SUBEDAR

v.

STATE OF U.P.

August 14, 1970

[K. S. HEGDE AND I. D. DUA, JJ.]

Constitution of India, Art, 136—*Conclusions of two Courts below holding accused guilty—When interference by Supreme Court justified.*

Evidence—Circumstantial evidence must point to guilt of accused and exclude possibility of innocence.

Seven persons including S (the appellant) and T were tried together, five under s. 396 I.P.C. and the appellant and T under s. 396 read with s. 109 I.P.C. The prosecution case depended only on circumstatial evidence and mainly on the testimony of two witnesses. The trial court convicted six accused, including the appellant and acquitted one. On appeal to the High Court by the convicted persons additional evidence was recorded and S. and T were also re-examined as accused for explaining the prosecution evidence. In the High Court prosecution relied on the following five circumstances against S and T :

1. Bitter enmity between G and C on the one side and S and T who were fast friends on the other;
2. The nature of the incident suggests that the primary object of the culprits was to commit the murder of G and C and having failed to kill C his property was looted as incidental venture;
3. On the evening preceding the night of dacoity S and T were seen in the company of five or six persons including the accused Gajju armed with *kanthas, ballas* and *lathis;*
4. S, who was inimical to G and C, raised false alarm at the time of dacoity to show false sympathy; and
5. On the following morning after dacoity S lodged F.I.R. by way of Peshabadi for putting the police on wrong track.

The appeal was dismissed by the High Court. According to both the courts below S and T were not amongst the dacoits. They were only stated to have assembled at the time of the dacoity. S is a first cousin of G and C, two victims of the dacoity. G was killed during the course of the dacoity.

On appeal by special leave in the Supreme Court counsel for the respondent State contended that it should not interfere with the conclusions of the two courts below holding the appellant guilty. Disagreeing with this contention.

HELD : This Court undoubtedly does not normally proceed to review and reappraise for itself the evidence in criminal cases when hearing appeals under Art. 136. But when the judgment under appeal has resulted in grave miscarriage of justice by some misapprehension or mistake in the reading of evidence or by ignoring material evidence, then this Court is not only empowered but is expected to interfere to promote the cause

A of justice. Article 136 is worded in very wide terms and the power conferred by it is not hedged in by any technical hurdles. This over-riding and exceptional power has been vested in this Court to be exercised sparingly and only in furtherance of the cause of justice. In the present case which depends only on circumstantial evidence, the courts below have completely ignored the warning given by this Court in *Hanumant* v. *The State of Madhya Pradesh* [1952 S.C.R. 1091] against the danger of conjectures and suspicions taking the place of proof. Evidence on basic
B or primary facts has of course to be approached in the ordinary practical way but the conclusions in the case of circumstantial evidence must necessarily point only to the guilt of the accused excluding any reasonable possibility of innocence. [832 B]

After considering the evidence on the record,

HELD : None of the five circumstances were established on the record:
C nor could they be considered either singly or collectively to be sufficiently cogent to bring home to the appellant abetment of the offence charged beyond the possibility of reasonable doubt. The evidence in the case did not satisfy the test required in cases founded on circumstantial evidence.

The appeal was allowed.

D CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 164 of 1967.

Appeal by special leave from the judgment and order dated October 14, 1966 of the Allahabad High Court, Lucknow Bench in Criminal Appeal No. 425 of 1964.

E *O. P. Varma*, for the appellant.

O. P. Rana, for the respondent.

The Judgment of the Court was delivered by—

Dua, J.—Subedar, appellant, has come up an appeal by spe-
F cial leave from his conviction under s. 396 read with s. 109, I.P.C. and sentence of life imprisonment imposed by the temporary Civil & Sessions Judge, Hardoi and affirmed on appeal by the Allahabad High Court according to which the appellant's case is covered by the second and third clauses of s. 107, I.P.C. read with Explanation 2.

G Seven persons, including the appellant, were tried. fixe under s. 396, I.P.C. and Subedar, appellant, and Tota under s. 396 read with s. 109, I.P.C. The trial court convicted six and acquitted one. The appeal of the convicted persons to the High Court failed. In this Court only Subedar has appealed.

According to the courts below Subedar and Tota were not
H amongst the dacoits. They are, however, stated to have assembled at the time of the dacoity which was committed on the night between the 21st and 22nd March, 1963. Subedar, it is not disputed, is a first cousin of the victims of the dacoity (Gajodhar

and Chhotey Lal) and is a resident of village Zafarpur where the dacoity was committed. Gajodhar, it may be stated, was killed during the course of the dacoity. The circumstances on which the prosecution relied against Subedar in the High Court are :

(1) bitter enmity between Gajodhar and Chhotey Lal and Subedar and Tota who are fast friends on the other;

(2) the nature of the incident suggests that the primary object of the culprits was to commite the murder of Gajodhar and Chhotey Lal and though the culprits did not succeed in killing Chhotey Lal his property was looted as an incidental venture;

(3) on the evening preceding the night of dacoity, Subedar and Tota were seen in a grove south of the village within less than a mile from Zafarpur in the company of five or six persons including appellant, Gajju son of Chheda, armed with *kantas, bhallas* and *lathis.* On the night following the dacoity was committed at the house of Gajodhar and Chhotey Lal when Gajodhar was killed and Chhotey Lal seriously injured and in the commission of that offence Gajju son of Chheda participated;

(4) Subedar, who was inimical towards Gajodhar and Chhotey Lal tried to show false sympathy for them by raising an alarm at the time of dacoity;

(5) on the following morning Subedar lodged first information report by way of *Peshabandi* in order to put the police on wrong track.

None of these circumstances is, in our view, established on the record; nor can they be considered either singly or collectively to be sufficiently cogent to bring home to the appellant abetment of the offence under s. 396, I.P.C. beyond the possibility of a reasonable doubt. According to Chhotey Lal undoubtedly there was a dispute in regard to property between him and the appellant who is his first cousin and indeed court litigation was pending between them. But it seems to be an exaggeration to say that there was bitter enmity between the parties. In support of the second circumstance also we are unable to find any evidence on the record. The inference seems to be conjectural, not supported by the material on the record on any rational basis. The charge under s. 396, I.P.C. also postulates murder in the course of the commission of dacoity and does not quite support the High Court's view. In any event it does not implicate the appellant. After dealing with the last two circumstances we will turn to the third. Subedar, it is conceded, actually lodged the first information report (Ex. Ka 7) on the morning of 22nd March. It was a writ-

A ten report covering nearly three printed pages. Now, merely because there was some dispute or litigation pending in courts between the parties it does not follow that the report was lodged by the appellant with the object of misleading the police or in order to forestall suspicion against him. From the contents of the report it is not possible to draw this inference. There is nothing misleading in it and certainly nothing indicative of a design to put
B the police on a wrong track. In fact its detailed nature suggests that it must have emanated from the persons who had taken full account of the loss and had even evaluated the articles stolen. The dacoity and murder it may be recalled was committed on the night between 21st and 22nd March. The written information was given by Subedar on the morning of the 22nd at 6.15 a.m.
C at the police station about 7 miles away. In these circumstances the suggestion of *Peshabandi* (to forestall suspicion) by the appellant seems to be wholly insupportable. Chhotey Lal, who appeared as P.W. 2, admitted in his cross-examination that Subedar, accused, had gone to the police station to lodge a report regarding the occurrence in question. Though he denied that he had sent Subedar to lodge the report he was constrained to admit
D that the following day at 9 or 10 O'clock the Sub-Inspector had also told him that Subedar had gone to the police station to lodge the report. He also admitted that when the Sub-Inspector informed him about Subedar having gone to lodge the report on his behalf he did not tell the Sub-Inspector that Subedar was inimical to him and his report should, therefore, be shown to him for
E scrutiny. The detailed nature of the report, the contents of which have not been shown to be incorrect, were presumably given to the appellant by Chhotey Lal. These circumstances support rather than negative the theory that Chhotey Lal had sent Subedar for lodging the report. There is, however, postive evidence in the statement of Dammar (P.W. 5) that Chhotey Lal had sent
F the appellant to lodge a report. Dammar (P.W. 5) had also accompanied Subedar along with Lila Pradhan and the chowkidar. We see no reason for disbelieving the testimony of P.W. 5. P.W. 17 Chaudhari Ishrat Husain, Sub-Inspector, has stated that Subedar was arrested by him on the 15th April, 1963. The statement of Babu Ram (P.W. 7) and Khanna (P.W. 8), the two witnesses on whose evidence the appellant is convicted were recorded by
G him on the 28th March, 1963. It is, however, not known as to what they had stated during the investigation. A day earlier on 27th March, 1963 P.W. 17 had actually framed a charge-sheet against Jitta and Gajjoo son of Rupan Pasi. On the 9th April, 1963 an application by Chhotey Lal was received by P.W. 17 in which suspicion was cast on Subedar and Tota. Prior
H to 9th April, according to this witness, he had no proof of these two persons having participated in the dacoity though he admits that he had already recorded Chhotey Lal's statement before 9th April. In fact Sub-Inspector Deorary (P.W. 15) had recorded

Chhotey Lal's statement as early as March 22, 1963 and it was from P.W. 15 that P.W. 17 took over the investigation. P.W. 15 does not say that Chhotey Lal or anyone else suspected the appellant. The foregoing discussion strongly indicates that the implication of Subedar, appellant, was an after-thought. Circumstances nos. 4 and 5 have thus no basis and appear to be purely conjectural.

We may now appropriately refer to the statements of the two witnesses whose sole testimony appears to be the basis of the appellant's conviction. The third circumstance is found on their evidence. Babu Ram (P.W. 7) whose statement was recorded in court on the 28th March, 1964 has deposed that about a year earlier he was returning to his village from the Consolidation Office at Thomharwa in the evening when the sun was about to set. Khanna and Bashir were with him. When they reached near the big grove lying to the south of village Daulatpur, he saw five or six persons in the grove. Out of them he knew only Tota and Subedar. Others were not known to him. They were armed with *ballam, kanta* and *lathis*. On the same night a dacoity was committed at the residence of Gajodhar and he was killed by the dacoits. Khanna (P.W. 8) has deposed in similar terms. The contradictions elicited in their cross-examination would show that their statement on the question of the presence of the appellant in the grove cannot be safely relied upon. According to Babu Ram who had on the day in question gone from Katghara (which was also the village of Khanna, P.W. 8) to the Consolidation Office in village Thomharwa along with Khanna and Bashir, they had made merely oral request in regard to their grievance without submitting any application. Khanna (P.W. 8) has, on the other hand, stated that Bashir and Babu Ram met him only on his way back home. He professes to have submitted his application but expresses ignorance about Babu Ram and Bashir having done so because they had not met him in the Consolidation Office. This contradiction on the facts and circumstances of this case is very material and casts a serious doubt on the veracity of their version in regard to the circumstances in which they profess to have seen the appellant near the grove. In their cross-examination a suggestion was also thrown that Subedar had appeared as a defence witness in a case against one Jailal, Chamar, in which case these two witnesses had appeared for the prosecution. This suggestion was apparently intended to indicate the motive on the part of these two witnesses to falsely implicate the appellant. The evidence of these two witnesses seems to us to be too infirm to carry conviction to their deposition that they saw the appellant as alleged. It is indeed somewhat surprising how their evidence was accepted by the courts below, without appropriate scrutiny, in holding the presence of the appellant in the grove. But even assuming that the appellant was seen by them as alleged, that by

A itself is not sufficient to connect him with the offence charged. It cannot be said that from this it follows as a necessary and the only rational or reasonable inference that the appellant was as abetter of the dacoity and murder. On a practical approach the reasonable possibility of his innocence cannot be ruled out. The courts below have erroneously ignored this vital aspect.

B At this stage we may refer to some evidence which was recorded in the High Court on appeal. It appears that on behalf of the present appellant and Tota it was complained in the High Court by their counsel that the circumstance that these two accused persons had been seen with the culprits who committed dacoity in question was not clearly put to them under s. 342, Cr. P.C. by the trial court, and that they were misled in their defence because the trial court had questioned them in a manner which suggested that they been charged with having actually committed dacoity along with the other culprits. The High Court, therefore, summoned Subedar and Tota who were on bail. This order was passed on 11th August, 1966. Subedar was accordingly examined by the High Court on the 24th August and was confronted with the statement of Babu Ram and Khanna (PWs 7 and 8). The appellant denied that he was ever in the grove as stated by these witnesses and stated that he had enmity with them and added that they were police witnesses. Subedar also expressed a desire to produce witnesses in his defence. Lila Pradhan was in the circumstances examined by the High Court as D.W. 4. It may be recalled that according to Dammar, Lila Pradhan was also one of the persons who had gone to lodge the report with him and Subedar. Lila Pradhan deposed in his examination-in-chief in the High Court that Chhotey Lal had asked Subedar to go and lodge a report in the police station about the dacoity in question. Subedar also raised an alarm at the time of the dacoity. This witness, after his cross-examination by the counsel for the State, was examined by the High Court at some length. He was village Pradhan for six years. His statement seems to be a frank and straightforward. From the evidence on the record we are also inclined to think that the appellant must have been included in the original list of prosecution witnesses. This view finds support from the statement of Sub-Inspector, Deorary, (P.W. 15) who had recorded the statements of Chhotey Lal and Dammar and of other witnesses on the day following the dacoity, P.W. 17 seems to us to have wrongly denied this fact.

Apart from the material which we have just discussed there is no other relevant material to which our attention has been invited or which we have come across on this record relevant to the case against Subedar. From this it is crystal clear that there was no real suspicion against Subedar and that it was in April that he was involved as an after-thought presumably because of some other ulterior consideration. Both the trial court and the High

Court seem to us to have completely gone wrong in convicting Subedar. A

The respondent's counsel strongly contended that this Court should not interefere on special leave appeal under Art. 136 with the conclusions of the two courts below holding the appellant guilty. We do not agree with this submission. This Court undoubtedly does not normally proceed to review and reappraise for itself the B evidence in criminal cases when hearing appeals under Art. 136. But when the judgment under appeal has resulted in grave miscarriage of justice by some misapprehension or mistake in the reading of evidence or by ignoring material evidence, then it is not only empowered but is expected to interfere to promote the cause of justice. Article 136 is worded in very wide terms and the power C conferred by it is not hedged in by any technical hurdles. This over-riding and exceptional power has been vested in this Court to be exercised sparingly and only in furtherance of the cause of justice. In the present case which depends only on circumstantial evidence, the courts below have completely ignored the warning given by this Court in *Hanumant* v. *The State of Madhya* D *Pradesh*(1) against the danger of conjectures and suspicions taking the place of proof. The caution was reiterated thus :

> "It is well to remember that in cases where the evidence of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts E so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hpothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to F leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused." (pp-1097-8).

Of course, the evidence on basic or primary facts has to be approached in the ordinary practical way but the conclusions in G the case of circumstantial evidence must necessarily point only to the guilt of the accused excluding any reasonable possibility of his innocence. We are not satisfied that the evidence against the appellant in this case satisfies this test. The appeal accordingly succeeds. The order of the court below as against the appellant is set aside and the appellant acquitted.

Y.P. *Appeal allowed.*

(1) (1952) S.C.R. 1091.