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SHAHID KHAN

v.

STATE OF RAJASTHAN

(Criminal Appeal No. 1460 of 2008)

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MARCH 02, 2016

**[JAGDISH SINGH KHEHAR AND C. NAGAPPAN, JJ.]**

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*Penal Code, 1860: ss.147, 148, 302/149 and 397 – Murder – Prosecution case that accused five in number caused injuries to the victim-deceased with sword and knife – Incident stated to have been witnessed by PW25 and his driver PW24 who had come from Kota to Jhalawar to meet the deceased – Thereafter, out of fear they hid themselves – Victim was declared brought dead – Trial court acquitted accused no.1 and convicted accused no.2 to 5 – High Court affirmed the conviction of accused no.2 to 5 – On appeal, held: Presence of PW24 and PW25 at the place of occurrence appeared doubtful – Their conduct in not informing the relatives of the deceased and in not lodging police complaint was also quite unnatural – Their statements were recorded after 3 days of occurrence – Delay in recording the statement had cast doubt about their being eye-witnesses to the occurrence – In view of delay, PW24 and PW25 did not appear to be wholly reliable witnesses – Moreover, there was no corroboration of their evidence from any other independent source – Therefore, PW24 and PW25 were not reliable witnesses so as to record conviction of the accused – The case against accused not proved beyond reasonable doubt – Conviction set aside.*

**Allowing the appeals, the Court**

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**HELD: 1. PW 24 and PW 25 are residents of Kota which is at a distance of about 150 kms. from Jhalawar town. According to PW25, he went to Jhalawar to meet the deceased and on reaching the factory at 1.00 p.m. they happened to witness the occurrence. PW9 and PW19, who on intimation rushed to the occurrence place, did not state that they saw PW25 and PW 24 in the occurrence place. It was only PW19, the brother of the deceased with the help of PW9 and PW20 lifted the injured and put in the Maruti vehicle and took him to Jhalawar hospital, where**

he was declared dead. Thereafter PW19 went to the Police Station and lodged the written complaint. In the said complaint, the names of the assailants were not mentioned and also the names of the persons who were present during the occurrence are not mentioned. PW25 and PW24 stated in their cross-examination that they did not help PW9 and PW19 to shift the injured to the hospital and they rushed towards Toll Tax and reached the hospital in a truck and on seeing their car, without entering the hospital, they drove to Kota and they did not inform any one about the occurrence and they did not also go to the Police Station for lodging the complaint. The High Court concluded that the presence of PW25 was established in view of the fact that his Maruti van was used for shifting injured to the hospital. There was nothing on record to show the Maruti vehicle used for transporting the deceased to the hospital belonged to PW25. PW25 and PW24 slipping away unnoticed by the others particularly after the alleged attack is utterly unbelievable. They did not render any help for shifting the injured to the hospital nor had the courtesy to go inside the hospital to ascertain the condition and also did not inform the occurrence to the police. The aspect of fear was without any foundation and was not supported by any evidence of act or conduct. [Paras 8, 10] [289-H; 290-A-G]

2. The statements of PW25 and PW24 were recorded after 3 days of the occurrence. No explanation was given as to why they were not examined for 3 days. It is also not known as to how the police came to know that these witnesses saw the occurrence. The delay in recording the statements casts a serious doubt about their being eye-witnesses to the occurrence. It may suggest that the investigating officer was deliberately marking time with a view to decide about the shape to be given to the case and the eye-witnesses to be introduced. The circumstances in this case lend such significance to this delay. PW25 and PW24, in view of their unexplained silence and delayed statement to the police, does not appear to be wholly reliable witnesses. There was no corroboration of their evidence from any other independent source either. It is, therefore, unsafe to rely upon their evidence only to uphold the conviction and sentence of the appellants. The case against the appellants has not been proved beyond reasonable doubt. [Para 11] [291-B-E]

A CRIMINAL APPELLATE JURISDICTION : Criminal Appeal  
No. 1460 of 2008

From the Judgment and Order dated 20.12.2006 of the High Court of Judicature for Rajasthan at Jaipur Bench in D. B. Criminal Appeal No. 1001 of 2003

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WITH

Cri. A. NOS. 1461 AND 1462 OF 2008

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Sushil Kr. Jain, Sr. Adv., Vikramjit Banerjee, Rishi Maheshwari, Bharat Sood, Bishwanath Chatterji, (For Mrs. Shally Bhasin), Abhinav Gupta, Apurv Taran, (For Ms. Pratibha Jain), Advs., with him for the Appellant.

Puneet Parihar, Saurabh Rajpal, (For Milind Kumar and Ms. Ruchi Kohli), Advs. for the Respondent.

The Judgment of the Court was delivered by

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**C. NAGAPPAN, J.** 1. These three appeals are preferred against the judgment dated 20.12.2006, passed by the High Court of Judicature for Rajasthan at Jaipur in DB Criminal Appeal No.1001 of 2003.

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2. The appellants in DB Criminal Appeal No.1001 of 2003 are accused nos.2 to 5 in the Sessions case no.31 of 2003 on the file of the Special Judge, SC/ST(POA), Jhalawar and they were tried with accused no.1 for alleged offences under Sections 147, 148, 302/149 and 397 Indian Penal Code. The Sessions Court found accused no.1 not guilty of all the charges and found accused nos. 2 to 5 not guilty of the charge under Section 397. At the same time Sessions Court convicted accused nos. 2 to 5 for the offence under Section 148 and sentenced them each to undergo Simple imprisonment for 2 years with fine of Rs.500 and in default to undergo further simple imprisonment for one month and convicted them under Section 302/149 and sentenced them each to undergo life imprisonment with fine of Rs.2000 and in default to undergo simple imprisonment for six months.

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3. Aggrieved by this conviction and sentence, accused nos. 2 to 5 preferred appeal being DB Criminal Appeal No.1001 of 2003, before the High Court of Rajasthan at Jaipur Bench. During pendency of appeal, appellant/A3 Irfan Ali died and his appeal abated. The High Court by its judgment dated 20.12.2006 dismissed the appeal preferred by the appellants. Challenging the same accused nos.2, 4 and 5 have preferred

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present appeals.

4. The prosecution case as it discerned from the records is briefly, as follows : PW 19 Anil Kumar Jain is the brother of deceased Ashok Kumar. On 22.1.2001 he submitted Exh. P34 complaint at Police Station Kotwali Jhalawar stating that Ashok Kumar was looking after the factory of Kota stones and the contract of royalty of toll tax was obtained by Abdul Khalid in which his brother Ashok Kumar was also a partner. It is further stated that Khalid was arrested for committing the murder of Kallu and Ashok Kumar gave assistance to Khalid. Due to this reason on 22.1.2001 companions of Kallu came to the factory and murdered Ashok Kumar. It is further stated therein that as per the information provided by PW 20 Lal Chand the accused were five in number and they caused injuries to Ashok Kumar with sword and knife. PW 25 Mirza Majid Beg came from Kota to Jhalawar to meet Ashok Kumar on the occurrence day, and he and his driver PW 24 Mohamed Shakir saw the occurrence in which the accused inflicted injuries with weapons on Ashok Kumar. Due to fear they hid themselves in the factory. PW 19 Anil Kumar Jain took injured Ashok Kumar in the Maruti car to hospital at Jhalawar where he was declared dead. On the written complaint of PW 19 Anil Kumar Jain a case under Sections 147, 148 302/149 and 448 IPC was registered and investigation commenced. PW 17 Dr. Arvind Kumar Bohra conducted autopsy on the body of Ashok Kumar and found the following ante-mortem injuries:

1. Incised wound 2 ½ x ½ x bone deep horizontally mid of forehead.
2. Abrasion 3 ½ long in front and over the pinna of left ear.
3. Stab incised wound 2" X ½" X cavity deep omentum and fresh blood come out from wound vertically Rt para umbilicus region.
4. Stab incised wound 2" X ½" X cavity deep. Vertically oblique omenten and fresh blood comes out left para umbilicus part of abdomen.
5. Stab incised wound 2" X ½" X cavity deep omentum and fresh bleeding present vertically left renal region of abdomen.
6. Stab incised wound 2" X ½" X cavity deep oblique ½" below lower costal margin left Hypochondrium of abdomen.

A 7. Incised wound 1" X ¼" x skin deep oblique lat. Aspect of middle of left thigh."

He issued Exh.P21 post-mortem report by expressing opinion that the cause of death was hemorrhagic shock as a result of cutting of pedicle of spleen omental and mesenteric vessels.

B 5. The investigation officer examined the witnesses, arrested the accused and recovered weapons by drawing the necessary memos and on completion of the investigation filed the charge-sheet. The Sessions Court on framing of charges conducted the trial in which prosecution examined 28 witnesses and marked documents and the defence examined  
C 2 witnesses on their side. The trial court acquitted accused No.1 of all the charges and convicted accused Nos. 2 to 5 as stated supra. On appeal the High Court confirmed the conviction and sentence. Aggrieved by the same the present appeals have been preferred.

D 6. Mr. Sushil Kumar Jain, Senior Advocate appearing for the appellants contended that PW 25 Mirza Majid Beg and his driver PW 24 Mohamed Shakir who claimed to have witnessed the occurrence are chance witnesses whose presence at the place of occurrence is doubtful and their conduct in not informing the relatives of the deceased and not lodging police complaint is quite unnatural and their statements were recorded after 3 days of the occurrence for which there is no explanation and the prosecution case was conceived and constructed after a good deal of deliberation and it is doubtful. It is further contended by him that  
E PW 25 Mirza Majid Beg implicated the appellants falsely because his son-in-law Khalid was tried for committing the murder of Kallu and in the said case the present appellant-Banti gave evidence against him as  
F prosecution witness, resulting in conviction. It is his further submission that the courts below have erroneously believed the uncorroborated testimonies of the eye-witnesses and conviction and sentence imposed on the appellants are not sustainable in law and liable to be set aside. In support of his submission reliance was placed on various decisions of this Court.

G 7. Per contra the learned counsel appearing for the respondent contended that the presence of the eye-witnesses at the time of occurrence is established and their testimonies have rightly been relied upon by the courts below for convicting the appellants and the impugned judgment is sustainable.

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8. Ashok Kumar died of homicidal violence is evident from the medical evidence adduced in the case. PW 17 Dr. Arvind Kumar Bohra who conducted post mortem found 4 stab incised wounds in the abdomen and 2 incised wounds on forehead and left thigh. Exh.P21 is the post-mortem report issued by him in which he has opined that the cause of death was hemorrhagic shock as a result of cutting of pedicle of spleen omental and mesenteric vessels. From the above it is clear that Ashok Kumar died of injuries sustained in the occurrence.

9. The prosecution case is that the appellants (Accused Nos.2, 4 and 5) alongwith other accused inflicted injuries with sword and knife to Ashok Kumar. During the trial PW 20 Lal Chand, PW 24 Mohammad Shakir and PW 25 Mirza Majid Beg were examined as having witnessed the occurrence. PW 20 Lal Chand did not support the prosecution case and was declared hostile. PW 25 Mirza Majid Beg in his testimony has stated that on 22.1.2001 he started from Kota at 10 O' clock and reached Jhalawar at about 12 O' clock in his Maruti Van driven by his driver PW 24 Shakir and halted for 5-10 minutes in the Toll Post and then went to the factory of Ashok Kumar to meet him and on reaching there they heard the sound of crying and they got down from the vehicle and ran inside the factory and saw accused no.2 Banti and accused no.4 Shahid Khan with daggers in their hand and accused no.5 Mansoor with Gupti type weapon and all the accused were attacking Ashok Kumar with the said weapons. According to him he and his driver stood adjacent to the quarter wall inside the factory and saw the occurrence and thereafter they ran away from the said place to Toll Tax and boarded a tanker lorry and reached the hospital at Jhalawar and they found their Maruti vehicle parked in the hospital and they drove from there directly to Kota in the said vehicle. It is the testimony of PW 24 Mohamed Shakir that on 22.1.2001 he drove the Maruti van of PW 25 Mirza Majid Beg from Kota to Jhalawar and when they reached the factory of Ashok Kumar they heard the sound of crying and both of them got down and rushed inside the factory and saw the appellants and other accused attacking Ashok Kumar with knife and they ran to the backside of the factory and hid themselves near the wall and after 5-10 minutes they came out and went to the Toll Tax check post and by taking a lift in a truck they reached Jhalawar hospital and on seeing their car there, both of them drove back to Kota.

10. Both the above witnesses are residents of Kota which is at a distance of about 150 kms. from Jhalawar town. According to PW 25

A Mirza Majid Beg he went to Jhalawar to meet Ashok Kumar and on reaching the factory at 1.00 p.m. they happened to witness the occurrence. It is relevant to point out that PW 9 Anwar and PW 19 Anil Kumar Jain, who on intimation rushed to the occurrence place, did not state that they saw PW 25 Mirza Majid Beg and PW 24 Mohamed Shakir in the occurrence place. It is only PW 19 Anil Kumar Jain with the help of

B PW 9 Anwar and PW 20 Lal Chand lifted injured Ashok Kumar and put in the Maruti vehicle and took him to Jhalawar hospital, where he was declared dead. Thereafter PW 19 Anil Kumar Jain went to the Police Station and lodged the written complaint. In the said complaint, the names of the assailants are not mentioned and also the names of the persons

C who were present during the occurrence are not mentioned. PW 25 Mirza Majid Beg and PW 24 Mohamed Shakir have stated in their cross examination that they did not help PW 9 Anwar and PW 19 Anil Kumar Jain to shift the injured to the hospital and they rushed towards Toll Tax and reached the hospital in a truck and on seeing their car, without entering

D the hospital, they drove to Kota and they did not inform any one about the occurrence and they did not also go to the Police Station for lodging the complaint. The High Court in the impugned judgment has concluded that the presence of PW 25 Mirza Majid Beg is established in view of the fact that his Maruti van was used for shifting injured to the hospital. There was nothing on record to show the Maruti vehicle used for

E transporting Ashok Kumar to the hospital belonged to PW 25 Mirza Majid Beg. In fact PW 19 Anil Kumar Jain in his cross examination has stated that he did not know the Registration number of the Maruti van in which Ashok Kumar was taken to hospital and he also did not know whose vehicle it was. In other words, nothing is stood established by the

F use of this Maruti vehicle for transporting to the injured to the hospital and in any event this will not clinch the presence of PW 25 Mirza Majid Beg at the time of occurrence. PW 25 Mirza Majid Beg and PW 24 Mohamed Shakir slipping away unnoticed by the others particularly after the alleged attack is utterly unbelievable. It appears unreal. They are not strange to expect and they did not render any help for shifting the

G injured to the hospital nor had the courtesy to go inside the hospital to ascertain the condition and also did not inform the occurrence to the police. The aspect of fear is without any foundation and is not supported by any evidence of act or conduct. This plea does not impress us. In this context, it is relevant to point out that PW 25 Mirza Majid Beg has admitted that he is a history-sheeter, and two cases under NDPS Act

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were imposed on him and he was also bound down under Section 110 Cr.P.C. A

11. The statements of PW 25 Mirza Majid Beg and PW 24 Mohamed Shakir were recorded after 3 days of the occurrence. No explanation is forthcoming as to why they are not examined for 3 days. It is also not known as to how the police came to know that these witnesses saw the occurrence. The delay in recording the statements casts a serious doubt about their being eye-witnesses to the occurrence. It may suggest that the investigating officer was deliberately marking time with a view to decide about the shape to be given to the case and the eye-witnesses to be introduced. The circumstances in this case lend such significance to this delay. PW 25 Mirza Majid Beg and PW 24 Mohamed Shakir, in view of their unexplained silence and delayed statement to the police, does not appear to us to be wholly reliable witnesses. There is no corroboration of their evidence from any other independent source either. We find it rather unsafe to rely upon their evidence only to uphold the conviction and sentence of the appellants. The High Court has failed to advert to the contentions raised by the appellants and re-appreciate the evidence thereby resulting in miscarriage of justice. In our opinion, the case against the appellants has not been proved beyond reasonable doubt. B  
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12. Consequently, the appeals are allowed and the conviction and sentence of the appellants is hereby set aside. The appellants are on bail. Their bail bonds shall stand discharged. E

Devika Gujral

Appeals allowed.

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