

HAKEEM KHAN & ORS.

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v.

STATE OF M.P.

(Criminal Appeal No. 612 of 2007)

MARCH 22, 2017

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[R. F. NARIMAN AND PRAFULLA C. PANT, JJ.]

Penal Code, 1860 – s.302 r/w s.49 – Prosecution case was that there was dispute between the complainant party and accused party due to panchayat elections – On fateful day, accused persons armed with lathis and farsis intercepted complainant party and attacked them resulting in death of one person – Trial court acquitted the accused persons on the ground that there were injuries on both the sides; that there were six eye-witnesses including injured eye-witness but only one of them was an independent witness who however turned hostile; and that two other independent eye witnesses were available but were not examined – High Court, however, reversed the order of acquittal – On appeal, held: Presence of the kingpin Sarpanch at the spot was itself doubtful in view of the fact that he attended the Court at some distance and arrived by bus after the incident took place – The findings of High Court that the unquestioned injuries could only lead to the conclusion that there was a scuffle without pre-meditation and the minor injuries on members of the accused party proved their presence at the incident, not sustainable – Also, High Court erred in discarding trial court's reasoning that the only independent eye-witness turned hostile and two other independent witnesses were not examined, leading to the conclusion that the prosecution story became doubtful – Interference with the order of High Court called for – Conviction set aside.

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Allowing the appeals, the Court

HELD:1. The trial court's judgment is more than just a possible view for arriving at the conclusion of acquittal, and that it would not be safe to convict seventeen persons accused of the crime of murder i.e. under Section 302 read with Section 149 of the Indian Penal Code. The most important reason of the trial

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A court, was that, given the time of 06:30 p.m. to 07:00 p.m. of a
winter evening, it would be dark, and, therefore, identification of
seventeen persons would be extremely difficult. This reason,
coupled with the fact that the only independent witness turned
hostile, and two other eye-witnesses who were independent were
not examined, would certainly create a large hole in the
prosecution story. Apart from this, the very fact that there were
injuries on three of the accused party, two of them being deep
injuries in the skull, would lead to the conclusion that nothing
was pre-meditated and there was, in all probability, a scuffle that
led to injuries on both sides. The respondent may be right in
stating that the trial court went overboard in stating that the
complainant party was the aggressor, but the trial court's ultimate
conclusion leading to an acquittal is certainly a possible view on
the facts of this case. This is coupled with the fact that the presence
of the kingpin Sarpanch is itself doubtful in view of the fact that
he attended the Court at some distance and arrived by bus after
the incident took place. [Para 10] [740-D-G]

2. The High Court has interfered with the trial court's
Judgment on several counts. First it states that according to the
complainant, there was "some dark", it was not stated that it was
completely dark, and this being so, even in poor light all seventeen
persons could have been identified as they were known to the
other side. The High Court seems to have reversed acquittal by
substituting its view for that of the trial court. The High Court
goes on to state that the presence of minor injuries on the persons
of the members of the accused parties proves their presence at
the incident. This is hardly the way to deal with a finding of the
trial court that these unquestioned injuries could only lead to the
conclusion that there was a scuffle without pre-meditation. Also,
the High Court stated that merely because independent witnesses
did not cooperate with the prosecution case, evidence of other
eye-witnesses cannot be discarded. This does not deal with the
trial court's reasoning that the only independent eye-witness
turned hostile and two other independent witnesses were not
examined, leading to the conclusion that the prosecution story,
would, therefore, become doubtful. Above all, when it came to
the presence of the Sarpanch, the High Court stated "he must
have been discharged by the Court before 5:00 P.M." so that he

could have covered the distance from Shyampur, in half an hour and be at the scene of the incident by 6:00 P.M. This conclusion apart, from being conjectural, is hardly the way to deal with a finding on *alibi* given by the trial court. That the Sarpanch must have been discharged by the Court before 5:00 p.m. is not based on any evidence. Also, there is no evidence that the distance of Shyampur from the scene of the incident, being 28 Kms, can be traversed within half an hour. The actual evidence in the case shows that the bus would have arrived only between 7:00 p.m. and 7:30 p.m. The incident did not take place at 6:00 p.m., as wrongly stated by the High Court. Even according to the FIR, the incident occurred between 6:30 and 7:00 p.m. The High Court clearly fell in grave error in setting aside the acquittal in the present case. [Paras 11-13] [740-H; 741-A-F]

3. Having regard to the above, the appeals are allowed and the judgment of the High Court is set aside. [Para 14] [742-F]

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 612 of 2007.

From the Judgment and Order dated 29.07.2006 of the High Court of Madhya Pradesh at Jabalpur in Criminal Appeal No: 1174 of 1992

WITH

CrI. A. No. 788 of 2008.

Fakhruddin, R. K. Dash, Sr. Advs., Raj Kishor Choudhary, Ms. Meenu Sharma, Dr. Nafis A. Siddiqui, Advs. for the Appellants.

Sunny Choudhary, Arjun Garg, Mishra Saurabh, Advs. for the Respondent.

The Judgment of the Court was delivered by

R. F. NARIMAN, J. 1. The incident which occurred in the present case took place in the dark on 30th January, 1990. 30 January is a dark day in world history. Charles I of England lost both his crown and his head on this day in 1649. Hitler came to power on this day in 1933. And the Father of our Nation was assassinated on this day in 1948. The backdrop of this incident occurred when one Ajij Khan and Shabbir Khan, had contested a Panchayat election. Shabbir Khan was elected as Sarpanch resulting in bad blood between the complainant

A party and the accused/appellants. On the date of the incident, one Chhote Khan lodged an FIR of the said incident in which he stated that one Sayeed Khan had told him that when he was coming from village Shyampur to Mukhtyar Nagar, Hafiz Khan, Jafrudeen and three to four other persons came and questioned him as to why he had raised a shoe on the aforesaid Shabbir Khan, who was the Sarpanch in the town of B Sehere. Chhote Khan with three others went to lodge a report to this effect in Shyampur. Further, when they came near the Culvert of Ganda Nala at about 06:30 p.m. to 07:00 p.m. then on the way to the Culvert eight persons, namely, Hafeez Khan, Rafiq Khan, Hakim Khan, Ayyub Khan, Jafrudeen, Israil Khan, Munne Khan, and Salim Khan together C with 7-8 other unnamed persons armed with Lathis and Farsis started to beat five of them. This was done with the common object of causing death, because these persons were badly beaten and indeed one, namely, Ismail Khan, succumbed to his injuries. Based on the aforesaid incident an FIR was lodged. It needs to be noted at this juncture that seventeen D persons were ultimately arrayed as accused in the case.

2. After examining the evidence before it, the trial court, being the order of the IInd Additional Sessions Judge, Sehere, arrived at the following conclusions:-

E 1. There were six eye-witnesses including the injured eyewitnesses in the case but only one of them could be said to be an independent witness who, however, turned hostile.

2. Two other independent eye-witnesses were available but they were not examined by the prosecution.

F 3. There were injuries on both sides. In fact, apart from the complainant party, the accused party also had three persons who were injured. Rafeez Khan had injuries which were deep in the skull and a swelling in the middle of the left hand and a swelling on the left leg; and Ismail also had a deep injury in the middle of the skull, and also had a swelling in the right arm, elbow of the G right hand, and knee of the right leg; and Munne Khan also had a swelling on the back side of the elbow of the left hand and swelling on the left shoulder.

H 3. The trial court then went on to say that the incident allegedly occurred around 06:30 p.m. to 7:00 p.m. on 30th January, 1990 which was a dark winter day and, therefore, it would have been extremely

difficult to identify the 17 persons who were supposedly the aggressors in the incident.

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4. Apart from the three injured persons, namely Raftiq Khan, Israil and Munne Khan, the Trial Court stated that the presence of all the others at the scene of the crime was doubtful. The Trial Court also remarked on the enmity caused between the parties and subsequently went into the fact that the Sarpanch, Shabbir Khan, who was the lynchpin in this drama, and who was stated to be present by the injured eye-witnesses, was found, in fact, not to be present, and that he attended Court till 5 O'clock and reached Shyampur after 07:15 p.m. i.e. after the incident took place.

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5. This being so, the presence of the very Sarpanch for whom this scuffle took place was stated to be doubtful. The trial court also went on to state that it appears that it was the complainant's party who was the aggressor in the incident and gave reasons for the same, and, accordingly, acquitted all the seventeen persons of the crime.

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6. In appeal, the High Court reversed the finding of the trial court and convicted the entire seventeen accused of murder under Section 302 read with Section 149 of the Indian Penal Code, and sentenced them to life imprisonment.

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7. We have heard the learned counsel for the parties. Mr. Fakhruddin, learned senior counsel and Mr. R.K. Das, learned senior counsel appearing for the appellants, submitted that the High Court has erred in over-turning the acquittal of seventeen persons and, therefore, unless it reached the conclusion that the order of the trial court was perverse, it could not do so. The trial court gave good reasons for acquitting them. The reasoning is at least a possible view and the High Court, in over-turning the order of the trial court, has fallen into a grave error and has, in fact, itself reached conclusions which were not reasonably possible in law.

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8. Learned counsel for the respondent, on the other hand, supported the High Court judgment, and stated that the alleged incident was in two parts, and it is clear that there was no scuffle but a pre-meditated attack by the appellants i.e. the accused, three of whom were armed with sickles and the others with lathis. According to the learned counsel, many of the trial court's conclusions are perverse and are not sustainable in the eyes of law. For example, for the trial court to conclude

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A that the accused party was the aggressor was nobody's case, and is a
conclusion without any reason. The fact of the matter is that there is one
death and several injured persons, who were eye-witnesses, and all that
the trial court said about the incident was that it was tragic, without
properly proceeding along that trajectory to finally come to the logical
B conclusion to convict the transgressors.

9. Learned counsel also stated that no right of private defence
was pleaded and, that being the case, it is clear that as the injuries on the
deceased were grievous and the injuries on the others were also not
simple injuries, the High Court was right in convicting the seventeen
C accused. He also went on to argue that the three persons armed with
sickles should, in any event, be convicted of culpable homicide not
amounting to murder.

10. Having heard the learned counsel for the parties, we are of
the view that the trial court's judgment is more than just a possible view
for arriving at the conclusion of acquittal, and that it would not be safe to
D convict seventeen persons accused of the crime of murder i.e. under
Section 302 read with Section 149 of the Indian Penal Code. The most
important reason of the trial court, as has been stated above, was that,
given the time of 06:30 p.m. to 07:00 p.m. of a winter evening, it would
be dark, and, therefore, identification of seventeen persons would be
E extremely difficult. This reason, coupled with the fact that the only
independent witness turned hostile, and two other eye-witnesses who
were independent were not examined, would certainly create a large
hole in the prosecution story. Apart from this, the very fact that there
were injuries on three of the accused party, two of them being deep
F injuries in the skull, would lead to the conclusion that nothing was pre-
meditated and there was, in all probability, a scuffle that led to injuries on
both sides. While learned counsel for the respondent may be right in
stating that the trial court went overboard in stating that the complainant
party was the aggressor, but the trial court's ultimate conclusion leading
to an acquittal is certainly a possible view on the facts of this case. This
G is coupled with the fact that the presence of the kingpin Sarpanch is
itself doubtful in view of the fact that he attended the Court at some
distance and arrived by bus after the incident took place.

11. The High Court has interfered with the trial court's Judgment
on several counts. First it states that according to the complainant Chhote
H Khan, there was "some dark", it was not stated that it was completely

dark, and this being so, even in poor light all seventeen persons could have been identified as they were known to the other side. The High Court seems to have reversed acquittal by substituting its view for that of the trial court. The High Court goes on to state that the presence of minor injuries on the persons of the members of the accused parties proves their presence at the incident. This is hardly the way to deal with a finding of the trial court that these unquestioned injuries could only lead to the conclusion that there was a scuffle without pre-meditation. Also, the High Court stated that merely because independent witnesses did not cooperate with the prosecution case, evidence of other eye-witnesses cannot be discarded. This does not deal with the trial court's reasoning that the only independent eye-witness turned hostile and two other independent witnesses were not examined, leading to the conclusion that the prosecution story, would, therefore, become doubtful.

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12. Above all, when it came to the presence of the Sarpanch, the High Court stated "he must have been discharged by the Court before 5:00 P.M." so that he could have covered the distance from Shyampur, in half an hour and be at the scene of the incident by 6:00 P.M. This conclusion apart from being conjectural, is hardly the way to deal with a finding on alibi given by the trial court. That the Sarpanch must have been discharged by the Court before 5:00 p.m. is not based on any evidence. Also, there is no evidence that the distance of Shyampur from the scene of the incident, being 28 Kms, can be traversed within half an hour. The actual evidence in the case shows that the bus would have arrived only between 7:00 p.m. and 7:30 p.m. As stated hereinabove, the incident did not take place at 6:00 p.m., as wrongly stated by the High Court. Even according to the FIR, the incident occurred between 6:30 and 7:00 p.m.

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13. For all these reasons, we are of the considered opinion that the High Court clearly fell in grave error in setting aside the acquittal in the present case. We have to remind ourselves that the law on reversal of acquittals is well settled and is stated in many judgments, but one of them needs to be quoted here. In *Murugesan Vs. State (2012) 10 SCC* this court went into the meaning of different expressions- "erroneous", "wrong" and "possible", and has stated the law as follows:-

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"33. The expressions "erroneous", "wrong" and "possible" are defined in Oxford English Dictionary in the following terms:

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“erroneous.- wrong; incorrect.

Wrong.- (1) not correct or true, mistaken.

(2) unjust, dishonest, or immoral.

Possible.- (1) capable of existing, happening, or being achieved.

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(2) that may exist or happen, but that is not certain or probable.

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34. It will be necessary for us to emphasise that a possible view denotes an opinion which can exist or be formed irrespective of the correctness or otherwise of such an opinion. A view taken by a court lower in the hierarchical structure may be termed as erroneous or wrong by a superior court upon a mere disagreement. But such a conclusion of the higher court would not take the view rendered by the subordinate court outside the arena of a possible view. The correctness or otherwise of any conclusion reached by a court has to be tested on the basis of what the superior judicial authority perceives to be the correct conclusion. A possible view, on the other hand, denotes a conclusion which can reasonably be arrived at regardless of the fact whether it is agreed upon or not by the higher court. The fundamental distinction between the two situations have to be kept in mind. So long as the view taken by the trial court can be reasonably formed, regardless of whether the High Court agrees with the same or not, the view taken by the trial court cannot be interdicted and that of the High Court supplanted over and above the view of the trial court.”

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14. Having regard to the above, the appeals are allowed and the judgment of the High Court is set aside.

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15. We have been informed that Ayub Khan is in jail for the last about 11 years. He shall be released, if not required in any other case, within a period of one week from today.

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