Reportable

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

**CRIMINAL APPEAL NO. 1683 OF 2010**

Jodhan ... Appellant

Versus

State of M.P. ... Respondent

**J U D G M E N T**

***Dipak Misra, J.***

The present appeal calls in question the defensibility and the legal sustainability of the Judgment of conviction and order of sentence passed by the Division Bench of the High Court of Madhya Pradesh, Bench at Gwalior in Criminal Appeal No. 214 of 1995 whereby the High Court has dislodged the Judgment of acquittal recorded by the learned Additional Sessions Judge in respect of all the accused persons including the present appellant for the offences punishable under Sections 302, 323, 324 read

with Sections 149 of the Indian Penal Code (IPC) and 148 IPC and proceeded to sentence each of the accused under Section 302 read with Section 149 of IPC and imposed rigorous imprisonment for life along with separate sentences for other offences with the stipulation that all the sentences would be concurrent. Be it noted, the appellant and one Mangal Singh were also tried under Sections 3 and 4 of the Explosive Substances Act, 1908.

2. The facts which are essential to be exposited for the disposal of this appeal are that on 7.1.1984 about 9.00 a.m. when Ratta, PW-7, was at his home, the accused persons, namely, Mangal Singh, Babbu, Jodhan, Kanchhedi, Bhinua, Ramswaroop and Natthu and others came there armed with lathis, farsa and handmade bombs and started abusing Ratta and his family members and exhorted that they would not leave the Kumharwalas alive. As alleged, Kanchhedi assaulted Rukmanibai on her left hand with farsa, Jodhan, the present appellant, caused injury in the right leg of Heeralal, PW-16, by throwing a handmade bomb at him and accused Mangal Singh threw a handmade bomb on the chest of Siriya alias

Shriram as a result of which he received serious injuries. Other accused persons used lathi in the incident. As the prosecution story proceeds, Ratta lodged an FIR, Ex. P/24, on 7.1.1984 about 12.15 p.m. and by that time Siriya @ Shriram had already succumbed to the injuries. The injured persons were medically examined and on requisition by the investigating agency postmortem was carried out. The investigating agency in the course of investigation prepared the spot map, collected the bloodstained soil from the place of incident, and further, as is demonstrable, on being led by the accused persons seized the weapons, namely, lathi, farsa and handmade bombs and, thereafter, sent the seized articles to the chemical examiner for analysis. The investigating officer recorded the statements of the witnesses and eventually placed the chargesheet in the court of Chief Judicial Magistrate, Vidisha, who, in turn, committed the matter to the Court of Session, Vidisha.

3. The learned trial Judge framed charges under Sections 302, 323, 324 read with Sections 149 and 148 of IPC against all the accused persons and an additional

charge under Section 324 IPC against the accused Kanchhedi and under Sections 3 and 4 of Explosive Substances Act against Jodhan and Mangal Singh.

4. The accused persons pleaded not guilty and took the plea of false implication. It was the further case of the accused persons that the informant and others had confined Babbu Khangar in a room and assaulted him and because of the injuries inflicted on Babbu he expired later on.

5. In order to establish the charges levelled against the accused persons the prosecution examined as many as 16 witnesses and marked number of documents as Exhibits. During trial Mishri, PW-1, Harnam Singh, PW-3, Tulsa Bai, PW-4 and Hazrat Singh, PW-5, did not support the prosecution story and accordingly were declared hostile by the prosecution. The learned trial Judge while appreciating the evidence on record noted certain discrepancies, expressed doubt about the testimony of the witnesses who had deposed in favour of the prosecution, referred to the cases pending in the Court, the free fight between the parties, absence of satisfactory explanation

by the prosecution as regards the injuries sustained by the accused persons, the absence of independent evidence on record and accordingly disbelieved the story of the prosecution and acquitted all the accused persons.

6. At this juncture, it is worthy to note that one Babulal who was arraigned as an accused in the FIR died before the chargesheet could be filed and, therefore, six accused persons faced the trial.

7. Being dissatisfied with the judgment of acquittal, the State preferred the criminal appeal against the six accused persons. During the pendency of the appeal Mangal Singh expired and the appeal stood abated against him. The High court reappreciated the evidence on record and opined that the view expressed by the learned trial Judge was totally incorrect and could not be regarded as a plausible one and, accordingly, reversed the same and recorded the conviction and imposed the sentence as has been stated hereinbefore. Hence, the present appeal. Except the present appellant, the other accused persons have not preferred any appeal.

8. We have heard Mr. Varinder Kumar Sharma, learned counsel for the appellant and Mr. C.D. Singh, learned counsel for the respondent.

9. It is submitted by Mr. Sharma, learned counsel for the appellant that the High Court while unsettling an order of acquittal should exercise the appellate power with great care and caution and it must be for substantial compelling reasons and the appellate court should not reverse a judgment of acquittal unless it finds that the same is totally perverse and wholly unsustainable. It is put forth by him that in the instant case the learned trial Judge had analysed the evidence brought on record in an appropriate manner, noted the discrepancies and contradictions and hence, the view expressed by him, being a plausible one, there was no warrant or justification on the part of the High Court to interfere with the same. Learned counsel would submit that the witnesses who have been placed reliance upon by the High Court are interested witnesses being family members of the informant and when all other independent witnesses have not deposed in favour of the prosecution the view expressed by the trial court deserved

acceptation. It is contended by Mr. Sharma, that the prosecution has failed to explain why other eye witnesses who were present at the spot were not examined and such non-furnishing of explanation having not been properly appreciated by the High Court, the judgment of reversal is unsustainable. It is also contended by Mr. Sharma that when the appellant had not caused any injury on the deceased, he should not have been convicted under Section 302 IPC, for he would be liable for his overt act only and not for others.

10. Mr. C.D. Singh, learned counsel for the State would submit that the findings recorded by the learned trial Judge are not founded on proper appreciation of the evidence on record and, in fact, they are perverse and totally untenable and, therefore, the High Court is justified in interfering with the judgment. It is urged by him that the view of acquittal as expressed by the learned trial Judge cannot be regarded as a plausible one. The discrepancies and the contradictions that have been perceived by the learned trial judge, submits Mr. Singh, are absolutely minor and they really do not even create a

mild dent on the prosecution version. It is his further submission that the principal witnesses who have been nomenclatured as interested witness are the close family members who had witnessed the occurrence and further they had sustained injuries in the incident, and hence, there is no reason for disbelieving their testimony. Learned counsel has contended that when the prosecution has been able to establish the case beyond reasonable doubt on the basis of the evidence brought on record its version could not have been thrown overboard on the ground that other independent witnesses had not been examined, for it is open to the prosecution even not to examine a material witness under certain circumstances and in the instant case nothing has been pointed out by the accused persons to show that the witness was one such material witness without whose evidence the prosecution version was bound to collapse or flounder. Lastly, it is canvassed by Mr. Singh that when the accused persons formed an unlawful assembly, Section 149 gets squarely attracted and in that circumstance the appellant cannot be permitted to advance an argument that he is

not liable to be convicted under Section 302 IPC as he had not assaulted the deceased.

11. To appreciate the submissions raised at the bar, we think it relevant to deal with the power of the appellate court while exercising the appellate jurisdiction against the judgment of acquittal. This Court in ***Gamini Bala Koteswara Rao* v. *State of A.P.***[1] has held that it is well settled in law that it is open to the High Court to reappraise the evidence and conclusions drawn by the trial court but only in a case when the judgment of the trial court is stated to be perverse. The word 'perverse' in terms as understood in law has been defined to mean 'against the weight of evidence'. In ***Kallu* v. *State of M.P.***[2], it has been held that if the view taken by the trial court is a plausible view, the High Court will not be justified in reversing it merely because a different view is possible. Elaborating further it has been ruled that while deciding an appeal against acquittal, the power of the appellate court is no less than the power exercised while hearing appeals against conviction. In both types of

[1] (2009) 10 SCC 636
[2] (2006) 10 SCC 313

appeals, the power exists to review the entire evidence. However, one significant difference is that an order of acquittal will not be interfered with, by an appellate court, where the judgment of the trial court is based on evidence and the view taken is reasonable and plausible. It will not reverse the decision of the trial court merely because a different view is possible. The appellate court will also bear in mind that there is a presumption of innocence in favour of the accused and the accused is entitled to get the benefit of any doubt.

12. In ***Ramesh Babulal Doshi* v. *State of Gujarat***[3], this Court has taken the view that while considering the appeal against acquittal, the appellate court is first required to seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable and if the court answers the above question in the negative, the acquittal cannot be disturbed. In ***Ganpat* v. *State of Haryana***[4], after referring to earlier authorities certain principles have been culled out. They read as follows:-

[3] (1996) 9 SCC 225
[4] (2010) 12 SCC 59

"*15*. The following principles have to be kept in mind by the appellate court while dealing with appeals, particularly, against an order of acquittal:

(*i*) There is no limitation on the part of the appellate court to review the evidence upon which the order of acquittal is founded and to come to its own conclusion.

(*ii*) The appellate court can also review the trial court's conclusion with respect to both facts and law.

(*iii*) While dealing with the appeal preferred by the State, it is the duty of the appellate court to marshal the entire evidence on record and by giving cogent and adequate reasons may set aside the judgment of acquittal.

(*iv*) An order of acquittal is to be interfered with only when there are 'compelling and substantial reasons' for doing so. If the order is 'clearly unreasonable', it is a compelling reason for interference.

(*v*) When the trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of ballistic experts, etc. the appellate court is competent to reverse the decision of the trial court depending on the materials placed."

13. In ***State of Punjab* v. *Karnail Singh*[5],** the Court opined that the paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to reappreciate the evidence even where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not. The aforestated principles have been reiterated in ***Jugendra Singh v. State of Uttar Pradesh*[6]** and ***Basappa v. State of Karnataka*[7]**.

14. Keeping in view the aforesaid enunciation of the legal principles we have to scrutinize whether the appreciation of the evidence by the learned trial Judge was so unacceptable having not been properly marshalled and hence, it was the obligation of the High Court to reappreciate the evidence and record a conviction. Before we proceed to delve into the grounds of interference by

[5] (2003) 11 SCC 271
[6] (2012) 6 SCC 297
[7] (2014) 5 SCC 154

the High Court in a judgment of acquittal within the parameters indicated hereinabove, we think it appropriate to refer to the post mortem report of the deceased Siria @ Shriram. Dr. Arun Kumar Srivastava, PW-13, has conducted the autopsy on the dead body and in his report, Ex. P-32, he has recorded the following findings:-

> "Full thickness continuous patch of burnt area with blackening and most of the skin area over front of chest is in form of roasted patches of skin. Burn area over chest is bordered with red area of skin of 1 cm thickness. This burnt area extends from mentum, sub mental region and extending laterally to both sub mandibular region, going downwards the burnt area enlarges over front and sides of neck over suprasternal notch. Then burnt area laterally beyond lateral border of sternum measuring 29 cm. Maximum vertical length and broadest area is 14 cm. there are 3 lacerated wounds situated in this burnt area.
>
> 1. Lacerated wound – obliquely placed over left 4th intercostals space close to lateral border of sternum 3 cm x 1 cm x 1 cm depth.
> 2. Lacerated wound over sternum close to lateral border of sternum 1 cm x ½ cm x skin deep.
> 3. Lacerated wound medical to lacerated wound no. 2, ½ cm x ¼ cm over sternum. Skin deep.
>
> No foreign body found in these wounds.
>
> Roaster patch of burn mark over left hand with blackening 3 cm x 1.5 cm. Dorsally and distally

placed over metacarpal bone in relation to left index finger."

15. According to the evidence of the autopsy surgeon, the deceased died due to extensive haemorrhage, shock and lung compression and the injuries were caused by explosive substance. On a perusal of the testimony of PW-13 and the injuries sustained by the deceased, there can be no trace of doubt that the death was homicidal in nature and was caused by explosive substance. It is manifest from the record that other witnesses had also suffered injuries in the occurrence. As is noticed, Ratta, PW-7, Rukmanibai, PW-14, Rambai, PW-15 and Heeralal, PW-16, who are related to the deceased are the eye witnesses and they have supported the prosecution version. All the witnesses have suffered injuries. Heeralal, PW-16 as per the treating physician, had suffered blast injury over dorsal aspect of right leg with blackening. He was advised for X-ray of right leg. Rukmanibai, PW-14, had sustained an incised wound over the left hand Anteriorly (Posterior). From the base of 5$^{th}$ metacarpal to head of 2$^{nd}$ metacarpal 30½ x ¼ x skin

deep muscles partially cut, abrasion over the back of left wrist ¼" x ¼", and abrasion over the left leg lower anterior 1/3" x ¼". As per the injury report, injury no. 1 was caused by sharp object and the other injuries were caused by hard and blunt object. Ratta, PW-7 had sustained abrasion over the left leg at tibial luburosity 1 ½" x 1". All the injuries had been caused by hard and blunt object. The other witnesses similarly had sustained injuries. The injuries on the body of the eye witnesses have been proven by PW-12 and supported by MLC reports.

16. Having noted the injuries suffered by the deceased and the witnesses, it is to be examined what has been deposed by the prosecution witnesses that have been given credence to by the High Court disagreeing with the view expressed by the learned trial Judge. As has been stated earlier, eye witnesses are Ratta, PW-7, Rukmanibai, PW-14, Rambai, PW-15 and Heeralal, PW-16. As per the evidence of Ratta, PW-7, the accused persons, namely, Jodhan, Ramswaroop, Bherosingh @ Bhinua, Babbu @ Babulal, Natthu, Mangal Singh and Kanchhedi came near

his house and abused in filthy language. The deceased, Siria, came and objected about the abuses being hurled by Mangal Singh who immediately threw a hand made bomb over the chest of Siria who sustained injuries. Jodhan threw a handmade bomb on Heeralal, PW-16, and the other accused persons assaulted the injured persons. As per the prosecution version, the villagers came on the spot and caught hold of Mangal Singh and Babulal and confined them in Siria's house. Ratta lodged an FIR, Exhibit P-24, and brought injured Siria, Heeralal and Rukmanibai and others to the hospital. Siria @ Shriram was declared brought dead by the Doctor and as has been stated earlier, other injured persons availed treatment.

17. As per the evidence brought on record, the incident had taken place near the house of the deceased and the witnesses. The criticism that has been advanced against these witnesses is to the effect they are interested witnesses and hence, their version does not deserve acceptance is sans merit, for they are the witnesses who were there at the spot and sustained injuries. They are close relatives and they have stood firm despite incisive

cross-examination. There can be no cavil over the proposition that when the witnesses are related and interested, their testimony should be closely scrutinized, but as we find, nothing has been elicited in the cross-examination to discredit their version. On a studied scrutiny of their evidence, it can be said with certitude that they have lent support to each other's version in all material particulars. There are some minor contradictions and omissions which have been emphasised by the learned trial Judge. The High Court has treated the said discrepancies and the minor contradictions as natural. That apart, their evidence also find support from the medical evidence and the initial allegations made in the FIR. The High Court has opined that there is no inconsistency in their version and on a perusal of the said evidence, we find there is absolutely no inconsistency which will compel a court of law to discard their version. The learned trial Judge, as is evincible, has attached immense emphasis to such omissions and contradictions which, according to the High Court, with which we concur, are absolutely insignificant and trivial. It is also perceived

that the learned trial Judge has given notable stress on the fact that the accused persons and the informant were in inimical terms due to non-voting by the informant's party in their favour. In our considered opinion, in the present case, the same cannot be a ground for not placing reliance on the eye witnesses who have supported the prosecution version.

18. It is emphatically submitted by Mr. Sharma, learned counsel for the appellant that when the witnesses are interested witnesses and other independent witnesses had turned hostile, the High Court should not have relied on such witnesses and overturned the judgment of acquittal by the learned trial Judge. First, we shall deal with the credibility of related witnesses. In ***Dalip Singh v. State of Punjab***[8], it has been observed thus:-

> "We are unable to agree with the learned Judges of the High Court that the testimony of the two eyewitnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many

[8] AIR 1953 SC 364

> criminal cases and one which another Bench of this Court endeavoured to dispel in *Rameshwar* v. *State of Rajasthan*[9]."

In the said case, it has also been further observed:-

> "A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close [relative] would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth."

19. In ***Hari Obula Reddy v. State of A.P.***[10]**,** the Court has ruled that evidence of interested witnesses *per se* cannot be said to be unreliable evidence. Partisanship by itself is not a valid ground for discrediting or discarding sole testimony. We may fruitfully reproduced a passage from the said authority:-

> "An invariable rule that interested evidence can never form the basis of conviction unless corroborated to a material extent in material particulars by independent evidence. All that is necessary is that the evidence of interested

[9] AIR 1952 SC54
[10] (1981) 3 SCC 675

> witnesses should be subjected to careful scrutiny and accepted with caution. If on such scrutiny, the interested testimony is found to be intrinsically reliable or inherently probable, it may, by itself, be sufficient, in the circumstances of the particular case, to base a conviction thereon."

20. The principles that have been stated in number of decisions are to the effect that evidence of an interested witness can be relied upon if it is found to be trustworthy and credible. Needless to say, a testimony, if after careful scrutiny is found as unreliable and improbable or suspicious it ought to be rejected. That apart, when a witness has a motive or makes false implication, the Court before relying upon his testimony should seek corroboration in regard to material particulars. In the instant case, the witnesses who have deposed against the accused persons are close relatives and had suffered injuries in the occurrence. Their presence at the scene of occurrence cannot be doubted, their version is consistent and nothing has been elicited in the cross-examination to shake their testimony. There are some minor or trivial discrepancies, but they really do not create a dent in their evidence warranting to treat the same as improbable or

untrustworthy. In this context, it is requisite to quote the observations made by the Court in ***State of Punjab v. Jagir Singh***[11]:-

> "A criminal trial is not like a fairy tale wherein one is free to give flight to one's imagination and fantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the crime with which he is charged. Crime is an event in real life and is the product of interplay of different human emotions. In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts. Although the benefit of every reasonable doubt should be given to the accused, the courts should not at the same time reject evidence which is ex facie trustworthy on grounds which are fanciful or in the nature of conjectures."

21. Tested on the backdrop of aforesaid enunciation of law, we are unable to accept the submission of the learned counsel for the appellant that the High Court has fallen into error by placing reliance on the evidence of the said prosecution witnesses. The submission that when other witnesses have turned hostile, the version of these witnesses also should have been discredited does not

[11] (1974) 3 SCC 277

commend acceptance, for there is no rule of evidence that the testimony of the interested witnesses is to be rejected solely because other independent witnesses who have been cited by the prosecution have turned hostile. Additionally, we may note with profit that these witnesses had sustained injuries and their evidence as we find is cogent and reliable. A testimony of an injured witness stands on a higher pedestal than other witnesses. In ***Abdul Sayeed v. State of M.P.***[12], it has been observed that the question of weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. It has been also reiterated that convincing evidence is required to discredit an injured witness. Be it stated, the opinion

[12] (2010) 10 SCC 259

was expressed by placing reliance upon ***Ramlagan Singh*** **v.** ***State of Bihar***[13]**,** ***Malkhan Singh*** **v.** ***State of U.P.***[14]**,** ***Vishnu*** **v.** ***State of Rajasthan***[15] **and** ***Balraje*** **v.** ***State of Maharashtra***[16] **and** ***Jarnail Singh*** **v.** ***State of Punjab***[17].

22. From the aforesaid summarization of the legal principles, it is beyond doubt that the testimony of the injured witness has its own significance and it has to be placed reliance upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and inconsistencies. As has been stated, the injured witness has been conferred special status in law and the injury sustained by him is an inbuilt-guarantee of his presence at the place of occurrence. Thus perceived, we really do not find any substance in the submission of the learned counsel for the appellant that the evidence of the injured witnesses have been appositely discarded being treated as untrustworthy by the learned trial Judge.

[13] (1973) 3 SCC 881
[14] (1975) 3 SCC 311
[15] (2009) 10 SCC 477
[16] (2010) 6 SCC 673
[17] (2009) 9 SCC 719

23. One of the contentions that has been highlighted by Mr. Sharma is that there was no justification on the part of the High Court to convict the present appellant in aid of Section 149 IPC, for he, as per the evidence of the prosecution, had not done any overt act to cause any injury to the deceased. The aforesaid submission assumes the proposition that even if the factum of unlawful assembly is proven by the prosecution, then also the Court is required to address the individual overt acts of each of the accused. In ***Baladin v. State of U.P.***[18], it was held that mere presence in an assembly does not make such a person member of an unlawful assembly unless it is shown that he had done something or omitted to do something which would make him a member of an unlawful assembly. The observations recorded by the three-Judge Bench in the said case was explained by a four-Judge Bench in ***Masalti v. State of U.P***.[19] wherein the larger Bench distinguished the observations made in ***Baladin*** (supra) and opined that the said observations must be read in the context of special facts of the case.

[18] AIR 1956 SC 181
[19] AIR 1965 SC 202

The dictum that has been laid down ***Masalti*** (supra) is to the following effect:

> "....it would not be correct to say that before a person is held to be a member of an unlawful assembly, it must be shown that he had committed some illegal overt act or had been guilty of some illegal omission in pursuance of the common object of the assembly. In fact, Section 149 makes it clear that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence; and that emphatically brings out the principle that the punishment prescribed by Section 149 is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly."

24. In ***Bhargavan v. State of Kerala***[20], it has been held:-

> "... It cannot be laid down as a general proposition of law that unless an overt act is proved against a person, who is alleged to be a member of an unlawful assembly, it cannot be said that he is a member of an assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of Section 141 IPC."

[20] (2004) 12 SCC 414

25. In this context, we may usefully reproduce a passage from ***Ramachandran v. State of Kerala***[21]:

> "Thus, this Court has been very cautious in a catena of judgments that where general allegations are made against a large number of persons the court would categorically scrutinise the evidence and hesitate to convict the large number of persons if the evidence available on record is vague. It is obligatory on the part of the court to examine that if the offence committed is not in direct prosecution of the common object, it yet may fall under the second part of Section 149 IPC, if the offence was such as the members knew was likely to be committed. Further inference has to be drawn as to what was the number of persons; how many of them were merely passive witnesses; what were their arms and weapons. The number and nature of injuries is also relevant to be considered. 'Common object' may also be developed at the time of incident."

26. On the bedrock of the aforesaid pronouncement of law, the submission canvassed by Mr. Sharma does not merit any consideration inasmuch as the prosecution has been able to establish not only the appellant's presence but also his active participation as a member of the unlawful assembly. He might not have thrown the bomb at the deceased, but thereby he does not cease to be a member of the unlawful assembly as understood within

[21] (2011) 9 SCC 257

the ambit of Section 149 IPC and there is ample evidence on record to safely conclude that all the accused persons who have been convicted by the High Court had formed an unlawful assembly and there was common object to assault the deceased who succumbed to the injuries inflicted on him. Thus analysed, the submission enters into the realm of total insignificance.

27. At this juncture, we are obliged to deal with the plea of the accused that Babulal was confined in the house of the deceased and that was the genesis of occurrence. On a scrutiny of the evidence it is found that accused Mangal Singh and Babulal were caught on the spot and confined to Siria's house, wherefrom the police apprehended them and got them admitted in hospital. Babulal died in the hospital. The High Court on scrutiny of the evidence has found that there is ample evidence on record to prove that the accused persons were aggressors and it is they who arrived at the place of occurrence and Mangal hurled abuses and threw the handmade bomb on the chest of the deceased, Shriram. Thereafter, the evidence shows that Mangal and Babulal got injuries. The learned trial Judge

has been guided that there was a free fight. The said finding is demonstrably erroneous inasmuch as the prosecution has clearly established the fact that the accused persons were the aggressors. After the episode of bombing took place there was pelting of stones and confinement. It is the accused persons who had come armed with lethal weapons and it is Mangal who threw the bomb on the chest of the deceased only because he had objected to the hurling of abuses. The learned trial Judge, after taking note of the evidence that Mangal and Babulal were confined in a room, had opined that there was a free fight. The High Court on reappreciation and analysis of the evidence has found that the accused persons were the aggressors. That apart, as the entire story of prosecution would show, the accused persons armed with lethal weapons had gone to the house of deceased and hurled abuses in filthy language and on being objected to one of them, namely, Mangal Singh with pre-determined mind threw the bomb on the chest of the deceased. Regard being had to the aforesaid evidence, we are inclined to agree with the view expressed by the High Court that it is

a case where the appellant deserved to be convicted under Section 302 in aid of Section 149 of the IPC.

28. Another limb of submission which has been propounded by Mr. Sharma is that the prosecution has deliberately not examined other independent material witnesses who were present at the spot and, therefore, the whole case of prosecution becomes unacceptable. In this context, it would be profitable to refer to what has been held in ***State of A.P. v. Gian Chand***[22]. In the said case, the three-Judge Bench has opined that:-

> "14. ... Non-examination of a material witness is again not a mathematical formula for discarding the weight of the testimony available on record howsoever natural, trustworthy and convincing it may be. The charge of withholding a material witness from the court levelled against the prosecution should be examined in the background of the facts and circumstances of each case so as to find whether the witnesses are available for being examined in the court and were yet withheld by the prosecution."

It has been further ruled therein that the Court is required to first consider and assess the credibility of the evidence available on record and if the Court finds that the

[22] (2001) 6 SCC 71

evidence adduced is worthy of credence, the testimony has to be accepted and acted upon though there may be other witnesses available, who could also have been examined but not examined. In ***Takhaji Hiraji v. Thakore Kubersing Chamansingh***[23], it has been opined that if the material witness, who unfolds the genesis of the incident or an essential part of the prosecution case, not convincingly brought to the fore otherwise, or where there is a gap or infirmity in the prosecution case which could have been supplied or made good by examining a witness who though available is not examined, the prosecution case can be termed as suffering from a deficiency and withholding of such a material witness would oblige the Court to draw an adverse inference against the prosecution, but if there is an overwhelming evidence available, and which can be placed reliance upon, non-examination of such other witnesses may not be material. Similarly, in ***Dahari v. State of U.P.***[24], while dwelling upon the issue of non-examination of material witnesses, it has been succinctly expressed that when the witness is

[23] (2001) 6 SCC 145
[24] (2012) 10 SCC 256

not the only competent witness, who would have been fully capable of explaining the factual score correctly and the prosecution stood fully corroborated by the medical evidence and the testimony of other reliable witnesses, it would be inappropriate to draw an adverse inference against the prosecution.

29. In the instant case, the witnesses, as the High Court has found and we have no reason to differ, are reliable and have stood embedded in their version and remained unshaken. They have vividly deposed about the genesis of occurrence, the participation and involvement of the accused persons in the crime and the injuries inflicted on the deceased, and on each of them. Therefore, non-examination of any other witnesses who might have been available on the scene of occurrence, would not make the case of the prosecution unacceptable. On that score, the case of the prosecution cannot be thrown overboard. Thus, we are constrained to reject the submission canvassed by Mr. Sharma, learned counsel for the appellant.

30. In the ultimate conclusion, we hold that laying emphasis on the minor discrepancies and omissions in the evidence of prosecution witnesses, who are natural witnesses to the occurrence and giving stress on irrelevant aspects and ultimately to record the acquittal, by no stretch of imagination, can be regarded as a plausible or possible view expressed by the learned trial Judge and, therefore, we are of the convinced opinion that the High Court is justified in reversing the judgment of acquittal to one of conviction.

31. Resultantly, the appeal, being devoid of any merit, has to pave the path of dismissal, and we so direct.

.....J.
(Dipak Misra)



....., J.
(N.V. Ramana)

New Delhi
April 08, 2015