Supreme Court of India
Surjan And Ors. vs State Of Rajasthan on 1 November, 1955
Equivalent citations: AIR 1956 SC 425, 1956 CriLJ 815
Author: Jagannadhadas
Bench: Bose, Jagannadhadas
JUDGMENT Jagannadhadas, J.

1. This is an appeal by special leave against the judgment of the High Court of Rajasthan, whereby a number of accused who were acquitted by the Sessions Judge at the trial were convicted and sentenced on appeal by the High Court.

In addition, the High Court while confirming the conviction of another accused (Surjan) under Section 323, Penal Code convicted him also under Section 304, Penal Code and sentenced him therefore to ten years' rigorous imprisonment.

2. The case arose out of an incident in the village of Dadoosan at or about 10 A.M. on 15-3-1949, between two rival groups. The village was a Jagir village belonging to a Jagirdar by name Thakore Bakhat Singh. The cultivating class in the village were mostly Bisnois and appear to have been split into two groups in connection with certain demands of the Jagirdar against the tenants, viz., the payment of hasal of Guar.

Twenty families of Bisnois in the village were in favour of the payment to the Jagirdar and seven families against it. The accused are partly members of these seven families and partly residents of adjoining villages. The prosecution witnesses belong mostly to the group of the twenty families favourable to the Jagirdar.

3. 15-3-1949 was the day next to the Holi called the Dulehandi day. On this day it was usual for the Bisnois to observe a ceremony called Pal at which all the Bisnois collect and take charanamrut from a Sad (who performs the Puja). In view of the existence of groups in the Bisnois of the village, the two groups had their Pal ceremony on that day separately.

The trouble arose with reference to the participation in this Pal ceremony of a person called Dhonkala examined as P.W. 4. He participated in the Pal ceremony celebrated by the twenty group. He appears to be somewhat closely related to some members of the seven group, who probably wanted to get him back to their group.

It is in the evidence of one of the prosecution witnesses, P.W. 18, that "Peka (one of the accused belonging to the seven group) the brother of Dhonkala (P.W. 4) directed Dhonkala to join him and leave the twenty". P.W. 4 himself says that he took Pal with the men of the twenty group and that when after taking Pal he started for home, Lachha (one of the accused belonging to the seven group) told him to take Pal with him and his party and that he did not go to them.

Whether it was Peka or Lachha, it is clear that one of the members of the seven group wanted P.W. 4 to participate with them and that on his refusal some wordy abuse followed. According to the

prosecution case this resulted in some of the accused pursuing P.W. 4 with a view to beat him. P.W. 4 ran into his dhani (hut).

Two of the accused Ramchand and Peka thereupon set fire to the dhani with a match stick. The flames which resulted from the fire attracted the attention of the others in the village and the prosecution eye-witnesses came running up to the scene. Some out of them attempted to extinguish the fire but the accused prevented them from doing so.

One Abhey Singh, a distant relation of the Jagirdar, was one of the prominent persons who so intervened. His interference was resented and three out of these accused were said to have hit him on the head with lathis which they had in their hands. It may be mentioned that it is part of the prosecution case that all the accused except one Ramchand came to the Pal with lathis in their hands and that accused Ramchand had an axe in his hands.

The assault on Abhey Singh by three of the accused resulted in a marpeet in which a number of persons on the prosecution side, viz. Rama, P.W. 13, Sawai, P.W. 14, Ridmal, P.W. 15, Chaina, P.W. 16 and Pusia, P.W. 18, also received injuries. The accused thereupon dispersed and went away to their places. Devi Singh, P.W. 8, the son of the Jagirdar, who is alleged to have run up to the scene of occurrence on noticing the smoke rising from the dhani of Dhonkala and who figured as an eye-witness of the incident in the case, took the injured persons to the Sanchore dispensary.

Abhey Singh's injuries proved fatal and he died on the way to the hospital. A postmortem examination was held by the Doctor, P.W. 10. He also examined the injuries received by the others. P.W. 14, Sawai, received a large number of injuries numbering as many as thirteen. P.W. 13, Rama, received one injury. P.W. 15, Ridmal, received three injuries, P.W. 16, Chaina, received three injuries. P.W. 18, Pusia, received two injuries.

All the injuries of these five persons were simple consisting of contusions, abrasions, swellings and so forth, excepting one injury on Sawai, P.W. 14, which was a "simple fracture at the junction of the upper one-fourth with the lower three-fourth of the left radius". All the injuries, according to the Doctor, were received by blunt weapons excepting one incised wound on Pusia, P.W. 18, which according to the Doctor, was inflicted with a sharp weapon.

In the prosecution evidence this injury was ascribed to the accused Ramchand, who is said to have had an axe in his hand. The first information of this incident was lodged with the Circle Inspector of Police, Sanchore, on 15-3-1949, by Devi Singh, P.W. 8. Challan was presented against seventeen persons who, after preliminary enquiry, were committed to the Court of Session by the First Class Magistrate, Bhinmal, by his order dated 24-12-1949. The accused were charged thereby as follows.

All the accused were charged under Section 148, Penal Code, the common object of the assembly being said to be to set the dhani of Dhonkala on fire. Accused Surjan was separately charged under Section 302, Penal Code for causing the death of Abhey Singh. Accused Ramchand and Peka were charged under Section 436, Penal Code for setting fire to the dhani of Dhonkala, P.W. 4, Accused Ramchand was also separately charged under Section 324, Penal Code in view of his alleged assault

with an axe in his hand.

In addition to these, all the accused were charged under Section 302, Penal Code taken with 149, Penal Code, Section 325, Penal Code taken with 149, Penal Code & Section 436, Penal Code taken with 149, Penal Code. At the Sessions trial, in addition to the above charges, individual charges were added against eight of the accused under Section 323, Penal Code.

After trial, the learned Sessions Judge came to the conclusion that no unlawful assembly with a common object as alleged was made out. He was not satisfied that Ramchand and Peka set fire to the dhani of Dhonkala or that Surjan dealt the fatal blow on Abhey Singh.

Accordingly he acquitted Ramchand, Peka and Surjan in respect of the respective individual charges framed against them. In view of his finding that unlawful assembly was not made out, he acquitted all the accused of the various charges against them under Sections 302/149, 325/149 and 436/149, Penal Code. The view taken by him was that the several accused could be found guilty only in respect of the individual part played by each.

Dealing with the evidence on this footing, he did not feel satisfied about the evidence against any of the accused excepting four. They were Surjan, Bhagchand son of Hamira, and Dhonkala (a person different from Dhonkala P.W. 4), who were said to have been the assailants of the deceased Abhey Singh, and Kana son of Hanuta who is said to have assaulted Sawai, P.W. 14. He accordingly convicted Surjan, Bhagchand and Dhonkala under Section 323, Penal Code and Kana under Section 325; Penal Code and sentenced each of them to undergo one year's rigorous imprisonment.

The remaining were acquitted. Thus thirteen persons were acquitted in toto while the four above mentioned were acquitted of all the major charges and were convicted only in respect of minor charges (Sections 823 and 325, Penal Code).

4. Against this judgment the State filed an appeal disputing the correctness of the acquittals excepting as regards Rama. The four convicted persons also filed an appeal as regards the convictions and sentences against them.

The High Court dealt with these two appeals together. It was of the opinion that the judgment of the Sessions Judge was "a very weak judgment". Accordingly it considered the entire evidence for itself and confirmed two of the findings of the learned Sessions Judge, viz., (1) that no unlawful assembly was made out, and (2) that there was no adequate proof as to who set fire to the dhani of P.W. 4. But it was of the opinion that a case under Section 304, Penal Code was satisfactorily made out against accused Surjan in respect of the death of Abhey Singh.

On these findings the acquittal of the accused Ramchand and Peka in respect of Section 436, Penal Code, as also of Surjan in respect of Section 302, Penal Code as also the acquittal of all the accused with reference to the charges under Section 149, Penal Code were maintained. The High Court also proceeded on the view that the various accused could be held guilty, only in respect of the individual part played by them at the incident.

As regards accused Surjan it came to the conclusion that it was he who dealt the fatal blow on the head of Abhey Singh. He was accordingly held guilty under Section 304 Penal Code. As regards the various other accused it did not agree with the learned Sessions Judge that the individual participation was satisfactorily made out only as against three others, i.e., Bhagchand, Dhonkala and Kana. It held that the evidence of the individual part played by each of the accused was satisfactory in respect of a number of other accused also.

In the result the High Court affirmed the total acquittal in respect only of Ramchand and Peka but convicted the fourteen others. Surjan's conviction was altered to that under Section 304, Penal Code, with a sentence therefore of ten years' rigorous imprisonment. The convictions of the other thirteen were in respect of Section 323, Penal Code with a sentence therefore of one year R.I.

The appeal to this Court accordingly is by 14 of the original 17 accused, Ramchand and Peka going out by virtue of their total acquittal, and Rama having been left out by the State when filing its appeal to the High Court, for reasons which do not appear on the record. Out of the fourteen appellants who filed this appeal, the name of one person, Lachha, son of Arjun (who appears to have died during the pendency of the appeal in this Court) was struck off from the appeal by order of this Court, dated 13-12-1954.

5. The main contention of the learned counsel for the appellant before us is that in reversing the acquittal, the learned Judges of the High Court have departed from the standards laid down by this Court in the cases in -- 'Surajpal Singh v. The State', , 'Ajmer Singh v. State of Punjab', , 'Puran v. State of Punjab', I, , 'Ittiravi Nambudiri v. State of Travancore-Cochin,' , 'Prandas v. State', , and 'Bansidhar Mohanty v. State of Orissa', .

All these cases lay down that while in such cases the High Court is free to appreciate the evidence for itself and to act on its own view thereof when it differs from that of the trial Court, it will not do so lightly and will be slow to reverse an acquittal except for strong and compelling reasons. These principles are now well-settled and are no longer in dispute.

In order to satisfy ourselves about the correctness or otherwise of the contention that the judgment of the High Court is not in consonance with the above standards, we have heard the matter at some length and given our careful consideration to it. We are satisfied that the judgment of the learned Sessions Judge and the acquittals consequent thereon were such as called for interference on appeal by the State.

The learned Sessions Judge having come to the conclusion that no unlawful assembly was made out, proceeded to consider the question of the criminal liability of the individual accused with reference to the part played by each of them. But in considering the evidence for this purpose he set about this task in a somewhat curious way.

One should have thought that he would have taken up the cases of the individual accused one by one and seen who all speak against him and what part each witness ascribes to him, and that he would then have considered whether and how far the evidence of each of such eye-witnesses is reliable as

against the particular accused. He has done nothing of the kind. He has set out in a very cursory way the evidence of only such of the prosecution eye-witnesses who have received injuries, i.e., P.Ws. 13, 14, 15, 16 and 18 and has proceeded on a somewhat artificial view that it is by the evidence only of these five witnesses in so far as each was able to speak to and identify his own assailants, that the individual accused could be found guilty.

The evidence of a number of other witnesses, which purports to show that the injuries which were in fact received by these prosecution witnesses were also inflicted by a large number of others has been completely ignored or brushed aside, Thus for instance Sawai, P.W. 14, as already stated, received 13 injuries. He himself spoke only to accused Kana, son of Hanuta having aimed a blow with a lathi on his left fore-arm breaking the arm-bone.

Other witnesses have spoken to Sawai being assaulted by other accused.. Dhonkala, P.W. 4 speaks of Hanuta, Hema, P.W. 6 of Phagloo, Devi Singh, P.W. 8 of Lachha, Hanuta, also as being assailants of Sawai. But the evidence of none of these witnesses with reference to the alleged assaults on Sawai was even referred to, apparently on the unsound and unreal assumption that it is only the victim that can speak about his own assailants.

But curiously enough the learned Sessions Judge does not even adhere to his own standard. He reverses the assumption when he dealt with the injuries of Ridmal, P.W. 15. Ridmal received lacerated wounds on the right and left parietal regions. He spoke to Phagloo and Surjan as his assailants. But the learned Sessions Judge does not convict them in respect of the said injuries on the ground that no other eye-witness named them . as the assailants of Ridmal.

Again the learned Sessions Judge in considering the evidence of Chaina, P.W. 16, (who received a contusion on the left parietal region and had a swelling with abrasion on the right forearm and another swelling on the left forearm) said that Chaina deposed that Baga had hit him, but that he confused himself about the other assailants by stating first that it was Ramchand, and then correcting himself that it was Lakha. He, therefore, came to the conclusion that it is difficult to say who was the assailant and did not convict even Baga about whom there was no confusion.

Thus it is seen that in acquitting the various accused other than the four convicted by him, the learned Sessions Judge adopted inconsistent and unsound standards without any real effort to assess the credibility of the evidence given by the various alleged eye-witnesses as against each of the accused.

6. Learned counel for the appellant attempted to justify the acquittals on the ground that the incident was in the nature of a confused melee between two hostile groups in which fairly large numbers participated as alleged in the F.I.R. and that it was not really possible for any individual witness to have noticed who was the assailant of each of the prosecution witnesses that received injuries.

In support of his argument, he relied on the evidence that both the groups had met at the place for the normal and legitimate purpose of performing Pal and that therefore the case that all the accused

went there with lathis in their hands must be false.

It is pointed out that the incident occurred after the prosecution group had finished taking the Pal and before the accused proceeded to take it and that the F.I.R. which was filed by one of the alleged eye-witnesses, P.W. 8, is absolutely silent as to the part played by each of the accused as against each of the injured persons, but rolled up the whole incident into a vague statement as follows :

"40 or 45 persons in all (including the 17 accused whose names were specified) attacked the dhani of Dhonkala son of Hamira and set fire to it and beat Abhey Singh, Sawai, Ridmal, Chaina, Rama, Pusia, from among those who went to extinguish the fire with lathies".

It is suggested that this is all the more remarkable since according to his own evidence, P.W. 8, the first informant, was accompanied by a number of eye-witnesses when he went to file the F.I.R. and that therefore he was in a position to get the complete picture by then.

It is also pointed out that most of the eye-witnesses belong to the rival group of Bisnois and were the tenants of the Jagirdar, whose relation Abhey Singh, was the victim of the murder and that individual ill-will of some of the eye-witnesses against some of the accused has also been brought out in cross-examination. It is necessary, however, to notice that the acquittals by the Sessions Judge of the various accused were not based on any such ground.

In a case of this kind there may well be adequate answers for criticisms of the sort which the learned counsel for the appellant has put forward. The mere fact that the judgments do not deal with them is not sufficient to show that they were not considered.

Neither the trial Court nor the appellate Court proceeded on the view that there was a confused melee in which none of the assailants could be identified by any of the witnesses. Nor are the acquittals by the trial Court based on the view that all or any of the eye-witnesses were not present on the scene or had particular motives to implicate any of such accused falsely. Indeed the very defence of six of the accused, viz. Peka Panna, Dhonkala, Ramchand, Kachhaba, and Baga, admits the presence of seven of the prosecution witnesses at the incident, viz., of P.Ws. 6, 8, 12, 13, 14, 16 and 18, and imputes to them aggressive action against themselves which is admitted to be the subject-matter of a counter-case.

The defence of alibi set up by some of the accused was not accepted by the trial Court in respect of any one of them. In these circumstances and in view of the highly unsatisfactory appreciation of the oral evidence by the learned Sessions Judge as pointed above, it is not possible to say that there is no justification for the correctness of the various acquittals being closely scrutinised and examined by the appellate Court.

In such a situation the Court is not only entitled but bound to give effect to its own independent conclusion on the evidence, giving due weight to all the circumstances which have normally to be kept in view in cases of this kind. We are, therefore, clearly of the opinion that there was ample justification for interference by the High Court with the acquittals which resulted from the judgment

of the learned Sessions Judge.

7. Learned counsel for the appellants next submitted that assuming that the judgment of the learned Sessions Judge was not satisfactory, the judgment of the High Court reversing the acquittals was not what it should have been. He urged that the learned Judges have not judicially applied their mind to the appreciation of evidence but that all that was done was" to look at and set out only the evidence in the examination-in-chief of each of the prosecution witnesses without noticing and taking into consideration the material brought out in cross-examination to discredit such evidence.

It is also pointed out that the individual guilt of each of the accused was determined by merely cataloguing how many eye-witnesses spoke against each of the accused. On a careful perusal of the judgment of the High Court we cannot help feeling that there is room for the above criticism. This is not, however, to say that the learned Judges did not in fact scrutinise and appreciate the evidence.

But they owed it to themselves, when reversing acquittals that their judgment should clearly set out and discuss the evidence of the eye-witnesses as against each of the accused succinctly and categorically, instead of merely cataloguing a summary of the evidence of each prosecution witness and an enumeration of all who spoke against each accused.

8. On the other hand, the learned Advocate-General for Rajasthan appearing for the State put forward a strenuous argument that the finding of both the Courts that there was no unlawful assembly is erroneous. It is no doubt rather extraordinary that in a case of this kind which was admittedly the outcome of conflict between two hostile groups resulting in the death of one person and injuries on a number of others, the accused should be able to get away with a concurrent finding of both the Courts that there was no unlawful assembly.

We have accordingly heard his argument in this behalf and are not prepared to say that the argument is without force. But we cannot give effect to any such argument in view of the fact that both the Courts have concurrently acquitted all the accused in respect of the charge under Section 148, Penal Code and of the various charges under Section 149, Penal Code.

The State has not obtained any leave from this Court for appeal against these acquittals. The said acquittals must accordingly stand. The learned Advocate-General urged that he was challenging the finding as to the non-existence of an unlawful assembly not for the purpose of getting the acquittals under Sections 148 and 149, Penal Code set aside and not even for the purpose of asking for any higher sentences in respect of the various convictions as found by the High Court but only in order to maintain those convictions and sentences.

Even so, we cannot accept the validity of such an argument in justification of maintaining the convictions and sentences. The validity and correctness of the convictions must depend on the other merits of the case. The accused are entitled to the benefit of the finding that there was no unlawful assembly under Section 148, Penal Code and no constructive, liability under Section 149, Penal Code.

9. What remains, therefore, to be considered is whether there is sufficient evidence as against each of the accused who have been convicted for specific offences in respect of their individual acts. Now, apart from two specific matters which will be dealt with presently, the question as to the sufficiency of evidence is one ultimately for the first appellate Court.

It is true that in so far as the appellants other than the four accused convicted by the trial Court are concerned, it cannot be said that there are concurrent findings against them by both the Courts below. Therefore it is arguable that the normal rule which this Court adopts for its own guidance in dealing with appeals by special leave, viz., that of not allowing the evidence to be canvassed, to challenge the concurrent findings of fact, is not applicable to this case.

All the same this Court will not, save in very exceptional cases, convert itself into a regular Court of appeal on evidence, in dealing with matters arising by way of special leave. In a case where it finds that the appellate Court has not at all applied its judicial mind to the appreciation of the evidence and grave injustice has resulted therefrom this Court may remand the case to the first appellate Court for fresh consideration. Keeping this in view we have permitted the evidence to be canvassed before us in its broad outline without going into meticulous details.

On a careful consideration thereof we are satisfied that this is not a case in which we should either go into a detailed examination of the evidence ourselves or call upon the High Court to reassess the evidence. We are, therefore, not prepared to set aside any of the convictions on the ground of absence of reliable evidence against the individual appellants who have been convicted with reference to the part played by each of them. Only two further questions that have been raised before us remain.

10. Out of 14 appellants before us there are individual charges only as against nine of them, eight under Section 323, Penal Code arid one against Surjan under Section 302, Penal Code. It is urged that the conviction of the other five against whom the only charges were under Section 149, Penal Code cannot be maintained in the absence of specific charges under Section 323, Penal Code.

In view, however, of Section 535, Criminal P. C. prejudice arising from the omission must be made out before the Court can interfere with the convictions. We do not find that there has been any such prejudice or grave injustice in respect of the cases relating to these five accused. We are, therefore, not prepared to interfere in their favour on this ground.

11. Now so far as accused Surjan is concerned, the case stands on a different" footing. The specific charge against him is under Section 302, Penal Code for having committed the murder of Abhey Singh. The evidence of all the eye-witnesses was that the three persons Surjan, Bhagchand and Dhonkala son of Samaratha inflicted injuries on the deceased.

While all the eye-witnesses excepting Dhonkala, P. W. 4, ascribe the fatal head-injury to Surjan, P. W. 4, Dhonkala, ascribes it to Bhagchand. The learned trial Judge was therefore not prepared to accept the evidence in so far as it ascribed the specific and fatal blow to Surjan. He was of the view that the evidence did not enable him to say who dealt the fatal blow.

Having acquitted all the accused under, Section 149, Penal Code he was of the opinion that each of the three persons including Surjan could be convicted only under Section 323, Penal Code. On-appeal, however, the learned Judges of the High Court virtually ignored the evidence of P. W. 4. In view of the evidence, in this behalf, of all the other eyewitnesses, they were of the opinion that Surjan was the person who gave the fatal blow.

But they held that he was guilty not under Section 302, Penal Code but only under Section 304, Penal Code. Surjan was accordingly convicted under Section 304, Penal Code and sentenced to ten years' rigorous imprisonment. Now, it is brought to our notice that it is in the medical evidence that there was more than one blow on the head of the deceased. If so, it is urged that it may well be that the evidence of P. W. 4 is not inconsistent with that of the other witnesses, in so far as they relate to the assault on the head of the deceased.

It is submitted that both Bhagchand as well as Surjan may have assaulted the deceased Abhey Singh on the head and that the two assaults may have resulted in two injuries on the head. If this view is accepted it follows that it would be difficult to depend on the evidence to determine who gave the fatal blow. The medical evidence in this behalf has therefore to be considered. P. W. 10 who conducted the post-mortem examination of the body of the deceased Abhey Singh recorded the following injuries on the deceased in his report.

"The following anti-mortem injuries were noted:

1. Lacerated wound 21/2" x 1/2" x bone deep on Lt. parietal region.

2. Contusion 7" x 3" front of the Rt. arm.

3. Contused wound 1/2" x 1/4" medical aspect of 1st. phalanx of Rt. middle finger.

4. Contusion 13" x 3" Rt. half of the back.

5. Contusion 6" x 2" on the Rt. shoulder and arm.

6. Bleeding from nostrils at Lt. ear.

7. Depression 6" x 2" on the Rt. and Lt. parietal region.

Head: Depressed fracture 8" x 1" Rt. and Lt. parietal bones. Deposition of blood clots below the meninges and in the brain substance. Brain substance decomposed.

* * * * * Cause of death-- Coma due to the compression of the brain as a result of the injury to the head."

In his evidence before the Court he adds an item by way of No. 8 to the injuries above indicated as follows :

"8. Depressed fracture 8" x 1" of right and left parietal bones. Deposition of blood dots' below the meninges and in the brain substance."

But this is merely the note in the post-mortem report given with a separate number. He says that this injury No. 8 was sufficient in the ordinary course to cause death. It is clear that injuries 7 and 8 are the same, injury 7 being the external aspect and injury 3 being the internal aspect.

The point to be noticed, however, is that the evidence indicates prima facie two injuries on the head. (1) Lacerated wound on left parietal region, and (2) depressed fracture of right and left parietal bones. This naturally gave rise to some doubt as to whether these two injuries could be caused by one blow or were the result of two blows. The Doctor, P. W. 10, was therefore asked about this in cross-examination. His answer was as follows :

"The injury on the head of the deceased could be by one blow and also by more than one blow."

In view of this dubious answer the Court put questions to him. His answer thereto was the following:

"The two injuries on the head should be by two blows. They could not be caused by single blow. I have wrongly deposed above that they could also be by one blow.' If this evidence of the Doctor is to be accepted -- and there is no reason why it should not be -- it is clear that two blows must have been inflicted on head of the deceased Abhey Singh. The learned Judges of the High Court, however, have not specifically noticed these answers of the Doctor to the questions by Court. They have brushed it aside as appears from the following passage in their judgment:

"We find that Abhji had eight injuries. Of these, one was on the head on the left parietal region. Four others were ordinary injuries on various other parts of the body. Sixth injury was bleeding from nostrils and left ear. This is really no independent injury for the bleeding must be due to the injury on the head. The seventh was a depression on the right and left parietal regions. This also appears to us to be the effect of injury No. 1 which caused the lacerated wound. The eighth was an internal injury, namely the fracture of the right and left parietal bones. It is obvious therefore that Abhji got only one blow on the head, and the witnesses are practically unanimous that it was given by Surjan."

It may be that it is not impossible that injuries 1 and 8 may be caused by one blow. If is also possible that the inquest report, Ex. P-16, which notes only one injury on the head describing it as "an injury inflicted by a lathi near the top of the head" is indicative of only one single blow on the head.

But the statement in the inquest report is not evidence by itself and it certainly cannot be pitted against the evidence of the medical witness given in Court. There is absolutely no material on the record on which the definite and categorical evidence of the medical witness that there were in fact two injuries on the head and that they could not be caused by a single blow could be discredited or ignored.

With respect, the learned Judges of the High Court in stating that "it was obvious Abhji got only one blow on the head" were acting not on evidence but on conjecture. In the circumstances the guilt of

the accused Surjan must be determined on the footing that there were two injuries on the head of the deceased and that they were caused by two blows.

As there is no evidence as to who dealt the fatal blow, appellant Surjan must get the benefit of that state of the evidence. There was, therefore, no sufficient reason for the High Court to interfere with the acquittal of the appellant Surjan in respect of the alleged murderous assault by him.

The conviction of accused Surjan, therefore, under Section 304, Penal Code and the sentence of ten years' R. I. therefore cannot be maintained. His conviction by the Sessions Judge for an offence under Section 323, Penal Code and the sentence of one year R. I. therefore as confirmed by the High Court is maintained.

12. In the result the appeal is dismiss ed except as regards the 'appellant Surjan. So far as he is concerned his conviction under Section 304, Penal Code and the sentence following thereupon are set aside and his conviction under Section 323, Penal Code and the sentence of one year's rigorous imprisonment therefore are, maintained.