BASUDEO YADAV

v.

SURENDRA YADAV & ORS.

(Criminal Appeal No.687 of 2001)

AUGUST 25, 2008

[DR. ARIJIT PASAYAT AND DR. MUKUNDAKAM SHARMA, JJ.]

Penal Code, 1860 – ss 364 r/w s.302, s. 302 r/w s.149 and s.201, s.148 – Conviction under – Accused armed with weapons formed a group and forcibly dragged deceased towards river bank in night hours – Incident witnessed by witnesses – Next day dead body of deceased found – Conviction – However, acquittal by High Court – Sustainability of – Held: Not sustainable – High Court acted on surmises and conjectures and disturbed the findings recorded by trial court – It did not record a finding that analysis of evidence and conclusions arrived at by trial court were erroneous, thus, was not justified in drawing different conclusions – Identification of accused was possible – Since time of death is not given, presence of undigested food is of no consequence – There was no delay in lodging of FIR – Also, witness categorically stated as to why they went to the particular police station – Thus, order of trial court upheld – Code of Criminal Procedure, 1973 – s. 378

Code of Criminal Procedure, 1973 – ss. 378 and 386 – Appeal against acquittal – Powers of appellate court – Discussed.

According to the prosecution case, on the fateful day, around 8.00 PM, all the accused persons armed with deadly weapons formed a group and forcibly dragged away VY towards river bank. PW 1, PW 4 and PW 3 saw the incident but they concealed themselves. However, PW 3 came out and informed BS, brother of

A VY-PW6. Thereafter, PW 6 along with PW 3 and PW 2 went towards the place where VY was dragged by the accused but did not find any trace of the whereabouts of VY. PW6, PW 3 and PW 2 then went to the house of Superintendent of Police. Thereafter, they went to
B Muffasil PS as being directed, and lodged information by giving fardbeyan. On basis of fardbeyan FIR was registered and was sent to Kotwali PS for investigation within whose jurisdiction the incident occurred. PW 1 returned home and PW 4 went to the house of PW 6. The
C next day PW 5 found the body of VY and informed PW 6 and the police. Inquest was held over the dead body. The doctor conducted the post mortem. He opined that the injuries were caused by fire arm and were ante mortem in nature. Investigations were carried out. Witnesses were
D examined. 14 persons faced trial. During trial two accused died and two absconded. Trial court convicted and sentenced the remaining accused u/s 364 r/w s.302 and s. 302 r/w s.149 and s.201 and s.148 IPC. During pendency of appeal, 3 accused died. High Court acquitted the remaining accused. Hence the present appeal.
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Allowing the appeal, the Court

HELD: 1.1 There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall
F not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the
G case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which
H may arise from acquittal of the guilty is no less than

from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to re-appreciate the evidence where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused really committed any offence or not. [Para 8] [602-E-H]

1.2 The principle to be followed by the appellate court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable and relevant and convincing materials have been unjustifiably eliminated in the process, it is a compelling reason for interference. [Para 8] [603-A B]

Bhagwan Singh v. State of M.P, **2003 (3) SCC 21 –** *Shivaji Sahabrao Bobade v. State of Maharashtra* **1973 (2) SCC 793;** *Ramesh Babulal Doshi v. State of Gujarat* **1996 (9) SCC 225;** *Jaswant Singh v. State of Haryana* **2000 (4) SCC 484;** *Raj Kishore Jha v. State of Bihar* **2003 (11) SCC 519;** *State of Punjab v. Karnail Singh* **2003 (11) SCC 271;** *State of Punjab v. Phola Singh* **2003 (11) SCC 58;** *Suchand Pal v. Phani Pal* **2003 (11) SCC 527 and** *Sachchey Lal Tiwari v. State of U.P.* **2004 (11) SCC 410 – Relied on.**

2. In the instant case, the trial court was justified in holding that identification was possible. So far as the finding relating to undigested food is concerned, the doctor said that death had occurred within 24 hours of the consumption. Since the time is not given, the presence of undigested food is of no consequence. So far as going to wrong police station is concerned, the witness categorically stated as to why they went to the particular police station. Their specific stand was that they had gone to the Superintendent of Police who had asked them to go to the particular police station, because the occurrence relating to kidnapping had taken place

A within the jurisdiction of that police station. In any event immediately after the FIR was lodged at the police station the same was sent to the correct police station. Therefore, there was no question of delay in lodging of FIR as held by the High Court. PW1 specifically stated B about the injuries sustained by pistol. Doctor's evidence shows that the injuries were caused by firearms. One thing is significant that the High Court has nowhere stated that the analysis of evidence and the conclusions arrived at by the Trial Court were erroneous. Without C recording such a finding, the High Court was not justified in drawing different conclusions without indicating any reason to justify the same. Such a course is impermissible. Even if a different view is possible to be drawn, it should be specifically held that the view taken D by the Trial Court was not supportable by evidence. It would not be possible for the High Court to act on surmises and conjectures and disturb the findings recorded by the Trial Court. Thus, the judgment of High Court is set aside and that of trial court is restored. [Paras 11 and 15] [606-B, 607-A-G]

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S. Sudershan Reddy and Ors. v. State of A.P. **2006 (10) SCC 163**; *Israr v. State of U.P.* **2005 (9) SCC 616**; *Munivel v. State of T.N.* **2006 (9) SCC 394** and *State of U.P. v. Satish* **2005 (3) SCC 114 – referred to.**

F

Case Law Reference

2003 (3) SCC 21	**Relied on**	**Para 8**
1973 (2) SCC 793	**Relied on**	**Para 8**
1996 (9) SCC 225	**Relied on**	**Para 8**
2000 (4) SCC 484	**Relied on**	**Para 8**
2003 (11) SCC 519	**Relied on**	**Para 8**
2003 (11) SCC 271	**Relied on**	**Para 8**
2003 (11) SCC 58	**Relied on**	**Para 8**

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2003 (11) SCC 527	**Relied on**	**Para 8**	A
2004 (11) SCC 410	**Relied on**	**Para 8**	
2006 (10) SCC 163	**Referred to**	**Para 9**	
2005 (9) SCC 616	**Referred to**	**Para 10**	
2006 (9) SCC 394	**Referred to**	**Para 12**	B
2005 (3) SCC 114	**Referred to**	**Para 13**	

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 687 of 2001

From the final Judgment and Order dated 29.11.2000 of the High Court of Judicature at Patna in Criminal Appeal No. 252 of 1987 C

Anoop Kumar Srivastava, Pavan Kumar, Rameshwar Pd. Goyal and Mrinay Singh for the Appellant. D

Akhilesh Kumar Pandey, Sudhanshu Saran, Gopal Singh, Manish Kumar, Rudreshwar Singh, Gopal Jha and Sanjay Jain for the Respondents.

The Judgment of the Court was delivered by E

Dr. ARIJIT PASAYAT, J. 1. Challenge in this appeal is to the judgment of acquittal passed by a Division Bench of the Patna High Court. 14 persons faced trial for alleged commission of offences punishable under Section 364 read with Section 302 and Section 302 read with Section 149 of F the Indian Penal Code, 1860 (for short 'IPC') and Section 201 and Section 148 IPC. During trial two accused persons died and two absconded. In other words, ten persons faced trial and each one of them was convicted and sentenced to various imprisonments. During pendency of the appeal before the High G Court A1, A9 and and A10 died and, therefore, the appeal filed by them was held to be abated.

2. Background facts in a nutshell are as follows:

On 19.3.1986 at about 8.00 p.m., Vyasdeo Yadav H

A (hereinafter referred to as the 'deceased') of village Sheo Nagar, P.S. Kotwali (Kasim Bazar) District Munger, went towards Sheo Nagar School to attend the call of nature with a water jug and when he reached near Sheo Nagar School, all of a sudden, all the accused persons together with Kashi B Mahton, Ram Gulam Mehton (both died during the pendency of trial of the case), Nageshwar Mahton and Ram Balak Mahton (absconders) came there in a group from the northern direction and another group from the southern direction, being armed with deadly weapons like gun, rifle etc. and they forcibly C took away and dragged Vyasdeo Yadav towards river bank. Such dragging was seen by Muneshwar Yadav (PW1) and Shyam Yadav (PW4) who were then returning home from their Parwal field and seeing such occurrence lest they be attached, concealed themselves behind a ditch and therefrom they could identify all the accused persons including absconders and the D deceased. Such dragging and taking away was also seen by another Mantu Yadav (PW3) who had also gone nearby for call of nature at a distance of about one rassi (equal to 110 cubcs). He also became frightened and also concealed himself and after the deceased Vyasdeo Yadav was dragged E towards river bank for considerable distance, then this Mantu Yadav (PW3) came out and on the Patna-Munger road, he found the informant Basudeo Yadav, the brother of the deceased Vyasdeo Yadav and gave information in detail. Then Basudeo Yadav in companion with Mantu Yadav (PW3) and F Baleshwar Yadav (PW2) went towards the place where the deceased was dragged by the accused-appellants but they could not find any trace of the whereabouts of the deceased as to where he had been taken. Then Basudeo Yadav (PW6) accompanied by Mantu Yadav (PW3) and Baleshwar Pd. G Yadav (PW-2) went to the residence of Superintendent of Police (Munger) on a rickshaw and there, on being directed by the Superintendent of Police concerned, (PW6) with his companions went to Muffasil P.S. and lodged information by giving fardbeyan which was recorded on that very night i.e. on H 19.6.1993 at about 23 hours at the Muffasil P.S. It may be

mentioned here that other two eye witnesses Muneshwar Yadav (PW1) and Shyam Yadav (PW4) after seeing the occurrence respectively went to their homes. Shyam Yadav (PW4) went to the house of Basudeo Yadav first and there he learnt that after knowing about this incident Basudeo Yadav had already left for police station. In the fardbeyan, a vivid description was given about the taking away of the deceased by the accused appellants including their other companions as mentioned above. On the basis of such fardbeyan (Ext. No.1) formal FIR was registered and then the same was sent to Kotwali P.S. for investigation as the place of occurrence wherefrom the deceased was dragged falling within the jurisdiction of Kotwali P.S. (Kasim Bazar). On the next day of the occurrence Dhirendera Yadav (PW.5) found the dead body near Sita Charan and from there he brought the dead body by boat to steamerghat and then information was given to the informant and police. From the steamerghar the deadbody was brought home at Sheonagar and inquest was held over the dead body and then the same was sent for post mortem examination. Dr. Shashi Bhushan (PW7) held autopsy over the dead body of Vyasdeo Yadav and found the following injuries on his person:

1) One lacerated circular wound 1/3" in diameter with inverted margins X brain cavity deep on left temple.

2) Lacerated wound ½" x ½" x brain cavity deep with everted margins on right side of head 1' above the prinna of right ear.

3) One desection left temporal and right pertial bones found fractured-both injuries communicating with laceration and haemorrhage in both brain cavities.

4) Lacerated wound circular 1/3" in diameter with inverted margins with left thorasic cavity deep with everted margins on back of right upper chest.

On desection both wounds were found communicating with each other fracture of 3rd and

A 4th ribs of left side with laceration of lung and plurra both right and left. Both chest cavities were full of blood clots.

5) Lacerated would circular 1/3" in diameter with inverted margins on back of left chest on coastal B border x abdominal cavity deep.

On desection spleen found lacerated and multiple perporation in small intestine. A bullet was found lodged in the paritonial cavity which was full of blood C and clot. The bullet was preserved and sent with the constable in a sealed container.

According to the doctor, all the injuries were caused by fire arm and were anti mortem in nature and death was caused due to shock and Haemorrhage resulting from the above D injuries.

Kameshwar Pd. Sinha (PW 8) took up the charge of the case after the investigation was over and he only submitted chargesheet. PWs. 9 and 10 are formal witnesses proving formal FIR and inquest report etc. E

3. The accused persons pleaded that they have been falsely implicated because of land dispute, though they did not deny the homicidal death of the deceased. It was defence version that he was murdered near Saheb Diara at Jafar Nagar F while he was returning from the house of the relations between 4/5 p.m. on the day of occurrence. After concocting a story at the P.S, the FIR was lodged with the motivated purpose. One witness was examined who happened to be a Priest and according to him he had seen from a distance that the G deceased and his relatives were surrounded by unknown persons with armed weapons and deceased was killed. PWs. 1, 3 and 4 were stated to be eye witnesses along with PW 6 who was the informant. The Trial Court accepted the prosecution version and convicted the persons.

H 4. In appeal, before the High Court it was contended that

the whole prosecution case is based on surmises and conjectures except the so called taking away by the accused-appellant of the deceased. There is no other material to show as to who had been the deceased, and whether there was a consensus of taking away of the deceased by the accused-appellant. Further, the so called eye witnesses PWs. 3 and 4 are got up witnesses and they were inimical to the accused persons. Additionally, they stated that the identification from the long distance in the night hours was impossible and, therefore, the prosecution version is without any foundation. The High Court found that there was no direct evidence and the case was based on circumstantial evidence. The High Court found that identification was not possible. The High Court noted that instead of filing the FIR at the correct police station, it was filed at a different police station and that gives an impression that the genesis of the occurrence has been twisted. It was held that the evidence relating to kidnapping was inadequate. Accordingly, acquittal was directed.

5. Learned counsel for the appellant submitted that the Trial Court has dealt each of the factors which the High Court found to be vulnerable. So far as distance is concerned, it is to be noted that the occurrence took place in the month of June in the evening when the accused persons were last seen in the company of the deceased. The evidence is clear and cogent about the role played by the accused persons. So far as the question of filing of FIR at wrong police station is concerned, it has been categorically stated by the witnesses that they went to the Superintendent of Police who had directed them to file the same at a particular police station. It is also submitted that the High Court erroneously stated that the witnesses are not stating as to which of the accused came from which direction. It is factually incorrect.

6. In response, leaned counsel for the respondents submitted that the view taken by the High Court is a reasonable one. PW3 specifically admitted that he was at a distance from the place of occurrence. The dead body was found at a

A distance of about 10 Kms. There were improvements in the evidence of the PWs. It is also submitted that conduct of the witnesses is unusual and immaterial. With reference to the medical evidence it was submitted that the defence version is more probable. It is pointed out that time of death has not B been specifically fixed. The presence of undigested food is a pointer in that regard.

7. Learned counsel for the appellant on the other hand submitted that the judgment of acquittal passed by the High Court is not sustainable. While dealing with the question of C identification, the High Court referred to some irrelevant material like the evidence of DW1. It is strange that DW1 did not inform anybody about the occurrence. If exception could be taken to the witnesses going to the house of the informant without going to the police station, the same logic is equally D applicable to DW1. The High Court held that at the most PWs stated to have seen the dragging and they have not stated to have seen the killing.

8. There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. E Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in F the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the G guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to re-appreciate the evidence where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused really committed H any offence or not. (See *Bhagwan Singh v. State of M.P.*

2003 (3) SCC 21). The principle to be followed by the appellate court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable and relevant and convincing materials have been unjustifiably eliminated in the process, it is a compelling reason for interference. These aspects were highlighted by this Court in *Shivaji Sahabrao Bobade v. State of Maharashtra* (1973 (2) SCC 793), *Ramesh Babulal Doshi v. State of Gujarat* (1996 (9) SCC 225), *Jaswant Singh v. State of Haryana* (2000 (4) SCC 484), *Raj Kishore Jha v. State of Bihar* (2003 (11) SCC 519), *State of Punjab v. Karnail Singh* (2003 (11) SCC 271), *State of Punjab v. Phola Singh* (2003 (11) SCC 58), *Suchand Pal v. Phani Pal* (2003 (11) SCC 527) and *Sachchey Lal Tiwari v. State of U.P.* (2004 (11) SCC 410).

9. So far as identification is concerned, a few decisions of this Court need to be noted. In *S. Sudershan Reddy and Ors. v. State of A.P.* (2006 (10) SCC 163) it was noted as follows:

> "19. In *Nathuni Yadav and Others v. State of Bihar and Another* (1998 (9) SCC 238) this Court observed that under what circumstances the lack of moon light or artificial light does not per se preclude identification of the assailants. It was noted as follows :-
>
> > "Even assuming that there was no moonlight then, we have to gauge the situation carefully. The proximity at which the assailants would have confronted with the injured, the possibility of some light reaching there from the glow of stars, and the fact that the murder was committed on a roofless terrace are germane factors to be borne in mind while judging whether the victims could have had enough visibility to correctly identify the assailants. Over and above those factors, we must bear in mind the further fact that the assailants were no strangers to the inmates of the tragedy-bound house, the eyewitnesses being well

A acquainted with the physiognomy of each one of the killers. We are, therefore, not persuaded to assume that it would not have been possible for the victims to see the assailants or that there was possibility for making a wrong identification of them. We are keeping B in mind the fact that even the assailants had enough light to identify the victims whom they targeted without any mistake from among those who were sleeping on the terrace. If the light then available, though meager, was enough for the assailants why should we think C that the same light was not enough for the assailants why should we think that the same light was not enough for the assailants why should we think that the same light was not enough for the injured who would certainly have pointedly focused their eyes on the faces of the intruders standing in front of them. What is sauce for D the goose is sauce for the gander."

20. In the instant case, the time was about 7 P.M. in the evening in the month of April. The position was again reiterated in *Bharasi and others v. State of M.P.* (2002(7) E SCC 239). It was inter alia noted as follows :

"In relation to the identification of the accused in the darkness, the High Court has clearly stated that in the month of April, the sun sets at about 7.00 p.m. in the evening, the accused were known to the F witnesses and could be identified even in faint darkness. Here again, the High Court has relied upon the decision of this Court in the case of *Nathuni Yadav v. State of Bihar* (1998 (9) SCC 238). The High Court has also noticed that the enmity between G the deceased and the appellants was not disputed."

21. In *Krishnan and Another v. State of Kerala* (1996(10) SCC 508) it was observed as follows :

"After giving our careful consideration to the facts H and circumstances of the case and the evidence

adduced, we do not find any reason to interfere with the well-reasoned judgment passed by the High Court in convicting appellant-2 Vijaykumar. So far as the contention of insufficient light is concerned, we may indicate that in an open field on a cloudless starry night, there was no difficulty in identifying the victim by the assailants because of existence of some light with which identification was possible. PW1 being a close relation of both the accused, there was no difficulty for PW 1 to identify them. The accused were also known to the other witness for which he could also identify them. So far as appellant- Vijaykumar is concerned, PW1 had physically prevented him from causing further injury on the deceased and there was a tussle between the two. Hence there was no difficulty for PW1 to identify Accused 2- Vijaykumar. His deposition gets corroboration from the deposition of PW3 who had seen Vijaykumar at the place of occurrence. PW3 had not seen Vijaykumar causing any injury on the deceased because by the time PW3 came near the place of the incident and noticed the incident, Vijaykumar had been prevented by PW1 and his knife had fallen on the ground."

10. Again in *Israr v. State of U.P.* (2005 (9) SCC 616), it was observed as follows:

"Coming to the plea relating to non-probability of identification, the evidence of PW-3 is very relevant. He has stated that the occurrence took place at the time of isha prayers which are concluded at about 9.30 p.m. There was light of the moon as well as of the neighbouring houses and the electric poles in the lane. The date of occurrence was 11th day of Lunar month and the place of occurrence is near the mosque as well as many houses close by. Therefore, identification was possible. Further a known person can be identified from a distance even without much light. The evidence of PW-3 has also been corroborated by the evidence

A of others. Evidence of PWs 3 to 5 proves that identification was possible."

11. Therefore, the Trial Court was justified in holding that identification was possible. The hypothetical conclusions of the High Court which are based on surmises and conjectures
B on the other hand are unsupportable.

12. So far as aspect of last seen is concerned, in *Munivel v. State of T.N.* (2006 (9) SCC 394) this Court has held as under:

"27. Doctor, PW 11, examined them at about 1 a.m. on
C 17.3.1994, that is, immediately after the incident took place. We do not find any material contradiction between the ocular evidence and medical evidence. The genuineness or otherwise of the said accident registers is not in question. Correctness of the entries made therein
D is not in issue. Even no suggestion has been given to the doctor that the entries made in the said accident registers were not correct."

28. Only because the investigating officer was negligent and did not make any attempt to recover the cut fingers of
E PW 3, the same by itself would not be sufficient to discard the consistent evidence of all the eyewitnesses."

13. Similarly, in *State of U.P. v. Satish* (2005 (3) SCC 114) it was noted as follows:

F "22. The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes
G impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the
H deceased were last seen together, it would be hazardous

to come to a conclusion of guilt in those cases. In this case there is positive evidence that the deceased and the accused were seen together by witnesses PWs. 3 and 5, in addition to the evidence of PW-2." A

14. So far as the finding relating to undigested food is concerned, the doctor said that death had occurred within 24 hours of the consumption. Since the time is not given, the presence of undigested food is of no consequence. So far as going to wrong police station is concerned, the witness categorically stated as to why they went to the particular police station. Their specific stand was that they had gone to the Superintendent of Police who had asked them to go to the particular police station, because the occurrence relating to kidnapping had taken place within the jurisdiction of that police station. In any event immediately after the FIR was lodged at the police station the same was sent to the correct police station. Therefore, there was no question of delay in lodging of FIR as held by the High Court. PW1 specifically stated about the injuries sustained by pistol. Doctor's evidence shows that the injuries were caused by firearms. One thing is significant that the High Court has no where stated that the analysis of evidence and the conclusions arrived at by the Trial Court were erroneous. Without recording such a finding, the High Court was not justified in drawing different conclusions without indicating any reason to justify the same. Such a course is impermissible. Even if a different view is possible to be drawn, it should be specifically held that the view taken by the Trial Court was not supportable by evidence. It would not be possible for the High Court to act on surmises and conjectures and disturb the findings recorded by the Trial Court. B C D E F

15. Above being the position, the judgment of the High Court is set aside and the judgment of the Trial Court is restored. G

16. The appeal is allowed.

N.J. Appeal allowed. H