A STATE OF MADHYA PRADESH

v.

DHARKOLE @ GOVIND SINGH AND ORS.

OCTOBER 29, 2004

B [ARIJIT PASAYAT AND C.K. THAKKER, JJ.]

Criminal trial

C *Medical evidence—At variance with ocular evidence—Weapon supposedly used not sharp enough to cause injuries as per medical evidence—Held: Hypothetical answers of medical witnesses pointing to alternative possibilities cannot be accepted as conclusive and accorded undue primacy to exclude credible and trustworthy eye-witnesses' account.*

D *Names of witnesses not appearing in FIR—That by itself cannot be ground to doubt their evidence, especially as there is no requirement of mentioning names of all witnesses therein—Cr.PC.—Sec. 154.*

Evidence

E *Witness—Non-examination by prosecution—If witness was not likely to support the prosecution version, his non-examination* **per se** *does not corrode vitality of prosecution version, particularly when the witnesses examined had withstood incisive cross-examination and pointed to the accused as perpetrators of crime—More so when prosecution gives reasons as to why it did not choose to examine that witness.*

F *Eye witness account—Appreciation of—Minor points do not affect credibility of evidence and should not be magnified.*

Probability amounting to proof and reasonable doubt—Discussed.

G *Appellate Court—Interference with acquittal by lower court—It should not be done lightly—However, if lower court has improperly analysed evidence, acted on surmises/conjectures, based its doubt on irrelevant grounds, ignored vital evidence or evidence accepted by Trial Court is rejected after a perfunctory consideration, it is duty of the appellate Court to set right the*

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wrong—Practice & Procedure. A

Deceased got injured in a scuffle wherein accused used weapons like sword, gupti and stones. On being rushed to a local hospital, he was examined by a doctor PW 15 and was referred to another hospital where he was declared dead. Autopsy performed by doctor PW-5 found that deceased succumbed to his injuries. Trial Court convicted all the accused for offences punishable B under Section 302 read with Section 149 of IPC. However, High Court acquitted the accused holding *inter alia* that medical evidence was at variance with the ocular evidence as PW 15, the doctor, had stated that the Gupti which was supposed to be used was not sharp enough to cause the injuries. The High Court further held that evidence of eye witnesses could not be relied upon as C there were inconsistencies in their statements not only amongst themselves but also with ones given by them earlier during investigation. Hence the present appeal.

Appellant submitted that the High Court has without any justiciable reason discarded the cogent and credible evidence of prosecution version; that D the medical evidence was not sufficient to discard the evidence of the three non-partisan and independent eye witnesses who had categorically stated about the manner in which the injury to deceased was caused; and that the prosecution had tendered evidence to show why examination of other persons was unnecessary.

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Respondent contended *inter alia* that the non-examination of the person who had claimed to be present as eye witness showed that there was great deal of doubt on the acceptability of prosecution version.

Allowing the appeals, the Court

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HELD: 1. The case at hand is one where the High Court ignored the relevant aspects and unnecessarily put emphasis on certain aspects which did not have any foundation. Thus the judgment of the trial Court is restored. [788-H; 789-A]

2. It would be erroneous to accord undue primacy to the hypothetical G answers of medical witnesses to exclude the eye-witnesses' account which had to be tested independently and not treated as the "variable" keeping the medical evidence as the "constant". It is trite law that where the eye-witnesses' account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive. [786-G, H] H

A *State of U.P.* v. *Krishna Gopal and Anr.,* **AIR (1988) SC 2154, relied on.**

Mathematics of Proof II: Glanville Williams: Criminal Law Review, 1979 by Sweet and Maxwell p340, **referred to.**

3. There is nothing unusual in the conduct of the eye witnesses. The
B **High Court has put unwarranted stress on certain aspects like the political party to which one of the accused belonged, or the place from where the witnesses came together. The High Court found that the business of PW1 was claimed to be supply of milk, but no sufficient basis has been indicated as to where he was going to sell milk at the time of alleged offence. These minor**
C **points do not affect the credibility of evidence and should not have been magnified. [788-F, G]**

4. It is not necessary for prosecution to examine somebody as a witness even though the witness was not likely to support the prosecution version. Non-examination of some persons *per se* does not corrode vitality of
D **prosecution version, particularly when the witnesses examined have withstood incisive cross-examination and pointed to the respondents as the perpetrators of the crime. In the instant case the prosecution has indicated the reasons as to why it did not choose to examine the alleged independent persons.**

[788-D, E, F]

E **5. The High Court has noted that the names of witnesses do not appear in the first information report. That by itself cannot be a ground to doubt their evidence. There is no requirement of mentioning the names of all witnesses in the First Information Report.**

Bhagwan Singh and Ors. v. *State of M.P.,* **J.T. (2002) 3 387,** *Chittar Lal*
F v. *State of Rajasthan,* **(2003) AIR SCW 3466 and** *State of Madhya Pradesh* v. *Man Singh and Ors.,* **(2003) 6 Supreme 202, referred to.**

6.1. It is true that in case acquittal has been recorded, the Appellate Court should not lightly interfere with the same. But where the evidence has not been properly analysed or the Court has acted on surmises or conjectures,
G **it is the duty of the appellate Court to set right the wrong. [788-G, H]**

6.2. The appellate Court will not abjure its duty to prevent miscarriage of justice where interference is imperative. Where doubt is based on irrelevant grounds or where the Court allows itself to be deflected by red herrings drawn across the track, or where the evidence accepted by the Trial Court is rejected
H **by the High Court after a perfunctory consideration or where the baneful**

approach of the Court has resulted in vital and crucial evidence being ignored or for any such adequate reason, the Court should feel obliged to secure the ends of justice, to appease the judicial conscience, as it were. [786-D, E]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 238-239 of 2004.

From the Judgment and Order dated 16.4.2003 of the Madhya Pradesh High Court in Crl.A. Nos. 396/96 and 11 of 1997.

Siddhartha Dave and Ms. Vibha Datta Makihija for the Appellant.

S.K. Dubey, J.P. Pandey and Mrs. Nandita Dubey with him for the Respondents.

The Judgment of the Court was delivered by

ARIJIT PASAYAT, J. State of Madhya Pradesh calls in question legality of the judgment rendered by a Division Bench of the Madhya Pradesh High Court, at Jabalpur directing acquittal of the respondents (hereinafter referred to as the 'accused') on the ground that prosecution failed to prove their guilt beyond reasonable doubts. Originally eight persons faced trial. Out of them co-accused Sunita and Kapoor Singh were acquitted. During the pendency of the trial one Ramkishore absconded. Two others Bhoora and Jabar Singh had died during trial. Trial Court convicted accused Komal Singh, Manni and Dharkole. During pendency of the appeal before this Court, accused Komal has died and the appeal stands abated so far as she is concerned. All the three accused were convicted for offences punishable under Section 302 read with Section 149 of the Indian Penal Code, 1860 (in short the 'IPC'). Appellant Manni was convicted for an offence punishable under Section 148 I.P.C. while the other two have been convicted for an offence punishable under Section 147 I.P.C. Each one of them has been sentenced to undergo imprisonment for life with a fine of Rs. 5,000 for the offence punishable under Section 302 read with Section 149 of I.P.C. Manni was directed to suffer rigorous imprisonment for two years for the offence punishable under Section 148 I.P.C. while the other two with rigorous imprisonment for one year for the offence punishable under Section 147.

Prosecution Version in a nutshell is as follows:

One Hamid Khan (hereinafter referred to as the deceased) was posted

A as a police constable in police station—Seodha. On the fateful day i.e. on 13.10.1989 at around 7 o'clock in the evening an information was received in the police station that one Manni and his friends, who were wanted, were hiding in the house of one Mannu Teli. The deceased accompanied by head-constable Dayaram went in their search to the house of that Mannu Teli. At the house of Mannu Teli, his daughter Sunita met the police party and
B quarrelled with them. Later on, on the same day at about 7.45 P.M. she provoked the present respondents and four others *viz.*, Bhure, Jabar Singh, Ramkishore and Kapoor Singh by weeping before them and telling them that the deceased had insulted her. They all conspired to kill the deceased on that very day. Thereafter when the deceased Hamid Khan came to the betel shop
C of one Santosh in Seodha itself, those persons excluding Kapoor Singh came there in two batches of three each armed with sword, Gupti etc. After reaching near the shop of said Santosh, accused Bhure caught hold of the deceased and thereafter Jabbarsingh gave a blow by sword injuring the deceased below his left ear. Then accused Manni inflicted an injury below his right ear with a Gupti. As the deceased fell on ground, Kapoor Singh asked others to kill
D him. Accused Dharkole picking up a stone which was lying nearby; assaulted on the head of deceased. Kapoor Singh warned all those present there not to utter a word. Accused Komal thereafter kicked the deceased and all of them went away from there. However, one Ashok Sindhi informed head-constable Dayaram, who was on duty at that time at the Municipal House that some one
E has beaten one constable near the shop of Santosh. On receiving this information, head-constable Dayaram reached the spot and found the deceased lying seriously wounded. Suspecting the hands of present respondents and their friends in it because of the earlier attempt for their arrest, he informed his officer at police station. The Officer-in-charge of the police station thereafter reached the spot, inspected it and seized the blood stained and non-stained
F mud from the spot and the blood stained stone which was also lying nearby together with a wooden handle of Gupti. Subsequently, after his arrest accused Manni had led to the discovery of the remaining part of the Gupti, which was used by him in the crime. The deceased who was at that time only injured was immediately referred to Hospital and from the Hospital was referred to
G Gwalior for better treatment. On reaching Gwalior he was declared dead at Gwalior Hospital by the doctor concerned. Autopsy was performed by Dr. Vijay Kumar Diwan (PW-5) and it was found that he has succumbed to the injuries found on the body. Dr. V.S. Singh (PW-15), who had examined the deceased in Seodha, had found one lacerated wound on the parietal region, one abrasion on the neck and five incised wounds. Out of these five incised

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wounds two were on the left side of his face, one below the ear and the other on the mandible and remaining three were on the right side of the face, one on the ear and two on the mandible. A

The three accused persons who were tried jointly with two other co-accused persons preferred an appeal before the High Court. The primary stand before the High Court was that the medical evidence was at variance with the ocular evidence. Many persons who were stated to be present during the occurrence were not examined and on the basis of evidence of partisan witnesses, the conviction has been recorded and, therefore, the judgment was indefensible. The High Court by the impugned judgment held that the medical evidence was at variance with the ocular evidence, by reference to PW 15 who has stated that the Gupti which was supposed to be used was not sharp enough to cause the injuries. There was manipulation in records. Though the place of occurrence was nearby the police station, the information at the police station was lodged after a considerable lapse of time. B C

The High Court noticed that there was inconsistency in the evidence of so called eye witnesses i.e. PWs. 13 and 16. It was observed discrepancies were not only between the statements of these witnesses but the statement of each one of them was also inconsistent with his earlier statement recorded during investigation. Therefore, they cannot be relied upon in view of the fact that some of them had a criminal background their evidence was not worthy of credence. Accordingly the judgment of the trial Court has been set aside. D E

In support of the appeal learned counsel for the appellant-State submitted that the High Court has without any justifiable reason discarded the cogent and credible evidence of the prosecution version. There were three eye witnesses who have categorically stated about the manner in which the injury was caused. The medical evidence shows that there was a possibility that the injuries were not possible by the weapon held by one person. But it was not sufficient to discard their evidence. Three witnesses were examined and they were not partisan witnesses, and on the contrary they were independent witnesses. The prosecution has tendered evidence to show as to why the examination of other persons was unnecessary. That being so it was submitted that the judgment of the trial court should be restored and that of the High Court set aside. F G

In response, Mr. S.K. Dubey, learned senior counsel for the respondents submitted that there has been suppression of the genesis of the dispute and H

A prosecution has not been fair. There has been manipulation of the first information report and the prosecution has gone to the extent of manipulating records to show that one person was an eye witness, but in fact he was not so. The conspiracy as projected by the prosecution has been disbelieved. The chemical examiner's report has not been exhibited which could have shown that there was any human blood present on the alleged weapon. There B was no injury which could have been possible by the throwing of the stone. Non-examination of person who had claimed to be present as eye witness shows that there is a great deal of doubt on the acceptability of prosecution version. The witnesses have not only lied but also exaggerated to establish the prosecution case. View taken by the trial Court was not a correct view and C was, therefore, rightly set aside.

A bare perusal of the judgment of the High Court shows that it has disposed of the appeal in a rather casual manner. Most of the conclusions arrived at by the High Court are *per se* not on sound footing. The appellate Court will not abjure its duty to prevent miscarriage of justice by interfering D where interference is imperative. Where doubt is based on irrelevant grounds or where the Court allows itself to be deflected by red herrings drawn across the track, or where the evidence accepted by the Trial Court is rejected by the High Court after a perfunctory consideration or where the baneful approach of the Court has resulted in vital and crucial evidence being ignored or for any such adequate reason, the Court should feel obliged to secure the ends E of justice, to appease the judicial conscience, as it were. The High Court has noted that the names of witnesses do not appear in the first information report. That by itself cannot be a ground to doubt their evidence as noted by this Court in *Bhagwan Singh and Ors.* v. *State of M.P.*, JT (2002) 3 SC 387, *Chittar Lal* v. *State of Rajasthan,* (2003) AIR SCW 3466 and *State of Madhya* F *Pradesh* v. *Man Singh and Ors.*, (2003) 6 Supreme 202. There is no requirement of mentioning the names of all witnesses in the first information report.

Coming to the plea that the medical evidence is at variance with ocular evidence, it has to be noted that it would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eye- G witnesses' account which had to be tested independently and not treated as the "variable" keeping the medical evidence as the "constant".

It is trite that where the eye-witnesses' account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive. Witnesses, as Bentham said, are the eyes and ears of justice. H

Hence the importance and primacy of the quality of the trial process. Eye witnesses' account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be credit-worthy; consistency with the undisputed facts; the 'credit' of the witnesses; their performance in the witness-box; their power of observation etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation.

A person has, no doubt, a profound right not to be convicted of an offence which is not established by the evidential standard of proof beyond reasonable doubt. Though this standard is a higher standard, there is, however, no absolute standard. What degree of probability amounts to 'proof' is an exercise particular to each case? Referring to of probability amounts to 'proof' is an exercise the inter-dependence of evidence and the confirmation of one piece of evidence by another a learned author says: (See "The Mathematics of Proof II": Glanville Williams: Criminal Law Review, 1979, by Sweet and Maxwell, p.340 (342)).

> "The simple multiplication rule does not apply if the separate pieces of evidence are dependent. Two events are dependent when they tend to occur together, and the evidence of such events may also be said to be dependent. In a criminal case, different pieces of evidence directed to establishing that the defendant did the prohibited act with the specified state of mind are generally dependent. A junior may feel doubt whether to credit an alleged confession, and doubt whether to infer guilt from the fact that the defendant fled from justice. But since it is generally guilty rather than innocent people who make confessions and guilty rather than innocent people who run away, the two doubts are not to be multiplied together. The one piece of evidence may confirm the other."

Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth. To constitute reasonable doubt, it must be free from an over emotional response. Doubts must be actual and substantial doubts as to the guilt of the accused persons arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a

A merely possible doubt; but a fair doubt based upon reason and commonsense. It must grow out of the evidence in the case.

The concepts of probability, and the degrees of it, cannot obviously be expressed in terms of units to be mathematically enumerated as to how many of such units constitute proof beyond reasonable doubt. There is an B unmistakable subjective element in the evaluation of the degrees of probability and the quantum of proof. Forensic probability must, in the last analysis, rest on a robust common sense and, ultimately, on the trained intuitions of the judge. While the protection given by the criminal process to the accused persons is not to be eroded, at the same time, uninformed legitimization of C trivialities would make a mockery of administration of criminal justice. This position was illuminatingly stated by Venkatachaliah, J. (as His Lordship then was) in *State of U.P.* v. *Krishna Gopal and Anr,*. AIR (1988) SC 2154.

On that score also the High Court's conclusion that the medical evidence varied with the ocular evidence suffers from vulnerability.

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It is not necessary for prosecution to examine somebody as a witness even though the witness was not likely to support the prosecution version. Non-examination of some persons *per se* does not corrode vitality of prosecution version, particularly when the witnesses examined have withstood incisive cross-examination and pointed to the respondents as the perpetrators E of the crime.

In the instant case the prosecution has indicated the reasons as to why it did not choose to examine the alleged independent persons. There is nothing unusual in the conduct of the eye witnesses as was inferred by the High Court. The High Court has put unwarranted stress on certain aspects F like the political party accused Dharkoke belonged, or the place from where the witnesses came together. The High Court found that the business of the PW1 was claimed to be a supply of milk, but no sufficient basis have been indicated as to where he was going to sell milk at the time of alleged offence. These minor points do not affect the credibility of evidence and should not G have been magnified. Looking at from the aforesaid perspective the judgment of the High Court is indefensible and therefore set aside. It is true that in case acquittal has been recorded the Appellate Court should not lightly interfere with the same. But where the evidence has not been properly analysed or the Court has acted on surmises or conjectures, it is the duty of the appellate Court to set right the wrong. The case at hand is one where the High Court

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ignored the relevant aspects and unnecessarily put emphasis on certain aspects which did not have any foundation. That being so, the appeals are allowed and the judgment of the trial Court is restored by reversing the judgment of the High Court. The respondents shall surrender to custody forthwith to serve remainder of sentence. A

V.S. Appeals allowed. B