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GANESH K. GULVE ETC.
v.
STATE OF MAHARASHTRA

AUGUST 21, 2002.

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[Y.K. SABHARWAL AND H.K. SEMA, JJ.]

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Code of Criminal Procedure, 1973—Section 378—Appeal against acquittal—Sixty accused persons—Unlawful assembly—Common object—Multiple murder—Attempt on life of one and injuries to others—Conviction of few of the accused and acquittal of others—High Court confirming conviction but reversing acquittal of one of the accused—Correctness of—On appeal held, the accused acquitted shared common object of unlawful assembly and did positive acts to achieve the object—Further slight variation in the positive act of accused to be ignored—Hence High Court rightly reversed acquittal order—Conviction against other accused confirmed as case against them stands established—Penal Code, 1860—Sections 147, 148, 302, 307, 452 read with 149.

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According to the prosecution, 60 persons formed unlawful assembly with the motive to commit murder of 'S' and his sons. They assaulted 'S' and his sons with deadly weapons and also caused injuries to other family members. They attempted to murder the third son too. 'S' and his two sons died and his other family members received injuries. Trial Court convicted 13 accused persons and acquitted rest of them. Cross appeals were filed and the High Court confirmed the conviction and sentence of 11 accused persons and set aside acquittal of appellant-accused No.24 as he shared common object of unlawful assembly and did positive acts to achieve the object. Hence the present appeals.

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Appellant-accused No. 24 contended that the conclusion drawn and view taken by trial court acquitting appellant was a reasonable and possible view which did not call for reversal by High Court and that the prosecution failed to prove its case against him since there were material contradictions in the testimony of eye-witnesses and deposition by eye-witnesses was not corroborated by medical evidence.

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Appellants in other appeals contented that prosecution had failed to

prove the motive; that FIR was ante-timed and there was non-compliance of Section 157 Cr.P.C. in forwarding FIR to Magistrate. A.

Appellant-accused No.53 contented that High Court has not properly considered the case against him.

Dismissing the appeals, the Court B

HELD: 1.1. Mere fact that a view other than the one taken by trial court can be legitimately arrived at by appellate court on reappraisal of evidence cannot constitute a valid and sufficient ground to interfere with an order of acquittal unless appellate court comes to conclusion that the entire approach of trial court in dealing with the evidence was patently illegal or conclusions arrived at by it were wholly untenable. [638-F, G] C

Ramesh Babulal Doshi v. State of Gujarat, AIR (1996) SC 2035 and *Awadhesh and Anr. v. State of Madhya Pradesh*, AIR (1988) SC 1158, referred to. D

1.2. In order to appreciate evidence, Court is required to bear in mind the set up and environment in which the crime is committed, the level of understanding of witnesses, the over jealousy of some of near relations to ensure that everyone even remotely connected with the crime be also convicted and that everyone has a different way of narration of same facts. Then the evidence is required to be appreciated to find out what part out of the evidence represents the true and correct state of affairs since it is for courts to separate grain from chaff. [638-G, H; 639-A] E

2.1. The presence of accused No.24 as a member of unlawful assembly and that he with others shared common object of doing away with the deceased and injuring others was established even though there was some variations in the manner of his doing positive act to achieve the said object. In fact, he was the main person who had instigated the mob. High Court held that slight variations in the role attributed to accused No.24 to be of no consequence in the facts and circumstances of the case. It convicted him on basis of the same evidence by which the other accused persons had been convicted, stating that he cannot be treated differently. Under the circumstances it cannot be said that while reversing the order of acquittal High Court did not bear in mind the principles required to be kept in view while deciding an appeal against an order of acquittal. F

[639-E, C, B, F] G

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A 2.2. In inquest panchanamas prepared soon after murder, which have
 been admitted by the defence, mention has been made of bruises which
 were noticed on the back of all the three deceased persons. Thus the
 dragging of the bodies could not be discarded only on account of non-
 mention of injuries on the back of the bodies in post-mortem reports and
 B this cannot be the basis for acquitting appellant-accused No.24 by applying
 any reasonable hypothesis. [640-C, D]

C 2.3. Prosecution witnesses deposed about actual assault on 'S' and
 his sons. Accused No.24 was one of the accused who challenged the
 deceased and his son 'D' to come out of the house. It has also been
 established that 'D' came out and expressed his apology and requested
 accused No.24 not to assault anybody. In view of the facts of the cases, it
 is natural that there would be some variance in evidence of these witnesses
 regarding number of accused participating in assault. However there is
 unanimity in the depositions regarding appellant-accused No. 24. The
 assault by accused No.24 on 'D' has been fully established. Thus, the
 D conclusion of High Court in respect of accused No.24 cannot be faulted
 and it cannot be said that the acquittal of accused No.24 was a possible
 view which was erroneously reversed by High Court. [640-F, G; 641-H]

E 3. When there are eye-witnesses including injured eye-witnesses,
 proof of motive loses its significance. However, High Court took into
 consideration the motive to commit murder. Further both trial Court and
 High Court did not place reliance upon FIR. Thus, it cannot be said that
 prosecution had failed to prove motive of crime or that FIR was ante-timed
 and there was non-compliance of provision of Section 157 of the Code of
 Criminal Procedure in forwarding FIR to Magistrate. [642-B, C]

F 4. Trial court and High Court, on appreciation of evidence, rightly
 found the case against accused No.53 as fully established. Thus it cannot
 be said that High Court has not properly considered the case against
 accused No. 53. [642-D, E]

G CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No.
 501 of 1999.

From the Judgment and Order dated 25.2.1999 of the Mumbai High
 Court in Crl. A. No. 80 of 1994.

H WITH

Crl.A. Nos. 324/2000, 156, 158, 159-161 of 2002.

U.R. Lalit, N.C. Kochar, S.M. Jadhav, Sunil K. Verma, H.K. Puri, P.K. Chakravarty, Ms. Anu Mohla, B.Y. Kulkarni, Ms. Madhvi Aggarwal and V.N. Raghupathy for the appearing parties.

The Judgment of the Court was delivered by

Y.K. SABHARWAL, J. Criminal Appeal No.501 of 1999 is a statutory appeal. It has been filed by Ganesh K. Gulve challenging the judgment and order of the High Court dated 25.2.1999 setting aside the judgment of acquittal passed by the trial court in his favour. The High Court has held him guilty for offences punishable under Sections 147, 148, 302, 307 and 452 read with Section 149 IPC and sentenced him to life imprisonment.

Criminal Appeal Nos.324 of 2000, 156, 158 and 159-161 of 2002 have been filed by accused challenging the judgment and order of the High Court confirming their conviction and sentence imposed by the trial court.

For commission of offences punishable under Sections 147, 148, 149, 302, 307, 324, 326, 452 and 34 IPC and certain other offences, 60 accused persons were tried in the Sessions Court. The trial court convicted 13 of them for offences punishable under Sections 147, 302 read with Section 149, Sections 149 and 307 read with Section 149 and Section 452 read with Section 149 IPC. They are : accused No.20 Ramchandra Krishna Kamble, accused No.21 Bhawan @ Dharmaji Krishna Kamble, accused No.22 Narhari Krishna Kamble, accused No.23 Pandurang Krishna Kamble, accused No.25 Babu Sopan Mandade, accused No.27 Namdev Pandurang Kamble, accused No.28 Venkati Govind Yenjane, accused No.36 Madan Kerba Jagtap, accused No.44 Rukhmaji Babarao Jagtap, accused No.49 Shivaji Kerba Jagtap, accused No.50 Ashok Dattarao Jagtap, accused No.52 Uttam Chandrabhan Jagtap and accused No.53 Shesherao Tukaram Kodale. Imprisonment for life was imposed on them for offence under Section 149 read with Section 302 IPC besides payment of fine and imprisonment in case of default in payment of fine as also varied punishments in respect of other offences.

The judgment and order of the trial court was challenged by 12 out of 13 convicted accused by preferring criminal appeals before the High Court. The State of Maharashtra also preferred two appeals before the High Court-one challenging the orders of acquittal passed in favour of 47 accused by the trial court and the other for enhancement of sentence against 13 accused who

A had been convicted by the trial court.

B All the appeals have been disposed of by the High Court by a common judgment and order. The High Court has confirmed the conviction and sentence of 11 accused persons; acquitted two accused persons, namely, accused No. 36, Madan Jagtap and accused No. 50 Ashok Dattarao Jagtap and one State appeal has been partly allowed by setting aside the judgment and order of the trial court acquitting accused No.24 Ganesh K. Gulve. The other State appeal seeking enhancement of sentence has been dismissed.

C The judgment and order of the High Court has been challenged by the convicted accused except accused Nos. 27 and 28. These two have not preferred any appeal.

D The main arguments have been addressed by Shri U.R. Lalit in Criminal Appeal No.501 of 1999. One of the contentions of the learned counsel was that the conclusion drawn and view taken by the trial court acquitting Ganesh K. Gulve was a reasonable and possible view which did not call for reversal by the High Court. Counsel further contended that the prosecution has failed to prove its case against accused No.24; there were material contradictions in the testimony of the eye-witnesses as also the version as deposed by the eye-witnesses is not corroborated by the medical evidence and the trial court was, thus, justified in passing order of acquittal.

E The case of the prosecution as culled out from the evidence in brief is that the three members from the same family, namely, Satwa and his two sons, Mohan and Raosaheb were murdered; there was an attempt to murder the third son and injuries were caused on the lady members of the family—Hirkani (PW17), widow of Satwa, Radhika (PW14) widow of one of the deceased son; Vatschala (PW15) wife of Damu (PW16) son of Satwa on whom attempt to murder was made and also causing injury to another son of Satwa, namely, Nagnath (PW13). The report was lodged with the Police by Gangubai (PW12) wife of Nagnath.

G The incident took place on 7th September, 1991 in two parts. The first part took place early in the morning when accused Nos. 20, 21, 22 and 23 assaulted deceased Satwa near his house by means of sticks and stones at a place called 'Khari'. He was rescued by his son and brought to the house of Mohan, one of his sons. Thereafter at about 7 a.m. on the same day, all the accused persons formed unlawful assembly with a motive to commit murder of Satwa and his sons. They were armed with deadly weapons such as axe,

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swords, knife, sticks and stones. They attacked the house of Mohan where they assaulted Satwa and his sons Mohan, Damu and Raosaheb and also caused injuries to the other persons of the family as earlier noticed. Satwa, Mohan and Raosaheb died whereas Damu received serious injuries. A

The prosecution examined 39 witnesses. Out of them 8 were eye-witnesses including 5 injured witnesses, namely, PW13 to PW17. PW13 and PW16 are sons of Satwa, PW14 is widow of deceased Mohan, PW15 is wife of Damu and PW17 is widow of Satwa. Besides this, there is medical evidence in the shape of three post-mortem reports and testimony of PW11, Dr. Ugile. Exhibits 84, 85 and 86 are three inquest panchanamas. B

From the evidence duly appreciated by the trial court and the High Court, it stands proved that : C

1. Three persons noticed above were murdered in the incident that took place in two parts on 7th September, 1991 and others as noticed hereinbefore received injuries and there was attempt to murder Damu; D
2. There was formation of unlawful assembly.
3. The common object of the unlawful assembly was to commit aforesaid murders and other offences;
4. In furtherance of the common object, the members of the unlawful assembly killed father and two sons, made attempt on the life of another son and caused injuries to family members of Satwa. E

The question to be determined, however, is as to who were the members of this unlawful assembly. The trial court and thereafter the High Court, wherever found any reasonable doubt about any accused person not being member of the unlawful assembly gave benefit thereof to the accused. The trial court convicted 13 out of 60 accused. The High Court confirmed conviction of 11 and acquitted accused Nos.36 and 50. On appreciation of evidence, the High Court found that there was positive evidence against 17 accused out of which 11 had been convicted and sentenced by the trial court. The conviction and sentence of the said 11 accused persons has been confirmed in the impugned judgment and order. Regarding remaining 6, the High Court found that there is no evidence to show actual sharing of common intention by accused Nos. 14, Chandrashen, accused No.26, Shesherao Ramchandra Kamble, accused No.31, Laxman and accused No.43, Devidas Tukaram Kodale. Therefore, the order of acquittal passed by the trial court in their H

- A favour was not disturbed for lack of evidence. As regards accused No.37, Bhanudas Chandrabhan Jagtap, it was noticed that he died during the trial. Regarding accused No.24, Ganesh K. Gulve, it has been held by the High Court that all the witnesses have not only stated his presence in the mob but have also stated the overt acts done by him at the time of the incident. He was seen prominently in the mob that marched to the house of Mohan. It was
- B he and others who challenged Satwa and his sons to come out of the house. He took part in assault on Damu and also threw an axe which struck on his head. At his instance, the dead bodies of the deceased were dragged upto Chawadi. On appreciation of evidence, the Court held that there is positive evidence against accused Ganesh K. Gulve to show that he very much shared
- C the common object of unlawful assembly and that he did positive acts to achieve the object. In view of the positive evidence, the High Court found that he could not be treated differently than the other 11 accused who had been convicted on the basis of the same evidence that was available against Ganesh K. Gulve.
- D Mr. U.R. Lalit, challenging the impugned judgment and order of the High Court, contends that the High Court by adopting an erroneous approach has reversed a well considered order of acquittal passed by the learned Additional Sessions Judge. Reliance has been placed by the learned counsel on *Ramesh Babulal Doshi v. State of Gujarat*, AIR (1996) SC 2035 and *Awadhesh and Anr. v. State of Madhya Pradesh*, AIR (1988) SC 1158]
- E reiterating the principles required to be kept in view while deciding an appeal against an order of acquittal. There cannot be any dispute about the said principles. Mere fact that a view other than the one taken by the trial court can be legitimately arrived at by the appellate court on reappraisal of the evidence cannot constitute a valid and sufficient ground to interfere with an
- F order of acquittal unless the appellate court comes to the conclusion that the entire approach of the trial court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable. The question in Criminal Appeal No.501 of 1999 is : whether the High Court while reversing the order of acquittal kept in view or not these principles?
- G In order to appreciate the evidence, the Court is required to bear in mind the set up and environment in which the crime is committed. The level of understanding of the witnesses. The over jealousy of some of near relations to ensure that everyone even remotely connected with the crime be also convicted. Everyone's different way of narration of same facts. These
- H are only illustrative instances. Bearing in mind these broad principles, the

evidence is required to be appreciated to find out what part out of the evidence represents the true and correct state of affairs. It is for the courts to separate the grain from the chaff. That has been exactly done. What has weighed with the High Court in reversing the order of acquittal in the case of Ganesh K. Gulve and convicting him is that on the basis of the same evidence, other accused had been convicted and there was no justifiable reason for convicting other 11 accused and confirming their conviction while at the same time upholding the order of acquittal in the case of Ganesh K. Gulve.

The presence of Ganesh K. Gulve was deposed to by all material witnesses. The fact that there was slight variations in the role attributed to him was held by the High Court to be of no consequences in the facts and circumstances of the case. In fact, he was the main person who had instigated the mob.

The murder of Satwa and his two sons had taken place in a broad daylight at 7 O'clock in the morning in front of many members of the family of Satwa. His two sons and two daughters-in-law had received various injuries. Those injuries had been fully established in the testimonies of PW13, PW14, PW15 and PW16. The High Court was faced with a question that when the presence of Ganesh K. Gulve as a member of the unlawful assembly had been established as also the fact that he with others shared common object of doing away with the deceased and injuring others, as aforesaid, can he be acquitted as a result of some variations in the manner of his doing positive act to achieve the said object. The High Court rightly answered that question by ignoring the minor variations and convicting Ganesh K. Gulve. Under the circumstances, it cannot be said that the High Court in reversing order of acquittal did not bear in mind the principles required to be kept in view while deciding an appeal against an order of acquittal.

It was pointed out by the learned counsel that despite the fact that in the First Information Report, it was stated that Ganesh K. Gulve had stone in his hand, some witnesses said that he had axe with him which he threw on Satwa from back side and some even stated that he had stick. It may be noticed that FIR was lodged on the statement of Gangubai (PW12). Saving herself from the incident, she went to the Police Station and reported the matter. She was pregnant at that stage. Her husband Nagnath (PW13) who had received injuries also reached the police station at that stage. It is evident that due to what had happened, family members must have been perplexed. In any case, the trial Court as well as the High Court did not place reliance

A on the FIR. In the factual scenario of the case in hand, the question whether he was holding stone, axe or stick would depend upon what time he is seen by the concerned witness and this aspect was not of any significance. Likewise, it was also of no significance whether Satwa had injury on his nose or not.

B It was pointed out by Mr. Lalit that the trial court had also taken into consideration the absence of injuries on the back in medical evidence showing the dragging of the three bodies. In this regard, Dr. Ugile (PW11) deposed that in the post-mortem reports, he had only mentioned major injuries and not minor injuries like abrasions and bruises. In the three inquest panchanamas prepared soon after the murder, which panchanamas have been admitted by the defence under Section 294 of the Code of Criminal Procedure, mention has been made of the bruises which were noticed on the back of all the three deceased persons. These panchanamas were prepared between 9 a.m. to 11.30 a.m. The incident had taken place at 7 a.m. In this view, the theory of dragging of the bodies could not be discarded only on account of non-mention of injuries on the back of the bodies in the post-mortem reports and on that basis acquitting Ganesh K. Gulve by applying any reasonable hypothesis.

C The High Court, on due scrutiny and analyses of the evidence, came to the conclusion that the case of Ganesh K. Gulve cannot be meted out a different treatment than others who had been convicted. In the impugned judgment and order, the High Court dealt with all the aspects which were taken into consideration by the trial court for acquitting Ganesh K. Gulve. The trial court had clearly adopted an erroneous approach which was set right by the High Court. PW14, PW15, PW16 and PW17 were all present in the house of Mohan when the mob marched towards his house. Some of mob members opened the door of the said house by hitting it with big stones. The aforesaid witnesses have deposed about actual assault on Satwa, Mohan and Damu. Ganesh K. Gulve was one of these who challenged the deceased and Damu to come out of the house. It has also been established that Damu came out and expressed his apology and requested Ganesh K. Gulve not to assault anybody. It is natural on the facts of case that there would be some variance in the evidence of these four witnesses regarding number of the accused participating in the assault. Insofar as Ganesh K. Gulve is concerned, there is, however, unanimity in the depositions. The assault by Ganesh K. Gulve on Damu has been fully established. The conclusion of the High Court in respect of Ganesh K. Gulve, as contained in para 53 of its judgment, cannot be faulted. The High Court said :

H "As regards the accused No.24 Ganesh, all the witnesses have not

only stated his presence in the mob but, have also stated the overt acts done by him at the time of the incident. He was seen prominently in the mob which marched to the house of Mohan. The evidence further shows that it was he and others who challenged Satwa and his sons to come out of the house. There is also specific evidence against the accused No.24 Ganesh to show that he took part in the assault on Damodar P.W.16. Nagnath P.W.13 has stated that when he made his escape through the hole in the wall he was chased by accused No.24 Ganesh and others and that, accused No.24 Ganesh threw an axe which struck him on his head. In addition, there is evidence of Hirkani P.W. 17 to show that accused No.24 Ganesh was one of the assailants of her husband Satwa and that, he gave an axe blow. It is also in the evidence that at the instance of accused No.24 Ganesh and others, the dead bodies of the deceased were dragged upto Chawadi. In short, there is positive evidence available against the accused No.24 Ganesh to show that he very much shared the common object of the unlawful assembly and that, he did positive acts to achieve the object. However, the trial Court has acquitted him. We do not find in the trial Court's judgment any specific discussion with regard to the evidence available against accused No.24 Ganesh. The trial Court has not given any particular reason for acquitting him. In our opinion, the trial Court has lost sight of the positive evidence available against the accused No.24 Ganesh. There is absolutely no reason for not accepting that evidence against the accused No.24 Ganesh. In paragraph 85 of its judgment, the learned Judge has observed that the involvement of accused No.24 Ganesh "as the striker of a solitary blow on the nose portion of Satwa", is not corroborated by medical evidence. It cannot, however, be ignored that Satwa had sustained a C.L.W. of 1½" x 2" x 1½" on his forehead. Hirkani P.W. 17 may not be correct in stating as to where on the person of Satwa the axe blow given by accused No.24 Ganesh had landed. It cannot be ignored that a blow aimed at the nose may hit on the forehead due to the movements or change of position made by the victim. We, therefore, think that the trial Court has failed to consider the positive evidence against the accused No.24 Ganesh."

We are unable to accept the contention that the view taken by the trial court in the case of Ganesh K. Gulve was a possible view that was erroneously reversed by the High Court.

- A Learned counsel appearing for the appellants in Criminal Appeal Nos.156, 158 and 159-161 of 2002 contended that the prosecution had failed to prove the motive of the crime; the FIR was ante-timed and there was non-compliance of the provision of Section 157 of the Code of Criminal Procedure in forwarding the FIR to the Magistrate. There is no substance in any of the contentions. In the presence of the eye-witnesses including injured eye-witnesses, the question of the proof of the motive loses its significance. The High Court has, however, duly taken into consideration the motive which was caste hostility and prosperity of the family of the deceased persons and the securing of position by the family member of Satwa in Gram Panchayat.
- B Regarding the FIR, as already noticed, both the trial Court and the High Court have not placed reliance thereupon and the matter has been rightly and adequately dealt with by the trial court and High Court. There is no merit in any of the contentions urged on behalf of the appellants.
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- D In Criminal Appeal No.324 of 2000, the contention urged was that the High Court has not properly considered the case against the appellant and, therefore, the criminal appeal (Criminal Appeal No.79/94) filed by him in the High Court deserved to be allowed. We do not agree. The trial court and the High Court, on appreciation of the evidence, have rightly found the case against accused No.53 being the appellant of this appeal as fully established. There is no merit in his appeal as well.

- E For the aforesaid reasons, we find no merit in any of the appeals. All the appeals are accordingly dismissed.

N.J.

Appeals dismissed.