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SUBHASH

v.

STATE OF UTTAR PRADESH

(Criminal Appeal No. 158 of 2022)

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FEBRUARY 01, 2022

**[DR. DHANANJAYA Y CHANDRACHUD, SURYA KANT  
AND VIKRAM NATH, JJ.]**

- C *Penal Code, 1860 – s.302 r/w s.149 and s.148 – Murder – Informant was sitting with his brother, the deceased, on a cot when the six accused persons allegedly arrived at the scene – Allegation that A-3 and three other accused, who were armed with pistols, fired at the deceased, while one other accused 'SD', who was armed with an axe, and A-6, who was armed with knife, assaulted deceased on his neck – Sessions Judge convicted all six accused u/s.302 r/w 149 and 148 IPC – High Court confirmed the conviction – On appeal by A-3 and A-6, held: On facts, the presence of both PW-1 and PW-2 at the spot was gravely in doubt – There were material contradictions in the evidence of both PW-1 and PW-2, which were not noticed either by the Sessions Judge or by the High Court –*
- D *Though the prosecution is not obligated to examine every witness who is alleged to have been present at the site or the scene of the offence, yet in context of the facts, the failure to examine the father of the deceased who was allegedly sitting in close proximity, assumes significance – Appellants (A-3 and A-6) accordingly entitled to benefit of doubt and are acquitted.*
- E *Allowing the appeals, the Court*

- G **HELD:** 1. Analyzing the evidence of PW-1, it is apparent that there are material improvements which have been attempted in the course of the deposition over the case as set out in the FIR as well as in the course of the examination-in-chief. The role which originally is attributed to all the accused who were armed with country made pistols is of having fired upon the deceased. Subsequently, in the course of the cross-examination, PW-1 has

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stated that insofar as A-3 is concerned, he had fired in the air while two accused had actually fired at the body of the deceased. [Para 15][265-F-G] A

2.1. The entire case of the prosecution was that all the accused who were alleged to be wielding country made pistols had fired upon the deceased. This case of the prosecution is substantially diluted in the cross-examination of PW-1 as well as in the cross-examination of PW-2. Significantly, the postmortem report indicates only one fire arm injury, which is not consistent with the case of the prosecution that all the accused had fired upon the deceased. That apart, the post-mortem report indicates one injury on the neck of the deceased which again is inconsistent with the deposition of PW-1 and PW-2 that both accused 'SD' armed with a farsa and A-6 who was allegedly armed with a knife had assaulted the deceased on the neck. [Para 17][266-D-E] B

2.2. The presence of both PW-1 and PW-2 at the spot is gravely in doubt. There are material contradictions in the evidence of both PW-1 and PW-2, which ought to have been, but have not been noticed either by the Sessions Judge or by the High Court. The High Court was of the view that the contradictions which have been pointed out by the defence are of a minor nature. Having evaluated the evidence, one is unable to sustain that conclusion given that the contradictions were of fundamental nature which go to the root of the case of the prosecution. It is true that the prosecution was not obligated to examine every witness who is alleged to have been present at the site or the scene of the offence, yet in the context of the facts, the failure to examine the father of the deceased who was allegedly sitting in the close proximity, assumes significance. Accused-appellants A-3 and A-6 are accordingly entitled to the benefit of doubt. [Paras 18 and 19][266-F-H; 267-A-B] C

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No.158 of 2022. D

From the Judgment and Order dated 11.01.2019 of the High Court of Judicature at Allahabad in Criminal Appeal No.5307 of 2008. E

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Criminal Appeal No. 159 of 2022.

Ms. Manju Jetley, Chandan Mishra, Brahmadandi Ramesh, Ms. Manisha Chava, M. Vijaya Bhaskar, Advs. for the Appellant.

B Sanjay Kumar Tyagi, Ms. Harshita Raghuvanshi, Ms. Saloni Tangri Java, Advs. for the Respondent.

The Judgment of the Court was delivered by

**DR. DHANANJAYA Y CHANDRACHUD, J.**

C A Facts.....2\*

B Submissions.....5\*

C Analysis.....9\*

D 1. Leave granted.

**A Facts**

E 2. These appeals arise from a judgment of a Division Bench of the High Court of Judicature at Allahabad dated 11 January 2019 in Criminal Appeal No 5307 of 2008.

F 3. The appeal before the High Court arose from a judgment of the Sessions Judge, Badaun dated 30 July 2008 in Sessions Trial No 499 of 2002, arising out of Case Crime No 61 of 2002 registered under Section 148 and Section 302 read with Section 149 of the Indian Penal Code 1860<sup>1</sup> at Police Station Dataganj District Badaun. The Sessions Judge convicted Rajaram, Rajesh, Subhash, Rampal, Shiv Dayal and Gyanvati for offences punishable under Sections 148 and 302/149 of the IPC. They were sentenced to imprisonment for life for the offences punishable under Sections 302/149 and to rigorous imprisonment for two years for the offence under Section 148 of the IPC.

G 4. The first information report<sup>2</sup> was registered at 1430 hours on the complaint lodged by PW-1 Vedram on 16 February 2002. The FIR records that at 11 am on the date of the incident, the informant was

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<sup>1</sup> "IPC"

<sup>2</sup> "FIR"

H \* Ed. Note : Pagination is as per the original Judgment.

sitting in proximity to the village well on a cot with his brother Surender and his father was sitting on the terrace. At that point, Rajaram and Rajesh who were armed with pistols, Subhash and Rampal who were armed with country made pistols, Shiv Dayal with an axe and Gyanvati, wife of Rajaram, armed with a knife arrived at the scene. Rajaram, Rajesh, Subhash and Rampal are alleged to have fired from their pistols at his brother Surender. Shiv Dayal, who was armed with an axe and Gyanvati are alleged to have assaulted Surender on his neck. The informant states that he then ran towards his house and informed, among others, his father who was on the terrace. The accused upon being challenged are alleged to have run away from the scene of incident. The informant also stated that the deceased was accused in the murder of the father of Rajesh, for which the trial was ongoing before the court.

5. The case of the prosecution at the trial principally rested on the evidence of PW-1 and PW-2. The postmortem of the deceased, Surender was conducted on 17 February 2002 by PW-4, Dr R K Rohatgi. Among the witnesses who were examined by the prosecution, Vedram is the informant, while PW-2, Jagdish is an alleged eye witness who is stated to have witnessed the incident while passing by from the village pond.

6. The postmortem indicated the following nine injuries on the deceased:

- “1. IW on posterior aspect of Rt. arm area 5.0 cm x 2.0 cm x muscle deep just above wrist.
- 2. IW on the outer aspect of mid of neck 9.0 cm x 3.0 cm x vertebra deep.
- 3. IW on the posterior aspect of left sleeve area 1.0 cm x 0.5 cm x muscle deep 11 cm below elbow.
- 4. IW on the posterior aspect of left sleeve area 3.0 cm x 0.5 cm x muscle deep 6.0 cm above wrist.
- 5. IW on the left side 8.0 cm x 8.0 cm x muscle deep and 1.0 cm below lip.
- 6. LW on the right side upper lip 2.0 cm x 0.5 cm x muscle deep.
- 7. LW Fire arm wound of entry on the right side chest 4.0 cm x 3.0 cm x cavity and 8.0 cm above the right nipple blackening present around wound.

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- A        8. LW on the top of right side of skull 4.0 cm x 2.0 cm x scalp deep 10 cm above the right ear.
9. Contusion on the left side of face 7.0 cm x 2.5 cm and 3.0 cm to ear.”
- B        7. The Sessions Judge found the accused guilty principally on the basis of the evidence of PW-1 and PW-2. The Sessions Judge held that:
- (i) Based on the evidence presented by the prosecution, it was proved that the deceased was an accused in the murder of Rajesh’s father. Since Rajesh, Subhash, Rajaram, Rampal and Gyanvati are related and members of the same family, the motive of the murder of the deceased was to avenge the death of Rajesh’s father;
- (ii) The fact that PW-1 did not save his brother and suffered no injuries, does not indicate that he was not an eye witness. As an unarmed person, it was natural for PW-1 to not make any attempt to save his brother; and
- (iii) The medical evidence that the deceased had suffered only one fire arm injury was in consonance with the statement of PW-1. PW-1 stated that Rajesh and Rajaram fired on the deceased, while Subhash and Rampal did open firing. Thus, it was proved that firing occurred from a close range, but the time of firing cannot be ascertained by a normal person.
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- F        **B Submissions**
- G        8. The findings and conviction recorded by the Sessions Judge have been confirmed in appeal by the High Court by its impugned judgment dated 11 January 2019.
- H        9. We have heard Mr Chandan Mishra, counsel appearing on behalf of the appellants and Mr Sanjay Kumar Tyagi, counsel appearing on behalf of the State of Uttar Pradesh.
- G        10. The two appeals before this Court have been instituted by Subhash (Accused No 3) and Gyanvati (Accused No 6).
- H        11. Mr Chandan Mishra, appearing on behalf of the appellants has urged that there are serious contradictions in the evidence which would warrant the acquittal of the accused-appellants. The following submissions have been urged in support of the appeals:

- (i) PW-1, Vedram was an accused in the murder of the father of accused Rajesh. PW-1 is alleged to be an eye witness who was present at the scene of offence when the deceased Surender was assaulted. PW 1 together with the deceased were accused in the murder of Rajesh's father it is unlikely that he would have been spared when a large group of persons belonging to the other side assaulted Surender with fire arms, an axe and a knife; A
- (ii) There are material improvements which have been made by PW-1 which would be apparent on a comparison of his complaint, statement under Section 161 of the Code of Criminal Procedure 1973 and the deposition, both in the course of the examination-in-chief and the cross-examination; B
- (iii) PW-2, Jagdish was a chance witness who is alleged to have witnessed the offence while he was returning from the village pond. The deposition of PW-2 would similarly indicate that he was unaware of the factual details of the incident, and as a matter of fact, has substantially improved upon his case in the course of his deposition; C
- (iv) The injuries which have been recorded in the course of the postmortem report demonstrate that there is only one fire arm injury and one injury which has been sustained by the deceased on the neck. The case of the prosecution that both Shiv Dayal and Gyanvati assaulted the deceased on the neck is therefore belied by the nature of the solitary injury which was sustained on the neck; D
- (v) The fact there was only one fire arm injury which has been noticed on the body of the deceased in the course of the postmortem would belie the case of the prosecution witnesses that as many as five of the accused had fired at the body of the deceased; E
- (vi) There is serious doubt about whether PW-1 is an eye witness at all and PW-2 who is a chance witness ought not to be believed for the simple reason that his testimony is subject to grave doubt; and F
- (vii) The failure of the prosecution to examine Chetram, the father of the deceased who was allegedly present at the scene of offence, would therefore assume some significance. G
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- A        12 On the other hand, Mr Sanjay Kumar Tyagi, Standing Counsel appearing on behalf of the State of Uttar Pradesh has made an attempt to emphasize the findings which have been recorded by the High Court in the course of its impugned judgment. Counsel submitted that the alleged contradictions which have been adverted to on behalf of the appellants are minor in nature, as held by the High Court while affirming the judgment of conviction. The High Court in the impugned judgment had observed that:
- (i) The statement of PW-1 was consistent with the FIR. In the FIR, PW-1 stated that all four accused fired their weapons, however in his cross-examination, he stated that only Rajesh and Rajaram fired at the deceased while Subhash and Rampal fired in the air. These are minor inconsistencies which cannot affect the credibility of PW-1;
- (ii) PW-1 had stated that the accused had fired from a distance of five to six steps, while PW-2 stated that they fired from a distance of 20 yards. In view of the medical evidence, the statement of PW-2 is not reliable, however, PW-2 is a rustic villager who was examined four years after the incident. Thus, these contradictions are not material enough to reject the deposition of PW-2 in its entirety;
- (iii) The evidence of PW-1- that the shots were fired from a distance of five to six steps - is in consonance with the medical evidence as there was blackening around the fire arm injury which indicates that the injury was caused by firing from close range;
- (iv) Although no weapon was recovered from the scene of crime, it is not a sine qua non for sustaining the conviction; and
- (v) The participation of accused Gyanvati in the crime cannot be doubted merely on the ground that she being a lady would not have joined the other accused persons. The statement of the two witnesses that she was armed with a knife and struck the deceased at his neck is consistent with the medical evidence.
- H        13. We shall now consider the rival submissions.

**C Analysis**

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14. The entire case of the prosecution essentially rests on the deposition of PW-1 and PW-2. PW-1, Vedram who is the informant has stated in the course of his deposition that before the incident, there was a case involving the murder of the father of accused Rajesh. In that case, Surender, the deceased, was an accused as was PW-1, Vedram. Vedram's narration of the incident in the FIR is that at about 11 am on the date of the incident, when he was sitting on a cot near the village well together with the deceased, Rajaram, Rajesh, Subhash and Rampal fired from their country made pistols and that the bullets had hit his brother Surender. Moreover, he stated that both Shiv Dayal who was armed with a farsa and Gyanvati (Rajaram's wife) who was armed with a knife, had assaulted the deceased on his neck. In the course of the examination-in-chief, it was also stated that both Shiv Dayal and Gyanvati had assaulted the deceased on his neck. Though in the course of the examination-in-chief, PW-1 adverted to the fact that the deceased was a co-accused in the case involving the murder of the father of the accused Rajesh, the fact that he was also a co-accused emerged during the course of cross-examination. In the course of cross-examination, PW-1 was specifically questioned about the fact he had not sustained any injury in the course of the occurrence nor was any effort made by the accused to assault or kill him. In his cross-examination, PW-1 however stated that the accused persons "2-1" fired upon his brother while some of the other accused fired in the air. As regards the role which is attributed to A-3, PW-1 stated in the course of his cross-examination that he had fired in the air together with Rampal, while Rajaram and Rajesh had fired upon his brother.

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15. Analyzing the evidence of PW-1, it is apparent that there are material improvements which have been attempted in the course of the deposition over the case as set out in the FIR as well as in the course of the examination-in-chief. The role which originally is attributed to all the accused who were armed with country made pistols is of having fired upon the deceased. Subsequently, in the course of the cross-examination, PW-1 has stated that insofar as A-3 is concerned, he had fired in the air while two accused had actually fired at the body of the deceased.

16. Having analyzed the evidence of PW-1, it would be material to advert to the evidence of PW-2, Jagdish. In the course of his examination-in-chief, PW-2 has adverted to A-3, who was wielding a

- A country made gun, and that Gyanvati (A-6) together with Shiv Dayal assaulted the deceased on his neck with a knife and a farsa respectively. PW-2 is evidently a chance witness who is alleged to have witnessed the incident while returning from the village pond. During the course of his cross-examination however, PW-2 stated that Vedram, PW-1 was sitting about two cubits away from the cot of Surender, the deceased.
- B He stated that he is unable to state as to who had fired earlier and who had last fired at the deceased. PW-2 also admitted during the course of his cross-examination that he was unable to specify whose fire had hit the deceased. He stated that the accused were about 20 yards from the deceased during the course of the incident and he was unable to state as
- C to how many injuries were caused by the farsa. PW-2 was unable to state how many injuries were caused by the knife. These aspects of the cross-examination of PW-2 assume crucial significance from more than one perspective.

17. The entire case of the prosecution, as noticed earlier, was that
- D all the accused who were alleged to be wielding country made pistols had fired upon the deceased. This case of the prosecution is substantially diluted in the cross-examination of PW-1 as well as in the cross-examination of PW-2. Significantly, the postmortem report indicates only one fire arm injury, which is not consistent with the case of the prosecution
  - E that all the accused had fired upon the deceased. That apart, the postmortem report indicates one injury on the neck of the deceased which again is inconsistent with the deposition of PW-1 and PW-2 that both Shiv Dayal armed with a farsa and Gyanvati (A-6) who was allegedly armed with a knife had assaulted the deceased on the neck.

18. On this state of the record, we are of the considered view that the presence of both PW-1 and PW-2 at the spot is gravely in doubt. There are material contradictions in the evidence of both PW-1 and PW-2, which ought to have been, but have not been noticed either by the learned Sessions Judge or by the High Court. The High Court was of the view that the contradictions which have been pointed out
- F by the defence are of a minor nature. Having evaluated the evidence, we are unable to sustain that conclusion given that the contradictions were of fundamental nature which go to the root of the case of the prosecution. It is true that the prosecution was not obligated to examine every witness who is alleged to have been present at the site or the scene of the offence, yet in the context of the facts as they have
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emerged before this Court, the failure to examine Chetram, who was the father of the deceased and was allegedly sitting in the close proximity, assumes significance.

19. For the above reason, we are of the view that the accused-appellants Subhash (A-3) and Gyanvati (A-6) are entitled to the benefit of doubt. We accordingly allow the appeals and set aside the impugned judgment and order of the High Court of Judicature at Allahabad dated 11 January 2019 in Criminal Appeal No 5307 of 2008. The appellants are accordingly acquitted and they shall be released from custody unless they are wanted in connection with any other case.

20. Pending applications, if any, stand disposed of.

Bibhuti Bhushan Bose

Appeals allowed.