2023INSC829

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1012 OF 2022

Javed Shaukat Ali Qureshi ... Appellant

versus

State of Gujarat ... Respondent

J U D G M E N T

ABHAY S. OKA, J.

FACTUAL ASPECTS

1. The occurrence based on which the appellant was convicted was of 7th November 2003. According to the prosecution case, around 10 a.m. on that day, about 1,000 to 1,500 people had gathered in the Shah Alam area of the city of Ahmedabad. When PW-1 Baldev was passing through that area by his two-wheeler, the crowd stopped him. He was forced to disclose his identity. After he disclosed his identity, the crowd started assaulting him and his two-wheeler was burnt. Thereafter, the crowd stopped an auto-rickshaw, and the passengers in the auto-rickshaw were forced to alight. The necklace of PW-2 Gitaben Bhailal, who was a passenger in the auto rickshaw, was snatched. The mob assaulted PW-3 Hemubhai, who was carrying LPG cylinders on a bicycle. PW-

13 Ajay was passing through that area on his two-wheeler with Mukesh as a pillion rider. PW-13 Ajay managed to run away. However, Mukesh was assaulted by the mob. Afterwards, the dead body of Mukesh was found in a nearby lake. A total of 13 accused were prosecuted. Accused nos. 1 to 6 and 13 were convicted and Trial Court acquitted the rest of the accused. Seven accused were convicted, including the present appellant-accused no.6, for the offences punishable under Section 396 read with Section 149, Section 395 read with Section 149, Section 307 read with Section 149, Section 435 read with Section 149 and Section 201 read with Section 149 of the Indian Penal Code, 1860 (for short 'IPC'). The maximum sentence imposed was life imprisonment for the offence punishable under Section 396 read with 149 of IPC. By the impugned judgment, while confirming the conviction of the accused, the High Court brought down the sentence to 10 years. The appeals preferred by the convicted accused were decided by a Division Bench of the High Court by the impugned judgment.

2. The appellant is accused no.6. Accused nos.1, 5 and 13 preferred Criminal Appeal no.1041 of 2016 to this Court. By the judgment dated 9th August 2018, this Court acquitted the said three accused. SLP (Crl.) Dy. No.13063 of 2018 filed by the accused no.2 was summarily dismissed vide order dated 11th May 2018. Accused nos.3 and 4 did not prefer any appeal for challenging the judgment of the High Court.

SUBMISSIONS

3. Learned counsel appointed as Amicus Curiae to espouse the cause of the appellant pointed out that only one witness, namely, PW-2 Gitaben identified the appellant and ascribed him a role of pulling her gold chain. He submitted that PW-2 did not know the appellant. Therefore, her identification of the appellant in the Court becomes doubtful as even according to her version; there were 50-100 persons in the mob which surrounded the auto-rickshaw by which the witness was travelling. Moreover, the witness deposed before the Court approximately two years after the occurrence of the crime. He pointed out that the test identification parade was not held.

4. He submitted that as an officer of the Court, it is his duty to point out that accused nos.3 and 4 were convicted only on the basis of the testimony of PW-25 and PW-26. He submitted that the same is the case with accused no 2. He submitted that while deciding Criminal Appeal no. 1041 of 2016 preferred by the accused nos.1, 5 and 13, this Court has completely discarded the testimony of both PW-25 and PW-26. He would, therefore, submit that not only that the appellant deserves to be acquitted, but the benefit of the judgment may be extended to accused nos. 2, 3 and 4 as well.

5. The learned counsel appearing for the respondent urged that PW-2 has clearly identified the appellant and has ascribed the role of snatching her gold chain to him. She submitted that time of only two years had elapsed between

the date of occurrence and the date of deposition of PW-2, and therefore, it was easily possible for PW-2 to identify the appellant. She submitted that PW-2, being a woman, would never forget the face of the accused who had snatched the gold chain from her neck. She submitted that as far as accused nos.2,3 and 4 are concerned, their conviction has become final and cannot be interfered with.

OUR VIEW

6. Firstly, we deal with the case of the appellant. PW-25 (Arif Khan) and PW-26 (Sachinbhai Patel), who are alleged to be the eyewitnesses, are the police constables. Both of them claimed that at the time of the incident, a mob of about 1000-1,500 people had gathered at the spot where the incident took place. Going by the impugned judgments, only PW-2 Gitaben has identified the appellant and has ascribed a specific role of chain snatching to him. Thus, as far as the appellant is concerned, PW-2 is the solitary witness. PW-2 stated in the examination-in-chief that there were six passengers in the auto-rickshaw by which she was travelling. After seeing the mob near Shah Alam Gate, the driver stopped the auto-rickshaw and fled away. She stated that a mob surrounded the auto-rickshaw. She also stated that the members of the mob belonged to the Muslim community. She stated that two people sitting in the front seat of the auto-rickshaw were pulled out. She could not get out of the auto-rickshaw. She stated that someone pulled her gold chain from her neck,

which was nearly weighing 10 grams. She stated that she was slapped and that she received injuries caused by a nail. She specifically stated that there were 50-100 people in the mob present around the auto-rickshaw, and she did not identify anyone from the mob. When her attention was invited to the accused present in the Court, she stated that one of them was present in the mob. The witness signalled toward one accused. The Trial Court has noted that the said accused was told to stand up who disclosed his name as Javed. Thereafter, the witness stated that the said accused pulled the chain from her neck. In the cross-examination, she accepted that no test identification parade was held. It must be noted here that no other prosecution witness has identified the appellant. The witness stated that a mob of around 50-100 people had gathered around the auto-rickshaw. It is not the case of the prosecution that she knew the appellant beforehand. Going by her version of the incident, there was no time available to her to observe the distinctive features of the appellant. The incident of snatching must have been over in seconds. Therefore, it is very difficult to accept that in such a large mob gathered around the auto-rickshaw, the witness could remember the face of only one accused and recognise him after a lapse of about two years from the date of the incident.

7. In a given case, the conviction can be based on the testimony of only one eyewitness. The law has been laid down on this behalf by a Bench of three Hon'ble Judges of

this Court in the case of ***Vadivelu Thevar & Anr. v. State of Madras***[1]. In paragraphs 10,11 and 12 of the said decision, this Court held thus:

> **"10.** .. ..
>
> On a consideration of the relevant authorities and the provisions of the Evidence Act, the following propositions may be safely stated as firmly established:
>
> **(*1*) As a general rule, a court can and may act on the testimony of a single witness though uncorroborated. One credible witness outweighs the testimony of a number of other witnesses of indifferent character.**
>
> **(*2*) Unless corroboration is insisted upon by statute, courts should not insist on corroboration except in cases where the nature of the testimony of the single witness itself requires as a rule of prudence, that corroboration should be insisted upon, for example in the case of a child witness, or of a witness whose evidence is that of an accomplice or of an analogous character.**
>
> (*3*) Whether corroboration of the testimony of a single witness is or is not necessary, must depend upon facts and circumstances of each case and no general rule can be laid down in a matter like this and much depends upon the judicial discretion of the Judge before whom the case comes.
>
> **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

1 AIR 1957 SC 614

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 Indian 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 recognized 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 added)

8. Considering the nature of the testimony of PW-2, it cannot be said that the evidence of PW-2 is wholly reliable. The identification of the appellant for the first time in the Court after a lapse of about two years becomes doubtful for more than one reason. Firstly, the appellant was not known to PW-2. Secondly, the appellant was part of a large aggressive mob of 50 to 100 people which surrounded the auto-rickshaw. Thirdly, there was no identification parade held. Fourthly, there was no time available to PW-2 to note the distinctive features of the appellant. Hence, it is very

unsafe to record a conclusion based only on the testimony of the solitary witness that the guilt of the appellant was proved beyond a reasonable doubt. Even if we categorise the evidence of PW-2 as "neither wholly reliable nor wholly unreliable," the appellant cannot be convicted only based on the sole testimony of PW-2 unless there is a corroboration to the version of PW-2 either by direct or circumstantial evidence. Such a corroboration is completely absent in this case. Therefore, the conviction of the appellant cannot be sustained.

9. Now, coming to the role of accused nos.2,3 and 4, we must note here that the only role ascribed to them was that they were a part of the mob. No overt act was ascribed to them. The Trial Court believed the testimony of PW-25 (Arifkhan) and PW-26 (Sachinbhai Patel). Both PW-25 and PW-26 identified accused no.2. However, a test identification parade was not conducted.

10. As far as accused no.3 is concerned, he was identified by PW-26 as a member of the mob. After having perused the testimony of PW-25, we find that he has not specifically named accused no.3. Accused no.4 was not identified by PW-26, but the finding of the Trial Court is that he was identified by PW-25.

11. The conviction of accused nos. 1, 5 and 13 was based only on the testimony of PW-25 and PW-26. The test identification parade as regards accused nos.1 and 5 was not

held, but as regards accused no.13, the test identification parade was conducted. While dealing with appeals preferred by accused nos.1,5 and 13, in paragraph 5, this Court held thus:

> **"On a careful consideration of the evidence adduced by PWs-25 and 26, we are left with serious doubt as to whether the evidence of the said two witnesses should inspire the confidence of the Court. Identification of a total of 13 accused, who were sent out for trial including present accused-appellants, in a mob of 1000-1500 people is by no means an easy task.** Over and above that no Test Identification Parade was held so far as accused Nos.1 and 5 are concerned. The prosecution has not offered any explanation as to why no Test Identification Parade was held in respect of A-1 and A-5 whereas a Test Identification Parade was held in respect of A-13."
>
> (emphasis added)

12. This Court was of the view that evidence of PW-25 and PW-26 does not inspire confidence. This Court did not partially reject the testimony of PW-25 and PW-26 but rejected their testimony in its entirety.

13. As Section 149 of IPC was applied, this Court dealt with the theory of the prosecution based on the fact that accused nos.1,5 and 13 were present in the mob. This Court relied upon what is held in paragraph 5 of its decision in the case of ***Musa Khan & Ors. v. State of Maharashtra***[2]. Paragraph 5 of the said decision reads thus:

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2 AIR 1976 SC 2566

"5. The appellants pleaded innocence and averred that they had been falsely implicated due to enmity and had not participated in the riot. Both the courts below have accepted the main facts leading to the occurrence as also participation of the appellants in the rioting. The Additional Sessions Judge as also the High Court, however, do not appear to have made a correct approach in examining the individual cases of the accused, particularly with reference to their actual presence or participation in the incident in question. It is true that having regard to the background against which the events took place all the incidents starting from the National Hotel and ending with the chawl of Jogendra Singh were parts of the same transaction, nevertheless they were separate incidents in which different members of the mob had participated. In these circumstances, therefore, without there being any direct evidence about the actual participation of the appellants in all the incidents it could not be inferred as a matter of law that once the appellants were members of the mob at the National Hotel, they must be deemed to have participated in all the other incidents at the Engineering College Hostel, Bharat Lodge and the chawl of Jogendra Singh. It is well settled that a mere innocent presence in an assembly of persons, as for example a bystander, does not make the accused a member of an unlawful assembly, unless it is shown by direct or circumstantial evidence that the accused shared the common object of the assembly. **Thus, a court is not entitled to presume that any and every person who is proved to have been present near a riotous mob at any time or to have joined or left it at any stage during its activities is in law guilty of every act committed by it from the beginning to the end, or that each member of**

> **such a crowd must from the beginning have anticipated and contemplated the nature of the illegal activities in which the assembly would subsequently indulge. In other words, it must be proved in each case that the person concerned was not only a member of the unlawful assembly at some stage, but at all the crucial stages and shared the common object of the assembly at all these stages. Such an evidence is wholly lacking in this case where the evidence merely shows that some of the accused were members of the unlawful assembly at one particular stage but not at another.** In these circumstances, therefore, the accused who were not present or who did not share the common object of the unlawful assembly at other stages cannot be convicted for the activities of the assembly at those stages. In view of this error committed by the High Court it has become necessary for us to examine the evidence on the limited question as to which of the accused had actually participated in the incidents at the Engineering College, Bharat Lodge and the chawl of Jogendra Singh where acts of incendiarism had taken place. It is also common ground that the occurrence had taken place at night and the evidence of the witnesses identifying the accused had to be examined with great caution."
>
> (emphasis added)

14. Assuming that PW-25 and PW-26 identified accused nos.2, 3 and 4 by stating that they were members of the mob; once a Coordinate Bench of this Court discards their testimony in its entirety being unreliable, the benefit of the said finding will have to be extended to the accused nos.2,3

and 4 as they are similarly placed with accused nos.1,5 and 13. Moreover, except for PW-25 and PW-26, no other witnesses have ascribed any role to the accused nos.2, 3 and 4.

15. When there is similar or identical evidence of eyewitnesses against two accused by ascribing them the same or similar role, the Court cannot convict one accused and acquit the other. In such a case, the cases of both the accused will be governed by the principle of parity. This principle means that the Criminal Court should decide like cases alike, and in such cases, the Court cannot make a distinction between the two accused, which will amount to discrimination.

16. As far as accused nos.3 and 4 are concerned, they did not prefer any appeal. In the case of ***Pawan Kumar vs. State of Haryana***[3], this Court dealt with similar contingency in some detail. This Court held that the jurisdiction under Article 136 of the Constitution of India can be invoked in favour of the party even *suo moto* when the Court is satisfied that compelling ground for its exercise exists. However, such *suo moto* power should be used very sparingly with caution and circumspection. The Court held that the power must be exercised in the rarest of the rare cases.

17. Accused nos. 1,5 and 13 were convicted only on the basis of the testimony of PW-25 and PW-26. They were

3 (2003) 11 SCC 241

acquitted by holding that the testimony of both witnesses was unreliable and deserved to be discarded. If the same relief is not extended to accused nos. 3 and 4 by reason of parity, it will amount to violation of fundamental rights guaranteed to accused nos. 3 and 4 by Article 21 of the Constitution of India. Therefore, we have no manner of doubt that the benefit which is granted to accused nos. 1,5 and 13 deserves to be extended to accused nos.3 and 4, who did not challenge the judgment of the High Court. In this case, the *suo motu* exercise of powers under Article 136 is warranted as it is a question of the liberty of the said two accused guaranteed by Article 21 of the Constitution.

18. Now, we come to the case of accused no.2. By the order dated 11th May 2018, a special leave petition filed by accused no.2 was summarily dismissed without recording any reasons. The law is well-settled. An order refusing special leave to appeal by a non-speaking order does not attract the doctrine of merger. At this stage, we may refer to a three-judge Bench decision of this Court in the case of ***Harbans Singh v. State of U.P. & Ors.***[4]. In paragraph 18, this Court held thus:

> **"18.To my mind, it will be a sheer travesty of justice and the course of justice will be perverted, if for the very same offence, the petitioner has to swing and pay the extreme penalty of death whereas the death sentence imposed on his co-accused for the very same**

4 (1982) 2 SCC 101

> **offence is commuted to one of life imprisonment and the life of the co-accused is shared (*sic* spared). The case of the petitioner Harbans Singh appears, indeed, to be unfortunate, as neither in his special leave petition and the review petition in this Court nor in his mercy petition to the President of India, this all important and significant fact that the life sentence imposed on his co-accused in respect of the very same offence has been commuted to one of life imprisonment has been mentioned. Had this fact been brought to the notice of this Court at the time when the Court dealt with the special leave petition of the petitioner or even his review petition, I have no doubt in my mind that this Court would have commuted his death sentence to one of life imprisonment.** For the same offence and for the same kind of involvement, responsibility and complicity, capital punishment on one and life imprisonment on the other would never have been just. I also feel that had the petitioner in his mercy petition to the President of India made any mention of this fact of commutation of death sentence to one of life imprisonment on his co-accused in respect of the very same offence, the President might have been inclined to take a different view on his petition."
>
> (emphasis added)

19. We have found that the case of accused no 2 stands on the same footing as accused nos. 1,5 and 13 acquitted by this Court. The accused no.2 must get the benefit of parity. The principles laid down in the case of ***Harbans Singh***[4] will apply. If we fail to grant relief to accused no 2, the rights

guaranteed to accused no. 2 under Article 21 of the Constitution of India will be violated. It will amount to doing manifest injustice. In fact, as a Constitutional Court entrusted with the duty of upholding fundamental rights guaranteed under the Constitution, it is our duty and obligation to extend the same relief to accused no.2. Therefore, we will have to recall the order passed in the special leave petition filed by accused no.2.

20. Before we part with the judgment, we must record our appreciation of the service rendered by Mr. M. Shoeb Alam, Advocate as Amicus Curiae.

21. Accordingly, the appeal succeeds and we pass the following order:

a. The appellant, accused no.6–Javed Shaukat Ali Qureshi, is acquitted of the offences alleged against him by setting aside the judgment of the Trial Court dated 17th March 2006 and judgment of the High Court dated 11th February 2016 to the extent. He is on bail. His bail bonds stand cancelled;

b. We set aside the order of conviction of accused no.3 Mehboobkhan Allarakha and accused no.4 Saidkhan @ Anna Ikbalhusain by setting aside the same judgments to that extent and acquit them of the offences alleged against them. They shall be

forthwith set at liberty if they are not required to be detained in connection with any other case;

c. We recall the order dated 11th May 2018 in SLP (Crl.) Diary No.13063 of 2018 and grant leave. For the reasons set out above, accused no. 2 Amjadkhan Nasirkhan Pathan stands acquitted by setting aside the impugned judgment of the Trial Court and the High Court to that extent. He shall be forthwith set at liberty unless he is required to be detained in connection with any other offence; and

d. The appeal is allowed on the above terms.

.....J.
(Abhay S. Oka)

.....J.
(Sanjay Karol)

New Delhi;
September 13, 2023.