REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1490 OF 2008

Shyamal Saha & Anr. ....Appellants

Versus

State of West Bengal
....Respondent

J U D G M E N T

Madan B. Lokur, J.

1. This appeal questions the limits of interference by the High Court in an appeal against the acquittal of an accused by the Trial Court. In our opinion, the High Court ought not to have interfered in the appeal before it with the acquittal of the appellants by the Trial Court.

Facts:

2. The sequence of events, as it has unfolded from the evidence of the witnesses, is that on 19th May, 1995 a thermal plant of the Calcutta Electric Supply Company had opened across

the river Ganges in Mauza Bhabanipur Char, District Hooghly, West Bengal.

3. Paritosh Saha was with his mother Bidyutprava Saha (PW-5) at about 5.00/5.30 p.m. on 19th May, 1995. Thereafter, he and his nephew Animesh Saha (CW-1) aged about 10 years went for a walk on the banks of the river Ganges where they met Gopal Saha, with whom they struck a conversation. At that time, the appellants Shyamal Saha and Prosanta @ Kalu Kabiraj also came there and called Paritosh to go across the river to see the Char (island). Animesh also expressed his desire to go to the Char but Shyamal asked him to return home.

4. When the three of them (Paritosh, Shyamal and Prosanta) were about to board Asit Sarkar's boat, they were joined by Dipak Saha (PW-6) and Panchu Sarkar (PW-11). The five of them then went across the river Ganges and, according to Animesh, when they reached the other side of the river, Dipak and Panchu went towards the thermal plant while Paritosh, Shyamal and Prosanta went in a different direction towards the jungle. Thereafter, Animesh came back to his house.

5. According to Bidyutprava Saha, at about 8.00 or 8.30 p.m. Shyamal and Prosanta came to her house and asked the whereabouts of Paritosh.

6. According to Paritosh's brother Amaresh Saha (PW-1) at about 10.00 p.m. Shyamal and Prosanta came to his house and enquired about Paritosh.

7. Early next morning on 20th May, 1995 Bidyutprava Saha noticed that Paritosh had not eaten his dinner which she had kept for him. She mentioned this to Amaresh and also informed him that Shyamal and Prosanta had come and met her the previous evening at about 8.00 or 8.30 p.m. During the course of this conversation, Animesh revealed to his father Amaresh that he had seen Paritosh cross the river Ganges the previous evening in a boat along with Shyamal and Prosanta.

8. On receiving this information Amaresh enquired from Shyamal and Prosanta the whereabouts of Paritosh but they informed him that they had seen him across the river with some boys. Later in the day, Amaresh was informed by Dipak and Panchu that they had crossed the river along with Paritosh, Shyamal and Prosanta. After crossing the river, Dipak and Panchu

had gone to see the thermal plant and the others had gone in another direction towards the jungle. Dipak and Panchu pleaded ignorance of the subsequent movements of Paritosh.

9. Later in the evening at about 7.30 p.m. Amaresh Saha lodged a First Information Report regarding the disappearance of Paritosh.

10. Sometime in the morning of 21st May, 1995 the corpse of Paritosh was found in the river tied to two iron chairs with a napkin around his neck. The police were informed about the recovery of the dead body and an inquest was carried out and the iron chairs and napkin were seized in the presence of some witnesses. It was noticed that a part of Paritosh's skin was burnt perhaps due to pouring of acid.

11. On these broad facts, investigations were carried out and Shyamal and Prosanta were charged with having abducted Paritosh and thereafter having murdered him.

Decision of the Trial Court:

12. In its judgment and order dated 29th July, 1998 the Trial Court held that neither the charge of abduction nor the charge of murder was proved against Shyamal and Prosanta and therefore

they were acquitted.[1] As far as the charge of abduction is concerned, that is not in issue before us and need not detain us any further.

13. The acquittal by the Trial Court was primarily in view of the absence of consistency in the testimony of Amaresh, Bidyutprava Saha, Animesh, Dipak and Panchu. For example, it was observed that if Animesh had in fact informed Amaresh and Bidyutprava Saha that he had gone to the banks of the river with Paritosh, it would have been reflected in their testimony. Similarly, Bidyutprava Saha did not say anything about Paritosh going to the river although she saw him at about 5.00 or 5.30 p.m. on 19th May, 1995. The Investigating Officer, Sub-Inspector Debabrata Dubey (PW-16) had yet another version of the events. His testimony indicated that many of the facts stated in the oral testimony of the witnesses were not put across to him at any time, suggesting considerable padding and embellishments in their testimony. As such, it was not possible to lend credence to the testimony of the prosecution witnesses and the accused were

[1] Session Trial Case No. 21 of 1997 decided by the Additional Sessions Judge, Hooghly

entitled to the benefit of doubt. Additionally, the Trial Court noted that it was a case of circumstantial evidence and also that there was no motive for Shyamal and Prosanta to have murdered Paritosh.

Decision of the High Court:

14. Feeling aggrieved by their acquittal, the State preferred an appeal before the Calcutta High Court against Shyamal and Prosanta. The appeal was allowed by a judgment and order dated 11th March, 2008.[2] The decision of the Trial Court was reversed and they were convicted for the murder of Paritosh and sentenced to imprisonment for life and a fine of Rs.5000/- each and in default of payment to undergo rigorous imprisonment of one year each.

15. According to the High Court, the case of the prosecution hinged, essentially, on the evidence of Dipak and Panchu, as well as of Animesh. The High Court considered their evidence and held that all five (Dipak, Panchu, Paritosh, Shyamal and Prosanta) crossed the river in a boat in the evening at about 5.30 p.m. on 19th May, 1995. This was supported by the testimony of Animesh

[2] State of West Bengal v. Shyamal Saha and another, 113 CWN 505=MANU/WB/0881/2008

who also wanted to go along with all of them but was prohibited from doing so by Shyamal.

16. It was also held, on the basis of the post mortem report given by Dr. P.G. Bhattacharya (PW-15) and his testimony that Paritosh died soon after 5.30 p.m. on 19th May, 1995. The High Court came to this conclusion on the basis of the doctor's statement that the death took place between 65 and 70 hours before he conducted the post mortem examination. Since the post mortem examination was conducted at about 12.00 noon on 22nd May, 1995 working backwards, it appeared that Paritosh died soon after 5.30 p.m. on 19th May, 1995.

17. Finally, the High Court held that Paritosh was last seen with Shyamal and Prosanta and therefore they had to explain the events that had occurred after they were last seen together. In the absence of any explanation offered by them, the last seen theory would apply and it must be held that Shyamal and Prosanta had murdered Paritosh.

Discussion on the law:

18. Aggrieved by their conviction and sentence, Shyamal and Prosanta have preferred this appeal. The primary submission

made on their behalf was to the effect that the High Court ought not to have interfered in the acquittal by the Trial Court particularly, in a case of circumstantial evidence. It was also submitted that the evidence on record points to the fact that they were made scapegoats by the prosecution. Of course, this was opposed by learned counsel for the State.

19. The crucial issue for consideration, therefore, relates to interference by the High Court in an acquittal given by the Trial Court. Recently, in ***Joginder Singh v. State of Haryana***[3] it was held, after referring to ***Sheo Swarup v. King Emperor***[4] that

> "Before we proceed to consider the rivalised contentions raised at the bar and independently scrutinize the relevant evidence brought on record, it is fruitful to recapitulate the law enunciated by this Court pertaining to an appeal against acquittal. In ***Sheo Swarup*** (supra), it has been stated that the High Court can exercise the power or jurisdiction to reverse an order of acquittal in cases where it finds that the lower court has "obstinately blundered" or has "through incompetence, stupidity or perversity" reached such "distorted conclusions as to produce a positive miscarriage of justice" or has in some other way so conducted or misconducted himself as to produce a glaring miscarriage of justice or has been tricked by the defence so as to produce a similar result."

Unfortunately, the paraphrasing of the concerned passage from

[3] MANU/SC/1096/2013
[4] AIR 1934 PC 227

Sheo Swarup gave us an impression that the High Court can reverse an acquittal by a lower court only in limited circumstances. Therefore, we referred to the passage in ***Sheo Swarup*** and find that what was stated was as follows:

> "There is in their opinion no foundation for the view, apparently supported by the judgments of some Courts in India, that the High Court has no power or jurisdiction to reverse an order of acquittal on a matter of fact, except in cases in which the lower Court has "obstinately blundered," or has "through incompetence, stupidity or perversity" reached such "distorted conclusions as to produce a positive miscarriage of justice," or has in some other way so conducted itself as to produce a glaring miscarriage of justice, or has been tricked by the defence so as to produce a similar result."

The legal position was reiterated in ***Nur Mohammad v. Emperor***[5] after citing ***Sheo Swarup*** and it was held:

> "Their Lordships do not think it necessary to read it all again, but would like to observe that there really is only one principle, in the strict use of the word, laid down there; that is, that the High Court has full power to review at large all the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed."

We are mentioning this only to dispel the possibility of anyone else getting an impression similar to the one that we got, though nothing much turns on this as far as this case is concerned.

[5] AIR 1945 PC 151

20. The entire case law on the subject was discussed in ***Chandrappa v. State of Karnataka***[6] beginning with perhaps the first case decided by this Court on the subject being ***Prandas v. State***.[7] It was held in ***Chandrappa*** as follows:

> "*(1)* An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.
>
> (*2*) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.
>
> (*3*) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.
>
> (*4*) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. *Firstly*, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. *Secondly*, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.
>
> (*5*) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

[6] (2007) 4 SCC 415
[7] AIR 1954 SC 36

21. The principles laid down in ***Chandrappa*** were generally reiterated but mainly reformulated in ***Ganpat v. State of Haryana***[8] though without reference to ***Chandrappa*** and by referring to decisions not considered therein. The reformulation of the principles in ***Ganpat*** is as follows:

> "(*i*) There is no limitation on the part of the appellate court to review the evidence upon which the order of acquittal is founded and to come to its own conclusion.
> (*ii*) The appellate court can also review the trial court's conclusion with respect to both facts and law.
> (*iii*) While dealing with the appeal preferred by the State, it is the duty of the appellate court to marshal the entire evidence on record and by giving cogent and adequate reasons may set aside the judgment of acquittal.
> (*iv*) An order of acquittal is to be interfered with only when there are "compelling and substantial reasons" for doing so. If the order is "clearly unreasonable", it is a compelling reason for interference.
> (*v*) When the trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of ballistic experts, etc. the appellate court is competent to reverse the decision of the trial court depending on the materials placed. (Vide *Madan Lal* v. *State of J&K*[9], *Ghurey Lal* v. *State of U.P.*[10], *Chandra Mohan Tiwari* v. *State of M.P.*[11] and *Jaswant Singh* v. *State of* Haryana[12].)"

22. Undoubtedly, we are suffering from an overdose of precedents but be that as it may, from the principles laid down, it

[8] (2010) 12 SCC 59
[9] (1997) 7 SCC 677
[10] (2008) 10 SCC 450
[11] (1992) 2 SCC 105
[12] (2000) 4 SCC 484

appears at first blush that the High Court is entitled to virtually step into the shoes of the Trial Court hearing submissions of learned counsel and then decide the case as a court of first instance. Perhaps this is not what is intended, notwithstanding the broad language used in ***Chandrappa*** and ***Ganpat***. Otherwise, the decision of the Trial Court would be a meaningless exercise and this Court would become a first appellate court from a decision of the High Court in a case of acquittal by the Trial Court. Realistically speaking, although the principles stated are broad, it is the obligation of the High Court to consider and identify the error in the decision of the Trial Court and then decide whether the error is gross enough to warrant interference. The High Court is not expected to merely substitute its opinion for that of the Trial Court only because the first two principles in ***Chandrappa*** and ***Ganpat*** permit it to do so and because it has the power to do so – it has to correct an error of law or fact significant enough to necessitate overturning the verdict of the Trial Court. This is where the High Court has to exercise its discretion very cautiously, keeping in mind the acquittal of the accused and the rights of the victim (who may or may not be

before it). This is also where the fifth principle laid down in ***Chandrappa*** and ***Ganpat*** comes into operation.

Discussion on facts:

23. Looked at from this perspective, it was submitted by learned counsel for the State that there cannot be two reasonable views of the events that took place. It was submitted that there was no doubt that Paritosh crossed the river Ganges with Shyamal and Prosanta and they went to a secluded and uninhabited place across the river. This was witnessed by Dipak, Panchu and Animesh. Paritosh then went missing and his corpse was found a couple of days later. It was submitted that on these facts there can be only one conclusion, namely that Shyamal and Prosanta caused the death of Paritosh.

24. In this context, the evidence of Dipak, Panchu, Animesh and the Investigating Officer assumes significance. Disputing the testimony given by Dipak and Panchu in Court, the Investigating Officer stated that when they were examined under Section 161 of the Criminal Procedure Code they neither told him that they had gone to the opposite side of the river nor that Shyamal and

Prosanta had gone with Paritosh towards the jungle. There was also no mention of the attendance of Animesh or the dress worn by Paritosh. In other words, they did not mention any of the events said to have taken place in their presence on the evening of 19th May, 1995. From this, it is quite clear that the subsequent statements made by them on oath appear to be add-ons and make believe. This casts serious doubt on their credibility.

25. An independent witness Swapan Kabiraj (PW-8) who is supposed to have seen Dipak, Panchu, Paritosh, Shyamal and Prosanta board the boat to cross the river, turned hostile and denied having made any statement before the Investigating Officer. Snehalata Sarkar (PW-7), wife of the boat owner Asit Sarkar also turned hostile and stated that their boat was, as usual, tied to the ghat and she could not say whether it was taken by any person on that date.

26. However, what is even more important is that Animesh stated in Court that on the morning of 20th May, 1995 he had told his father Amaresh and Bidyutprava Saha that he had seen the abovementioned five persons cross the river in a boat the previous evening. He also stated that he was taken by Amaresh

to the police station and he had even mentioned this to the police. However, Amaresh does not depose anything about having taken Animesh to the police station. The Investigating Officer deposed that Animesh had not been cited as a witness and “had it been known to me that Animesh is a material witness who saw the victim together with the accused, during investigation, he would have been cited as a witness in the charge sheet”. Therefore, the possibility of Animesh having been tutored cannot be completely ruled out.

27. It is clear that there is considerable padding in the testimony of the three crucial witnesses namely, Dipak, Panchu and Animesh and there are unexplained additions made by them. In this state of the evidence on record, the Trial Court was entitled to come to a conclusion that the prosecution version of the events was doubtful and that Shyamal and Prosanta were entitled to the benefit of doubt and to be acquitted. We also find from the record that a number of independent witnesses have turned hostile and, as mentioned above, three important witnesses have added much more in their oral testimony before the Court than what was stated before the Investigating Officer during investigations.

28. The High Court believed the testimony of Dipak and Panchu and came to the conclusion that they had crossed the river along with Paritosh, Shyamal and Prosanta. However, the High Court did not take into consideration the view of the Trial Court, based on the evidence on record, that it was doubtful if the five persons mentioned above boarded the boat belonging to Asit Sarkar to cross the river as alleged by the prosecution. The High Court also did not consider the apparently incorrect testimony of Animesh who had stated that he had gone to the police station and given his version but despite this, he was not cited as a witness. The version of Animesh was specifically denied by the Investigating Officer.

29. When the basic fact of Paritosh having boarded a boat and crossing the river with Shyamal and Prosanta is in doubt, the substratum of the prosecution's case virtually falls flat and the truth of the subsequent events also becomes doubtful. Unfortunately, the High Court does not seem to have looked at the evidence from the point of view of the accused who had already secured an acquittal. This is an important perspective as noted in the fourth principle of ***Chandrappa***. The High Court was

also obliged to consider (which it did not) whether the view of the Trial Court is a reasonable and possible view (the fifth principle of ***Chandrappa***) or not. Merely because the High Court disagreed (without giving reasons why it did so) with the reasonable and possible view of the Trial Court, on a completely independent analysis of the evidence on record, is not a sound basis to set aside the order of acquittal given by the Trial Court. This is not to say that every fact arrived at or every reason given by the Trial Court must be dealt with – all that it means is that the decision of the Trial Court cannot be ignored or treated as non-existent.

30. What is also important in this case is that it is one of circumstantial evidence. Following the principles laid down in several decisions of this Court beginning with ***Sharad Birdhi Chand Sarda v. State of Maharashtra***[13] it is clear that the chain of events must be so complete as to leave no room for any other hypothesis except that the accused were responsible for the death of the victim. This principle has been followed and reiterated in a large number of decisions over the last 30 years and one of the more recent decisions in this regard is

[13] (1984) 4 SCC 116

***Majenderan Langeswaran v. State (NCT of Delhi) and Another*.**[14] The High Court did not take this into consideration and merely proceeded on the basis of the last seen theory.

31. The facts of this case demonstrate that the first link in the chain of circumstances is missing. It is only if this first link is established that the subsequent links may be formed on the basis of the last seen theory. But the High Court overlooked the missing link, as it were, and directly applied the last seen theory. In our opinion, this was a rather unsatisfactory way of dealing with the appeal.

32. Under the circumstances, we are unable to agree with learned counsel for the State and are of the opinion that there was really no occasion for the High Court to have overturned the view of the Trial Court which was not only a reasonable view but a probable view of the events.

33. Learned counsel for Shyamal and Prosanta raised some issues such as the failure of the prosecution to examine Gopal Saha and Asit Sarkar. He also submitted that there was no motive

[14] (2013) 7 SCC 192

for Shyamal and Prosanta to murder Paritosh. In the view that we have taken, it is not necessary to deal with these submissions.

34. Learned counsel for the State relied on the evidence of Dr. Bhattacharya to submit that Paritosh died between 65 and 70 hours before the post mortem examination was conducted. As observed by High Court, this placed Paritosh's death soon after 5.30 p.m. on 19th May, 1995. The significance of this is only with respect to the time of death and has no reference to the persons who may have caused the death of Paritosh. The evidence of Dr. Bhattacharya, therefore, does not take the case of the State any further.

Conclusion:

35. The view taken by the Trial Court was a reasonable and probable view on the facts of the case. Consequently, there was no occasion for the High Court to set aside the acquittal of Shyamal and Prosanta. Accordingly, their conviction and sentence handed down by the High Court is set aside. Their appeal against their conviction and sentence is allowed.

.....J.

(Ranjana Prakash Desai)

.....J.
(Madan B. Lokur)

New Delhi;
February 24, 2014