Shivaji Sahebrao Bobade & Anr vs State Of Maharashtra on 27 August, 1973

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Author: V.R. Krishnaiyer

Bench: V.R. Krishnaiyer, P. Jaganmohan Reddy, Hans Raj Khanna

PETITIONER:
SHIVAJI SAHEBRAO BOBADE & ANR.

Vs.

RESPONDENT:
STATE OF MAHARASHTRA

DATE OF JUDGMENT27/08/1973

BENCH:
KRISHNAIYER, V.R.
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KRISHNAIYER, V.R.
REDDY, P. JAGANMOHAN
KHANNA, HANS RAJ

CITATION:
1973 AIR 2622 1974 SCR (1) 489
1973 SCC (2) 793
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APL 1974 SC 606 (8)
RF 1975 SC 241 (13)
D 1977 SC 472 (27)
RF 1981 SC1917 (16)
F 1983 SC 867 (28)
R 1984 SC1622 (152)
R 1988 SC2154 (9)
RF 1991 SC1842 (6)

ACT:
Code of Criminal Procedure (Act 5 of 1898)- Section 417-Appeal against acquittal-Power of the High Court to interfere-Norms for the exercise of the power.

HEADNOTE:

The dangers of exaggerated devotion to the rule of benefit of doubt at the expense of social defence and to the soothing sentiment that all acquittals are always good regardless of justice to the victim and the community, demand special emphasis in the contemporary context of escalating crime and escape. The judicial instrument has a public accountability. The cherished principles or golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt. The excessive solicitude reflected in the attitude that a thousand guilty men may go but one innocent martyr shall not suffer is a false dilemma. Only reasonable doubts belong to the accused. Otherwise any practical system of justice will breakdown and lose credibility with the community. if unmerited acquittals become general, they tend to lead to a cynical disregard of the law, and this in turn leads to a public demand for harsher legal presumptions against indicated 'persons' and more severe punishment of those who are found guilty. Jurisprudential enthusiasm for presumed innocence must be moderated by the pragmatic need to make criminal justice potent and realistic. A balance has to be struck between chasing chance possibilities as good enough to set the delinquent free and chopping the logic of pre-ponderant probability to punish marginal innocents.

Certainly, in the last analysis, reasonable doubts must operate to the advantage of the appellant. In India the law has been laid on these lines long ago.

The appellants were charged under s. 302 read with section 34 of the Indian Penal Code. The Sessions Court gave the accused the benefit of doubt and acquitted them. On appeal the High Court after elaborate consideration of the evidence and the grounds relied upon by the trial judge to discard the prosecution case, reversed the findings and convicted both the accused to imprisonment for life. Confirming the conviction and sentence and dismissing the appeal,

HELD : This Court had ever since its inception considered the, correct principle to be applied by the court in an appeal against an order of acquittal and held that the High Court has full power to review at large the evidence upon which the order of acquittal was founded and to reach the conclusion that upon that evidence the order of acquittal should be reversed. In law there are no fetters on the plenary power of the_ appellate court to review the whole evidence on which the order of acquittal is founded and, indeed, it has a duty' to scrutinise the probative material de novo informed, however, by the weighty thought that the rebuttable innocence attributed to the accused having been converted into an acquittal the homage our jurisprudence owes to individual liberty constrains the higher court not to upset the holding without very convincing reasons and

comprehensive consideration. The High Court's judgment survives this exacting standard. [493F]
Sheo Swarup v. King-Emperor, [1934] L.R. 61 I.A. 398, Sanwat Singh v. State of Rajasthan. [1961] 3 S.C.R. 120 and Hai-bans Singh v. State of Punjab, [1962] Supp. 1 S.C.R. 104, referred to.
[equere : Whether the punitive strategy of the Penal Code sufficiently reflects the modern-trends in correctional treatment and personalised sentencing.]
490

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 26 of 1970.

Appeal by special leave from the judgment and order dated February 4, 15 February, 1969 of the High Court of Bombay in Criminal Appeal No. 800 of 1967.

V. C. Parashar, for the appellants.

S. B. Wad and S. P. Nayar, for the respondent.

The Judgment of the Court was delivered by KRISHNA IYER, J. The murder of an old man in broad day light occurred on 26th September, 1966, on a country road in Satara District and about seven years later the fluctuating fortunes of the two young persons charged with the crime are being finally set at rest. One of the misfortunes of our criminal process, which stultifies penal justice, is the counter-productive course of trial and appeal and appeal, "at each remove a lengthening chain". The facts of the case have been set out fairly fully in the judgments of the High Court and the Trial Court and for the purposes of this appeal it is sufficient to set out the story in its broad essentials.

The venue of the offence lies on a cart track connecting the villages of Bibi and Ghadgewadi. The dramatis personae are P.W, 8. Sita Ram, a somewhat consequential man of village Kadamwadi, his quondum servant, the deceased Hariba, the alleged assailants (accused) Shivaji and Lalasaheb, the eye- witness Vilas (P. W. 5) who is the Assistant Gram Sewak of the area, and others cast in lesser roles. There were some disputes between the 2nd accused and P.W. 8. Kadamwadi, the place of residence of these two persons, is a little to the north of Ghadgewadi. About a mile to the south of Ghadgewadi is Bibi which is 4 furlongs further south of Kadamwadi. This topography is not very relevant except to follow the arguments accepted by the trial judge. The quarrel between P.W. 8 and the second accused had been fostering since 1959 leading to reports to the police about threatened violence and a criminal case which ended in the acquittal of latter. There was no love lost between P.W. 8 and the first accused either. For P. W. 1 0 (Bhagwan), one of the sons of the former, and his father-in-law who is a close relation of the first accused, were not on terms for reasons divergently given by the accused and Sita Ram blaming each other. Thus it is more or less the admitted case, and both the courts have found it established, that the accused and P.W. 8 were mutually at loggerheads during the relevant time. The deceased was in the service of P. W. 8 for a long while and

although about 10 or 12 years ago he had left the service, his loyalty lasted all the time with the result that whenever Sita Ram requisitioned him he readily responded. In a sense it is common case thai Hariba was a satellite of P. W. 8 and was, at about the time of the occurrence, an inmate of the house: P. W. 5 too was staving in P.W.8's house and must have been close to him as is evident from the residential nexus. On the ill-starred day, Hariba and Vilas set out to go to the weekly bazar at Bibi after taking their food at about 10 or 10-30 a.m. They went to P.W. 5's office at Ghadgewadi and proceeded to Bibi where Hariba did some shopping visiting P. W. 6 a shopkeeper and Shiva Ram, a carpenter. Later both of them started on their way back finishing their chores. The way lay along a cart track from Bibi to Ghadgewadi. One Dada also had accompanied them. of course, it was a day of fair and people from the neighbouring villages going to and fro was not unnatural. While the three men were trekking back and were at some distance from Ghadgewadi the two accused turned up from behind and called out to Dada to stop. He obeyed and the other two went along. Thereupon the accused are alleged to have run and overtaken the deceased and P.W. 5 at the place known as Zamanacha Mala, Survey No. 8, Hariba, who was asked to stop, Was set upon by the two assailants. Accused No. 8 drew his knife and silenced P. W. 5 by threat of stabbing if he broke into raising alarm. Soon after, the second accused dealt knife blows on the deceased on the head and eye-brow and accused No. 1 gave heavy strokes with a wire rope to which was attached a leaden ball described as a hunter by the witnesses. Hariba fell on the ground and the second accused kicked him as he lay. Dada was warned not to divulge and P.W. 5, similarly cautioned, was conducted by the assailants up to a distance. It is significant that at the time of the attack the accused angrily asked the deceased whether he would still remain in the vasti (at Kadamwadi with Sita Ram). According to the prosecution, P.W. 7 Zumber was going by the same cart track from Ghadgewadi to his field for sowing and when he reached the spot was told by the accused to divert the cart and not to speak out.

Dada left the place on being threatened and Vilas accompanied the accused, having been intimidated against going to Kadamwadi. A little later, one Balakrishna (P.W.

2) accompanied by Ramu Sakharam (P.W. 9) and others while on his way from Ghadgewadi side to Bibi stumbled on the scene where Hariba was sinking. One Anna, father of Zumber (P.W.

7) was, at about the same time, coming from Bibi side. 'Ibis person asked helpless Hariba what befell him and was told by the latter that Lala and Shivaya (the names are of the accused) had beaten him. Shortly after, he breathed his last. P.Ws. 2 and 9 were present then. P.W. 2 proceeded to Bibi and reported the death of Hariba to P.W. 15, Narayan, the police patil at Bibi, Ext. 8. The report was recorded and was transmitted to the police, the First Information Report being Ext. 36.

Several witnesses were examined and documents exhibited at the end of which the Sessions Court concluded : "In any case a reasonable doubt is cast to the case of the prosecution and the benefit thereof must be given to the accused. I,, therefore, hold that it is not proved that the accused committed the offence". In his judgment, which adverts with apparent care to all the relevant circumstances but suffers from a few fatal flaws which we will refer to in due course, the trial judge negatived the veracity of the prosecution version, but on appeal by the State a Division Bench of the Bombay High Court, after elaborate consideration of the evidence and the grounds relied upon by the trial judge to discard the prosecution's case, reversed the findings. The conviction that followed

was visited with a sentence of imprisonment for life. The court wound up thus :

> "Having thus given our anxious consideration to the entire material on record and the evidence of the eye-witnesses, Vilas and Zumber, we are satisfied that the learned Judge was not right in rejecting the prosecution evidence and acquitting the accused. We, therefore, hold that on the evidence of the two eyewitnesses coupled with the several circumstances pointed out above the prosecution has brought home the guilt to the two accused beyond all reasonable doubt, and the only finding in this case can be that the prosecution has proved that the two accused had assaulted and attacked the deceased with knife and the hunter with the lead-ball and caused injuries to him which resulted in his death. Both the accused must, therefore, be held guilty of the offence under section 302 read with section 34 of the Indian Penal Code."

The two prisoners have challenged the reversal of their acquittal in this Court.

Before dealing with the merits of the contentions, we may perhaps make a few preliminary remarks provoked by the situation presented by this case. An appellant aggrieved by the overturning of his acquittal deserves the final court's deeper concern on fundamental principles of criminal justice. The present accused, who have suffered such a fate, have hopefully appealed to us for a loaded approach against guilt in consonance with the initial innocence presumed in their favour fortified by the acquittal that followed. We are clearly in agreement with this noble proposition, stated in American Jurisprudence at, one time (not now, though) as implied in the rule against double jeopardy, in the British system as a branch of the benefit of reasonable doubt doctrine and in our own on the more logical, socially relevant and modern basis, that an acquitted accused should not be put in peril of conviction on appeal save where substantial and compelling grounds exist for such a course. In India it is not a jurisdictional limitation on the appellate court but a judge-made guideline of circumspection. But we hasten to add even here that, although the learned judges of the High Court have not expressly stated so, they have been at pains to dwell at length on all the pointed relied on by the trial court as favourable to the prisoners for the good reason that they wanted to be satisfied in their conscience whether there was credible testimony warranting, on a fair consideration, a reversal of the acquittal registered by the court below. In law there are no fetters on the plenary power of the Appellate Court to review the whole evidence on which the order of acquittal is founded and, indeed, it has a duty to scrutinise the probative material de novo, informed, however, by the weighty thought that the rebuttable innocence, attributed to the accused having been converted into an acquittal the homage our jurisprudence owes to individual liberty constrains the higher court not to upset the holding without very convincing reasons and comprehensive consideration, In our view the High Court's judgment survives this exacting standard.

Even at this stage we may remind ourselves of a necessary social perspective in criminal cases which suffers from insufficient forensic appreciation. The dangers of exaggerated devotion to the rule of benefit of doubt at the expense of social defence and to the soothing sentiment that all acquittals are. always good regardless of justice to the victim and .,the community,' demand especial emphasis in the contemporary context of escalating crime and escape. The judicial instrument has a public accountability. The cherished principles or golden thread of proof beyond reasonable doubt which

runs thro' the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt. The excessive solicitude reflected in the attitude that a thousand guilty men may go but one innocent martyr shall not suffer is a false dilemma. Only reasonable doubts belong to the accused. Otherwise any practical system of justice will then break down and lose credibility with the community. The evil of acquitting a guilty person lightheartedly as a learned author(1) has sapiently observed, goes much beyond the simple fact that just one guilty person has gone unpunished. If unmerited acquittals become general, they tend to lead to a cynical disregard of the law, and this in turn leads to a public demand for harsher legal presumptions against indicated 'persons' and more severe punishment of those who are found guilty. Thus too frequent acquittals of the guilty may lead to a ferocious penal law, eventually eroding the judicial protection of the guiltless. For all these reasons it is true to say', with Viscount Simon, that "a miscarriage of justice may arise from the acquittal of the ,guilty no less than from the conviction of the innocent. .."-In short, our jurisprudential enthusiasm for presumed innocence must be moderated by the pragmatic need to make criminal justice potent and realistic. A balance has to be struck between chasing enhance possibilities as good enough to set the delinquent free arid chopping the logic of preponderant probability to, punish marginal innocents. We have adopted these cautious in analysing the evidence and appraising the soundness of the contrary conclusions reached by the courts below. Certainly, in the last analysis reasonable doubts must operate to the advantage of the appellant. In India the law has been laid down on these lines long ago. This Court had ever since its inception considered the correct principle to be applied by the Court in an appeal against an order of acquittal and held that the High Court has full power to review at large I the evidence upon which the order of acquittal was founded and to reach the conclusion that upon that evidence the order of acquittal should be reversed. The, Privy, Council in Sheo Swarup v. King Emperor(2) negatived the legal basis for the limitation which the several decisions of the High Courts had placed on the right of the State to appeal under s. 417 of the Code. Lord Russel delivering the judgment of the Board pointed out that there was "no indication in the Code of any limitation or restriction on the High Court in the exercise of its powers as an appellate tribunal", that no distinction was drawn "between an appeal from an order of acquittal and an appeal from a conviction", and that "no limitation should be placed upon that power unless it be found expressly stated in the Code". He further pointed out at p. 404 that, "the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has (1) Clanville Williams in 'Proof of Guilt'. (2) [1934] L. R. 61 I. A. 398.

been, acquitted at his trial, (3) the right of the accused lo the benefit of any doubt, and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses". In Sanwat Singh & Others v. State of Rajasthan. (1) after an exhaustive review of cases decided by the Privy Council as well as by this Court, this Court considered the principles laid down in Sheo Swarup's case(2) and held that they afforded a correct guide for the appellate court's approach to a case against an order of acquittal. It was again pointed out by Das Gupta, J. delivering the judgment of five Judges in Harbans Singh and Another v. State of Pubjab(3) "In many cases, especially the earlier ones the Court has in laying down such principles emphasised the necessity of interference with an order of acquittal being based only on "

compelling and substantial reasons' and has expressed the view that unless such reasons are present an Appeal Court should not interfere with an order of acquittal (vide Suraj Pal Singh v. The State-(1952) S.C.R. 194; Ajmer Singh v. State of Punjab (1953) S.C.R.418; Puran v. State of Punjab A.I.R. 1953 S.C. 458). The use of the, words 'compelling reasons' embarrassed some of the High Courts in exercising their jurisdiction in appeals against acquittals and difficulties occasionally arose as to what this Court had meant by the words 'compelling reasons'. In later years the Court has often avoided emphasis on 'compelling reasons' but nonetheless adhered to the' view expressed earlier that before interfering in appeal with an order of acquittal a Court must examine .not only questions of law and fact in all their aspects but must also closely and carefully examine the reasons which impelled the lower courts to acquit the accused "and should interfere only if satisfied after such examination that the conclusion reached by the lower court that the guilt of the person has not been proved is unreasonable. (Vide Chinta v. The State of Madhya Pradesh-Criminal Appeal No. 178 of 1959 decided on 18-11-1960; Asharakha Haibatkha Pathan v. The State of Bombay-Criminal Appeal No. 38 of 1960 decided on 14-12-1960).

"..... On close analysis, it is clear that the principles laid down by the Court in this matter have remained the same. What may be called the golden thread running through all these decisions is the rule that in deciding appeals against acquittal the Court of Appeal must examine the evidence with particular care, must examine also the reason on which the order of acquittal was based and should interfere with, the order only when satisfied that the view taken by the acquitting Judge is clearly unreasonable. Once the appellate court comes to the conclusion that the view taken by the lower court is clearly an unreasonable one that itself is a "compelling (1) [1961] 3 S.C. R. 120. (2) [1934] L. R. 61 1. A. 398..

(3)[1962] Suppl. (1) S. C. R. 104 at p. 109.

reason" for interference. For, it is a court's duty to convict a guilty person when the guilt is established beyond reasonable doubt, no less than it is its duty to acquit the accused when such guilt is not so established."

Now to the facts. The scene of murder is rural, the witnesses to the case are rustics and so their behavioural pattern and perceptive habits have to be judged as such. The too sophisticated approaches familiar in courts based on unreal assumptions about human conduct cannot obviously be applied to those given to the lethargic ways of our villages. When scanning the evidence of the various witnesses we have to inform ourselves that variances on the fringes, discrepancies in details, contradictions in narrations and embellishments in inessential parts cannot militate against the veracity of the core of the testimony provided there is the impress of truth and conformity to probability in the substantial fabric of testimony delivered. The learned Sessions Judge as at some length. dissected the evidence, spun out contradictions and unnatural conduct, and tested with precision the time and sequence of the events connected with the crime, all on the touchstone of the medical evidence and the postmortem certificate. Certainly, the court which has seen the witnesses

depose, has a great advantage over the appellate judge who reads the recorded evidence in cold print, and regard must be had to this advantage enjoyed by the trial judge of observing the demeanour and delivery, of reading the straightforwardness and doubtful candour, rustic naivete and clever equivocation, manipulated conformity and ingenious unveracity, of persons who swear to the facts before him. Nevertheless, where a judge draws his conclusions not so much on the directness or dubiety of the witness while on oath but upon general probabilities and on expert evidence, the court of appeal is in as good a position to assess or arrive at legitimate conclusions as the court of first instance. Nor can we make a fetish of the trial judge's psychic insight.

Let us now sift the evidence from the proper perspective outlined above avoiding both the exploitation of every plausible suspicion as militating against the certitude of guilt and the unjust loading of the dice against the accused merely because of a conviction rendered by the High Court. The probative items placed before the court by the prosecution there is no defence evidence adduced-falls into three groups. Firstly, we have the eye-witness account of the mortal attack as given by P. Ws. 5 and 7. Secondly, the dying declaration stated to have been made by the deceased a little before he expired and witnesses, Balakrishna and Ramu, P.Ws. 2 and 9, have been cited in support thereof. The last set of incriminating facts consists in the discovery, under section 27 of Evidence Act, of certain material objects pursuant to the statements made by the accused supported by the evidence of few persons and the chemical analyst's report. The Sessions Judge has rejected all the, three categories taking up an extreme position grounded on the medical evidence and supposed human conduct while the appellate judges have swung to the opposite standpoint and accepted substantially all the prosecution evidence. With vigilant skepticism, let us scan the important evidence without going over the whole ground again.

That Liariba died of violence on 26th September, 1966, is indubitable, but who did him to death is a moot point. The lethal attack is alleged to have been made on a cart-.track lying between the two villages, Bibi and Ghadgewali in the afternoon on a bazaar day in the former village when people must evidently have been moving about. The macabre story of an old man, Hariba, being killed on a road near village Bibi around 5-30 p.m. by two known persons, Shivaji and Lalasaheb was recounted by one Balakrishna (P.W. 2) before the Police Patial (P. W. 15) in less than an hour of the incident (vide Ex. 8 and Ex. 36). Thus, the first information has been laid promptly, if we assume the hour of death to have been correctly stated there. Ext. 8 does mention briefly the material facts and the crucial witnesses in what may be treated as a hurriedly drawn up embryonic document. The contention of counsel for the respondents before us, which has received judicial reinforcement by acceptance by the Sessions Judge, is that this first information is an ersatz product of many minds manupulating to make it, and the apparently short, honest interval between the occurrence and the report, to the Patil is a make-believe, the death having occurred beyond doubt at about 2-00 p.m. and not at 5-30 p.m. as the prosecution disingenously pleads. Reliance is primarily placed for this pre-clocking of the occurrence on the postmortem certificate, doctor's evidence and the medical expertise contained in Modi's Medical Jurisprudence. Admittedly, 'semi-digested solid food particles' were observed in the deceased's stomach by P.W. 4 the medical officer, and the inference sought to be too neatly drawn therefrom is that the man must have come by his end (and that the digestive process must also have come to a halt with it) 2 to 3 hours after his last lunch, which, according to P.W. 2, was at 10.00 a.m. If he did die before 2.00 p.m., everything else in the

prosecution evidence became suspect, argued the court. The assurance of this assertion, however, turns on the exact accuracy, in terms of the I.S.T., of the testimony of P.W. 5 who swore that himself and the deceased had taken food on the fateful day at about 10.00 or 10.30 a.m. before setting out for Bibi. The sluggish chronometric sense of the country-side community in India is notorious since time is hardly of the essence of their slow life; and even urban folk make mistakes about 'time when no particular reason to observe and remember the hour of minor event like taking a morning meal existed. 10.30 a.m. could well have been an hour or more one way or the other and too much play on such slippery facts goes against realism so essential in a testimonial appraisal. More importantly, the court must not abandon a scientific attitude to medical science if it is not to be guilty or judicial superstition To quote Modi's Medical Jurisprudence that food would be completely digested in four to five hours or to swear by the doctor to deduce that death must have occurred within 3 hours of the eating and, therefrom, to argue that the presence of undigested food in the dead body spells the sure inference that death must have occurred before 2.00 p.m. is to mis-read the science on the subject of digestive processes. Modi's Medical Jurisprudence, extracts from which have been given by both the courts, makes out that a mixed diet of animal and vegetable foods. normally taken by Europeans, takes 4 to 5 hours for complete digestion while a vegetable diet, containing mostly farinaceous food usually consumed by Indians, does not leave the stomach completely within 6 to 7 hours after its ingestion. Indeed, the learned author cautiously adds that the stomachic contents cannot determine with precision the time of death "inasmuch as the power of digestibility may remain in abeyance for a long time in states of profound shock and coma". He also states "it must also be remembered that the process of digestion in normal healthy persons may continue for a time after death". The learned judges reminded themselves of the imponderables pointed out by Modi which makes the 'digestive' testimony inconclusive and, therefore, insufficient to contradict positive evidence, if any, about the time of death To impute exactitude to a medical statement oblivious to the variables noticed by experts and changes in dietary habits is to be unfair to the science. We are not prepared to run the judicial risk of staking the whole verdict on nebulous medical observations. Given so according to P.W. 5 deceased took tea some time after 12-30 p.m. when they started for Bibi. At that time the possibility of his having had something to eat is not ruled out. If so, the medical evidence as to the time of death will not be inconsistent with the postmortem findings. Now let us get into the core of the matter to ascertain whether reasonable doubts about the prosecution case are available on the record. Have we credible eye-witness evidence ? Have we corroborating circumstances ? Have any key witnesses been kept out of the Court without just explanation or rousing serious suspicion ? Are there circumstances militating against the reliability of the State's case ? Have the accused a plausible explanation for incriminating discoveries ? As stated earlier, there are three types of evidence adduced on behalf of the prosecution. Eye-witnesses must naturally figure most prominently in a judicial search for truth. P.W. 5, Vilas, had admittedly some quarrel with the second accused and friendliness with Sita Ram (P. W. 8) who in turn bore bitter hostility towards both the accused. In that view, P.W. 5 may be said to be tainted by bias and interestedness and so his testimony must be warily evaluated. However, witnesses who are not neutral may well testify to truth and need not be condemned out of hand provided in basic features their deposition is direct, probable and otherwise corroborated. Absent such reassuring factors P.W. 5's evidence may have to be eschewed. Vilas speaks to his having taken his forenoon meal on the 26th September 1966 at Kadam wadi. He bad met Hariba, quite naturally, because both of them were staying in the house of Sita Ram. They set out together to Bibi as each had some work in that place. The journey together is

explained in the evidence in a credible manner. They appear to have met grocer Himmat Gujar (P.W. 6) and each one purchased some sundry items from his shop. This fact is corroborated by P.W. 6. While returning they stepped into the house of one Shiva Ram and later proceeded to Kaclamwadi at about 3-45 or 4. p.m. One Dada who was also going in the same direction, joined them. All this is consistent with country. side leisureliness and gregariousness. As they were walking along, the accused called out to Dada who waited in response while the deceased and Vilas went ahead. Whereupon the accused spring upon. Hariba. At the behest of accused No. 1, accused No. 2 drew his knife, frightened Vilas into silence and gave knife blows on the head and eye- brow or Hariba. The first accused made his violent contribution with a 'hunter' to which a lead-ball was attached and the strikers therewith brought the deceased down on the ground. The second accused kicked the fallen man, P.W.5, speaks to these facts as also to the accused accosting the deceased whether he would still reside in the Vasti. The arrival at about that time of Zumber Mali, P.W. 7 in a cart, from Ghadgewadi side is also spoken to by P.W.

5. He would have us believe that he was taken by the accused, threatened to keep what he saw secret and warned not to leave Ghadgewadi for a couple of days. The witness later went to his office at Ghadgewadi and mentioned about Haris violent death to school boy Bhanudas (P.W. 17), the son of Sita Ram. Many other inconsequential details were also related by the witness but the fact remains that he met Sita-Ram (P.W. 8) only at about 9 p.m. and had not informed the authorities before that. The failure to disclose the incident to any one at the village Ghadgewadi, the bias and interest Vilas had, the evidence that Hariba had taken the food at about 10 or 10-30 a.m. and that later on they had not taken meals any where-a circumstance which militates against the medical evidence about undigested food in the cadavar, in a feeble way though-the slight discrepancy between Vilas, P.W. 5, and Sita Ram, P.W. 8 about the time of the former's arrival at Kadamwadi and the unnaturalness of the twists and turns of the story narrated by Mm-these are made points of veliement criticism by the accused. There is elaborate discussion of his evidence by both the courts. "There is nothing unnatural or improbable", is the view of the High Court about P.W. 5's evidence. Himmat Lal, P.W. 6 substantially corroborates the visit of the deceased and P.W. 5 to his shop at Bibi early in the afternoon. Likewise Shiva Ram, P.W. 12 swears to the deceased and P.W. 5 being together at Bibi till about 3-30 p.m. This also strengthens the version of Vilas. The minor conflict between P.W. 8 who says that P.W. 5 came at lamp-lighting time while P.W. 5 puts it at 9 p.m. is of little moment. The other criticisms also do not add up to much-although. certainly this somewhat interested witness must be subjected to serious corroboration in material particulars before he can be acted upon.

The evidence of Zumber (P.W. 7) is relied upon as that of an eyewitness because he swears to having seen the accused kicking and fisting the deceased. However, his testimony looks tricky and shaky. He had stated in the committal court that he had not seen whether the first accused had a hunter with him and the second accused a knife in his hand. It is also doubtful that a witness who had been declared hostile in the committal court by the prosecution can be so readily accepted at his word. If he had been won over by one party at one stage, as the prosecution seems to suggest, it is difficult to accept his integrity in a grave case of murder when he deposes as an eye-witness. What is more his flagrant contradiction on a crucial point between the committal court and the Sessions Court weakens his veracity, and worse is his conduct when he says that he was able to see the occurrence

from an uneven terrain because he went to sow in the field that afternoon although his uncle had died that very day and he had gone for the funeral The witness admits that he did not ask the accused why they were kicking the man nor did he stop the sowing in the field at least to see what had happened to the victim. Even on his way back when he saw people collected near the dead body, he did not bother to enquire what had happened. To taint his truthfulness he admits that there was a quarrel between the accused's uncle on the one hand and himself and his father on the other. A careful reading of the evidence given by this the place at all that afternoon. We are not able to agree with the easy credence lent by the learned Judges of the High Court to this testimony. In short, there is only a single eye-witness to the occurrence, P.W. 5. A legitimate criticism is made as to why Dada has been with- drawn. It is not as if every witness who has something to do with some part of the prosecution story should pass through the witness box. There is a discretion in the Public Prosecutor to pick and choose but to be fair to the Court and to truth. If Dada were essential to untold the prosecution story and had been suspiciously suppressed from the Court, we would and should have drawn an adverse infe- rence but in the circumstances set out earlier, Dada does not seem to be an eye-witness to the actual attack and his absence from the witnessbox is not, therefore, fatal to the prosecution. No sinister motive can be imputed to his not being examined. Prudence would have suggested a different course.

Had the whole case rested on the sole testimony of P.W. 5 our minds would have wavered. The prosecution places, by way of corroboration, the dying declaration of Hariba. Balakrishna, P.W. 2. a resident of Bibi who is the first informant in the case, states that he had proceeded from Bibi to Ghadgewadi for purchasin'g' his rations, having received wages in the morning. Ramu (P.W. 9) and a few others were also with him. On their way back from Ghadgewadi to Bibi after buying rations, they came by three persons identified as accused No. 1 and accused No. 2 and the Secretary (presumably P.W. 5). Balakrishna (P.W. 2) testifies to having seen the deceased lying on the road at Jamana field. One Anna Mali and a "malaria doctor" had come from the basti side at the spot at about that time. A man lying on the road was bleeding and Anna asked him why he came by the wounds whereupon Hariba spoke in a groaning tone to the he of P.W. 2 and others that Lala and Shiva had beaten him. This =Is says that the malaria doctor had left without stopping there-not that unnatural in our country to see people disappear when anything savouring of violent crime takes place fearing that their remaining there might involve them as witness or otherwise later on. Any way, P.W. 2 proceeded to Bibi, reported to the Police Patil, P.W. 15 and signed the statement recorded from. him, Ext. 8. Little injury has been inflicted on his testimony in cross- examination and no serious reason has been made out in this Court why the High Court's acceptance of his word should be rejected. Indeed, apart from describing the evidence as unnatural and as not in consonance with Zumber's presence, precious little has been adduced by the trial court to discredit his evidence. But the criticism about the non- examination of Anna who drew the dying declaration from the mouth of the deceased and of the malaria doctor, who Drobably is a respectable man by rural standards, cannot be lightly brushed aside. The non-examination of the latter need not detain us because smelling trouble he had made himself scarce without even stopping there. The failure to put Anna in the witness box after having cited him disturb our minds a little more but he is the father of Zumber and may at the most repeat what P.W. 2 has sworn. The prosecutor giving him up under these circumstances, may perhaps be taking chances with the court but we are not persuaded of any unfairness in the special circumstances of this case. It is noteworthy that P. W. 2 had

purchased rations as deposed to by P.W. 14, their ration shopkeeper. P.W. 9 Ramu who had accompanied P.W. 2 also corroborates him Ext. 8, the first information statement, makes specific reference to the dying declaration made to Anna. We are satisfied that P.W. 2 and P.W. 9 are credible enough to prove the dying declaration since P.W. 9 also has not suffered any material dent in his evidence as a result of cross-examination. We are conscious that undocumented dying declarations' are easy to get up and being based on the fading recollection and unsure probity of ordinary persons with human frailities, cannot be safely trusted save when the general features and other dependable materials justify reliance. Even so the natural statement of Hariba about the cause of his death to the passersby proved by P.Ws. 2 and 9, read in the background of other circumstances of the case, overcomes the rule of prudent reluctance judicially adopted in evaluating oral dying declarations.

The discovery of incriminating materials pursuant to confessions made by the accused constitutes the third category of, evidence. Obviously, the confessions are inadmissible but- the discoveries are, provided they are pertinent to the guilt of the accused., So far as accused No. 2 is concerned, his statement resulted in the discovery of a knife (vide Panchnama, Ext. 13). of course, knives were discovered long ago and not now but this knife lay buried and was recovered by the .accused from a pit in the corner of a wall of his house. There was .human blood on the blade of the knife, M.O. 5/11 according to the chemical analyst's report. The second accused's clothes also were picked up by him pursuant to his statement. He had worn a shirt and pants on the day of occurrence and P.W. 13, a neighbour deposes that ,the second accused had come to him at about 6 p.m. on the Monday when Hari died and had mentioned to him that since his own house was locked he might be permitted to keep his clothes in the witness's house. Thereafter he left his clothes under am empty Khokha from where he himself took them out-when he later came in. the company of .the police. There are blood 'Stains on the clothes and it is found by, the chemical examiner that the blood on the pants are of the same blood group as that of the deceased. When the second accused was asked under sec. 342, Cr. P.C. about the export of the chemical examiner noticing blood stains on the shirt, M.O. 5/2 and of human blood on the blade of the knife, M.O. 511, he merely answered, "I do not know". He also described as false the fact of his recovering the clothes and the knife. Bald denial notwithstanding, we are inclined to believe, with the learned Judges of the High Court. that the knife and the shirt have been identified as his and since he gad recovered them, thereby making the police discover, the fact, there was incriminating inference available against the said accused. We may notice here a serious omission committed by the trial Judge and not noticed by either court. The pants allegedly worn at the time of the attack by the second accused has stains of blood relatable to the. group of the deceased. This circumstance binds him to, the crime a little closer but it is unfortunate that no specific question about this circumstance has been put to him by the court. It is trite law, nevertheless fundamental that the prisoner's attention should be drawn to every inculpatory material so as to enable him to explain it. This is the basic fairness of a criminal trial and failures in this area many gravely' imperil the validity of the trial itself, if consequential miscarriage of justice has flowed. However, where such an omission has occurred it does not ipso facto vitiate the proceedings and- prejudice occasioned by such defect must be established by the accused. In the event of evidentiary material not being put to the accused, the court must ordinarily eschew such material from consideration. it is also open to the appellate court to call has as regards the circumstances established against him but not put to him and if the accused is unable to offer the

appellate court any plausible or reasonable explanation of Such circumstances, the court may assume that no acceptable answer exists and that even if the accused had been questioned at the proper time in the trial court he would not have been able to furnish any good ground to get out of the circumstances on which the trial court had relied for its conviction. In such a case, the court proceeds on the footing that though a grave irregularity has occurred as regards compliance with section 342, Cr. P.C., the omission has not been shown to hive caused prejudice to the accused. In, the present case, however, the High Court, though not the trial court has relied upon the presence (if blood on the, pants of the blood group of the deceased. We have not been shown what explanation the accused could have offered to this chemical finding particularly when we remember that his answer to the question regarding the human blood on, the blade of the knife was 'I do not know'. Counsel for the appellants could not make out any intelligent explanation and the 'blood' testimony takes the crime closer to the accused. However, we are not inclined to rely over much on this evidentiary-circumstance. although we should emphasise how this inadvertence of the trial court had led to a relevant fact being argued as unavailable to the the prosecution. Great-care is expected of Sessions Judges.who try grave cases to collect every incriminating circumstance and put it to the accused even though at the end of a long trial the Judge may be a little fagged out. The first accused also had made a statement leading to the discovery of a hunter with a lead-ball from a pit in the field of his uncle Bobade (vide Panchnama Ext. 14). P.W. 3, the Panch witness speaks to this effect. The High Court has relied on this evidence with which we agree After all a hunter with a lead-ball is not something ordinarily found in fields or wells or in houses. The conclusion that emerges from these discoveries is that the apparel, of the second accused and the weapons recovered establish some nexus between the crime and the appellants. We are aware that by themselves they are inconclusive but in conjunction with other facts they may have efficacy.

Some attempt was made to show that the many injuries found on the person of the deceased and the manner of their infliction as deposed to by the eye-witnesses do not tally. There is no doubt that substantially the wounds and the weapons and the manner of causation run congruous. Photographic picturisation of blows and Kicks and hits and strikes in an attack cannot be expected from witnesses who are not fabricated and little turns on indifferent incompatibilities. Efforts to harmonise humdrum details betray police tutoring, not rugged truth-, fulness. Now let us sum up the whole case in the light of the evidence we have found to be of worth. We must observe that even if a witness is not reliable, he need not be false and even if the Police have trumped up one witness or two or has embroidered the story to give a credible look to their case that cannot defeat justice if there is clear and un- impeachable evidence making out-the guilt of the accused. Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between ,may be' and 'must be' is long and divides vague conjectures from sure conclusions. Informing ourselves of these important principles we analyse the evidence found good by us. In our view there is only one eye-witness, P.W. 5, Vilas. Even if the case against the accused hangs on the evidence of a single eye-,witness it may be enough to sustain the, conviction given sterling testimony of a competent, honest man, although as a rule of prudence courts call for corroboration. It is a platitude to say that witnesses have to be weighed and not counted since quality matters more than quantity in human affairs. We are persuaded that the PW 5 is a witness for truth but in view of the circumstances that he is interested, we would still want corroboration in this case to reassure ourselves. And that we have in this case.

The earlier discussion leaves unscathed the dying declaration and incriminating discoveries and the only question is whether they are sufficient to reinforce the essential facts bearing on the appellants' direct involvement in the crime. The accused, we feel convinced, are reasonably proved to have murdered Heriba. But counsel argues that no animus against the victim has been made out and motiveless malignity militates against natural human condut. Proof of motive satisfies the judicial mind about the likelihood of the authorship but its absence only demands deeper forensic search and cannot undo the effect of evidence otherwise sufficient. Motives of men are often subjective, submerged and unamenable to easy proof that courts have to go without clear evidence thereon if other clinching evidence exists. In the case on hand the enmity with Sita Ram being active and admitted,, the pique against Hariba, his loyal dependent, is understandable. While striking the deceased he was asked in a tell-tale manner, whether he would still stay at Vasti (Kadamwadi, with Sita Ram). That betrays the motive. We affirm the finding of the High Court.

Two men in their twenties thus stand convicted of murder and have to suffer imprisonment for life because the punitive strategy of our Penal Code does not sufficiently reflect the modern trends in correctional treatment and personalised sentencing. We do riot wish to consider these facets as they fall outside our scope here.

We confirm the conviction and sentence and dismiss the appeal.

K. B. N. Appeal dismissed.