Abdul Gani And Ors. vs State Of Madhya Pradesh on 3 March, 1952

Equivalent citations: AIR1954SC31, AIR 1954 SUPREME COURT 31

Bench: Chief Justice, Chandrasekhara Aiyar

JUDGMENT

Mahajan, J.

1. These two appeals under Article 134 of the Constitution have been preferred against the judgment of the High Court of Judicature at Nagpur, dated 5-2-1951, setting aside the acquittal of the appellants on charges of rioting and murder, and convicting them for the same.

2. The facts are these: One Wazir Ali was the Jambardar Malguzar of mauza Dhadi, a village in tehsil Arvi of district Wardha (Madhya Pradesh). His widow Wazdi Begum succeeded him after his death to that office. She died in 1947, and the malguzari of the village was inherited by her nine sons, viz. Hasan Ali (P. W. 22), Rashid Ahmad (P. W. 23), Asadali, Bashir Ahmad, Nazir Ahmad, Ashraf Ali, Hafiz Ali, Aman Ali and Shiraz Ahmad. The last three were murdered on 25-7-1949, two at the house where Hafiz Ali was residing and Aman Ali at his own house.

3. According to the prosecution they were murdered in the following circumstances. The villagers of Dhadi had a dislike for the malguzars, as some amount of grazing dues and rents were in arrear from them. The malguzars had not been able to meet the Government demand for land revenue and on 16-7-1949 the Sub-Divisional Magistrate, Arvi, ordered the sale of the malguzari rights of mauza Dhadi on account of this default on the part of the malguzars. On 34-7-1949 the station house officer, Ashti, one Dongar Singh, visited the village in connection with the investigation of a complaint filed by Hafiz Ali against a number of villagers for forcibly removing timber from a forest owned by the malguzars and converting the wood into charcoal. He arrested a number of persons including some of the accused. They were, however, released on bail on the 25th morning and accused Bhimrao Kadu stood surety for some of them.

The sale of the village ordered by the Sub-Divisional Magistrate had to take place after the rainy season. In order to avert this sale and meet the Government demand, Hafiz Ali, Aman Ali and Bashir Ahmad, held consultations and decided to make an effort to realise the arrears of rent and grazing dues from the villagers. Accordingly a demand for payment of these arrears was made by making a proclamation in the village by beat of drum on the morning of the 25th July. The demand for payment of arrears by a public proclamation excited the ire of the villagers who also held consultations between themselves and they decided to resist it. It is said that a meeting of the villagers took place in the morning at the house of Govinda Gaikwad accused 22), where it was

decided that the demand should be resisted and if necessary, the malguzars should be severely dealt with.

Hafiz Ali and Aman Ali, being apprised of this meeting, held consultations 'inter se' and met at the house of Bashir Ahmad for the purpose of devising means to meet the situation that had arisen. A report was written out to be sent to the police. Aman Ali along with Jilani, a servant of Hafiz Ali, was deputed to take the report personally to Ashti. Leaving Jilani and Shiraz Ahmad at Bashir Ahmad's house Aman Ali returned to his house to dress up and then proceed to the thana. Hafiz Ali also came back from Bashir Ahmad's house and on his way he found the accused assembled at the house of Abdul Gani (accused 6). Some members of the mob attacked him with sticks and struck him a blow. Hafiz Ali thereupon ran into his house, and shut the door. The mob surrounded the house, dug out the small door and removed it. Hafiz Ali was standing near the door. Bhimrao Kadu (accused 5) struck him a blow with, a spear and then all the accused entered the house, and beat Hafiz Ali with swords, spears, sticks and stones and wounded him grievously. They then left him in that condition and marched to Aman All's house and burst into it. They struck him down with swords, spears and lathis and killed him.

Shiraz Ahmad and Jilani on hearing the uproar and finding that the accused had left Hafiz Ali's house, arrived at his house and while they were there the crowd returned to Hafiz Ali's house after having finished Aman Ali. Hafiz Ali was assaulted afresh and was killed. A search was made for Shiraz Ahmad who had hidden himself on the loft. He was pulled down and was murdered.

The corpses of the two unfortunate men were dragged out of the house and were left lying, that of Hafiz Ali outside the door and that of Shiraz Ahmad near a well close by. The accused then turned their attention to Jilani, caught hold of him and marched him outside the house. He was tied to a wooden post and Sheshrao Patode (accused 19), it is said, then snatched a sword from the hand of Abdul Gani (accused 6) and cut his nose and the upper lip. The accused then broke open a box belonging to Hafiz Ali and carried away cash amounting to 600 in ten rupee notes and other papers. All this took place between 12-30 P.M. and 2 P.M. on the 25th July.

4. At 7-45 P.M. the same evening, the first information report regarding the murder of Aman Ali and the wounding of Hafiz Ali was recorded at the police station Ashti to the dictation of Ikrar Ullah, son-in-law of Hafiz Ali, who had managed to escape from the house of Hafiz Ali after the first attack had been made on him. Ashti is at a distance of six miles from Dhadi. He also informed Rashid Ahmad, another brother of Hafiz Ali, who resides at Ashti, of this incident. In pursuance of this report, Sub-inspector Dongar Singh and Circle inspector Kanetkar who was got from Arvi, proceeded to Ashti and started investigation. They reached the village at about 2 A.M. in the morning.

5. As a result of the investigation, the police put in four separate challans against the accused before Shri R.K. Pandey, Magistrate First Class, Wardha. Thirty two persons were charged for rioting with deadly weapons and for the murder of Hafiz Ali, Shiraz Ahmad and Aman Ali and some of the accused were also charged with the offence of dacoity and causing grievous hurt, which offences were triable with the aid of jury.

The Magistrate committed all these persons by one order dated 19-10-1949 to take their trial in the Court of session. He was of the opinion that the offences under the four challans were committed in the course of the same transaction and could be tried jointly.

6. The jury returned a verdict of not guilty regarding accused Sheshrao Patode of the charge under Section 326, I.P.C. and also of the charge under Sections 326/109 against accused Shankar Mahar, Govinda Gaikwad, Gondu Mussalman, Sampat Gawari and Gulab Lande. A unanimous verdict of not guilty was also given by the jury regarding accused Walayut, Pundalik Chore, Shamrao Wankhede, Maroti Gawande, Ramarao Wankhede, Dinya, Gond, Puniya Gond, Bhurya Gond, Sheshrao Patode, Bhimrao Gawande and Govinda Gaikwad on the charges under Section 395, I.P.C. These charges were in respect of the cutting of the nose of Jilani and of breaking open the box of Hafiz Ali and removing from it currency notes of the value of Rs. 600 and other papers. The learned Sessions Judge accepted the verdict of the jury and acquitted all the accused persons in respect of these charges.

7. In respect of the charges of rioting and murder, the learned Sessions Judge accepted the verdict of the majority of the assessors and found all the accused not guilty and acquitted all of them. In the concluding part of his judgment, the learned Judge observed as follows:

> "Out of the eleven eye-witnesses, five have gone back upon their statements made in the committing Court. They are Jilani, Mahadeo, Sitaram, Radhi and Hayatbi. I will particularly refer to Jilani and Hayatbi who could have no reason to go behind their statements, they being personally affected by the offences. Jilani had his nose cut by the assailants and Hayatbi lost her husband at their hands. They could not go behind their statements if they had made true Statements in the committing Court. Their statement that they made false statements in the committing Court at the instance of the relatives of the deceased and as pressure was brought to bear upon them by the police, therefore, does not seem to be improbable. Even if this was not correct, it is not at all safe to rely on the testimony of these witnesses at all, though law permits that if they are otherwise trustworthy they can be acted upon under Section 288, Cr. P. C."
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> "Shakir & Ikrar are not trustworthy & are proved to be perjurers. Ikrar went to the length of Warning the committing Court in order to justify his perjured statement. Shakir has made very inconsistent statements. From the evidence of the Circle Inspector, it is clear that Ikrar was taking active interest throughout the investigation. In the circumstances, it is not possible to rely on the testimony of these witnesses. Gulzarali (P.W.9) is a petty servant of the malguzars of Dhadi of whom three were murdered. Thus, his testimony cannot be said to be disinterested..... Hasan Ali is brother of the deceased and has given a very unnatural story. I do not believe for a moment that he was present and had seen the assault on Hafiz Ali as stated by him. The next witness is Ibrahim who was not examined by the police for 21 days after the incident. He has also been proved to be perjurer. The statement of Biyabi is also unconvincing and her statement in this Court is seriously impaired on account of the

> written and signed report taken from her during the investigation..... the investigation was not as impartial as one would expect it to be. The police officers seem to have acted at the instance of Ikrar right from the very beginning. They failed to take down material statements and effect the seizures in proper manner. Most of the seizures were unauthorised and illegal. In this state of affairs it is not possible to rely on the prosecution case laid in this Court. 'It is no doubt true that it is probable that some of the accused might have participated in the offence but it is impossible to find out from the state of the prosecution evidence who they were, with any amount of certainty. As I have already said, it is to be regretted that some of the guilty might go unpunished for such brutal and broad day-light murders but in the state of the prosecution evidence, it would be a pure gamble to convict any of the accused'."

The State Government preferred an appeal against the acquittal of these persons to the High Court of Judicature at Nagpur. The High Court reached the conclusion that the good evidence in the case was given by five persons whose presence at the spot could not be gainsaid. These witnesses were Biyabi (P.W.1), Jilani (P.W.3), and Ikrar Ullah (P.W. 25) for the murders of Hafiz Ali & Shiraz Ahmad, and Mt. Hayatbi (P.W.6) and Radhi (P.W. 4) for the murder of Aman Ali. Reliance was placed on the statements of Hayatbi and Radhi made in the committal Court and also on the statement of Jilani made in that Court in preference to their subsequent statements in the Court of Session, which were considered as suborned and influenced by the accused. The High Court agreed with the view of the learned Sessions Judge that the evidence of the other witnesses was not reliable.

As regards the offence of dacoity, however, the High Court took the view that there was no misdirection to the jury and the jury were, therefore, entitled to believe or disbelieve Biyabi and it could not be held that in disbelieving Mt. Biyabi the jury had acted perversely. The verdict therefore of not guilty on the charge of dacoity against the persons concerned was maintained. As regards the cutting of the nose of Jilani, the High Court also maintained the verdict of the jury and found that it could not be held that the jury were acting perversely in not relying upon the testimony of Jilani about the identity of the persons concerned.

8. As regards the offence of rioting with deadly weapons and murder, the acquittals of the appellants in the two appeals were set aside and they were convicted as follows:

Name	Sections of the I.P.C. under which convicted.
1. Walayat.	302-149 (2 counts) and 148.
2. Pundalik Gulab Chore	302-149 (2 ") " 148.
3. Bhimrao Kadu	302-149 (2 ") " 148.
4. Abdul Gani	302-149 (3 ") " 148.
5. Pundalik Bajirao	302-149 (2 ") " 147.
6. Ramrao Wankhede	302-149 (3 ") " 148.
7. Dinya Gond	302-149 (2 ") " 148.
8. Shankar Mahar	302-149 (3 ") " 148.
9. Sheshrao Patode	302-149 (3 ") " 148.
10. Bhimrao Gawande	302-149 (3 ") " 148.
11. Govinda Gaikwad	302 149 (3 ") " 148.

12. Gendu	802-149 (3 ") "	147.
13. Gulab Chore	302149 (2 ") "	148.
14. Bahman	302 149 (2 ") "	147.
15. Sampat Manya Gawari	302-149 (2 ") "	147.
16. Baburao Chore	302-149 (2 ") "	147.
17. Gulab Lande	302-149 (2 ") "	147.

The accused convicted under Section 148, I.P.C. were sentenced to undergo rigorous imprisonment for two years and those convicted under Section 147 were sentenced to rigorous imprisonment for one year. Under Sections 302/149 Bhimrao Kadu, Abdul Gani and Sheshrao Patode were sentenced to death and the remaining appellants were sentenced to transportation for life on each of the counts for which they were convicted. It was ordered that the sentence of imprisonment awarded under Sections 147 and 148 would run concurrently with the life sentence. The acquittal of the remaining persons challenged by the police was maintained and they were ordered to be released.

9. The learned counsel for the appellants in the two cases argued with much force that there were no substantial and compelling reasons for converting the acquittal of the appellants into conviction on appeal. It was contended that the presumption of inconcence of the accused had been further reinforced by their acquittal by the trial Court, who had the advantage of seeing the witnesses and hearing their evidence and that the High Court was in error in interfering with that decision on a mere balance of probabilities and conjectures.

It was said that the whole prosecution story was a faked one, that Ikrar when he made the first information report at 7-45 P.M. on 25th, did so in consultation with some of the brothers of the deceased and tried to implicate all the persons with whom they had enmity; that the police recorded a very brief report and did not examine Ikrar fully about the incidents of which he said he was an eye-witness; that when the police party started from Ashti to Dhadi soon after, it met two kotwars (village watchmen) on their way to the police station to make a report; that the sub-inspector and the circle inspector failed in their duty to take down the report of these independent persons which would have given the police a true version about the three murders; that it also met two of the accused persons Walyat and Chotu who had injuries on their person and who were on their way to the police station to make a report but it failed to record their report as well; that on reaching Dhadi for about five to six hours, the police did not take steps to record the statements of any of the eye-witnesses. In view of these acts of omission on the part of the police, it was suggested that a case was cooked up against the accused who were inimical to Ikrar and his people in consultation with him and the brothers of the deceased persons and that after due deliberations, at 8 A.M. after the preparation of the inquest reports and despatch of the dead bodies for postmortem examination and of the injured persons to the hospital, Ikrar wrote out a report (Ex. P-1), got it signed by Mt. Biyabi and handed it over to the police, including in it the names of all the accused persons on whom he wanted to take his revenge and that evidence was later prepared to suit that story.

It was further urged that from the statements of Baiyabi, Ikrar and Jilani, it was clear that she (Biyabi) was not present in the house when her husband was murdered, but was either at Ashti or at Asadali's house and was brought by the police to Hafiz Ali's house on the morning of the 26th and

was thus not an eye-witness in the case; that even if she was there, in view of the material discrepancies in her different statements, she was an untrustworthy witness and it was not safe to convict the appellants on her evidence. As regards Ikrar, it was said that he was a liar and no reliance could be placed on his statement and that as a matter of fact, he was not in the house at all and never witnessed the occurrence, that had he left the house of Hafiz Ali as deposed by him, he should have reached the police station at 4 O' clock at the latest and that the delay in making the report was due to the circumstance that he was in consultation with two of the brothers of Hafiz Ali, viz., Bashir and Rashid, so that a report be made to the police involving those who were inimically inclined to the malguzars, that in all likelihood the murders were committed by some of the servants of the malguzars who were not on good terms with them. Ikrar's evidence was criticised on a number of grounds, that the statement made by him in the committing Court was in material points different from that made in the Sessions Court, that he changed his statements to suit the prosecution and threw the blame for all his omissions on the police or the Magistrate. As regards Jilani, whose nose was cut, it was said that he was wholly unreliable. He named Sheshrao Patode as the person who had cut his nose, but in the Sessions Court he said that though one Sheshrao had cut his nose, Sheshrao Patode was not that man. A person who could change like this and was prepared or ready to tell a lie on such a vital matter, it was said, should not have been relied upon on any point.

As regards Hayatbi and Radhi, It was urged that these witnesses wholly retracted the statements they had made in the Court of the committing Magistrate & that there was no satisfactory reason why preference should be given to the statement made by them in the Court of the committing Magistrate over the statement made in the Court of Session. Lastly, it was argued that an inference should have to be drawn against the prosecution because it failed to examine two-very important witnesses in the case, viz., Bashir, brother of the deceased persons and Subhan, son of Hafiz Ali, a boy aged 9, and that the defence was considerably prejudiced by the circumstances that it was not given copies of the 'roznamcha' entries maintained by the police on the lame excuse that the 'roznamcha had been lost.

10. After a careful consideration of the contentions raised by the learned counsel, we are of the opinion that though the prosecution witnesses accepted by the High Court have not told the whole truth and though from their evidence it is not possible to get an absolutely true picture of the events, and of the tragic drama that was staged by the villagers on the afternoon of 25-7-1949 and which resulted in the murder of three persons and the cutting of the nose of a. fourth, yet it is not possible to accept the contention that the prosecution case is a complete fabrication and that the murders of the three persons and the cutting of the nose of fourth did not result from a riot that occurred that afternoon in which some at least of the accused participated.

It is true that in the present state of the record, the story given by the eye-witnesses has to be carefully scrutinized and unless it can be said with reasonable certainty that a certain person took part in the riot the benefit of doubt has to be given to him. The learned Sessions Judge was undoubtedly in error when he said that it was impossible to find out from the state of the prosecution evidence with any amount of certainty who among the accused persons participated in the offence and that it would be a pure gamble to convict any of the accused. He made no effort to

disengage the truth from the falsehood and to sift the grain from the chaff but took an easy course and after holding the evidence discrepant held that the whole case was untrue. We are of the opinion that in the case of some of the accused persons, the material on the record is sufficiently convincing and there were no sufficient or satisfactory reasons for their acquittal, while in the case of some others it seems, to us that the High Court erroneously converted the acquittals into convictions. Before considering the individual case of the appellants it is necessary to examine the merits of some of the points raised for the appellants and referred to above.

11. The contention that Mt. Biyabi was not present in the house of Hafiz Ali on the day of the occurrence cannot bear examination. In the natural course of events it has to be presumed that she was living with her husband unless it is found that she had gone out. All the prosecution witnesses unanimously stated that she was there. No evidence was led to show that she was residing at Ashti or was living at Asadali's house, Vague suggestions were no doubt made to her in the cross-examination that she came with the police party or that she was at Asadali's house, but she emphatically repudiated those suggestions. In support of his contention the learned counsel drew our attention to the following evidence. P. W. 14, Biyabi, in her deposition said:

> "Tukya Gawari had also hit my husband over the mouth with an axe at the time when he was being assaulted by the accused as a result of which his teeth had fallen down and uprooted."

The doctor, P. W. 23, stated:

> "I did not find any injury indicating that the teeth had freshly fallen."

On the strength of these statements the learned counsel argued that if Biyabi was there, she could not, have said that the teeth had fallen down and were uprooted, which was not a fact. It seems to us that this argument is the result of ah incorrect translation of the statement of the witness, it was nobody's case that the teeth of Hafiz Ali had fallen down and were uprooted. All that was mentioned in the inquest report was that the teeth became visible as the lip had been cut. Be that as it may, this statement does not in any way prove that Biyabi was not an eye-witness to the occurrence. Her description of the injury may not be very accurate. Again in para 19 of her statement Biyabi said as follows: "The Sari Article A-12 belongs to me and I had wrapped this sari on my husband ..... One burkha and 2 dupattas belonging to me were also soiled with blood ..... Some of the clothes of my child also were soiled with blood but they are not in Court." In para 56 she said as follows: "The two dupattas Arts. C-38 and C-39 were on the rope in the house and they were soiled with the blood of Shiraz during the marpit..... Burkha was also hanging on the same string The clothes that I was putting on were also besmeared with blood. I had shown my clothes to the police but they were not seized by the police. I had also shown blood marks on my own clothes.

> "The Sub-Inspector Dondgar Sing in para. 74 of his deposition said as follows: "I did not seize any wearing apparel put on by Biyabi at the time of the incident. If those clothes were bloodstained, I would have seized those clothes also. I would have seized the clothes of her son Subhan also if they were bloodstained."

It was contended that if Biyabi was present at the time of the incident it was unlikely that her clothes would not have been bloodstained and that her assertion that her and her son's clothes were bloodstained was untrue in view of the statement of the Sub-inspector and that in this situation the only correct inference to draw was that the clothes were not bloodstained and this was so because she was not at the house at the time of the occurrence. We do not think that this inference is a legitimate one. There is no reason not to accept the statement of the Sub-Inspector on the point that neither the son's nor the woman's clothes were bloodstained. She was at some distance from the place where her husband was given spear blows and from where Shiraz Ahmad was murdered anti there would be nothing strange if there were no' bloodstains on her clothes or on the clothes of her son. It seems probable that in order to meet the defence suggestion that she was not there she somewhat exaggerated her statement and in order to repel that suggestion she asserted that her clothes and her son's clothes were also bloodstained. The next point relied on to show that she was not present at the occurrence is by no means a weighty one. In para 69 she deposed as follows:

> "The spear blow given by Bhimrao Kadu struck Hafiz Ali on the stomach. But I cannot say on what part of his stomach the blow fell. I had seen the blow falling on the stomach. The blow did not fall on the chest, I can distinguish between the stomach and the chest. I had not stated before the police that the blow given by Bhimrao Kadu fell on the chest. I had not stated that Bhimrao Kadu speared Hafiz Ali on the chest. I had not stated that the spear blow given by Bhimrao Kadu hit my husband on the chest."

Before the committing Magistrate and in her statement to the police she had said that the spear blow given by Bhimrao Kadu struck Hafiz Ali on the chest. The learned counsel placed considerable reliance on this discrepancy and urged that if Biyabi was there, how could she possibly make a statement to the effect that the blow fell on the chest, when as a matter of the fact there was no such blow on the chest and he contended that she changed her statement before the Sessions Judge to make it in accord with the doctor's statement. It seems to us that this criticism has not much force because even in the inquest report the police described a wound on the chest and not on the stomach. The spear blow was on the upper part of the abdomen and quite near the chest and both the lady and the police when they examined the body at the time of the inquest considered this blow as having been struck on a part of the chest, while the doctor in the post-mortem accurately described it as an injury on the abdomen. Prom a discrepancy of this nature it is difficult to draw the conclusion that this error was made by her because she was absent at the time of the occurrence.

12. As regards the omission on the part of the prosecution to examine Subhan and Bashir, this is not of a very serious character. The observations of Lord Porter in -- 'Malak Khan v. Emperor', , furnish a good answer on the point. The learned Lord observed as follows:

> "It is no doubt very important that, as a general rule, all Crown witnesses should be called to testify at the hearing of a prosecution, but important as it is, there is no obligation compelling counsel for the prosecution to call all witnesses who speak to facts which the Crown desire to prove. Ultimately it is a matter for the discretion of counsel for the prosecution and though a Court ought, and no doubt will, take into

> consideration the absence of witnesses whose testimony would be expected, it must adjudge the evidence as a whole and arrive at its conclusion accordingly taking into consideration the persuasiveness of the testimony given in the light of such criticism as may be leveled at the absence of possible witnesses."

The evidence in the case has been examined in the light of the absence of the two persons mentioned above. Subhan, a boy of nine, could hardly have been a valuable witness in this case, and Bashir was not an eye-witness to the occurrence but was only a witness to some of the events that took place antecedent to the riot. The production of these two witnesses could not have materially helped the defence or thrown much light on the actual happenings and the murders.

13. It was then urged that the first information report was a sketchy document and was Intentionally kept in this state in order to leave enough scope for fabrication and that no reliance should have been placed upon it. So far as we have been able to see, the first information report has not been used as substantive evidence in the case at all by the High Court but has been used only to corroborate the statements of the eyewitnesses. It is not possible to accept the suggestion that because this report was not as full as it could have been, it should be ignored altogether. There is no warrant for doing so.

Again the suggestion that Biyabi was tutored between 2 A.M. and 8 A.M. on 26th morning and that Ikrar wrote a report for her which she blindly signed cannot be accepted. We have very carefully read the statement of Biyabi and we have no hesitation in saying that in spite of the various contradictions and discrepancies in her statement, substantially her narration of the essential events of the 25th is a true one and it would be quite safe to base a conviction on it at least as regards the accused to whom she has ascribed an important part & in respect of whom she has neither contradicted her statement nor Improved upon it in any manner whatsoever, especially where independent corroboration can be found for her statements.

The loss of the 'roznamcha' also, in our opinion, has not materially affected the result of the case because in respect of the statements of the eye-witnesses the police diary was supplied to the defence and was used by them for the purpose of contradicting the prosecution evidence.

14. As regards the evidence of Ikrar, the criticism of the learned counsel to a large extent is justified and reliance on it should only have been made to the extent it was possible to say with any amount of certainty that he has made a true statement. As regards Jilani, our view is that the High Court was not justified in. placing any reliance on his statement which in certain vital particulars is untrue. We would therefore ignore his evidence altogether.

15. As regards Hayatbi and Radhi they completely altered their statements in the Sessions Court and it would not be prudent to convert the acquittals into convictions merely on the basis of their statements made in the Court of the committing Magistrate without more. We now proceed to examine the case of the individual appellants.

16-34. (His Lordship then examined the evidence against individual appellants and concluded as follows:)

35. The result is that this appeal is allowed as regards the following persons and they are acquitted:-- Pundalik Bajirao Mahar (accused 11), Gendu (accused 23), Gulab Chore (accused 24), Sampat Manya Gawari (accused 29), Baburao Chore (accused 30) and Gulab Lande (accused 32). As regards the rest the appeal fails and is dismissed.