GANESH SHAMRAO ANDEKAR & ANR. A

v.

STATE OF MAHARASHTRA

(Criminal Appeal No. 547 of 2007)

MARCH 30, 2017 B

[R. F. NARIMAN AND PRAFULLA C. PANT, JJ.]

Penal Code, 1860 – s.302 r/w s.34 – Murder – Appeal against the acquittal by trial court – Scope for interference – Appellants and victim-deceased were neighbours – There was enmity between C *them – Prosecution case that after a heated exchange, appellants chased down the deceased and assaulted him with weapons – When accused were chasing deceased, his wife (PW-13) and daughter (PW-2) had followed them and had witnessed the assault – PW-2 took deceased to the hospital where he succumbed to the injuries – Trial court acquitted all the accused – High Court, however,* D *convicted the appellants and two others u/s.302 r/w s.34 IPC – On appeal, held: **Per Prafulla C. Pant, J.**: Both PW-2 and PW-13 had described the blows inflicted in their presence, when they reached the spot and their conduct following the deceased was natural – Truthfulness of fact that deceased was taken to hospital by PW-2 is* E *corroborated from the evidence on record of PW-3, autorickshaw driver who took deceased to the hospital and same cannot be doubted only for reason that name mentioned in hospital records was of different person and not of PW-2 – Further, FIR was prompt – PW-2 and PW-13 stated that appellant had inflicted blow in groin area but there was no injury on the said part of body, however,* F *same not a reason to disbelieve the statements since a living human being is not expected to remain motionless while being inflicted with blow after blows – Further, ocular evidence of the two witnesses corroborated from the same blood group found on stained clothes, earth sample and weapons recovered from appellants – Therefore,* G *no error of law committed by High Court – **Per R.F. Nariman, J.**: When an order of acquittal is appealed against, it can only be interfered with when order of trial court is unreasonable, palpably wrong or demonstrably unsustainable – In the instant case, order of trial court does not fall in any of these categories – Hospital record shows that deceased was brought to Hospital by one 'R' and* H

A *not PW-2, who was not examined by the prosecution – PW-3 has been disbelieved both by the trial court and the High Court, but was a key witness on behalf of prosecution and his version destroys the version of two interested eye-witnesses PW-2 and PW-13 inasmuch as he specifically states that neither witness was present at the spot*
B *when actual assault leading to murder took place – High Court wrongly states that mentioning of injury at the iliac region of deceased give strong credence to story of PW-2, here again, iliac region being region at the backside, there is, in fact, no injury near groin – Insofar as blood group is concerned, blood group of both the appellants and of deceased is of same group 'B', so it would not*
C *necessarily lead to the conclusion that the appellants were there, given the fact that blood of deceased is also of group 'B', in any case, this factor cannot alone outweigh other factors pointed out by trial court – Thus, for all these reasons the judgment of High Court reversed and both appellants-accused acquitted.*

D **Referring the matter to CJI, to constitute an appropriate bench, the Court**

Per Prafulla C. Pant, J.:

HELD: 1. There is no doubt, normally, where the trial court has acquitted the accused on the ground that charge stood not
E **proved on the basis of evidence on record, and such view is reasonable, the High Court should not interfere with the same. However, such general rule cannot be extended against the spirit of clause (a) of Section 386 of Code of Criminal Procedure, 1973 which empowers the appellate court to reverse the order of acquittal, and pass sentence on him in accordance with law. [Para**
F **11] [286-B-C]**

2. In the present case the High Court has given categorical finding that the finding arrived at by the trial court was perverse, as such, it cannot be said that the High Court could not have taken the view supported by evidence on record. [Para 14] [288-
G **D]**

3. So far as believing the testimony of PW-2 (daughter of the deceased) and PW-13 (widow of the deceased) is concerned, the same cannot be doubted by presuming that being women they could not have followed the deceased who was running to save his life from the accused. Both the witnesses are adults, one aged
H **twenty three years and another aged forty years. The two**

witnesses have only described the blows inflicted in their presence on the body of the deceased after they reached at the spot. It cannot be ignored that there are nine incised wounds and only the incised wounds given in the presence of the eye witnesses by the two appellants have been narrated by them. It was a day light incident in which quarrel started in front of the house of the deceased and the presence of the two eye witnesses who are family members of the deceased was natural, and their conduct in following the deceased and accused is also natural. [Para 15] [288-E-G]

4. As to the truthfulness of the fact that the deceased was taken in the injured condition by PW-2 to hospital, the same cannot be doubted only for the reason that name of one 'R' is mentioned in the hospital as a person who got admitted the injured. The fact relating to taking deceased to hospital by PW-2 is corroborated from the evidence on record of PW-3, Autorickshawala. In the present case the First Information Report is prompt and even the post mortem has been conducted on the same day after investigation started. Keeping these facts in mind, who got the deceased admitted is not of much relevance.[Para 17] [289-B-D]

5. There is no reason to disbelieve the statement of PWs 2 and 13 on the ground that while they stated that the appellant inflicted blow in the groin area but there is no injury on the said part of the body of the deceased. This is for the reason that a living human being is not to remain motionless while being inflicted with blow after blow. If the injury is near thigh or on the iliac crest, instead of groin area, this is not sufficient to hold that the testimony of the witnesses is false. Also, the ocular evidence of PW 2 and PW 13 is further corroborated with the report received from the Forensic Science Laboratory regarding the blood group 'B+' found on the blood stained clothes and earth sample collected. The same blood group was found on the blood stained weapons recovered on disclosure made by the appellants. [Para 18] [289-E-G]

Manu Sharma v. State of Delhi (2010) 6 SCC 1 : [2010] 4 SCR 103; *Bhagwan Singh and Others v. State of M.P.* (2002) 4 SCC 85 – relied on.

Murugesan v. State (2012) 10 SCC 383 : [2012] 13 SCR 1; *State of Punjab v. Karnail Singh* (2003) 11 SCC

271 : [2003] 2 Suppl. SCR 593 – referred to.

Case Law Reference

[2010] 4 SCR 103	relied on	Para 11
[2012] 13 SCR 1	referred to	Para 12
(2002) 4 SCC 85	relied on	Para 13
[2003] 2 Suppl. SCR 593	referred to	Para 16

Per R. F. Nariman, J. (dissenting):

HELD: 1. The High Court, in its judgment reversing the trial court, has held that even if PW-3 is not found trustworthy, the court cannot throw out the entire prosecution case. However, PW-3 is a key prosecution witness. As he is a witness relied upon by the prosecution, his version destroys the version of the two interested eye-witnesses PW-2 and PW-13 inasmuch as he specifically states that neither was present at the spot when the actual assault leading to murder took place. [Para 5] [291-H; 292-A-B]

2. The High Court also wrongly states that mentioning of an injury at the iliac region of victim's body gives strong credence to the story of PW-2, which, according to the High Court, is an injury near the groin. The High Court states that if PW-2 had not witnessed the incident, she would not be in a position to speak about this particular injury. Here again, the iliac region being a region at the backside, obviously, there is, in fact, no injury near the groin. [Para 6] [292-B-C]

3. Turning to the fact that 'R' is mentioned as the person who brought the deceased to the hospital in the hospital register, the High Court only states that it does not find any substance in this contention because PW-2 and PW-13 are eye-witnesses. This does not answer unimpeachable documentary evidence in the form of the hospital register entry, or the fact that 'R' was not examined by the prosecution. [Para 7] [292-D]

4. On not sustaining abrasions on PW-2's legs and hands, the High Court only says witnesses do make exaggerations in such cases but that cannot be a reason to disregard and disbelieve their entire story. This again is hardly the way in which to deal with an appeal against acquittal, where, unless perverse, the trial court judgment ought not to be interfered with.[Para 8][292-E-F]

5. After going into the evidence of PW-13, who stated that one 'S' was present at the time of the assault, the High Court adverts to the fact that 'S', though an independent eye-witness, turned hostile, but gives no importance to this fact. [Para 9] [292-F-G]

6. The High Court referred to the Chemical Examiner's Report in which it was stated that the blood group of deceased is 'B' and the blood group of Appellant No.1 and Appellant No.2 is also 'B'. If that is so, the fact that the earth, PW-2 clothes, T-shirt and lungi, and weapons all have blood group 'B', would not necessarily lead to the conclusion that the blood of appellants happens to be there given the fact that deceased-victim's blood was also of blood group 'B'. In any case, this factor alone cannot outweigh all the other factors pointed out by the trial court. [Para 11] [293-B-C]

7. In any case, no active and specific role has been assigned to appellant no.2 in the murder of deceased. Given the fact that the FIR and the evidence of PW-2 to 13 (even as found by the High Court) contains many incorrect facts (for example, 6 ladies who were acquitted are also sought to be roped in), and given the fact that there is enmity between the deceased-victim's family and the accused, it is reasonable to say that, in any case, Appellant No.2 should be given the benefit of doubt. [Para 13] [293-E-G]

8. When an order of acquittal is appealed against, it can only be interfered with when there are compelling and substantial reasons for doing so and if it is found that the trial court order is clearly unreasonable, palpably wrong, manifestly erroneous, or demonstrably unsustainable. The trial court order did not fall in any of these categories and the High Court in convicting the appellants and reversing a well reasoned order of acquittal, has committed a grave error. [Para 12] [293-D-E]

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 547 of 2007.

From the Judgment and Order dated 20.02.2007 of the High Court of Judicature at Bombay in Criminal Appeal No. 643 of 1989.

U. R. Lalit, Sr. Adv., Santosh Kumar, Mehul Sharma, Rajiv Ranjan Mishra, V. Sushant Gupta, Mushtaq Ahmad, Advs. for the Appellants.

Sushil Karanjkar, Nishant Ramakantrao Katneshwarkar, Advs. for the Respondent.

A The Judgments of the Court were delivered by

PRAFULLA C. PANT, J. 1. This Appeal is directed against the judgment and order dated 20th February, 2007 passed by High Court of judicature at Bombay, whereby Criminal Appeal No. 643 of 1989 filed by the respondent-State was allowed, and the appellants are convicted
B under Section 302 read with Section 34 of Indian Penal Code (for brevity "I.P.C."), and each one of them has been sentenced to imprisonment for life and to pay fine of ₹ 5,000/- in default of payment of which the defaulter convict is directed to undergo further imprisonment for a period of one year.

C 2. Prosecution story, in brief, is that appellant no. 2 and deceased were neighbours and they used to live with their families in Guruwar Peth, Pune. There was enmity between the two families. Earlier also a criminal case was filed against accused Shamrao Andekar (since died) and his brothers when an attempt was made to commit murder of Raghunath (deceased in the present case). In this background, the incident
D in question is said to have taken place. It is stated in the First Information Report (Exh.-38) that on 14.10.1986 at about 3.00 p.m., Raghunath was taking rest on a cot outside of his door when accused Shamrao Andekar came in a drunken condition and started hurling filthy abuses at him. The deceased objected to the behavior of the said accused, and heated
E exchange of words started between the two. Meanwhile, appellants Ganesh Andekar and Avinash Andekar (both sons of Shamrao Andekar) and others also reached there. They were armed with weapons and attempted to assault the deceased. On this, Raghunath started running to save his life and was chased by the accused persons. They succeeded in catching Raghunath in Gadikhana Chowk near Rajesh Boarding House.
F When the accused chased the deceased, PW-2 Rohini (daughter of the deceased), and PW-13 Shakuntala (wife of the deceased) followed them. Ganesh Andekar (appellant no. 1) stabbed the deceased on his stomach. Appellant no. 2 Avinash Andekar gave a blow with 'Gupti' (pointed sharp edged weapon) near groin area of the deceased. Accused Vijay
G Ramchandra Yadav (since died), who was armed with sword, and other accused also allegedly assaulted the deceased. PW-2 Rohini in an attempt to save her father fell on him but she was pushed aside. When the accused left Raghunath (believing him to have died), Rohini took her father in an Auto rickshaw to Sassoon Hospital, Pune, in the injured condition. According to prosecution, PW-3 Suresh Chavan was the Auto
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rickshawala who helped in taking the injured to hospital. PW-16 Dr. Shivram Waghmare gave medical aid to the injured who succumbed to injuries at about 4.40 p.m. A report (Exh. 38) of the incident was given by PW-2 Rohini at Police Outpost, Mithi Ganj against the four appellants and others which included their family members. The said report was forwarded from Outpost Mithi Ganj to Police Station, Khadak, and a Crime No. 265 of 1986 was registered relating to offences punishable under Sections 143, 147, 148, 149, 302 read with Section 34 and 426 of I.P.C., on the same day at 6.30 p.m.

3. PW-19 Suresh Suresh Kulkarni investigated the crime. He got inquest report prepared through Sub-Inspector Lonakar. Autopsy on the dead body was conducted by PW-18 Dr. Laxman Pherwani on the very day i.e. 14.10.1986 from 9.15 p.m. to 10.15 p.m. He prepared Post Mortem Examination Report (Exh.70). On completion of investigation, the Investigating Officer submitted charge-sheet against fifteen accused, namely, Ganesh Andekar, Shamrao Andekar, Avinash Andekar, Dinesh Andekar, Vijay Ramchandra Yadav, Bhau Mohol, Vinayak Kadam, Shekhar Vardekar, Sathyabhama Vardekar, Laxmi Indapurkar, Rukmini Indapurkar, Kaml Andekar, Sangita Vardekar, Pushpa Andekar and Gopinath Mane.

4. The case appears to have been committed by the Magistrate to Court of Session for trial after giving necessary copies to the accused. On 26.04.1988, Additional Sessions Judge, Pune, after hearing the parties framed charge in respect of offence punishable under Sections 147, 148, 149, 302 read with Section 34 and under Section 201 I.P.C. against all the 15 accused named above who pleaded not guilty and claimed to be tried. On this, prosecution got examined PW-1 Ravindra, PW-2 Rohini (informant and eye witness), PW-3 Suresh (auto rickshaw wala-eye witness), PW-4 Surkakant, PW-5 Iqbal Ahmed , PW-6 Shivaji Jagtap, PW-7 Sudhakar Pardeshi, PW-8 Sandip Valsangkar, PW-9 Rajendra Lohokare, PW-10 Vikas Pawar, PW-11 Malhari Bhise, PW-12 Rangnath Jagtap, PW-13 Shakuntala (widow of the deceased and eye wintness), PW-14 Arun Jadhav, PW-15 Murlidhar Wadkar, PW-16 Dr. Shivram Waghmare, PW-17 Sunil Jagdale, PW-18 Dr. Laxman Pherwani and PW-19 Suresh Kulkarni (Investigation Officer). The evidence was put to the accused persons under Section 313 of Cr.P.C. whereafter, in defence, DW-1 Rajnikant Nikam (a photographer) was examined on behalf of the defence.

A 5. Learned Additional Sessions Judge, Pune, after considering the evidence on record, found that charge against the accused persons is not proved beyond reasonable doubt, and accordingly acquitted all the fifteen accused vide its judgment and order dated 11.05.1989, passed in Sessions Case No. 160 of 1987. Aggrieved by the order passed by the trial court, State of Maharashtra filed an appeal before the High Court. B The High Court, after re-appreciating the evidence on record and hearing the parties, found no infirmity in the finding of the trial court in respect of accused no. 4, and accused nos. 7 to 15, and dismissed the appeal to that extent. However, the High Court found that trial court has erred in law in acquitting the four accused, namely, Ganesh Andekar (A-1), Shamrao C Andekar (A-2), Avinash Andekar (A-3) and Vijay Ramchandra Yadav (A-5). The High Court convicted these four accused under Section 302 read with Section 34 I.P.C. and sentenced each one of them to imprisonment for life and to pay fine of ₹ 5,000/- in default of payment of which it is directed that further imprisonment for one year shall be served out. Hence this appeal before us by the four convicts. D

6. During the period of this appeal, appellant Shamrao Andekar and appellant Vijay Ramchandra Yadav reported to have died.

7. We have heard learned counsel for the appellants and learned counsel for the State and perused the record.

E 8. Before further discussion, it is just and proper to mention the ante mortem injuries recorded by PW-18 Dr. Laxman Pherwani at the time of autopsy on the dead body of Raghunath. The same are reproduced from autopsy report (Exh.70):

"1. An incised wound present on right iliac region 1" x ¼" going F deep inside near the iliac crest.

2. An incised wound present on right side back of thigh 1 ¼" x ¼" muscle deep. Margins-Regular.

3. An incised wound present on the back in the centre at level of thoracic 6. Margins-Regular.

G 4. An incised wound present in the centre of neck 1" x ¼". Margins-Regular.

5. An incised wound right elbow inner aspect 1" x ¼".

6. An incised wound left upper arm front aspect 1" x ¼" margins Regular.

H 7. An incised wound present in left axilla 1" x ¼".

8. An incised wound left upper arm outer aspect 1" x ¼". A

9. An incised wound ¾" x ¼" front on right temporal region of head."

PW-18 Dr. Laxman Pherwani in his oral evidence has stated that the above mentioned ante mortem injuries were of recent origin and could have been caused by sharp edged weapon. He further stated that B on opening the body, Haematoma on right temporal region was also found, and there was a crack fracture on right temporal region. The Medical Officer (PW-18) has opined that the deceased had died of traumatic and haemerrahagic shock due to multiple injuries. This proves that Raghunath died a homicidal death. PW-18 has opined that the nine injuries (quoted above) could have been caused by the weapons like C Sword, Knife, 'Gupti' and 'Khukri'. When the weapons seized during the investigation were shown to the witness, he stated that the injuries could have been caused with the same.

9. Now, it is to be examined as to whether the appellants Ganesh Andekar and Avinash Andekar, with common intention, have committed D the murder of Raghunath as suggested by prosecution and concluded by the High Court. It is also to be examined whether the finding of acquittal recorded by the trial court relating to these appellants was against the weight of the evidence of record, and it was not the reasonably possible view considering the testimony of the eye witnesses. E

10. On behalf of the appellants, Shri U. R. Lalit, learned senior counsel took us through the First Information Report and the prosecution story narrated by PW-2 Rohini (informant-eye witness) and PW-13 Shakuntala (widow of the deceased-eye witness) and other evidence on record. It is contended before us by Shri Lalit that it is unnatural that the F two eye witnesses who are ladies followed the deceased and the accused with the same speed to witness the incident at Gadikhana Chowk. He further pointed out that though PW-2 states that she took her injured father to hospital but from the entry in the hospital register name of one Rekha is mentioned as the person who got him admitted. It is also submitted that the two eye witnesses have stated that appellant Avinash G Andekar caused injury in the groin area of the deceased but the post mortem report does not show injury over groin area. It is further submitted that had the incident taken place in the manner suggested by the prosecution, the deceased would have rushed inside his house instead of running towards Gadikhana Chowk. It is argued that since the deceased H

had many enemies, as such, commission of murder by others cannot be ruled out. It is also pointed out that no specific role of inflicting injury by Avinash Andekar is attributed to him, in the First Information Report. Lastly, it is argued that since two views are possible from the evidence on record, as such, the High Court erred in reversing the order of acquittal recorded by the trial court.

11. No doubt, normally, where the trial court has acquitted the accused on the ground that charge stood not proved on the basis of evidence on record, and such view is reasonable, the High Court should not interfere with the same. However, such general rule cannot be extended against the spirit of clause (a) of Section 386 of Code of Criminal Procedure, 1973 which empowers the appellate court to reverse the order of acquittal, and pass sentence on him in accordance with law. In ***Manu Sharma Vs. State of Delhi*** **(2010) 6 SCC 1 (Para 27)**, this court has held that following principles have to be kept in mind by the appellate court while dealing with appeals, particularly against the order of acquittal:

> "(*i*) There is no limitation on the part of the appellate court to review the evidence upon which the order of acquittal is founded.
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> (*ii*) The appellate court in an appeal against acquittal can review the entire evidence and come to its own conclusions.
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> (*iii*) The appellate court can also review the trial court's conclusion with respect to both facts and law.
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> (*iv*) While dealing with the appeal preferred by the State, it is the duty of the appellate court to marshal the entire evidence on record and by giving cogent and adequate reasons set aside the judgment of acquittal.
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> (*v*) An order of acquittal is to be interfered with only when there are "compelling and substantial reasons" for doing so. If the order is "clearly unreasonable", it is a compelling reason for interference.
>
> (*vi*) While sitting in judgment over an acquittal the appellate court is first required to seek an answer to the question whether findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities, it can reappraise the evidence to arrive at its own conclusion.

(*vii*) When the trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of ballistic experts, etc. the appellate court is competent to reverse the decision of the trial court depending on the materials placed." A

12. In ***Murugesan Vs. State*** **(2012) 10 SCC 383 (Para 34)**, this Court has held that - B

"**34**....a possible view denotes an opinion which can exist or be formed irrespective of the correctness or otherwise of such an opinion. A view taken by a court lower in the hierarchical structure may be termed as erroneous or wrong by a superior court upon a mere disagreement. But such a conclusion of the higher court would not take the view rendered by the subordinate court outside the arena of a possible view. The correctness or otherwise of any conclusion reached by a court has to be tested on the basis of what the superior judicial authority perceives to be the correct conclusion. A possible view, on the other hand, denotes a conclusion which can reasonably be arrived at regardless of the fact where it is agreed upon or not by the higher court. The fundamental distinction between the two situations have to be kept in mind. So long as the view taken by the trial court can be reasonably formed, regardless of whether the High Court agrees with the same or not, the view taken by the trial court cannot be interdicted and that of the High Court supplanted over and above the view of the trial court. C D E

13. In ***Bhagwan Singh and Others Vs. State of M.P.*** **(2002) 4 SCC 85 (Para 7)**, this court has made following observation: F

"**7.** We do not agree with the submissions of the learned counsel for the appellants that under Section 378 of the Code of Criminal Procedure the High Court could not disturb the finding of facts of the trial court even if it found that the view taken by the trial court was not proper. On the basis of the pronouncements of this Court, the settled position of law regarding the powers of the High Court in an appeal against an order of acquittal is that the court has full powers to review the evidence upon which an order of acquittal is based and generally it will not interfere with the order of acquittal because by passing an order of acquittal the presumption of G H

A innocence in favour of the accused is reinforced. The golden thread which runs through the web of administration of justice in criminal case 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. Such is not a jurisdiction limitation on the appellate court but Judge-made guidelines for circumspection. The paramount consideration of the court is to ensure that miscarriage of justice is avoided. A miscarriage of justice which may arise from the acquittal of the guilty is no less than from the conviction of an innocent. In a case where the trial court has taken a view ignoring the admissible evidence, a duty is cast upon the High Court to reappreciate the evidence in acquittal appeal for the purposes of ascertaining as to whether all or any of the accused has committed any offence or not..."

14. In the present case the High Court has given categorical finding that the finding arrived at by the trial court was perverse, as such, it cannot be said that the High Court could not have taken the view supported by evidence on record.

15. So far as believing the testimony of PW-2 Rohini (daughter of the deceased) and PW-13 Shakuntala (widow of the deceased) is concerned the same cannot be doubted by presuming that being women they could not have followed the deceased who was running to save his life, and chased by the accused. Both the witnesses are adult, one aged twenty three years and another aged forty years. The two witnesses have only described the blows inflicted in their presence on the body of the deceased after they reached at the spot. It cannot be ignored that there are nine incised wounds and only the incised wounds given in the presence of the eye witnesses by the two appellants have been narrated by them. It was a day light incident in which quarrel started in front of the house of the deceased and the presence of the two eye witnesses who are family members of the deceased was natural, and their conduct in following the deceased and accused is also natural.

16. So far as the argument raising possibility of commission of murder by other than the accused mentioned in the F.I.R. is concerned, that would be a mere conjecture. This court in ***State of Punjab Vs. Karnail Singh*** **(2003) 11 SCC 271 (Para 12)**, has held that the prosecution is not required to meet any and every hypothesis put forward

by the accused. It must grow out of the evidence in the case. If a case is proved perfectly, it can be argued that it is artificial, and where the case has some flaws inevitable because human beings are prone to err, it is argued that it is a doubtful story. Proof beyond reasonable doubt is a guideline, not a fetish. A judge does not preside over a criminal trial merely to see that that no innocent man is punished. A judge also presides to see that a guilty man does not escape. Both are public duties.

17. As to the truthfulness of the fact that the deceased was taken in the injured condition by PW-2 Rohini to hospital, the same cannot be doubted only for the reason that name of one Rekha is mentioned in the hospital as a person who got admitted the injured. The fact relating to taking deceased to hospital by PW-2 Rohini, is corroborated from the evidence on record of PW-3 Suresh Chavan, Autorickshawala. In the present case the First Information Report is prompt and even the post mortem has been conducted on the same day after investigation started. Keeping these facts in mind as to who got admitted the deceased is not of much relevance. It has been put to PW 19 by the defence counsel in cross-examination that Rekha was sister of Ashok Appa Kolekar (husband of PW 2 Rohini). The statement of PW-16 Dr. Shivram Waghmare corroborates that the deceased was brought to the hospital at 4.25 p.m. and died at 4.40 p.m.

18. On behalf of the appellants, it is vehemently argued that the eye witnesses have stated that appellant Avinash Andekar inflicted blow in the groin area but there is no injury on said part of the body. We have carefully scrutinized the evidence on record and we do not find any reason to disbelieve the statement of the two eye witnesses on the above ground for the reason that a living human being is not supported to remain motionless while being inflicted with blow after blow. If the injury is near thigh or on the iliac crest, instead of groin area, in our opinion, this is not sufficient to hold that the testimony of the witnesses is false. It is also relevant to mention here that the ocular evidence of PW 2 Rohini and PW 13 Shakuntala is further corroborated from the report Ext.84 received from Forensic Science Laboratory regarding the blood group 'B+' found on the blood stained clothes and earth sample collected. The same blood group was found on the blood stained weapons recovered on disclosure made by the appellants.

19. For the reasons as discussed above, there is no error of law committed by the High Court in re-appreciating the evidence on record

A and coming to the conclusion that the view taken by the trial court was perverse with regard to the four accused. Therefore, the appeal is liable to be dismissed. Accordingly, the appeal of the appellants Ganesh Shamrao Andekar and Avinash Shamrao Andekar is dismissed. They are on bail. They shall surrender to serve out the sentence awarded by the High Court. The appeal of the appellant Shamrao Andekar and Vijay Ramchandra Yadav stands abated.

R. F. NARIMAN, J. 1. I have read the draft judgment of my noble and learned brother but for the reasons stated herein below find it difficult to agree with his conclusion that the High Court judgment in the present appeal is correct.

2. The facts have been set out in the aforesaid judgment. It has been noticed that the trial court acquitted all the accused, whereas the High Court has partly reversed and convicted the appellants under Section 302 read with Section 34 of the Indian Penal Code.

3. The trial court arrived at the conclusion of acquittal on several grounds:

1) It clearly held that the prosecution has failed to establish and prove the actual place where the deceased was assaulted – whether in front of his house or at some distance at Gadikhana Chowk in front of the Rajesh Boarding House.

2) The trial court adverted to an entry made in the Register maintained in the hospital in which it shows that the deceased Raghunath was brought to the hospital by one Rekha Kolekar. This lady was not examined by the prosecution, and if the hospital register is true, it falsifies the prosecution case that PW-2 Rohini brought the deceased to the hospital.

3) A perusal of the FIR would show that the time at which it was recorded is not stated. Further, there is no material on record to show that the Investigating Officer had forwarded a copy of the FIR to the Magistrate concerned at the earliest available opportunity.

4) PW-2 Rohini specifically stated that she sustained abrasions on her hands and legs in order to save her father. This is not proved from the record, and would therefore cast a doubt as to the veracity of her evidence.

5) Most importantly, PW-3 Suresh Chavan, who is the Autorickshaw driver and is well known to the family of the

deceased, has specifically stated that PW-2 Rohini came to the spot of the incident only after the accused ran away from the spot, making it clear that she was not an eye-witness as claimed.

6) PW-3 Suresh Chavan's evidence also shows that the mother of Rohini, PW-13, wife of the deceased was not at the scene of the incident, thereby falsifying PW-13's claim that she was an eye-witness.

7) PW-3 Suresh Chavan has been disbelieved by both courts, i.e. the trial court as well as the High Court, but was a key witness on behalf of the prosecution, as he was known to the deceased's family, and drove PW-2 Rohini alongwith the deceased to the hospital.

8) It is admitted that PW-3 Suresh Chavan and PW-2 Rohini, though known to each other, did not exchange a single word in the autorickshaw while PW-2 Rohini and her father were driven to the hospital, thereby rendering improbable the autorickshaw ride to hospital, and consequently the evidence of PW-2 and PW-13 as a whole.

9) One Sudhakar, who was a friend of the deceased, was also examined as an eye-witness on behalf of the prosecution. Being an independent eye-witness, his testimony is of importance and cannot be wished away. He has turned hostile. His son Vijay was also listed in the chargesheet as a witness on behalf of the prosecution but not examined.

4. All these factors ultimately led the trial court to conclude:

"Normally there is no reason to disbelieve the version of the complainant, but in the present case, the relations between 2 families are strained, the evidence of PW. Rohini is inconsistent with that of PWs. Suresh and Shakuntala. The evidence of these 3 witnesses besides interested in the case of prosecution is mutually destructive also to the prosecution case. Therefore, cumulative effect of all these facts is that no reliance can be placed on such type of witnesses to hold the accused guilty for assault on the deceased."

5. As against this, the High Court, in its judgment reversing the trial court, has held that even if PW-3 Suresh Chavan is not found trustworthy, the court cannot throw out the entire prosecution case. This

A is a little difficult to understand in view of the fact that PW-3 Suresh Chavan is a key prosecution witness. As he is a witness relied upon by the prosecution, his version destroys the version of the two interested eye-witnesses PW-2 and PW-13 inasmuch as he specifically states that neither was present at the spot when the actual assault leading to murder took place.

B

6. The High Court also wrongly states that mentioning of an injury at the iliac region of Raghunath's body gives strong credence to the story of PW-2, which, according to the High Court, is an injury near the groin. The High Court states that if Rohini had not witnessed the incident, she would not be in a position to speak about this particular injury. Here again, the iliac region being a region at the backside, obviously, there is, in fact, no injury near the groin.

C

7. Turning to the fact that Rekha Kolekar is mentioned as the person who brought the deceased to the hospital in the hospital register, the High Court only states that it does not find any substance in this contention because Rohini and her mother are eye-witnesses. This does not answer unimpeachable documentary evidence in the form of the hospital register entry, or the fact that Rekha was not examined by the prosecution.

D

8. On not sustaining abrasions on Rohini's legs and hands, the High Court only says witnesses do make exaggerations in such cases but that cannot be a reason to disregard and disbelieve their entire story. This again is hardly the way in which to deal with an appeal against acquittal, where, unless perverse, the trial court judgment ought not to be interfered with.

E

9. After going into the evidence of PW-13, who stated that Sudhakar was present at the time of the assault, the High Court adverts to the fact that Sudhakar, though an independent eye-witness, turned hostile, but gives no importance to this fact. In fact, the High Court specifically states:

F

> "Most of the other witnesses PW.7 eye witness Sudhakar Pardeshi, P.W. G. Sandeep Valsangkar, P.W.9 Rajendra Lohokare Panch witness, P.W. 10 Vikas Pawar – Panch witness regarding the discovery of lungi at the instance of accused No. 1. Ganesh, have turned hostile and did not support the prosecution."

G

10. The High Court is impressed by one fact and one fact only that given the fact that the incident took place at around 3.30 P.M. to

H

4.30 P.M., and the fact that the FIR was lodged very soon thereafter, there was no time to concoct a false story. This is purely in the realm of conjecture. Even if true, if so many other factors lead to a reasonable doubt in the prosecution story, the accused deserve acquittal.

11. The High Court referred to the Chemical Examiner's Report in which it was stated that the blood group of Raghunath is 'B' and the blood group of accused no.1 and accused no.3 is also 'B'. If that is so, the fact that the earth, Rohini's clothes, T-shirt and lungi, and weapons all have blood group 'B', would not necessarily lead to the conclusion that accused no.1 and accused no.3's blood happens to be there given the fact that Raghunath's blood was also of blood group 'B'. In any case, this factor alone cannot outweigh all the other factors pointed out by the trial court.

12. Having regard to the authorities cited by my noble and learned brother, there is no doubt that there is no limitation on the part of the appellate court to review the evidence upon which the order of acquittal is founded and arrive at its own conclusion. However, when an order of acquittal is appealed against, it can only be interfered with when there are compelling and substantial reasons for so doing and if it is found that the trial court order is clearly unreasonable, palpably wrong, manifestly erroneous, or demonstrably unsustainable. In my opinion, the trial court order did not fall in any of these categories and the High Court in convicting the appellants and reversing a well reasoned order of acquittal, has committed a grave error.

13. Coming to accused no.3, in any case, as has been pointed out by Shri Lalit, no active and specific role has been assigned to him in the murder of Raghunath. Given the fact that the FIR and the evidence of PW-2 to 13 (even as found by the High Court) contains many incorrect facts, (for example, 6 ladies who were acquitted are also sought to be roped in), and given the fact that there is enmity between the deceased's family and the accused, it is reasonable to say that, in any case, accused no. 3 should be given the benefit of doubt. For all these reasons, I would reverse the High Court judgment and acquit the two accused before us.

PC: In view of the disagreement between us, papers to be placed before the Hon'ble Chief Justice of India to constitute an appropriate bench to rehear the matter.

Ankit Gyan

Matter referred to CJI.