SUPREME COURT OF INDIA

Mohammad Khalil Chisti

Vs.

State of Rajasthan

Crl.A.No.634 of 2012

(P.Sathasivam and Ranjan Gogoi,JJ.)

12.12.2012

JUDGMENT

P.Sathasivam,J.

1. These appeals are directed against the common judgment and order dated 20.12.2011 passed by the High Court of Judicature for Rajasthan, Bench at Jaipur in D.B. Criminal Appeal Nos. 189 and 188 of 2011 whereby the Division Bench of the High Court dismissed the appeals filed by the appellants herein and affirmed the judgment dated 31.01.2011 passed by the Court of Additional Sessions Judge (Fast Track) No.1, Ajmer in Sessions Case No.157 of 2001.

2. Brief facts:

> "(a)The case relates to a fight between two groups of Khadim Mohalla, Jhalra, Ajmer which culminated into the death of one Idris and registration of 2 FIRs being Nos. 90 and 91 of 1992.
>
> (b) On 14.04.1992, an altercation took place between Khalil Chisti (A-2) and Khurshid Pahalwan – co usin of Aslam Chisti (the complainant in FIR No. 90 of 1992) during a function at the house of one Shabbir on account of old rivalry. On the same evening, Khurshid had called Idris-cousin brother of Shabbir for having the matter resolved by way of a compromise between the two parties. In pursuance of the same, Idris, Shamim, Aslam, Mustqueem, Asif, Sagir and Javed (relatives) proceeded towards the house of Khalil Chisti where they found Khalil Chisti (A-2), Yasir Chisti (A-1), Akil Chisti (A-3) and Farukh Chisti (A-4) who were already present there. On entering the house, they realized that Khalil (A-2) was having sword in his hand and Farukh (A-4) was holding a gun whereas Yasir and Akil were having revolvers and the accused party immediately closed the door from behind and Khalil Chisti (A-2) shouted "no one should escape, kill all of them." On seeing their intention, the

complainant party tried to run in order to save their lives at which time Farukh (A-4) fired a shot at Idris which resulted into injury to his right eye. Khalil (A-2) also gave a sword blow to the complainant-Aslam Chisti which struck on his forehead and Yasir and Akil also opened fire. Later on, considering the injured to have been shot dead, the accused persons fled away. Subsequently, Khurshid and Shamim had taken Aslam Chisti and Idris to the hospital where Idris succumbed to his injuries.

(c) On the same day, i.e., on 14.04.1992, Aslam Chisti lodged an FIR being No. 90 of 1992 at Police Station Ganj, Ajmer against Yasir (A-1), Khalil (A- 2), Akil (A-3) and Farukh (A-4).

(d) On the same day, at about 10:30 to 11:00 p.m., another FIR being No. 91 of 1992 was registered at P.S. Ganj, Ajmer on the statement made by Akil Chisti, while under treatment, wherein he stated that at about 5:00 to 5:30 p.m., when he along with other persons were sitting in his house, he suddenly noticed pelting of stones on the grills of the house. When all of them went on the roof top to understand the matter, they found Idris, Shamim, Aslam, Mustqueem, Asif, Sagir and Javed standing there duly armed with weapons. On enquiring about the same, Idris stabbed Farukh (A-4) with a knife and Shamim opened fire on Akil (A-3) which missed the target. In the meantime, Akil (A-3) brought a rifle of his father but Sagir, Asif and Javed snatched the same from him and Aslam stabbed him into his waist from behind leading to his collapse. Asif also opened fire on to him which hit Idris. A number of persons had gathered in the neighbourhood on hearing the hue and cry.

(e) After investigation, chargesheets were filed against 4 persons, namely, Yasir, Khalil, Akil and Farukh in FIR No. 90 of 1992 and against 6 persons, namely, Shamim, Aslam, Mustqueem, Asif, Sagir and Javed in Cross FIR No. 91 of 1992 and both the cases were committed to the Court of Additional Sessions Judge (Fast Track) No.1, Ajmer and were registered asSessions Case No. 157/2001 (FIR No.90/1992) and Sessions Case No. 178/2001 (FIR No.91/1992).

(f)The trial Court, by judgment dated 31.01.2011 in Sessions Case No. 157 of 2001, convicted Farukh Chisti (A-4), Yasir Chisti (A-1) and Akil Chisti (A-3) under Sections 302 and 324 read with Section 34 of the Indian Penal Code, 1860 (in short 'the IPC') whereas Khalil Chisti (A-2) was convicted under Sections 302 and 324 of the IPC. A-1, A-2, A-3 and A-4 were sentenced to undergo RI for life along with a fine of Rs. 20,000/-, in default, to further undergo RI for a period of 6 months for the offence punishable under Section 302 of IPC. They all were further sentenced to undergo simple imprisonment for 2 years along with a fine of Rs. 2,000/-, in default, to further undergo simple imprisonment for 1 month for the offence punishable under Section 324 read with Section 34 of IPC.

(g) On the same day, the trial Court convicted the accused persons in Session Case No. 178 of 2001 and sentenced all of them to suffer RI for 10 years alongwith a fine

of Rs.10,000/-, in default, to further undergo RI for 6 months for the offence punishable under Section 307 read with Section 149 of IPC. They were further sentenced to RI for 2 years under Section 148 of IPC, RI for 3 years with a fine of Rs.1,000/-, in default, to undergo RI for one month under Section 452 and RI for 2 years under Section 324 read with Section 149 of IPC. Challenging the said judgment, all the accused persons named in FIR 91 of 1992 filed Criminal Appeal No. 131 of 2011 before the High Court which is still pending.

(h) Challenging the judgment in Session Case No. 157/2001, Yasir Chisti and Akil Chisti filed D.B. Criminal Appeal No. 188/2011, Dr. Mohammad Khalil Chisti filed D.B. Criminal Appeal No. 189 of 2011 and Farukh Chisti filed D.B. Criminal Appeal No. 423 of 2011 before the High Court. By a common judgment dated 20.12.2011, the High Court dismissed all the appeals and affirmed the judgment passed by the trial Court. (i) Aggrieved by the said judgment, Dr. Mohammad Khalil Chisti preferred Criminal Appeal No. 634 of 2012 and Yasir Chisti and Akil Chisti preferred Criminal Appeal No. 635 of 2012 before this Court."

3. Heard Mr. Uday U. Lalit, learned senior counsel for Dr. Mohammed KhalilChisti -appellant in Criminal Appeal No. 634 of 2012, Mr. K.T.S. Tulsi, learnedsenior counsel for Yasir Chisti and Akil Chisti, appellants in Criminal Appeal No.635 of 2012, Mr. Rahul Verma, learned counsel and Jasbir Singh Malik, learned Additional Advocate General for the State in both the appeals and Mr. Mukul Gupta, learned senior counsel for the Union of India in Criminal Appeal No. 634 of 2012. Contentions:

4. After taking us through FIR No. 90 of 1992 and Cross FIR No. 91 of 1992 dated 14.04.1992, the entire material relied on by the prosecution and defence, the decision of the trial Court in Session Case No. 157 of 2001 and Session Case No. 178 of 2001 and the reasoning of the impugned decision of the High Court, Mr. Lalit as well as Mr. K.T.S. Tulsi, learned senior counsel contended that the members of the complainants' party were aggressors, they formed an unlawful assembly armed with various weapons and had climbed upon the roof of their premises in order to beat the accused persons in furtherance of their common object. It is further submitted that the appellants/accused persons had not committed any offence and whatever they did was in exercise of their right of private defence. There is no evidence on record to show that the accused persons were having any common object to commit murder of the deceased-Idris. They further submitted that the trial Court as well as the High Court failed to take into consideration the fact that the complainant party including Idris, Aslam, Asif, Shamim, Mustqueem, Sagir and Javed were duly armed and had come to the place of the accused persons. In such circumstances, the accused appellants deserve to get the benefit of right of private defence on their person. They also submitted that there is no explanation by the prosecution as to how Farukh (A-4) and Akil (A-3) sustained injuries. They also contended that the prosecution suppressed the true genesis of the incident.

5. On the other hand, learned counsel for the State submitted that the judgment of the trial Court as well as the High Court is based on evidence and in the light of the settled principles

of law. It is pointed out that the accused appellants, after full preparation, sent a message to Khurshid, Shamim, Idris and other members of the complainant party to meet at their house. It is pointed out that as soon as the members of the complainant party started climbing the stairs of their house and moved towards the roof top, the accused appellants followed them and inflicted injuries by use of various weapons, consequently, Idris and Aslam were seriously injured and later on Idris succumbed to his injuries. Finally, they submitted that the prosecution has proved its case beyond reasonable doubt and the impugned judgment does not suffer from any infirmity or illegality.

6. We have carefully considered the rival submissions and perused all the relevant materials.

Discussion:

7. It is not in dispute that in respect of the same incident that took place on 14.04.1992, there had been two FIRs, namely, FIR No. 90 of 1992 and Cross FIR No. 91 of 1992. In these appeals, we are concerned about FIR No. 90 of 1992 in which the present appellants and one Farukh were implicated as accused. The said FIR was registered on the basis of a complaint made by one Syed Md. Aslam who was examined as PW-3. He is a resident of Mian House, Khadim Mohalla, Ajmer. In the complaint, it has been stated that on 14.04.1992, on the occasion of "Peela Ki Rasm" at the place of Shabbir, an altercation took place between Khalil Chisti (A-2) and Khurshid Pahalwan on account of old rivalry following which Khurshid had called his brother Idris in the evening in order to finally sort out the matter by way of a compromise. When Idris, Shamim-his relative and Md. Aslam Chisti-the complainant went to the house of Khurshid at that time, one Tariq Mohammed informed them that Khalil Chisti is calling them for a compromise following which, all of them, namely, Idris, Shamim, Md. Aslam, Khurshid, his brother Sagir went to the house of Khalil. On reaching there, they found that Khalil, Farukh, Yasir and Akil were present there at home. It has been further stated that having entered into the house, the accused party closed the door from behind and Khalil shouted that "they should not escape, kill all of them". It has been further stated that Khalil was armed with a sword and Farukh was carrying a rifle. When they tried to escape, at that time, Farukh (A-4) opened fire on Idris (deceased) which hit at his right eye and he fell down. Khalil (A-2) gave a blow with the sword to the head of Md. Aslam Chisti-the complainant which struck on his forehead and hit his temple and eye. Akil (A-3) and Yasir (A-1), who were armed with revolvers also opened fire. All the accused persons ran away and Khurshid and Shamim had taken Idris to the hospital where he succumbed to his injuries. The above statement was recorded at 5.45 p.m. on 14.04.1992.

8. Though we are not directly concerned about the cross FIR No. 91 of 1992 dated14.04.1992, in view of the plea and the defence of the present appellants, it is desirable to note down the contents of the same. The complainant in this cross FIR is Akil Chisti (A-3), the appellant in the present appeal. The following persons were shown as accused, namely, Idris, Shamim, Aslam, Mustqueem, Asif, Sagir and Javed. According to the complainant, Akil Chisti, who is a resident of Baitool Jhalra, Dargah Sharief, Ajmer that on 14.04.1992 at 5 to 5.30 p.m., when he was in the room of Farukh Chisti, they suddenly noticed pelting of stones on the grills of their house. When they went on the roof top, they found that Idris, his brother Shamim, Aslam, Mustqueem, Asif, Sagir and Javed were

standing there, armed with weapons and Shamim was armed with a country-made pistol. When Farooq questioned about pelting of stones, Idris stabbed him with a knife. Shamim opened fire on him which missed him. It has been further stated that Akil-the complainant brought a 12-bore licensed rifle of his father but Sagir, Asif and Javed snatched it from him and Aslam inflicted stab wounds in his waist from behind and he fell down. Asif opened fire from his rifle which missed him and hit Md. Idris. A number of persons had gathered in the neighbourhood who raised a clamour "maar diya - maar diya". These people assaulted them by entering inside their house. The above statement was recorded at 10.30 p.m. by SHO Police Station, Ajmer.

9. It is relevant to note that in respect of FIR No. 90 of 1992, the present appellants and one Farukh were convicted and sentenced to life imprisonment by the trial Court as affirmed by the High Court. It is brought to our notice that in respect of cross FIR No. 91 of 1992, the same trial Judge on the same day i.e. 31.01.2011 convicted and sentenced all of them for various offences and the appeals filed against those convictions is still pending in the High Court.

10.Now, let us consider the witnesses and materials relied on by the prosecution and the defence. Aslam Chisti (PW-3):

11.In his evidence, he deposed that deceased Idris was his cousin and Khurshid and Sahir were also his cousins. Shamim is his real younger brother. He identified Khalil Chisti (A-2), a Pakistani citizen in the Court. He was familiar with accused Farukh, Yasir and Akil. He narrated that he came to know from his father that some altercation took place between Khalil Chisti (A-2) and Khurshid Pahalwan on account of old rivalry on the occasion of "Peela ki Rasm" at the place of Shabbir. He further narrated that in the evening of 14.04.1992, when he was at his home with his brothers Shamim and Idris, the son of Khurshid came to their residence and informed that his father was calling all of them. After reaching there, Khurshid asked them to sort out the matter. In the meantime, one Tariq Mohammad informed them that Khalil Chisti (A-2) has called them for a meeting. He along with others went to the residence of Khurshid. From there, he, along with the deceased-Idris, Shamim, Khurshid, Sagir, Javed, Mustqueem and Asif proceeded towards the house of Khalil and on reaching there they noticed that Khalil was standing at the entrance. On their entering into the house of Khalil, the other persons present there closed the door from behind and Khalil shouted to kill all of them. In order to save their lives, he along with Idris, Shamim, Asif and others climbed over the Baitool Manzil and reached the roof top of Kaptan house. At that time, accused Khalil, Farukh, Yasir and Akil came to that place and Khalil was carrying a bare sword and Farukh was armed with a rifle, Yasir and Akil were holding rifles. Farukh fixed the target and shot fired his brother Idris. The bullet had hit on the right eye of Idris leading to his collapse there itself. Khalil hit two injuries of sword in his skull and forehead. Akil and Yasir had also opened fires from their respective revolvers but they managed to escape. He admitted that the fire triggered from the revolver of Akil and Yasir had hit none. In the course of the above narration, PW-3 admitted that two police personnel had arrived on the roof top, particularly, when Akil and Yasir were firing. From the evidence

of PW-3, it is clear that though he narrated the prosecution case about the involvement of the present appellants as well as the role of Farukh, he admitted the arrival of two police personnel, viz., Bhanwar Singh (PW-4) and Bhanwarlal Sharma (PW-5) on the roof top when Akil and Yasir were firing.
Bhanwar Singh (PW-4):

12. At the relevant time, PW-4 was posted as LHC at Police Post Tripolia Gate, Police Station Ganj, Ajmer. In his evidence, he has stated that on 14.04.1992, at about 4.30 p.m., he received information from wireless control room that a quarrel has broken out at Jhalra. On receiving the said information, PW-4 and Bhanwar Lal Sharma (PW-5), reached the spot and went to the house of Ahmed Chisti. On enquiry, they came to know that some altercation took place on the issue of children in the morning. In order to make a call to the Control Room, both of them went to the room situated at the first floor of house of one Ahmed Chisti and while they were returning, they found 5-6 persons duly armed with sword and hockey sticks climbed upstairs from the ground. They tried to prevent them but they didn't stop. Out of them, he knew Shamim, Aslam and Idris. He further deposed that they were shouting "bring out Farukh", "bring out Pakistani (A- 2) and where he is, we will kill him". He also stated that in spite of their intervention, the assailants reached at the roof top of the second floor of that house. Both PWs 4 and 5 followed them. He also stated that he had seen Farukh Chisti (A-4) with a 12 bore gun with him. Khalil (A-2), Yasir and Akil were having swords with them. Farukh went to the roof and fired from his gun and the shot hit the right eye of Idris, because of which, he died on the spot. When PW-5 came in between, he also Law Information Center 7 SpotLaw sustained injuries. He was there at the same place till 11.30 p.m. and after 11.30 p.m. he went to Tripolia Gate, P.S. made necessary entries in the daily diary in his own handwriting which is Exh. P-3. He left constable Bhanwar Lal Sharma (PW-5)at the place of incident.

13.Since PW-4 contradicted his statement made under Section 161 of the Code of Criminal Procedure, 1973 (in short 'the Code'), the Public Prosecutor sought for permission to cross examine him. Even in the cross- examination, he admitted that he made a statement to police and at the time of incident, deceased-Idris and others were armed with swords and hockey sticks and they were going upstairs which is Exh. P-4. Though PW-4 turned hostile, to some extent, he being a police constable, on receipt of information and after recording the same in the diary he left the police station along with Bhanwar Lal Sharma (PW-5) another police constable to the spot and noticed that the complainant parties rushed towards the roof top with sword and hockey sticks. It is also clear that the present accused appellants were inside the house of Khalil Chisti and the complainant's group reached there with arms. It has been also made clear that he was accompanied by another constable PW-5 and after noticing the incident, he rushed to P.S. Tripoli and made necessary entries leaving PW-5 at the spot. As rightly pointed out by learned senior counsel for the appellants, the presence of PWs 4 and 5 at the relevant spot and time cannot be disputed. It is also clear from the evidence of PW-4 that the complainant parties reached the spot armed with sword and hockey sticks. The presence of the complainants with arms is the subject matter of Cross FIR No. 91 of 1992.
Bhanwar Lal Sharma (PW-5):

14. At the relevant time, he was posted as a police constable with the police station of Tripolia Gate and was on duty on 14.04.1992. According to him, on that day, around 4.30 p.m., he and another constable PW-4 received an information on wireless from the Police Control Room in Tripolia P.S. that some fight is going on at Jhalra. On hearing such information, both of them went to Jhalra and noticed that there was no such brawl. In order to inform the same to the Control Room, they went to the house of one Ahmed Chisti by using the stairs. At the same time, he noticed Shamim (A-6 in Cross FIR) running upstairs with hockey stick in his hand, Aslam (A-1 in Cross FIR) armed with sword and two more people who were armed with weapons were going upstairs. Both of them (PW-4 and (PW-5) tried to stop them but they did not stop. Both of them went to the Chisti Manzil's room and on the roof, they noticed Shamim Chisti and others were abusing Farukh and others and then they went to Jamil Chisti's room and started pelting stones. After 8seeing the seriousness of the situation and to avoid untoward incident, PW-5 went downstairs to call other police staff while PW-4 remained on the roof. He also heard the sound of a shot being fired. When he came back after making a call, he saw Idris was lying on the Kaptan's room and was bodily injured. At the place of incident where Idris was lying, a 12-bore gun was also found 10-15 ft. away from the spot. He also explained that based on his message, other police men came to the spot. He also mentioned the injuries sustained by him when they were trying to stop Shamim and others on the stairs. He further narrated that in the midnight, around 12.50 a.m., they came to Tripolia Gate P.S. and made necessary entries of their arrival time which is Exh. P-3. Since he contradicted his statement under Section 161 of the Code, the Public Prosecutor sought permission of the court in order to cross-examine him. Even in the cross-examination, he asserted that at the time of the incident only Shamim (A-6 in Cross FIR) was throwing stones downstairs with full force in Jamil Chisti's house. He also mentioned about the fights and FIRs were registered against Aslam and Shamim.

15. Like PW-4, PW-5 narrated the incident starting from the receipt of wireless message till the clash at Jamil Chisti's house. It is relevant to point out that PWs 4 and 5 were not associated with any group, on the other hand, they were policemen of the Tripoli P.S. having jurisdiction over the area. The entries in the concerned registers of their departure and arrival to the police station also prove their statement. In the light of their statement, we have carefully analyzed their evidence and it is clear that the complainant's party came to the spot with weapons like sword, hockey sticks and few from that group also pelted stones. These aspects, though the trial Court and the High Court failed to give credence, the appellants are justified in claiming that the complainants group was responsible for the incident and the injuries caused to them. Evidence of PWs 6, 13 and 18:

16. At the instance of the counsel for the State, we were taken through the evidence of PWs 6, 13 and 18. No doubt, they supported the prosecution stand and claim that it was the appellants who caused the injuries and, particularly, Idris died due to the shot fired by Farukh using his revolver. They also stated that they sustained injuries due to the sword used by Khalil Chisti (A-2). It is also their claim that the other two accused Yasir Chisti and Akil Chisti, A-1 and A-3 respectively used revolver but their shots had hit none. Like PWs 6, 13

and 18, PW-3 who sustained sword injury at the instance of A-2 also explained about the prosecution case. It is also seen from the evidence of PW-3 that Farukh (A- 4) also sustained injuries for Law Information Center9 SpotLaw which there is no explanation by the prosecution. Relying on the evidence of PWs 3, 6 13 and 18 even if we accept the case of the prosecution, the statement of official witnesses examined on the side of the prosecution, namely, PWs 4 and 5 clearly show that the complainants were rushing towards the house of Chisti with sword and hockey sticks and also pelted stones. In these circumstances, as rightly pointed out by the counsel for the appellants, the complainants who were accused in the cross case were also responsible for their individual act.
Occurrence at the residence of A2:

17.All the prosecution witnesses, namely, PWs 3, 4, 5, 6 13 and 18 deposed that the incident occurred at the residence of A-2, namely, Chisti Manzil. It is also clear from the categorical statement of two police constables, viz., PWs 4 and 5 that on receipt of a phone call, they left Tripoli PS and reached the house of Kaptan which is adjacent to Chisti Manzil. It is clear that it was not the appellants/accused who went out of their house with arms, but even according to the prosecution witnesses, the incident took place at the residence of A-2. It is also clear that all of them entered the said house with weapons like sword and hockey sticks which we have already noted from the evidence relied on by the prosecution. No explanation as to how Farukh (A-4) and Akil (A-3) sustained injuries:

18.The prosecution document, viz., injury report of Farukh dated 14.04.1992 and injury report of Akil dated 14.04.1992 have been placed as Annexure P-5 (Colly). The injury report relating to Farukh Chisti (A-4) issued by the Department of Medical Jurist, J.L.N. Medical College and Hospital, Ajmer reads as under:-

> "Admitted in MSW II, Time-5.45 p.m. date - 14.4.1992, 839/92 Department of Medical and Health, Rajasthan, JaipurInjury Report FormAccompanied by PoliceInjury Report of Shri Farukh Chisti s/o Shri Sadiq Chisti, age 26 years, Caste-Muslim, Resident of Khadim Mohalla, Ajmer, Police Report No d a t e d enclosed.|Nature |Size of|Hurt |Normal |Which |Identificat|X-Ray |Special | |of |each |on |or |type of|ion mark of|Tajbeez|descripti| |injury
> |which|grievou|weapon |the injured| |on | |of |in |part |s |caused | | | | |slash, |inches,|of | |huwound, |length,|the | | | | | | |crushing|width |body | | | | | |
> |etc. |and | | | | | | | | |depth | | | | | | | |1 |2 |3 |4 | 5 | 6 | 7 | 8 | |Stab wound 4x0.5cm x depth in| Sharp |M.F.1 ½ x | |Fresh | |on umbilical region, right | |½ cm old | | | |lateral to umbilical obliquely| |scar on | | | |placed | |left side | | | |Stab 4x3/4 cm x on left | |of right | | | |lateral side of chest wall 6 | |leg upper | | | |cm below axilla in mid axillur| |third | | | |line. | | | | | |Stab wound 3x1x? on left | | | | | |scapular region | | | | | |Injured in the state of
> shock | | | | | | | | | | |Opinion | | | | | | | | |after | | | | | | | | |surgical | | | | | | | | |note | | |
> Sd/-Dr. V.D. Kavia, MD Reader, Head of Department Department of Medical Jurist J.L.N. Medical College and Hospital,Ajmer"Operative notes of Farukh Chisti reads as

follows:

"Operative notes Patient Name : Farukh Chishti No. 9741 Date : 14/4/92Surgical Pathology Stab wound
1.Abdomen
2. Back 2Lt. Chest Anaesthesia - G.A. Operation - Explanatory haprotomy and repair of the tear in stomach. Incision - Continuation of the stab wound (Rt. Paramedian) - On exploration it was found that there was a tear in the anterior stomach wall up to the serosa. The vessel was bleeding which was ligated and tear sutured and closed in layers. The wounds on the chest (Lt. side and back were muscle deep and sutured in single layer. Dr. Neera Jain Surgeons Dr. Sanjay Kolani Dr. B.L. Laddha Dr. K.K. Dangayeh Dr. Paramjeet Singh Dr. Ashok NarainaForwarded in original to SHO, PS Ganj in continuation to IR No. 839/92 Injury Nos. 2 3 are simple and Injury No. 1 is grievous (dangerous) in nature."

"The injury report of Akil Chisti (A-3) reads as under: "Admitted in MSW II, Time-5.45 p.m. date - 14.4.1992, 839/92 Department of Medical and Health, Rajasthan, Jaipur
Injury Report Form
Injury Report of Shri Akil Chisti s/o Shri Jamil Chisti, age 24 years, Caste- Muslim, Resident of Police Report No dated enclosed.
|Nature |Size of|Hurt |Normal |Which |Identificat|X-Ray |Special | |of |each |on |or |type of|ion mark of|Tajbeez|descripti| |injury |injury |which|grievou|weapon |the injured| |on | |or |in |part |s |caused | | | |slash, |inches,|of | |hurt | | | |wound, |length,|the | | | | | |crushing|width |body | | | | | |etc. |and | | | | | | | |depth | | | | | | | |1 |2 |3 |4 | 5 | 6 | 7 | 8 |
|Stab wound 4x1 cm x | Sharp |M. |3x1 cm |Fresh | |Back of left region Obliquely
|Opinion |Old scar| | | | | | |after |on outer| | | | | | |surgical |side of | | | | | | | |note |back andright | | | | | | | |heal | |
Sd/-
Dr. V.D. Kavia, MD Reader, Head of Department Department of Medical Jurist J.L.N. Medical College and Hospital,
Ajmer"
Operative notes of Akil Chisti reads thus:
"Operative notes Patient Name : Akil Chisti R.No. 9740 Date : 14/4/92
Surgical Pathology -Cut wound back Anaesthesia - L.A.
Operation - Repair of the wound.
Notes : There was a wound on the back side near midline in lumber region which was muscle deep and sutured in layers.
Dr. Neera Jain Surgeons
Dr. Sanjay Kolani Dr. B.L. Laddha Dr. K.K. Dangayeh Dr. Paramjeet Singh
Law Information Center 13 SpotLaw
Dr. Ashok Naraina
Sd/-

(Dr. K.K. Dangayeh)
Forwarded in original to SHO, PS Ganj in continuation to IR No. 840/92 Injury No. 1 is simple in nature."

19.The above 'injury reports' of Farukh Chisti and Akil Chisti as well as their respective 'operative notes' clearly show that both of them sustained injuries on 14.04.1992 in the same incident. The report relating to Farukh shows that he sustained stab wound injuries due to the use of sharp edged weapons. Operative notes relating to him also show that injury Nos. 2 and 3 are simple and injury no. 1 is grievous (dangerous) in nature. Injury report relating to Akil Chisti also shows that he sustained stab wound injuries by use of sharp edged weapon. Though all the relevant aspects, namely, the injuries sustained by two accused appellants are available in the materials placed by the prosecution, there is no explanation at all as to how they sustained those injuries. In other words, the prosecution failed to prove the genesis of the incident and in fact they suppressed the same.

20. In Lakshmi Singh and Others vs. State of Bihar, (1976) 4 SCC 394, this Court held that:

> " It is well settled that fouler the crime, higher the proof, and hence in a murder case where one of the accused is proved to have sustained injuries in the course of the same occurrence, the non- explanation of such injuries by the prosecution is a manifest defect in the prosecution case and shows that the origin and genesis of the occurrence had been deliberately suppressed which leads to the irresistible conclusion that the prosecution has not come out with a true version of the occurrence "

21. It is clear that where the prosecution fails to explain the injuries on the accused, two results follow: (1) that the evidence of the prosecution witness is untrue and (2) that the injuries probabilize the plea taken by the appellants. In a murder case, non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the court can draw the 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."

22. It is further clear that the omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of

interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one. However, there may be cases where the non-explanation of the injuries by the prosecution may not affect the prosecution case. This principle would apply to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, that it outweighs the effect of the omission on the part of the prosecution to explain the injuries.

23. In Waman and Others vs. State of Maharashtra, (2011) 7 SCC 295 wherein one of us (P. Sathasivam, J.) reiterated the very same principles and held that:

> "36. Ordinarily, the prosecution is not obliged to explain each injury on an accused even though the injuries might have been caused in the course of occurrence, if the injuries are minor in nature, however, if the prosecution fails to explain a grievous injury on one of the accused persons which is established to have been caused in the course of the same occurrence then certainly the court looks at the prosecution case with a little suspicion on the ground that the prosecution has suppressed the true version of the incident. However, if the evidence is clear, cogent and creditworthy then non¬explanation of certain injuries sustained by the deceased or injury on the accused ipso facto cannot be the basis to discard the entire prosecution case."

24. Mr. Tulsi, learned senior counsel for the appellants in Criminal Appeal No. 635 of 2012 contended by pointing out that since the complainant's were the aggressors, armed with sword, hockey sticks and pelted stones, the appellants/accused are entitled to avail the right of private defence for which he relied on various principles enunciated by this Court.

25. In Raghubir Singh vs. State of Rajasthan and Ors. (2011) 12 SCC 235, the following conclusion in para 16 has been pressed into service:

> "16. In the light of the facts that have been enumerated above, it would be seen that the observations of the High Court that both sides had come to do battle appears to be justified as this is an assessment on an appreciation of the evidence which cannot be said to be palpably wrong so as to invite the intervention of this Court. The observation in Gajanand case that in order to bring the matter within a free fight both sides have to come armed and prepared to do battle must be applied in the present case with the result that each accused would be liable for his individual act."

26. In Krishnan vs. State of Tamil Nadu, (2006) 11 SCC 304, the following principles have been relied on:

> "15. It is now well settled that the onus is on the accused to establish that his action was in exercise of the right of private defence. The plea can be established either by letting in defence evidence or from the prosecution evidence itself, but cannot be based on speculation or mere surmises. The accused need not take the plea explicitly. He can succeed in his plea if he is able to bring out from the evidence of the

prosecution witnesses or other evidence that the apparent criminal act was committed by him in exercise of his right of private defence. He should make out circumstances that would have reasonably caused an apprehension in his mind that he would suffer death or grievous hurt if he does not exercise his right of private defence. There is a clear distinction between the nature of burden that is cast on an accused under Section 105 of the Evidence Act (read with Sections 96 to 106 of the Penal Code) to establish a plea of private defence and the burden that is cast on the prosecution under Section 101 of the Evidence Act to prove its case. The burden on the accused is not as onerous as that which lies on the prosecution. While the prosecution is required to prove its case beyond a reasonable doubt, the accused can discharge his onus by establishing a preponderance of probability (vide Partap v. State of U.P, Salim Zia v. State of U.P. and Mohinder Pal Jolly v. State of Punjab."

27. In Sekar v. State this Court observed: (SCC p. 355) "A plea of right of private defence cannot be based on surmises and speculation. While considering whether the right of private defence is available to an accused, it is not relevant whether he may have a chance to inflict severe and mortal injury on the aggressor. In order to find whether right of private defence is available or not, the injuries received by the accused, the imminence of threat to his safety, the injuries caused by the accused and the circumstances whether the accused had time to have recourse to public authorities are all relevant factors to be considered. Whether in a particular set of circumstances, a person acted in the exercise of the right of private defence, is a question of fact to be determined on the facts and circumstances of each case. No test in the abstract for determining such a question can be laid down. In determining this question of fact, the court must consider all the surrounding circumstances. It is not necessary for the accused to plead in so many words that he acted in self-defence. If the circumstances show that the right of private defence was legitimately exercised, it is open to the court to consider such a plea. In a given case, the court can consider it even if the accused has not taken it, if the same is available to be considered from the material on record." (emphasis supplied)

28. The above legal position was reiterated in Rizan v. State of Chhattisgarh. After an exhaustive reference to several decisions of this Court, this Court summarised the nature of plea of private defence required to be put forth and the degree of proof in support of it, thus: (SCC pp. 670-71, para 13)

> "Under Section 105 of the Evidence Act, 1872, the burden of proof is on the accused, who sets up the plea of self-defence, and, in the absence of proof, it is not possible for the court to presume the truth of the plea of self-defence. The court shall presume the absence of such circumstances. It is for the accused to place necessary material on record either by himself adducing positive evidence or by eliciting necessary facts from the witnesses examined for the prosecution. An accused taking the plea of the right of private defence is not required to call evidence; he can establish his plea by reference to circumstances transpiring from the prosecution evidence itself. The question in such a case would be a question of assessing the true effect of the prosecution evidence, and not a question of the accused discharging any burden.

> When the right of private defence is pleaded, the defence must be a reasonable and probable version satisfying the court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused. The burden of establishing the plea of self-defence is on the accused and the burden stands discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record. ... The accused need not prove the existence of the right of private defence beyond reasonable doubt. It is enough for him to show as in a civil case that the preponderance of probabilities is in favour of his plea." (emphasis supplied)"

29. In Babulal Bhagwan Khandare and Another vs. State of Maharashtra, (2005) 10 SCC 404, this Court held that non-explanation of the injuries sustained by the accused at about the time of occurrence or in the course of altercation is a very important circumstance. It was further held that the right of self defence is a very valuable right, serving a social purpose and should not be construed narrowly.

30. It is clear that it is the duty of the prosecution to explain the injuries sustained by the accused and establish the genesis of the incident by placing acceptable materials. In the case on hand, we have already pointed out there is enough material to show that in the course of the very same incident F arukh (A-4) and Akil (A-3) also sustained injuries. In fact, Farukh sustained grievous injury by use of sharp edged weapon. However, these injuries were not explained at all by the prosecution.

31. Mr. Jasbir Singh Malik, learned counsel for the State by relying on a decision of this Court reported in Mitthulal and Another vs. The State of Madhya Pradesh, (1975) 3 SCC 529 submitted that evidence in cross case cannot be relied upon. It is true that in the said decision, this Court held that it has not accepted the procedure followed by the High Court which has based its conclusion not only on the finding recorded in the case against the appellants therein and the four other accused but also taken into account the evidence recorded in the cross case against Ganpat, Rajdhar and others. This Court held that the course adopted by the High Court was clearly impermissible. There is no dispute about the said proposition and in fact in the case on hand, neither the trial court nor the High Court relied on the evidence led in the cross case but the same were tried separately and in fact appeals are still pending before the High Court against the conviction in the cross case.

32. The other decision relied on by the State counsel is reported in Sambhu Das alias Bijoy Das and Another vs. State of Assam, (2010) 10 SCC 374 which shows Law Information Center 18 SpotLaw that this Court in exercise of its powers under Article 136 of the Constitution will not reopen the findings of the High Court when there are concurrent findings of facts and there is no question of law involved and the conclusion is not perverse. The above proposition holds good. We also reiterate that Article 136 of the Constitution does not confer a right of appeal on a party. It only confers discretionary power on this Court to be exercised sparingly to interfere in suitable cases where grave mis-carriage of justice has resulted from illegality or misapprehension or mistake in reading evidence or from ignoring,

excluding or illegally admitting material evidence.
Summary:

33. The analysis of the prosecution case, undoubtedly, has led two sets of evidence. The evidence adduced suggest that the accused in the present appeals are to some extent victims of armed aggression at the hands of the deceased and his companions. We have pointed out that Tariq Mohammad (PW- 1) deposed that he saw Idris (deceased) with a knife in his hand, Mohd. Aslam (PW-3), Sagir (PW-6), Shamim (PW-18) and others armed with sticks left for the house of the Farukh (A- 4). It was also deposed by him that he tried to stop Idris and others but in vain. Bhanwar Singh (PW-4) and Bhanwar Lal Sharma (PW-5) -the police constables, examined on the side of the prosecution, were present at the scene of offence. We have already dealt with the evidence of these two witnesses which clearly show that the complainant's party, i.e., accused in FIR No. 91 of 1992 were armed with sword, hockey sticks etc. and entered into Chisti Manzil, hurled abuses, threw stones on the inmates and exhorted to kill Khalil Chisti (A-2) and Farukh (A-4). These persons also deposed that Idris (deceased) and the accused in FIR No. 91 of 1992 were the aggressors in the incident. PWs 4 5 were categorized as independent witnesses by the trial Court. Even in their evidence, they did not attribute any specific overt act to Khalil (A- 2). M.A. Tariq I.O. (PW-25) also deposed that the complainant's party forcibly entered the house of the appellants herein with the intent to attack them.

34. Mohd. Aslam (PW-3), Sagir Ahmed (PW-6), Sayeed Javed (PW-13) and Shamim (PW-18) were examined as eye witnesses to the occurrence. Admittedly, none of them offered any explanation to the admitted injuries received by Farukh (A-4) and Akil (A-3). We have already adverted to the details as to the injury report relating to these persons. In the absence of any explanation by the prosecution, we are of the view that they are guilty of suppressing the real genesis of the occurrence. The trial Court had also condemned the evidence of PW-18 for narrating a parrot like version and also pointed out numerous improvements made.

35. The analysis of the materials clearly show that two versions of the incident adduced by the prosecution are discrepant with each other. In such a situation where the prosecution leads two sets of evidence each one which contradicts and strikes at the other and shows it to be unreliable, the result would necessarily be that the Court would be left with no reliable and trustworthy evidence upon which the conviction of the accused might be based. Though the accused would have the benefit of such situation and the counsel appearing for the appellants prayed for acquittal of the appellants of all the charges, in view of the principles which we have already discussed, we are of the view that each accused can be fastened with individual liability taking into consideration the specific role or part attributed to each of the accused. In other words, both sides can be convicted for their individual acts and normally no right of private defence is available to either party and they will be guilty of their respective acts.

36. Having regard to the facts and circumstances of the role attributed to Khalil (A- 2), we are of the view that there is no scope for invoking the applicability of Section 34 IPC against

him. Even independent witnesses, viz., PWs 4 and 5 do not attribute any overt act to him.

37. As rightly pointed out by the learned counsel for the appellants, in the light of the case and cross-case, it would be in the fitness of things that the respective appeals preferred by the appellants against Session Case No. 157 of 2011 and the one preferred by the convicts in Sessions Case No. 178 of 2011 ought to have been heard and disposed of simultaneously by the High Court. Unfortunately, such recourse has not been adopted by the High Court and we were informed that the other appeal (Crl. Appeal No. 131 of 2011) relating to Sessions Case No. 178 of 2011 is still pending on the file of the High Court.

38. Coming to the other accused, namely, Yasir Chisti (A-1) and Akil Chisti (A-3), they cannot be punished and fastened the liability of individual acts committed by them with the aid of Section 34 IPC without acceptable materials. Though the prosecution witnesses mentioned that these appellants had a pistol, they did not state whether anyone was hit by that pistol fire and no specific evidence was led in that the shot emanated from the pistol in their hand. Even Mohd. Aslam (PW-3) - the informant, stated before the Court that these appellants fired from their pistols but no one was hit from that fire.

39. As discussed earlier, the evidence of PWs 4 5 - police constables, clearly shows that the complainant's party was armed with sword and hockey sticks and were abusing and pelting stones. Sagir (PW-6), though deposed that the present appellants had a revolver and they fired from that pistol, without telling whether anybody was injured from such firing. PW-4 - one of the prosecution witnesses, police constable, had denied that these appellants had revolvers, in fact, PWs 4 and 5 did not attribute any overt done by the appellants, i.e., A-1 and A-3 and categorically stated that the complainant's party was the armed aggressors. It is relevant to point out that on the same day in Sessions Case No. 178 of 2001, the informant along with five other co-accused was convicted under Sections 307, 324, 326, 452 and 148 IPC read with Section 149 IPC. We are also satisfied that though the prosecution witnesses have stated that these appellants were having revolvers, the evidence of PWs 4 5 clearly shows that the complainant's party were aggressors and the present appellants were not carrying any revolver.

40. In the light of the facts that have been enumerated above, particularly, from the evidence of PWs 4 5 - police constables attached to the Tripolia Police Chowki, P.S. Ganj, and the materials abundantly show that the deceased and the complainant's party were also armed with sword and hockey sticks. In the absence of evidence of fire shot from the revolvers of A-1 and A-3 and in view of the statement of PWs 3, 6, 13 18 alleging against the present appellants, in order to bring the matter within a free fight both sides have to come armed and prepared to do battle must be applied in the present case with the result that each accused would be liable for his individual act alone.

Conclusion:

41. In the light of the above discussion, even if we accept the evidence of prosecution witnesses that A-2 was having a sword and PW-3 sustained injuries at his instance,

considering his individual act, he can only be convicted under Section 324 of IPC and taking note of his age and of the fact that he was in custody from14.04.1992 till09.05.1992 during the trial and again from 31.01.2011 to 12.04.2012 (roughly one year and four months), we feel that the ends of justice would be met by altering the sentence to the period already undergone. The conviction and sentence is modified to the extent mentioned above and Criminal Appeal No. 634 of 2012 is disposed of accordingly.

42. By order dated 10.05.2012, this Court directed Dr. Mohammad Khalil Chisti - being a national of Pakistan-appellant in Crl.A. No. 634 of 2012 or his nominee to deposit a sum of Rs. 5 lakhs as security with the Registry of this Court within a period of two weeks from that date and on fulfilling the above condition, the appellant was permitted to leave India and visit his home country, i.e., Pakistan. It is informed to us that the said condition has been complied with and an amount of Rs. 5 lakhs was deposited. By another order dated 17.09.2012, this Court directed the Registry to invest the amount deposited by the appellant in an interest bearing account in any Nationalised Bank initially for a period of one year. In view of our conclusion that no further custody is required, the Registry is directed to return the said amount to Dr. Mohammed Khalil Chisti or his nominee forthwith. It is further directed that if the passport or any other document of the appellant is in the custody of the trial Court or any other authority of the Government of India, they are directed to return the same to him and he is free to return to his country without any restriction. Taking note of his age and academic qualification etc., to facilitate such course, the concerned department of the Government of India is directed to issue necessary visa and complete all the formalities for his smooth return to his country.

43. In the light of the evidence and conclusion in respect of Yasir Chisti (A-1) and Akil Chisti (A-3), the appellants in Criminal Appeal No. 635 of 2012, taking note of their individual acts, they can only be convicted under Section 324 of IPC and also in view of the fact that A-1 and A-3 have served approximately 11 and 10 months respectively, the same would be sufficient and no further imprisonment is required, hence, both of them are directed to be released forthwith, if they are not required in any other case.

44. With the above modification, both the appeals are disposed of accordingly.