A GANESH

v.

STATE OF KARNATAKA AND ORS.

(Criminal Appeal No.586 of 2007)

AUGUST 20, 2008

B

[DR. ARIJIT PASAYAT AND DR. MUKUNDAKAM SHARMA, JJ.]

Penal Code, 1860:

C *ss.143, 147, 148, 504, 324, 307 r/w s.149 and s. 302 r/w s.149 – Prosecution under – Of twenty five accused – Enmity between parties – Incident seen by eye-witnesses – Trial court convicting 6 accused under all the provisions except u/s 302 r/w s.149 – Rest of the accused acquitted –* D *High Court acquitting one of the convicted accused and holding that rest of the five accused were also liable to be punished u/s 302 r/w s.149 – On appeal, held: Order of High Court is justified – Evidence of eye-witnesses is trustworthy – Acquittal of large number of accused cannot be a ground* E *to discard the evidence of trustworthy witnesses – When a portion of prosecution evidence is discarded, it is open to court to differentiate between acquitted and convicted accused – Rule of 'falsus in uno, falsus in omnibus' is merely a rule of caution.*

F **Twenty five persons including the appellants-accused were prosecuted for offences u/ss.143, 147, 148, 504, 324, 307 r/w s.149 and u/s. 302 r/w s.149 IPC. According to prosecution, strained relations between the accused and the complainant party resulted in assault** G **on the deceased and his sons. The deceased succumbed to the injuries after 5 days of the assault. Trial Court relying on the evidence of eye-witnesses convicted 6 accused persons for all the offences they were charged, except u/s 302 r/w s.149 IPC.**

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State filed appeal before High Court questioning acquittal of the accused u/s 302 r/w s.149 IPC. The convicted accused also filed appeals questioning their conviction. High Court held that five out of the six accused were liable to be punished u/s 302 r/w s.149 IPC. However, one of the appealing accused was acquitted. Hence the present appeals.

Dismissing the appeals, the Court

HELD: 1. Though large number of co-accused have been acquitted, that cannot be a ground to discard the evidence of trustworthy witnesses. As a rule of universal application, it cannot be said that when a portion of the prosecution evidence is discarded as unworthy of credence, there cannot be any conviction. It is always open to the court to differentiate between an accused who has been convicted and those who have been acquitted. The maxim *'falsus in uno, falsus in omnibus'* is merely a rule of caution. An attempt has to be made to separate the grain from the chaff, truth from falsehood. When the prosecution is able to establish its case by acceptable evidence, though in part, the accused can be convicted even if the co-accused have been acquitted on the ground that the evidence led was not sufficient to fasten guilt on them. But where the position is such that the evidence is totally unreliable, and it will be impossible to separate the truth from falsehood to an extent that they are inextricably mixed up, and in the process of separation an absolutely new case has to be reconstructed by divorcing essential details presented by the prosecution completely from the context and background against which they are made, conviction cannot be made. [Paras 10, 11] [368,F-H; 369,A-D]

Masalti v. State of Uttar Pradesh AIR 1965 SC 202; *Gurcharan Singh v. State of Punjab* AIR 1956 SC 460 and *Sucha Singh v. State of Punjab* 2003 (7) SCC 643 – relied on.

2. The doctor's evidence to the effect that the death was not due to any injury but it was due to cardiac arrest and respiratory failure as a result of tetanus, is by way of hypothetical answer. The evidence of PW-2, PW-7 and PW-3 clearly established the role played by the accused persons and PW-3 was the injured witness. The evidence of PWs 1, 2, 3, 7 and 14 inspire confidence and, therefore, the trial Court and the High Court had rightly convicted the appellants. So far as acquittal of A-1 is concerned, the High Court has given ample reasoning for setting aside his conviction and affirming the conviction of other accused persons. [Para 12] [369, D-G]

Case Law Reference

AIR 1965 SC 202	**Relied on**	**Para 9**
AIR 1956 SC 460	**Relied on**	**Para 11**
2003 (7) SCC 643	**Relied on**	**Para 11**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 586 of 2007

From the final Judgment and Order dated 24.8.2005 of the High Court of Karnataka at Bangalore in Criminal Appeal Nos. 394 of 2001 & 1344 of 2000

K.V. Viswanathan, Shekhar G. Devasa, Rohit Pandey, Dinesh Kumar Garg, Chinmoy Khaladkar and S.K. Nandy, for the Appellant.

Anil Kr. Mishra, A. Rohen Singh, Sanjay R. Hegde, Amit Kr. Chawla, Chinmoy Khaladkar, S.K. Nandy, Rakesh K. Sharma and P.V. Yogeswaran for the Respondents.

The Judgment of the Court was delivered by

Dr. ARIJIT PASAYAT, J. 1. These appeals are interlinked and therefore they are disposed of by this common judgment.

2. The High Court by its judgment dated 24th August, 2005 disposed of three appeals. Criminal Appeal 394 of 2001

was filed by the State of Karnataka questioning acquittal of the accused persons for the offence punishable under Section 302 read with Section 149 of the Indian Penal Code, 1860 (in short the 'IPC'). The other appeals were filed by the accused persons who were convicted for offences punishable under Sections 143, 148, 504 read with Section 149, Section 324 read with Section 149 IPC, Section 326 read with Section 149 and Section 307 read with Section 149 IPC. In all 25 persons faced trial. However, the trial Court found only 6 of the accused persons to be guilty and therefore they filed appeals which were numbered as Criminal Appeal Nos.1344/2000 and 1359/2000. The other appeal was filed by the State as noted above.

3. The High Court acquitted S.Holeyappa (A-1) but held the other five to be guilty of offence punishable under Section 302 read with Section 149 IPC. Accordingly State's appeal was allowed. The appeals filed by the accused persons were dismissed.

4. It is to be noted that while accepting the State's appeal, the accused persons were convicted for the offence punishable under Section 302 read with Section 149 IPC.

5. Background facts in a nutshell are as follows:

The accused, the deceased and the material prosecution witnesses are all residents of Malladihalli village in Holalkere Taluk. Accused Nos. 1 and 4 are brothers. Accused No.2 is the son of accused No.4, whereas accused Nos. 3 and 5 are the sons of accused No.1. Accused No.6 is related to these accused. Similarly on prosecution side, Shivakumar (PW-2), Lokesh (PW-3) and Murthappa (PW-7) are the sons of the Kenchappa (hereinafter referred to as 'deceased'). Relation between the accused group and the deceased and his family members was strained over erecting an electric pole in the land of the accused, the line of which would have passed and benefited the deceased and his borewell in the land near by which was objected by the accused. This ill will and enmity ultimately resulted in the assault on the deceased and his

A sons on 2.10.1995. On that day, there was a festival and a procession was taken of the deity by the villagers. The deceased and his children had also joined the procession. According to the prosecution when the procession came near the post office by the side of which is also the house of the B accused, the accused group suddenly pounced upon the deceased and his children and assaulted them. This took place around 6.30 P.M., or so in the evening. After the assault Kenchappa (deceased), P.W.2 Shivakumar, Lokesh were taken to the hospital. In spite of the treatment given to the injured C Kenchappa, he breathed his last on 7.10.1995. Thereafter, PW-1 a nephew of the deceased approached the jurisdictional police at Holalkere and gave his written information as per Ex.P.1, P.W.25 Mohammad Arif, S.H.O. of the Police Station on receipt of the written information from P.W.1, registered a case in Crime D No.290/1995 for the offences under Sections 143, 147, 148, 504, 324, 307 read with Section 149 IPC against 18 named and other un-named accused and investigation was taken up. After the death of Kenchappa on 7.10.1995 the offence under Section 302 read with Section 149 IPC was also added. After completion of investigation, the charge sheet was filed. The E trial was held as the accused persons abjured guilt. Thirty nine witnesses were examined to further the prosecution version. The trial Court as noted above placed reliance on the evidence of large number of persons who are stated to be eye witnesses and held the accused persons guilty of several offences but F acquitted them of the charge relatable to Section 302 read with Section 149 IPC.

In appeal, the primary stand of the State was that the evidence on record left no manner of doubt that Section 302 G read with Section 149 IPC was clearly applicable. The accused appellants in their appeals contended that the evidence does not inspire confidence and most of the related witnesses are partisan witnesses and the High Court did not find any substance in the appeals filed by the accused persons and accepted the appeal filed by the prosecution.

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6. In support of the appeals, learned counsel for the appellants submitted that the eye witnesses PWs 2 and 3 should not have been accepted as they were to be related witnesses. Admittedly, there was enmity between the parties because of political rivalry. There was delayed examination of so-called witnesses. It is submitted that when the trial Court acquitted 19 accused persons i.e. A-7 to A-25 and the High Court directed acquittal of A-1, it would be unsafe to sustain the conviction of others. The investigating officer did not investigate fairly and therefore the trial Court and the High Court were not justified in upholding the conviction of the five appellants. It is submitted the cause of death was due to cardiac arrest and not on account of injuries sustained in the alleged incident. Therefore, Section 302 IPC has no application.

7. Per contra, learned counsel for the State supported the judgments of the trial Court and the High Court.

8. In the instant case, the evidence of PWs 2, 3, 7 and 13 is of considerable relevance. Out of 39 witnesses examined, PWs 1 to 7, 12, 14, 15, 16, 27 to 29, 31, 33 and 35 were projected as eye witnesses to the incident. But at the stage of trial, except PWs 1 to 3, 7, 14 and 15, others did not support the prosecution. The evidence on record shows that PWs 2 and 3 were injured witnesses. Their evidence assumes great importance. It was pointed out by learned counsel for the appellants that no definite overt act has been attributed to any of the five respondents.

9. *In Masalti v. State of Uttar Pradesh* (AIR 1965 SC 202) it has been observed as follows:

> "where a crowd of assailants who are members of an unlawful assembly proceeds to commit an offence of murder in pursuance of the common object of the unlawful assembly, it is often not possible for witnesses to describe accurately the part played by each one of the assailants. Besides, if a large crowd of persons armed with weapons assaults the intended victims, it may not be necessary

A that all of them have to take part in the actual assault. Where for instance, several weapons were carried by different members of the unlawful assembly, but it appears that the guns were used and that was enough to kill 5 persons, it would be unreasonable to contend that because B the other weapons carried by the members of the unlawful assembly were not used, the story in regard to the said weapons itself should be rejected. Appreciation of evidence in such a complex case is no doubt a difficult task; but criminal courts have to do their best in dealing with such cases and it is their duty to sift the evidence carefully and C decide which part of it is true and which is not.

It is true that under the Evidence Act, 1872 trustworthy evidence given by a single witness would be enough to convict an accused person, whereas evidence given by half a dozen witnesses which is not trustworthy would not D be enough to sustain the conviction. But where a criminal Court has to deal with evidence pertaining to the commission of an offence involving a large number of offenders and a large number of victims, it is usual to adopt the test that the conviction could be sustained only E if it is supported by two or three or more witnesses who give a consistent account of the incident. In a sense, the test may be described as mechanical; but it cannot be treated as irrational or unreasonable. It is, no doubt, the quality of the evidence that matters and not the number of F witnesses who give evidence. But sometimes it is useful to adopt a mechanical test."

10. In the instant case, though large number of co-accused have been acquitted that cannot be a ground to discard the evidence of trustworthy witnesses.

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11. As a rule of universal application, it cannot be said that when a portion of the prosecution evidence is discarded as unworthy of credence, there cannot be any conviction. It is always open to the court to differentiate between an accused who has been convicted and those who have been acquitted.

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(See *Gurcharan Singh v. State of Punjab* (AIR 1956 SC 460) and Sucha Singh v. State of Punjab (2003 (7) SCC 643). The maxim *"falsus in uno, falsus in omnibus"* is merely a rule of caution. As has been indicated by this Court in *Sucha Singh* case in terms of felicitous metaphor, an attempt has to be made to separate the grain from the chaff, truth from falsehood. When the prosecution is able to establish its case by acceptable evidence, though in part, the accused can be convicted even if the co-accused have been acquitted on the ground that the evidence led was not sufficient to fasten guilt on them. But where the position is such that the evidence is totally unreliable, and it will be impossible to separate the truth from falsehood to an extent that they are inextricably mixed up, and in the process of separation an absolutely new case has to be reconstructed by divorcing essential details presented by the prosecution completely from the context and background against which they are made, conviction cannot be made.

12. Great emphasis was laid on the version of the doctor to contend that the death was not due to any injury but it was due to cardiac arrest and respiratory failure as a result of tetanus. The doctor's evidence is by way of hypothetical answer that the death would not occur because of the injuries received by sharp edged weapon. The evidence of Shiv Kumar (PW-2), Murthappa (PW-7) and Lokesh (PW-3) clearly established the role played by the accused persons and PW-3 was the injured witness. Ganesh (A-3) assaulted PW-2 with axe on the neck part. He stated that A-4 has assaulted PW-2 with sickle and thereafter he assaulted him. The evidence of PWs 1, 2, 3, 7 and 14 inspire confidence and, therefore, the trial Court and the High Court had rightly convicted the appellants. So far as acquittal of A-1 is concerned, the High Court has given ample reasoning for setting aside his conviction and affirming the conviction of other accused persons.

13. The appeals are without merit and deserve dismissal which we direct.

K.K.T. Appeals dismissed.