

Khalil Pasha & Ors. Vs. Abdul Rasheed & Anr.

Criminal Appeal No. _____ of 2026 @ SLP (Crl.) No. 1115 of 2023 · Supreme Court of India · 2026-07-28 · J. B. Pardiwala · K. Vinod Chandran · F2J-C-1170

Full judgment text

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K. Vinod Chandran, J.

1. Leave granted.

2. A distraught brother was before the High Court of Judicature at Bombay with a Criminal Revision Application against the judgment of acquittal passed in a case in which the accused were arrayed for the murder of one Qavi. The order of acquittal was once upset by the High Court but without hearing the accused. An SLP was filed in which, by Annexure P13 the matter was remitted back to the High Court noticing Section 401(2) of the Criminal Procedure Code, 1973 (for short, 'Cr.PC) which restricts the revisional power being exercised to the prejudice of the accused, unless there is an opportunity afforded for hearing, either personally or through Counsel; which obviously was not provided since the Advocate engaged had expired.

3. On remand, the High Court again by the impugned order remitted the matter to the Additional Sessions Judge to consider afresh the testimony of the eyewitnesses coupled with the recoveries made under Section 27 of the Indian Evidence Act, 1872 and the Chemical Analysis Report produced. The finding of the Trial Court refusing to place any credence on the dying declarations were upheld. The accused are before us challenging the order of remit with respect to an incident alleged to have occurred on 14.02.1988.

4. The 1st respondent who was the revision petitioner had sought for an appointment of a Senior Advocate through legal services and Ms. Mukta Gupta, Senior Advocate was appointed by this Court assisted by Mr. Anuj Agarwala, learned AOR. A question was also raised by this Court by order dated 17.12.2024 as to whether in a case of acquittal under Section 302 of the Indian Penal Code, the revision petition has to be placed before a Division Bench or a Single Bench; the impugned order having been passed by a Single Judge. We heard Mr. Amol Nirmalkumar Suryawanshi, the learned AOR for the appellants.

5. As to the question raised, we find that the same is now academic. As on the date of filing of the criminal revision application, there was no provision for appeal by the victim from an order of acquittal and Section 378 of the Cr.P.C only provided for an appeal in case of acquittal, by the State, that too after obtaining leave of the High Court. However, as pointed out in the written submissions placed before us by the learned Amicus, a proviso was introduced under Section 372 of the Cr.P.C wherein the victim was provided with a right to prefer an appeal against any order passed by the Court, acquitting the accused or convicting for a lesser offence or imposing inadequate compensation; as inserted by Act 5 of 2009.

It has also been held by this Court in *Mallikarjun Kodagali v. State of Karnataka*¹ that the victim is not required to pray for grant of special leave to appeal, as under section 378, since he has been conferred with a statutory right under the proviso to Section 372 which does not provide for obtaining a special leave to appeal unlike in sub-section (4) of Section 378. *Joseph Stephen v. Santhanasamy*² relying on *Mallikarjun Kodagali*¹ held that no revision can be entertained at the instance of a victim against the order of acquittal where the remedy of appeal is available in the Cr.P.C, after the 2009 amendment.

6. It is also pertinent to note here that while Section 401 of Cr.P.C delineates the power of revision, sub-section (4) prohibits the entertainment of any revision at the instance of a party who has a remedy to file an appeal, which had not been availed of. This does not preclude the High Court from taking up a revision since as per sub-section (1) of Section 401, it could be considered even suo motu as is provided for by the words employed:

"In the case of any proceeding the record of which has been called for by itself or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by Section 386, 389, 390 and 391 or on a Court of Session by Section 307."

7. It is also pertinent that sub-section (5) empowers the High Court even in a case where an appeal lies and the appellate remedy available is not availed, but recourse is taken to the revisional remedy, on an erroneous belief that no remedy lies thereto, in the interest of justice, the application for revision can be treated as a petition of appeal and dealt with accordingly.

8. The jurisdiction to consider a revision obviously is conferred on a Single Judge or a Division Bench by the applicable High Court Act and Rules. We need only notice that with regard to the above revision filed, there was ample power available on the revisional court to convert it into an appeal; be it the date of filing, falling in 1990 and at the time of disposal in 2022. However, if as per the jurisdiction conferred under the High Court Act and Rules, the appeal is to be considered by a Division Bench, it will have to be referred to the jurisdictional bench, who would also have to be satisfied as to the erroneous belief under which the revision was filed, despite an efficacious appellate remedy; which in the present case was not available in 1990 when the revision was instituted. We notice that Section 442 of the Bharatiya Nagarika Suraksha Sanhita, 2023 (for short, 'BNSS') is analogous to Section 401 of the Cr.P.C; a verbatim reproduction.

9. Considering the fact that the incident itself is of the year 1988 and the accused having been under legal proceedings from then onwards, we deem it appropriate to consider the matter on a reappraisal of the evidence as led before the Trial Court. The prosecution, in the trial, attempted to prove motive, the incident of an unlawful assembly and assault on the deceased. The dying declaration, the nature of injuries, cause of death, the recoveries of weapon and clothes and the chemical examination report, were the circumstances projected to prove the murder as having been committed by the accused arrayed before the court.

10. On motive, it was the contention that an altercation occurred between A4 and the deceased in the shop of A3 when after a wordy duel, the deceased slapped A4. PW4, who witnessed the incident along with one Ajaz, intervened, separated them and send them on their ways in the direction of their respective homes. Later, at 08.30 pm, near one Sagar Tailoring shop PW3, PW4; who had again stepped on to the road to have tea with Ajaz, and PW8, witnessed the assault. A2 was holding the deceased when A1, A3, A5 and A6 were assaulting him. The victim was seen running away and falling on the roadside near the fire brigade station. PW10, the brother of the deceased came to the scene of occurrence on hearing about the attack on his brother. The deceased lying injured on the wayside was taken by PW10 to the hospital in an auto rickshaw.

11. PW1 was the doctor who examined the victim initially and later PW11, the surgeon attended to the injured, who succumbed to the injuries. PW5, the father of the deceased came to the hospital before the death and PW12, the Investigating Officer, summoned on the intimation given by the hospital, reached the hospital after the death. The accused is said to have made dying declaration to PW10 - his brother, PW5 - his father and PW11 - the doctor.

The post-mortem report of PW1 indicated eight injuries of which five and six were penetrating injuries, which led to the death, due to hemorrhagic shock sustained by reason of the said internal injuries to the left lung and heart. A4 was arrested subsequent to the arrest of others and the weapon used in the assault was recovered under Section 27 of the Indian Evidence Act, 1872, through Ex.37 mahazar and the clothes worn by A2 were also seized. Both the clothes and the weapon indicated the presence of human blood on chemical analysis.

12. The Trial Court had examined the testimony of the witnesses threadbare and acquitted the accused. Insofar as the motive, PW4 spoke of an altercation in the shop of A3 between A4 and the deceased which was narrated to be on account of the deceased having refused to whitewash the house of A3. It has been brought out in the cross examination of PW4 itself that the deceased was engaged in a business, specifically of selling apparels in the locality under a scheme, presumably on installments and not engaged in whitewashing.

PW4 is said to have witnessed the crime proper, and later he saw the injured lying on the road from where he was taken to the hospital. PW4 consistently spoke of Ajaz who was with him throughout, to witness both the altercation earlier in the night and the murder later at 08.30 pm, who has not been examined before Court. This has been specifically noticed by the Trial Court, which assumes

significance since the other eyewitnesses; PW3 and PW8, does not speak of the presence of PW4 or each other.

13. PW3 is another witness who narrated the assault of the deceased by A1 to A6 who also was an inquest witness. Despite his signature having been taken in the inquest report, he admits in cross examination that his statement under Section 161, Cr. PC was taken two or three days later to the inquest report. This assumes significance since it was the I.O, PW12 who prepared the inquest report and took down the statement under Section 161. The prosecution did not attempt to elicit any explanation for the delay when the I.O was examined.

PW3 also spoke of having left the scene where the injured was lying on the road, proceeding to the house of the injured to inform them, when it is admitted that the police station was just 5-7 minutes away from the scene of occurrence. He is said to have informed the relatives of the injured, which however is not corroborated by PW10, the brother who came to the spot on receiving such information. PW10's evidence is that he came to the spot after receiving information at his home delivered by some children.

14. PW8 was another passerby who is said to have witnessed the incident and walked away to his house. He is said to have told PW5 about an assault on the deceased when he went to the hospital. His testimony also does not inspire confidence, especially since he talks of having been a moot spectator to the incident when admitting to a close acquaintance with PW4. PW3, PW4 and PW8, as rightly observed by the Trial Court, are chance witnesses. Chance witnesses in a public place, as found by the High Court cannot be disbelieved for that reason alone.

However, their testimony, especially of the incident, does not inspire confidence and hence their presence at the scene of occurrence had to be established since all of them had close acquaintance with the injured and did not take him to the hospital or inform the police. This assumes relevance especially with reference to the evidence of PW1-doctor as to who brought the injured to the hospital and the suspicion regarding the very scene of occurrence, which we will deal with a little later.

15. PW1 - doctor testified that the injured was brought to the hospital by an auto-driver and was not accompanied by anybody. He also deposed that the injured was admitted at about 09.30 pm and was attending to him, till he summoned PW11, the surgeon, at 11.10 pm. The Trial Court noticed from the hospital register that PW11 had recorded in the register that the injured was brought conscious to the hospital. However, PW1 who admitted the injured was not even asked about his role other than conducting post-mortem examination, in his chief-examination.

In cross-examination PW1 also was stated that the injured was brought unconscious and never regained consciousness. His cross examination was not tested in reexamination by the prosecution. More importantly, the specific statement of PW1 was that the injured was brought to the hospital by an auto rickshaw driver and no one was accompanying him. PW11, on the other hand, despite no questions having been asked in chief examination regarding the status of the injured; whether he would have been able to make a dying declaration or not, admitted in cross examination that the injured was conscious to give a dying declaration.

A specific suggestion was made by the accused that he had given the testimony and written to that effect only to oblige a colleague who worked in the same hospital who was related to the father of the injured. The response was that he was not obliging the father of the deceased who was his friend. PW11's statement also was that the patient was accompanied by his father, who recited the history. This cannot be believed since it was PW1 who admitted the injured and that too at 9.30 p.m. while PW11 saw the injured long after at 11.10 p.m.

16. We cannot but observe that the testimony of PW11 that the injured was conscious has to be considered, juxtaposed with the testimony of PW10 and PW12 about the dying declaration. PW10 spoke of a dying declaration made by the injured in the auto rickshaw while however PW5, the father spoke of a dying declaration made in the hospital, immediately on his arrival which was about 20 minutes after the injured was brought to the hospital. Hence, the certification of the injured being conscious by the doctor who treated him at 11.10 pm cannot support the dying declarations.

PW1 deposed that the deceased was brought to the hospital by an auto rickshaw driver and was not accompanied by any relative. In this context, we have to notice that PW4 and PW8 spoke of the incident having culminated in the injured lying on the roadside. However, they did not take the injured to the hospital or inform the police when the police station was just 5-7 minutes away. They also do

not speak of any information passed on to the relatives and PW10, the brother of the deceased surprisingly appeared on the spot which can only be much later.

17. Testimonies of the eyewitnesses and PW10, as found by the Trial Court raises a suspicion about the scene of occurrence; especially when the I.O had just prepared a scene mahazar and not made any seizures from the spot. Definitely the blood of the accused would have been spilled at the scene, since he sustained numerous cut injuries and would have been profusely bleeding at the spot from which he was alleged to have been transported to the hospital.

The dying declaration hence, is on a very sketchy premise, was the finding of the Trial Court, especially when there was no clarity as to the conscious state of the injured at the hospital which is also presumably from the very grievous injuries suffered by the deceased, as disclosed from the postmortem report which also speaks of internal injuries in the lung and the heart making it highly improbable that the injured was conscious and was able to speak clearly of the assault made by the five named persons; which is the narration of PW10 - brother and PW4 - father of the deceased. The dying declaration anyway has not been believed by the High Court also.

18. Section 27 recovery of the weapon has been proved, and blood stains were found on it, which on chemical analysis was found to be human blood. The prosecution did not confront the eyewitness with the weapon, which the Trial Court was described in a manner, which was not in consonance with the physical appearance of the weapon produced before the Court. Section 27 recovery alone cannot lead to a conviction and here it fails to implicate A4 since there is no connection to the crime proved, but for the human blood found, not indicated to be that of the accused.

19. The motive fails to impress this Court as it failed to impress the Trial Court. The eyewitnesses' testimonies are not trustworthy. The dying declaration spoken of was not credible. The scene of occurrence was not above suspicion, for no tell-tale signs of the brutal attack having been seized. The expert doctors differed on the conscious state of the injured and the doctor who attended the patient for the initial hours spoke of the patient having remained unconscious throughout.

20. The only evidence is the blood stains found on the weapon recovered under Section 27 of the Evidence Act which by itself cannot lead to a finding of guilt without other circumstances which provide a complete chain leading to the hypothesis of guilt being the only one possible, excluding any hypothesis of innocence. The facts proved by the prosecution is the homicidal death, the brutal murder of a person and nothing to inculcate the accused except the eyewitness testimonies which are suspect. Our reappraisal of the evidence, manifestly indicates that this was not a fit case for converting the revision petition filed before the High Court to an appeal.

21. We have absolutely no reason to sustain the impugned order. A brutal murder definitely, and we understand the anguish of the brother who was the revision petitioner. The murder went unavenged, but it is not for the courts to convict the accused on mere assumptions when the evidence led by the prosecution fails to satisfy the judicial mind, of the guilt of the accused. The decisions are legion which speak of what a reasonable doubt is, and it is trite that while an acquittal is handed down by the Trial Court, it fortifies the presumption of innocence that is available to an accused.

The principle not to overturn an acquittal if the view taken in the order of acquittal is plausible; even if another view is possible, is not one of mere caution but is a tenet of criminal jurisprudence which ensures no prejudice being caused to the accused and ensures the benefit of any reasonable doubt arising, being conferred on the accused.

22. We allow the appeal and restore the order of the Trial Court. The accused shall stand acquitted. If they are in prison, they shall be released forthwith, if not wanted in any other case and if they are already on bail, their bail bonds shall stand cancelled.

23. Pending applications, if any, shall stand disposed of.

.....J. (J. B. Pardiwala)

.....J. (K. Vinod Chandran)

New Delhi;

July 28, 2026.

1 (2019) 2 SCC 752

2 (2022) 13 SCC 115

Source disclosure: Complete sanitized public judgment text retained for research; official-primary replacement remains pending.

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