A RAMANAND YADAV

v.

PRABHU NATH JHA AND ORS.

OCTOBER 31, 2003

B [DORAISWAMY RAJU AND ARIJIT PASAYAT, JJ.]

Criminal Trial

Practice and procedure—Order of acquittal—Interference by appellate C *Court—When—Held: When there are compelling and substantial reasons for doing do as miscarriage of justice may result from acquittal of guilty—No embargo on re-appreciation of evidence by appellate Court—Re-appreciation of evidence permissible when admissible evidence ignored—Indian Penal Code, 1860—Sections 34, 149 and 302—Arms Act, 1959—Sections 25A and 27—* D *Explosive Substance Act, 1908—Section 3.*

Appreciation of evidence—Opinion evidence—Inconsistency between evidence of medical witness and eye witness—Evidentiary value—Held, oral evidence to get primacy as medical evidence is opinionated—Testimony of eye witness to be discarded only when medical evidence conclusively rules out E *even possibility of version of eye witness.*

Appreciation of evidence—Eye witness—Interested or partisan witnesses—Held, duty of Court to analyse evidence with deeper scrutiny—Non-examination of other eye witnesses—Held, mere non-examination would not affect prosecution version.

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Prosecution alleged that day of occurrence when the informant and his elder brother, D, went to market place to take tea at tea-shop, accused P fired at D on right lower side chest with a revolver / pistol as a result of which D fell down and accused persons L and B hurted bombs at fallen D G **while remaining five accused persons fired in the air and threw brickbats to scare the villagers to run away. D was firstly taken to a clinic and thereafter to a hospital but at both places he was delivered dead. Trial Court convicted accused persons P, L and B under Section 302 of Indian Penal Code, 1860 and under Sections 25A and 27 of the Arms Act, 1959 while accused L and B were also convicted under Sections 3 of the**

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Explosive Substances Act, 1980. The remaining five accused persons were convicted under Section 302 read with Sections 149 IPC. A

In appeal preferred by the accused persons, High Court set aside the conviction and acquitted all eight accused persons on the ground that there was no explanation as to why deceased was taken to hospital at some distance instead of a nearby referral hospital; that PWs 6,7 and 9 were B examined three days after occurrence; that eye witnesses other than interested witnesses were not examined by prosecution; and that medical evidence is inconsistent with prosecution case as no bullet was found on the right lower side chest of the deceased. Hence, these appeals by the informant and the State. However, the scope of appeals was restricted to C accused persons P, L and B was dismissed as far as after accused persons were concerned.

Allowing the appeals, the Court

HELD : 1. PWs 1 and 2 have categorically stated that at most of the times the doctors at referral hospital are not present. They substantiated D this impression by pointing out that Dr. Manoj who had first examined the deceased and declared him to be dead was a doctor of the referral hospital. The impression may be totally out of context; but the reason given cannot be said to be wholly implausible. Therefore, that should not have been taken as a ground by the High Court for directing acquittal. E [50-D, E]

2. It is clear from reading of the evidence that the Investigating Officer was not asked specifically the reason for the delayed examination of PWs 6,7 and 9. Unless the Investigating Officer is categorically asked as to why there was delay in examination of the witnesses the defence F cannot gain any advantage therefrom. [50-F, G]

Ranbir and Ors. v. *State of Punjab,* AIR (1973) SC 1409 and *Bodhraj @ Bodha and Ors.* v. *State of Jammu and Kashmir,* [2002] 8 SCC 45, relied on.

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3. It is established by the evidence on record that the village was a faction ridden one. In some cases persons may not like to come and depose as witnesses and in some other cases the prosecution may carry the impression that their evidence would not help it as there is likelihood of partisan approach so far as one of the parties is concerned. In such a case mere non-examination would not affect the prosecution version. But at H

A the same time if the relatives or interested witnesses are examined, the Court has a duty to analyse the evidence with deeper scrutiny and then come to a conclusion as to whether it has a ring of truth or there is reason for holding that the evidence was biased. Whenever a plea is taken that the witness is partisan or had any hostility towards the accused foundation for the same has to be laid. If the materials show that there is partisan B approach, the Court has to analyse the evidence with care and caution. Additionally, the accused persons have always the option of examining the left out persons as defence witnesses. [50-H; 51-A-C]

Ram Avtar Rai and Ors. v. *State of Uttar Pradesh,* AIR (1985) SC 880, *Harpal Singh.* v. *Devinder Singh and Anr.,* [1997] 6 SCC 660 and *Gopi Nath* C *@ Jhallar.* v. *State of U.P.,* [2001] 6 SCC 620, relied on.

4.1. It is trite law that oral evidence that has to get primacy and medical evidence is basically opinionative. It is only when the medical evidence specifically rules out the injury as claimed to have been inflicted as per the oral testimony, then only in a given case the Court has to draw D adverse inference. The High Court has thus knocked out an eyewitness on the strength of an uncanny opinion expressed by a medical witness. But to discard the testimony of an eyewitness simply on the strength of such opinion expressed by the medical witness is not conducive to the administration of criminal justice. Over dependence on such opinion E evidence, even if the witness is an expert in the field, to checkmate the direct testimony given by an eyewitness is not a safe modus adoptable in criminal cases. It has now become axiomatic that medical evidence can be used to repel the testimony of eyewitnesses only if it is so conclusive as to rule out even the possibility of the eye witness's version to be true. [51-D-G]

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Mange. v. *State of Haryana,* [1979] 4 SCC 349, *State of U.P.* v. *Krishna Gopal and Anr.,* AIR (1988) SC 2154, *Ram Dev and Anr.* v. *State of U.P.* [1995] Supp. 1 SCC 547 and *State of U.P.* v. *Harban Sahai and Ors.* [1998] 6 SCC 50, relied on.

G 4.2. Even otherwise, the medical evidence may be at variance so far as alleged assault by accused P is concerned. But there is no variance pointed out by the High Court so far as others are concerned. Therefore, there is no supportable foundation for holding that there was concoction. Accused P even otherwise can be held guilty by application of Section 34 IPC as the evidence on record clearly brings out application of Section H 34. [52-C]

Lallan Rai and Ors. v. *State of Bihar,* [2003] 1 SCC 268 , relied on. A

5.1. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the Court is to ensure that B **miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. [52-E, F]**

5.2. The principle to be followed by appellate Court considering the C **appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. There is no embargo on the appellate Court reviewing the evidence upon which an order of acquittal is based. In a case where admissible evidence is ignored, a duty is cast upon the appellate Court to re-appreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as** D **to whether any of the accused committed any offence or not. If the impugned judgment is clearly unreasonable and relevant and convincing materials have been unjustifiably eliminated in the process, it is a compelling reason for interference. [52-E-H]**

Bhagwan Singh and Ors. v. *State of Madhya Pradesh,* **[2002] 2 Supreme** E **567,** *Shivaji Sahabrao Bobade and Anr.* v. *State of Maharashtra,* **[1973] 3 SCC 193,** *Ramesh Babulal Doshi.* v. *State of Gujarat,* **[1996] 4 Supreme 167,** *Jaswant Singh.* v. *State of Haryana,* **[2000] 3 Supreme 320,** *Rai Kishore Jha.* v. *State of Bihar and Ors.,* **[2003] 7 Supreme 152,** *State of Punjab.* v. *Karnail Singh* **[2003] 5 Supreme 508 and** *State of Punjab.* v. *Pohla Singh and Anr.,* F **[2003] 7 Supreme 17, relied on.**

6. The High Court was not justified in directing acquittal. The same is set aside. Respondents are convicted under Section 302 read with section 34 IPC and are sentenced to undergo imprisonment for life. [53-B, C]

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CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 119-121 of 1997.

From the Judgment and Order dated 16.8.96 of the Patna High Court in Crl.A. Nos. 361, 364 and 365 of 1993.

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Crl. A. Nos. 314-316 of 1997.

Sujit K. Singh for S.B. Upadhyay and B.B. Singh for the Appellants.

B Anil Kr. Jha, Anil Kr. Chopra and Ram Ekbal Roy for the Respondents.

The Judgment of the Court was delivered by

ARIJIT PASAYAT, J. In these six appeals challenge is to the judgment of the Patna High Court which directed acquittal of 8 persons upsetting C conviction recorded and sentence imposed by the First Additional Sessions Judge, Darbhanga. Three of them namely, Prabhu Nath Jha, Laxmi Yadav and Badri Yadav were found guilty of offence punishable under Section 302 of the Indian Penal Code, 1860 (in short the 'IPC') while five others namely, Ramashish Yadav, Yadu Nath Yadav, Ram Chandra Yadav, Bhutkun Yadav and Ram Prakash Yadav were found guilty of offence punishable under D Section 302 read with Section 149 IPC. Three of the accused persons namely Prabhu Nath Jha, Ramashish Yadav and Yadu Nath Yadav were also found guilty of the offence punishable under Sections 25A and 27 of the Arms Act, 1959 (in short the 'Arms Act') and two of them namely Laxmi Yadav and Badri Yadav were found guilty of offence under Section 3 of the Explosive E Substance Act, 1908 (in short 'Explosive Act'). Life sentence was imposed by offences relatable to Section 302 or Section 302 read with Section 149. Custodial sentence of various magnitudes were imposed for other offences. Since Prabhu Nath was absconding, his trial was separated initially but finally the trial Judge tried the sessions trial of all the accused persons together.

F Accusations which led to the trial of the accused persons and the prosecution version as unfolded during trial are as follows:

On 16.6.1991 which was a Sunday at about 7.00 a.m. in the morning the informant Ramanand Yadav (PW-12) (who leads the life of a Sadhu) came along with his elder brother Thakkan Yadav, a school teacher (hereinafter G referred to as the deceased) to Chanaur Chowk of the village to take tea at a tea-shop; this Chanaur Chowk is a market place in village Aabadi, where there are several small tea-shops, hair-cutting saloons, grocery shops, cloth shops etc; while Thakkan Yadav was chatting with one Lambodar Jha, a press-reporter in front of the shop of one Krishna Purbey, the accused Prabhu H Nath Jha holding a revolver in small bag tied around his waist and the

accused Laxmi Yadav and his brother Badri Yadav having bags on their shoulder arrived near the deceased; accused Prabhu Nath Jha fired his revolver/ pistol on the right side Panjra (lower side chest) of the deceased and being hurt from this fire-arm shot of Prabhu Nath Jha, deceased fell down on the ground, and the other two accused Laxmi Yadav and Badri Yadav took out bombs from their bags and they started hurling bombs on the body of fallen deceased, and these two accused persons hurled several bombs and the smoke of the bombs engulfed the surroundings; deceased was severely injured; that the other accused Ramashish and Yadu Nath who were standing near the house of Prabhu Nath Jha at a distance of about hundred feet from the Chowk started firing in the air to scare the villagers to run away, and the accused Bhutkun, Ram Chandra and Ram Prakash started throwing brick-bats to make the villagers run away as the firing had started.

According to the prosecution case all the eight accused belong to one camp led by the accused Prabhu Nath Jha and all the eight accused were sympathizers of a particular political party. After this occurrence all the eight accused persons ran away towards the house of Prabhu Nath Jha, and the informant Ramanand Yadav (PW-12) went to the house of Prabhu Nath Jha and found that all these accused were running away towards north.

With the help of Jagannath Yadav (PW-1), Shyam Yadav (PW-2) and others the seriously injured Thakkan Yadav was carried on a rickshaw to the clinic of Dr. Manoj Kumar in Manigachhi for treatment, and they stayed there for ten minutes or about and there Dr. Manoj Kumar declared that Thakkan Yadav was dead, not being satisfied with the opinion of the doctor and hoping that the expert doctors might help in revival of life of Thakkan Yadav, Ramanand Yadav (PW-12) finding the jeep of a political party with some workers of the party in it by the side of the clinic of Dr. Manoj Kumar, placed the injured Thakkan Yadav in that jeep and brought him to Darbhanga Medical College Hospital, where the doctors of emergency wing too declared that Thakkan Yadav was dead.

According to the prosecution there were 6 eye-witnesses namely Jagannath Yadav (PW-1), Utim Yadav (PW-3), Mahabir Yadav (PW-7), Batohi Yadav (PW-9), Indra Mohan (PW-10) and Ramanand Yadav (PW-12). Nagendra Mishra (PW-14) was the Investigating Officer and Dr. A.R. Kishore (PW-17) was the doctor who conducted the post-mortem. Shyam Yadav (PW-2), Autar Jhan (PW-4) and Mahadeo Yadav (P-6) were stated to be immediate post occurrence witnesses.

A Stand of the accused persons was that deceased was murdered by some unknown persons which was not witnessed by anybody and they have been falsely roped in due to enmity and political rivalry. Reference was made to some criminal cases to show enmity. Accused Prabhu Nath took the plea of alibi claiming that he was working at a different place and could not have been at the place of occurrence.
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Placing implicit reliance on the evidence of the prosecution witnesses the trial Judge directed conviction and sentence as aforesaid. Three appeals were filed by the appellants separately and the High court directed acquittal by the impugned judgment disposing of them together.

C The primary grounds on which the acquittal was directed are as follows: (i) there is a referral hospital between the place of occurrence and the Darbhanga Government Hospital and it has not been explained as to why the deceased was not taken to the referral hospital and was taken to the Darbhanga Hospital which is at a greater distance; (ii) PWs 6, 7 and 9 were examined D after three days of occurrence; (iii) one Lambodar Jha and two others were available at the spot of occurrence but were not examined and only the interested witnesses were examined and, therefore, the prosecution version is suspect; (iv) when PWs 2 and 4 reached the place of occurrence they did not see any of the so-called eye witnesses and, therefore, their presence at the spot is doubtful; (v) the medical evidence is inconsistent with the prosecution E case, as no bullet injury was found on the lower side of the right chest though witnesses said that a bullet was fired at that part of the body. It has to be noted that PW-7 has been found to be unreliable, and that according to High Court adds to the vulnerability of the prosecution version.

F As indicated above, both the informant Ramanand (PW-12) and State of Bihar have questioned correctness of the High Court's judgment. By order dated 31.1.1997 the scope of present appeals was restricted to respondents 1 to 3 i.e. accused Prabhu Nath Jha, Laxmi Yadav and Badri Yadav, and was dismissed so far as others are concerned.

G Learned counsel for the appellant-State contended that each of the reasons which has weighed with the High Court suffers from unsupportable fallacies and even there has been mis-reading of the evidence. So far as not taking the deceased to the referral hospital nearby, it has been pointed out that the witnesses have given reasons as to why the deceased was not taken to such hospital. It has been clearly indicated that at most of the times doctors
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are not available at the hospital and, therefore, the relatives were not taking any chance. The fact that the first examination was done by a doctor attached to the referral hospital clearly establishes the possibility of the doctors being not there, and merely because the deceased was taken to a Government hospital at some distance that cannot be a ground to render the prosecution version suspect. Unfortunately, the High Court has not properly considered this aspect. The second reason which has weighed with the High Court is the delayed examination of PWs 6, 7, and 9. There was no question put to the Investigating Officer as to why there was delayed examination. Therefore, same cannot be taken as a ground for discarding the prosecution version on this ground alone. Regarding non examination of Lambodar and two others who claimed to be at the spot it was pointed out that the prosecution is not obliged to examine every witness in a faction ridden village and even those whose sympathies lay with the accused may hesitate to take any risks by offering themselves as witnesses and such non examination cannot be a ground to discard the prosecution version. So far as evidence of PWs 2 and 4 ruling out presence of so-called eye witnesses is concerned it was pointed out that the witnesses have clearly stated that after the explosion they went away being afraid and shocked, and came back after a short time. The evidence of PWs 2 and 4 shows that they reached the spot of occurrence immediately after the explosion and, therefore, the fact that they did not see the eye-witnesses cannot be a factor to doubt their presence. So far as the medical evidence is concerned, it is pointed out that the witnesses have stated about firing a gun by accused Prabhu Nath. Merely because no bullet injury was found that does not rule out the participation of accused Prabhu Nath. Even otherwise, the medical evidence in no way varies from the ocular evidence as the assaults attributed to other accused persons are clearly linked to the injuries on the body of the deceased. In any case, by application of Section 34 IPC accused Prabhu Nath Jha can be convicted.

In response, learned counsel for the accused submitted that the whole incident alleged to have taken place is a sequél to a political event. The parliamentary election was held on 12.6.1991 whereas the date of occurrence is 16.6.1991. The election tempo and frayed tempers continued. Evidence on record shows that there was political rivalry. The High Court's conclusions are in order. Firstly, there was no need to take the deceased to a hospital at a distant place after the doctor had opined that the deceased was no longer alive. There was few hours delay in lodging the FIR and that afforded an opportunity to falsely rope in the accused persons because of political rivalry. Out of six so-called eyewitnesses three were admittedly having hostility

A towards the accused persons. They were also not only related but also politically linked. Further delayed examination of PWs 6, 7 and 9 probabilises the inference that the prosecution version was concocted. PWs 1, 3 and 9 had business links with the deceased and, therefore, they had reason to rope in the accused persons falsely. Though medical evidence at first blush rules out role of accused Prabhu, but that also leads to an inference of false implication of B other accused persons. There is little scope for interference with the order of acquittal unless the judgment is totally perverse and this is not a case of that nature.

Learned counsel appearing for the informant in Crl.A. Nos. 119-121/ C 1997 adopted the arguments of learned counsel for the State in the connected appeals.

The first factor which appears to have weighed with the High Court is taking the deceased to the hospital at some distance. The prosecution evidence amply clarifies as to why that was necessary to be done and the reading of D evidence of PWs 1 and 2 is relevant in this regard. They have categorically stated that at most of the times the doctors at referral hospital are not present. They substantiated this impression by pointing out that Dr. Manoj who had first examined the deceased and declared him to be dead was a doctor of the referral hospital. The impression may be totally out of context; but the reason given cannot be said to be wholly implausible. Therefore, that should not E have been taken as a ground by the High Court for directing acquittal.

The second factor which has weighed with the High Court is the delayed examination of three witnesses i.e. PWs 6, 7 and 9. The evidence of PW-7 does not appear to be very much credible and the trial Court and the High F Court also did not appear to have placed much reliance on his evidence. But so far as PWs 6 and 9 are concerned, it is clear from reading of the evidence that the Investigating Officer was not asked specifically the reason for their delayed examination. This Court in several decisions has held that unless the Investigating Officer is categorically asked as to why there was delay in examination of the witnesses the defence cannot gain any advantage therefrom. G (See *Ranbir and Ors.* v. *State of Punjab,* AIR (1973) SC 1409 and *Bodhraj @Bodha and Ors.* v. *State of Jammu and Kashmir,* [2002] 8 SCC 45).

So far as non-examination of Lambodar and two others is concerned it is established by the evidence on record that the village was a faction ridden one. In some cases persons may not like to come and depose as witnesses and H in some other cases the prosecution may carry the impression that their

evidence would not help it as there is likelihood of partisan approach so far as one of the parties is concerned. In such a case mere non examination would not effect the prosecution version. But at the same time if the relatives or interested witnesses are examined, the Court has a duty to analyse the evidence with deeper scrutiny and then come to a conclusion as to whether it has a ring of truth or there is reason for holding that the evidence was biased. Whenever a plea is taken that the witness is partisan or had any hostility towards the accused foundation for the same has to be laid. If the materials show that there is partisan approach, as indicated above the Court has to analyse the evidence with care and caution. Additionally, the accused persons have always the option of examining the left out persons as defence witnesses.

In *Ram Avtar Rai and Ors.* v. *State of Uttar Pradesh,* AIR (1985) SC 880, *Harpal Singh* v. *Devinder Singh and Anr.,* [1997] 6 SCC 660 and *Gopi Nath @ Jhallar* v. *State of U.P.*, [2001] 6 SCC 620 these aspects have been elaborately dealt with. Here again the High Court has erroneously drawn adverse inference.

So far as the alleged variance between medical evidence and ocular evidence is concerned it is trite law that oral evidence has to get primacy and medical evidence is basically opinionative. It is only when the medical evidence specifically rules out the injury as claimed to have been inflicted as per the oral testimony, then only in a given case the Court has to draw adverse inference.

The High Court has thus knocked out an eyewitness on the strength of an uncanny opinion expressed by a medical witness. Over dependence on such opinion evidence, even if the witness is an expert in the field, to checkmate the direct testimony given by an eyewitness is not a safe modus adoptable in criminal cases. It has now become axiomatic that medical evidence can be used to repel the testimony of eyewitnesses only if it is so conclusive as to rule out even the possibility of the eyewitness's version to be true. A doctor usually confronted with such questions regarding different possibilities or probabilities of causing those injuries or post-mortem features which he noticed in the medical report may express his views one way or the other depending upon the manner the question was asked. But the answers given by the witness to such questions need not become the last word on such possibilities. After all he gives only his opinion regarding such questions. But to discard the testimony of an eyewitness simply on the strength of such

A opinion expressed by the medical witness is not conducive to the administration of criminal justice.

Similar view has also been expressed in *Mange* v. *State of Haryana,* [1979] 4 SCC 349, *State of U.P.* v. *Krishna Gopal and Anr.*, AIR (1988) SC 2154; *Ram Dev and Anr.* v. *State of U.P.*, [1995] Supp. 1 SCC 547 and *State* B *of U.P.* v. *Harban Sahai and Ors.*, (1998] 6 SCC 50.

Even otherwise, the medical evidence may be at variance so far as alleged assault by accused Prabhu Nath Jha is concerned. But there is no variance pointed out by the High Court so far as others are concerned. Therefore, there is no supportable foundation for holding that there was C concoction. Accused Prabhu even otherwise can be held guilty by application of Section 34 IPC. Though there was no charge framed for an offence under Section 302 read with Section 34, the evidence on record clearly brings out application of Section 34 and as was observed by this Court in *Lallan Rai and Ors.* v. *State of Bihar,* [2003] 1 SCC 268 Section 34 can be applied if D the evidence of the eyewitnesses clearly establishes the role played by the concerned accused.

There is no embargo on the appellate Court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the E accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of F the Court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate Court to re-appreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not. [See *Bhagwan* G *Singh and Ors.* v. *State of Madhya Pradesh,* [2002] 2 Supreme 567]. The principle to be followed by appellate Court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable and relevant and convincing materials have been unjustifiably eliminated in the process, it is a compelling reason for interference. These H

aspects were highlighted by this Court in *Shivaji Sahabrao Bobade and Anr.* v. *State of Maharashtra,* [1973] 3 SCC 193, *Ramesh Babulal Doshi* v. *State of Gujarat,* (1996) 4 Supreme 167, *Jaswant Singh* v. *State of Haryana,* [2000] 3 Supreme 320, *Raj Kishore Jha* v. *State of Bihar and Ors.,* [2003] 7 Supreme 152), *State of Punjab* v. *Karnail Singh,* [2003] 5 Supreme 508 and *State of Punjab* v. *Pohla Singh and Anr.,* [2003] 7 Supreme 17.

The inevitable conclusion because of the factual and legal panorama noted above is that the High Court was not justified in directing acquittal. The same is set aside. Respondents are convicted under Section 302 read with Section 34 IPC and are sentenced to undergo imprisonment for life. As they are on bail, they shall surrender forthwith to suffer remainder of the sentence. The appeals are allowed in the aforesaid terms.

A.K.T. Appeals allowed.