A SHANKER

v.

STATE OF MADHYA PRADESH

(Criminal Appeal No.1785 of 2011)

B APRIL 18, 2018

[N. V. RAMANA AND S. ABDUL NAZEER, JJ.]

Penal Code, 1860 – s.302 – Prosecution case that the victim while attending a marriage, had altercation with some persons who threatened him and went away – They subsequently came back with more persons at night and assaulted the victim – Allegedly 11 persons were involved in the crime – Victim was taken to police station and FIR was lodged, thereafter he died in the hospital – Trial Court acquitted 6 accused persons, however, remaining 5 persons were convicted u/ss.148,302/149 – Appeal dismissed by the High Court – Aggrieved, two accused persons, A-3 and A-5 filed appeal – Held: Prosecution has failed to prove the alleged offence by adducing cogent and trustworthy evidence – High Court has also not dealt with the matter in accordance with the settled principles of law – Record reveals that the entire case of prosecution was based on the evidence of two prosecution witnesses i.e. P.W-1 and P.W-5 – In instant case, the Courts below failed to take into consideration the contradictions and distortions in the evidence of P.W-1 & 5 – From the evidence of P.W-1, it transpires that the participation and the role played by the appellants (A-3 and A-5) in the crime was limited to giving blows with fists and legs to the deceased, whereas, P.W-5 stated differently that one appellant (A-5) had also attacked the victim holding a knife – There was no corroboration among their statements, who were the prime witnesses, as to the role played by the accused – In the FIR also, it was stated that appellants had beaten the victim with hands and feet and no weapon was ascribed to have been held by them – The post mortem report and evidence of the doctor did not disclose any injuries suffered by the victim resulted from the beatings received by fists, cuffs and legs as such injuries were not visible – Prosecution had made large number of assailants as accused to have attacked the victim, but the evidences of witnesses was full of discrepancies and they were not able to state as to how the appellants caused injuries

to the victim leading to his death – Discrepancies and contradictions in the case on hand go to the root of the matter and are material ones and based on such evidence, it is not possible to convict the accused.

Allowing the appeals, the Court

HELD: 1. The High Court unfortunately has not dealt with the matter in accordance with the settled principles of law. Before going to award conviction against an accused for the offence under Section 302, IPC the Courts should be mindful of the fact that there should be no room to suspect the evidence of key prosecution witnesses based on whose evidence the conviction is being awarded. As a general rule, while appreciating evidence in a criminal case, the Court should bear in mind that it is not the quantity, but the quality of evidence that is material. It is the duty of the Court to consider the trustworthiness of the witness and the evidence adduced on record and to assess the same in a prudent manner whether the same inspires confidence so as to accept and act upon, before convicting an accused. [Para 17] [823-A-C]

2. In the case on hand, the Courts below failed to take into consideration the contradictions and distortions in the evidence of PWs 1 and 5. From the evidence of PW1 it clearly transpires that the participation and the role played by the accused-appellants in the crime was limited to giving blows with fists and legs to the deceased, while other accused were assaulting the deceased with knife and sword stick respectively. A statement of the prosecution witness which is otherwise untrustworthy cannot be corroborated by another piece of unreliable evidence of another prosecution witness. In the FIR also, it was stated that, the appellants herein, had beaten the victim with hands and feet and no weapon was ascribed to have been held by them. Whereas, PW5 states differently that the accused-appellant (A-5) had also attacked the victim holding a knife. There was no corroboration among their statements, who are the prime witnesses, as to the role played by the accused herein. The postmortem report and the evidence of PW7 (Dr.) does not disclose any injuries suffered by the victim resulted from the beatings received by fists, cuffs and legs as such injuries are not visible. The prosecution had made large

A **number of assailants as accused to have attacked the victim, but the witnesses, though their evidences are full of discrepancies, could not be able to state as to how the appellants herein caused injuries to the deceased leading to his death. In such a scenario, it would not be in the interest of justice to convict the appellants as the standard of proof in a criminal trial is proof beyond reasonable doubt and the prosecution could not prove the guilt of the accused in those standards. The Courts below, basing on their own assumptions and presumptions, have convicted the accused. Though every discrepancy and contradiction in the evidence of prosecution witnesses is not fatal to the case of the prosecution, but the contradictions in the case on hand goes to the root of the matter are material ones and basing on such evidence it is not advisable to convict the accused. [Para 18] [823-G-H; 824-A-E]**

Harijana Thirupala and Ors. v. Public Prosecutor, High Court of A.P., Hyderabad **[2002] 1 Suppl. SCR 379 : (2002) 6 SCC 470 – relied on.**

S. Govidaraju v. State of Karnataka **2013 (10) SCALE 454 – referred to.**

Case Law Reference

2013 (10) SCALE 454	**referred to**	**Para 14**
[2002] 1 Suppl. SCR 379	**relied on**	**Para 17**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1785 of 2011.

From the Judgment and Order dated 12.09.2007 of the High Court of Madhya Pradesh Judicature at Jabalpur in Criminal Appeal No. 333 of 1999 in Session Case No. 120 of 1998

WITH

Criminal Appeal Nos. 1786-1788 of 2011.

Krishnakant Pandey, Dhanesh B. Dhotre, Shiv Sagar Tiwari, Advs. for the Appellant.

D.S. Parmar, Rajesh Srivastava, Ms. Swarupma Chaturvedi (for Mishra Saurabh), Advs. for the Respondent.

The Judgment of the Court was delivered by

N.V. RAMANA, J. 1. These appeals by special leave are directed against the judgment dated 12th September, 2007 passed by the High Court of Madhya Pradesh, at Jabalpur in Criminal Appeal Nos. 315, 316, 333 and 590 of 1999, whereby the High Court dismissed the criminal appeals filed by the appellants herein and affirmed the order of conviction and sentence passed by the trial Court against them.

2. Brief facts of the case, according to the prosecution, are that on 8th May, 1998 one Sanjay Sorle was attending a marriage at Bharveli village. While the ceremonials were underway, one Deepak with two others arrived there on motorcycle. An altercation had taken place between Sanjay Sorle and the motorcyclists. Deepak, while leaving that place, threatened Sanjay Sorle and went away. After that, he came back to the marriage venue at about 10.30 p.m. on a bullet motorcycle with Gudda @ Shivshanker, Shiv, Suresh (appellant herein) and Shanker (appellant herein) and took away Sanjay Sorle from the venue to the road and assaulted him. Altogether 11 persons were allegedly involved in the crime. Gudda had inflicted injuries with knife, Shiv with Gupti while Shanker and Suresh i.e. appellants herein attacked him by giving fist blows. The injured Sanjay Sorle was taken to police station at Bharveli and lodged the F.I.R. at 11 p.m.

3. Upon registering the same as Crime No. 54/98, police sent the injured Sanjay Sorle to the District Hospital at Balaghat for treatment, where he was declared dead. After conducting inquest (Ext.P3), dead body of the deceased was sent for postmortem, statements of witness were recorded, site map has been prepared by Patwary (Ext. P5) as well as police (Ext.P24). Accused were arrested and at the instance of accused Shivshankar, Manoj, Dwarka and Shivkumar knives and other incriminating material have been seized. Bullet motorcycle, allegedly rode by the accused, has also been recovered from the possession of accused Chokhu @ Sudhanshu (Ext. P9). Other things such as bloodstained soil, normal soil and clothes of deceased were seized and sent for expert examination. Charges were levelled against five accused persons i.e. Manoj, Baburao, Deepak, Gudda @ Shivshanker, Shanker and Dwarka @ Dan under Sections 148 and 302/149, IPC. In addition to those charges, accused Rupesh, Chokhu @ Rakesh, Suresh, Shiv Kumar and Dablu @ Sudhanshu were additionally charged for the offence punishable under

A Section 3(2)(5) SC & ST Act, 1989. The accused denied the charges, pleaded to have been falsely implicated and claimed to be tried.

4. After an elaborate trial, learned Additional Sessions Judge by a common judgment in Special Sessions Case No. 51/1998 and Sessions Case No. 120/1998, acquitted six accused persons from all the charges
B and discharged the accused (including appellants herein) from the charges under Section 3(2)(5) of SC & ST Atrocities Act, 1989. However, the trial Court came to the conclusion that the remaining five accused (including appellants herein) were guilty of the offences punishable under Sections 148, 302/149, IPC. Accordingly by judgment dated 27th January,
C 1999 they were convicted and sentenced to suffer rigorous imprisonment for a period of one year for the offence under Section 148, IPC. Whereas, for the offence punishable under Section 302/149, IPC they were sentenced to suffer life imprisonment and to pay a fine of Rs.2,000/- each, in default, to further suffer one year imprisonment. However, all the sentences were directed to run concurrently.

D 5. All the five accused persons, being aggrieved by the judgment of the trial Court, carried the matter in appeal before the High Court of Madhya Pradesh at Jabalpur assailing the award of their conviction and sentence. By the judgment impugned herein, the High Court found their appeal devoid of merits and therefore dismissed the same upholding the
E judgment passed by the trial Court. Dissatisfied with the same, Accused No. 3—Suresh Dhobi and Accused No. 5—Shanker are before this Court by way of present appeals.

6. We have heard learned counsel for the appellants as well as learned counsel appearing on behalf of the respondent – State of Madhya
F Pradesh. Unfortunately, there is no proper assistance from the learned counsel appearing on behalf of the appellants, in spite of taking adjournments. However, learned counsel appearing for the State has submitted that since two Courts have concurrently affirmed the guilt of the accused, there are no compelling reasons for this Court to interfere with the impugned judgment and advanced arguments in support of the
G same.

7. The translated copies of evidence of prime witnesses, P.W.-1 and P.W.5, whose evidence is crucial for this case, which were filed by the appellant along with appeals are not clear and we found so many typographical and grammatical mistakes in them. In all fairness, learned
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counsel appearing on behalf of the respondent—State himself has even filed translated copies of evidence of PWs 1 and 5. We acknowledge the able assistance of learned counsel appearing for the respondent—State, in facilitating this Court to go through the evidence in the process of arriving at a just conclusion. A

8. The evidence available on record reveals that the entire case of the prosecution is based on the evidence of two prosecution witnesses i.e. P.W.1—Ganesh Prasad and P.W.5—Savitri Bai. B

9. It is manifest from the evidence of P.W.1—Ganesh Prasad, that though he had seen both the accused—appellants herein, but he knew them only by their face and it is PW5—Savitri Bai who told him their names, and basing on what she said, he has got their names recorded in the FIR. He further states that both the accused have disclosed their names to be Shanker and Suresh. But it is not clear from his evidence that to whom the accused disclosed their names. Even though the names of the two accused are there in the F.I.R., as per P.W.-1, the role played by these two accused is that they had, along with other accused, beat the victim by giving blows with fists and legs. It was expressly stated by PW1 that by the time he thought of calling for help, the accused—appellants fled away from the place of occurrence. C D

10. PW5—Savitri Bai, who also happened to be the panch of the ward, deposed that she was standing at a distance of about 10 feet from the victim Sanjay Sorle at the marriage venue (*Mandap*) accused Shiv took away Sanjay Sorle outside where other accused Gudda, Deepak, Shanker and Suresh were present. Contrary to the statement of PW1, she deposed that the accused—appellant Shanker was armed with a knife and assaulted the victim while Shiv assaulted with sword-stick, Gudda with a knife while Suresh and Deepak caught hold of Sanjay. She says that she did not notice the other persons present at the place of occurrence. When she shouted loudly, the accused persons fled away and the victim came to the *Mandap* groaning. Whereas, in her cross-examination, she categorically stated that the scene of offence cannot be seen from the place of *Mandap*. E F G

11. From the evidence of PW5, it appears that there is a huge discrepancy in the prosecution case as to who lodged the FIR. It was clearly stated by PW5 that it was she who lodged the report at the police station and she had no knowledge about anyone else lodging the complaint H

A and also she does not know the reason for not enclosing her report. She made it clear that after lodging the report she came back to her home. Then after half an hour when she returned home, police recorded her statement. It is significant to note that PW5 has specifically stated that PW1—Ganesh Prasad had not lodged the report. It was also clarified by her that none of the accused assaulted the victim with lathi (stick).

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12. At this juncture, it is very much relevant to have a look at the evidence of Doctor. According to PW7—Dr.Nilay Jain, who conducted postmortem on the body of the deceased, the deceased had sustained the following injuries:

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1. One quenched wound at present near the nipple oblique 2.0 x 1.5 x 3.0 cms.
2. One quenched wound at mid auxiliary line oblique (D) on 10^{th}, 11^{th} and 12^{th} ribs standard sized about 1.5 x 1.0 x 4.5 cms.

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3. One quenched wound on abdomen at mid chronological line on 10^{th}, 11^{th} and 12^{th} ribs oblique sized about 3.0 x 2.5 x 6.0 cms. (depth) at thigh (upper side) on lateral aspect.
4. One oblique quenched wound sized about 5.0 x 2.0 x 7.0 cms. on (depth) right renal angle;

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5. One horizontal quenched wound dolente sized about 5 x 1.5 x 2.0 cms. (D) injury near nipple is very clear pleasing 2^{nd} and 3^{rd} ribs picking about of the chest (RT atinum).

The Doctor expressed his opinion that the death could have occurred as a result of shedding of excessive bleeding from the heart and the same could have caused with 18 hours of postmortem. In the cross-examination, it was elicited from the Doctor that the death was caused by Injury No. 1 only and there was no possibility of occurring death from other injuries. The Injury No. 1, in the opinion of the Doctor, could only be inflicted by a knife or gupti and not by hand or a lathi.

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13. We have given our anxious consideration to the evidence of prime prosecution witnesses i.e. PWs 1 & 5, it is clear that their statements are not corroborating with the other on material aspects. It appears that the Courts below have unmindfully given greater importance to the evidence of PWs 1 and 5, without looking into the veracity of their statements. First and foremost, if credence is given to the statement of

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PW5, the genesis and genuineness of FIR (Annexure P1) is, undoubtedly questionable. If the FIR (Ext.P1) was registered on the basis of complaint of PW1, which remains duly proved by the statement of its writer M.G. Choubey (PW17), then the statement of PW5 could not be believed and given effect to, as in her deposition she categorically asserts that it was she who lodged the complaint with police and PW1 did not lodge any report to the police. If PW1's statement is to be believed, it cannot be said that he was an eyewitness to the incident, as according to him at the time of incident, he went to the *mandap* to call for help of other persons and the place of incident is not visible from *mandap.* This fact also proved by the evidence of Amit—PW4, another close relative of PWs 1 and 5. According to PW4, when he and PW1 were present in the *mandap,* Sanjay Sorle came there and fall down going into the state of unconsciousness. When PWs 1 and 4, gone to see outside the *mandap,* by then the accused left the place. He says that he has no knowledge in which direction the accused left. PW5 is none other than niece of PW1. According to her, she was the person physically present at the *mandap* and followed the accused when they were taking away the deceased. This only establishes the factum of being the eyewitness but crucially she had omitted to state to the I.O. about the fact that she followed the deceased to the scene of offence from the *mandap*. The omission to this effect is marked as Ex. D2. In view of that, the evidence of PW1 that he came to know about the names of the assailants through PW5 also does not inspire confidence.

14. At this juncture, it would be helpful to look at the observations made by this Court in ***S. Govidaraju*** vs. ***State of Karnataka,*** 2013 (10) SCALE 454 in the following words:

> "It is well settled legal proposition that while appreciating the evidence, the court has to take into consideration whether the contradictions/omissions were of such magnitude so as to materially affect the trial. Minor contradictions, inconsistencies, embellishments or improvements in relation to trivial matters, which do not effect the core of the case of the prosecution, must not be made a ground for rejection of evidence in its entirety. The trial Court, after going through the entire evidence available, must form an opinion about the credibility of the witnesses, and the appellate court in the normal course of action, would not be justified in

A reviewing the same, without providing justifiable reasons for doing so. Where the omission(s) amount to a contradiction, creating a serious doubt regarding the truthfulness of a witness, and the other witnesses also make material improvements before the court in order to make the evidence acceptable, it would not be safe to rely upon such evidence. The discrepancies in the evidence of eyewitnesses, if found not to be minor in nature, may be a ground for disbelieving and discrediting their evidence. In such circumstances, the witnesses may not inspire confidence and if their evidence is found to be in conflict and contradiction with other evidence available or with a statement that has already been recorded, then in such a case, it cannot be held that the prosecution has proved its case beyond reasonable doubt".

15. On the face of the present case, it can be said without any hesitation that the prosecution has miserably failed to prove the alleged offence by adducing cogent and trustworthy evidence. In other words, the present case is based on a fragile and weak footing with several contradictions in the evidences of prime prosecution witnesses. Further, most of the prosecution witnesses have turned hostile and no independent witness supported the prosecution case. Interestingly, no test identification parade was conducted even though PW1 states that he could recognize the accused only by face, initially there were only five persons named as accused but subsequently in all, 11 persons were charged and most of them have already been acquitted by the Courts below. The material on record shows that a lathi (stick) was also recovered from the possession of accused, but there was no evidence to show who wielded the lathi in the assault against the victim. According to PW5, none of the accused assaulted the deceased with lathi.

16. The judgment of the trial Court, in our opinion, filled with assumptions and presumptions basing on which the trial Court awarded conviction and sentence to the accused. The trial Court had also pointed out that except Ganesh Prasad (PW1), Amit (PW4) and Savitri Bai (PW5) no other witness has supported the prosecution case. Clearly, the statements of PWs 1 & 5 do not corroborate on crucial aspects, more particularly the genesis of FIR remained doubtful, yet the trial Court went on convincing itself with the evidences of PWs 1 and 5 and also on the basis of its own presumptions.

17. The High Court unfortunately has also not dealt with the matter in accordance with the settled principles of law. Before going to award conviction against an accused for the offence under Section 302, IPC the Courts should be mindful of the fact that there should be no room to suspect the evidence of key prosecution witnesses based on whose evidence the conviction is being awarded. As a general rule, while appreciating evidence in a criminal case, the Court should bear in mind that it is not the quantity, but the quality of evidence that is material. It is the duty of the Court to consider the trustworthiness of the witness and the evidence adduced on record and to assess the same in a prudent manner whether the same inspires confidence so as to accept and act upon, before convicting an accused. Here it is apt to look at the observations made by this Court in ***Harijana Thirupala and Ors.*** vs. ***Public Prosecutor, High Court of A.P., Hyderabad,*** (2002) 6 SCC 470:

> "In cases where the court entertains reasonable doubt regarding the guilt of the accused the benefit of such doubt should go in favour of the accused. At the same time, the court must not reject the evidence of the prosecution taking it as false, untrustworthy or unreliable on fanciful grounds or on the basis of conjectures and surmises. The case of the prosecution must be judged as a whole having regard to the totality of the evidence.
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> In appreciating the evidence the approach of the court must be integrated not truncated or isolated. In other words, the impact of evidence in totality on the prosecution case or innocence of accused has to be kept in mind in coming the conclusion as to the guilt or otherwise of the accused. In reaching a conclusion about the guilt of the accused, the court has to appreciate, analyse and assess the evidence placed before it by the yardstick of probabilities, its intrinsic value and the animus of witnesses.
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> It must be added that ultimately and finally the decision in every case depends upon the facts of each case".

18. In the case on hand, the Courts below failed to take into consideration the contradictions and distortions in the evidence of PWs 1 and 5. From the evidence of PW1 it clearly transpires that the participation and the role played by the accused—appellants Shanker

A and Suresh in the crime was limited to giving blows with fists and legs to the deceased, while other accused Gudda and Shiv were assaulting the deceased with knife and sword stick respectively. A statement of the prosecution witness which is otherwise untrustworthy cannot be corroborated by another piece of unreliable evidence of another prosecution witness. In the FIR also, it was stated that Shanker and Suresh, the appellants herein, had beaten the victim with hands and feet and no weapon was ascribed to have been held by them. Whereas, PW5 states differently that the accused Shanker had also attacked the victim holding a knife. There was no corroboration among their statements, who are the prime witnesses, as to the role played by the accused herein. The postmortem report and the evidence of PW7 (Dr. Nilay Jain) does not disclose any injuries suffered by the victim resulted from the beatings received by fists, cuffs and legs as such injuries are not visible. The prosecution had made large number of assailants as accused to have attacked the victim, but the witnesses, though their evidences are full of discrepancies, could not be able to state as to how the appellants herein caused injuries to the deceased leading to his death. In such a scenario, it would not be in the interest of justice to convict the appellants as the standard of proof in a criminal trial is proof beyond reasonable doubt and the prosecution could not prove the guilt of the accused in those standards. The Courts below, basing on their own assumptions and presumptions, have convicted the accused. Though every discrepancy and contradiction in the evidence of prosecution witnesses is not fatal to the case of the prosecution, but the contradictions in the case on hand goes to the root of the matter are material ones and basing on such evidence it is not advisable to convict the accused.

19. In view of the foregoing, we are not able to appreciate the reasoning given by the Courts below for convicting the appellants for the alleged offences and we are of the considered view that the prosecution has miserably failed to prove the guilt of the accused beyond reasonable doubt. Resultantly, we set aside the impugned judgment passed by the High Court and allow these appeals.

Ankit Gyan Appeals allowed.