KALYAN AND ORS. A

v.

STATE OF U.P.

SEPTEMBER 28, 2001

[M.B. SHAH AND R.P. SETHI, JJ.] B

Penal Code, 1860 : Sections 302, 307, 147, 148 read with sections 149 and 120B.

Criminal trial—Murder—Variance between FIR and deposition of witnesses—Conflict between statements of eye witnesses and medical evidence—Failure of prosecution to prove charges against accused beyond doubt—Acquittal by Trial Court—Appeal—Reversal of acquittal order by Appellate Court—Held not justified—Acquittal order passed by Trial Court upheld. C

Code of Criminal Procedure, 1973 : Section 378. D

Appellate court—Power to interfere with acquittal order—Scope of.

In a criminal trial under section 302, 307, 147, 148 read with sections 149 and 120B of the Penal Code, 1860, the Trial Court acquitted all the accused persons holding that the prosecution had failed to prove its case beyond reasonable doubt. It negated the existence of a criminal conspiracy and found that (i) the sequence of circumstances narrated by the witnesses in the Court was totally different from the occurrence detailed in the First Information Report; (ii) though in the F.I.R. and panchnamas it was stated that injuries were caused to the deceased by gun shots, yet at the evidence stage the prosecution came out with a new case that the injuries to the deceased were caused with weapons like ballam, kanta and lathi; and (iii) the dead body of a victim was not found from a place as mentioned in the F.I.R. On appeal High Court reversed the order of acquittal in respect of nine persons and convicted them for various offences and sentenced them to imprisonment which ranged upto imprisonment for life. E F G

In appeal to this Court it was contended on behalf of the appellants accused that (i) the High Court was not justified in interfering with the well considered order of acquittal passed by the trial court; (ii) as the H

A prosecution had failed to prove the charges beyond doubt, the appellants were entitled to the benefit of all reasonable doubts and (iii) the view taken by the trial court being probable, could not have been substituted by another view even though it is possible to be drawn from the circumstances of the case.

B Allowing the appeal and setting aside the judgment of High Court, the Court

HELD : 1. In an appeal against an order of acquittal though the High Court has full powers to review the evidence upon which an order of acquittal C is passed but it is equally well settled that the presumption of innocence of the accused persons is further reinforced by his acquittal by the trial court. The High Court while dealing with the appeals against the order of acquittal must keep in mind the propositions namely; (i) the slowness of the appellate court to disturb a finding of fact; (ii) the non-interference with the order of acquittal where it is indeed only a case of taking a view different from the one D taken by the High Court. [412-D; 413-G; H]

2. The incident stated in the F.I.R., being the first version of the occurrence has to be given due weight. The trial court does not appear to have committed any glaring irregularity in disbelieving the alleged eye-witnesses whose testimony was concededly contrary to the case of the E prosecution as projected in the F.I.R. The case of the prosecution, as sought to be proved at the trial, appears to be different than the one as narrated in the F.I.R. When the testimony of eye-witnesses is totally different from the story set out in the F.I.R., the trial court cannot be held to have taken a view which was not at all possible. [415-H; 416-B]

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3. The trial court had found that the prosecution had come with a new case that the injuries to the deceased were not caused by the gun shots but with weapons like ballam, kanta and lathi. Such a view cannot be termed to be either erroneous or highly improbable in the light of the statements of the witnesses and the record produced before the trial court. G The panchnamas showed that the deceased had received gun shot injuries but in the post mortem report no such injury was noticed on the body of any of the deceased persons. The dead body of the deceased was not found on the roof of any house as mentioned in the F.I.R. but in the courtyard of the house of another person. The post mortem report of the deceased H persons did not show any of the gun shot injury and the cause of death is

stated to be shock and haemorrhage. Therefore, the trial court was not unjustified in coming to the conclusion that the occurrence has not taken place in the manner as stated by the witnesses in their depositions recorded in the court. Even if another view regarding the occurrence was possible, as taken by the High Court, the same could not be made a basis for setting aside the order of acquittal passed by the trial court. [416-C; 417-E; G-H]

4. Keeping in view the facts and circumstances of the case, particularly the variance between the F.I.R. and the depositions made in the court, the mention of gun shot injuries in the panchnama and their absence in the F.I.R., the conflict between the statements of eye-witnesses and the medical evidence and major contradictions and improvements in the depositions of the eye-witnesses, it is clear that the prosecution failed to prove their case against the appellants beyond all shadows of doubt. The appellants are, therefore, entitled to the benefit of reasonable doubt. [418-A; B]

Kali Ram **v.** *State of Himachal Pradesh*, **AIR (1973) SC 2773;** *Shivaji Sahebrao*, **AIR (1973) SC 2622;** *Antar Singh* **v.** *State of Madhya Pradesh*, **AIR (1979) SC 1188;** *Harijan Meghan Jesha* **v.** *State of Gujarat*, **AIR (1979) SC 1566;** *Tara Singh* **v.** *State of Madhya Pradesh*, **AIR (1981) SC 950 and** *Kora Ghasi* **v.** *State of Orissa*, **AIR (1983) SC 360, referred to.**

The Proof of Guilt by Glanville Williams Second Edition, **referred to.**

5. It is true that the statements of PWs cannot be thrown out merely on the ground that they are partisan witnesses or have any enmity with some of the accused persons. However, the testimony of such witnesses require to be judged with more circumspection. [416-A]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 418 of 1998.

From the Judgment and Order dated 19.1.98 of the Allahabad High Court in Crl. A. No. 3202 of 1978.

K.B. Sinha and Rakesh U. Upadhyay for the Appellants.

Praveen Swarup for Pramod Swarup for the Respondent.

The Judgment of the Court was delivered by

A **SETHI, J.** The appellants along with seven others were charged for having committed the offences punishable under Sections 302, 307, 147, 148 read with Sections 149 and 120B of the Indian Penal Code for committing the murders of Mulaim Singh, Munshi Singh, Itwari and Ram Murti. One of the accused persons, namely, Pothi died during the pendency of the trial. All the
B accused persons, facing the trial, were acquitted by the trial court. In the appeal filed by the respondent-State, the High Court convicted nine accused persons for various offences and sentenced them to imprisonments which ranged upto the imprisonment for life. Two of the accused persons, namely, Brijpal Singh (A10) and Beer Sahai (A11) were acquitted. Out of the 9 convicted persons the appellants who were arrayed as accused Nos.2,3,4,5 and 6 in the trial court
C have preferred this appeal. The Accused Nos.A7, A-8 and A-9 did not file any appeal against the judgment of conviction and sentences and are reported to have died.

The present appeal has been filed, as a matter of right, under Section
D 2(A) of the Supreme Court Enlargement of Criminal Appellate Jurisdiction Act, 1971. It has been contended on behalf of the appellants that the impugned judgment being contrary to law and facts deserves to be set aside. It is argued that the High Court was not justified in interfering with the well considered order of acquittal passed by the trial court and the prosecution has miserably failed to connect the accused with the commission of the crime. The prosecution
E witnesses were not only interested and biased but had deposed contrary to the prosecution case as initially discussed in the First Information Report. The material contradictions in the deposition of the witnesses cannot be reconciled, making their deposition untrustworthy. It is further contended that as the prosecution had failed to prove the charges beyond doubt, the appellants were
F entitled to the benefit of all reasonable doubts.

In the present case occurrence is stated to have taken place on 27th June, 1977 at 5.00 p.m. in Village Khiria Madhukar, Police Station Usehat, District Badayun(U.P.), the FIR of which was lodged by Bhawar Pal Singh (PW1) at about 10 p.m. in the police station which was at a distance of about 15 kms.
G from the place of occurrence. The deceased persons, namely, Mulaim Singh is the father, Munshi Singh, uncle and Itwari, brother of the first informant and Ram Murti is stated to be an acquaintance of the family. The prosecution story, as narrated by the Informant (PW1) in the First Information Report is that about one year prior to the date of occurrence one Budhpal Singh was murdered and
H in connection with that case his father Mulaim Singh, his uncle Munshi Singh

and others were facing the trial. It was alleged that the said case was filed on account of the old enmity of the deceased with one Pt.Hori Lal (A1). About 13-14 days prior to the date of occurrence the said Pt.Hori Lal, along with Ram Nath and others entered the house of one Lal Janki Prasad of the same village and assaulted him. Pt.Hori Lal was the leader of a gang and wanted to kill Mulaim Singh and Munshi Singh. On the date of occurrence the informant, his father Mulaim Singh, his cousin Radhey, Pt.Ram Saran, Latoori and Ram Murti came from Village Sakhrauli to their house where Munshi Singh, Itwari, Jasbhoo Singh and Ram Dayal were already present. At about 5 p.m. 11 named accused persons along with one unknown person, at the instance of Pt.Hori Lal, armed with guns, Ballams, kantas and lathis reached there. To save their lives Mulaim Singh and others went inside their house and closed the door. The accused persons encircled the house of the informant. Mulaim Singh went on the roof of the house along with his gun. Munshi Singh, Itwari and Ram Saran along with their guns followed him. The accused persons started firing from all the four sides. Mulaim Singh, Munshi Singh and Itwari were killed on the roof, whereas Ram Murti, who was assaulted with lathi, ballam and kantha on the ground, died later on. The accused persons also took away the one barrel licensed gun of Mulaim Singh. On the FIR lodged by Bhawar Pal Singh (PW1), the investigation commenced. The dead bodies of the deceased persons were seized, accused arrested and after recording the statement of witnesses, formal charge-sheet filed against the accused persons.

To prove their case, the prosecution examined 15 witnesses. Bhawar Pal Singh (PW1), Ram Saran (PW4), Ram Dayal (PW6) and Latoori (PW6) claimed to be eye-witnesses of the occurrence. Dr.G.D. Bhaskar (PW2) was produced to prove the injuries sustained by Ram Saran (PW4). S.I. Onkar Singh (PW3) proved the registration of the FIR and G.D. entry about the sending of 6 sealed bundles of the case property to the Sadar Malkhana. Dr.M.C. Sharma (PW7) is the doctor who had conducted the post-mortem on the dead bodies of Munshi Singh and Itwari. Constable Yogendrapal Singh (PW8), Constable Gur Prasad (PW9) are formal witnesses who took the dead body of Ram Murti to the mortuary for post mortem. Police Constable Devinder Kumar (PW10) is a formal witness. Dr.N.P. Singh (PW11) was examined to prove the injuries sustained by Ram Murti deceased and Ram Dayal, injured. PW15 is the investigating officer and the other witnesses are of only formal nature.

As noted earlier, the trial court vide its judgment dated 19.8.1978 acquitted the accused persons and the High Court vide the judgment impugned convicted

A 9 out of 11 accused persons against whom the State had filed the appeal.

We have heard the learned counsel of the parties at length and critically examined the testimony of all the witnesses particularly the statements made by PWs 1, 4, 5 and 6 who were cited as eye-witnesses in the case.

B Mr.K.B. Sinha, Senior Counsel appearing for the appellants has submitted that the High Court was not justified in interfering with the judgment of acquittal passed by the trial court on proper appreciation of evidence. He has submitted that the view taken by the trial court being probable, could not have been substituted by the another view even though possible to be drawn from the circumstances of the case. It was submitted that the order of acquittal could C be set aside only for compelling reasons and wherever two views are possible to be drawn, the one favourable to the accused person should have been preferred.

The settled position of law on the powers to be exercised by the High D Court in an appeal against an order of acquittal is that though the High Court has full powers to review the evidence upon which an order of acquittal is passed, it is equally well settled that the presumption of innocence of the accused persons, as envisaged under the criminal jurisprudence prevalent in our country is further reinforced by his acquittal by the trial court. Normally the views of the trial court, as to the credibility of the witnesses, must be given E proper weight and consideration because the trial court is supposed to have watched the demeanour and conduct of the witness and is in a better position to appreciate their testimony. The High Court should be slow in disturbing a finding of fact arrived at by the trial court. In *Kali Ram* v. *State of Himachal Pradesh,* AIR (1973) SC 2773 this Court observed that the golden thread which F runs through the web of administration of justice in criminal case is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The court further observed:

> G "It is no doubt true that wrongful acquittals are undesirable and shake the confidence of the people in the judicial system, much worse, however, is the wrongful conviction of an innocent person. The consequences of the conviction of an innocent person are far more serious and its reverberations cannot but be felt in a civilised society. Suppose an innocent person is convicted of the offence of murder and H is hanged, nothing further can undo the mischief for the wrong resulting

from the unmerited conviction is irretrievable. To take another instance, if an innocent person is sent to jail and undergoes the sentence, the scars left by the miscarriage of justice cannot be erased by any subsequent act of expiation. Not many persons undergoing the pangs of wrongful conviction are fortunate like Dreyfus to have an Emile Zola to champion their cause and succeed in getting the verdict of guilt annulled. All this highlights the importance of ensuring, as far as possible, that there should be no wrongful conviction of an innocent person. Some risk of the conviction of the innocent, of course, is always there in any system of the administration of criminal justice. Such a risk can be minimised but not ruled out altogether. It may in this connection be apposite to refer to the following observations of Sir Carleton Allen quoted on page 157 of "The Proof of Guilt" by Glanville Williams, Second Ediction:

> "I dare say some sentimentalists would assent to the proposition that it is better that a thousand, or even a million, guilty persons should escape than that one innocent person should suffer; but no responsible and practical person would accept such a view. For it is obvious that if our ratio is extended indefinitely, there comes a point when the whole system of justice has broken down and society is in a state of chaos."

The fact that there has to be clear evidence of the guilty of the accused and that in the absence of that it is not possible to record a finding of his guilt was stressed by this Court in the case of Shivaji Sahebrao, Cri.Appeal No.26 of 1970, D/27.8.1973 = (reported in AIR (1973) SC 2622) (supra) as is clear from the following observations:

> "Certainly it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distinction between 'may be' and 'must be' is long and divides vague conjectures from sure considerations."

The High Court while dealing with the appeals against the order of acquittal must keep in mind the following propositions laid down by this Court, namely, (i) the slowness of the appellate court to disturb a finding of fact; (ii) the non-interference with the order of acquittal where it is indeed only a case of taking a view different from the one taken by the High Court.

In *Antar Singh* v. *State of Madhya Pradesh,* AIR (1979) SC 1188 it was

held:

> "This Court has repeatedly held that although in an appeal against acquittal, the powers of the High Court in dealing with the case are as extensive as of the trial court, but before reversing the acquittal, the High Court should bear in mind that the initial presumption of the innocence of the accused is in no way weakened, if not reinforced, by his acquittal at the trial, and further, the opinion of the trial court which had the advantage of observing the demeanour of the witnesses, as to the value of their evidence should not be lightly discarded. Where two views of the evidence are reasonably possible, and the trial court has opted for one favouring acquittal, the High Court should not disturb the same merely on the ground that if it were in the position of the trial court, it would have taken the alternative view and convicted the accused accordingly. In the instant case, by any reckoning, the view of Diwakar's testimony taken by the trial court could not be said to be unreasonable or erroneous."

In *Harijan Megha Jesha* v. *State of Gujarat,* AIR (1979) SC 1566 the Court observed that: "Even assuming that the view taken by the High Court is correct, the circumstances clearly disclose that the view taken by the learned Sessions Judge was also reasonably possible. Once this is so, there can be no question of reversing the order of acquittal."

To the same effect are the judgments in *Tara Singh* v. *State of Madhya Pradesh,* AIR (1981) SC 950 and *Kora Ghasi* v. *State of Orissa,* AIR (1983) SC 360.

In the instant case, after appreciating the evidence produced by the prosecution, the trial court dealt with various aspects of the matter and after negating the existence of a criminal conspiracy, the motives and noticing inherent contradictions, concluded:

> "In view of the above discussion, it would appear that the prosecution has not come with the true story. The occurrence most probably took place in the night at 9 or 10 p.m. and the assailants could not be recognised. The presence of witnesses Bhamarpal Singh and Latoori is doubtful as discussed above, and that the presence of Pt.Ram Saran is also doubtful. His injuries are also suspicious as discussed above. It would appears that Ram Dayal was present but he could not recognise

the assailants on account of darkness of night. He also could not identify Brijpal and Veer Sahai at the test identification parade although he named them. I have already discussed this matter of identification.

The defence has also produced one witness Chimman Lal who stated that the occurrence took place in the night. However, in view of the weakness of the prosecution evidence, the defence evidence need not to be taken into account. In view of the above discussion, it is obvious that the prosecution has failed to prove its case against Hori Lal who was charged only under section 120-B I.P.C. As already discussed the evidence of conspiracy given by Kalyan is worthless and cannot be believed. As against the other accused persons also the prosecution has failed to prove its case beyond reasonable doubt. In the result all 11 accused persons must be held not guilty and acquitted."

The High Court agreed with the trial court so far as the allegations regarding hatching of conspiracy was concerned but on appreciation of evidence and taking a different possible view, convicted the eight accused persons.

What weighed most to the trial court for acquitting the accused persons was that the prosecution had failed to prove the case beyond reasonable doubt and the sequence of circumstances narrated by the witnesses in the court was totally different than the occurrence detailed in the First Information Report. In the First Information Report it is stated that while attacking the deceased persons the accused persons had used only guns with which they were armed. Only Ram Murti and Ram Dayal(PWs) are stated to have been assaulted with lathi, ballam and kanta. The aforesaid two persons are stated to have been assaulted when they were running from the house of the complainant. It may be worth noticing that according to the FIR, at that time, only such accused persons who were armed with guns were on the ground whereas others are suggested to have climbed the roof tops to murder the deceased persons, namely, Mulaim Singh, Munshi Singh, and Itwari. None of the persons who were on the ground are stated to be armed with any weapons other than the guns. Similarly it is not evident from the FIR that who of the accused persons went on the roof top and with what weapons they were armed with. The incident stated in the FIR, being the first version of the occurrence has to be given due weight. The trial court does not appear to have committed any glaring irregularity in disbelieving the alleged eye-witnesses whose testimony was concededly contrary to the case of the prosecution as projected in the FIR.

A It is true that the statements of PWs 1, 4, 5, and 6 cannot be thrown out merely on the ground that they are partisan witnesses or have any enmity with some of the accused persons. However, the testimony of such witnesses require to be judged with more circumspection. The case of the prosecution, as sought to be proved at the trial, appears to be different than the one as narrated in the FIR. When the testimony of eye-witnesses is totally different from the story set out in the FIR, the trial court cannot be held to have taken a view which was not at all possible. The view taken by the trial court could have been disturbed only if there were compelling reasons. We do not find any compelling reason noticed by the High Court while setting aside the order of acquittal.

C The trial court had further found that the prosecution had come with a new case that the injuries to the deceased were not caused by the gun shots but with weapons like ballam, kanta and lathi. In this regard the trial court had noticed:

> "To explain the absence of the gun shot injuries, the prosecution at the time of the evidence took up a new case that all the four gun-men in the party of the accused remained on the ground and only Lathi, BALLAM AND KANTA bearing men went up on the roofs to kill Mulaim Singh etc. It has also come in the evidence of two of the witnesses that the gun bearing men fired shots from downwards in the air. Now this story is against the FIR version where it is said, "the accused persons began to fire shots from all sides and the complainant's father Mulaim Singh brother Itwari and Tau Munshi Singh were killed on the roofs by these accused persons. After killing them, they took away the single barrel gun of his father. Ram Saran on being hit by a shot jumped down from the roof along with his double barrel gun". Thus the FIR will give the impression that Mulaim Singh Munshi Singh and Itwari were also fired upon and killed on the roofs. This impression of the FIR continued even at the time of writing of Panchayatnama. In the Panchayatnama of Mulaim Singh, Munshi Singh and Itwari were also fired upon and killed on the roofs. This impression of the FIR continued even at the time of writing of Panchayatnama. In the Panchayatnama of Mulaim Singh, Munshi Singh and Itwari Exe.Ka-14, Ka-18 and Ka-22 a number of shot injuries on each one of them are noted, but the postmortem reports show that none of them had any gun shot injury. This also seems a very improbable story. The accused persons knew that Mulaim Singh and

Pt.Ram Saran had guns with them, hence lathi, ballams and kanta bearing people alone will not go on the roofs leaving gun-bearing people down-ward. It is also note-worthy that the main enmity with Mulaim Singh was of Jadunath Singh and Shyampal Singh, who had also guns according to the prosecution case. They would have gone forward on the roofs to kill Mulaim Singh and his brother Munshi Singh. This case that all the four gunmen remained on the ground was not taken even in u/s.161 Cr.P.C. The fact that gun shot injuries were shown in the Panchayatnamas goes to show that was the prosecution case even till then. But when it was found that there was no gun shot injuries on any one in post mortem report, then this new case was invented that the four gun men remained down ward on the ground. This will go to show that no one including the complainant had seen the occurrence and recognized the assailants."

Such a view cannot be termed to be either erroneous or highly improbable in the light of the statements of the witnesses and the record produced before the trial court. The Panchanamas prepared immediately after the occurrence showed that the deceased had received gun shot injuries but when examined by the doctor and in the post mortem report no such injury was noticed on the body of any of the deceased persons. The dead body of Munshi Singh was not found on the roof of any house as mentioned in the FIR but in the courtyard of the house of Jogender with injuries including "(i) On right eye-brow clotted blood injury of bullet, (ii) on head in between both eye brows injury bullet injury black blood clot". The panchanama pertaining to the dead body of Mulaim Singh also showed the following injuries:

"(i) On left chest injury near armpit at two places bloodstained gunshot injury.

(ii)On left thigh towards left side bloodstained injury of bullet."

The post-mortem report pertaining to Munshi Singh did not show any of the gun shot injury and the cause of death is stated to be shock and haemorrhage. The same is the position so far as the post-mortem report pertaining to Mulaim Singh is concerned. We feel that the trial court was not unjustified in coming to the conclusion that the occurrence has not taken place in the manner as stated by the witnesses in their depositions recorded in the court. Even if another view regarding the occurrence was possible, as taken by the High Court, the same could not be made a basis for setting aside the order of

A the trial court in view of the settled position of law on the point.

Keeping in view the facts and circumstances of the case, particularly the variance between the FIR and the depositions made in the court, the mention of gun shot injuries in the panchanama and their absence in the FIR, the conflict between the statements of eye-witnesses and the medical evidence and major
B contradictions and improvements in the depositions of the eye-witnesses, we are of the view that the prosecution failed to prove their case against the appellants beyond all shadows of doubt. The appellants are, therefore, held entitled to the benefit of reasonable doubt. To form an opinion giving the appellants-accused the benefit of doubt we have kept in mind the defence as
C projected and suggested by them to the witnesses during their cross-examination.

Under the circumstances, the appeal is allowed by setting aside the judgment of the High Court convicting the accused persons and sentencing them to various imprisonments including the life imprisonment. We uphold the order of acquittal passed by the trial court in favour of the appellants. The
D appellants shall be set at liberty at once unless required in some other case.

T.N.A. Appeal allowed.