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KHAIRUDDIN & ORS.

v

STATE OF WEST BENGAL

(Criminal Appeal No. 2036 of 2009)

MAY 7, 2013

B

[T.S. THAKUR AND GYAN SUDHA MISRA, JJ.]

PENAL CODE, 1860

C

ss. 302/149, 148 and 323/149 - Death of two persons and injuries to others as a result of attack by accused persons - Held: Conviction of four of the appellants who have been named in FIR and attributed specific role and the fifth appellant who though not named in FIR but attributed specific role and also stated in his statement u/s.313 about his presence at the place of occurrence and participation, upheld - Remaining appellants acquitted giving them benefit of doubt - Code of Criminal Procedure, 1973 -s.313.

D

CONSTITUTION OF INDIA, 1950:

E

Art.136 - Scope of - Held: The width and plenitude of powers available under Art.136 would permit a reappraisal at the apex stage in cases of manifest injuries.

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Twenty six persons including 16 appellants were prosecuted for murder of two persons and causing injuries to others. The prosecution case was that there was dispute between the complainant's side and the accused-appellants over the land which was in cultivatory possession of the complainant party. On the day of the incident at about 10.00 a.m, when PW1 and others were working in the land in dispute, twenty four named accused and some others came there armed with bows and arrows, knives, daggers, lathis etc. and attacked the complainant party causing death of two

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persons and injuries to others. The trial court convicted 21 accused u/ss.302/149, 148 and 323/149 and sentenced each of them to imprisonment for life. The High Court affirmed the conviction and sentence. Appellant no.11 died pending appeal.

It was contended for the appellants that out of sixteen appellants found guilty, only five were named in FIR and attributed specific roles and the remaining were not named in the FIR or, if named, no specific role was attributed to them in the evidence adduced at the trial; and that there were several contradictions in the deposition of prosecution witnesses as to the genesis of the incident and actual sequence of events which resulted in the death of two persons who participated in the incident. It was submitted that in the circumstances, the entire prosecution case was rendered suspect entitling the appellants to an acquittal

Allowing the appeal in part, the Court

HELD: 1.1. It is trite that appreciation of evidence is essentially the duty of the trial court, and the first appellate court. But in cases, where, the Courts below are shown to have faltered and ignored material aspects resulting in miscarriage of justice, this Court can and has interfered to grant relief. That is because even when this Court may not be an ordinary court of appeal, the width and the plenitude of the powers available to it under Art.136 would permit a reappraisal even at the apex stage in cases of manifest injustice. [para 9] [487-A-C]

Radha Mohan Singh v. State of U.P. 2006 (1) SCR 519 = (2006) 2 SCC 450, *Bhagwan Singh v. State of Rajasthan* (1976) 1 SCC 15, *Kirpal Singh v. State of Uttar Pradesh* 1964 SCR 992 = AIR 1965 SC 712 - relied on.

2.1. The evidence adduced at the trial comprising the

A depositions of PW-1 PW-4 PW-5, PW-6 and PW-17,
attributed overt acts of assault to only five of the
appellants namely appellants nos. 1,3,4,9 and 11.
Appellant No.11 expired during the pendency of the
appeal. These appellants were not only named in the FIR
B but were in specific terms named even at the trial by the
witnesses examined by the prosecution, some of whom
were themselves injured in the incident, thereby, proving
their presence on the spot beyond any doubt. The courts
below have also appreciated their depositions in the right
C perspective and rightly held that the presence and
participation of the five appellants in the incident was
established by the prosecution beyond any reasonable
doubt. To that extent, therefore, there is no reason to
interfere with the findings recorded by the trial court and
D affirmed by the High Court except recording that appellant
no. 11 has died pending appeal and his appeal stands
abated. [para 10] [487-E-H; 488-A-B]

2.2. None of the appellants nos. 8, 12 and 16,
admittedly, was named in the FIR, which was lodged by
E PW-1 who was present on the spot and claims to have
witnessed the occurrence. Absence of the names of
these three appellants from the FIR which gave details of
the incident and named several others who were
allegedly participating in the occurrence assumes
F importance and would require a cautious approach
towards the evidence. That is because omission of the
names of those who are alleged to have participated in
the commission of the crime would be a significant
circumstance which cannot be lightly ignored. Possible
G false implication by subsequent deliberations and
consultations to cast the net wider and accuse even
those who may not have been actually present on the
spot, cannot be ruled out. No explanation is in any case
coming forth from the witnesses for the omission of the
H names of these accused-appellants. [para 12] [489-B-E]

2.3. However, the statement of appellant no. 16 u/s 313 CrPC shows that he was present on the spot at the time of the occurrence according to his own admission. Not only that, he had according to his own statement, participated in the incident and even assaulted one of the deceased before fleeing from the spot, That the statement of an accused made u/s 313 Cr.P.C. can be taken into consideration is not in dispute. [para 13] [489-H; 490-A]

Sanatan Naskar and Anr. v. State of West Bengal (2010) 8 SCC 249; *Ashok Kumar v. State of Haryana* 2010 (7) SCR 1119 = (2010) 12 SCC 350; *Brajendra Singh v. State of Madhya Pradesh* 2012(3) SCR 599 = (2012) 4 SCC 289 - referred to

2.4. PW-4 has in his deposition specifically stated that appellant no. 16 was one of those who had assaulted deceased-'D'. Similarly, the injured witness, PW-5, PW-6 and PW-7 have also implicated appellant no. 16 stating that one of the deceased was assaulted by PW-16 and others. Thus, it is evident that presence of appellant no.16 on the spot and participation in the commission of the offence is proved by the evidence led by the prosecution and supported by his own statement recorded u/s 313 Cr.P.C. That is not, however, true about the remaining two appellants, namely, appellants nos. 8 and 12, who were neither named in the FIR nor is there any cogent evidence to suggest their complicity or participation in the commission of the offence, and they are also entitled to the benefit of doubt. [para 15-16] [491-G-H; 492-C-E]

2.5. Appellants no. 2,5,6,7,10,13 and 15 have no doubt been named in the FIR but, there is no evidence showing that they were either present on the spot or participated in the occurrence. The depositions of the eye-witnesses,

4. *M/s. Newton Engineering and Chem, Ltd. v. Indian Oil Corporation Ltd. & Ors.*: [Civil Appeal No. 7587 of 2012; Decided on 18.10.2012.]

- A do not incriminate these appellants. At any rate, in the absence of any cogent and reliable evidence proving that the said appellants were either present on the spot or that they had committed any overt act that could show that they shared the common object of the unlawful assembly
- B comprising those who had come to the spot armed with weapons and actually carried out the assault, it is not possible to support their conviction. There is, it is well-known, a general tendency in such incidents to implicate as many members of the opposite party as is possible.
- C That the villagers in the vicinity of the disputed land were divided into factions is evident from the depositions of the witnesses examined at the trial. It is not, therefore, unnatural that a very large number of persons were named in the FIR but when it came to giving them a role in the incident, the prosecution witnesses fell short of
- D words. [para 11] [488-C-G]

- 2.6. It is true that the commission of an overt act may not always be necessary to prove that a member of an unlawful assembly shared the common object of the
- E assembly, but then, the minimum that the prosecution must prove is that the persons concerned were members of the unlawful assembly. There is no evidence worthy of credence to prove that requirement in the case at hand. Therefore, appellants nos. 2,5,6,7,10,13 and 15
 - F deserve the benefit of doubt in the facts and circumstances of the case. [para 11] [488-G-H; 489-A]

- 2.7. In the result, conviction of appellants nos. 1, 3, 4, 9 and 16 is affirmed. The rest of the appellants are given the benefit of doubt and acquitted of the charges
- G framed against them.[para 17] [492-E-F]

Case Law Reference:

2006 (1) SCR 519 relied on para 9

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(1976) 1 SCC 15	relied on	para 9	A
1964 SCR 992	relied on	para 9	
(2010) 8 SCC 249	referred to	para 13	
2010 (7) SCR 1119	referred to	para 14	B
2012 (3) SCR 599	referred to	para 14	

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal
No. 2036 of 2009.

From the Judgment & Order dated 24.12.2008 of the High Court of Calcutta in Criminal Appeal No. 291 of 1990. C

Sudhir Naagar, Chetan Chawla, for the Appellants.

Mohit Paul, Shagun Matta, Saakar Sardana, Anip Sachthey for the Respondent. D

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. This appeal by special leave arises out a judgement and order dated 24th December, 2008, passed by the High Court of Calcutta, whereby Criminal Appeal No.291 of 1990 filed by the appellants has been dismissed, in the process confirming the conviction and sentence of imprisonment for life awarded to them by the trial Court for offences punishable under Section 302 read with Section 149 of the IPC, and Sections 148 and 323/149 of the IPC. A fine of Rs.2000/- was also imposed on each one of the appellants, in default of payment whereof the appellants were sentenced to undergo further imprisonment for a period of one year. Half of the amount realised towards fine was directed to be paid to the legal heirs of the deceased in equal share. E F G

2. Facts giving rise to the commission of the offence and the registration of the case alleged against the appellants, as also their eventual conviction and sentence have been stated at length by the trial Court in its judgment and recapitulated even by the High Court in the order under appeal before us. H

A We need not, therefore, recount the same over again except to the extent it is absolutely necessary to do so for the disposal of this appeal.

B 3. The prosecution case precisely is that one Akalu was in cultivating possession of a parcel of agricultural land admeasuring 21 bighas situated in village Fatehpur, Mouza Lakhipur. Akalu, it appears, was helped by his tillers colloquially called adhiars. Some of the appellants claim to be the pattadars of the said parcel of land. A dispute regarding possession and the right to cultivate had embittered the relations between the appellant-pattadars on the one hand and Akalu and his adhiars on the other. The prosecution story is that on 3rd November, 1978, at about 10.00 a.m., Akalu, along with Budhu Md. (PW-1) and deceased Dabaru and Imamuddin, accompanied by a few others, namely, Jharu, Monglu, Bholu and Lal Khan were working in the disputed parcel of land when twenty four named persons including the appellants and some unnamed persons came to the spot, armed with sharp weapons like bows and arrows, knives, daggers, khapa-ballams and lathis. An altercation ensued between the two parties when the appellants tried to obstruct Akalu and his men from ploughing the land in question. The altercation escalated into a murderous assault by the appellants upon the persons in cultivation of the land who sustained grievous injuries with sharp edged weapons which the appellants' party was carrying with them. While Dabaru succumbed to his wounds and died on the spot, deceased-Imamuddin breathed his last within an hour thereafter. Other members of the complainant party also sustained several injuries on their bodies.

G 4. A First Information Report about the incident was lodged by Budhu Md. in which several persons including some of the appellants were named as the assailants. It was also alleged that apart from the persons named in the First Information Report, there were 15-16 unnamed persons who participated in the assault. C.R. Case No.1352/78, corresponding to Case

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No.4 dated 3rd November, 1978 was accordingly registered by the police at Chopra P.S. and the investigation started, in the course whereof the investigating officer conducted an inquest and got the dead bodies of the deceased subjected to post-mortem examination, apart from making recoveries of the weapons of offence used by the assailants. A chargesheet was eventually filed by the police before the committal Court against as many as 26 persons including the appellants herein. The case was, in due course, committed to the Court of Additional Sessions Judge, Islampur, before whom the appellants pleaded not guilty and claimed a trial.

5. At the trial, the prosecution examined as many as 19 witnesses in support of its case. By its judgment dated 30th May, 1990, the trial Court found 21 out of 26 accused persons guilty of the offence of murder punishable under Section 302 read with Section 149 IPC, and by its order dated 31st May, 1990, sentenced each one of them to undergo imprisonment for life besides payment of fine as already indicated earlier. The trial Court also found the said 21 persons including the appellants herein guilty of commission of the offences punishable under Sections 148 and 323 read with Section 149 IPC but did not separately award any sentence for those offences in view of the fact that the accused had already been sentenced to undergo life imprisonment for the main offence punishable under Section 302/149 IPC. Out of the remaining five accused persons the trial Court acquitted Yusuf Amin, Jabbar and Abdul Rahman giving them the benefit of doubt, while the other two having died during the pendency of the trial, the case against them was held to have abated.

6. Aggrieved by the judgement and order pronounced by the trial Court, the convicts including the appellants filed Criminal Appeal No.291 of 1990 before the High Court of Judicature at Calcutta. During the pendency of the said appeal, five of the convicts passed away. The appeal qua them was accordingly held to have abated. The High Court heard the appeal on merits qua the remaining sixteen convicts/appellants before it

A and upon a reappraisal of the evidence came to the conclusion
that the appellants had been rightly convicted and sentenced
by the trial Court to undergo imprisonment for life as the
prosecution had proved the charges framed against them
beyond a reasonable doubt. The present appeal by special
B leave assails the correctness of the said judgment and order
of the High Court.

7. Learned counsel for the appellants contended that the
Courts below had failed to properly appreciate certain glaring
features of the prosecution case that cast a cloud over the
C truthfulness of the prosecution story and, thereby, resulted in
gross miscarriage of justice. In particular, it was urged that out
of sixteen appellants found guilty and condemned to undergo
imprisonment for life, only five were named in the FIR and
attributed specific roles in the incident that led to the killing of
D the deceased Dabaru and Imamuddin. The remaining eleven
appellants were not either named in the FIR or if named no
specific role was attributed to them in the evidence that was
adduced at the trial. Three of the appellants viz Monglu,
Hafijuddin and Motilal Motin were also not named in the FIR
E and yet given a role in the oral evidence adduced at the trial.
This, according to the learned counsel, rendered the entire
prosecution case suspect entitling the appellants to an acquittal.
It was further contended that there were several contradictions
in the depositions of the prosecution witnesses as to the
F genesis of the incident and the actual sequence of events that
resulted in the death of two of those who were present and
participated in the same. The appellants were on that count
also entitled to the benefit of doubt arising from the deficiencies
in the prosecution case, argued the learned counsel.

G 8. Mr. Anip Sachthey, learned counsel for the respondent,
per contra, contended that the appreciation of evidence by the
two Courts below was proper and did not, therefore, call for any
interference, especially, when there was no demonstrable
miscarriage of justice in the appraisal of the evidence by the
H Courts below.

9. We have given our anxious consideration to the submissions made at the Bar who have taken us through the evidence led at the trial. It is trite that appreciation of evidence is essentially the duty of the trial Court, and the first Appellate Court. But in cases, where, the Courts below are shown to have faltered and ignored material aspects resulting in miscarriage of justice, this Court can and has interfered to grant relief. That is because even when this Court may not be an ordinary Court of appeal, the width and the plentitude of the powers available to it under Article 136 would permit a reappraisal even at the apex stage in cases of manifest injustice. The legal position as to the powers of this Court under Article 136 of the Constitution is well-settled by pronouncements of this Court to which a detailed reference is in our view unnecessary. Reference can all the same be made to the decisions of this Court in *Radha Mohan Singh v. State of U.P.* (2006) 2 SCC 450, *Bhagwan Singh v. State of Rajasthan* (1976) 1 SCC 15, *Kirpal Singh v. State of Uttar Pradesh* AIR 1965 SC 712 etc.

10. Coming to the case at hand, we find that the First Information Report named as many as twenty four persons who, according to the first informant, were responsible for the commission of several offences including murder of the deceased Dabaru and Imamuddin. The evidence adduced at the trial comprising the depositions of PW-1 Budhu, PW-4 Samsul, PW-5 Monglu Mohd., PW-6 Lal Khan and PW-17 Bholu Mohd., attributed overt acts of assault to only five of the appellants viz. Khairuddin, Nazrul Haq, Nasir Md. Munshi, Bhoka @ Jarifuddin and Iswahaque only. Appellant No.11-Ishwahaque expired during the pendency of this appeal. The depositions of the above witnesses have been carefully perused by us with the assistance of learned counsel for the parties. We are of the opinion that the appellants above-mentioned were not only named in the FIR but were in specific terms named even at the trial by the witnesses examined by the prosecution, some of whom were themselves injured in the incident, thereby, proving their presence on the spot beyond any

- A doubt. The Courts below have also appreciated their depositions in the right perspective and in our opinion rightly held that the presence and participation of the above-mentioned five appellants in the incident was established by the prosecution beyond any reasonable doubt. To that extent, B therefore, we see no reason to interfere with the findings recorded by the trial Court and affirmed by the High Court.

11. That leaves us with appellants Rahimuddin, Idrish, Nurul Ibrahim, Khoka Md., Pasir @ Bishu, Kanchu and Asir @ Asiruddin. These appellants have no doubt been named in the C FIR but, as rightly pointed out by learned counsel for the appellants, there is no evidence showing that they were either present on the spot or participated in the occurrence. The depositions of the eye-witnesses, reliance upon which was placed by Mr. Sachthey do not incriminate these appellants. At D any rate, in the absence of any cogent and reliable evidence proving that the above-mentioned appellants were either present on the spot or that they had committed any overt act that could show that they shared the common object of the unlawful assembly comprising those who had come to the spot E armed with weapons and actually carried out the assault, it is not possible to support their conviction. There is, it is well-known, a general tendency in incidents of the kind we are dealing with in this case, to implicate as many members of the opposite party as is possible. That the villagers in the vicinity F of the disputed land were divided into factions is evident from the depositions of the witnesses examined at the trial. It is not, therefore, unnatural that a very large number of persons were named in the FIR but when it came to giving them a role in the incident, the prosecution witnesses fell short of words. It is true G that the commission of an overt act may not always be necessary to prove that a member of an unlawful assembly shared the common object of the assembly, but then, the minimum that the prosecution must prove is that the persons concerned were members of the unlawful assembly. There is H no evidence worthy of credence to prove that requirement in

the case at hand. We are, therefore, inclined to give to the appellants named above the benefit of doubt which in our view they deserve in the facts and circumstances of the case. A

12. That brings us to the cases of three other appellants viz. Monglu, Hafijuddin and Motilal Motin. None of them admittedly was named in the FIR, which was lodged by PW-1 Budhu Md. who was present on the spot and claims to have witnessed the occurrence. Absence of the names of these three appellants from the FIR which gave details of the incident and named several others who were allegedly participating in the occurrence assumes importance and would require a cautious approach towards the evidence. That is because omission of the names of those who are alleged to have participated in the commission of the crime would be a significant circumstance which cannot be lightly ignored. Possible false implication by subsequent deliberations and consultations to cast the net wider and accuse even those who may not have been actually present on the spot, cannot be ruled out. No explanation is in any case coming forth from the witnesses for the omission of the names of these accused-appellants. Having said that, we cannot ignore the fact that out of these three appellants, appellant Monglu Md. has in his statement under Section 313 answered question No.14, as under : B C D E

"I am also a Pattadar. A few days (4/5) before I had sown 'Tisi' in my lands. On the day of the occurrence I heard that the gang of Akalu was ploughing our land. Then Isa Haque, myself, Hafij, Kusrat and Tamij went. We asked them not to do so. There began fighting. I was assaulted on my finger. Darbaru, Betu and Sudhu were ploughing. Kusrat (my elder brother) had a great fighting with Darbaru. Then I also hit Darbaru. Then I fled away." F G

13. The above, shows that appellant Monglu Md. was present on the spot at the time of the occurrence according to his own admission. Not only that, he had according to his own statement, participated in the incident and even assaulted the H

- A deceased Dabaru, before fleeing from the spot, That the statement of an accused made under Section 313 Cr.P.C. can be taken into consideration is not in dispute; not only because of what Section 313 (4) of the Code provides but also because of the law laid down by this court in several pronouncements.
- B We may in this regard refer to the decision of this Court in *Sanatan Naskar and Anr.. v. State of West Bengal* (2010) 8 SCC 249, where this Court observed:

C "21. The answers by an accused under Section 313 of the Cr.PC are of relevance for finding out the truth and examining the veracity of the case of the prosecution. ...

D 22. As already noticed, the object of recording the statement of the accused under Section 313 of the Cr.PC is to put all incriminating evidence to the accused so as to provide him an opportunity to explain such incriminating circumstances appearing against him in the evidence of the prosecution. At the same time, also permit him to put forward his own version or reasons, if he so chooses, in relation to his involvement or otherwise in the crime. ... Once such a statement is recorded, the

E next question that has to be considered by the Court is to what extent and consequences such statement can be used during the enquiry and the trial. Over the period of time, the Courts have explained this concept and now it has attained, more or less, certainty in the field of criminal

F jurisprudence.

G 23. The statement of the accused can be used to test the veracity of the exculpatory nature of the admission, if any, made by the accused. It can be taken into consideration in any enquiry or trial but still it is not strictly evidence in the case. The provisions of Section 313(4) of Cr.PC explicitly provides that the answers given by the accused may be taken into consideration in such enquiry or trial and put in evidence for or against the accused in any other enquiry into or trial for, any other offence for which

H such answers may tend to show he has committed. In

other words, the use is permissible as per the provisions of the Code but has its own limitations. The Courts may rely on a portion of the statement of the accused and find him guilty in consideration of the other evidence against him led by the prosecution, however, such statements made under this Section should not be considered in isolation but in conjunction with evidence adduced by the prosecution. A B

24. Another important caution that Courts have declared in the pronouncements is that conviction of the accused cannot be based merely on the statement made under Section 313 of the Cr.PC as it cannot be regarded as a substantive piece of evidence....." C

14. To the same effect is the decision of this Court in Ashok Kumar v. State of Haryana (2010) 12 SCC 350. Reference may also be made to the decision of this Court in Brajendra Singh v. State of Madhya Pradesh (2012) 4 SCC 289 where this Court said : D

"15. It is a settled principal of law that the statement of an accused under section 313 of Cr.P.C can be used as evidence against the accused, insofar as it supports the case of the prosecution. Equally true is that the statement under section 313 of Cr.P.C simpliciter normally cannot be made the basis for conviction of the accused. But where the statement of the accused under section 313 Cr.P.C is in line with the case of the prosecution, then certainly the heavy onus of proof on the prosecution is, to some extent, reduced." E F

15. Time now to examine whether Monglu's participation in the crime is proved by the prosecution evidence adduced at the trial. PW-4 Samsul has in his deposition specifically stated that Monglu was one of those who had assaulted deceased-Darbaru. Similarly, PW-5 Monglu Md., an injured witness, has also implicated Appellant no.16, and stated "Darbaru was assaulted by Yusuf, Bhaka, Monglu and Jabbar. G H

- A I also stated to the I.O. the fact regarding assault of Darbaru..." PW-6 Lal Khan is yet another injured witness who incriminates Appellant no.16-Monglu. He stated, "At first Jabbar, Yusuf Amin, Monglu assaulted Darbaru with a dagger, ballam etc. who sustained multiple injuries on his person and succumbed to such injuries..." PW-17 Bholu Md. is also an injured witness
- B who corroborated the version given by the other eye-witnesses and stated "Sabdul, Khairuddin, Ishahaque, Nasiruddin, Monglu and others assaulted Darbaru severely."

16. It is evident from the above that the Appellant no.16-Monglu's presence on the spot and participation in the commission of the offence is proved by the evidence led by the prosecution and supported by his own statement recorded under Section 313 Cr.P.C. That is not, however, true about the remaining two appellants namely, Hafijuddin and Motilal who
- D were neither named in the FIR nor is there any cogent evidence to suggest their complicity or participation in the commission of the offence. In the circumstances, therefore, while appeal filed by Monglu shall have to be dismissed, that filed by Hafijuddin and Motilal shall have to be allowed giving to the said
- E two appellants also the benefit of doubt.

17. In the result, we dismiss this appeal qua Appellants No. 1-Khairuddin, No.3-Nazrul Haq, No.4-Nasir Md. Munshi, No.9-Bhoka @ Jarifuddin and No.16-Monglu. The appeal in so far as appellant No.11-Ishwahaque is concerned, shall stand
- F dismissed as abated. The rest of the appellants are given the benefit of doubt and acquitted of the charges framed against them. The appeal qua them is allowed and the judgments and orders of the Courts below modified to that extent. The appellants No.2- Rahimuuddin, No.5-Ildrish, No.6-Nurul, No.7-Ibrahim, No.8- Motilal Motin, No.10 Asir @ Asiruddin, No.12-Hafijuddin, No.13-Khoka Md., No.14-Pasir @ Bishu, and No.15-Kanchu shall be released from custody forthwith, unless
- G otherwise required in connection with any other case.

H R.P.

Appeal partly allowed.