RAJU AMBADAS GANGEKAR

v.

THE STATE OF MAHARASHTRA

(Criminal Appeal No. 1961 of 2009)

JANUARY 24, 2019

[DR. DHANANJAYA Y CHANDRACHUD AND HEMANT GUPTA, JJ.]

Penal Code, 1860 – s.304, Part II – Murder – Reversal of acquittal – Jurisdiction of Appellate Court – Pursuant to a quarrel, deceased and his colleague were allegedly chased by the accused – Appellant assaulted the deceased with a 'gupti' *– PW-13, Police Constable was on patrolling duty in the area and was alleged to have seen the appellant assault the deceased with a* gupti *– Trial court acquitted the accused – High Court, while confirming the acquittal of three of the accused, convicted the appellant u/s.304 Part II, IPC– On appeal held: On the basis of the evidence, there is no doubt in regard to the identity of the appellant as the assailant – Dying declaration has a ring of truth – Deceased specifically deposed to the clothes worn by the assailant – PW-13, who witnessed the incident, corroborated the nature of the apparel worn by the accused/assailant – Clothes recovered from the appellant at the time of his arrest within a few hours of the incident, matched that description – Stains found on the clothes, matched the blood group of the deceased – Identity of the appellant established beyond reasonable doubt – Medical evidence in regard to the nature of the injuries is entirely consistent with the ocular evidence – Appellate court is justified in reversing an order of acquittal where the order of acquittal suffers from perversity and has resulted in a miscarriage of justice – High Court has furnished cogent reasons for coming to the conclusion that the charge against the appellant was established beyond reasonable doubt – Trial court proceeded purely on the basis of surmises when it observed that it was unlikely that PW-13 had witnessed the incident – Trial court fell into grievous error which was justifiably corrected by the impugned judgment of the High Court.*

A **Dismissing the appeal, the Court**

HELD: 1.1 There is no doubt, on the basis of the evidence which has emerged, in regard to the identity of the appellant as the assailant. The dying declaration Exh. 21 has a ring of truth. The deceased specifically deposed to the clothes which were worn
B **by the assailant. PW-13, the beat constable who had witnessed the incident, corroborated the nature of the apparel worn by the accused/assailant. The clothes which were recovered from the appellant at the time of his arrest within a few hours of the incident, matched that description. Added to this, is the fact that the blood group on the stains which were found on the clothes, matched**
C **the blood group of the deceased. The identity of the appellant has been established beyond reasonable doubt. Undoubtedly, two of the witnesses i.e. PW-3 and PW-9 as well as two panch witnesses had turned hostile. However, there is no reasonable basis for the trial court to have disregarded and rejected the evidence of PW-**
D **13, the beat constable, who was on duty. The presence of PW-13 at the spot where the incident took place was in the natural course of things. Nothing has been elicited in the course of his cross-examination to cast a doubt on his statement that he was assigned to duty at the place where the incident took place. Similarly, the**
E **mere fact that the panch witnesses in support of the discovery had turned hostile is no reason to discredit the case of the prosecution. The medical evidence in regard to the nature of the injuries is entirely consistent with the ocular evidence. [Paras 21, 22][11-B-F]**

1.2 The High Court on the basis of the evidence on the
F **record came to the conclusion that since the incident had been preceded by a quarrel, the case would not attract the provisions of Section 302. It is in this view of the matter, that the High Court has convicted the appellant under Section 304 Part II and sentenced him to imprisonment for a period of five years. The**
G **appellate court is justified in reversing an order of acquittal where the order of acquittal suffers from a perversity and has resulted in a miscarriage of justice. The High Court has furnished cogent reasons for coming to the conclusion that the charge against the appellant was established beyond reasonable doubt. The trial court**

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has proceeded purely on the basis of surmises when it observed that it was unlikely that PW-13 had witnessed the incident. In failing to refer to crucial parts of the evidence, the trial court had fallen into a grievous error which was justifiably corrected by the impugned judgment of the High Court. The judgment of the trial court suffered from a clear perversity and had resulted in a miscarriage of justice. [Paras 23, 24][11-G-H; 12-A-C]

K Gopal Reddy v. State of Andhra Pradesh **(1979) 1 SCC 365 : [1979] 2 SCR 265;** *Chandrappa v. State of Karnataka* **(2007) 4 SCC 415 : [2007] 2 SCR 630 – relied on.**

Mookiah v. State, Rep. by Inspector of Police, Tamil Nadu **(2013) 2 SCC 89 : [2013] 2 SCR 881;** *Murugesan v. State, through Inspector of Police* **(2012) 10 SCC 383 : [2012] 13 SCR 1;** *Prem Singh v. State of Haryana* **(2013) 14 SCC 88 : [2013] 10 SCR 51 – referred to.**

Case Law Reference

[2013] 2 SCR 881	**referred to**	**Para 7**
[1979] 2 SCR 265	**relied on**	**Para 11**
[2007] 2 SCR 630	**relied on**	**Para 11**
[2012] 13 SCR 1	**referred to**	**Para 11**
[2013] 10 SCR 51	**referred to**	**Para 11**

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 1961 of 2009.

From the Judgment and Order dated 18.03.2006 of the High Court of Judicature of Bombay, Bench at Aurangabad in Criminal Appeal No. 584 of 1989

Sushil Karanjkar, K. N. Rai , Advs. for the Appellant.

Nishant Ramakantrao Katneshwarkar, Anoop Kandari, Advs. for the Respondent.

A The Judgment of the Court was delivered by

DR DHANANJAYA Y CHANDRACHUD, J. 1. This appeal arises from a judgment of the Division Bench of the Bombay High Court dated 18 March 2006. The State of Maharashtra was in appeal before the High Court, assailing the judgment and order of the Additional Sessions B Judge, Ahmednagar dated 10 July 1989. The Additional Sessions Judge acquitted all the four accused, including the appellant, who were tried for offences under Sections 302 and 325 read with Section 34 of the India Penal Code[1] and Sections 37 and 135 of the Bombay Police Act 1951.

C 2. The High Court, while confirming the acquittal of three of the accused, reversed the judgment of the Trial court insofar as the appellant is concerned and found him guilty of the offence under Section 304 Part II of the Penal Code. The appellant was sentenced to suffer rigorous imprisonment for five years and pay a fine of INR 2,000/-

D 3. Captain Vinod Rawat (deceased) was a Captain in the Indian Army. On 10 July 1988, he and his colleague Lieutenant Mellvin Desouza visited New Jagdamba Hotel situated at M.G. Road, Ahmednagar. The hotel was managed by original accused No. 4. The prosecution alleged that a quarrel took place at the hotel between the accused and the two visitors. It is alleged that chilly powder was thrown by the accused into E the eyes of the two customers, upon which the deceased and his colleague ran out of the hotel. The case of the prosecution is that they were chased and were assaulted. Police Constable Divakar Shinde (PW-13) was on patrolling duty in the area. He is alleged to have seen the appellant assault the deceased with a *gupti*. As a consequence of the assault, F the deceased fell on the road. PW-13 took him in a rickshaw to the Police Station, Ahmednagar after which he was removed to the Civil hospital.

4. At the Civil hospital, the statement of the deceased was recorded by the Special Executive Magistrate, Vishnu Narang (Exh. 21). The G statement was recorded at midnight. On the basis of this statement, an offence was registered under Sections 326 and 307 read with Section 34 of the Penal Code.

5. The appellant was arrested at 2.10 a.m. on 11 July 1988. According to the prosecution, upon his arrest, a seizure was effected

H [1] Penal Code

from the appellant of blood stained clothes, namely a vest and a lungi. The prosecution has also alleged that, based on the information provided by the appellant, a blood stained *gupti* was seized from him. The clothes which were seized from the appellant were sent for chemical analysis. The prosecution alleged that the blood group on the clothes recovered matched the blood group of the deceased. The victim died on 23 July 1988 after which the investigation proceeded into an offence under Section 302 of the Penal Code. During the course of the trial, 14 witnesses were examined.

6. The Trial court acquitted the accused by its judgment dated 10 July 1989. Insofar as the appellant is concerned, the judgment has been reversed by the High Court.

7. Mr Sushil Karanjkar, learned counsel appearing on behalf of the appellant submitted that having regard to the settled principle of law which emerges from several decisions of this Court, among them being the judgment in **Mookiah** v **State, Rep. by Inspector of Police, Tamil Nadu**[2]("Mookiah"), the High Court was not justified in reversing the judgment of acquittal.

8. Learned counsel submitted that the trial court, noting the discrepancies in the investigation, adduced valid reasons for the order of acquittal. If such a view was possible, the High Court ought not to have interfered. Among the circumstances which are pressed by the learned counsel for the appellant are the following:-

(i) Though the incident took place on the night of 10 July 1988 and the death of the victim occurred on 23 July 1988, no effort was made by the investigating officer to produce the accused before the victim for the purposes of identification;

(ii) The evidence of PW-13 indicates that the identity of the appellant has not been established. PW-13, in the course of his deposition, indicated that he followed the accused and the victim from behind and had not actually seen the face of the assailant;

(iii) In the absence of the identification of the assailant by PW-13 who was the beat constable on duty, the failure of the prosecution to conduct a Test Identification Parade assumes significance;

[2] (2013) 2 SCC 89

A (iv) Two independent witnesses, PW-3 and PW-9 turned hostile;

(v) The Panch witnesses, who were relied upon by the prosecution in support of the seizure, also turned hostile;

(vi) The accompanying beat constable, Ram Deshmukh was not examined by the prosecution; and

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(vii) The colleague of the victim, Lt. Melvin Desouza, who had accompanied him on the night of the incident, was not examined by the prosecution.

Learned counsel submitted that at the highest, the recovery of the C blood stained clothes is one circumstance which may be taken into consideration, but that in itself is not sufficient to sustain a reversal of the judgment of the trial court by which the appellant was acquitted.

9. On the other hand, Mr Nishant R, learned Standing Counsel appearing on behalf of the State submitted that the appreciation of the D evidence by the trial court was evidently perverse and the High Court has justifiably interfered with the acquittal in order to ensure that there is no miscarriage of justice. Learned counsel submitted that this is a case where an army-man was put to death. Among the circumstances, learned counsel has relied upon the following:

E (i) The evidence of the beat constable on duty (PW-13);

(ii) The dying declaration (Ex. 21); and

(iii) The evidence of the investigating officer (PW-14).

10. These submissions fall for our consideration.

F 11. The principles that guide the exercise of appellate jurisdiction in reversing an order of acquittal may be briefly adverted to. In **K Gopal Reddy** v **State of Andhra Pradesh**,[3] the accused was charged under Section 302 of the Penal Code. The Additional Sessions Judge acquitted the accused. The order of acquittal was reversed by the High Court and the accused was sentenced to imprisonment for life. A two judge Bench G of this Court affirmed that the High Court, adopting a cautious approach, may review the evidence on record to come to its own conclusion. It was held that the benefit of doubt claimed by the accused must also be reasonable. This Court held thus:

[3] (1979) 1 SCC 355

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> "9. …After *Sanwat Singh* v *State of Rajasthan*, this Court has consistently recognised the right of the appellate court to review the entire evidence and to come to its own conclusion bearing in mind the considerations mentioned by the Privy Council in *Sheo Swamp case*. Occasionally phrases like "manifestly illegal", "grossly unjust", have been used to describe the orders of acquittal which warrant interference. But, such expressions have been used more as flourishes of language, to emphasise the reluctance of the appellate court to interfere with an order of acquittal than to curtail the power of the appellate court to review the entire evidence and to come to its own conclusion. …If two reasonably probable and evenly balanced views of the **evidence are possible, one must necessarily concede the existence of a reasonable doubt. But, fanciful and remote possibilities must be left out of account. To entitle an accused person to the benefit of a doubt arising from the possibility of a duality of views, the possible view in favour of the accused must be as nearly reasonably probable as that against him. If the preponderance of probability is all one way, a bare possibility of another view will not entitle the accused to claim the benefit of any doubt. It is, therefore, essential that any view of the evidence in favour of the accused must be reasonable even as any doubt, the benefit of which an accused person may claim, must be reasonable**." (Emphasis supplied)

In **Chandrappa** v **State of Karnataka**[4]("Chandrappa"), the Additional Sessions Judge held that the prosecution had failed to prove its case beyond a reasonable doubt and acquitted the accused of charges under Sections 143, 147, 148, 302 and 324 read with Section 149 of the Penal Code. The High Court reversed the order of acquittal and convicted the accused. It was argued in appeal before this Court that unless the findings of the trial court are non-existent, extraneous, perverse, acquittal palpably wrong, totally ill-founded or wholly misconceived, an appellate court ought not to interfere. A two judge Bench of this Court reviewed extensively the law on the power of the appellate court in reversing a finding of acquittal and laid down guiding principles in the following terms:

> "42. From the above decisions, in our considered view, the following general principles regardingpowers of the appellate court while dealing with an appeal against an order of acquittal emerge:

[4] (2007) 4 SCC 415

A (*1*) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded;

(*2*) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate
B court on the evidence before it may reach its own conclusion, both on questions of fact and of law;

(*3*) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc.
C are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion;
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(*4*) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. *Firstly*, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty
E by a competent court of law. *Secondly*, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court; and

(*5*) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding
F of acquittal recorded by the trial court."

The principles laid down in **Chandrappa** (supra) have been affirmed by this Court in **Murugesan** v **State, through Inspector of Police**[5] and **Prem Singh** v **State of Haryana**[6].

G 12. In assessing whether the High Court was justified in interfering with the judgment of acquittal, it is primarily necessary for this Court to consider the material evidence on the record.

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[5] (2012) 10 SCC 383

[6] (2013) 14 SCC 88

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13. The crucial evidence in the present case is that of PW-13, Divakar Shashikant Shinde, who was the beat constable and was on duty together with his colleague Ram Deshmukh on 10 July 1988.PW-13 stated in the course of his deposition that at about 11.30 p.m he was present near the place where the altercation took place. He saw a crowd gathered near Jagdamba Hotel and asked his colleague to wait at a fixed point. PW-13 proceeded to Jagdamba Hotel where the crowd had collected. He witnessed the victim having escaped from the crowd and having run away from the scene. PW-13 deposed that he had seen the accused assaulting the victim. The appellant was seen to have chased the victim. PW-13 stated that the appellant was wearing a black colour 'sando baniyan' and lungi. The appellant accosted the victim near New West India Watch Co. where he was assaulted with a weapon in the nature of a knife on the left side of his body. The appellant thereafter ran away. PW-13 removed the victim initially to the City Police Station in a rickshaw, after which he was taken to the Civil hospital. PW-3 was a beat constable on duty and is an eye-witness to the incident.

14. Emphasis has been laid by the learned counsel appearing on behalf of the appellant on the statement elicited during the cross-examination of PW-13 that he did not know the appellant previously and had no occasion to see him prior to the incident. PW-13 stated that he had seen the appellant running behind the victim but, at that stage, had not seen his face. In assessing this aspect, it is necessary that the Court must have the totality of the evidence in mind.

15. After the incident took place at about 11.30 p.m, the victim was moved to the hospital and his dying declaration (Exh. 21) was recorded at the Civil hospital at about 12.30 a.m. In his dying declaration, the victim stated that when he was standing on the road near the establishment of Jagdamba Beer Bar, a person had come from the road in his direction and threw chilly powder in his eyes. The victim stated that he had been assaulted with a knife in the stomach and the assailant was wearing a black coloured sando banian on his body and a printed lungi. The dying declaration has been believed by the High Court. PW-7, Dr. Ravindra Sonar examined the victim at the hospital and certified that he was in a fit condition to give a statement.

16. The evidence of the Special Executive Magistrate, PW-1, Vishnu Narang who recorded the statement has also been evaluated by the High Court. The Special Executive Magistrate had, on a request

A from the police station, visited the hospital to record the dying declaration. It is in this background that the High Court placed reliance on the recovery which was made of the blood stained clothes. The blood stained clothes consisted of a black coloured sando banian and the lungi. The recovery was made from the appellant when he was arrested within a few hours after the incident. The Report of the Chemical Analyser found that the B blood group on the blood stained clothes of the appellant matched the blood group of the deceased.

17. In this background, it is necessary to advert to the evidence of the investigating officer PW-14, Dattatraya Ramchandra Shejal. PW-14 deposed about the sequence of events leading to the report being made C to him by the head constable and by the PSO when the victim was brought in an injured condition in a rickshaw to the police station. PW-14 deposed that he, together with his subordinate staff, immediately visited the spot where the incident had taken place. He thereafter arrested the appellant at about 12.30 a.m. and attached from his person, one black D colour banian and one lungi cloth containing blood stains under a panchnama. On 11 July 1988, in close proximity to the incident, he recorded the statement of police constable Divakar Shinde, who deposed at the trial as PW-13. The other accused was also arrested at about 3 a.m. on 11 July 1988. The appellant was sent to the Civil hospital for treatment and examination as he had injuries on his leg and ankle.

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18. PW-14 deposed in the course of his evidence that during the course of the night between 10 – 11 July 1988, Capt. Rawat was removed by the military authorities to the Military Hospital Ahmadnagar. On the next day, when PW-14 went to the Military Hospital, Capt. Rawat was not in a condition to give a statement. PW-14 has deposed to the seizure F both of the blood stained clothes as well as the *gupti* at the behest of the appellant.

19. Though some emphasis was placed on the fact that the prosecution did not examine Lt. Melvin Desouza who was accompanying the deceased on the night of the incident, the High Court has, as we find, G observed that this witness could not be produced before the court since he was unavailable due to the exigencies of his military service. The High Court has noted that the prosecution did not deliberately suppress the witness from the court nor was it an attempt to prevent the truth from emerging.

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20. As regards the non-examination of the accompanying beat constable, we may note that PW-13, in the course of his examination, had stated that upon hearing the commotion, he had directed the accompanying constable to wait for him at a fixed point. Thereafter, PW-13 proceeded to the spot where the incident had taken place.

21. There is no doubt, on the basis of the evidence which has emerged, in regard to the identity of the appellant as the assailant. The dying declaration Exh. 21 has a ring of truth. The deceased specifically deposed to the clothes which were worn by the assailant. PW-13, who had witnessed the incident, corroborated the nature of the apparel worn by the accused/assailant. The clothes which were recovered from the appellant at the time of his arrest within a few hours of the incident, matched that description. Added to this, is the fact that the blood group on the stains which were found on the clothes, matched the blood group of the deceased. The identity of the appellant has been established beyond reasonable doubt.

22. Undoubtedly, two of the witnesses i.e. PW-3 and PW-9 as well as two panch witnesses had turned hostile. However, we find no reasonable basis for the trial court to have disregarded and rejected the evidence of PW-13, the beat constable, who was on duty. The presence of PW-13 at the spot where the incident took place was in the natural course of things. Nothing has been elicited in the course of his cross-examination to cast a doubt on his statement that he was assigned to duty at the place where the incident took place. Similarly, the mere fact that the panch witnesses in support of the discovery had turned hostile is no reason to discredit the case of the prosecution. We have already adverted to the testimony of the investigating officer, PW-14. The medical evidence in regard to the nature of the injuries is entirely consistent with the ocular evidence.

23. The High Court on the basis of the evidence on the record came to the conclusion that since the incident had been preceded by a quarrel, the case would not attract the provisions of Section 302. It is in this view of the matter, that the High Court has convicted the appellant under Section 304 Part II and sentenced him to imprisonment for a period of five years. Far from assisting the case of the appellant, the decision of this Court in **Mookiah** (supra) affirmed the principles laid down in **Chandrappa** (supra). The appellate court is justified in reversing an

order of acquittal where the order of acquittal suffers from a perversity and has resulted in a miscarriage of justice.

24. On a careful perusal of both the judgments of the trial court and the High Court, we find that the High Court has furnished cogent reasons for coming to the conclusion that the charge against the appellant was established beyond reasonable doubt. The trial court has proceeded purely on the basis of surmises when it observed that it was unlikely that PW-13 had witnessed the incident. In failing to refer to crucial parts of the evidence, the trial court had fallen into a grievous error which was justifiably corrected by the impugned judgment of the High Court. The judgment of the trial court suffered from a clear perversity and had resulted in a miscarriage of justice.

25. For the above reasons, we find no merit in this appeal. The appeal shall, accordingly, stand dismissed.

26. Since the appellant has been released on bail during the pendency of these proceedings, we order that the bail bonds shall stand cancelled and the appellant shall forthwith surrender to undergo the sentence. A copy of this judgment shall be forwarded to the Chief Judicial Magistrate concerned to secure compliance.

Divya Pandey Appeal dismissed.