

CASE NO.:
Appeal (crl.) 197 of 198

PETITIONER:
HAJI KHAN

RESPONDENT:
STATE OF UTTAR PRADESH

DATE OF JUDGMENT: 23/11/2005

BENCH:
S.B. Sinha & P.P. Naolekar

JUDGMENT:
JUDGEMENT

P.P.NAOLEKAR, J.

The accused appellant along with two other persons namely, Sahdulli Khan and Mehtab Khan were tried for committing an offence under Section 302, 307/34 IPC and under Section 27 of the Arms Act. The learned Sessions Judge acquitted all the accused persons. The State preferred two appeals challenging the order of acquittal of the appellant and the other being acquittal of two other persons. The High Court refused leave in appeals preferred by the State against the two other persons and accordingly the appeals were dismissed. Against the order of acquittal passed in favour of the appellant in two appeals, leave was granted and the High Court set aside the order of the Sessions Judge, acquitting the accused-appellant and convicted the appellant under Section 302 IPC and sentenced him to undergo life imprisonment. He was further held guilty of the charge under Section 307/34 IPC and sentenced to undergo five years rigorous imprisonment and guilty of the charge under Section 27 of the Arms Act and sentenced to undergo one year rigorous imprisonment. All the sentences were to run concurrently. Aggrieved by the order of conviction the present appeal is filed.

The prosecution case in short as per the FIR lodged at the Police Station Kotwali, Mathura on 22.2.1978 by PW-1 Satya Prakash is that his father living in Pirpanchi Gali, Mathura had litigation with one Kedar, son of Ayodhya Prakash, resident of Mathura. On 22-2-1978 at about 6.30 P.M. a call was given at the door of Ranchor Lal, father of the complainant, to come and receive a telegram. Ranchor Lal came out to the main door, received the telegram and started reading it. Satya Prakash followed him and was standing behind him. The complainant saw that some one fired two shots on his father Ranchor Lal and the shots hit Ranchor Lal PW-15 on his chest and elbow, whereafter he fell down. Shiv Kumar PW-2, the other brother of the complainant ran after the miscreants raising hue and cry, who were four in number in the street. One Ramesh (deceased), son of Keshav also ran after the miscreants and was able to catch hold of one of them. The miscreant in his attempt to flee fired on Ramesh which hit Ramesh on the abdomen. After the fire was shot the miscreant was overpowered in Holiwali Gali, near Chhota Bazar, Mathura by the complainant and other namely, Halla,

Banwari Lal, Dauji and few others. The other three companions of the miscreant were successful in escaping from the spot but various witnesses, in the streetlight managed to see their faces. The apprehended miscreant had a country made pistol in his hand and upon questioning, gave out his name as Haji Khan (appellant herein). The FIR was prepared by Satya Prakash PW-1 in his own hand and was sent to the police station. His brother Shiv Kumar, PW-2 and witnesses Dauji and Banwari Lal PW-3, caught the appellant on the spot and a country made pistol was recovered from him. It is also mentioned in the FIR that injured Ramesh had been sent to the hospital and Satya Prakash the complainant was also in the process of taking his father to the hospital. On his way to the Agra Hospital, Ramesh succumbed to his injuries and died.

The defence version appears to be that they have been falsely roped in the case due to some wrong assumptions. According to the appellant-Haji Khan, he was serving in the Indian Army at the relevant time and that he had gone to Chhota Bazar, Mathura. There was electricity failure in the market and suddenly some commotion took place, people started running helter-skelter. In the confused melee, some one hit him on the head and he fell down in the market. He was then taken to the house where he was mercilessly beaten, upon gaining consciousness he found himself in the hospital and only then he came to know that he was under arrest. He alleged false implication. In support of the defence of the appellant, four witnesses were examined. Relevant for the purposes of the appellant's case are DW-3, Vinod Kumar Bisht, Asstt. Supervisor in the Hydrel Sub-station, Mathura, to prove that there was electricity failure in the evening of 22.2.78 in Chhota Bazar area of Mathura and its adjacent streets; DW-4 Virendra Singh, Arms and Ammunition Expert of Indian Army to contradict the version and the facts proved by the Ballistic Expert (Budhal Rai) examined by the prosecution.

The learned Sessions Judge acquitted the appellant as the court did not place reliance on the statement of PW-1 Satya Prakash and PW-2 Shiv Kumar, PW-4 Bhanwari Lal, eye witnesses examined by the prosecution of the incidence concerning the deceased, Ramesh and attack on PW-15 Ranchor Lal. The court did not rely on these witnesses as they were not found to be trustworthy. The Sessions Court disbelieved the statement of PW-1 mainly on the ground that it looks unnatural that he would scribe the FIR in his own hand inside his house when his injured father remained lying at the door during that period and that he did not take immediate steps to provide to him medical aid. Further that when 32-40 persons had assembled at the house of PW-1, he could not name even 2-4 persons. The Sessions Court further held that while chasing the four assailants, only one was apprehended but none tried to go after the remaining assailants and, further how is it that his clothes were not found smeared with blood when his father PW-15 Ranchor Lal was hit on the right side of the chest and right elbow region causing bleeding injuries. PW-2 Shiv Kumar was disbelieved because he was unable to see the person who handed over the telegram to his father but was able to see the other four persons, who came to the house and were at a distance of about 15 paces. The four miscreants who fired at PW-15 were facing north-west whereas PW-2 was coming from west

having his face towards east. PW-3 was disbelieved as he could not give the direction of the shop at which he was standing at the time of the incidence. He could not tell from where the deceased Ramesh entered and chased the miscreants. The court in its finding has also stated that it could not understand as to how an attempt was not made to get the miscreant free at the time of his capture despite the fact that the other two accused out of the three who made the escape, were the real brothers of the miscreant and were fully armed at that time. It is also surprising that the persons responsible for hatching conspiracy of firing were not proceeded against inspite of the fact that the evidence was collected against them. The prosecution version was disbelieved by the Court as it found that PW-1 and his family members were not strangers to the crime. PW-3 is the chance witness and has close association with PW-1. From the place where PW-2 was standing, it would not have been possible for him to see the miscreants. The prosecution has not examined independent witnesses when their presence is admitted and examination of the interested witness does not inspire confidence.

In the appeal, the High Court has re-appreciated the evidence as according to the High Court the prosecution has proved that the FIR was lodged by PW-1 without any delay and thus there was not much time and opportunity available to the complainant to consult others and to cook-up a tailored case. In the absence of adequate evidence regarding the enmity of the complainant with one Kedar Nath, who was alleged to be behind the incident and who was instrumental and conspirator to the crime, the conspiracy does not play a significant part to prove the involvement of the appellant in the commission of crime. The Sessions Court had not scrutinized the ocular testimony of PW-15 who was attacked by the assailants and whose presence at the initial stage of the crime is undoubtedly proved. The Sessions Judge has ignored the statement of PW-15 who is an injured witness which is supported by prompt FIR and medical evidence. The Sessions Judge has committed a gross illegality in not analyzing the version of PW-15 in a fair manner and ignored its legal value. On appreciation of the evidence of PW-1 the court found that his presence at the spot could not be doubted rather his presence is very much undisputed and proved by his statement and the evidence of the other witnesses as well by his conduct. The Sessions Judge has unnecessarily created a doubt in the version of PW-1 and PW-2 on the basis of the fact that they had left their injured father and started chasing the culprits, which according to the High Court is the most natural conduct when there are other persons to look after the injured father. The High Court was also of the view that the statement of PW-1 could not have been disbelieved simply because he could not name the persons gathered at the time of the shooting incident on his father at his residence. The High Court further found that the statement of PW-3 should not have been rejected outright although he was not wholly a true witness, at least the truthful portion of his evidence should have been accepted after due care and caution. The High Court discarded the evidence of DW-4, Jitendra Singh, the witness examined as an expert on the ground that it was not scientific. The High Court was of the view that his evidence is not reliable to discard the testimony of PW-21

Budhal Rai, an expert witness examined by the prosecution to prove the factum of usage of the country made pistol. On appreciation of the material placed on record by the prosecution, the High Court was of the view that the Sessions Court has committed an error in appreciating the evidence, particularly the statement of the eye witnesses in proper perspective and required interference.

In this appeal the learned senior counsel for the appellant has addressed us on three broad issues. (i) whether the High Court, while passing an order of conviction by reversing the judgment of the sessions judge erred in re-apprising the evidence and not giving enough weightage to the conclusion reached upon by the sessions judge; (ii) whether the High Court has erred in convicting the appellant even though prosecution was unable to establish any motive and further more the conspiracy theory as put forward by the prosecution when it was rejected by the sessions court as well as by the High Court; (iii) whether the High Court has committed a gross injustice by over looking the evidence of Mahesh Singh Yadav DW-5 and statement of the appellant pertaining to the purpose of his visit to Mathura and he being falsely implicated simply because he happened to be at the place of incidence.

On the first question, the submission of the learned senior counsel is based on the principles enunciated by this Court, in cases where two views are possible, the High Court should not interfere because it feels that sitting at the sessions court it would have preferred conviction. The High Court should consider every reason given by the sessions court in favour of acquittal and then dislodge them. We are in complete agreement with the principles laid down by this Court in number of decisions but at the same time we may mention that they do not take away the powers and jurisdiction of the appellate court to re-appraise the evidence in cases where it feels that the sessions court has committed an error in its approach, application of law and also appreciation of evidence on record or when the court has misread or not read the evidence placed before it. It cannot be said that the appellate court does not have the power to reverse the order of the sessions court when it feels and finds that there is a direct evidence to prove to the contrary on record, otherwise it would defeat the entire purpose and the intent of providing appeal against the judgment of the sessions judge.

In the present case, what we find is that the High Court has reached a different conclusion on appreciation of the statement of the eye witnesses. The High Court has appreciated the statement of the victim PW-15 which the sessions court failed to do. The High Court has placed reliance on the fact of immediate lodging of FIR and the confirmation of the story narrated therein by ocular statement of the witnesses examined by the prosecution. The High Court has rightly taken a different view on the statement of PW-1 which has been ignored by the trial court on the basis of the insignificant aspects namely that he could not name the persons among the crowd that had gathered outside his house. Or that how is it that his clothes were not blood stained while he was standing behind his father and tried to help his father. We have also considered the statement of PW-15 on whom the first attack was made and from where the accused started running away and was chased by PW-1,

along with the deceased Ramesh who was shot when he was able to catch hold of accused appellant. We feel that the testimony of PW-15 cannot be discarded as he is the victim and also there is no denying of the fact that he was shot at. It would be incorrect to say that the person who was shot at from a near distance would not be in a position to look at the face of the assailants in the availability of sufficient light. There does not appear to be any motive or reason for PW-15 to falsely implicate the appellant in such a serious crime. The statement of PW-1 could not have been discarded whose presence in the whole of the incident is natural as the incident commenced at his house and culminated in a nearby place when he along with other persons including the deceased Ramesh, chased the miscreants and apprehended the accused-appellant with a gun in his hand. It could not be ignored that there was sufficient time and opportunity for him to see that it was the appellant who was involved in commission of the crime. The sessions court's approach in appreciating the evidence of PW-1 was, in our view, rightly discarded by the High Court. We do not see any merit in the argument of the appellant that he has been falsely implicated, as he was caught near the place of incident, along with a country made pistol. The fact that PW-1 could not remember the faces of persons among the people who had gathered outside his house at the time of incident, would not make the testimony unreliable. One has to look at the situation in which crime was committed and also the mental condition of the witness who is the son of the injured person who had witnessed the heinous crime. In the heat of the moment it is quite natural that his attention would be more towards the assailants and his injured father and also to catch hold of the assailants who were running away from the spot rather than to find out who were the persons present at the spot and in that course if he could not remember the faces of the persons present, it cannot be a ground for discarding his statement whose presence at the spot was most natural. The approach of the sessions court could not be appreciated in discarding his statement on the ground that his clothes were not found with blood stains. The evidence on record shows that he had simply helped his father after he received the injuries and thereafter he immediately left the spot and particularly so when there is nothing on record to disbelieve the statement of Ranchor Lal. We also do not see any reason to disbelieve the version of PW-2 whose presence at the spot cannot be denied. His testimony does not suffer from any material incongruity or falsehood as has been noted by the High Court. PW-3 deposed that after hearing the sound of two gun fires he saw four persons with tamancha running towards the bazaar and he followed them. Sons of Ranchor Lal, PW-1 and PW-2 were also chasing them. Ramesh apprehended one of the four badmash and that badmash turned and fired shot on Ramesh which hit him in the stomach and he fell down but they all apprehended the badmash who fired gun shot. His statement was discarded by the sessions court as he failed to point out the direction towards which the assailants were running and the direction of the shop at which he was standing at the time of incidence. The High Court has agreed that he is not a wholly truthful witness but so far as his statement of identifying the assailant is concerned, it does inspire confidence. The High Court's acceptance of part of the

evidence and discarding the unreliable part is in accordance with law and is in tune of the established practice followed by the courts while appreciating the evidence of the witnesses. The sessions court has committed an error in discarding his evidence wholly. The statement of PW-3 is a corroborative piece of evidence corroborating the statement of witnesses PW-1 and PW-2. The High Court has rightly found that the statement of Dr. Goyal who was the first in point of time to examine Ramesh, the deceased, is reliable regarding the nature of injuries and supported by the statement of ballistic expert (PW-21) that a gun was used in the incidence .

From the evidence on record the sessions court and the High court has rightly held that the prosecution has failed to establish the conspiracy theory, and that the motive to commit the crime has not been proved, but does this mean that the High Court could not have convicted the accused placing reliance on the statement of the eye witnesses just because the prosecution failed to prove a particular theory. We do not think so. It is not necessary that if the prosecution theory of the conspiracy or the motive fails, the entire case would crumble to ground. The High Court has found the version given by the witnesses trustworthy and found support to their statement from the medical evidence and lodging of the prompt FIR, apart from the fact that the appellant was apprehended on the spot or near about the spot of crime with the weapon which was used in commission of crime. When the court finds that the evidence of the eye witnesses is true and can be relied upon, absence of proof of motive or the conspiracy to commit the crime would not dislodge the prosecution of securing the conviction of the accused on the basis of the reliable evidence.

Lastly, the submission of the counsel that an innocent person was apprehended at the spot and he was wrongly implicated in the commission of crime, the counsel relied upon the statement of DW-5, Mahender Singh Yadav for the stand taken by the accused that his presence in Mathura was for the purposes of purchase of buffalo and he was not there at Mathura for committing the alleged crime. DW-5 has deposed that he was posted at Mathura Cantonment at the relevant time and on 19.2.78, the appellant came to him at Mathura and stayed with him till 22.2.78, he was on leave. On 22nd he left his house at about 5.30 P.M. saying that he is going to see a buffalo and he will need some money from DW-5 and he may arrange for it, thereafter he did not return back. Discarding this defence the High Court relied on the fact that from the appellant only an amount of Rs.120.13 np. was recovered at the time when he was apprehended. Apart from this, defence was put forth not at the outset when he was examined first time under Section 313 Cr. P.C. The stand was only taken when he was examined the second time on 16.5.80 after examination of the court witnesses. It is surprising that any person intending to purchase a buffalo would come with such a meager amount. We cannot place reliance on the defence witness on the face of the reliable evidence led by the prosecution.

On overall consideration and on appreciation of the evidence on record placed by the prosecution, we are of the view that the High Court has not committed any error or illegality in reversing the order of acquittal passed

by the sessions court. Appeals are dismissed.

JUDIS