Naresh @ Nehru vs The State Of Haryana on 9 October, 2023

Author: Aravind Kumar

Bench: Aravind Kumar, S. Ravindra Bhat

2023INSC889 REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1786 OF 2023

NARESH @ NEHRU .... APPELLANT

VERSUS

STATE OF HARYANA …. RESPONDENT

WITH

CRIMINAL APPEAL NOS.1787-1788OF 2023

IRSHAD AND ANOTHER .... APPELLANTS

VERSUS

STATE OF HARYANA …. RESPONDENT

JUDGMENT

Aravind Kumar, J.

1. Judgment dated 09-01-2020 rendered in Criminal Appeal Nos.1063 of 2017, 997 & 1043 of 2017 by the High Court of Punjab NEETA SAPRA Date: 2023.10.09 19:33:33 IST Reason:

> and Haryana, Judicature at Chandigarh is under challenge in these appeals, whereunder the accused Nos.4, 5 and 6 (appellants herein) who were convicted for the offences punishable under Section 302 read with Section 149 of the Indian Penal Code (for short 'IPC') by the Sessions Court came to be affirmed.
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> GIST OF PROSECUTION CASE:

2. On 22-04-2016, ASI Ram Kishan while on patrolling duty at 75 feet road, had received a telephonic information that in the village Maheshwari certain persons had fired a gun-shot at a boy and upon reaching there, statement of Mohit @ Kala came to be recorded which was to the effect that at about 6.40 pm his cousins Ajay and Suraj were talking in front of the house of Ex. Sarpanch Karan Singh and they were near the house of Dharmender and he (Mohit) saw Ajay and Suraj running towards the house of Dharmender as they were being chased by three youngsters on a bullet motorcycle. It was also stated by Mohit @ Kala that bullet motorcycle was being driven by Ravi, Shoaib Khan was the pillion rider and one unknown person was sitting behind them. It was further stated that two more motorcycles having two riders each, with batons in their hands were following the Bullet motorcycle. It was also alleged that unknown person sitting on the Bullet motorcycle got down and fired at Ajay with country-made revolver, which hit his head and Ajay fell in front of the house of Dharmender. Suraj hid in Dharmender's house and on raising the alarm the assailants sped away on their motorcycles towards Bhiwadi; it is also stated by Mohit @ Kala that injured Ajay was shifted to the hospital; it is further stated that Ravi was studying in his school and was his junior and he used to bully and threaten all. Mohit also stated that Ajay and Suraj had a fight with Ravi on the day of 'Dulhandi' and he had threatened to kill them and Ravi along with his companions had fired at Ajay with intend to kill him. Based on the said statement FIR under Sections 148, 149, 307 of IPC and Section 25 of the Arms Act came to be registered and on the death of Ajay (on 23-04-2016) Section 302 of IPC was substituted in place of Section 307 IPC and accused persons were apprehended; on the disclosure statement of first accused (Pawan) country made pistol was recovered and as per the statement of accused No.2 (Dharmender) wooden stick was recovered apart from four motorcycles. One of the accused-Shoaib was produced before the Juvenile Justice Board and Ravi was tried by the Children's Court under the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015. The charge was framed against six accused persons and in all 18 witnesses were examined on behalf of the prosecution. The statements of the accused under Section 313 of the Code of Criminal Procedure (for short 'Cr.P.C.') came to be recorded and the accused having denied the incriminating material appearing in evidence against them, had pleaded not guilty. After hearing the learned advocates appearing for the accused persons and the public prosecutor and on appreciation of the evidence laid before the court, the learned Sessions Judge by judgment dated 06- 10-2017 convicted the accused persons for the offences already noticed hereinabove and said order of conviction and sentence imposed came to be affirmed by the High Court under the impugned order vide judgment dated 09-01-2020. Hence, these appeals have been preferred by accused Nos.4 to 6.

3. We have heard Mr. Siddharth Mittal and Mr. Soumik Ghosal, learned Advocates appearing for the accused-appellants in Criminal Appeal Nos.1786 of 2023 and 1787-1788 of 2023 respectively, and Ms. Manisha Aggarwal Narain, learned Additional Advocate General appearing for the State of Haryana, Respondent.

SUBMISSIONS ON BEHALF OF THE APPELLANTS:

4. Mr. Siddharth Mittal, learned counsel for the appellant appearing for Naresh @ Nehru Accused No.4, contends that the trial court and High Court had committed an error in convicting him without considering the statement of Mohit @ Kala (PW-9) in proper perspective whereunder he

had not named the appellant and the CCTV footage did not conform to Section 65 B of the Indian Evidence Act which even otherwise did not reflect A-4's of presence. He also contends that no Test Identification Parade (TIP 'for short') was conducted, and PW-9 had only identified this accused (A-4) in the court. Mr. Mittal learned counsel would also contend that said witness (PW-

9) was shocked or perplexed when his statement came to be recorded as admitted by him and reliance could not have been placed on said evidence for convicting the appellant. He would further contend that A- 4 had no common object to share with the main accused, Pawan (PW-

1), who is said to have fired at Ajay (deceased). Mr. Mittal, learned counsel would also contend that PW-9 was an interested witness as he was a close relative of the deceased, and various discrepancies, including the improvement in his statement made before court, ought to have been the ground to summarily brush aside his testimony. Mr. Mittal, learned advocate would point out that discrepancies in PW-9's statement had clearly surfaced which was evident from his admission of not informing the police about the Splendor vehicle being driven by the appellant and this fact was conveniently ignored by the courts below. Mr. Mittal, learned counsel would also contend that CCTV footage relied upon by prosecution was recorded on a mobile phone by PW-8 and converted into a CD, which was not in conformity with Section 65B of the Evidence Act and it was allegedly recorded on 26.04.2016 but handed over to the police on 01.06.2016 and during this interregnum period the possibility of said recording being tampered could not have been ruled out. Even otherwise the face of the assailants was not identifiable in the CCTV footage as found by the trial court itself and, therefore, no inference could have been drawn to implicate the appellant(A-4).

5. He would contend that the alleged motive attributed to the accused persons is due to a quarrel that had ensued between the deceased, Suraj, Ravi, and Nabbu on the day of Dulhandi and there was no evidence placed on record by prosecution to suggest any common object had been shared by the appellants with other accused persons. He would contend that appellant has not been alleged to have been armed with any weapon, so no inference could have been drawn about the common object to commit the offence. He would submit that the reasoning adopted by the courts below to convict the accused by overlooking the fact that TIP had not been conducted and only on the ground of PW-9 having known the remaining accused by face before the incident was erroneous, though the testimony of PW-9 would suggest that accused persons were not previously known to him and his admission in evidence that came to know about them only when they were arrested and their names were published in the newspaper. The non-disclosure of the names of the accused persons at the first instance creates reasonable doubts as to the appellant's identity. The learned counsel for the appellant (A-4) would also contend that there was unexplained delay in recording PW-9's statement, namely it was recorded at 11:30 p.m., despite the incident having taken place at 6:30 p.m. and PW-9 was present during this period. The alleged confessional statement of the appellant is of no value in the light of Section 25 of the Evidence Act and said statement does not indicate any common object having been shared by the appellant with other assailants. Hence, he prays for his appeal being allowed and the appellant (A-4) being acquitted.

6. Mr. Soumik Ghosal, learned counsel appearing for the appellants, namely, Irshad and Sonu Kumar (accused numbers 5 and 6 respectively) in Criminal Appeal Nos.1787-1788 of 2023, contends

that courts below had erred in not considering the fact that a person liable for being punished for the offence of being a member of an unlawful assembly under Section 149 IPC would be necessary to prove that such persons had acted in pursuance of a common object. He would further contend that prosecution had failed to prove that appellants were aware of Pawan's (Accused No.1) possessing the pistol and he had the intention/object to kill Ajay and such intention could not be inferred. He would contend that appellants' involvement in the unlawful assembly and sharing a common object to kill Ajay could not be inferred in the circumstances of the case, particularly when there was no evidence to support the stand of the prosecution that appellants were aware of pistol being in possession of Pawan (A-1).

7. He would further contend that the prosecution failed to prove that the members of the unlawful assembly had assembled to accomplish the common object of killing Ajay, as attributed to them. There was no evidence suggesting a sharing of common object between the accused. The CCTV footage, which was relied upon by the prosecution, does not inspire confidence to accept the story of the prosecution, since, faces appearing in the video was not clear and this itself would be a good ground to allow appeals and set aside the conviction of the appellants. He would also contend that appellants were not residents of the village where the incident took place and there is no whisper in the statement of PW-9 recorded under Section 161 of Cr.P.C. on this aspect. Hence, he prays for appeal preferred by A-5, and A-6 be allowed by setting aside the impugned judgment.

ANALYSIS AND CONCLUSION:

8. Having heard the learned counsels appearing for the parties and on perusal of the judgments of the courts below, it would emerge therefrom, that conviction of all the accused is based on the testimony of PW-9 and recovery of the motor-cycles and the motive for the crime attributed by PW-9 in his statement recorded on the date of incident. In this background, we have perused the judgments of the courts below by bestowing our anxious consideration to the rival contentions raised at the Bar.

9. At the outset, it requires to be noticed that motive that has been attributed against the accused persons for the killing of Ajay was, he (Ajay) and Suraj had a fight with Ravi on the day of Dulhandi, where Ravi had threatened to kill them and in furtherance of said threat, he is said to have come along with other co-accused, and a person sitting on the bullet motor-cycle had fired at Ajay from the pistol, while Ravi was driving the Bullet motorcycle. PW-9 had also deposed that Ajay was in the company of Suraj, who ran alongside the deceased and hid himself in Dharmender's house. However, the police did not record the statement of Suraj, and he was not even cited as a witness on behalf of the prosecution. This would be the first gap in the prosecution story or a defective investigation.

9.1 The prosecution relied on Statement of Mohit @ Kala (PW-

9) and courts below accepted him as a star witness to convict the accused. PW-9's testimony was shrouded with inconsistencies and he had not named the appellants in the FIR and had failed to identify Naresh @ Nehru as the driver of the Splendor motorcycle. He had identified Irshad and

Sonu Kumar in court but had not named them in his statement Ex.PM made before police. In his cross-examination, PW-9 admitted of not informing the police about the Pulsar motorcycle and two other Splendor motorcycles. He stated in his statement Ex.PM that victim Ajay and his friend Suraj were being chased by three motorcycles, namely Bullet, Splendor and Pulsar motorcycles respectively. However, in the statement made before the court, he improvised his version by deposing that the victim was being chased by four motorcycles. In the cross-examination, PW-9 admitted to have informed the police about deceased having been chased by four motorcycles and reiterated the contents of his statement in Ex.PM as true. These inconsistencies give rise to suspicion and raises doubt in the prosecution story.

9.2 PW-9 had named only Ravi and Shoaib in his statement Ex.PM. and for the first time before court he had identified Naresh (A-4), Irshad and Sonu (A-9 and A-6). He admitted in his cross-examination that he only knew Ravi and Shoaib before the incident, and had known about the names of the other accused persons when they were arrested. This raises doubts about PW-9's presence at the scene of the incident itself. Undisputedly no recovery was made from Irshad and Sonu. Contradictions in PW-9's statement is glaring. In his deposition he admits his statement was written by the police at 10:45 PM on 22.04.2016, whereas PW-12 (ASI Ram Kishan) deposed that written statement EX.PM was handed over to the police by the complainant's party at 11:30 PM on 22.04.2016. PW-9 and also deposes that police arrived at the scene of crime between 10:30-11:00 PM, creating serious doubt about the recording of PW-9's statement at the place of crime as claimed by the prosecution.

9.3 As noticed hereinabove, the evidence of the eye-witness should be of very sterling quality and calibre and it should not only instil confidence in the court to accept the same but it should also be a version of such nature that can be accepted at its face value. This Court in the case of Rai Sandeep @ Deepu alias Deepu Vs. State (NCT of Delhi) (2012) 8 SCC 21 has held:

> "22. In our considered opinion, the "sterling witness" should be of very high quality and caliber whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be

akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that such a witness can be called as a “sterling witness” whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged.” PW-9, the cousin of the deceased, was examined as an eyewitness to the crime. However, the presence of PW-9 at the scene raises doubt due to contradictions. Although Suraj, who was also the deceased's cousin, was accompanying the deceased, PW-9 never tried to contact him to ascertain the names of the accused persons. This raises a serious doubt about his presence that has been ignored by the courts below. The presence of PW-9 at the scene raises doubts and raises questions about the veracity of his evidence. This is the second lacunae in the prosecution case.

9.4 The courts below have relied on CCTV footage to convict the appellants and co-accused persons. However, we are of the considered view that said evidence could not have been relied upon, as it was infested with serious doubts and the very manner in which it came into existence itself would raise a serious doubt not only about its source but also raises a serious doubt about the presence of the appellants at the scene of crime. PW-8, who made a video from his mobile phone of the CCTV footage on 22.04.2016 and has claimed to have handed over the recorded CD (Ex.P.3) to the police on 01.06.2016. However, the video (CD) has not been forwarded by the police to the Forensic Science Laboratory. He (PW-8) claims to have downloaded the video from his mobile phone and transferred to his laptop and then prepared CD (Ex.P.3). Neither laptop nor mobile phone was produced by prosecution or had been seized by the police during the course of investigation. The trial court's conclusion is based on inconsistent evidence and there is lack of clarity in the evidence of PW.8. He has identified his signature on the certificate Ex. P-L (furnished as required under Section 65-B of the Evidence Act) which certificate was prepared by police official Mr. Aman and he has not been examined. The CD(Ex.P.3) was played in the trial court and observation recorded by Sessions Judge which is to the following effect would acquire great significance.

“COURT OBSERVATION:- from the video clips the faces of assailants and complainants are not decipherable.” (Emphasis supplied by us) 9.5 He (PW-8) admits in his cross-examination that certificate Ex. PL was prepared by a police official, and he (PW-8) had affixed his signature to Ex.PL. He also admits that faces of the assailants are not visible and identifiable and the registration numbers of the motorcycles are also not visible. It is pertinent to note at this juncture itself that Investigating Officer (PW-15) also admits in his cross-examination that faces of the accused are not

identifiable from the video. The said video according to PW-8 was taken from the CCTV camera located in the house of Dharmendra and he (Dharmendra) was never cited as a witness by the prosecution. This is the third stage of the deficient investigation and blame has to be necessarily laid at their door and the benefit of the doubt has to be extended to the accused persons.

9.6 The confessional statement of the accused and co-accused came to be recorded when they were in police custody. This court in Mehboob Ali & Another Vs. State of Rajasthan (2016) 14 SCC 640 has held:

> "12. Section 25 of the Evidence Act provides that no confession made to a police officer shall be proved as against a person accused of any offence. Section 26 provides that no confession made by any person while he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person. Section 27 is in the form of a proviso, it lays down how much of an information received from accused may be proved.
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> 13. For application of Section 27 of the Evidence Act, admissible portion of confessional statement has to be found as to a fact which were the immediate cause of the discovery, only that would be part of legal evidence and not the rest. In a statement if something new is discovered or recovered from the accused which was not in the knowledge of the police before disclosure statement of the accused is recorded, is admissible in the evidence.
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> 14. Section 27 of the Evidence Act refers when any "fact" is deposed. Fact has been defined in Section 3 of the Act. Same is quoted below:
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> "'Fact'.— 'Fact' means and includes— (1) any thing, state of things, or relation of things, capable of being perceived by the senses;
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> (2) any mental condition of which any person is conscious. Illustrations
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> (a) That there are certain objects arranged in a certain order in a certain place, is a fact.
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> (b) That a man heard or saw something, is a fact.
>
> (c) That a man said certain words, is a fact.
>
> (d) That a man holds a certain opinion, has a certain intention, acts in good faith or fraudulently, or uses a particular word in a particular sense, or is or was at a specified time conscious of a particular sensation, is a fact.
>
> (e) That a man has a certain reputation, is a fact.

'Relevant'.—One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts." In the instant case, the confessional statement of the accused relied upon by the prosecution was admittedly recorded after the arrest of those accused persons when accused 4, 5, and 6 were in police custody. Hence, said statement would become inadmissible having regard to the provisions of Sections 25 and 26 of the Evidence Act, of 1872. Section 25 of the Act in no uncertain terms makes it clear that no confession made to a police officer shall be proved as against a person accused of any offence. Likewise, Section 26 states that any such statement is inadmissible if given while in police custody. For this proposition, the judgment of this Court in Indra Dalal vs. State of Haryana (2015) 11 SCC 31 can be looked up.

10. As already noticed hereinabove prosecution has attempted to drive home the guilt of the accused based on accused persons having shared a common object, by pressing into service Section 149 of IPC. This provision does not create a separate offence but only declares vicarious liability of all members of unlawful assembly for acts done in common object. Thus, in order to attract Section 149 of the Code it must be shown by the prosecution that the incriminating act was done to accomplish the common object by such unlawful assembly. It must be within the knowledge of the other members as one likely to be committed in furtherance of the common object. Even if no overt act is imputed to the accused, the presence of the accused as part of the unlawful assembly is sufficient for conviction. The inference of a common object has to be drawn from various factors such as the weapons with which the members were armed, their movements, the acts of violence committed by them, and the end result. This court in Roy Fernandes vs. State of Goa and Others (2012) 3 SCC 221 has held:

> "18. That leaves us with the question whether the commission of murder by a member of an unlawful assembly that does not have murder as its common object would attract the provisions of Section 149 IPC?
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> 19. Section 149 IPC reads:
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> "149.Every member of unlawful assembly guilty of offence committed in prosecution of common object.—If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence." A plain reading of the above would show that the provision is in two parts. The first part deals with cases in which an offence is committed by any member of the assembly "in prosecution of the common object" of that assembly. The second part deals with cases where the commission of a given offence is not by itself the common object of the unlawful assembly but members of such assembly "knew that the same is likely to be committed in prosecution of the common object of the assembly".

20. As noticed above, the commission of the offence of murder of Felix Felicio Monteiro was itself not the common object of the unlawful assembly in the case at hand. And yet the assembly was unlawful because from the evidence adduced at the trial it is proved that the common object of the persons comprising the assembly certainly was to either commit a mischief or criminal trespass or any other offence within the contemplation of clause (3) of Section 141 IPC, which may to the extent the same is relevant for the present be extracted at this stage:

"141. Unlawful assembly.—An assembly of five or more persons is designated an 'unlawful assembly', if the common object of the persons composing that assembly is— First.—*** Second.—*** Third.—To commit any mischief or criminal trespass, or other offence;"

21. From the evidence on record, we are inclined to hold that even when commission of murder was not the common object of the accused persons, they certainly had come to the spot with a view to overawe and prevent the deceased by use of criminal force from putting up the fence in question. That they actually slapped and boxed the witnesses, one of whom lost his two teeth and another sustained a fracture only proves that point.

22. What then remains to be considered is: whether the appellant as a member of the unlawful assembly knew that the murder of the deceased was also a likely event in prosecution of the object of preventing him from putting up the fence? The answer to that question will depend upon the circumstances in which the incident had taken place and the conduct of the members of the unlawful assembly including the weapons they carried or used on the spot. It was so stated by this Court in Lalji v. State of U.P. [(1989) 1 SCC 437 : 1989 SCC (Cri) 211] in the following words: (SCC p. 441, para 8) "8. ... Common object of the unlawful assembly can be gathered from the nature of the assembly, arms used by them and the behaviour of the assembly at or before scene of occurrence. It is an inference to be deduced from the facts and circumstances of each case."

23. The Court elaborated the above proposition in Dharam Pal v. State of U.P. [(1975) 2 SCC 596 : 1975 SCC (Cri) 704] as: (SCC p. 603, para 11) "11. Even if the number of assailants could have been less than five in the instant case (which, we think, on the facts stated above, was really not possible), we think that the fact that the attacking party was clearly shown to have waited for the buggi to reach near the field of Daryao in the early hours of 7-6-

1967, shows pre-planning. Some of the assailants had sharp- edged weapons. They were obviously lying in wait for the buggi to arrive. They surrounded and attacked the occupants shouting that the occupants will be killed. We do not think that more convincing evidence of a preconcert was necessary. Therefore, if we had thought it necessary, we would not have hesitated to apply Section 34 IPC also to this case. The principle of vicarious liability does not depend upon the necessity to

convict a required number of persons. It depends upon proof of facts, beyond reasonable doubt, which makes such a principle applicable. (See Yeshwant v. State of Maharashtra [(1972) 3 SCC 639 : 1972 SCC (Cri) 684] and Sukh Ram v. State of U.P. [(1974) 3 SCC 656 : 1974 SCC (Cri) 186]) The most general and basic rule, on a question such as the one we are considering, is that there is no uniform, inflexible, or invariable rule applicable for arriving at what is really an inference from the totality of facts and circumstances which varies from case to case. We have to examine the effect of findings given in each case on this totality. It is rarely exactly identical with that in another case. Other rules are really subsidiary to this basic verity and depend for their correct application on the peculiar facts and circumstances in the context of which they are enunciated." In the instant case by the impugned order, the High Court has held that every member had inhibited the common intention to accomplish the unlawful object. The facts on hand would disclose that the motive alleged was a quarrel that ensued between Ravi and Nabbu with Ajay and Suraj on the day of Dulhandi and Ravi is said to have threatened to kill Ajay. This factor would clearly disclose that the appellants herein were not involved in the fight that occurred on the day of Dulhandi and as such no motive could be attributed to the appellants. The prosecution had failed to prove that the appellants herein had shared a common object with other members of the alleged unlawful assembly. To convict a person under Section 149 IPC prosecution has to establish with the help of evidence that firstly, appellants shared a common object and were part of unlawful assembly and secondly, it had to prove that they were aware of the offences likely to be committed is to achieve the said common object. Both these ingredients are conspicuously absent and there is no evidence to connect the petitioners with the deceased or the co-accused. Undisputedly, no overt act has been attributed to the appellants, and in unequivocal terms PW-9 admits in his cross-examination that none of the accused except Pawan had caused injury to the deceased and there was only a single shot fired from the pistol. Hence, we are of the considered view that the prosecution had failed to prove the guilt of the appellants herein beyond reasonable doubt, and non-consideration of the lacuna in the prosecution case in proper perspective by the Trial Court and the High Court as analysed hereinabove has resulted in miscarriage in the administration of justice namely conviction of the appellants which cannot be sustained.

11. Resultantly, the appeals are allowed and the judgment passed by the Sessions Court in SC No.21 of 2016 dated 09.05.2017 as affirmed by the High Court of Punjab and Haryana at Chandigarh in CRA-D Nos.1063 of 2017, 997 of 2017 and 1043 of 2017 are hereby set aside and consequently appellants are acquitted of the offences alleged and are ordered to be released forthwith if not required in any other case.

.....J. (S. Ravindra Bhat) .....J. (Aravind Kumar) New Delhi, October 09, 2023