Kailash Gour & Ors vs State Of Assam on 15 December, 2011

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Bench: Dipak Misra, T.S. Thakur, Dalveer Bhandari

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1068 OF 2006

Kailash Gour & Ors. ...Appellants

Versus

State of Assam ...Respondent

J U D G M E N T

T.S. THAKUR, J.

1. This appeal arises out of a judgment and order dated 29th June, 2006, passed by the High Court of Judicature at Gauhati whereby Criminal Appeal No.133 of 2005 filed by the appellants has been dismissed and the conviction and sentence of life imprisonment awarded to them by the trial Court for offences punishable under Sections 448, 324 and 302 read with Section 34 IPC upheld.

2. The appeal was initially heard by a Division Bench of this Court comprising S.B. Sinha and H.S. Bedi, JJ., who differed in their conclusions. While S.B. Sinha, J. acquitted the appellants giving them the benefit of doubt, Bedi, J. upheld their conviction and sentence and consequently dismissed the appeal. The appeal has, in that backdrop, been listed before us to resolve the conflict.

3. Briefly stated, the prosecution case is that at about 10.00 p.m. on December 14, 1992, Mohd. Taheruddin (PW2) a resident of village, Changmazi Pathar situate within the limits of Police Station Doboka, District Nagaon in the State of Assam was guarding his paddy crop in his field close to his house. Md. Mustafa Ahmed (PW3), one of the two sons of Mohd. Taheruddin was sleeping at home in one of the rooms while Md. Hanif Ahmed (PW4) was together with one Zakir, said to be a close relative, was sleeping in the kitchen. Sahera Khatoon wife of Mohd. Taheruddin and his daughters Hazera Khatoon, Jahanara Begum, Samana Khatoon and Bimala were sleeping in another room. A mob allegedly comprising nearly twenty people entered the house of Mohd. Taheruddin and forcibly opened the door. Around the same time another house belonging to one Nandu situate at some distance from Mohd. Taheruddin's house was on fire. The prosecution case is that Md. Mustafa Ahmed (PW3) heard accused Gopal Ghose calling for `Munshi' which ostensibly is also how Mohd. Taheruddin was known. Md. Mustafa Ahmed (PW3) is said to have replied that Taheruddin was not at home. Apprehending danger, Md. Mustafa Ahmed escaped from the house but not before Gopal Ghose had injured him with the help of a spear. On his way out Md. Mustafa Ahmed is said to have recognised two persons standing outside the house allegedly armed with dao, dagger etc. Out of the house and in the field, he saw his father Mohd. Taheruddin coming homeward. Md. Mustafa Ahmed told him not to do so for he may be killed by the mob that had attacked the house. Taheruddin paid heed to the advice and watched the incident from a distance. According to his version Rahna Gour, one of the members of the mob, shot an arrow at him which hit his right hand. After the crowd had left the place he shouted to attract the attention of an army vehicle that was passing by and reached the spot only to find his daughters Bimala and Hazera lying dead and his wife Sahera Khatoon lying injured in the middle of a paddy field near the house. He carried her home where she died after some time. Zakir Hussain who was sleeping along with Md. Hanif Ahmed (PW4) in the kitchen was also injured by the mob. According to the version of Md. Hanif Ahmed (PW4) three accused persons, namely, Kailash, Hari Singh and Ratan entered his room and took away Zakir with them. Hanif is said to have stepped out of his house to take shelter behind the banana trees growing near the house and witnessed the entire incident from there. According to his version Gopal Ghose, Kailash Gour, Gundulu Gour, Krishna Gour and Harendra Sarkar assaulted his mother while his sister Hazera Khatoon was attacked by Budhuram Timang, Hari Singh and Rahna. Bimala, the other sister, was similarly assaulted by Gopal, Ratan Das and Harendra Sarkar. The rest of the sisters, however, managed to escape unhurt.

4. The injured were then taken to Nagaon Civil Hospital by the police who had also arrived at the place of occurrence on receipt of intimation about a house having been put on fire in the

neighbourhood. The dead bodies were removed in the army vehicle, while Zakir Hussain and Md. Mustafa Ahmed were medically examined by the medical officer who found the following injuries on them:

"Zakir Hussain

1) There was vertical cut injury over the lip. Size 2" x =".

2) There are six cut injuries over the scalp each about 2" x =".

3) Left little finger was severed at the bone of the proximal phalange.

4) There is swelling and tenderness over the right hand.

5) There were two cut injuries over the back, on each side.

There was multiple cut injury with blunt injury of the right hand with sharp cutting. Wounds were dangerous in nature. Md. Mustafa Ahmed

1) Penetrating injury of the right leg with sharp pointed weapon. Size 1/3" x =".

The injury is fresh and margins were irregular.

2) Simply cut injury by sharp pointed object."

5. The post-mortem examination on the dead bodies was conducted by Dr. Madhusudhan Dev Goswami (PW1) who reported incised wound on the right upper neck of Hazera Khatoon and two incised wounds one on the neck and other on left upper neck of Bimala Khatoon. Similarly, injuries were also noticed by the doctor on the dead body of Sahera Khatoon. After completion of the investigation the police filed a charge sheet against 14 persons out of whom 13 were named in the First Information Report. The accused persons were charged with offences punishable under Sections 302, 326, 324, 323, and 448 read with Section 34, IPC. The accused pleaded not guilty to the charges and claimed a trial. Accused Gopal Ghose, it is noteworthy, passed away during the trial.

6. By its judgment and order dated 18th June, 2005, the trial Court convicted 8 out of 14 persons for the offence of murder and sentenced them to undergo imprisonment for life and a fine of Rs.2,000/-, and in default of payment to suffer rigorous imprisonment for six months. The High Court has, as seen earlier, upheld the conviction of the appellants while acquitting Ratan Das, Gundulu Gour and Budhu Timang giving them benefit of doubt. Two appeals were filed against the said judgment and order, out of which viz. Crl. Appeal No.907 of 2006 filed by Harendra Sarkar has since been dismissed as abated upon the death of the appellant in that appeal. The present criminal appeal is, therefore, relevant only to appellants Kailash Gour, Krishna Gour, Hari Singh Gour and Rahna Gour.

7. We have heard learned counsel for the parties at considerable length. The prosecution has examined 7 witnesses in all. These are Dr. Madhusudhan Dev Goswami (PW1), Mohd. Taheruddin (PW2), Md. Mustafa Ahmed (PW3), Md. Hanif Ahmed (PW4), Abdul Jabbar (PW5), Dr. Jiauddin Ahmed (PW6) and B.N. Kalita (PW7).

8. The deposition of Dr. Madhusudhan Dev Goswami (PW1) who conducted the post-mortem on the dead bodies of the three unfortunate victims leaves no manner of doubt that they suffered a homicidal death. The nature of the injuries found on the dead body of the deceased Smt. Sahera Khatoon and her two minor daughters Hazera Khatoon aged 7 years and Bimala Khatoon aged 3 years manifestly show that they suffered a homicidal death. To that extent we see no reason to interfere with the findings recorded by the trial Court and the High Court in appeal. It is noteworthy that even in the dissenting judgments delivered by S.B. Sinha and H.S. Bedi, JJ., their Lordships are unanimous on the cause of death of the three victims. The question, however, is whether the prosecution has established beyond a reasonable doubt that the appellants were the perpetrators of the crime. The prosecution has, in that regard, placed reliance upon the deposition of Mohd. Taheruddin (PW2) and his two sons named Md. Mustafa Ahmed (PW3) and Md. Hanif Ahmed (PW4). We shall refer in some detail to the depositions of these three witnesses especially because while Sinha J. has held that only Md. Hanif Ahmed (PW4) claims to be an eye witness to the occurrence, Bedi J. has taken the view that all the three witnesses were eye witnesses to the incident.

9. Mohd. Taheruddin (PW2) has in his deposition stated that the accused persons were known to him as they live within one mile from his village. On the date of occurrence he was guarding harvested paddy in the field to the West of his house. In his house his sons Md. Mustafa Ahmed and Md. Hanif and Zakir Hussain, a young boy, were sleeping. In another room of the house were his wife Sahera Khatoon and daughters Hazera Khatoon, Jahanara, Bimala and Samana Khatoon. He also used to sleep in that very room but on the date of occurrence he was in the field. He saw a group of 10-12 men coming from the North of his homestead and another group of 10-12 men coming from the South. They assembled in front of his house and entered the premises. Accused Gopal Ghose called out his name and asked if `Munshi' was at home. Hearing this, the witness started moving towards his house as there was a commotion. In the meantime his eldest son Mustafa Ahmed came and advised him not to do so as people were being attacked there. The boy ran towards the West through the paddy fields out of fear. The witness came close to the house to have a look and saw the mob striking the walls of his house with dao and lathi. A couple of youth were running away towards the West. Rahna Gour shot an arrow at the witness which hit the witness on his right hand. The accused came out from the house on the road, blew whistles and went away. The witness then reached his house and raised an alarm. An army vehicle also arrived. He saw the injured Bimala who had died. He also saw Hazera lying dead besides the road to the house. He took Bimala on his shoulder and stood on the road. He then found his wife Sahera Khatoon lying injured in the paddy field near the house and carried her home. She died immediately after being given water. His son Mustafa and Zakir sustained cut injuries. The Army personnel saw all this. Police was also with them. The Army sent the injured to Nagaon Civil hospital and took the dead bodies to Doboka Police Station.

10. There were disturbances over demolition of a mosque in the year 1992. He got his statement (ejahar) written by Abdul Jabbar and lodged the same under his signature in the police station. In cross-examination the witness stated that ejahar was written at his house on the 3rd day in the evening and that Investigating Officer Shri Kalita was present at that time. Other police personnel were also with him. The dead bodies were buried before the ejahar was written. Police, Army and the Magistrate were present there. While ejahar was being written at the house of the witness, he called the village President Abdul Jabbar and other prominent persons of the village and upon being advised by the Investigating Officer, Gaji Saheb also came. At the time of writing the ejahar his injured sons were at Nagaon Civil Hospital. Witness further stated that before the ejahar had been written, the Daroga had interrogated the prominent persons. But the witness did not discuss anything with the prominent persons. He told them about his recognising a couple of the accused persons. After Jabbar had written the ejahar, he had read it out to the witness. Witness further stated that he and his son together named 13 persons in the ejahar out of whom he knew only 4 who had come to his house and called him.

12. In the ejahar he had written that apart from the 13 people named by him there were 30-35 other people. Rahna Gour's name was also written in the ejahar. The house of the witness is in the middle of a field and there are no houses nearby. The occurrence had taken place one week after the demolition of the mosque. He also had a case concerning a land dispute against accused Hari Singh and Kailash but did not know whether Gopal had got them out on bail in that case. He had also been arrested in connection with a case the year before. He denied having been arrested by the police on a number of other occasions.

13. The witness did not see whether the people who had assembled there were carrying anything in their hands. The rest of the people were in the courtyard when Gopal shouted and asked whether Munshi was at home. Till before hearing Mustafa's shout the witness had not moved. After being cautioned by Mustafa, the witness went back towards West and then stopped. Witness further stated that Nandu's brother's house was burnt when the Army personnel arrived. His house was 40-50 nals (70 ft.) away from that of Nandu. Before the Army vehicle had returned for the second time, Jabbar Bari, Gaji Sahah, Noor Islam, Hamid and others had arrived at his house.

14. None of the 30-35 people had chased the witness. Witness also stated that till before filing the ejahar he had not told the Investigating Officer about the occurrence. The next day the Daroga asked him to go gather a few people so that he could interrogate them. When the Investigating Officer came next day, he called the people. They were all muslims. He did not remember whether he had mentioned the moonlight in the ejahar. The witness was confronted with certain omissions in the statement recorded under Section 161 Cr.P.C.

15. On a careful reading of the statement of Md. Taheruddin (PW2) we are of the view that he is not an eyewitness to the killing of the victims as such. All that the witness saw from a distance was that 30-40 people had gathered in front of his house and there was a commotion including the shouts of his son Mustafa, who ran towards him to tell him not to go home because people were being attacked there. The witness does not accuse any particular individual of assaulting or killing of the three victims. Even regarding identification of those persons he claimed to know only four who had

come to his house and had called him. What is interesting is that an injury said to have been received by him from an arrow shot by Rahna Gour was not mentioned in the First Information Report or medico-legally examined by the doctor. The deposition of the witness suggests that a mob had entered his house and attacked the inmates. Besides, who committed what act resulting in what injury to either the prosecution witnesses or any one out of the dead is not evident from the deposition of the witness. We shall presently revert back to the deposition of this witness when we examine credibility of the First Information Report. We may for the present simply state that we agree with Sinha, J. that this witness is not a witness for the murder of any one of the three victims.

16. We may for now take up the deposition of Md. Mustafa Ahmed (PW3). In his deposition this witness stated that his family consisted of 9 persons including his father Taheruddin, mother Sahera Khatoon. On the fateful day of 14th December, 1992 he was at home while his father was guarding paddy in the field, 50 meters away. Accused Gopal came to the house calling for his father. The witness could recognise him by his voice and responded that he was not at home. He then asked where he had gone, the witness said that he had been guarding paddy in the field. Gopal and 12-14 people who had come with him then started thrusting daggers, spears etc. into the walls. They opened the bamboo door of his house. Gopal, Hari Singh and Kailash stood in front of the door. Gopal started poking him with a spear which injured him. He pulled the spear out and ran out of the room along with the spear. He recognised two more men Haren Sarkar and Rahna Gour who were armed with dao, dagger, arrows etc. He knew them as they were from the same village. Thereafter the witness ran towards the field. His father was also coming towards the house but the witness stopped him and told him not to go home as he would be killed. The witness stated that he did not recognise the man who had hacked his two sisters Bimala Khatoon and Hazera Khatoon and his mother. He returned after 15 minutes and found his mother lying in a critical condition but had not died till then. He called the villagers and with their help got his mother home. His sisters were lying dead. Their bodies were also taken home. By the time his mother also died. Police also arrived within five minutes and took the witness and Zakir to the Civil Hospital. Both the witness and Zakir had sustained injuries.

17. In cross-examination the witness said that Zakir was not his consanguine brother but is distantly related to him. Within five minutes of the occurrence, officer in charge of Doboka P.S. arrived there with five policemen. But the witness did not know who had informed them about the incident. The witness did not tell the officer in charge about the occurrence. The officer in charge stayed back and the policemen and the driver took the witness to the police station from where they were taken to the hospital. The witness and Zakir stayed at the police station for half an hour. Police did not ask the witness about the occurrence. He was interrogated in the hospital two or three days after the incident. It is not known who lodged the ejahar and when. Disturbance over the demolition of the mosque were going on. People whose houses had been burnt or whose family members had died had taken shelter in the camp out of fear. He was terribly afraid when spears were being thrust into his room. While coming out he saw 15-20 men outside. But while inside he recognised three men and two more when coming out. Witness deposed :

> "I had not seen who had killed my two sisters and where. A lot of people were there when I came out of the house. I did not notice who had been assaulting whom and

where."

18. When his father and he had been discussing the names of the assailants or the probable assailants, the men whom he had called were also with them.

19. From the above it is clear that the witness does not claim to have seen the act of violence against the victims. The witness simply says that Gopal and three others had entered the house and injured him with a spear whereupon he made good his escape, recognising two intruders on his way out. As to when and where and by whom were his mother and sisters hacked to death is something on which the witness pleads complete ignorance. In that view we respectfully agree with the opinion expressed by Sinha, J. that Md. Mustafa Ahmed (PW3) is not an eye-witness to the occurrence although he may have observed certain incidents that preceded the actual act of killing of the victims. It was also relevant that the witness did not make any disclosure to the police, who was on the spot within five minutes of the occurrence, about the assailants nor did he do so till 2-3 days after the incident when the Investigating Officer interrogated him in the hospital. He also did not know about the lodging of the FIR nor did he know as to who had lodged the same and when.

20. That brings us to the deposition of the only other witness who is said to be a witness to the occurrence. Md. Hanif Ahmed (PW4) was also like Md. Mustafa Ahmed at home when the mob attacked their house. The witness has stated that accused Kailash, Hari Singh and Ratan entered his room and took away Zakir with them. Out of fear the witness ran out of the house and took shelter under the banana trees growing near his house and observed the incident from there. The witness claimed to have seen accused Gopal, Kailash, Gundulu, Krishna and Haren Doctor giving blows on the person of his mother. Similarly, he also claimed to have seen Budhuram Timang, Hari Singh and Rahna hacking his sister Hazera. Bimala who was 4-5 years old was also similarly assaulted by accused Gopal, Ratan and Haren Doctor according to the witness. After the incident accused persons left by which time his father had come to the house from the paddy field. The Army personnel who had come there sent Zakir and Mustafa to the Civil Hospital Nagaon for treatment.

21. The incident, according to the witness, happened on a moonlit night which enabled him to identify the assailants. The witness claimed that the police arrived at the place of occurrence in the meantime. The witness and his father searched for his mother and sisters with the help of a torch in the field and discovered their bodies within 3-4 minutes. While both the sisters had died, his mother died 10 minutes later. Police, according to the witness, came on the following day and interrogated them. FIR was written at the police station on the dictation of the witness and was signed by him. Witness further stated that he did not know whether his father had lodged any FIR to the police. Finally the police took a written report from him and his father. The witness was confronted with certain significant omissions in the statement made under Section 161 Cr.P.C.

22. Abdul Jabbar (PW5) is a witness who had scribed Ext.1. According to the witness ejahar was written at the house of Taher Ali whose house is 2 Kms. from that of this witness. He went to Taher's house where 100-200 people had gathered. Taher had discussed the things that should be mentioned in the ejahar and had given the names of the accused persons himself.

23. Dr. Ziauddin Ahmed (PW6) is a witness to the medical examination of the injured witnesses Mustafa Ahmed and Zakir and has proved the injury report.

24. Shri B.N. Kalita (PW7) is the Investigating Officer. In his statement this witness deposed that he was attached to the Doboka Police Station and received message from Biresh Dutta that a fire had occurred at the place of occurrence which information was entered in General Diary under Entry No.532 dated 14th December, 1992. He led the police staff to Mikir Gaon. Taheruddin lodged a formal ejahar there. The case was registered and investigation taken up. He drew sketch of the place and conducted inquest and post-mortem on the dead-bodies and arrested the accused persons. The charge sheet was finally submitted by S.I. Dharma Kanta Talukdar.

25. In cross-examination this witness has stated that a large number of police had been deployed in the area for maintenance of law and order on account of disturbances arising out of the dispute over the demolition of the mosque. He received a written ejahar at the police station on 15th December, 1992 from Taheruddin at 12.10 p.m. He proved the omissions in the very statements of Mohd. Taheruddin (PW2), Md. Mustafa Ahmed (PW3) and Md. Hanif Ahmed (PW4) recorded under Section 161 Cr.P.C.

26. That being the state of evidence adduced in the case, the question is whether the deposition of Md. Hanif, the solitary eye witness, is reliable, having regard to the attendant circumstances. The prosecution witnesses except the two doctors examined at the trial have all deposed that the communal atmosphere in the area was surcharged as an aftermath of the demolition of the mosque, an event that took place just about a week before the occurrence in this case. Those affected by the disturbances were shifted to camps established by the administration. Deployment of a large police force in the area to which the Investigation Officer has referred in his deposition also was clear indicator of the atmosphere being surcharged and tense. That a house was set afire in the neighbourhood of the place of occurrence is also amply proved by the evidence on record. As a matter of fact, the police arrived on the spot within minutes of the commission of the gruesome murders not because any report was made to it about the said crime but because it had received information about a house having been set on fire. Once on the spot the police and the Army realised that there was much more at their hands than just an incident of fire. A mob comprising 35-40 people had intruded in the homestead of Taheruddin and committed cold blooded murder of three innocent persons, two of whom were female children of tender age. If the prosecution version were to be believed, the Investigating Officer had the opportunity of getting an eye witness and first hand account of the incident within minutes of the commission of the crime. In the ordinary course, the Investigating Officer would have immediately recorded the First Information Report based on the eye witness account of the occurrence given by Md. Hanif and started his investigation in the right earnest. That is not, however, what happened. No effort was made by the Investigating Officer nor is there any explanation for his failure to ascertain from the alleged eye witness the sequence of events and the names and particulars of those who were responsible for the same. Instead, without the registration of the First Information Report, the Investigating Officer completes the inquest, prepares a site plan and gets the post mortem of the dead conducted on 15th December, 1992, long before the First Information Report was registered at 11.00 p.m. late in the evening on that date.

27. There can be only two explanations for this kind of a situation. One could be, that the Investigating Officer was so stupid, ill-trained, ignorant of the law and procedure that he did not realise the importance of getting a crime registered in the police station concerned before undertaking any investigation including conduct of an inquest, post mortem etc. The other explanation could be that since neither the Investigating Officer had any clue as to who the perpetrators of the crime were nor did the witnesses now shown as witnesses of the occurrence had any idea, the investigations started without any First Information Report being recorded till late at night on 15th December, 1992. We are inclined to believe that the second explanation is more probable of the two. We say so for reasons that may be summarised as under:

> (i) The Investigating Officer was a Sub Inspector of Police and the Station House Officer of Police Station Doboka.

It follows that he had sufficient experience in conducting investigations especially in cases involving heinous crimes like murder. We also assume that the incident having taken place in an area which was apparently susceptible to communal violence and widespread disturbances as a result of the dispute over the demolition of the mosque, the same would have been reported to the higher officers in the police administration who would in turn ensure appropriate action being taken with suitable care in the matter.

(ii) The least which the Investigating Officer would do was to record the statement of the eye witnesses or send the eye witnesses to the police station for getting the First Information Report recorded. Interestingly, while the alleged witnesses to the occurrence were first sent to the police station, no one ever questioned them about the incident nor did the witnesses volunteer to make a statement. It defies one's imagination how Md. Hanif who was on the spot and who is alleged to have seen the occurrence was not questioned by the Investigating Officer especially when he did not have any injury much less a serious one requiring immediate medical care and attention. Even if the eye witness was injured, there is no reason why his statement could not be recorded in the hospital to ensure that an FIR is registered without undue delay and those responsible for committing the crime brought to book. Failure of the prosecution to provide any explanation much less a plausible one shows that the investigating agency had no clue about the perpetrators of the crime at the time when it reached the spot or soon thereafter nor did anyone claim to have seen the assailants, for otherwise there was no reason why they could not be named and an FIR registered immediately. This Court in State of H.P. v. Gian Chand (2001) 6 SCC 71 dealt with the effect of failure of prosecution to satisfactorily explain the delay in the lodging of the FIR and declared that if the delay is not satisfactorily explained the same is fatal to the prosecution. This Court observed:

> "If the prosecution fails to satisfactorily explain the delay and there is a possibility of embellishment in the prosecution version on account of such delay, the delay would be fatal to the prosecution. However, if the delay is explained to the satisfaction of the court, the delay cannot by itself be a ground for disbelieving and discarding the entire prosecution case."

To the said effect is the decision of this Court in Dilawar Singh v. State of Delhi (2007) 12 SCC 641, where this Court observed:

> "In criminal trial one of the cardinal principles for the Court is to look for plausible explanation for the delay in lodging the report. Delay sometimes affords opportunity to the complainant to make deliberation upon the complaint and to make embellishment or even make fabrications. Delay defeats the chance of the unsoiled and untarnished version of the case to be presented before the court at the earliest instance. That is why if there is delay in either coming before the police or before the court, the courts always view the allegations with suspicion and look for satisfactory explanation. If no such satisfaction is formed, the delay is treated as fatal to the prosecution case."

Reference may also be made to the decisions of this Court in State of Punjab v. Daljit Singh (2004) 10 SCC 141 and State of Punjab v. Ramdev Singh (2004) 1 SCC 421 which also reiterated the legal position stated in the earlier mentioned decisions.

(iii) From the deposition of Mohd. Taheruddin (PW2), it is clear that the FIR was drawn only after the Investigating Officer had through this witness got the people from the locality gathered. The officer then interrogated them and after deliberations with the elders of the community got a report scribed by Abdul Jabbar (PW5) naming as many as 13 persons as accused. PW5 has in his deposition clearly admitted that Mohd. Taheruddin had discussed in the gathering of the prominent people of the area the facts to be mentioned in the ejahar. There were nearly 100/200 people who had assembled when the ejahar was written by him. It is difficult to appreciate how a report prepared after such wide consultation and deliberations could carry a semblance of spontaneity to be credible in a criminal trial of such a serious nature. Even the Investigating Officer was contributing to the creation of a report after confabulations with elders of the area. Mohd. Taheruddin has in this regard deposed:

> "While ejahar was being written at his house, he called the village President Abdul Jabbar and other prominent persons of the village and upon being advised by the I.O. Gaji Sahab also came. xxxxx The Daroga had interrogated prominent persons before the writing of ejahar."

(iv) According to Mohd. Taheruddin (PW2) he had recognised only four of the accused who had come looking for him. There is no explanation as to how were the remaining accused named when he had not identified them at the time of the occurrence and at whose instance especially when according to the witness his sons were in the hospital when the ejahar was scribed.

(v) The Investigating Officer having prepared a site plan of the place of occurrence before the registration of the case and even before the statements of the witnesses were recorded under Section 161 Cr.P.C., did not make any mention about the banana trees behind which Md. Hanif (PW4) is said to have hidden himself. If the story regarding PW4 having had observed the occurrence from behind the banana trees was correct, the trees ought to appear in the site plan which is not the case.

Absence of any banana trees in the area around the house is an indication of the fact that no implicit reliance can be placed upon the version of Md. Hanif (PW4).

(vi)According to PW3 and PW4, after they emerged from their hideouts and after their father returned to the spot they started looking for the dead bodies with the help of a torch. If PW4 was right in his version, then the victims were hacked in front of the door of the house, there was no question of searching for the dead bodies with the help of torch light.

(vii)The use of torch light to look for bodies shows that there was no source of light. The night was a foggy, cold December night. The presence of fog is admitted by PW4 in his deposition. Assuming that there was moonlight, the presence of fog was a disabling factor that made visibility poor for any one to observe the occurrence from a distance when a huge mob of 30-40 people was on the rampage.

(viii)According to Shri B.N. Kalita (PW7) the Investigating Officer in the case a written ejahar was presented to him by Taheruddin when the former reached the spot on 14th December, 1992. If that were so, the least which the officer would have done was to take that ejahar as the first information report regarding the occurrence and register a case of murder against those named in it. This admittedly was not done. In cross- examination the witness said that a written ejahar was presented to him by Taheruddin on 15th December, 1992 at 12.10 p.m. Now, even if that were true, there is no explanation why the officer delayed registration of the FIR till 11.00 p.m. on that day. The delay in the lodging of the FIR and the circumstances in which the ejahar was written, cast a serious doubt about the whole prosecution case especially when there is no explanation whatsoever for the failure of the Investigating Officer to record the report based on the alleged eye witness account immediately after he reached the spot.

(ix) The non-examination of Zakir, injured witness at the trial is also inexplicable. Zakir was allegedly taken out of the house by the accused persons and assaulted. The best person to say who were the persons responsible for the assault was this witness himself. The failure of the prosecution to put him in the witness box, in support of its version is also an important circumstance that cannot be legally brushed aside. The prosecution has failed to examine other inmates who were inside the house and who had escaped unhurt in the occurrence.

(x) The medical evidence adduced in the case also does not support the prosecution version. According to Dr. Madhusudhan Dev Goswami (PW1), who conducted the post-mortem examination on the dead bodies of the victims had deposed that the death had occurred 48 to 72 hours prior to the examination. If the prosecution version as given by alleged eye witnesses is accepted the victims had died within 12 hours of the post- mortem examination. This inconsistency in the medical evidence and the ocular evidence assumes importance rendering the version given by the prosecution witnesses suspicious.

(xi) According to Mohd. Taheruddin (PW2) the appellant had shot an arrow towards him which missed the target but hurt the witness in his hand. There is no corroborative medical evidence to suggest that Taheruddin has sustained any injury on the hand or any other part of his body.

(xii) Even regarding the motive for commission of the crime the prosecution case is that the incident had its genesis in the demolition of the mosque and the large scale disturbances that followed. While it is evident that large scale disturbances had indeed taken place in the area including an incident of a house being set on fire in the neighbourhood of the place of occurrence, the previous enmity between some of the appellants and Taheruddin on account of a land dispute between them could be a possible reason for Taheruddin naming appellants and others close to him as assailants. Enmity between complainant party and the accused being a double-edged weapon there could be motive on either side for the commission of offence as also for false implication.

28. It is one of the fundamental principles of criminal jurisprudence that an accused is presumed to be innocent till he is proved to be guilty. It is equally well settled that suspicion howsoever strong can never take the place of proof. There is indeed a long distance between accused `may have committed the offence' and `must have committed the offence' which must be traversed by the prosecution by adducing reliable and cogent evidence. Presumption of innocence has been recognised as a human right which cannot be wished away. See Narendra Singh and Anr. v. State of M.P. (2004) 10 SCC 699 and Ranjitsingh Brahmajeetsingh Sharma v. State of Mahsrashtra and Ors. (2005) 5 SCC 294. To the same effect is the decision of this Court in Ganesan v. Rama SRaghuraman and Ors. (2011) 2 SCC 83 where this Court observed:

> "Every accused is presumed to be innocent unless his guilt is proved. The Presumption of innocence is human right. Subject to the statutory exceptions, the said principle forms the basis of criminal jurisprudence in India."

29. The above views were reiterated by this Court in State of U.P. v. Naresh and Ors. (2011) 4 SCC 324.

30. In his dissenting judgment our esteemed Brother, Bedi, J. has referred to as many as five different Reports of Commissions of Enquiry set up over the past five decades or so to point out that the findings recorded in the reports submitted by the Commissions indicate an anti-minority bias among the police force in communal riot situations and investigations. Copious extracts from the reports reproduced in the judgment no doubt suggest that in situations when the police ought to protect the citizens against acts of communal violence, it has at times failed to do so giving rise to the perception that the police force as a whole is insensitive to the fears, concerns, safety and security of the minority communities. Whether these reports have been accepted by the governments concerned and if so how far have they contributed to the reform of the force is a matter with which we are not directly concerned in this case. All that we need to say is that sooner such reforms are brought the better it would be for an inclusive society like ours where every citizen regardless of his caste or creed is entitled to protection of his life, limb and property. It will indeed be a sad day for the secular credentials of this country if the perception of the minority communities about the fairness and impartiality of the police force were to be what the reports are suggestive of. And yet it may not be wholly correct to say that the police deliberately make no attempt to prevent incidents of communal violence or that efforts to protect the life and property of the minorities is invariably half hearted or that instead of assailants the victims themselves are picked up by the police. So also there is no reason for us to generalise and say that there is an attempt not to register

cases against assailants and when such cases are registered loopholes are intentionally left to facilitate acquittals or that the evidence led in the Courts is deliberately distorted. No one can perhaps dispute that in certain cases such aberrations may have taken place. But we do not think that such instances are enough to denounce or condemn the entire force for ought we know that for every life lost in a violent incident the force may have saved ten, who may have but for timely intervention been similarly lost to mindless violence. Suffice it to say that while the police force may have much to be sorry about and while there is always room for improvement in terms of infusing spirit of commitment, sincerity and selfless service towards the citizens it cannot be said that the entire force stands discredited. At any rate the legal proposition formulated by Bedi J. based on the past failures do not appear to us to be the solution to the problem. We say with utmost respect to the erudition of our Brother that we do not share his view that the reports of the Commissions of Enquiry set up in the past can justify a departure from the rules of evidence or the fundamental tenets of the criminal justice system. That an accused is presumed to be innocent till he is proved guilty beyond a reasonable doubt is a principle that cannot be sacrificed on the altar of inefficiency, inadequacy or inept handling of the investigation by the police. The benefit arsing from any such faulty investigation ought to go to the accused and not to the prosecution. So also, the quality and creditability of the evidence required to bring home the guilt of the accused cannot be different in cases where the investigation is satisfactory vis-`-vis cases in which it is not. The rules of evidence and the standards by which the same has to be evaluated also cannot be different in cases depending upon whether the case has any communal overtones or in an ordinary crime for passion, gain or avarice. The prosecution it is axiomatic, must establish its case against the accused by leading evidence that is accepted by the standards that are known to criminal jurisprudence regardless whether the crime is committed in the course of communal disturbances or otherwise. In short there can only be one set of rules and standards when it comes to trials and judgment in criminal cases unless the statute provides for any thing specially applicable to a particular case or class of cases. Beyond that we do not consider it necessary or proper to say anything.

31. We are conscious of the fact that three innocent persons including two young children have been done to death in the incident in question which needs to be deprecated in the strongest terms but unless proved to be the perpetrators of the crime beyond a reasonable doubt, the appellants cannot be convicted and sentenced for the same. We accordingly allow this appeal and acquit the appellants giving them the benefit of doubt. They shall be set free forthwith unless required in connection with any other case.

.....J. (DALVEER BHANDARI) .....J. (T.S. THAKUR)
.....J. (DIPAK MISRA) New Delhi December 15, 2011