SUKHDEV YADAV AND ORS. A

v.

STATE OF BIHAR

SEPTEMBER 13, 2001

[UMESH C. BANERJEE AND N. SANTOSH HEGDE, JJ.] B

Evidence Act, 1872 : Section 3:

Evidence—Appreciation of—Accused alleged to have fired at the deceased—Testimony of witnesses—Minor discrepancies—Trial Court convicted the accused—High Court upheld conviction—On appeal, held if evidence in its entirety trustworthy, divergence in evidence cannot oust the prosecution case—Penal Code, 1860—S.302. C

Criminal Trial :

Seizure List—Non-production of—Does not vitiate the trial. D

Appellants were convicted under section 302 of the Penal Code 1860 and were awarded life imprisonment. The prosecution case was that on the fateful day when informant and his son were on their way back to the village, the son reached the house of one 'M' and was surrounded by E **appellants. On the call of appellant No.1, One 'R' fired at the son who fell down dead. Thereafter, the other accused persons fled away. At the trial, five prosecution witnesses deposed that they had seen the actual occurrence and that the accused persons surrounded that deceased and one 'R' fired shot at him. However, defence witness stated that the place of occurrence** F **was different. Sessions Judge convicted and sentenced the appellants. On appeal, High Court upheld the conviction and sentence. Hence the present appeal.**

Appellants contended that there has been a divergence of evidence as regards the place of occurrence which displaces the prosecution case. G

Dismissing the appeal, the Court

HELD : 1.1. Court can sift the chaff from the grain and find out the truth from the evidence itself. There may be minor variations but if on a perusal of the evidence in its entirety, it appears to be otherwise trustworthy, H

A **question of the evidence being non-trustworthy would not arise. [100-C;D]**

1.2. In the instant case, there are some variations in testimony of witnesses regarding the place of occurrence and the manner in which the incident took place but there exists no major contradiction on record. Therefore, the evidence tendered lends credence to the prosecution case as
B **regards the involvement of the appellants in the murder. [100-C; D]**

Leela Ram (Dead) through Duli Chand **v.** *State of Haryana & Anr.*, **[1999] 9 SCC 525;** *State of U.P.* **v.** *M.K. Anthony*, **[1985] 1 SCC 505;** *Rammi* **v.** *State of M.P.*, **[1999] 8 SCC 649;** *Tahsildar Singh* **v.** *State of U.P.*, **AIR (1959) SC 1012 and** *Appabhai and Anr.* **v.** *State of Gujarat*, **[1988] Suppl. SCC 241,**
C **referred to.**

2. In case of a lapse on the part of the prosecution the issue has to be considered from the point of view of prejudice to the accused. If prejudice has been caused by reason of at such a lapse it will have a serious impact on
D **the trial but if no prejudice is caused the question of the trial being vitiated would not arise. Therefore, on facts the eye-witnesses account as available on record cannot but be termed to be trustworthy and by reason therefor, the lapses of non-production of the seizure list stands over-shadowed by the testimony of the eye-witnesses. [102-E; F]**

E *Shivnath Singh & Anr.* **v.** *State of U.P.*, **[1994] 2 SCC 563 and** *Baleshwar Mandal & Anr.* **v.** *State of Bihar*, **AIR (1997) SC 347, relied on.**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 482 of 2000.

F From the Judgment and Order dated 20.12.99 of the Patna High Court in Crl. A. No. 154 of 1993.

K.T.S. Tulsi, Ms. J.S. Wad, Ashish Wad, Ms. Niharika Bahl for M/s. J.S. Wad & Co. for the Appellants.

G Saket Singh, B.B. Singh, Prabhash Kr. Yadav and Dr. K.S. Chauhan for the Respondent.

The Judgment of the Court was delivered by

BANERJEE, J. It is now well-settled that the Court can sift the chaff
H from the grain and find out the truth from the testimony of the witnesses. The

evidence is to be considered from the point of view of trustworthiness and once the same stands satisfied, it ought to inspire confidence in the mind of the Court to accept the stated evidence. This Court in *Leela Ram (Dead) Through Duli Chand* v. *State of Haryana and Anr.*, [1999] 9 SCC 525 relying upon an earlier decision of this Court in *State of U.P.* v. *M.K. Anthony*, [1985] 1 SCC 505 observed:

> "...There are bound to be some discrepancies between the narrations of different witnesses when they speak on details, and unless the contradictions are of a material dimension, the same should not be used to jettison the evidence in its entirety. Incidentally, corroboration of evidence with mathematical niceties cannot be expected in criminal cases. Minor embellishment, there may be, but variations by reason therefor should not render the evidence of eyewitnesses unbelievable. Trivial discrepancies ought not to obliterate an otherwise acceptable evidence."

In *Rammi* v. *State of M.P.*, [1999] 8 SCC 649, this Court further observed:

> "24. When an eyewitness is examined at length it is quite possible for him to make some discrepancies. No true witness can possibly escape from making some discrepant details. Perhaps an untrue witness who is well tutored can successfully make his testimony totally non-discrepant. But courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the court is justified in jettisoning his evidence. But too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny."

This Court went on to state : (SCC pp.656-57, paras 25-27)

> "25. It is a common practice in trial courts to make out contradictions from the previous statement of a witness for confronting him during cross-examination. Merely because there is inconsistency in evidence it is not sufficient to impair the credit of the witness. No doubt Section 155 of the Evidence Act provides scope for impeaching the credit of a witness by proof of an

A inconsistent former statement. But a reading of the section would indicate that all inconsistent statements are not sufficient to impeach the credit of the witness. The material portion of the section is extracted below:

B '*155. Impeaching credit of witness.*- The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the court, by the party who calls him —

(1) — (2)

C (3) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted;'

26. A former statement though seemingly inconsistent with the evidence need not necessarily be sufficient to amount to contradiction. Only such of the inconsistent statement which is liable to be 'contradicted' D would affect the credit of the witness. Section 145 of the Evidence Act also enables the cross-examiner to use any former statement of the witness, but it cautions that if it is intended to 'contradict' the witness the cross-examiner is enjoined to comply with the formality prescribed therein. Section 162 of Code also permits the cross-examiner to use the previous statement of the witness (recorded under Section 161 of the E Code) for the only limited purpose i.e. to 'contradict' the witness.

27. To contradict a witness, therefore, must be to discredit the particular version of the witness. Unless the former statement has the potency to discredit the present statement, even if the latter is at variance with the former to some extent it would not be helpful to contradict that witness F (vide *Tahsildar Singh* v. *State of U.P.*, AIR (1959) SC 1012).

It is indeed necessary however to note that there would hardly be a witness whose evidence does not contain some amount of exaggeration or embellishment-sometimes there would be a deliberate attempt to offer the same G and sometimes the witnesses in their over anxiety to do better from the witness box details out an exaggerated account. In *Appabhai and Anr.* v. *State of Gujarat*, [1988] Suppl. SCC 241, this Court in paragraph 13 of the Report observed:

".....The court while appreciating the evidence must not attach H undue importance to minor discrepancies. The discrepancies which do

not shake the basic version of the prosecution case may be discarded. The discrepancies which are due to normal errors of perception or observation should not be given importance. The errors due to lapse of memory may be given due allowance. The court by calling into aid its vast experience of men and matters in different cases must evaluate the entire material on record by excluding the exaggerated version given by any witness. When a doubt arises in respect of certain facts alleged by such facts, the proper course is to ignore that fact only unless it goes into the root of the matter so as to demolish the entire prosecution story. The witnesses now a days go on adding embellishments to their version perhaps for the fear of their testimony being rejected by the court. The courts, however, should not disbelieve the evidence of such witnesses altogether if they are otherwise trustworthy....."

Having dealt with the basics of the legal issue as regards probative value of the evidence and the acceptability thereof and adverting to the factual matrix of the matter at this juncture, be it noted that against a judgment of affirmation as regards the conviction under Section 302 of the I.P.C. and sentence of imprisonment for life awarded to the appellants, the present petitioners being the accused in Sessions case No.288 of 1989, moved this Court under Article 136 of the Constitution for leave to Appeal and upon the leave being granted, the matter came up for consideration before this Court.

Be it noted that against the judgment of the Additional Sessions Judge, two criminal appeals were moved before the Patna High Court [Crl. Appeal No.154 of 1993 (*Sukhdev Yadav & Ors.* v. *State of Bihar*) and Crl. Appeal No. 209 of 1993 (*Rakesh Mondal* v. *State of Bihar*)] and in the common judgment for both the appeals, the High Court was of the view that the prosecution has succeeded in proving its case beyond all reasonable doubts and conviction and sentence awarded to the appellants do not require any interference.

Incidentally this Court on 7.8.2000 was pleased to reject the special leave petition against the order and judgment dated 20.12.1999 in Criminal Appeal No.209 of 1993. This Court however on 9th May, 2000 admitted the instant appeal by the grant of leave in S.LP. (Crl.) No.1606 of 2000 as regards the other appeal being Crl. Appeal No. 154 of 1993 before the High Court.

On the factual score it appears that the occurrence dates back to 1st December, 1986 at about 9.30 a.m. in village Khaira within Kharagpur P.S. of

A Munger district in which Ramdeo Singh Mukhia fell a victim of gun shot injury. The prosecution case as made out depicts that the informant had gone to Fasiyabad to get labourers for his field and on his way back to village Khaira, he met his son who went ahead of him and as the son reached the house of one Mahabir Modi, the son was surrounded by the appellants herein together with
B one Munindra alias Bimal Singh besides some unknown persons on the road. On the call of appellant Sukhdev Yadav, Rakesh Mandal fired at the deceased who immediately fell down dead on the spot. The accused persons thereafter fled away. The informant alleged that the occurrence took place as the deceased was an active member of a political party and opposed to that of another political party of which Rakesh and others were members.

C

The post-mortem examination on the body of the deceased was conducted by Dr. Nageshwar Prasad Jha (P.W.6) at Munger and he had found ante mortem injuries on the body as appears from his deposition.

D "1. One lacerated wound 2½"x1½" on left side of scalp in frontal and temporal region with burnt hairs and inverters edges (wounds of enteries) and fracture of left side of frontal Bone, left temporal Bone and left perital bone. On dissection laceration of manages, bring substance, hamhoerhage and clot in the brain substance from left cerebral hemisphere to right cerebral hemisphere.

E

Lacerated wound right side of scalp in occipital and perital region 4½" x 3½" with fragmentation of right perital and temporal Bones and from this area of wound bone chsaps were absent. There was laceration in the scalp and blood in the scalp. Blood oozing from left ear and both nasal cavity.

F

2. Rigor Mortis was present on all from limbs. In my opinion death was due to commia and brain injuries caused by missible (fire arm) age within 24 hours.

G 3. Sees the P.M. report and states. It is in my pen and bears my signature."(Mark exhibit 2).

4. From Injury no.1 it appears that fire arm was made from close range because burnt hairs were found

H xxx examination xxx

5. Injury no.1 was upto brain. Meninge is the membrane which covers the brain. This membrane is covered by skull bones. Injury no.1 had affected all the membranes of the brain. Membrane on both sides of the brain were affected. Even the piamater was effected on back side of the brain.

6. I also found exit wound. Injury no.(ii) is wound of exit. I have not mentioned it in my report. Non mentioning of "exit wound" in injury no. (ii) is merely slip of pen."

At the trial the prosecution examined eight (8) witnesses, five (5) of whom were on the point of occurrence and the other three (3) were formal witnesses including the doctor who held the post-mortem examination on the body of the deceased. The accused persons also examined one Shyam Sunder Mandal as D.W.1 and who in turn stated that the occurrence had taken place at a place different as also in a manner contra, the prosecution case, on account of a dispute between the accused and the mother of Rakesh Mandal, namely Urmila Devi. At the conclusion of the trial, however, the learned Sessions Judge convicted the appellants herein as noticed herein before but acquitted Moninder alias Bimal Singh. The appeals therefrom stand rejected by the High Court and hence this appeal as noticed herein before more fully.

Mr. Tulsi, the learned Senior Advocate appearing in support of the appeal rather strenuously contended that there has been a serious divergence of evidence as regards the place of occurrence which in turn completely displaces the prosecution case and the High Court has clearly fallen into an error in not taking note of such a divergent view pertaining to the place of occurrence. As noticed above five (5) of the prosecution witnesses claimed to have seen the actual occurrence to wit, the accused persons surrounded the deceased and one Rakesh Mandal firing shot at him—let us therefore, have a short scrutiny of the evidence pertaining to the place of occurrence : The informant being the father of the deceased in his First Information Report recorded:

> ".....today at about 9.00 O'clock I had gone to call labour..... I was returning from there when my son Ram Dev Singh Mukhiya met me while going from the west to the village. My son went ahead and I remained behind a little and between this, I saw on the road near the hut of Mahavir Manjhi, that Sukhdev Yadav, the leader of S.U.C.I. Resident of Muzaffar Ganj, Rakesh Mandal son of Shyan Sunder

A Mandal, Muninder @ Vimal Singh son of Bangali Singh, Ram Avtar Singh son of Biso Singh, all residents of Khaira, Parmeshwar Bind, son of unknown, resident of Pakuri, Police Station: Kharagpur, District Monger, and some unknown outside people, surrounded Mukhiya ji. Sukhdev Yadav ordered that "fire the bullet immediately". On his order Rakesh Mandal fired the bullet, then Mukhiya ji fell on the ground. All the above said accused by firing bullet ran towards the East."

B

The following are the necessary and relevant extracts from the depositions available on record as regards the place of occurrence so far as the prosecution C witnesses are concerned:

P.W.1 :

".....I saw that Sukhdev Yadav, Ram Autar Mandal and Vimal Mandal and one more person whom I did not recognise, came out D of the field of Rhar. Mukhiaji who was coming from the west, was grabbed by Parmeshwar Bind and Rakesh Mandal and the rest of the people surrounded him. Sukhdev Yadav said what you are looking for fire the bullet, on which Rakesh Mandal took out the pistol from the waist and fired the bullet at Mukhia Ram Dev Singh, which hit on his head. Thereafter Rakesh Mandal and E Parmeshwar Bind ran towards South East. The rest of the people ran towards North.

In cross examination however, P.W.1 stated:

F "Rakesh and Parmeshwar had caught both the hands of the deceased. When other accused came out of the field of 'Rahad' then the hand of the deceased was caught. When the hand was caught, by then, other accused reached there and surrounded the deceased. I do not remember that I had made such a statement before Darogaji or not, when the four persons by coming out of G the field of Rahad surrounded Mukhiaji, then Rakesh and Parmeshwar joined with the accused.

.....

"At the time when the deceased was hit by bullet, at that H time I was at a distance of about 25-30 yards from the deceased.

After being hit by bullet, Mukhiaji fell on the road towards the western corner, due to which a lot of blood oozed out on the land. At the place of incident there is a slight curve on the road which has taken a turn towards western side. I had seen only that injury which occurred as a result of the bullet which hit Mukhiaji in the head; could not see any other injury.....

After this incident, I also alongwith other people started driving away the accused, who had run towards the North."

PW 2 :

"When I reached towards the west from the house of Mahavir Modi, then saw that near the Mango tree Sukhdev Yadav, Ram Autar Mandal, Rakesh Mandal, Parmeshwar Bind and Munim Mandal @ Vimal Mandal were there. Vimal was going from there towards the village at a distance of about 100 yards. Rakesh Mandal and others were surrounding deceased Ramdev Mukhia. Accused Sukhdev Yadav said Rakesh what you are looking — fire the bullet. On this Rakesh fired bullet, Mukhiaji fell and the accused ran away. Sukhdev Yadav and Ram Autar had run towards North and Rakesh Mandal and Parmeshwar Bind ran towards the East."

PW 3 :

".....When I reached near the house of Mahavir Modi, then saw that at a little distance near the Mango tree, 5-6 persons were going running, out of which I recognised Sukhdev Yadav, Rakesh Mandal and Parmeshwar Bind and on going ahead, I saw that Ram Dev Singh (Mukhiaji) was lying on the road who had expired. In the head of Mukhiaji bullet had hit and blood was oozing out from there. The reason for the incident is political quarrel between Sukhdev Yadav and deceased Ram Dev Singh."

PW 4 :

"The informant in his deposition however, clarified that the incident took place on the road going North-South near the place in East-West direction..."

A *PW 5* :

> ".....When Mukhiaji reached near Mahavir Modi's basa, Sukhdev, Ramautar and two other accused came out from Rahar field and encircled Mukhiya. Rakesh and Parmeshwar, who were going ahead were also amongst those who encircled Mukhiya. Thereafter, Sukhdev ordered to fire bullet and Rakesh fired at Mukhiyaji. Thereafter, all the accused fled away....."

B

The evidence on record does not, however, lend any credence to the submissions of Mr. Tulsi. There may be some variations but there exists no major contradiction on record. Modi's house and Rahar field are the two places which have been mentioned by the accused persons but the factum of being surrounded and the firing done at the instance of the appellant No.1 stands uncontradicted. As noticed above, minor variations may be there but if on a perusal of the evidence in its entirety, it appears to be otherwise trustworthy, question of the evidence being non-trustworthy would not arise. As noticed above, the Court can sift the chaff from the grain and find out the truth from the evidence itself. The evidence tendered lends credence to the prosecution case as regards the involvement of the appellant herein in the murder. It is in this context, the High court observed:

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D

> "As they were deposing in court after more than five years of the occurrence, there might be some inconsistency..... but being minor in nature they have to be ignored. The evidence of eye-witnesses being consistent, we have no reason to disbelieve the prosecution case".

E

Mr. Tulsi next contended that the earliest version of the occurrence had been suppressed in as much as although the chowkidar visited the place of occurrence and thereafter passed on the information to the investigating officer, on the basis of which the latter came to the place of occurrence has been withheld deliberately -- this creates, Mr. Tulsi contended, some doubt regarding the verasity of the prosecution case and benefit whereof ought to be given to the appellants: While it is on record that the Chowkidar happened to visit the place of occurrence before he came again with the investigating officer, but a positive evidence of the investigating officer to the effect that the latter reached the village on hearing a rumour about the murder of Ram Dev Singh and it so happened that there was no cross-examination on this score and in the absence of which the statement of the investigating officer cannot but be accepted. In any event, what would be the effect by reason of non production of the

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chowkidar? The Chowkidar may or may not be there or it may be a sheer co-incidence that both the investigating officer and the chowkidar came together but that by itself does not affect the verasity of the prosecution case neither it is possible to have any conjectures to the effect that the chowkidar had gone to the Police Station and brought the investigating officer at the site — it is however too trivial a matter to be considered at length and as such we do not find any reason to dictate further on the issue neither the same lends any credence to the submissions in support of the appeal or as regards the conclusion arrived by the High Court.

The other aspect pertains to non production of the seizure list in Court as a part of the records — undoubtedly, a lapse on the part of the prosecution but the issue however, needs to be considered from the point of view of credibility of the witnesses and in the event of there being credible evidence on record, a lapse pertaining to non production of seizure list does not really affect the prosecution case in any way — the issue has to be considered from the point of view of prejudice to the accused, before however detailing thereon, the observations of this Court in *Shivnath Singh and Anr.* v. *State of U.P.*, [1994] 2 SCC 563 may be noticed. This Court observed:

> "7. Learned counsel also argued that the bloodstains must have been found at the place where the deceased was beaten and also at the place where the head was cut and the investigating officer did not collect the bloodstained earth. Therefore, the place of occurrence is doubtful. This aspect has been examined by both the courts below and it has been noticed that presence of bloodstains were noted in the site plan and if the investigating officer did not collect the bloodstains at all the places, that by itself is not an infirmity. Learned counsel vehemently argued that there is a grave doubt whether the recovered head was that of Mohan Lal. In this context reliance is placed on the evidence of PW 6 the doctor, who stated that the trunk of which he conducted the post-mortem was stoutly built and that the head was that of a young man. According to the learned counsel the deceased was not a young man and therefore the prosecution has not proved that it was the head of Mohan Lal. In our view this is not at all an infirmity. Even assuming that the prosecution has not conclusively proved that the head which was recovered was that of Mohan Lal, witness after witness has clearly deposed that Mohan Lal was killed and his head was severed and there cannot be any doubt that Mohan Lal was beheaded in the manner stated

A by these witnesses. As a matter of fact it is also mentioned in the FIR that the head was cut-off. An argument was advanced regarding the identification of the body on the ground that PW 5 the grandson of the brother of the deceased filed an affidavit that he did not identify the body. We cannot give any weight to this affidavit even if it had been
B filed in that manner. PW 5 deposed that he came from the fields after hearing about the occurrence and to the dictation of PW 3 he wrote the complaint. He was also a witness to some of the recoveries including the head. This witness was cross-examined at length on several days regarding the recoveries particularly that of the head. We do not find any serious infirmity in his evidence. We have to point out
C that all the submissions of the learned counsel involve only appreciation of evidence and both the courts below have considered the evidence of the material witnesses in great detail and as already mentioned we have also examined the same and we are satisfied with their evidence. Learned counsel, however, lastly submitted that it is not
D possible to separate grain from the chaff in such cases and some of the accused are not attributed any specific overt acts and that the appellants cannot be convicted on such omnibus allegations. The way the crime has been perpetrated would manifest the object of the unlawful assembly and every member of such unlawful assembly would be squarely liable."

E

True, as noticed above there are lapses, but the question that arises for consideration is whether any prejudice has been caused by reason of such a lapse, if the answer thereto is in the affirmative obviously it will have a serious impact on to the trial but if in the event however, it is on the negative, no
F prejudice can be said to have been caused and correspondingly question of the trial being vitiated would not arise. The eye-witnesses account as available on record cannot but be termed to be trustworthy and by reason therefor, the lapses stand over-shadowed by the testimony of the eye-witnesses. The observations above obtain support from the decision of this Court in *Baleshwar Mandal and Anr.* v. *State of Bihar,* AIR (1997) SC 3471.

G

Mr. Tulsi lastly contended that evidence available on record discloses that the shoes of the deceased were found kept by the side of the head alongwith a bag and on the basis thereof it has been contended that the place of occurrence was thus different from the place where the dead body was found
H by the investigating officer. The High Court on this score observed as below:

"12. It is true that there is no apparent explanation regarding keeping the shoes on the side of the head of the deceased, which is borne out not only by the inquest report, but this fact by itself is not sufficient to create reasonable doubt so as to disbelieve the entire prosecution case. It may be pointed that as per the inquest report one pair of shoes was found on the side of the head of the deceased *but it is not clear as to whether the feet of the deceased were bare, that is, no shoes were put on. It is also not clear as to whether while going to his village, the deceased had put on the shoes. No question was put to either investigating officer or any other witness in this regard.*" (Emphasis supplied)

On the state of evidence as emphasized above, we do not feel it inclined to lend concurrence to the submissions in support of the appeal that the factum of placement of shoes at a particular place would vitiate the entire trial.

In the view as above, we do not find any merit in the appeal, neither there is any reason to interfere with the judgment of affirmance. The appeal, therefore, fails and is thus dismissed.

N.J. Appeal dismissed.