CHANAKYA DHIBAR (DEAD) A

v.

STATE OF WEST BENGAL AND ORS.

DECEMBER 19, 2003

[DORAISWAMY RAJU AND ARIJIT PASAYAT, JJ.] B

Penal Code, 1860 :

Sections 148, 304 Part I r/w Section 149—Death caused—Assault by five accused—Witnessed by two eye-witnesses—One of them independent C *witness—Conviction by trial court—Acquittal by High Court disbelieving the witnesses—On appeal, held: Acquittal not justified—High Court's judgment was based on surmises and conjectures and not on analysis of evidence—Conclusions of High Court is contrary to records of the case.*

Section 149—Common object—Scope of—Discussed—Section 141. D

'Common object' and 'Common intention'—Distinction between.

Criminal Trial :

E

Chance witness—Reliability on—Held: Evidence of such witness cannot be brushed aside or viewed with suspicion—In a murder trial evidence of an independent witness cannot be discarded describing it as chance witness.

F

Constitution of India, 1950—Article 136—Special Leave Petition—Scope of interference with order of acquittal—Held : Generally such order should not be interfered with—However, interference permissible when the order is unreasonable and relevant and convincing materials have been unjustifiably eliminated.

G

Five respondents-accused were charged for having assaulted a person severely and causing his death. PW-3 who was accompanying the deceased saw the assault and fearing attack on him ran away and informed the family members of the deceased i.e. his brother and his wife (PW-2) who took the deceased to the hospital. The incident was H

A also seen by a rickshaw puller (PW-5). In the FIR names of the five respondents-accused were indicated. Trial Court held the accused guilty of offences punishable under Sections 148 and 304 Part I read with Section 149 IPC.

B On appeal, High Court held that the two eyewitnesses were not truthful witnesses; that PW-3 could not have seen the occurrence as he had fled away from the spot; that his conduct of not lodging the information and going to the house of the deceased and his not accompanying the deceased to the hospital raises suspicion; that suspicion for the occurrence could be raised against PW-3 who was C companion of the deceased and was partner in his business; that PW-5 could not have seen the occurrence being far away from the place; that he also could not be relied on as his antecedents were not clear; that he appeared to be tutored witness; and that there could have been temple goers on the road who would have seen the occurrence. Hence D accused were acquitted.

In appeal to this Court, respondent-accused contended that evidence of PWs 3 and 5 show that they could not have seen the occurrence as claimed; that evidence of PW5 could not have been acted upon as he was only a chance witness; that FIR did not have detail E as to respective roles played by the accused persons; evidence is not sufficient to bring in application of Section 149 IPC; and that in an appeal against acquittal jurisdiction under Article 136 of the Constitution of India cannot be exercised.

F Allowing the appeal, the Court

HELD : 1.1. High Court was wrong in holding the accused persons to be not guilty. High Court's judgment is based more on surmises and conjectures than making an attempt to analyse the evidence. Some of the conclusions are contrary to record. All the accused persons were G armed. Their conduct before, during and after the occurrence clearly brings about the object. The assembly was patently unlawful. It is inconceivable that persons armed would surround the persons without any criminal object in mind. Mere fact that only one of them used the weapon does not really rule out application of Section 149 IPC. It cannot H be said that since definite roles have not been ascribed to the accused

and, Section 149 is not applicable. In view of definition of "default" as given in Section 351 IPC, it cannot be said that if five persons were really assaulting, the result would not have been only one injury. The trial Court had rightly and in proper legal perspective convicted the accused-respondents under Section 148 and 304 Part I read with Section 149 IPC. [1188-H; 1189-A; 1196-A-C]

Masalti and Ors. v. *State of U.P.*, AIR (1965) SC 202; *Lalji* v. *State of U.P.*, [1989] 1 SCC 437 and *State of U.P.* v. *Dan Singh and Ors.*, [1997] 3 SCC 747, referred to.

1.2. High Court has over-looked the categorical evidence of PW-3, who during cross-examination has stated that after seeing the assault he had run away. High Court has also raised suspicion over PW-3's conduct in not lodging the information first and going to the house of the deceased and not his own house which was nearer. This is of no consequence. The deceased was closely related to him and, therefore, as explained in evidence he thought it proper to inform the relatives of deceased first so that medical treatment could be immediately provided. The most vulnerable conclusion of the High Court relates to its view regarding PW-3 because he claimed to have accompanied the deceased. Such a conclusion borders on absurdity and is without any foundation for such a conclusion. The High Court should not have recorded such a finding. The High Court also doubted PW-3's evidence on the ground that he did not accompany the deceased to the hospital. The witnesses PWs-2 and 3 have categorically stated that PW-2 had seen the deceased in an injured condition and therefore PW-3 accompanied her to the deceased's house when the deceased was shifted to the hospital. [1190-B-F]

1.3. There was no delay in lodging FIR. There was no evidence to show that the temple goers were passing on the roads. The hypothetical conclusion of the High Court that people must be passing, is without any foundation. [1190-C-D]

1.4. The evidence of PW-5 has been disbelieved on the ground that he could not have possibly seen the occurrence being far away from the road where he claimed to be sitting. The evidence on record shows that the distance is even less than 10 yards. The evidence of PW-5 has

A also been discarded because of his antecedents. When the evidence has been analysed carefully by the trial Court to find that he is a truthful witness, his antecedents should not have weighed with the High Court to completely discard his evidence. There is also no material to support the conclusion of the High Court that he was a tutored witness. PW-5 was an independent witness. There was not even a suggestion to the witness that he had any animosity towards any of the accused. In a murder trial by describing the independent witnesses as 'chance witnesses', it cannot be implied thereby that their evidence is suspicious and their presence at the scene doubtful. If murder is committed in a street, only passersby will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere "chance witnesses". The expression "chance witnesses" is borrowed from countries where every man's home is considered his castle and everyone must have an explanation for his presence elsewhere or in another man's castle. It is quite unsuitable an expression in a country where people are less formal and more casual.

[1189-G-H; 1190-D-E; 1194-G-H; 1195-A-B]

2.1. The emphasis in Section 149 IPC is on the common object and not on common intention. Mere presence in an unlawful assembly cannot render a person liable unless there was a common object and he was actuated by that common object and that object is one of those set out in Section 141 IPC. Where common object of an unlawful assembly is not proved, the accused persons cannot be convicted with the help of Section 149. [1190-H; 1191-A]

2.2. The word 'object' means the purpose or design and, in order to make it 'common', it must be shared by all. A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. The expression 'in prosecution of common object' as appearing in Section 149 have to be strictly construed as equivalent to 'in order to attain the common object'. It must be immediately connected with the common object by virtue of the nature of the object. [1191-C-F]

2.3. 'Common object' is different from a 'common intention' as it

does not require a prior concert and a common meeting of minds before the attack. It is enough if each has the same object in view and their number is five or more and that they act as an assembly to achieve that object. The 'common object' of an assembly is to be ascertained from the acts and language of the members composing it, and from a consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined. It is not necessary under law that in all cases of unlawful assembly, with an unlawful common object, the same must be translated into action or be successful. The time of forming an unlawful intent is not material. An assembly which, at its commencement or even for some time thereafter, is lawful, may subsequently become unlawful. [1191-H; 1192-A-D]

2.4. Section 149, IPC consists of two parts. In order that the offence may fall within the first part, the offence must be connected immediately with the common object of the unlawful assembly of which the accused was member. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 141, if it can be held that the offence was such as the members knew was likely to be committed and this is what is required in the second part of the Section. The distinction between the two parts of Section 149 cannot be ignored or obliterated. In every case it would be an issue to be determined, whether the offence committed falls within the first part or it was an offence such as the members of the assembly knew to be likely to be committed in prosecution of the common object and falls within the second part. However, there may be cases which would be within first, offences committed in prosecution of the common object, but would be generally, if not always with the second, namely, offences which the parties knew to be likely committed in the prosecution of the common object. [1193-C-E; 1192-D-F]

Chikkarange Gowda and Others **v.** *State of Mysore,* **AIR (1956) SC 731, referred to.**

3.1. 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 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 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 where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused really committed any offence or not. The principle to be followed by appellate Court considering the appeal against the judgment of acquittal is to interfere only when there are compelling the 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. [1195-C-G]

Shivaji Sahabrao Bobade and Anr. **v.** *State of Maharashtra,* **AIR (1973) SC 2622;** *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;** *State of Punjab* **v.** *Pohla Singh and Anr.,* **(2003) 7 Supreme 17 and** *Suchand Pal* **v.** *Phani Pal and Anr.,* **JT (2003) 9 SC 17, relied on.**

Bhagwan Singh and Ors. **v.** *State of Madhya Pradesh,* **(2002) 2 Supreme 567, referred to.**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 728 of 1997.

From the Judgment and Order dated 19.3.97 of the Calcutta High Court in Crl. A. No. 406 of 1988.

Ranjit Kumar, Aseem Mehrotra for A.P. Medh for the Appellant.

U.R. Lalit, Ranjan Mukherjee, Satish Vig, Siddharth Dave, Ms. Radha Rangaswamy and Tara Chandra Sharma for the Respondents.

The judgment of the Court was delivered by

ARIJIT PASAYAT, J. : The informant has filed this appeal questioning judgment of acquittal rendered by a learned Single Judge of the Calcutta High Court acquitting five respondents (hereinafter referred to as the 'accused' by their respective names). Since he has died during the pendency of the appeal, an application for substitution by his legal representatives has been filed which is allowed.

The trial Court found the respondents guilty of offences punishable under Sections 148 and 304 Part I read with Section 149 of the Indian Penal Code, 1860 (in short the 'IPC'). Law was set in motion by PW-1 (Chanakya) on the accusation that Jaba Dhibar (hereinafter referred to as the 'deceased') was assaulted severely by five respondents on the date of occurrence i.e. on 16.9.1985 at about 9.45 p.m. Naran Dhibar (PW-3) who was accompanying him saw the assault by accused Mana Bhattacharjee and fearing assaults on him ran away and informed the family members of the deceased. On hearing about the assaults, the informant, his elder brother Naran and Sandhya, wife of the deceased (PW-2) went to the spot. When they arrived there finding the deceased with bleeding injuries, took him to the Bankura hospital on police jeep. Apart from PW-3, a rickshaw puller Pradip Das (PW-5) was examined to show that he has seen the deceased being surrounded by accused persons and assaulted him. The first information report was lodged at about 10.25 p.m. in which the names of the five respondents were indicated. Sub-Inspector (PW-9) attached to the Bankura Police Station took up investigation. The doctor (PW-4) who examined the deceased found a sharp cut injury on top of the deceased's skull. He was attended to by other doctor (PW-15). He continued to be under treatment till 13.10.1985 when he was shifted to S.S.K.M. hospital, Calcutta and ultimately he breathed his last on 8.11.1985. Post mortem was conducted by PW-18 who opined that the death was due to septicemia. The injury was, according to him, sufficient in the ordinary course of nature to cause death and that it was homicidal. After completion of investigation, charge sheet was placed for commission of offence punishable under Sections 147, 148, 304 read with Section 149 IPC. Charges were framed under Sections 148 and 304 Part I read with Section 149 IPC. Accused

A persons pleaded innocence. According to the defence plea as evident from the cross examination of prosecution witnesses and statement of the accused persons recorded under Section 313 of the Code of Criminal Procedure, 1973 (in short the 'Code') the accused persons were falsely implicated out of grudge. People of Pathakpara locality made attempts to
B evict the prostitutes from the locality in between Pathakpara and Keotpara, which was strongly opposed by Chanakya (PW-1).

After considering the evidence on record, the trial Court held that accused persons were guilty of offence punishable under Sections 148 and 304 Part I read with Section 149 IPC. Each of the accused was sentenced
C to undergo rigorous imprisonment for seven years and to pay a fine of Rs.1,000 with default stipulation so far as offence punishable under Section 304 Part I read with Section 149 IPC and two years for the offence punishable under Section 148 IPC.

D The convicted accused persons filed appeal before the Calcutta High Court. The High Court by the impugned judgment held that the two witnesses on whose evidence prosecution heavily relied on were not truthful witnesses. It was not explained as to how the accused persons would know the movements of the deceased, when both PWs 1 and 3
E accepted their presence nearby the place of occurrence was not known to anybody. PW-5 could not have also seen the occurrence which was far away from the road. PW-3 could not also have seen the occurrence as he accepted to have run away after the accused persons stabbed the deceased. The inmates of the nearby houses were not examined as prosecution
F witnesses. There must have been temple goers passing along the road. As PW-5 was earlier prosecuted by the police, his antecedents were not very clean and he appeared to be a tutored witness. There is no motive attributed as to why the accused persons would attack the deceased. On the other hand, the needle of suspicion could be raised against Naran Dhibar (PW-3) who was the companion of the deceased and was his partner in the fish
G business. Though the death was due to the injury sustained, yet it has not been proved that the vital injury was caused by the accused persons. Accordingly, the conviction made and sentences imposed were set aside.

In support of the appeal, Mr. Ranjit Kumar, learned senior counsel
H submitted that the High Court's judgment is based more on surmises and

conjectures, than analysing the evidence on record. Even the evidence has not been properly appreciated. Since the judgment of the High Court is bereft of acceptable reasoning, the same is liable to be set aside and the judgment of the trial Court should be restored.

In response, Mr. U.R. Lalit, learned senior counsel for the accused submitted that the view taken by the High Court is a possible view. It is not that the High Court has not analysed the evidence. It has arrived at the right conclusions. The evidence of PWs 3 and 5 clearly show that they could not have seen the occurrence as claimed. PW-3 has accepted that he had run away after the accused had stopped the deceased. The first information report does not detail as to the respective roles played by the accused persons. In any event, the evidence is not sufficient to bring in application of Section 149 IPC. There is no sound reasoning indicated to hold that there was any unlawful assembly which is a *sine qua non* for the application of Section 149. The identification as claimed by PWs 3 and 5 is improbabilised by the evidence of the Investigating Officer. He clearly stated that he had not mentioned anything about the street light or the torch light claimed to have been carried by PW-3 in the case diary. PW-5's presence at the spot of occurrence has also not been explained and he at the most is a chance witness and, therefore, his evidence could not have been acted upon.

In essence, it was submitted that in an appeal against acquittal the jurisdiction under Article 136 of the Constitution of India, 1950 (in short the 'Constitution') should not be exercised. Learned counsel for the State of West Bengal supported the stand taken by the informant-appellant.

A bare perusal of the High Court's judgment shows that the same is based more on surmises and conjectures than making an attempt to analyse the evidence. Some of the conclusions as rightly submitted by learned counsel for the appellant are contrary to record. The evidence of PW-5 has been disbelieved on the ground that he could not have possibly seen the occurrence being far away from the road where he claimed to be sitting. The evidence on record shows that the distance is even less than 10 yards. Another factor which seems to have weighed with the High Court is the statement of PW-3 that he had taken to his heels after the accused persons stopped the deceased. The High Court has clearly over-looked the categori-

A cal evidence of PW-3, who during cross examination has stated that after seeing the assault he had run away. The statement to the effect that he ran away after the accused persons stopped the deceased is to be read along with other parts of the evidence and not in an isolated way. The statement made in the cross examination to the effect that he ran away after seeing
B the assaults is significant. The High Court has also raised suspicion over PW-3's conduct in not lodging the information first and going to the house of the deceased and not his own house which was nearer. This according to us is really of no consequence. The deceased was closely related to him and, therefore, as explained in evidence he thought it proper to inform the relatives of deceased first so that medical treatment could be immediately
C provided. There was also no delay in lodging the FIR. The occurrence took place at about 9.45 p.m. and the information with the police was lodged at about 10.15 p.m. There was no evidence to show that the temple goers were passing on the roads. The hypothetical conclusion of the High Court that people must be passing is without any foundation. The evidence of
D PW-5 has been discarded because of his antecedents. When the evidence has been analysed carefully by the trial Court to find that he is a truthful witness, his antecedents should not have weighed with the High Court to completely discard his evidence. There is also no material to support the conclusion of the High Court that he was a tutored witness. The most
E vulnerable conclusion of the High Court relates to its view regarding PW-3 because he claimed to have accompanied the deceased. Such a conclusion to say the least borders on absurdity and is without any foundation for such a conclusion. The High Court should not have recorded such a finding. The High Court also doubted PW-3's evidence on the ground that he did not accompany the deceased to the hospital. The witnesses PW-2 and PW-
F 3 have categorically stated that PW-2 had seen the deceased in an injured condition and therefore PW-3 accompanied her to the deceased's house when the deceased was shifted to the hospital.

In view of the aforesaid position, clearly the High Court was wrong
G in holding the accused persons to be not guilty.

However, one plea which was urged with some amount of vehemence was the applicability of Section 149 IPC.

The emphasis in Section 149 IPC is on the common object and not
H on common intention. Mere presence in an unlawful assembly cannot

render a person liable unless there was a common object and he was actuated by that common object and that object is one of those set out in Section 141. Where common object of an unlawful assembly is not proved, the accused persons cannot be convicted with the help of Section 149. The crucial question to determine is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects, as specified in Section 141. It cannot be laid down as a general proposition of law that unless an overt act is proved against a person, who is alleged to be a member of unlawful assembly, it cannot be said that he is a member of an assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of Section 141. The word 'object' means the purpose or design and, in order to make it 'common', it must be shared by all. In other words, the object should be common to the persons, who compose the assembly, that is to say, they should all be aware of it and concur in it. A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. The expression 'in prosecution of common object' as appearing in Section 149 have to be strictly construed as equivalent to 'in order to attain the common object'. It must be immediately connected with the common object by virtue of the nature of the object. There must be community of object and the object may exist only up to a particular stage, and not thereafter. Members of an unlawful assembly may have community of object up to certain point beyond which they may differ in their objects and the knowledge, possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence of this the effect of Section 149, IPC may be different on different members of the same assembly.

'Common object' is different from a 'common intention' as it does not require a prior concert and a common meeting of minds before the attack. It is enough if each has the same object in view and their number

A is five or more and that they act as an assembly to achieve that object. The 'common object' of an assembly is to be ascertained from the acts and language of the members composing it, and from a consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. What the common object of the B unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms carried by the members, and the behaviour of the members at or near the scene of the incident. It is not necessary under law that in all cases of unlawful assembly, with an unlawful common object, the same must be translated into action or be successful. Under the C Explanation to Section 141, an assembly which was not unlawful when it was assembled, may subsequently become unlawful. It is not necessary that the intention or the purpose, which is necessary to render an assembly an unlawful one comes into existence at the outset. The time of forming an unlawful intent is not material. An assembly which, at its commence- D ment or even for some time thereafter, is lawful, may subsequently become unlawful. In other words it can develop during the course of incident at the *spot co instanti.*

Section 149, IPC consists of two parts. The first part of the section E means that the offence to be committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. In order that the offence may fall within the first part, the offence must be connected immediately with the common object of the unlawful assembly of which the accused was member. Even if the offence committed is not in direct prosecution of the common object of the F assembly, it may yet fall under Section 141, if it can be held that the offence was such as the members knew was likely to be committed and this is what is required in the second part of the section. The purpose for which the members of the assembly set out or desired to achieve is the object. If the object desired by all the members is the same, the knowledge that is G the object which is being pursued is shared by all the members and they are in general agreement as to how it is to be achieved and that is now the common object of the assembly. An object is entertained in the human mind, and it being merely a mental attitude, no direct evidence can be available and, like intention, has generally to be gathered from the act H which the person commits and the result therefrom. Though no hard and

fast rule can be laid down under the circumstances from which the common object can be culled out, it may reasonably be collected from the nature of the assembly, arms it carries and behaviour at or before or after the scene of incident. The word 'knew' used in the second branch of the section implies something more than a possibility and it cannot be made to bear the sense of 'might have been known'. Positive knowledge is necessary. When an offence is committed in prosecution of the common object, it would generally be an offence which the members of the unlawful assembly knew was likely to be committed in prosecution of the common object. That, however, does not make the converse proposition true; there may be cases which would come within the second part but not within the first part. The distinction between the two parts of Section 149 cannot be ignored or obliterated. In every case it would be an issue to be determined, whether the offence committed falls within the first part or it was an offence such as the members of the assembly knew to be likely to be committed in prosecution of the common object and falls within the second part. However, there may be cases which would be within first offences committed in prosecution of the common object, but would be generally, if not always, with the second, namely, offences which the parties knew to be likely committed in the prosecution of the common object. [See *Chikkarange Gowda and Others* v. *State of Mysore,* AIR (1956) SC 731.]

The other plea that definite roles have not been ascribed to the accused and, therefore, Section 149 is not applicable, is untenable. A 4-Judge Bench of this Court in *Masalti and Ors.* v. *State of U.P.,* AIR (1965) SC 202 observed as follows:

> "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."

To similar effect is the observation in *Lalji* v. *State of U.P.*, [1989] 1 SCC 437. It was observed that:

"Common object of the unlawful assembly can be gathered from the nature of the assembly, arms used by them and the behaviour of the assembly at or before the scene of occurrence. It is an inference to be deduced from the facts and circumstances of each case."

In *State of U.P.* v. *Dan Singh and Ors.*, [1997] 3 SCC 747 it was observed that it is not necessary for the prosecution to prove which of the members of the unlawful assembly did which or what act. Reference was made to *Lalji's* case (supra) where it was observed that "while overt act and active participation may indicate common intention of the person perpetrating the crime, the mere presence in the unlawful assembly may fasten vicariously criminal liability under Section 149".

Coming to the plea of the accused that PW-5 was 'chance witness' who has not explained how he happened to be at the alleged place of occurrence it has to be noted that the said witness was an independent witness. There was not even a suggestion to the witness that he had any animosity towards any of the accused. In a murder trial by describing the independent witnesses as 'chance witnesses' it cannot be implied thereby that their evidence is suspicious and their presence at the scene doubtful. Murders are not committed with previous notice to witnesses; soliciting their

presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a street, only passersby will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere 'chance witnesses'. The expression 'chance witness' is borrowed from countries where every man's home is considered his castle and everyone must have an explanation for his presence elsewhere or in another man's castle. It is quite unsuitable an expression in a country where people are less formal and more casual.

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 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 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-appraciate the evidence where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused really committed any offence or not. [See *Bhagwan 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 aspects were highlighted by this Court in *Shivaji Sahabrao Bobade and Anr.* v. *State of Maharashtra,* AIR (1973) SC 2622, *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 and *Suchand Pal* v. *Phani Pal and Anr.,* JT (2003) 9 SC 17.

A All the accused persons were armed. Their conduct before, during and after the occurrence clearly brings about the object. The assembly was patently unlawful. It is inconceivable that persons armed would surround the persons without any criminal object in mind. Mere fact that only one of them used the weapon does not really rule out application of Section B 149 IPC. Learned counsel for the accused persons submitted that contrary to the evidence of PWs 3 and 5 there was only one injury found by the doctor. PWs 3 and 5 have stated about assaults and if five persons were really assaulting the result would not have been only one injury. The definition of "assault" as given in Section 351 IPC makes the plea unacceptable. The trial Court had rightly and in proper legal perspective C convicted the accused-respondents under Section 148 and 304 Part I read with Section 149 IPC. The High Court's judgment suffers from serious infirmities making it indefensible and is therefore, set aside. The judgment of the trial Court recording conviction and imposing sentences is restored. The appeal is allowed.

D

K.K.T. Appeal allowed.