A PANDURANG KALU PATIL AND ANR.

v.

STATE OF MAHARASHTRA

JANUARY 17, 2002

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

Criminal Law :

Penal Code, 1860/Evidence Act, 1872—Sections 34, 149, 302, 307 & C *326/Section 27—Accused A1, A2 and A3 armed with guns and A4 and A6 with knives—Deceased was shot dead and his brother suffered gun-shot injuries—Discovery of gun on interrogation of A2—Conviction of A1, A2 and A3 for murder and acquittal of A4 and A6 by Trial Court—High Court altering the conviction of A2 for attempt to murder and of A4 and A6 for voluntarily* D *causing grievous hurt—Held, the discovery of the gun is a discovery of fact—On facts, conviction of A2 upheld since A2 had common intention with A1 and A3 to murder the deceased and his brother—Acquittal of A4 and A6 since they did not inflict knife injuries and no intention to murder.*

Accused A1 had enmity with the father of the deceased over some E **landed property. A1 with other five accused A2 to A6 went in a jeep and stopped before the deceased and his brother PW2. A1, A2 and A3 had guns and A4 and A6 had knives. On seeing them, the deceased and PW2 started running to escape. The accused chased them and opened fire at them. Both of them sustained serious gun shot injuries. While the deceased** F **died on the spot, PW2 did not succumb to the injuries. Trial Court convicted A1 and A3 under Section 302 IPC, A2 under Section 307 IPC and acquitted A4 and A6. The High Court, while confirming the conviction and sentence of A1 and A3, converted the conviction of A2 from Section 307 to Section 302 read with Section 149 IPC and reversed the acquittal of A4 and A6 and convicted them under Section 326 read with Section** G **149 IPC. Hence the appeals by A2, A4 and A6.**

The appellants contended that the version of PW2 is inconsistent with the injuries noted by the doctors on the deceased - that the deceased had gun shot injuries in the front and not at his back; that the High Court was wrong in relying on the evidence of a police officer PW18, who stated H

that the gun, which was used in the crime, was unearthed on interrogation of accused A2; and that A2 should be convicted for attempt to murder under Section 307 IPC since PW2 had not succumbed to the injuries.

Disposing the appeals, the Court

HELD : 1.1. It is quite possible as per the reflex action, the running deceased would have turned back either to see whether he has gone out of the range of peril or to know the nearness of it. The mere fact that PW2 said that the deceased was running forward and the accused shot them from behind cannot rule out the possibility of such twirling of the deceased when the guns were fired. [344-H; 345-A]

1.2. The fact discovered by the police officer PW18 is certainly not the gun. The fact discovered is that A2 had concealed the gun behind the old house under a heap of wood. It was the same gun with which A2 had fired at PW2 and that aspect has been proved with the help of other evidence. [345-D]

1.3. The object of making Section 27 as a proviso to Sections 25 and 26 of the Indian Evidence Act, 1872 was to permit a certain portion of the statement made by an accused to a police officer admissible in evidence whether or not such statement is confessional or non-confessional. Nonetheless the ban against the admissibility would stand lifted if the statement distinctly related to a discovery of fact. A fact can be discovered by the police pursuant to an information elicited from the accused if such disclosure was followed by one or more of a variety of causes. Recovery, or even production of object by itself need not necessarily result in discovery of a fact. [342-E-F]

1.4. The High Court erred by not taking the import of the collocation of the words 'discovery of a fact' as envisaged in Section 27 of the Act. In a given case, an object could also be a fact but discovery of a fact cannot be equated with recovery of the object though the latter may help in the final shape of what exactly was the fact discovered pursuant to the information elicited from the accused. [343-C]

Pulikuri Kottaya & Ors. v. *Emperor,* AIR (1947) Privy Council 67, relied on.

Jaffar Hussain Dastagir v. *State of Maharashtra,* [1969] 2 SCC 872; *Earabhadrappa (alias) Krishnappa* v. *State of Karnataka,* AIR (1970) SC

A **1788; *Ranbir Yadav* v. *State of Bihar*, [1983] 2 SCC 330; *Shamshum Kanwar* v. *State of U.P.*, [1995] 4 SCC 430; *State of Rajasthan* v. *Bhup Singh*, [1997] 10 SCC 675 and *State of Maharashtra* v. *Damu*, [2000] 5 SCC 269, referred to.**

B ***State of Bombay* v. *Chhaganlal Gangaram Lavar*, AIR (1955) Bombay 1 (FB), referred to.**

1.5. When A2 along with other assailants alighted from the jeep together and chased the deceased and PW2 together and fired their lethal weapons together, the common intention shared by A2 with A1 and A3
C **looms large, albeit the fact that the bullet of his fire arm could reach only upto the body of PW2 who was not destined to die. What A1 and A3 had done was certainly with the common intention shared by A2 also. Therefore, the conviction of A2 by the High Court under Section 302 read with Section 149 IPC is altered to conviction under Section 302 read with Section 34 IPC. [345-F-G]**

D

1.6. Though A4 and A6 had knives with them, they had not chosen to do anything. Even after the deceased fell down they did not inflict any injuries on him. They did not do any harm to PW2. There is nothing to indicate that they knew about the design of the other accused. Hence they
E **are acquitted. [345-H]**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 194 of 2000.

From the Judgment and Order dated 14.10.99 of the Bombay High
F Court in Crl. A. No. 336 of 1996.

WITH

Crl. A. No. 189 of 2000.

G

S.R. Chitnis, Sunil Kumar Verma and Shivaji M. Jadhav for the Appellants.

V.B. Joshi, S.S. Shinde and S.V. Deshpande for the Respondent.

H The Judgment of the Court was delivered by

THOMAS, J. A Division Bench of the High Court of Bombay has ventured to disagree with a ratio which has become locus classicus and well stood the long period of half-a-century. That ratio is the one laid down in the celebrated decision in *Pulikuri Kottaya and Ors.* v. *Emperor,* AIR (1947) Privy Council 67. In that exercise the Division Bench of the Bombay High Court had unwittingly overlooked another legal guideline delineated by a Full Bench of the Bombay High Court itself in *State of Bombay* v. *Chhaganlal Gangaram Lavar;* AIR (1955) Bombay - 1 wherein Chief Justice Chagla speaking for the Full Bench had said thus :-

> "so long as the Supreme Court does not take a different view from the view taken by the Privy Council, the decisions of the Privy Council are still binding upon us, and when we say that the decisions of the Privy Council are binding upon us, what is binding is not merely the point actually decided but an opinion expressed by the Privy Council, which opinion is expressed after careful consideration of all the arguments and which is deliberately and advisedly given."

Quite possibly the attention of the learned judges of the Division Bench of the High Court would not have been drawn to the observations made by Chagla, C.J. of the Full Bench of the Bombay High Court in the aforecited decision, for, otherwise we are sure that learned judges of the Division Bench would not have erred into the matter of judicial discipline.

While delivering judgment in two connected criminal appeals relating to the murder of one Ramdas, the Division Bench of the Bombay High Court (D.K. Trivedi and DG Deshpande, JJ) proceeded to consider the legal proposition propounded in Pulikuri Kottaya and held thus :-

> "with respect we are unable to agree with the interpretation of the Privy Council of Section 27 not because it does not lay down correct Law but because it has failed to take into consideration some material aspect of Section 27 of the Evidence Act.....The observation of the Privy Council that it is fallacious to treat the "fact discovered within the section as equivalent to the "object produced", in our humble and respectful opinion *is not based on proper construction of the word 'fact deposed to' used in Section 27.* Because the definition of the fact given in Section 3 of the Evidence Act is not considered at all. The object discovered is a fact, and therefore, when a witness is deposing in the Court and deposes to a fact, it means he could and he should depose about the object discovered".

A The legal proposition adumbrated in *Pulikuri Kottaya* has been considered and tested by this Court, time and again, and on all such occasions this Court has only reiterated the said principle with approval (vide *Jaffar Hussain Dastagir* v. *State of Maharashtra*, [1969] 2 SCC 872; AIR (1970) SC 1788, [1983] 2 SCC 330, [1995] 4 SCC 392; *Shamshul Kanwar* v. *State of U.P.*, [1995] 4 SCC 430 and *State of Rajasthan* v. *Bhup Singh*, [1997] 10 B SCC 675 Para 15 and in the last cited decision this Court, while again re-affirming the ratio in *Pulikuri Kottaya* has said thus :-

> "The ratio therein (Kottaya) has become locus classicus and even the lapse of half-a-century after its pronouncement has not eroded its C forensic worth."

Even the recent decision in *State of Maharashtra* v. *Damu*, [2000] 6 SCC 269 this Court followed Pulikuri Kottaya with approval. The fallacy committed by the Division Bench as per the impugned judgment is possibly on account of truncating the word "fact" in Section 27 of the Evidence Act D from the adjoining word "discovered". The essence of Section 27 is that it was enacted as a proviso to the two preceding Sections (see Sec. 25 and 26) which imposed a complete ban on the admissibility of any confession made by an accused either to the police or to any one while the accused is in police custody. The object of making a provision in Section 27 was to permit a E certain portion of the statement made by an accused to a police officer admissible in evidence whether or not such statement is confessional or non-confessional. Nonetheless he ban against admissibility would stand lifted if the statement distinctly related to a discovery of fact. A fact can be discovered by the police (investigating) officer) pursuant to an information elicited from the accused if such disclosure was followed by one or more of a variety of F causes. Recovery of an object is only one such cause. Recovery, or even production of object by itself need not necessarily result in discovery of a fact. That is why way Sir John Beaumont said in Pulikuri Kottaya that "it is fallacious to treat the fact discovered in the section as equivalent to the object produced". The following sentence of the learned law lord in the said decision, G though terse, is eloquent in conveying the message highlighting the pith of the ratio.

> "Information supplied by the person in custody that 'I will produce a knife concealed in the roof of my house' *does not lead to the discovery of a knife; knives were discovered many years ago.* It leads H to the discovery of the fact that a knife is concealed in the house of

the informant to his knowledge and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant." A

(emphasis supplied)

Learned Judges in the impugned judgment laboured to show that the word "fact" can envelop an object also, and tried to project that the said aspect has not been taken into account by their Lordships of the Privy Council. Here again we may repeat that the Division Bench had erred by not taking the import of the collocation of the words "discovery of a fact" as envisaged in Section 17. No doubt in a given case an object could also be a fact, but discovery of a fact cannot be equated with recovery of the object though the latter may help in the final shape of what exactly was the fact discovered pursuant to the information elicited from the accused. Thus the labour made in the impugned judgment by giving emphasis to the word "fact" disjuncted from the word "discovery" rendered the exercise in vain. Ratio in *Pulikuri Kottaya* thus remains unscathed. B C D

It is unfortunate that learned judges of the Division Bench of the Bombay High Court, in the impugned judgment, have chosen to set a locus classicus at nought without reference to any of the catena of judicial pronouncements rendered by High Court as well as the Apex Court pertaining to the ratio in that decision. Nonetheless the guidelines laid down by the Division Bench of the impugned judgment did not call for any interference as they related to the manner of recording the evidence in the trial court. However, we feel that guideline number 'F' (mentioned in the impugned judgment) seems to be unnecessary and would only cause additional workload for the trial courts. E

While dealing with the facts of this case we may point out that the trial court convicted A1-Shankar Gopal Patil and A3-Balaram Waman Patil under Section 302 of the IPC while A2-Nazir Babu Sheikh was convicted only under Section 307 of the IPC. Trial Court acquitted A4-Pandurang Kalu Patil and A6-Janardhan Shaligram Patil. But the High Court in the impugned judgment reversed the acquittal of A4 and A6 and convicted them under Section 326 read with Section 149 of the IPC and sentenced them to rigorous imprisonment for ten years. The High Court confirmed the conviction and sentence passed on A1 and A3 but in the matter of A2 - Nazir Babu Sheikh, the High Court raised up the conviction from Section 307 to Section 302 read with Section 149 of the IPC and sentenced him to imprisonment for life. The convicted A1 and A3 have filed special leave petitions in this Court but they F G H

A were dismissed by this Court.

The present appeals are by A2 - Nazir Babu Sheikh and A4 - Pandurang Kalu Patil and A6 - Janardhan Shaligram Patil (Criminal appeal Nos. 189/ 2000 is by A2 while the other two appeals are by remaining two appellants).

B The gist of the prosecution case is the following :-

There was a dispute between A1 and the father of the deceased over some landed property. The said dispute made them enemies. This is the background of the occurrence. While deceased Ramdas, and his brother PW2 Narayan were proceeding to their village for taking lunch around 1.30 P.M. C on 29.6.92 the assailants went in a jeep and stopped just near the place of occurrence. All the assailants alighted from the jeep. A1, A2 and A3 had a gun each with them. A4 and A6 had either a knife or a sword with them. It is unnecessary to mention about the weapons possessed by other persons. The assailants who were armed with guns opened fire at the deceased as well D as PW2. The deceased was then a few feet ahead of PW2 and both were running up presumably to escape from the chasing assailants. Both of them sustained serious gun shot injuries, though PW2 did not succumb to them. But the deceased fell down at the spot and died. Seeing this the assailants took to their heals leaving the jeep remaining at the spot as a mute remnant of the acts done by them.

E

The prosecution examined four persons as eye witnesses, they are PW2 to PW5. The trial court and the High Court placed reliance on the testimony of PW2 Narayan and PW3 Janu Bhoir.

We have absolutely no doubt that PW2 Narayan who was injured and F seen the occurrence and hence he was competent to say who were all the assailants. He also vouchsafed the presence of PW3 Janu Bhoir. We are not disposed to disbelieve the testimony of those two witnesses as they were relied upon by the two Courts.

G Mr. SR Chitnis, learned senior counsel for the appellants contended that the version of the eye witnesses is inconsistent with the injuries noted by the doctors. According to the version of the eye witnesses the deceased was running forward while the assailants shot him from behind but the fire arm injuries sustained by the deceased could well have been shot face-to-face. This aspect is not enough to doubt the correctness of the testimony of the eye H witnesses, for, it is quite possible as per the reflex action the running deceased

would have turned back either to see whether he has gone out of the range of penil or to know the nearness of it. The mere fact that PW2 eye witness said that the deceased was running forward and the assailants shot them from behind cannot rule but the possibility of such twirling of the deceased when the guns were fired.

Learned counsel then contended that the High Court had gone wrong in relying on the evidence of PW18-Dy. S.P. who said that when A2 was arrested and interrogated a gun was disintered pursuant to the information supplied by him. It is on the said aspect that the Division Bench of the High Court considered the ratio in Pulikuri Kottaya. What PW 18 said in the Court is that the statement made by A2 had been recorded in Exh. 91 memorandum. We have noticed from the said memorandum the following statement of A2 as recorded therein :-

> "I have kept the fire arm concealed behind the old house in a heap of wood".

The fact discovered by PW 18 is certainly not the gun. The fact discovered is that A2 had concealed the gun (article no. 5/2) behind the old house under a heap of wood. It was the same gun with which A2 had fired at PW2 and that aspect has been proved with the help of other evidence.

Mr. SR Chitnis, made an alternative endeavour to show that the act committed by A2 can at the worst amount only to the offence under Section 307 of the IPC because PW2 had not succumbed to the injuries. When A2 along with other assailants alighted from the jeep together and chased the deceased and PW2 together and fired their lethal weapons together, the common intention shared by A2 with other assailants (A1 and A3) looms large, albeit the fact that the bullet of his fire arm could reach only upto the body of PW2 who was not destined to die. What A1 and A3 had done was certainly with the common intention shared by A2-Nazir Babu also. Of course, the High Court has convicted him under Section 302 with the help of Section 149 of the IPC. That error has to be corrected by us. We, therefore, confirm the conviction and sentence passed on A2-Nazir Babu Sheikh under Section 302 with the aid of 34 of the IPC and dismiss Cr. Appeal No. 189/2000.

But the position of A4 and A6 is different. Though they had knives with them they had not chosen to do anything. Even after the deceased fell down they did not move forward to inflict even a scratch on him. They did not do any harm to PW2. There is nothing to indicate that they knew about

A the design of the other assailants. They were acquitted by the trial court. The view taken by the trial court on the facts of the case is reasonable and hence it was impermissible for the appellate court to interfere with the acquittal.

We, therefore, allow Crl. Appeal No. 194/2000 and set aside the conviction and sentence passed on A4-Pandurang and A6-Janardhan Shaligram
B Patil. They are acquitted. Their bail bond will stand discharged. (A copy of this judgment will be forwarded to the Registrar of the Bombay High Court as copies of the impugned judgment were directed to be circulated to all the sessions judges under Bombay High Court. Now it is necessary to bring this also to the notice of all those sessions judges).

C B.S. Appeals disposed of.