2023 INSC 623

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.413 OF 2013

CENTRAL BUREAU OF INVESTIGATION ...Appellant

Versus

SHYAM BIHARI & OTHERS ...Respondents

J U D G M E N T

MANOJ MISRA, J.

1. This appeal assails the judgment and order of the High Court of Uttarakhand at Nainital (in short, "the High Court"), dated 26.07.2012, in Government Appeal No.4 of 2022. By the said order, though the delay in preferring the appeal against the judgment and order of acquittal dated 13.12.2011 passed by the third Additional District & Sessions Judge/Special Judge (Prevention of Corruption Act), C.B.I., Dehradun (for short "the trial court") in C. No. RC-5/87-SIU.II was condoned, the application seeking leave to appeal under section 378 (3) of the Code of Criminal Procedure, 1973 (in short, "the Code") was rejected and in consequence the Government Appeal was dismissed.

Introductory Facts

2. In the night/late evening of 24.06.1987, one Raj Kumar Baliyan (in short, "the deceased") was killed. A first information report (FIR) was lodged by Pramod Kumar Tyagi (PW-6) alleging, inter-alia, that while he and Sudeep (PW-3), on one Scooter, and Raj Kumar Balyan (the deceased) on another Scooter, were travelling from Muzaffarnagar to Meerapur to attend a marriage, near Bhatoda turn, at about 9.30 pm, in the light of the Scooter, they saw three policemen standing on the road. One of them had a *Danda* (stick) whereas the other two were carrying rifles. The person who had the *Danda* flashed a torch light on them. As a result, they lost control of their respective scooters, which skidded and fell. One of the policemen exhorted to shoot to kill. In consequence, shots were fired hitting the deceased, who collapsed at the spot. PW-3 and PW-6, however, managed to escape to the village. On information, villagers arrived at the scene of crime and so did the police. In the presence of police the deceased was rushed to the hospital but he succumbed to his injuries on the way. Thereafter, the dead body was taken to the hospital and after leaving the body there,

PW-6 lodged the FIR, which was registered as Case Crime No.48/87 at P.S. Sikhera.

3. Another version of the incident was lodged at the instance of one Mahindra Singh on 25.06.1987, which gave rise to Case Crime No.48A/87. There it was alleged, inter-alia, that on 26.05.1987 a robbery took place in the village wherein one person died. As criminals were regularly visiting the village since then, a constant vigil was maintained by the villagers as well as the police which had been patrolling the area. It was alleged therein that while three police constables were patrolling the village and people of the village were keeping a watch in the night of 24.06.1987, at about 9.00 pm, a man came and raised an alarm that 5-6 criminals were about to come to the village on motorcycles and scooters. On receiving this information, the villagers and the policemen became alert. At about 9.30 pm, a motorcycle came and stopped a little ahead of Bhatoda turn. Thereafter, two scooters came at a fast speed. When torch lights were flashed and the scooters were signalled to stop, the rider fired a shot with a view to kill the villagers and the policemen. However, one of the scooters skidded and the other stopped. The criminals however started running away

while firing shots. As a result, there was retaliatory fire by the police and the villagers. One of the criminals was chased and nabbed by the villagers. He was also beaten by them. At that time, from P.S. Sikhera, an Inspector arrived in an Ambassador Car. He interrogated the criminal. Later, several villagers arrived and informed that the person caught is Raj Kumar, Advocate. Thereafter, Raj Kumar was taken to the hospital. At the same time, the spot was searched and two empty shells of cartridges were recovered from the spot.

4. The investigation of the aforesaid two cases was assigned to CB-CID and later, for further investigation, to Central Bureau of Investigation (CBI) upon which, CBI registered a case No.RC-5/87-SIU.II. After investigation, CBI submitted a charge-sheet against the accused persons (the respondents herein) under Section 302 read with Section 34 of the Indian Penal Code, 1860 (in short, "I.P.C.") After taking cognizance on the police report, the Court of First Additional Sessions Judge, Dehradun charged Anil Kumar, Shyam Bihari and Arshad Ali (the respondents herein) for committing offence punishable under Section 302 read with Section 32

I.P.C. The accused pleaded not guilty and claimed trial.

5. During the trial, the prosecution examined 33 witnesses and produced various documentary evidences with regard to GD entries, seizure memos, site plan, forensic reports, autopsy report, etc. Various material exhibits such as articles seized during investigation were produced and exhibited during trial.

6. After closure of prosecution evidence, the incriminating circumstances appearing in the prosecution evidence were put to the accused for recording their statement under section 313 of the Code. In their statement, under section 313 of the Code, the accused denied the incriminating circumstances appearing against them and claimed that they have been falsely implicated and made scapegoat.

Nature of the Prosecution Evidence

7. The prosecution sought to bring home the charge against the aforesaid three accused by leading evidence to the following effect: -

(i) On the date, time and place of the incident, the three accused were on a picket duty as reflected by the GD

Entries made at the police station concerned;

(ii) The GD Entries reflected that they had departed from the police station with a rifle and 50 cartridges each;

(iii) The ballistic expert report confirmed that some of the empty rifle cartridges recovered from the spot were fired from the service rifles of the accused thereby confirming their presence at the spot;

(iv) PW-3 and PW-6 narrated that the shots were fired by policemen who flashed torch light at the scooter riders;

(v) PW-15 (Shyam Singh) confirmed participation of the three accused in the crime and proved that on exhortation by the other two accused, Anil Kumar took out a country made pistol and had fired a shot at the deceased;

(vi) The villagers who had arrived at the spot after the incident had noticed that the three accused along with others were present at the spot;

(vii) Police set up a false cross version of the incident, namely, Case Crime No.

48A/87, which indicated that there was a deliberate attempt on the part of the police to save themselves from the clutches of law.

Trial Court Findings

8. The trial court found the testimony of PW-3 and PW-6 inconsequential because the two witnesses did not state that the policemen involved in the crime were the ones facing trial. Rather, they admitted that they had not seen the accused before and that the accused were not put for identification.

9. As regards eye-witness Shyam Singh (PW15), the trial court found him unreliable for the following reasons: (a) PW15 made no prompt disclosure of his knowledge about the incident and the culprits either to the police or to the villagers, rather, after a lapse of several days, chose to swear an affidavit and dispatch it by post to a higher official of the police; (b) three affidavits, including that of PW15, making the same disclosure in identical language, sworn on the same day, at more or less the same time, and prepared by the same lawyer, were received by the police after a

few days; and (c) PW15 lied that he was alone when he went to swear the affidavit.

10. Having discarded the eye witness account of PW-15 and finding the eye witness accounts of PW-3 and PW-6 inconsequential to inculpate the accused, the trial court proceeded to address other circumstances on which the prosecution relied. These were: (a) few empty cartridge shells lifted from the spot were found to have been fired from the rifles issued to the accused; and (b) there was an attempt to set up a false narration of the incident vide Case Crime No.48A of 1987.

11. In respect of some of the empty cartridges matching with service rifles of the accused, the trial court noticed that out of four .303 cartridges recovered from the scene of crime, one was fired from the rifle of accused Anil, one from the rifle of accused Shyam Bihari whereas the remaining two cartridges were not fired from service rifles of any of the three accused persons. Thus, it was not clear from the prosecution evidence as to from whose rifle the remaining two bullets were fired. This discrepancy, according to the trial court, rendered the prosecution version against the accused doubtful because there could be the hand of some other person also.

12. In addition to the above, the trial court noticed from the autopsy report that the gun shot injury sustained by the deceased was not from a rifle bullet but from a .12 bore weapon which was not recovered from any of the accused persons. Hence, even if rifle bullets were found at the spot, they were not the ones from which injuries were caused to the deceased. As regards the cross version of the incident (i.e. Case Crime No.48A/87), no adverse inference was drawn against the accused as it was not at their behest.

13. Apart from above, the trial court noticed that, according to the prosecution version, several persons (i.e. villagers including PW-3 and PW-6 and police personnel) had arrived at the spot and the three accused were also present there, yet they were not identified. In these circumstances, it was concluded that if PW-3 and PW-6, who were travelling on another scooter in close proximity to the deceased, had recognized the accused persons, they would have identified them at the scene of crime as those who killed the deceased, and country made pistols might have also been recovered.

14. After analysing the entire prosecution evidence in detail, the trial court concluded that the

prosecution had failed to prove that those three policemen in uniform, who attacked Raj Kumar Baliyan (the deceased), were the persons facing trial.

High Court's observations

15. Having failed to succeed in the trial, the State filed a time-barred appeal along with a delay condonation application and an application seeking leave to appeal. The High Court by the impugned order allowed the delay condonation application but rejected the application seeking leave to appeal and dismissed the appeal accordingly.

16. While rejecting the application seeking leave to appeal, the High Court noticed that the prosecution case rested on three eye-witnesses' accounts. Eye-witnesses PW-3 and PW-6 could not identify the policemen and in so far as PW-15 was concerned, he was found not reliable. Moreover, the medical evidence indicated that the deceased died due to gun-shot injuries fired from a .12 bore weapon and not a rifle, which was with the accused, hence, granting leave to appeal to formally hear the appeal would be an exercise in futility.

17. We have heard Shri Vikramjit Banerjee, learned Additional Solicitor General, assisted by Shri Rajan Kumar Chaurasia, learned Advocate for the

appellant; Shri Anil K. Sharma, learned Advocate for the respondents; and have perused the record.

Submissions

18. The learned counsel for the appellants submitted that this is a case where it was proved beyond doubt that the deceased was shot by persons who were wearing police uniform. On the night of the incident, the three accused, namely, Shyam Bihari, Anil Kumar Sharma and Arshad Ali, all armed constables, were patrolling the area, as per evidence brought on record. Soon after the incident these constables were found present at the spot. Hence, their presence at the scene of crime was confirmed not only by eye witnesses but also by circumstances including the fact that certain empty cartridges recovered from the spot were fired from their service rifles. Thus, not only their presence was proved but another version of the incident i.e. Case Crime No.48A of 1987, depicting police action, confirmed that death was a consequence of police action. Therefore, the burden was heavy on the accused to explain these incriminating circumstances and in absence whereof, an adverse inference ought to have been drawn against the accused persons.

19. It was also argued that even if PW-3 and PW-6 could not identify the accused persons, they corroborated the prosecution story with regard to the manner in which the incident occurred and, therefore, their testimony could be used to corroborate the testimony of PW-15, who not only narrated the incident but could recognize and identify the accused persons.

20. Thus, according to the learned counsel for the appellant, the trial court's verdict was perverse and rejection of the application seeking leave to appeal has resulted in grave miscarriage of justice. It has therefore been prayed that the appeal be allowed and the matter be remitted to the High Court to accord fresh consideration on merits.

21. Per contra, the learned counsel for the respondents submitted that, firstly, PW-3 and PW-5, who were travelling with the deceased, have not been able to identify the accused as those who were involved in the killing of the deceased; and, secondly, the deceased died of a gun-shot wound which could be ascribed to a .12 bore weapon, not a rifle which was with the accused. Moreover, some of the empty cartridges lifted from the spot did not match with the rifles of the three accused thereby giving rise to a

possibility that someone else was also present with a rifle and had used it. In these circumstances, if the trial court gave the benefit of doubt to the accused, the judgment and order of the trial court cannot be held perverse as to warrant reversal in an appeal.

22. With regard to the testimony of PW-15, the learned counsel for the respondent submitted that PW-15 has been found not reliable for multiple reasons. Firstly, he did not make disclosure to anyone of having witnessed the incident even though the villagers had arrived and congregated at the spot in sufficient numbers to instil confidence in any person to make a disclosure against any person regardless of his position. Secondly, instead of giving his statement to the investigating agency, the witness got an affidavit prepared from a lawyer, who prepared not one but three affidavits identically worded. One was of PW15 and the other two were of those two persons who could not appear as witnesses during the trial. This would indicate that those affidavits were prepared on legal advice. Thirdly, PW15's version that Anil Kumar took out a country made pistol to shoot the deceased appears improbable for two reasons, namely, there was no proven motive to commit such an act and once they had already fired from their

rifles they could easily have used the same to kill the deceased by giving the incident a colour of an encounter.

23. In respect of the incriminating circumstances such as the presence of the accused persons at the spot, use of service rifle to fire shots and killing of the deceased by policemen, it was submitted that they by themselves are insufficient to constitute a chain so far complete as to indicate that in all human probability it were the accused and no one else who committed the crime. Rather, there existed circumstances, proven on record, such as the presence of few empty cartridges at the spot which were not fired from rifles issued to the three accused, which indicated the presence of some other person also and possibility of the incident occurring in some other manner than set out by the prosecution.

24. Highlighting all the above points, the learned counsel for the respondents submitted that this is not a case where the judgment and order of the High Court be interfered with.

Analysis

25. We have considered the rival submissions and have perused the record.

26. At the outset, we may observe that no doubt the judgment and order of the High Court appears a bit cryptic but that by itself need not be a ground for us to set aside the order and remit the matter to the High Court, particularly, when we have the relevant record to assess the merit of the prosecution case. More so, because the incident is of the year 1987 and the appeal has remained pending since more than a decade. In such circumstances, if we remit the matter to the High Court only to rewrite the judgment, it would be travesty of justice. Consequently, as the trial court has dealt with the matter at great length and has discussed each and every piece of evidence on which the prosecution seeks to rely, it would be apposite for us to assess whether, by not granting leave to appeal against the judgment of the trial court, there has been a miscarriage of justice.

27. It is trite law that in an appeal against acquittal, the power of the appellate court to reappreciate evidence and come to its own conclusion is not circumscribed by any limitation. But it is equally settled that the appellate court must not interfere with an order of acquittal merely because a contrary view is permissible, particularly, where the view taken by the trial court is a plausible view based

on proper appreciation of evidence and is not vitiated by ignorance/misreading of relevant evidence on record.

28. In the instant case, the prosecution case rested on ocular account as well as on certain circumstances. The ocular account is provided by PW-3, PW-6 and PW-15. PW-3 and PW-6 were traveling with the deceased, though on a separate scooter. They, therefore, had the opportunity to witness the incident. According to them, while they were traveling on their respective scooters, torch light was flashed at them by men in police uniform. As a result, deceased's scooter skidded. Thereafter, when gun shots were fired they escaped and came to the village. On information, a large number of persons from the village arrived at the spot. What is important is that neither PW3 nor PW6 could identify any of the three accused. They did not depose that the three policemen involved in the crime were those who were facing trial. Thus, there is no infirmity, much less perversity, in the view taken by the trial court that the testimony of PW-3 and PW-6 is not of much help to the prosecution qua the three accused facing trial.

29. With regard to the testimony of PW-15, detailed reasons have been recorded by the trial court to hold him unreliable and unworthy of credit. Moreover, PW15's presence is not confirmed by PW3 and PW6. Otherwise also, PW15's conduct of remaining silent for over a week creates a lingering doubt in our mind as to whether he is a witness set up on advise, particularly, when we notice that his first statement was not to the investigating agency but made on an affidavit prepared by a lawyer, who simultaneously prepared three affidavits identically worded. The trial court noticed all these facts as also that PW-15 was lying when he stated that he went alone to get the affidavit prepared. The trial court also noticed that all the three affidavits were prepared on stamp papers, consecutively numbered, bought from the same vendor and the affidavits were sworn in quick succession giving rise to a definite conclusion that they were prepared by an advocate. The trial court also noticed that the conduct of PW-15 was a bit unusual in the sense that he made no disclosure to anyone including the father of the deceased yet, he straightaway went to swear and dispatch an affidavit by post to a higher officer of the police even though, by that time, the investigation

had been transferred to the CB-CID from the local police and, therefore, there was no threat from the local police. In these circumstances, if the trial court discarded the testimony of PW-15, in our view, the same was justified.

30. Adverting to the proven circumstances, what transpires is that the witnesses are consistent that there was a police action on that fateful night. Assuming that it is true that in the night there was an exchange of fire between men in uniform and members of the public, but there is no reliable evidence that the exchange of fire was with a view to kill. Moreover, the deceased did not die of a rifle bullet injury. Rather, he died from a .12 bore gun-shot which could not be ascribed to rifles issued to the accused persons. Therefore, even if empties of rifle cartridges relatable to service rifles issued to the accused were found at the spot, culpability of the accused persons in causing death of the deceased is not inferable. Further, there is no recovery of a .12 bore gun from any of the accused persons facing trial. Notably, after the incident, villagers congregated at the scene of crime. The police arrived at the spot and took the injured to the hospital. According to the prosecution evidence, the accused persons were

present at the spot during this period. Therefore, if they were really involved they could have been identified by either PW3 or PW6, but there was no such event. Further, the continued presence of the accused at the spot is a circumstance which goes in favour of the accused, being a conduct that belies a guilty mind.

31. Another circumstance which goes in favour of the accused is that, according to the prosecution's own case, the accused persons, three in number, had a rifle each with 50 rounds. Admittedly, some of the empty cartridges found at the spot, as per the ballistic expert report, were not fired from the rifle issued to the accused. This is indicative of presence of some other rifle also. Whose rifle it was, the prosecution evidence is silent. Moreover, if the accused were to use their rifle to fire shots why would they use a country made pistol to inflict injury to the deceased.

32. The circumstance that the accused persons were required to patrol that area and had left the police station for that end on that fateful night is a circumstance which is not conclusive as to turn the tables on the accused, inasmuch as the patrolling

area covered two villages. It may be possible that the accused arrived at the spot late, when the incident had already taken place, and to chase away the miscreants, fired shots from their service rifles. Be that as it may, once the ocular account of PW-15 stood discarded, to clinch a conviction on the basis of circumstances, the circumstances ought to have formed a chain so far complete as to indicate that in all human probability it were the persons facing trial and none else who committed the crime. Here the circumstances found proved do not constitute a chain so far complete as to indicate that in all human probability it were the accused persons and no one else who committed the crime. In such a situation, there was no option for the trial court but to extend the benefit of doubt to the accused.

33. At this stage, we may put on record that the learned ASG could not point out that the Trial Court ignored or misread any relevant evidence.

34. For all the reasons as stated above, we do not find it to be a fit case to interfere with the order passed by the High Court and remit the matter only for the High Court to rewrite the judgment as the

same, in our view, would be an exercise in futility. The appeal is dismissed.

.....J.
(B. V. NAGARATHNA)

.....J.
(MANOJ MISRA)

New Delhi;
July 17, 2023