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LAL MANDI

v.

THE STATE OF WEST BENGAL

APRIL 4, 1995

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[DR. A.S. ANAND AND M.K. MUKHERJEE, JJ.]

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*Indian Penal Code 1860—Section 302—Criminal Appeal—Appraisal of evidence by the appellate court—Appellate court must appreciate the evidence to arrive at an independent finding—The accused to be given benefit of reasonable doubt if on appreciation of evidence-two views are possible.*

*Constitution of India—Article 136—Reappraisal of evidence under—Court does not generally reappraise evidence but in certain cases evidence on record can be analysed to satisfy judicial conscience.*

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The appellant was convicted and sentenced by the Sessions Judge under Section 302/34 IPC and Section 201 IPC. On appeal, the High Court dismissed the appeal without considering the evidence on record on the ground that the Sessions Judge had the opportunity of watching the demeanour and conduct of the witnesses deposing before him and his assessment of evidence cannot be substituted by the appellate court even if two views were possible on the appraisal of the evidence. Hence the present appeal by way of S.L.P.

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Setting aside the conviction of the appellant for offences under Section 302/34 IPC and 201 IPC and convicting him for offence under Section 325/34 IPC, this Court

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**HELD: 1.** An appellate court may give every reasonable weight to the conclusions arrived at by the trial Court but it must be remembered that an appellate court is duty bound, in the same way as the trial court, to test the evidence extrinsically as well as intrinsically and to consider as thoroughly as the trial court, all the circumstances available on the record so as to arrive at an independent finding regarding guilt or innocence of the convict. An appellate court fails in the discharge of one of its essential duties, if it fails to appreciate the evidence on the record and arrive at an independent finding based on the appraisal of such evidence. The High Court failed to do so and its view is patently erroneous. [138-B, C]

2. Though, the powers of an appellate court, while dealing with an appeal against acquittal and an appeal against conviction are equally wide but the considerations which weigh with it while dealing with an appeal against an order of acquittal and in an appeal against conviction are distinct and separate. The presumption of innocence of an accused which gets strengthened on his acquittal is not available on his conviction.

[137-H, 138-A-B]

*Tota Singh v. State of Punjab*, AIR (1987) SC 1083, distinguished.

3.1. Though this court does not generally reappraise the evidence which has been considered by the courts below, in an appeal by Special Leave, but since the consideration of the evidence by the High Court was not proper, the evidence on the record can be analysed.

3.2. The evidence on the record does not justify the conviction of the appellant for offences under Section 307/34 IPC and Section 201 IPC.

[139-E]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 745 of 1991.

From the Judgment and Order dated 31.7.90 of the Calcutta High Court in Crl.A.No. 172 of 1986.

K.V. Vishwanathan and K.V. Venkataraman for the Appellant.

Tapas Ray, J.R. Das and D.K. Sinha for the Respondent.

The Judgement of the Court was delivered by

DR. ANAND, J. The appellant alongwith four absconding accused Man Singh, Babu Lal, Arjan and a son-in-law of Ganesh was charge-sheeted for committing the murder of Dullen Maddi, wife of PW2, Murka Maddi on 31.8.1982 at about 8.00 p.m. It is alleged by the prosecution that after causing injuries to the deceased, the assailants buried her dead body with the intention of screening the offenders from legal consequences. The learned Additional Sessions Judge, Burdwan convicted the appellant for offences under Section 302/34 IPC and Section 201 IPC and sentenced him to undergo imprisonment for life and to pay a fine of Rs. 5,000 for the offence under Section 302/34 IPC and RI for a period of 5 years and a fine of Rs. 2,000 for the offence under Section 201 IPC. The substantive sentences were however, directed to run concurrently. His appeal before

A the High Court of Calcutta against conviction and sentence failed on 31.7.1990. Hence, this appeal by special leave.

B The prosecution case against the appellant is that the villagers of Dhupchindanga in Burdwan District were under an impression that the deceased was a witch and was responsible for the death of the infant daughter of one of the absconding accused, Man Singh. It is alleged that on 31.8.1982 at about 8.00 p.m., while PW2 Murka Maddi, his three sons including Sita Ram Maddi, PW8 and a daughter alongwith his wife Dullon Maddi (deceased) were sitting inside their house, Man Singh alongwith another person and Babu Lal (the absconding accused) entered their house and gave beating to PW2 and his wife Dullon and then dragged her away to Man Singh's house. While Dullon was being assaulted in her house, PW2 and PW8 fled away. The appellant and one of the absconding accused were present at the house of Man Singh and all of them took part in assaulting the deceased at the house of Man Singh. PW2 and PW8 went to the police station and lodged a report on 1.9.1982 at about 1030 hrs. C The report Ex.-7 was entered in the general diary by the Station House Officer, PW10. The statement, however, was cryptic. It did not disclose the names of the accused even. Subsequently, when PW14 took over the investigation, he recorded the statement of PW2 on 1.9.1982 at about 1235 hrs. and on the basis of that statement, a formal FIR was registered. D The body of Dullon (deceased) was exhumed on 2.9.1982 by the SI in the presence of the Executive Magistrate and inquest proceedings were held. E The dead body was sent for postmortem examination. The SI during the investigation seized lathis alleged to have been in the assault of Dullon from the house of Man Singh and Ganesh.

F Before the Trial Court, it was submitted on behalf of the appellant that had PW8, Sitaram, son of the deceased and PW2 husband of the deceased been actually eye witnesses and had witnessed the occurrence the statement Ex.7 made by them to PW10, which was recorded in the general diary would not have been so cryptic and the name of the appellant and others, who were admittedly known to them would have found a mention therein. G It was also submitted that the conduct of Murka Maddi, PW2, the husband of the deceased, who made no efforts either to save his wife from being forcibly dragged from his house also creates a doubt about his presence at the time of the occurrence. Both the submissions were rejected H by the Trial Court and in our opinion rightly and for cogent reasons with

which we agree.

The High Court dismissed the appeal and confirmed the conviction and sentence of the appellant. However, the manner in which the High Court dealt with the appeal leaves much to be desired. The High Court did not consider much less discuss the evidence at all and after a narration of the prosecution case observed :

"The learned Sessions Judge had an opportunity of watching the demeanour and conduct of the witnesses deposing before him and his assessment of the evidence in facts and circumstances could not be discarded as pervert or illogical or illegal. That being the case this court of appeal would not substitute the findings of the Sessions Judge by its own simply because a different conclusion could be arrived at on the assessment of the evidence from a different angle or from the same angle. So, considering all these, we do not find any reason to depart from the findings made by the learned Sessions Judge as to the guilt of the accused. See *Tota Singh v. State of Punjab*, AIR (1987) S.C. 1083 though this case dealt with order of acquittal in appeal, the principle laid down in the said decision by the Supreme Court may apply to order of conviction as well. It is said that where two views are possible on an appraisal of the evidence adduced in the case and the court below has taken a view which is a plausible one, the Appellate Court cannot legally interfere with an order of acquittal even if it is of the opinion that the view taken by the Court below on its consideration of the evidence is erroneous."

To say the least, the approach of the High Court is totally fallacious. In an appeal against conviction, the Appellate Court has the duty to itself appreciate the evidence on the record and if two views are possible on the appraisal of the evidence, the benefit of reasonable doubt has to be given to an accused. It is not correct to suggest that the "Appellate Court cannot legally interfere with" the order of conviction where the trial court has found the evidence as reliable and that it cannot substitute the findings of the Sessions Judge by its own, if it arrives at a different conclusion on reassessment of the evidence. The observation made in *Tota Singh's* case, which was an appeal against acquittal, have been misunderstood and mechanically applied. Though, the powers of an appellate court, while

- A dealing with an appeal against acquittal and an appeal against conviction are equally wide but the considerations which weigh with it while dealing with an appeal against an order of acquittal and in an appeal against conviction are distinct and separate. The presumption of innocence of accused which gets strengthened on his acquittal is not available on his conviction. An appellate court may give every reasonable weight to the conclusions arrived at by the trial court but it must be remembered that an appellate court is duty bound, in the same way as the trial court, to test the evidence extrinsically as well as intrinsically and to consider as thoroughly as the trial court, all the circumstances available on the record so as to arrive at an independent finding regarding guilt or innocence of the convict. An Appellate Court fails in the discharge of one of its essential duties, if it fails to itself appreciate the evidence on the record and arrive at an independent finding based on the appraisal of such evidence. The High Court failed to do so and its view is patently erroneous. Though this Court does not generally reappraise the evidence which has been considered by two courts below in an appeal by special leave but since the consideration of the evidence by the High Court was not proper, we have ourselves analysed the evidence on the record with the assistance of learned counsel for the parties.
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- E Our independent analysis of the evidence shows that the appellant was present at the house of Man Singh when Dullon deceased was brought there and had also given a kick to the deceased at the house of Man Singh. The question, however, is, what offence can be said to have been committed by the appellant ? In this connection, the statement of PW8 that he know the appellant and at the time of the occurrence *had seen him standing at a distance* after his mother had been dragged away by Man Singh and the son-in-law of Ganesh but that the appellant had not taken any part in that incident assumes much significance, particularly when it is admitted by the prosecution witnesses that the appellant has no relationship whatsoever with either Man Singh or the other absconding co-accused.
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- G According to PW5, the appellant had kicked the deceased once. This witness did not ascribe any other role to the appellant. However, PW8 deposed that besides kicking the deceased, the appellant had *also* given her one lathi blow. This part of the testimony of PW8 has not received corroboration from any other witness. Admittedly, the complainant party and the appellant were not on good terms. PW8 admitted that not only
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had the appellant boycotted the marriage feast on the occasion of the marriage of the elder brother of PW8 but he had also restrained some other persons from attending that feast. During his cross-examination, PW8 admitted that he had animosity with the appellant. The possibility, therefore, that PW8 exaggerated the role of the appellant and attributed a lathi blow also to him cannot be ruled out. No role has been ascribed to the appellant by PW2, PW5 or PW8 in so far as the dragging of the deceased from the house of Man Singh towards the river side is concerned. Again, no part is attributed to the appellant when the deceased was buried near the river side, which place was pointed out by Babu Lal, the absconding co-accused to the police. In the face of all these circumstances, in our opinion it would not be safe to hold that the appellant shared the common intention with the absconding co-accused in either causing the death of the deceased or in destroying the evidence to screen the offence.

The only consistent evidence that emerges from the testimony of PW2, PW5 and PW8 is that the appellant gave a kick to the deceased at the house of Man Singh. According to the post-mortem report, the deceased had four incised wounds besides a lacerated wound and fracture of ribs. The fracture of ribs of the deceased is attributed to the appellant and his co-accused. The appellant can, thus, be fastened with the liability of an offence under Section 325/34 IPC only. The evidence on the record does not justify the conviction of the appellant for offences under Section 302/34 IPC and Section 201 IPC. We accordingly set-aside his conviction and sentence for the offences under Section 302/34 IPC and 201 IPC and instead find him guilty of an offence under Section 325/34 IPC and sentence him to suffer rigorous imprisonment for the period already undergone by him. This appeal, therefore, succeeds to the limited extent as noticed above. The appellant shall be released from custody forthwith if not required in any other case.

T.N.A.

Petition disposed of.