STATE OF UTTAR PRADESH

v.

WASIF HAIDER ETC.

(Criminal Appeal Nos. 1702-1706 of 2014)

DECEMBER 10, 2018

[N. V. RAMANA AND
MOHAN M. SHANTANAGOUDAR, JJ.]

Penal Code, 1860 – ss.302 and 307 r/w ss.149, 148 – Appeal against acquittal – PW-2-Police Official got to know that a crowd of around 200-300 rioters was causing rampage and destruction at a temple – PW-2 accompanied by the police force and a senior official proceeded towards scene of occurrence – Rioters started firing upon them, injuring the senior official, who later succumbed to the injuries – Respondents-accused persons arrested – Trial court convicted the respondents – High Court set aside the conviction – Held: In appeal against acquittal, the appellate court would interfere only where there exists perversity of fact and law – Present case is ridden with multiple investigative laches and flaws which go to the root of the matter– Specific identification of the respondents, from a group of 200-300 rioters, with 100% perfection; without a mention of any distinguishing marks seems highly improbable considering the distance of the witnesses from the place of occurrence– Test Identification Parade (TIP) has to be conducted timely, if not, then the delay has to be explained – However, in the present case, not only there was delay in conducting the TIP, but there was no explanation for the same – This creates doubt about its genuineness – Further, although the charges were framed u/s.307,IPC, the prosecution failed to substantiate the charges by means of evidence – Trial Court erred in convicting the respondents for the aforesaid offence, without any evidence – Prosecution failed to link the chain of circumstances to dispel the cloud of doubt about the culpability of the respondents – Suspicion, however grave cannot take place of proof – Investigative lapses have fortified the presumption of innocence in favor of the respondents – Benefit of doubt arising out of faulty investigation accrues in favor of the accused – No perversity in the judgment of the High Court – Concurrent order of

A *acquittal for offences under the Arms Act and Explosive Substances Act also not interfered with - Arms Act, 1959 – ss.25, 27 – Explosive Substances Act, 1908 – ss.4, 15 – Criminal Law Amendment Act, 1932.*

Dismissing the appeals, the Court

B **HELD: 1.1 The present case is ridden with multiple investigative laches and flaws which goes to the root of the matter. *Firstly*, out of the seven eye witnesses who participated in the TIP, five of them identified the accused-respondents without committing any mistake. Accused no.3 has big protruding teeth,** C **the accused no.4 was suffering from polio hence, had permanent physical disability, but surprisingly this fact was never mentioned either in the F.I.R. or in the witness statements. The specific identification of the four accused-respondents, from a group of 200-300 rioters, with 100% perfection; without a mention of any distinguishing marks seems highly improbable considering the** D **distance of the witnesses from the place of occurrence. Moreover, there existed an inordinate delay of 55 days in conducting the TIP of the accused no.1 and 2. Although, the involvement of accused no.3 and 4 was brought to light on 03.08.2001 itself, the prosecution did not take any effort to arrest or interrogate them** E **for 6 weeks. But no reasonable explanation was provided for the aforesaid inordinate delay. [Paras 13, 14][1168-D-H]**

1.2 Furthermore, no documentary evidence has been provided to prove that the identity of the accused was kept concealed. TIP has to be conducted timely, if not, then the delay F **has to be explained and such delay should not cause exposure of the accused. However, in the case at hand, not only there was a delay in conducting the TIP, but no explanation for the same has been forthcoming from the prosecution. This creates a considerable doubt about the genuineness of the TIP. [Para 15][1169-A-D]**

G **1.3 *Secondly,* it is surprising that, although the post-mortem report describes that there were only two wounds in the body of the deceased, one being the entry and the other being the exit wound, allegedly a bullet was still recovered from the ashes of the deceased. The recovery of bullet from the ashes of the** H **deceased is irreconcilable with the post-mortem report which**

allegedly states an exit wound, implying that the bullet had already left the body. The aforesaid fact raises a suspicion on both the Post-Mortem report and the F.S.L. report as they are incompatible with each other. *Thirdly,* the prosecution has failed to establish that the bullet allegedly recovered from the ashes of the deceased 20 days later was indeed fired from the pistol recovered from respondent no.1. Even, the recovery of pistol is doubtful. [Paras 16, 17][1169-D-G]

1.4 *Fourthly*, as regards to the place of incident, the prosecution failed to ascertain the same with precision. *Fifthly*, the prosecution failed to examine the orderly of the deceased who was also injured in the same incident and had suffered a gunshot injury. *Sixthly*, the prosecution has also failed to adduce any independent witness. Even though it is wrong to disbelieve the evidence adduced from the official witnesses, but prudence demands that their evidence needs to be tested on the altar of strict scrutiny. Considering the aforesaid facts and circumstances, the evidences adduced by the prosecution witnesses do not inspire the confidence of this Court. *Lastly*, it is surprising that although the charges have been framed under Section 307 of IPC, the prosecution has absolutely failed to substantiate the charges by means of evidence. The trial court has erred in convicting the respondents for the aforesaid offence, without any evidence to prove the same. [Paras 19-21][1170-A-F]

1.5 The prosecution has failed to link the chain of circumstances so as to dispel the cloud of doubt about the culpability of the respondents. A suspicion, however grave it cannot take place of proof, i.e., there is a long distance between "*may be*" and "*must be*", which must be traversed by the prosecution to prove its case beyond reasonable doubt. In the present case, the cumulative effect of the aforesaid investigative lapses has fortified the presumption of innocence in favor of the accused-respondents. In such cases, the benefit of doubt arising out of a faulty investigation accrues in favor of the accused. There exists no perversity in the judgment of the High Court. The concurrent order of acquittal for offences committed under the Arms Act and Explosive Substances Act is also not interfered with. [Paras 22, 24, 26 and 27][1170-F-G; 1171-B-F]

A *Bannareddy and Ors. v. State of Karnataka and Ors.* **(2018) 5 SCC 790 ;** *Rabindra Kumar Pal @ Dara Singh v. Republic of India* **(2011) 2 SCC 490 : [2011] 1 SCR 929 ;** *Mulla v. State of UP* **(2010) 3 SCC 508 ;** *Kailash Gour and Ors. v. State of Assam* **(2012) 2 SCC 34 – relied on.**

B *Narendra Singh v. State of MP* **(2004) 10 SCC 699 – referred to.**

Case Law Reference

C **(2018) 5 SCC 790**	**relied on**	**Para 12**
[2011] 1 SCR 929	**relied on**	**Para 12**
(2010) 3 SCC 508	**relied on**	**Para 15**
(2004) 10 SCC 699	**referred to**	**Para 22**
D **(2012) 2 SCC 34**	**relied on**	**Para 23**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 1702-1706 of 2014.

From the Judgment and Order dated 29.05.2009 of the High Court of Judicature at Allahabad in Criminal Appeal Nos. 1419, 1430, 1518, E 898 of 2004 and Government Appeal No. 5270 of 2005.

Dinesh Kr. Goswami, Ankur Prakash, K. Luikang Michael, Sushil Tomar, Ashutosh K. Sharma, Garvesh Kabra, T. Mahipal, Ms. Kamini Jaiswal, Mohd. Irshad Hanif, Arif Ali Khan, Adeel Siddiqui, Rizwan Ahmad, Sheik Moulali Basha, Aamir Naseem, Naeem Ilyas, F Ram Mishra, Jatinderpal Singh, Siddhartha Dave, Farrukh Rasheed, Abu Bakr Sabbaq, Ms. Jemtiben AO, Advs. for the appearing parties.

The Judgment of the Court was delivered by

N. V. RAMANA, J.

G 1. These appeals by special leave arise out of the common impugned judgment dated 29.05.2009, passed by the High Court of Allahabad in Criminal Appeal Nos. 1419, 1430, 1518 and 898 of 2004, whereby the High Court has reversed the judgment of conviction passed by the Additional Sessions Judge, Kanpur in Sessions Trial No. 164/2002 dated 22.01.2004 under Sections 302 read with 149, 307 read with 149, H 148 IPC and Section 7 of Criminal Law Amendment Act, 1932. Whereas

the High Court in Government Appeal no. 5270 of 2005 preferred by the appellant-State, has dismissed the appeal against the acquittal of accused no.1-respondent (Wasif Haider) for offences under Sections 25 and 27 of Arms Act, 1959 and Sections 4 and 15 of Explosive Substances Act, 1908, while affirming the judgment dated 3.8.2005 passed by the Additional Sessions judge, Kanpur acquitting the accused no.1-respondent (Wasif Haider) in Sessions Trial No. 143 and 144 of 2002.

2. Brief facts as unfolded from the prosecution story are that, while the complainant (P.W.2- S.O., P.S. Moolganj, Kanpur) along with other police personnel was on duty at the parade crossing, he came to know that a crowd of around 200-300 rioters were causing rampage and destruction at the Chaubey Gola Temple. Immediately, the complainant accompanied by the police force and A.D.M (Finance and Revenue)-Sri Chandra Prakash Pathak (hereinafter referred as "**the deceased**"), and half a section of Provincial Armed Constabulary ["PAC"] proceeded towards scene of occurrence. Admittedly, when the deceased along with police personnel were at a distance of around 100-150 paces from Sunehri Mosque on the Nai Sarak, rioters started firing upon them resultantly injuring the deceased and his orderly, Ram Chandra. In order to control the law and order situation, the police were compelled to fire in their defense. When the police party reached the mosque, the rioters had already fled away. Subsequently, when the police party reached Chaubey Gola Temple where rioters had already looted some houses and had also committed arson. In the meanwhile, the police also received the information that the deceased had succumbed to the gunshot injuries in the hospital. Finally, the F.I.R., Case Crime No. 7 of 2001 came to be registered at 8.05P.M. on 16.03.2001 against 200-300 unknown rioters.

3. On the same night, after conducting the inquest proceedings, the dead body was sent for post mortem examination and the investigation commenced. The investigation officer after recording the statement of witnesses, inspected the place of occurrence and prepared Site Plan ext. Ka-6. A bullet which was recovered from the ashes of deceased was sent for Forensic examination.

4. On 02.08.2001 accused no. 2-respondent (Mumtaz *alias* Maulana) was brought to Kanpur by the Delhi police. On 04.08.2001, accused no. 1-respondent (Wasif Haider) was arrested. Accused no. 3-respondent (Hazi Atiq) and accused no. 4-respondent (Safat Rasool)

were arrested on 17.09.2001 and 18.09.2001 respectively and thereafter the Test Identification Parade (hereinafter referred to as "**TIP**") was held on 27.09.2001 at District Jail, Kanpur. Subsequent to the completion of investigation, the charge-sheet was submitted.

5. The accused pleaded not guilty and claimed to be tried. It is pertinent to note that in the statements made by the accused under Section 313 of Cr.P.C. They claimed that there existed an inordinate delay in conducting the TIP, as this time period was used by the prosecution witnesses to see them at their homes or places of work to mark them carefully for the subsequent identification. They stressed on the fact that they were not kept concealed in a veil (*baparda*). The accused-respondents have further stated that, prior to the TIP, the police had taken their photographs and had shown it to the other witnesses. This creates a considerable doubt about the genuineness of the TIP. Further, the accused-respondents have alleged that, they were wrongfully roped in the case when the police failed to trace the real culprits. The accused respondents have also put forth that, although they had clear antecedents, but they were implicated in the crime falsely.

6. By order dated 22.01.2004, the trial court, while relying upon the prosecution version, rejected the defence story and convicted the accused persons as under,

ACCUSED	CHARGES	CONVICTION
[1]. Wasif Haider [A-1] [2]. Mumtaz *alias* Maulana [A-2] [3]. Hazi Atiq [A-3] [4]. Safat Rasool [A-4]	S. 302/ 149 IPC	Life Imprisonment
	S. 307/ 149 IPC	RI for 5 years
	S. 148	RI for 1 year
	S. 7 Criminal Law Amendment Act	RI for 3 months
	All of them were acquitted for the charges under Sections 395, 397, 436 and 153A IPC.	
Wasif Haider [A-1]	Acquitted for charges under Sections 25 and 27 of Arms Act, 1959 and Sections 4 and 15 of Explosive Substances Act, 1908.	

7. Aggrieved by the abovementioned order of conviction and sentence, the accused-respondents appealed before the High Court. The High Court on analysis of evidence found that, not only there exists various contradictions in the testimonies of the prosecution witnesses but there exists lack of corroboration of the same. While passing the order of acquittal the High Court observed that the case of prosecution was ridden with flaws in investigation, most importantly the identification of the accused was highly suspicious and the TIP was held to be "*too good to be believed*". Accordingly, the High Court through the impugned judgment acquitted the accused-respondents and set aside the aforesaid order of conviction as the prosecution failed to prove its case beyond reasonable doubt.

8. Aggrieved by the impugned order passed by the High Court acquitting all the accused, the State of Uttar Pradesh has preferred these appeals.

9. The learned Counsel, Mr. Dinesh Kumar Goswami, on behalf of the appellant-State while supporting the prosecution's case, submitted that pursuant to the arrest of the accused-respondents their identification was properly done after taking due precautions and following the procedure. Moreover, the prosecution witnesses had clearly identified the accused persons in the identification parade and in the court as well. On the issue of delay caused in conducting the TIP, the counsel also vehemently submitted that, there was no inordinate delay in conducting the TIP as canvassed by the counsels for the accused-respondents. The High Court has committed a grave error by not placing reliance on the TIP as there is nothing on record to vitiate the results of the same. Lastly, the learned counsel submitted that since there existed sufficient evidence to prove the culpability of the accused-respondents, the Sessions Judge had correctly passed the order of conviction against them and therefore prayed for setting aside the impugned order.

10. On the other hand, the learned Counsel, Ms. Kamini Jaiswal, appearing on behalf of the accused-respondents no. 1, 3 and 4, while supporting the order of acquittal rendered by the High Court, submitted that, the entire prosecution story hinges on the identification of the accused-respondents, the genuineness of which in itself is questionable. It was further argued that, when admittedly the witnesses were at a great distance from the place of occurrence, it was not plausible to identify

A specifically the accused-respondents, that too in the absence of any particular *hulia* or distinguishing marks from amongst a crowd of 200-300 rioters. Further, there was inordinate delay in conducting the TIP which was fatal for the prosecution.

11. Further, the learned Counsel, Mr. Siddhartha Dave, on behalf
B of accused-respondent no. 2 submitted that accused-respondent no. 2 has been dragged into the matter only on account of confessional statement of the co-accused which has not been corroborated, and no other incriminating evidence is available on record.

12. Heard learned counsels for the parties. At the outset, we would
C like to state that in an appeal against acquittal, the appellate court would interfere only where there exists perversity of fact and law [*See* ***Bannareddy and Ors. v. State of Karnataka and Ors.***, (2018) 5 SCC 790]. Further, the presumption of innocence is further reinforced against the acquitted-accused by having a judgment in his favor [*See* ***Rabindra Kumar Pal @ Dara Singh v. Republic of India***, (2011) 2 SCC 490 in
D para. 94].

13. We concur with the aforesaid order of acquittal rendered by the High Court, as the present case is ridden with multiple investigative laches and flaws which goes to the root of the matter. We shall be addressing the same in *seriatim*.

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14. *Firstly*, it is apt to note that out of the seven eye witnesses who participated in the TIP, five of them identified the accused without committing any mistake. As observed by the accused no.3-respondent, Hazi Atiq has big protruding teeth, the accused no.4-respondent Safat Rasool was suffering from polio hence had permanent physical disability,
F but surprisingly this fact was never mentioned either in the F.I.R. or in the witness statements. The specific identification of the four accused-respondents, from a group of 200-300 rioters, with 100% perfection; without a mention of any distinguishing marks seems highly improbable considering the distance of the witnesses from the place of occurrence.
G Moreover, there existed an inordinate delay of 55 days in conducting the TIP of the accused no.1 and 2. Although, the involvement of accused no.3 and 4 was brought to light on 03.08.2001 itself, the prosecution did not take any effort to arrest or interrogate them for 6 weeks. But no reasonable explanation was provided for the aforesaid inordinate delay.

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15. Furthermore, no documentary evidence has been provided to proof that the identity of the accused was kept concealed. On the contrary, D.W.3, Mohd. Shamim Siddique, Record Keeper in the Police Office stated that the general diary does not mention that the accused no.2-respondent Mumtaz *alias* Maulana was kept *baparda*. The defence also pleaded that, the aforesaid inordinate delay was used by the prosecution witnesses to see the accused-respondents at their homes or places of work to mark them carefully for the subsequent identification. Additionally, accused no.1-respondent Wasif Haider, in his statement under Section 313 Cr.P.C. went to the extent of saying that, prior to the TIP he was shown to the witnesses and his photographs and videotapes were prepared. In ***Mulla v. State of U.P.***, (2010) 3 SCC 508 para 55, this court laid down that a TIP has to be conducted timely, if not, then the delay has to be explained and such delay should not cause exposure of the accused. However, in the case at hand, not only there was a delay in conducting the TIP, but no explanation for the same has been forthcoming from the prosecution. This creates a considerable doubt about the genuineness of the TIP.

16. *Secondly,* it is surprising that, although the post-mortem report describes that there were only two wounds in the body of the deceased, one being the entry and the other being the exit wound, allegedly a bullet was still recovered from the ashes of the deceased. The F.S.L. report shows that this bullet was charred and blistered. This recovery of bullet from the ashes of the deceased is irreconcilable with the post-mortem report which allegedly states an exit wound, implying that the bullet had already left the body. The aforesaid fact raises a suspicion on both the Post-Mortem report and the F.S.L. report as they are incompatible with each other.

17. *Thirdly,* the prosecution has failed to establish that the bullet allegedly recovered from the ashes of the deceased 20 days later was indeed fired from the pistol recovered from accused-respondent Wasif Haider. Even, the recovery of pistol is doubtful. While, the prosecution case reveals that one .380 bore pistol colt was recovered from the possession of the accused-respondent Wasif Haider, on the contrary, the evidence of P.W.2-S.O., Rajendra Dhar Dwivedi reveals that one .320 bore pistol colt was recovered pursuant to his arrest. Additional contradiction can be seen in the sanction order wherein two pistols of .380 bore were shown to be recovered from the possession of the accused-respondent Wasif Haider.

A 18. *Fourthly*, as regards to the place of incident, the prosecution failed to ascertain the same with precision. While the F.I.R. reveals the place of occurrence to be in front of Sunehri Masjid, P.W.2, the complainant later improved over his earlier statement and stated that, the incident actually took place in Noorani Masjid. On the contrary, the two site plans show the place of incident to be Noorani Masjid.

B 19. *Fifthly*, the prosecution failed to examine Ram Chandra, the orderly of the deceased who was also injured in the same incident and had suffered a gunshot injury. The prosecution was also unable to prove the injury report of the above victim. Such a failure is fatal to the prosecution case as his presence in the place of occurrence is beyond C doubt. It has been placed on record that, despite Ram-Chandra attending the proceedings of the trial regularly he was not examined by the prosecution.

20. *Sixthly*, the prosecution has also failed to adduce any independent witness. Even though it is wrong to disbelieve the evidence D adduced from the official witnesses, but prudence demands that their evidence needs to tested on the altar of strict scrutiny. Considering the aforesaid facts and circumstances, the evidences adduced by the prosecution witnesses do not inspire the confidence of this Court.

21. *Lastly*, it is surprising that although the charges have been E framed under Section 307 of IPC, the prosecution has absolutely failed to substantiate the charges by means of evidence. It is rather unfortunate that the courts below have failed to take note of the same. The trial court has erred in convicting the respondents for the aforesaid offence, without any evidence to prove the same.

F 22. In the instant appeals before us, the prosecution has failed to link the chain of circumstances so as to dispel the cloud of doubt about the culpability of the accused-respondents. It is a well settled principle that a suspicion, however grave it may be cannot take place of proof, i.e., there is a long distance between "*may be*" and "*must be*", which G must be traversed by the prosecution to prove its case beyond reasonable doubt [*See* ***Narendra Singh v. State of M.P.***, (2004)10 SCC 699].

23. This Court in ***Kailash Gour and Ors. v. State of Assam***, (2012) 2 SCC 34 has held that,

"44. ***The prosecution, it is axiomatic, must establish its case*** H ***against the accused by leading evidence that is accepted by***

the standards that are known to criminal jurisprudence regardless whether the crime is committed in the course of communal disturbances or otherwise. In short, there can only be one set of rules and standards when it comes to trials and judgment in criminal cases unless the statute provides for anything specially applicable to a particular case or class of cases…"

(emphasis supplied)

24. In the present case, the cumulative effect of the aforesaid investigative lapses has fortified the presumption of innocence in favor of the accused-respondents. In such cases, the benefit of doubt arising out of a faulty investigation accrues in favor of the accused.

25. Although we acknowledge the gravity of the offence alleged against the accused-respondents and the unfortunate fact of a senior official losing his life in furtherance of his duty we cannot overlook the fact that the lapses in the investigation have disabled the prosecution to prove the culpability of the accused. The accused cannot be expected to relinquish his innocence at the hands of an inefficacious prosecution, which is ridden with investigative deficiencies. The benefit of doubt arising out of such inefficient investigation, must be bestowed upon the accused.

26. In our opinion, there exists no perversity in the judgment of the High Court. Further, in the absence of compelling reasons, this Court is not keen to entertain these appeals challenging the order of acquittal.

27. We are also not inclined to interfere with the concurrent order of acquittal for offences committed under the Arms Act and Explosive Substances Act presently before us in Criminal Appeal no. 1706 of 2014.

28. The appeals are accordingly dismissed. Pending applications, if any, shall also stand disposed of.

Divya Pandey Appeals dismissed.