Kallu @ Masih & Ors vs State Of Madhya Pradesh on 4 January, 2006

Equivalent citations: AIR 2006 SUPREME COURT 831, 2006 (10) SCC 313, 2006 AIR SCW 177, 2006 (1) AIR JHAR R 662, 2006 (3) SCC(CRI) 546, 2006 (1) SCALE 100, 2006 (2) SRJ 305, 2006 CRILR(SC&MP) 161, 2006 CRILR(SC MAH GUJ) 1 161, 2006 ALL MR(CRI) 32 NOC, (2006) 2 CHANDCRIC 238, (2005) 124 DLT 16, 2005 CHANDLR(CIV&CRI) 235, (2006) 1 GCD 634 (SC), (2006) 1 RECCRIR 427, (2006) 1 CURCRIR 418, (2006) 1 CURCRIR 171, (2006) 2 JAB LJ 194, (2006) 1 MADLW(CRI) 253, (2006) 1 MAD LJ(CRI) 301, (2006) 33 OCR 372, (2006) 1 RAJ CRI C 223, (2006) 1 SUPREME 30, (2006) 1 ALLCRIR 341, (2006) 1 SCALE 100, (2007) 57 ALLCRIC 959, (2006) 1 CHANDCRIC 290, (2006) 1 CRIMES 1, (2006) SC CR R 498, MANU/SC/271/2006, (2005) 4 RECCRIR 494, (2006) 2 RAJ LW 1146, (2006) 3 SCJ 141, (2006) 1 CURCRIR 38, (2006) 2 EASTCRIC 39, (2006) 2 ALLCRILR 91, 2006 (1) ALD(CRL) 442, 2006 (2) ANDHLT(CRI) 56 SC

Bench: S. B. Sinha, R. V. Raveendran

CASE NO.:
Appeal (crl.) 520 of 2005

PETITIONER:
Kallu @ Masih & Ors.

RESPONDENT:
State of Madhya Pradesh

DATE OF JUDGMENT: 04/01/2006

BENCH:
S. B. Sinha & R. V. Raveendran

JUDGMENT:

J U D G M E N T RAVEENDRAN, J.

This appeal is by the four convicted accused against the judgment dated 13.12.2004 of the High Court of Madhya Pradesh allowing in part, Criminal Appeal No.874 of 1995 filed by the State.

2. The case of the prosecution is that on 5.7.1993, at about 6 p.m., an unlawful assembly of 27 persons, including Kallu, Safi, Madaniya and Bhuria (appellant nos.1 to 4 herein) and one Anwar, came to the house of Sadruddin (PW-4), armed with swords, Ballams, lathis, hockey sticks, farsas

and dharias, shouting "kill/cut Sadruddin". Kallu dealt a blow on the head of Sadruddin with a sword. Madaniya also dealt a blow with a sword on his hand. Shafi gave a blow of sword injuring his forehead, nose and jaw. Bhuria gave a blow with a spear injuring his thigh and calf. On seeing Sadruddin being attacked, Sabdar Bano (PW-6), Noorbano (PW-7), Baby (PW-9) and Annobai (PW-10) rushed to the rescue of Sadruddin. They were also beaten up by the appellants and their associates. Sabdarbano received injuries on her head and body. Annobai received injuries on the head. Baby and Noorbano received injuries on their hands. By then, a Police van came near the spot. On seeing it, the appellants and others took to their heels. Kanizbano (PW-3) who was sitting outside her house and who witnessed the entire incident, along with some others, took the injured persons to the hospital. Kanizbano also lodged an FIR (Ex. P-28) within half an hour of the incident in Police Station, Dhar, naming all the 27 persons. They were tried by the 3rd Additional Sessions Judge, Dhar, for the offences under Sections 147, 148, 307/149, 324/149 and 323/149 of the Indian Penal Code. Appellant Nos.1 and 2 and one Nazir Khan were also charged under Section 25/27 of the Arms Act.

3. The trial court by judgment dated 16.8.1995 acquitted all 27 accused primarily on three grounds. The first is that all the eye- witnesses belonged to Sadruddin group who had enmity with the accused and, therefore, their statements were not reliable. The second is that no independent eye-witness was examined even though some spectators were stated to be present. The third is that there were inconsistencies in the statements of the eye- witnesses.

4. The State filed an appeal before the Madhya Pradesh High Court in Criminal Appeal No.874 of 1995. Leave to appeal was granted by the High Court under section 378(3) of Cr.P.C. in regard to five accused (the four appellants and one Anwar) who were specifically named in the evidence as persons who attacked and injured PWs. 4, 6, 7, 9 and 10. Thus, the acquittal of other 22 who were not named by any of the witnesses and to whom no specific overt act was attributed, attained finality.

5. The High Court by its judgment dated 13.12.2004 allowed the appeal in part, convicted appellant Nos.1 to 4 and sentenced each of them as follows :

> (i) RI for two years with fine of Rs. 1,000/- in default six months RI under Section 326 IPC (appellant no. 1) and 326/149 IPC (appellant nos. 2 to 4) for causing skull injury to PW-4;
>
> (ii) RI for one year with fine of Rs.500/-, in default 3 months RI under Section 324/149 IPC for causing injuries to PW-6 and PW-9;
>
> (iii) RI for six months with fine of Rs.500/- each, in default 3 months RI to each, under Section 323/149 IPC, for causing injuries to PWs.7 and 10.

6. The High Court directed that all substantive sentences shall run concurrently, and that the period of detention shall be set off against the substantive sentences awarded to them. The appeal, in so far as accused Anwar was, however, dismissed by giving him the benefit of doubt. Feeling aggrieved,

Respondents 1 to 4 in the appeal before the High Court (Accused Nos.1, 11, 19 and 23) have filed this appeal by special leave. The appellants contend that the trial court which had observed the demeanour of the witnesses and considered all the facts and circumstances, had rightly acquitted them of all charges. It is also contended that the High Court failed to notice that (a) appellants had been falsely implicated on account of previous enmity between the two groups; (b) there are several inconsistencies and discrepancies in the evidence of the eye- witnesses; and (c) though several members of public were allegedly present at the time of the incident, no independent witness was examined. It is submitted that in the absence of any perversity or omission to consider material evidence or apparent error in law, the judgment of the Trial Court was not open to interference in an appeal against acquittal. Lastly, it is contended that when only four persons are found guilty, conviction invoking section 149 IPC is not warranted.

7. The circumstances in which an appellate court will interfere with the finding of acquittal recorded by a Trial Court are reiterated in Bhim Singh vs. State of Haryana [2002 (10) SCC 461], thus :-

> "Before concluding, we would like to point out that this Court in a number of cases has held that an appellate court entertaining an appeal from the judgment of acquittal by the trial court though entitled to reappreciate the evidence and come to an independent conclusion, it should not do so as a matter of routine. In other words, if from the same set of evidence two views are possible and if the trial court has taken one view on the said evidence, unless the appellate court comes to the conclusion that the view taken by the trial court is either perverse or such that no reasonable person could come to that conclusion or that such a finding of the trial court is not based on any material on record, it should not merely because another conclusion is possible reverse the finding of the trial court."

8. While deciding an appeal against acquittal, the power of the Appellate Court is no less than the power exercised while hearing appeals against conviction. In both types of appeals, the power exists to review the entire evidence. However, one significant difference is that an order of acquittal will not be interfered with, by an appellate court, where the judgment of the trial court is based on evidence and the view taken is reasonable and plausible. It will not reverse the decision of the trial court merely because a different view is possible. The appellate court will also bear in mind that there is a presumption of innocence in favour of the accused and the accused is entitled to get the benefit of any doubt. Further if it decides to interfere, it should assign reasons for differing with the decision of the trial court.

9. Kanizbano, PW-3, who does not belong to the family of the injured Sadruddin and lives near the house of Sadruddin has stated that Kallu, Safi, Madaniya, (appellant Nos.1, 2 and 3) had beaten Sadruddin. She has also stated that they along with others, including Bhuria, (appellant No.4), had come armed with dharias, farsas, lathis etc., shouting "kill, kill".

10. Sadruddin (PW-4) has named all the four appellants and 18 other accused as the persons who came armed with swords, ballams, hockey sticks, farsas and dharias. He also described the manner in which each of the appellants had inflicted blows on him. He stated that Kallu hit him on his head

with a sword; that Madaniya hit him with a sword on his hand; that Shafi hit him with a sword on his face injuring his forehead, eye and nose and breaking his tooth; and that Bhuria gave a blow with Ballam causing injuries to his thigh and calf.

11. PW-6, Sabdarbano, daughter of Sadruddin, specifically stated that appellant nos. 1 to 4 and their friends (who were present in court) had come armed with spears, dariyas, lathis etc., and that they were shouting "Maro, kato". She also stated that Kallu hit her father with a sword; that Shafi had a sword and Bhuria had a spear. She stated that when she along with PW-7 and PW-10 went to rescue her father, they attacked her and she received sword hits on her hand and ribs and spear hit on her shoulder and head and that her fingers were fractured. Noorbano, PW-7, another daughter of Sadruddin stated that appellant Nos.1 to 4 and other accused had come running and Kallu hit her father on the head using a sword. She also stated that when she, PW-6, PW-9 and PW-10 went to rescue her father, they were all beaten up by all the accused and that her hand was injured. Baby (whose father is a nephew of Sadruddin) examined as PW-9, stated that appellants 1 to 4 chased Sadruddin; that Kallu hit him with a sword on the head and Shafi hit him on the face with a sword, and that all of them beat Sadruddin. She also stated that she was hit by someone on right hand. Annobai (PW-10), niece of Sadruddin stated that Kallu and others came to the house of Sadruddin, shouting "kill/cut" and Kallu, Bhuria and Altaf hit Sadruddin with sword/s. She also states that she was hit by a sword on her head by someone.

12. It is true that only Sadruddin clearly stated as to who hit him with what weapon and at which part of his body. The other four eye-witnesses (PWs 6, 7, 9 and 10) have not stated who landed the blows on them. All of them, however, identify Kallu as hitting Sadruddin on the head. In addition, Baby (PW-9) has stated that Shafi hit Sadruddin on the nose and Annobai (PW-10), stated that Bhuria hit Sadruddin with a sword.

13. The evidence of PWs. 4, 6, 7, 9 and 10 when read with the evidence of PW-3 makes it clear that appellants 1 to 4 along with others, had come armed with swords, spears, hockey sticks etc.; that a blow was given when Sadruddin was sitting on Otla of his house and, thereafter, he ran a few steps and there all the appellants landed him blows with different weapons. It is also clear that when the womenfolk, namely, PWs.6, 7, 9 and 10 ran to save him, they were also beaten up. The evidence also clearly shows that neither Sadruddin nor the womenfolk were armed. On the other hand, appellants 1 to 4 were armed when they came in a group along with others to Sadruddin's house shouting "kill/hit". The evidence of the eye-witnesses is also clear that but for a Police van intervening at that time, there was the likelihood of Sadruddin and the women who went to save him, sustaining more injuries. Though there was a cross-complaint by the defence group, significantly, none of the appellants was injured. The evidence also shows that there was a longstanding enmity between Sadruddin and Kallu. In these circumstances, the High Court held the appellants guilty.

14. Though the trial court referred to the evidence of the eye- witnesses, it chose to disbelieve them merely on account of minor inconsistencies in their evidence, relating to the exact site of occurrence and failure to name all who landed blows and the exact nature of injuries. The High Court, on the other hand, held that minor inconsistencies and discrepancies regarding the exact place or the point at which the incident took place or as to who landed the blows is not sufficient to disbelieve the

evidence of injured eye- witnesses. It is not necessary that all eye-witnesses should specifically refer to the distinct acts of each member of an unlawful assembly. In fact, it is difficult, if not impossible. This Court in Masalti v. State of U.P. [1964 (8) SCR 133], observed :

> "Where a crowd of assailants who are members of an unlawful assembly proceeds to commit an offence of murder in pursuance of the common object of the unlawful assembly, it is often not possible for witnesses to describe accurately the part played by each one of the assailants. Besides, if a large crowd of persons armed with weapons assaults the intended victims, it may not be necessary that all of them have to take part in the actual assault.

15. The trial court was of the view that absence of an independent eye-witness in the background of previous enmity, was a serious lacuna. But what the trial court failed to notice is that previous enmity was not denied and the prosecution case is that Kallu and other accused came in a group to Sadruddin's house specifically to beat him up. Therefore, the mere fact that there was enmity between Sadruddin and Kallu cannot be a ground to reject the clear evidence of the eye-witnesses -- PWs 4, 6, 7, 9 and 10 who were the injured, and PW-3. The High Court has, therefore, rightly held that the appellants and other accused were the assaulting party; that they had come together with weapons and had acted jointly and had run away after injuring Sadruddin and four female members of his family.

16. We find that the High Court has not interfered in the matter in a routine manner merely because a different view is possible. The High Court has interfered rightly, in our view, because the trial court unreasonably disbelieved the evidence of six eye-witnesses on insufficient grounds. The High Court has also assigned reasons for interfering with acquittal. We find no error in the decision of the High Court.

17. The contention that when only four persons are found guilty, there cannot be conviction under section 149 IPC, has no merit. Section 149 provides that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence. Section 141 requires a minimum of five persons for being designated as an 'unlawful assembly'.

18. The question has been specifically considered by this Court in Mohan Singh & Anr. vs. State of Punjab [AIR 1963 SC 174] and Ram Bilas Singh & Ors. Vs. The State of Bihar [1964 (1) SCR 775], and in Dharam Pal and Others vs. The State of U.P. [1975 (2) SCC 596]. It is sufficient to refer to the principle as stated in Dharam Pal (supra), for our purpose :

> "It is true that the acquittal of an accused person does raise, in the eye of law, a presumption that he is innocent even if he was actually guilty. But, it is only the acquitted accused person and not the convicted accused persons who can, as a rule, get the benefit of such a presumption. The effect of findings on questions of fact

> depends upon the nature of those findings. If, for example, only five known persons are alleged to have participated in an attack but the courts find that two of them were falsely implicated, it would be quite natural and logical to infer or presume that the participants were less than five in number. On the other hand, if the court holds that the assailants were actually five in number, but there could be a doubt as to the identity of two of the alleged assailants, and, therefore, acquits two of them, the others will not get the benefit of doubt about the identity of the two accused so long as there is a firm finding, based on good evidence and sound reasoning, that the participants were five or more in number. Such a case is one of doubt only as to identity of some participants and not as to the total number of participants. It may be that a definite conclusion that the number of participants was at least five may be very difficult to reach where the allegation of participation is confined to five known persons and there is doubt about the identity of even one. But, where a large number of known persons (such as eighteen, as is the case before us), are alleged to have participated and the Court acts on the principle that it is better to err on the side of safety, so that no injustice is done to a possibly wrongly implicated accused, and benefit of doubt is reaped by a large number, with the result that their acquittal, out of abundant caution, reduces the number of those about whose participation there can be no doubt to less than five, it may not be really difficult at all, as it is not in the case before us, to reach the conclusion that, having regard to undeniable facts, the number of participants could not possibly be less than five. "

[Emphasis supplied]

19. The accused before the trial court were 27 in number. PW- 4 specifically named 22 persons and further named the four out of them who landed him the blows. PW-3 names 12 persons who came as a group. Other eye-witnesses also clearly stated that the appellants with other accused who were present in court had come to attack Sadruddin. As noticed above, the trial court chose to acquit all the 27 accused. In the appeal filed by the State, leave was granted by the High Court only in regard to five of the accused, as they were specifically named as the persons wielding weapons and causing injuries to Sadruddin and others and as the names of others were mentioned only as being members of the assembly without any specific act being attributed to them. The High Court gave benefit of doubt to one of the five (Anwar) though his presence as a member of the group was accepted. This resulted in conviction of only four. This does not mean that there is no finding that there was an unlawful assembly. When the evidence clearly shows that more than five persons armed with swords, spears etc. had come to the house of Sadruddin with the common object of causing injury, and injured him. The mere fact that several accused were acquitted and only four are convicted, does not enable the four who are found guilty to contend that Section 149 is inapplicable. We may also in this context refer to the following observations in Masalti vs. State of UP [1964 (8) SCR 133], reiterated in Triloki Nath vs. State of UP reported in JT 2005 (9) SC 370 :-

> "In fact, section 149 makes it clear that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of

> that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence; and that emphatically brings out the principle that the punishment prescribed by section 149 is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly."

20. We, therefore, find no merit in this appeal and the same is, accordingly, dismissed.