SUPREME COURT OF INDIA

Md. Ankoos

Vs.

The Public Prosecutor, High Court of A.P.

Crl.A.No.120 of 2008

(D.K. Jain and R. M. Lodha JJ.)

06.11.2009

JUDGEMENT

R.M. LODHA, J.

1. Five persons were done to death in the intervening night of October 2 and 3, 2000 in village Thimmapur, District Warangal. The villagers suspected that deceased were practicing sorcery and due to that few deaths took place in the village. 77 persons were sent up for trial for the offences under Sections 148, 448, 307, 302, 120-B read with 109, IPC. The Court of 2nd Additional Sessions Judge at Warangal vide his judgment dated June 9, 2009 acquitted all of them. In the appeal preferred by the State of Andhra Pradesh, High Court confirmed the judgment of acquittal of 59 accused but convicted nineteen persons for the offence punishable under Section 302 read with Section 149, IPC and sentenced them to undergo imprisonment for life vide judgment dated October 4, 2007. Their acquittal for other offences was, however, confirmed. All these nineteen convicted persons preferred special leave petition in which leave has been granted and appeal has come up for hearing before us.

2. Few cattle died in the village Thimmapur in 1997. The death of these cattle were due to sudden ill-health. The villagers of Thimmapur suspected that their cattle died due to sorcery practiced by some of the villagers. T. Lingaiah (A-19), G. Sambaiah (A-60), B. Mallaiah (A-61), M. Ramreddy (A-62) and K. Veeraswamy (A-69) thought of identifying the culprits. They called M. Yakaiah (A-16) - a Mantrik from Lingapuram village; collected some donations from the villagers and paid to him to identify the persons responsible for the death of cattle. A-16 revealed the names of Chatta Boina Ilu Mallamma @ Ilamma (D-1), Velpula Narsamma (D-2), Konkanoori Yellaiah (D-3), Konkanoori Rajamma (D-4), Veera Uppakantha (D-5), Panduga Renuka (PW-6) and Pochala Yeshoda (PW-7) responsible for the tragedy. About fifteen days prior to the incident, one Boyana Bikshapathi, son of B. Venkataiah (A-17) and B. Rayalaxmi (A-72) and brother of B. Sampath (A-71) and B. Ravi (A-73) died at MGM Hospital at Warangal. Ten days prior to the incident, one Pandunga Nirmala relative of P. Yadagiri (A-9), P. Hymavathi (A-10), P. Ramulu (A-26), P. Buchaiah (A-59) and P. Ellaswamy (A-76) died in the village due to ill-health. The case of the prosecution is that the accused hatched a plan on August 2, 2000 to kill D-1, D-2, D-3, D-4, D-5, PW-6 and PW-7 as they suspected that these persons were responsible for these deaths because of sorcery played by them. According to the prosecution 78 persons viz., Md. Ankoos (A-1), D. Yella Swamy (A-2), Ch. Laxmaiah (A-3), S. Babu (A-4), Ch. Shankar (A-5), I. Buchaiah (A-6), K. Sammaiah (A-7), K. Bhasker (A-8), P. Yadagiri (A-9), P. Hymavathi (A-10), I. Mogili (A-11), K. Raju (A-12), K. Suresh (A-13), I. Ellaiah (A-14), N. Sudhakaar (A-15), B. Venkataiah (A-17), A. Chandraiah (A-18), T. Lingaiah (A-19), M. Venu (A-20), Neerati Sudhaker (A-21), Ch. Veeralaxmi (A-22), K. Laxmi (A-23), V. Vijaya (A-24), A. Lalitha (A-25), P. Ramulu (A-26), P. Narasaiah (A-27), V. Mogili (A-28), Ch. Satyanarayana (A-29), M. Laxmi (A-30), I. Renuka (A-31), E. Aruna (A-32), S. Padma (A-33), Ch. Yakamma (A-34), K. Mariya (A-35), K. Narsamma (A-36), K. Yellamma (A-37), K. Komuramma (A-38), S. Radha (A-39), K. Kanakalaxmi (A-40), N. Bhadramma (A-41), K. Kamalamma (A-42), N. Narsamma (A-43), M. Ahalya (A-44), D. Yaka Laxmi (A-45), S. Laxmi (A-46), N. Bhadramma (A-47), N. Suguna (A-48), V. Narsamma (A-49), I. Yakaiah (A-50), K. Narsaiah (A-51), S. Ramchandru (A-52), P. Roja (A-53), B. Bichamma (A-54), D. Saramma (A-55), D. Laxmi (A-56), Ch. Sammakka (A-57), A. Soundarya (A-58), P. Buchaiah (A-59), M. Ramreddy (A-62), V. Iylaiah (A-63), I. Babu (A-64), T. Sadaiah (A-65), T. Vishnu (A-66), B. Sudhakar (A-67), N. Ilumallu (A-68), K. Veeraswamy (A-69), D. Sarangapani (A-70),B. Sampath (A-71), B. Rayalaxmi (A-72), B. Ravi (A-73), Ch. Sammaiah (A-74), D. Yakaiah (A-75), P. Ellaswamy (A-76), K. Veeraiah (A-77) and T.Veeraswamy (A-78) formed an unlawful assembly; some of them were armed with sticks while the women accused held chilli powder and gathered in front of the house of A-7. A-1, A-5 and A-6 entered the house of D-2 and dragged her out. Similarly, A-11, A-13, A-14 dragged D-5, A-9, A-10, A-26 and A-29 dragged D-3 and D-4; A-2, A-3, A-4 and A-17 dragged D-1; A-28, A-31 and A-33 dragged PW-6 and A-18, A-20 and A-24 dragged PW-7 out of their respective houses forcibly. A-1 to A-15, A-17 to A-59 and A-63 to A-78 gave beating to D-1 to D-5, PW-6 and PW-7 with sticks and women accused sprinkled chilli powder sprinkled on their faces. PW-6 and PW-7 ran away from the scene with injuries. The prosecution has further come out with the case that A-19, A-65 and A-66 brought a drum of kerosene and A-1 to A-15, A-17 to A-59 and A-62 to A-78 poured kerosene on D-1, D-2, D-3, D-4 and D-5 and set them on fire, as a result of which D-1 D-2, D-3 and D-4 died on the spot while D-5 died at MGM Hospital, Warangal.

3. S. Venkateshwara Rao (PW-1)- Village Administrative Officer - on August 3, 2000 lodged a report about the incident at police station Sangam at about 6.00 a.m. Ch. Rajeshwar Rao (PW-20) - Inspector of Police – upon receipt of information immediately rushed to the scene of occurrence;

conducted Inquest Panchnama over the dead bodies and sent the dead bodies to MGM Hospital, Warangal for post-mortem. PW-20 seized the kerosene drum (MO-1) at the scene of offence and took steps towards investigation and after collecting the evidence and on completion of investigation, submitted charge-sheet against A-1 to A-78 before the Court of III Additional Judicial First Class Magistrate, Warangal who committed them to court of sessions for trial. A-21 being juvenile was separated from the trial.

4. Accused (77 in number) were charged for the following offences :

"CHARGE NO. 1 :

That you A. 1 to A. 15, A. 17 to A. 59 and A. 62 to A.78 on 2/3.8.2000 at about 0100 hr. at Thimmapur (v) were members of an unlawful assembly and did, in prosecution of the common object of such assembly, namely to commit the murder of D.1) S. Iyla Mallamma, D.2) V. Narsamma, D.3) K. Nuri Yellaiah D.4) K. Rajamma, D.5) E. Uppakantha, commit the offence of rioting by pouring kerosene and that you thereby committed an offence punishable u/S. 148 IPC and within the cognizance of this Court.

CHARGE NO. 2 :

That you on the above mentioned date, time and place committed house-trespass by entering into the houses of D. 1 to D.5 with intent to kill them and that you thereby committed an offence punishable u/S. 448 IPC and within the cognizance of this Court.

CHARGE NO. 3 :

That you on the above mentioned date, time and place did an act i.e. murder of D.1 to D. 5 with such intention and under such circumstances that if by that act you had caused the death of D. 1 to D. 5 you would have been guilty of murder and that you thereby committed an offence punishable u/S. 307 IPC and within the cognizance of this Court.

CHARGE NO. 4 :

That you on the above mentioned date, time and place did commit murder by intentionally causing the death of D.1 to D.5 and that you thereby committed an offence punishable u/S. 302 IPC and within the cognizance of this Court.

CHARGE NO. 5 :

That you A.16, A.60 and A.61 on the above mentioned date, time and place were members of an unlawful assembly to do an illegal act i.e. murder of D.1 to D.5 and that the same act was done in pursuance of the agreement which was committed in consequences of abatement and that you have thereby committed an offence

punishable u/S. 120-B r/w 109 IPC and within the cognizance of this Court."

5. The prosecution examined twenty-two witnesses of which PW-2, PW-3, PW-4, PW-5, PW-6, PW-7, PW-8 and PW- 9 were tendered as eye-witnesses.

6. The postmortem of the dead bodies was conducted on August 4, 2000. The postmortem of dead body of D-1 records that she died of burn injuries. The injuries sustained by her are recorded in the postmortem report thus :

"1. A contusion of 8 x 6 cm present over the vertex area of scalp.

2. A contusion of 6 x 4 cm present on outer aspect of left arm.

3. A contusion of 7 x 4 cm present on outer aspect of right shoulder.

4. A contusion over area of 16 x 10 cm present on back trunk.

5. A contusion over an area of 9 x 5 cm present on right buttock.

6. Antemortem, fresh deep burn injuries are present over scalp, face, neck, both sides of trunk, both

upper limbs, perenium and both lower limbs up to knees, sparing both legs. The burns more deep over anterior abdominal wall and made a rent in it through which intestines are coming out. About 90% of body surface area is involved."

7. D-2 also died of burn injuries and the following injuries are recorded in the postmortem report concerning D-2 :

" 1. A contusion of 6 x 4 cm present on occipital area of scalp.

2. A contusion of 3 x 2 cm present on outer aspect of left elbow.

3. A contusion of 6 x 4 cm present on outer aspect of right shoulder.

4. A contusion of 8 x 6 cm present on back of trunk.

5. A contusion of 4 x 3 cm present on right buttock.

6. A contusion of 8 x 4 cm present on outer aspect of left buttock.

7. Antemortem, deep burns present on scalp, face, neck, both sides of trunk, both upper limbs, both lower limbs and perenium, with bone deep on left side body over arm and buttock and cavity deep at abdomen. About 100% of body surface area is involved."

8. As regards D-3, the postmortem report records the following injuries :

" 1. A contusion of 6 x 4 cm present over vertex area of scalp.

2. A contusion of 6 x 4 cm present over outer aspect of right arm.

3. A contusion of 5 x 4 cm present over outer aspect of left arm.

4. A contusion of 18 x 12 cm present over back of trunk.

5. A contusion of 6 x 4 cm present on outer aspect of right wrist.

6. A contusion of 3 x 2 cm present over right elbow, outer aspect.

7. A contusion of 4 x 3 cm present over outer aspect of left elbow.

8. A contusion of 4 x 3 cm present over outer aspect of left wrist.

9. A contusion of 7 x 5 cm present on back of right buttock.

10. A contusion of 8 x 6 cm present on back of left buttock.

11. A contusion of 10 x 6 cm present on front of right thigh.

12. A contusion of 8 x 4 cm present on front of left thigh.

13. A contusion of 6 x 4 cm present on outer aspect of right leg.

14. A contusion of 5 x 3 cm present on outer aspect of left leg.

15. A contusion of 6 x 4 cm present on left sole.

16. Antemortem, mixed burn injuries are present on scalp, face, neck, both sides of trunk, both upper limbs, both lower limbs and perenium, except over both feet. About 95% of body surface area is involved."

9. D-4 also died of burn injuries. The postmortem report records the following injuries on her.

"1. A contusion over an area of 20 x 16 cm present on entire area of scalp.

2 Antemortem, deep burns present on scalp, face, neck, both sides of trunk, both upper limbs, both lower limbs and perenium. The burns are cavity deep at abdomen and intestines came out through the deficit and part of them are burnt. They are bone deep and muscles are charred on both upper limbs and lower limbs. About 100% of body surface area is involved."

10. The cause of death of D-5, as reflected in postmortem report, is again burn injuries. The following injuries are recorded in the postmortem report concerning D-5 :

"1. A contusion of 3 x 2 cm present on scalp on vertex area.

2 A contusion over an area of 20 x 8 cm, present on right shoulder outer aspect.

3 A contusion of 10 x 8 cm, present on outer aspect of left arm.

4 A contusion of 8 x 6 cm present on outer aspect of left wrist area.

5 A contusion over an area of 16 x 10 cm present on right thigh, outer aspect.

6 A contusion over an area of 10 x 8 cm present on outer aspect of left buttock.

7 Antemortem burns of mixed degree, present on face, scalp, neck, both sides of trunk, both upper limbs, both lower limbs and perenium, with loss of entire superficial skin. About 100% of body surface area is involved."

11. The death of D-1 to D-5 is neither accidental nor suicidal; rather their death is established to be homicidal. The trial court held that prosecution failed to establish the guilt of the accused for the offences for which they were charged and, accordingly, acquitted them by giving benefit of doubt. The High Court, however, upturned the judgment of acquittal insofar as present appellants are concerned and convicted them for the offence punishable under Section 302 read with Section 149, IPC and sentenced them to suffer imprisonment for life, although their acquittal under Sections 148 and 448 IPC was not interfered with.

12. This Court has, time and again, dealt with the scope of exercise of power by the Appellate Court against judgment of acquittal under Sections 378 and 386, Cr.P.C. It has been repeatedly held that if two views are possible, the Appellate Court should not ordinarily interfere with the judgment of acquittal. This Court has laid down that Appellate Court shall not reverse a judgment of acquittal because another view is possible to be taken. It is not necessary to multiply the decisions on the subject and reference to a later decision of this Court in Ghurey Lal v. State Of Uttar Pradesh1 shall suffice wherein this Court considered a long line of cases and held thus :

"69. The following principles emerge from the cases above:

1. The appellate court may review the evidence in appeals against acquittal under Sections 378 and 386 of the Criminal Procedure Code, 1973. Its power of reviewing evidence is wide and the appellate court can reappreciate the entire evidence on record. It can review the trial court's conclusion with respect to both facts and law.

2. The accused is presumed innocent until proven guilty. The accused possessed this presumption when

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he was before the trial court. The trial court's acquittal bolsters the presumption that he is innocent.

3. Due or proper weight and consideration must be given to the trial court's decision. This is especially true when a witness' credibility is at issue. It is not enough for the High Court to take a different view of the evidence. There must also be substantial and compelling reasons for holding that the trial court was wrong.

70. In light of the above, the High Court and other appellate courts should follow the well-settled principles crystallised by number of judgments if it is going to overrule or otherwise disturb the trial court's acquittal:

1. The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so. A number of instances arise in which the appellate court would have "very substantial and compelling reasons" to discard the trial court's decision. "Very substantial and compelling reasons" exist when:

(i) The trial court's conclusion with regard to the facts is palpably wrong;

(ii) The trial court's decision was based on an erroneous view of law;

(iii) The trial court's judgment is likely to result in "grave miscarriage of justice";

(iv) The entire approach of the trial court in dealing with the evidence was patently illegal;

(v) The trial court's judgment was manifestly unjust and unreasonable;

(vi) The trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/report of the ballistic expert, etc.

(vii) This list is intended to be illustrative, not exhaustive.

2. The appellate court must always give proper weight and consideration to the findings of the trial court.

3. If two reasonable views can be reached--one that leads to acquittal, the other to conviction--the High Courts/appellate courts must rule in favour of the accused."

13. The question to be considered is : is the High Court justified in reversing the judgment of acquittal and convicting the appellants for the offence punishable under Section 302 read with Section 149, IPC.

14. The prosecution tendered PW-2, PW-3, PW-4, PW-5, PW-6, PW-7, PW-8 and PW-9 as eye-witnesses in support of its case. The witnesses other than PW-2, PW-3 and PW-4 did not support prosecution case and they were declared hostile witnesses. PW-2 is son of D-1. The Trial Court did not find his evidence worthy of acceptance as his evidence was found to be inconsistent with the evidence of PW-3, PW-10 and PW-20. The trial court also noticed material contradictions in his deposition. In cross examination he was completely shaken in respect of his statement in chief that A-2, A-3, A-7, A-17, A-60 and some others hatched the plan to do away with the deceased persons suspecting them to be sorcerers. He admitted in the cross examination that he was not aware as to

who brought D-2 and D-5 to the scene of offence. The Trial Court meticulously considered the evidence of PW-2 and gave the following reasons in reaching the conclusion that his evidence is full of embellishments and improvements :

"No doubt, P.W. 2 has alleged in his chief- examination that he found A.2, A.3, A.7, A.17, A.60 and someothers hatching a plan to do away the deceased persons suspecting them to be sorcerers but he did not state the same before the Investigating Officer-P.W. 20 in his statement u/s. 161 Cr.P.C. He has also denied the said part of evidence in his cross-examination. During the cross- examination, P.W. 2 has admitted that he did not know about the approach of any of the accused persons to A.16 and bringing him to Thimmapur (v) in order to identify the sorcerers. P.W. 2 has deposed in his chief-examination that A.2, A.3, A.5, A.6, A.9 to A.12, A.14, A.41, A.48, A.59, A.68 and A.77 brought the deceased persons and P.Ws. 6 and 7 forcibly from their respective houses. But during his cross- examination, he could not say who brought the deceased Uppakantha and Narsamma to the scene of offence though admittedly, they were his neighbours. He has also admitted at the end of his cross-examination that A.10 did not take the deceased, mother of P.W. 2 to the scene of incident from his house. As per his evidence in the cross-examination, by the time he reached the scene of offence, he found gathering of 60 to 70 persons and that only 25 persons were near the deceased persons and others were at a distance. This version creates doubt about his version given in the chief- examination with regard to his witnessing of forcibly taking the deceased persons to the scene of offence. P.W. 2 has given the duration of the incident as 9.00 p.m. to 3.00 a.m. and his presence at the scene althrough. As per his version, he did not go to Police Station on the night of the incident due to fear but went thereon the following morning on 3.8.2k at 5.00 a.m. and informed about the

incident to the SHO and returned back to his village. If this version is taken to be true, it can be said that the police received the information about the incident at 5.00 a.m. for the first time on 3.8.2k but not at 6.30 a.m. on the said day through PW-1 by way of his complaint, ex. P.1. But contrary to the evidence of P.W. 2, P.W. 10 has deposed that on the night of the incident itself at about 2.00 a.m. P.W. 2 went to P.W. 10, engaged his jeep, arrived to Thimmapur (v) at about 6.00 a.m. and then proceeded to Sangem P.S. and lodged a written complaint. In fact, P.W. 2 has denied about it to a suggestion given by

the learned defence counsel in his cross-examination. P.W. 10 in his cross-examination also deposed that P.W. 2 informed him that he came to know about the incident on that night. If the version of P.W. 10 is taken to be true, the entire evidence of P.W. 2 has to be jettisoned with regard to his actual witnessing of the incident. P.W. 2 has deposed that he has given names of the culprits who have committed the offences to the A.S.I and that he has noted down the same and obtained signature of P.W. 2. But the C.I. of Police-P.W. 20 has deposed that on the next day of the incident i.e. on 4.8.2k he has recorded the statements of witnesses including P.W. 2 and for the first time came to know about the names of accused persons. It is to be noted that as per the evidence of P.W.2 and P.W.20, the C.I. of Police visited Thimmapur (v) at 9.00 a.m. on 3.8.2k and that at that time, P.W. 2 was also present in the village. This aspect creates doubt about the identity of the accused persons during the course of investigation conducted by P.W. 20."

15. The Trial Court was also not convinced to accept the testimony of PW-3 (husband of D-5) as his evidence was inconsistent on material points with the evidence of PW-2. The Trial Court pointed out the material contradictions in the deposition of PW-3 thus :

"P.W. 3 is husband of the deceased Uppakanthamma. He has given time of the incident as 9.00 p.m. which is contrary to the time noticed in Ex. P.1 as 1.00 a.m. As per the evidence of P.W. 3, A.1, A.2, A.3, A.5, A.6, A.7, A.10 to A.13, A.34, A.37 and A.54 took his deceased wife forcibly from his house to the scene of incident. Though P.W. 2 has alleged in his chief-examination about his witnessing the fact of taking the deceased Uppakanthamma from her house, he did not give names of A-1, A.7, A.13, A.34 and A.37 and A.54. Though P.W. 3 alleged that A-9 beat his deceased wife with a stick on her head and she sustained bleeding injury and that A.71 sprinkled chilli powder on it. P.W. 2 did not whisper about it in his entire evidence. P.W. 2 has deposed that A.13, A.20 and A.65 brought kerosene drum from the house of A.19 and that A.10 sprinkled kerosene on the deceased persons but P.W. 3 has given the names of the accused persons noted above as to have brought the kerosene drum and that A.13 poured kerosene on the deceased. Though P.W. 3 has stated that A.17 supervised the whole affair, P.W. 2 did not state about it. These are material contradictions in the evidence of P.Ws. 2 and 3 going to very root of the case......... As per the evidence of P.W. 3, he was with his deceased wife Appakanthamma at the scene of incident till she was shifted to MGM Hospital, Warangal for treatment and that although she was conscious and did not give names of the persons who poured kerosene on her body and set on fire. Evidently, she did not give names of any of the accused persons as responsible for causing burn injuries to her in her dying declaration dt. 3.8.2k vide Ex. P. 36."

16. As regards PW-4 who is son of D-3 and D-4, the Trial Court found his evidence self-contradictory and also doubted his witnessing the incident. After scanning his evidence, the Trial Court gave the following reasons in not accepting the evidence of PW-4 :

"P.W. 4 is son of deceased K. Yellaiah and K. Rajamma. His evidence is self-contradictory because during his chief-examination he has deposed that he saw A.1, A.5, A.7, A.8, A.10 to A.15, A.17 and A. 41 while beating his parents but in his cross-examination, he has deposed that by the time, he reached the scene of incident, his parents were already lying unconscious and were surrounded by 20 persons. Even at the end of his chief-examination itself, he has deposed that by the time he reached the scene of offence, he found the other accused persons, except the accused persons noted above, were not present there. Admittedly, when his parents were allegedly taken to the scene of offence forcibly, they were sleeping in the front portion of the house whereas PW-4 was sleeping inside the house. This aspect creates doubt about his witnessing the incident. As per his evidence, he heard a commotion at about 12.30 midnight but as per the evidence of P.Ws. 2 and 3, the incident commenced at 9.00 p.m. itself, P.W. 4 has alleged that A.5, A.12 and A.13 only brought kerosene drum from the house of A.19 which is contradictory to the versions given by P.Ws. 2 and 3 noted above.

17. Although PW-6 and PW-7 are injured witnesses and, according to prosecution, they were beaten at the scene of offence by the villagers but in their deposition, they stated that they went to the scene of occurrence voluntarily. Neither of them named any of the accused for the injuries sustained by them. PW-8 is daughter of D-3 and D-4 and she deposed that she did not witness the incident and came to know about the same on the next day through the wife of PW-4. PW-9 deposed that at midnight he heard the commotion and rushed to the scene of offence but he returned back to his house after somebody beat him and he could not identify as it was dark night.

18. The Trial Court, thus, held that PW-5 to PW-9 have not supported the case of prosecution at all. As a matter of fact they were declared hostile witnesses by the prosecution.

19. Insofar as High Court is concerned, it accepted the view of the Trial Court that offence punishable under Section 148, IPC is not made out. The High Court affirmed the acquittal of the accused under Section 148, IPC holding thus :

"Coming to charge No. 1, leveled against accused 1 to 15, 17 to 59 (except accused No. 21) and 62 to 78, for the offence punishable under Section 148 I.P.C., we are of the view that though the act of rioting is made out, regarding the persons and the weapons of offence said to have been used by them, there is no evidence about their presence much less usage of deadly weapons. The evidence of P.Ws. 2 to 4 is also totally silent on this. So, in the absence of main ingredient i.e., the presence of deadly weapons, the act of the accused, even assuming that the same is made out, cannot be brought into the ambit of Section 148 I.P.C. Accordingly, the acquittal of the accused recorded by the trial

court for the offence under Section 148 I.P.C., is confirmed."

20. With regard to the offence punishable under Section 448, IPC, High Court held that the evidence was lacking as to who actually trespassed into the houses of the deceased and forcibly dragged them out of their respective house. The High Court, accordingly, affirmed the finding of the Trial Court acquitting the accused for the offence under Section 448, IPC.

21. However, the High Court held that PW-2 to PW-4 were reliable being eye-witnesses of truth. The High Court held that the contradictions in the evidence of PW-2 to PW-4 and the evidence of Investigating Officer (PW-20) about the presence of accused cannot be accepted as the evidence of PW-20 is liable to be discarded. This opinion was formed by the High Court by perusal of the statements of PW-2 to PW-4 recorded under Section 161(3), Cr.P.C. after calling for the case diary in exercise of the power of the Court under Section 172(2) of Code of Criminal Procedure.

22. In the first place, High Court erred in accepting the evidence of PW-2 to PW-4 without adequately meeting the reasons given by the Trial Court for not accepting their evidence. Moreover, we considered the evidence of these witnesses ourselves and we find that the view of the Trial Court in not accepting the evidence of PW-2, PW-3 and PW-4 cannot be said to be erroneous. Secondly, and more importantly, the High Court committed a serious error of law in discarding the evidence of PW-20 on the basis of case diary summoned in exercise of power conferred on the Court under Section 172 of the Code.

23. Section 172 of Code of Criminal Procedure reads thus :

(1) "Every police officer making an investigation under this Chapter shall day by day enter his proceedings in the investigation in a diary, setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place, or places visited by him, and a statement of the circumstances ascertained through his investigation.

(2) Any Criminal Court may send for the police diaries of the case under inquiry or trial in such Court, and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial.

(3) Neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they are referred to by the Court; but, if they are used by the police officer who made them to refresh his memory, or if the Court uses them for the purposes of contradicting such police officer, the provisions of Sec. 161 or Sec. 145, as the case may be, of the

Indian Evidence Act, 1872 (1 of 1872) shall apply."

24. A criminal court can use the case diary in the aid of any inquiry or trial but not as an evidence. This position is made clear by Section 172(2) of the Code. Section 172(3) places restrictions upon the use of case diary by providing that accused has no right to call for the case diary but if it is used by the police officer who made the entries for refreshing his memory or if the Court uses it for the purpose of contradicting such police officer, it will be so done in the manner provided in Section 161 of the Code and Section 145 of the Evidence Act. Court's power to consider the case diary is not unfettered. In light of the inhibitions contained in Section 172(2), it is not open to the Court to place reliance on the case diary as a piece of evidence directly or indirectly. This Court had an occasion to consider Section 172 of the Code vis-`-vis Section145 of the Evidence Act and Section 162 of the Code in the case of Mahabir Singh v. State of Haryana2 and it was stated as follows:

"14. A reading of the said sub-sections makes the position clear that the discretion given to the court to use such diaries is only for aiding the court to decide on a point. It is made abundantly clear in sub-section (2) itself that the court is forbidden from using the entries of such diaries as evidence. What cannot be used as evidence against the accused cannot be used in any other manner against him. If the court uses the entries in a case diary for contradicting a police officer it should be done only in the manner provided in Section 145 of the Evidence Act i.e. by giving the author of the statement an opportunity to explain the contradiction, after his attention is called to that part of the statement which is intended to be so used for contradiction. In other words, the power conferred on the court for perusal of the diary under Section 172 of the Code is not intended for explaining a contradiction which the defence has winched to the fore through the channel permitted by law. The interdict contained in Section 162 of the Code, debars the court from using the power under Section 172 of the Code for the purpose of explaining the contradiction."

25. The High Court, however, did not keep the aforesaid legal position in mind and erred in placing reliance upon the evidence of PW-2 to PW-4 by verifying their

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(2001) 7 SCC 148 statements recorded under Section 161(3) of the Code from the case diary. It is here that the High Court fell into grave error in using the statements of PW-2 to PW-4 recorded under section 161(3) of the Code; particularly for contradicting PW-20 without affording any opportunity to him to explain the position. The course adopted by the High Court is impermissible in law as Section 172 of the Code is not meant to be used for the purpose it has been used by the High Court i.e. to overcome the contradictions pointed out by the defence. Ought we know what would have been the view of the High Court with regard to the evidence of PW-2 to PW-4, had it not considered the statements of these witnesses under Section 161(3) of the Code. As a matter of fact, High Court heavily relied upon the deposition of PW-2 to PW-4 in upsetting the judgment of acquittal passed by the Trial Court. This is what the High Court held :

"Accused 2,3,5,6,9,10,11,12,14,41 and 48 were identified by P.W.2; Accused 1,2,3,5,6,7,10,11,12,13,34 and 37 were identified by P.W.3; Accused 1,5,7,8,10,11,12,13,14,15,17, 41 and 48 were identified by P.W.4; and Accused 1,2,3,5,6,7,8,9,10,11,12,13,14,15,17,34,37,41 and 48 were commonly identified by P.Ws. 2 to 4."

26. In our view, as a result of aforenoticed error of law, judgment of the High Court is rendered unsustainable.

27. Another grave illegality vitiating the judgment of the High Court is conviction of the appellants under Section 302 read with Section 149 IPC even though appellants have been acquitted of the offence under Section 148 IPC.

28. All 77 accused, vide charge No. 1, were charged to the effect that they were members of the unlawful assembly and in prosecution of the common object of such assembly, to commit the murder of D-1, D-2, D-3, D-4 and D-5, committed the offence of rioting by pouring kerosene and thereby committed an offence punishable under Section 148 IPC vide charge No.4, all the accused were charged that they committed murder by intentionally causing the death of D-1 to D-5 and

thereby committed an offence punishable under Section 302 IPC. The Trial Court held that neither offence under Section 148 IPC nor under Section 302 IPC was established against the accused beyond any reasonable doubt. The High Court affirmed the finding of the Trial Court about the acquittal of the appellants under Section 148 IPC but convicted them for the offence punishable under Section 302 read with Section 149 IPC without their being any charge to this effect. Section 149 IPC creates constructive liability i.e. a person who is a member of the unlawful assembly is made guilty of the offence committed by another member of the same assembly in the circumstances mentioned in the Section, although he may have had no intention to commit that offence and had done no overt act except his presence in the assembly and sharing the common object of that assembly. The legal position is also fairly well settled that because of a mere defect in language or in the narration or in form of the charge, the conviction would not be rendered bad if accused has not been affected thereby. But in a case such as the present one where the appellants have been expressly charged for the offence punishable under Section 148 IPC and have been acquitted thereunder, they cannot be legally convicted for the offence punishable under Section 302 read with Section 149 IPC. It is so because the offence of rioting must occur when members are charged with murder as the common object of the unlawful assembly. Section 148 IPC creates liability on persons armed with deadly weapons and is a distinct offence and there is no requirement in law that members of unlawful assembly have also to be charged under Section 148 IPC for legally recording their conviction under Section 302 read with Section 149 IPC. However, where an accused is charged under Section 148 IPC and acquitted, conviction of such accused under Section 302 read with Section 149 IPC could not be legally recorded. We find support from a Four Judge Bench decision of this Court in the case of Mahadev Sharma v. State of Bihar3 wherein this Court held thus :

".............Of course, if a charge had been framed under s.147 or s.148 and that charge had failed against any of the accused then s.149 could not have been used against him. The area which is common to ss.147 and 149 is the substratum on which different degrees of liability are built and there cannot be a conviction with the aid of s.149 when there is no evidence of such substratum."

29. In view of the aforesaid legal position, the appellants having been acquitted under Section 148 IPC by the Trial Court as well as the High Court, they could not have been legally convicted by the High Court under Section 302 read with Section 149 IPC.

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30. It is also pertinent to mention that the prosecution came out with the case that the accused committed house trespass by entering into houses of D-1 to D-5 and dragged them out with an intent to kill. Accordingly, all accused persons were charged under Section 448 IPC but all of them have been acquitted as prosecution failed to establish the said offence against them. This again dislodges the material aspect of the prosecution case. Be that as it may, the view of the Trial Court in passing the judgment of acquittal is a possible view and cannot be said to be palpably wrong on facts or based on erroneous view of law and, therefore, High Court was not justified in interfering with the judgment of acquittal. It is true that five persons were done to death in the dead of night in a ghastly manner and the whole incident is quite shocking but in the absence of cogent and reliable evidence against the appellants connecting them to crime, view of the Trial Court in passing the judgment of acquittal cannot be said to be unjustified.

31. In the result and for the reasons indicated above, the appeal deserves to be allowed and is allowed. The judgment of the High Court passed on October 4, 2007 is set aside. The appellants shall be released forthwith, if not required in any other case.