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STATE OF RAJASTHAN

v.

ISLAM

(Criminal Appeal No. 1318 of 2005)

MAY 24, 2011

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**[ASOK KUMAR GANGULY AND DEEPAK VERMA, JJ.]**

*Penal Code, 1860 – ss. 302 and 304 (Part-II) – Accused hit the victim on his head with deadly weapon, resulting in his death – Convicted u/s. 302 and sentenced to life imprisonment by trial court – High Court converted the sentence from s. 302 to s. 304 (Part-II) as accused had already undergone detention for more than six years – On appeal held: Order of conversion of sentence not justified – In the background of the consistent evidence, it cannot be said that accused had no intention to kill the deceased – There was some pre-meditation on the part of accused when he went to his house after a minor scuffle and came back armed with a deadly weapon and in furtherance of that intention struck the deceased with that weapon repeatedly at a vital part of his body – Also, none of the ingredients to bring the case under exception (4) to s. 300 proved – Thus, order of High Court is set aside and that of the trial court is restored.*

*Constitution of India, 1950 – Article 136 – Order of acquittal passed by the High Court – Interference with – Held: Is permissible, when consideration by the High Court is, misconceived and perverse.*

*Administration of criminal justice – Possibility of two views – One pointing to the guilt of the accused and other his innocence – Courts to adopt view in favour of accused.*

**It is alleged that altercation took place between respondent No. 1 and others who had assembled for a**

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meeting. Respondent No. 1 and others went back home and came back armed with Farsa. Respondent No. 1 hit 'J' repeatedly on his head with Farsa. The trial court convicted respondent No. 1 under Section 302 IPC and sentenced him to life imprisonment. The High Court set aside the conviction of respondent No. 1 under Section 302 and converted it under Section 304 Part-II IPC considering that the relations between respondent No. 1 and 'J' were cordial; that only one blow by respondent No. 1 on the head of 'J' proved fatal; and that respondent No. 1 had already undergone detention for more than six years. Therefore, the appellant filed the instant appeal.

Allowing the appeal, the Court

**HELD:** 1.1 When this Court exercises its jurisdiction under Article 136, it definitely exercises a discretionary jurisdiction but such discretionary jurisdiction has to be exercised in order to ensure that there is no miscarriage of justice. If the consideration by the High Court is misconceived and perverse, there is nothing in law which prevents this Court from exercising its jurisdiction under Article 136 against an order of acquittal when such acquittal cannot be sustained at all, in view of the evidence of record. [Para 15] [996-F-H]

1.2 In criminal cases if two views are possible, one pointing to the guilt of the accused and the other to the innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. *A miscarriage of justice which may arise from acquittal of the guilty is no less than from a conviction of an innocent.* The principle to be followed by appellate court considering an appeal against an order of acquittal is to interfere only when there are compelling and substantial reasons to do so. [Paras 16 and 17] [897-A-C]

**A 1.3 In reversing an acquittal, this Court keeps in mind that presumption of innocence in favour of the accused is fortified by an order of acquittal and if the view of the High Court is reasonable and founded on materials on record, this Court should not interfere. However, if this Court is of the opinion that the acquittal is not based on a reasonable view, then it may review the entire material and there would be no limitation on this Court's jurisdiction under Article 136 to come to a just decision quashing the acquittal. [Paras 19, 20] [998-C-D]**

**C 2.1 It cannot be said that respondent No. 1 had no intention to kill the deceased. It may be true that initially there was no pre-mediation or intention of respondent No. 1 but the intention can develop on the spot and in the instant case, there is some amount of pre-meditation on the part of respondent No. 1 when after attending the assembly in which there was a minor scuffle, respondent No. 1 went to his house and came back to the place of occurrence armed with a Farsa, a deadly weapon and in furtherance of that intention struck the deceased with that weapon repeatedly and at a vital part of his body and caused very grievous injuries. In the background of this consistent evidence against respondent No. 1, the conversion of the conviction of respondent No. 1 from Section 302 IPC to Section 304 (Part II) IPC cannot be sustained and the entire approach of the High Court is misconceived, if not perverse. The judgment and order of conviction passed by the trial court is approved and the same is restored. [Paras 12 and 13] [995-D-H; 996-A-B]**

**G 2.2 In order to bring a case under exception (4) to Section 300 IPC, the evidence must show that the accused acted without any pre-mediation and in a heat of passion and without having taken undue advantage and he had not acted in a cruel or unusual manner. Every**

one of these circumstances is required to be proved to attract exception (4) to Section 300 IPC and it is not sufficient to prove only some of them. In the facts of the case, none of the said ingredients have been proved from the evidence to bring the case under exception (4) to Section 300 IPC. The High Court's finding to the contrary is totally against the evidence on record. [Paras 13 and 14] [996-B-D]

*State of U.P. vs. Sahai* AIR 1981 SC 1442; *State of MP vs. Bachhudass* (2007) 9 SCC 135; *State of Punjab vs. Parveen Kumar* (2005) 9 SCC 769; *Rajesh Kumar vs. Dharamvir* 1997(4) SCC 496; *State of UP vs. Abdul* 1997(10) SCC 135; *State of UP vs. Premi* 2003(9) SCC 12; *State of TN vs. Suresh* 1998(2) SCC 372; *State of MP vs. Paltan Mallah* 2005(3) SCC 169; *Gaurishanker Sharma vs. State of UP* AIR 1990 SC 709; *State of Maharashtra vs. Pimple* AIR 1984 SC 63; *State Delhi Administration vs. Laxman Kumar* 1985 (4) SCC 476; *Dharma v Nirmal Singh alias Bittu & Anr.* 1996 (7) SCC 471 – relied on.

## Case Law Reference:

AIR 1981 SC 1442	Relied on.	Para 18
(2007) 9 SCC 135	Relied on.	Para 18
(2005) 9 SCC 769	Relied on.	Para 18
1997(4) SCC 496	Relied on.	Para 18
1997(10) SCC 135	Relied on.	Para 18
2003(9) SCC 12	Relied on.	Para 18
1998(2) SCC 372	Relied on.	Para 18
2005(3) SCC 169	Relied on.	Para 18
1979 (2) SCC 297	Relied on.	Para 18

A	AIR 1990 SC 709	Relied on.	Para 18
	AIR 1984 SC 63	Relied on.	Para 18
	1985 (4) SCC 476	Relied on.	Para 20
B	1996 (7) SCC 471	Relied on.	Para 20

CRIMINAL APPEALTE JURISDICTION : Criminal Appeal No. 1318 of 2005.

C From the Judgment & Order dated 19.2.2003 of the High Court of Judicature for Rajasthan at Jaipur Bench, Jaipur in DB Criminal Appeal No. 401 of 1997.

Dr. Manish Singhvi, AAG, Ansar Ahmad Chaudhary for the Appellant.

D C.L. Sahu, Rajendra Sahu, Hema Sahu, Rishabh Sahu for the Respondents.

The Judgment of the Court was delivered by

E **GANGULY, J.** 1. Heard learned counsel for the parties.

F 2. The State of Rajasthan is in appeal before us impugning the judgment dated 19.2.2003 passed by the High Court whereby the High Court by its judgment disposed of two appeals, being Criminal Appeal No. 401 of 1997 and Criminal Appeal No. 380 of 1997. The appeal of the State is in respect of Criminal Appeal No. 401 of 1997. By the judgment of acquittal rendered by the High Court in the aforesaid criminal appeal, it inter alia, confirmed the conviction of the other accused, namely, Rujdar, Ilias, Muvir, and Manna under Section 323 IPC but modified their sentence awarded to them by enhancing the fine instead of imposing imprisonment.

G 3. The appeal of the accused Asru, Guncheri, Mohammada, Kalto, Roshan and Titta was allowed and they were acquitted from the charges under Sections 148 and 336/  
H 149 IPC.

4. So far as Islam is concerned, the High Court set aside his conviction under Section 302 and converted it under Section 304 Part II IPC considering that Islam had already undergone detention for more than six years. The High Court also imposed a fine of Rs. 30,000(Rupees Thirty Thousand) on Islam and held that the same would meet the ends of justice.

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5. Impugning that judgment, when the State filed Special Leave Petition before this Court, a Bench of this Court, while granting leave, passed the following order:-

6. "Delay condoned.

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Leave granted to the extent of respondent No. 1-Islam only. As to other respondents the special leave petition is dismissed.

Issue warrants bailable in an amount of Rs. 10,000/- only requiring production of accused- respondent no. 1 before the Trial Court on the dates to be appointed by it or before this Court as directed. The bail bonds shall be furnished to the satisfaction of the Trial Court."

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7. Therefore, the purpose of our examination is confined to the question whether in passing the order of conversion of sentence from Section 302 IPC to Section 304 Part II IPC in respect of respondent no. 1, the High Court exercised its judicial discretion properly. It may be mentioned in this connection that the Trial Court, namely, Court of Additional District & Sessions Judge, Deeg convicted respondent no. 1 under section 302 IPC and convicted him to undergo life imprisonment and a fine of Rs. 1000/-, in default, to further undergo imprisonment of six months.

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8. Learned counsel for the appellant while taking us through the judgment of the Trial Court drew our attention to the evidence of PW 7, PW 9, PW 12, PW 16 and PW 17 and submitted that these are all eye-witnesses and there is consistent evidence of these eye-witnesses about the involvement of respondent no. 1 in the commission of crime,

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- A namely, the murder of Jenu. The material facts relevant for our consideration are that on the date of the incident, i.e. 18.3.1988, a meeting was held in the morning for raising some funds for repairing the mosque and in the said meeting, an altercation took place between respondent no. 1 and various
- B other persons of the area who assembled for the meeting. One of the person assembled there told PW 7 that he had been treacherous in misappropriating public funds for repair of the mosque. There was a minor shuffle amongst those who had assembled there. It is the consistent evidence of the witnesses
- C mentioned above that after that, respondent no. 1 along with others went home and came back armed with a 'Farsa'. It is also the consistent evidence that respondent no. 1 hit Jenu thrice on his head with the Farsa. This evidence has been consistently repeated by PW 7, PW 9, PW 16 and PW 17. PW
- D 12 said that Islam hit Jenu with Farsa on his head but the number of times had not been mentioned by him.

9. Appreciating the evidence of these witnesses, the Trial Court reached the finding that respondent no. 1 can be held guilty under Section 302 IPC and accordingly found him guilty

E under Section 302 IPC and sentenced him for life imprisonment. The High Court has noted the injuries on the deceased. The injuries on the deceased are as follows:

1. One incised wound 7 cm X 1 cm X bone deep on
- F left frontal region of head.
2. One incised wound 6.5 cm X 1 cm X bone deep
- on Rt. Frontal region of head.
3. One incised wound 8 cm X 1 cm X bone deep on
- G Rt. Parietal region of head.

10. PW 3 Dr. Ashok Kumar Gupta in his evidence said the cause of death of the deceased was in view of the head injury leading to compression of Brain and Coma. From the

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nature of the injuries, it is clear that they were inflicted by a deadly and sharp weapon and undoubtedly Farsa is one such weapon. A

11. In the context of this evidence, the judgment of the High Court is rather surprising. The High Court while converting the conviction of the respondent no. 1 from Section 302 IPC to Section 304 Part-II in paragraph 12 held that the relations between respondent no. 1 and the deceased Jenu were cordial and only one blow was caused by Islam on the head of the deceased and that proved fatal. The High Court further said that the injury inflicted by respondent no. 1 was not pre-meditated and the respondent no. 1 did not take any undue advantage or nor acted in a cruel manner and as such, the case of respondent Islam is covered by Explanation IV appended to Section 300 IPC and could only be held guilty under Section 304 Part II IPC. B C D

12. We fail to appreciate the aforesaid reasoning by the High Court in the context of the consistent evidence discussed above. It cannot be said that respondent no. 1 had no intention to kill the deceased. After attending the assembly in which there was a minor scuffle, respondent no. 1 Islam admittedly went to his house and came back armed with a Farsa which is a deadly weapon. Thereafter, he hit the deceased repeatedly on the head, a vital part of human body, with Farsa and caused very grievous injuries. It may be true that initially there was no pre-mediation or intention of the respondent no. 1 but it is well settled that intention can develop on the spot and in the instant case, there is some amount of pre-meditation on the part of respondent no. 1 when he had gone to his house and came back to the place of occurrence armed with a deadly weapon and in furtherance of that intention struck the deceased with that weapon repeatedly and at a vital part of his body. In the background of this consistent evidence against respondent no. 1, this Court is of the opinion that the conversion of the conviction of respondent Islam from Section 302 IPC to Section E F G H



- A 304 Part II IPC cannot be sustained and the entire approach of the High Court is misconceived, if not perverse.

B 13. The finding of the High Court that the act of the respondent no. 1 is coming under the fourth exception cannot be sustained at all. It is clear that respondent no. 1 did not strike the deceased at the first instance, but he struck him after an interval of time since he left the place of occurrence, went to his home and then came back armed with a Farsa. In order to bring a case under exception (4) to section 300 IPC, the evidence must show that the accused acted without any pre-mediation and in a heat of passion and without having taken undue advantage and he had not acted in a cruel or unusual manner. Every one of these circumstances is required to be proved to attract exception (4) to section 300 IPC and it is not sufficient to prove only some of them.

D 14. In the facts of this case, none of above ingredients have been proved from the evidence to bring the case under exception (4) to Section 300 IPC. The High Court's finding to the contrary is totally against the evidence on record.

E 15. The learned counsel for respondent no. 1 has urged that this Court should not interfere in exercise of its jurisdiction under Article 136 of the Constitution when an order of acquittal was granted by the High Court and respondent no. 1 had suffered imprisonment for 6 years. There is no such absolute proposition in law as has been said to be advanced by the learned counsel for respondent no. 1. When this Court exercises its jurisdiction under Article 136, it definitely exercises a discretionary jurisdiction but such discretionary jurisdiction has to be exercised in order to ensure that there is no miscarriage of justice. If the consideration by the High Court is misconceived and perverse as indicated above, there is nothing in law which prevents this Court from exercising its jurisdiction under Article 136 against an order of acquittal when such acquittal cannot be sustained at all, in view of the evidence of record.

16. The golden thread which runs through the administration of justice in criminal cases is that if two views are possible, one pointing to the guilt of the accused and the other to the innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from a conviction of an innocent.

17. The principle to be followed by appellate court considering an appeal against an order of acquittal is to interfere only when there are compelling and substantial reasons to do so.

18. Thus, in such cases, this Court would usually not interfere unless

a. The finding is vitiated by some glaring infirmity in the appraisal of evidence. (*State of U.P. Vs. Sahai*, AIR 1981 SC 1442 at paras 19-21)

b. The finding is perverse. (*State of MP Vs. Bachhudas*, (2007) 9 SCC 135 at para 10 and *State of Punjab Vs. Parveen Kumar* (2005) 9 SCC 769 at para 9)

c. The order suffers from substantial errors of law and fact (*Rajesh Kumar Vs. Dharamvir* 1997(4) SCC 496 at para 5)

d. The order is based on misconception of law or erroneous appreciation of evidence (*State of UP Vs. Abdul* 1997(10) SCC 135; *State of UP Vs. Premi* 2003(9) SCC 12 at para 15)

e. High Court has adopted an erroneous approach resulting in miscarriage of justice (*State of TN Vs. Suresh* 1998(2) SCC 372 at paras 31 and 32; *State of MP Vs. Paltan Mallah* 2005(3) SCC 169 at para 8)

A f. Acquittal is based on irrelevant grounds (*Arunachalam Vs. Sadhanatham* 1979(2) SCC 297 at para 4

g. High Court has completely misdirected itself in reversing the order of conviction by the Trial Court (*Gaurishanker Sharma Vs. State of UP*, AIR 1990 SC 709)

B h. The judgment is tainted with serious legal infirmities (*State of Maharashtra Vs. Pimple*, AIR 1984 SC 63 at para 75)

C 19. In reversing an acquittal, this Court keeps in mind that presumption of innocence in favour of the accused is fortified by an order of acquittal and if the view of the High Court is reasonable and founded on materials on record, this Court should not interfere.

D 20. However, if this Court is of the opinion that the acquittal is not based on a reasonable view, then it may review the entire material and there will be no limitation on this Court's jurisdiction under Article 136 to come to a just decision quashing the acquittal (See 1985(4) SCC 476 at para 45; 1996(7) SCC 471 at para 4)

E 21. For the reasons aforesaid, this Court cannot approve the judgment of the High Court insofar as conversion of conviction in respect of respondent no. 1 from Section 302 to Section 304 Part-II is concerned. This Court approves the judgment and order of conviction passed by the Trial Court and restores the same. The bail bonds of respondent no. 1 are discharged. He is directed to immediately surrender before the Trial Court and serve out the sentence imposed on him by the Trial Court.

G 22. The appeal of the State is thus allowed.

N.J.

Appeal allowed.