

A

DHANANJAY SHANKER SHETTY

v.

STATE OF MAHARASHTRA

JULY 31, 2002

B

[SHIVARAJ V. PATIL AND B.N. AGRAWAL, JJ.]

C

*Penal Code, 1860—Section 302 read with Section 34—Conviction under—No direct evidence—Non-disclosure of name of the accused in station diary entry—Statement of witnesses that accused seen by them fleeing away with weapons—Conviction by Trial Court—Upheld by High Court—On appeal—Held, in view of non-disclosure of the name in the station diary entry witnesses not reliable—Conviction set aside.*

*Criminal Trial:*

D

*Injuries on accused—Not explained by prosecution—Effect of—Held, non-explanation of injuries assumes significance when there are material circumstances which make the prosecution case doubtful.*

E

*Motive—Not alleged or proved—Effect of—Held, merely because motive is neither alleged nor proved would ipso facto not affect prosecution case.*

F

*Practice and Procedure—Concurrent finding by courts below—Reappraisal of evidence by Supreme Court—Permissibility of—Held, ordinarily not permitted—But where it is found that compelling grounds exist it is permitted for doing complete justice.*

G

Appellant-accused and two other accused were tried for offences under Section 302 r/w Section 34 IPC. Prosecution case was that PWs 1,2 and 9, police constables while they were on patrolling duty saw appellant and his associate running armed with weapons shouting that 'U' was killed. They came to the spot of incident, and found 'U' lying dead. PW1 then sent telephonic message to the police station stating that the deceased was killed by appellant-accused. However, name of the appellant was not entered in station diary.

H

On medical examination of the appellant, several injuries were found on his person. Two other accused were also arrested as suspects. All the

three accused were identified in Test Identification Parade by PWs 1,2 and 9. Blood stained clothes and weapons were recovered from the house of the appellant. A

Sessions Court acquitted the co-accused but convicted the appellant-accused of the charges. The conviction was confirmed by High Court. Both the courts found legal infirmities in the holding of test identification parade and also did not rely on the recovery of clothes and weapons. B

In appeal to this Court appellant contended that prosecution had not established its case beyond reasonable doubt in view of failure to explain injuries on him and absence of allegation or evidence to prove motive of the appellant to commit the offence. C

Allowing the appeal, the Court

HELD: 1. Prosecution has failed to prove its case beyond reasonable doubt and the High Court was not justified in upholding the conviction of the appellant. [358-A] D

2.1. The fact that name of the appellant was not mentioned in station diary entry makes the statement of PWs 1,3 and 9, to the effect that in the telephonic information which was given to the police station by them name of the appellant was disclosed, highly doubtful. None of the three witnesses had seen any of the accused persons much less the appellant fleeing away and when they found the deceased lying dead, they might have sent telephonic message to the police station only to the effect that he had been murdered and name of the appellant was not disclosed therein and subsequently when PWs 12 and 15 arrived at the place of occurrence, name of the appellant was disclosed for the first time in the *fard beyan* as he was a history-sheeter. Thus, because of non-disclosure of name of the appellant in the station diary entry, it is not safe to place reliance on the evidence of PWs 1,3 and 9 that they had seen the appellant and three other accused persons fleeing away with swords and choppers shouting that 'U' was killed. [356-F, G, H; 357-A] E F G

2.2. As the appellant was named accused person, his so called identification in the test identification parade could not be of any avail to the prosecution. [357-C]

3. It cannot be laid down as a matter of law or invariably a rule that H

- A** whenever accused sustained an injury in the same occurrence, the prosecution is obliged to explain it and on its failure to do so the prosecution case should be disbelieved. But non-explanation of injuries assumes significance when there are material circumstances which make the prosecution case doubtful. In the instant case, non-explanation of injuries on the appellant by the prosecution assumes significance as there are circumstances which make the prosecution case, showing complicity of appellant with the crime, highly doubtful. [357-E, F, G]

*Takhaji Hiraji v. Thakore Kubersing Chamansing*, [2001] 6 SCC 145 and *Kashiram and Ors. v. State of M.P.*, [2002] 1 SCC 71, referred to.

- C** 4. Merely because motive is neither alleged nor proved, the same would ipso facto not affect the prosecution case, but in the instant case there are other circumstances to create doubt regarding veracity of the prosecution case, this may also become material. [357-H; 358-A]
- D** 5. Ordinarily, after appraisal of evidence by the two courts below and recording concurrent verdict of conviction, this Court does not interfere with the same, but where it is found that compelling grounds exist and there would be failure of justice, a duty is enjoined upon it to reappraise the evidence itself for doing complete justice in the case. In the facts and circumstances for the present case, reappraisal of evidence is deemed fit and proper. [356-B, C]

**E** CIVIL APPELLATE JURISDICTION : Civil Appeal No. 166 of 2002.

- F** From the Judgment and Order dated 18.7.2000 of the Bombay High Court in Crl. A. No. 632 of 1995.

T.R. Kakar, for the Appellants.

Ravi Adsure S.S. Shinde and V.N. Raghupathy, for the Respondent.

- G** The Judgment of the Court was delivered by

**B.N. AGRAWAL, J.** The sole appellant in this appeal by Special Leave has impugned his conviction under Section 302 read with Section 34 of the Penal Code as upheld by Bombay High Court.

- H** The short facts are that Shankar Maruti Kamble (PW.1), Dilip Shrirang

Barge (PW.2) and Siddharth Keshav Kamble (PW.9) were constables attached to Jogeshwari police station and they were on patrolling duty at Partap Nagar within the jurisdiction of the said police station in the afternoon of 29th October, 1991. At about 3.30 p.m. when they arrived at the junction of Partap Nagar, they saw people running helter skelter from Triveni Lane. They also noticed that four persons were running armed with weapons, i.e., swords and choppers shouting that Uday Patole was killed. Dilip Shrirang Barge (PW 2) could identify the appellant - Dhananjay Shanker Shetty as he was known history sheeter from that area and also wanted in criminal cases. The said constables tried to chase the appellant and his three other companions but in vain. Thereupon, they returned back to Triveni Lane junction and found that Uday Patole was lying in pool of blood with several injuries on his person. PW.1 immediately sent telephonic message from the nearby medical stores to the police station stating that Uday Patole was murdered by Dhananjay Shankar Shetty and three other persons on receipt of which Ravindra J. Medsingh-Station Duty Officer, (PW.12) and Bhimrao Shivram Khambe-Inspector of Police (PW.15) rushed to the place of occurrence where statement of Shankar Maruti Kamble (PW.1) was recorded stating therein the above said facts on the basis of which a first information report against the appellant and three unknown persons was registered at Jogeshwari police station at 4.40 p.m.

The police after registering the case took up investigation during the course of which when the appellant was arrested he was found injured and accordingly referred by the police to doctor-Dilip Ram Chandra Waje (PW.13) for examination who found several injuries on his person. During investigation, two other persons, namely, Sudhir Dattatraya Shinde and Rajesh Babu Kharat were also arrested as suspect and they along with the appellant were put on test identification parade in which PWs. 1,3 and 9 are said to have identified all of them. Upon completion of investigation, the police submitted charge sheet, on receipt whereof learned Magistrate took cognizance and committed the appellant and the aforesaid two other accused persons to the Court of Sessions to face trial.

Defence of the accused was that they were innocent and no occurrence much less the one alleged had taken place.

During trial, the prosecution examined 15 witnesses in all and various documents were exhibited. Upon conclusion of the trial, the learned Sessions Judge acquitted other two accused persons of the charge under Section 302

A read with Section 34 of the Penal Code whereas convicted the appellant under Section 302 read with section 34 of the Penal Code and sentenced him to undergo imprisonment for life. On appeal being preferred by the appellant, his conviction and sentence have been upheld by the High Court. Hence, this appeal by special leave.

B Ordinarily, after appraisal of evidence by the two courts below and recording concurrent verdict of conviction, this Court does not interfere with the same, but where it is found that compelling grounds exist and there would be failure of justice, a duty is enjoined upon it to reappraise the evidence itself for doing complete justice in the case. In the facts and

C circumstances of the present case, we deem it fit and proper to reappraise the evidence. Undisputedly, in the case on hand, there is no direct evidence as nobody is said to have seen the accused persons assaulting Uday Patole, the deceased, and it is a case of circumstantial evidence. The most important circumstance against the appellant was that PWs. 1, 3 and 9 who were on patrolling duty had seen the appellant and his associates fleeing away armed

D with swords and choppers shouting that Uday Patole was killed. According to the first information report as well as evidence of PWs. 1,3 and 9, information was telephonically given to Ravindra J. Medsingh (PW.12) at the police station immediately to the effect that the appellant and three others had murdered Uday Patole who passed on information immediately to the Inspector

E of Police - Bhimrao Shivram Khambe (PW.15), who was also there, on the basis of which station diary entry was made by PW.12 which has been marked as Ex. 36 and thereafter they left for the place of occurrence. But curiously enough in the station diary entry, name of the appellant was not mentioned. PW.15 admitted during the course of cross-examination that

F ordinarily on receipt of information in respect of any offence, entries are required to be made in the station diary. No reason whatsoever has been assigned either by PW.12 or PW.15 as to why normal procedure of entering name of the appellant as accused in the station diary entry was not followed and the fact that name of the appellant was not mentioned in station diary entry makes the statement of PWs. 1, 3 and 9 to the effect that in the telephonic

G information which was given to the police station by them, name of the appellant was disclosed, highly doubtful. It appears that none of these three witnesses had seen any of the accused persons much less the appellant fleeing away and when they found Uday Patole lying dead, they might have sent telephonic message to the police station only to the effect that he had been murdered and name of the appellant was not disclosed therein and subsequently

H when PWs.12 and 15 arrived at the place of occurrence, name of the appellant

was disclosed for the first time in the fard beyan as he was a history sheeteer. A  
Thus, because of non- disclosure of name of the appellant in the station diary  
entry, it is not safe to place reliance on the evidence of PWs 1, 3 and 9 that  
they had seen the appellant and three other accused persons fleeing away  
with swords and choppers shouting that Uday Patole was killed. -

Next circumstance against the appellant was his so called identification B  
in the test identification parade by PWs 1, 3 and 9. The trial court as well as  
the High Court has found various legal infirmities in the holding of test  
identification parade as such no reliance has been placed thereon. Moreover,  
as the appellant was named accused person, his so called identification in the C  
test identification parade could not be of any avail to the prosecution as it  
was meaningless.

Another circumstance which was alleged against the appellant was that  
blood stained clothes and weapon were recovered from his house, but the  
trial court as well as the High Court did not place any reliance upon this D  
circumstance in view of the fact that according to the report of chemical  
examiner, the blood group found thereon did not tally with that of the deceased.

Learned counsel appearing on behalf of the appellant pointed out that  
when the appellant was arrested, the police found several injuries on his  
person and accordingly forwarded him to Dr. Dilip Ram Chandra Waze E  
(PW.13) who found four incised injuries on non-vital parts of his body caused  
by sharp edged weapon and the prosecution has completely failed to explain  
the same. It cannot be laid down as a matter of law or invariably a rule that  
whenever accused sustained an injury in the same occurrence, the prosecution  
is obliged to explain it and on its failure to do so the prosecution case should F  
be disbelieved. But non-explanation of injuries assumes significance when  
there are material circumstances which make the prosecution case doubtful.  
Reference in this connection may be made to recent decisions of this Court  
in the cases of *Takhaji Hiraji v. Thakore Kubersing Chamansing*, (2001) 6  
SCC 145, and *Kashiram and Ors. v. State of M.P.*, [2002] 1 SCC 71. In the  
present case, non-explanation of injuries on the appellant by the prosecution G  
assumes significance as there are circumstances which make the prosecution  
case, showing complicity of appellant with the crime, highly doubtful. Learned  
counsel appearing on behalf of the appellant submitted that neither there is  
any allegation nor evidence to show that the appellant had any motive  
whatsoever to commit the crime. It is well settled that merely because motive  
is neither alleged nor proved, the same would ipso facto not affect the H

- A** prosecution case but in case there are other circumstances to create doubt regarding veracity of the prosecution case, this may also become material.

In view of the foregoing discussion, we are of the opinion that the prosecution has failed to prove its case beyond reasonable doubt and the High Court was not justified in upholding conviction of the appellant.

**B**

In the result, the appeal is allowed, conviction and sentence awarded against the appellant are set aside and he is acquitted of the charge. The appellant, who is in custody, is directed to be released forthwith if not required in connection with any other case.

**C** K.K.T.

Appeal allowed.