

SUPREME COURT OF INDIA

State of Madhya Pradesh

Vs

Sardar

Ahmad Noor

Vs

State of Madhya Pradesh

25.07.2001

(M.B. Shah and S.N. Variava, JJ.)

Criminal Appeal No. 871 of 1997. WITH Criminal Appeal No. 872 of 1997.

JUDGMENT

S.N. Variava, J. - These two appeals by special leave are directed against orders dated 28th June, 1996 and 17th July, 1996 passed by the High Court of Madhya Pradesh at Jabalpur in Criminal Appeal No. 490 of 1990.

2. Briefly stated the facts are as follows :

It is the case of the prosecution that on 20th February, 1987 PW1 Yaqub was coming back from the forest near his village Khokariya, under the jurisdiction of Police Station Narwar, district Ujjain, and on the way he was accosted by accused No. 4 Sardar. It is the case of the prosecution that Sardar caught hold of Yakub, by his collar, slapped him, abused him and threatened him for lodging many reports against him, the brother of Yaqub namely Peera, and his uncle Ismile Hazi (PW5) came on the spot, separated the two persons, took Yaqub to the brothers' house and forced Yaqub to remain in a room which was bolted from outside; that sometime after this incident, at about 10 a.m., accused No. 4 Sardar armed with axe, accused No. 1 Ahmad Noor armed with Saliya, accused No. 5 Daulat armed with Saliya, accused No. 2 Usman armed with axe, accused No. 6 Sikander armed with Saliya and accused No. 3 Ramzu armed with stick came to the spot. These persons first assaulted Ismile and then proceeded towards the house of PW2 Mubarik. The door of Mubarik's house was closed. Thereafter, accused broke open the door with the axe, entered the house and assaulted Mubarik, Yusuf PW4 and Ahmad Noor (since deceased). The three injured persons were taken by the Police to the Police Station. As Ahmad Noor's condition was serious he was sent to the hospital. Yaqub lodged the report. FIR for the offences under Sections 307/452/147/148/149/294/506/323/324/294 IPC was lodged. Ahmad Noor then expired in the

hospital.

3. All the accused persons viz. Sardar, Ahmad Noor, Daulat, Usman, Sikander and Ramju denied the charges. By its judgment and order dated 7th November, 1990 the trial Court acquitted accused Usman and Raju. The trial Court convicted accused Ahmad Noor, Daulat and Sikander under Section 302 read with 34 IPC and sentenced them to suffer life imprisonment. Accused Sardar was convicted by the trial Court under Section 307 IPC and was sentenced to suffer life imprisonment. Simultaneously all the accused were held guilty of committing offence under Section 307 read with Section 34 IPC and were sentenced to three years R.I. for attempt to murder Ismile, three years R.I. for attempt to murder Yusuf and three years R.I. for attempt to murder Mubarik. All the sentences were directed to run concurrently.

4. The State did not file any appeal against the acquittal of the two persons. Therefore, their acquittal has become final. The four persons who were convicted filed an appeal to the High Court. By the impugned judgment dated 28th June, 1996, the High Court allowed the appeal of Sardar and acquitted him of all the charges. The High Court did so on the following reasoning :

"Looking to the fact that door was broke open and 3 persons of complainant party have sustained injuries out of them Ahmad Noor died and, therefore, the number of persons who entered the house and caused injuries must have been more. As the door was broke open possibility of presence of axe in the hand of some of the accused is also probable, but looking to the fact as two persons have been extended benefit which has finalised because of non-filing of appeal by the State, the person placed in the similar situation is entitled to the same benefit. In this view of the matter Sardar also deserves same benefit as his participation becomes doubtful and does not stand corroborated from the medical evidence. He is entitled to benefit of reasonable doubt."

The High Court upheld the conviction of Ahmad Noor, Daulat and Sikander under Section 302 read with 34 IPC and dismissed their Appeal. Criminal Appeal No. 871 of 1997 has been filed by the State against that portion of the impugned judgment which acquits Sardar. Criminal No. 872 of 1997 has been filed by the other three persons whose conviction has been upheld by the High Court.

5. We have heard the counsel for the parties.

6. Mr. U.R. Lalit, and Mr. K.N. Shukla, Senior Advocates have taken us through the evidence and the material on record. According to Mr. Lalit there is no evidence of any independent witnesses, even though there would be many such witnesses as the incident had taken place during day time in a village. According to Mr. Lalit the prosecution witnesses are all interested persons belonging to the complainant group. He submitted that they were all biased witnesses who falsely deposed in order to falsely implicate the accused. According to him, these witnesses had contradicted themselves in material particulars. Learned counsel Mr. Lalit submitted that the investigation has been one-sided and that the accused have lodged FIR prior in time for the serious injuries caused to them and that prosecution has not explained serious injuries to 3 of the accused persons. Learned counsel submitted that the appeal filed by the State against acquittal of Sardar be dismissed and the appeal filed by the accused requires to be allowed and all be acquitted.

7. As against this Mr. Shukla submitted that the prosecution has proved its case beyond reasonable doubt against all accused. He submitted that in an incident like this, where two groups in a village fight, no independent person comes forth to give evidence or even make a statement. He points out the evidence where it has been deposed to by the police witnesses that nobody was willing to make

any statement. Learned counsel Mr. Shukla submitted that the High Court has acquitted Sardar on erroneous reasoning. He submits that Sardar was the main accused who had accosted, threatened and beaten Yakub, who had then beaten Ismile and who had then gone, along with other accused armed with axe at Mubarik's house. He submits that the evidence clearly implicates Sardar and brings out the major role that he has played. It is his contention that the acquittal of Sardar cannot be maintained and the appeal filed by the State requires to be allowed and the order of the trial Court convicting him be restored. He submitted that both the trial Court and High Court, have on proper appreciation of facts rightly convicted the 3 accused and thus their appeal be dismissed.

8. At this stage, it must be mentioned that having heard the very persuasive arguments of Mr. Lalit, initially the Court felt that there may be force in his contentions. To do absolute justice to the matter, we re-read the entire evidence and looked at the material on record. Let us now see what the evidence on record is and whether on the evidence and material on record it could be said that prosecution had proved its case beyond a reasonable doubt. The evidence qua injuries to PW5 Ismile, PW2 Mubarik and PW4 Yusuf and deceased Ahmad Noor and the accused as set out by the High Court is as under :-

"Dr. Ravindra Shrivastava (PW16) examined Hazi Ismile s/o Somaji on 20.2.1987 at about 1.45 p.m. and as per his report Ex.P/17 following injuries were found :-

1. Abrasion over the frontal region of scalp 1/2 x 1/2"
2. Rt. Eye become black in colour, swollen in upper lid, Rt. Eyebrow extend upto infrabital margin of Rt. Eye and face.
3. Lacerated wound 6" x 1" x 1/2" (bone deep) on the frontal occipital region. Blood oozing from wound.
4. Abrasion 3/4" x 3/4" on the Pt. dorsal aspect of hand.
5. Contusion 1" x 1" around the abrasion.

Dr. Shrivastava also examined 3rd injured Mubarik at about 1.30 same day and as per report Ex.P/19 found following injuries :-

1. Abrasion 1/4" x 1/4" over the Rt. Forearm on lateral aspect 1" above the Rt. elbow.
2. Contusion 2" x 2" around the abrasion, red in colour, elbow movements are restricted.
3. Contusion 2" x 2" upper 1/3rd on Rt. forearm on lateral aspect.
4. Contusion 1" x 1" on the Rt wrist. Movements are restricted.
5. Abrasion 1" x 3/4" on the lower 1/3rd of left forearm.

Dr. S.P. Khare (PW15) conducted X-ray examination of Yusuf vide X-ray plate Ex.P/13 and detected fracture of metacarpal of first right finger vide Ex.P/14. The X-ray examination of Mubarik s/o Abbad was also conducted vide X-ray plate Ex.P/15 and the fracture of Rt. ulna was detected vide Ex.P/16. X-ray of Ismile s/o Shobhaji was also conducted but no fracture was detected.

Ahmad Noor s/o Abbas was directly taken to the hospital, as such, Dr. A.K. Diwan, (PW17) examined him at about 2 p.m. and found following injuries, vide Ex.P/20 :

1. Contusion 2 cms. in radius above Rt. eye including upper lid.
2. Contusion (sic) cms in radius lateral to Rt. eye.
3. Lacerated wound 5 mm x 2 mm x 2 mm posteriorly on the Rt. parietal region.
4. Contused swelling all over Lt. hand.

Report of admission of Ahmad Noor was also sent to the police. As Ahmad Noor died, a request for post mortem examination was made, as such, Dr. V.K. Garg (PW3) conducted autopsy on the body of Ahmad Noor and found as under :-

1. Abrasion "x" on sternal region.
2. The head was bandaged. On removal of the bandage, there was lacerated wound over parietal region. Rt. side 1/4" x (sic) x skin deep.
3. Contusion underneath the L.W. 2" x 2".
4. There was extra cranial haematoma in fronto-perieto-temporal region Rt. side 5" x 5".
5. There was a depressed domminuted fracture of the skull right side fronto-parietal region extending from Rt. Parietal.
6. There was extradural haemorrhage present underneath the fracture, membranes and brain matter intact. There was collection of blood beneath the fracture portion of the skull.

Dr. Garg prepared report Ex.P/3. As per report Ahmad Noor died of haemorrhage and shock due to reapture of meningeal vessels and vessels under the scalp and depressed fracture of the skull.

9. It must be mentioned that during his deposition, Dr. Garg deposed that the injury inflicted on head of deceased Ahmad Noor could have been caused by hitting axe from backside. This opinion is corroborated by another Dr. Diwan (PW17) during his deposition.

10. In respect of injuries to the accused persons, Sikander, Ahmad Noor and Daulat, the High Court has set out as follows :-

On 20.2.1987, at 10.50 Dr. Ravindra Shrivastava (PW16) examined accused Sikander and as per report Ex.D/7 he found following injuries :-

1. Lacerated wound 2" x 1/2" x 1/2" on the occipital region of scalp.
2. Abrasion 3/4" x 3/4" on the base of Lt. little finger.
3. Abrasion 3/4" x 3/4" on the base of Lt. ring finger.

Dr. Shrivastava on the same day 11.25 a.m. examined Ahmad Noor s/o Mohammad and as per report. Ex.D/8, he found following injuries :-

1. Contusion 1" x 1/4" on the lower 1/2 of Lt. forearm on lateral aspect.
2. Lacerated wound 1" x (sic) x" on the Rt. parietal region of scalp.
3. Contusion 1/2" x 1/2" on the medial aspect of Lt. knee joint.
4. Abrasion 2" x 1" on the chin of face.

On 20.2.1987 Dr. Laxminarain (DW1) examined accused Daulat and vide report Ex.D/13-C, he found as follows :-

1. Incised wound 8.5 cm x 1/2 x bone deep on the back of Rt. ear.
2. Incised wound 12:5 cm x 1 cm on middle of scalp.
3. Penetrating wound 5.5 cm x 2.5 cm on Rt. shoulder.
4. Incised wound 1/5 cm x 1/4 cm on the left cheek.
5. Abrasion 7.5 cm x 3 cm on the outer part of shoulder."

11. In the light of the aforesaid injuries to the prosecution witnesses and to the accused we would examine the evidence on record. The complainant Yusuf was examined as prosecution witness No. 1. He has deposed that in the morning Sardar had caught him, beaten him with fists, abused him and threatened as to how many reports he was lodging against him. His brother and uncle separated them and his brother took him to his house. Five minutes later. Sikander and Ahmad Noor (accused No. 2) started beating Hazi Ismile and after that they went away. Ahmad Noor had beaten Ismile. Yaqub further pointed out that according to this witness only Sikander and Ahmad Noor had beaten Ismile. Yaqub further deposed that 10 minutes later Usman and Sardar armed with axe, Daultat, Sikander and Ahmad Noor armed with Saliya and Ramju armed with lathi came in. They went to the house of Mubarik, dismantled the door, entered the house and started beating the persons inside the house. Usman and Sardar dealt axe blows upon Ahmad Noor (deceased) and others also dealt blows to Ahmad Noor. He deposed that except for Mubarik and Ahmad Noor nobody else was beaten. After assaulting them, the accused persons fled away. Learned counsel Mr. Lalit submits that though the witness had started by claiming that six persons came to the house of Mubarik he now states that there were only four persons. According to learned Counsel prosecution had come to Court with a story of two incidents, namely, Sardar accosting Yaqub and then the attack in the house of Mubarik. He submitted that this witness and other witnesses have improved upon the case of the prosecution and deposed about three incidents, the third being attack on Ismile. However, it is to be seen that at all stages the prosecution has been claiming 3 incidents viz. Sardar accosting Yaqub, attack on Ismile and then the incident in the house of Mubarik. Yaqub had also deposed that the police came to the house and the police had taken away the door after getting it unhinged. Learned counsel Mr. Lalit submits that there is no evidence of police having taken away the door after unhinging it. He submits that this also indicates that this witness is depositing falsely. Learned counsel points out that in his cross-examination, this witness has admitted that he is supposed to have seen all this peeping through a "Chheka" from inside his brother's house. It is his submission that the statement of this witness, in cross-examination, that Ahmad Noor had been attacked with the off-side of the hatchet is an improvement. He points out that this witness admits that he was so stating for the first time and that it had not been mentioned in his statements to the police that Ahmad Noor had been beaten with the off side of the hatchet. Learned counsel points out that this

witness admits that there is a cross case against him and his group which is still pending in the court.

12. PW2 Mubarik at whose house third incident took place has also given the same prosecution story. It is his say that the six accused persons had come to his house. Usman had axe; Daulat, Sikander and Ahmad Noor had Saliya and Ramju was having lathis with him. He had closed the door after seeing them. Usman and Sardar had broken the door and entered the house, assaulted him and his brother Ahmad Noor (deceased). Sardar and other accused assaulted Ahmad Noor with the reverse side of axe. He was beaten by Sikander.

13. Complainant Yusuf PW4 stated that when he along with his brother Ahmad Noor, mother and sister was sitting in his house, all six accused came to the house and started assaulting his brother Ahmad Noor. He has also deposed that Usman and Sardar assaulted Ahmad Noor with an axe and that they hit Ahmad Noor with the reverse side of the axe. Ramju, Sikander and Usman had beaten him with the axe and Saliya and that again he was hit by the reverse side of the axe. He deposed that his brother Mubarik was beaten by Sikander and Daulat as well as Ahmad Noor. In cross-examination he reiterates that he has told the police that his brother Ahmad Noor was beaten with the reverse side of the axe. It is also brought out that between the complainant group and the group of accused persons there was a dispute over land. He has further admitted that his family had been out-casted by the villagers. He has denied the suggestion that his group was the aggressor.

14. Next evidence is of Ismile (PW5), who also supported the prosecution story. He deposed that on the date of incident, in the morning, Sardar had accosted Yaqub and asked him why he had lodged the reports against him. He separated both of them and that after 4 or 5 minutes, Sikander, Ahmad Noor and Sardar had assaulted him. Mr. Lalit submits that now these persons are supposed to have assaulted Ismile, whereas according to Yaqub it was Sikander, Daulat and Ahmad Noor who had beaten Ismile. This witness deposed that the accused then went to the house of Abbas (which is the same as that of Mubarik) and Ahmad Noor, Daulat and Ramju had assaulted him, Mubarik and Yusuf. In cross-examination, except for getting an honest admission that there was a cross case against them which was also pending in the Court, the deposition of this witness has not been shaken.

15. Prosecution has also examined PW18 Jamila. She has deposed that she was at home along with her brother Ahmad Noor and Yusuf and Mubarik was outside. All the accused had come to the house and immediately Mubarik came inside and closed the door. She deposed that the six accused broke open the door and assaulted her brother Ahmad Noor with Lathis and axe. She admits that there is a dispute between the two groups over land. She also deposed that Ahmad Noor had been hit with the reverse side of the axe. In the cross-examination she reiterates that she had told the police that Ahmad Noor had been assaulted with the reverse side of the axe.

16. Prosecution has further examined Head Constable Ramesh Chandra PW7 who came to the place of incident immediately on receipt of information about the dispute. He has deposed that in the village, with great difficulty he learned, from the villagers, where the dispute took place. Having so learnt he went to the house of Mubarik. This itself is indicative of where the main incident took place. Had it been on the street as claimed by the accused, he would have gone to that place. In his evidence-in-chief, he deposes that he found that the door of the house was flooded with blood. The doors were closed and at several places handles (Batte) of axe were lying. He has further deposed that he had reassured the inmates that the police had come and then the inmates of the house opened the door from inside. He found Ahmad Noor lying unconscious in the house and Yusuf and Mubarik were lying injured inside the house. He also found Hazi Ismile lying injured upstairs in the house.

17. Learned counsel contended that this evidence clearly shows that the door of Mubarik's house was not broken. He submitted that this gave a lie to the story that the main incident took place in Mubarik's house. Much has been made by learned Counsel about the fact that this witness has deposed that when he went to the house he had to persuade the inmates to open the door. He submitted that if the door had been broken there was no question of the inmates being able to close the door thereafter. Learned counsel referred to the statement of this witness during cross-examination to the following effect :-

"Doors were in no way broken and separated. Their state was that, without opening them, one cannot enter."

It must, however, be noted that this witness has also stated that the door of the house was flooded with blood and that the other doors were closed. He also deposed that at several places handles of axe were lying and that the door of the house was stained with blood and was broken at several places by strokes of axe. The evidence of this witness has to be read as a whole. It conveys that the doors had not been completely separated from its hinges. This witness corroborates the fact that the door had been broke open at several places by the strokes of an axe. Merely because the inmates managed to close the door which was opened by the accused, would not mean that earlier the door had not been broke open. This is evidence of an independent witness, who was first on the scene after the incident. He has no axe to grind and is not interested in taking sides. Far from assisting the accused the evidence indicates that the main incident took place at the house of Mubarik.

18. PW.20 Amarnath Upadhyay, SHO was also examined. He has stated that on receiving the information he had gone to the spot, prepared a map of the spot on the basis of identification by the complainant Yaqub. He deposes about having seen blood on the spot of the incident and having seized the blood, stained soil and ordinary soil. He further deposed about seizure of axe and Saliya from the accused persons respectively and the arrest of accused persons. In cross-examination he admits that the accused had lodged a complaint on the same day and that he had also investigated that crime as three of the accused persons were also injured. He admits that accused Daulat and Sikander had remained in the hospital even when they were arrested as their injuries were not completely cured. He had also prepared a map of the spot where according to the accused the incident took place and had not found any blood on that spot. He stated that the spot indicated by the accused is a thoroughfare. It is his say that he made enquiries from the neighbours but nobody was ready to speak.

19. The prosecution has proved a site map which was marked as Ex.P-12 through the evidence of PW14 Bhagirath Patwari. This site map showed that the door of Ahmad Noor's house had broken marks on it. It must be mentioned that during cross-examination there has been virtually no challenge to the facts mentioned in this site map.

20. In our view, the evidence of injured witnesses as well as eye-witnesses including that of PW14 Bhagirath Patwari, who prepared the site map, and PW7 Head Constable Ramesh Chander, who visited the house on receipt of information, proves beyond reasonable doubt that the door of Mubarik's house was broke open. This would mean that incident took place as narrated by the injured witnesses. Their testimony has not been affected by cross-examination nor there is any contradiction or omission on this aspect. Further, the suggestion made to the witnesses in the cross-examination would also indicate that door in question was broken. It was suggested by the defence that door was broken by the injured witnesses. In the cross-examination, Yakub (PW1) stated that it is wrong that we people had assaulted Sikander, Daulat and accused Ahmad Noor with stick and

axe, in which Daulat's head was fractured; it is wrong that no door of Mubarik's house was broken nor any assault was done; it is wrong that Mubarik himself had broken the door of his house to save him from the report of these accused persons. Yusuf (PW4) stated that it is wrong that we ourselves had broken the door of our house to save us from the responsibility of the assault of accused persons, it is wrong that incident had taken place at our house, it occurred in the street which is in front of the house of Gokul. In this set of circumstances, there is no reason to disbelieve the prosecution evidence that accused entered the house of Mubarik after breaking open the door and inflicted injuries to the prosecution witnesses.

21. Further, Ismile (PW5) has stated that injuries were caused to him by accused Ahmad Noor, Daulat and Ramzu and injuries to deceased Ahmad Noor were caused by accused Usman and Sardar. Yusuf (PW4) has stated that injured Mubarik was attacked by accused Daulat, Sikander and Ahmad Noor and he himself was attacked by Ramzu, Sikander and Usman and deceased Ahmad Noor was attacked by Usman and Sardar. As per third injured witness Mubarik (PW2), accused Sardar and all other accused assaulted Ahmad Noor, he was assaulted by accused Sikander and Yusuf was assaulted by accused Ahmad Noor.

22. From the above evidence of all the injured witnesses one thing is clear that all have stated that accused Sardar had assaulted Ahmad Noor. It is true that there is contradiction in naming the accused with regard to the assault on the injured witnesses. For assault and injury to self, they named different accused, but out of them PW2 and PW4 named accused Sikander and Ahmad Noor who assaulted and injured them. PW5 stated that he was assaulted by Ahmad Noor, Daulat and Ramzu. Question would be whether evidence of these injured witnesses should be discarded on some omissions or contradictions ? Normally omissions, or contradictions which affect the basic structure of the prosecution case may be considered to be sufficient for giving benefit of doubt to the accused. From the facts narrated above, all the witnesses have named all the accused as assailants. On the basis of some contradictions, no doubt, benefit of doubt is given to two accused, but that would not mean that basic structure of the prosecution version that accused came at the house of Mubarik and assaulted injured witnesses as well as the deceased is affected at all and it stands proved beyond reasonable doubt. Hence, in our view, after considering the omissions and contradictions and after appreciating the entire evidence, if the courts below have arrived at the conclusion that the prosecution has proved its case beyond reasonable doubt against some accused, it would not be a case for interference under Article 136 of the Constitution.

23. The next contention of the learned Counsel for the accused is that the prosecution has failed to explain the serious injuries caused to accused and that prosecution has suppressed the genesis of the incident and changed the scene of offence. It is proved on record that in the same incident accused received serious injuries. Question is what is the effect of non-explanation of such injuries sustained by the accused. In the present case, it has to be decided whether accused were the aggressors as contended by the prosecution, and aggressor to such an extent that they went at the house of the deceased, broke upon the door and inflicted fatal injuries to Ahmad Noor and serious injuries to Mubarik PW2 and Yusuf PW4 and Ismile PW5.

24. Undisputedly, incident took place. However, defence version is that incident took place at a different place, namely, near a public water tap. That defence is disbelieved by both the courts below and as discussed hereinabove, in our view, there is no reason to take a different view from the view taken by the High Court as well as the Sessions Court. Then, next question is - what is effect of non-explanation of injuries sustained by the accused at about the time of occurrence ? It is settled law that in case of non-explanation of injuries to the accused, Court can draw following inferences :

(1) that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version.

(2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and, therefore, their evidence is unreliable.

(3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case.

But, non-explanation of injuries may lose its importance where the evidence is clear, cogent and creditworthy and where court can distinguish the truth from falsehood without much difficulty. It is also true that the reasonable inference which could be drawn in such cases is that accused persons received the injuries during the course of occurrence and that some members of the prosecution party inflicted such injuries. On that basis again, the question would be whether the accused caused the injury to the prosecution witnesses and the deceased by exercising right of private defence? If the prosecution establishes that the accused were the aggressors and went at the residence of the deceased or the prosecution witness and inflicted injuries to the deceased and witnesses, there is no question of right of private defence to the accused. On the contrary in such situation, the prosecution party would have the right of private defence. In *Kashmiri Lal and others v. State of Punjab, 1996(10) SCC 471 : 1996(3) RCR (Crl.) 543 (SC)*, the Court observed thus :-

"The law does not confer a right of self-defence on a person who invites an attack on himself by his own attack on another. The principle of right of self-defence cannot legitimately be utilized as a shield to justify an act of aggression. A person who is unlawfully attacked has every right to counteract and attack his assailant and cause such injury as may be necessary to ward off the apprehended danger or threat."

25. Facts proved in record establish that accused were aggressors. Accused and the prosecution witnesses were having long standing dispute over the land. Because of previous incident of assaulting Yakub, it is the prosecution story that all the six accused came at the scene of offence, first assaulted Ismile and at the house of Mubarik by breaking open the door which was closed, assaulted Ahmad Noor, Yusuf and Mubarik. At that stage, if someone from prosecution party counter-attacked the assailants, there is no question of disbelieving the prosecution witnesses nor any right of private defence to the accused could be inferred. In such cases, there must be some evidence on record to probabalise such defence. In this view of the matter, we see no infirmity in the judgment of the trial Court or in the judgment of the High Court in convicting the appellants in Criminal Appeal No. 872 of 1997.

26. As set out hereinabove, accused Sardar had been acquitted by the High Court only on the ground that he should be given the same benefit of doubt which had been given to accused Usman and Ramzu. The High Court also accepts the fact that the door was broken open and 3 persons of the complainant party were injured in the house. The High Court also notes that circumstances indicate presence of "more persons". The High Court also notes that as door was broken open there was possibility of presence of axe in the hands of some persons. Yet the High Court acquits Sardar only on ground that acquittal of two accused had become final. It is to be noted that Sessions Court gave benefit of doubt to Usman and Ramzu on the basis of contradiction in deposition of witnesses Ismile, Yusuf and Mubarik with regard to the assault to the witnesses and also as there was no mark of injuries on their person. But this would not mean that there was any reason to discard the consistent evidence of prosecution witnesses with regard to the assault made by Sardar. The High

Court also observed that according to Yaqub, Usman and Sardar both were armed with axe, but no axe injury, i.e. incised wound has been found on the body of any person of the complainant party. Mubarik has stated that Sardar caused injury to Ahmad Noor by blunt part of the axe, but this does not find place in the FIR. Ismile has also stated that Usman and Sardar had axe, but as observed earlier, no incised injury has been found on the body of any person from the complainant side. The High Court observed that Sardar allegedly caused injury by axe, but no incised injury has been found and, therefore, Sardar deserved the same benefit as his participation becomes doubtful and does not stand corroboration from the medical evidence.

27. In our view, this part of reasoning is entirely fallacious. It is to be seen from the evidence on record that Sardar is the main aggressor. It is established beyond reasonable doubt that he was the person who first accosted Yaqub, caught hold of him, beat him and threatened him. Thereafter within few minutes, he along with other accused came at the house of Mubarik, first assaulted Ismile and thereafter broke open the door of the house of Mubarik which was closed and assaulted deceased Ahmad Noor as well as Mubarik and Yusuf. Merely because the trial Court has given benefit of doubt to Usman and Ramzu, it would not mean that Sardar who is the main person should also be given benefit of doubt despite the fact that all the witnesses have named him and stated that he was the aggressor and assaulter. It is true that incised injury is not found on the person of the injured witnesses or the deceased, but that would not be a ground for giving him benefit of doubt in the facts and circumstances of the present case because it would depend on whether the blunt side or the sharp-edged side of the axe was used, but considering the evidence of prosecution witnesses entirely is required to be convicted for the offence punishable under Section 302 read with 34 IPC and not only under Section 302 IPC.

28. In the result, Criminal Appeal No. 871 of 1997 filed by the State is allowed. The judgment and order passed by the High Court acquitting respondent is set aside and the order of the trial Court convicting the respondent for the offence punishable under Section 302 read with Section 34 is restored. He is directed to surrender within two weeks from today before the trial Court for undergoing remaining part of his sentence. Criminal Appeal No. 872 of 1997 filed by the accused is dismissed.

Order accordingly.