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SWAMI PRASAD
v.
STATE OF MADHYA PRADESH

MARCH 8, 2007

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[S.B. SINHA AND MARKANDEY KATJU, JJ.]

Penal Code, 1860—s. 302—Murder—Sole eye-witness—Three prosecution witnesses to the incident turned hostile—Accused, after the incident, himself going to the police station with the weapon of offence and blood stained clothes and confessing that the deceased had been killed by that weapon—Evidence of the hostile witnesses disbelieved by trial court and accused was acquitted—High Court convicting the accused—On appeal, held: Facts and circumstances of the case lead to the conclusion that the accused had killed the deceased—Evidence of sole eye-witness as well as the hostile witnesses are reliable—In a given situation court may rely upon the statements of hostile witnesses—Witness—Hostile witness.

Appeal—Appeal against acquittal—Scope of—Held: Though, when two views are possible, order of acquittal should not be interfered with—But, if the appellate court after analyzing the evidence, finds overwhelming evidence pointing to the guilt of the accused, order of acquittal can be interfered with.

Appellant was charged for having caused death of one person. According to the prosecution, appellant-accused was the son of PW-3. PW-4 and the deceased were his step-brothers and PW-6 was his step-sister. PWs-1, 2, 3 and the appellant were talking about partition of the property of PW-3. Appellant wanted half share of the property while PW-3 was ready to give only one-third share to him. At this, appellant, with an axe went to the deceased (who was taking bath) and assaulted him by giving two to three blows with the axe. On his threat, PWs 1, 2 and 3 entered their respective houses. PW-6, hearing the alarm went to the deceased. She also alarmed PW-4 not to come out of the house. Appellant with his axe went to the Police Station and made a statement to the Officer-in-charge that the deceased had been killed by that axe. On the basis thereof Officer-in-charge went to the spot and recorded statement of PW-1. On the basis of his statement FIR was recorded.

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At the trial, PWs 1, 2 and 3 turned hostile. Evidence of PW6 was not disbelieved on the premise that she had made improvement upon her statement. The appellant was acquitted. On appeal, High Court, after examining the matter, convicted the appellant.

In appeal to this Court, appellant contended that in view of the facts of the case, particularly the fact that Trial Court as well as High Court did not rely upon the testimony of the sole eye-witness (PW-6), High Court had committed error in reversing the judgment of acquittal.

Dismissing the appeal, the Court

HELD: 1.1. There are several circumstances which lead to the conclusion that the appellant alone is guilty of commission of murder of the deceased. [Para 17] [666-G]

1.2. From the evidences on records, apart from PW-6, who is an eye-witness, the following facts must be held to have been sufficiently proved. Appellant had demanded 1/2 share in the property from his father; and having been told that the property would be divided equally amongst the three sons, he became angry; PW-4 while in his house heard a cry that the deceased had been killed by the appellant. Appellant was seen at the place of occurrence with an axe. He went to the Police Station with the axe and blood-stained clothes. [Para 24] [668-D-F]

1.3. It is true that three prosecution witnesses were declared hostile, but the same by itself, would not lead to the conclusion that the High Court committed any error in passing the impugned judgment. It is well settled that a Court in a given situation even may rely on the statements of the witnesses, who had been permitted to be cross-examined by the prosecution.

[Para 15] [666-C]

1.4. Although PW 3 resiled from his statement that he had seen the appellant assaulting the deceased, but he had proved the other part of his earlier statement, namely, the demand of 1/2 share in the property by the appellant and on his refusal to accept the said demand, the appellant went towards the well with an axe in his hand. The dispute in regard to the share in the property has been proved by all the prosecution witnesses, namely, PW-1, PW-2 and PW-3. [Paras 17 and 20] [666-G-H; 667-C]

1.5. It may be true that the evidence of PW-6 had not been believed in its entirety by the Trial Judge. Her evidence has, however, been believed at

A least in part by the High Court. The reason for not believing her evidence is said to be that in her statement under Section 161 Cr. P.C. before the Investigating Officer, she had not stated to have seen the appellant assaulting the deceased with an axe. Her statement, however, before the police as also before the trial court should be considered in its entirety. It is not in dispute that at least she had heard a cry that the deceased had been killed by the B appellant. She ran to the place of occurrence. She even before going to the place of occurrence asked her brother not to come there. PW-4 in his evidence supported that part of the testimony of PW-6. [Para 16] [666-D-E]

C 1.6. Although the appellant did not make any categorical statement that he had killed the deceased, his statement to the effect that the deceased had been killed with the axe which he had been holding is sufficiently indicative of the fact that it was he who had killed the deceased. His statement is to be read reasonably and in its entirety. So read no other meaning can be attributed thereto. [Para 25] [668-G]

D 2. There cannot be any doubt whatsoever, that a judgment of acquittal should not be interfered with, if two views are possible. However, it is equally true that the High Court while entertaining an appeal against a judgment of acquittal would be entitled to consider the entire materials on records for the purpose of analyzing the evidence. There is a presumption that an accused is innocent, unless proved otherwise. When he is acquitted, the said E presumption, becomes stronger. But it may not be correct to contend that despite overwhelming evidence available on records, the appellate court would not interfere with a judgment of acquittal. [Paras 26 and 27] [668-H; 669-B]

F *Chandrappa and Ors. v. State of Karnataka*, (2007) 3 SCALE 90, relied on.

Samghaji Hariba Patil v. State of Karnataka, AIR (2007) SC 28, referred to.

G CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 731 of 2000.

From the Judgment and Order dated 24.11.1999 of the High Court of Madhya Pradesh at Jabalpur in Criminal Appeal No. 762/1988.

H Yashank P. Adhyaru, Jetendra Singh and S.K. Sabharwal, for the Appellant.

Sididhartha Dave and C.D. Singh for the Respondent.

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The Judgment of the Court was delivered by

S.B. SINHA, J. 1. This appeal is directed against a judgment and order dated 24.11.1999 passed by a Division Bench of the Madhya Pradesh High Court at Jabalpur in Criminal Appeal No. 762 of 1988 whereby and whereunder a judgment of the learned Sessions Judge, Taikamgarh, Madhya Pradesh dated 30.12.1987 in Sessions Trial No. 4 of 1987 acquitting the appellants from the charge of commission of an offence punishable under Section 302 of the Indian Penal Code, was set aside.

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2. The basic fact of the matter is not in dispute. One Devakinandan (PW-3) is the father of the appellants as also the deceased Rameshwar. Appellants herein are his sons through his first wife. After the death of his first wife, Devakinandan married one Binna. The deceased and Ram Sahay (PW-4) were his sons and Ramsri (PW-6) was his daughter through Binna, the second wife of Devakinandan.

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3. On 08.11.1986 at about 10 a.m. Paras Ram (PW-1) Devakinandan (PW-3), Raj Kumar (PW-2) and the appellants were talking beneath a 'neem' tree near the house of PW-3 as regards partition of the lands belonging to him. Appellants herein claimed 1/2 share in the property of PW-3. PW-3, however, declined to give him 1/2 share stating that he had three sons and all the sons would get equal shares.

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4. PW-4 Ram Sahay, (brother of the deceased) and the deceased at that point of time were minors. They were taking bath at a well. PW-4 after taking bath left for his house. Appellant, in the meanwhile, went towards the well with an axe in his hand. While the deceased was taking bath, he allegedly assaulted him by giving two or three blows with his axe on his neck saying that 'he had done the division in two parts'. He also gave an exhortation that whoever would come would be killed; upon hearing of which, PW-1, PW-2 and PW-3 allegedly entered their respective houses. PW-6, Ramsri (sister of the deceased and PW-4), who was standing near her house, heard the alarm that the appellant had killed Rameshwar, came to the spot and found her brother lying in an injured condition. She immediately alarmed her brother PW-4 not to come from his house. Appellant from the place of occurrence went to the Police Station, Niwari. He purported to have made a statement before the officer in charge at the Police Station, disclosing that Rameshwar had been killed with the axe carried by him in his hand. At that point of time,

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A one Rajendra Shekhar, who was an advocate as also a journalist was present in the Police Station. He examined himself as PW-11.

5. On the basis of the said information, the officer in charge of the Police Station came to the spot. PW-1 made the following statement before him :

B "I am doing agriculture in Byavata - Ram Sahai, Rameswar, Swami Prasad are sons of my uncle. Swami Prasad was the son of elder wife and Rameswar was the son of younger wife. Swami Prasad is in possession of half the land. While Devaki Nandan wanted to give one-third share to Swami. Today at about 10' O' clock in the morning, Swami Prasad, Dewaki Nandan, Raj Kumar Yadav and I were sitting under Neem Tree. Swami Prasad said "I am son of married lady (wife), give me half share of the land", Dewaki said you are three brothers". Therefore you will get only one third share. At that time, Ram Sahai, Rameswar were taking bath on the well. After a short time, Ram Sahai went to, Swami Prasad armed with an axe reached the well where D Rameswar was bathing and suddenly make strike with axe two three times and shouted "see", there are two parts. We saw dying Rameswar thereafter Swami shouted "come" all to be killed. Raj Kumar, Dewaki Nandan and I ran and entered in the house. Swami Prasad kept on waiting with axe for some time and then moved towards Niwari. Till E now, I stayed at the home on account of fear. Having come there, I saw, there were axe injuries on Rameswar's neck and he had died. Therefore, I lodge this report. Investigation may be done."

6. A First Information Report was drawn on the basis of the said statement.

F 7. At the trial, however, not only PW-1 but also PW-2 and PW-3 turned hostile. They resiled from their earlier statements. PW-4 was not an eye-witness. The learned Trial Judge disbelieved the statement of PW-6, inter alia, on the premise that she had made improvement thereupon. A judgment of acquittal, therefore, on the said findings, was passed.

G 8. On an appeal made by the State before the High Court against the said judgment of acquittal, however, a Division Bench of the High Court examined the matter in details and held the appellant guilty of commission of murder of Rameswar and sentenced him to undergo rigorous imprisonment for life.

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9. Mr. Yashank P. Adhyaru, the learned Senior Counsel appearing on behalf of the appellant, would submit that having regard to the nature of evidences brought on records by the prosecution, the High Court must be held to have committed a manifest error in reversing a judgment of acquittal particularly in view of the fact that both the learned Trial Judge as also the High Court did not rely upon the testimony of the sole eye-witness PW-6 on the ground that she had not made any statement before the Investigating Officer under Section 161 of the Code of Criminal Procedure, 1973 to the effect that she had seen the appellant assaulting the deceased with an axe. A B

10. The learned counsel would submit that even the informant PW-1 had not made any statement before the court that he had seen the actual incident, and he merely disclosed that he had heard an alarm and on cross-examination, made a categorical statement that somebody had told him thereabout, but the name of the person from whom he had known had not been disclosed. C

11. Our attention has further been drawn to the fact that even PW-2 refused to claim himself to be an eye-witness. PW-3, the father of the deceased, categorically stated that he had not seen the incident. He thus, was a witness to the dispute. According to the learned counsel PW-4 was admittedly not an eye-witness. Mr. Siddhartha Dave, learned counsel for the State, however, supported the judgment of the High Court. D

12. The death of Rameshwar being homicidal in nature is not in dispute. Dr. Vimal Kumar Jain, (PW-5) conducted the post-mortem examination. He found the following external injuries on the person of the deceased : E

“(1) There was incised wound 5” x 4” x 3” with clear cut margin on right back and lateral upper portion of the neck. There was clotted blood and main artery was cut. F

(2) There was incised wound 3” x 2” x 2” in the back lower side of neck and in lateral portion and the margin of the wound was clearly cut. There was clotted blood and blood vein cut.

(3) There was incised wound with clearly cut margin 3” x 2” x 1” in the right side of back and Scapular region and there was clotted blood.” G

13. Death of Rameshwar, therefore, being homicidal in nature is not in doubt. It is also not in dispute that the incident took place at 10 a.m. on 08.11.1986. The place of occurrence is also not in dispute. Appellant admittedly H

A came to the Police Station, Niwari at about 11 a.m. He came there with an axe in his hand. It was stained with blood. He stated that a murder had been committed by the axe which he had been holding. The said axe was seized by the officer in charge of the Niwari Police Station, Shri N.C. Tiwari.

B 14. On the basis of the said information, Shri Tiwari came to the spot and recorded the First Information Report.

C 15. It is true that three prosecution witnesses were declared hostile, but the same by itself, in our considered opinion, would not lead to the conclusion that the High Court committed any error in passing the impugned judgment. It is well settled that a Court in a given situation even may rely on the statements of the witnesses, who had been permitted to be cross-examined by the prosecution.

D 16. It may be true that the evidence of PW-6 had not been believed in its entirety by the learned Trial Judge. Her evidence has, however, been believed at least in part by the High Court. The reason for not believing her evidence is said to be that in her statement under Section 161 Cr. P.C. before the Investigating Officer, she had not stated to have seen the appellant assaulting the deceased with an axe. Her statement, however, before the police as also before the trial court should be considered in its entirety. It is not in dispute that at least she had heard a cry that Rameshwar had been killed by the appellant. She ran to the place of occurrence. She even before going to the place of occurrence asked her brother not to come there. PW-4 in his evidence supported that part of the testimony of PW-6. He stated:

F “By that time I finished taking bath and then I left for my home and at that time still Rameshwar was taking the bath at the well. The distance between my house and the pump is 500 ft. and as soon as I sat in my house to take the meal, then my sister Ramshri, who was outside, raised the alarm that Swami killed Rameshwar by giving blow of the axe and she asked to close the gate and to remain indoor...”

G 17. There are several other circumstances which, in our opinion, lead to the conclusion that the appellant and the appellant alone is guilty of commission of murder of Rameshwar. The dispute in regard to the share in the property has been proved by all the prosecution witnesses, namely, PW-1, PW-2 and PW-3.

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18. PW-3 is the father of the deceased as also the appellant. He, however, resiled from his earlier statement; but he had assigned reasons therefor, stating :

“...I think whatever destined has happened and now there should not be bad consequences for the family of Swami.”

19. It shows as to why he had turned hostile. It also indicates why PW1 and PW2 turned hostile. Even PW4 did not tell the whole truth.

20. Let us now consider as to what extent PW3 can be believed. Although he resiled from his statement that he had seen the appellant assaulting the deceased, but he had proved the other part of his earlier statement, namely, the demand of $1/2$ share in the property by the appellant and on his refusal to accept the said demand, the appellant went towards the well with an axe in his hand.

21. PW-1, the informant, is also a witness to the aforementioned incident. He was present when Appellant made a claim of $1/2$ share in the property. He was also seen going towards the well with axe in his hands. According to him when he reached home, he had heard an alarm that Rameshwar had been murdered. He did not in his cross-examination, dispute his earlier statements. He stated :

“It is correct to say that I and Rameshwar used to sit together in the village and even we used to go together in the marriage. Rajkumar does not belong to my family. Rajkumar got the share and he belongs to our family. The First Information Report of the occurrence were shown to T.I. I got it mentioned by T.I. in the report Ext. P-1 marked as 'A' to 'A' that at that time Ramsahay and Rameshwar were taking bath at the well. Ramsahay left for the home after some time. Thereafter Swami Prasad armed with Axe and he reached in the well, where Rameshwar was taking bath and he immediately gave 2-3 blows of Axe at the neck of Rameshwar and he raised the voice telling that see that now there are two shares. I saw Rameshwar while falling. Later Swami raised the voice and he invited all persons to come as he wanted to kill all. It is correct to say that I did not see Swami Prasad while giving blows of axe at Rameshwar. I did not give the attention that whether Swami was armed with axe at that time when he left. It is correct to say that I saw Swami while going towards the well. I did not see Ramsahay and Rameshwar while taking bath. As I heard the alarm, so

A I got it dictated that Swami killed Rameshwar with the axe.”

22. Similarly, he furthermore stated :

B “...It is correct to say that I disclosed in my statement in the portion 'B to 'B' of Ext. P-4 that after some time Ramsahay left for the home and then Swami Prasad suddenly came armed with the axe towards the well. I did not disclose in my statement to the T.I. in the portion 'C' to 'C' of Ext. P-4 that Swami Prasad suddenly gave blow of the axe at Rameshwar and when he gave second blow, then he told that see there are two portions...”

C 23. Even in cross-examination made on behalf of the appellant, he accepted that he heard an alarm that Rameshwar was killed and the appellant had killed him.

D 24. From the evidences on records, apart from PW-6, who is an eye-witness, in our opinion, the following facts must be held to have been sufficiently proved :

- E (1) Appellant had demanded ^{1/2} share in the property from his father at about 10 a.m. on 08.11.1986; and having been told that the property would be divided equally amongst the three sons, he became angry;
- (2) PW-4 while in his house heard a cry that Rameshwar had been killed by the appellant.
- (3) Appellant was seen at the place of occurrence with an axe.

F He went to the Police Station with the axe and blood-stained clothes;

G 25. Although he did not make any categorical statement that he had killed the deceased, his statement to the effect that Rameshwar had been killed with the axe which he had been holding is sufficiently indicative of the fact that it was he who had killed the deceased. His statement is to be read reasonably and in its entirety. So read no other meaning can be attributed thereto.

H 26. There cannot be any doubt whatsoever, that a judgment of acquittal should not be interfered with, if two views are possible. This has recently been stated in *Samghaji Hariba Patil v. State of Karnataka*, AIR (2007) SC

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27. However, it is equally true that the High Court while entertaining an appeal against a judgment of acquittal would be entitled to consider the entire materials on records for the purpose of analyzing the evidence. There is a presumption that an accused is innocent, unless proved otherwise. When he is acquitted, the said presumption, becomes stronger. But it may not be correct to contend that despite overwhelming evidence available on records, the appellate court would not interfere with a judgment of acquittal. {See *Chandrappa & Ors. v. State of Karnataka*, (2007) 3 SCALE 90}.

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28. For the reasons aforementioned, we do not find any merit in this appeal which is dismissed accordingly.

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29. Appellant is on bail. He is directed to surrender forthwith and serve out the remaining sentence, failing which, the Chief Judicial Magistrate concerned shall take proper steps for his apprehension.

K.K.T.

Appeal dismissed.