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DURBAL

v.

STATE OF U.P.

(Criminal Appeal No. 1398 of 2008)

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JANUARY 25, 2011

**[B. SUDERSHAN REDDY AND SURINDER SINGH
NIJJAR, JJ.]**

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Penal Code, 1860 – s.302 – Testimony of PW-1 that the accused persons assaulted his father and nephew with knives and spears (bhalas), which led to their death – Three accused – Suggested previous enmity between the accused and PW1

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– Incident occurred in the dead of night during mid winter – Witnesses claimed to have identified the accused with the aid of lantern and torches – Trial court acquitted all the accused – High Court, however, relied upon the evidence of PW-1, and reversed the order of acquittal – Meanwhile A-1 and A-3 accused died – Conviction of A-2 challenged before Supreme Court – Held: When the suggested enmity, if at all, was

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between the accused and PW 1, there was no reason as to why the accused should attack the deceased and leave PW-1 unscratched – If PWs 1, 2 and 3 were present at the scene of offence as stated by PW 1, there was no explanation forthcoming as to why three of them put together could not

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resist the accused in attacking the deceased – The lantern and the torch lights though allegedly seized were not produced in the Court – The seizure memos did not contain the crime number and other recovery particulars – In the circumstances, it became highly doubtful as whether PWs 1,

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2 and 3 actually had torch lights in their hands as stated by them – The evidence of PW 1 did not inspire any confidence and the presence of PWs 2 and 3 at the scene of offence was doubtful – The trial Court rightly gave the benefit of doubt to the accused – The view taken by trial Court was plausible and

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could not be held perverse – High Court ought not to have interfered with the judgment of the trial Court merely because there was a possibility of taking a different view – A-2 entitled to benefit of doubt and acquitted.

According to the prosecution, pursuant to an earlier altercation between the accused and PW-1 over fishery rights in respect of the village pond, the accused persons assaulted the father and nephew of PW-1 with knives and spears (bhalas), which led to their death. The incident allegedly occurred in the dead of night during the mid winter. PW 8, the Investigating Officer, recorded statements of the witnesses and collected lantern and torches which were the alleged source of light in which the witnesses claimed to have seen the occurrence. The accused were charged of having committed offences under Sections 147, 148, 302/149, IPC.

The trial Court found the evidence of PW-1 to be highly doubtful since he was not attacked by the accused; and also doubted the presence of PW-2 at the scene of offence. The trial Court also disbelieved the evidence of PW-3 who is a close relative of PW 1. The trial Court further found that the lantern and torch lights were not produced in the Court and the seizure memos of lantern, torches did not contain the crime number and came to the conclusion that since the offence occurred in the dead of night in the last week of December, the witnesses could not have identified the assailants except with the aid of lantern and torches, whose seizure itself was doubtful and accordingly acquitted all the accused.

The High Court, however, relied upon the evidence of PW-1, and reversed the order of acquittal and sentenced the accused to life imprisonment, holding that non-production of the lantern and the torch lights in the Court was inconsequential.

A During pendency of appeal filed by the State in the High Court, A-1 and A-3 died and the appeal against them was ordered to be abated. The instant appeal was preferred by A-2.

B Allowing the appeal, the Court

C HELD:1. Though the whole prosecution case is that on account of the dispute over fishery rights, the accused bore a grudge against PW 1 and even threatened him with dire consequences, it is highly doubtful that there was any dispute over the fishery rights itself. The only person apart from PW 1 who speaks about the dispute is PW 4 who was examined by the police after more than two months of the occurrence. It is true, motive for committing the crime pales into insignificance in a case where the prosecution story rests upon the evidence of eyewitnesses. But, for the purposes of evaluating and appreciating the evidence, the sequence of events cannot be ignored. [Para 11] [1072-C-D]

E 2. In any event, there was no enmity whatsoever between the deceased and the accused. When the suggested enmity, if at all, was between the accused and PW 1, there does not appear to be any reason as to why the accused should attack the deceased and leave PW 1 unscratched. Admittedly, there was not even an attempt by the accused to attack PW 1. This story somehow appears unbelievable and difficult to accept. At any rate, there is no evidence adduced by prosecution in this regard. Admittedly A-1, on reaching the scene of occurrence on that fateful night, challenged PW 1 to open the door. PW 1 woke up and reached the door with the torch and lathi in his hand raising alarm. On hearing the cries, PW 3 and PW 2 reached the spot with torch lights in their hands. PW 1 opened the door only after the said witnesses reached the scene of offence and saw all the

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accused along with two or three persons assaulting his father and nephew with knives and spears. PW 1 made an omnibus allegation that all the accused attacked the deceased indiscriminately with the weapons in their hands. If PWs 1, 2 and 3 were present at the scene of offence as stated by PW 1, there is no explanation forthcoming as to why three of them put together could not resist the accused in attacking the deceased. [Para 12] [1072-E-H; 1073-A-B]

3. PW 2 in his evidence stated that two of the accused were armed with knives and two with lathis. He is alleged to have witnessed the incident with the assistance of the torch lights in his hand. He also levelled omnibus allegations against all the accused that they were inflicting knife and spear injuries on the deceased. It is in his evidence that about two or three persons were standing outside the verandah while actually the accused were inflicting knife and spear injuries over the victims. Those other individuals remained unidentified. According to him, he himself and PWs 1 and 3 were also armed with lathis but no attempts were made to resist the accused who were indulging in the acts of assault. In the circumstances, it is doubtful to believe PW 2 to have actually witnessed the incident and recognized the accused with the help of torch lights. [Para 13] [1073-C-E]

4. PW 3 stated in his evidence that he had purchased the house along with PW 1. He speaks about the presence of PW 2 and one other witness who was not examined and does not speak about presence of any other person including that of PW 1 at the scene of offence. He also made indefinite allegations against all the accused as inflicting knife and spear blows on the victims. [Para 14] [1073-E-G]

5. All the eyewitnesses had stated in their evidence

A that lantern was burning in the verandah and PW 1, PW
B 2 and PW 3 were having torch lights in their hands and
only with the help of the lantern and the torch lights they
C could recognize and identify the assailants. The lantern
and the torch lights though were alleged to have been
D seized were not produced in the Court. The seizure
E memos did not contain the crime number and other
recovery particulars. In the circumstances, it becomes
F highly doubtful as to whether those torch lights and
lantern were actually seized during the course of
investigation by the Investigating Officer. The
Investigating Officer, PW 8 did not explain as to why the
crime number was not noted on the seizure memos and
as to why the material objects, if at all seized, were not
produced in the Court. The very fact that the lantern and
torch lights were pressed into service for the purpose of
identifying the accused, itself suggests that it was a
pitched dark night during the mid winter and it was not
possible to identify the assailants without the aid of
lantern and torch lights. It is highly doubtful as to whether
PWs 1, 2 and 3 actually had torch lights in their hands
as stated by them, in the absence of their recovery details
in the seizure memo and their non-production before the
Court. Moreover, PW 1 refused to state as to whether the
assailants were covering their faces with chadar. His
evidence does not inspire any confidence. [Para 15]
[1073-G-H; 1074-A-E]

6. These all are the factors which give rise to doubt
as to the presence of PWs 2 and 3 at the scene of offence.
The trial Court rightly entertained the doubt and
G accordingly gave the benefit of doubt to the accused. It
is a plausible view taken by the trial Court which could
not be held to be a perverse one. Such a view has been
taken by the trial Court after appreciation of the evidence.
The High Court ought not to have interfered with the
H judgment of the trial Court merely because there is a

possibility of taking a different view other than the one taken by the trial Court. The appellant (A-2) is entitled to the benefit of doubt. It would be unsafe to convict the accused on the evidence which is not free from doubts. The appellant is thus acquitted of all the charges and his conviction and sentence is accordingly set aside. [Paras 16 and 17] [1074-F-H; 1075-A-B]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1398 of 2008.

From the Judgment and Order dated 10.10.2007 of the High Court of Judicature at Allahabad in Criminal Appeal No. 2514 of 1982.

Sandhya Goswami, M.P.S. Tomar, Jabar Singh, Vipul Maheshwari and H.C. Kharbandha for the Appellant.

Savitri Pandey, Ajay Singh and Shrish Kumar Misra for the Respondent.

The Judgment of the Court was delivered by

B. SUDERSHAN REDDY, J. 1. This appeal under Section 2(a) of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970 is directed against the judgment of the High Court of Judicature at Allahabad in Criminal Appeal No. 2514 of 1982 whereby the High Court allowed the appeal preferred by the State and accordingly reversed the judgment and order of acquittal passed by the trial Court under Sections 147, 148, 302/149, IPC. The High Court having convicted the accused, sentenced them to life imprisonment.

2. During the pendency of the appeal preferred by the State in the High Court, the accused Awadhoo (A-1) and Birbal (A-3) died and the appeal against them was ordered to be abated. This appeal is preferred by Durbal, accused No. 2.

3. In order to appreciate as to whether the judgment of the High Court reversing the order of acquittal, requires any

A interference at our hands, we may have to notice the prosecution case in brief:

The origin of the prosecution case lies in an altercation between the accused and one Kaldhari (PW 1) alleged to have taken place two days prior to the date of incident on 23rd December, 1979. It is the case of the prosecution that one Ramdhani (not examined) in partnership with Kaldhari (PW 1) had obtained lease of fishery rights in respect of a pond situated in Harirampur village. They had raised fish in the said pond. The accused were claiming right to collect fish from the said pond. Kaldhari (PW 1) along with his companions had gone to village Harirampur for the collection of the fish from the pond. The accused along with their associates had also assembled there to collect the fish from the pond. Their attempts were resisted by Kaldhari (PW 1) resulting in an altercation. Awadhoo (A 1), since deceased, threatened Kaldhari (PW 1) of his life. This incident had taken place in the presence of Madan (PW 4) and one Sidhu (not examined).

4. It is further the case of the prosecution that on 24th December, 1979 at about 10.30 p.m. in the night while Kaldhari (PW 1) was sleeping in his house with its door bolted from inside, his father Abhi Raj (deceased) and nephew Bal Kishun (deceased) were sleeping on a takhat in the verandah, all of a sudden, Abhi Raj and Bal Kishun (both deceased) raised alarm and in the meanwhile, someone started thumping on the door of the room where Kaldhari (PW 1) was sleeping. As he was about to open the door, he could hear Awadhoo (A 1) commanding him to open the door. Kaldhari (PW 1) identified him from his voice. Kaldhari then started raising alarm from inside the house. This attracted Sonai (PW 3), Sheo Kumar (PW 2) and Lal Mani (not examined) from the neighbourhood who reached the place of occurrence flashing torch lights. On seeing the witnesses, Kaldhari gathered courage and opened the door of his room and came into verandah. He saw that all the four accused accompanied by two or three unknown associates were assaulting his father Abhi Raj and nephew Bal

Kishun with knives and bhalas. On finding that the villagers were gathering at the scene of offence, the miscreants retreated and before turning away from the place of occurrence, they also opened fire. The police station, as per chik FIR is about 20 kilometers away from the place of occurrence. Kaldhari (PW 1) could not go to the police station in that night. In the early morning he got the information registered. At that time, Ram Awadh Chaudhary (PW 8), the Investigating Officer, was present at the police station who having registered the First Information Report, proceeded to the scene of offence and commenced the investigation. He recorded statements of the witnesses and collected lantern and torches which were the alleged source of light in which the witnesses claimed to have seen the occurrence. He also collected blood stained earth and other material including an empty cartridge shell and some pellets of the shot which was fired by the miscreants on the spot. The dead bodies were then sent for autopsy after holding inquest and due formalities.

5. Dr. P.N. Awasthi (PW 5) performed the autopsy on 26th December, 1979 and has found the following ante mortem injuries on the body of Abhi Raj who was aged about 70 years:

1. Punctured wound clean cut margins $1\frac{1}{2}$ " x pleural cavity deep, 3" from middle line on front of chest.
2. Punctured wound clean cut margins $1\frac{1}{2}$ " x $\frac{1}{2}$ " x peritoneal cavity deep, just below lower and sternum.
3. Punctured wound with clean cut margins $1\frac{1}{4}$ " x $\frac{1}{4}$ " x pleural cavity deep on right side front of chest in between 3rd and 4th rib 4" from middle line.
4. Punctured wound with clean cut margins $1\frac{1}{4}$ " x $\frac{1}{4}$ " x pleural cavity deep 1" below injury No. 3.
5. Punctured wound with clean cut margins $1\frac{1}{2}$ " x $\frac{1}{2}$ "

A x pleural cavity deep, on right side chest 6" below right axilla.

Cause of death, in his opinion was shock and hemorrhage as a result of ante mortem injuries and death had occurred two days prior to the time of autopsy.

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6. On the same day, post mortem examination of the body of Bal Kishun, a boy aged about 11 years revealed the following ante mortem injuries:

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1. Abrasion $\frac{1}{4}$ " x $\frac{1}{4}$ " on front of left side chest 1" below left nipple.

2. Incised wound $\frac{1}{4}$ " x $\frac{1}{4}$ " x muscle deep on front of right side chest $\frac{1}{2}$ " below right nipple.

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3. Twelve punctured wounds with clean cut margins on back of whole of chest in an area of 8" x 8" measuring from $1\frac{1}{2}$ " x $\frac{1}{2}$ " plural cavity deep to 1" x $\frac{1}{4}$ " x pleural cavity deep, pleura was cut underneath.

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In the opinion of the Doctor, the death had occurred two days before on account of ante mortem injuries and the injuries could have been caused by sharp edged weapons like knife and bhala.

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7. The prosecution in support of its case examined Kaldhari (Pw 1), Sheo Kumar (PW 2) and Sonai (PW 3) apart from Dr. P.N. Awasthy (PW 5) and Ram Avadh Chaudhary (PW 8), the Investigating Officer.

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8. The trial Court by its well reasoned judgment acquitted all the accused of the charges. The trial Court found that there was no motive whatsoever for the accused to have attacked the deceased on that fateful night. There was no altercation whatsoever at the pond over fishery rights two days prior to the incident as alleged by the prosecution. The trial Court

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disbelieved Magan (PW 4) who allegedly witnessed the altercation. He was examined by the Investigating Officer after more than two months of the incident. The trial Court also found that PW 4 (Magan) is closely related to Kaldhari (PW 1). Ramdhani, the alleged partner of Kaldhari (PW 1) was not examined. The trial Court also found the evidence of Kaldhari (PW 1) to be highly doubtful. The very fact that Kaldhari (PW 1) was not attacked by the accused is a strong circumstance, according to the trial Court, to doubt the prosecution's case. The trial Court noticed the contradictions in the statement of Kaldhari and accordingly disbelieved his evidence. The trial Court also noticed that Sonai (PW 3) stated that he came out of the house on hearing alarm raised by Abhi Raj (deceased) and found only Sheo Kumar (PW 2) and one Lal Mani (not examined). According to him, no other person was present at the scene of offence. The trial Court, in the circumstances, came to the conclusion that it was extremely doubtful as to the presence of Kaldhari (PW 1) at the scene of offence. The trial Court also doubted the presence of Sheo Kumar (PW 2) at the scene of offence. The trial Court also disbelieved the evidence of Sonai (PW 3) who is a close relative of PW 1. His statement is so vague and the same did not inspire any confidence in the trial Court to accept. The trial Court also found that the lantern and torch lights were not produced in the Court. The seizure memos of lantern (Ext. ka-2), torches (Ext. Ka-3) did not contain the crime number. The trial Court came to the conclusion that since the offence occurred in the dead of night in the last week of December, the witnesses could not have identified the assailants except with the aid of lantern and torches, whose seizure itself was doubtful.

9. The High Court, upon reappreciation of the evidence available on record, mainly relying upon the evidence of Kaldhari (PW 1), came to the conclusion that non-production of the lantern and the torch lights in the Court were of no consequence.

A 10. A short question that arises for our consideration in this appeal is whether the High Court committed any error in relying upon evidence of Kaldhari (PW 1) since the whole prosecution case rests upon his evidence? Whether his evidence is acceptable based on which the High Court convicted the accused?

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D 11. The whole prosecution case is that on account of the dispute over fishery rights, the accused bore a grudge against Kaldhari (PW 1) and even threatened him with dire consequences. Whether there was any dispute over the fishery rights itself is highly doubtful. The only person apart from PW 1 who speaks about the dispute is Magan (PW 4) who was examined by the police after more than two months of the occurrence. It is true, motive for committing the crime pales into insignificance in a case where the prosecution story rests upon the evidence of eyewitnesses. But, for the purposes of evaluating and appreciating the evidence, the sequence of events cannot be ignored.

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H 12. Be it as it may, there was no enmity whatsoever between the deceased and the accused. When the suggested enmity, if at all, was between the accused and Kaldhari (PW 1), there does not appear to be any reason as to why the accused should attack the deceased and leave Kaldhari unscratched. Admittedly, there was not even an attempt by the accused to attack Kaldhari. This story somehow appears unbelievable and difficult to accept. At any rate, there is no evidence adduced by prosecution in this regard. Admittedly Awadhoo (A-1), on reaching the scene of occurrence on that fateful night, challenged Kaldhari (PW 1) to open the door. Kaldhari woke up and reached the door with the torch and lathi in his hand raising alarm. On hearing the cries, Sonai (PW 3) and Sheo Kumar (PW 2) reached the spot with torch lights in their hands. Kaldhari opened the door only after the said witnesses reached the scene of offence and saw all the accused along with two or three persons assaulting his father

Abhi Raj and Bal Kishun with knives and spears. Kaldhari (PW 1) makes an omnibus allegation of all the accused of their attacking the deceased indiscriminately with the weapons in their hands. If PWs 1, 2 and 3 were present at the scene of offence as stated by Kaldhari (PW 1), there is no explanation forthcoming as to why three of them put together could not resist the accused in attacking the deceased.

13. Sheo Kumar (PW 2) in his evidence stated that two of the accused were armed with knives and two with lathis. He is alleged to have witnessed the incident with the assistance of the torch lights in his hand. He also levels omnibus allegations against all the accused that they were inflicting knife and spear injuries on the deceased. It is in his evidence that about two or three persons were standing outside the verandah while actually the accused were inflicting knife and spear injuries over the victims. Those other individuals remained unidentified. According to him, he himself and PWs 1 and 3 were also armed with lathis but no attempts were made to resist the accused who are indulging in the acts of assault. In the circumstances, it is doubtful to believe PW 2 to have actually witnessed the incident and recognized the accused with the help of torch lights.

14. PW 3 is one Sonai who stated in his evidence that he had purchased the house along with Kaldhari (PW 1) from one Swaminath Chaudhary. He speaks about the presence of Sheo Kumar (PW 2) and one Lal Mani (not examined) and does not speak about presence of any other person including that of PW 1 at the scene of offence. He also made indefinite allegations against all the accused as inflicting knife and spear blows on the victims.

15. It is also required to note that all the eyewitnesses had stated in their evidence that lantern was burning in the verandah and Kaldhari (PW 1), Sheo Kumar (PW 2) and Sonai (PW 3) were having torch lights in their hands and only with the help of

A the lantern and the torch lights they could recognize and identify the assailants. The lantern and the torch lights though were alleged to have been seized vide seizure mahazar Exts. Ka-2 and Ka-3 respectively, were not produced in the Court. The seizure memos Ext. Ka-2 and Ka-3 did not contain the crime number and other recovery particulars. In the circumstances, it becomes highly doubtful as to whether those torch lights and lantern were actually seized during the course of investigation by the Investigating Officer. The Investigating Officer (PW 8) did not explain as to why the crime number was not noted on Ext. C Ka-2 and Ka-3 and as to why the material objects if at all seized, were not produced in the Court. The very fact that the lantern and torch lights were pressed into service for the purpose of identifying the accused, itself suggests that it was a pitched dark night during the mid winter and it was not possible to identify the assailants without the aid of lantern and torch lights. D It is highly doubtful as to whether PWs 1, 2 and 3 had actually torch lights in their hands as stated by them, in the absence of their recovery details in the seizure memo and their not production before the Court. Moreover, Kaldhari (PW 1) refused to state as to whether the assailants were covering their faces E with chadar. His evidence does not inspire any confidence.

16. These all are the factors which give rise to doubt in our minds as to the presence of PWs 2 and 3 at the scene of offence. The trial Court rightly entertained the doubt and accordingly gave the benefit of doubt to the accused. It is a plausible view taken by the trial Court which could not be held to be a perverse one. Such a view has been taken by the trial Court after appreciation of the evidence. The High Court, in our considered opinion, ought not to have interfered with the judgment of the trial Court merely because there is a possibility of taking a different view other than the one taken by the trial Court. The appellant, in our considered opinion, is entitled to the benefit of doubt. It would be unsafe to convict the accused on the evidence which is not free from doubts.

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17. For the aforesaid reasons, the impugned judgment of the High Court is set aside and judgment of the trial Court shall stand restored. The appellant is thus acquitted of all the charges and his conviction and sentence is accordingly set aside. He may be set free forthwith unless otherwise required in any other case.

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18. The appeal is allowed accordingly.

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Appeal allowed!