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MURLI AND ANR.

v.

STATE OF RAJASTHAN

(Criminal Appeal No. 1011 of 2005)

AUGUST 18, 2009

B

[V.S. SIRPURKAR AND CYRIAC JOSEPH, JJ.]

Penal Code, 1860:

C

s.302 r.w. s.149 – Conviction under – Accused persons came together on the spot, gave abuses to the deceased – A1 assaulted deceased with lathi on his head and A2 gave blows with sharp edged weapon – Conviction of A1 and A2 based on evidence of eye witnesses – On appeal, held: Evidence of PW1 remained unshaken – Insignificant contradictions in the statement made by this witness which was recorded after 11 years, not fatal – The fact that PW2 had criminal record itself not sufficient to throw his evidence – His statement was recorded late however, no explanation was asked nor there was any cross examination of investigating officer on this issue – No infirmity in the order of conviction.

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Code of Criminal Procedure, 1973:

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Contents of the Panchanama are not the substantive evidence – Substantive evidence is what has been stated by the Panchas or the concerned person in the witness box.

Previous statement of the witness, even if admissible in evidence, cannot be used against the witness, unless he is confronted with the same and his attention is invited.

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CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 1011 of 2005.

From the Judgment & Order dated 05.05.2005 of the High

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Court of Judicature for Rajasthan at Jaipur Bench, Jaipur in D.B. Criminal Appeal No. 252 of 2000. A

U.U. Lalit, K.K. Tyagi, Iftexhar Ahmad, Prasenjit Keswani, N. Annapoorani for the Appellants.

Milind Kumar, Sudhir Pal Singh for the Respondent. B

The Judgment of the Court was delivered by

V.S. SIRPURKAR, J. 1. This Criminal Appeal is at the instance of two accused persons, who stand convicted of the offences under Section 302 by Trial Court and the High Court. As many as seven persons were tried for the offences under Sections 147, 148 & Sections 325 and 323 read with Section 149 of the Indian Penal Code (hereinafter referred to as "IPC" for short) on the allegation that they formed an unlawful assembly and in pursuance of the common object thereof, committed murder of Virendera Singh (the deceased), who was serving as a Patwari. In that process, one Lokendra Singh, his brother, was also injured. C D

2. Initially, the Sessions Judge convicted accused Murli (A-1), Heera (A-2), Bheru (A-3), Mohan Lal (A-4), Chhittar (A-5), Kanwar Lal (A-6) and Bhanwar Lal (A-7) for the offences for which they were charged. Three separate appeals came to be filed on behalf of the accused, they being D.B. Criminal Appeal No. 248 of 2000, D.B. Criminal Appeal No. 252 of 2000 and D.B. Criminal Appeal No. 309 of 2000. The High Court, ultimately, allowed the D.B. Criminal Appeal No. 248 of 2000 and D.B. Criminal Appeal No. 309 of 2000. The High Court dismissed the D.B. Criminal Appeal No. 252 of 2000 filed by Murli (A-1) and Heera (A-2), but allowed the same insofar as Chhittar (A-3) was concerned. We are, therefore, concerned only with two accused persons, i.e., Murli (A-1) and Heera (A-2), who are the appellants in the present Appeal, the rest of the accused having been acquitted by the High Court. E F G

A 3. The prosecution story, in short, is as under.

The incident is dated 14.9.1987. Lokendra Singh (PW-1) filed a report in the Police Station that while his elder brother Virendra and one Badri Dhakar were standing at the Paan Shop of Latur Mali at Bundi Road, Heera S/o Hardev Gujar, who was armed with Gandasa, Murli S/o Sunder Brahmin, who was armed with a Lathi and one other person, who was also armed with a Lathi came near them at Paan Shop. They abused his brother Virendra Singh, whereupon he (Lokendra Singh) and Virendra Singh asked them not to mishbehave. Just then, 6-7 persons armed with Lathies, Farsa, Gandasi and knives cornered Virendra Singh in a lane. Murli gave a lathi blow on his head and then all of them started shouting, expressing their intention to kill him and started assaulting Virendra Singh with various weapons. Virendra Singh fell down there itself. Then also, he was assaulted by Murli and one other person, though Badri Dhakar tried to stop them, which was futile. After the incident, all of them boarded one tractor of red colour and went away towards Kota Road, shouting 'Jai'. When PW-1 Lokendra Singh saw Virendra Singh, he had already died and his head and face were injured. He had seen those persons in the light and he could identify them. On this basis, the offence was registered at the Police Station. After the usual investigation, all accused persons excepting Bhanwar Lal (A-7) were arrested and the chargesheet came to be filed against the arrested accused persons, wherein Bhanwar Lal (A-7) was shown as an absconder. The investigation was kept pending against him. The matter was committed to Sessions Court, Bundi. When the trial commenced before the Sessions Judge, Bhanwar Lal (A-7) was also arrested and a chargesheet came to be filed against him after about 3 years of the first chargesheet on 2.1.1990. His case was also committed to the same Court. He was also charged for the same offences, with which the earlier accused persons were charged on 22.6.1988. The charge against Bhanwar Lal (A-7) was framed on 8.2.1990.

H All the accused abjured their guilt. The witnesses, who were

earlier examined like Lokendra Singh (PW-1), Badri Lal (PW-2) were recalled. The evidence of all the witnesses, whose evidence was recorded earlier, was then recorded again. Ultimately, the Sessions Judge found all the accused persons guilty. The prosecution mainly relied on the evidence of Lokendra Singh (PW-1) and Badri Lal (PW-2). During the investigation, the Test Identification Parade was also held since barring the two appellants, no other name was mentioned in the First Information Report. The evidence of the Magistrate was also recorded.

4. Shri U.U. Lalit, Learned Senior Counsel appearing on behalf of the appellants, pointed out that the prosecution has not been able to establish its case fully and as many as five accused persons have been acquitted by the High Court. He, therefore, pointed out that the same witnesses, whose evidence was disbelieved by the Trial Court could not have been believed by the Appellate Court, as the sub-stratum of the prosecution story itself was disbelieved. The Learned Senior counsel secondly pointed out that barring Lokendra Singh (PW-1), the other witness Badri Lal (PW-2) cannot be believed, as his submission was recorded after considerable delay of over 25 days. The explanation given for this delay is also not satisfactory. It is pointed out that the name of Badri Lal (PW-2) did not find mention in the First Information Report and, therefore, he is clearly a set up witness. Insofar as Lokendra Singh (PW-1) is concerned, the Learned Senior Counsel pointed out that his evidence was also not liable to be accepted, as was done by the High Court, particularly, when his evidence was disbelieved in respect of the other accused persons. The Learned Senior Counsel further pointed out that in the Test Identification Parade, Lokendra Singh, who had earlier named Heera as one of the assailants, had identified accused Bheru and called him as 'Heera'. The Learned Senior Counsel tried to take advantage of the situation and contended that when he had named Heera, he might have seen only accused Bheru, whom he had identified as Heera. The

- A Learned Senior Counsel also relied on the record of the Identification Parade to point out that the error committed by Lokendra Singh in calling Bheru as Heera, was fatal to the case against accused Heera and hence Heera was liable to be acquitted. Insofar as appellant Murli is concerned, the Learned
- B Senior Counsel pointed out that as per the prosecution evidence, he had only given one stick blow on the head of the deceased and, therefore, he could not have had an intention to commit murder of the deceased and his conviction should be altered from under Section 302 IPC to Section 304 Part II IPC
- C or even under Section 326 IPC.

5. As against this, Shri Milind Kumar, the Learned Counsel appearing on behalf of the State supported the conviction and pointed out that though the evidence of Badri Lal (PW-2) was disbelieved by the High Court, this Court still could go into that
- D evidence and if the evidence of these two witnesses (PW-1 and PW-2) is read together, the prosecution case against these two appellants stood fully established. The Learned Counsel pointed out that both these witnesses have stood the test of searching Cross Examination and the Appellate Court had
 - E disbelieved the evidence of Badri Lal (PW-2) only on the ground that firstly, his statement was recorded late and secondly, that Badri Lal (PW-2) was of dubious character, facing number of prosecutions. The Learned Counsel pointed out that merely because of these two reasons, the evidence could not have
 - F been thrown, as the Investigating Officer was not even cross-examined and was not given any opportunity to explain as to why Badri Lal's Statement under Section 161 of the Code of Criminal Procedure (hereinafter called "Cr.P.C." for short) was recorded late. According to the Learned Counsel, since Badri
 - G Lal was afraid to go to the Police because of his dubious past and had clearly deposed the same in his evidence, he should have been believed by the Appellate Court and his evidence should be accepted by us, since he was honest to that extent in owning up the pending prosecutions against him. As regards
 - H the error committed by PW-1 Lokendra Singh, the Learned

Counsel pointed out that there was no substantive evidence on record to the effect that Lokendra Singh has committed the mistake. The Learned Counsel urged that merely because it was, at one place, so recorded in the Test Identification Panchanama, that by itself, could not be viewed as substantive evidence, unless the Magistrate recording the same, had referred to that fact in his substantive evidence before the Court. It is on this basis that we have to consider as to whether the High Court was right in convicting the appellants herein.

6. There can be no dispute that the witnesses, as well as, the accused persons have criminal background. It has come in the evidence of Lokendra Singh (PW-1) that there were two false cases going on against him and his brother in Kota, instituted by Nayapura Police Station. He also disowned any knowledge regarding the prosecution of his brother for offences under Section 365 and 376 IPC. He also refused to admit that as many as seven cases were continuing against his brother, instituted by the Police Station Pattan. It has also come in the evidence that accused persons were no better. Same thing is about Badri Lal (PW-2). He himself admitted that he was facing some charges and, therefore, he did not depose about the incident because he was afraid of Police. Therefore, the criminal background, in our opinion, would not be of much consequence, though while appreciating their evidence, that fact has to be borne in mind. At the same time, it has to be borne in mind that the two witnesses claimed to be eye-witnesses and Lokendra Singh (PW-1) had lost his brother. He could not be expected to let off the persons, who were, in fact, guilty of assault on his brother. In his evidence, he has referred to the strange relations between the accused and his brother. In his Examination-in-Chief, he has specifically attributed the specific act to appellants Murli and Heera. Their names very clearly appearing in the First Information Report, which was immediately lodged. He has also referred in the First Information Report, to the father's name of both these persons, as well as, Caste and the towns that they belong to. Lokendra

- A Singh (PW-1) was also injured during the incident and his injuries have been established on record. In his Examination-in-Chief, he has specifically stated that Badri Lal (PW-2), who was present, was shouting. It was in his presence that the inquest report, as well as, the spot panchanama were prepared. He gives a specific explanation as to why he has not noted the number of tractor, in which the accused had fled. In his cross examination, it has come that he knew Heera and Murli even before the incident. He was candid to admit in his cross examination that except accused Heera and Murli, he could not say as to which weapons were handled by each accused. Thus, this witness had clearly identified Heera in the Court and had also named the accused Heera with reference to his father and the caste in the First Information Report. Considering that this witness had given an immediate report within half an hour of the incident and that he has specifically told the names of Heera and Murli with reference to their fathers and their castes, there was hardly anything to disbelieve that he did not know Heera and Murli before the incident.

7. We have seen the cross examination very closely. However, we do not see anything worth in the same, at least relating to the main incident. The evidence of this witness was recorded more than once. Firstly, it was on 1.3.1989, which was continued on 16.3.1989, when Bhanwar Lal (A-7) had not been arrested. It was again recorded after ten years, on 26.9.1998, after the arrest of Bhanwar Lal (A-7). Even then, substantive amount of evidence was the same. He identified all the accused in the Court. His story also remained more or less the same. His cross examination started on 24.3.1999, where the First part of cross examination was regarding the criminal cases that he was facing including one murder case, which was still continuing against him. In his cross examination, which took place after about 11 or 12 years, he was specifically asked on the subject of Identification Parade. He had definitely committed some errors by saying that Heera and Murli were also put in for the Identification Parade that day, which was not a fact. The

concerned Magistrate has deposed that they were not put for Identification Parade, as their identity was already established in the First Information Report. All that the witness was asked was about Exhibit P-28, the Identification Panchanama and he admitted that whatever was written in Panchanama, was correct. From this, the Learned Senior Counsel Shri Lalit urged that a sufficient opportunity was given to this witness. We will go into that aspect a little later. However, suffice to say that insofar as the basic incident is concerned, his evidence has remained unshaken as far as the present two appellants are concerned. In fact, in his re-appearance, after 11 years, there is hardly any cross examination on the main incident. He was mostly cross examined on the Panchanama and some insignificant contradictions were taken out in his evidence. The other contradictions and omissions were as regards the accused Bheru (A-3), with whose case, we are not concerned here. Therefore, the evidence of this witness has remained unshaken in respect of the actual incident.

8. Same is the case of Badri Lal (PW-2). We are quite mindful of the fact that the statement of Badri Lal (PW-2) was recorded extremely late, i.e., after about 25 days of the incident. Strangely enough, no explanation thereof was asked and there is no cross examination of the Investigating Officer on this issue. This is apart from the fact that Badri Lal (PW-2) very specifically spoke about his criminal past and explained that since he was afraid of the Police, he did not go to the Police Station. This witness was also examined, firstly, on 17.6.1989 and in his cross examination, at the first instance, his criminal past was brought out. There can be no dispute that the witness has a criminal past, but that by itself, may not be sufficient to throw his evidence, as has been done by the Appellate Court. While we see the impugned judgment, it is evident that even the statements of other two witnesses, namely, Bajrang Lal (PW-3) and Durga Lal (PW-4) were recorded after about 23 days of the occurrence of the incident. Those two witnesses turned hostile and hence, they were not believed. However,

- A insofar as this witness (Badri Lal – PW-2) is concerned, in Para 22 of the Appellate Judgment, it was held that the delay in recording of his evidence under Section 161 Cr.P.C. was fatal. The Appellate Court did see that the name of Badri Lal (PW-2) was there in the First Information Report also, which gave
- B great support to the fact that he was present. The only reason that the Appellate Court has given is the late recording of his statement under Section 161 Cr.P.C. and that he was involved in number of criminal cases. We are also not satisfied with the observation made. Beyond this, the Appellate Court has not
- C dealt with his evidence at all. The Public prosecutor took us through the evidence of Badri Lal (PW-2) in detail and we find that there is absolutely nothing to disbelieve insofar as the evidence relating to the main incident is concerned. He claimed that in his evidence, it has come that he had no dispute with the accused and rather he was friendly with them. He also
- D claimed that he saved Lokendra Singh (PW-1). He candidly admitted that he did not go to the Police Station, that was probably because PW-1 had already gone to the Police Station. The only material omission, which has come in is about his not having stated in the statement under Section 161 Cr.P.C. that
- E Murli was armed with Lathi. In his cross examination itself, the position of the accused persons, while assaulting, has come on the record. As if all this was not sufficient, it has come in his evidence that there was a 200W Bulb, burning in the lane, the tube lights of the hotel were on and its light was coming in
- F the lane. It has also come in his evidence that the municipal electric pole from the lane was at a distance of 45 Feet. Thus, it was in the cross examination that the source of light was brought in. Second round of recording of his evidence was took place on 17.3.1993. Again, the witness unmistakably pointed
- G out the roles played by the two appellants and the weapons that they were armed with. There can be no doubt that the witness was of criminal character and that his statement was recorded later, but even then, if that caution is kept in mind while appreciating the evidence and if his evidence inspires upon
- H confidence, it is not incorrect to accept such evidence.

However, for that purpose, his evidence has to be scrutinized very closely. This is apart from the fact that an opportunity has to be given to the Investigating Officer to explain as to why the statement was recorded late. Applying all these tests, we do not think that his evidence was liable to be thrown only on the ground that he had a criminal past and his statement was recorded late. Therefore, we are of the opinion that, applying all these tests, his evidence as against two appellants, is acceptable.

9. This takes us to the question argued by the Learned Senior Counsel for the appellants regarding the wrong identification made by Lokendra Singh (PW-1), wherein he had identified accused Bheru as Heera. We have seen the Exhibit P-28. Exhibit P-28 stands proved by Tara Chand Soni (PW-15). We have seen the evidence of PW-15 closely. Though Exhibit P-28 is exhibited on the basis of the evidence of the said witness, he has not stated in his substantive evidence that Lokendra Singh (PW-1) called Bheru as Heera. It is a comment made by Heera, which has been incorporated in the document in Column No. 7, which reads as under:-

"Yah Aadmi ladai me majud tha, isliye janta hun. Main iska naam pahle se janta hun."

Thereafter, in Column No. 9, he named the said person as Heera S/o Hardev, Caste Gujjar, R/o Gamach.

10. We have also seen the evidence of Lokendra Singh (PW-1) very closely on this issue. Undoubtedly, he has committed an error in suggesting that Heera and Murli were also put in for Identification Parade, which is not a fact. That was an obvious mistake. This may be because of the lapse of memory because he has referred to these facts only in the second installment of his evidence, which was recorded after about 11 years. We do not attach much importance to that, though the Learned Senior Counsel for the appellants earnestly urged that we must take note of this mistake. The Learned

- A Senior Counsel for the appellants then invited our attention to the following sentence in his cross examination:-

“In Exhibit P-28, whatever I have stated before the Magistrate at X to Y, was stated correctly.”

- B From this, the Learned Senior Counsel urged that the witness was given sufficient opportunity to explain his earlier statement made to the Magistrate and that is how we will be able to read the contents of Panchanama and accept the same as substantive evidence. We do not agree. The contents of the
- C Panchanama are not the substantive evidence. The law is settled on that issue. What is substantive evidence is what has been stated by the Panchas or the concerned person in the witness box. Again, even if we accept the extreme preposition, anything and everything stated in the Panchanama can be read
- D as the substance evidence, still the fact remains that in this case, the witness who has supposed to have made the statement to the Magistrate, is not given an opportunity to explain the same. The portion marked from X to Y is in Column No. 7 of the Panchanama, where he had made the statement
- E as above. However, there is no cross-examination or no question put to him about the contents of Column No. 9, where he has taken the name of Heera. The statement in Column No. 7 amounts to his previous statement and unless he was confronted with the statements specifically and asked to explain,
- F such statement cannot be used. It is trite law that a previous statement of the witness, even if admissible in evidence, cannot be used against the witness, unless the witness is confronted with the same and his attention is invited. In his substantive evidence, the witness has never made a statement that he had identified Bheru as Heera. So much so that there is nothing in
- G the evidence, which suggests that Heera and Murli were ever identified by him. His admitted case was that he knew Heera and Murli even before the incident took place. It is an admitted position that Heera and Murli were never put in for identification in the Identification Parade. Under such circumstances, the
- H

insignificant circumstance in the Test Identification Panchanama to the effect that the witness had identified Bheru and named him as Heera, cannot amount to the substantive evidence and further it cannot be used, as that statement was never specifically put to the witness. This is apart from the fact that even if the witness was confronted with his previous statement, there is other over-whelming evidence to the effect that witness had in fact known Heera and had identified him and named him in the First Information Report. We may also point out that a statement that he knew Heera from the beginning and even before the incident took place, has gone completely unchallenged. Strangely enough, that fact has been brought in his cross examination. We have, therefore, no hesitation in accepting the evidence of Lokendra Singh (PW-1). We have also given our reasons as to why the evidence of Badri Lal (PW-2) was also acceptable and that the High Court should not have rejected the same. Once we see the evidence of Badri Lal (PW-2), there are hardly any inter se contradictions in between the evidence of Lokendra Singh (PW-1) and Badri Lal (PW-2). In that view, the active role played by Heera and Murli is obvious.

11. The Learned Senior Counsel for the appellants further urged that Murli had given only one blow and there could not be an intention of committing murder. It has come in the evidence of Dr. Vinod Kumar Dhingra (PW-10) that besides the incised wounds, the deceased also suffered the fracture. What was tried to be argued by the Learned Senior counsel was that Dr. Vinod Kumar Dhingra (PW-10), in his evidence, had stated that the deceased had died on account of asphyxia due to complete incised injury to trachea. The Learned Senior Counsel tried to argued that if this alone was the injury resulting in death, then some advantage should be given to Murli who was merely handling a Lathi. The accused persons, as per the charges, were charged with the offence under Section 302 substantively. In addition to that, all the accused were also charged with the aid of Section 149 IPC. It is obvious that both the appellants had specifically taken part in the assault, their

- A presence was established, their overt acts were also established. It was further established that while Heera had given the blows with the aid of a sharp edged weapon, Murlu had assaulted the deceased with Lathi on the head. In that view, both the accused can be convicted. The High Court in the
- B appellate judgment, however, has not discussed any of these aspects and has merely chosen to dismiss the appeal and thereby confirming the conviction ordered by the Trial Court with the aid of Section 149 IPC. That undoubtedly was incorrect. The High Court ought to have given a specific finding. However, the
- C fact remains that these two appellants were found to have inflicted the injuries with sharp edged weapon, as well as, Lathi. They have also been individually charged with the offence under Section 302 IPC. In that view, they were bound to be convicted for the offence under Section 302 read with Section 34 IPC.
- D They came together on the spot, they also gave abuses to the deceased and thereafter, acted along with each other. Therefore, we have no hesitation in upholding the conviction, but not with the aid of Section 149 IPC, but with the aid of Section 34. Unfortunately, the High Court has not discussed this aspect of the case. We, therefore, find no merits on this ground.
- E

12. We, therefore, hold that the appeal has no merits and has to be dismissed. It is accordingly dismissed.

F D.G.

Appeal dismissed.