

STATE OF U.P. A

v.

NANDU VISHWAKARMA & ORS.
(Criminal Appeal No. 786 of 2001)

JULY 6, 2009 B

[DR. MUKUNDAKAM SHARMA AND DR. B.S.
CHAUHAN, JJ.]

Penal Code, 1860 – s.302 r/w s.34 and s.367 r/w s.34 – Armed assault resulting in death of one person and injuries to two persons – Conviction of accused-respondents by trial Court – Set aside by High Court – On appeal, held: The number of contradictions, referred to by High Court in its judgment, in respect of all the witnesses definitely make out a case of plausible view – Moreover, the High Court gave detailed reasons for disbelieving the prosecution case and for acquitting the respondents – When on basis of evidence on record, two views could be taken, one in favour of accused and the other against the accused, the one favouring the accused should always be accepted – On facts, there were two possible views, one taken by trial court and the other taken by High Court – View taken by High Court being a plausible view, no ground to interfere with the order of acquittal passed by High Court – Appeal – Appeal against acquittal – Scope for Interference. C D E F

According to the prosecution, the respondents assaulted PW1's brother with various weapons such as gadasa, lathi and spear and when PW1 and his wife, PW2, tried to save him, they too were assaulted and that consequent to the said assault, PW1's brother died while PW1 and PW2 sustained injuries. The trial court convicted the respondents under s.302 r/w s.34 IPC and under s.367 r/w s.34 IPC. The High Court, however, disbelieved the prosecution case and acquitted the G H

A respondents. Hence the present appeal.

Dismissing the appeal, the Court

B HELD: 1.1. PW-1 and PW-2 stated that they were assaulted by the respondents with lathi and Gandasa. The said fact is, however, not mentioned in the FIR. [Para 12] [192-B-C]

C 1.2. PW-1 had two plots in the village where the incident took place. There is no mention in the FIR to indicate in which of the two plots the alleged incident had taken place. What is mentioned in the FIR is that the incident had taken place at the disputed land. The Investigating Officer also could not enlighten and state and clarify in his deposition in which of the two plots the incident had actually taken place. [Para 13] [192-E-G]

D 1.3. Why PW-2 was not brought to the hospital along with PW1's brother and why the Investigating Officer did not take any step to get PW-2 admitted to the hospital has not been explained at all in his statement although he had stated that he visited the place of occurrence. No thumb impression of PW1 was obtained on the FIR or in the Entry made at the time of the registration of the case. In view of the aforesaid position, the High Court came to the finding that the FIR of the case was transcribed on the next date, that is, after the Investigation Officer visited the site and not at the time when the prosecution alleged to have done. [Para 14] [192-G-H; 193-A-C]

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G 1.4. Evidence of PW-2 was not accepted by the High Court for various reasons. One of the grounds on which her statement was not accepted was that she made contradictory statement in the trial inasmuch as she had stated at one stage that the Investigating Officer stayed at the spot of occurrence for two hours after fall of

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darkness and then again stated that he stayed there throughout the night. The aforesaid statement of PW-2 is also contradictory to the statement made by PW-1, her husband. There are many other vital contradictions in her deposition which are pointed out and noted by the High Court. [Para 15] [193-C-F]

1.5. Similarly, the deposition of PW-3 was also not believed by the High Court on the ground that his statement is also full of contradictions. He had stated at one stage in his statement that at the time of the incident, PW-1 and PW-2 were harvesting the field and cutting the crops but at the later stage he stated that deceased (PW1's brother) was leveling his field for collecting harvesting crop. If PW-1 and PW-2 were harvesting the crop they were using some instruments and doing the same with the help of their respective instruments and, therefore, the evidence of PW-1 and PW-2 that they had no weapons in their hands could be belied by the aforesaid statement. At another stage he stated that PW1's brother was not leveling the land. His statement is also contradictory in respect of the alleged use of weapons by the three accused persons when the same is pitted against the statements of PW-1 and PW-2 in that regard.[Para 16] [193-F-H; 194-A]

1.6. The medical report clearly indicate that the doctor did not find any Gandasa injury either on the body of the deceased or on the body of PW-1 and PW-2 who were stated to be injured witnesses. [Para 17] [194-B]

2.1. The number of contradictions, referred to by High Court in its judgment, in respect of all the witnesses definitely make out a case of plausible view which could be deduced from the evidence on record. Moreover, the High Court has given detailed reasons for disbelieving the prosecution case and for acquitting the accused

A persons. [Para 17] [194-B-C]

2.2. When on the basis of the evidence on record two views could be taken – one in favour of the accused and the other against the accused – the one favouring the accused should always be accepted. [Para 18] [194-D-E]

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2.3. In the present case, it is also not clearly established from the records as to who was in possession of the property in question where the occurrence had taken place. In view of the aforesaid situation and the two possible views taken by the courts below – one taken by the trial court and the other taken by the High Court – and the view taken by the High Court being a plausible view, no ground is found to interfere with the order of acquittal passed by the High Court. [Para 19] [195-E-G]

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Chandrappa v. State of Karnataka (2007) 4 SCC 415, relied on.

Case Law Reference:

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(2007) 4 SCC 415 relied on Para 18

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 786 of 2001.

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From the Judgment & Order dated 24.05.2000 of the High Court of Judicature at Allahabad in Criminal Appeal No. 2807 of 1980.

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Sahdev Singh, Mukesh Verma and Chandra Prakash Pandey for the Appellants.

Shree Pal Singh, Rahul Singh and Rama Rao for the Respondents.

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The Judgment of the Court was delivered by

DR. MUKUNDAKAM SHARMA, J. 1. This appeal is directed against the judgment and order of acquittal passed by the High Court of Allahabad whereby and whereunder the High Court acquitted Nandu Vishwakarma, Kalu and Laloo from the charges under Section 302 of Indian Penal Code (hereinafter referred to as 'the IPC') read with Section 34 and also under Section 367 read with Section 34 IPC.

2. Before dealing with the rival contentions raised on behalf of the parties and in order to appreciate the said contentions it would be necessary to state a few facts leading to the registration of the aforesaid criminal case.

3. Dangar Yadav, who is the elder brother of informant PW-1 (Prithivi Pal), and Gujrati Devi (PW-2), wife of the informant are residents of village Samraha, Police Station Karchana. The respondents who are accused in the present case are residents of another village namely village Dubawal, Police Station Sarai Inayat. There is no dispute with regard to the fact that both the informant side as also the accused are involved in litigation pertaining to some plots of land in Kachhar village of Leelapur which is a separate village than the village in which the informant party reside and also from the village where the accused party reside.

4. There was an incident of mutual assault (marpit) on 26th February, 1979 at about 12.00 O' clock. It is alleged in the first information report (for short 'the FIR') that the informant Prithivi Pal (PW-1) and his wife Gujrati Devi (PW-2) were engaged in harvesting their crops in village Kachhar. Around noon, the three alleged accused persons namely Nandu Vishwakarma, Kalu and Laloo armed with Gandasa, lathi and spear respectively reached the scene of occurrence and started assaulting Dangar Yadav. Dangar Yadav raised an alarm whereupon the two witnesses namely Prithivi Pal (PW-1) and his wife, Gujrati Devi (PW-2), who were present in the vicinity tried to save him but in the process they were also assaulted by the aforesaid

A accused persons.

B 5. Consequent to the said assault caused by the aforesaid three accused persons, Dangar Yadav died at the spot and Gujrati Devi (PW-2) also fell down in the field. An oral report of the incident was lodged at about 5.30 p.m. by Prithivi Pal (PW-1) at Police Station Sarai Inayat. On the basis of the aforesaid report, an FIR being Crime No. 50 of 1979 was recorded and the investigation was started by the police. After completion of the investigation the police submitted the charge-sheet against the respondents herein on the basis of which charges were framed and they were tried. The respondents pleaded not guilty and stated that they were falsely implicated in the said case due to the litigation which is pending between the parties.

D 6. In the trial, the prosecution examined a number of witnesses. After completion of the trial, the learned trial court found all the respondents guilty of the charges against them and convicted all three of them for the offence under Section 302 read with Section 34 IPC and also under Section 367 read with Section 34 IPC and they were sentenced to undergo life imprisonment for the offence under Section 302/34 IPC and for rigorous imprisonment for five years under Section 367/34 IPC which was to run concurrently.

F 7. Being aggrieved by the aforesaid judgment and order of conviction the respondents filed an appeal before the High Court of Allahabad. After hearing the appeal the High Court passed an order on 24.05.2000 acquitting all the respondents of the charges under Section 302/34 IPC as also under Section 367/34. While passing the order of acquittal various reasons have been given and recorded by the High Court.

G 8. All the aforesaid grounds and the findings recorded by the High Court are under challenge in this appeal which has been filed by the State. We have heard Mr. Sahdev Singh, Public Prosecutor appearing for the State of U.P. as also Mr. H Shree Pal Singh, Advocate appearing for the respondents.

9. The Public Prosecutor very forcefully submitted that in view of the clear statement of the eye-witnesses namely Prithivi Pal (PW-1) and Gujrati Devi (PW-2) in the aforesaid assault and mutual marpit the order passed by the High Court is not tenable on the face of it and their statement should not have been disbelieved by the High Court. It was also submitted that the discrepancies which are referred to by the accused persons are minor discrepancies which do not in any manner affect the substratum of the prosecution case. Therefore, the said minor discrepancies should have been ignored by the High Court. He next submitted that because the deceased had no Gandasa injury on his body the same would not belie entirely the prosecution's story particularly in view of the fact that the witnesses have explained that though the accused persons tried to assault Dangar with Gandasa but the same did not hit him. He further submitted that the High Court committed a manifest error of law and facts in holding that probably the occurrence had taken place at night and that what is put forth by the prosecution as its case is a concocted story.

10. The aforesaid submissions were strongly refuted by the counsel appearing for the respondents. Having submitted before us that there is a total contradiction of medical evidence and the ocular evidence it was also submitted that if Gujrati Devi (PW-2) was injured in the mutual assault (marpit), she would have been taken to the hospital and admitted thereto when the deceased was taken to the hospital. But admittedly, she was admitted to the hospital only on the next day in respect of which also there is some doubt. He further submitted that in view of the contradictions in the statements of the witnesses, the prosecution story was rightly disbelieved by the High Court. It was also submitted by him that if two views are possible to be drawn up from the same set of facts and the view taken by the High Court is a plausible view, in that event the said order of acquittal should not be interfered with.

11. We have considered the aforesaid submissions in the

A light of the record of the case and proceed to analyse the same and thereafter giving our findings and reasons thereon.

B 12. Prithivi Pal (PW-1) is the informant/complainant and is the brother of Dangar Yadav, the deceased whereas Gujrati Devi (PW-2) is the wife of PW-1. These two witnesses stated that they were assaulted by the respondents with lathi and Gandasa. The said fact is, however, not mentioned in the FIR. The incident had taken place in the village Kachhar but neither the informant party nor the accused are residents of the said village. There is no dispute that there is some litigation pending between the parties in respect of the said land.

D 13. The High Court has found on appreciation of evidence on record that the accused-respondents had won the case against the deceased from the court of Deputy Collector whereas the appeal against the same was won by the deceased. It also transpires from the record that the accused-respondent No. 1 namely Nandu Vishwakarma had obtained a stay in the appeal which was continuing till the date of occurrence. The informant (PW-1) had two plots in the village Kachhar. There is no mention in the FIR to indicate in which of the two plots the alleged incident had taken place. What is mentioned in the FIR is that the incident had taken place at the disputed land. The Investigating Officer also could not enlighten and state and clarify in his deposition in which of the two plots the incident had actually taken place. It is disclosed from the records that there is some evidence to indicate that the accused persons are in possession of the land where the incident had taken place.

G 14. The medical examination of Gujrati Devi (PW-2) was conducted on 27th February, 1979 at about 7.15 p.m. which is the next morning of the incident. Why PW-2 was not brought to the hospital along with Dangar Yadav, the deceased and why the Investigating Officer did not take any step to get PW-2 admitted to the hospital has not been explained at all in his statement although he had stated that he has visited the place

of occurrence at night. It is an admitted position that Head Moharrir (PW-5) stated that he did not send the copy of the checked FIR on 27/28.02.1979 to the Judicial Magistrate. No thumb impression of the informant was obtained on the FIR or in the Entry made at the time of the registration of the case. In view of the aforesaid position, the High Court came to the finding that the FIR of the case was transcribed on the next date, that is, after the Investigation Officer visited the site and not at the time when the prosecution alleged to have done.

15. Evidence of Gujrati Devi (PW-2) was not accepted by the High Court for various reasons. One of the grounds on which her statement was not accepted was that she made contradictory statement in the trial in as much as she had stated at one stage that the Investigating Officer stayed at the spot of occurrence for two hours after fall of darkness and then again stated that he stayed there throughout the night. In her deposition she deposed that she reached Kotwa hospital at about 12.00 p.m. in the night but the injury report prepared by the hospital indicates that she was medically examined in the morning. The aforesaid statement of Gujrati Devi (PW-2) is also contradictory to the statement made by Prithivi Pal (PW-1), her husband. There are many other vital contradictions in her deposition which are pointed out and noted by the High Court.

16. Similarly, the deposition of Shiv Murat (PW-3) was also not believed by the High Court on the ground that his statement is also full of contradictions. He had stated at one stage in his statement that PW-1 and PW-2 were harvesting the field and cutting the crops but at the later stage he stated that the deceased was leveling his field for collecting harvesting crop. If PW-1 and PW-2 were harvesting the crop they were using some instruments and doing the same with the help of their respective instruments and, therefore, the evidence of PW-1 and PW-2 that they had no weapons in their hands could be belied by the aforesaid statement. At another stage he stated that Dangar Yadav was not leveling the land. His statement is

A also contradictory in respect of the alleged use of weapons by the three accused persons when the same is pitted against the statements of PW-1 and PW-2 in that regard.

B 17. The medical report placed before us clearly indicate that the doctor did not find any Gandasa injury either on the body of the deceased or on the body of PW-1 and PW-2 who were stated to be injured witnesses. The number of contradictions, which are referred to by the High Court in its judgment, in respect of all the witnesses definitely make out a case of plausible view which could be deduced from the evidence on record. Moreover, the High Court has given detailed reasons for disbelieving the prosecution case and for acquitting the accused persons.

C 18. It is a settled principle of law that when on the basis of the evidence on record two views could be taken – one in favour of the accused and the other against the accused – the one favouring the accused should always be accepted. This Court in the case of *Chandrappa v. State of Karnataka*, (2007) 4 SCC 415, at page 432 observed as follows :

E “42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

F (1) An appellate court has full power to review, reappraise and reconsider the evidence upon which the order of acquittal is founded.

G (2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

H (3) Various expressions, such as, “substantial and compelling reasons”, “good and sufficient grounds”, “very

strong circumstances”, “distorted conclusions”, “glaring mistakes”, etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of “flourishes of language” to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. *Firstly*, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. *Secondly*, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.”

19. In the present case, it is also not clearly established from the records as to who was in possession of the property in question where the occurrence had taken place. In view of the aforesaid situation and the two possible views taken by the courts below – one taken by the trial court and the other taken by the High Court – and the view taken by the High Court being a plausible view, we find no ground to interfere with the order of acquittal passed by the High Court.

20. Accordingly, this appeal has no merit and is, therefore, dismissed.

B.B.B.

Appeal dismissed.