Suresh Vs State of U.P.

Court: Allahabad High Court

Date of Decision: July 9, 2010

Acts Referred: Criminal Procedure Code, 1973 (CrPC) â€" Section 397, 401
Penal Code, 1860 (IPC) â€" Section 458

Citation: (2011) 2 ACR 1299

Hon'ble Judges: Virendra Singh, J

Bench: Single Bench

Final Decision: Partly Allowed

Judgement

Virendra Singh, J.
Suresh the accused/revisionist, preferred this revision against the judgment and order dated 14.6.1983 passed by Sri

Praduman Kumar H.J.S. 7th Additional Sessions Judge, Badaun in Criminal Appeal No. 286/1982, Suresh v. State, whereby the learned lower

court dismissed the appeal and upheld the order dated 6.10.1982 passed by learned Judicial Magistrate 2nd, Badaun in Case No. 791/1982,

State v. Ram Autar and Ors., in which the accused/revisionist was convicted and sentenced to undergo R.I. for one year for the offence u/s 458,

I.P.C. and R.I. for 6 months for the offence u/s 323/34, I.P.C. with the direction that both the sentence shall run concurrently.

2. I have heard learned Counsel for the revisionist and learned A.G.A. on behalf of the State of U.P. the Respondent and perused the record.

3. It is submitted on behalf of the revisionist that no case u/s 458 and Section 323/34, I.P.C. was made out against the revisionist and the judgment

of the courts below are bad in law. There is no independent witness to support the prosecution case. The witnesses produced by the prosecution

are related to the complainant. Even independent witness have not supported the prosecution case. They have only stated that they had seen

accused persons from behind of them running from the place of occurrence. The injury on the person of the injured persons speak to falsity of the

prosecution case as were found merely five superficial injuries on two persons. There were material contradictions too in the statements of the

prosecution witnesses and even then the court below placed reliance on such witnesses thereby committing manifest error in passing the impugned

order. It is also submitted that this revision may be allowed thereby setting aside the judgment and orders of both the courts below thereby

acquitting the revisionist for the offences and sentences awarded to him.

4. The learned A.G.A. contended that there is no error either on the facts of the case or on any point of law in the impugned orders which have

been passed by both the courts below thereby convicting the accused/revisionist and sentencing them for the offence under Sections 498, 323/34,

I.P.C., well proved on record through the reliable prosecution evidence. It is also contended that there is no force in this revision being no error in

concurrent findings of both the courts below.

5. In the light of the contentions of both the parties, I have gone through the facts and circumstances on record. Briefly stated, the facts of the case

are that in the night of 13/14.7.1980 accused-revisionist Suresh alongwith his companion Ram Autar and two other persons is alleged to have

committed lurking house trespass by entering into the house of Nafees Ahmad who was sleeping alongwith his brother Munne in the courtyard.

When complainant Nafees Ahmad and his brother Munne raised alarm, the accused-revisionist Suresh and his three companions are alleged to

have given beating to them with lathis and thereafter they ran away from there. The occurrence was witnessed besides the injured. also by P.W.

Rafiq Ahmad. Razi Mohammad and Rupa. A report of the incident was lodged at Police Station Kotwali by complainant Nafees Ahmad next

morning. In support of the case of prosecution, seven P. Ws. in all were examined in lower court. Nafees Ahmad complainant P.W. 1, his injured

brother Munne P.W. 2, Razi Mohammad P.W. 6, Rupa P.W. 3, Rafiq P.W. 4 are eye-witnesses. Dr. N.P. Singh P.W. 5 conducted medical

examination of Nafees Ahmad and his brother Munne on 14.7.1980 and he proved their injury reports Exts. Ka. 3 and Ka. 4. P.W. 7 S.I.

Chandra Pal Singh is the Investigating Officer of the case.

6. The law pertaining to the powers of this Court at the time of hearing the revision is well known as is summarized below:

The revisionary court is empowered to exercise all the powers conferred on the appellate court by virtue of the provisions contained in Section

401, Code of Criminal Procedure Section 397, Code of Criminal Procedure confers power on the High Court or Sessions Court as the case may

be, for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed and as to the

regularity of any proceeding of such inferior court. It is for the above purpose, if necessary, the High Court or Sessions Court can exercise of

appellate powers. Section 401, Code of Criminal Procedure conferring power of appellate court on the revision court is with the above limited

purpose. Sections 395 to 401, Code of Criminal Procedure read together do not indicate that the revisionary power of the High Court can be

exercised as the consequent appellate power. The revisional powers though very wide are purely discretionary, to be fairly exercised according to

the exigencies of each case. It is very well-settled that it is normally to be exercised only in unexceptional case if there is glaring defect in the

procedure or there is manifest error of point of law and consequently there has been a flagrant miscarriage of justice. These powers are

extraordinary powers which must be exercised with due regard to the circumstances of each particular case. High Court will not interfere on a

technical ground, but may only interfere when substantial question arises or when a material error effects the decision. It may interfere when a

jurisdiction vested has been exercised in an improper manner or improper ground. Even if the order is wrong or illegal, the High Court will not

always interfere when substantial justice has been done or no prejudice has resulted to the accused. The error of law must lead to a failure of

justice. In revisionary matter the High Court does not take a technical view and interfere in every case when an order has been made irregular or

improper. The fact that the High Court as a court of appeal might have taken different view is no ground for interference. The revisionary

jurisdiction will not be exercised in such a way as a given right of appeal in cases excluded by the Code of Criminal Procedure.

7. Looking into the law, the facts and circumstances on record, no doubt, the revisional power of the High Court is not restricted to question of

law only, but the settled practice is not ordinarily to interfere with a finding of fact, But in suitable cases, it is not only right but it is duty of the Court

to interfere. Findings of facts or even such concurrent findings may be interfered with where the conscience of the Court is satisfied that the

conviction is not sustainable and in special or proper cases, the High Court can go into the whole evidence as is the law laid down by Hon''ble

Apex Court in the case of Babu, AIR 1933 SC 139. But the High Court cannot embark upon a re-appreciation of evidence as is also the law laid

down by Hon''ble Supreme Court in the case of Dull Chand v. Delhi Administration, AIR 1975 SC 1960. In the case of State of Karnataka v.

Marigowda, AIR 1982 SC 1117, the Hon''ble Supreme Court has held in a case of conviction of a Secretary of a Co-operative Society for the

offence of criminal breach of trust in respect of three sums of money by disbelieving his story that he had given the sums in question to the

Executive Officer for depositing them in District Co-operative Society and they were in fact so deposited, the High Court must be deemed to have

misdirected itself in interfering with the concurrent findings of fact and acquitting the accused thereby accepting the version of the Executive Officer

that the identical sums credited with the District Co-operative Bank had come from other sources, when the version of the Executive Officer as to

sources of receipts was not challenged in his cross-examination and no suggestion was made to him.

8. Coming to the facts of this case, I do find no force in this revision with regard to appreciation of the evidence and the findings of the facts for the

occurrence and I am fully agreed with the concurrent findings of both the courts below and therefore I do not find any substance to interfere in this

regard, as the learned Sessions Judge rightly held that P.W. 1 Nafees Ahmad and P.W. 2 Munne are real brothers and since they had been found

injured, they cannot be disbelieved being real brothers too. So far as the question of P.W. 4 Rafiq is concerned, he is the uncle of the complainant

but since he is the neighbourer of the complainant, his testimony cannot be belied merely on this fact that he is the relative of the complainant and

interested in the case of the complainant. P.W. 6 Razi has also supported the prosecution case and his testimony cannot be discarded merely on

this ground that he had been the neighbourer and of the same religion to whom the complainant belongs and interested in supporting the case of the

complainant, while he seems to be a natural witness appearing on the scene of occurrence and witnessing the accused from his back running from

the place of occurrence. There is no motive against the witnesses for false implication of the accused. Thus, the arguments advanced on behalf of

the accused/revisionist regarding independent witness and the relations of the witnesses have no force.

9. The argument advanced on behalf of the revisionist in this regard too is not tenable that the witnesses have only stated that they had seen

accused persons from the back of the accused because P.W. 1 and P.W. 2 are the persons who have not stated that they had witnessed the

accused from his back. Rather, they are the injured persons and reliable for this fact that they were beaten by the accused alongwith his

companions. There is no contradiction on which basis the prosecution case should be discarded. Therefore, I do not find any substance on record

to interfere with the finding of facts on record and there is no fact on record to lead the conscience of this Court to this satisfaction that the

conviction is not sustainable so that especially, the findings of the facts should be interfered in this case.

10. So far as the question of conviction of the accused for the offence u/s 458, I.P.C. is concerned, I am of this view that both the courts below

committed error thereby convicting the accused for the offence u/s 458, I.P.C. because there is no evidence on record for lurking house trespass

or house breaking by the accused. Lurking house trespass is defined u/s 443, I.P.C, while house breaking is defined u/s 445, I.P.C, which are

punishable u/s 458, I.P.C. In both the aforesaid sections, house trespass is must, which is defined in Section 442, I.P.C For house trespass, the

criminal trespass is must, which is defined in Section 441, I.P.C. as follows:

441. Criminal Trespass.-- Whoever enters into or upon property in possession of another with intent to commit an offence or to intimidate, insult

or annoy any person in possession of such property, or, having lawfully entered into or upon such property, unlawfully remains there with intent

thereby to intimidate, insult or annoy any such person, or with intent to commit an offence, or having entered into or upon such, property, whether

before or after the coming into force of the Criminal Laws (U.P. Amendment) Act, 1961, with the intention of taking unauthorized possession or

making unauthorized use of such property fails to withdraw from such property or its possession or use, when called upon to do so by that another

person by notice in writing, duly served upon him, by the date specified in the notice, is said to commit criminal trespass.

11. Whoever commits criminal trespass as is defined by entering into or remaining in any building and/or vessel used as a human dwelling or any

building used as place for worship or as a place for the custody of property, is said to commit house trespass as is defined in Section 442, I.P.C.

Criminal trespass is necessary for house trespass. On the facts of the case, the accused seems to have entered upon the property in possession of

the complainant with intent to commit an offence as is evidenced that he committed maarpeet with the complainant and his brother, therefore, he

trespassed the house or not is the question of law in this case. It has been the case of the prosecution that the complainant and his brother were

sleeping in the courtyard. The occurrence of marpeet is also alleged to have been occurred in the courtyard. Therefore, it is evident that the

accused did not enter in the house, i.e., the building, tent or vessel meant for use of the human dwelling. In this case, both the courts below seems

to have committed error thereby presuming that the accused entered in the house of the complainant for the purpose of theft which they could not

achieve as the complainant and his brother had woke up. Unless any person entered into or remaining in any building, tent or vessel used as a

human dwelling or any building used as a place of worship or as a place for the custody of property, the offence of house trespass may not be

deemed to have been committed. Here in this case, no doubt the accused entered in the courtyard after sunset and before sunrise, but for the

purpose of lurking house trespass or house breaking, the house trespass is must and since the accused had not entered in the building, i.e., the

house of the complainant and the occurrence is occurred in the courtyard therefore there is no offence made out against the accused/revisionist

punishable u/s 458, I.P.C. The entire facts of this case and the circumstances on record merely show a case of criminal trespass and voluntarily

causing hurt to the complainant and his brother by the accused and his companions, therefore, the conviction of the accused is sustainable merely

for the offence u/s 323/34, I.P.C. and for the offence u/s 447, I.P.C. Hence, the conviction and sentence u/s 323/34, I.P.C. is liable to be upheld

and conviction u/s 458, I.P.C. is liable to be converted for the offence u/s 447, I.P.C. Hence, this revision is liable to be partly allowed.

12. Therefore, this revision is hereby partly allowed. The conviction and sentence for the offence u/s 458, I.P.C. passed by both the courts below

against accused/ revisionist Suresh is hereby converted for the offence u/s 447, I.P.C. and his sentence is reduced for two months converting the

offence u/s 458, I.P.C. to the offence u/s 447, I.P.C. The conviction and sentence against him for the offence u/s 323/34, I.P.C. is hereby upheld.

Since the accused is in jail, the learned lower court, the Judicial Magistrate concerned is hereby directed to send the conviction warrant of the

accused Suresh accordingly. Both the sentences shall run concurrently. The previous jail custody of the accused shall be adjusted in the aforesaid

sentence. Office is directed to communicate this order and to send the record of the lower court to the court concerned and immediately for

compliance.