ANIL KUMAR

v.

STATE OF U.P.

SEPTEMBER 16, 2004

[ARIJIT PASAYAT AND C.K. THAKKER, JJ.]

Penal Code, 1860—Section 302 and Section 302 r/w Section 34—Murder—Trial Court acquitted all the three accused disbelieving the Prosecution version—High Court reappreciated the evidence and convicted only the appellant accused as the other two accused died—On appeal decision of High Court upheld—Criminal Procedure Code, 1973-Section 313.

Criminal Trial:

Credibility of prosecution case—Affected only when medical evidence totally improbabilises oral evidence.

Evidence Act, 1872—Injuries sustained by accused in the same occurrence in which offence has been committed—Prosecution's failure to prove—Held, will not affect the prosecution case.

Accused-appellant along with two others faced trial for alleged commission of offence under Section 302 and Section 302 read with Section 34. All three accused were acquitted by Trial Court. State preferred appeal before High Court. During pendency of appeal two accused died and High Court convicted appellant accused for alleged offence after reviewing and re-appreciating the evidence. Hence the present appeal.

Dismissing the appeal, the Court

HELD, 1. There is no embargo on the appellate Court reviewing the evidence upon which order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by the acquittal. If two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which

A is favourable to the accused should be adopted. In a case of acquittal where admissible evidence is ignored, a duty is cast upon the appellate Court to re-appreciate the evidence, for the purpose of ascertaining as to whether any of the accused really committed any offence or not. [454-H; 455-A, B, C]

B *Bhagwan Singh and Ors.* v. *State of Madhya Pradesh,* (2002) 2 Supreme 567; *Shivaji Sahabrao Bobade and Anr.* v. *State of Maharashtra,* AIR (1973) SC 2622; *Ramesh Babulal Doshi* v. *State of Gujarat,* (1996) 4 Supreme 167; *Jaswant Singh* v. *State of Haryana,* (2000) 3 Supreme 320; *Raj Kishore Jha* v. *State of Bihar and Ors.,* (2003) 7 Supreme 152; *State* C *of Punjab* v. *Karnail Singh,* (2003) 5 Supreme 508; *State of Punjab* v. *Pohla Singh and Anr.,* (2003) 7 Supreme 17 and *Suchand Pal* v. *Phani Pal and Anr.,* JT (2003) 9 SC 17, referred to.

2.1. There is no such law that in each and every case where prosecution fails to explain the injuries found on some of the accused, D the prosecution case should automatically be rejected, without any further probe. Non-explanation of injuries by the prosecution will not affect prosecution case where injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and trustworthy, that it E outweighs the effect of omission on the part of prosecution to explain the injuries. [455-F; 457-B]

Mohar Rai and Bharath Rai v. *The State of Bihar,* [1968] 3 SCR 525; *Lakshmi Singh and Ors.* v. *State of Bihar,* [1976] 4 SCC 394; *Vijayee Singh and Ors.* v. *State of U.P.,* AIR (1990) SC 1459 and *Ramlagan Singh* v. F *State of Bihar,* AIR (1972) SC 2593, referred to.

2.2. It is not an invariable rule that prosecution has to explain the injuries sustained by the accused in the same occurrence. When prosecution comes with a definite case that the offence has been G committed by the accused and proves its case beyond any reasonable doubt, it becomes hardly necessary for the prosecution to again explain how and under what circumstances injuries have been inflicted on the person of accused. It is more so when injuries are simple or superficial in nature. In the case at hand, trifle and superficial injuries on accused are of little assistance to them to throw doubt on the veracity of H prosecution case. [457-D, E, F]

Hare Krishna Singh and Ors. v. *State of Bihar,* **AIR (1988) SC 863** A
and *Surendra Paswan* **v.** *State of Jharkhand,* **(2003) 8 Supreme 476, referred to.**

3. The Trial Court's conclusions were patently based on surmises and conjectures and were contrary to the evidence. There was no basis for the Trial Court to conclude that appellant-accused acted in right of B
private defence. The material on record on the contrary established that appellant-accused fired the shot resulting in the death of one of deceased persons. The presumption that FIR was ante-dated was on an erroneous reading of evidence. Minor variance in statement of illiterate rustic lady should not be given primacy when the evidence itself was recorded long C
time after the incident. It is trite law that when oral evidence is credible and cogent, medical evidence is contrary, is inconsequential. Only when the medical evidence totally improbabilises the oral evidence, adverse inference can be drawn. This is not the case of that nature. There is no infirmity in the judgment of the High Court to warrant interference.
[457-G, H; 458-A, B, C] D

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 616 of 1999.

From the Judgment and Order dated 26.2.99 of the Allahabad High Court in Government Appeal No. 1580 of 1986. E

Ravindra Shrivastava, Kunal Verma and Manoj Prasad for the Appellant.

Pramod Swarup, Ms. Prerna Swarup, Praveen Swarup, Imtiaz Ahmad, Mrs. Naghma Imtiaz and V.N. Raghupathy for the Respondent.
F

The Judgment of the Court was delivered by

ARIJIT PASAYAT, J. : Acquittal of the appellant (hereinafter referred to as the 'accused') by the trial court was reversed by the High Court by the impugned judgment. Three persons, namely, Akshay Kumar, Anil Kumar and Shiv Kumar faced trial for alleged commission of offence punishable G
under Sections 302 and 302 read with Section 34 of Indian Penal Code, 1860 (in short the 'IPC').

Accusations which led to the trial of the accused persons are essentially as follows:
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A Goverdhan Lal son of Guljari Lal lodged first information report (hereinafter referred to as FIR) on 27.2.1980 at about 4.45 p.m. with the allegation that about 3.00 p.m. on the same date accused Akshay Kumar, Anil Kumar and Shiv Kumar came towards their house. Accused Shiv Kumar was driving a tractor while Akshay Kumar and Anil Kumar were sitting on the B trolley of the tractor with double barrel gun in the hands of each of them. They wanted to take the tractor through the land of the complainant. In front of the house and the land of the complainant and his brothers, there is some open land. Gram Pradhan Akshay Kumar wanted to make path (Rasta) over the said land. He filed a case in the Munsif's court about 21-22 years ago for the said purpose. He won the case. The accused persons bore enmity C for that reason. Before three years of the present occurrence accused Anil Kumar and Shiv Kumar went to the plot of the complainant and wanted to assault by fire. The complainant had lodged a report in the police station to this effect. On 27.2.1980 at about 3.00 p.m. Kunji Lal brother of the complainant and Kali Charan, nephew of the complainant (each of them D described as "deceased" by name) were keeping potatoes in bags in the west of their house. They asked the accused persons that since there was no path in front of house of the complainant where they are taking the tractor. They stopped the tractor in front of the house of deceased Kunji Lal. Accused Shiv Kumar exhorted to kill them. On this Akshay Kumar and Anil Kumar got down from the tractor and started to abuse. Accused Anil Kumar fired the E gun and the bullet hit Kunji Lal. Akshay Kumar fired the gun and the bullet hit Kali Charan and both of them died on the spot. The accused persons sat on their tractor and went towards their house proclaiming that if anybody tried to raise his head, he shall also be killed. The occurrence was said to have been seen by Kalloo son of Sukha, Ram Beti wife of Gokaran and F Rakesh Kumar son of Siya Ram.

Rakesh Kumar has since died. Govardhan Lal, the complainant was examined as PW-1, Kallo as PW-2 and Ram Beti as PW-3.

In order to further its version the prosecution examined 6 witnesses. The G accused persons pleaded innocence. The appellant took the plea that his driver Navin Chandra was driving the tractor to plough the field of one Virendra son of Onkar. Near the house of complainant, Kali Charan, Munshi Lal, Hari Shankar, Siyaram etc. emerged with lathies and country made pistols, stopped the tractor and threatened the driver and he cried out for help. H Appellant Anil Kumar came along with licenced gun of his father to save

them. When he reached near the tractor, Kali Charan and Kunji Lal fired at him as well as Navin Chandra. Both of them suffered fire-arm injuries. In self defence, he fired twice. He was medically examined and injuries were x-rayed.

Learned Sessions Judge came to the conclusion that it was amply clear that the occurrence took place at the time, place and date as claimed by the prosecution. But accused Anil Kumar and Shiv Kumar were incapable of committing any crime. Their presence at the spot appeared to be out of question in view of their age. Injuries on the accused were not explained and, therefore, the prosecution had not come to Court with clean hands. The first information report was ante-timed and there was no immediate motive for the crime. Accused Anil Kumar and Shiv Kumar did not play any active role in the commission of the offence. Though accused Anil Kumar had played active role it was in exercise of right of self defence. Accordingly, all the 3 persons were acquitted. The State of Uttar Pradesh filed the appeal before the Allahabad High Court. During the pendency of the appeal before the High Court Akshay Kumar and Shiv Kumar died and the appeal was taken to have been abated so far as they are concerned and was continued against the accused-appellant Anil Kumar.

The High Court found that the approach of the trial court was not correct. In view of the clear and cogent evidence of the eye-witnesses, the trial court should not have come to a conclusion based on surmises and presumptions about the inability of Shiv Kumar and Askhay Kumar to commit the crime. The injuries on the accused and Navin Chandra were of very superficial nature. Interestingly, though the incident took place on 27.2.1980, medical records so far as accused-appellant Anil Kumar and Navin Chandra are concerned came into existence on 29.2.1980. The stand that when Navin Chandra was attacked Anil Kumar came and fired in defence, was too fragile to warrant acceptance as was wrongly done by the trial court. High Court noticed that neither Navin Chandra nor Virendra, who it was claimed by the defence were present all through, had not been examined as defence witnesses. The High Court also noticed that without any basis the trial court held that at least four gunshots were made for causing injuries on the two deceased persons. The plea regarding private defence was not proved and no material was placed to substantiate the plea. Without any material the trial court came to hold that the FIR was ante-timed. That being so, the trial court's conclusions were erroneous. Accordingly, State's appeal

A was allowed and accused-appellant Anil Kumar was found guilty of offence punishable under Section 302, as well as Section 302 read with Section 34 of IPC.

In support of the appeal learned counsel for the accused-appellant B submitted that the High Court has lightly interfered with the judgment of acquittal. The view taken by the trial court was a possible view. Even though the occurrence was admitted by the accused, the same was not unqualified. High Court proceeded on the basis as if the accused accepted the prosecution version. The High Court should not have acted on part of the statement recorded under Section 313 of the Code of Criminal Procedure, 1973 (in short C the 'Code') and ignored rest of the same. It should have scanned the entire evidence to arrive at the conclusion. The High Court may have recorded different conclusion but that does not render the judgment of the trial court illegal when it was reasonable and possible view. The Investigating Officer clearly noted that the accused-appellant Anil Kumar and Virendra were D injured, but no further inquiry was conducted. There is no material for the genesis of the dispute. There was no immediate motive as was held by the trial court. The medical evidence is also at variance with the oral evidence. The FIR was rightly held to be ante-timed when the evidence of Ram Beti (PW-3) is taken note of. Admittedly, the litigation took place two decades back. If there was any motive the victim would have been Girdhari Lal and E not the two deceased persons.

In response, learned counsel for the State submitted that the first information report was lodged immediately. The evidence of the eye-witnesses has not been shaken during the cross-examination at length. The F trial court had only held that the possibility of role played by Shiv Kumar was not sufficient to implicate him and whatever discussions were made related to Shiv Kumar. After having come to the conclusion that Anil Kumar might have been responsible for the mischief, it was illogical to give any benefit of doubt on the ground that he acted in self defence. This is a conclusion without any foundation. The High Court has rightly discarded the G plea of the defence about non-explanation of injuries which were clearly superfluous in nature. PWs were unarmed at the time of assaults. Accordingly it was submitted that the High Court was justified in reversing the acquittal.

There is no embargo on the appellate Court reviewing the evidence H upon which an order of acquittal is based. Generally, the order of acquittal

shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the Court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate Court to re-appreciate the evidence where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused really committed any offence or not. [See *Bhagwan Singh and Ors.* v. *State of Madhya Pradesh,* (2002) 2 Supreme 567]. The principle to be followed by appellate Court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable and relevant and convincing materials have been unjustifiably eliminated in the process, it is a compelling reason for interference. These aspects were highlighted by this Court in *Shivaji Sahabrao Bobade and Anr.* v. *State of Maharashtra,* AIR (1973) SC 2622, *Ramesh Babulal Doshi* v. *State of Gujarat,* (1996) 4 Supreme 167, *Jaswant Singh* v. *State of Haryana,* (2000) 3 Supreme 320, *Raj Kishore Jha* v. *State of Bihar and Ors.,* (2003) 7 Supreme 152, *State of Punjab* v. *Karnail Singh,* (2003) 5 Supreme 508 and *State of Punjab* v. *Pohla Singh and Anr.,* (2003) 7 Supreme 17 and *Suchand Pal* v. *Phani Pal and Anr.,* JT (2003) 9 SC 17.

We shall first deal with the question regarding non-explanation of injuries on the accused. Issue is if there is no such explanation what would be its effect? We are not prepared to agree with the learned counsel for the defence that in each and every case where prosecution fails to explain the injuries found on some of the accused, the prosecution case should automatically be rejected, without any further probe. In *Mohar Rai and Bharath Rai* v. *The State of Bihar,* [1968] 3 SCR 525, it was observed:

> "...In our judgment, the failure of the prosecution to offer any explanation in that regard shows that evidence of the prosecution witnesses relating to the incident is not true or at any rate not wholly true. Further those injuries probabilise the plea taken by the appellants."

A In another important case *Lakshmi Singh and Ors.* v. *State of Bihar,* [1976] 4 SCC 394, after referring to the ratio laid down in *Mohar Rai's* case (supra), this Court observed:

> "Where the prosecution fails to explain the injuries on the
B accused, two results follow:
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> (1) that the evidence of the prosecution witnesses is untrue; and (2) that the injuries probabilise the plea taken by the appellants."

It was further observed that:

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> "In a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the Court can draw the following inferences:
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D (1) that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;
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> (2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material
E point and, therefore, their evidence is unreliable;
>
> (3) that in case there is a defence version which explains the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability
F with that of the prosecution one."

In *Mohar Rai's* case (supra) it is made clear that failure of the prosecution to offer any explanation regarding the injuries found on the accused may show that the evidence related to the incident is not true or at any rate not
G wholly true. Likewise in *Lakshmi Singh's* case (supra) it is observed that any non-explanation of the injuries on the accused by the prosecution may affect the prosecution case. But such a non-explanation may assume greater importance where the defence gives a version which competes in probability with that of the prosecution. But where the evidence is clear, cogent and creditworthy and where the Court can distinguish the truth
H from falsehood the mere fact that the injuries are not explained by the

prosecution cannot by itself be a sole basis to reject such evidence, and consequently the whole case. Much depends on the facts and circumstances of each case. These aspects were highlighted by this Court in *Vijayee Singh and Ors.* v. *State of U.P.*, AIR (1990) SC 1459.

Non-explanation of injuries by the prosecution will not affect prosecution case where injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it outweighs the effect of the omission on the part of prosecution to explain the injuries. As observed by this Court in *Ramlagan Singh* v. *State of Bihar,* AIR (1972) SC 2593 prosecution is not called upon in all cases to explain the injuries received by the accused persons. It is for the defence to put questions to the prosecution witnesses regarding the injuries of the accused persons. When that is not done, there is no occasion for the prosecution witnesses to explain any injury on the person of an accused. In *Hare Krishna Singh and Ors.* v. *State of Bihar,* AIR (1988) SC 863, it was observed that the obligation of the prosecution to explain the injuries sustained by the accused in the same occurrence may not arise in each and every case. In other words, it is not an invariable rule that the prosecution has to explain the injuries sustained by the accused in the same occurrence. If the witnesses examined on behalf of the prosecution are believed by the Court in proof of guilt of the accused beyond reasonable doubt, question of obligation of prosecution to explain injuries sustained by the accused will not arise. When the prosecution comes with a definite case that the offence has been committed by the accused and proves its case beyond any reasonable doubt, it becomes hardly necessary for the prosecution to again explain how and under what circumstances injuries have been inflicted on the person of the accused. It is more so when the injuries are simple or superficial in nature. In the case at hand, trifle and superficial injuries on accused are of little assistance to them to throw doubt on veracity of prosecution case. [See *Surendra Paswan* v. *State of Jharkhand,* (2003) 8 Supreme 476].

The trial court's conclusions were patently based on surmises and conjectures and were contrary to the evidence. There was no basis for the trial court to conclude that accused-appellant Anil Kumar acted in exercise of right of private defence. Merely because such a statement was made in the statement recorded under Section 313 of the Code that was not sufficient. The High Court did not endorse the view as this plea was not established and

A the material on record was on the contrary established that Anil Kumar had fired the shot resulting in the death of one of deceased persons. The presumption that FIR was ante-timed was on an erroneous reading of the evidence of PW-3. The trial court completely lost sight of the fact that PW-3 was an illiterate rustic lady and minor variance in her statement should not B be given primacy when the evidence itself was recorded long time after and it should not have been made basis for coming to a conclusion that the FIR was ante-timed. It is trite law that when oral evidence is credible and cogent, medical evidence is contrary, is inconsequential. Only when the medical evidence totally improbabilises the oral evidence, adverse inference can be drawn. This is not a case of that nature.

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Above being the position, we find no infirmity in the judgment of the High Court to warrant interference. The appeal is dismissed.

K.G. Appeal dismissed.