

N. SOMASHEKAR (DEAD) BY LRS.

A

v.

STATE OF KARNATAKA

MAY 6, 2004

[DORAISWAMY RAJU AND ARIJIT PASAYAT, JJ.]

B

Criminal Procedure Code, 1973—Sections 378 and 386—Appeal against acquittal—Interference by High Court—Scope of—Acquittal by Trial Court on conjectures and surmises—High Court ordering conviction—On appeal, Held : Though interference with acquittal order is limited, but permissible where evidence has not been properly analysed and acquittal order based on surmises and conjectures—High Court justified in interfering and ordering conviction.

C

Sentencing—Death of accused—Impleadment of LRs.—Effect on, sentencing and fine—Sentence became unexecutable—Fine of Rs. 1 lac reduced to Rs. 50000.

D

The case of the prosecution was that appellant-accused, a police official, went for swimming, along with his wife and children where he found deceased sniggering at his wife. Accused abused him and gave 3 blows to him, and he fell in the swimming pool. PW-13, the coach tried to save the deceased, but accused stopped him by holding his hand. Deceased was found dead when brought out of the pool. Accused called Doctor and also informed Police Station that someone had drowned. PW-34 Sub-Inspector reported before the accused at the swimming pool. Accused asked him to draw Inquest Mahazar. Statements were recorded during inquest proceedings as per directions and assistance of accused. After investigation, accused was charged under Sections 341, 302, 201 and 507, IPC. Trial Court found him innocent and acquitted him. In appeal, High Court set aside the acquittal and ordered conviction and also imposed fine of Rs. 1 lac, which was directed to be paid as compensation to the mother of deceased. During pendency of appeal before this court, accused died and his Legal Representatives were impleaded.

E

F

G

In appeal to this Court, on behalf of the accused it was contended

H

A that the evidence of witnesses recorded under Section 164 Cr.P.C. showed that the prosecution was trying to tie down the witnesses; that evidence of eye-witnesses and the coach (PW-13) was not properly analysed; that delay in recording the complaint indicates the prosecution's effort to implicate the accused; that evidence of the child witnesses was not reliable because of their tender age; that the case was one of dry drowning and that since the medical evidence and the ocular evidence are at variance, the Trial Court was justified in directing acquittal.

C State contended that the high police official had taken law into his own hands, and had directly interfered with the investigation and even monitored it which shows the impropriety in his conduct; that the doctor's evidence clearly substantiates the accusations; that the conduct of the accused in not trying to save the deceased when he was really drowning is significant; that there is no embargo for accepting the evidence of the child witnesses if found to be credible and cogent and the acquittal recorded by the Trial Court was based on surmises and conjectures and, therefore, the High Court was justified in interfering with the acquittal order.

E Disposing of the appeal, the Court

F HELD : 1. Though the scope for interference with the judgment of acquittal is limited, where the evidence has not been properly analysed by the trial court and conclusions drawn are based on surmises and conjectures, it is not only permissible but also desirable that the appellate court should interfere with the order of acquittal. The only criterion is that if the view taken by the Trial Court is reasonable and possible view, interference should not be made. In the instant case, the evidence clearly established that accused was the perpetrator of the crime. The High Court was justified in directing conviction and imposing sentence. [386-B-D]

H 2. Recording of the statement of witnesses under Section 164 of the Code would not automatically dilute the worth of their evidence. There has been sufficient explanation rendered as to why there was delay in recording evidence. A high placed police official was the accused and

was participating and was associating himself with the investigation. It is unusual that one of the child witnesses was the son of one of the investigating officers. The postmortem report disclosed commission of a cognizable offence. The distinction between dry drowning and wet drowning is really of no consequence, in view of the fact that the eye witness version is credible and cogent. There is no reason as to why witnesses would falsely implicate the accused. [385-F-H; 386-A]

The State of Assam v. Jilkadar Ali, AIR (1972) SC 2166 and *Vishwanath v. The State of Uttar Pradesh*, AIR (1960) SC 67, relied on.

3. Record shows that the accused was giving instructions to PW-34 about the manner of recording the inquest report. The evidence also shows that the blow that was inflicted could cause the injury which is fatal in the ordinary course of nature to cause death. [386-B]

4. In view of death of the accused, custodial sentence becomes unexecutable. Considering this fact, reduction of fine to Rs. 50,000 is ordered. The other directions regarding disbursement as contained in the High Court's order remain unaltered. [386-E]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1262 of 1997.

From the Judgment and Order dated 14.11.1997 of the Karnataka High Court in CrI. A. No. 584 of 1994.

Naresh Kaushik, Ms. Shilpa Chohan and Mrs. Lalita Kaushik for the Appellants.

Siddharth Dave and Sanjay R. Hegde for the Respondent.

The Judgment of the Court was delivered by

ARIJIT PASAYAT, J. : One Somashekar (also described as 'accused') was prosecuted for alleged commission of offences punishable under Sections 341, 302, 201 and 506 of the Indian Penal Code, 1860 (in short 'IPC'). He was acquitted by the Trial Court. He was, however, convicted by the impugned judgment by a Division Bench of the Karnataka

A High Court by revision of the judgment of the Trial court. The High Court held the accused guilty of offences punishable under Section 304 (part II) and Section 201 IPC. For the first offence the accused was sentenced to undergo imprisonment for three years and a fine of Rs.1 lakh with default stipulation. For the offence relating to Section 201 IPC, one year rigorous imprisonment was imposed. It was directed that in case the fine was deposited the same was to be treated as compensation to the mother of the deceased (PW 1). Said Somashekhar died during pendency of the appeal before this Court. In his place, his legal representatives have been impleaded.

C The prosecution version is essentially as follows:

On 7.4.1991 in the afternoon, the accused along with his wife Shamanthakamani and her two young sons had come to the Lalitha Mahal swimming pool for a swim. This swimming pool is attached to a posh five Star Hotel known as Lalitha Mahal Palace Hotel, situate in Mysore. When the accused came to the swimming pool, he noticed that K. Sathyadev (hereinafter referred to as the 'deceased') was present in the swimming pool. Since the deceased was an unauthorised user of the swimming pool, the accused asked Swimming Attendant (PW-13) to remove the said deceased Sathyadev, from the swimming pool. After instructing PW-13 thus, the accused and his wife went to the dressing room to change into their swimming costumes. Shamanthakamani got into her swimming costume and entered the swimming pool first. The accused also came to the swimming pool in his swimming dress and he noticed that the deceased was sniggering at his wife Shamanthakamani. The accused abused the deceased and gave three blows to the deceased. One blow landed on the mouth, one blow on the shoulder and a third blow which was given in Karate style landed on the left side of neck of the deceased, who fell dead in the swimming pool. PW-13 who was the swimming attendant rushed towards the pool and wanted to save the deceased. The accused restrained him by holding his hand. Subsequently, others brought the deceased out of the swimming pool and placed him by the side of the swimming pool. The deceased was dead when he was brought out of the pool.

PW-34 was the Sub-Inspector of Police, Law and Order, Nazarabad Police Station, Mysore. On 7.4.1991, while he was at his residence, he got

a message that some person has been drowned in the Swimming Pool of the hotel. He also received a message from the accused that he should bring a life guard to the swimming pool. In the meanwhile, the car of the accused also arrived at the police station. The driver of the car one Chavan told PW-34 that somebody had drowned in the swimming pool. He went to a nearby Nursing Home and was not able to find a doctor and, therefore, went in the accused's car to bring a doctor, who was Dr. Vishnumurthy (PW-20). PW-20 came in the accused's car to the swimming pool followed by PW-34 in his Motorcycle. When PW-34 went to the swimming pool, he saw the accused and his wife and the children of the accused and PW-13 swimming pool attendant. He also saw PW-27 and his son PW-29 near the swimming pool. He saw the deceased and noticed that he had only an underwear on his body. The accused asked Dr. Vishnumurthy (PW-20) to examine the deceased. The sub-Inspector (PW-34) reported before the accused at the swimming pool. The accused told PW-34 in Kannada which translated into English, reads as follows:-

“Look here, see some bastard has fallen into the water and drowned. Take the case as per Section 174 Cr.P.C. and prepare inquest Panchanama”.

PW-34 asked the accused who should give the complaint. The accused retored as to why he was in such a hurry and that Mrs. Mallik (PW-4), the Manager of the Hotel would give the complaint. The accused told PW-34 to draw the inquest mahazar. In the meanwhile, apart from Dr. Vishnumurthy (PW-20), another doctor Dr. Ammanna (not examined) came there. He also pronounced that the deceased was dead. PW-34 wanted to ask the accused more details about the incident. However, as the accused started shouting at PW-34, he did not ask more questions. PW-34 immediately drew the inquest mahazar. According to PW-34, it was the accused, who dictated the inquest mahazar. Even the statements that were recorded during inquest, were done as per the directions of the accused. PW-34 objected to the inquest being prepared without the deceased being identified. The accused was unrelenting. The accused directed that the inquest report be prepared and the dead body be sent to the mortuary and identification of the deceased be done on the next day. Entire inquest on the dead body of deceased was done as per the directions of the accused. When the inquest report was being written, accused went to the South of

- A** the Swimming pool and brought a pant, a shirt and a pair of chappal kept near a chair. There was a chit in the pant pocket identifying the deceased as 'Sathyadev' but without any address. However, there was a tailor mark on the shirt collar which was noted by PW-34. About that time, Dr. Shenoy (PW-32), also arrived on the direction of the accused. He also examined
- B** the deceased and pronounced the deceased dead. Accused specifically asked PW-34 that his presence or the presence of his family members should not be shown at the time of drawing of the inquest proceedings. Till the completion of the inquest proceedings, accused remained there and was giving 'directions and assistance'. It was indeed the accused who
- C** brought a white cloth from the hotel and wrapped the deceased and sent the dead body to the mortuary for post mortem examination through PC 522. The accused sent for PW-34 a little later from the Manager's (PW-4) room. When PW-34 went there, he was given a complaint. It contained Mrs. Mallik's (PW-4) signature. On the basis of this complaint, PW-34
- D** registered a U.D.R. case in Cr. No. 17/91 under Section 174 of the Code of Criminal Procedure, 1973 (in short the 'Code').

E On the basis of the challan, investigation was undertaken and charge sheet was placed against the accused for commission of offence punishable under Sections 341, 302, 201 and 506 IPC. The accused pleaded innocence and false implication at the behest of higher officials. As noted earlier, the Trial court found the accused innocent. In appeal, the High Court upset the judgment of acquittal and directed conviction.

F In support of the appeal, learned counsel submitted that the Trial Court had found several infirmities in the evidence tendered by the prosecution and had rightly observed that the medical evidence clearly ruled out the possibility of any assault having been done by the accused. The case was one of dry drowning. The possibility of the injuries having been sustained when the dead body was being taken out, was not ruled out.

G The stand was specifically taken that the death was due to drowning which was probalised by the evidence on record. The doctor's evidence is unsustainable and the fact that the evidence of some witnesses was recorded under Section 164 of the Code shows that the prosecution was trying to tie down the witnesses. The evidence of so-called eye witness and

H the swimming coach (PW-13) was not properly analysed.

The fact that the alleged complaint was recorded much belatedly clearly indicates the prosecution's effort to somehow implicate the accused who had fallen from the grace of higher officials. In fact, the Commissioner had obtained the complaint from the deceased's mother i.e. PW-1. Though the incident took place on 7.4.1991, practically nothing was done till 9.5.1991. Thereafter a different approach was adopted, a second medical opinion was obtained and the appellant was falsely implicated. The evidence of the child witnesses which could not have been accepted as they are not reliable witnesses because of their tender age was accepted. Since the medical evidence and the ocular evidence are at variance, the Trial Court was justified in directing acquittal, while the High Court, without taking note of the fact that the view taken by the Trial Court was a possible view, erroneously directed conviction. A
B
C

In response, learned counsel for the State submitted that the high police official had taken law into his own hands, and strangely was directly interfering with the investigation and even monitoring it. This itself shows the impropriety in the conduct of the accused. The position that some of the officials were showing partisan attitude is of significance, because of diluting the evidence of the doctor by seeking answers to hypothetical questions. The doctor's evidence clearly substantiates the accusations. Presence of the accused is accepted. The conduct of the accused in not trying to save the deceased if he was really drowning is significant. There is no embargo for accepting the evidence of the child witness if found to be credible and cogent. The acquittal recorded by the Trial Court was based on surmises and conjectures and, therefore, the High Court was justified in its decision. D
E
F

It needs first to be noted that merely because the statement of witnesses is recorded under Section 164 of the Code that does not automatically dilute the worth of his evidence. (See *The State of Assam v. Jilkadar Ali*, AIR (1972) SC 2166 and in *Vishwanath v. The State of Uttar Pradesh*, AIR (1960) SC 67. There has been sufficient explanation rendered as to why there was delay in recording evidence. A high placed police official was the accused and strangely, as noted above, was participating and was associating himself with the investigation. It is rather unusual that one of the child witnesses was the son of one of the investigating officers. The postmortem report of 8.4.1991 disclosed G
H

- A commission of a cognizable offence. The distinction between dry drowning and wet drowning is really of no consequence, in view of the fact that the eye witness version is credible and cogent. There is no reason as to why PWs 28 and 29 would falsely implicate the accused. It is on record that the accused was giving instructions to Ganesh (PW-34) about the manner of recording the inquest report. The evidence also shows that the blow that was inflicted could cause the injury which is fatal in the ordinary course of nature to cause death. Though the scope for interference with the judgment of acquittal is limited where the evidence has not been properly analysed by the Trial Court and the conclusions drawn are based on surmises and conjectures, it is not only permissible but also desirable that the appellate court should interfere with the order of acquittal. The only criterion is that if the view taken by the Trial Court is reasonable and possible view interference should not be made. In the case at hand the evidence clearly establishes that accused was the perpetrator of the crime. The High Court was justified in directing conviction and imposing sentence as noted above.

Aş noted supra, the appellant has died and his legal representatives have been impleaded. Considering this fact, which is of some relevance, we direct reduction of fine to Rs. 50,000. The other directions regarding disbursement as contained in the High Court's order remain unaltered. In view of the death of the accused, custodial sentence becomes unexecutable. However, execution in accordance with law can be levied by PW-1 if the fine amount is not deposited within four months from today.

The appeal is accordingly finally disposed of.

D.G.

Appeal disposed of.