DAMODARPRASAD CHANDRIKAPRASAD & ORS.

v.

STATE OF MAHARASHTRA

November 29, 1971

[A. N. RAY AND D. G. PALEKAR, JJ.]

Practice and Procedure—Appeal against acquittal—High Court's power of interference.

Evidence Act (1 *of* 1872), *s.* 157—*F.I.R. not proved through maker If admissible.*

The High Court set aside an order of acquittal of the appellants on various charges and convicted them. One of the items of evidence on which the High Court relied was the first information report. Though it was not proved through its maker when he gave evidence in the trial court, the High Court held it to be admissible under s. 157 of the Evidence Act. In appeal to this Court,

HELD : (1) The High Court was wrong in holding that the First Information Report would be admissible under s. 157 of the Evidence Act. Under that section, it could not be used as substantive evidence but only to corroborate its maker. The appellants were also denied the opportunity of cross-examination on the First Information Report. [627 A-D]

(2) The High Court, however, was correct in setting aside the order of acquittal and convicting the appellants on the other evidence. [639 D-G]

In dealing with an appeal against acquittal the High Court can go into questions of law and fact and reach its own conclusion on evidence provided it pays due regard to the principles for such review. These principles are giving due regard to, the views of the trial Judge as to the credibility of the witnesses, the presumption of innocence in favour of the accused, the right of the accused to any benefit of doubt and the slowness of an appellate court in disturbing the finding of fact arrived at by a Judge who had the advantage of seeing the witnesses. The appellate court in coming to its own conclusion should not only consider every matter on record having a bearing on questions of fact and the reasons given by the trial court in support of the order of acquittal but should also express reasons for holding that the acquittal was not justified. If two conclusions can be reached with a plausible appearance of reason the court should lean in favour of that which leads to acquittal and not to that which leads to conviction. But once the appellate court comes to the conclusion that the view of the trial court was unreasonable that itself would provide a reason for interference. [629 H; 630 A-E; 631 B-D]

In the present case, the High Court had kept in view the rules and principles of appreciation of evidence in setting aside the order of acquittal. In such a case, this Court would not ordinarily interfere with the order of conviction passed by the High Court in an appeal against an acquittal, on review the evidence. [630 E; 631 B-D]

Harbans Singh and Anr. v. *State of Punjab*, [1962] Supp. 1 S.C.R. 104, *Senwat Singh & Ors.* v. *State of Rajasthan*, [1961] 3 S.C.R. 120. *Nihal Singh & Ors.* v. *State of Punjab*, [1964] 4 S.C.R. 5, *State of Bombay* v. *Rusy Mistry*, A.I.R. 1960 S.C. 391 and *Laxman Kalu Nikalje* v. *State of Maharashtra*, [1968] 3 S.C.R. 685, followed.

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Khedu Mohton & Ors. v. *State of Bihar*, A.I.R. 1971 S.C. 66 and *Sheo Swarup* v. *King Emperor*, 61 I.A. 398, referred to.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 138 of 1968.

Appeal by special leave from the judgment and order dated
B the June 10, 1968, of the Bombay High Court in Criminal Appeal No. 667 of 1967.

V. S. Desai, P. S. Nadkarni and *Vineet Kumar*, for the appellants.

S. K. Dholakia and *B. D. Sharma*, for the respondent.

C The Judgment of the Court was delivered by

Ray, J. This is an appeal by special leave from judgment dated 10 June, 1968 of the High Court at Bombay setting aside the order of acquittal of the appellants and convicting them under section 325 read with section 34 of the Indian Penal Code for having
D assaulted and injured Choharjasing and sentencing each of the appellants to four years rigorous imprisonment and a fine of Rs. 1000 each and six months rigorous imprisonment in default of payment of fine and further convicting the appellants under section 323 read with section 34 of the Indian Penal Code for having assaulted and injured Ramkeshwarsing and sentencing each of the appellants to three months rigorous imprisonment. The sentences
E were to run concurrently.

The appellants and another accused were charged under sections 143, 147, 307 read with section 149 of the Indian Penal Code. The four appellants were also charged under section 148 of the Indian Penal Code. In the alternative the appellants were
F charged under section 307 read with section 34 of the Indian Penal Code. The appellants and the other accused were further charged under section 326 read with section 149 of the Indian Penal Code. In the alternative they were charged under section 324 read with section 34 of the Indian Penal Code. The appellants and the other accused were further charged under section 324 read with section 149 of the Indian Penal Code. In the alter-
G native they were charged under section 324 read with section 34 of the Indian Penal Code.

The complainant Choharjasing and Nandlal are brothers. They resided in room No. 5 of Vidya Bhuvan Kurla along with their cousin Ramkeshwarsing and Gayitrising brother-in-law of Choharjasing. Choharjasing, Nandlal and Ramkeshwarsing were
H employed at Premier Automobiles at Kurla. The prosecution witness Awadh Narayan who resided at Moturam Chawl was also employed at Premier Automobiles. Another prosecution witness

Dinanath was a shopkeeper residing at Halav Pool, Kurla. The first appellant dealt in milk and resided at Maulana Chawl, Halav Pool, Kurla. Appellant No. 2 is the brother of appellant No. 1 and resided at a nearby Chawl at Halav Pool and was employed at Premier Automobiles at Kurla. Appellant No. 3 also resided at Halav Pool Chawl, Kurla and was employed at Premier Automobiles, Kurla. Appellant No. 4 resided at another Chawl at Kurla and was also employed at Premier Automobiles, Kurla. Accused No. 5 worked as a Mehtaji of one Jairaj Pandye and resided at Bhagwat Bhuvan, Halav Pool, Kurla.

The prosecution case was this. The relation between Choharjasing and his brother Nandlal on the one hand and appellants No. 1 and 2 on the other were strained for some time. On the morning of 15 October, 1964 Nandlal brought a truck load of earth and spread the same in front on their room. On that account there was some altercation between him and appellants No. 1, 2 and 3. On the morning of 16 October, 1964 Choharjasing left his room and went to Podar Hospital at Worli for undergoing an operation for fistula. He returned to his room at about 11 or 12 noon. On his return he was told by his brother Nandlal about the quarrel and that the appellants and another accused had given a threat and enquired as to where Choharjasing was. Nandlal further told Choharjasing that the appellants and the other accused had threatened that they would break Choharjasing's hands and feet. Choharjasing went to the Police Station and filed a non-cognizable complaint. The police directed Choharjasing to approach the proper criminal court. Choharjasing went to prosecution witness Dinanath and told him about the threats.

Choharjasing then returned to his room and launched with his brother Nandlal, cousin Ramkeshwarsing and brother-in-law Gaitrising. Choharjasing was not feeling comfortable after the operation. He sat on a *charpoy* (cot) outside his room. Nandlal was with Choharjasing. Ramkeshwarsing was inside the room. At about 5 or 5.30 p.m. the appellants came there. Appellant No. 1 was armed with a lathi. Appellants No. 2, 3 and 4 had also lathis or something like iron bars. Accused No. 5 was standing at some distance. Accused No. 5 instigated the appellants by shouting the words *'Dekhte kya ho, Mar Dalo'* (what are you looking at, assault them). Appellant No. 1 also shouted to assault. The appellants surrounded Choharjasing and Nandlal and started assaulting them with weapons. Appellants No. 1 and 4 hit Choharjasing. Appellants No. 2 and 3 hit Nandlal. Choharjasing fell down. The assault continued. Appellant No. 2 thrust his stick in the mouth of Choharjasing and he lost four of his teeth. Choharjasing and Nandlal both fell unconscious. Ramkeshwarsing received a blow on left hand.

A The Sub-Inspector of Police on getting a telephone message came to the spot. On the way the Sub-Inspector met appellants No. 1 and 4 each of whom had injuries on their person. They were put in the police van. The van was taken to the place of incident. Choharjasing and Nandlal were lying unconscious. Witnesses Awadh Narayan and Dinanath were present there. B Choharjasing and Nandlal were put into the van and removed to the hospital.

At the time of admission to the hospital Choharjasing had 12 injuries. Nandlal had 5 injuries. Appellant No. 4 had 3 injuries. Choharjasing and Nandlal were detained in the hospital as C indoor patients from 16 October 1964 to 12 November, 1964. Appellant No. 4 in spite of medical advice left the hospital on 17 October, 1964.

The trial Court acquitted all the 5 accused. The trial Court gave these reasons. Choharjasing and Ramkeshwarsing, did not mention accused No. 5. Witness Award Narayan did not mention D accused No. 5. Ramkeshwarsing did not mention accused No. 2, 3 and 5. Witness Awadh Narayan did not mention accused No. 3. Choharjasing and Nandlal were all thin and of weak build. The accused were hefty in build. It is difficult to say why so many persons would engage in the assault on two weak persons, particularly when Choharjasing had just returned after E operation from the hospital. The injuries on appellants No. 1 and 4 were not satisfactorily explained. The possibility of persons from the crowd feeling enraged at the assault on accused No. 1 to 5 who were holding important offices in the local Congress organisation and then rushing forward and inflicting injuries on the assaulters of Choharjasing and Nandlal two well known per- F sons of the locality cannot be ruled out as contended for by the defence. Iron bars and sticks were not recovered. Ramkeshwarsing had failed to go to the police station of his own accord. He and Choharjasing did not implicate accused No. 5 in their earlier statements. The presence of accused No. 2 and 3 is not free from doubt. Ramkeshwarsing and Awadh Narayan did not mention G accused No. 2 in their earlier statements. Ramkeshwarsing did not mention the name of accused No. 2 in his statement to the police. Choharjasing and Nandlal could not explain how accused No. 1 and 4 came to receive the injuries. Though the injuries on Choharjasing and Nandlal are no doubt serious, the evidence does not satisfactorily establish that they were caused by the accused in furtherance of their common intention and that they form- H ed an unlawful assembly and used force or violence and they rioted with deadly weapons in prosecution of their common intention. The defence that accused No. 1 was assaulted and seeing

this accused No. 4 came there and he was assaulted cannot in the circumstances be overlooked. With these reasons the trial Court acquitted all the five accused.

The High Court set aside the order of acquittal. The High Court arrived at these conclusions. The evidence established that the grievous injury inflicted on Choharjasing and Nandlal and the simple injury inflicted on Ramkeshwarsing were inflicted by the appellants. The trouble arose on account of dispute over the open space adjoining the room of Choharjasing. The appellants could not be convicted under section 307 of the Indian Penal Code. The appellants were guilty of causing grievous hurt. The High Court, therefore, convicted the appellants for injuries sustained by Choharjasing, Nandlal and Ramkeshwarsing.

Counsel for the appellants made these submissions. The High Court interfered with the acquittal without giving any reasons. The first information report about the cognizance of the offence was wrongly admitted in evidence. The incident on the morning of 16 October, 1964 could not be believed and therefore the entire prosecution would fail.

As to the incident on the morning of 16 October, 1964 the trial Court said that the time of recording the complaint on 16 October, 1964 was 11.05 a.m. whereas the complainant's version in court was that he returned from the hospital at about 11 a.m. or 12 noon, when he received information from Nandlal. Further in the complaint Choharjasing did not mention about any of the accused and Nandlal also did not mention accused No. 5. The land on which earth was spread belonged to one Khot and therefore appellant No. 1 could not have interest in that land. On these grounds the trial Court did not accept the version that there was any occurrence on the morning of 16 October, 1964.

The High Court, however, accepted the version that there was an incident on the morning of 16 October, 1964 and said that Choharjasing would not have taken the trouble of going to the police and lodging a complaint. The High Court gave two broad reasons for accepting the prosecution version about the incident on the morning of 16 October, 1964. First, there was the complaint by Choharjasing. Secondly, Choharjasing had gone to the hospital on the morning of 16 October, 1964 and on his return from the hospital he went to lodge the complaint. Choharjasing would not have done so, if there had been no incident in the morning.

The High Court referred to the first information report about the commission of the offence and said that once the statement was admitted in evidence it afforded a very strong corroboration

A to the testimony of Choharjasing so far as the complicity of accused No. 1 to 4 in the crime was concerned and the first information report was admissible under section 157 of the Evidence Act. The first information report is not substantive evidence. It can be used for one of the limited purposes of corroborating or contradicting the makers thereof. Another purpose for which B the first information report can be used is to show the implication of the accused to be not an afterthought or that the information is a piece of evidence *res gestao.* In certain cases, the first information report can be used under section 32(i) of the Evidence Act or under section 8 of the Evidence Act as to the cause of the informant's death or as part of the informer's conduct. The High C Court was wrong in holding that the first information report would be admissible under section 157 of the Evidence Act. When the maker of the first information report was examined in court the report was not tendered by the prosecution in accordance with the provisions of the Evidence Act. The appellants were denied the opportunity of cross-examination on the first D information report. The first information report was therefore wrongly relied upon in evidence for the purposes suggested by the High Court.

It is therefore to be seen as to whether the High Court was justified in convicting the appellants on the evidence and the grounds mentioned in the judgment.

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The evidence of the complainant is that in the afternoon of 16 October, 1964 all the appellants came armed with lathis or somethink like iron bars and all the four appellants assaulted Choharjasing and Nandlal with what the appellants had in their hands. The further evidence is that appellant No. 2 thrust the F lathi into Choharjasing's mouth and he lost four of his teeth as a result of that.

Nandlal in his evidence stated that appellant No. 2 gave a blow with a stick on his head. Nandlal and Choharjasing were attempting to run away when appellant No. 3 assaulted Nandlal on his head with what looked like an iron bar and appellant G No. 4 also assaulted him with what he was holding and which also looked like an iron bar. Nandlal further said that appellant No. 2 assaulted him before he fell down and after he had fallen down all the appellants assaulted him.

Witness Ramkeshwarsing said that he saw all the appellants H and when Choharjasing and Nandlal had fallen on the ground they were assaulted by all the appellants with sticks and iron bars. Ramkeshwarsing further said that in the statement to the police he mentioned that he saw appellant No. 1, 2 and two others.

Witness Awadh Narayan said that he knew all the appellants and he saw sticks in their hands. He corroborated Nandlal's evidence that appellant No. 2 assaulted with a stick Choharjasing on the mouth. He also said that all the appellants continued assaulting Choharjasing and Nandlal. He said that in his statement to the police he mentioned the names of appellants No. 1 and 2.

Witness Dinanath said that he knew Choharjasing and Nandlal for a few years and he also know the appellants. He said that appellant No. 2 had a stick in his hand and appellant No. 2 assaulted Nandlal on his head. His further evidence was that appellant No. 2 gave a straight and perpendicular blow with a stick on the mouth of Choharjasing.

The Sessions Court was wrong in holding that Ramkeshwarsing did not mention the name of appellant No. 2. He not only stated in his oral evidence that he had mentioned the name of appellant No. 2 to the police but this was also not challenged in cross-examination. The other witnesses Choharjasing, Nandlal, Awadh Narayan and Dinanath all spoke about the appellants who assaulted Choharjasing and Nandlal. As to appellant No. 3 Choharjasing said that appellants No. 3 and 4 carried something like iron bars of a black colour.

As far as appellant No. 3 is concerned there is no contradictory police statement on the part of Choharjasing. The oral evidence of Nandlal in relation to appellant No. 3 was that he assaulted Nandlal. Nandlal in his statement to the police also mentioned about appellant No. 3. There is no contradictory police statement on the part of Nandlal as far as appellant No. 3 was concerned. Nor was any such contradiction put to Nandlal.

The medical evidence about the injuries to Choharjasing was that the injuries could be caused by hard and blunt substance like iron bars and lathis and were likely to cause death if not medically attended to. The medical evidence about the injuries to Nandlal was that those injuries could be caused by coming in contact with hard and blunt substance such as lathi, bamboo, stones, iron bars etc. and were serious injuries and were likely to cause death if not medically attended to.

Ramkeshwarsing in his oral evidence said that the appellants assaulted Choharjasing and Nandlal. He said that he did not mention appellants No. 3 and 4 in the police statement because he did not know them. There is no contradictory police statement as far as witness Ramkeshwarsing is concerned in relation to appellant No. 3. In his police statement he mentioned appellants No. 1 and 2 and he said that two others assaulted Choharjasing and Nandlal. Ramakeshwarsing thus spoke of four persons

A assaulting Choharjasing and Nandlal. That was not challenged in cross-examination. Witness Awadh Narayan spoke of appellant No. 3. There is no contradictory police statement of Awadh Narayan in relation to appellant No. 3.

Witness Dinanath spoke about appellant No. 3 assaulting
B Choharjasing and Nandlal. There is no cross-examination of Dinanath that appellant No. 3 gave a blow with a stick to Nandlal.

On behalf of the appellants it was contended that appellants No. 2 and 3 did not receive any injuries and therefore it was improbable that they would be involved in the assualt. That
C contention is unacceptable because of the clear and convincing evidence of several witnesses about appellants No. 2 and 3 assaulting Choharjasing and Nandlal. The trial Court was wrong in holding that the names of appellants No. 2 and 3 were not mentioned by the witnesses to the police. The names of appellants No. 2 and 3 were mentioned by the witnesses to the police. The
D oral evidence of the witnesses was to that effect. That evidence was not challenged.

The High Court was therefore justified in coming to the conclusion that the acquittal of appellants No. 2 and 3 by the trial Court was to be set aside. The evidence of the several witnesses that appellants No. 2 and 3 assaulted Choharjasing and Nandlal
E cannot be discarded on the statement that the appellants No. 2 and 3 did not receive injuries. It does not follow that appellants No. 2 and 3 were not at the scene of occurrence and did not commit the acts of assault just because there was no injury on them. As far as appellants No. 1 and 4 are concerned the High Court was correct in holding that they were wrongly acquitted by
F the trial Court. 12 injuries on Choharjasing and 5 injuries on Nandlal were all serious in nature. The oral evidence was rightly accepted by the High Court that all the appellants were guilty of assaulting Choharjasing, Nandlal and Ramkeshwarsing.

Counsel for the appellants relied on the decisions of this Court in *Harbans Singh and Anr.* v. *State of Punjab* [1962
G Suppl. (1) S.C.R. 104] and *Khedu Mohton & Ors.* v. *State of Bihar* A.I.R. 1971 S.C. 66 in support of the proposition that the High Court should not have interfered with the acquittal by the trial Court and if on the ruling of this Court in *Khedu Mohton & Ors.* v. *State of Bihar* (*supra*) two reasonable conclusions can be reached on the basis of the evidence on record then
H the acquittal of the accused should be preferred. The observations in *Khedu Mohton's* case mean this: If two conclusions can be reached with a plausible appearance of reason the court should lean in favour of that which leads to acquittal and not to that

which leads to conviction. Two views and conclusions cannot both be right and one must be preferred over the other because our criminal jurisdiction demands that the benefit of doubt must prevail.

As to powers of the appellate court this Court in *Sanwat Singh & Ors.* v. *State of Rajasthan* (1961) 3. S.C.R. 120 laid down three principles. First, the appellate court had power to review the evidence upon which the order of acquittal is founded. Second, the principles laid down by the Judicial Committee in *Sheo Swarup* v. *King Emperor* 61 I.A. 398 are a correct guide for the approach by an appellate court. These principles are that the views of the trial Judge as to the credibility of the witnesses, the presumption of innocence in favour of the accused, the right of the accused to the benefit of doubt and the slowness of an appellate court in disturbing the finding of fact arrived at by a Judge who had the advantage of seeing the witnesses are the 'rules and principles' in the administration of justice. Thirdly, the appellate court in coming to its own conclusion should not only consider every matter on record having a bearing on the questions of fact and the reasons given by the trial court in support of the order of acquittal, but should also express reasons to hold that the acquittal was not justified.

In the light of the rulings of this Court to which reference has been made, we are satisfied that the High Court kept in view the rules and principles of appreciation of evidence and the right of the accused to the benefit of doubt and the High Court gave reasons as to why the occurrence on the morning of 16 October, 1964 was proved and also why the appellants were found on the evidence on record to be guilty of having committed an offence. Benefit of doubt was not sustainable in the present case inasmuch as the materials on record did not exclude the guilt of the appellants.

This Court in *Khedu Mohton & Ors.* v. *State of Bihar* (*supra*) set aside the judgment of the High Court and restored that of the Sessions Judge by acquitting the appellants because the High Court did not deal with finding of the first appellate court that it was unsafe to place reliance on the evidence of four prosecution witnesses who were interested witnesses. Another feature which vitiated the approach of the High Court in that case was that there was a delay of 8 days in filing the complaint and the first appellate court said that it threw a great deal of doubt on the prosecution story. The High Court made reference to some information lead before the Police and did not properly assess the delay in the filing of the complaint. This Court found there that the information before the police prior to the complaint was

A an application that there was an apprehension of breach of peace. It is in this context of facts that this Court said that the High Court was wrong in setting aside the acquittal.

Once the appellate court came to the conclusion that the view of the trial court was unreasonable that itself would provide a B reason for interference. Again if it was found that the High Court applied the correct principles in setting aside the order of acquittal this Court would not ordinarily interfere with the order of conviction passed by the High Court in an appeal against acquittal or review the entire evidence where the High Court was right in its view of evidence. Therefore, if the High Court has C kept in view the rules and principles of appreciation of the entire evidence and has given reasons for setting aside the order of acquittal this Court would not interfere with the order of the High Court [See *Harbans Singh* v. *State of Punjab* (*supra*)].

This Court in *Nihal Singh & Ors.* v. *State of Punjab* (1964) 4 S.C.R. 5 said that there were two ways of dealing with D an appeal by this Court from an order of conviction setting aside an acquittal. One of the modes was to go through the evidence and find out whether the High Court had infringed the principles laid down in *Sanwat Singh* v. *State of Rajasthan* (*supra*) or whether the appeal was an exceptional one within the ruling of this Court in *State of Bombay* v. *Rusy Mistry* A.I.R. 1960 S.C. 391 where the finding was such that 'it shocks the conscience of the E court' or that it disregarded the forms of legal process or substantial and grave injustice had been done.

In dealing with an appeal against an acquittal the High Court can go into the questions of law and fact and reach its own conclusion on evidence provided it pays due regard to the fact that F the matter had been before the Court of Sessions and the Sessions Judge had the chance and opportunity of seeing the witnesses depose to the facts [See *Laxman Kalu Nikalje* v. *The State of Maharashtra* (1968) 3 S.C.R. (685].

The High Court was correct in setting aside the order of acquittal and convicting the appellants. The appeal therefore G fails and is dismissed. If the appellants are on bail their bail bonds are cancelled. They will surrender and serve out the sentence.

V.P.S. *Appeal dismissed.*