

## ABDUL LATIF AND ORS.

v.

## STATE OF UTTAR PRADESH

January 24, 1978

[S. MURTAZA FAZAL ALI AND P. N. SHINGHAL, JJ.]

*Additional Evidence or examining some witnesses by appellate court—Criminal Procedure Code (Act II of 1974), 1973 S. 391 r/w 311. [S. 428 r/w 540 of 1898 Code]—Scope of—Discretionary power of the High Court u/s 311 Crl. P. C. (Old 540)—Constitution of India, 1950, Art. 136—Interference by Supreme Court in special leave.*

The appellants variously armed entered the house of Khan Mohammad, deceased and husband of P.W. 1 Jamila, assaulted him with various sharp cutting instruments, and took away his body which was later recovered from a river where it was found to have been cut into pieces. On the evidence of Jamila (PW 1) Nazeer (PW 3) father of the deceased, and Sughara (PW 4) mother-in-law of the deceased, the appellants were convicted u/s 302/149 and 201/149 I.P.C. and sentenced to life imprisonment and various terms of imprisonment under various sections. The conviction and the sentences were affirmed by the High Court in appeal, after rejecting the oral application to take the additional evidence of P.W. Dhannu (brother of the deceased) and PW Zinat (sister of PW 1) by examining them as material witnesses in view of the affidavits dt. 12-7-69 and 27-1-68 filed by them alleging that six of the appellants including Abdul Latif had not participated in the occurrence at all.

Dismissing the appeal by special leave the Court.

**HELD :** 1. Unless there is some substantial error in the judgment of the High Court, Supreme Court would not interfere in special leave on the findings of fact which has been arrived at by the High Court on the relevant material. [613 A-B]

2. All the decisions of this Court u/s 540 Crl. P.C., 1898 indicate that the main test is to determine whether the evidence is necessary "for the just decision of the case". [613 F]

In the instant case :—

(a) The evidence of PW Dhannu and PW Zinat was not material and would not help in proving the case, especially when even in their affidavits both did not allege that they were not examined by the Police or that the statements taken down by the Police were wrongly recorded or that they made no statement before the police supporting the case. On the contrary, their statements were recorded by the Police on 1-8-67. Even if these witnesses were allowed to be examined by the High Court and had deposed in favour of the accused, they would have been confronted with the previous statement made before the police which would have rendered their testimony wholly contradictory and discrepant. Their examination in the High Court would have amounted to an exercise in futility. [613 A, C, D]

(b) It would have been better if Ramagopal the constable would have been examined before the Sessions Court, but his non-examination does not put the prosecution case out of Court and his evidence was not necessary for the just decision of the case and [613 G]

(c) there is no error of law in the judgment of the High Court so as to justify any interference. [613 G]

**CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 376 of 1977.**

**A** Appeal by Special Leave from the Judgment and Order dated 13-12-1973 of the Allahabad High Court in Criminal Appeal No. 300 of 1970.

*R. K. Garg, S. C. Agarwal and Shiv Pujan Singh* for the Appellants.

**B** *D. P. Uniyal and O. P. Rana* for the Respondent.

The Judgment of the Court was delivered by

**FAZAL ALI, J.**—This is an appeal by Special Leave confined only to the question, whether section 428 read with section 540 of the old Cr. P.C. was applicable to the facts of this case. The appeal is directed against the judgment of the High Court of Allahabad by which the

**C** convictions of the appellant under various sections of the Penal Code have been upheld by the High Court. The main conviction against the appellants were under section 302/149 and 201/149 I.P.C. All the appellants were sentenced to life imprisonment and various terms of imprisonment under various sections. It is not necessary for us to give a narrative of the prosecution case, because in view of the limited nature of the leave, we have to deal only with the question as to how far the High Court was justified in rejecting the oral prayer of the appellant for taking additional evidence or examining some witnesses, who were not examined by the prosecution. It appears that on the night of 31st July, 1967 the appellants variously armed entered the house of Khan Mohammad, the husband of P.W. 1 Jamila, and assaulted him with various sharp cutting instruments. Thereafter his body was taken away by accused and was later recovered from a river where it was found to have been cut into pieces. The defence was that the appellants were falsely implicated due to enmity.

**F** The central evidence in this case consisted of testimony of P.W. 1 Jamila, the wife of the deceased, P.W. 3 Nazeer (father of the deceased) and P.W. 4 Sughara, (mother-in-law of the deceased). One of the main grievances, which was made before the High Court by the counsel for the appellant, was that P.W. Dhannu, the brother of the deceased and Zinat, sister of Jamila though very material witnesses, were not examined by the Sessions Judge. It was prayed before the High Court that it should examine these witnesses under section 540 read with section 428 of the Code of Criminal Procedure. There is no doubt that section 428 confers power on the High Court to take additional evidence in suitable cases. Section 540 further gives a power to the High Court to summon witnesses, whose evidence it thinks necessary for the just decision of the case. There can be no doubt that both Dhannu and Zinat were also close relations of the deceased and their evidence would have been branded as almost similar to the evidence of P.Ws. 1, 3 and 4, that is to say interested witnesses. It was not a case where there were some independent witnesses, who had seen the occurrence and were deliberately suppressed by the prosecution. The sheet anchor of the argument of the appellant consisted of the affidavits filed by Zinat on 27.1.1968 and by Dhannu on 12.7.1969 in which they have averred that six of the appellants including Abdul Latif had not participated in the occurrence at all. It is common ground that

in the affidavits while the aforesaid avertments were made both Zinat and Dhanno did not allege that they were not examined by the police or that the statements taken down by the police were wrongly recorded or that they had made no statement before the police supporting the prosecution case. In these circumstances, therefore, we feel that their evidence was not very material and would not help in proving the case. The High Court after considering the circumstances and facts of the case has given a clear finding that the evidence of these witnesses was not necessary for a just decision of the case. This is a finding of fact which has been arrived at by the High Court on the relevant material before it and unless there is some substantial error in the judgment of the High Court, this Court would not interfere in special leave. Moreover the High Court has pointed out that so far as Dhannu was concerned there is clear evidence of P.W. 1 Jamila to the effect that after the occurrence she was concluding with the accused and became inimical to P.W. 1 and her family in so much so that P.W. 1 had to make some alterations in the house for her safety. In the interest of justice we have perused the statements of Dhannu and Zinat, recorded by the police on 1.8.1967 and we find that they had fully supported the prosecution case in their statements before the police. It is obvious that even if these witnesses were allowed to be examined by the High Court and had deposed in favour of the accused, they would have been confronted with their previous statements made before the police, which would have rendered their testimony wholly contradictory and discrepant. Thus their examination in the High Court would not have served any useful purpose but would have amounted to an exercise in futility. For these reasons, therefore, we are satisfied that the High Court was right in rejecting the oral prayer of the appellant for summoning Dhannu and Zinat.

Secondly it was argued by Mr. Garg that there appears to have been some delay in lodging the F.I.R. and the constable, Ramgopal, for taking the F.I.R. to the Superintendent of Police from the Police Station, should have been examined. It would have been better, if Ramgopal would have been examined before the Session's Court but his non-examination does not put the prosecution case out of Court and in our opinion his evidence was not necessary for the just decision of the case. The learned counsel for the appellant cited some decisions of this Court spelling out the circumstances under which the High Court should exercise its discretion under section 540 Cr.P.C. We have gone through these decisions and fully agree with the principles laid down by these cases which hold that the main test is to determine whether the evidence is necessary for the just decision of the case. In our opinion the High Court has rejected the prayer of the accused after being fully alive to the principles laid down by this Court.

For these reasons, therefore, we are clearly of the opinion that there is no error of law in the judgment of the High Court so as to justify any interference. The result is that the appeal fails and is accordingly dismissed. The appellants who are on bail will now surrender and serve out the remaining period of the sentence imposed.