STATE OF M.P. A

v.

BADRI YADAV AND ANR.

MARCH 31, 2006

[H.K. SEMA AND DR. AR. LAKSHMANAN, JJ.] B

Code of Criminal Procedure, 1973:

s.233—Examination of witness for defence—Prosecution witnesses— C
Supporting prosecution case in their statements u/s164 as also before trial court deposing as eye-witnesses—Later filing affidavit before trial court resiling from their earlier statements and deposing as defence witnesses—Held, this was clearly for the purpose of defeating the ends of justice which is not permissible under the law—Provisions of sub-s.(3) of s.233 cannot be understood as compelling attendance of any prosecution witness examined, D
cross-examined and discharged to be juxtaposed as DWs—High Court was not justified in reversing conviction recorded by trial court—Penal Code, 1860—s.302/34.

Penal Code, 1860:

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s.193—Perjury—Prosecution witnesses—Resiling from their earlier statements made u/s 164 Cr.P.C. and statements as eye-witnesses made on oath before Court of Session—Later filing affidavit before trial court appearing as defence witnesses and resiling from their earlier statements and denying to have seen the incident at all—Held, their subsequent statements made as F
DWs, **prima facie,** *appear to be false—Trial court is directed to file a complaint u/s 193 and initiate proceeding against the PWs juxtaposed as DWs—Code of Criminal Procedure, 1973—s.233(3).*

Appellant alongwith others was prosecuted under s.302/34 IPC. Prosecution witnesses, PW 8 and PW 9 supported the prosecution case as eye- G
witnesses in their statements recorded u/s 164 Cr.P.C. before the Magistrate on 21.9.1989 and during the trial before the Court of Session on 18.12.1990. Later, these two witnesses filed affidavits on 16.8.1994 before the trial court stating that their earlier statements made before the Magistrate and the trial court were

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A tutored by the police and were made due to threat and coercion. They denied to have seen any incident at all. The trial court allowed them to be examined as defence witnesses. They deposed as DW-1 and DW-2 and resiled from their earlier statements. The trial court observed that in between 18.12.1990, the day on which their statements were recorded as PWs and 17.7.1995, when their B statements were recorded as defence witnesses, no complaint whatsoever was made by them that they gave the earlier statements due to coercion, threat or being tutored by the police; and disbelieved their subsequent statements made as defence witnesses. The trial court after considering the evidence of prosecution witnesses including the evidence of the two eye witnesses as PW-8 and PW-9, convicted the accused under s.302 read with s.34 IPC. On appeal, the High Court C acquitted the accused observing that delay in conducting the trial resulted in strange situation where the two witnesses stated something as prosecution witnesses and after lapse of sufficient time gave evidence as defence witnesses. Aggrieved, the State filed the appeal.

Allowing the appeal, the Court

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HELD: 1.1. The power to summon any person as a witness or recall and re-examine any person already examined is the discretionary power of the Court in case such evidence appears to it to be essential for a just decision of the case. Under Section 233 Cr.P.C. the accused can enter upon defence and he can apply for the issue of any process for compelling the attendance of any witness in his E defence. The provisions of sub-section (3) of Section 233 cannot be understood as compelling the attendance of any prosecution witness examined, cross-examined and discharged to be juxtaposed as DWs. In the present case PW-8 and PW-9 were juxtaposed as DW-1 and DW-2. This situation is not one what was contemplated by sub-section (3) of Section 233 Cr.P.C. [629-C, D]

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1.2. When such frivolous and vexatious petitions are filed, a Judge is not powerless. He should use his discretionary power and refuse relief on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. In the instant case, the witnesses were examined by the prosecution as eyewitnesses on 18.12.1990, cross-examined and discharged. Thereafter, an G application under Section 311 Cr.P.C. for recalling and re-examining persons already examined was rejected. The two witnesses were recalled purportedly in exercise of power under sub-section (3) of Section 233 Cr.P.C. and examined as DW-1 and DW-2 on behalf of the accused on 17.7.1995. This was clearly for the purpose of defeating the ends of justice, which is not permissible under the law. [629-E, F]

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Yakub Ismail Bhai Patel v. *State of Gujarat*, [2004] 12 SCC 229, relied on.

2.1. Both PW-8 and PW-9 are closely related to the deceased. There is no rhyme and reason to depose falsely against the accused and allowing the real culprit to escape unpunished. In the statements recorded before the Magistrate under s.164 Cr.P.C. on 21.9.1989 and their depositions recorded before the Sessions Judge on 18.12.1990, they have stated that they were eyewitnesses and witnessed the occurrence. Both of them have stated that they saw the accused assaulting the deceased with knives and swords. They were subjected to lengthy cross-examination but nothing could be elicited to discredit the statement-in-chief. Their examination as defence witnesses was recorded on 17.7.1995 when they resiled completely from the previous statements as prosecution witnesses. It, therefore, clearly appears that the subsequent statements as defence witnesses were concocted well an after thought. [630-E-F-G]

2.2. *Prima facie* **PW-8 and PW-9 in their subsequent affidavits made a false statement which they believed to be false or did not believe to be true. Hence, they are liable for perjury for giving false evidence punishable under Section 193 IPC. The trial court is directed to file a complaint under Section 193 IPC and initiate proceedings against PW-8 and PW-9 juxtaposed as DW-1 and DW-2 and pass necessary orders in accordance with law. [631-C, D]**

3. In the facts and circumstances, the High Court was not justified in reversing the conviction recorded by the trial court. The order of the High Court is set aside and that of the trial court convicting the respondent under Section 302/34 IPC is restored. [631-D, E]

CIVIL APPELLATE JURISDICTION : Criminal Appeal No. 1642/2005.

From the Judgment and Order dated 12.5.2000 High Court of Madhya Pradesh in Crl.A. No. 699/96.

Sidhartha Dave and Ms. Vibha Datta Makhija for the Appellant.

A.T.M. Rangaramanujam, B.S. Jain, Ajayveer Singh, Dr Vipin Gupta, Ms. Charu Wati Khanna and R.D. Upadhyay for the Respondent.

The Judgment of the Court was delivered by

H.K. SEMA, J. This appeal filed by the State of Madhya Pradesh is against the judgment and order of the High Court dated 12.5.2000 passed in Criminal Appeal No. 699 of 1996, whereby the High Court recorded acquittal of respondents-accused herein, by reversing the judgment of the Trial Court convicting the respondent and others under Section 302/34 IPC and sentenced them RI for life and a fine of Rs. 200 and in default to undergo RI for a period

A of one month.

Briefly stated the facts are as follows:—

On 16.9.1989, the respondents herein were loitering around 'kothi building' where the courts are situated in order to find out the deceased Lal B Mohd. They were all sitting in an auto rickshaw which was hired by them. Finally, they succeeded in locating the deceased Lal Mohd. who was sitting in a tempo. While the tempo stopped for permitting a lady to alight from it and proceeded ahead, the accused-respondents obstructed the said tempo and they pulled out the deceased Lal Mohd. from the said tempo and assaulted him with swords and knives causing number of injuries, which resulted in his C death. The matter was investigated and after a *prima facie* case being established the charge was laid before the Additional Sessions Judge. The learned Sessions Judge after threadbare discussion of the evidence of prosecution witnesses including the two eye witnesses PW-8 Mohd. Amin and PW-9 Zakir Ali who later juxtaposed as DW-1 and DW-2, came to the D conclusion that an offence punishable under Section 302 read with 34 was found well established against the accused and convicted as aforesaid.

Before the Trial Court four accused had faced the trial namely accused Badri Yadav, Raju, Mahesh Bhat and Mohan Jayaswal. Accused Mohan Jayaswal died during the trial. Accused Mahesh Bhat was acquitted by the E Trial Court on benefit of doubt. Accused Raju died during the pendency of this appeal and, therefore, appeal *qua him* stands abated. Now only the respondent-accused Badri Yadav is before us.

The High Court by the impugned order relied upon the testimony of DW-1 Mohd. Amin and DW-2 Zakir Ali who were examined as eye witnesses F as PW-8 and PW-9 and acquitted the respondents by reversing the well merited judgment of the Trial Court convicting the respondents.

The facts of this case illustrate a disquieting feature as to how the High Court has committed a grave miscarriage of justice in recording the acquittal of the respondents.

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Few dates would suffice. PW-8 Mohd. Amin and P.W.9 Zakir Ali's statements were recorded under Section 164 Cr.P.C. before the Magistrate on 21.9.1989. On 18.12.1990 their statements on oath were recorded before the Trial Court as prosecution witnesses.

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It appears that PW-8 and PW-9 filed an affidavit on 16.8.1994 that the

statements made before the Magistrate by them were under pressure, tutored by police of Madhav Nagar and due to their pressure the statements were recorded. It was further stated that the policemen threatened them that if they did not make statements as tutored by the police they would implicate PW-8 and PW-9 in this case and when the statements were recorded before the Magistrate the policemen were standing outside and therefore the statements were made as tutored by the police and due to threat and coercion. By this affidavit they have completely resiled from their previous statements recorded before the court as prosecution witnesses. They further stated that they did not see any marpeet and who had inflicted injuries. They further denied that they did not see any incident at all nor any person. Though the affidavit appeared to be dated 16.8.1994, it was actually signed by both on 17.8.1994.

In the affidavit of Zakir Ali PW-9 dated 17.8.1994 it is also stated that his statement was recorded on 18.12.1990 before the Sessions Judge. The affidavit further stated that the statement recorded on 18.12.1990 was made due to threat and under the pressure of police. It is further stated that the applicant was going for Haj and according to the religious rites, he wanted to bid good-bye to all the sins he had committed. It is further stated that the statements he made before the court of Magistrate and before the Sessions Judge were false. It is unfortunate that the said application was allowed by the Sessions Judge on 9.2.1995 and they were allowed to be examined as defence witnesses juxtaposed as DW-1 and DW-2. The Sessions Judge, however, on examining the credibility of PW-8 and PW-9 juxtaposed as DW-1 and DW-2 rejected it as not trustworthy, in our view rightly.

The Sessions Judge came to a finding that the statements of DW-1 and DW-2 were recorded under Section 164 Cr.P.C. before the Magistrate on 21.9.1989 as PW-8 and PW-9. Thereafter, their statements were recorded before the Sessions Judge on 18.12.1990 and after four years on 17.7.1995 they gave a different version resiling from their previous statements on grounds of threat, coercion and being tutored by the police. It will be noticed that in between 18.12.1990 the day on which their statements were recorded before the Sessions Judge as PWs and their statements as defence witnesses which were recorded on 17.7.1995 as DWs, no complaint whatsoever was made by DW-1 and DW-2 to any Court or to any authority that they gave statements on 18.12.1990 due to coercion, threat or being tutored by the police. This itself could have been a sufficient circumstance to disbelieve the subsequent statements as DW-1 and DW-2 as held by the Sessions Judge, in our view, rightly.

A The High Court, while reversing the order of conviction recorded by the Sessions Judge gave the following reasons in support of the reversal in paragraph 16 as under:-

> "This case has focused a very strange phenomenon before us. The witnesses were examined initially as prosecution witnesses. The trial
B was not completed within short span of time. It lingered on for about five years. After lapse of five years these witnesses stated in favour of the accused and against the prosecution. The question arises whether the prosecutor in charge of the prosecution was vigilant enough to see that all prosecution witnesses are examined within
C reasonable time span, so as to see that the case is completed within that time span. The question arises whether the court was vigilant enough to see that the trial is conducted day by day system. The both answers would be negative. Unfortunately, the Sessions Trial was not conducted day by day. The prosecution witnesses were not produced by making them to remain present for day by day trial. The
D adjournments were sought by defence and they were also granted liberally. All this resulted in strange situation where those two witnesses stated something as prosecution witnesses and after lapse of sufficient time, they appeared before the court and gave the evidence as defence as witnesses and stated against the prosecution."

E In our view, the reasoning recorded by the High Court, itself would have been sufficient to reject the testimony of DW-1 and DW-2. However, having said so the High Court reversed the order of conviction and recorded the order of acquittal, which is perverse.

F In this case the application under Section 311 Cr.P.C. for recalling PW-8 and PW-9 and re-examining them was rejected by the Court on 2.9.1994. Therefore, the question with regard to recalling PW-8 and PW-9 and re-examining them stood closed. There is no provision in the Code of Criminal Procedure that by filing affidavit the witnesses examined as PWs (PW-8 and PW-9 in this case) could be juxtaposed as DW-1 and DW2- and be examined
G as defence witnesses on behalf of the accused.

Mr. A.T.M. Rangaramanujam, learned senior counsel for the respondent, however, contended that the accused is entitled to enter upon defence and adduce evidence in support of his case as provided under Section 233 Cr.P.C. particularly Sub-Section (3) of Section 233. Sub-Section (3) of Section 233
H reads:-

"(3) If the accused applies for the issue of any process for compelling the attendance of any witness or the production of any document or thing, the Judge shall issue such process unless he considers, for reasons to be recorded, that such application should be refused on the ground that it is made for the purpose of vexation or delay or *for defeating the ends of justice.*"

(emphasis supplied)

Section 233 itself deals with entering upon defence by the accused. The application for recalling and re-examining persons already examined, as provided under Section 311 Cr.P.C., was already rejected. The power to summon any person as a witness or recall and re-examine any person already examined is the discretionary power of the Court in case such evidence appears to it to be essential for a just decision of the case. Under Section 233 Cr.P.C. the accused can enter upon defence and he can apply for the issue of any process for compelling the attendance of any witness in his defence. The provisions of sub-section (3) of Section 233 cannot be understood as compelling the attendance of any prosecution witness examined, cross-examined and discharged to be juxtaposed as DWs. In the present case PW-8 and PW-9 were juxtaposed as DW-1 and DW-2. This situation is not one what was contemplated by sub-section 3 of Section 233 Cr.P.C.

When such frivolous and vexatious petitions are filed, a Judge is not powerless. He should have used his discretionary power and should have refused relief on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. In the present case, the witnesses were examined by the prosecution as eyewitnesses on 18.12.1990, cross-examined and discharged. Thereafter, an application under Section 311 Cr.P.C. was rejected. They were recalled purportedly in exercise of power under sub-section (3) of Section 233 Cr.P.C. and examined as DW-1 and DW-2 on behalf of the accused on 17.7.1995. This was clearly for the purpose of defeating the ends of justice, which is not permissible under the law.

In the case of *Yakub Ismail Bhai Patel* v. *State of Gujarat,* [2004] 12 SCC 229 in which one of us Dr. AR. Lakshmanan, J. was the author of the judgment, in somewhat similar case to the facts of the present case it was held that once a witness is examined as a prosecution witness, he cannot be allowed to perjure himself by resiling from the testimony given in court on oath by filing affidavit stating that whatever he had deposed before court as

A PW was not true and was done so at the instance of the police. In that case the evidence of PW-1 was relied upon by the Trial Court and also by the High Court. He was examined by the prosecution as an eyewitness. He also identified the appellants and the co-accused in the Court. After a long lapse of time he filed an affidavit stating that whatever he had stated before the Court was not true and had done so at the instance of the police. In those facts and B circumstances this Court in paragraphs 38 and 39 at SCC pp.240-241 held as under:—

> "38. Significantly this witness, later on filed an affidavit, wherein he had sworn to the fact that whatever he had deposed before Court as C PW 1 was not true and it was so done at the instance of the police".
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> "39. 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 D 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."

In the present case, both PW-8 and PW-9 are related to the deceased. PW-8 is the elder brother of the deceased and PW-9 is the friend of the E deceased. Being the close relative and friend of the deceased there is no rhyme and reason to depose falsely against the accused and allowing the real culprit to escape unpunished. On 21.9.1989, their statements were recorded under Section 164 Cr.P.C. before the Magistrate. On 18.12.1990, their depositions were recorded before the Sessions Judge. In both the statements they have F stated that they were eyewitnesses and witnessed the occurrence. Both of them have stated that they saw the accused assaulting the deceased with knives and swords. They were subjected to lengthy cross-examination but nothing could be elicited to discredit the statement-in-chief. Their examination as defence witnesses was recorded on 17.7.1995 when they resiled completely from the previous statements as prosecution witnesses. It, therefore, clearly G appears that the subsequent statements as defence witnesses were concocted well an after thought. They were either won over or were under threat or intimidation from the accused. No reasonable person, properly instructed in law, would have acted upon such statements.

H Another contention of counsel for the respondent is being noted only

to be rejected. It is contended that accused Mahesh who suffered disclosure statement was acquitted by the Trial Court on benefit of doubt and, therefore, the same yardstick should have been applied to the case of the respondent herein. The Trial Court acquitted the accused Mahesh by giving him the benefit of doubt because his name does not figure in the F.I.R. One Gopal Yadav was mentioned in the F.I.R. as an accused. Whether the Gopal Yadav mentioned in the F.I.R. was the same Mahesh was not explained by the prosecution and this was the reason for the acquittal of Mahesh. The name of the respondent herein was named in the F.I.R. as one of the assailants and he was also identified by PW-8 and PW-9.

Prima facie PW-8 Mohd. Amin and PW-9 Zakir Ali in their subsequent affidavits made a false statement which they believed to be false or did not believe to be true. Hence, they are liable for perjury for giving false evidence punishable under Section 193 IPC. We direct the Vth Additional Sessions Judge, Ujjain, Madhya Pradesh, to file a complaint under Section 193 of the Indian Penal Code and initiate proceedings against Mohd. Amin PW-8 and Zakir Ali PW-9 juxtaposed as DW-1 and DW-2 and pass necessary orders in accordance with law.

In the facts and circumstances aforesaid, the High Court was not justified in reversing the conviction recorded by the Trial Court. The order of the High Court dated 12.5.2000 is accordingly set aside and the order of the Trial Court convicting the respondent under Section 302/34 IPC is restored. The appeal is allowed. The respondent is on bail. His bail bond and surety stands cancelled. He is directed to be taken back into custody forthwith to serve out the remaining part of the sentence. Compliance report within one month.

R.P. Appeal allowed.