Khujji @ Surendra Tiwari

Vs

State of Madhya Pradesh

Criminal Appeal No. 413 of 1982

(K. Ramaswamy, A. M. Ahmadi, V. Ramaswami – II JJ)

16.07.1991

JUDGMENT

AHMADI, J.

1. This appeal by special leave is preferred by the appellant Khujji @ Surender Tiwari who has been convicted by both the courts below under Section 302 IPC for the murder of one Gulab. The facts leading to this appeal, briefly stated, are that on the evening of May 20, 1978 the deceased Gulab and his companion PW 4 Ramesh Chander hired a rickshaw to go to the dispensary of Dr. Mukherjee. PW 3 Kishan Lal pulled the rickshaw and while he was passing through Suji Mohalla near Panchsheel Talkies the appellant and his companions surrounded the rickshaw and launched and attack on the deceased and his companion. PW 4 was the first to receive an injury by a cycle chain. Sensing trouble both Gulab and PW 4 jumped out of the rickshaw and ran in different directions. Gulab ran towards Suji Mohalla whereas PW 4 ran towards Panchsheel Talkies. They were chased by the assailants who formed themselves into two groups. PW 4 was fortunate enough to escape with not too serious an injury but his companion Gulab received stab wounds to which he succumbed on the spot. The evidence of PW 12 Dr. Nagpal shows that the deceased had received three injuries, namely, (1) a penetrating stab wound with a second injury on the intercostal space on right side rib of the size of 3 cms x 5 cms x 1 cm, (2) a piercing stab wound 8 cms below the scapular bone and 8 cms outside the vertebral column of the size of 2.5 cms x 1.5 cms x 3 cms, and (3) an incised wound on the frontal auxiliary line 2.5 cms x 1.5 cms x 2 cms deep on the left hipocardium region. This witness, who performed the post-mortem, deposed that injury No. 1 which had injured the heart was sufficient in the ordinary course of nature to cause death. He further stated that all the three injuries were collectively sufficient to cause death in ordinary course of nature. The three articles, namely, the knife, the chhuri and the chhura which were attached in the course of investigation were shown to this witness and he stated that the three injuries were possible by the aforesaid articles. It is clear from this evidence that Gulab died a homicidal death.

2. To bring home the guilt against the appellant the prosecution placed reliance on the evidence of three eye-witnesses, namely, PW 1 Komal Chand (an onlooker), PW 3 Kishan Lal (the rickshaw puller) and PW 4 Ramesh (the companion of the deceased) besides the find of human blood on the weapon discovered at the instance of the appellant and on the pant which he was wearing at the time of his arrest.

3. The first information report, Ex. P-3, was lodged by PW 4 Ramesh immediately after the incident and the same was recorded by the Investigating Officer PW 13 Ramji Singh at about 9.15 p.m. In the said first information report PW 4 gave the details regarding the incident and furnished the names of all the six assailants. Soon after the first information report was lodged the Investigating

Officer visited the scene of occurrence and drew up the panchnama on the basis of which a sketch plan Ex. P-20A was prepared in due course. The appellant and some of his companions could not be traced till May 22, 1978. After they were traced, they were interrogated and on their expressing willingness to discover the weapons used in the commission of the crime, the Investigating Officer summoned two witnesses, namely, PW 5 Panna Lal and Rajinder to act as panch witnesses. The prosecution case is that in the presence of these witnesses the appellant and his companions made certain confessional statements under Section 27 of Evidence Act which led to the discovery of the weapons used in the commission of the crime. According to the prosecution the appellant Khujji discovered a chhura (knife) from his garage and the same was attached under the panchnama Ex. P-9. Since this weapon had blood-like stains, it was sent to the Chemical Analyser and Serologist for examination and report. The report indicates that it was stained with human blood but the blood group could not be determined. The other two companions of the appellant, namely, Parsu and Guddu, also discovered a knife, Ex. P-7, and a chhura, Ex. P-13, which were attached under panchnamas Exs. P-6 and P-12, respectively. As stated earlier the shirt and pant of Khujji were also attached as blood-life stains were noticed thereon. Both these articles were sent to the Chemical Analyser and Serologist. So far as the shirt is concerned, since the blood stains were disintegrated it was not possible to determine the origin thereof. But so far as the pant is concerned, the report states that the stains were of human blood but the blood group could not be determined as the result of the test was inconclusive. On the basis of the first information report, the statements of three witnesses recorded in the course of investigation as well as the evidence regarding discovery and the find of human blood on the incriminating articles, the appellant and five others were charge-sheeted for the murder of Gulab. The trial court acquitted all expect the appellant. Before the trial court PW 4 Ramesh, who had lodged the first information report, tried to disown it. He was declared hostile as he expressed his inability to identify the accused persons as the assailants of the deceased Gulab. PW 3, the rickshaw puller, while narrating the incident expressed a similar inability and he too was treated as hostile and cross-examined by the Public Prosecutor. The third eye-witness PW 1 Komal Chand, however, supported the prosecution case in his examination-in-chief but in his cross-examination he expressed some doubt regarding the identify of the appellant and Guddu stating that he had seen their backs only. The trial court came to the conclusion that not only was this witness a chance witness but his presence at the scene of occurrence was extremely doubtful as it was difficult to believe that he had come out at that hour to purchase vegetables. Thus the trial court refused to place reliance on the evidence of the three eye-witnesses. The trial court, however, came to the conclusion that the appellant was absconding and that he had discovered the weapon which was found to be stained with human blood. It also relied on the factum of find of human blood on the pant worn by the appellant at the time of his arrest. On the basis of this evidence the trial court convicted the appellant under Section 302 IPC and sentenced him to life imprisonment. Khujji preferred an appeal against the said conviction. The High Court while ignoring the evidence of PW 3 Kishan Lal and PW 4 Ramesh relied on the evidence of PW 1 Komal Chand and came to the conclusion that his evidence clearly established the presence of the appellant as one of the assailants notwithstanding his effort in cross-examination to wriggle out of his statement in examination-in-chief in regard to the identity of the appellant. The High Court noticed that the examination-in-chief of this witness was recorded on November 16, 1976 whereas his cross-examination commenced on December 15, 1976 i.e. after a month and in between he seemed to have been won over or had succumbed to threat. This inference was drawn on the basis of PW 3's statement that he was severely beaten on the night previous to his appearance in court as a witness. The High Court, therefore, took the view that the subsequent attempt of PW 1 Komal Chand to create a doubt regarding the identity of the appellant was of no consequence since there was intrinsic material in his evidence to establish the presence of the appellant amongst the assailants of deceased Gulab.

Relying further on the discovery evidence as well as the find of human blood on the weapon found from the garage of the appellant and on his pant which he was wearing at the time of his arrest, the High Court came to the conclusion that his conviction was well founded and dismissed his appeal. It may here be mentioned that the State did not prefer an appeal against the five companions of the appellant who came to be acquitted by the trial court. It is in these circumstances that the appellant has invoked this Court's jurisdiction under Article 136 of the Constitution.

4. Mr. U. R. Lalit, learned counsel for the appellant, took as through the entire evidence and submitted that the prosecution version regarding the incident, particularly the involvement of the appellant, is highly doubtful since the correctness of the statement made in the first information report purporting to have been lodged by PW 4 Ramesh is itself doubtful because Ramesh himself has disowned it. Since the prosecution had declared both PW 3 Kishan Lal and PW 4 Ramesh as hostile to the prosecution the trial court was justified in refusing to rely on their evidence. He further submitted that the presence of PW 1 Komal Chand at the place of occurrence at that hour was highly doubtful and this doubt was reinforced by his conduct in not raising a hue and cry or going to the help of the victim. The evidence disclosed that this witness resides at a place almost two furlongs from the scene of occurrence and claims to have been the incident from a distance of about 22 feet from a point wherefrom the incident could not have been witnessed by him as is evidence from the physical condition of the locality described in the sketch Ex. P-20A. He, therefore, submitted that the trial court was justified in describing this witness as a chance witness and in doubting his presence at the scene of occurrence at the relevant point of time. According to him the High Court committed an error in placing reliance on the testimony of this witness. He, however, submitted that the trial court was not justified in recording the conviction on the mere fact that the appellant could not be found for two days and there was human blood on his weapon and pant attached in the course of investigation. These two circumstances, contended counsel, constituted extremely thin and weak evidence to record a finding of guilt particularly when the trial court had discarded the evidence of all the three eye-witnesses and had doubted the contents of the first information report Ex. P-3. Lastly he submitted that the High Court committed an error in brushing aside the statement made by PW 1 Komal Chand in his cross-examination which went to show that his evidence regarding identity of the appellant was highly suspect. Merely because there was a time gap between his examination-in-chief and his cross-examination the High Court was not justified in jumping to the conclusion that the accused party had succeeded in winning him over by threat or otherwise. On this line of reasoning Mr. Lalit contended that the High Court ought not to have interfered with the appreciation of his evidence by the trial court. Besides these submissions based on the evidence of the three eye-witnesses and the find of human blood on the weapon and pant of the appellant, Mr. Lalit further submitted that one set of panch witnesses, PW 5 Pannalal and Rajinder (not examined), had been employed for all the discovery panchnamas as well as the attachment of clothes of the appellant and others which went to show that PW 5 was a stock witness for the prosecution. He, therefore, submitted that no reliance could be placed on the evidence of PW 5 and consequently the find of human blood on the weapon and the pant loses its probative value. In the end he submitted that the conviction of the appellant substantively under Section 302 IPC was not well founded for the simple reason that not a single witness had deposed that the fatal injury was caused by the appellant. The evidence of PW 12 Dr. Nagpal shows that the deceased had three injuries and out of them only injury No. 1 was by itself sufficient in the ordinary course of nature to cause death. So for as injuries No. 2 and 3 are concerned, the medical evidence does not show that each one of them separately was sufficient in the ordinary course of nature of cause death. But the medical evidence is to the effect that all the three injuries taken collectively were sufficient in the ordinary course of nature to cause death. In the absence of positive evidence that injury No. 1 was

caused by the appellant and non else, his conviction substantively under Section 302 cannot be sustained. In that case at best he can be convicted for hurt under Section 324, IPC. He further submitted that since his companions were acquitted and the State had not preferred any appeal against their acquittal he could not be convicted with the aid of Sections 34 or 149 IPC.

5. Mr. Prithvi Singh, the learned counsel for the State, submitted that the trial court was wrong in rejecting the evidence of PWs 3 and 4 merely because they were declared hostile as if their evidence was totally against the prosecution on that account. He submitted that their evidence cannot be treated as effaced from the record merely because the prosecution chose to treat them as hostile on the limited question of identity of the assailants. Their evidence so to the occurrence and number of persons involved in the commission of the crime can be relied upon along with that of PW 1 as he was neither a chance witness nor was he faking his presence at the scene of occurrence at the material time. His evidence regarding identity of the assailants is equally acceptable and his subsequent statement made in cross-examination after a time gap of almost one month was rightly brushed aside by the High Court, whatever be the reason for his change of heart. With regard to the criticism regarding the absence of names of witnesses in the Inquest Report, counsel urged that it was not necessary in law to mention the names of the witnesses in the inquest report as the purpose of preparing the inquest report was merely to make a note of the physical condition of the body and the marks of injury thereon noticed at that point of time. On the question of value to be attached to the evidence of the panch witness PW 5, counsel submitted that nothing was alleged against this witness nor had the appellant given any explanation regarding existence of human blood on the weapon and the pant attached from him in his statement recorded under Section 313 of the Code. On the question regarding the offence committed by the appellant, counsel submitted that once it is proved that more than one person had participated in the assault, the appellant could be convicted for the murder of the deceased with the aid of Section 34 or 149 IPC. He, therefore, submitted that the appeal is without merit and deserves to be dismissed.

6. We have given our anxious consideration to the submissions made by the learned counsel for the contesting parties. The fact that an incident of the type alleged by the prosecution occurred on May 20, 1978 at about 8.20 p.m. is not seriously disputed nor is the location of the incident doubted. The evidence of PW 3 Kishan Lal and PW 4 Ramesh came to be rejected by the trial court because they were declared hostile to the prosecution by the learned Public Prosecutor as they refused to identify the appellant and his companions in the dock as the assailants of the deceased. But counsel for the State is right when he submits that the evidence of a witness, declared hostile, is not wholly effaced from the record and that part of the evidence which is otherwise acceptable can be acted upon. It seems to be well settle by the decisions of this Court - Bhagwan Singh v. State of Haryana ((1976) 1 SCC 389 : 1976 SCC (Cri) 7 : (1976) 2 SCR 921), Rabindra Kumar Dey v. State of Orissa ((1976) 4 SCC 233 : 1976 SCC (Cri) 566 : AIR 1977 SC 170) and Syad Akbar v. State of Karnataka ((1980) 1 SCC 30 : 1980 SCC (Cri) 59 : (1980) 1 SCR 95) - that the evidence of a prosecution witness cannot be rejected in to merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof. In the present case the evidence of the aforesaid two eye-witnesses was challenged by the prosecution in cross-examination because they refused to name the accused in the dock as the assailants of the deceased. We are in agreement with the submission of the learned counsel for the State that the trial court made no effort to scrutinise the evidence of these two witnesses even in regard to the factum of the incident. On a careful consideration of their evidence it becomes crystal clear that PW 4 had accompanied the deceased in PW 3's rickshaw to the place of incident. In the incident that occurred at the location pointed out by the prosecution, PW 4 sustained an injury. His

presence in the company of the deceased at the place of occurrence, therefore, cannot be doubted. Immediately after the incident within less than an hour thereof PW 4 went to the police station and lodged the first information report. It is true that the first information report is not substantive evidence but the fact remains that immediately after the incident and before there was any extraneous intervention PW 4 went to the police station and narrated the incident. The first information report is a detailed document and it is not possible to believe that the investigating officer imagined those details and prepared the document Ex. P-3. The detailed narration about the incident in the first information report goes to show that the subsequent attempt of PW 4 to disown the document, while admitting his signature thereon, is a shift for reasons best known to PW 4. We are, therefore, not prepared to accept the criticism that the version regarding the incident is the result of some fertile thinking on the part of the investigating officer. We are satisfied, beyond any manner of doubt, that PW 4 had gone to the police station and had lodged the first information report. To the extent he has been contradicted with the facts stated in the first information report shows that he has tried to resile from his earlier version regarding the incident. So also the presence of PW 3 at the scene of occurrence cannot be doubted once the presence of PW 4 is accepted. The trial court did not go so far as to say that both these witnesses were not present at the scene of occurrence or that PW 4 was not injured in the incident but refused to look into their evidence treating their evidence as non-est on their being declared hostile by the prosecution. We think that the approach of the trial court insofar as the evidence of these two witnesses is concerned, is legally unacceptable. The High Court has not endeavoured to assess their evidence since it thought that the conviction of the appellant could be sustained on the evidence of PW 1 Komal Chand. We are satisfied on a close scrutiny of the evidence of the aforesaid two eye-witnesses, PWs 3 and 4, that the deceased and PW 4 came to the place of occurrence in the rickshaw pulled by PW 3. On reaching the spot where the incident occurred they were surrounded by certain persons who were lying in wait and a murderous assault was launched on them. The first to receive the injury was PW 4. When they gauged the intention of their assailants they jumped out of the rickshaw and both ran in different directions. The appellant first tried to chase PW 4 but later he turned to the deceased as he was informed by one of his companions Gopal that the person he was pursuing was not Gulab. Therefore, from the evidence of these two eye-witnesses the fact that the deceased and PW 4 came to the place of occurrence in the rickshaw of PW 3 is established. So also the fact that on their reaching the place of occurrence they were surrounded by some persons and an assault was launched on them in which PW 4 received an injury and Gulab dies is clearly established. The only area where they have not supported the prosecution and have resiled from their earlier statements is regarding the identity of the assailants. We will deal with that part of the evidence a little later but the fact remains that the deceased had received three injuries as narrated by PW 12 Dr. Nagpal, to which he succumbed on the spot. Once these facts are accepted as proved, the only question which really survives for consideration is whether the appellant was an assailant of the deceased.

7. That brings us to the evidence of PW 1 Komal Chand. Komal Chand's evidence was not accepted by the trial court on the ground that he was not a natural witness and was only a chance witness. PW 1 explained his presence by stating that he had gone to the market to purchase vegetables and while he was returning therefrom on foot with his cycle in hand he heard a commotion and saw the incident from a short distance. Being a resident of Suji Mohalla, the place of occurrence was clearly in the vicinity thereof and, therefore, his presence at the market place could not be considered to be unnatural. It is not unnatural for working people to purchase vegetables at that hour and, therefore, his explanation regarding his presence cannot be ruled out as false. The sketch map prepared by PW 11 Gaiser Prasad shows that he had seen the incident from the short distance of hardly 22 feet although PW 1 says the saw it from the square. Since the incident occurred at a public place with a

lamppost nearby, the possibility of his having identified the assailants could not be ruled out. The examination-in-chief of this witness was recorded on November 16, 1976 when he identified all the assailants by name. He stated that the knew the six accused persons in court and they were the persons who had surrounded the rickshaw and launched an assault on PW 4 and the deceased Gulab. Of them Gopal struck PW 4 with a chain. He also stated that the appellant Khujji and his companions Gudda and Parsu were armed with knives and when Khujji tried to assault PW 4 with a knife, Gopal shouted 'Khujji that man is not Gulab'. Thereupon Khujji and his companions ran after the deceased Gulab, overtook him and the appellant, Parsu and Gudda assaulted Gulab with their weapons. Gudda struck Gulab from the front on his chest, Parsu stabbed him on the side of the stomach while Ram Kishan and Gopal held him and the appellant attacked him from behind with a knife whereupon Gulab staggered shouting 'save save' and fell in front of the house of advocate Chintaman Sahu. Thereafter all the six persons ran away. His cross-examination commenced on December 15, 1978. In his cross-examination he stated that the appellant Khujji and Gudda had their backs towards him and hence he could not see their faces while he could identify the remaining four persons. He stated that he had inferred that the other two persons were the appellant and Gudda. On the basis of this statement Mr. Lalit submitted that the evidence regarding the identity of the appellant is rendered highly doubtful and it would be hazardous to convict the appellant solely on the basis of identification by such a wavering witness. The High Court came to the conclusion and, in our opinion rightly, that during the one month period that elapsed since the recording of his examination-in-chief something transpired which made him shift his evidence on the question of identity to help the appellant. We are satisfied on a reading of his entire evidence that his statement in cross-examination on the question of identity of the appellant and his companion is a clear attempt to wriggle out of what he had stated earlier in his examination-in-chief. Since the incident occurred at a public place, it is reasonable to infer that the street lights illuminated the place sufficiently to enable this witness to identify the assailants. We have, therefore, no hesitation in concluding that he had ample opportunity to identify the assailants of Gulab, his presence at the scene of occurrence is not unnatural nor is his statement that he had come to purchase vegetables unacceptable. We do not find any material contradictions in his evidence to doubt his testimony. He is a totally independent witness who had no cause to give false evidence against the appellant and his companions. We are, therefore, not impressed by the reasons which weighed with the trial court for rejecting his evidence. We agree with the High Court that his evidence is acceptable regarding the time, place and manner of the incident as well as the identity of the assailants.

8. It was faintly submitted by counsel for the appellant that the evidence of eye-witnesses could not be relied upon as their names did not figure in the inquest report prepared at the earliest point of time. We see no force in this submission in view of the clear pronouncement of this Court in Pedda Narayana v. State of A.P. ((1975) 4 SCC 153 : 1975 SCC (Cri) 427 : 1975 Supp SCR 84). Referring to Section 174 of the Code of Criminal Procedure this Court observed at page 89 as under : (SCC pp. 157-58, para 11)

> "A perusal of this provision would clearly show that the object of the proceedings under Section 174 is merely to ascertain whether a person has died under suspicious circumstances or an unnatural death and if so what is the apparent cause of the death. The question regarding the details as to how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted appears to us to be foreign to the ambit and scope of the proceedings under Section 174. In these circumstances, therefore, neither in practice nor in law was it necessary for the police to have mentioned these details in the inquest report."

We, respectfully agree and see no merit in this submission made by the counsel for the appellant.

9. After the appellant and his two companions Parsu and Gudda were arrested they were interrogated by the investigating officer PW 13 Ramji Singh. In the course of interrogation they showed their willingness to point out the weapons of assault. Thereupon the investigating officer called two panchas, one of them being PW 5 Panna Lal. The very same panch witnesses were panchas to all the three discovery panchnamas as well as panchnamas regarding the attachment of the clothes worn by the appellant and his companions. It was, therefore, contended by the counsel for the appellant that PW 5 Panna Lal was a stock witness whom the police had employed to act as a panch witness. Pointing out that it was Tulsi Ram the brother of the deceased who had chosen him because he was closely associated with the family of the deceased and was intimate with Babulal another brother of the deceased, Mr. Lalit submitted that no reliance can be placed on the evidence of such a highly interested and specially chosen witness. The witness comes from the same locality and his house is situate within 100 yards of the residence of the deceased. He knows the family of the deceased quite well being a neighbour and of the same 'biradari'. It is equally true that he had gone to the hospital on learning about the assault on Gulab and had stayed back with Babulal since the latter was not feeling well. But would it be proper to throw out his evidence on account of his neighbourly relations with the family of the deceased, when nothing has been brought out in cross-examination to shake the intrinsic value to be attached to his evidence ? Even in the cross-examination of the investigating officer nothing has been brought out to infer that the choice of PW 5 as a panch witness was a deliberate one made with a view to enlisting his support to the prosecution case. The mere fact that he was a witness to all the panchnamas prepared by the investigating officer is by itself not sufficient to discard his evidence. Even in the case of an interested witness, it is settled law that his evidence cannot be overlooked merely on that ground but at the most it must receive strict scrutiny. In the case of PW 5, except being a good neighbour nothing more is shown. On the question of recovery of the weapon as well as the blood-stained pant of the appellant there is hardly any effective cross-examination. Nor has the appellant offered any explanation in his statement recorded under Section 313 of the Code. In these circumstances we are not prepared to reject his evidence on the specious plea of his being an interested witness. In Himachal Pradesh Administration v. Om Prakash ((1972) 1 SCC 249 : 1972 SCC (Cri) 88 : (1972) 2 SCR 765) this Court observed at page 777 (SCC p. 260. para 10) that it could not be laid down as a matter of law and practice that where recoveries have been effected from different places on the information furnished by the accused different sets of persons should be called in to witness them. There was no injunction in law against the same set of witnesses being present at the successive enquiries if nothing could be urged against them. It is, therefore, clear from the decision of this Court that merely because the same set of panch witnesses were used for witnessing all the three discoveries as well as the attachment of the clothes of the appellant and his companions, PW 5's evidence could not be discarded since nothing had surfaced in cross-examination to shake his evidence. We are, therefore, satisfied that the evidence of PW 5 Pannalal was rightly accepted by both the courts below. We make limited use of this evidence in the sense that we do not use any part of the evidence admissible under Section 27, Evidence Act, against the appellant. We merely use the factum of find of the incriminating weapon from his garage and his inability to explain the presence of human blood thereon as a circumstance against the appellant. The evidence of PW 5 further shows that when the appellant was arrested his garments, namely, shirt and pant were attached as blood-like stains were noticed thereon. These articles were sent to the Chemical Analyser and Serologist for examination and report. As stated earlier these reports reveal that the blood stains on the pant worn by the appellant were of human origin. The appellant has not offered any plausible explanation for the existence of human blood on his pant. This too is a circumstance against the

appellant particularly because no injury was noticed on the person of the appellant.

10. Mr. Lalit, however, argued that since the report of the serologist does not determine the blood group of the stains on the weapon and the pant of the appellant, the mere find of human blood on these two articles is of no consequence, whatsoever. In support of this contention he placed strong reliance on the decisions of this Court in Kansa Behera v. State of Orissa ((1987) 3 SCC 480 : 1987 SCC (Cri) 601) and Surinder Singh v. State of Punjab (1989 Supp 2 SCC 21 : 1989 SCC (Cri) 649). In the first mentioned case the conviction was sought to be sustained on three circumstances, namely, (i) the appellant and the deceased were last seen together; (ii) a dhoti and a shirt recovered from the possession of the appellant were found to be stained with human blood; and (iii) the appellant had made an extra-judicial confession to two witnesses when arrested. There was no dispute in regard to the first circumstance and the third circumstance was held not satisfactorily proved. In this backdrop the question for consideration was whether the first and the second circumstances were sufficient to convict the appellant. This Court, therefore, observed that a few small blood stains could be of the appellant himself and in the absence of evidence regarding blood group it cannot conclusively connect the blood stains with the blood of the deceased. In these circumstances this Court refused to draw any inference of guilt on the basis of the said circumstance since it was not 'conclusive' evidence. This Court, however, did not go so far as to say that such a circumstance does not even provide a link in the chain of circumstances on which the prosecution can place reliance. In the second case also this Court did not consider the evidence regarding the find of human blood on the knife sufficient to convict the appellant in the absence of determination of blood group since the evidence of PW 2 was found to be uninspiring and there was no other circumstance to connect him with the crime. In this case we have the direct testimony of PW 1 Komal Chand, besides the testimony of PWs 3 and 4 which we have considered earlier. The find of human blood on the weapon and the pant of the appellant lends corroboration to the testimony of PW 1 Komal Chand when he states that he had seen the appellant inflicting a knife blow on the deceased. The appellant has not explained the presence of human blood on these two articles. We are, therefore, of the opinion that the aforesaid two decisions turned on the peculiar facts of each case and they do not lay down a general proposition that in the absence of determination of blood group the find of human blood on the weapon or garment of the accused is of no consequence. We, therefore, see no substance in this contention urged by Mr. Lalit.

11. That brings us to the last contention whether the conviction of the appellant for the substantive offence of murder can be sustained in the absence of a finding that the fatal injury No. 1, was caused by the appellant. We must at once accept the fact that it is not possible from the ocular evidence to record a definite finding of fact that the appellant had caused that fatal injury. On the contrary the evidence of PW 1 Komal Chand indicates that in all probability the stab wound inflicted by the appellant resulted in injury No. 2. That injury by itself was not sufficient in the ordinary course of nature to cause death. If that be so, can the appellant be convicted under Section 302, IPC ? Counsel for the appellant submits that the legal position is well settled by a chain of decisions of this Court that if named accused are acquitted except one of them, the latter cannot be convicted with the aid of Section 34 or 149, IPC. In support of this contention he invited our attention to a few decisions, namely, Baikuntha Nath Chaudhury v. State of Orissa ((1973) 2 SCC 432 : 1973 SCC (Cri) 880 : AIR 1973 SC 2337), Kasturi Lal v. State of Haryana ((1976) 3 SCC 570 : 1976 SCC (Cri) 467 : AIR 1976 SC 2042), Chandubhai Shanabhai Parmar v. State of Gujarat (1981 Supp SCC 46 : 1981 SCC (Cri) 682) and Sukhram v. State of M.P. (1989 Supp 1 SCC 214 : 1989 SCC (Cri) 357) Counsel for the State, however, submitted that while it may be correct that the appellant cannot be substantively convicted under Section 302, IPC, he can certainly be convicted with the aid of Section 34 or 149, IPC, if this Court on a reappreciation of the evidence comes to the conclusion

that more than one person, may be six or seven of them, had launched an attack on the deceased. In this connection he submitted that notwithstanding the acquittal of others by the trial court this Court can reach its own conclusion regarding the number of persons who attacked the deceased for the obvious reason that the higher court is not bound by the appreciation of evidence by the trial court or even the High Court. In support of this contention he placed strong reliance on this Court's recent decision in Brathi v. State of Punjab ((1991) 1 SCC 519 : 1991 SCC (Cri) 203). Counsel for the appellant on the other hand contended that the acquittal of the co-accused creates a legal bar against the conviction of the appellant on the ground that they were privy to the crime notwithstanding their acquittal and this legal bar cannot be got over by reappreciation of evidence. In support of this contention he invited our attention to a five Judge bench decision in Krishna Govind Patil v. State of Maharashtra ((1964) 1 SCR 678 : AIR 1963 SC 1413 : (1963) 2 Cri LJ 351) and contended that the said decision was binding on us being of a larger bench and the decision in Brathi case ((1991) 1 SCC 519 : 1991 SCC (Cri) 203) must be taken to be per incuriam since it had failed to notice and runs counter to the said larger bench decision. We are of the opinion, for reasons which we will immediately state, that the contention urged by counsel for the appellant is not well founded.

12. The ratio of the decision of this Court in Brathi case ((1991) 1 SCC 519 : 1991 SCC (Cri) 203) may be noticed at the outset to appreciate the contention urged by counsel for the appellant. In that case, the appellant and his uncle were tried under Section 302/34, IPC. The trial court acquitted the appellant's uncle but convicted the appellant under Section 302, IPC. The order of acquittal became final because the State did not choose to challenge it in appeal. The appellant, however, preferred an appeal against his conviction to the High Court. The High Court on a reappreciation of the evidence held that the fatal blow was given by the appellant's uncle and since the appellant was charged under Section 302/34, IPC, he could not be convicted substantively under Section 302, IPC. However, for assessing the credibility of the prosecution case, the High Court incidentally considered the involvement of the appellant's uncle and held that the eye-witnesses had given a truthful account of the occurrence and the appellant's uncle had actually participated in the commission of the crime along with the appellant. In other words, the High Court came to the conclusion that the acquittal of the appellant's uncle was erroneous but since there was no appeal preferred by the State it could not interfere with that order of acquittal. It, however, came to the conclusion that the crime was committed by the appellant and his uncle in furtherance of their common intention and accordingly maintained the conviction of the appellant under Section 302, IPC, with the aid of Section 34, IPC. Before this Court the appellant contended that on the acquittal of his uncle the sharing of common intention disappeared and the High Court was not justified in invoking Section 34 for maintaining the conviction against him under Section 302, IPC. This Court while dealing with this submission held that in the matter of appreciation of evidence the powers of the appellate court are as wide as that of the trial court and the High Court was, therefore, entitled in law to review the entire evidence and to arrive at its own conclusion about the facts and circumstances emerging therefrom. To put it differently, this Court came to the conclusion that the High Court was not bound by the appreciation of the evidence made by the trial court and it was free to reach its own conclusions as to the proof or otherwise of the circumstances relied upon by the prosecution on a review of the evidence of the prosecution witnesses. This Court, therefore, held that when several persons are alleged to have committed an offence in furtherance of their common intention and all except one are acquitted, it is open to the appellate court under sub-section (1)(b) of Section 386 of the Code to find out on a reappraisal of the evidence who were the persons involved in the commission of the crime and although it could not interfere with the order of acquittal in the absence of a State appeal it was entitled to determine the actual offence committed by the convicted person. Where on the reappreciation of the evidence the appellate court comes to the conclusion that the appellant and the

acquitted accused were both involved in the commission of the crime, the appellate court can record a conviction with the aid of Section 34 notwithstanding the acquittal of the co-accused. While the appellate court cannot reserve the order of acquittal in the absence of State appeal, it cannot at the same time be hedged by the appreciation of the evidence by the lower court if that appreciation of evidence is found to be erroneous. This Court, therefore, pointed out that in such a fact-situation it is open to the appellate court to record a finding of guilt with the aid of Section 34 notwithstanding the acquittal of the co-accused since the English doctrine of repugnancy on the face of record has no application in this country as we are governed by our own statutory law. On this ratio this Court confirmed the conviction of the appellant under Section 302, IPC, but with the aid of Section 34, IPC. The fact-situation before us is more or less similar.

13. Several decisions were cited in support of the contention that where two named persons are charged for the commission of an offence with the aid of Section 34, IPC and one of them is acquitted the other cannot be convicted with the aid of Section 34, IPC. Dealing with these decisions this Court observed in Brathi case ((1991) 1 SCC 519 : 1991 SCC (Cri) 203) that all the decisions relied on were distinguishable on the ground that in none of them the appellate court was shown to have disagreed with the trial court's appreciation of evidence but on the contrary the appellate court had proceeded on the footing that the appreciation of evidence by the trial court was correct. We think that the cases on which Mr. Lalit has placed reliance can also be distinguished on the same ground.

14. In Baikuntha Nath Chaudhury case ((1973) 2 SCC 432 : 1973 SCC (Cri) 880 : AIR 1973 SC 2337) the evidence of two eye-witnesses PWs 9 and 10 was to the effect that accused 1 and 2 had killed their brother with the active participation of accused 3, their mother. According to the prosecution accused 2, the appellant, had called the deceased to his house and while he was there accused 1 inflicted two lathi blows which proved fatal. The dead body was then put in a gunny bag supplied by accused 3 and drowned into a nearby tank. The three accused persons were charged under Sections 302/34, and 201, IPC. The trial court acquitted accused 3 but found the other two guilty. On appeal the High Court acquitted accused 1 rejecting the prosecution evidence in regard to his involvement but confirmed the conviction of accused 2 under Section 302/34, IPC, though the fatal injuries were inflicted by the acquitted accused 1. It will thus be noticed that on a reappreciation of evidence by the High Court accused 1 came to be acquitted although he was stated to have given the fatal lathi blows while his brother, the appellant, was convicted on the same evidence. This Court, therefore, concluded that if the evidence of the two eye-witnesses were to be accepted, accused 1 could not be acquitted since according to them it was he who had given the fatal blows while the appellant had merely caught hold of him. This Court, therefore, observed in paragraph 12 of the judgment that if the occurrence spoken to by PWs 9 and 10 is accepted, the appellant will be constructively liable for his involvement, though the fatal injuries were inflicted by his brother. In that case his brother will also be guilty of the said offence. But since the High Court had acquitted the first accused it meant that the High Court did not accept the evidence of PWs 9 and 10 in regard to the incident. This Court did not come to the conclusion that the High Court's appreciation of evidence in regard to accused 1 was not proper. In fact it did not examine the case from that point of view but held that since the High Court had not accepted the evidence of PWs 9 and 10 in regard to the part played by the acquitted accused, the appellant could not have been convicted on the same appreciation of evidence. This becomes clear on a close reading of paragraphs 12 and 13 of the judgment. Similarly in the case of Kasturi Lal ((1976) 3 SCC 570 : 1976 SCC (Cri) 467 : AIR 1976 SC 2042) this Court came to the conclusion that the reasons given by the High Court for distinguishing the case of Kasturi Lal from that of Khazan Singh and Gurdial Singh were not correct and, therefore, it was not justified in convicting Kasturi Lal. So, when, the

case of Kasturi Lal was not distinguishable from that of the above two, this Court felt that the High Court erred in convicting Kasturi Lal. It will thus be seen that this Court came to the conclusion that the reasons which weighed with the High Court for the distinction drawn were not correct and hence the conviction of Kasturi Lal had to be set aside. This decision also does not help the appellant. In Chandubhai case (1981 Supp SCC 46 : 1981 SCC (Cri) 682), the prosecution relied on the testimony of PWs 1, 5 and 6. Both the courts below found their testimony to be unreliable in several particulars and acquitted the co-accused of the appellant in two stages. This Court concluded that the appellant's case could not be distinguished from that of his two acquitted companions insofar as the reliability of the ocular evidence of three eye-witnesses was concerned. It was in the said circumstances that this Court thought that the conviction of the appellant under Section 302/34, IPC was not justified, particularly, after the evidence of the three witnesses was found to be unreliable. This also, therefore, is not a case where the appellate court disagreed with the appreciation of the evidence by the trial court and came to a different conclusion regarding the participation of others in the commission of the crime. In Sukh Ram case (1989 Supp 1 SCC 214 : 1989 SCC (Cri) 357) to which one of us (Ahmadi, J.) was a party, this Court interfered with the conviction of the appellant recorded with the aid of Section 34 by the High Court because on the facts found proved on evidence the conviction of the appellant could not be sustained on the acquittal of the co-accused on the same set of established facts. This Court on its own did not come to the conclusion that the acquittal of Gokul was not well founded as High Court's appreciation of evidence was not correct. Had it come to that conclusion it could have recorded a conviction of the appellant under Section 302/34, IPC, notwithstanding the acquittal of Gokul. Therefore, all the aforesaid cases are clearly distinguishable from the facts of Brathi case ((1991) 1 SCC 519 : 1991 SCC (Cri) 203) where the High Court had clearly departed from the appreciation of the evidence by the trial court and had reached its own conclusion in regard to the proof of various facts and circumstances relied on by the prosecution. We are, therefore, in respectful agreement with the distinction drawn by this Court on the ground that in none of the cases cited on behalf of the appellant it was shown that the appellate court had disagreed with the appreciation of evidence by the trial court and the conclusion of facts and circumstances recorded by it.

15. Does the decision in Krishna Govind Patil ((1964) 1 SCR 678 : AIR 1963 SC 1413 : (1963) 2 Cri LJ 351) take a different view ? It is true that the attention of the bench which disposed of Brathi case ((1991) 1 SCC 519 : 1991 SCC (Cri) 203) was not invited to this decision. But, in our opinion, this decision does not take a view inconsistent with the ratio laid down in Brathi case ((1991) 1 SCC 519 : 1991 SCC (Cri) 203). The facts reveal that Krishna Govind Patil and three others were put up for trial for the murder of one Vishwanath. They were charged under Section 302/34, IPC and were also separately charged under Section 302, IPC. Accused 1, 3 and 4 pleaded an alibi while accused 2 raised the plea of private defence. The trial court acquitted all the caused on the ground that the prosecution witnesses were not speaking the truth and the version of accused 2 was a probable one. The State appealed against the order of acquittal under Section 302/34, but not against the acquittal under Section 302, IPC. The High Court confirmed the acquittal of accused 1, 3 and 4 on the ground that the evidence regarding their participation in the commission of the crime was doubtful but convicted accused 2 on the ground that one or more of them might have participated in the commission of the offence. Accused 2, therefore, preferred an appeal to this Court and contended that when three of the four named persons were acquitted the High Court was not justified in convicting him on the basis of constructive liability. This Court held that before a court can convict a person under Section 302/34, IPC, it must record a definite finding that the said person had prior consultation with one or more other persons, named or unnamed, for committing the offence. When three of the accused came to be acquitted on the ground that the evidence was not acceptable or on

the ground that they were entitled to benefit of doubt, in law it meant that they did not participate in the offence. It was further held that the effect of the acquittal of the three co-accused is that they did not co-jointly and with the appellant commit the murder. These observations have to be read in the context of the facts stated above. The High Court on an appreciation of the evidence, came to a definite conclusion that accused 1, 3 and 4 had not participated in the commission of the crime. On that appreciation of the evidence the High Court could not have come to the conclusion that any of those acquitted accused was privy to the crime even for the limited purpose of convicting the appellant with the aid of Section 34. This again is not a case where the appellate court disagreed with the appreciation of evidence and reached a conclusion different from the conclusion recorded by the trial court in regard to the participation of the other co-accused. This decision is also distinguishable on the same ground as this Court distinguished the other decisions in Brathi case ((1991) 1 SCC 519 : 1991 SCC (Cri) 203). We are, therefore, of the opinion that the omission to refer to this decision does not render the decision in Brathi case ((1991) 1 SCC 519 : 1991 SCC (Cri) 203) per incuriam. We are, therefore, in respectful agreement with the law explained in Brathi case ((1991) 1 SCC 519 : 1991 SCC (Cri) 203).

16. Coming now to the facts of this case the trial court acquitted the co-accused but convicted the appellant under Section 302, IPC. The High Court has confirmed that conviction. Mr. Lalit is right when he says that the prosecution evidence does not disclose that the fatal blow which caused injury No. 1 was given by the appellant. Inherent in this submission is the assumption that the fatal blow was given by someone else. That establishes the fact that more that one person participated in the commission of the crime. We have also on an independent appreciation of the evidence of the three eye-witnesses, namely, PW 1 Komal Chand, PW 3 Kishan Lal and PW 4 Ramesh, come to the conclusion that several persons had participated in the commission of the crime. The failure on the part of the prosecution witnesses PWs 3 and 4 to identify the others does not alter the situation. We are, on the other hand, convinced from the evidence of PW 1 Komal Chand that some of the co-accused, particularly, Gunda, Parsu and Gopal had participated in the commission of the crime. It is another matter that in the absence of a State appeal the High Court could not, nor can we, interfere with their acquittal, but as rightly pointed in Brathi case ((1991) 1 SCC 519 : 1991 SCC (Cri) 203) this Court is not bound by the facts found proved on the appreciation of evidence by the courts below and is, in law, entitled to reach its own conclusion different from the one recorded by the court's below on a review of the evidence. In that view of the matter we think that the conviction of the appellant can be sustained with the aid of Section 34 or 149, IPC, as the case may be. In the present case we feel it safe to confirm the conviction of the appellant with the aid of Section 34, IPC. We, therefore, cannot agree with the submission of the learned counsel for the appellant that at best the conviction can be recorded under Section 324, IPC. We confirm the conviction of the appellant under Section 302, IPC, with the aid of Section 34 and maintain the sentence awarded to him.

17. For the above reasons we see no merit in this appeal and dismiss the same.

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