Harvinder Singh @ Bachhu vs The State Of Himachal Pradesh on 13 October, 2023

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Bench: A.S. Bopanna, M.M. Sundresh

1

2023 INSC 907

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS. 266-267 OF 2015

Harvinder Singh @ Bachhu … Appellant

Versus

The State of Himachal Pradesh … Respondent

JUDGMENT

M. M. Sundresh, J.

1. Conviction rendered for life imprisonment by the Division Bench of the High Court of Himachal Pradesh, by setting at naught the order of acquittal rendered by the Additional Sessions Judge (Presiding Officer), Fast Track Court, Solan, Himachal Pradesh, is under challenge in these appeals.

BRIEF FACTS

2. The appellant, along with the co-accused (since deceased), was charged under Sections 302, 376, 511, 454, 380 read with Section 34 of the Indian Penal Code, 1860 (hereinafter referred to as "IPC"). The case of the prosecution is that PW1 while making a visit to his cow-shed on 17.06.2003 at about 3.15 pm heard the cries of the deceased frantically asking him for help stating "Mama ji Bachao". He went to the house of the deceased, and called out the name of her husband (PW5) but received no response. Thereafter, he heard the hushed voices of the accused, two in number. He then saw both of them at the main gate. Accused No. 1 was found with blood stains on his shirt while smelling of alcohol. The accused threatened him with dire consequences and made an attempt to grab him. After extricating himself from the accused, he ran towards his house. PW1 informed one Chandrawati about the incident, who in turn advised him to wait till his wife joins. It was preceded by an enquiry with the mother-in-law of the deceased.

3. After the advent of PW2, his wife, he, along with her and Chandrawati made a visit to the house of the deceased. They saw two children of the deceased who were studying in 5th and 7th standards respectively, at the house. On inquiry they informed that their mother was sleeping. PW1 and PW2, along with Chandrawati, entered the room and saw the deceased in a pool of blood, half-naked. PW2 sent telephonic information to the police station, followed by the registration of the first information report at about 6.30 pm at the instance of PW1.

4. The first information report was sent after about 5 hours, despite the office of the Magistrate being very near to the police station. The inquest was done on the same day. Of the two witnesses who signed the inquest report, one has not been examined.

It was found that certain articles including gold jewels were missing while liquor bottles were recovered.

5. Though, fingerprints were lifted and sent to the expert, there was no report as it appears that there was no sufficient indication of the availability of adequate marks.

6. A charge-sheet was filed on 14.05.2004, primarily placing reliance upon the statement of PW1, who was incidentally a literate and presumably a God-fearing man. The children of the deceased gave their statement under Section 161 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "CrPC") but they, along with scores of other witnesses, though, not seen the occurrence, have not been examined.

7. Both the accused were found absconding and curiously they have been arrested on the same day and at the same time – 16.01.2006, after they were declared as proclaimed offenders on 10.09.2003. Recovery of the stolen articles was made, inclusive of gold jewels, from the custody of PW6, a lady from Tibet, with whom they were allegedly pledged, though the prosecution was not very clear as to whether they were sold or pledged.

8. A supplementary charge-sheet was filed on 01.04.2006, slightly modifying the earlier charge-sheet, giving a narration that the accused broke open the house of the deceased and PW5, her husband, due to previous enmity and when she made her entry into the house, she was raped and murdered. The murder took place as she was resisting rape and tried to attack the accused with a sword, recovered from the place of occurrence, which was actually used by them.

9. Before the trial court, the prosecution has examined 16 witnesses, while a police officer has been examined on behalf of the accused based upon Exhibits D1 and D2, statements recorded under Section 161 of the CrPC, given by the minor children of the deceased, to elucidate the contradiction in the case of the prosecution.

10.PW1, as already stated, is the informant and PW2 is his wife. PW3 is the witness to the recoveries made from the house of the deceased. PW5 is the husband of the deceased and PW6 is the lady from Tibet to whom jewels were pledged. PW9 is the doctor who conducted the post-mortem. This witness had deposed that there was no evidence of rape. PW16 and PW13 are the Investigating

Officers who filed the initial and the supplementary charge sheets respectively.

11.The trial court, after a complete and thorough examination of the evidence placed before it, rendered an order of acquittal. It disbelieved the testimony of PW1 on account of his unnatural conduct. This witness had chosen not to react and to take follow-up action even after the accused left the place. It took into consideration the statement given by the children under Section 161 of the CrPC that this witness advised the children to tell their mother to give a complaint to the police, though she was found dead. There were a number of houses adjoining the home of the deceased.

It was not known as to how PW1 could come to the conclusion about the manner of the death, if according to his statement, he had not actually seen the occurrence.

12.The Court further found that there was no explanation as to why the fingerprint report has not been placed on record. The children of the deceased, her mother-in-law and her neighbour Chandrawati have not been examined, despite being material witnesses.

Taking note of the statement of PW6, the trial court observed that the so-called recovery is highly doubtful as she has stated that the jewels have been pledged, but not sold.

13.The High Court in the impugned order set aside the acquittal rendered by the trial court by substantially placing reliance upon the evidence of PW1. It held that the evidence of PW1 would indicate the prior enmity between PW5 and the accused.

PW9 has clearly stated that the death was homicidal. Recovery of the sword and knife has been proved by the evidence of PW3, from the scene of occurrence. PW1 being a natural, educated and God-fearing person, his testimony has to be accepted. The evidence of PW2 is also in tune with that of PW1. PW5 has also deposed that he was informed by PW1 that the accused was seen fleeing away towards the hillside. The fact that the accused were declared as the proclaimed offenders would add substance to the case of the prosecution. Non-examination of the material witnesses and the non-availability of the fingerprint report would not render the prosecution version doubtful. However, it was held that the offences pertaining to rape and theft are not proved beyond reasonable doubt. Accordingly, the appellant was convicted for committing murder with a further conviction for an attempt to rape. Incidentally, conviction was also rendered for house breaking under Section 454 of the IPC.

SUBMISSIONS OF THE APPELLANT

14. Learned counsel appearing for the appellant made a primary contention that the High Court without specifically pointing out the conclusion arrived at by the trial court on a factual analysis has chosen to reverse it. Reliance made on the evidence of PW1, despite existence of contradictions, ought not to have been undertaken. The question is not as to whether there occurred a homicidal death or not but who did it.

The lapses on the part of the prosecution would go to the root of the case especially when there was no explanation forthcoming. Having not agreed with the version of the prosecution qua the recovery, the High Court ought not to have placed reliance on the doubtful testimony of PW1.

SUBMISSIONS OF THE RESPONDENT

15. Repelling the contentions made, the learned counsel appearing for the State submitted that it is well open to the High Court to reappreciate the evidence available on record, which was actually done. In the absence of any motive on the part of PW1 to implicate the appellant on purpose, the High Court rightly ignored minor contradictions. Having found the existence of prior enmity between accused and PW5, a conviction was accordingly rendered. The mere fact that the appellant was acquitted for rape while holding him guilty for an attempt to rape, is itself a testimony to hold that there was application of mind by the High Court. Inasmuch as relevant materials having been taken note of, the order of conviction requires to be confirmed.

REPUTATION IS A FACT Section 3 of the Indian Evidence Act 1872 “3. Interpretation clause.—In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:— xxx xxx xxx “Fact”.—“Fact” means and includes— (1) any thing, state of things, or relation of things, capable of being perceived by the senses;

(2) any mental condition of which any person is conscious.

Illustrations

(a) That there are certain objects arranged in a certain order in a certain place, is a fact.

(b) That a man heard or saw something, is a fact.

(c) That a man said certain words, is a fact.

(d) That a man holds a certain opinion, has a certain intention, acts in good faith or fraudulently, or uses a particular word in a particular sense, or is or was at a specified time conscious of a particular sensation, is a fact.

(e) That a man has a certain reputation, is a fact.”

xxx xxx xxx

(emphasis supplied)

16. Reputation is indeed a fact as defined under Section 3 of the Indian Evidence Act, 1872 (hereinafter referred to as "Evidence Act"). Facts can broadly be divided into external and internal facts. External facts are those which can be perceived by the five senses while internal facts arise through thoughts and feelings such as love, anger, fear, hatred and intention etc. A reputation has to be seen from the point of view of an identifiable group while character is what a person really is. Character is to be formed while reputation is to be acquired. Character may lead to formation of one's reputation but both are distinct and different. Reputation thus forms part of internal facts and therefore it is required to be proved in the form of opinion of persons who form it accordingly. When reputation is to be taken as a relevant fact, its evidentiary value becomes restrictive and limited. It is indeed a weak piece of evidence when becomes relatable to a fact in issue.

17. A court of law cannot declare the reputation of a person based upon its own opinion merely because a person is educated and said to be God-fearing, that by itself will not create a positive reputation.

18. Character and reputation do have an element of interconnectivity. Reputation is predicated on the general traits of character. In other words, character may be subsumed into reputation. Courts are not expected to get carried away by the mere background of a person especially while acting as an appellate forum, when his conduct, being a relevant fact, creates serious doubt. In other words, the conduct of a witness under Section 8 of the Evidence Act, is a relevant fact to decide, determine and prove the reputation of a witness. When the conduct indicates that it is unnatural from the perspective of normal human behaviour, the so-called reputation takes a back seat.

19. We wish to place reliance on the decision of this Court in Lahu Kamlakar Patil And Another v. State of Maharashtra, (2013) 6 SCC 417, "26. From the aforesaid pronouncements, it is vivid that witnesses to certain crimes may run away from the scene and may also leave the place due to fear and if there is any delay in their examination, the testimony should not be discarded. That apart, a court has to keep in mind that different witnesses react differently under different situations. Some witnesses get a shock, some become perplexed, some start wailing and some run away from the scene and yet some who have the courage and conviction come forward either to lodge an FIR or get themselves examined immediately. Thus, it differs from individuals to individuals. There cannot be uniformity in human reaction. While the said principle has to be kept in mind, it is also to be borne in mind that if the conduct of the witness is so unnatural and is not in accord with acceptable human behaviour allowing variations, then his testimony becomes questionable and is likely to be discarded.

27. Keeping in mind the aforesaid, we shall proceed to scrutinise the evidence of PW

2. As is evincible from his deposition, on seeing the assault he got scared, ran away from the hotel and hid himself behind the pipes till early morning. He went home, changed his clothes and rushed to Pune [Ed.: Since the case has been tried by the Additional Sessions Judge, Raigad, Alibag, it would seem that the incident took place in Alibag, Raigad, which is about 300 km from Pune.] . He did not mention about the incident to his family members. He left for Pune and the reason for the same was also not stated to his family members. He did not try to contact the police from his

residence which he could have. After his arrival at Pune, he did not mention about the incident in his sister-in-law's house. After coming back from Pune, on the third day of the occurrence, his wife informed him that the police had come and that Bhau, who had accompanied him, was dead. It is interesting to note that in the statement under Section 161 of the Code, PW 2 had not stated that he was hiding himself out of fear or he was scared of the police. In the said statement, the fact that he was informed by his wife that Bhau was dead was also not mentioned. One thing is clear from his testimony that on seeing the incident, he was scared and frightened and ran away from the hotel. He was frightened and hid himself behind the pipes throughout the night and left for home the next morning. But his conduct not to inform his wife or any family member and leaving for Pune and not telling anyone there defies normal human behaviour. He has also not stated anywhere that he was so scared that even after he reached home, he did not go to the police station which was hardly at any distance from his house. There is nothing in his testimony that he was under any kind of fear or shock when he arrived at his house. It is also surprising that he had not told his family members and he went to Pune without disclosing the reason and after he arrived from Pune and on being informed by his wife that his companion Bhau had died, he went to the police station. We are not oblivious of the fact that certain witnesses in certain circumstances may be frightened and behave in a different manner and due to that, they may make themselves available to the police belatedly and their examination gets delayed. But in the case at hand, regard being had to the evidence brought on record and, especially, non-mentioning of any kind of explanation for rushing away to Pune, the said factors make the veracity of his version doubtful. His evidence cannot be treated as so trustworthy and unimpeachable to record a conviction against the appellants. The learned trial court as well as the High Court has made an endeavour to connect the links and inject theories like fear, behavioural pattern, tallying of injuries inflicted on the deceased with the post-mortem report and convicted the appellants. In the absence of any kind of clinching evidence to connect the appellants with the crime, we are disposed to think that it would not be appropriate to sustain the conviction." (emphasis supplied)

20. In Narendrasinh Keshubhai Zala v. State of Gujarat, 2023 (4) SCALE 478, "8. It is a settled principle of law that doubt cannot replace proof. Suspicion, howsoever great it may be, is no substitute of proof in criminal jurisprudence [Jagga Singh v. State of Punjab, 1994 Supp (3) SCC 463]. Only such evidence is admissible and acceptable as is permissible in accordance with law. In the case of a sole eye witness, the witness has to be reliable, trustworthy, his testimony worthy of credence and the case proven beyond reasonable doubt. Unnatural conduct and unexplained circumstances can be a ground for disbelieving the witness. This Court in the case of Anil Phukan v. State of Assam, (1993) 3 SCC 282 has held that:

> "3. ... So long as the single eyewitness is a wholly reliable witness the courts have no difficulty in basing conviction on his testimony alone. However, where the single eyewitness is not found to be a wholly reliable witness, in the sense that there are some circumstances which may show that he could have an interest in the prosecution, then the courts generally insist upon some independent corroboration of his testimony, in material particulars, before recording conviction. It is only when the courts find that the single eyewitness is a wholly unreliable witness that his testimony is discarded in toto and no amount of corroboration can cure that defect..." (emphasis

supplied)

> 21. On the issue of appreciation of evidence, we wish to place reliance upon the decision of this Court in Rajesh Yadav And Another v. State of Uttar Pradesh, (2022) 12 SCC 200, "13. The definition of the word "proved" though gives an impression of a mere interpretation, in effect, is the heart and soul of the entire Act. This clause, consciously speaks of proving a fact by considering the "matters before it". The importance is to the degree of probability in proving a fact through the consideration of the matters before the court. What is required for a court to decipher is the existence of a fact and its proof by a degree of probability, through a logical influence.

14. Matters are necessary, concomitant material factors to prove a fact. All evidence would be "matters" but not vice versa. In other words, matters could be termed as a genus of which evidence would be a species. Matters also add strength to the evidence giving adequate ammunition in the Court's sojourn in deciphering the truth. Thus, the definition of "matters" is exhaustive, and therefore, much wider than that of "evidence". However, there is a caveat, as the court is not supposed to consider a matter which acquires the form of an evidence when it is barred in law. Matters are required for a court to believe in the existence of a fact.

15. Matters do give more discretion and flexibility to the court in deciding the existence of a fact. They also include all the classification of evidence such as circumstantial evidence, corroborative evidence, derivative evidence, direct evidence, documentary evidence, hearsay evidence, indirect evidence, oral evidence, original evidence, presumptive evidence, primary evidence, real evidence, secondary evidence, substantive evidence, testimonial evidence, etc.

16. In addition, they supplement the evidence in proving the existence of a fact by enhancing the degree of probability. As an exhaustive interpretation has to be given to the word "matter", and for that purpose, the definition of the expression of the words "means and includes", meant to be applied for evidence, has to be imported to that of a "matter" as well. Thus, a matter might include such of those which do not fall within the definition of Section 3, in the absence of any express bar.

17. What is important for the court is the conclusion on the basis of existence of a fact by analysing the matters before it on the degree of probability. The entire enactment is meant to facilitate the court to come to an appropriate conclusion in proving a fact. There are two methods by which the court is expected to come to such a decision. The court can come to a conclusion on the existence of a fact by merely considering the matters before it, in forming an opinion that it does exist. This belief of the court is based upon the assessment of the matters before it. Alternatively, the court can consider the said existence as probable from the perspective of a prudent man who might act on the supposition that it exists. The question as to the choice of the options is best left to the court to decide. The said decision might impinge upon the quality of the matters before it.

18. The word "prudent" has not been defined under the Act. When the court wants to consider the second part of the definition clause instead of believing the existence of a fact by itself, it is expected to take the role of a prudent man. Such a prudent man has to be understood from the point of view

of a common man. Therefore, a Judge has to transform into a prudent man and assess the existence of a fact after considering the matters through that lens instead of a Judge. It is only after undertaking the said exercise can he resume his role as a Judge to proceed further in the case.

19. The aforesaid provision also indicates that the court is concerned with the existence of a fact both in issue and relevant, as against a whole testimony. Thus, the concentration is on the proof of a fact for which a witness is required. Therefore, a court can appreciate and accept the testimony of a witness on a particular issue while rejecting it on others since it focuses on an issue of fact to be proved. However, we may hasten to add, the evidence of a witness as whole is a matter for the court to decide on the probability of proving a fact which is inclusive of the credibility of the witness. Whether an issue is concluded or not is also a court's domain.

Appreciation of evidence

20. We have already indicated different classification of evidence. While appreciating the evidence as aforesaid along with the matters attached to it, evidence can be divided into three categories broadly, namely, (i) wholly reliable,

(ii) wholly unreliable, and (iii) neither wholly reliable nor wholly unreliable. If evidence, along with matters surrounding it, makes the court believe it is wholly reliable qua an issue, it can decide its existence on a degree of probability. Similar is the case where evidence is not believable. When evidence produced is neither wholly reliable nor wholly unreliable, it might require corroboration, and in such a case, court can also take note of the contradictions available in other matters.

21. The aforesaid principle of law has been enunciated in the celebrated decision of this Court in Vadivelu Thevar v. State of Madras [1957 SCR 981 : AIR 1957 SC 614] : (AIR p. 619, paras 11-12) “11. In view of these considerations, we have no hesitation in holding that the contention that in a murder case, the court should insist upon plurality of witnesses, is much too broadly stated. Section 134 of the Indian Evidence Act has categorically laid it down that ‘no particular number of witnesses shall in any case, be required for the proof of any fact’. The legislature determined, as long ago as 1872, presumably after due consideration of the pros and cons, that it shall not be necessary for proof or disproof of a fact to call any particular number of witnesses. In England, both before and after the passing of the Evidence Act, 1872, there have been a number of statutes as set out in Sarkar's Law of Evidence — 9th Edn., at pp. 1100 and 1101, forbidding convictions on the testimony of a single witness. The Indian Legislature has not insisted on laying down any such exceptions to the general rule recognized in Section 134 quoted above. The section enshrines the well-recognised maxim that “Evidence has to be weighed and not counted”. Our Legislature has given statutory recognition to the fact that administration of justice may be hampered if a particular number of witnesses were to be insisted upon. It is not seldom that a crime has been committed in the presence of only one witness, leaving aside those cases which are not of uncommon occurrence, where determination of guilt depends entirely on circumstantial evidence. If the Legislature were to insist upon plurality of witnesses, cases where the testimony of a single witness only could be available in proof of the crime, would go unpunished. It is here that the discretion of the presiding Judge comes into play. The matter thus must depend upon the circumstances of each case and the quality of the

evidence of the single witness whose testimony has to be either accepted or rejected. If such a testimony is found by the court to be entirely reliable, there is no legal impediment to the conviction of the accused person on such proof. Even as the guilt of an accused person may be proved by the testimony of a single witness, the innocence of an accused person may be established on the testimony of a single witness, even though a considerable number of witnesses may be forthcoming to testify to the truth of the case for the prosecution. Hence, in our opinion, it is a sound and well-established rule of law that the court is concerned with the quality and not with the quantity of the evidence necessary for proving or disproving a fact. Generally speaking, oral testimony in this context may be classified into three categories, namely:

(1) Wholly reliable.

(2) Wholly unreliable.

(3) Neither wholly reliable nor wholly unreliable.

12. In the first category of proof, the court should have no difficulty in coming to its conclusion either way — it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subornation. In the second category, the court equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial. There is another danger in insisting on plurality of witnesses. Irrespective of the quality of the oral evidence of a single witness, if courts were to insist on plurality of witnesses in proof of any fact, they will be indirectly encouraging subornation of witnesses. Situations may arise and do arise where only a single person is available to give evidence in support of a disputed fact. The court naturally has to weigh carefully such a testimony and if it is satisfied that the evidence is reliable and free from all taints which tend to render oral testimony open to suspicion, it becomes its duty to act upon such testimony. The law reports contain many precedents where the court had to depend and act upon the testimony of a single witness in support of the prosecution. There are exceptions to this rule, for example, in cases of sexual offences or of the testimony of an approver; both these are cases in which the oral testimony is, by its very nature, suspect, being that of a participator in crime. But, where there are no such exceptional reasons operating, it becomes the duty of the court to convict, if it is satisfied that the testimony of a single witness is entirely reliable. We have, therefore, no reasons to refuse to act upon the testimony of the first witness, which is the only reliable evidence in support of the prosecution." (emphasis supplied) CIRCUMSTANTIAL EVIDENCE "The mind was apt to take a pleasure in adapting circumstances to one another, and even in straining them a little, if need be, to force them to form parts of one connected whole; and the more ingenious the mind of the individual, the more likely was it, considering such matters, to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete." Warning addressed by Baron Alderson to the jury in Reg. v.

Hodge [(1838) 2 Lewin 227]

22. Law governing circumstantial evidence has been reiterated quite often by this Court. One has to be circumspect and cautious while undertaking the exercise of linking the evidence available. Courts should not lose sight of the fact that such evidence should unerringly lead and point out the accused alone, of course, on the facts of each case. We wish to quote with profit the Panchsheel of the proof of a case based on circumstantial evidence, laid down by this Court in Sharad Birdhichand Sarda v. State of Maharashtra, (1984) 4 SCC 116, "153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

> (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 Cri LJ 1783] where the following observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047] Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions. (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty, (3) the circumstances should be of a conclusive nature and tendency, (4) they should exclude every possible hypothesis except the one to be proved, and (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence." (emphasis supplied) DOUBLE PRESUMPTION

23. When the view of the trial court, which had the benefit of seeing the demeanour of the witnesses, is both a possible and plausible one, it shall not be replaced by yet another one. The presumption of innocence in favour of the accused gets strengthened by the decision of the trial court when he gets an order of acquittal. In Jafarudheen and Others v. State of Kerala, (2022) 8 SCC 440, "25. While dealing with an appeal against acquittal by invoking Section 378 CrPC, the appellate court has to consider whether the trial court's view can be termed as a possible one, particularly when evidence on record has been analysed. The reason is that an order of acquittal adds up to the presumption of innocence in favour of the accused. Thus, the appellate court has to be relatively slow in reversing the order of the trial court rendering acquittal. Therefore, the presumption in favour of the accused does not get weakened but only strengthened. Such a double presumption that enures in favour of the accused has to be disturbed only by thorough scrutiny on the accepted legal parameters. Precedents

26. Mohan v. State of Karnataka [(2022) 12 SCC 619 : 2021 SCC OnLine SC 1233] as hereunder : (SCC paras 20-23) “20. Section 378 CrPC enables the State to prefer an appeal against an order of acquittal. Section 384 CrPC speaks of the powers that can be exercised by the appellate court. When the trial court renders its decision by acquitting the accused, presumption of innocence gathers strength before the appellate court. As a consequence, the onus on the prosecution becomes more burdensome as there is a double presumption of innocence. Certainly, the Court of first instance has its own advantages in delivering its verdict, which is to see the witnesses in person while they depose. The appellate court is expected to involve itself in a deeper, studied scrutiny of not only the evidence before it, but is duty-bound to satisfy itself whether the decision of the trial court is both possible and plausible view. When two views are possible, the one taken by the trial court in a case of acquittal is to be followed on the touchstone of liberty along with the advantage of having seen the witnesses. Article 21 of the Constitution of India also aids the accused after acquittal in a certain way, though not absolute. Suffice it is to state that the appellate court shall remind itself of the role required to play, while dealing with a case of an acquittal.

21. Every case has its own journey towards the truth and it is the Court's role to undertake. Truth has to be found on the basis of evidence available before it. There is no room for subjectivity nor the nature of offence affects its performance. We have a hierarchy of courts in dealing with cases. An appellate court shall not expect the trial court to act in a particular way depending upon the sensitivity of the case. Rather it should be appreciated if a trial court decides a case on its own merit despite its sensitivity.

22. At times, courts do have their constraints. We find, different decisions being made by different courts, namely, the trial court on the one hand and the appellate courts on the other. If such decisions are made due to institutional constraints, they do not augur well. The district judiciary is expected to be the foundational court, and therefore, should have the freedom of mind to decide a case on its own merit or else it might become a stereotyped one rendering conviction on a moral platform. Indictment and condemnation over a decision rendered, on considering all the materials placed before it, should be avoided. The appellate court is expected to maintain a degree of caution before making any remark.

23. This Court, time and again has laid down the law on the scope of inquiry by an appellate court while dealing with an appeal against acquittal under Section 378 CrPC. We do not wish to multiply the aforesaid principle except placing reliance on a recent decision of this Court in Anwar Ali v. State of H.P. [(2020) 10 SCC 166 : (2021) 1 SCC (Cri) 395] : (SCC pp. 182-85, para

14) ‘14.2. When can the findings of fact recorded by a court be held to be perverse has been dealt with and considered in para 20 of the aforesaid decision, which reads as under : (Babu case [Babu v. State of Kerala, (2010) 9 SCC 189 : (2010) 3 SCC (Cri) 1179] , SCC p. 199) “20. The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. The finding may also be said to be perverse if it is “against the weight of evidence”, or if the finding so outrageously defies logic as to suffer from the vice of irrationality. (Vide Rajinder Kumar Kindra v. Delhi Admn. [(1984) 4 SCC 635 :

1985 SCC (L&S) 131], Excise & Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons [1992 Supp (2) SCC 312], Triveni Rubber & Plastics v. CCE [1994 Supp (3) SCC 665], Gaya Din v. Hanuman Prasad [(2001) 1 SCC 501], Arulvelu [Arulvelu v. State, (2009) 10 SCC 206 : (2010) 1 SCC (Cri) 288] and Gamini Bala Koteswara Rao v. State of A.P. [(2009) 10 SCC 636 : (2010) 1 SCC (Cri) 372])" It is further observed, after following the decision of this Court in Kuldeep Singh v. Commr. of Police [(1999) 2 SCC 10 : 1999 SCC (L&S) 429] , that if a decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the findings would not be interfered with." xxx xxx xxx (emphasis supplied) NON-EXAMINATION OF MATERIAL WITNESSES

24. Failure on the part of the prosecution in not examining a witness, though material, by itself would not vitiate the trial. However, when facts are so glaring and with the witnesses available, particularly when they are likely to give a different story, the Court shall take adequate note of it. When a circumstance has been brought to the notice of the Court by the defense and the Court is convinced that a prosecution witness has been deliberately withheld, as it in all probability would destroy its version, it has to take adverse notice. Anything contrary to such an approach would be an affront to the concept of fair play. In Takhaji Hiraji v. Thakore Kubersing Chamansing, (2001) 6 SCC 145, "19. So is the case with the criticism levelled by the High Court on the prosecution case finding fault therewith for non-examination of independent witnesses. It is true that if a material witness, who would unfold the genesis of the incident or an essential part of the prosecution case, not convincingly brought to fore otherwise, or where there is a gap or infirmity in the prosecution case which could have been supplied or made good by examining a witness who though available is not examined, the prosecution case can be termed as suffering from a deficiency and withholding of such a material witness would oblige the court to draw an adverse inference against the prosecution by holding that if the witness would have been examined it would not have supported the prosecution case. On the other hand if already overwhelming evidence is available and examination of other witnesses would only be a repetition or duplication of the evidence already adduced, non-examination of such other witnesses may not be material. In such a case the court ought to scrutinise the worth of the evidence adduced. The court of facts must ask itself — whether in the facts and circumstances of the case, it was necessary to examine such other witness, and if so, whether such witness was available to be examined and yet was being withheld from the court. If the answer be positive then only a question of drawing an adverse inference may arise. If the witnesses already examined are reliable and the testimony coming from their mouth is unimpeachable the court can safely act upon it, uninfluenced by the factum of non-examination of other witnesses..." (emphasis supplied) EFFECT OF ABSCONDING

25. A subsequent conduct would be a relevant fact under Section 8 of the Evidence Act. However, such a fact has to be proved. Mere absconding by itself cannot constitute a sole factor to convict a person. It may be because an accused may abscond as he might fear an illegal arrest. In Durga Burman Roy v. State of Sikkim, (2014) 13 SCC 35, "13. "To abscond" means, go away secretly or illegally and hurriedly to escape from custody or avoid arrest. It has come in evidence that the

accused had told others that they were going from their place of work at Gangtok to their home at New Jalpaiguri. They were admittedly taken into custody from their respective houses only, at New Jalpaiguri on the third day of the incident. Therefore, it is difficult to hold that the accused had been absconding. Even assuming for argument's sake that they were not seen at their workplace after the alleged incident, it cannot be held that by itself an adverse inference is to be drawn against them as held by this Court in Sunil Kundu v. State of Jharkhand [(2013) 4 SCC 422 : (2013) 2 SCC (Cri) 427] . To quote para 28 :

> (SCC pp. 433-34) "28. It was argued that the accused were absconding and, therefore, adverse inference needs to be drawn against them. It is well settled that absconding by itself does not prove the guilt of a person. A person may run away due to fear of false implication or arrest. (See Sk. Yusuf v. State of W.B. [(2011) 11 SCC 754 : (2011) 3 SCC (Cri) 620]) It is also true that the plea of alibi taken by the accused has failed. The defence witnesses examined by them have been disbelieved. It was urged that adverse inference should be drawn from this. We reject this submission. When the prosecution is not able to prove its case beyond reasonable doubt it cannot take advantage of the fact that the accused have not been able to probabilise their defence. It is well settled that the prosecution must stand or fall on its own feet. It cannot draw support from the weakness of the case of the accused, if it has not proved its case beyond reasonable doubt." (emphasis supplied) DISCUSSION
>
> 26. PW1 has not acted after the deceased pleaded for help, particularly from him.

There is absolutely no evidence available on record as to how the deceased was aware of the fact that PW1 was outside. Be that as it may, it is rather strange that he did not even venture to get into the house. Added to that, he went away after being threatened by the accused. Strangely, he undertook the unnecessary exercise of making further inquiries with the mother-in-law of the deceased. If he had seen the accused leaving towards the hill area, he should have entered the house of the deceased and checked her condition. Rather, he was waiting for his wife (PW2). His evidence is also not in tune with PW5 with respect to motive. PW5 has stated that there was no prior enmity.

We are of the considered view that the High Court has misconstrued the concept of reputation and blindly believed the evidence of PW1.

27. The fact that PW1 immediately advised the children of the deceased to tell their mother to register a complaint with the police coupled with the further fact that PW11 deposed that Police station was near to the Magistrate's complex creates doubt on the origin of the first information report.

28. The trial court has given substantial reasons for arriving at its conclusion. One has to keep in mind that it is the prosecution which has to prove the charges beyond reasonable doubt. The approach of the High Court in dealing with the case of circumstantial evidence is not in line with the caution expressed in R. v. Hodge, (1838) 2 Lew 227. The High Court after holding that a homicide had occurred, blindly placed reliance upon the evidence of PW1.

29. Apart from the non-availability of the fingerprint report, the non-examination of the witnesses, as noted by the trial court, would go to the root of the very case of the prosecution. It is nobody's case that the witnesses were not available. That is the reason why the defense has marked Exhibits D1 and D2, statement recorded under section 161 of the CrPC rendered by the children of the deceased. We have to take into consideration the fact that when PW1 came back the children were very much available in the house of the deceased. They were not toddlers but studying in 5 th and 7th standard. It is impossible to accept that they did not know that their mother was dead lying in a pool of blood and that too in half-naked condition.

30. When it comes to the recovery of jewels, even the High Court did not give its approval. But nonetheless it proceeded to rely upon the recovery made from the place of occurrence on the basis of the observation in the inquest report. It is the very case of the prosecution that the material object-sword, was used to commit murder and therefore in the absence of the availability of any fingerprint belonging to the accused, one cannot come to the conclusion that it was used by them alone

31. The High Court was persuaded by the homicidal death of the deceased while ignoring multiple findings rendered by the trial court including the fact that the house of the deceased was surrounded by numerous other houses. Thus, on the basis of the discussion made, we are constrained to come to the conclusion that the appellant is entitled to the benefit of doubt as the prosecution has not proved its case beyond reasonable doubt. The impugned order passed by the High Court is set aside and resultantly, the order of acquittal passed by the trial court stands restored. The appeals are allowed. The appellant is directed to be released forthwith, if not required in any other case.

.....J. (M.M. SUNDRESH) .....J. (J.B. PARDIWALA) NEW DELHI;

OCTOBER 13, 2023

ITEM NO.1501 COURT NO.7 SECTION II-C

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Criminal Appeal No(s). 266-267/2015

HARVINDER SINGH @ BACHHU Appellant(s)

VERSUS

THE STATE OF HIMACHAL PRADESH Respondent(s)

([HEARD BY: HON. M.M. SUNDRESH AND HON. J.B. PARDIWALA,JJ.]) Date : 13-10-2023
These appeals were called on for hearing today.

For Appellant(s) Mr. Mansoor Ali, AOR

For Respondent(s) Mr. Rishi Malhotra, AOR
Mr. Jaydip P., Adv.
Mr. Mohan Lal Sharma, Adv.

UPON hearing the counsel the Court made the following

O R D E R

Hon'ble Mr. Justice M.M. Sundresh pronounced the Reportable judgment of the Bench comprising Hon'ble Mr. Justice A.S. Bopanna and His Lordship.

Relevant portion of the judgment is quoted hereunder:

"The impugned order passed by the High Court is set aside and resultantly, the order of acquittal passed by the trial court stands restored. The appeals are allowed. The appellant is directed to be released forthwith, if not required in any other case." Pending application, if any, also stands disposed of.

(INDU MARWAH) (DIPTI KHURANA)
COURT MASTER (SH) ASSISTANT REGISTRAR
(Signed Reportable judgment is placed on the file)