

A JAVED MASOOD AND ANR.
v.
STATE OF RAJASTHAN
(Criminal Appeal No. 1522 of 2008)

B MARCH 09, 2010

**[B. SUDERSHAN REDDY AND SURINDER SINGH
NIJJAR, JJ.]**

Penal Code, 1860: s.302 – Conviction under, by courts below, on the basis of evidence of eye witnesses – Justification of – Held: On facts, not justified – Entire prosecution case rested upon the Parcha Bayan lodged by PW-5 – PW-5 was brother of deceased and a highly interested witness – Evidence of PW-6 completely ruled out presence of PW-5 at the scene of offence — Once his presence is disbelieved, whole case of prosecution would collapse – The police personnel who came on the spot after incident and took deceased to hospital deposed that PWs were not present at the scene of offence – Police personnel were independent witness and there was no reason for them to depose falsely.

Constitution of India, 1950: Article 136 – Scope of – Held: Concurrent findings of facts are not usually interfered with in exercise of jurisdiction under Article 136 by re-appreciation of the evidence unless it is clearly established that courts below altogether ignored vital piece of evidence and rested their conclusion placing reliance on the evidence which could not be accepted on the face of it.

Prosecution case was that on the fateful day, accused persons equipped with deadly weapons reached the spot of occurrence and started inflicting injuries on the deceased and others. Thereafter accused persons fled away. The police van reached the spot and removed the deceased to the hospital where he was

declared dead. PW-5 lodged a Parcha Bayan. The prosecution in support of its case examined 33 witnesses. Trial Court accepted the prosecution case and convicted the appellants under Sections 148, 201 and 302 IPC. On appeal, High Court set aside conviction under Sections 148 and 201. It however upheld conviction under Section 302 IPC. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1.1. The concurrent findings of facts are not usually interfered with in exercise of jurisdiction under Article 136 of the Constitution of India by re-appreciation of the evidence unless it is clearly established that the courts below altogether ignored vital piece of evidence and rested their conclusion placing reliance on the evidence which cannot be accepted on the face of it. [Para 8] [244-F-G]

1.2. The evidence of PW-6 is very crucial. It is in his evidence that on the fateful day the deceased alone had come on a motorcycle to his shop at about 12.30 p.m. to repay an old debt. There was conversation between them for about 15 minutes. While the deceased was sitting in the shop he went into the basement of the shop to find as to any old tyres were available to sell as requested by the deceased and when he returned to the shop the deceased was not found in the shop. Then he found crowd in the street and when he went to the place to know as to what transpired found the deceased lying completely soaked in blood. He had died at the place of occurrence. Within 5-10 minutes the police came in gypsy and removed the body to hospital in gypsy. It was specifically stated in his evidence that PW-5 who was brother of the deceased came to the spot after 10 minutes of the removal of the dead body and enquired from him regarding the occurrence. He also stated in his evidence

- A that he had not given the names of any individuals to the police in as much as he had not seen the actual occurrence of the incident. He repeatedly stated that PW-5, PW-13, PW-7 and PW-14 were not present when the police kept the dead body of deceased in gypsy. He also
- B explained that there was no need for him to send any telephonic message had they been present at the scene of occurrence. This witness did not support the prosecution case. He was not subjected to any cross-examination by the prosecution. His evidence remained
- C unimpeached. The evidence of PW-13 and PW-14 was more or less the same as of PW-5. [Paras 10 and 11] [245-D-H; 246-A-C]

- 1.3. PW-18 was a Police Constable who along with driver PW-30 went in the gypsy to the spot and lifted the
- D injured person into gypsy to take him to the hospital. He stated in his evidence that at that time except himself, driver PW-30 and Circle Inspector nobody else was present. He specifically stated that PW-5, PW-14 and PW-13 were not present at the place of occurrence at the time
- E when he reached the scene of offence. PW-29 is another Policeman who corroborated the evidence of Constable PW-18. In the same manner PW-30 driver of the gypsy corroborated the evidence of PW-18 and PW-29 stating that no one was present when they have lifted the body
- F from the scene of occurrence and placed the same in gypsy. All of them were police personnel and on duty at the relevant time. There was no reason for them to depose falsely. It was nobody's case that PWs 6, 27, 29 and 30 were not independent witnesses. There is no
- G reason to disbelieve the evidence of PW-6. The evidence of PW-6, if it is to be taken into consideration, makes the presence of PWs 5, 13 and 14 highly doubtful at the scene of occurrence. There is no reason whatsoever to discard the evidence of PW-6 who is an independent witness. He
- H was not present at the actual scene of offence when the

deceased was subjected to attack even though PW-5, in his evidence stated as if PW-6 was also present at the time of attack. But PW-6 in categorical terms stated, by the time he went to the scene of offence within a couple of minutes, the deceased was lying dead in a pool of blood and neither PW-5 nor PWs 13 and 14 were present at the scene of offence. PW-5 is none other than the brother of deceased and a highly interested witness whose evidence was required to be carefully scrutinised. The testimony of PW-6 cannot easily be surmounted by the prosecution. It is not known as to why the public prosecutor in the trial court failed to seek permission of the court to declare him "hostile". His evidence is binding on the prosecution as it is. No reason, much less valid reason has been stated by the High Court as to how evidence of PW-6 can be ignored. In the present case the prosecution never declared PWs 6, 18, 29 and 30 "hostile". Their evidence did not support the prosecution. Instead, it supported the defence. There is nothing in law that precludes the defence to rely on their evidence. [Paras 12 and 13] [246-D-H; 247-A-F]

Mukhtiar Ahmed Ansari v. State (NCT of Delhi) (2005) 5 SCC 258, relied on.

1.4. It is clear that the evidence of PW-6 completely rules out the presence of PW-5 at the scene of offence. It is thus clear that PW-5 was not speaking truth, being interested witness obviously made an attempt to implicate the appellant in the case due to previous enmity. The entire prosecution case rests upon the Parcha Bayan lodged by PW-5. Once his presence is disbelieved, the whole case of the prosecution collapses like a pack of cards. In addition, the evidence of PWs 18, 29 and 30 who are all independent witnesses, also cast a serious shadow on the evidence of PWs 5, 13 and 14 as regards their presence at the scene of offence. It is under those circumstances, it is difficult and impossible to place any

- A reliance whatsoever on the evidence of PW-5 who is a highly interested and partisan witness. No reliance can be placed on his evidence in order to convict the appellants of the charge under Section 302, IPC. For the same reasons, the evidence of PWs 13 and 14 also is to be discarded. None of them was speaking truth. The Courts below altogether ignored these vital aspects of the matter. On such careful analysis, it is difficult to accept the evidence of PWs 5, 13 and 14 to sustain the conviction and sentence imposed on the appellants.
- C There is no other acceptable evidence on record based on which the charge could be held proved against the appellants. [Paras 15 and 16] [248-E-H; 249-A]

Case Law Reference:

- D (2005) 5 SCC 258 relied on Para 13
CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1522 of 2008.

- E From the Judgment & Order dated 4.3.2008 of the High Court for Rajasthan, Jaipur Bench at Jaipur in D.B. Criminal Appeal No. 1089 of 2003.

A. Sharan, A.K. Singh, Samir Ali Khan for the Appellant.

R. Gopalakrishnan for the Respondent.

- F The Judgment of the Court was delivered by

B. SUDERSHAN REDDY, J. 1. This appeal pursuant to the special leave granted is directed against the concurrent judgments.

- G 2. The two appellants were tried for offences punishable under Sections 147, 323, 324, 302 of IPC. The trial court convicted both of them for the offences punishable under Sections 148, 201 and 302 IPC. On appeal, the High Court, however, confirmed the sentences awarded against the appellants for the offences punishable under Section 302 of the
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IPC while setting aside the conviction of the appellants of the charges under Sections 201 and 148 IPC. The prosecution case is as follows :

On May 25, 1999 at about 1.00 p.m., Chuttu @ Nizamuddin (PW-5) lodged a Parcha Bayan (Ex.P-12) before the Police Sub-Inspector of Kotwali, Tonk inter-alia stating that at about 12.30 in the noon he along with Saleem (PW-7) and Noor (PW-13) were getting a truck repaired at Rajasthan Tyrewala near Roadways Depot, Tonk. One Mohamaad Deen @ Mulla (deceased) came at the shop of Ayub Bhai (PW-6). All of a sudden about 10-12 persons equipped with deadly weapons such as gupties, swords, knives and gandasas came there and surrounded the deceased. Javed Masood (A.1), Syed Najeeb Hassan (A.2), Ashraf and Aziz were armed with gupties and others were equipped with swords and knives. Javed Masood inflicted blow with gupti on the chest of the deceased, Najeeb and others inflicted blows on neck, face and back. One Gullo and Sadique gave blows with swords on hands of deceased. Thereafter the assailants fled away from the scene of occurrence under the impression that Mohammad Deen @ Mulla was dead. Meanwhile police patrol van reached at the spot and removed the deceased to the hospital where he was declared dead. On the basis of Parcha Bayan, the FIR No.184/99 (Ex.P-48) was registered and investigation commenced. On completion of investigation, charge-sheet was filed against the appellants and investigation was kept pending under Section 173(8) Cr.P.C. against the rest of the individuals named in the Parcha Bayan. The prosecution in support of its case examined as many as 33 witnesses and got marked certain documents and material objects in evidence. The appellants denied the charges and claimed trial.

3. The trial court accepted the prosecution case and convicted and sentenced the accused, as stated above. The trial court held that the prosecution proved its case beyond reasonable doubt against the appellants and held them guilty

A of having entered into a criminal conspiracy, unlawful assembly and committing murder of the deceased. The High court, however, confirmed the conviction of the appellants only under Section 302 IPC and acquitted them of the rest of the charges.

B 4. In the appeal before the High Court and as well as before us, it was contended on behalf of the defence that the incident took place out of acute enmity. The evidence of highly interested eye-witness should be rejected as there is likelihood of implicating some innocent persons.

C 5. Shri Amarendra Sharan, learned senior counsel, inter-alia, submitted that the presence of alleged eye-witnesses at the scene of offence is highly doubtful and no reliance can be placed on their evidence. He relied on the evidence of
D Mohammad Ayub-PW-6 and police personnel—Laxmi Narayan-PW-29, Suresh Kumar-PW-18 and Ranjeet Singh-PW-30 in this regard. The learned counsel appearing for the State supported the judgment under appeal.

E 6. As has been rightly held by the courts below that the death of Mohammad Deen @ Mulla was homicide in nature. As per post-mortem report (Ex.P-43) following ante mortem injuries were found on the dead body:

F 1. Incised wound 1" x ½" sub cut deep right parietal posterior part, elliptical

F 2. Incised wound 1" x ½" pharyngeal cavity deep elliptical vertical bleeding + Rt. carotid region ant. to ear lobe.

G 3. Incised wound ½" x ¼" muscle deep on Rt. parotid region anterior to injury No. 2 vertical elliptical.

H 4. Contusion 3" x 2" lt. forehead above lt. eye brow with black eye.

H 5. Incised wound 1" x 1/8" sub cut elliptical 1½" lateral to eye on face right vertical.

6. Incised wound elliptical $1\frac{1}{2}$ " x $\frac{1}{2}$ " muscle deep on upper 1/3rd forearm Lt. vertical. A
7. Incised wound elliptical $1\frac{1}{2}$ " x $\frac{1}{2}$ " muscle deep on lt. arm upper 1/3 vertical.
8. Penetrating incised wound $1\frac{1}{2}$ " x $\frac{1}{2}$ " Rt. chest cavity deep 2" above & $\frac{1}{2}$ " medial to right nipple on anterior right chest wall elliptical, directing down & medial aspect. B
9. Penetrating incised wound $1\frac{1}{2}$ " x $\frac{1}{2}$ " chest cavity deep elliptical, oblique $1\frac{1}{4}$ " medial to injury No. 8 giving downward & laterally on ant. chest wall (Rt.) C
10. Incised wound $1\frac{1}{2}$ " x $\frac{3}{4}$ " muscle deep elliptical oblique direction medial & lateral aspect Rt. lower chest mammary line interiorly. D
11. Penetrating Incised wound $1\frac{1}{2}$ " x $\frac{1}{2}$ " abdominal cavity deep on left hypochondrium on abdominal wall elliptical obliquely placed 2" below sub costal Lt. marg & 2" lt. lateral to mid line.
12. Incised wound $\frac{1}{2}$ " x $\frac{1}{8}$ " sub cuticle $4\frac{1}{2}$ " below left nipple transverse elliptical. E
13. Abrasion 3 No. $2\frac{1}{2}$ ", 2", 1" linear oblique each parallel to each other 4" lat. & above to umblicus on lt. Ant. abdominal wall. F
14. Incised wound 4" x $\frac{1}{2}$ " muscle oblique above down 2" lateral to (Rt. nipple, on Rt. chest anterior lat.)
15. Incised wound $1\frac{1}{2}$ " x $\frac{1}{4}$ " muscle deep elliptical horizontally in mid axillary region (right). G
16. Penetrating Incised wound $1\frac{1}{2}$ " x $\frac{1}{2}$ " chest cavity deep Rt. mid axillary region $\frac{1}{2}$ " below injury No. 15, elliptical vertical bleeding. H

A 17. Incised wound 1½" x ½" x scapular deep horizontal elliptical Rt. back chest inter scapular region.

18. Incised wound 1¼" x ¼" muscle deep left to mid line of back on chest vertical elliptical

B 19. Incised wound 1¼" x ¼" muscle deep transverse ½" right medial to mid line on Rt. back of chest

20. Incised wound ½" x ¼" muscle deep on left lower to chest back in lower part elliptical horizontal.

C 21. Abrasion (three) ¼" x ¼" each three No. number Rt. knee joint.

22. Abrasion (two) ¼" x ¼" on left knee joint.

D 7. The cause of death according to the medical opinion was due to the excessive haemorrhage on account of injuries caused to right lung and liver. The injuries found on the chest were penetrating in nature.

E 8. The short question that arises for consideration in this appeal is as to whether the courts below committed any manifest error in relying on the evidence of Chuttu (PW-5), Noor (PW-13) and Rayees (PW-14) to convict the appellants for the charge under Section 302 IPC. It is well settled and needs no restatement at our hands that concurrent findings of facts are not usually interfered with by this court in exercise of its jurisdiction under Article 136 of the Constitution of India by reappreciating the evidence unless it is clearly established that the courts below altogether ignored vital piece of evidence and rested their conclusion placing reliance on the evidence which cannot be accepted on the face of it.

G 9. Chuttu (PW-5) who lodged the FIR is an important witness. He more or less confirmed in the examination-in-chief as to what has been stated by him in Parcha Bayan (Ex.P-12).
H He specifically alleged that Javed Masood (A.1) inflicted gupti

blow on the chest of the deceased and Najeeb (A.2) had inflicted with gupti on abdomen and chest. It is in his evidence that the occurrence was witnessed by Husain (PW-4), Rayees (PW-14) and Ayub Bhai Tyrewala (PW-6). He stated that while assault was going on the deceased he remained shouting and no one came to rescue the deceased. Meanwhile, a white coloured police gypsy arrived at the scene of offence in which the deceased was removed to hospital where Mullaji was declared dead. He admitted that police gypsy reached just after two minutes of occurrence. He also admitted that there was an enmity between him and the appellants as Javed Masood lodged a case against him and PW 14 and others.

10. The evidence of Ayub Bhai (PW-6) is very crucial. It is in his evidence that on the fateful day the deceased alone had come on a motorcycle to his shop at about 12.30 p.m. to repay an old debt. The deceased requested for sale of some more tyres on credit basis to which he refused. There was conversation for about 15 minutes in that regard. While the deceased was sitting in the shop he went into the basement of the shop to find as to any old tyres were available to sell as requested by the deceased and when he returned to the shop the deceased was not found in the shop. Then he found crowd in the street parallel to his shop and went to the place to know as to what transpired and found the deceased was lying overturned completely soaked in blood. He had died at the place of occurrence. Within 5-10 minutes the police came in gypsy and removed the body to hospital in gypsy. It is specifically stated in his evidence that PW-5-Chuttu who is none other than the brother of the deceased came to the spot after 10 minutes of the removal of the dead body and enquired from him regarding the occurrence and he informed that the police took him to the hospital. He also stated in his evidence that he has not given the names of any individuals to the police in as much as he had not seen the actual occurrence of the incident. It is also in his evidence that immediately after the incident he telephoned to one Habib with a request to

- A communicate the message to Chuttu about the occurrence. He repeatedly stated that Chuttu (PW-5), Noor (PW-13), Saleem (PW-7) and Rayees (PW-14) were not present when the police kept the dead body of Mullaji (deceased) in gypsy. He also explained that there was no need for him to send any telephonic
- B message had they been present at the scene of occurrence. This witness did not support the prosecution case. He was not subjected to any cross-examination by the prosecution. His evidence remained unimpeached.

- C 11. The evidence of Noor (PW-13) and Rayees (PW-14) is more or less the same as of PW-5 and therefore no detailed discussion is required about their evidence.

- D 12. Suresh Kumar (PW-18) is a Police Constable who along with driver Ranjit Singh (PW-30) went in the gypsy to the spot and lifted the injured person into gypsy to take him to the hospital. He stated in his evidence that at that time except himself, driver Ranjit Singh (PW-30) and Circle Inspector nobody else was present. He specifically stated that Chuttu (PW-5), Rayees (PW-14) and Noor (PW-13) were not present
- E at the place of occurrence at the time when he reached the scene of offence. Laxshami Narayan (PW-29) is another Policeman who corroborated the evidence of Constable Suresh Kumar (PW-18) stating that he and Constable Suresh Kumar and driver Ranjit Singh (PW-30) kept the body of the injured
- F (deceased) in the gypsy and went to Sahadat hospital. There was crowd near the injured person but no relative of deceased was present. In the same manner Ranjit Singh (PW-30) driver of the gypsy corroborated the evidence of PW-18 and PW-29 stating that no one was present when they have lifted the body from the scene of occurrence and placed the same in gypsy.
- G All of them were police personnel and on duty at the relevant time. There is no reason for them to depose falsely. It is nobody's case that PWs 6, 27, 29 and 30 are not independent witnesses. There is no reason to disbelieve the evidence of PW-6 and no valid reason has been suggested as to why his
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evidence cannot be relied on and taken into consideration. The evidence of PW-6, if it is to be taken into consideration, makes the presence of PWs 5, 13 and 14 highly doubtful at the scene of occurrence. We do not find any reason whatsoever to discard the evidence of PW-6 who is an independent witness. He was not present at the actual scene of offence when the deceased was subjected to attack even though PW-5, in his evidence stated as if PW-6 was also present at the time of attack. But PW-6 in categorical terms stated, by the time he went to the scene of offence within a couple of minutes, the deceased was lying dead in a pool of blood and neither PW-5 nor PWs 13 and 14 were present at the scene of offence. PW-5 is none other than the brother of deceased and a highly interested witness whose evidence was required to be carefully scrutinised and precisely for that reason we have looked into the evidence of PW-5 with care and caution. The testimony of Mohammad Ayub (PW-6) cannot easily be surmounted by the prosecution. He has testified in clear terms that PWs 5, 13 and 14 were not present at the scene of occurrence. It is not known as to why the public prosecutor in the trial court failed to seek permission of the court to declare him "hostile". His evidence is binding on the prosecution as it is. No reason, much less valid reason has been stated by the Division Bench as to how evidence of PW-6 can be ignored.

13. In the present case the prosecution never declared PWs 6, 18, 29 and 30 "hostile". Their evidence did not support the prosecution. Instead, it supported the defence. There is nothing in law that precludes the defence to rely on their evidence. This court in *Mukhtiar Ahmed Ansari vs. State (NCT of Delhi)* observed:

"30. A similar question came up for consideration before this Court in *Raja Ram v. State of Rajasthan*, (2005) 5 SCC 272. In that case, the evidence of the Doctor who was examined as a prosecution witness showed that the

1. (2005) 5 SCC 258.

A deceased was being told by one K that she should
implicate the accused or else she might have to face
prosecution. The Doctor was not declared "hostile". The
High Court, however, convicted the accused. This Court
held that it was open to the defence to rely on the evidence
B of the Doctor and it was binding on the prosecution.

31. In the present case, evidence of PW1 Ved Prakash
Goel destroyed the genesis of the prosecution that he had
given his *Maruti* car to police in which police had gone to
Bahai Temple and apprehended the accused. When Goel
C did not support that case, accused can rely on that
evidence."

14. The proposition of law stated in the said judgment is
equally applicable to the facts in hand.

D 15. It is clear that the evidence of PW-6 completely rules
out the presence of Chuttu (PW-5) at the scene of offence. It is
thus clear that PW-5 was not speaking truth, being interested
witness obviously made an attempt to implicate the appellant
E in the case due to previous enmity. Be it noted that the entire
prosecution case rests upon the Parcha Bayan (Ext. P12)
lodged by PW-5. Once his presence is disbelieved, the whole
case of the prosecution collapses like a pack of cards. In
addition, the evidence of PWs 18, 29 and 30 who are all
F independent witnesses, also cast a serious shadow on the
evidence of PWs 5, 13 and 14 as regards their presence at
the scene of offence. It is under those circumstances, we find
it difficult and impossible to place any reliance whatsoever on
the evidence of PW-5 who is a highly interested and partisan
G witness. No reliance can be placed on his evidence in order
to convict the appellants of the charge under Section 302, IPC.
For the same reasons, the evidence of PWs 13 and 14 also is
to be discarded. None of them was speaking truth.

16. The Courts below altogether ignored these vital
H aspects of the matter which compelled us to carefully analyze

their evidence. On such careful analysis, we find it difficult to accept the evidence of PWs 5, 13 and 14 to sustain the conviction and sentence imposed on the appellants. There is no other acceptable evidence on record based on which the charge could be held proved against the appellants. A

17. For the aforesaid reasons the conviction of the appellants and the sentence imposed on them is set aside and they are directed to be released forthwith. B

18. The appeal is accordingly allowed.

D.G.

Appeal allowed. C