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PARVAT SINGH & ORS.

v.

STATE OF MADHYA PRADESH

(Criminal Appeal No. 374 of 2020)

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MARCH 02, 2020

[ASHOK BHUSHAN AND M. R. SHAH, JJ.]

- Penal Code, 1860 – s. 302 r/w s. 149 – Murder – All the accused including the appellants came to be tried by the Trial Court for the offences u/s. 302 r/w. s. 149 of the IPC for having killed son of the informant-PW-8 – The Trial Court convicted appellants-original accused nos. 2 to 5 for the offences punishable u/s. 302 r/w. s. 149 of the IPC – The High court confirmed the conviction of the appellants – Before the Supreme Court, the appellants contended that the High Court has not properly appreciated the fact that so far as the evidence/ deposition of PW-8 is concerned, it is full of material contradiction and improvements – Held: PW-8 stated in her statement recorded u/s. 161 Cr. P.C. that he had seen all the accused in the light of the torch – she stated that the accused no. 1 was having axe and other four accused were armed with lathis – She also stated that accused no. 1 gave the axe blow on the neck of the deceased due to the enmity and earlier dispute and other accused were telling to run immediately – However, in her deposition, PW-8 stated that two accused persons caught hold of deceased – She stated in her deposition that there was chimney light in the cattle shed and accused ran away from the nearby agricultural field of sugarcane – Therefore, the deposition of PW-8 is full of material contradictions and improvements so far as original accused nos. 2 to 5 are concerned – No other independent witness, even named by PW-8 supported the case of prosecution – In her deposition, she has not stated anything that the appellants were having lathis – As per the settled proposition of law, the statement recorded u/s 161 Cr. P.C. can be used only to prove the contradictions and/or omissions – Further, according to PW-8, she identified the accused in the light of the torch, however, there is no recovery of torch – In the facts and circumstances of the case, there are material contradictions, omissions and/or improvements so far as the appellants are*

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concerned – Therefore, the benefit of material contradictions, omissions and improvements must go in favour of the appellants – The conviction of the appellants u/s. 302 r/w. s. 149 of the IPC set aside.

Allowing the appeal, the Court

HELD: 1. It is required to be noted that it was a black night (Amavasya) at the time of incident. It was a dark night as the incident has happened between 4-5 a.m. PW8 in her statement recorded under Section 161 Cr.P.C. has stated that she has seen all the accused in the light of the torch. She has stated that original accused no.1 was having an axe and other four were armed with lathis. She had also stated in her statement under Section 161 Cr.P.C. that original accused no.1 gave the axe blow on the neck of the deceased due to the enmity and earlier dispute and other accused were telling to run away immediately and thereafter all the five accused ran away from behind the cattle shed/house. She stated that she had identified all the accused in the light of the torch and also by voice. According to her after she shouted, other persons came. However, there is material improvement in her deposition before the Court. In her deposition, she has stated that the two accused caught hold of deceased. In her deposition, she has also stated that there was a chimney light in the cattle shed. She has also stated in her deposition that the accused ran away from the nearby agricultural field of sugarcane. Therefore, the deposition of PW8 is full of material contradictions and improvements so far as original accused Nos. 2 to 5 is concerned. It is required to be noted that no other independent witness even named by PW8 has supported the case of the prosecution. Though, according to PW8, she identified the accused in the light of the torch, there is no recovery of torch. There is material improvement so far as the chimney light is concerned. In her deposition, she has not stated anything that the appellants – original accused nos. 2 to 5 were having the lathis, though she has stated this in her statement under Section 161 Cr.P.C. The High Court has observed relying upon her statement recorded under Section 161 Cr.P.C. that the appellants herein – accused nos. 2 to 5 were having lathis. However, as per the settled preposition of law a statement recorded under Section 161 Cr.P.C.

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- A is inadmissible in evidence and cannot be relied upon or used to convict the accused. As per the settled proposition of law, the statement recorded under Section 161 Cr.P.C. can be used only to prove the contradictions and/or omissions. Therefore, as such, the High Court has erred in relying upon the statement of PW8 recorded under Section 161 Cr.P.C. while observing that the appellants were having the lathis. [Para 14.1][972 F-H; 973 A-F]
 - 2. As observed hereinabove in her statement under Section 161 Cr.P.C., she has never stated that the two accused caught hold of the deceased, but stated that the appellants herein told to run away as other persons have woken. In the facts and circumstances of the case, there are material contradictions, omissions and/or improvements so far as the appellants herein – original accused nos. 2 to 5 are concerned and therefore this Court is of the opinion that it is not safe to convict the appellants on the evidence of the sole witness of PW-8. The benefit of
- B recorded under Section 161 Cr.P.C. while observing that the appellants were having the lathis. [Para 14.1][972 F-H; 973 A-F]
- C run away as other persons have woken. In the facts and circumstances of the case, there are material contradictions, omissions and/or improvements so far as the appellants herein – original accused nos. 2 to 5 are concerned and therefore this Court is of the opinion that it is not safe to convict the appellants on the evidence of the sole witness of PW-8. The benefit of
- D material contradictions, omissions and improvements must go in favour of the appellants herein. Therefore, as such the appellants are entitled to be given benefit of doubt.[Para 142][973 F-H]

- Now, so far as the submission on behalf of the State that relying upon the deposition of PW8, the original accused no.1 was convicted and his conviction has been confirmed upto this Court and therefore to dismiss the present appeal qua other accused is concerned from the evidence on record and having observed hereinabove the case of the appellants – original accused nos. 2 to 5, is distinguishable on facts. There are material contradictions and omissions so far as the appellants – original accused nos. 2 to 5 are concerned. So far as the original accused no 1 is concerned, PW8 is consistent in her statement under Section 161 Cr.P.C. as well as in her deposition before the Court. There was a recovery of axe used in commission of the offence by accused no.1 at the instance of accused no.1. Under the circumstances, the case of the original accused nos. 2 to 5 is clearly distinguishable to that of original accused no.1. [Para 14.3][974 A-D]

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. A
374 of 2020.

From the Judgment and Order dated 19.04.2018 of the High Court of Madhya Pradesh, Bench at Gwalior in Criminal Appeal No. 574 of 2006.

A.K. Shrivastava, Sr. Adv., Shishir Kumar Saxena, R.N. Pareek, P.K. Sinha, Brijendra Singh, Praveen Swarup, Advs. for the Appellants.

Ms. Madhurima Mridul, AAG, Yasir Rauf, Rahul Kaushik, Harsh Parashar, Advs. for the Respondent.

The Judgment of the Court was delivered by C

M. R. SHAH, J.

1. Leave granted.

2. Feeling aggrieved and dissatisfied with the impugned judgment and order dated 19.04.2018 passed by the High Court of Madhya Pradesh at Gwalior in Criminal Appeal No. 574 of 2006 by which the High Court has confirmed the conviction of the appellants herein – original accused Nos. 2 to 5 for the offences punishable under Section 302 r/w Section 149 of the IPC, the original accused nos. 2 to 5 have preferred the present appeal. D

3. All the accused including the appellants came to be tried by the Learned Trial Court for the offences under Section 302 r/w Section 149 of the IPC for having killed one Bal Kishan s/o the informant Mullo Bai on 01.12.2005 around 4-5 a.m. in the morning at Village Hinotiya Gird. E

4. According to the case of the prosecution, the informant Mullo Bai – PW8 was sleeping in the cattle shed. At that time, the appellants and one another accused named Bal Kishan, s/o Diman Singh while sharing common object caused murder of Bal Kishan, s/o Bhagwan Singh. According to the informant there was a dispute going on between the parties. As per the case of the prosecution and according to the informant, when she was sleeping in the cattle shed in the house, around 4-5 a.m. in the morning due to the barking of the dogs she woke up and in the light of torch, she saw that in the cattle shed, accused Bal Kishan with an axe and other original accused Nos. 2 to 5 herein with sticks/lathis in their hands were standing. Thereafter, accused Bal Kishan F

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- A entered in the cattle shed and with an intention to kill her son Bal Kishan gave a blow of axe. She shouted and the other members of the family and nearby house came there and all the accused ran away from the spot. Investigation was carried out by one Mahesh Sharma – Investigating Officer - PW12. He recorded the statements of concerned witnesses.
- B I.O. also obtained the relevant evidences including the medical evidence and also the postmortem report. That all the accused were charge-sheeted for the offences punishable under Section 302 r/w Section 149 and Section 450 of the IPC. The case was committed to the Court of Sessions. All the accused pleaded not guilty, therefore, all the accused came to be tried by the Learned Trial Court for the aforesaid offences.
- C 5. To prove the case against the accused, the prosecution examined in all 12 witnesses including PW8 Mullo Bai -informant – mother of the deceased who was the sole eyewitness. At this stage, it is required to be noted that mother of the deceased Mullo Bai was the sole eyewitness. At this stage, it is required to be noted that the axe used in the commission
- D of the offence by the original accused no.1 was recovered at the instance of the accused no.1 himself. Ratan Singh – PW1 and Pahalwan Singh – PW2 did not support the prosecution and therefore, they were declared as hostile by the prosecution. In support of the defence two witnesses were examined by the defence to bring home the theory of *alibi* in respect of original accused no.1 - Bal Kishan.
- E 6. After perusing the evidence led by the parties and solely relying upon the evidence of Mullo Bai – PW8 the sole eye-witness, the Learned Trial Court convicted all the accused for the offences under Section 302 r/w Section 149 of IPC.
- F 7. Feeling aggrieved and dissatisfied with the judgment and order of conviction by the Learned Trial Court, the appellants herein - original accused Nos.2 to 5 preferred Criminal Appeal No.574 of 2006 before the High Court. Original Accused No.1 also preferred one separate appeal. By the impugned judgment and order, the High Court has dismissed the appeal preferred by the accused nos.2 to 5 - appellants
- G herein. The High Court also dismissed the appeal preferred by the Accused No.1 – Bal Kishan. It is reported that the SLP against the judgment and order of conviction of the original accused no. 1 – Bal Kishan is dismissed by this Court. Feeling aggrieved and dissatisfied with the impugned judgment passed by the High Court, the original
- H accused nos. 2 to 5 have preferred the present appeal.

8. Shri A.K. Srivastava, learned Senior Advocate appearing on behalf of all the appellants – original accused nos. 2 to 5 has vehemently submitted that in the facts and circumstances of the case, the High Court has materially erred in dismissing the appeal and confirming the judgment and order of conviction passed by the Learned Trial Court and convicting them for the offences under Section 302 r/w Section 149 IPC.

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8.1 It is vehemently submitted by Mr. Srivastava, learned Senior Advocate that the High Court has not properly appreciated the fact that the Trial Court convicted the appellants solely relying upon the evidence/deposition of Mullo Bai – PW8.

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8.2 It is submitted that the High Court has not properly appreciated the fact that so far as the evidence/deposition of PW8 is concerned, it is full of material contradiction and improvements.

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8.3 It is further submitted by Learned Senior Advocate appearing on behalf of the appellants that the High Court has not properly appreciated the fact that it was a black night when the incident took place, there was a dark, and it was not possible for Mullo Bai to recognize/identify the accused – the appellants herein.

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8.4 It is further submitted that as such there was material contradiction in the deposition of the PW8 insofar as identifying/recognizing the appellants in the light of torch or from the chimney light. It is further submitted by Learned Senior Advocate appearing on behalf of the appellants that the testimony of Mullo Bai – PW8 suffers from material omissions, which amounts to contradictions as well as material improvements in her statement in Court as regards place of incident where she was sleeping. It is submitted that it was for the first time in the Court that she has stated that accused Santosh and Rakesh caught hold the deceased and that Bal Kishan inflicted axe injury over his neck.

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8.5 It is further submitted that in fact there is no recovery of any torch from the place of incident.

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8.6 It is further submitted that even the observations made by the High Court that the appellants herein went with the lathis is contrary to the evidence on record. It is submitted that in the deposition of PW8 – Mullo Bai, she has not stated anything that the appellants herein were carrying the lathis. It is submitted that in her statement recorded under Section 161 Cr.P.C. She has stated that the appellants were having lathis, but the statement under Section 161 Cr.P.C. is not admissible in evidence

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A and therefore the High Court has committed a grave error in observing that the appellants were having lathis, solely relying upon the statement of PW8 recorded under Section 161 Cr.P.C.

8.7 It is further submitted by the Learned Senior Advocate appearing on behalf of the appellants that as such there is no cogent material and/or evidence with respect to the common object and/or conspiracy hatched amongst the accused persons to kill the deceased. It is submitted that the appellants are convicted with the aid of Section 149 IPC. It is submitted that, therefore, in absence of theory of common intention/object, the appellants could not have been convicted for the offences under Section 302 IPC with the aid of Section 149 IPC.

C 8.8 It is further submitted by the Learned Senior Advocate appearing on behalf of the appellants that even as per the deposition of Mullo Bai – PW8 the dispute was going on between the parties. It is submitted that therefore the false implication of the appellants cannot be ruled out. It is submitted that therefore conviction of the accused is solely based upon the evidence – deposition of PW8 and no other independent witness supports the case of the prosecution and that the evidence – deposition of the PW8 is full of contradictions, omissions and improvements, it is not safe to convict the appellants solely relying upon the evidence/deposition of PW8.

E 8.9 It is further submitted by the Learned Senior Advocate appearing on behalf of the appellants – original accused nos. 2 to 5 that the case of the original accused nos. 2 to 5 is clearly distinguishable on facts, from that of original accused no.1. It is further submitted that there are no much contradictions and/or improvements in the case so

F far as original accused no.1 is concerned. It is submitted that so far as accused no.1 is concerned, it can be seen that PW8 is consistent with her statement under Section 161 Cr.P.C. as well as her deposition before the Court. It is submitted that even there was a recovery of axe used in the commission of the offence at the instance of the original accused no.1. It is submitted that therefore the dismissal of SLP qua original

G accused no.1 would not come in the way of appeal. It is further submitted that even otherwise, the SLP was dismissed in limine and therefore it is prayed to consider the present appeal on its own merits.

H 9. Making the above submissions it is prayed to allow the present appeal.

10. Present appeal is vehemently opposed by Ms. Madhurima Mridul, Learned Advocate appearing on behalf of the respondent – State. A

11. It is vehemently submitted by the Learned Advocate appearing on behalf of the State that there are a concurrent finding of facts recorded by both the Courts below while convicting the appellants for the offences under Section 302 r/w 149 IPC. It is submitted that the findings recorded by the Learned Trial Court and the High Court are on appreciation of evidence and therefore the same are not required to be interfered with by this Court in exercise of powers under Article 136 of the Constitution of India. B

11.1 It is further submitted by Learned Counsel appearing on behalf of the State that in the present case though the conviction of the appellants is solely based upon the deposition of PW8 – Mullo Bai, however there is no rule that there cannot be any conviction relying upon the sole witness, more particularly an eye-witness. It is submitted that PW8 is a reliable and trustworthy witness. It is submitted that her presence on the spot is natural as the incident has taken place in her house and near the place where she was sleeping. It is submitted that as she is the sole eyewitness to the incident, both the courts are justified in convicting the accused relying upon the deposition/evidence of PW8 – Mullo Bai. C

11.2 It is further submitted by the Learned Counsel on behalf of the State that in the present case the presence of appellants herein-original accused nos. 2 to 5 on the spot has been established and proved by the prosecution by examining PW8 who is the eyewitness. It is submitted that presence on the spot at the time of incident and that too between 4-5 a.m. early morning is sufficient to convict the accused for the offence under Section 302 IPC with the aid of Section 149 IPC. E F

11.3 It is further submitted by the Learned Counsel appearing on behalf of the State that even the accused were recognized and identified by PW8 – Mullo Bai even from their voice, so stated by PW8 in her deposition. G

11.4 It is further submitted by the Learned Counsel appearing on behalf of the State that the original Accused no.1 also came to be convicted solely relying upon the deposition of PW8. It is submitted that the conviction of original Accused no.1 has been confirmed upto this Court. It is submitted that therefore there is no reason not to believe PW8 so H

- A far as the appellants – original accused nos. 2 to 5 are concerned. It is submitted that therefore both the courts below have rightly convicted the appellants herein for the offences under Section 302 r/w Section 149 IPC. Making the above submissions, it is prayed to dismiss the present appeal.
- B 12. Heard the Learned Counsel for the respective parties at length. We have gone through and considered in detail the entire evidence recorded by the learned Trial Court as well as the High Court. We have also considered in detail the evidence on record more particularly the statement of PW8 – Mullo Bai recorded under Section 161 Cr.P.C. as well as her deposition before the Court.
- C 13. At the outset, it is required to be noted that the appellants herein - original accused nos. 2 to 5 are convicted by the Learned Trial Court and the High Court solely relying upon the evidence/deposition of PW8 – Mullo Bai. It cannot be disputed that there can be a conviction relying upon the evidence/deposition of the sole witness. However, at the same time, the evidence/deposition of the sole witness can be relied upon, provided it is found to be trustworthy and reliable and there are no material contradictions and/or omissions and/or improvements in the case of the prosecution. Therefore, the question which is posed for consideration of this Court is whether in the facts and circumstances of the case, can the appellants herein – original accused nos. 2 to 5 be convicted relying upon the deposition of the sole witness – PW8 and whether PW8 is a reliable and trustworthy witness to convict the appellants herein- original accused nos. 2 to 5?
- F 14. Having heard Learned Counsel appearing for the respective parties and considering the evidence on record, we are of the opinion that the evidence/deposition of PW8 is full of material contradictions, omissions and improvements.
- G 14.1 It is required to be noted that it was a black night (Amavasya) at the time of incident. It was a dark night as the incident has happened between 4-5 a.m. PW8 in her statement recorded under Section 161 Cr.P.C. has stated that she has seen all the accused in the light of the torch. She has stated that Bal Kishan – original accused no.1 was having an axe and other four were armed with lathis. She had also stated in her statement under Section 161 Cr.P.C. that Bal Kishan – original accused no.1 gave the axe blow on the neck of the deceased due to the enmity and earlier dispute and other accused were telling to run away

immediately and thereafter all the five accused ran away from behind the cattle shed/house. She stated that she had identified all the accused in the light of the torch and also by voice. According to her after she shouted, other persons came. However, there is material improvement in her deposition before the Court. In her deposition, she has stated that accused Santosh and Rakesh caught hold of Bal Kishan – deceased. In her deposition, she has also stated that there was a chimney light in the cattle shed. She has also stated in her deposition that the accused ran away from the nearby agricultural field of sugarcane. Therefore, the deposition of PW8 is full of material contradictions and improvements so far as original accused Nos. 2 to 5 is concerned. It is required to be noted that no other independent witness even named by PW8 has supported the case of the prosecution. Though, according to PW8, she identified the accused in the light of the torch, there is no recovery of torch. There is material improvement so far as the chimney light is concerned. In her deposition, she has not stated anything that the appellants – original accused nos. 2 to 5 were having the lathis, though she has stated this in her statement under Section 161 Cr.P.C. The High Court has observed relying upon her statement recorded under Section 161 Cr.P.C. that the appellants herein – accused nos. 2 to 5 were having lathis. However, as per the settled preposition of law a statement recorded under Section 161 Cr.P.C. is inadmissible in evidence and cannot be relied upon or used to convict the accused. As per the settled proposition of law, the statement recorded under Section 161 Cr.P.C. can be used only to prove the contradictions and/or omissions. Therefore, as such, the High Court has erred in relying upon the statement of PW8 recorded under Section 161 Cr.P.C. while observing that the appellants were having the lathis.

14.2 As observed hereinabove in her statement under Section 161 Cr.P.C., she has never stated that accused Santosh and Rakesh caught hold of Bal Kishan, but stated that the appellants herein told to run away as other persons have woken. In the facts and circumstances of the case, there are material contradictions, omissions and/or improvements so far as the appellants herein – original accused nos. 2 to 5 are concerned and therefore we are of the opinion that it is not safe to convict the appellants on the evidence of the sole witness of PW8. The benefit of material contradictions, omissions and improvements must go in favour of the appellants herein. Therefore, as such the appellants are entitled to be given benefit of doubt.

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- A 14.3 Now, so far as the submission on behalf of the State that relying upon the deposition of PW8, the original accused no.1 was convicted and his conviction has been confirmed upto this Court and therefore to dismiss the present appeal qua other accused is concerned from the evidence on record and having observed hereinabove the case of the appellants – original accused nos. 2 to 5, is distinguishable on facts. There are material contradictions and omissions so far as the appellants – original accused nos. 2 to 5 are concerned. So far as the original accused no 1 is concerned, PW8 is consistent in her statement under Section 161 Cr.P.C. as well as in her deposition before the Court. There was a recovery of axe used in commission of the offence by accused no.1 at the instance of accused no.1. Under the circumstances, the case of the original accused nos. 2 to 5 is clearly distinguishable to that of original accused no.1.

15. For the reasons stated hereinabove, we are of the firm opinion that in view of the material contradictions, omissions and improvements D in the statement of PW8 recorded under Section 161 Cr.P.C. as well as deposition before the Court qua the appellants – accused nos. 2 to 5 and that there was a prior enmity and no other independent witness has supported the case of the prosecution, we are of the opinion that the appellants herein – original accused nos. 2 to 5 are entitled to be given the benefit of doubt. Under the circumstances, the present appeal is E allowed. The impugned judgment and order of conviction passed by the learned Trial Court and confirmed by the High Court convicting the appellants herein – accused nos. 2 to 5 for the offence under Section 302 r/w Section 149 of the IPC are hereby quashed and set aside and the appellants herein – original accused nos. 2 to 5 are acquitted of the F charges for which they were tried. The appellants herein – accused nos. 2 to 5 be released forthwith, if not required in any other case.

Ankit Gyan

Appeal allowed.