FAHIM KHAN

v.

STATE OF BIHAR NOW JHARKHAND

(Criminal Appeal No. 2081 of 2009)

APRIL 21, 2011

[HARJIT SINGH BEDI AND CHANDRAMAULI KR. PRASAD, JJ.]

PENAL CODE, 1860:

s. 302 – Murder – Victim shot dead by three accused in presence of his mother –Acquittal by trial court – Two accused died during pendency of appeal before High Court – Conviction by High Court of the surviving accused who had fired the shot – Held: Evidence of the mother of the deceased has been supported by other witnesses – Her evidence inspires full confidence – Delay in registration of FIR and sending the special report, explained – Conviction upheld – Code of Criminal Procedure, 1973 – ss. 157(3) and 313 – Appeal against acquittal.

CODE OF CRIMINAL PROCEDURE, 1973:

s. 313 – Power of trial court to examine accused – Held : Though statements of accused recorded are extremely perfunctory, but no prejudice to the accused has been pointed out at any stage even before the Supreme Court – It must, therefore, be presumed that no prejudice has in fact occurred – Penal Code, 1860 – s. 302.

Appeal against acquittal – Murder – Acquittal by trial court – Conviction by High Court u/s 302 IPC – Held: High Court can re-appraise the entire evidence and if it is found that the judgment of the trial court was perverse or against the evidence, the High court has to interfere in the matter – Penal Code, 1860 –s. 302.

A The appellant-accused along with two others, at about 11.30 p.m. on 10.5.1989, went to the place where the son of PW-4 was sleeping. PW-4 stated that her son after going to bed asked her for a glass of water and when she took out a bottle for him she saw the three accused B surrounding him. When she questioned them, the appellant-accused shot her son on his head killing him instantaneously. PW-2 informed the police. The statement of PW-4 was recorded by the police at 0:10 hours on 11-5-1989 and formal FIR was recorded at the police station C at 3.00 a.m. The trial court acquitted the accused. But, on appeal by the State, the High Court convicted the accused-appellant u/s 302, as the other two accused had died pending appeal.

In the instant appeal filed by the convict, it was D contended for the appellant that once the trial court had acquitted the accused, the High Court should not have interfered with the acquittal; that there was delay in lodging the FIR as the inquest report did not bear the FIR number; that the statement of PW-4 that she tried to lift E her son was wrong as there was no evidence that her clothes had blood stains; that the statements of the accused u/s 313 were recorded in a perfunctory manner.

Dismissing the appeal, the Court

F HELD: 1. It is true that the High Court's interference in an appeal against acquittal is somewhat circumscribed, and interference should be made only in a case where the judgment of the trial court was perverse and not based on the evidence. It is, however, well-settled G that the High Court can re-appraise the entire evidence to test the judgment rendered by a trial court and if two views are possible, the one taken by the trial court should not be interfered with. On the contrary, if it is found that the judgment of the trial court was perverse or against H the evidence, it would be a travesty of justice if the High

Court was to sit back and not interfere in the matter. [para 5] [583-G-H; 584-A-B] A

2.1 The plea of delay in the lodging of the FIR, as the inquest report did not bear the FIR number, cannot be accepted as it flows from a presumption that the FIR had been lodged at the site. This can never be the position as an FIR is always recorded in the police station. It has come in the evidence that PW-4's statement had been recorded at the site at about 0:10 hours on 11.5.1989 by the Sub-Inspector (PW-7). This statement had been carried to the police station and the formal FIR recorded at 3:00 a.m. It is significant that as per the post mortem report the dead body had been received in the hospital at 6:30 a.m. on the 11.5.1989 i.e. within 3 hours of the F.I.R. with all relevant papers which would include the inquest papers. It is true that the special report u/s 157 (3) Cr.P.C. was received by the Magistrate after two days but it is told that in the State of Bihar this is a normal process. [para 6] [584-C-F] B C D

2.2 The plea that PW-4 was not present at the place of occurrence, is equally without merit. In her evidence she has categorically stated that when her son had called for a glass of water she had taken a bottle out for him and witnessed the shooting. She also stated that relations between the appellant and her son-in-law were strained and that her son was killed on that account. She also explained that she had come to her daughter's house as she was to give birth to a child and in that process she had been present when the incident had happened. She also identified the three accused in court when questioned. Her evidence also reveals that she had indeed tried to lift her son after he had been shot but from this assertion it cannot be inferred that her clothes would have been heavily blood stained. [para 7] [584-F-H; 585-A-B] E F G H

A **2.3 It is also significant that the statement of PW-4 is supported by the evidence of PW-2. It was this witness who had conveyed the information of the murder to the police station which had brought the police party to the place of incident. PW-2 stated that as he returned home**
B **after seeing a film, he saw the dead body of the victim lying there and his mother crying on it. He also stated that the deceased used to live in the house of his brother-in-law and that his mother was living with them. The prosecution story is also supported by the evidence of**
C **PW-7, the Sub-inspector. It was this officer who had recorded the statement of PW-4 at the site and then sent the same to the police station for registration of the FIR. Therefore, the prosecution story given by PW-4 inspires full confidence notwithstanding the fact that PW-1**
D **outside whose house the incident happened, did not support the prosecution. [para 7-8] [585-B-E]**

3. It is indeed true that the statements of the accused recorded u/s 313 Cr.P.C. are extremely perfunctory and do not satisfy the requirement of the Section. However,
E **no argument whatsoever in this regard had been raised at any stage although the matter had travelled up and down the appellate ladder several times earlier. Even no such ground has been raised in the SLP. In the absence of any complaint on this score, it must be assumed that**
F **the appellant had suffered no prejudice on account of a defective 313 statement. [para 9] [585-F-H; 586-A]**

Shobit Chamar & Anr. vs. State of Bihar **1998 (2) SCR 117 = 1998 (3) SCC 455;** *Shivaji Sahebrao Bobade vs. State*
G *of Maharashtra* **AIR 1973 SC 2622; and** *Santosh Kumar Singh Versus State through CBI* **2010 (13) SCR 901 = 2010 (9) SCC 747- relied on.**

Asraf Ali Versus State of Assam **2008 (16) SCC 328 and** *Ranvir Yadav Versus State of Bihar* **2009 (6) SCC 595- cited.**
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Case Law Reference:

2009 (6) SCC 595	**cited**	**para 3**
2008 (16) SCC 328	**cited**	**para 3**
1998 (2) SCR 117	**relied on**	**para 9**
(AIR 1973 SC 2622)	**relied on**	**para 9**
2010 (13) SCR 901	**relied on**	**para 9**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2081 of 2009.

From the Judgment & Order dated 25.06.2009 of the High Court of Jharkhand at Ranchi in Government Appeal No. 3 of 1992 (R).

Sushil Kumar, Feroz Ahmad, R.S. Sharma, Aditya Kumar, Anmol Thakral, Ranjan Dwivedi for the Appellant.

Ratan Kumar Choudhuri, Brahmajeet Mihra, Akshay Shukla for the Respondent.

The Judgment of the Court was delivered by

HARJIT SINGH BEDI, J. 1. The facts leading to this appeal by way of special leave are as under :

Fahim Khan-the appellant, herein alongwith two others Chotna @ Chottu @ Karim Khan and Arsad Hussain @ Arsad @ Arsad Kadri Hussain was put on trial for having committed the murder of Sagir Hasan Siddique. The Trial Court by its judgment dated 15th June, 1991 in Sessions Trial No.122 of 1990 acquitted all the accused holding that the prosecution story had not been proved. The State of Bihar challenged this judgment in the High Court in appeal. The appeal was allowed by a Division Bench by its judgment dated 13th April, 2000 and the matter was remitted to the trial court to pass a fresh judgment on the evidence already adduced by the parties after

A hearing them denovo. The accused, however, approached this court in Criminal Appeal No.661 of 2001. The order of the High Court was set aside on the 12th May, 2001 and the matter was sent back with a direction that the High Court should itself go into the merits of the case and take a decision thereon. B Pursuant to the orders of the Supreme Court, the matter was heard and the High Court, has, by the impugned judgment, set aside the acquittal of the appellant herein holding that the Trial Court's judgment was perverse, and sentenced him to undergo imprisonment for life for the offence punishable under Section C 302 of the Indian Penal Code. It is relevant, that Karim Khan and Arsad Hussain-accused died during the proceedings before the High Court and as of today we are left with the appellant-Fahim Khan alone.

2. The facts of the case are as under :

D

At about 11:30 p.m. on the 10th May, 1989, Sagir Hasan Siddique, deceased, after taking his meal, went to sleep in front of the house of Alamgir (PW-1) on a cot which had been made ready for him. A short time later, he called out to his E mother Mst. Habibul Nisa (PW-4) asking for some water. As she came out to hand him a glass of water, she saw the three accused Fahim Khan, Chotna and Arsad Kadri surrounding her son. She questioned them as to why they had come to that place whereupon Fahim Khan-appellant suddenly fired his F pistol at the deceased, hitting him on his head and killing him instantaneously.

On information received by the police from PW-2 Hanif, a police party reached the place of incident. The statement of PW-4 Habibul Nisa was recorded at the site at 0:10 hours on G the 11th May, 1989 whereas the formal FIR was recorded at the police station at 3:00 a.m. The accused were arrested in due course and were brought to trial leading to the events already given above.

H 3. In the course of the hearing of this appeal, Mr. Sushil

Kumar, the learned senior counsel for the appellant, has raised primarily four arguments. He has first submitted that the trial court had acquitted the accused and the High Court, therefore, should not have interfered in an appeal against acquittal as the circumstances of the case did not warrant interference. He has also pleaded that the FIR had apparently been lodged after a delay and the proceedings had been interpolated to cover up the fact of delay. It has been highlighted on this aspect that if the inquest report had been recorded after the registration of the FIR in which case the inquest report ought to have borne number of the FIR and as this detail was missing, it indicated that the FIR had not been registered at its purported time. It has finally been pleaded that the story given by PW-4 that she had tried to lift her son was wrong as if that had been so, her clothes would have been blood-stained but there was no evidence to that effect, which cast a doubt on her presence. It has finally been pleaded that the statements of the accused under Section 313 of the Cr.P.C. had been recorded in a very perfunctory manner and for this reason as well the appellant was entitled to acquittal. In support of this plea Mr. Sushil Kumar has relied on *Asraf Ali Versus State of Assam* [2008 (16) SCC 328] and *Ranvir Yadav Versus State of Bihar* [2009 (6) SCC 595].

4. The learned counsel for the State of Bihar (now Jharkhand) has however supported the judgment of the High Court and has pointed out that the High Court had opined that the judgment of the trial judge acquitting the accused was perverse and in this situation interference was not only called for but was infact imperative.

5. We have heard learned counsel for the parties and gone through the record. It is true that the High Court's interference in an appeal against acquittal is somewhat circumscribed and interference should be made only in a case where the judgment of the trial court was perverse and not based on the evidence. It is, however, well-settled that the High Court can re-appraise the entire evidence to test the judgment rendered by a trial court

A and if two views are possible, the one taken by the trial court should not be interfered with. On the contrary if it is found that the judgment of the trial court was perverse or against the evidence, it would be a travesty of justice if the High Court was to sit back and not interfere in the matter. We have gone B through the judgment of the High Court and the Sessions Judge in the light of this broad principle and have accordingly re-examined the evidence in this background.

6. The first argument raised by Mr. Sushil Kumar is with C regard to the delay in the lodging of the FIR, as the inquest report did not bear the FIR number. This argument however flows from a presumption that the FIR had been lodged at the site. This can never be the position as a FIR is always recorded in the police station. It has come in the evidence that the PW-4's statement had been recorded at the site at about 0:10 hours D on the 11th May, 1989 by Sub-Inspector S.N. Das-PW. This statement had been carried to the police station and the formal FIR recorded at 3:00 a.m. It is significant that as per the post mortem report the dead body had been received in the hospital at 6:30 a.m. on the 11th May, 1989 i.e. within 3 hours of the E F.I.R. with all relevant papers which would include the inquest papers. It is true that the special report under Section 157 (3) of the Cr.P.C. had been received by the Magistrate after two days but we are told that in the State of Bihar this is a normal process. We, therefore, find no merit in Sushil Kumar's first F argument.

7. The second argument with regard to the lack of blood on the clothes of PW-4 leading to the conclusion that she was not an eye-witness to the incident, is equally without merit. In G her evidence PW-4 has categorically stated that when her son had called for a glass of water she had taken a bottle out for him and witnessed the shooting. She also stated that relations between the appellant-Fahim Khan and her son-in-law Mahfooz Khan were strained and that her son had been killed on that account. She also explained that she had come to her H

daughter's house as she was to give birth to a child and in that process she had been present when the incident had been happened. She also identified the three accused in court when questioned. Her evidence also reveals that she had indeed tried to lift her son after he had been shot but from this assertion it cannot be inferred that her clothes would have been heavily blood stained. It is significant also that the statement of PW-4 is supported by the evidence of Hanif Khan-PW-2. It was this witness who had conveyed the information of the murder to the police station which had brought the police party to the place of incident. Hanif stated that as he returned home after seeing a film, he had seen the dead body of Sagir Hasan Siddique lying there and his mother crying on it. He also stated that the deceased used to live in the house of Mahfooz Ahmed his brother-in-law and that his mother was living with them. The prosecution story is also supported by the evidence of PW-7 Sub-inspector S.N. Das. It was this officer who had recorded the statement of PW-4 at the site and then sent the same to the police station for the registration of the FIR.

8. We are, therefore, of the opinion that the prosecution story given by PW-4 inspires full confidence notwithstanding the fact that Alamgir-PW-1 outside whose house the incident happened, did not support the prosecution.

9. It is indeed true that the statements of the accused recorded under Section 313 of the Cr.P.C. are extremely perfunctory and do not satisfy with the requirement of Section 313 of the Cr.P.C. We however find that that no argument whatsoever in this regard had been raised at any stage although the matter had travelled up and down the appellate ladder several times earlier. We should not however be held to mean that an argument with regard to a defective 313 cannot be raised at the SLP stage but we have gone through the grounds of SLP in this matter and find that no ground has been raised even before us in the SLP. In the absence of any complaint on this score, we must assume that the appellant had suffered no

A prejudice on account of a defective 313 statement. The cases cited by Mr. Sushil Kumar, undoubtedly talk about the importance of a 313 statement and the implications for the prosecution, should there be some defect. It is, however, equally well-settled that an objection as to prejudice must be taken at
B the earliest [see *Shobit Chamar & Anr. Versus State of Bihar* (1998 (3) SCC 455)] and prejudice must be shown before a trial could be said to be invalidated [see in this connection *Shivaji Sahebrao Bobade Versus State of Maharashtra* (AIR 1973 SC 2622) and *Santosh Kumar Singh Versus State*
C *through CBI* (2010 (9) SCC 747)]. No prejudice to the accused has been pointed out even this belated stage. It must therefore be presumed that no prejudice has in fact occurred.

11. We are therefore of the opinion that there is no merit in this appeal. It is accordingly dismissed.
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R.P. Appeal dismissed.