A CHHOTANNEY & ORS.

v.

STATE OF UTTAR PRADESH & ORS.

CRIMINAL APPEAL NO. 441 OF 2002

FEBRUARY 18, 2009

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[DR. ARIJIT PASAYAT AND ASOK KUMAR GANGULY, JJ.]

Evidence Act, 1872 :

C *s. 3 – Testimony of eye witness – Evidentiary value of – Held: When eye witnesses account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive – Eye witnesses account requires careful independent assessment – On facts, there* D *was no conflict between ocular evidence and medical evidence – Thus, conviction of main accused u/s. 302 r/w s. 201 and s.148 and co-accused u/s. 302 r/w s.149 and s.147 IPC by courts below justified.*

Criminal Law – Evidence – Standard of proof – Degree E *of proof and probability – Measurement of – Explained.*

Prosecution case was that on account of previous enmity appellant no. 1 and 4 chopped the head of deceased on exhortation of appellant no. 2. Two prosecution witnesses were the eye witness to the F **incident of murder. The courts below convicted appellant no. 1 and 4 u/s. 302 r/w s. 201 and 148 and appellant no. 2 u/s. 302 r/w s. 149 and 147 IPC. Hence the present appeal.**

Dismissing the appeal, the Court

G **HELD: 1. The plea that the medical evidence is at variance with ocular evidence, it would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eye-witnesses' account which had to be tested independently and not treated as**

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the "variable" keeping the medical evidence as the "constant". There was no conflict between the ocular evidence and the medical evidence. [Paras 6 and 10] [762-C; 764-C] A

2.1 Where the eye-witnesses' account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive. Witnesses are the eyes and ears of justice. Hence the importance and primacy of the quality of the trial process. Eye witnesses' account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility. Evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be credit-worthy; consistency with the undisputed facts; the 'credit' of witnesses; their performance in the witness-box; their power of observation etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation. [Para 7] [762-D] B C D E

2.2 A person has, no doubt, a profound right not to be convicted of an offence which is not established by the evidential standard of proof beyond reasonable doubt. Though this standard is a higher standard, there is, however, no absolute standard. What degree of probability amounts to 'proof' is an exercise particular to each case. [Para 8] [762-G] F

"The Mathematics of Proof II": Glanville Williams: Criminal Law Review, 1979, by Sweet and Maxwell, p.340 (342) – referred to. G

2.3 Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth. To constitute reasonable doubt, it must be free from an over emotional response. H

A **Doubts must be actual and substantial doubts as to the guilt of the accused persons arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt; but a fair doubt based** B **upon reason and commonsense. It must grow out of the evidence in the case. [Para 9] [763-E]**

2.4 The concepts of probability, and the degrees of it, cannot obviously be expressed in terms of units to be mathematically enumerated as to how many of such units C **constitute proof beyond reasonable doubt. There is an unmistakable subjective element in the evaluation of the degrees of probability and the quantum of proof. Forensic probability must, in the last analysis, rest on a robust common sense and, ultimately, on the trained intuitions** D **of the judge. While the protection given by the criminal process to the accused persons is not to be eroded, at the same time, uninformed legitimization of trivialities would make a mockery of administration of criminal justice. [Para 10] [763; 764-G]**

E *State of U.P. v. Krishna Gopal and Anr. AIR 1988 SC 2154; State of Madhya Pradesh v. Dharkole @ Govind Singh and* Ors. 2004 (11) SCC 308 – relied on.

Case Law Reference

F **AIR 1988 SC 2154**	**Relied on.**	**Para 10**
2004 (11) SCC 308	**Relied on.**	**Para 10**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 441 of 2002

G From the final Judgement and Order dated 19.11.1999 of the High Court of Judicature at Allahabad, Lucknow in Criminal Appeal No. 291 of 1980.

B.S. Jain, Ajay Veer Singh Jain, Mamta Jain, Mankish H Raghav, Vipin Gupta, Goodwil Indeevar for the Appellant.

Pramod Swarup, Manoj Kr. Dwivedi Gunnam Venkateswara for the Respondents. A

The Judgement of the Court was delivered by

DR. ARIJIT PASAYAT, J

1. Challenge in this appeal is to the judgment of a Division Bench of the Allahabad High Court dismissing the appeal filed by the appellants and respondents 2 and 3 who were co-accused persons. Respondent No.2 Tahir, appellant No.3-Azmat Ullah, appellant No.1-Chhotanney and appellant No.4-Mubarak were convicted by learned IV Additional Sessions Judge, Sitapur for offences punishable under Section 302 read with Section 201 and 148 of the Indian Penal Code, 1860 (in short the 'IPC'). Appellant No.2-Liyakat and respondent No.3-Abdullah were found guilty of offence punishable under Section 302 read with Section 149 IPC and Section 147 IPC. B C D

2. Prosecution version in a nutshell is as follows:

On 18.11.1977 one Zahid Khan (hereinafter referred to as the 'deceased') was killed. and one Azhar Beg alias Gobrey, father of appellant Azmatullah was done to death earlier and in that murder case, deceased Zahid Khan was also one of the accused. Zahid Khan was released on bail a few months before the occurrence of 18.11.1977. Ever since the release of Zahid Khan on bail, the accused had an eye on him and wanted to liquidate him. On 18.11.1977 at about 2 p.m. deceased Zahid Khan followed by his father Khadim Khan (now dead), Samiullah Khan and Salam Khan was coming back on foot with a cycle loaded with two bags of maize after completing the process of sowing of wheat in his plot situating within the limits of village Bangh Bhari. Accused Tahir and Azmatullah fired at him. Appellants Chhotanney and Mubarak chopped off upper portion of his head with their respective 'Banka' on the exhortation of appellant Liyakat. It was also alleged that the chopped portion of the head was handed over to the accused Abdullah and thereafter appellant Mubarak, Chhotanney, Azmat Ullah and E F G H

A accused Tahir Beg dragged the dead body of Zahid Khan for some distance with a view to throw away the same in a nearby river. But due to the arrival of witnesses they did not succeed in taking the dead body to the river. It was also claimed that Hakik Khan and Nasrullah Khan had also come on the spot during the B course of the occurrence and had witnessed the incident of murder. According to the prosecution case, the accused ran away with the severed part of the head.

Khadim Khan lodged written report on the same clay at 1755 hrs. with P.S. Sadarpur of district Sitapur in which he C named all the six accused persons. S.I. B.N. Mishra was present at the time the FIR was lodged with the police station. He took up the investigation. After recording the statement of informant Khadim Khan and Qaiyame Khan he rushed to the spot and reached there late in the evening. On reaching there, he found D the dead body lying in a "Galiyara" at a distance of about 2½ furlongs from village Benjh Bhari. He prepared the inquest report (Ext. Ka 5), prepared the diagram of the dead body and sent the dead body to the District Head Quarter through constable Shiv Singh, for post mortem examination. The upper portion of E the head was missing. He inspected the place of occurrence in the light of patromax; a bicycle having blood stains on the left paddle, two bags of maize were found lying on the spot and were given in the Supurdagi of Khadim Khan, after necessary formalities. He also observed the evidence of dragging of the F dead body. Blood stained and simple earth were collected and necessary Fard was prepared. The Investigating Officer also recovered a piece of blood stained bone, blood-stained hair and grass. The place of occurrence was a user land having grass on it and a site plan was prepared. On the next day, statements G of Hakik, Nasrullah Khan, Salam Khan and Samiullah were recorded and a search for the named accused was made. The accused were absconding. The served portion of the head could not be traced out. The accused surrendered in court on different dates and their statements were recorded in jail.

H On post mortem examination that took place on

20.11.1977 at 11.30 a.m. Dr. Om Prakash found various ante-mortem external injuries on the body of the deceased. A

On the basis of information lodged, investigation was undertaken and on completion thereof charge sheet was filed. As the accused persons pleaded innocence, trial was held. B

The trial Court placing reliance on the evidence of the eye witnesses PWs 1, 2 and 3 directed conviction as noted above. In appeal, it was primarily contended that PWs 2 and 3 have not identified the accused persons and the medical evidence was in conflict with the ocular evidence. The High Court did not accept the stand and upheld the conviction. C

3. In the present appeal the stand taken by the appellants before the High Court was re-iterated. It is pointed out by learned counsel for the appellants that appellant No.3-Azmat Ullah has died in the meantime, so also respondents 2 and 3- Tahir and Abdullah respectively. It appears that there were three eye witnesses PWs 1, 2 and 3. The stand that PW-3 could not recognize the accused is not factually correct as it is evident from a bare reading of the evidence of PW-3. D

4. It is also submitted that the ocular evidence is at variance with the medical evidence. It is submitted that the so called eye witnesses stated that firing was done twice, but there are six injuries. It is to be noted that the trial Court and the High Court have clearly stated that the doctor who conducted post mortem did not properly visualize the location of the injuries. The doctor did not know the places from where the pellets were recovered. As a matter of fact the evidence on records shows that four pellets were recovered. E F

5. It has also been stated by learned counsel for the appellants that the injuries could not have been caused by lathis. According to the prosecution, accused Liyakat and Abdullah held lathis. This stand is also without any substance. It is stated by the doctor that the injuries were possible on account of assault by lathi. It was also submitted that according to the prosecution, G H

A the dead body was dragged but there was no injury. As highlighted by both the trial Court and the High Court that the place was a grassy land. Therefore, there was no possibility of injury on account of dragging when the person was fully clothed. The doctor's evidence appears to be little confusing. He has
B stated that the injuries can be possible by 2, 3 or 5 shots.

6. Coming to the plea that the medical evidence is at variance with ocular evidence, it has to be noted that it would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eye-witnesses'
C account which had to be tested independently and not treated as the "variable" keeping the medical evidence as the "constant".

7. It is trite that where the eye-witnesses' account is found credible and trustworthy, medical opinion pointing to alternative
D possibilities is not accepted as conclusive. Witnesses, as Bentham said, are the eyes and ears of justice. Hence the importance and primacy of the quality of the trial process. Eye witnesses' account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence, including
E medical evidence, as the sole touchstone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be credit-worthy; consistency with the undisputed facts; the 'credit' of the
F witnesses; their performance in the witness-box; their power of observation etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation.

G 8. A person has, no doubt, a profound right not to be convicted of an offence which is not established by the evidential standard of proof beyond reasonable doubt. Though this standard is a higher standard, there is, however, no absolute standard. What degree of probability amounts to 'proof' is an exercise particular to each case? Referring to what degree of
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probability amounts to 'proof' is an exercise the inter-dependence of evidence and the confirmation of one piece of evidence by another, a learned author says: (See "The Mathematics of Proof II": Glanville Williams: Criminal Law Review, 1979, by Sweet and Maxwell, p.340 (342).

> "The simple multiplication rule does not apply if the separate pieces of evidence are dependent. Two events are dependent when they tend to occur together, and the evidence of such events may also be said to be dependent. In a criminal case, different pieces of evidence directed to establishing that the defendant did the prohibited act with the specified state of mind are generally dependent. A junior may feel doubt whether to credit an alleged confession, and doubt whether to infer guilt from the fact that the defendant fled from justice. But since it is generally guilty rather than innocent people who make confessions and guilty rather than innocent people who run away, the two doubts are not to be multiplied together. The one piece of evidence may confirm the other."

9. Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth. To constitute reasonable doubt, it must be free from an over emotional response. Doubts must be actual and substantial doubts as to the guilt of the accused persons arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt; but a fair doubt based upon reason and commonsense. It must grow out of the evidence in the case.

10. The concepts of probability, and the degrees of it, cannot obviously be expressed in terms of units to be mathematically enumerated as to how many of such units constitute proof beyond reasonable doubt. There is an unmistakable subjective element in the evaluation of the degrees of probability and the quantum of proof. Forensic probability

A must, in the last analysis, rest on a robust common sense and, ultimately, on the trained intuitions of the judge. While the protection given by the criminal process to the accused persons is not to be eroded, at the same time, uninformed legitimization of trivialities would make a mockery of administration of criminal
B justice. This position was illuminatingly stated by Venkatachaliah, J. (as His Lordship then was) in *State of U.P. v. Krishna Gopal and Anr.* (AIR 1988 SC 2154) and *State of Madhya Pradesh v. Dharkole @ Govind Singh & Ors.* (20004 (11) SCC 308). Apparently, there was no conflict between the ocular evidence
C and the medical evidence as contended by learned counsel for the appellant.

11. Above being the position, we find no merit in this appeal which is accordingly dismissed.

N.J. Appeal dismissed.