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HEM RAJ AND ORS.

v.

STATE OF HARYANA

MARCH 29, 2005

B

[P. VENKATARAMA REDDI AND P.P. NAOLEKAR, JJ.]

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Penal Code, 1860—Section 302—Death—Evidence of related eyewitnesses—Availability of independent eyewitness—Non-examination of—Absence of blood on the spot of occurrence—Inadequate light—Evidence of Investigating Officer, one of the eyewitnesses and time and source of FIR doubtful—Conviction by Courts below—On appeal, held : conviction not justified—In view of the evidence and broad probabilities there is possibility of conviction of wrong persons—Accused entitled to benefit of doubt.

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Criminal Trial :

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Independent witness—Non-examination—Effect of on prosecution case—Held : Non-examination of such witness by itself may not give rise to adverse inference against prosecution—But unexplained omission of examination would assume significance when the presence of eye-witness at the scene of occurrence is doubtful.

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Appellants-accused were alleged to have murdered a person at about 8.45 p.m. It was alleged that they had stabbed the deceased with knives. The incident was alleged to have been seen by PWs-4 and 5 (brother and relative of deceased respectively) and one 'K' an independent witness. PW4 was alleged to have seen the occurrence from a distance of 30 feet. PWs 4 and 5 took the deceased to the hospital, where the deceased was declared dead by the doctor and he sent the 'rucca' to Police Station. PW-9, the Investigating Officer received the 'rucca' at the gate of the hospital itself and recorded the statement of PW 4 and sent the same to Police Station on the basis of which FIR was recorded at 11.35 p.m. There was delay by Investigating Officer in reaching the spot of occurrence. Blood stains were not found there. Knife was recovered from accused 'K'. No blood stains were found on the clothes of PWs 4 and 5. After two days of the incident investigation was entrusted to PW-10, at the instance of Superintendent of Police, and he found that all the accused other than accused 'K' were

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innocent. However all the accused were tried and charge was framed against all of them u/s 302 IPC. Witness was not examined despite the facts that he took the deceased to hospital, was present in the hospital, FIR referred him as eye-witness, and was present in Court on one of the dates. PW-9 stated that place of occurrence was pointed out to him by the eye-witness 'K'. PW-10 in his examination did not give all the relevant details of his investigation. PWs 4, 6 and 9 had given different versions regarding time of recording FIR. Trial Court convicted all the accused u/s 302 IPC on the basis of evidence of PWs 4 and 5. High Court confirmed the conviction and opined regarding non-examination of the independent eyewitness that his examination would amount to 'proliferation' of direct evidence; and as regards absence of blood stains from the scene it opined that it would have disappeared in view of the time gap between the incident and inspection of Investigating Officer. Hence the present appeals.

Allowing the appeals, the Court

HELD : 1. On a consideration of the evidence on record and the broad probabilities, there is a reasonable possibility of some accused who were not involved in the attack having been convicted. It is difficult to sift the grain from the chaff. It is a case in which benefit of doubt has to be accorded to the appellants. [1162-E]

2. Two days after the incident, the investigation was entrusted to PW-10, at the instance of Superintendent of Police. PW10 in his evidence did not choose to give all the relevant details of his investigation. The version of this Investigating Officer itself casts a cloud on the reliability of the prosecution case as unfolded by PWs 4 and 5 that four accused were involved. [1158-H; 1159-C]

3.1. The fact that no independent witness - though available, was examined and not even an explanation was sought to be given for not examining such witness is a serious infirmity in the prosecution case having regard to the indisputable facts of this case. To put a seal of approval on the prosecution's omission to examine a material witness who is unrelated to the deceased and who is supposed to know every detail of the incident on the ground of 'proliferation' of direct evidence is not a correct approach. The corroboration of the testimony of the related witnesses-PWs 4 & 5 by a known independent eye-witness could have strengthened the prosecution case, especially when the incident took place in a public place.

[1159-D; 1159-G-H]

A 3.2. Non-examination of independent witness by itself may not give rise to adverse inference against the prosecution. However, when the evidence of the alleged eye-witnesses raise serious doubts on the point of their presence at the time of actual occurrence, the unexplained omission to examine the independent witness, would assume significance. [1160-A]

B *Takhaji Hiraji v. Thakore Kubersing Chamansing and Ors.*, [2001] 6 SCC 145, referred to.

C 4. The surmise of the High Court that the blood stains at the public placase would have disappeared in view of the time gap between the incident and the Investigating Officer's inspection may not be correct, especially, in view of the fact that it is a metal road, as shown by PW8 in the site plan and it was night time. It is difficult to believe that traces of blood would fade out by the time of the visit of the Investigating Officer. [1160-F-G]

D 5. There is also a doubt regarding the time when the first information was received at the police station. The FIR was registered at 11.35 p.m. on the basis of the statement of PW4 recorded at 11.15 p.m. at the hospital. However, as per the evidence of PW6 (Police Constable), the information regarding the occurrence was received in the police station at 10.30 or 10.45 p.m. and thereafter PW-9 accompanied by him and other police personnel went to the hospital. Apart from the fact that his evidence goes contrary to the version of PW9 that on receiving the death intimation at the hospital gate, he went straight to the hospital and an hour later he recorded the statement of PW4, a doubt is cast on the time and source of first information. [1160-H; 1161-A-B]

F 6. No weapons were recovered from any of the accused. The recovery of knife from accused 'K' at the time of surrender has been rightly disbelieved by the trial Court. [1161-C]

G 7. The possibility of seeing all the accused attacking the deceased with the knives and 'Neja' from a distance of 30 feet or more, that too, in the night time, is rather doubtful. It would have been difficult for PW4 at the night time to notice each of the accused carrying a particular type of weapon, that too a small weapon like knife. It is difficult to accept the version of PW4 of having seen the weapon in the hand of each of the accused and the nature of the weapon. The reference to 'Neja' in particular H appears to have been introduced for explaining the injuries on the body

of the deceased. His further version that PW5 having heard his cries joined him and witnessed the attack seems to be a story invented for the purpose of introducing another eye-witness to corroborate his version. Another factor which casts a doubt on the evidence of PWs 4 and 5 is that there were no blood stains on their clothes, though allegedly, they placed the deceased on cot and carried him to the hospital. Moreover, soon after his brother was declared dead, PW4 did not go to the Police Station which was quite close to the hospital to lodge a report. That is not a natural course of conduct. It is on account of these doubtful features in the evidence of PW4 that the factum of non-examination of independent witness, though available, assumes importance. [1161-E; G-H; 1162-C-D]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 957 of 1998.

From the Judgment and Order dated 14.5.98 of the Punjab and Haryana High Court in Crl. A. No. 22-DB of 1998.

WITH

Crl.A. No. 958 of 1998.

Sushil Kumar, K.R. Nagaraja, A.P. Jain, Ms. E.R. Sumathy, with him for the Appellants.

D.P. Singh V.K. Garg, Manu Sharma, Ms. Avneet Toor for the Respondent.

R.N. Mittal, Puneet Mittal, Pawan Kr Mittal and Arvind Kumar Gupta for the Respondent/Complainant.

The Judgment of the Court was delivered by

P. VENKATARAMA REDDI, J. The four appellants herein who are brothers faced trial before the Additional Sessions Judge - I, Jind for murdering one Hemant Kumar at a central place in Safidon town, on the night of 3.4.1996 at about 8.45 p.m. They were convicted under Section 302 IPC and sentenced to life imprisonment. The High Court dismissed the appeals filed by the accused. Hence, these appeals by special leave.

The following is a brief account of the prosecution case and other relevant facts :

A On the night of 3rd April, 1996, all the accused attacked Hemant Kumar at Channi Chowk and stabbed him with knives. As a result of stabbing, he received six injuries out of which two were in the chest region. The fatal assault by the four accused was seen by the younger brother of deceased-PW4, who was returning home from his watch repair shop. On being informed

B by a passer-by on a bicycle, PW4 rushed to the spot and having noticed from a distance of 30 ft. or so that the attack on the deceased was going on, he raised an alarm. Hearing the cries, PW5-another relation of the deceased and one Kapoor Singh who were at a nearby sweet shop joined PW4. On seeing all of them, the accused fled. According to PWs 4 and 5, three accused carried knives and the accused, namely, Kala carried 'Neja' (which resembles

C knife). The injured person fell down on the spot and he was taken on a cot to the Civil Hospital, Safidon by the aforementioned three persons. At the hospital, the doctor (not examined) declared him dead. The same doctor sent a *rucca* (memo) to the Police Station, Safidon at about 9.50 p.m. The Sub-Inspector of Police-PW9 was going on a jeep by the side of the hospital. The

D Ward Boy of the hospital handed over the *rucca* to him PW9 then came to the hospital and after sometime, recorded the statement of PW4 at the hospital. He sent the same to the Police Station, on the basis of which an FIR was recorded at 11.30 p.m., for an offence under Section 302 read with Section 34 IPC. Copy was sent to the Judicial Magistrate through a Constable and it reached him at about 1.00 a.m. In the said statement given to the police, PW4

E named the four accused as the assailants. PW9 held the inquest over the dead body in the hospital and sent the dead body for post-mortem. The Medical Officer attached to the General Hospital, Jind did the post-mortem examination at 9.15 a.m. on 4.4.1996 and prepared the post-mortem report which is Ex.PA. PW9 could go to the scene of occurrence at about 2.30 a.m. The delay was

F for the reason that he tried to stop a reprisal attack by a mob to set fire to the houses of the accused. He prepared a site plan. One Gobind Das produced all the four accused persons involved in the offence in the night of 4.4.1996 before PW9 while he was at Court Road Chowk. They were arrested and immediately thereafter, the accused Kala produced a knife (Ex.P1). The total

G length of that knife was 8 inches inclusive of 4'' of handle and the width of the blade was about 0.2 to 0.3 cms. PW10-Inspector of Police, CIA, was entrusted with investigation from 6.4.1996 onwards. He recorded the statements of some witnesses. He applied for judicial remand of the arrested accused. On the same day, PW10 took the knife seized from Kala to the Medical

H Officer-PW1, who endorsed on the post-mortem report that the injuries could be inflicted by that knife. On the basis of his investigation, PW10 found that

the accused other than Kala were innocent. Therefore, in the report under Section 173 Cr.P.C., only Kala was shown as the accused for the offence punishable under Section 302 IPC. However, all the four accused persons were committed to Sessions. After examining the record, the learned Judge found that there was a *prima facie* case to proceed against all the accused. Accordingly, the charge was framed against all the accused under Section 302 IPC. Curiously, Section 34 was omitted in the charge. On the basis of the evidence of the eye-witnesses, namely, PWs 4 and 5, the accused were convicted under Section 302 IPC.

The motive of the accused is traced to an incident which had happened one and a half years earlier when the deceased Hemant Kumar identified the accused as the persons involved in the kidnapping of the daughter of one Niranjana Das. However, the motive was held to be not proved by the trial court. The High Court did not hold to the contra.

The details of post-mortem examination may be noticed at this juncture. The following injuries were found on the body of the deceased : -

- (i) Spindle shaped incised wound on left side of chest just lateral to left nipple 1.5 cm x 1 cm x 4 cm. The wound cut through skin, costal muscles, corresponding cut in pleura was present.
- (ii) Incised wound (spindle shaped) 3 x 1 x 7 cm on the left side of chest 5 cm below injury no. 1 longitudinally placed, wound cut through shirt, banian, Costal muscles, 6th and 7th intercostals space, left lung.
- (iii) Incised wound (spindle shaped) 2.5 x 1 cm x 6 cm obliquely placed on left side of abdomen 5 cm below the costal margin. The wound cut through skin muscle, peritoneal membrane and a cut of 1.5 x ½ x ¼th of cm. on spleen was present.
- (iv) Incised wound 4 cm x 1.5 cm muscle deep on the posterior lateral aspect of left fore-arm.
- (v) Incised spindle shaped wound on upper thigh of the size of 3 x 1.5 cm x 1cm. 15 cm below iliac crest.
- (vi) Incised wound 3 cm x 1.5 cm bone deep on the palmer aspect of right thumb, bone was fractured.

The learned senior counsel for the appellant contended that it is a case of blind murder which might not have been witnessed by anybody and the

A version of PWs 4 and 5 - the alleged eye-witnesses and close relations of the deceased is unnatural and unbelievable. No explanation was forthcoming for not examining the independent witnesses who would have been available at the place of occurrence which is in a busy locality. The scene of offence has not been established beyond doubt and the time of occurrence, the time of recording the statement of PW4 and the FIR and the time of death are all doubtful. Recovery of knife from the accused Kala is concocted, as held by the trial court. It is pointed out that the pattern of stab injuries received by the victim only on one side of the body shows that one or two persons would have inflicted injuries but not as many as four. In this context, it is pointed out that the 2nd investigating officer-PW10, after recording the statements of certain witnesses thought it fit to file the charge-sheet against one accused only, namely Kala. However, by the order of the Sessions Judge, all the four were charged on the ground that they were named in the FIR. Finally it is submitted that in the absence of charge under Section 302 IPC read with Section 34, the conviction cannot be sustained under Section 302 simplicitor. It is then submitted that the offence does not in any case fall under Section 300 IPC.

The learned counsel appearing for the State as well as the learned senior counsel appearing for the informant—PW4 who has been allowed by this Court to intervene have countered the above arguments. It is contended by them that even in the absence of specific mention of Section 34 IPC in the charge, the conviction can still be sustained, that there is nothing to discredit the testimony of PW4 or PW5, that the arguments relating to antedating of the FIR and the improbability of participation of as many as four accused are without substance. The injuries being sufficient in the ordinary course of nature to cause death, all accused are constructively liable for the offence of murder irrespective of which accused had inflicted the particular injury. It is submitted that the concurrent findings of both the Courts cannot be legally faulted.

The prosecution case rests on the evidence of PWs 4 & 5 who are related to the deceased and who happened to be chance witnesses. Before scrutinizing this evidence and testing its credibility, we have to advert to certain features in the prosecution case which make a dent on the reliability of the prosecution version. They are discussed hereunder : -

Two days after the incident i.e. on 5.4.1996, the investigation was entrusted to PW10-Inspector, CIA at the instance of Superintendent of Police,

Jind. PW10 stated in cross examination that he inspected the place of occurrence and examined the persons staying near the place of occurrence and recorded the statements of such persons. The names of those five persons were given. Then he added that "from their statements, it was revealed that Hemraj, Chunnilal and Omprakash were innocent". He further stated that the investigation done by him was verified by DSP. Ultimately he filed the final report showing only Kala as the sole accused. However, as already noticed, all the four accused mentioned in the FIR were committed to Sessions and the Sessions Judge framed charge against all of them under Section 302. PW10 did not choose to give all the relevant details of his investigation. However, the version of this Investigating Officer itself casts a cloud on the reliability of the prosecution case as unfolded by PWs 4 and 5 that four accused were involved.

The fact that no independent witness - though available, was examined and not even an explanation was sought to be given for not examining such witness is a serious infirmity in the prosecution case having regard to the indisputable facts of this case. Amongst the independent witnesses, Kapur Singh was one, who was very much in the know of things from the beginning. Kapur Singh is alleged to have been in the company of PW5 at a sweet stall and both of them after hearing the cries joined PW4 at Channi Chowk. He was one of those who kept the deceased on a cot and took the deceased to hospital. He was there in the hospital by the time the first I.O.-PW9 went to the hospital. The evidence of the first I.O. reveals that the place of occurrence was pointed out to him by Kapur Singh. His statement was also recorded, though not immediately but later. The I.O. admitted that Kapur Singh was the eye-witness to the occurrence. In the FIR, he is referred to as the eye-witness along with PW5. Kapur Singh was present in the Court on 6.10.1997. The Addl. Public Prosecutor 'gave up' the examination of this witness stating that it was unnecessary. The trial court commented that he was won over by the accused and therefore he was not examined. There is no factual basis for this comment. The approach of the High Court is different. The High Court commented that his examination would only amount to 'proliferation' of direct evidence. But, we are unable to endorse this view of the High Court. To put a seal of approval on the prosecution's omission to examine a material witness who is unrelated to the deceased and who is supposed to know every detail of the incident on the ground of 'proliferation' of direct evidence is not a correct approach. The corroboration of the testimony of the related witnesses- PWs 4 & 5 by a known independent eye-witness could have strengthened the prosecution case, especially when the incident took place in a public place.

A Non-examination of independent witness by itself may not give rise to adverse inference against the prosecution. However, when the evidence of the alleged eye-witnesses raise serious doubts on the point of their presence at the time of actual occurrence, the unexplained omission to examine the independent witness-Kapur Singh, would assume significance. This Court pointed out in *Takhaji Hiraji v. Thakore Kubersing Chamansing and Ors.*, [2001] 6 SCC 145. -

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“.....if already overwhelming evidence is available and examination of other witnesses would only be a repetition or duplication of the evidence already adduced, non-examination of such other witnesses may not be material. In such a case, the court ought to scrutinize the worth of the evidence adduced. The Court of facts must ask itself - whether in the facts and circumstances of the case, it was necessary to examine such other witness, and if so, whether such witness was available to be examined and yet was being withheld from the Court. If the answer be positive then only a question of drawing an adverse inference may arise. If the witnesses already examined are reliable and the testimony coming from their mouth is unimpeachable the Court can safely act upon it, uninfluenced by the factum of non-examination of other witnesses. In the present case we find that there are at least 5 witnesses whose presence at the place of the incident and whose having seen the incident cannot be doubted at all. It is not even suggested by the defence that they were not present at the place of the incident and did not participate therein.”

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One more aspect which deserves notice is that at the alleged scene of offence, no blood-stains were found by the I.O., though he made a search. The surmise of the High Court that the blood stains at the public place would have disappeared in view of the time gap between the incident and the I.O.'s inspection may not be correct, especially, in view of the fact that it is a metal road, as shown by PW8 in the site plan and it was night time. It is difficult to believe that traces of blood would fade out by the time of the visit of I.O. This is one of the circumstances that has to be kept in mind while appreciating the prosecution case.

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There is also a doubt regarding the time when the first information was received at the police station. The FIR was registered at 11.35 p.m. on the basis of the statement of PW4 recorded at 11.15 p.m. at the hospital. However,

as per the evidence of PW6 (Police Constable), the information regarding the occurrence was received in the police station at 10.30 or 10.45 p.m. and thereafter the SI-PW9 accompanied by him and other police personnel went to the hospital. Apart from the fact that his evidence goes contrary to the version of PW9 that on receiving the death intimation at the hospital gate, he went straight to the hospital and an hour later he recorded the statement of PW4, a doubt is cast on the time and source of first information. If the information was received at the police station at 10.30 p.m. why was it suppressed? What are the details of such information? These are the questions which remain unanswered.

No weapons were recovered from any of the accused. The recovery of knife from Kala at the time of surrender has been rightly disbelieved by the trial Court.

All the above factors would not have assumed much importance if the evidence of PWs 4 and 5 could be accepted without raising an eye-brow. However, two views are possible on the point whether these persons had really witnessed the attack. There is every reason to think that PW4, on being informed by a way-farer, would have reached near the scene of offence almost after the attack was over. The possibility of seeing all the accused attacking the deceased with the knives and '*Neja*' from a distance of 30 feet or more, that too, in the night time, is rather doubtful. It is not safe to rely on his version that he had seen the accused with the particular weapons in their hands. In this context, it may be noted that PW4 did not mention the distance from which he observed the attack. In the site plan drawn to scale, the distance of the spot from where PW4 observed the incident was given as 30 ft. It was night time-almost 9.00 p.m. and most of the shops were closed, as seen from the evidence of PW4. PW4 or any other witness did not give any details about the lighting in the vicinity. However, from the site plan drawn by PW8, there was a tube-light attached to the electrical pole situated at 20 feet distance. It would have been difficult for PW4 at the night time to notice each of the accused carrying a particular type of weapon, that too a small weapon like knife. But, PW4 came forward with the version that all the accused except one, were carrying knives and the other was carrying '*Neja*'. Thus he claims to have seen so clearly as to distinguish between a knife and '*Neja*' at that juncture, when the attack would have been almost over and PW4 was trying to evoke the attention of the people around. It is difficult to accept the version of PW4 of having seen the weapon in the hand of each of accused and the nature of the weapon. The reference to '*Neja*' in particular

- A appears to have been introduced for explaining the injuries on the body of the deceased. It seems to us that the picture given by PW4, as if he had seen each of them with the knife or '*Neja*' seems to be an embellishment developed with the idea of implicating all the brothers as the accused. His further version that PW5 having heard his cries joined him and witnessed the attack seems to be a story invented for the purpose of introducing another eye-witness to corroborate his version. The possibility of PW5 who was at a sweet shop hearing his cries, joining PW4 and then observing the incident appears to be highly improbable. If PW5 had already been there near Channi Chowk for purchasing sweets, he would have noticed the commotion caused by the attack and would have seen the assailants even before PW4 arrived at the spot. But his story is different. Another factor which casts a doubt on the evidence of PWs 4 and 5 is that there were no blood stains on their clothes, though allegedly, they placed the deceased on cot and carried him to the hospital. Moreover, soon after his brother was declared dead, PW4 did not go to the police station which was quite close to the hospital to lodge a report. That is not a natural course of conduct. It is on account of these doubtful features in the evidence of PW4 that the factum of non-examination of independent witness, though available, assumes importance.

E On a consideration of the evidence on record and the broad probabilities, we come to an irresistible inference that there is a reasonable possibility of some accused who were not involved in the attack having been convicted. It is difficult to sift the grain from the chaff. The High Court missed to notice certain crucial aspects adverted to above. It is a case in which benefit of doubt has to be accorded to the appellants. It is unnecessary to consider the question whether in the absence of charge under Section 34 IPC, the conviction can be sustained.

F In the result, the appeals are allowed and the conviction and sentence of all the appellants is set aside.

K.K.T.

Appeal allowed.