A YAKUB ISMAILBHAI PATEL

v.

STATE OF GUJARAT

AUGUST 31, 2004

B [K.G. BALAKRISHNAN AND DR. AR. LAKSHMANAN, JJ.]

Penal Code, 1860—Section 302 read with section 34—Prosecution case that accused persons inflicted injuries on the vital part of deceased which resulted in his death—Conviction and sentence by trial court on C *basis of evidence—High Court upheld the same—Justification of—Held : Prosecution case Proved beyond reasonable doubt—Evidence of sole eye-witness wholly reliable and stands corroborated by other circumstances and evidence of other prosecution witness throwing light on the conduct of accused on the day of incident and also blood stained weapon of offence* D *recovered at the instance of accused—Furthermore, cumulative effect of injuries found on the dead body sufficient in ordinary course of nature to cause death and the injury found on the vital part of the body alone could have caused death—Also non-production of material witnesses and even the discrepancies pointed out not affecting the prosecution case—Hence, conviction and sentence imposed by courts below justified—Evidence Act,* E *1872—Sections 3 and 114, illustration (g).*

Evidence Act, 1872—Section 23.

Witness—Prosecution witness—Application for examination of, as F *defence witness—Admissibility of—Held : Once the witness is examined as a prosecution witness, he cannot be allowed to perjure himself by resiling from the testimony given in Court.*

Solitary witness—Testimony of—Test for reliability—Explained.

G **According to the prosecution, appellant-accused No. 1 and accused no 2 along with other person attacked N with kukari and inflicted injuries on the neck of N which resulted in his death. Investigations were carried out. Accused were arrested and weapons were recovered at their instance. Prosecution witnesses were examined. PW-1, friend** H **of N deposed that the day before the incident there was a dispute**

between accsued No. 1 and N in respect of railway quarter and on the day of the incident while he was approaching the railway tracks, he saw accused No. 1 and 2 along with others running and accused No. 1 and 2 had kukari in their hands. He went towards the fuel room of the diesel shed and saw dead body of N lying in a pool of blood near the railway track and also saw injuries on the throat and on the face of N. He also saw PW-2 standing near the body of the deceased. Thereafter, PW-1 and PW-2 went to the Police Station to lodge complaint.

It is the case of PW-2 that he accompanied N to his office to drop sick note because N was sick and did not sign the muster roll. PW-2 also deposed that while he was present in the railway office, accused No. 1 and 2 along with another person inflicted injuries with sharp dangerous weapons on the neck of N and on witnessing this ghastly attack, PW-2 ran away from the spot out of fear and came back after some time and saw body at a distance of 200 ft. from office and did not see any blood, on his way to office and PW-1 was standing there. PW-2 also deposed that there were four other railway employees who were present at the scene of offence. Out of the four eye witnesses, prosecution called upon only two eye witnesses for deposition. Doctor who conducted the autopsy deposed that the victim had sustained multiple injuries which were caused by sharp edged deep penetrating weapons. Trial court convicted and sentenced the appellant along with other co-accused under section 302 read with section 34 IPC. High Court upheld the order. Hence, the present appeal.

Appellant-accused No. 1 contended that the prosecution has failed to prove the case beyond reasonable doubt and, as such the conviction should be set aside; that the courts below have based the conviction of the appellant on sole ocular testimony of PW-2 and as such no reliance can be placed on the statement of PW-1; that the statements of PW-1 and PW-2, even though establish their irrespective presence near the railway tracks are, in fact, contradictory as regards who was there first at the railway tracks near the body; that the statement of PW2, sole eye-witness fails to meet the test of 'entire reliability; that the testimony of PW-2 to the effect that there were other employees present at the time of the occurrence is belied by the evidence of two

A of the employees, who have deposed otherwise and, therefore, the evidence of the other two witnesses far from corroborating the sole eye-witness account in fact belies it and sole statement of PW-2 cannot be made basis for convicting the accused; that no test identification parade was conducted for accused No. 1; that as per the ocular B evidence the weapon of offence was alleged to be kukari which is a blunt weapon whereas the medical evidence shows that there were as many as 24 wounds caused by sharp edged weapons, and in view of the discrepancy reliance should not have been placed on the ocular evidence; that the High Court on noting the discrepancy that the muster roll was signed by the deceased, should not have continued to C place reliance on the statement of PW-2; that the investigating officer deposed that the scene of the offence has been stated to be between two railway tracks whereas PW-2 deposed that deceased was attacked in the diesel shed 200 metres away; that no investigation was done of how the body came to be found 200 meters away; that the non-production D of material witnesses leads to an adverse inference under Section 114, illustration (g) of the Evidence Act; and that the accused having spent over seven years in jail and if this Court allows the present appeal, it would only be trite to allow the appeal qua accused Nos. 2 and 3 who were unable to approach this Court.

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Respondent-State contended that the statement of PW-1 supports the case in identifying the accused persons and established the presence of PW-2 at the scene of the offence; and that both PW-1 and PW-2 were known to the deceased as well as the appellant-accused and the F testimony of both these witnesses has been relied upon by trial court and High Court to base the conviction of the appellant.

Dismissing the appeal, the Court

G HELD : 1.1. The courts below rightly convicted the appellant under section 302 read with section 34 IPC and sentenced him to life imprisonment. [984-E]

1.2. Appellant has failed to establish his case of innocence. On the contrary, the prosecution has proved its case beyond any H reasonable doubt. The evidence of witness and the evidence on record

sufficiently and convincingly upholds the narrative of the guilt of the appellant. Certain discrepancies pointed out by the appellant are trivial in nature and would not affect the case of conviction imposed on the appellant. A

1.3. PW-2 even though not claiming to have seen the entire attack but categorically deposed about having seen the initial attack by the appellant and co-accused with sharp edged weapons on a vital organ of the deceased, namely, the neck. The deposition of PW-2 is reliable and that there is no reason to disbelieve him. The deposition that the assault was directed at the neck of the deceased proved the intention of the accused to cause the death of the deceased. The testimony of PW-2 proves and corroborates the presence of the complainant PW-1 at the spot and *vice-versa*. PW-2 cannot be branded as a related or interested witness because he is merely a friend of the deceased. There is nothing significant to infer that there was enmity between himself and accused persons. The testimony of PW-2 is also sufficient by itself to prove the case against the appellant and that the credibility of this witness has not been impaired in the cross-examination by the appellant. This witness has stuck to his police statement and the subsequent examination-in-chief in Court where he identified the appellant-accused as well as the co-accused as the assailants of the deceased. The conduct of PW-2 appears to be consistent and natural in accompanying the deceased to his office at loco shed on the date of the incident. His act of running away to save his own life and not going forward to help the deceased at the time of the incident is a most probable and natural human conduct which most men faced in such situation would resort to. It is not and cannot be a circumstance or a ground to disbelieve his testimony particularly when the rest of his testimony is tested in cross-examination. [995-H; 996-A-F] B C D E F

1.4. The testimony of PW-1 corroborates the presence of the eye-witness PW-2 at the spot. The doubts sought to be raised by the appellant in receipt of the sick note of the deceased and the subsequent staying back at the office are rendered irrelevant and insignificant. PW-1 has deposed that he has identified the appellants and the co-accused in the Court. Thus, it is clear from the testimony of PW-1 as a prosecution witness that although he is not an eye-witness of the G H

A incident, yet he throws light on the conduct of the accused on the day of the incident around the time of incident. His testimony together with the testimony of Investigating Officer corroborates the presence of PW-2 at the place of the incident. [996-G-H; 997-B-D]

B 1.5. In order to pass conviction upon the testimony of a solitary eye-witness such a testimony must be of a nature which inspires the confidence of the Court. While looking into such evidence this Court has always advocated the Rule of Caution and such corroboration from other evidence and even in the absence of corroboration if testimony of such single eye-witness inspires confidence then conviction C can be based solely upon it. In the instance case, the testimony of the solitary eye-witness stands corroborated by other circumstances and evidences and more particularly PW-1 whose testimony has been relied upon by both the Courts. [999-B-D; 997-A]

D *Shivaji Sahabrao Bobade and Anr.* v. *State of Maharashtra,* [1973] 2 SCC 793; *Joseph* v. *State of Kerala,* [2003] 1 SCC 465; *Suresh Chaudhary* v. *State of Bihar,* [2003] 4 SCC 128; *Shahauddin Abdul Kahlik Shaikh* v. *State of Gujarat,* [1995] Supp. 2 SCC 441; *Thevar Etc.* v. *The State of Madras Etc.,* AIR (1957) SC 614 and *Mohamed Sugal Esa* v. *The* E *King,* AIR (1946) PC 3, referred to.

1.6. The Investigating Officer has stated in his testimony that the test identification parade was not necessary in the instant case. This apart, both the witnesses PW-1 and 2 have categorically stated in their F deposition that they knew the appellant from the past. [997-F-G]

1.7. A weapon of offence has been recovered at the instance of the appellant from his own house. The testimony of the panch witness PW-6 in respect of the recovery and the appellant's identity therein has remained unshaken during extensive cross-examination and blood G stains were also seen on the said weapon. [997-H; 998-A]

1.8. The presence of blood at the spot where PW-2 states the attack had taken place establishes the correctness of the version of PW-2. In such an event, the mere failure to explain the presence of the dead H body at an adjoining place does not disprove or contradict the

prosecution case. [998-E-F] A

1.9. Since two of the witnesses to the prosecution case present at the spot turned hostile, it cannot be said that the prosecution must suffer adverse inference for any further non-production of witnesses. It is not the case of the appellant that there were certain witnesses who B were cited as witness in the charge-sheet but later on dropped as witnesses by the prosecution during the trial. Also one of the witnesses before the trial court had been granted police protection by the trial court on the ground of threats from the accused persons. [999-D-F]

Habeeb Mohammad v. *The State of Hyderabad,* [1954] SCR 475; C *Stephen Senivaratne* v. *The King,* AIR (1936) PC 289 and *State of U.P. and Anr.* v. *Jaggo alias Jagdish and Ors.,* [1971] 2 SCC 42, referred to.

1.10. The deposition of the doctor who conducted the autopsy that the victim had sustained multiple injuries which were caused by sharp D edged deep penetrating weapons and owing to the same there was haemorrhage which ultimately resulted in his death. The cumulative effect of injuries found on the dead body were sufficient in ordinary course of nature to cause death and the injury found on the neck, a vital part of the body alone could have caused death. High Court also E specifically held that the ocular version in this case is not at loggerheads with the medical evidence. [1000-C-E; 998-D]

1.11. Once the witness is examined as a prosecution witness, he cannot be allowed to perjure himself by resiling from the testimony F given in Court on oath. High Court and also the Sessions Court rightly rejected the affidavit filed by PW-1 wherein he had sworn to the fact that whatever he had deposed before Courts as PW-1 was not true and it was so done at the instance of Police. It is pertinent to note that during the intervening period between giving of evidence as PW-1 and filing of affidavit in Court later he was in jail in a narcotic case and G that the accused persons were also fellow inmates there. [997-E-G]

1.12. In the instance case, the guilt of the appellant has been convincingly established. Therefore, it cannot be said that the accused having spent over seven years in jail and if this Court allows the present H

A **appeal, it would only be trite to allow the appeal qua accused Nos. 2 and 3 who were unable to approach this Court. [993-H; 994-A]**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 62 of 2004.

B

From the Judgment and Order dated 29.8.2003 of the Gujarat High Court in Crl. A. No. 327 of 1998.

Huzefa Ahmadi, Nakul Dewan and Ejaz Maqbool, for the Appellant.

C Madhukar, Ms. Sadhana Sandhu and Ms. Hemantika Wahi for the Respondent.

The Judgment of the Court was delivered by

D **DR. AR. LAKSHMANAN, J. :** The present criminal appeal arises out of the judgment and order dated 29.08.2003 passed by the High Court of Gujarat at Ahmedabad in Criminal Appeal No. 327 of 1998 wherein the High Court confirmed the conviction of the Appellant along with two other co-accused for offence under Section 302 read with Section 34 of the I.P.C. E and sentenced them to imprisonment for life.

The brief facts of the present case are as under:

On 25.08.1995 at about 13.15 hrs. the Ahmedabad Railway Police F received a Vardhi from one Abdulmajid that a knife blow has been inflicted on Nazim at Kankaria Loco Shed. On the strength of the said entry, Police Sub-Inspector went to the scene of occurrence, prepared inquest report of dead body and also drew panchanama of scene of occurrence. In the meantime, at about 17.40 hrs. complaint was given by Munna @ Gheti Mohamadshafi Shaikh. In the said complaint, it is stated that he happens G to be a friend of Nizamuddin Ismailbhai (deceased) for the last 15 years and the said Nizamuddin has been allotted one quarter in B scale colony of Kankaria railway colony, but he was not residing there. He gave the quarter to his relative. Nearby the quarter of Nizamuddin, Yakubbhai Patel (accused No.1) was residing. The Complainant also used to visit the said H quarter along with Nizamuddin. On 24.08.1995, there was altercation and

quarrel in between accused No.1 and deceased in respect to the said quarter, as he wanted to get it evicted. On 25.08.1995, the day of the incident, while the said Munna @ Gheti was returning from the house of his friend, somewhere near Kankaria railway colony, he saw accused No. 1 and accused No. 2 along with other person. They were running. There was Jamaiya (kukari) in the hands of accused Nos. 1 and 2. Therefore, he went towards the fuel room of diesel shed, where he saw the dead body of Nizamuddin in a pool of blood lying near the railway track. One Raju was also there. In the inquiry, he could gather from the said Raju that accused No.1 and 2 along with one another person had inflicted injuries on the person Nizamuddin and thus has resulted into death. The said Munna had also seen the injury on the throat and on the face of Nizamuddin.

During investigation, police recorded the statements of witnesses, panchanamas were drawn in respect of the clothes of the deceased, discovery of weapons at the instance of the accused persons and post mortem note of the deceased was collected. Incriminating articles were also collected for having scientific examination. Police arrested accused Nos. 1 and 2 and Tapan @ Tondi Shashdhar accused No.3 on 19.09.1995. After completion of investigation, accused came to be charge-sheeted on 16.12.1995 before the Metropolitan Magistrate, Court No.5, Ahmedabad. The said charge-sheet was for the alleged offences punishable under Sections 302 and 304 of the I.P.C. and Section 135 of the Bombay Police Act. It was numbered as Criminal Case No. 2833 of 1995. The Metropolitan Magistrate, in turn, committed the said Criminal Case No. 2833 of 1995 of his file to the Court of Sessions Ahmedabad on 01.02.1996 and it was numbered as Sessions Case No. 101 of 1996. Charge was framed against all the three accused. They pleaded not guilty to the charges and claimed to be tried.

The prosecution, in order to prove the charge against the accused, examined 14 witnesses and also relied on documentary evidence which consisted of FIR, Panchanama of place of incident, recovery of weapons panchanama from the present appellants. The appellants have also examined D.W. 1 Munna @ Gheti Mohammadsami Shaikh and produced documentary evidence.

After the prosecution case was over, the appellants were questioned with regard to the evidence led by the prosecution against them and their

A statements were recorded under Section 313 of the Code. In their further statements, all the appellants have denied the alleged part played by them in the commission of the offence. However, they gave application to examine the Complainant Munna @ Gheti Mohammadshafi Shaikh as defence witness.

B The Additional Sessions Judge, after appreciating the oral and documentary evidence and arguments advanced by the respective counsel for the prosecution as well as the defence, held that on the day of incident i.e. 25.08.1995 all the appellants had common intention to kill the deceased. It was further held that the deceased Nizamuddin died a C homicidal death. In the light of this, the Additional Sessions Judge convicted all the appellants and sentenced them, as stated above, which has given rise to the appeal before the High Court. The High Court, after considering the entire evidence and the facts and circumstances of the case, found themselves in complete agreement with the reasoning and findings D of the Sessions Judge and dismissed the appeal and gave liberty to the trial Court to proceed against the witness Munna @ Gheti under Section 344 of the Cr.P.C. Aggrieved by the order of the High Court, the appellant has preferred the special leave petition before this Court. Leave was granted on 12.01.2004.

E We heard Mr. Huzefa Ahmadi, learned counsel appearing for the Appellant ably assisted by Mr. Nakul Dewan and Mr. Ejaz Maqbool and Mr. Madhukar, learned counsel for the Respondent ably assisted by Ms. Sadhana Sandhu and Ms. Hemantika Wahi. We have been taken through the pleadings, the evidence let in and the documents produced by learned F counsel appearing on either side.

Mr. Huzefa Ahmadi, learned counsel appearing for the appellant, made the following submissions:

a) the Courts below have relied upon the sole testimony of G PW-2 and, therefore, no reliance can be placed on the statement of PW-1;

b) the Courts have disbelieved the statement of PW-1 and have based the conviction solely on the ocular testimony of H PW-2;

c) No other eye-witness supports the case; A

d) In any event, it is evident that the statements of PW-1 and PW-2, far from establishing their respective presence near the railway tracks are, in fact, contradictory. In order to establish the above contention, learned counsel for the B appellant drew our attention to the following extract from the judgment of the High Court:

"Thereafter, he saw the body of deceased Nizamuddin lying in a pool of blood. He saw Raju standing near the body for C Nizamuddin. Raju told the witness that Yakub Patel and other accused persons gave blow to Nizamuddin and ran away. Subsequently, Raju and witness went to police station to lodge complaint which is given mark 10/1.

The witness came after some time and he saw the body of D Nizamuddin at a distance of 200 ft. from the office. He did not see any blood on way to his office. Munna @ Geti was standing near deceased Nizamuddin before witness went there."

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According to learned counsel for the appellant, the following is evident from the above extract:

- There is clear dichotomy between the statements of PW-1 and PW-2 as regards who was there first at the railway tracks F near the body;

- If, indeed, the sole eye-witness PW-2 is to be believed, then it is PW-1 who reached the railway tracks first and not *vice versa*. Therefore, PW-1's statement that he had seen three persons running away while he was approaching the railway G tracks and that he was told by PW-2 that said persons killed the deceased is wholly unbelievable.

Learned counsel for the appellant further submitted that no T.I. Parade was conducted for accused No. 1. Learned counsel also pointed H

A out the discrepancy between medical and ocular evidence. It was submitted that while the witnesses deposed that the accused had used jamiyas/kukaris which are blunt edged weapons, the medical evidence and the wounds show that sharp edged weapons were used. Learned counsel drew our attention to pages 17, 19, 22 and 23 of Volume-I of the paper-book.

B

It was further submitted that the weapon of offence was alleged to be kukari/jamiya which is a blunt weapon whereas the medical evidence shows that there were as many as 24 wounds caused by the sharp edged weapons. It was, therefore, submitted that the High Court in view of the C discrepancy between the medical and ocular evidence ought not to have relied upon the ocular evidence to convict the accused.

The learned counsel brought to our notice the following discrepancies in the case of the prosecution:

D *STATEMENT OF PW-2:*

The case of PW-2 is that on the request of the deceased, he accompanied the deceased to his office in order to enable the deceased to file a sick note. However, PW-2 had stated in his deposition that the E deceased had not signed the muster roll, which the High Court has recorded as under:

> "When they went to diesel shed on scooter, Nizamuddin did not sign the muster roll".

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The statement of PW-2 is, however, belied by the fact that the muster roll was signed by the deceased. The High Court has recorded this as under:

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> "As per muster roll Exh. 66 it is clear that on 25.08.1995 the deceased was present on his duty."

He would submit that in view of the High Court noting the discrepancy, it ought not to have continued to place reliance on the H statement of PW-2.

It was further submitted that PW-2 is not an employee of the railway and otherwise not a person who would ordinarily be at the scene of the offence. It was his submission that because the deceased was sick, at 7.30 AM he took the deceased to drop a sick note. The case of the prosecution is that both the persons were at one office for two and a half hours and then in another office for another two and a half hours and were, therefore, together from 12.30 AM to 1.00 PM when the alleged incident took place.

According to learned counsel for the appellant, it is inconceivable to believe that:

i. A person who is sick and needs to be taken to office by a friend in order to drop a sick note, will continue to remain present in office;

ii. Even if the deceased had, in fact, decided to stay on, it is unbelievable that his friend would continue to remain with him and not attend to his daily work.

iii. Lastly, it is not as if the case of the prosecution is that the deceased had changed his mind about the sick note, or that he was feeling better on reaching his office. PW-2 has stated that the deceased did not sign the muster roll, a fact which has not proved to be untrue.

SCENE OF THE OFFENCE:

In the deposition of PW-12, Police Sub-Inspector, the scene of the offence has been stated to be between two railway tracks. According to learned counsel for the appellant, this is contrary to the deposition of PW-2, who states that the deceased was attacked in the diesel shed 200 meters away. Learned counsel invited our attention to appreciate the deposition of PW-12, the Investigating Officer.

He has admitted that Fuel Room, gate of Fuel Room and the tracks of railway are distinct places. He volunteers that though, it may be called distinct, but it is nearby. He has admitted that no blood sample was obtained from the Fuel Room. He has admitted that he has not shown date

A and time of preparation of report exh. 48 when he reached at Loco Diesel Shed, dead body was not there. Dog squad was available however no trace was found out.

According to the learned counsel for the appellant, there is no explanation of how the body came to be found 200 meters away. No B investigation was done on that behalf and even the dog squad could not determine the trace. Therefore, it is submitted that the prosecution version is not believable.

NO OTHER EYE-WITNESS SUPPORTS THE CASE:

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Learned counsel for the appellant submitted that PW-2 in his deposition has stated that there were four other railway employees who were present at the scene of offence and, therefore, their deposition becomes necessary for unfolding the narrative.

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In the present case, out of the four other alleged eye-witnesses, the prosecution only called upon PW-3 and PW-9 to depose as eye-witnesses and even these two eye-witnesses did not support the case of the prosecution. Thus it is submitted that the failure of the prosecution to call all material witnesses leads to an adverse inference against the prosecution E under Section 114: illustration (g) of the Indian Evidence Act.

THE STATEMENT OF P.W.1 IS UNRELIABLE:

The learned counsel for the Respondent submitted that the statement of PW-1 supports the case in identifying the accused persons. It was also F his submission that the statement of PW-1 established the presence of PW-2 at the scene of the offence. According to learned counsel for the appellant, the said submission is devoid of merits for the following reasons:

a) the Courts below have relied upon the sole testimony of PW-G 2 and, therefore, no reliance can be placed on the statement of PW-1 at this stage;

b) the Courts have disbelieved the statement of PW-1 and have based the conviction solely on the ocular testimony of H PW-2;

c) In any event, it is evident that the statements of PW-1 and PW-2, far from establishing their respective presence near the railway tracks are, in fact, contradictory. A

The learned counsel for the appellant made two legal propositions for consideration of this Court: B

(1) THE TESTIMONY OF A SINGLE EYE-WITNESS MUST BE ENTIRELY RELIABLE FOR A CONVICTION:

According to Mr. Huzefa Ahmadi, the test for relying on the testimony of a sole eye-witness is based on the rule of caution, expounded by this Court in a catena of judgments. He placed reliance on the following judgments: C

1) *Joseph* v. *State of Kerala,* [2003] 1 SCC 465 which prescribes that the evidence of other witnesses must corroborate the single eye-witness. D

> "When there is a sole witness to the incident his evidence has to be accepted with an amount of caution and after testing it on the touchstone of the evidence tendered by other witnesses or evidence as recorded. Section 134 of the Indian Evidence Act provides that E no particular number of witnesses shall in any case be required for the proof of any fact and, therefore, it is permissible for a court to record and sustain a conviction on the evidence of a solitary eyewitness. But, at the same time, such a course can be adopted only if the evidence tendered by such witness is cogent, reliable F and in tune with probabilities and inspires implicit confidence. By this standard, when the prosecution case rests mainly on the sole testimony of an eyewitness, it should be wholly reliable. Even though such witness is an injured witness and his presence may not be seriously doubted, when his evidence is in conflict with G other evidence, the view taken by the trial court that it would be unsafe to convict the accused on his sole testimony cannot be stated to be unreasonable. Particularly, when the trial court had given cogent reasons to acquit the accused, the High Court ought not to have interfered with the same merely because another opinion is possible and not that the finding concluded by the trial H

A court was impossible. The High Court did not follow the aforesaid standard but went on to analyse evidence as if the material before them was given for the first time and not in appeal.

(Paras 12 & 13)

B 2) *Suresh Chaudhary* v. *State of Bihar,* [2003] 4 SCC 128.

In the above case, this Court while setting aside the sentence of conviction of two Courts below advocated the Rule of Caution.

3) The Rule of Caution has also been advocated by this Court in C *Shahbuddin Abdul Kahlik Shaikh* v. *State of Gujarat,* [1995] Supp 2 SCC 441.

4) The aforesaid judgments are based on the judgment of this Court in *Vadivelu Thevar Etc.* v. *The State of Madras Etc.,* AIR (1957) SC 614 D wherein this Court has divided the appreciation of evidence into three categories, namely: (1) wholly reliable; (2) wholly unreliable; and (3) Neither wholly reliable nor wholly unreliable and thereafter stated that 'it becomes the duty of the court to convict, if it is satisfied that the testimony of a single witness is entirely reliable'.

E 5) The above view emerges from the view of the Privy Council in *Mohamed Sugal Esa* v. *The King,* AIR (1946) PC 3.

> "In England where provision has been made for the reception of unsworn evidence from a child it has always been provided that F the evidence must be corroborated in some material particular implicating the accused. But in the Indian Act there is no such provision and the evidence is made admissible whether corroborated or not. Once there is admissible evidence a Court can act upon it; corroboration, unless required by statute, goes only to the weight and value of the evidence. It is a sound rule in practice G not to act on the uncorroborated evidence of a child, whether sworn or unsworn, but this is a rule of prudence and not of law."

Mr. Ahmadi, in view of the above judgments and of the facts stated above, submitted that the statement of PW-2, sole eye-witness fails to meet H the test of '*entire reliability*' and, therefore, cannot be the basis for

convicting the accused and that the testimony of PW-2 to the effect that there were other employees present at the time of the occurrence is belied by the evidence of two of the said employees, who have deposed otherwise and, therefore, the evidence of the other two witnesses far from corroborating the sole eye-witness account in fact belies it. A

The learned counsel for the appellant then concentrated on the second legal proposition, namely, *non-production of material witnesses leads to an adverse inference against the prosecution:* B

It was contended that it is the duty of the prosecution to produce all material witnesses and failure thereof leads to an adverse inference under Section 114, illustration (g) of the Indian Evidence Act, 1857. C

This Court in *Habeeb Mohammad* v. *The State of Hyderabad,* [1954] SCR 475 at 490 extracting from the judgment of the Privy Council in *Stephen Senivaratne* v. *The King,* AIR (1936) PC 289 stated as under: D

> "Witnesses essential to the unfolding of the narrative on which the prosecution is based, must, of course, be called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution." E

The above two judgments have been relied upon by this Court in the case of *State of U.P. and Anr.* v. *Jaggo Alias Jagdish and Ors.,* [1971] 2 SCC 42.

It was submitted that while the prosecution is not necessarily required to call upon each and every witness, it is bound to call all witnesses who are material to the unfolding of the narrative and failure to do so, leads to an adverse inference. In the present case, the other two eye-witnesses did not support the prosecution and it can thus be inferred that the other eye-witnesses would also not support the version of the prosecution and in these circumstances, the Courts below have erred in relying upon the sole statement of PW-2 for convicting the accused. F G

Concluding his argument, Mr. Huzefa Ahmadi, submitted that the accused have spent over seven years in jail and if this Court is to allow H

A the present appeal, it would only be trite to allow the appeal qua accused Nos. 2 and 3 who were unable to approach this Court. For this, the learned counsel for the appellant, relied on the judgment of this Court in *Suresh Chaudhary's* case (supra) wherein relying on precedents, the Court stated as under:

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> "This Court in a catena of cases has held where on the evaluation of a case this Court reaches the conclusion that no conviction of any accused is possible, the benefit of doubt must be extended to the co-accused similarly situated though he has not challenged the order of conviction by way of an appeal. [See *Bijoy Singh* v. *State of Bihar*, [2002] 9 SCC 147]. This Court while rendering the above judgment has placed reliance on some other judgments of this Court in *Raja Ram* v. *State of M.P.*, [1994] 2 SCC 568, *Dandu Lakshmi Reddy* v. *State of A.P.*, [1999] 7 SCC 69 and *Anil Rai* v. *State of Bihar*, [2001] 7 SCC 318 wherein this Court had taken a similar view. Following the above dictum of this Court in the judgments noticed by us hereinabove, we are of the opinion since we have come to the conclusion that no conviction of any accused is possible based on the prosecution case as presented, it becomes our duty to extend the benefit of acquittal in these appeals also to a non-appealing accused, therefore, Sona @ Sonwa Chaudhary who is the first accused before the Sessions Court in Sessions Trial No. 417 of 1993 and who was the first appellant before the High Court in Crl. A. No. 88 of 1995 will also be acquitted of all the charges of which he is found guilty by the two courts below".

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Concluding his argument, learned counsel submitted that the prosecution has failed to prove the case beyond reasonable doubt and, therefore, the accused appellant ought to be acquitted.

G Learned counsel for the State of Gujarat Mr. Madhukar while justifying the judgments of the Courts below submitted that the body of the evidence produced by the prosecution against the appellant consisted of the following:-

H 1. Testimony of eyewitness to the incident (PW-2);

2. Motive;

3. Evidence relating to Recovery of weapons at the instance of the accused;

4. Medical evidence;

5. Absence of accused from railway duty and their arrest only after 24 days of incident;

After narrating the case of the prosecution and the evidence and documents produced, he submitted that it has come in the evidence of PW-1 and PW-2 that both the witnesses were known to the deceased as well as the appellant accused and the testimony of both these witnesses has been relied upon by the trial Court and the High Court to base the conviction of the appellant.

He invited our attention to paras 20, 21 and 29 of the High Court's order and paras 50-53 of the trial Court's order of PW-2 Akbar Khan @ Raju. This witness is an eye-witness to the incident. The two other eye-witnesses who were examined by the prosecution turned hostile during the trial and thus this witness was rendered in the position of being the sole eye-witness. We have perused the evidence of PW-2. It has given in his testimony that on the fateful day of the incident, he escorted the deceased to the railway office in order to enable him to place a sick note in the railway office. PW-2 has specifically stated in that while he has present in the railway office, the appellant along with the co-accused threatened and attacked the deceased with sharp dangerous weapons on his neck. It is the version of PW-2 that on witnessing this ghastly attack, he ran away from the spot out of fear. He came back from the hiding after sometime and saw the dead body of the deceased while PW-2 was near the body. He has stated to have met PW-1.. In fact, PW-1 who is also the Complainant was accompanied by PW-2 to the Police Station for lodging of the complaint.

The testimony of this witness, in our opinion, proves and corroborates the presence of the Complainant PW-1 and *vice-versa*. PW-2 does not claim to have seen the entire attack but has categorically deposed about

A having seen the initial attack by the appellant and co-accused with sharp edged weapons on a vital organ of the deceased, namely, the neck.

The testimony of PW-2, in our view, is wholly believable and worthy of inspiring confidence but is also sufficient by itself to prove the case B against the appellant and that the credibility of this witness has not been impaired in the cross-examination by the appellant. This witness has stuck to his police statement and the subsequent examination in chief in Court where he identified the appellant accused as well as the co-accused as the assailants of the deceased. This deposition, in our view, proved the intention of the accused to cause the death of the deceased inasmuch as C he deposes that the assault was directed at the neck of the deceased. It is also not the case of the appellant that this witness was inimical to the appellant or that there was a reason for PW-2 to implicate the appellants falsely. The factum of his friendship with the deceased does not reduce PW-2 to the position of being an interested witness.

D

The learned counsel for the appellant has argued before this Court as well as the Courts below that the conduct of this witness in not saving the life of his friend, the deceased, renders him an improbable witness. In our view, the act of this witness in running away to save his own life and E not going forward to help the deceased at the time of the incident is a most probable and natural human conduct which most men faced in such situation would resort to. In our view, the conduct of PW-2 in not having the courage to stop three persons armed with deadly sharp edged weapons is not and cannot be a circumstance or a ground to disbelieve his F testimony particularly when the rest of his testimony is tested with cross-examination.

Next we analyse the evidence of PW-1 Munna @ Gheti. Our attention was drawn to the various paras in the trial Court's order and the High Court's order of this witness. PW-1's evidence was relied upon by G the trial Court and also by the High Court. The most important feature of the testimony of this witness is that he corroborates the presence of the eye-witness PW-2 at the spot. It is submitted that in face of the specific deposition of this witness, the PW-2 was present at the spot the doubts sought to be raised by the appellant in receipt of the sick note of the H deceased and the subsequent staying back at the office are rendered

irrelevant and insignificant. PW-1 has deposed that he was known to the deceased and the appellant and that there were altercation on 24.08.1995 between the appellant and the deceased in respect of the railway quarter. It is the version of this witness that on the day of the incident he saw the present appellant running away and also saw the deceased in the pool of blood. Raju was present there. PW-1 has deposed as prosecution witness that while he was returning from railway colony after meeting his friend at about 12.00 noon accused Nos. 1 and 2 and one another were being seen by him, they were running away. PW-1 has identified the appellants and the co-accused in the Court. Thus, it is clear from the testimony of Munnabhai @ Geti as a prosecution witness that although he is not an eye-witness of the incident, yet he throws light on the conduct of the accused on the day of the incident around the time of incident. His testimony together with the testimony of Investigating Officer corroborates the presence of PW-2 at the place of the incident.

Significantly this witness, later on filed an affidavit, wherein he had sworn to the fact that whatever he had deposed before Court as PW-1 was not true and it was so done at the instance of Police.

The averments in the affidavit are rightly rejected by the High Court and also the Sessions Court. Once the witness is examined as a prosecution witness, he cannot be allowed to perjure himself by resiling from the testimony given in Court on oath. It is pertinent to note that during the intervening period between giving of evidence as PW-1 and filing of affidavit in Court later he was in jail in a narcotic case and that the accused persons were also fellow inmates there.

It was argued by the learned counsel for the appellant that no identification parade was conducted for the accused. The Investigating Officer has stated in his testimony that the test identification parade was not necessary in the instant case. This apart, both the witnesses PW-1 and 2 have categorically stated in their deposition that they knew the appellant from the past.

RECOVERY:

It is seen from the records that a weapon of offence has been recovered at the instance of the appellant from his own house. The

A testimony of the panch witness PW-6 in respect of the recovery and the appellant's identity therein has remained unshaken during extensive cross-examination and blood stains were also seen on the said weapon recovered at the instance of the accused.

B *MEDICAL EVIDENCE:*

We shall now see the medical evidence. There were as many as 24 injuries on the dead body of the deceased. The High Court says that all injuries were ante mortem in nature and death was caused in this case due to haemorrhage and shock as a result of multiple injuries sustained and that C the injuries were caused by sharp edged and tipped penetrating weapon/ weapons. After referring to the Muddamal articles Kukari and knives, the doctor has observed that the injury could be caused by mudammal articles kukari and knives. The High Court also specifically held that the ocular version in this case is not at the loggerheads with the medical evidence.

D

Certain discrepancies were pointed out by learned counsel for the appellant at the time of arguments. The learned counsel for the State while answering the said submission of the counsel for the appellant submitted that according to PW-2, the duration of attack which he witnessed before E he ran away took place at the office and that there is evidence on record that blood was found at the spot where PW-2 states that he had witnessed the armed attack upon the deceased. The presence of blood at the spot where PW-2 states the attack had taken place establishes the correctness of the version of this witness. In such an event, the mere failure to explain F the presence of the dead body at an adjoining place does not disprove or contradict the prosecution case and in our opinion is certainly not fatal to the prosecution case.

Learned counsel for the State also made certain submissions on law and, in particular, the testimony of single eye-witness. Learned counsel G for the State relied upon the legal principles as laid down in *Shivaji Sahabrao Bobade and Anr.* v. *State of Maharashtra,* [1973] 2 SCC 793 (three-Judge Bench) wherein it has been held as follows:

> ".....Even if the case against the accused hangs on the evidence H of a single eye-witness it may be enough to sustain the conviction

given sterling testimony of a competent, honest man, although as a rule of prudence courts call for corroboration. It is a platitude to say that witnesses have to be weighed and not counted since quality matters more than quantity in human affairs....." A

The legal position in respect of the testimony of a solitary eye-witness is well settled in a catena of judgments inasmuch as this Court has always reminded that in order to pass conviction upon it, such a testimony must be of a nature which inspires the confidence of the Court. While looking into such evidence this Court has always advocated the Rule of Caution and such corroboration from other evidence and even in the absence of corroboration if testimony of such single eye-witness inspires confidence then conviction can be based solely upon it. In the case on hand, the testimony of the solitary eye-witness stands corroborated by other circumstances and evidences and more particularly PW-1 whose testimony has been relied upon by both the Courts. B C D

Learned counsel for the State next answered the submission of the learned counsel for the appellant in regard to the non-production of material witnesses. According to him, the witnesses which were necessary should unfold the narrative of the incident were cited and examined as witnesses. Two of the witnesses to the prosecution case present at the spot turned hostile. In such a scenario, it cannot be said that the prosecution must suffer adverse inference for any further non-production. It is not the case of the appellant that there were certain witnesses who were cited as witness in the charge-sheet but were later on dropped as witnesses by the prosecution during the trial. It was also pointed out to us and is pertinent to mention that one of the witnesses before the trial Court had been granted police protection by the trial Court on the ground of threats from the accused persons. E F

In our opinion, the appellant has failed to establish his case of innocence. On the contrary, the prosecution has proved its case beyond any reasonable doubt. We are of the opinion that the depositions that was given on record, namely, Akbar Khan @ Raju can be said to be reliable and that there is no reason to disbelieve him so far as the ocular aspect of the prosecution case is concerned. The witness Akbar Khan cannot be branded as a related or interested witness because he is merely a friend of G H

A the deceased. There is nothing significant to infer that there was enmity between himself and accused persons. His conduct appears to be consistent and natural in accompanying the deceased to his office at loco shed on the date of the incident thus the testimony of eye-witness Akbar Khan @ Raju cannot be brushed aside. He is believable and does inspires confidence.

B

Learned counsel for the appellant pointed out certain discrepancies which, in our opinion are trivial in nature but such discrepancies would not affect the case of conviction imposed on the appellant. The deposition of Dr. Patil who conducted the autopsy is worth to mention. There were in all 24 external injuries and 3 internal injuries on the head, chest and C abdomen region. According to him, the injuries were caused by sharp edged deep penetrating weapons the victim had sustained multiple injuries and owing to the same there was haemorrhage which ultimately resulted into his death.

D The cumulative effect of injuries found on the dead body were sufficient in the ordinary course of nature to cause death and the injury found out on the neck, a vital part of the body alone could have caused death. The evidence of the witnesses and the evidence on record sufficiently and convincingly upholds the narrative of the guilt of the E appellant.

We, therefore, find ourselves in complete agreement with the reasoning and findings of the learned trial Judge and of the High Court. Therefore, the present appeal deserves to be dismissed and accordingly it is dismissed.

F

Before taking leave of the case, we would like to advert to the argument of the learned counsel for the appellant on the question of sentence. He submitted that the accused had spent over seven years in jail. He relied on the judgment of this Court in *Suresh Chaudhary* v. *State of Bihar* (supra). The above judgment is to the effect that if no conviction G of any accused is possible, the benefit of doubt must be extended to the co-accused similarly situated though he has not challenged the order of conviction by way of an appeal.

In the instant case, we have come to the conclusion that the conviction H and sentence imposed by the Courts below are correct and, therefore, the

acquittal is not possible. We also hold that the prosecution has proved the case beyond any reasonable doubt. It is true that an order of sentence purely falls in the realm of judicial discretion and the prosecuting State is only duty bound to endeavour that the guilty had tried and convicted in accordance with law. A

In the present case, the guilt of the appellant has been convincingly established. We are, therefore, unable to countenance the submission made by the learned counsel for the appellant on the submission of sentence. B

The appeal fails and is therefore dismissed. The appellant to serve the remaining period of sentence. C

N.J. Appeal missed.