part of the learned trial court is not in accordance with law.

In support of her argument, learned AGA has placed reliance on the judgment passed by Hon'ble Supreme Court in the case of Mukesh and another Vs. State (NCT of Delhi) and others reported in (2017) 2 Supreme Court Cases (Cri) 673 equivalent citation is (2017) 6 Supreme Court Cases 1. She has relied on paragraph no. 449 of the said judgment, which reads as under:-

"449. The above contention of the defence counsel urges one to look into the specifics of Section 27 of the Evidence Act. As a matter of fact, need of examining independent witnesses, while making recoveries pursuant to the disclosure statement of the accused is a rule of caution evolved by the judiciary, which aims at protecting the right of the accused by ensuring transparency and credibility in the investigation of a criminal case. In the present case, PW 80 SI Pratibha Sharma has deposed in her cross-examination that no independent person had agreed to become a witness and in the light of such a statement, there is no reason for the courts to doubt the version of the police and the recoveries made."

Learned AGA has further placed reliance on the judgment passed by Hon'ble Supreme Court in the case of State of Maharashtra Vs. Ramlal Devappa Rathod and others reported in (2016) 2 Supreme Court Cases (Cri) 638 equivalent citation is (2015) 15 Supreme Court Cases 77. She has relied on paragraph no. 19 of the said judgment, which reads as under:-

"19. It also requires to be noted that pursuant to the disclosure statements made by A-1 Ramlal, A-2 Ramchandra, A-3 Limbaji, A-29 Shivaji and A-30 Pandit, certain weapons with bloodstains were recovered immediately on the day after the incident. The aforesaid recoveries have been doubted by the trial court inasmuch as the independent panchas had not supported the prosecution case. However, PW 18 Pratap Kishan Pawar in his testimony deposed that such recoveries were made pursuant to the disclosure statements of the accused. It has been laid down by this Court in Mohd. Aslam v. State of Maharashtra; (2001) 9 SCC 362: 2002 SCC (Cri) 1024 and Anter Singh v. State of Rajasthan; (2004) 10 SCC 657:2005 SCC (Cri) 597 that the recoveries need not always be proved through the deposition of the panchas and can be supported through the testimony of the investigating officer. The fact that the recoveries were made soon after the incident is again a relevant circumstance and we accept that the recoveries can be considered against the respondents as one more circumstance."

Accordingly, learned AGA submits that matter in question needs reconsideration by this Court and leave to appeal may be granted.

We have heard learned AGA and perused the material placed on record.

From perusal of record as well as finding given by the learned trial court, the position which emerges out is to the effect that in the present case the complainant Rajendra Prasad Tiwari lodged a First Information Report on 08.02.2009 that the incident has been done by three unknown persons and he can recognize them if they are brought before him. Further, from perusal of material placed on record, the position which emerges out is to the effect that in the present case no Test Identification Parade has been done by the police authorities after the arrest of the accused persons. So, taking into consideration the said fact, the trial court has made one of the basis of passing of the judgment of acquittal. So far as the argument which is raised by the learned AGA in respect to the recovery of the stolen item namely motorcycle C.D. Delux Registration No. U.P. 44 L 1990 on the

pointing out of Mohan Pasi, one of the co-accused and the reliance which has been placed by her on the judgment given by Hon'ble Supreme Court in the case of Mukesh (supra) are concerned, Hon'ble Supreme Court while taking into consideration the provisions of Section 27 of the Indian Evidence Act has held that need of taking independent witnesses, while making recoveries pursuant to the disclosure statement of the accused is a rule of caution evolved by the judiciary, which aims at protecting the right of the accused by ensuring transparency and credibility in the investigation of a criminal case. It is further held by the Hon'ble Supreme Court that if the recovery memo is not signed by any independent witness and no independent witness has agreed to become a witness, in such type of situation, the Court should not place any doubt on the version of the police and the recoveries made therein. However, in the present case, from perusal of the statement given by the Investigating Officer PW-6 S.I. S.N. Singh, the position which emerges out is to the effect that in his statement, it is nowhere stated that he has made any effort to take any independent witness while making the recovery and they had refused to witness the same. So in view of the above said facts, learned AGA cannot derive any benefit from the law as laid down by Hon'ble Supreme Court in the case of Mukesh (supra) and in the case of State of Maharashtra (supra) and the same are not applicable in the facts and circumstances of the present case, rather the same shall be governed by the law laid down by Hon'ble Supreme Court in the case of M. Nageshwar Rao v. State of Andhra Pradesh reported in (2011) 2 Supreme Court Cases 188. Relevant portion of the report is reproduced below:-

"Before proceeding to examine the evidence adduced by the prosecution in support of its case, it would be better to put aside the so called confessional statement made by the appellant. It is seen above that the confessional statement was completely repudiated by the appellant before the trial court. Further, the statement was supposedly made in presence of 'panchas,' namely, Sri. S. Chengaiah Chetty and Sri. G. Venkateswar Reddy and it was shown to have been signed by them as witnesses along with Inspector Ashok Kumar Singh, the investigating officer (PW18). Of the two panchas, only Venkateswar Reddy was examined as PW12, but he did not support the prosecution case either in regard to the appellant's confessional statement or the Seizure Report of the Limca bottle and was declared hostile. It was only PW18, the investigating officer, who stated before the trial court that the accused voluntarily made the confessional statement and voluntarily produced the empty Limca bottle from the 'sajja' at his residence. The confessional statement, disowned by the appellant and not supported even by the witness, is of no use for judging the appellant's guilt and must be kept out of consideration."

So far as the reliance placed by learned AGA on the judgment given by Hon'ble Supreme Court in the case of State of Maharashtra (supra) that the recoveries need not always be proved through the deposition of the panchas and can be supported by the testimony of the investigating officer is concerned, in our opinion, from the said law as laid down by the Hon'ble Supreme Court, learned AGA cannot derive any benefit in the present case, as in the instant matter from the bare reading of the statement given by the I.O. Sri S.N. Singh (PW-6), the position which emerges out to the effect is that he was not able to state in his deposition that the house of Mohan Pasi from where the recovery is made, is KACHCHA or PAKKA and even he was not able to depose to the effect that what is

location of the house of Mohan Pasi and what is the area and how many rooms are there in the house of Mohan Pasi from where the recovery of the motorcycle is said to have been made on the basis of pointing out of one MUKHBIR. So taking into consideration the said facts and evidence, learned trial court came to the conclusion that recovery of the stolen article i.e. C.D. Delux Motorcycle Registration No. U.P. 44 L 1990 on pointing out of accused Mohan Pasi, does not fulfill the mandatory requirement of Section 27 of the Evidence Act and the same is doubtful.

Hon'ble Supreme Court in State of Rajasthan v. Firoz Khan @ Arif Khan, reported in 2016 (1) S.C.C. Cr.R. 815, after referring to an earlier judgment rendered by the apex court in State of Maharashtra v. Sujay Mangesh Poyarekar : (2008) 9 SCC 475, has noted the parameters which are to be kept in mind by the High Court while deciding an application for grant of leave to appeal under Section 378 (3) Cr.P.C. The relevant paragraphs 19, 20, 21 and 24 are quoted herein below:

"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 grant of 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.

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.

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."

Hon'ble the Supreme Court in State of Gujarat v. Jayrajbhai Punjabhai Varu reported in 2016 (2) SC.C.Cr.R. 943 in paragraph 13 of the report has held as under :

"13. The burden of proof in criminal law is beyond all reasonable doubt. The prosecution has to prove the guilt of the accused beyond all reasonable doubt and it is also the rule of justice in criminal law that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other towards his innocence, the view which is favourable to the accused should be adopted."

Having regard to the parameters as laid down by the apex court in the aforesaid cases, for considering the application for leave to file an appeal under Section 378(3) Cr.P.C., we are of the considered opinion that the view taken by the trial court while acquitting the deceased is based on valid reasons.

The impugned judgment passed by the learned trial court cannot be said to be illegal, illogical and perverse. and not based on material on record. So, we are of the view that there is absolutely no hope of success in this appeal and, accordingly, no interference is called for.

Hence, the prayer for grant of leave to appeal is hereby rejected.

Order Date :- 4.4.2018

SR

[Daya Shankar Tripathi, J.] [Anil Kumar, J.]

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Since application for grant of leave to appeal has been rejected, the memorandum of appeal also does not survive and stands dismissed.

Order Date :- 4.4.2018

SR

[Daya Shankar Tripathi, J.] [Anil Kumar, J.]