A CHANDRA SHEKHAR BIND AND ORS.

v.

STATE OF BIHAR

OCTOBER 9, 2001

B [K.T. THOMAS AND S.N. VARIAVA, JJ.]

Penal Code, 1860—Sections 302 and 302 read with 149—Conviction under—Prosecution case supported by 2 eyewitnesses—All the accused except 3 identified by both the eyewitnesses—Convicted by Courts below—On appeal C *conviction of 3 accused set aside giving benefit of doubt—Conviction of other accused upheld.*

Constitution of India, 1950—Article 136—Special leave—New Plea—Mixed question of law and facts and not pure question of law—Held, cannot be permitted to be raised for the first time in Supreme Court.

D

Eighteen accused including the appellants were charge-sheeted under section 302 and 302 read with section 149 I.P.C. PWs 1, 4, 5 and 6 were the eye witnesses to the incident. PW 5 had lodged FIR. In trial, PW5 who had identified all the accused except accused No. 12 and PW 6 who had identified all the accused except accused Nos. 9 and 10 supported the prosecution E **case. PWs 1 and 4 on whom injury was proved turned hostile as they refused to identify the accused but confirmed that the incident had taken place. Defence examined two witnesses to prove *alibi* and DWs 3, 4 and 5 stated that after the incident when they had gone to the house of the deceased, PWs 5 and 6 had not named any of the accused. However, this** F **was not put to PWs 5 and 6 in their cross-examination.**

Trial Court relying on the evidence of PWs 5 and 6 and rejecting the evidence of defence, convicted the accused. High Court confirmed the conviction.

G **In appeal to this Court appellants for the first time sought to make submission on the basis of Juvenile Justice (Care and Protection of Children) Act, 2000.**

Dismissing the appeals, the Court

H **HELD : 1. The evidence of DWs 3, 4 and 5 has rightly not been**

accepted by the trial court and the High Court. PWs 5 and 6 are trustworthy and reliable witnesses. Their presence on the scene could not be denied. There is absolutely no reason why they should falsely implicate the accused. All the accused were known to these witnesses and, therefore, they could identify the accused. [661-D; E; F]

Masalti **v.** *State of U.P.*, **AIR (1965) SC 202 and** *Binay Kumar Singh* **v.** *State of Bihar*, **[1997] 1 SCC 283, referred to.**

2. PWs 1 and 4 were injured witnesses and their injuries had been proved. PW4 was also the informant who had lodged the first information report. Though PWs 1 and 4 turned hostile and refused to identify any person, they however confirmed that the incident had taken place. PW5 has not identified accused No. 12 and PW 6 has not identified accused Nos. 9 and 10. However, PWs 5 and 6 have both identified all the other accused. Considering the large number of people involved, it would be prudent in this case to adopt the two witness theory. On the basis of this two witness theory, benefit of doubt would have to be and is given to accused Nos. 9, 10 and 12 inasmuch as more than one witness has not identified them.

[662-D; G; 662-E-G]

3. The Court cannot permit to take up point regarding Juvenile Justice (Care and Protection of Children) Act, 2000. It has not been urged before the trial court that any of the accused was a juvenile. No such point had been taken before the High Court. No such point has been taken in the SLP filed before this Court. This is not a pure question of law which can be taken up for the first time in this Court. It is mixed question of law and fact. [663-A; 662-H]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 337-338 of 1999.

From the Judgment and Order dated 9.1.98 of the Patna High Court in Crl. A. No. 407 of 1991 with Crl. A. No. 433 of 1991.

WITH

Crl. A. No. 339 of 1999 and Crl. A. No. 1366 of 1999.

P.S. Mishra and H.L. Agrawal, Rakesh Khanna R.P. Singh, Chandra Shekhar, Vishnu Sharma, Upendra Mishra, Anil Kumar Gupta-II (A.C.)

A Jayant Bhushan (A.C.) Ms. Sunita R. Singh and B.E. Singh for the appearing parties.

The Judgment of the Court was delivered by

S.N. VARIAVA, J. These Appeals are against the Judgment dated 9th B January, 1998 by which the High Court has dismissed the Criminal Appeals filed by the Appellants herein.

Briefly stated the facts are as follows :

According to the prosecution, on 3rd June, 1989 Tungnath Mistri, C Parshuram Bind, Shiv Nath Bind, Ram Vinod Bind and certain others villagers were sitting in front of the house of Parshuram Bind. All of a sudden 22 to 23 persons came running from the western 'gali' armed with rifles, guns, country made pistols, pasulis and lathis and started firing from the fire-arms. It is the case of the prosecution that these assailants started firing at Parshuram Bind. D Appellant No. 1 (Chandra Shekhar Bind) fired at Tungnath Mistri causing injuries on his left elbow. One Suresh Bind also fired at Tungnath Mistri causing injury on his right hand. It is the case of the prosecution that when Parshuram Bind tried to enter his house he was chased by the assailants who caught him and brought him out and then he was assaulted with a pasuli. It is E the case of the prosecution that Sita Ram Bind, father of Parshuram Bind, came out of the house and he was also fired at. It is the case of the prosecution that as a result of this Parshuram Bind and his father Sita Ram Bind died and the assailants then fled away. It is the case of the prosecution that the motive behind this was previous enmity as well as a dispute between Parshuram Bind and the assailants for catching fish in a 'ahar'. It is the case of the prosecution that F Parshuram Bind was a supporter of Bhartiya Janta Party and the Appellants were members of IPF, being a rival political party.

As a result of the first information report lodged by P.W. 4 investigation was taken up. Ultimately 18 persons were charge-sheeted. The trial court G convicted, on 10th September, 1991, 11 persons under Section 302 Indian Penal Code and 7 other persons under Section 302 read with 149 Indian Penal Code. All were sentenced to undergo imprisonment for life.

All the accused filed Appeals before the High Court. During the pendency of the Appeal (before the High Court) Suresh Bind died. The High Court by H the impugned Judgment dismissed the Appeals.

The original Accused Nos. 6 and 13 have not filed any S.L.P. before this Court. The other 15 accused have filed these Criminal Appeals.

In order to prove its case the prosecution has examined 10 witnesses. PWs. 1, 4, 5 and 6 are the eye witnesses. P.Ws. 1 and 4 turned hostile and refused to identify any of the accused in Court. They, however, confirmed that the incident, as alleged, had taken place. P.Ws. 5 and 6 have supported the prosecution. The prosecution also examined two doctors. P.W. 7 carried out the post-mortem on both the deceased persons and proved that their death was homicidal as a result of gun shot injuries. P.W. 9 proved injuries on P.Ws. 1 and 4.

The defence examined 5 witnesses. P.Ws 1 and 2 were examined in order to try and prove an *alibi* set up by Appellant No. 5. Both the Courts below have disbelieved this evidence. Both the Courts below have disbelieved the case of *alibi*. The other three defence witnesses deposed that after the incident they came to the house of the deceased and that at that time neither P.W. 5 nor P.W. 6 had named anybody. However, when P.Ws. 5 and 6 had given evidence it had not been put to them that they had not named any person to D.Ws. 3, 4 and 5. Thus the evidence of these witnesses has rightly not been accepted by the trial Court and the High Court.

Both the trial Court and the High Court have based the conviction on the evidence of P.Ws. 5 and 6. We have gone through the evidence of P.Ws. 5 and 6. We are in agreement with the trial court and the High Court that both these witnesses are trustworthy and reliable witnesses. Their presence on the scene could not be denied. There is absolutely no reason why they should falsely implicate the accused. All the accused were known to these witnesses and, therefore, they could identify the accused.

However, this is an incident in which a large number of accused had participated. The Constitution Bench of this Court has, in the case of *Masalti* v. *State of U.P.* reported in AIR (1965) SC 202, held that under the Evidence Act trustworthy evidence given by a single witness would be enough to convict an accused person, whereas evidence given by half a dozen witnesses which is not trustworthy would not be enough to sustain the conviction. It was held that where a criminal court has to deal with evidence pertaining to the commission of an offence involving a large number of offenders it is usual to adopt the test that the conviction could be sustained only if it is supported by two or three or more witnesses who give a consistent account of the incident. It was held

A that in a sense, the test may be described as mechanical, but it cannot be treated as irrational or unreasonable. It was held that even though it is the quality of the evidence that matters and not the number of witnesses, still it is useful to adopt such a mechanical test.

This two-witness theory has also been adopted by this Court in the case B of *Binay Kumar Singh* v. *State of Bihar* reported in [1997] 1 SCC 283. It is held that there is no rule of evidence that no conviction can be based unless a certain minimum number of witnesses have identified a particular accused as a member of the unlawful assembly. It is held that it is axiomatic that evidence is not to be counted but only weighed and it is not the quantity of evidence but C the quality that matters. It is held that even the testimony of one single witness, if wholly reliable, is sufficient to establish the identification of an accused as a member of an unlawful assembly. It is held that all the same, when the size of the unlawful assembly is quite large and many persons would have witnessed the incident, it would be a prudent exercise to insist on at least two reliable witnesses to vouchsafe the identification of an accused as a participant in the D rioting.

P.Ws. 1 and 4 were injured witnesses and their injuries had been proved. P.W. 4 was also the informant who had lodged the first information report. Yet, as stated above, P.Ws. 1 and 4 turned hostile and refused to identify any person. E They however confirmed that the incident had taken place. On a careful reading of the evidence of P.Ws. 5 and 6 we find that P.W. 5 has identified Accused Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17 and 18 whereas P.W. 6 has identified Accused Nos. 1, 2, 3, 4, 5, 6, 7, 8, 11, 12, 13, 14, 15, 16, 17 and 18. Thus P.W. 5 has not identified Accused No. 12 and P.W. 6 has not identified Accused Nos. 9 and 10. However, P.Ws. 5 and 6 have both identified F all the other accused.

In our view, considering the large number of people involved, it would be prudent in this case to adopt the two-witness theory. On the basis of this two-witness theory benefit of doubt would have to be and is given to Accused Nos. G 9, 10 and 12 inasmuch as more than one witness has not identified them.

Mr. Mishra, who came in at a later stage, sought to make a submission on the basis of the Juvenile Justice (Care and Protection of Children) Act 2000. We, however, find that it had not been argued before the trial court that any of the accused was a juvenile. No such point had been taken before the High H Court. No such point has been taken in the SLP filed before this Court. In our

view, this is not a pure question of law which can be taken up for the first time in this Court. It is mixed question of law and fact. We, therefore, do not permit Mr. Mishra to take up this point and do not deal with theis aspect. A

In this view of the matter, we set aside the conviction of Accused Nos. 9, 10 and 12. They shall be set free forthwith unless they are required in some other case. The Appeals of the other Appellants are dismissed. Their conviction, as passed by the High Court, stands confirmed. They shall serve out their sentences. B

K.K.T. Appeals dismissed.