STATE OF RAJASTHAN

v.

ANI @ HANIF AND ORS.

JANUARY 13, 1997

[DR. A.S. ANAND AND K.T. THOMAS, JJ.]

Criminal Law : Evidence Act, 1872 : Section 165 :

Trial Judge—Powers and duty of—Trial Judge interjected during cross-examination of a witness to get a confusion in his mind cleared—Held: the trial Judge was within his powers in so interjecting—The trial Judge had vast and unrestricted powers to put any question in any form at any stage, to any witness, to elicit the truth—Judge remaining mute during trial was not an ideal situation—He was expected to actively participate in the trial.

Criminal Procedure Code, 1973 : Section 154.

Criminal Trial—Appreciation of evidence—Injured eye witness stated in FIR that it was recorded in the evening—Whereas police version was that it was recorded in the morning—Held: this discrepancy, on the facts of the case, was not enough to cascade the testimony of an important eye witness, whose presence at the spot could not be doubted—The maximum consequence was that the First Information Statement could not be used to corroborate the evidence of the maker of it.

Criminal Trial—Appreciation of evidence - FIR - name of injured eye witness not mentioned in FIR as one of those present during the incident - Held: Evidence of such injured eye witness could not be rejected merely because of non-mention of his name in FIR—The condition of the maker of the FIR and whether he was in a position to reproduce the vivid details of the occurrence, should be borne in mind.

Penal Code, 1860: Sections 302, 307 and 326.

Criminal Trial—Appreciation of evidence—Murder—PW-3, an injured eye witness, identified all six accused in court as assailants—But in FIR filed by him only names of four accused were mentioned but not the names of the remaining two accused—PW-3 not involved in test identification parade—Held the two accused were entitled to benefit of doubt and were

A *rightly acquitted by High Court—But High Court erred in setting aside conviction recorded by trial court against these four accused, overlooking the evidence of PW-3 and other important witnesses examined by the prosecution—Accordingly, the conviction and sentence passed by trial court against these four accused restored—Evidence Act, 1872, S.9.*

B **The respondents-accused were convicted by the Sessions Court under Sections 302, 307 and 326 read with Section 149 of the Indian Penal Code, 1860. But the High Court, on appeal by the respondents, acquitted them all. Hence this appeal.**

C **According to the prosecution, the deceased along with PW-3 were travelling in a bus for reaching the Court where they had to appear as accused in a case. Their uncle, PW-18, was also travelling with them. When the bus halted at a stop, the respondents variously armed with swords and hatchets boarded the bus and shot at the deceased and PW-3. The respondents dragged the deceased and PW-3 out of the bus and showered blows**
D **on them. The deceased died at the spot, but PW-3 was saved by prompt medical attention. The DIG and his staff Officer, PW-11, who were going by that way in a car saw the respondents armed with swords and hatchets and PW-11 identified them. A First Information Report (FIR) was lodged and a post-mortem was held. The respondents were arrested and in-**
E **criminating articles were recovered from them.**

On behalf of the appellants it was contended that the High Court had overlooked the evidence of PW-3 and other important witnesses examined by the prosecution.

F **On behalf of the respondents it was contended that it was improper for the Trial Judge to have interjected during the cross-examination of PW-3; that PW-3 stated that the FIR was recorded in the evening while the police version was that it was recorded in the morning and there was a discrepancy in his evidence; and that the evidence of the injured witness,**
G **PW-18, must be rejected since his name was not mentioned in the FIR as one of those present during the incident.**

Allowing the appeal, this Court

HELD: 1.1. Section 165 of the Evidence Act, 1872 confers vast and
H **unrestricted powers on the trial court to put "*any* question he *pleases*, in *any***

form, at *any* time, of *any* witness, or of the parties, about *any* fact *relevant* or *irrelevant*" in order to discover relevant facts. The said section was framed by lavishly studding it with the word "any" which could only have been inspired by the legislative intent to confer unbridled power on the trial court to use the power whenever he deems it *necessary to elicit truth.* Even if any such question crosses into irrelevance the same would not transgress beyond the contours of powers of the court. This is clear from the words "relevant or irrelevant" in Section 165. Neither of the parties has any right to raise objection to any such question. [205-G-H, 206-A]

1.2. Reticence may be good in many circumstances, but a judge remaining mute during trial is not an ideal situation. A taciturn Judge may be the model caricatured in public mind. But there is nothing wrong in his becoming active or dynamic during trial so that criminal justice being the end could be achieved. Criminal trial should not turn out to be a bout or combat between two rival sides with the judge performing the role only of a spectator or even an umpire to pronounce finally who won the race. A judge is expected to actively participate in the trial, elicit necessary materials from witnesses at the appropriate context, which he feels necessary for reaching the correct conclusion. There is nothing, which inhibits his power to put questions to the witnesses, either during chief examination or cross-examination or even during re-examination to elicit truth. The corollary of it is that if a judge felt that a witness has committed an error or a slip it is the duty of the judge to ascertain whether it was so, for, to err is human and the chances of erring may accelerate under stress of nervousness during cross-examination. Criminal justice is not to be founded on erroneous answers spelled out by witnesses during evidence collecting process. It is a useful exercise for trial judge to remain active and alert so that errors can be minimised. [206-B-E]

Ram Chander v. *State of Haryana,* AIR (1981) SC 1036, relied on.

1.3. When the trial judge noticed that PW-3 was in a bit of confusion during cross-examination he put a question to get the confusion clarified. If the witness has corrected an error slipped out of his tongue there is no justification terming his evidence as "not believable", particularly since the High Court has found that presence of PW-3 at the scene of occurrence during the relevant time is indisputable. In the instant case, there was nothing wrong in the trial court interjecting during cross-examination of

PW-3 with a view to ascertain the correct position. [205-E, 207-A]

2.1. The discrepancy regarding the time of recording First Information Statement, on the facts of this case, is not enough to castigate the testimony of an important eyewitness, whose presence at the spot cannot in any way be doubted. The maximum consequence, which such discrepancy may visit on the facts of this case, is that the First Information Statement cannot be used to corroborate the evidence of the maker of it. [207-C-D]

2.2. The evidence of the injured witness PW-18 cannot be rejected merely because PW-3 did not name him in the FIR. The condition of the maker of the First Information Statement should be borne in mind - whether he was in a position to reproduce the vivid details of the occurrence including making reference to all the persons who would have witnessed the occurrence. [207-G-H; 208-A]

2.3. The injured witness, PW-3, correctly identified all the six accused in court as the assailants. But in the FIR filed by him only the names of four accused were mentioned but not the names of the remaining two accused. The Police did not involve PW-3 in the test identification parade. Hence, the two accused were entitled to benefit of doubt and were rightly acquitted by the High Court. But the High Court erred in setting aside the conviction recorded by the trial court against these four accused overlooking the evidence of PW-3 and other important witnesses examined by the prosecution. Accordingly, the conviction and sentence passed by the trial court against these four accused is restored. [208-G-H, 209-A-B]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1533 of 1995.

From the Judgment and Order dated 13.3.92 of the Rajasthan High Court in D.B. Crl.A. No. 447 of 1987.

K.S. Bhati for the Appellant.

Sushil Kumar and Shakil Amhed Syed for the Respondents.

The Judgment of the Court was delivered by

THOMAS, J. It was a jinxed bus journey for Phool Chand and Dwarkalal as both of them were murdered by armed assailants and also

for Badri Lal (PW-3) who too was travelling in the same bus. However, Badri Lal survived despite being badly managed by the assailants. The case was registered on his complaint and the present six respondents were challanned by the police for various offences. Sessions Court convicted them under Sections 302, 307 and 326 read with Section 149 of the Indian Penal Code besides other lesser offences relating to unlawful assembly. But High Court of Rajasthan, on appeal by the respondents, acquitted them all. This appeal by special leave has been filed by the State of Rajasthan challenging the said order of acquittal.

The double murder happened around 8.00 a.m. on 23.12.1983 at Simalia (Kota District). Prosecution case is, shortly, this : Badrilal (PW3) along with brother Phool Chand and Dwarkalal were travelling in a bus for reaching the court where they had to appear as accused in the case. His uncle Gopal (PW18) was also travelling with them. When the bus reached Simala some passengers went out for tea break. Respondents variously armed with swords and hatchets etc. boarded the bus at that stop and unleashed a blitz on Phool Chand, Dwarkalal and Badri Lal with the weapons. They dragged Phool Chand and Dwarkalal out of the bus and continued to shower blows on them. As the victims became motionless they turned to Badri Lal and dragged him also out of the bus and showered him with blows. Respondents left the place when Badri Lal became motionless. Phool Chand and Dwarkalal died at the spot, but since Badri Lal was not destined to die he was escorted to the hospital where his life was saved by prompt medical attention.

DIG of Kota region Shri Shankar Sharan was going by that way in a car with a constable Ram Kumar (PW-11). As they reached the spot where the incident took place they heard from the people of a blurred account of what happened. So the DIG made arrangement for immediate ambulancing of Badrilal to the hospital. He sent a wireless message to Sultanpur Police Station and pursuant to it SHO PW-22 (Aasu Singh) reached the spot. He recorded the statement of PW-25 at 9.25 A.M. which was used for preparing FIR in this case.

Respondents were arrested on 26.12.1983 and the police recovered incriminating articles on the strength of informations elicited from them.

Dr. Shivachandra Misra (PW-9) who conducted the autopsy on the dead bodies of the two deceased has described the injuries found on them.

A Among the injuries perforation on the carotid artery on both the deceased became the cause for their instantaneous death. Dr. Chander Mohan Srivastava (PW-13) examined Badri Lal on the same day and found six incised injuries besides some fractures.

There is no dispute that Phool Chand and Dwarkalal as also Badri
B Lal (PW-3) were subject to a violent attack at the bus stop of Samalia on the morning hours on 23.12.1983. Respondents only disputed about their involvement in the incident. So the crucial question which High Court had to consider was whether appellants were the assailants who launched attack on the deceased and injured. Learned Judges found that it was not possible
C to attach credence to the testimony of Gopal (PW-18) and Badrilal (PW-3). Learned counsel who argued for the State of Rajasthan contended that the said finding was the result of misreading the evidence and a consequence of over-looking the testimony of an important witness Ram Kumar (PW-11).

D PW-3 (Badri Lal) has stated in his evidence that all the six respondents went to the bus armed with swords and hatchets and he mentioned the different roles played by each respondent it this gory incident. But in the first information statement he named first respondent Hanifa, third respondent Gani Mohd., fifth respondent Abdul Kayam @ Babu and sixth
E respondent Guddu @ Guddi, and not the names of second respondent (Abdul Salim) and fourth respondent (Ishak Mohd.) though he said that there were two other assailants also whose names he did not know. He was not subject to any test identification parade and therefore, we do not have the advantage of Badri Lal's earliest version identifying second and fourth respondent.

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The motive alleged PW-3 (Badri Lal) for this planned onslaught was the murder of Hameed - the eldest brother of the respondents. It is not disputed that Phool Chand and Dwarka Lal (the deceased) and Badri Lal were the accused in that murder case.

G The High Court, having found that presence of PW-3 at the place of occurrence has been indisputably established, sidelined his testimony with a sweeping remark that it is "full of contradictions, inconsistencies and improbabilities". Learned Judges did not cite a single material from PW-3's narration of the occurrence as proof of inconsistency. Of course it is
H pointed from the evidence of PW-3 that appellants had covered their faces

and subsequently PW-3 has corrected it when the court put a question on that aspect. In the deposition of PW-3 the following questions and answers have been recovered as part of cross- examination :

Question : The correct thing is that those assaulters covered their faces and hence you could not recognise who had beaten whom?

Answer : This is correct that the persons who came with the intention of killing had covered their faces.

The trial Judge then put a question as this :

Question : Once you have stated that the accused persons had covered their faces and then you have stated that they were not covering their faces. Which is the correct statement out of those two?

Answer : Nizam met me on the way and his face was covered. But the persons who boarded the bus had never covered their face.

Learned Judges of the High Court have observed that the said explanation offered by PW-3 is not believable at all. When the trial judge noticed that PW-3 Badri Lal was in a bit of confusion during cross-examination he put a question to get the confusion clarified. If the witness has corrected an error slipped out of his tongue there is no jurisdiction terming his evidence as "not at all believable", particularly since the High Court has found that presence of PW-3 at the scene of occurrence during the relevant time is indisputable.

Shri Sushil Kumar, learned senior counsel criticised the manner in which the trial judge had put the question. Counsel submitted that when the cross-examiner has successfully elicited a pivotal answer from PW-3 it was improper for the court to have interjected to upset the trend.

We are unable to appreciate the above criticism. Section 165 of the Evidence Act confers vast and unrestricted powers on the trial court to put "*any* question *he pleases*, in *any* form, at *any* time, of *any* witness, or of the parties, about *any* fact *relevant or irrelevant*" in order to discover relevant facts. The said section was framed by lavishly studding it with the word "any" which could only have been inspired by the legislative intent to confer unbridled power on the trial court to use the power whenever he deems it

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B mute during trial is not an ideal situation. A taciturn Judge may be the model caricatured in public mind. But there is nothing wrong in his becoming active or dynamic during trial so that criminal justice being the end could be achieved. Criminal trial should not turn out to be a bout or combat between two rival sides with the judge performing the role only of
C a *spectator or even an umpire* to pronounce finally who won the race. A judge is expected to actively participate in the trial, elicit necessary materials from witnesses at the appropriate context which he feels necessary for reaching the correct conclusion. There is nothing which inhibits his power to put questions to the witnesses, either during chief examination or cross-examination or even during re-examination to elicit *truth*. The
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E process. It is a useful exercise for trial judge to remain active and alert so that errors can be minimised.

In this context it is apposite to quote the observations of Chinnappa Reddy, J. in *Ram Chander* v. *The State of Haryana,* AIR (1981) SC 1036 :

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> "The adversary system of trial being what is is, there is an unfortunate tendency for a judge presiding over a trial to assume the role of a referee or an umpire and to allow the trial to develop into a contest between the prosecution and the defence with the inevitable distortions flowing from combative and competitive elements entering the trial procedure. If a Criminal Court is to be an effective
G instrument in dispensing justice, the presiding judge must cease to be a spectator and a mere recording machine. He must become a participant in the trial by evincing intelligent active interest by putting question to witnesses in order to ascertain the truth."

H We respectfully concur with the aforesaid observations. We find no wrong

in the trial court interjecting during cross-examination of PW-3 with a view to ascertain the correct position. A

Another reason advanced by the High Court for jettisoning the evidence of PW-3 - Badri Lal - is that he did not concur with the police version that the First Information Statement was recorded at 9.55 A.M. True PW-3 said that his statement was recorded by the police during evening. Learned counsel who argued for the State of Rajasthan submitted that PW-3 (Badri Lal) would have lost his sense of time in the agony of excruciating pain suffered by him on account of serious injuries sustained. We are of the view that the discrepancy regarding the time of recording First Information Statement, on the facts of this case, is not enough to castigate the testimony of an important eye witness, whose presence at the spot cannot in any way be doubted. The maximum consequence which such discrepancy may visit, on the facts of this case, is that the First Information Statement cannot be used to corroborate the evidence of the maker of it. B C

In this context we may refer to the testimony of PW-18 Gopal. That witness had identified the appellants as the assailants in the incident in a test identification parade conducted by a Judicial Magistrate of 1st Class (PW-12). But the High Court did not accept his evidence for the main reason that his name was absent in the First Information Statement and further that the appellants after arrest, were paraded openly which would have impaired the value of the test identification parade considerably. D E

P-18 - Gopal is none other than the uncle of Phool Chand and was staying with his nephew and he stated that on the date of occurrence he too accompanied his nephew who was proceeding to appear in the court for the case. PW-18 said that when the incident stated he tried to protect the injured by catching hold on one of the weapons used by the assailants and that resulted in an injury on his palm. Dr. Shivchandra Mishra (PW-9) had examined PW-18 on 24.12.1983 and found a skin deep incised wound of 1x1/18 inches on his left thumb. Learned Sessions Judge found the evidence of PW-18 quite believable. F G

We are of the view that the evidence of PW-18 Gopal should never have been rejected merely because Badri Lal did not name him in the First Information Statement. The condition of the maker of the First Information Statement should have been borne in mind - whether he was in a position to reproduce the vivid details of the occurrence including making reference H

A to all the persons who would have witnessed the occurrence. Similarly the defence contention that accused were openly paraded by the police is not supported by any reliable material on evidence.

We cannot overlook the evidence of yet another important witness in this case - PW-11 - Ram Kumar. He was the staff officer on duty B attached to the DIG of Police. He reached the place of occurrence along with the DIG soon after the occurrence as they were proceeding to some other place on this route. They saw the two deceased and the injured (PW-3) lying near the bus and got an account from the people crowded there as to what had happened. After sending a wireless message to Kota C Central Control Room the DIG and PW-11 proceeded towards Bhonsa village and found a bullock-cart on the way in which respondents were travelling. As they were armed with swords and hatchets, DIG advisedly chose for re-inforcement of police personnel for nabbing the armed men and hence they went to the nearest police station and with a posse of police proceeded to village Bhonsa. But unfortunately during this interval the D assailants escaped. This is the substance of the evidence of PW-11.

No doubt there is scope for criticism that if the DIG had been more discreet he could have succeeded in nabbing the miscreants on the same day. But that is a different matter altogether. The fact remains that DIG E and PW-11 could see the armed persons and PW-11 identified the respondents in this case as those armed persons. Unfortunately the High Court has overlooked this very important piece of evidence.

About the evidence relating to recovery of blood-stained swords, hatchets and shoes pursuant to the information elicited from the respon- F dents after the arrest the High Court observed that the same could be used only for corroborative purpose. However, the High Court did not dissent from the trial court's view regarding its reliability.

In the light of the above reasoning we have absolutely no doubt that PW-3 (Badrilal) has correctly identified A-1 the first respondent - Hanif, G 3rd respondent Gani Mohammed, 5th respondent Abdul Duayum @ Babu and 6th respondent Guddu @ Guddi, whose names he mentioned in the First Information Statement. However, we find weight for the contention of learned counsel that PW-3's evidence is not sufficient to establish the case against second and fourth respondents (Abdul Salim and Ishaq H Mohammad) who were not named by him in the First Information State-

ment. Police did not involve PW-3 in the test identification parade. We are, therefore, persuaded to give benefit of the said doubt to those respondents. A

Resultantly, we set aside the order of acquittal passed by the High Court as for first respondent - Hanif, 3rd respondent - Gani Mohammad, 5th respondent - Abdul Duayum @ Babu and 6th respondent - Guddu @ Guddi are concerned. The conviction and sentence passed by the sessions court on those respondents are hereby restored. We direct the Sessions Judge, Kota to take immediate steps to put those respondents back in jail for undergoing the sentence passed on them. B

V.S.S. Appeal allowed.