PRATAP SINGH AND ANR. A

v.

STATE OF MADHYA PRADESH

NOVEMBER 23, 2005

[S.B. SINHA AND P.P. NAOLEKAR, JJ.] B

Evidence:

Minor—Witness—Contradiction in statement—Effect of—Minor stating that he went directly to his father and narrated the incident to him, whereas according to another witness, minor came to him first and then went to his father—Acquittal by Trial Court on the ground that the evidence of minor appeared doubtful—Correctness of—Held: Trial Court did not err in holding that suspicion had arisen as regards the correctness of statement made by minor and he might have been tutored. C D

Non-examination of eye witness—Effect of.

Non-examination of seizure witness—Effect of—Held: Seizure of material objects cannot be said to have been proved.

Code of Criminal Procedure, 1973—Section 161: E

Statement recorded under Section 161—Not filed along with the charge-sheet—Held, fatal to the prosecution.

Investigation—Duty of Investigating Officer—Held: If during investigation, Investigating Officer notices that two other witnesses had also witnessed the occurrence then it is his duty to record evidence of such witness.. F

Prosecution case was that the deceased was assaulted by appellants with Lathi and Bhala. PW.2 witnessed the occurrence from a distance of about 50 hands. He went up on a mound and saw the incident therefrom and when the Appellants ran towards him, he ran towards the village and informed about the incident to PW.1. PW.1 in his statement contended that he, upon being informed about the said incident by PW.2 went to the place of occurrence and saw deceased lying in an injured condition. Deceased was taken to the hospital G H

A where he was declared dead. PW.1 lodged FIR and investigation was taken up by PW.7. He prepared a site plan. During investigation, another site plan was prepared by the Patwari. In both the site plans places wherefrom two persons, namely Shivraj Singh and Motiram were said to have witnessed the occurrence as eye witnesses were shown. Their statements were recorded under Section 161 CrPC but same was neither filed along with the charge sheet nor were B they examined.

Sessions Judge ordered acquittal on the ground that the evidence of PW. 2 appeared doubtful as the existence of mound had not been shown in the site plan prepared either by PW. 7 or by the Patwari; Shivrajsingh and Motiram C who were considered to be the real eye witnesses and whose statements had been recorded under Section 161 CrPC by the Investigating Officer were not examined as witnesses in Court and as the seizure witnesses have not been examined, the seizure of the material objects cannot be said to have been proved.

D On appeal, High Court reversed the judgment of acquittal on the ground that Sessions Judge was not correct in drawing adverse inference for non-examination of the two eye-witnesses. The High Court also made adverse comments in respect of the manner in which the investigation has been conducted by the Investigating Officer holding that the officer cannot escape his liability by not filing the documents in Court on account of inadvertence. E

Allowing the appeal, the Court

HELD : 1. The High Court, in the facts and circumstances of the present case, was not justified in reversing the Judgment of acquittal passed by the Sessions Judge. It is not in dispute that PW. 2 was the only eye witness. He F was a minor. His evidence required a closer scrutiny. He contradicted himself on material particulars. He did not make any statement before the police that he had seen the occurrence from a mound. Existence of the mound was very vital in the sense that if his statement before the Court to the effect that the deceased, at the time of his assault, remained sitting, a question might have G arisen that he was not in a position to witness the entire occurrence in detail from a distance. The distance between the place of occurrence and the place where he was collecting fodder, according to the Investigating Officer, was 105 feet. Furthermore, if upon noticing appellants proceeding towards the deceased with Barchhi and Lathi in their hands he started running towards the place of occurrence, it is difficult to understand as to how he could climb H

upon a mound and see the entire occurrence. If he was in a position to see the entire occurrence either from the place where he was cutting the grass or while running towards the place of occurrence, there was absolutely no reason as to why he should climb upon a mound to see the occurrence. [446-F-H; 447-A]

2. Another important contradiction in the statement of PW. 2 is that whereas according to PW.1, he went directly to him and narrated the incident, according to PW. 4, PW-2 came to him first and he in turn went to PW. 1 and informed him as to what had been conveyed to him by PW. 2. A suspicion also arises as regards the correctness of the statements made in the FIR in this behalf insofar as it is one thing to say that the first informant heard the entire story directly from the mouth of PW. 2 but it would be another thing to say that he heard the story from PW.4 who in turn was told about the incident in question by PW.2. [447-C-D]

2. In this view of the matter, it cannot be said that the Trial Judge committed any illegality in coming to the conclusion that PW.2 might have been a tutored witness. [447-E]

3. The High Court, further committed an error in not drawing an adverse inference for non-examination of Shivrajsingh and Motiram. It was for the prosecution to prove its case. Even if in the FIR their names were not disclosed but if during investigation materials came to the notice of the Investigating Officer that apart from PW. 2 two other witnesses had also witnessed the occurrence, he was duty bound to show the places wherefrom they had witnessed the occurrence in the site plan prepared by him and also record their statements under Section 161 CrPC. There is no reason as to why adverse inference should not have been drawn for non-filing of the said statements before the Court along with the charge sheet. The adverse remarks were made as against the Investigating Officer. The High Court may or may not be correct in making those remarks that a site plan is not prepared at the instance of the witnesses but is done as a part of the investigation. If a site plan has been prepared and if during investigation it has been brought to the notice of the Investigating Officer that there were some other witnesses whose evidence would be material for the purposes of proving the prosecution case, there is no reason why evidence of such witnesses should not have been recorded. It is correct that it is the duty of the Investigating Officer to produce the said statements with the charge sheet but, if the same had not been done, the benefit thereof must be given to the defence and not to the prosecution.

The High Court therefore committed a serious error in this behalf. Non-examination of the seizure witnesses also, in the peculiar facts and circumstances of the case was of some significance. The Sessions Judge made comments about the non-examination of the seizure witnesses only for the purpose of showing that the investigation in the matter might have been of partisan in nature at the hands of PW.7. The High Court on the one hand made adverse comments against the conduct of the Investigating Officer but on the other hand placed strong reliance on his evidence alone for the purposes of believing that several material objects including the weapons of offence viz. Lathi and Barchhi were recovered in accordance with law.

[447-F-H; 448-A-D]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 682 of 1999.

From the Judgment and Order dated 7.10.98 of the Madhya Pradesh High Court in Crl.A. No. 14 of 1984.

R.M. Tewari, Jayant Tewari and Rishi Kesh for the Appellants.

Ms. Vibha Dutta Makhija for the Respondent.

The Judgment of the Court was delivered by

S.B. SINHA, J. This Appeal under Section 379 of the Code of Criminal Procedure, 1972 (Act 2 of 1974), read with the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970, arises out of a Judgment and Order dated 7th October, 1998 passed by the Gwalior Bench of Madhya Pradesh High Court in Criminal Appeal No.14 of 1984 whereby and whereunder Judgment and order dated 27th September, 1982 passed by Shri S.K. Jain, Sessions Judge, Muraina (M.P.) acquitting the Appellants herein was set aside.

On 20th December, 1981 at about 10.00 A.M. the incident took place, in relation whereto, a First Information Report was lodged at about 6.30 P.M. at Ambah Police Station. The said Police Station is said to be situated at a distance of 9 Km. from the place of occurrence.

The First Information Report was lodged by Rajvir Singh - (PW.1). He stated that on 19th December, 1981 at about 8.00 P.M. he had heard a commotion and came out from his house and found that the Appellants-herein had a brawling with his grandfather Vidya Ram (deceased) purported

to be in connection with the latter's conduct *vis-a-vis* a girl (daughter of Birbal Singh). The Village people, however, pacified the parties. Vidya Ram (deceased) complained to him that the Appellants-herein had made false allegations against him in relation to the girl in question.

As regards the incident in question, the first informant alleged that the deceased (his grandfather), as usual at 5.00 O'clock in the morning on 20th December 1981, had gone towards the bank of river Chambal to see the vegetable field. The Appellants herein were seen carrying Bhala (spear) and Lathi respectively and proceeding towards the river from the village. At about 11.30 A.M. Mangal Singh PW.2 (cousin brother of the informant), who had also gone to the bank of the river for the purpose of bringing grass, came and told him that the Appellants herein had assaulted the deceased with Lathi and Bhala (spear) whereupon he along with Chob Singh-PW.4 and Tula Ram went to the said place and found the deceased lying in an injured condition. The injured was thereafter brought to the village on a chorpoy (cot). He was thereafter taken to the Ambah Hospital where he was declared dead.

Upon registration of the said First Information Report, the investigation in relation to the offence was taken up by Shri N.M. Singh Chandel- PW.7. During investigation he prepared a site plan which was marked as Ex. P.3. He had also seized blood stained earth. The Appellants were arrested on 29th December, 1981. One Barchhi (spear) Ex.P.10 and Lathi Ex.P.11 were also seized. It is also not in dispute that during investigation another site plan was prepared by the Patwari of the village which was marked as Ex.P.13. In both the site plans places wherefrom two persons, namely, Shivrajsingh and Motiram were said to have witnessed the occurrence as eye witnesses were shown. It is also not in dispute that the statements of the said Shivrajsingh and Motiram were recorded under Section 161 of the Code of Criminal Procedure but the same were neither filed along with the charge sheet nor were they examined.

Before the learned Trial Judge 7 witnesses were examined by the prosecution to bring home the charge against the accused.

The evidence of PW.2 Mangal Singh, who is a minor, is of some significance in this case. He was the only eye witness. Besides him, the first informant was examined as PW.1. Dr. V.K. Gupta who conducted the post mortem examination on the body of the deceased Vidya Ram was examined as PW.5. Nine ante mortem injuries were found by Dr. Gupta on the body of

A the deceased.

It further appears that Barchhi (spear) and Lathi which were said to have been recovered from the Appellants herein were sent for chemical examination. One V.K. Bajaj, Assistant Chemical Examiner of the Government of Madhya Pradesh, F.S.L. Sadar, submitted a report showing, *inter alia*, the B presence of blood on the said Lathi (marked by him as "C") and Barchhi (marked by him as "D") .

PW. 2 Mangal Singh in his deposition before the Court stated that he not only saw the Appellants coming from the side of the village and proceeding to the place where his grandfather was working but also saw them assaulting C his grandfather whereupon he ran towards the place of occurrence. He, however, witnessed the occurrence from a distance of about 50 hands. He, furthermore categorically stated that he went up on a mound and saw the incident therefrom. He further stated that when the Appellants ran towards him, he ran towards the village and informed about the incident to PW.1. PW.1 D in his statement contended that he, upon being informed about the said incident by PW.2 went to the place of occurrence with PW.4 Chob Singh and Tula Ram (not examined) and brought the injured Vidya Ram to the village.

PW. 4 Chob Singh, who examined himself as PW.4 in cross-examination categorically stated that Mangal Singh, came to him from the field directly and E told him about the incident. He admitted that Mangal Singh did not call his father aside and talk to him separately. He, thereafter, went to the house of Rajvir Singh (PW.1) and informed him about what Mangal Singh had told him about the incident. According to PW.4 on his suggestion PW.1, he and Tula Ram went to the place of occurrence. Having regard to the substance of the F depositions of the witnesses as also other materials brought on record, the learned Sessions Judge recorded a Judgment of acquittal holding *inter alia* (i) in view of the fact that PW.2 in his statement under Section 161 of the Code of Criminal Procedure did not mention about the existence of a mound wherefrom he allegedly saw the occurrence, his evidence is doubtful particularly in view of the fact that existence of said mound had not been shown in the G site plan prepared either by PW. 7 or by the Patwari marked as Exhibits P.3 and P.13 respectively. (ii) Shivrajsingh and Motiram who were considered to be the real eye witnesses and whose statements had been recorded under Section 161 of the Code of Criminal Procedure by the Investigating Officer were not examined as witnesses in Court. (iii) The alleged motive for commission H of the crime namely, the incident occurred on 19th December, 1981, i.e. the

quarrel, which took place between the Appellants herein and the deceased Vidya Ram on his misbehaviour towards the daughter of Birbal Singh was not proved. (iv) No opinion has been rendered by Shri V.K. Bajaj as regards the existence of human blood on the Barchhi and Lathi observing that "The Chemical Examination also does not make any mention that any human blood was found on the weapons. Hence, the evidence regarding the seizure of the weapons is also unbelievable". (v) As the seizure witnesses have not been examined; the seizure of the material objects cannot be said to have been proved.

In the appeal preferred by the State of Madhya Pradesh against the said Judgment of acquittal passed by the learned Sessions Judge, the High Court on the other hand has reversed the said Judgment holding:

> "It is reflected from the map that the place of occurrence was by the side of river Chambal. The lands are on the slope towards river. Therefore, any field away from the river will be on higher plain than the fields nearer to river. Even otherwise, the map so prepared does not have any evidentiary value. Any statement made in respect of a map alleged to have been prepared on the information supplied by other persons, is inadmissible in evidence being hearsay. All the statements recorded in the map are the statements of police and are not admissible in evidence under Section 162 of Code of Criminal Procedure."

As regards the non-examination of the two eye witnesses, the High Court opined that the names of the two eye witnesses mentioned in the spot map Ex.P/3 are not reflected from any of the statements recorded by the police. Even in the evidence, none of the witnesses has stated that the incident was seen by any other witness. The names of these two eye witnesses mentioned in the spot map have not been mentioned in the First Information Report. The learned Sessions Judge was not correct in drawing adverse inference for their non-examination. It was observed:

> "How and in what manner the names of Motiram and Shivrajsingh were recorded in the spot map Ex.P/3 is not explained by PW. 7 Shri N.M. Singh, Chandel. He has also not stated that this map was prepared at the instance of some persons of the village. He admitted that the first information report Ex. P/1 was written on 20.12.1981. He also admitted that the first information report was recorded in his handwriting. He has prepared the map and though statements were

A recorded in the map, but he has not stated that at whose instance statement in respect of presence of witnesses Shivraj Singh and Motiram was recorded. This witness has stated in his cross-examination that he has recorded the depositions of Shivrajsingh and Motiram but due to inadvertence, he has not filed those statements."

B The High Court also made adverse comments in respect of the manner in which the investigation has been conducted by the Investigating Officer in the following words:

"The manner of recording statement does not appear to be true. It is unfortunate that a responsible officer has made statement without
C going through the records. The officer cannot escape his liability by not filing the documents in Court on account of inadvertence. It is the duty of the investigating officer to produce all documents along with challan papers. This is a serious lapse which requires thorough probe by the authorities. The matter be referred to Director General of Police
D for initiating appropriate action against the officer why he has not produced the material documents in Court."

On the aforesaid findings alone, the High Court came to the conclusion that the view taken by the Trial Judge is not at all reasonable and contrary to the evidence on record.

E

As regards the non-examination of the seizure witnesses, the High Court opined that it was not necessary that the seizure should be proved by all the witnesses in view of the fact that PW.7 had proved the same.

Having heard the learned counsel for the parties, we are of the opinion
F that the High Court, in the facts and circumstances of the present case, was not justified in reversing the Judgment of acquittal passed by the learned Sessions Judge. It is not in dispute that PW.2 Mangal Singh was the only eye witness. He was a minor. Although we do not intend to lay down a law that in all situations evidence of a minor must be corroborated by other independent evidence but the evidence of PW.2 in our opinion required a
G closer scrutiny. He contradicted himself on material particulars. He did not make any statement before the police that he had seen the occurrence from a mound. Existence of the mound was very vital in the sense that if his statement before the Court to the effect that the deceased, at the time of his assault, remained sitting, a question might have arisen that he was not in a
H position to witness the entire occurrence in detail from a distance. The

distance between the place of occurrence and the place where he was collecting fodder, according to the Investigating Officer, was 105 feet. Furthermore, if upon noticing the Appellants proceeding towards the deceased with Barchhi and Lathi in their hands he started running towards the place of occurrence, we fail to understand as to how he could climb upon a mound and see the entire occurrence. If he was in a position to see the entire occurrence either from the place where he was cutting the grass or while running towards the place of occurrence, there was absolutely no reason as to why he should climb upon a mound to see the occurrence. Furthermore, he stated that when the Appellants saw him, they started running towards him and then he ran towards the village.

Another important contradiction in the statement of PW.2 which had been brought on record is that whereas according to PW. 1, he went directly to him and narrated the incident, according to PW. 4, Mangal Singh came to him first and he in turn went to PW.1 and informed him as to what had been conveyed to him by PW. 2. A suspicion also arises as regards the correctness of the statements made in the First Information Report in this behalf insofar as it is one thing to see that the first informant heard the entire story directly from the mouth of Mangal Singh but it would be another thing to say that he heard the story from PW. 4 who in turn was told about the incident in question by PW. 2.

In this view of the matter, it cannot be said that the learned Trial Judge committed any illegality in coming to the conclusion that PW. 2 might have been a tutored witness.

The High Court, in our opinion, further committed an error in not drawing an adverse inference for non-examination of Shivrajsingh and Motiram. It was for the prosecution to prove its case. Even if in the First Information Report their names were not disclosed but if during investigation materials came to the notice of the Investigating Officer that apart from Mangal Singh two other witnesses had also witnessed the occurrence, he was duty bound to show the places wherefrom they had witnessed the occurrence in the site plan prepared by him and also record their statements under Section 161 of the Code of Criminal Procedure. We do not see any reason as to why adverse inference should not have been drawn for non-filing of the said statements before the Court along with the charge sheet. We have noticed hereinbefore the adverse remarks made as against the Investigating Officer. The High Court may or may not be correct in making those remarks but we only intend to

point out that a site plan is not prepared at the instance of the witnesses but is done as a part of the investigation. If a site plan has been prepared and if during investigation it has been brought to the notice of the Investigating Officer that there were some other witnesses whose evidence would be material for the purposes of proving the prosecution case namely, witnessing the occurrence by two independent witnesses; we do not see any reason why evidence of such witnesses should not have been recorded. It is correct that it is the duty of the Investigating Officer to produce the said statements with the charge sheet but, if the same had not been done, the benefit thereof must be given to the defence and not to the prosecution. The High Court therefore in our opinion committed a serious error in this behalf. Non-examination of the seizure witnesses also, in the peculiar facts and circumstances of the case was of some significance. The learned Sessions Judge made comments about the non-examination of the seizure witnesses only for the purpose of showing that the investigation in the matter might have been of partisan in nature at the hands of PW.7. The High Court on the one hand made adverse comments against the conduct of the Investigating Officer but on the other hand placed strong reliance on his evidence alone for the purposes of believing that several material objects including the weapons of offence viz. Lathi and Barchhi were recovered in accordance with law.

Furthermore, the High Court did not discuss the effect of the statement of PW.4 at all which the Trial Judge had considered at some length. For the reasons above mentioned we are of the opinion that it cannot be said to be a case where the views of the learned Trial Judge could be said to be perverse meriting reversal thereof at the hands of the High Court.

In view of our findings afore-mentioned, the Judgment of the High Court cannot be sustained which is set aside accordingly. This Appeal is allowed. The Appellants are on bail. They are discharged from their bail bonds.

D.G. Appeal allowed.