Supreme Court of India
Himmat Sukhadeo Wahurwagh & Ors vs State Of Maharashtra on 1 May, 2009
Author: H S Bedi
Bench: S.B. Sinha, Harjit Singh Bedi, Aftab Alam

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1641 OF 2007

HIMMAT SUKHADEO WAHURWAGH & ORS. APPELLANTS

VS.

STATE OF MAHARASHTRA ...RESPONDENT

JUDGMENT

HARJIT SINGH BEDI, J.

1. This appeal is directed against the judgment of the Bombay High Court dated 24th April 2007 whereby the State appeal against acquittal against the judgment of the Additional Sessions Judge, Akola has been allowed and the accused convicted and sentenced for offences punishable under Section 302/149 of the IPC etc. The facts are as under:

2. At about 4 p.m. on 11th June 1989 Babarao Kolhe, his brother Jaidev Kolhe and grandson Sanjay PW-1 residents of village Panaj, went to plough their fields, about one-and-a half kilometers away from the village. As they were returning home in their bullock cart, they were waylaid by the eight accused, variously armed with axes and sticks who attacked Babarao and Jaidev. Sanjay escaped from the spot and reached home and informed his grandfather Namdeo Kolhe about what had happened, giving details of the injuries caused by each of the accused. In the meantime, the bullock cart sans Babarao and Jaidev too returned to the residence in the village. Namdeo Kolhe thereupon called his sons Dadarao and Wasudeo and alongwith several other persons went in search and found Babarao and Jaidev lying seriously injured in the field of one Vishwanath Akotkar. It is the case of the prosecution that Jaidev made a dying declaration to Dadarao that the eight accused had beaten him and Babarao. The two injured were thereafter taken homeward and as the party entered the village. Namdeo and the others received information that the accused were searching for them as well so that they too could be killed. Dadarao and Wasudeo thereupon left the cart and returned home by a circuitous route. Namdeo then left for the house of the Police Patil accompanied by his grandson Bhimrao PW 4 and Deokabai PW 5 but he too was assaulted along the way by the accused. Bhimrao rushed back home and narrated the incident to his mother Shantabai and to his father. The

accused also threatened Deokabai that they would kill her as well on which she made a hasty retreat to her home. Wasudeo then went to Karla to send a message to the Police at Akot on phone, but he could not get the connection on which the operator him to call the police at Anjangaonsurji Police Station. The message was accordingly conveyed by the Anjangaonsurji police to Akot police station on which PSI Thombre recorded the message in the Daily Diary and also informed Inspector Patil PW 14 about the incident. This police officer reached Panaj at about 1:00 a.m. and on enquiry found that Babarao, Jaidev and Namdeo were dead. He then recorded the statement of Dadarao on which a First Information Report under Section 302 r/w Section 34 of the Indian Penal Code was registered. The Police also started on the investigation and sent the dead bodies for the post mortem examinations. The accused, who did not make an attempt to run away, were arrested from the village the very same day and on their disclosure statements, the weapons of offence as also bloodstained clothes were recovered. On committal the Additional District Judge framed charges under Sections 147, 148 and 149 r/w Section 302 of the IPC against the accused. The Trial Court in the course of a somewhat laboured judgment held that the deposition of Sanjay PW 1, the solitary eye witness to the murders of Jaideo and Babarao, could not be believed as his conduct belied his presence in as much that after reaching home he had hidden himself in the house of one Abgad and had not reported the matter to his neighbours. The Court also held that the graphic details of the injuries caused by each of the accused made his story improbable. The statements of Dadarao PW 2, to whom Jaideo (deceased) had made a dying declaration and Wasudev PW 3 naming the accused as their assailants were also discarded, on the premise that there were many improvements vis-`-vis their statements under Section 161 of the Cr.P.C. The Trial Court also observed that the witnesses were closely related to the deceased and to each other and as there appeared to be no plausible motive for the murders and the delay in the lodging of the FIR were other factors which cast a serious doubt on the prosecution's story. The Trial Judge accordingly, by his Judgment dated 20th February 1991, acquitted the accused. On appeal the High Court observed that the finding of the Court that the eye witness account was unreliable was erroneous, the more so as Sanjay, who was a witness to the first two murders, though a child, was absolutely reliable. The Court also found that the testimonies of PW 4 Bhimrao, PW 5 Deokabai and Anandrao PW 6 with respect to the assault and murder of Namdeo too were reliable and had to be accepted. The High Court also observed that the finding of the Additional Sessions Judge that there was no apparent motive for the murders was, on the face of it, unacceptable as it was the admitted position that in 1981, Namdeo (deceased) and his sons had been prosecuted for an attempt to murder Sukhdeo, father of accused nos. 1 to 5 and had been convicted and sentenced to rigorous imprisonment for five years but on appeal in the High Court, the sentence had been reduced to three years whereafter the accused had been released from jail in February 1989. The High Court, thus, deduced that the present incident, which took place on 11th June 1989 was a fall out of the incident of 1981 and had occurred about four months after the accused had been released from jail. The Trial Court further held that the medical evidence given by Dr. Jaiswal PW 7 and the chemical examiners report corroborated the eye witness account. The Court also believed the statement of PW 2 Dadarao with respect to the dying declaration made by Jaideo. Having recorded its findings on these basic issues, the High Court reversed the order and judgment of acquittal and convicted all the accused for offences punishable under Sections 147, 148 and 302 r/w 149 of the Indian Penal code and sentenced each of them as under; two years rigorous imprisonment for the offence punishable under Section 147 of the Indian Penal Code, three years rigorous imprisonment for the offence under Section 148 and to imprisonment for life and a fine of

Rs.5,000/- in-default to suffer rigorous imprisonment for one year for the offence punishable under Section 302 r/w Section 149. It is in this background that the matter is before us by way of Special Leave.

3. At the very outset, it has to be pointed out that the two warring groups belong to Village Panaj, live in the same locality and belong to the same caste. They are also, within themselves, very closely related inter se. Namdeo (deceased), was the father of Babarao and Jaideo (deceased) whereas Dadarao PW 2, and Wasudeo PW 3 are his sons and PW 1 Sanjay is the son of Babarao whereas Bhimrao PW 4 is the son of Dadarao aforesaid and Shantibai PW 10. Likewise we see from the record that the appellants Himmat, Siddhartha, Gautam, Anil and Sanjay Kumar are brothers; Waman- is an uncle of the above mentioned accused whereas Prakash and Suresh are his sons.

4. In this background, Mr. R.S. Lambat, the learned counsel for the appellants has argued that the Trial Court on a minute examination of the evidence had thought it fit to record an order of acquittal, a view which was clearly tenable on the facts of the case, and the High Court was, thus, not justified in re-appreciating the evidence and arriving at a different conclusion. He has highlighted that an accused was presumed to be innocent till held guilty by a competent court and this principle was immeasurably strengthened where the Trial Court had made an order of acquittal. There can be no quarrel with these basic propositions, but we are of the opinion that the evidence in the case suggests that the judgment of the Additional Sessions Judge was unjustified in the face of extremely credible evidence and was based on a complete misconception as to the evidence on record. We are, therefore, of the opinion that the High Court was justified in interfering in the matter on a re-appreciation of the evidence. In this connection, we refer to the judgment in Chandrappa and others vs. State of Karnataka (2007) 4 SCC 415 wherein it has been observed that an Appellate Court has full authority to re-appreciate and re-consider the evidence in a case of acquittal barring a case where two views are possible on the evidence and one favouring the accused has been taken. However where the judgment of the Trial Court is based on a complete misreading of the evidence and a view in favour of the accused was not justified and only one view with regard to the culpability of the accused was possible, the High Court would be failing in its duty if it did not interfere. Similar views have been expressed in Swami Prasad vs. State of Madhya Pradesh J.T. 2007 (4) SC 337, and a plethora of other judgments. We are, therefore, of the opinion that interference by the High Court was called for in the circumstances.

5. Mr. Lambat then argued that there was no motive for the triple murder as the earlier incident of 1981 had apparently been forgotten inasmuch that the relations between the parties had admittedly improved and they were on visiting terms. It was then submitted that the first two murders had been seen by Sanjay PW 1 but his presence was doubtful as he had disappeared from the scene and hidden himself in the house of Abgad and had surfaced only the next morning, and thereafter narrated his story. It has also been pleaded that the evidence of PW 4 Bhimrao another young child of about 13 years, PW 5 Deokabai and Anandrao PW 6 who had witnessed the attack on Namdeo, could not be believed as the story projected by them that they had rushed into their houses after seeing the incident and had done little else could not be believed. It has accordingly been emphasized that the entire eye witness account was based on the testimony of close and interested relatives of the deceased and though, the entire incident had happened either in the village itself or

just outside of it, no independent witness had come forth in support of the prosecution. It has been pointed out that in this background the fact that the FIR had been filed belatedly was a factor which cast a serious doubt on the prosecution story.

6. The Counsel for the respondent State has, however, submitted that the motive for the incident was writ large on the facts of the case and that merely because the primary witnesses Sanjay and Bhimrao were related to the deceased was no ground to disbelieve their testimonies particularly as they had been corroborated by the dying declaration made by Jaideo to Dadarao PW 2, the medical evidence in the case, as also the recovery of the murder weapons at the instance of the accused which were found on analysis to have been stained with human blood of identifiable blood groups.

7. Before we embark on an appreciation of the evidence some thoughts come to mind. The criminal justice system as we understand it as of today in our country, is beset with major issues, sometimes unrelated to what happens in court, particularly in cases involving more than one accused. Fudged and dishonest first information reports, tardy and misdirected investigations and witnesses committing perjury with not the slightest qualm or a quibble make the decision of even the most diligent and focused of judges particularly galling and difficult. Several other factors inhibit the proper conduct of proceedings in a trial. As per "Crimes in India - 1998" a total of 5,42,345 cases under the Indian Penal Code including those carried over from the previous years, and another 6,37,345 criminal cases under Special and Local Laws making a backlog of 11,79,690 cases were pending investigation. It has also been found that the delay in the investigation and disposal of a criminal case makes the possibility of acquittal that much higher as witnesses tend to turn hostile. The Fourth Report of the National Police Commission (1980) Chapter XXVIII gives some alarming statistics inasmuch that a sample study of Sessions cases in a crime infested district revealed that out of 320 cases disposed off in the concerned Sessions court during the 8 months working period in a year, only 29 ended in conviction while 291 ended in acquittal. In conclusion, the Commission observed:

> "As many as 130 cases, which included 21 murders, 58 attempts at murder, 17 decoities and 9 robberies, took more than 3 years for disposal, reckoning the time from the date of registration of First Information Report. It was also noticed that the longer a case took for disposal the more were the chances of its acquittal. Protracted proceedings in courts followed by acquittal in such heinous crimes tend to generate a feeling of confidence among the hardened criminals that they can continue to commit crimes with impunity and ultimately get away with it all at the end of leisurely and long drawn legal battles in courts which they can allow their defence counsel to take care of. Such a situation is hardly assuring to the law abiding citizens and needs to be immediately corrected by appropriate measures even if they should appear drastic and radical."

8. We hasten to add that these alarming figures are not universally applicable to all districts, but they are undoubtedly indicative of the malaise that afflicts our criminal justice system and paint a grim picture. The Commission also found that one of the primary reasons for the failure of the prosecution was the propensity of prosecution witnesses to turn hostile and several reasons for this

trend have been spelt out. The Commission also quoted with approval from a letter of a senior Sessions Judge in which he wrote that:

> "A prisoner suffers for some act or omission but a witness suffers for no fault of his own. All his troubles arise because he is unfortunate enough to be on the spot when the crime is being committed and at the same time "foolish" enough to remain there till the arrival of the police. It is for these reasons that people do not take the victim of a road accident to hospital or come to the help of a lady whose purse or gold chain is being snatched in front of her eyes. If some person offers help in such cases he is to appear as a witness in a court and has to suffer not only indignities and inconveniences but also has to spend time and money for doing so. Some time the witnesses incur the wrath of hardened criminals and are deprived of their lives or limbs."

9. In this pernicious state of affairs, the judge, gravely handicapped, has to apply his knowledge of the law and his assessment of normal human behaviour to the facts of the case, his sixth sense based on his vast experience as to what must have happened, and then trust to God and good luck that he strikes home to come to a right conclusion. To our mind, the last two are undoubtedly imponderables but they do come into play in negotiating the judicial minefield. This is an undeniable fact whether we admit it or not

10. We now take up for discussion the various issues raised by the learned counsel. Happily, the pitfalls that we have noted above do not exist in the present case. Namdeo, the deceased and his sons were prosecuted for an attempt to murder Sukhdeo, the father of accused 1 to 5 in the year 1981 and were sentenced to five years by the trial court, but the sentence was reduced to three years by the High Court and the accused were released from jail in February 1989. The present incident took place within four months of that release. It is true that some of the prosecution witnesses have testified that during the eight years between the earlier incident and the present one, the relations between the two parties had improved and that they were on visiting terms as well. It is obvious, however, that the release of Namdeo and his sons from jail was an event which undoubtedly ignited old passions and animosities and precipitated the incident. The finding of the Trial Court that there was no motive for the murders is, thus, on the face of it unacceptable and it has been so found by the High Court, a finding that we too firmly endorse.

11. The record reveals that the incident happened in two parts, first at about 6:00 p.m. and again an hour later. In the first incident Babarao and Jaideo were killed, an event which was witnessed by PW 1 Sanjay, the son and nephew of the two deceased, respectively. The second incident was witnessed by PW 4 Bhimrao, PW 5 Deokabai and PW 6 Anandrao. We now take up for consideration the evidence of each of these two sets of witnesses.

12. It has been submitted by the learned counsel for the appellants that Sanjay was a mere child of 11 years of age and in running away and hiding himself in the house of Abgad particularly after his father had been brutally murdered, was an unacceptable story. We find no merit in this plea. On a perusal of Sanjay's evidence, it stands revealed that he was able to discern between right and wrong

and despite a searching cross-examination made by the defence lawyer nothing adverse could be brought out. Sanjay testified that he had gone along with the two deceased to the plough fields at about 4:00 p.m. and while they were returning home, they had been surrounded by all the accused near the field of one Vishwanath and injuries had been caused to his father and uncle. Sanjay also specified the weapons that each of the accused was holding and the manner of their use. He also stated that in the confusion that followed the attack, he had managed to escape, had rushed home, revealed the story to his family and then hidden himself till the next morning. It is also evident from the testimonies of the other prosecution witnesses Bhimrao, Deokabai and Anandrao that when they along with Namdeo (deceased), were planning to go to the Police Patil to lodge the report with regard to the first incident, they had been apprehended by the accused and injuries had been caused to Namdeo which had led to his death. Deokabai further deposed that after this incident the accused had also come to her home and threatened to beat her as well. PW 14 Sub Inspector Vinayak, one of the investigation officers, in his deposition stated that when he reached the village at about 1:45 a.m. on 12th June 1989, he noticed an unusual and artificial calm in the village, an atmosphere of panic and fear and that the inhabitants were unwilling to even open the door till they were told that the police had arrived. It is, therefore, obvious that the accused had let loose a reign of terror and after having killed three persons were still not satisfied and were looking around for other victims from the Kolhe family. Little wonder, therefore, that Sanjay had thought it fit and prudent to hide himself till the coast was clear. It is true that the Addl. Sessions Judge did not put any questions to Sanjay to ascertain his suitability as a witness. We, however, find from the evidence that he fully understood the implications of what he was saying and despite a stiff cross-examination nothing to discredit him could be brought out. We endorse the finding of the High Court that Section 118 of the Evidence Act does not preclude a child from being a witness and the only test that is applicable is as to whether the witness understood the sanctity of an oath and the import of the questions that were being put to him.

13. In Nivrutti Pandurang Kokate and Others vs. State of Maharashtra (2008) 12 SCC 565, it has been observed that the Section 118 of the Evidence Act envisages that all persons shall be competent to testify unless the Court thinks otherwise. In summing up the various judgments on this issue, this is what this Court had to say:

> "The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness".

14. We are of the opinion that Sanjay was aware of what had happened in the answers given by him in the course of his evidence which clearly proved that he was a competent witness. We also find that Sanjay's statement has been duly corroborated by the dying declaration made by Jaideo, to Dadarao PW 2 who had rushed to the spot on being informed by Sanjay as to what had happened.

15. The murder of Namdeo had been witnessed by PW 4 Bhimrao, PW 5 Deokabai and PW 6 Anandrao. Admittedly, PW 4 Bhimrao who was then 13 years of age, was a child witness and is the grandson of Namdeo. He deposed that while accompanying his grandfather to lodge the report with the police Patil with respect to the earlier murders, they had met Deokabai on the way and she too had accompanied them. They had thereafter been accosted by all the accused who were armed with axes and sticks and they had caused injuries to Namdeo with their weapons. He also deposed that on seeing this, he had run home, informed his mother about the incident and on account of the panic prevailing in the village, he too was hidden away till the next morning. We find that the cross-examination of this witness was very sketchy and nothing fruitful could be elicited by the defence counsel. Bhimrao's statement also finds corroboration from the evidence of Deokabai a member of the Gram Panchayat, and Anandrao. It has come in Deokabai's statement that her house and that of Namdeo were facing each other. It is, therefore, obvious that her presence was absolutely natural. She stated that she had witnessed the beating of Namdeo from a distance of 15 feet. She specifically denied any relationship with Namdeo or his family but candidly admitted that her husband was one of the accused in the case involving Namdeo and his sons and the accused party in the incident of 1981. Anandrao too repeated the story given by the others and this witness while in the witness box when called upon to identify the accused identified six of them. He also denied any relationship or any connection, even a remote one, with the complainant party. We, therefore, find that though Bhimrao was a child witness, he too satisfies the test laid down in the above mentioned case.

16. The learned counsel for the State has also brought to our notice some observations in the judgment of this court in Dinesh Kumar vs. State of Rajasthan (2008) 8 SCC 270 with respect to the evaluation of the evidence of an interested or relation witnesses. They are:

> "When the eyewitnesses are stated to be interested and inimically disposed towards the accused, it has to be noted that it would not be proper to conclude that they would shield the real culprit and rope in innocent persons. The truth or otherwise of the evidence has to be weighed pragmatically. The court would be required to analyse the evidence of related witnesses and those witnesses who are inimically disposed towards the accused. But if after careful analysis and scrutiny of their evidence, the version given by the witnesses appears to be clear, cogent and credible, there is no reason to discard the same. Conviction can be made on the basis of such evidence".

17. It is true, as contented, that a transformation has indeed taken place within the last three or four decades and from the query ` why should an interested witness be believed ' to ` why should such a witness be disbelieved as he is not likely to leave out the real culprits', reflects the anxiety and utter helplessness of criminal courts as independent witness tend to turn hostile.

18. We are also aware of the fact that the evidence in most of these cases is recorded after some delay and that in any case if every witness were to give an identical and parrot like statement, it would smack of tutoring and would lose credibility. Some inconsistencies are thus bound to arise particularly where a large number of victims, witnesses and accused are involved and the incident itself is spread out over a distance and period of time, as in the present case. Moreover, the involvement of a large number of accused in the present matter is further proved from the number of murders, the injuries caused, and more glaringly, in that a reign of terror had been let loose with the accused making repeated forays into the village, looking for more members of the Kolhe family.

19. We have also gone through the medical evidence and find that it fully supports the prosecution's story. The accused were armed with axes and sticks capable of causing incised and lacerated injuries. Two lacerated and two incised injuries along with several fractures on the arms and legs were found on the dead body of Namdeo. Likewise, Babarao had ten injuries including four incised and six lacerated with four compound fractures, two on the arms and two on the legs. The post mortem of Jaideo likewise revealed 14 injuries in all of which five were incised, four were abrasions and the remaining were lacerated with three compound fractures; two on the leg and one on the right hand. Dr. Jaiswal PW 7 clarified that these injuries could have been caused by the axes and sticks recovered from the accused.

20. The prosecution story, to our mind, is further fortified by the recoveries made from some of the accused. As per the prosecution, two axes had been recovered from the residence of Siddhartha accused, on 14th June 1989. These were found to be stained with human blood of group `A'. Five bamboo sticks were seized from the house of Anil accused, on 12th June 1989, which were stained with human blood of group `A' and group `O'. It has come in evidence that the blood group of Namdeo was `O' and that of Babarao and Jaideo was `A'.

21. In this view of the matter, the argument made by the defence counsel that there was some delay in the lodging of the F.I.R., even if taken as correct, becomes insignificant. On the contrary, however, we find that there is no delay in the facts of the case. As per the record, after the gruesome murders, PW 3 Wasudeo had gone to a nearby village from where he had telephoned Village Anjangaonsurji from where the information had further been conveyed to police station Akot. The fact that information of the incident had been received at Akot at 1:00 a.m. is clear from the daily diary entry (Exh.31). In this entry, the fact that Babarao and Jaipal had been killed also finds mention. It also appears that at that stage Wasudeo was not aware that Namdeo too had been killed as his murder had been committed some distance away from his residential house and also away from the venue of the first two murders. It has come in evidence that the police reached the village within half-an-hour or so on which the formal F.I.R. had been recorded. It needs reiteration that the three murders and the manner in which the members of the complainant party had been hunted out and killed and threats had been held out to the other members of the Kolhe family as well, had created an atmosphere of terror in the village and if the entire investigation on the crucial day did not proceed with clock work precision, no adverse inference can reasonably be drawn from this fact.

22. We accordingly dismiss the appeal.

.....J.

(S.B. SINHA) .....J.

(HARJIT SINGH BEDI) .....J.

New Delhi, (AFTAB ALAM)
Dated: May 1, 2009