

STATE OF U.P.

v.

SMT. NOORIE @ NOOR JAHAN AND ORS.

MARCH 26, 1996

[M.K. MUKHERJEE AND G.B. PATTANAIK, JJ.]

Indian Penal Code, 1860 :

Sections 147, 148, 302/149 and 201/511.

Conviction under—Validity of.

Evidence—Criminal Trial—Eye witnesses—Assessment and evaluation of evidence—Principles for—Duty of Court to avoid conjecture and fanciful speculation.

Respondents N, I, R and B were prosecuted under sections 147, 148, 302/149 and 201/511 of the Indian Penal Code, 1860. The allegation against them was that they along with some unknown person murdered R with knives and lathis. The prosecution case was that deceased R had gone to his tubewell at 10.30 A.M. on 25.2.1975 for getting the same repaired through a mechanic, PW 2. As he did not come home to take his lunch till 2.30 P.M. his nephew PW-1 went to call his uncle for food. When both of them were returning respondent N stopped the deceased on the way and started talking to him. In the meantime the three other respondents along with two unknown persons came armed with knives and lathis and started assaulting the deceased. While the deceased was being assaulted, respondent N was standing. PW-2 who followed the deceased and PW-1 soon reached the spot and saw the occurrence. N then left the place of occurrence while the other three respondents dragged the dead body towards the grove and threw it into a pit.

Out of nine witnesses examined by prosecution, PWs-1, 2 and 3 were eye witnesses. PW-1 witnessed the occurrence as he was accompanying the deceased. The evidence of PW-2 was that after repairing the tubewell when he was returning home he heard the shouting of PW-1 and on reaching the place of occurrence he saw that deceased had fallen down and I, B and R were assaulting the deceased with knives.

Relying upon the testimony of three eye witnesses the Trial Court held that the prosecution has been able to establish the charges beyond reasonable doubt and accordingly convicted and sentenced all the accused persons. On appeal the High Court set aside the conviction and sentence holding that (i) it was not established that the murder had been witnessed by the three witnesses; (ii) PW-2 could not have reached the place of occurrence simultaneously with PW-1 and the deceased since he had to screw one bolt and lock the tube-well which in the process would have taken at least five minutes; and (iii) PW-3 could not have seen N clearly from the place of occurrence.

In appeal to this Court on the question whether the testimony of the three eye-witnesses was reliable :

Allowing the appeal in part, this Court

HELD : 1. The order of acquittal passed by the High Court so far as respondent N is concerned is confirmed. There is not an iota of material on record to indicate any prior meeting of N with the other accused persons nor is there any material to implicate N in any way with the occurrence. N has not been assigned any role in the assault of the deceased. Therefore, the order acquitting N cannot be interfered with. But the order of acquittal in respect of other accused persons is set aside and their conviction and sentence is confirmed. [893-E-F]

2. While assessing and evaluating the evidence of eye witnesses the court must adhere to two principles, namely whether in the circumstances of the case it was possible for the eye witness to be present at the scene and whether there is anything inherently improbable or unreliable. The High Court has failed to observed the aforesaid principles and in fact has mis-appreciated the evidence which has caused gross miscarriage of justice. Credibility of a witness has to be decided by referring to his evidence and finding out how he had fared in cross-examination and what impression is created by his evidence taken in other context of the case and not by entering into realm of conjecture and speculation. [893-B-C]

3. The evidence of PWs 1, 2 and 3 is consistent with one another so far as the place of occurrence, the manner of assault, the weapon of assault used by the accused persons, the fact of dragging of the dead body of the deceased from the place to the grove is concerned. Nothing has been

brought out in their cross-examination to impeach their testimony. Their evidence fully corroborate the medical evidence. The conclusion is irresistible that the evidence of PWs 1, 2 and 3 on material particulars have been brushed aside by the High Court by entering in the realm of conjecture and fanciful speculation without even discussing the evidence more particularly the evidence relating to the basic prosecution case. In that view of the matter the inevitable conclusion is that the prosecution has been able to establish the charge against the accused persons and the High Court committed error in acquitting the three respondents. [893-A; D; E]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 183 of 1986.

From the Judgment and Order dated 15.7.85 of the Allahabad High Court in Crl. A. No. 55 of 1978.

Pramod Swarup, Ms. Pareena Swarup and A.S. Pundhir for the Appellants.

Ranjit Kumar for the Respondents.

The Judgment of the Court was delivered by

G.B. PATTANAIK, J. This appeal by grant of special leave is directed against the order of acquittal passed by the High Court of Allahabad, Lucknow Bench in Criminal Appeal No. 55 of 1978.

The four respondents were tried for offence under Sections 147, 148, 302/149 and 201/511 I.P.C. on the allegation that they along with some unknown persons mercilessly assaulted deceased Bachan Shah with knives and lathis and thereafter carried a cycle of the deceased and dragged the dead body of the deceased to the nearby grove and left it in a pit and escaped from the place of occurrence. The learned Additional Sessions Judge convicted 4 respondents under Section 147 and 302 read with Section 149 I.P.C. and further convicted respondents Inder Dutt, Raghu Raj and Bikram under Sections 148, 302 and 201/511 of the Indian Penal Code. Respondent Noori, however, was acquitted of the charge under Section 201/511 against her. All of them were sentenced to life imprisonment under Section 302/149 and respondent Noori was further sentenced to undergo for one year under Section 147 and the rest 3 respondents were sentenced under Section 148 of the Indian Penal Code and R.I. for one

year under Section 201/511 of the Indian Penal Code. Sentences have been directed to run concurrently. The respondents then filed appeal and the High Court acquitted all of them for the charges levelled against them and hence this present appeal.

Prosecution case in nutshell is that deceased Ram Bharosey alias Bachan Shah had gone to his tubewell at 10.30 A.M. on 25.2.1975 for getting the same repaired through the mechanic, Latta Mallah P.W. 2. As he did not come home to take his lunch till 2.30 P.M. His nephew Iqbal Narain P.W. 1 went to call his uncle for food. When both of them were returning respondent Noori stopped the deceased on their way and started talking to him. In the meantime and three other respondents along with two unknown persons came armed with knives and lathis and started assaulting the deceased. While the deceased was being assaulted, respondent Noori was standing. P.W. 2 who followed the deceased and P.W. 1 soon reached the spot and saw the occurrence. Noori then left the place of occurrence. Rest of the three respondents after mercilessly assaulting the deceased dragged the dead body towards the grove and threw it into a pit, and left the place. The informant Iqbal Narain P.W. 1 prepared a written report and lodged the same at Loni Katra Police Station at 4.30 P.M. On receipt of the said report which was treated as F.I.R. P.W. 7 registered the case and started investigation. On reaching the place of occurrence, he held the inquest and then sent another officer to search for the accused persons but the accused persons were not found. A dog squad was then sent to trace but the two unknown persons and the said dog went upto the door of the accused Raghu Raj which was found locked. The dead body was sent for postmortem examination. The investigating officer seized incriminating articles and sent for chemical examination. Witnesses were examined under Section 161 Cr. P.C. Finally on completion of investigation charge sheet was filed. On being committed the respondents stood their trial. The defence plea is one of denial. The prosecution examined 9 witnesses in all of whom PWs 1, 2 and 3 are eye witnesses to the occurrence. PW, 6 is the doctor who had conducted autopsy over the dead body of the deceased. PW 4 is a witness to the inquest as well as witness to certain seizure made in the course of investigation. PW 5 is the constable who carried the dead body to the morgue for postmortem examination. P.W. 7 is the police officer who has recorded the FIR and investigated into the offence. PW. 8 is a constable and formal witness. PW. 9 is the Head

Constable who had made some entries at the Police Station on receipt of the written report. Prosecution also proved several documentary evidence of which Ext. 26 is the FIR, Ext. 9 is the postmortem report of the deceased, Ext. 40 is the Report of chemical Examiner and Ext. 39 is the Serologist Report. The defence also examined one witness as DW. 1. The learned Additional Sessions Judge on a scrutiny of the entire materials on record came to the conclusion, mostly relying upon the evidence of 3 witnesses PWs. 1, 2 and 3, that the prosecution has been able to establish the charges beyond reasonable doubt and accordingly convicted and sentenced the accused persons as already stated. On appeal by the accused respondents the High Court though accepted the prosecution story that the deceased was murdered in the Galiayar and his body was shifted to the pit where it was dumped but held it was not established that the said murder had been witnessed by the alleged witnesses namely PWs. 1, 2 and 3 and therefore the possibility that the deceased was murdered by others and the appellants were implicated on mere suspicion or out of vengeance cannot be ruled out. With this conclusion the High Court set aside the conviction and sentence passed by the learned Additional Sessions Judge and acquitted the accused respondents.

Mr. Pramod Swarup, the learned counsel appearing for the appellant contended that the reasonings given by the High Court in discarding the prosecution story and in disbelieving the oral testimony of PWs to the 3 are wholly unsustainable in law and consequently the order of acquittal is vitiated. The learned counsel also contended that the High Court wholly erred in law in discarding the prosecution case on the basis of certain infirmities in the investigation and this has resulted in gross miscarriage of justice by ordering acquittal of the respondents. The learned counsel for the appellant, however, fairly stated that so far as respondent Noori is concerned on the basis of evidence on record it would be difficult to assail her acquittal made by the High Court. Mr. Ranjit Kumar, learned counsel appearing for the respondents on the other hand submitted that in view of the proved animosities of the prosecution witnesses and in view of the gross infirmities in their evidence, the High Court was fully justified in discarding prosecution case. According to Mr. Ranjit Kumar though prosecution case so far as death of Ram Bharosay is concerned is true but the prosecution case as unfolded through the witnesses PWs 1 to 3 and the manner in which the death occurred is not true and therefore the order of acquittal passed by the High Court should not be interfered with by this Court.

In view of the rival stand of the parties the question arises for consideration is whether the evidence of PWs 1 to 3 can be discarded on the grounds advanced by the High Court or not? Before scrutinising the evidence of these three witnesses it would be appropriate to examine the correctness of the reasonings advanced by the High Court in discarding the prosecution case. But before doing so we may first set out the case against respondent Noori. The only evidence against Noori was that while the deceased and PW. 1 were coming she stopped them on the way and talked with deceased and at that point of time other accused persons came and assaulted the deceased. There is not an iota of material on record to indicate any prior meeting of Noori with the other accused persons nor is there any material to implicate Noori in any way with the occurrence. Noori has not been assigned any role in the assault of the deceased. In this view of the matter the order of acquittal of respondent Noori by the High Court cannot be interfered with by this Court.

The High Court came to the conclusion that PW. 2 could not have reached the place of occurrence simultaneously with PW. 1 and the deceased since he had to screw one bolt and lock the tube-well which in the process would have taken at least five minutes. It is neither the evidence of PW. 1 that PW. 2 came with them to the place of occurrence nor is it evidence of PW. 2 that he was along with the deceased and PW. 1. On the other hand the evidence of PW. 2 is that after the deceased and PW. 1 left the tube-well, PW. 2 tightened the bolt and left for home and while he was at a distance of 100 paces from the place of occurrence he heard shouting of PW. 1 and then he ran and on reaching the place of occurrence he saw that deceased had fallen down and three respondents, Inder Dutt, Vikram and Raghuraj were assaulting the deceased with knives. The conclusion of the High Court, therefore, is based upon total misreading of the evidence of PWs 1 & 2. The High Court has commented upon the investigation as to why the fact whether PW. 2 was at all engaged in the repair work of the tube-well had not been investigated into. In our considered opinion it is wholly untenable approach and had no relevance with the appreciation of the evidence PW. 2. The High Court had commented upon the evidence of PW. 2 on the ground that at one place he said that he was called by the investigating officer at about the time of sun set whereas at other place he said that he was called by the investigating officer at night and on this score the High Court jumped to the conclusion that PW. 2 cannot be accepted to be a witness to the occurrence. We are unable to accept this reasoning

of the High Court. Instead of focussing its intention to the testimony of the witness with regard to the actual occurrence the High Court has gone around the periphery and without even discussing anything so far as occurrence is concerned has discarded the testimony and in our view erroneously. So far as PW. 3 is concerned the High Court discarded his testimony by comparing his evidence with the evidence of PW. 2 and on coming to a conclusion the he could not have seen Noori clearly from the place of occurrence. As stated earlier the very approach of the High Court in appreciating the evidence has been rather faulty and no attention has been bestowed by the High Court in discussing the basic prosecution case. The conclusion of the High Court that the evidence of PW. 3 does not inspire confidence is a wrong conclusion without discussing his evidence and the said conclusion is wholly unsustainable in law. On discussion of medical evidence, the High Court came to the conclusion that the ocular version of the evidence does not receive complete support and corroboration from the medical evidence. But we are unable to sustain this conclusion of the High Court also. The Doctor PW 6 who conducted the post-mortem examination found as many as 9 punctured wounds, 3 incised wounds, one lacerated wound and three abrasions on different parts of the body of the deceased. The High Court accepted the prosecution case that the punctured wounds and incised wounds could be caused by a knife but since the lacerated wound which was found between right index finger and thumb measuring 3 cm x 2 cm could not be caused by a Knife, the High court jumped to the conclusion that the medical evidence does not corroborate the ocular statement. We find it difficult to sustain this conclusion. Commenting upon the investigation the High Court observed that it is not free from taint. The aforesaid conclusion is based upon the fact as to why the dog was given a smell of the bicycle of the deceased instead of the piece of Dhoti which had allegedly got stuck to a tree. The further reasoning advanced is as to what was the necessity of dragging the deceased and throwing the dead body into a pit. Then again the High Court observed that the bicycle of the deceased had been touched by Noori alone apart from deceased then how the dog after smelling the bicycle proceeded towards the house of Raghuraj. In our considered opinion the alleged infirmities found out by the High Court neither can be held to be sufficient to hold the investigation to be tainted nor can it be taken into account to discredit the prosecution case.

The High Court having acquitted the accused persons on apprecia-

tion of the evidence, we have ourselves scrutinised the evidence of PWs. 1, 2, and 3. The conclusion is irresistible that their evidence on material particulars have been brushed aside by the High Court by entering in the realm of conjecture and fanciful speculation without even discussing the evidence more particularly the evidence relating to the basic prosecution case. While assessing and evaluating the evidence of eye witnesses the court must adhere to two principles, namely whether in the circumstances of the case it was possible for the eye witness to be present at the scene and whether there is anything inherently improbable or unreliable. The High Court in our opinion has failed to observe the aforesaid principle and in fact has mis-appreciated the evidence which has caused gross miscarriage of justice. Credibility of a witness has to be decided by referring to his evidence and finding out how he has fared in cross-examination and what impression is created by his evidence taken in other context of the case and not by entering into realm of conjecture and speculation. On scrutinising the evidence of PWs. 1, 2 and 3 we find they are consistent with one another so far as the place of occurrence, the manner of assault, the weapon of assault used by the accused persons, the fact of dragging of the dead body of the deceased from the place to the grove and nothing has been brought out in their cross-examination to impeach their testimony. The aforesaid oral evidence fully corroborate the medical evidence. In that view of the matter we unhesitatingly come to the conclusion that the prosecution has been able to establish the charge against the accused persons and the High Court committed error in acquitting the three respondents namely Inder Dutt, Raghu Raj and Bikram. In the aforesaid premises the order of acquittal passed by the High Court so far as respondent Noori is concerned is confirmed but the order of acquittal so far as accused Inder Dutt, Raghu Raj and Bikram is concerned is set aside their conviction and sentences passed by the learned Additional Sessions Judge are confirmed. The appeal is allowed in part. Respondents Inder Dutt, Raghu Raj and Bikram are directed to surrender to serve the balance period of sentence. Their bail bonds stand cancelled.

Appeal allowed.