

BALU SONBA SHINDE
v.
STATE OF MAHARASHTRA

SEPTEMBER 6, 2002

[U.C. BANERJEE AND B.N. AGRAWAL, JJ.]

Penal Code, 1860—Section 302—Murder—Circumstantial evidence—Conviction by courts below relying on sole witness—On appeal—Held, in the facts of the case witness not reliable and the chain of circumstance is not complete—Accused entitled to benefit of doubt—Hence acquitted.

Criminal trial Hostile witness—Evidence—Reliability—Held, would not be totally rejected—But to be subjected to close scrutiny.

Circumstantial evidence—Acceptability of—Role of law courts in regard there to—Discussed .

Constitution of India, 1950, Article 136—Special Leave jurisdiction—Appreciation of evidence—Held, normally not permissible—But where there is lacuna in appreciation of evidence and likelihood of prejudice resulting in miscarriage of justice, it is permissible.

Petitioner accused was tried for having committed murder of his brother by giving him an axe blow. Prosecution relied on the evidence of PW4 and PW5 (complainant). PW5, in the complaint, had reported to have witnessed the fight between the accused and the deceased and had put her thumb impression on the complaint. During trial though she admitted to have put her thumb impression but refused that she was eye witness to the incident and hence was declared hostile. Trial Court placing reliance on the evidence of PW4 convicted the petitioner under Section 302 IPC. Conviction was upheld in appeal to High Court. Hence this appeal.

Allowing the appeal, the Court

HELD: 1.1 The conviction as confirmed by the High Court stands set aside. Evidence of PW4 cannot be accepted and having regard to the availability of materials, the success of prosecution becomes rather doubtful. Admittedly, there is no direct evidence and the entire prosecution

A hinges on circumstantial evidence. In the event, however, the chain is snapped and there is a gap therein, the accused cannot but be said to be entitled to a doubt. [145-D-E]

B 1.2. In the instant case the aspect that there was gap in chain of circumstances, has been totally ignored by the High Court and thus the same goes to the root of the matter and by reason of non-adherence to the basic principles pertaining to circumstantial evidence, there was truly a miscarriage of justice warranting intervention of this Court. [145-E-F]

C *MG Agarwal and Anr. v. State of Maharashtra*, AIR (1963) SC 200, followed.

Hanumant Govind Nargundkar and Anr. v. State of Madhya Pradesh, AIR 1952 SC 343; *Pawan Kumar v. State of Haryana*, [2001] 3 SCC 628 and *Sudama Pandey and Ors. v. State of Bihar*, [2002] 1 SCC 679, relied on.

D 2. While it is true, declaration of a witness to be hostile does not *ipso facto* reject the evidence - the portion of evidence being advantageous to the parties may be taken advantage of - But the court before whom such a reliance is placed shall have to be extremely cautious and circumspect in such acceptance. [143-D]

E *State of U.P. v. Ramesh Prasad Misra and Anr.*, [1996] 10 SCC 360, relied on.

F 3. Under normal circumstances, analysis of evidence or appreciation of evidence ought not to be effected by the Apex Court while dealing with the matter but it is trite to note that in the event, this Court finds any lacuna in appreciation of evidence by the High Court and in the event there is likelihood of prejudice being suffered by the accused resulting in miscarriage of justice, the present day justice-oriented approach ought to prompt this Court to go into necessary detail so as to assess the correctness of such an appreciation in the interest of justice. [140-D, E]

G CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 950 of 2000.

From the Judgment and Order dated 18.1.2000 of the High Court of Bombay in Crl. A. No. 651/85 of 1987.

H Sanjay K. Visen, A.S. Basme and Manoj K. Mishra, for the Appellants.

A.P. Mayee, S.S. Shinde and V.N. Raghupathy for the Respondent. A

The Judgment of the Court was delivered by

BANERJEE, J. It is stated that Shankar and Balu, the two brothers were admittedly having some differences and disputes over the family property but subsequently the disputes were admittedly resolved and a deed of partition was entered into between the brothers. It is in pursuance of the same however that Shankar was fencing his portion of the land when he was said to have been brutally axed by his brother Balu. Prosecutor's version in the appeal presently under consideration against the confirmation of the conviction and sentence by the High Court stands out to be the truth is stronger than fiction, more so by reason of involvement of blood relations. B C

The prosecution case proceeds on the basis that on 8th July 1984, while Shankar was putting the fencing round his plot, he was brutally axed, resulting in his death. It has been the definite case for the prosecution that the axe blow was given by Balu, the younger brother and in support of its case placed on witness-box two material witnesses - one of whom however was declared hostile, since the case in the First Information Report stands completely contradicted. The other witness is said to be an independent witness though said to be related to both the brothers. This particular witness (PW 4) while foisting liability on to the other brother has taken recourse to certain circumstances which prompted him to depose as regards to identify the killer. The details thereof would be dealt with immediately hereafter, but before so doing it would be convenient to note the well-established rule in criminal jurisprudence as regards the acceptability of circumstantial evidence and the role of the law courts in regard thereto: D E

The word of caution introduced in the judgment of this Court about five decades ago in that direction however still stands as an acceptable guide. This Court in *Hanumant Govind Nargundkar and Anr. v. State of Madhya Pradesh*, AIR (1952) SC 343 stated: F

"It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In G H

A other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.”

B Subsequently, the Constitution Bench of this Court in *MG Agarwal and Anr. v. State of Maharashtra*, AIR (1963) SC 200 in the similar vein and without any contra note stated the law with utmost lucidity in the manner noted below:

C “It is a well established rule in criminal jurisprudence that circumstantial evidence can be reasonably made the basis of an accused person’s conviction if it is of such a character that it is wholly inconsistent with the innocence of the accused and is consistent only with his guilt. If the circumstances proved in the case are consistent either with the innocence of the accused or with his guilt, then the accused is entitled to the benefit of doubt. There is no doubt or dispute about this position. But in applying this principle, it is necessary to distinguish between facts which may be called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to the proof of basic or primary facts, the Court has to judge the evidence in the ordinary way, and in the appreciation of evidence in respect of the proof of these basic or primary facts there is no scope for the application of the doctrine of benefit of doubt. The court considers the evidence and decides whether that evidence proves a particular fact or not. When it is held that a certain fact is proved, the question arises whether that fact leads to the inference of guilt of the accused person or not, and in dealing with this aspect of the problem the doctrine of benefit of doubt would apply and an inference of guilt can be drawn only if the proved fact is wholly inconsistent with the innocence of the accused and is consistent only with his guilt.”

G Similar however is the opinion of this Court in *Pawan Kumar v. State of Haryana*, [2001] 3 SCC 628 in which one of us (U.C. Banerjee, J) was a party. The opinion of the Court runs as under:

H “Incidentally, success of the prosecution on the basis of circumstantial evidence will however depend on the availability of a complete chain of events so as not to leave any doubt for the conclusion that the act must have been done by the accused person. While, however, it is

true that there should be no missing links, in the chain of events so far as the prosecution is concerned, but it is not that every one of the links must appear on the surface of the evidence, since some of these links may only be inferred from the proven facts. Circumstances of strong suspicion without, however, any conclusive evidence are not sufficient to justify the conviction and it is on this score that great care must be taken in evaluating the circumstantial evidence. In any event, on the availability of two inferences, the one in favour of the accused must be accepted and the law is well settled on this score, as such we need not dilate much in that regard excepting, however, noting the observations of this Court in the case of *State of U.P. v. Ashok Kumar Srivastava*, AIR (1992) SC 840 wherein this Court in paragraph 9 of the report observed:-

“This Court has, time out of number, observed that while appreciating circumstantial evidence the Court must adopt a very cautious approach and should record a conviction only if all the links in the chain are complete pointing to the guilt of the accused and every hypothesis of innocence is capable of being negated on evidence. Great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. The circumstance relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt. But this is not to say that the prosecution must meet any and every hypothesis put forward by the accused however far-fetched and fanciful it might be. Nor does it mean that prosecution evidence must be rejected on the slightest doubt because the law permits rejection if the doubt is reasonable and not otherwise.”

The other aspect of the issue is that the evidence on record, ascribed to be circumstantial, ought to justify the inferences of the guilt from the incriminating facts and circumstances which are incompatible with the innocence of the accused or guilt of any other person. The observations of this Court in the case of *Balwinder Singh v. State of Punjab*, AIR (1987) SC 350 lends concurrence to the above.”

In a more recent decision of this Court in *Sudama Pandey and Ors. v. State of Bihar*, [2002] 1 SCC 679 the law as noticed above and to the same

A effect stands very felicitously expressed. It is now time however to advert to the factual details so as to appreciate the contentions raised in the matter: On 8th July, 1984 deceased Shankar was said to have been assaulted by his own brother Balu at around 10 a.m. in the field, where Shankar, the deceased was working on fencing his plot of land. Balu is stated to have hit the deceased with an axe which stands recovered near his house having blood marks and which after forensic examination found to be of the same group as that of Shankar, the deceased. Reliance on PW 4 Dharu has been rather total since the complainant PW 5 Baby whilst in the witness Box did tell a different story and thus resulting in PW 5 Baby being declared as a hostile witness.

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C Significantly, the Trial Court did place very strong reliance on PW 4 Dharu and convicted the accused under Section 302 and thus sentenced him to imprisonment for life. The appeal preferred before the High Court did not yield any benefit and the same was dismissed and hence the Special Leave Petition under Article 136 of the Constitution and the subsequent grant of leave by this Court. Let us however analyse the evidence of PW 4 Dharu in a little bit greater detail. Incidentally be it noted that under normal circumstances, analysis of evidence or appreciation of evidence ought not to be effected by the Apex Court while dealing with the matter but it is trite to note that in the event this Court finds any lacuna in appreciation of evidence by the High Court and in the event there is likelihood of prejudice being suffered by the accused resulting in miscarriage of justice, the present day justice-oriented approach ought to prompt this Court to go in to necessary detail so as to assess the correctness of such an appreciation in the interest of justice - on this score the law is so well-settled that we need not dilate thereon.

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F Turning attention on the evidence of PW 4 Dharu, the material portion records as under:

G “In the last Waishak in the year 1985, partition of family lands took place between deceased Shankar and accused Balu. Before partition, deceased Shankar did not get any income from family lands, so he was working at other place. At the time of partition, land Chambharbuva was divided and half share each was allotted to deceased Shankar and accused Balu. At the time of dividing the land at Chambharbuva dividing line with the ploughing mark was made in between the two shares.

H There was Sunday at that time of incident. The incident took place 1

to 1 and quarter years before. On that day at about 10 a.m., I was going to my field from my house. The way leading to my land passed by the side of land Chambharbuva. While going on foot, I came near the land of Chambharbuva. That time, I saw exchange of words going between accused Balu and deceased Shankar in the land Chambharbuva. That time, deceased Shankar was planting bushes on the boundary line of his land and land of accused Balu. I went near them and advised them not to quarrel. Then I started going towards my land. I cross the long distance, that time I heard the commotion coming from the direction of land Chambharbuva. It was the cry of Baby daughter of Sonba Shinde. She cried, Mela, Mela. Hearing her cry I came back and went in Chambharbuva land. I went near deceased Shankar. At that time, I did not see accused Balu in the vicinity. That time, Shankar was lying injured in the land, he was not able to speak. That time, I saw injury on the right side of head. The injury was bleeding. That time, my nephew Gorakh was also present there. Then myself and Gorakh lifted Shankar and brought him in front of house of accused. I then tied his head injury with Dhoti. Then we put him in the bullock-cart and brought him in Talegaon General Hospital. That time, accused Balu and his wife did not accompany us to Talegaon Hospital. Dr. gave medical treatment to Shankar and as per advice of Doctor, Shankar was taken in Sasoom Hospital in tempo. Then myself and my relations returned home. Shankar's relations accompanied him in Sasoom Hospital. After 5/6 days I came to know that Shankar died."

Since the cross-examination has been rather brief it would be worthwhile to note the same *in extenso*. The evidence in cross-examination reads as below:

"My land is far away from the land of Chambharbuva. My land Nayar is on the bank of river. I go to my other land by road leading to Diva. Road leading to Diva goes through village Urse. The land Chambharbuva is not on the way leading to Diva. There is compound of thorny bushes on all sides of land Chambharbuva. The height of said thorny bushes is about 7/8 feet.

I have not stated in my police statement that I advised deceased Shankar and accused Balu not to quarrel. I was 30 to 40 feet away from the land Chambharbuva when I heard commotion. It is not true that I did not see accused Balu and Shankar in land Chambharbuva

- A at that time, I had kept injured Shankar on the Oti of the house of accused Balu. That time, his head injury was bleeding and the blood fell on the Oti. After the Shankar was put on Oti. I asked somebody to bring cloth to tie injury. That time, somebody brought shirt to me. At the time of departure to Talegaon Hospital, the said shirt was lying on the Oti. The exchange of quarrel was going between Shankar and accused Balu in the corner of Paddy field. The said Paddy field is just near from the house of accused Balu.”
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- The evidence thus records that whilst Dharu was on his way to his field on the fateful day, he saw two brothers involved in hot exchange of words and like a good neighbour, advice came from him so that the brothers do not fight against each other: Dharu thereafter proceeded towards his field and by the time he had gone barely 30/40 feet there was wailing of Baby (PW5). On hearing the same Dharu came back to the alleged place of occurrence and found Shankar being in grossly injured condition. The next part of his evidence is rather interesting and important as well, since the evidence is delightfully
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- D silent on the score as to what has happened to wailing of PW 5: Dharu significantly neither sees the assailant brother nor said anything about the whereabouts of PW 5: But his evidence remained positive as regards the wailing of PW 5. But what has happened to her? Where has she gone and if not there then which direction!! Similar is the situation as regards the accused person: It is only 30-40 feet - Hearing of wailing and turning back to see what has happened yielded no further but that did not prevent him from seeing Gorakh with whose assistance he lifts Shankar and took him to the front of the house of the accused. The deponent did not see the actual axe-hit, neither could see the accused from behind - the vision obviously became totally blurred otherwise there was no earthly chance of missing both the
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- F accused person and PW 5. The introduction of Gorakh had to be effected since he had to carry the body of Shankar. Significantly, however, Gorakh was not called to give evidence The reason for non-production of such a vital witness goes unnoticed by both the trial Court as also the High Court.

- We shall come back to the evidence of Dharu (PW 4) once again shortly afterwards but presently the evidence tendered by Baby (PW 5) ought to be noticed:
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- “The incident took place 1 to 1 and quarter years before. It was Sunday. During my stay, I was staying in the house of deceased Shankar in Urse. On the day of incident, PW 4 Dharu met me Urse at about 10 a.m. That time, I asked Dharu whether he wanted to go
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to his field. He told me that he would not go to his field due to sickness. While I was in the house of deceased Shankar, at about 10 a.m., boys came shouting to me and told me my brother Shankar fell injured in the land Chambharbuva. Then I immediately rushed to Shambharbuva land and saw Shankar lying injured in the field. I cried for water. Then hearing my cry, neighbours gathered and water was given, but Shankar was unconscious. PW 4 Dharu and Gorakh came there. They lifted injured Shankar and took him on the Oti of house of accused Balu. I brought shirt from the house of accused Balu for tying the head injury of Shankar. But people told me to bring Dhoti instead of shirt. So I gave Dhoti to Dharu and it was tied to the head injury of Shankar. Then PW. 4 Dharu and Gorakh took Shankar in bullock cart and he was taken to Talegaon.”

It is at this juncture the prosecutor declared her a hostile witness and prayed for permission to cross-examine the witness upon however, the leave being granted, PW 5 totally decried the factual aspect as contained in the complaint lodged, though however, the thumb impression was admitted while it is true declaration of a witness to be hostile does not *ipso facto* reject the evidence and it is now well-settled that the portion of evidence being advantageous to the parties may be taken advantage of but the Court before whom such a reliance is placed shall have to be extremely cautious and circumspect in such acceptance. Reference in this context may be made to the decision of this Court in *State of U.P. v. Ramesh Prasad Misra and Anr.*, [1996] 10 SCC 360 wherein this Court stated:

“It is equally settled law that the evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused, but it can be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence may be accepted.”

It is on this backdrop the evidence of PW 5 if analysed, totally negates the prosecution case.

We thus have to assess the credit worthiness of this particular witness and assess the situation ourselves.

Admittedly PW 4 did not see the accused in fact giving the blow It is only a circumstantial inference the probative value thus will have to be assessed.

A Incidentally PW 5 (Baby) happened to be complainant and we should have a look at the complaint so lodged by PW5. Relevant extract of the complaint reads as below:-

B “On 8.7.1984 at 10-00 or 11-00 a.m. I was going from our house to my uncle’s house. At the time Shankar was doing fencing to the land which was owned by him after partition near open space, owned by Balu after partition. At that time Balu was grazing his cattles in his own land. When I was going to my uncle’s house I heard altercations were taking place in between Balu and Shankar. As it was as usual hence I neglected it and went to my uncle’s house. As C I was to reach my uncle’s house I heard my brother Shankar raised shout as “Mello, Mello”, hence inspite of going inside my uncle’s house I returned back and came near Shankar. At that time, sharp D clash was going on in between Shankar and Balu and Balu was having an axe in his hand, and Balu was assaulting Shankar. When Balu saw me going towards them, Balu returned to his house with cattles. I ran towards Shankar. Shankar was lying with dripping blood from his body, he was unconscious hence I saw where he was assaulted. I saw E deep wound in his head hence I shouted “Bring water” (Pani Ana, Pani Ana). Then my cousin brother Gorakh Anna brought the water. Water was given to him but he did not talk anything hence I started F weeping loudly. At that time after hearing my voice my uncle Daru Shinde and cousin brother Gorakh Anna shifted my brother to Talegaon Hospital, by bullock cart. At that time my mother Sitabai, aunt Indubai, Shankar’s wife Dwarkabai accompanied them. I went to our house. When I was at home my uncle Daru Shinde and aunt Indubai came back to Urse at 2.00 p.m. with the bullock-cart. They G told me that Shankar was not admitted by Talegaon Hospital due to serious injuries. He is sent to hospital at Pune. This quarrel has arose out of partition of land.”

H It is further to be noticed that in the evidence tendered by PW 5, there is existing a complete departure as regards the witnessing of the fight. Though the oral testimony lends corroboration to the later part of the complaint. The situation thus emerges that authentication of the complaint by the left thumb impression of PW 5 though stands admitted, but there was a refusal as regards PW 5 being an eye witness to the occurrence. PW 5 stated in no uncertain language that intimation of Shankar’s injury was given to her by some local boys and on arrival at the place of occurrence PW 5 found Shankar lying

injured in the field and it is at that juncture she cried for water as noticed herein before. PW 5 however then proceeds to state that upon hearing the cry, neighbours gathered and it is only thereafter Dharu and Gorakh came there together, who lifted the injured Shankar and took him on the Oti of the house of the accused Balu. A

At this juncture, let us analyse the evidence of PW 4 in a slightly more greater detail it seems that the involvement of the accused shall have to be established : Dharu therefore has to be present at the place of occurrence and show the good neighbourly gesture by advising the brothers not to fight, even if this is an acceptable piece of evidence but evidence thereafter seem to be rather an improbable if not an impossibility for acceptance. Since the distance of 30/40 feet cannot be that long a distance which Dharu has said to have traversed between the neighbourly gesture and the wailing of PW 5; Dharu immediately looked back, but the silence pervades thereafter as regards the presence of Balu and PW 5. On the contrary, the evidence of PW 5 for which she has been declared hostile seems to be going in consonance with the normal reactions and normal behavioural pattern. The factum of not seeing either the accused or PW 5 Dharu turned round within a distance of 30/40 feet is rather difficult to accept. If the evidence of PW 4 is considered in the perspective as above question of acceptance thereto would not arise and having regard to the availability of materials, the success of prosecution becomes rather doubtful. Admittedly, there is no direct evidence and the entire prosecution hinges on circumstantial evidence. In the event, however, the chain is snapped and there is a gap therein, the accused cannot but be said to be entitled to a doubt. This aspect of the matter has been totally ignored by the High Court and in our view the same goes to the root of the matter and by reason of non-adherence to the basic principles pertaining to the evidence in the perspective as has been stated hereinbefore, there was truly a miscarriage of justice warranting intervention of this Court. B C D E F

In the view of the aforesaid, this appeal succeeds. The appeal is thus allowed the conviction and the order of sentence as confirmed by the High Court stands set aside and quashed. The appellant who is in custody is directed to be released forthwith unless required in any other matter. G

K.K.T.

Appeal allowed.