State Of Rajasthan Th.Secy. Home Dept vs Abdul Mannan on 7 July, 2011

Equivalent citations: AIR 2011 SUPREME COURT 3013, 2011 AIR SCW 4551, AIR 2011 SC (CRIMINAL) 1713, 2010 CLC 1114, 2011 CRILR(SC MAH GUJ) 683, 2011 (3) SCC(CRI) 341, 2011 (7) SCALE 583, (2012) 1 CRIMES 32, (2011) 2 CRILR(RAJ) 683, (2011) 3 ALLCRIR 3266, (2011) 4 CHANDCRIC 5, 2011 CRILR(SC&MP) 683, 2011 (8) SCC 65, (2011) 7 SCALE 583, (2011) 50 OCR 40, (2011) 4 MAD LJ(CRI) 254, (2010) 96 ALLINDCAS 811 (CAL), (2010) 3 CALLT 251, (2011) 3 DLT(CRL) 237, (2011) 3 RECCRIR 663, (2011) 3 CURCRIR 148

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Bench: Swatanter Kumar, B.S. Chauhan

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 29 of 2008

STATE OF RAJASTHAN ... Appellant

TH. SECY. HOME DEPT.

Versus

ABDUL MANNAN ... Respondent

WITH

CRIMINAL APPEAL NO. 30 OF 2008

STATE OF RAJASTHAN ... Appellant

Versus

ABDUL ZABBAR & ANR. ... Respondents

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J U D G M E N T

Swatanter Kumar J.

These appeals are directed against the judgment of the High Court of Rajasthan, Bench at Jaipur dated 15th March, 2005 in a case of communal violence. The trial court vide its judgment dated 7th September, 1999 returned a finding that charge against three accused namely Abdul Mannan, Afzal and Abdul Zabbar under Sections 302/149, 148, 324/149 and 449 of the Indian Penal Code (for short `IPC') was fully established beyond reasonable doubt and sentenced them as follows:

> a For committing an offence under Section 302/149 IPC, all three accused were awarded rigorous imprisonment for life along with fine of Rs.5,000/- each and in default of payment of fine to suffer six months' simple imprisonment.
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> b Under Section 148 IPC, all the three accused were awarded one year's rigorous imprisonment. c Under Section 324/149 IPC, all the accused were awarded one year's rigorous imprisonment each and d Lastly, under Section 449 IPC, they were awarded three years' of rigorous imprisonment each along with fine of Rs.1,000/- each, in default of payment of fine, to undergo simple imprisonment for three months. Aggrieved by the judgment of the trial court, all the three accused preferred an appeal before the High Court, raising various issues in relation to the appreciation of evidence, false implications, contradiction in statements of witnesses and that no evidence had been led against them. On these premises, they prayed for setting aside of the judgment of the trial court and claimed acquittal. The High Court vide its judgment dated 15th March, 2005, acquitted all the accused and passed the following order:
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> "9. That takes us to the evidence of the eye witnesses examined at the trial. Coming to the testimony of Mahesh (PW-
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> 4) we notice that in his examination in chief he deposed that a mob of around 70 persons of muslim (sic) attacked the house of Govind Narayan, but he could identify only Mehboob, Hanif and Zabbar.

He however, could not identify Afzal and Mannan. In his cross-examination Mahesh stated that he did not narrate the incident to anybody for 5-7 days. He did not go to jail or other place for the purpose of identification of accused Kanhaiya Lal (PW5) deposed that mob of 60-70 persons belonging to Muslim community entered the house of Govind Narayan. He could identify Afzal, Kadir, Islam, Bada Bhaiya, two brother of Noor Tractorwala, Zabbar Tractorwala, Mannan, Hanif and Mehboob. In the cross examination he however stated that he did not narrat the names of these persons to police. Satya Narayan (PW-7) in his deposition stated that a mob of 60 persons attacked the house. Afzal, Motal, Lakhara, Hanif, Mehboob, Zabbar Ahmad Tractorwala were the members of the mob. He could not say as to who inflicted the injury on his person. This witness was declared hostile by the prosecution.

He could not identify Abdul Mannan in the court. Having closely scrutinized the evidence of Mahes, Kanhaiya Lal and Satya Narayan we are of the opinion that element of consistency is missing from their testimony. A through and scrupulous examination of the facts and circumstances of the case leads to an irresistible and inexplicable conclusion that the prosecution has not established the charge leveled against all the three accused by producing cogent, reliable and trustworthy evidence. Testimony of Mahesh (PW-4), Kanhaiya Lal (PW5) and Satya Narayan (PW7) is ambulatory and vacillating and it is not safe to reply upon. Variations, infirmities, additions, and embellishments in the evidence of these witnesses are of such nature that could undermine the substratum of the prosecution case. The prosecution could only able to establish that an unruly mob of Muslims attacked the house of deceased but could not prove beyond reasonable doubt that the three appellants were the members of unruly mob and they inflicted injuries. On examination of testimony of these three witnesses Mahesh (PW4), Kanhaiya Lal (PW5) and Satya Narayan (PW-7) from the point of view of trustworthiness we find it untruthful. Learned trial judge in our opinion did not properly appreciate the prosecution the evidence and committed illegality in convicting and sentencing the appellants.

10. For these reasons we allow the instant appeals and set aside the judgment dated September 7, 1999 of the learned Special Judge Shri G.C. Sharma, Communal Riots and Man Singh Murder Case, Jaipur in Sessions Case No.1/1997. We acquit the appellants Abdul Zabbar, Afzal and Abdul Mannan of the charges under Sections 148, 302/149, 324/149 and 449 IPC. The appellants Abdul is on bail, he need not surrender and his bail bonds stand discharged. The appellants Abdul Zabbar and Afzal, who are in jail, shall be set at liberty forthwith, if not required to be detained in any other case."

State of Rajasthan aggrieved by the said judgment of acquittal, preferred the present appeal before this Court.

Let us briefly examine the case of the prosecution. As per the submission of the State, this Court should set aside the judgment of acquittal and punish the accused in accordance with law.

Satyanarain Baheti made a report to the S.H.O., Police Station, Malpura in front of the hospital at Malpura on 9th December, 1992 to the effect that, at about 11.15 a.m. that morning the complainant had been standing outside his house in Bahetiyon-ke-Mohalle in Ward No.6 of Kasba Malpura.

Hearing the noise of the stampede and uproar, he entered his house and closed the door. After a while a crowd came from the side of Hathai and started pelting stones at his house.

Two or three persons came inside the house after breaking the bolt of the door. Satyanarain ran to stop them but those persons started beating him. Thereafter, 8-10 persons including Afzal son of Mota, Mahboob son of Jumma, two brothers of tractorwala, Syyed Jabbar Ahmad tractorwala, Abdul Manjan son of Jabbar, Hanif son of Iqbal and Qadir Islam came inside by climbing the back wall. These persons were duly armed with knife, pharsi, sword and lathies. They gave two or three blows with swords on the head of Govind Narain father of Satyanarain. The remaining persons also inflicted injuries on the head of Govind Narian. Hari Narain, kakaji of Satyanarain, was also standing there and these persons also inflicted injuries with sword and pharsi on his head. Govind Narain fell down, even then these persons did not stop inflicting injuries on his arms and shoulders with lathies. Besides Kanhaiya Lal Baheti, Babulal Aggarwal and Mahesh Mukar Kacholiya had also witnessed the occurrence.

These persons, who had witnessed the occurrence, along with the complainant, brought Govind Narain and Hari Narain to hospital at Malpura. At the hospital, doctor after examining them declared both of them dead. Resultantly, FIR was registered on 9th December, 1992 at about 12.45 p.m. The case was investigated. On completion of the investigation, the charge-sheet was filed before the court of competent jurisdiction. The case was committed only with regard to two accused namely Hanif and Mehboob. Vide its judgment dated 12th August, 1997, the trial court acquitted both the accused persons. The case in relation to other accused was then committed to the trial court. Two other accused, namely, Firoze and Anwar were discharged by the court vide judgment dated 21st March, 1998. Thus, the subject matter of the judgment of the trial court dated 7th September, 1999 relates only to the three accused namely Abdul Zabbar, Afzal and Abdul Mannan.

The prosecution had examined seven witnesses including three eye-witnesses (namely, PW7 and complainant Satyanarain, PW4 Mahesh and PW5 Kanhiyalal) as well as PW2 medical examiner Dr. Chandra Prakash, and the investigating officer, PW3 Shri Rajendra Ojha. The incriminating evidence against the accused was put to the accused while recording their statement under Section 313 of the Cr.P.C. The plea taken by the accused was that these witnesses are deposing falsely, and have implicated them in commission of the crime at the instance of the police. Abdul Mannan took the plea of false implication, and claimed that he was in a school at a distance of 18 km away from the Malpura.

Accused Afzal also took the plea of false implication, and stated that there were two or three persons by the name of Afzal Lakhara and he had not been present at the place of occurrence. Similar stand was taken by Zabbar.

The learned trial court discussed the prosecution evidence as well as the defence at great length. While holding the statements of above eye-witnesses trustworthy and finding the witnesses led by the defence as not credible, the court held as under:

> "In the opinion of the court, the evidence of witnesses Ramnarain and Nathu Lal does not inspire confidence. When this court could not ignore the evidence of witnesses - Mahesh, Kanhaiyalal and Satyanarain in any manner, which is the reliable evidence of eye-witnesses to the occurrence, under such circumstances, the evidence of witnesses - Ramnarain, Nathu Lal, Satya Narain and Ratan Singh does not inspire confidence of the court that at the time of occurrence, at the three accused persons were not present at the place of occurrence, rather they were present at the place told by the defence witnesses. Such type of defence evidence, appears to be absolutely fabricated, because such type of evidence can be prepared easily."

The trial court had specifically recorded the finding that the prosecution has been able to establish its case that the role of the accused in inflicting injuries upon the body of the deceased persons had fully been established and therefore, they were liable to be punished in accordance with law.

However, the High Court while upsetting the said finding noticed that PW4, PW5 and PW7 were untruthful witnesses and that the trial court had not properly appreciated the prosecution evidence, and therefore, committed an illegality in convicting and sentencing the accused.

As is evident from the above recorded findings, the judgment of conviction was converted to a judgment of acquittal by the High Court. Thus, the first and foremost question that we need to consider is, in what circumstances this Court should interfere with the judgment of acquittal.

Against an order of acquittal, an appeal by the State is maintainable to this Court only with the leave of the Court.

On the contrary, if the judgment of acquittal passed by the trial court is set aside by the High Court, and the accused is sentenced to death, or life imprisonment, or imprisonment of more than 10 years, then the right of appeal of the accused is treated as an absolute right subject to the provisions of Articles 134 91) (a) and 134 (1) (b) of the Constitution of India and Section 379 of the Code of Criminal Procedure, 1973. In light of this, it is obvious that appeal against acquittal is considered on slightly different parameters compared to an ordinary appeal preferred to this Court. When an accused is acquitted of a criminal charge, a right vests in him to be a free citizen and this Court is very cautious in taking away that right. The presumption of innocence of the accused is further strengthened by the fact of acquittal of the accused under our criminal jurisprudence. The courts have held that if two views are possible on the evidence adduced in the case, then the one favourable to the accused, may be adopted by the Court.

However, this principle must be applied keeping in view the facts and circumstances of a case and the thumb rule is whether the prosecution has proved its case beyond reasonable doubt. If the prosecution has succeeded in discharging its onus, and the error in appreciation of evidence is apparent on the face of the record then the Court can interfere in the judgment of acquittal to ensure that the ends of justice are met. This is the linchpin around which the administration of criminal justice revolves. It is a settled principle of criminal jurisprudence that the burden of proof lies on the prosecution and it has to prove a charge beyond reasonable doubt. The presumption of innocence

and the right to fair trail are twin safeguards available to the accused under our criminal justice system but once the prosecution has proved its case and the evidence led by the prosecution, in conjunction with the chain of events as are stated to have occurred, if, points irresistibly to the conclusion that accused is guilty then the Court can interfere even with the judgment of acquittal. The judgment of acquittal might be based upon misappreciation of evidence or apparent violation of settled canons of criminal jurisprudence.

We may now refer to some judgments of this Court on this issue. In State of Madhya Pradesh v. Bacchudas [(2007) 9 SCC 135], the Court was concerned with a case where the accused had been found guilty of an offence punishable under Section 304 (Part II) read with Section 34 IPC by the trial court; but had been acquitted by the High Court of Madhya Pradesh. The appeal was dismissed by this Court, stating that the Supreme Court's interference was called for only when there were substantial and compelling reasons for doing so.

After referring to earlier judgments, this Court held as under:

> "9.There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. 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 where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused really committed any offence or not. (See Bhagwan Singh v.
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> State of M.P.[(2003) 3 SCC 21] The principle to be followed by the appellate court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable and relevant and convincing materials have been unjustifiably eliminated in the process, it is a compelling reason for interference. These aspects were highlighted by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra, Ramesh Babulal Doshi v. State of Gujarat, Jaswant Singh v. State of Haryana, Raj Kishore Jha v. State of Bihar, State of Punjab v. Karnail Singh, State of Punjab v. Phola Singh, Suchand Pal v. Phani Pal and Sachchey Lal Tiwari v. State of U.P.
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> 10. When the conclusions of the High Court in the background of the evidence on record are tested on the touchstone of the principles set out above, the inevitable conclusion is that the High Court's judgment does not suffer from any infirmity to warrant interference. In a very recent judgment, a Bench of this Court in Criminal

Appeal No. 1098 of 2006 titled State of Kerala and Anr. v. C.P. Rao decided on 16.05.2011, discussed the scope of interference by this Court in an order of acquittal and while reiterating the view of a three Judge Bench of this Court in the case of Sanwat Singh & Ors. v. State of Rajasthan [AIR 1961 SC 715], the Court held as under:

"14. In coming to its conclusion, we are reminded of the well settled principle that when the court has to exercise its discretion in an appeal arising against an order of acquittal, the Court must remember that the innocence of the accused is further re-established by the judgment of acquittal rendered by the High Court. Against such decision of the High Court, the scope of interference by this Court in order of acquittal has been very succinctly laid down by a Three- Judge bench of this Court in the case of Sanwat Singh and Ors. v. State of Rajasthan [1961 (3) SCR 120]. At page 129, Justice Subba Rao (as His Lordship then was) culled out the principles as follows:

The foregoing discussion yields the following results: (1) an appellate court has full power to review the evidence upon which the order of acquittal is founded; (2) the principles laid down in Sheo Swarup's case [1934 L.R. 61 I.A. 398] afford a correct guide for the appellate court's approach to a case in disposing of such an appeal; and (3) the different phraseology used in the judgments of this Court, such as (i) "substantial and compelling reasons", (ii) "good and sufficiently cogent reasons", and (iii) "strong reasons" are not intended to curtail the undoubted power of an appellate court in an appeal against acquittal to review the entire evidence and to come to its own conclusion; but in doing so it should not only consider every matter on record having a bearing on the questions of fact and the reasons given by the court below in support of its order of acquittal in its arriving at a conclusion on those facts, but should also express those reasons in its judgment, which lead it to hold that the acquittal was not justified."

Reference can also be usefully made to the judgment of this Court in the case of Suman Sood v. State of Rajasthan, [(2007) 5 SCC 634] where this Court reiterated with approval the principles stated by the Court in earlier cases, particularly, Chandrappa v. State of Karnataka, [(2007) 4 SCC 415].

Emphasizing that expressions like `substantial and compelling reasons', `good and sufficient grounds', `very strong circumstances', `distorted conclusions', `glaring mistakes', etc are not intended to curtail the extensive powers of an appellate court in an appeal against acquittal, the court stated that such phraseologies are more in the nature of `flourishes of language' to emphasize the reluctance of an appellate court to interfere with the acquittal. Thus, where it is possible to take only one view i.e. the prosecution evidence points to the guilt of the accused and the judgment is on the face of it perverse, then the Court may interfere with an order of acquittal.

In light of the above stated principles, we revert to the facts of the present case. As already noticed, three eye witnesses PWs.4, 5 and 7 were found to be truthful and reliable witnesses by the trial court whereas those very witnesses were held to be untrustworthy witnesses by the High Court. We shall

shortly proceed to discuss the statements of these three witnesses in some detail, as it is necessary for us to practically re-appreciate the entire evidence in view of the serious conflict, on findings of fact, in the two judgments under consideration in the present appeal.

One must notice another very significant error in the judgment of the High Court. Though the High Court has made a reference to the injuries inflicted upon the body of the deceased as detailed by Dr. Chandra Prakash (PW2) in his report, there is no discussion of his statement, in regard to nature of injuries inflicted and the weapon used for inflicting such injuries. There is also no discussion in the judgment of the High Court on the comparative evaluation of medical evidence, ocular evidence and the documentary evidence produced by the prosecution on record. These are certainly material evidence which have either been completely ignored, or not appropriately appreciated by the High Court. This renders the judgment of the High Court perverse, and provides strong reasons for this Court to interfere with the judgment of acquittal. In our considered view, the order of acquittal can hardly be sustained where it is based just on some contradiction in the statements of the while completely ignoring the entire case of the prosecution particularly when the prosecution has been able to prove its case beyond reasonable doubt. Dr. Chandra Prakash (PW2), who on 9th December, 1992 was posted as SMO at medical centre, Malpura had conducted the postmortem on the body of both the deceased persons. The injuries on the body of the deceased Hari Narain, aged 70 years, were recorded by this witness in his report (Ex.P4) which reads as under:

"I. Lacerated wound in size 3 inch x 2/10 inch till penetrating up to the bones on the left side of the head which was up to parietal region. This injury was having depressed fracture. The blood was oozing out from the wound.

II. Lacerated wound in the size 3.5 inch x 2/10 inch penetrating up to the bones. In this injury also there was

depressed fracture on the right parietal region of the (sic). The blood was oozing out from this injury also. And the brain matter was coming out.

III. Incised wound in the size of 3 inch x 2/10 into = inch on the upper arm behind the shoulder and the blood was oozing out from it.

On the dead body aforesaid external injuries were found. In my opinion the death of Hari Narayan was cause (sic) due to Neutrogena (sic) shock that is injury of the brain caused by injury Nos.1 and 2.

All the aforesaid injuries were of before death. The injury Nos. 1 and 2 on the head of Hari Narayan were in general nature sufficient to cause the death. The death of Hari Narayan was caused within 2 to 3 hours of (sic) the postmortem. I prepared the postmortem report which is exhibit P-4 which is in my hand writing and it is signed. It bears my signature from A to B and I have entered the cause of death at C to D. On the same date in the day time at 1.30 P.M. I conducted the post mortem on the

dead body of Govind Mahajan son of Lachh Raj age 72 years, resident of Malpura and found following injuries on the dead body which were caused before death:

> 1 A wound of cut in size 4 inch x 2/10 inch x penetrating up to bone and even up to the brain. And the brain Metter (sic) was coming out this injury was on the center of the head from where the blood was oozing.

Both the edges of the wound were sharp.

2 Lacerated wound in size of 3 inch x < inch deep up to the bones on the center with depressed fracture. And obtuse injury all around right eyes (sic).

3 The blood was coming out from the right ear.

In my opinion the death of Govind was caused due to Neutrogena (sic) shock which was caused by injury no.1 and due to hemorrhage which was caused by injury no.2. All the 3 injuries were caused before the death and in general nature were sufficient to cause the death of Govind. The death of Govind was caused within 2 to 3 hours from (sic) conducting the post mortem I have prepared the post mortem report which is exhibit and is verified. It bears my signature at A to B and I have entered the cause of death at C to D."

Mahesh (PW 4) in his statement in Court had stated that he saw a mob of persons belonging to the Muslim community approaching when he was standing outside his house. Some of them held swords in their hands, some of them lathies and some held pharsi and once they reached the house of Govind Narain, they forcibly opened the door. He went onto the roof of Premchand Mehru's house, from where he could see that some persons were pushing the door of Gopal Narain's house.

He identified the persons who jumped inside the house, as Mahboob, Haneef and Abdul Zabbar. Even in the Court, he rightly identified one person Abdul Zabbar. This witness stated the he knew Zabbar even prior to the occurrence. He had also taken Kanhaiya Lal, who was injured, to the hospital.

He had seen the accused persons at the place of incidence. He was subjected to lengthy cross examination. In his cross examination, he gave a few vague answers like he does not remember whether he had discussed the identity of the accused persons with Satyanarain, whether 4, 5 or 50 police officers were present at the funeral etc. Corroborating the statement of PW4, Kanhaiya Lal (PW5) stated that after seeing the mob, he shut the door of his house called the Malpura police station and climbed to the roof. He could see persons climbing the roof of Govind Narain's house and he could recognize Afzal Kadir Islam, Bada Bahaiya, two brothers of tractorwala namely Jabbar tractorwala and Mannan, Hanif and Mahboob. According to him these persons went inside the house of Govind Narain and created nuisance.

This witness, according to the trial court, rightly identified the persons named by him. This witness also stated that he knew these persons even before the incident. All the three accused were identified

by the witness in Court. Later on, when the police came and the persons from the mob fled away, he went to the house of Govind Narain, the door was broken and he noticed that both Govind Narain and Hari Narain were lying in a pool of blood and were unconscious. Satyanarain had sustained injuries. Thereafter he took all of them to the hospital where two deceased persons were declared `brought dead'. In his cross examination also nothing material was brought out by the defence. He did admit that he could not identify all the persons, who had come there.

PW 6-Radhey Shyam is the Investigating Officer and was the SHO of police Station, Malpura. According to him, he was busy in maintaining law and order situation when he received the information that assailants had entered the house of one Govind Narain Waheti and had beaten those inside; and that the latter had been taken to the hospital. Satyanarain (PW7), who is the most material witness of the prosecution, had made the report (Ex.P7) to PW6. He is the injured witness. He stated that a mob of 50-60 persons had come towards that area shouting, "Maro! Maro!". He went inside his house and closed the door but in a short while stones were thrown at the house. Some members of the mob started pushing the door and eventually broke the door and PW7 ran away for safety.

Afzal Mota Lakhara, Mahboob, Hanif tractorwala, Jabbar Ahmad Tractorwala came inside and some other persons who he could not identify started assaulting Govind Narain and Hari Narain with lathi and pharsi which he witnessed from his room. According to PW7, the injuries were caused on the head. He came out of his room and tried to save them, and in the process, he also suffered injuries. In the meantime, the police siren blew and upon hearing the same, these persons ran away. The witness correctly identified Zabbar and Afzal in Court and stated that these persons had caused injuries to the deceased. This witness referred to the place of occurrence, preparation of site plan and medical report by the doctor, he admitted his signature on all these documents including Exh.

P-8. It appears from the record that during recording of statement of this witness, the public prosecutor sought permission to declare the witness hostile. Without declaring him hostile, the Court had permitted him to be cross-

examined by the public prosecutor. This related to the fact that after hearing portion C to D, part of Exh. P-9, the witness has stated that after identifying the accused, he had stated the name of the accused as Abdul Mannan to the police. He then stated that Abdul was also there, however he could not identify him definitely. At that stage, this witness was declared hostile. Cross examination of these witnesses by the public prosecutor as well as by the defence counsel did not have an adverse impact on the main case of the prosecution.

In his cross examination, he said that he had forgotten and therefore he had stated that he did not go to the police station for lodging the report. In fact he wrote the report in his own hand (Exh.P7). According to him, the persons who had assaulted him were the same persons who had assaulted his father and uncle. He also tried to wriggle out of his earlier statement that he could identify the accused. It needs to be noticed that his statement, which was recorded in the Court on 17th March, 1999, was completely in consonance with the case of the prosecution but when he appeared in the Court for further cross-examination on 18th March, 1999, he tried to wriggle out of his main

statement. Thus, it is not very difficult to understand the variation in his statement resulting in the further cross examination. This entire evidence has to be read along with the statement of the Investigating Officer (PW6).

Establishment of a complete chain of events and clear identification of the persons assailing the deceased lead to the irresistible conclusion that the prosecution has been able to bring home the guilt of the accused. Undoubtedly, emphasis on the second half of the statement of PW7 cannot completely demolish the case of the prosecution which otherwise stands proved by the statements of PW4, PW5, PW6 and PW2.

The strain on the witness due to the incident cannot be ruled out inasmuch as he had lost his father, uncle and was himself injured. All the basic facts that supported the case of the prosecution were stated by him on 17th March, 1999 when the case was adjourned for further cross-examination on 18th March, 1999 when he made a statement at variance with his earlier statement in Court as well as his statement recorded under Section 161 of the Cr.P.C. Another fact which the Court cannot lose sight of is that Exh. P2 was not a document written by the police but was written in his own hand and duly signed by him which he admitted even in his statement in Court.

Satyanarain (PW 7) has also made statements which fully aid the case of the prosecution and his statement recorded on the adjourned date before the trial court i.e. 18th March, 1999 which is at variance cannot be treated as gospel truth. In fact the bare reading of the statement clearly shows this fact.

Even if we exclude the statement of PW7 from consideration, then identity of the accused is still fully established by the statements of PW3, PW4, PW5 and PW6. There is no reason, whatsoever advanced, as to why PW4 and PW5 (neighbours of the deceased) who are otherwise independent witnesses, and the doctor would involve the accused falsely. There is no animosity between the parties, and in fact according to these witnesses, they knew the accused particularly Abdul Zabbar, Afzal and Mannan for quite some time. There is no reason for the Court to hold that PWs 4 and 5 are not trustworthy. Their statements describe the occurrence in its proper course and are compelling evidence of the same. We do not find it appropriate to discard their statements as not inspiring confidence. The statement of these witnesses must be appreciated in the proper perspective. It was an incident involving a mob but only few persons had entered the house of the deceased, out of which 7 to 8 persons could be identified including the three accused as having inflicted injuries on the body of the deceased and were duly identified by the prosecution witnesses. The injury on the head duly finds corroboration from the statement of the Doctor i.e. Ex.P4. It is not a case where the medical evidence does not support or corroborate the ocular evidence. Some discrepancies or some variations in minor details of the incident would not demolish the case of the prosecution unless it affects the core of the prosecution case. Unless the discrepancy in the statement of witness or the entire statement of the witness is such that it erodes the credibility of the witness himself, it may not be appropriate for the Court to completely discard such evidence.

The core of the prosecution case is that when the mob came, PWs 4 and 5 ran to their houses, locked their doors, went to the roof of the houses which were adjacent to the house of the deceased and

watched some members of the mob, of whom they could identify a few, assault the deceased. This statement clearly shows the trustworthiness of these witnesses as they have stated that there were some other persons whom they could not identify. However both these witnesses and complainant Satyanarain clearly identified the persons who had entered and assaulted the deceased persons.

Though Satyanarain (PW 7) fully supported the case of the prosecution that he was also assaulted by these persons, he did speak in a different voice the next day before the Court. In our considered opinion the cumulative effect of the ocular evidence and documentary evidence is that the prosecution has been able to establish its case beyond reasonable doubt.

We may also refer to a very recent judgment of this Court, given by us in Crl. Appeal Nos. 1693-1994/2005, State of U.P. v. Mohd. Ikram & Ors. decided on 13th June, 2011 where by upsetting the judgment of acquittal passed by the High Court, this Court held as under:

> "15.....Once the prosecution had brought home the evidence of the presence of the accused at the scene of the crime, then the onus stood shifted on the defence to have brought forth suggestions as to what could have brought them to the spot at that dead of night. The accused were apprehended and therefore, they were under an obligation to rebut this burden discharged by the prosecution, and having failed to do so, the trial court was justified in recording its findings on this issue. The High Court committed an error by concluding that the prosecution had failed to discharge its burden. Thus, the judgment proceeds on a surmise that renders it unsustainable.
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> The trial court did not find evidence of Bhugan (DW.1), examined by Mohd. Iqram, one of the respondents , worth acceptance.
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> 16. The High Court did not even make any reference to him. It is a settled legal proposition that in exceptional cases where there are compelling circumstances, and the judgment under appeal is found to be perverse i.e. the conclusions of the courts below are contrary to the evidence on record or its entire approach in dealing with the evidence is patently illegal, leading to miscarriage of justice or its judgment is unreasonable based on erroneous law and facts on the record of the case, the appellate court should interfere with the order of acquittal. While doing so, the appellate court should bear in mind the presumption of innocence of the accused and further that the acquittal by the courts below bolsters the presumption of his innocence. Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference.
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> 17. In the instant case, the circumstantial evidence is so strong that it points unmistakably to the guilt of the respondents and is incapable of explanation of any other hypothesis that of their guilt. Therefore, findings of fact recorded by the High Court are perverse, being based on irrelevant considerations and inadmissible material."

Learned counsel for the accused had placed reliance upon the judgment of this Court in Shivalingappa Kallayanappa v. State of Karnataka [1994 Supp 3 SCC 235] to contend that there was no common object to commit murder.

The appellants cannot derive much advantage from the judgment of this Court in that case: First, the facts of that case are entirely different from those of the case in hand. In that case, it was established by the prosecution that A-1 to A-

5 formed an unlawful assembly wherein A1 and A2 were armed with axes and A3, A4 and A5 with sticks in order to assault the two deceased persons amongst others. While A3 did not participate, A4 and A5 only dealt blows on legs and arms with their sticks but A1 and A2 dealt blows to the head with the butt end of their axes which proved to be fatal.

Convicting A1 and A2 under S. 302/149, IPC and A3-5 under S. 326/149, the Court held that taking all the circumstances of the case into consideration, the common object can be held to be to cause grievous hurt only and not to commit murder.

However, in the present case, common object to commit murder has been fully proved. Second, the case of the prosecution is not that the entire mob had entered the house of the deceased. Out of the mob of 50-60 persons only 7 to 10 persons had broken the door of the house and some of them had climbed the wall to enter the house of the deceased.

These persons had raised the slogan `maro! maro!' and thereafter had inflicted the injuries upon the body of the deceased. The common intention could even develop at the spur of the moment when the three accused, as duly identified, were actively inflicting injuries on the body of the deceased. They, therefore, not only caused injuries to the vital body parts of the deceased, including head injury, but kept on inflicting injuries even after the deceased had fallen to the ground. The efforts of Satyanarain to save them were in vain and he himself suffered certain injuries. Thus, in the present case, it has been established that more than five persons constituted an unlawful assembly and in furtherance to their common object and intent, assaulted and caused injuries to vital parts of the bodies of the deceased, ultimately resulting in their death. We, therefore, have no hesitation in holding that there is no merit in this contention of the accused and the trial Court applied the law correctly.

Section 149 consists of two parts; the first deals with the commission of an offence by any member of an unlawful assembly in prosecution of the common object of that assembly; the second part deals with commission of an offence by any member of an unlawful assembly in a situation where other members of that assembly know the likelihood of the offence being committed in prosecution of that object. In either case, every member of that assembly is guilty of the same offence, which other members have committed in prosecution of the common object.

The final point is the common object. The case of Lokeman Shah v. State of W.B. [(2001)5 SCC 235] on this point would further substantiate the case of the State and diminish the worth of the defence. Accused have inflicted the injuries after raising slogan and have commonly participated in

committing offence which resulted in the death of the deceased.

For the reasons afore-recorded, we find the present case a fit case for interference in the judgment of acquittal recorded by the High Court. Consequently, the appeals of the State are allowed, the judgment of the High Court is set aside and that of the trial court is restored. We concur with the finding of guilt and the quantum of punishment awarded by the trial court.

The bail bonds of the accused, if any, who are on bail, are cancelled. They are directed to surrender within four weeks from today failing which the Chief Judicial Magistrate, District Tonk, Rajasthan shall ensure to take them into custody and they shall undergo the remaining part of their sentence in terms of the judgment of conviction and punishment awarded by the trial court.

A copy of the judgment be sent to the concerned CJM for information and action.

.....J. [Dr. B.S. Chauhan] .....J. [Swatanter Kumar] New Delhi;

July 7, 2011