ABC 2016 (II) 195 SC

ACQUITTAL & BAIL CASES

SUPREME COURT OF INDIA

(V. Gopala Gowda & Adarsh Kumar Goel, JJ.)

Criminal Appeal No. 1516 of 2011

(From Bombay High Court)

Decided On 4 October, 2016

BHAGWAN JAGANNATH MARKAD & ORS. ***- Appellant(s).***

Versus

STATE OF MAHARASHTRA ***- Respondent(s).***

Law Covered:- ***(A) Indian Penal Code, 1860 — Sections 147, 149, 302 r/w 149, 324 & 326 — Reversal of acquittal by High Court — Broad day light— One of the accused himself mentioned about the enmity — said accused himself is injured — shows his & the presence of deceased — Except for some contradictions, the version of eye witnesses consistence — no reason to reject their said version— the discrepancies of trivial nature — could not be the basis of rejecting the evidence of injured eye witnesses — all the five eye witnesses have named A1 to A7 — Specific role attributed— their conviction u/s 302/149 upheld — Other accused not named by two eye witneses — Benefit of doubt given— Appeal partly allowed. (Para 22, 32 & 33)***

(B) Criminal Jurisprudence — Accepted Principle — Burden of proof — is always on the prosecution — & the accused is presumed to be innocent unless proved guilty— The prosecution has to prove its case beyond reasonable doubt — & the accused is entitled to the benefit of the reasonable doubt. (Para 18)

(C) Criminal Jurisprudence — Reasonable doubt — Interpretation of — The reasonable doubt is one which occurs to a prudent and reasonable man. (Para 18)

(D) Interpretation of Statute — Indian Evidence Act, 1872 — Section 3 — Relevant fact — Reasonable doubt —Interpretation of — two conditions - (i) when a person feels absolutely certain of a fact - "believe it to exist" & — (ii) when he is not absolutely certain and thinks it so extremely probable that a prudent man would, under the circumstances, act on the assumption of its existence. (Para 18)

(E) Criminal Jurisprudence — Reasonable doubt — Construction of — The doubt which the law contemplates is not of a confused mind but of prudent man who is assumed to possess the

capacity to — "separate the chaff from the grain" — The degree of proof need not reach certainty but must carry a high degree of probability. (Para 18)

(F) Criminal trial — Criminal Jurisprudence — Appreciation of Evidence — Duty of the Court — Held, the court has to assess — whether read as a whole, the evidence is truthful — The court has to keep in mind — the deficiencies — drawbacks — & infirmities — to find out whether such discrepancies shake the truthfulness. (Para 19)

(G) Criminal trial — Criminal Jurisprudence — Evidence of witness — Discrepancies in — Appreciation of — Held, some discrepancies not touching the core of the case are not enough to reject the evidence as a whole — No true witness can escape from giving some discrepant details — Only when discrepancies are so incompatible as to affect the credibility of the version of a witness, the court may reject the evidence. (Para 19)

(H) Indian Evidence Act, 1872 — Section 155 — impeaching credit of witness — Scope — the section enables the doubt to impeach the credibility of the witness by proof of former inconsistent statement. (Para 19)

(I) Indian Evidence Act, 1872 — Section 145— Cross-examination as to previous statement — Scope — the section lays down the procedure for contradicting a witness by drawing his attention to the part of the previous statement which is to be used for contradiction. (Para 19)

(J) Indian Evidence Act, 1872 — Section 145— Cross-examination as to previous statement — Contradiction — in the evidence — Former statement should have the effect of discrediting the present statement. (Para 19)

(K) Criminal Jurisprudence — Indian Evidence Act, 1872 — Section 145— Cross-examination as to previous statement — Contradiction — Held, merely because the latter statement is at variance to the former to some extent — is not enough to be treated as a contradiction. (Para 19)

(L) Criminal Trial — Criminal Jurisprudence — Evidence of witness — Exaggeration or Embellishment in — Credibility of — Held, it is not every discrepancy which affects creditworthiness and trustworthiness of a witness — There may at times be exaggeration or embellishment not affecting credibility. (Para 19)

(M) Criminal Trial — Criminal Jurisprudence — Evidence of witness — Appreciation of — Duty of Court — The court has to sift the chaff from the grain and find out the truth — A statement may be partly rejected or partly accepted. (Para 19)

(N) Criminal Trial — Criminal Jurisprudence — Indian Evidence Act, 1872 — Section 3 — Relevant fact — Appreciation of evidence — Independent witness or unusual behavior of witness — Want of independent witnesses or unusual behavior of witnesses of a crime is not enough to reject evidence. (Para 19)

(O) Criminal Trial — Criminal Jurisprudence — Indian Evidence Act, 1872 — Section 3 — Relevant fact — Evidence of close relative — Evidentiary value — Held, a witness being a close relative is not enough to reject his testimony if it is otherwise credible— A relation may not conceal the actual culprit. (Para 19)

(P) Indian Evidence Act, 1872 — Section 3 — Relevant fact — 'Partisan' or 'Interested' witness — Evidence of — Evidentiary value — Duty of the Court — Held, the evidence may be closely scrutinized to assess whether an innocent person is falsely implicated — Mechanical rejection of evidence even of a 'partisan' or 'interested' witness may lead to failure of justice — "falsus in uno, falsus in omnibus" has no general acceptability. (Para 19)

(Q) Criminal Trial — Criminal Jurisprudence — Appreciation of evidence — Held, on the same evidence, some accused persons may be acquitted while others may be convicted — depending upon the nature of the offence —The court can differentiate the accused who is acquitted from those who are convicted. (Para 19)

(R) Criminal Trial — Criminal Jurisprudence — Indian Evidence Act, 1872 — Section 3 — Relevant fact — Evidence of witness — Discrepancies in — relying on — Held, a witness may be untruthful in some aspects but the other part of the evidence may be worthy of acceptance. (Para 19)

(S) Criminal Trial — Criminal Jurisprudence — Indian Evidence Act, 1872 — Section 3 — Relevant fact — Evidence of witness — Discrepancies in — Credibility of — Held, discrepancies may arise due to error of observations — loss of memory due to lapse of time — mental disposition such as shock at the time of occurrence — & as such the normal discrepancy does not affect the credibility of a witness. (Para 19)

(T) Criminal Trial — Criminal Jurisprudence — Benefit of Doubt — Rule of — Exaggeration of — Held, can result in

miscarriage of justice— Letting the guilty escape is not doing justice. (Para 20)

(U) Criminal Trial — Criminal Jurisprudence — Duty of the Court — A Judge presides over the trial not only to ensure that no innocent is punished but also to see that guilty does not escape. (Para 20)

(V) Indian Penal Code, 1860 — Sections 34 & 141 — Common object & unlawful assembly — Ambit & Scope — An offence committed in prosecution of common object of an unlawful assembly by one person renders members of unlawful assembly sharing the common object vicariously liable for the offence. (Para 21)

(W) Indian Penal Code, 1860 — Section 34 — Common object — Ascertaining of — Held, has to be ascertained from the acts and language of the members of the assembly — & all the surrounding circumstances. (Para 21)

(X) Indian Penal Code, 1860 — Section 34 — Common object — Ascertaining of — It can be gathered from the course of conduct of the members — It is to be assessed keeping in view the nature of the assembly — arms carried by the members — & the behavior of the members at or near the scene of incident. (Para 21)

(Y) Indian Penal Code, 1860 — Section 34 — Common object — Sharing of — Held, sharing of common object is a mental attitude — which is to be gathered from the act of a person and result thereof. (Para 21)

(Z) Indian Penal Code, 1860 — Section 34 — Common object — Inference of — Held, no hard and fast rule can be laid down as to when common object can be inferred — When a crowd of assailants are members of an unlawful assembly, it may not be possible for witnesses to accurately describe the part played by each one of the assailants — It may not be necessary that all members take part in the actual assault. (Para 21)

(AA) Indian Penal Code, 1860 — Sections 34 & 141 — Common object & unlawful assembly — Appreciation of evidence — Duty of the Court — Held, criminal courts have to do their best in dealing with such cases — & it is their duty to sift the evidence carefully and decide which part of it is true and which is not. (Para 21)

(BB) Indian Evidence Act, 1872 — Section 3 — Relevant fact — Unexplained injury — on the person of accused — Held, mere non -explanation is not enough to reject the prosecution version. (Para 23)

(CC) Indian Evidence Act, 1872 — Section 3 — Relevant fact — injury — on the person of the accused — non-explanation of — is

an important circumstance which requires the court to satisfy itself that true version is not suppressed and whether defence version is probable. (Para 23)

(DD) Code of Criminal Procedure, 1973 — Section 378 — Appeal against acquittal — Interference by appellate Court — Duty of appellate Court — Held, The appellate court should deal with reasons for acquittal & interfere only if acquittal is perverse. (Para 28)

(EE) Code of Criminal Procedure, 1973 — Section 378 — Appeal against acquittal — Reversal of acquittal — Held, the reversal is permissible only if the view of the trial court is not only erroneous but also unreasonable and perverse. (Para 28)

(FF) Code of Criminal Procedure, 1973 — Section 378 — Appeal against acquittal — Review of evidence — Power of the appellate Court — Held, the appellate court has full power to review the evidence and to reach at its own conclusion. (Para 28)

(GG) Code of Criminal Procedure, 1973 — Section 378 — Appeal against acquittal — Interference by appellate Court — Duty of appellate Court — Held, the appellate court has to consider the fact that the trial court has the benefit of seeing the witnesses in the witness box & the presumption of innocence is not weakened by the acquittal. (Para 28)

(HH) Criminal Trial — Non-examination of witness — Held non-examination of some of the witnesses cannot be a ground to reject the prosecution case — when injured eye witnesses were examined. (Para 30)

(II) Criminal Jurisprudence — Indian Penal Code, 1860 — Section 141 — Unlawful assembly — Fixing of culpability — Duty of the Court — Held, when a crowd of unlawful assembly commits an offence— it is often not possible to accurately describe the part played by each of the assailants— the court has to perform its duty of sifting the evidence carefully. (Para 30)

(JJ) Criminal Trial — Remission of remaining sentence — on the ground of old age — Accused were continued to remain on bail for one month for making an application for remission — also continued to remain on bail thereafter till the decision of the said application— Held, if the remission not given, they will surrender to serve out the remaining sentence. (Para 33)

Facts:- *It was alleged that Accused No.3 put the house of the complainant party on fire on account of which everyone came out. Thereafter*

all the accused assaulted the inmates with the help of weapons like swords, knife, iron rods, barchi, axe and sticks. On account of that one person died and other got injured. The occurrence was a result of the enmity on account of party faction in Panchayat and Co- operative Society elections. It was stated that a bullock cart was arranged to carry injured and the deceased upto the main road and thereafter they were carried in a jeep. On the way, the FIR was lodged and thereafter the injured and the deceased were taken to the PHC and then to the civil hospital. PW11 remained in the hospital for three to four months and thereafter in private hospital for two to three months.

The trial Court rejected the prosecution version and acquitted the accused persons. The High Court observed that acquittal by the trial court was based on omissions and contradictions which were not material and did not affect the veracity of the prosecution case. Holding that the trial Court adopted a "totally perverse approach" the acquittal was reversed. Aggrieved appellants are before the Honourable Apex Court in the present appeal.

The appeal was partly allowed and two of the accused were given benefit of doubt. Rest of the appellants were held guilty u/s 302/149.

Law of relief:- ***The degree of proof for reasonable doubt need not reach certainty but must carry a high degree of probability.***

Held:- It is accepted principle of criminal jurisprudence that the burden of proof is always on the prosecution and the accused is presumed to be innocent unless proved guilty. The prosecution has to prove its case beyond reasonable doubt and the accused is entitled to the benefit of the reasonable doubt. The reasonable doubt is one which occurs to a prudent and reasonable man. Section 3 of the Evidence Act refers to two conditions – (i) when a person feels absolutely certain of a fact – "believe it to exist" and (ii) when he is not absolutely certain and thinks it so extremely probable that a prudent man would, under the circumstances, act on the assumption of its existence. The doubt which the law contemplates is not of a confused mind but of prudent man who is assumed to possess the capacity to "separate the chaff from the grain". The degree of proof need not reach certainty but must carry a high degree of probability. (Para 18)

While appreciating the evidence of a witness, the court has to assess whether read as a whole, it is truthful. In doing so, the court has to keep in mind the deficiencies, drawbacks and infirmities to find out whether such discrepancies shake the truthfulness. Some discrepancies not touching the core of the case are not enough to

reject the evidence as a whole. No true witness can escape from giving some discrepant details. Only when discrepancies are so incompatible as to affect the credibility of the version of a witness, the court may reject the evidence. Section 155 of the Evidence Act enables the doubt to impeach the credibility of the witness by proof of former inconsistent statement. Section 145 of the Evidence Act lays down the procedure for contradicting a witness by drawing his attention to the part of the previous statement which is to be used for contradiction. The former statement should have the effect of discrediting the present statement but merely because the latter statement is at variance to the former to some extent, it is not enough to be treated as a contradiction. It is not every discrepancy which affects creditworthiness and trustworthiness of a witness. There may at times be exaggeration or embellishment not affecting credibility. The court has to sift the chaff from the grain and find out the truth. A statement may be partly rejected or partly accepted. Want of independent witnesses or unusual behavior of witnesses of a crime is not enough to reject evidence. A witness being a close relative is not enough to reject his testimony if it is otherwise credible. A relation may not conceal the actual culprit. The evidence may be closely scrutinized to assess whether an innocent person is falsely implicated. Mechanical rejection of evidence even of a 'partisan' or 'interested' witness may lead to failure of justice. It is well known that principle "falsus in uno, falsus in omnibus" has no general acceptability. On the same evidence, some accused persons may be acquitted while others may be convicted, depending upon the nature of the offence. The court can differentiate the accused who is acquitted from those who are convicted. A witness may be untruthful in some aspects but the other part of the evidence may be worthy of acceptance. Discrepancies may arise due to error of observations, loss of memory due to lapse of time, mental disposition such as shock at the time of occurrence and as such the normal discrepancy does not affect the credibility of a witness. (Para 19)

Exaggerated to the rule of benefit of doubt can result in miscarriage of justice. Letting the guilty escape is not doing justice. A Judge presides over the trial not only to ensure that no innocent is punished but also to see that guilty does not escape. (Para 20)

An offence committed in prosecution of common object of an unlawful assembly by one person renders members of unlawful assembly sharing the common object vicariously liable for the offence.

The common object has to be ascertained from the acts and language of the members of the assembly and all the surrounding circumstances. It can be gathered from the course of conduct of the members. It is to be assessed keeping in view the nature of the assembly, arms carried by the members and the behavior of the members at or near the scene of incident. Sharing of common object is a mental attitude which is to be gathered from the act of a person and result thereof. No hard and fast rule can be laid down as to when common object can be inferred. When a crowd of assailants are members of an unlawful assembly, it may not be possible for witnesses to accurately describe the part played by each one of the assailants. It may not be necessary that all members take part in the actual assault. (Para 21)

The occurrence has taken place in broad day light. One of the accused himself mentioned about the enmity on account of the panchayat election. The said accused himself is injured which proves his presence at the scene of the occurrence. This version further shows the presence of deceased and the injured. But his version fails to explain as to why the deceased would have been killed by PW11 when the deceased was the messenger of PW11 himself. Except for some contradictions, the version of eye witnesses PWs 10, 11, 15, 12 and 18 is consistent. There is no reason to reject the said version. Of course, the court has to be cautious in appreciating evidence and rule out exaggeration. (Para 22)

We may also note that version of A5 is not probable and mere fact that injury on him is not explained is not enough to reject the prosecution version. In such a case, the Court is to examine whether evidence is trustworthy. This aspect has been repeatedly examined by this Court and settled law is that non explanation of injuries on accused is an important circumstance which requires the court to satisfy itself that true version is not suppressed and whether defence version is probable. This by itself is not enough to reject the prosecution case. (Para 23)

The appellate court should deal with reasons for acquittal and interfere only if acquittal is perverse. There is no doubt about the proposition that the appellate court has to arrive at an independent conclusion about the credibility of the evidence and to re-appreciate the evidence to arrive at a just conclusion. If the appellate court is to reverse the judgment of the trial court, the

reasoning of the trial court has to be adverted to and reversal of acquittal is permissible only if the view of the trial court is not only erroneous but also unreasonable and perverse. At the same time, the appellate court has full power to review the evidence and to reach at its own conclusion. The appellate court can set aside the acquittal if the acquittal is not justified. Of course, the appellate court has to consider the fact that the trial court has the benefit of seeing the witnesses in the witness box and the presumption of innocence is not weakened by the acquittal. If two reasonable conclusions can be reached, the appellate court should not disturb the finding of the trial court. In the present case, the High Court has followed the above principles. (Para 28)

As already observed, the discrepancies of trivial nature could not be the basis of rejecting the evidence of injured eye witnesses nor non- examination of some of the witnesses be a ground to reject the prosecution case when injured eye witnesses were examined. (Para 30)

Cases Referred:-

1. *Padam Singh versus State of U.P.; (2000) 1 SCC 621. (Para 14)*
2. *Devatha Venkataswamy versus Public Prosecutor, High Court of A.P.; (2003). (Para 14) 10 SCC 700. (Para 14)*
3. *Narendra Singh versus State of M.P.; (2004) 10 SCC 699. (Para 14)*
4. *Prasanna Das versus State of Orissa; (2004) 13 SCC 30. (Para 14)*
5. *Majjal versus State of Haryana; (2013) 6 SCC 798. (Para 14)*
6. *Lalita Kumari versus Govt. of U.P.; (2014) 2 SCC 1. (Para 14)*
7. *Baby alias Sebastian versus Central Inspector of Police; (2016) 7 Scale 444. (Para 14)*
8. *Damodar versus State of Rajasthan; (2004) 12 SCC 336. (Para 14)*
9. *Mano Dutt & Anr. Versus State of Uttar Pradesh; (2012) 4 SCC 79. (Para 15)*
10. *Sanjeev versus State of Haryana; (2015) 4 SCC 387. (Para 15)*
11. *A. Shankar versus State of Karnataka; (2011) 6 SSC 279. (Para 15)*
12. *State of Karnataka versus Suvarnamma & Anr.; (2015) 1 SCC 323. (Para 15)*
13. *Bava Hajee Hamsa versus State of Kerala; (1974) 4 SCC 479. (Para 15)*
14. *Patai Alias Krishna Kumar versus State U.P.; (2010) 4 SCC 429. (Para 15)*
15. *Ravishwar Manjhi versus State of Jharkhand; (2008) 16 SCC 561. (Para 15)*
16. *T.T. Antony versus State of Kerala; (2001) 6 SCC 181. (Para 15)*
17. *Vijayee Singh vs. State of U.P.- (1990) 3 SCC 190. (Para 18)*
18. *Leela Ram vs. State of Haryana (1999) 9 SCC 525. (Para 19)*
19. *Gangadhar Behera vs. State of Orissa (2002) 8 SCC 381. (Para 19)*
20. *Takhaji Hiraji vs. Thakore Kubersing Chamansing; (2001) 6 SCC 145. (Para 23)*
21. *Mano Dutt vs. State of U.P.; (2012) 4 SCC 79] (Para 23)*

22. Anand Mohan versus State of Bihar; (2012) 7 SCC 225. (Para 23)
23. Masalti versus State of U.P.; (1964) 8 SCR 133. (Para 31)

a

JUDGMENT

ADARSH KUMAR GOEL, J.: - 1. The appellants are aggrieved by the judgment and order dated 20th April, 2007 passed by the High Court of Judicature at Bombay in Criminal Appeal No.533 of 1990 whereby they have been convicted under Sections 147, 149, 302 read with Sections 149, 324 and 326 of the Indian Penal Code and sentenced to undergo imprisonment for life, apart from other lesser sentences which are to run concurrently and payment of fine, setting aside their acquittal by the trial court.

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2. Originally there were 16 accused namely:-

1) Bhagwan Jagannath Markad,
2) Janardhan Rambhau Tate,
3) Dada Sayyednoor Mulani,
4) Sayyed Sayyadnoor Mulani,
5) Sandipan Sakhara Koyale,
6) Nivrutti Sakharam Koyale,
7) Krishna Sakharam Koyale,
8) Shailendra Sandipan Koyale,
9) Chandrakant Shankar Markad,
10) Babu Rama Berad,
11) Balu Naradeo Berad,
12) Manik Rama Berad,
13) Pandurang Babu Arade,
14) Sadashiv Shahu Arade,
15) Kisan Rama Berad, and
16) Appa Shabu Arade.

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3. The trial court acquitted all the accused. The High Court upheld acquittal of accused Nos. 8, 9, 12, 13, 14, 15 and 16.

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4. Accused No.2 is reported to have died. Thus, eight appellants are before this Court. They are A1 Bhagwan Jagannath Markad; A3 Dada Sayyednoor Mulani; A4 Sayyed Sayyadnoor Mulani; A5 Sandipan Sakhara Koyale; A6 Nivrutti Sakharam Koyale; A7 Krishna Sakharam Koyale; A10 Babu Rama Berad and A11 Balu Naradeo Berad respectively.

h

5. According to the prosecution, one Bibhishan Vithoba Khadle has been murdered and six persons have been injured being

Indubai, PW11 Dagadu Gopinath Koyale, PW18 Chaturbhuj Khade, PW15 Bibhishan Kshirsagar, Gopinath Mahadev Koyale and PW12 Kernath Koyale in the attack by the accused.

6. As per the prosecution version recorded in the FIR lodged by PW10 Satyabhama, her husband PW11 Dagadu Gopinath Koyale, father-in-law Gopinath Koyale, deceased Bibhishan Vithoba Khadle, PW18 Chaturbhuj Khade, PW15 Bibhishan Kshirsagar along with others were present in their house on the date of the occurrence on 13th November, 1988 at 12.00 noon when all the accused came there to attack her husband. Accused No.3 Dada Sayyednoor Mulani put the house on fire on account of which everyone came out. Accused Nos.1 and 2 Bhagwan Jagannath Markad and Janardhan Rambhau Tate attacked Dagadu with swords on hands, legs and knees. Accused No.3 Dada Sayyednoor had barchi. Accused No.4 Sayyed Sayyadnoor Mulani had knife. Accused No.5 Sandipan Sakharam Koyale had iron rods. Accused No.6 Nivrutti Sakharam Koyale had barchi. Accused No.7 Krishna Sakharam Koyale had axe. Accused No.10 and 11 Babu Rama Berad and Balu Naradeo Berad had axe. Accused No.8 Shailendra Sandipan Koyale had sticks. PW11 Dagadu fell down on account of beating and became unconscious. Accused No.3 Dada Sayyednoor, accused No.4 Sayyed Sayyadnoor Mulani, accused No.5 Sandipan Sakharam Koyale, accused No.6 Nivrutti Sakharam Koyale, accused No.7 Krishna Sakharam Koyale caused beating to the deceased Bibhishan Vithoba Khade. Accused Nos.1 and 2 Bhagwan Jagannath Markad and Janardhan Rambhau Tate also attacked deceased Bibhishan Vithoba Khadle. The accused then beat PW11 Dagadu Gopinath Koyale and PW18 Chaturbhuj Khade with sticks and swords. The occurrence was a result of the enmity on account of party faction in Panchayat and Co- operative Society elections.

7. In the statement before the court, apart from repeating above version, PW10 Satyabhama further stated that a bullock cart was arranged to carry injured Dagadu and the deceased Bibhishan Vithoba Khade upto the main road and thereafter they were carried in a jeep. On the way, the FIR was lodged at 5.30 p.m. and thereafter the injured and the deceased were taken to the PHC and then to the civil hospital. PW11 Dagadu remained in the hospital for three to four months and thereafter in private hospital for two to three months.

8. After registering the FIR, investigation was carried out and charge- sheet was submitted before the Court. The accused

denied the charge. Accused No.5 Sandipan Sakharam, however, stated that he was called by Dagadu through deceased Bibhishan Vithoba Khade to his place where PW18 Chaturbhuj Khade and PW12 Kernath Koyale were also present. PW11 Dagadu told him that he should not contest the election. The said accused, however, replied that PW11 Dagadu had been Sarpanch for 10-12 years and thus, accused should be allowed to become Sarpanch. This led to inter se assault between PW11 Dagadu and deceased Bibhishan Vithoba Khade and the said accused was also assaulted by PW11 Dagadu.

9. The prosecution led evidence comprising of medical evidence, recovery of material objects, eye-witnesses and the investigation. We will make reference only to the relevant evidence on record. PW4 Dr. Shravan Gavhane conducted the post mortem on the body of the deceased and found seven injuries. Injury No.1 was on the head which was found to be fatal. Injuries Nos. 2 to 7 were said to be with hard and blunt object like sticks or swords. PW5 Dr. Dinesh Kumar examined the injured PW11 Dagadu and found 10 injuries which included eight incised wounds, two injuries on Gopinath Mahadev Koyale, one contused wound on PW18 Chaturbhuj Khade, three injuries on Murlidhar Yeshu Kshirsagar. He also found one incised wound on the right forearm of accused No.5 Sandipan Sakharam. He found two injuries on Bibhishan PW15.

10. The prosecution relied upon the eye witness account rendered by PW10 Satyabhama, PW11 Dagadu, PW15 Bibhishan Kshirsagar, PW18 Chaturbhuj Khade, PW12 Kernath Koyale. PW2 Shivaji Fuge, PW3 Yuvraj Koyale, PW7 Bhimrao and PW9 Bhimrao Dhavale are witnesses to the recovery in pursuance of the statements under Section 27 of the Evidence Act. The Chemical Analyser's report was also produced about the blood group on some of the recovered articles.

11. The trial Court rejected the prosecution version inter alia for following reasons :

(i) Recovery was not admissible as the location of the articles recovered was already known;

(ii) There was inordinate delay in sending the case property to the Chemical Analyser and possibility of tempering was not ruled out;

(iii) There was inconsistency in the evidence of PWs Kernath Koyale, Bibhishan Vithoba Khadle and Chaturbhuj Khade in the manner of assault and the weapon used;

(iv) The prosecution did not examine Indubai and Gopinath;

(v) Motive was not established as there was no immediate election of the Panchayat or of the Cooperative Society;

(vi) There was improvement in the version initially given to the police and the version put forward before the Court; and

(vii) All the material witnesses are either related or otherwise interested and their testimony could not be accepted in absence of corroboration in material particulars.

12. The High Court observed that acquittal by the trial court was based on omissions and contradictions which were not material and did not affect the veracity of the prosecution case. Thus, the trial Court adopted a "totally perverse approach". It was observed :

> "32. It is true that there are contradictions and omissions but none of them, according to us, is vital or material. They are regarding the particulars. When 7/8 persons are injured and assailants are about 16, then these omissions are bound to be there. They are natural omissions and contradictions and the most important fact that wipes out the effect of these contradictions and omissions is that many persons from the side of complainant had received injuries, so also accused No.5.
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> 33. This is not a case of exercising the right of self defence of the accused. No such plea was raised before us nor from the case of the prosecution any such plea can be permitted to be raised directly or indirectly by the accused. The accused are aggressors. They have launched attack while persons from the complainant's side had assembled to celebrate their Diwali. Vasti was set to fire. Bibhishan Khade died in the said attack and many persons from the side of complainant had received injuries. The assault was by deadly weapons like sword, barchi, knife, gupti and sticks. This was, therefore, not a case of clear cut acquittal of all the 16 accused. No further corroboration is necessary. Investigation is prompt and swift and even if other evidence regarding recovery of incriminating articles is not considered, the oral evidence and

ocular evidence of the aforesaid witnesses i.e. P.W.10, 11, 12, 13, 15 and 18 and others discussed by us including those two doctors fully prove the prosecution case. The findings of the trial Court are totally perverse and therefore this appeal is required to be allowed, but to what extent and against which of the accused is the question. The close scrutiny of the evidence of eye witnesses particularly P.W.10, 11, 15 and 18 shows that P.W.10 has implicated accused Nos.1,2,3,5,6,7, 10 and 11. P.W.11 has implicated accused Nos.1,2,3,4,5,6,7 and according to P.W.11, accused No.3 set fire to the Vasti. P.W.15 has implicated accused Nos.1,2,3,4,5,6, 10 and 11. P.W. 18 has implicated accused Nos.1,2,3,5,6,7 and according to him, accused No.3 set fire to the Vasti. Presence of accused No.5 Sandipan at the spot is fully proved, apart from other evidence, because of the injuries suffered by him. There are in all 16 accused. Considering the aforesaid evidence, this appeal against acquittal has to be allowed in respect of accused Nos.1,2,3,4,5,6,7, 10 and 11, and their acquittal is required to be set aside. So far as accused Nos.8,9,12,13,14,15 and 16 are concerned, their acquittal is required to be upheld. Undoubtedly, the accused Nos.1 to 7 and 10 and 11 had formed an unlawful assembly with a common object of launching an assault. The house or vasti of Dagadu was set to fire. In the attack Bibhishan Khade died and P.W.11, 15 and 18 and others received injuries by deadly weapons. Therefore, for causing death of Bibhishan Khade the accused are required to be held guilty under Section 302 read with Section 149 of the Indian Penal Code and for causing severe injuries to the aforesaid prosecution witnesses and others, they are required to be held guilty under Sections 324 and 326 r/w 149 of the Indian Penal Code. So far as offence under Section 436 of the Indian Penal Code is concerned, the evidence of the prosecution witnesses is not consistent and, therefore, nobody can be convicted under that section."

13. We have heard learned counsel for the appellants on the one hand as also learned counsel for the State and the complainant on the other and with their assistance, gone through the material on record.

14. Main contention raised on behalf of the appellants is that the judgment of acquittal rendered by the trial Court was certainly a

possible view on appreciation of evidence and the High Court could not reverse the same as there was no perversity. The High Court has not fully discussed the evidence nor dealt with the reasons recorded by the trial Court for rejecting the prosecution version. There was no explanation for the injury suffered by accused No.5. There are omissions and contradictions in the version of the prosecution witnesses. In the first version given by PW 12, the accused have not been named and instead of recording the said version as FIR, it was on belated statement of PW 10 which was an improved version that the FIR was registered. The omissions in the statement made to the police amount to contradictions as per explanation to Section 162 Cr.P.C. Thus, the evidence of eye witnesses PWs10, 11, 12, 15 and 18 has been rightly rejected by the trial court and could not be relied upon by the High Court. Since there was enmity between the parties, there was possibility of exaggeration and false implication and it was not safe to convict the appellants. It was also submitted that since the incident was 28 years old, some of the appellants have become very old and ought not to be convicted at this stage. Reliance has been placed on the judgments of this Court in ***Padam Singh versus State of U.P.; (2000) 1 SCC 621, Devatha Venkataswamy versus Public Prosecutor, High Court of A.P.; (2003) 10 SCC 700, Narendra Singh versus State of M.P.; (2004) 10 SCC 699, Prasanna Das versus State of Orissa; (2004) 13 SCC 30, Majjal versus State of Haryana; (2013) 6 SCC 798, Lalita Kumari versus Govt. of U.P.; (2014) 2 SCC 1*** and ***Baby alias Sebastian versus Central Inspector of Police; (2016) 7 Scale 444***.

15. On the other hand, learned counsel for the State and the complainant, supported the judgment of the High Court and pointed out that the reasons for acquittal by the trial court were perverse and the High Court has duly dealt with the said reasons and found them to be perverse. There is consistent evidence of injured eye witnesses which could not be altogether brushed aside. Contradictions and omissions which are not vital or material are bound to be there in every case. The same did not affect the credibility of the main version that the accused caused the death of the deceased and injuries to six persons on the complainant side. The accused formed unlawful assembly and action of even one accused in prosecution of common object of the unlawful assembly or which was known to likely to be so committed was action of all the accused in law. It was not necessary to prove individual role of different accused. The information by PW12 on

telephone was cryptic and could not be treated as FIR. Therein though name of accused No.5 was mentioned and it was further stated that he was accompanied by others also, other details were not mentioned. This was not at par with the statement to be recorded by the officer in charge of the Police Station under Section 154 CrPC which can be treated as FIR. Thus, the telephonic message could not be treated as FIR. The statement of PW 10 made in the Police Station has rightly been treated as FIR. The said statement was prompt and could not be treated as an improved version. The statement was corroborated by sworn testimony of the author of the FIR before the Court which has been corroborated in all material particulars by four other injured witnesses. Thus, the evidence on record fully warranted conviction of the appellants and no interference was called for by this Court. Reliance has been placed on the judgments of this Court in ***Damodar versus State of Rajasthan; (2004) 12 SCC 336, Mano Dutt & Anr. Versus State of Uttar Pradesh; (2012) 4 SCC 79, Sanjeev versus State of Haryana; (2015) 4 SCC 387, A. Shankar versus State of Karnataka; (2011) 6 SSC 279, State of Karnataka versus Suvarnamma & Anr.; (2015) 1 SCC 323, Bava Hajee Hamsa versus State of Kerala; (1974) 4 SCC 479, Patai Alias Krishna Kumar versus State U.P.; (2010) 4 SCC 429, Ravishwar Manjhi versus State of Jharkhand; (2008) 16 SCC 561, T.T. Antony versus State of Kerala; (2001) 6 SCC 181.***

16. We have given due consideration to the rival submissions. The question for consideration is whether the High Court was justified in reversing the acquittal of the appellants on the basis of evidence available on record.

17. Before considering this aspect with reference to the evidence on record, we may advert to the settled principles of law dealing with the issues arising in the present case. The approach to be adopted by the court generally in appreciating the evidence in a criminal case as also the approach of the appellate court is discussed in several decisions of this Court, some of which have been cited by learned counsel for the parties.

18. It is accepted principle of criminal jurisprudence that the burden of proof is always on the prosecution and the accused is presumed to be innocent unless proved guilty. The prosecution has to prove its case beyond reasonable doubt and the accused is entitled to the benefit of the reasonable doubt. The reasonable doubt is one which occurs to a prudent and reasonable man. Section 3 of the

Evidence Act refers to two conditions – (i) when a person feels absolutely certain of a fact – "believe it to exist" and (ii) when he is not absolutely certain and thinks it so extremely probable that a prudent man would, under the circumstances, act on the assumption of its existence. The doubt which the law contemplates is not of a confused mind but of prudent man who is assumed to possess the capacity to "separate the chaff from the grain". The degree of proof need not reach certainty but must carry a high degree of probability ***[Vijayee Singh vs. State of U.P.- (1990) 3 SCC 190, Paras18, 28-30].***

19. While appreciating the evidence of a witness, the court has to assess whether read as a whole, it is truthful. In doing so, the court has to keep in mind the deficiencies, drawbacks and infirmities to find out whether such discrepancies shake the truthfulness. Some discrepancies not touching the core of the case are not enough to reject the evidence as a whole. No true witness can escape from giving some discrepant details. Only when discrepancies are so incompatible as to affect the credibility of the version of a witness, the court may reject the evidence. Section 155 of the Evidence Act enables the doubt to impeach the credibility of the witness by proof of former inconsistent statement. Section 145 of the Evidence Act lays down the procedure for contradicting a witness by drawing his attention to the part of the previous statement which is to be used for contradiction. The former statement should have the effect of discrediting the present statement but merely because the latter statement is at variance to the former to some extent, it is not enough to be treated as a contradiction. It is not every discrepancy which affects creditworthiness and trustworthiness of a witness. There may at times be exaggeration or embellishment not affecting credibility. The court has to sift the chaff from the grain and find out the truth. A statement may be partly rejected or partly accepted ***[Leela Ram vs. State of Haryana (1999) 9 SCC 525, paras 9 - 13].*** Want of independent witnesses or unusual behavior of witnesses of a crime is not enough to reject evidence. A witness being a close relative is not enough to reject his testimony if it is otherwise credible. A relation may not conceal the actual culprit. The evidence may be closely scrutinized to assess whether an innocent person is falsely implicated. Mechanical rejection of evidence even of a 'partisan' or 'interested' witness may lead to failure of justice. It is well known that principle "falsus in uno, falsus in omnibus" has no general acceptability ***[Gangadhar Behera vs. State of Orissa (2002) 8 SCC 381 -para 15].*** On the same evidence,

some accused persons may be acquitted while others may be convicted, depending upon the nature of the offence. The court can differentiate the accused who is acquitted from those who are convicted. A witness may be untruthful in some aspects but the other part of the evidence may be worthy of acceptance. Discrepancies may arise due to error of observations, loss of memory due to lapse of time, mental disposition such as shock at the time of occurrence and as such the normal discrepancy does not affect the credibility of a witness.

20. Exaggerated to the rule of benefit of doubt can result in miscarriage of justice. Letting the guilty escape is not doing justice. A Judge presides over the trial not only to ensure that no innocent is punished but also to see that guilty does not escape.[Gangadhar Behera (supra), para 17]

21. An offence committed in prosecution of common object of an unlawful assembly by one person renders members of unlawful assembly sharing the common object vicariously liable for the offence. The common object has to be ascertained from the acts and language of the members of the assembly and all the surrounding circumstances. It can be gathered from the course of conduct of the members. It is to be assessed keeping in view the nature of the assembly, arms carried by the members and the behavior of the members at or near the scene of incident. Sharing of common object is a mental attitude which is to be gathered from the act of a person and result thereof. No hard and fast rule can be laid down as to when common object can be inferred. When a crowd of assailants are members of an unlawful assembly, it may not be possible for witnesses to accurately describe the part played by each one of the assailants. It may not be necessary that all members take part in the actual assault[Gangadhar Behera (supra), paras 22-24]. In ***Gangadhar Behera (supra),*** this Court observed :

> "25. The other plea that definite roles have not been ascribed to the accused and therefore Section 149 is not applicable, is untenable. A four- Judge Bench of this Court in ***Masalti case [AIR 1965 SC 202]*** observed as follows:
>
> > "15. Then it is urged that the evidence given by the witnesses conforms to the same uniform pattern and since no specific part is assigned to all the assailants, that evidence should not have been accepted. This criticism again is not

well founded. Where a crowd of assailants who are members of an unlawful assembly proceeds to commit an offence of murder in pursuance of the common object of the unlawful assembly, it is often not possible for witnesses to describe accurately the part played by each one of the assailants. Besides, if a large crowd of persons armed with weapons assaults the intended victims, it may not be necessary that all of them have to take part in the actual assault. In the present case, for instance, several weapons were carried by different members of the unlawful assembly, but it appears that the guns were used and that was enough to kill 5 persons. In such a case, it would be unreasonable to contend that because the other weapons carried by the members of the unlawful assembly were not used, the story in regard to the said weapons itself should be rejected. Appreciation of evidence in such a complex case is no doubt a difficult task; but criminal courts have to do their best in dealing with such cases and it is their duty to sift the evidence carefully and decide which part of it is true and which is not."

22. We have referred to the above settled principles as the trial court has adopted perverse approach in rejecting the entire evidence comprising of injured eye witnesses when one person has been killed and six others have been injured. The trial court ignored the above principles by mechanically rejecting the evidence of all the witnesses by finding one or the other contradiction. The occurrence has taken place in broad day light. One of the accused himself mentioned about the enmity on account of the panchayat election. The said accused himself is injured which proves his presence at the scene of the occurrence. This version further shows the presence of deceased and the injured. But his version fails to explain as to why the deceased would have been killed by PW11 when the deceased was the messenger of PW11 himself. Except for some contradictions, the version of eye witnesses PWs 10, 11, 15, 12 and 18 is consistent. There is no reason to reject the said version. Of course, the court has to be cautious in appreciating evidence and rule out exaggeration.

23. We may also note that version of A5 is not probable and mere fact that injury on him is not explained is not enough to reject the prosecution version. In such a case, the Court is to examine whether evidence is trustworthy. This aspect has been repeatedly

examined by this Court and settled law is that non explanation of injuries on accused is an important circumstance which requires the court to satisfy itself that true version is not suppressed and whether defence version is probable***[Vijayee Singh (supra), para 9, (2001) 6 SCC 145-Takhaji Hiraji vs. Thakore Kubersing Chamansing, (2012) 4 SCC 79-Mano Dutt vs. State of U.P.]***. This by itself is not enough to reject the prosecution case.

24. To demonstrate that the approach of the trial court is outrightly perverse, some of the observations are put in :

> " But in general terms she has stated that accused came with weapons. Similarly it is admitted by her during the cross-examination that she has not stated assault by particular accused on the person of Bibhishan Khade. But she has stated in general terms that Bibhishan was assaulted by the accused.
>
> Moreover it is to be noted that she has admitted that Dagadu and Bibhishan were assaulted by said weapons like cutting a wood by an axe, sword and barchi. But there is no piercing wound or cut injury on the person of deceased Bibhishan as well as Dagadu.
>
> Moreover it is in her complaint that she had been to the vasti of Murlidhar and Bibhishan Kshirsagar to hand over the break fast to Dagadu. But the evidence of PWs and Dagadu and other eye witnesses disclose that they all had been to the house of Murlidhar Kshirsagar for Diwali snacks and there Dagadu invited for meals in the noon time. Hence, all the eye-witnesses mentioned above had been to the vasti of Dagadu. But P.W. Dagadu, Kernath, P.W. Bibhishan Kshirsagar and P.W. Chaturbhuj disclose that they were called for the Diwali snacks and not for meals in the house of Dagadu. It is to noted that if Dagadu was invited for Diwali snacks in the house of Murlidhar kshirsagar then there was no necessity to take breakfast for Dagadu to the house of Murlidhar Kshirsagar. Considering all the aspects the evidence of the complaint cannot be accepted. "

25. Similar is the appreciation by the trial court of other witnesses. Since rejection of eye witness account is uncalled for, other reasons given by trial court are not sufficient to reject the prosecution case. Even if recoveries or Chemical Analyzer's report are disregardedly the same have only corroborative value, prosecution case is established by credible eye witness account. Mere fact that

some of the witnesses have not been examined is also of no consequence when credible evidence to prove the case has been produced. We thus, find that the High Court rightly reversed the trial Court judgment.

26. One of the submission of learned counsel for the appellants is that telephonic message by PW12 recorded at the police station should have been treated as FIR. We have been taken through the said message which is to the effect that A5 and other accused assaulted the complainant party. Learned counsel relied upon the observation in ***Lalita Kumari (supra)*** to the effect that a GD Entry can also be treated as FIR in an appropriate case. From the said observation, it cannot be laid down that every GD Entry or every cryptic information must be treated as FIR. In ***Anand Mohan versus State of Bihar; (2012) 7 SCC 225,*** while referring to Section 154 Cr.P.C., this Court observed that every cryptic information, even if not signed by the person giving the information, cannot be treated as FIR. The information should sufficiently disclose the nature of the offence and the manner in which the offence was committed. It was observed :

> "50. In ***Sk. Ishaque v. State of Bihar [(1995) 3 SCC 392]*** Gulabi Paswan gave a cryptic information at the police station to the effect that there was a commotion at the village as firing and brickbatting was going on and this Court held that this cryptic information did not even disclose the commission of a cognizable offence nor did it disclose who were the assailants and such a cryptic statement of Gulabi Paswan cannot be treated to be an FIR within the meaning of Section 154 CrPC.
>
> 51. Similarly, in ***Binay Kumar Singh v. State of Bihar [(1997) 1 SCC 283]*** information was furnished to the police in Ext. 10/3 by Rabindra Bhagat that the sons of late Ram Niranjan Sharma along with large number of persons in his village had set fire to the houses and piles of straws and had also resorted to firing. This Court held that Ext. 10/3 is evidently a cryptic information and is hardly sufficient to discern the commission of any cognizable offence therefrom."

27. Similar view has been taken by this Court in ***Damodar (supra), T.T. Antony (supra), Patai Alias Krishna Kumar (supra) and Ravishwar Manjhi (supra).***

28. Learned counsel for the appellants also criticized the judgment of the High Court by submitting that the principles laid down by this Court in ***Padam Singh (supra), Devatha Venkataswamy (supra), Narendra Singh (supra), Prasanna Das (supra), Majjal (supra), Lalita Kumari (supra), and Baby (supra)*** for exercise of appellate jurisdiction have not been followed. The appellate court should deal with reasons for acquittal and interfere only if acquittal is perverse. There is no doubt about the proposition that the appellate court has to arrive at an independent conclusion about the credibility of the evidence and to re-appreciate the evidence to arrive at a just conclusion. If the appellate court is to reverse the judgment of the trial court, the reasoning of the trial court has to be adverted to and reversal of acquittal is permissible only if the view of the trial court is not only erroneous but also unreasonable and perverse. At the same time, the appellate court has full power to review the evidence and to reach at its own conclusion. The appellate court can set aside the acquittal if the acquittal is not justified. Of course, the appellate court has to consider the fact that the trial court has the benefit of seeing the witnesses in the witness box and the presumption of innocence is not weakened by the acquittal. If two reasonable conclusions can be reached, the appellate court should not disturb the finding of the trial court. In the present case, the High Court has followed the above principles.

29. In ***Bava Hajee Hamsa (supra)*** while approving the reversal of acquittal by the High Court, it was held that erroneous approach of the trial Court led to misdirection in appraising the evidence and the High Court was justified in rejecting the approach of the trial court and in analyzing the evidence in its own way. This Court observed :

> "30. We agree with the High Court that the very "scheme of approach" adopted by the trial Judge was faulty and misleading. It led to aberration and misdirection in appraising evidence, and vitiated his conclusions. The learned trial Judge started correctly when on a broad look of the evidence, he found the evidence of PWs 1, 8 and 9 prima facie acceptable. But after the second lap of discussion, he became sceptical; and reversed his mind at the end of the third round of circumgyratory discussion. In such cases where large number of persons are involved and in the commotion some persons cause injuries to others and the evidence is of a partisan character, it is often safer for the Judge of fact to be

guided by the compass of probabilities along the rock-ribbed contours of the case converging on the heart of the matter. Once the court goes astray from the basic features of the case, it is apt to lose itself in the labyrinths of immaterial details, desultory discussion and vacillation arising from unfounded suspicions. This is exactly what has happened in the instant case. Despite the pains taken and the conscentious effort put in to write an elaborate judgment, the trial Judge had, as it were, missed the wood for the trees. The learned Judges of the High Court were, therefore, right in discarding altogether the basically wrong "scheme of approach" adopted by the trial court, and in analysing the evidence in their own way."

30. As already observed, the discrepancies of trivial nature could not be the basis of rejecting the evidence of injured eye witnesses nor non- examination of some of the witnesses be a ground to reject the prosecution case when injured eye witnesses were examined.

31. We may also refer to the judgment of this Court in ***Masalti versus State of U.P.; (1964) 8 SCR 133,*** to the effect that the evidence of interested partisan witnesses though required to be carefully weighed, the same could not be discredited mechanically. When a crowd of unlawful assembly commits an offence, it is often not possible to accurately describe the part played by each of the assailants. Though the appreciation of evidence in such cases may be a difficult task, the court has to perform its duty of sifting the evidence carefully.

32. Applying the above principles to the present case, it is clear that all the five eye witnesses have named A1 to A7. Other accused have not been named by PW11 and PW18. By way of abundant caution, we give benefit of doubt to A10 and A11 for the reason that they have not been named by PW11 and PW18 and also for the reason that PW10 has attributed specific role only to A1 to A7. But as far as A1 to A7 are concerned (A2 has already died) all the five witnesses have consistently named them. A1 to A7 have been assigned specific role in assaulting the deceased. Their conviction and sentence under Section 302/149 of the IPC has to be upheld.

33. For the above reasons, this appeal is partly allowed to the extent that appellant Nos.7 and 8 (Babu Rama Berad and Balu Naradeo Berad) are given benefit of doubt and are acquitted. They be released from custody, if not required in any other case.

Appeal of other appellants is dismissed. However, appellant Nos.5 and 6 (Nivrutti Sakharam Koyale and Krishna Sakharam Koyale) will continue to remain on bail for one month and if they make an application for remission of the remaining sentence on the ground of advanced age within one month, they will continue to remain on bail thereafter till the decision of the said application by the appropriate authority. If their application for remission is not accepted, they will surrender to serve out the remaining sentence.

Result:- Appeal partly allowed.

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ACQUITTAL & BAIL CASES

SUPREME COURT OF INDIA

(Pinaki Chandra Ghose & Amitava Roy, JJ.)

Criminal Appeal Nos. 1624-1625 of 2013 with Criminal Appeal Nos. 217-218 of 2013

(From Rajasthan High Court)

Decided On 20 October, 2016

HARBEER SINGH & ANR. ***- Appellant(s).***

Versus

SHEESHPAL & ORS. ***- Respondent(s).***

Law Covered:- ***(A) Indian Penal Code, 1860 — Section 302 r/w 149 — Code of Criminal Procedure, 1973 — Sections 161, 162 & 378 — Material omissions amounting to contradictions — Chance witnesses — Statements have been rightly discarded — Eye witness — presence of — highly unnatural — ability to individually and correctly identify each of the accused from a considerable distance, in dark, is itself suspect — evidence not truthful, reliable and trustworthy, cannot form the basis of conviction — Vehicle of the accused —not convincingly connected, with the incident beyond reasonable doubt — prosecution has been unable to prove its case beyond all reasonable doubt — Appeal dismissed. (Para 15, 24, 25, 26 & 27)***

(B) Code of Criminal Procedure, 1973 — Sections 161 & 162 — Omission to state a fact or circumstance in the statement recorded u/ s 161 Cr.P.C. — Held, if the omission appears to be significant and