

S U P R E M E

C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G S

Criminal Appeal No.9 4 9 of 20 0 7

A S I F M A M U

Appellant(s)

V E R S U S

S T A T E O F M A D H Y A P R A D E S H

Respondent(s)

With Crimin al Appeal No.7 1 8 of 2 0 0 7

Crimin al Appeal No.8 3 8 of 2 0 0 7

Date : 14 / 1 1 / 2 0 0 8 This Appeal was called on for judgement today.

For Appellant(s)

Mr. P. K . J ain,Adv.

Mr. Hasan Anzar,Adv.

Mr. S.A. Siddiqui,Adv.

Mr. Osam a Suhail,Adv.

Mr. Sabe Sattar Siddiqui,Adv.

Mr. Goodwill Indeevar,Adv.

Ms. Malini Poduval,Adv.

Mr. K.T.S. Tulsi,S r.Adv.

Mr. R. P . Gupta,S r.Adv.

Mr. M.R. Sha ms h a d,Adv.

Mr. Vivek Vishnoi,Adv.

Mr. Mukesh Verma,Adv.

Mr. Rudreshwa r Singh,Adv.

Mr. Kaus hi k Poddar,Adv.

Ms. Neha Gaur,Adv.

Mr. Sanjay J ain,Adv.

For Respondent (s)

Ms. Vibha Datta Makhija,Adv.

Hon'ble Mr. Justice B.N. Agrawal pronounced the judgement of the Bench comprising His Lordship and Hon'ble Mr. Justice G.S. Singhvi.

The criminal appeals are allowed.

The appellants, who are in custody, are directed to be released forthwith if not required in connection with any other case.

[Alka Dudeja]
Court Master

[Savita Sainani]
Court Master

[Signed non- reportable judgement is placed on the file]

I N T H E S U P R E M E C O U R T O F I N D I A

C R I M I N A L A P P E L L A T E J U R I S D I C T I O N

C R I M I N A L A P P E A L N O . 9 4 9 O F 2 0 0 7

Asif Mamu

...Appellant

Vs.

State of Madhya Pr ades h

...Respondent

W I T H

C R I M I N A L A P P E A L N O . 7 1 8 O F 2 0 0 7

AND

C R I M I N A L A P P E A L N O . 8 3 8 O F 2 0 0 7

J U D G M E N T

B.N. A G R A W A L , J .

1. Crimin al Appeal Nos. 94 9 and 83 8 of 20 0 7 arise out of the impugned common judgment of conviction rendered by the High Court after reversing the order of acquittal passed by the trial court in Sessions Trial No. 37 9 / 19 9 6 , whereby, appellants Asif Mamu and Mukhtiyar Malik @ J aved, besides accused Rajiulla Kh an and Sheru @ Sher Kha n Nepali [in short "Asif", Mukhtiyar", "R ajiulla " and "Sheru", respectively] were acquitted. Criminal Appeal No. 718 of 2 0 0 7 arises out of the said common judgment of conviction passed by the High Court after reversing the separate judgment passed by trial court in Sessions Trial No. 383/ 9 6 acquitting eight accused persons, namely, Muzaffar Hussain @ Munne P a inter, Mazhar Hussain [in short, "Munne P a inter " and "Mazha r ", respectively], Badsh a h, Sadiq, Sajid, Haseen @ Mohasin, Guddu J adugar @ Mehtab @ Ganja [in short, "Haseen" and "Guddu", respectively] and Salim Kela. These two sessions cases were case and counter case, tried one after the other by the same court, separ ate evidence was recorded therein and disposed of by separate judgments. As such, we proceed to consider cases of accused persons in the two trials separ ately.

Crimin al Appeal Nos. 9 4 9 and 8 3 8 of 2 0 0 7

2. Asif, the sole appellant in Crimin al Appeal No. 9 4 9 of 2 0 0 7 and Mukhtiyar, who is also the sole appellant in Crimin al Appeal No. 8 3 8 of 2 0 0 7 , and Raziulla, appellant in Criminal Appeal No. 8 3 7 of 2 0 0 7 along with accused Sheru were tried and acquitted of the charges by judgment rendered by the trial court. The State of Madhya P r adesh filed an appeal

before the High Court against the said order of acquittal, during the pendency of which accused Sheru died, as such the appeal against him abated. So far as the other three accused persons are concerned, they have been convicted by the High Court under Section 302 / 149 of Indian Penal Code [for short 'I P C']. Appellants Mukhtiyar and Asif have been sentenced to

death whereas accused Raziulla life imprisonment. All the three accused persons have been further convicted under

Section 148, I P C and sentenced to undergo rigorous imprisonment for a period of three years and to pay a fine of Rs. 10,000 / - each, in default to undergo further rigorous imprisonment for a period of six months. Appellant

Mukhtiyar has been also convicted under Section 25 (1B) of the Arms Act and sentenced to undergo rigorous imprisonment for a period of three years and to pay fine of Rs. 10,000 / - , in default to undergo further rigorous imprisonment for a period of six months. All the sentences,

however, have been ordered to run concurrently. Challenging their convictions the three accused persons filed separate appeals by special leave. As accused Raziulla died during the pendency of appeal, Criminal Appeal No. 837 of 2007 filed by him abated and consequently on 5th August, 2008 an order of abatement of the said appeal was recorded by this Court.

Thus, we are required to decide the two appeals filed by appellants Mukhtiyar and Asif.

3. Prosecution case in short was that 10/07/1996 was the date fixed in Sessions Trial No. 379 / 1995 in the court of the 3rd Additional Sessions Judge, Bhopal for evidence. The said case related to causing bullet injury by Mukhtiyar, Sheru and Asif on the leg of one Munne Painter who arrived court premises on that day at 10.30 am along with his witnesses viz., Munnu,

Rais Nai, Saleem Baba, Saleem Bucha, Babu Bhai, besides others and they sat in the gallery outside the courtroom of

the 3rd Additional Sessions Judge, which was on the first floor

of the building of the said courthouse, where accused Mukhtiyar, Sheru, Asif and one boy, who was wearing red

shirt, [in short, "red shirt boy"] were sitting from before. At 11.45 am accused Rajiulla, who was an advocate and uncle of appellant Mukhtiyar, came there and ordered to kill. Accused Asif and the red shirt boy were armed with knives. Accused Mukhtiyar and Sheru, who were armed with revolvers, started firing from their respective weapons aiming towards Munne Painter besides Saleem Baba and Saleem Bucha and in order to save himself Munne Painter entered inside the courtroom of the 3rd Additional Sessions Judge. As a result of firing by the aforesaid two accused persons, Saleem Baba and Saleem Bucha received injuries and while Saleem Bucha fell down in the gallery itself, Saleem Baba moved to the said courtroom, fell down there and both of them succumbed to their injuries. According to the prosecution, the accused persons, with the intention of putting pressure upon the members of the prosecution party for changing their statement in the Sessions Trial No. 379 / 1995, in which witnesses had come to depose, conspired and made homicidal attack on them. Stating the aforesaid facts, a written report was submitted by Munne Painter before the officer-in-charge, Shahjahanabad police station in Bhopal town on the basis of which First Information Report [for short 'FIR'] No. 410/ 1996 was drawn up at 1.10 pm against five accused persons, namely, Mukhtiyar, Rajiulla, Sheru, Asif and red shirt boy.

4. Thereafter, on the basis of statement of Rajiulla, who is accused in the present case, another FIR was drawn up at the same very police station at 1.35 pm bearing FIR No. 411 of 1996 for the prosecution of eleven accused persons, namely, Munne Painter, Majhar, Saleem Baba [since deceased], Saleem Bucha [since deceased], Saleem Kela, Badshah, Sadiq, Sajid, Guddu, Haseen and Assu Bambaiya [absconding], which includes eight accused persons referred to above, in which case allegations were that red shirt boy was inflicted injuries by knife by accused persons of that case at the same

time and place of occurrence and the said boy, after being assaulted, was thrown by some of the accused persons of that case from the first floor of the court building to the ground floor, who succumbed to the injuries.

5. Another FI R was drawn up at the said police station being FI R No. 4 1 2 / 19 9 6 under Section 3 0 7 , I PC against Saleem Kela, who was accused in FI R No. 41 1 / 199 6, on the statement of one Mohd. Ras hid - auto driver, in which allegations were made that when said Saleem Kela, after commission of the offence relating to which FI R No. 4 1 1 / 199 6 was registered, was fleeing away and when he was chased by the Town Inspector, he boarded the said auto ricksh aw asking the driver to drive the same but on refusal caused knife injury upon him. Saleem Kela also fired at the Town Inspector but the same did not hit him.

6. On the same day fourth FI R was drawn up at the aforementioned police station being FI R No. 4 1 3 / 1 9 9 6 under Section 3 0 7 , I PC on the basis of the statement of Shar ad Charan Dubey, Inspector of Police attached to the concerned police station on allegations that when the accused persons of FI R No. 4 1 1 of 1 9 9 6 were coming down through the stairs, he challenged them and accused Saleem Kela and three other persons attacked him with dagger, as a result of which injury was caused on the index finger of his left hand whereupon while Shar ad Charan Dubey, in self defence, fired shots from his service revolver and chased them, Saleem Kela fired at him from country made revolver, but he remained unhurt. Then Saleem Kela boarded the auto ricksh aw and compelled the driver to drive the same and at that point of time once again resorted to firing. Shar ad Charan Dubey, in self defence and in order to save driver of the auto rickshaw, again fired at Saleem Kela as a result of which he was injured and fell down whereupon he was taken to Hamidia Hospital for treatment.

7. After registering the cases, police took up investigation in all

the four cases and submitted chargesheets against four
accused persons in the case arising out of F I R No. 41 0 /

199 6 since red shirt boy had died and against only nine

accused persons in the case arising out of F I R No. 41 1 /

1 9 9 6 showing accused Assu Ba mb a iya as absconder since two

accused persons, viz., Saleem Bucha and Saleem Baba, who

are said to have received injuries in the occurrence, which

was subject matter in F I R No. 41 0 of 19 9 6 , succumbed to

their injuries. Police also submitted chargesheets in cases

arising out of F I R Nos. 41 2 & 41 3 / 19 9 6 . Upon receipt of

final forms in the aforesaid four cases, cognizance was taken

and all the four accused persons of this case and accused

persons of other three cases were committed to the Court of

Sessions to face trial.

8. The defence of the accused persons in short was that they
were innocent, had no complicity with the crime, were falsely
implicated in the case on hand and the victims might have
received injuries in some other manner of occurrence. Some
of the accused persons had also taken a plea of alibi.

9. During trial, prosecution examined 24 witnesses and adduced
oral and documentary evidence. Defence also examined
witnesses and adduced oral and documentary evidence.

1 0. Upon the conclusion of trial, separate orders of acquittal
were rendered by the trial court in case and counter case, but
on appeals being preferred High Court by a common order
reversed the same and convicted accused persons in both the
cases as stated above.

1 1. P residing Officer of the trial court after recording of evidence
thought it fit to inspect the place of occurrence, which is court
premises, itself in the presence of Special Public P rosecutor
and learned counsel appearing on behalf of the accused
persons and prepared a map of the site where occurrence in
both the cases is said to have taken place, which includes the
gallery outside the court of the 3 rd Additional Sessions Judge
and the same was visible to the persons sitting in the

courtroom of 1 st Additional Sessions Judge, 3 rd Additional Sessions Judge, 4 th Additional Sessions Judge, counters of District Court, Nazar at Office, Office of COC and CCD Counter. The staff sitting in any of the three courts or in the aforesaid offices might have witnessed the occurrence. The Investigating Officer - R. K . Bajpai [P W- 2 2] stated that he did not make any enquiry from the employees who were attached to the court of 1 st and 4 th Additional Sessions Judges, CCD Counter and to the offices of CDC Counter, Nazar at Office, COC Office or any other 4 th Grade employees who were supposed to remain present. It appears from his evidence that the statements of advocates and advocates' clerks were also not recorded during the course of investigation. It further appears that during the course of investigation statements of K. Raja m m a Kurup [Reader] and Ra m Chandra [Adeshik Lekh a k], who were attached to the court of 3 rd Additional Sessions Judge, were recorded by the police, but curiously enough, they have not been examined as witnesses in the present case. The aforesaid persons could have been independent witnesses in support of the prosecution case but, for reasons best known to the prosecution, they have been withheld. In the present case the informa nt, Munne P a inter, who has been examined as P W- 1 and according to the FI R was an eyewitness to the alleged occurrence did not support the prosecution case, as such declared hostile. According to the prosecution case Majhar [P W- 2], Badsh a h [P W- 3], Sadik [P W- 4], Sajid [P W- 5], Haseen [P W- 6], Guddoo [P W- 7] and Saleem [P W- 8], who were also eyewitnesses to the alleged occurrence and could have been independent witnesses, did not support the prosecution case, as such also declared hostile.

1 2. Shar ad Charan Dubey [P W- 2 4], who was the Inspector of Police attached to the concerned police station, stated that on receipt of an application from P W- 1 that he apprehended danger to his life as appellat Mukhtiyar had given out

threats to him that in case he appeared in court on 10.07.1996 for deposing as a prosecution witness in Sessions Trial No. 379 / 1995, he would be done to death. Upon receipt of the said application, P W- 24 along with Head Constable - Ram Sewak and Constable - Saleem arrived court at 11.00 am on the date of occurrence. The witness stated that he went to the first floor of the court building and found other persons in the gallery in front of the court of 3rd Additional Sessions Judge but did not find any of the two appellants, viz., Mukhtiyar and Asif and accused Sheru. He also stated that he made a frantic search of these three persons in and around the court premises but didn't find them there. He then stated that when this witness was near the chamber of the Chief Judicial Magistrate on the ground floor he heard the sound of firing from the first floor and when he rushed towards the stairs, found four persons coming down through the stairs, out of whom, two persons were armed with firearms and the other two with knives. The witness admitted during the course of cross-examination that he knew all the four accused persons of this case, including the appellants of these appeals, from before the occurrence and none of them was amongst the accused persons who were coming to the ground floor through the stairs. This witness has not been declared hostile. Thus, statement of P W- 24 makes presence of, all the four accused persons of the present case including the appellants at the place and time of occurrence, highly doubtful.

13. The prosecution has placed reliance upon the evidence of Amar Bahadur Singh [P W- 9], Balram Singh P aith a r i [P W- 11], Surendra Nath [P W- 12], Lavkush Sharma [P W- 14] and Ramesh Dubey [P W- 17], who were police witnesses and said to have witnessed the occurrence. Out of these witnesses, P W s 11, 12 and 17 stated that appellant - Mukhtiyar fired at Saleem Bucha on his back while he was fleeing away, but Dr. D.S. Badkur [P W- 13], who held post-mortem examination on the dead body of Saleem Bucha categorically stated that the

said deceased received bullet injuries and the wound of entry was in the chest. From the evidence of the doctor [P W- 1 3] it appears that Saleem Bucha did not receive any injury on the back of his body. Thus, medical evidence completely demolishes the statements of P W s 1 1, 1 2 and 1 7 that appellant - Mukhtiyar caused firearm injury on the back of Saleem Bucha when he was fleeing away. Likewise, according to the evidence of P W s 1 1, 1 2 and 1 7 accused Sheru fired at Saleem Baba as a result of which he received injury on his chest, but the doctor [P W- 1 3] who conducted post- mortem examination on the dead body of Saleem Baba, did not find any injury whatsoever on his chest but he found wound of entry on the back of his body. Statement of the doctor [P W- 1 3] thus makes the evidence of P W s 1 1, 1 2 and 1 7 that accused Sheru caused injury on the chest of deceased Saleem Baba highly doubtful.

1 4. According to prosecution, the Investigating Officer, R. K. Bajpai [P W- 2 2] seized one revolver belonging to appellant Mukhtiyar and two live cartridges from the house of the said appellant on disclosure statement made by him and prepared Seizure Memo [Ext. P/ 3 4] . Appellant Mukhtiyar is said to have fired at deceased Saleem Bucha and the bullet recovered from his dead body by the doctor [P W- 13] was marked as article 'J' and sent to Forensic Science Laboratory [for short 'F S L'] where it was marked as article 'E B- 5', though the revolver said to have been recovered from the possession of appellant Mukhtiyar, for the reasons best known to the prosecution, was never sent to the F S L . P W- 2 2 is said to have recovered a country made revolver from one Saleem Kela also which was marked as article 'K' and sent to the F S L where it was marked as article 'A-2'. The report of the F S L [Ext.- 40] shows that the bullet article 'J' which was recovered from the dead body of Saleem Bucha and marked by the F S L as article 'E B- 5' was fired from the country made revolver [article 'A-2'] which was seized from the possession of Saleem Kela.

This finding of the FS L gives a death blow to the prosecution case that appellant Mukhtiyar fired at the deceased Saleem Bucha by his country made revolver causing injury to him.

1 5. So far as deceased Saleem Baba is concerned, from his dead body the doctor [P W- 13] recovered a bullet which was marked as article 'H' and sent to the FS L where it was marked as article 'E B- 4'. P W- 2 2 is said to have recovered a country made revolver from accused Sheru which was marked as article 'D' and sent to the FS L where it was marked as article 'A-1'. The report of the FS L [Ext.- 4 0] shows that the bullet [article 'E B- 4'] recovered from the dead body of Saleem Baba was never fired from the country made revolver [article 'A-1'] recovered from the possession of accused Sheru, rather it has been specifically stated that the said bullet could have been fired only from 0.3 8 bore service revolver which is ordinarily used by the police personnel. Therefore, in the absence of any evidence whatsoever that the firearm recovered from the possession of accused Sheru was 0.3 8 bore service revolver, rather specific case is, what was recovered from him was country made revolver, the above finding in the report of the FS L makes the prosecution case of causing firearm injury by accused Sheru upon Saleem Baba by country made revolver highly suspicious.

1 6. In relation to appellant - Mukhtiyar, P W s 9, 11, 12, 14 and 1 7 who are police personnel and claim to be eyewitnesses, for the first time, stated in court after about two years that this accused was armed with country made revolver and fired at Saleem Bucha as in their previous statements made before the police none of these witnesses attributed any weapon to this accused much less a country made revolver and firing therefrom at Saleem Bucha. So far as appellant Asif is concerned, according to P W- 9, he was not armed with any weapon much less knife. P W s 1 1, 1 2, 1 4 and 17 in their evidence in court, after about two years, for the first time, stated that this appellant was armed with a knife as in their

statements made before the police these witnesses did not attribute any weapon, much less knife, to this appellant. In court, for the first time improvement was made and knife was attributed to this accused, which makes the complicity of appellant Asif with the crime highly doubtful. Apart from this, none of the aforesaid witnesses stated that Asif assaulted anybody with knife.

17. In view of the fact that the prosecution case is not supported by medical evidence, the report of FSL, the fact that PW-24, who knew the accused persons from before, did not find any of them amongst the persons, who were fleeing away through the stairs of the court immediately after the occurrence, PWs 1 to 8, including the informant, who were independent persons having not supported the prosecution case, no steps whatsoever were taken by the prosecution to examine in court, the Reader and Adeshik Lekhak of the court of 3rd Additional Sessions Judge, though they were examined by the police during the course of investigation, the investigating officer - PW-22 having not even made any enquiry from the employees who were attached to the various courts and offices from where the place of occurrence was visible much less examining them as prosecution witnesses, not examining any of the advocates and pleaders' clerks who were present in the court and there being other discrepancies in the evidence of the police witnesses, who claimed to be eyewitnesses, we are of the view that it would not be safe to place reliance upon the evidence of PWs 9, 11, 12, 14 and 17.

18. Thus, we hold that prosecution has failed to prove its case beyond reasonable doubt and view taken by the trial court in recording the judgment of acquittal was reasonable one, as such the High Court was not justified in reversing the same which cannot be said to be perverse in any manner.

Criminal Appeal No. 718 of 2007

19. All the eight appellants viz., Munne Painter, Mazhar,

Badshah, Sadiq, Sajid, Haseen, Guddu and Saleem Kela of this appeal were tried in Sessions Trial No. 383 / 1996 and were acquitted by trial court of all the charges. Against the order of acquittal the State of Madhya Pradesh filed an appeal before the High Court which reversed the same and convicted the appellants under Section 302 / 149, I PC and sentenced them to undergo imprisonment for life and pay fine of Rs. 50,000 / - each, in default to undergo further rigorous imprisonment for a period of three years. They were further convicted under Section 147, I PC and sentenced to undergo rigorous imprisonment for a period of two years and to pay fine of Rs. 10,000 / - each, in default to undergo further rigorous imprisonment for a period of six months. They were also convicted under Section 148, I PC and sentenced to undergo rigorous imprisonment for a period of three years and to pay fine of Rs. 10,000 / - each, in default to undergo further rigorous imprisonment for a period of six months. All the sentences, however, have been ordered to run concurrently.

20. Prosecution case in short was that Rajiulla, who was a practising advocate in Bhopal Court, arrived as usual, court premises at 11 A.M. on 10.07.1996 which was the date fixed in Sessions Trial No. 379 / 1995 in the Court of the 3rd Additional Sessions Judge, Bhopal for evidence. In the said case Mukhtiyar, nephew of Rajiulla and his associates, viz., Asif and Sheru were made accused under Section 307, I PC. Asif, Sheru and his friend, red shirt boy came to court premises and they were in the gallery in front of the court of 3rd Additional Sessions Judge at about 12 noon. Rajiulla, along with his Senior Advocate Shri Jagdish Gupta and typist Asif Bundella, came to the court of the 3rd Additional Sessions Judge with an application for dispensing with the personal appearance of Mukhtiyar who didn't come to court because he was apprehending danger to his life and filed the same. Seeing Rajiulla, out of the eleven accused persons, viz.,

appellants Munne P a inter, Majhar, Saleem Kela, Badsh a h, Sadiq, Sajid, Guddu, Haseen and accused Saleem Baba [since deceased], Saleem Bucha [since deceased] and Assu Ba mb a iya [absconding], who were there in the gallery outside the courtroom of the 3 rd Additional Sessions Judge, appellants Munne P a inter and Majha r said that as Mukhtiyar was not coming to court on that day his uncle Rajiulla and his associates Asif, Sheru and friend red shirt boy should be done to death. Upon this, appellant Saleem Kela started firing from his revolver whereas other accused persons who were armed with knives pounced upon the red shirt boy and caused knife injuries to him. Appellant Saleem Kela fired at Rajiulla, but he could save himself by lying down on the floor. After the assault, appellant Munne P a inter and Majha r exhorted that the red shirt boy should not remain alive, upon which, appellants Saleem Kela, Badsh a h, Sajid, Guddu and accused Assu Ba mb a iya lifted the red shirt boy and threw him from the first floor of the court building to its ground floor, as a result of which, he died instantaneously. It is further case of prosecution that Rajiulla fled away from the gallery to save his life and all the aforesaid eleven accused persons took to their heels. Stating the aforesaid facts, Rajiulla submitted a written report at the police station on the basis of which FI R No. 4 1 1 of 1 9 9 6 was drawn up at 1.3 5 pm on the same day for prosecution of the aforesaid eleven accused persons, which includes eight appellants of the present appeal.

2 1. The police after registering this case as well as the other three cases referred to above proceeded to investigate the same and submitted chargsheets in all the four cases. As in the present case, accused Saleem Bucha and Saleem Baba, who were the two deceased persons in FI R No. 4 1 0 of 1 9 9 6 , had died on the date of occurrence itself, chargesheet was submitted against nine persons, viz., all the eight appellants of this appeal and accused Assu Ba mb a iya showing him as absconder. Upon receipt of the chargesheets, the learned

Magistrate took cognizance and committed the accused persons in all the four cases to the Courts of Sessions to face trial. In the present case only eight appellants were tried as the trial of accused Assu Ba mb a iya was separated as he was absconding.

2 2. Defence of the accused persons, in short, was that they were innocent, had no complicity with the crime, were falsely implicated and the victim might have received injuries in some other manner of occurrence. Some of the accused persons had taken a plea of alibi.

2 3. In support of its case, prosecution examined twenty seven witnesses and adduced documentary evidence. The defence also examined four witnesses and adduced documentary evidence.

2 4. In all the four cases the accused persons were acquitted by the trial court. Against the order of acquittal passed in sessions cases arising out of FI R No. 4 1 0 / 1 9 9 6 and 41 1 / 1 9 9 6 appeals were filed before the High Court which allowed the same and recorded conviction of the accused persons in both the cases as stated above. Three appeals by special leave were filed against the order of conviction recorded by the High Court in relation to Sessions Case No. 3 7 9 / 19 9 6 which had arisen out of FI R No. 4 1 0 / 19 9 6 , out of which, one appeal abated as stated above, and cases of accused persons in other two appeals have been already considered in the earlier part of this judgment. The present appeal by Special Leave has been filed against the order of conviction recorded by the High Court in relation to the Sessions Trial No. 3 8 3 / 1 9 9 6 arising out of FI R No. 4 1 1 / 19 9 6 .

2 5. P residing Officer of the trial court after recording of evidence thought it fit to inspect the place of occurrence which is court premises in presence of Special Public P rosecutor and learned counsel appearing on behalf of accused persons of both the cases, i.e., case and counter case and prepared a map of the site, i.e., the gallery outside the

court of the 3 rd Additional Sessions Judge where occurrence in both the cases is said to have taken place, which place was visible to the persons sitting in the court of 1 st Additional Sessions Judge, 3 rd Additional Sessions Judge, 4 th Additional District Judge, CDC and CCD counters of District Court, Nazar at Office and Office of COC. The staff sitting in any of the aforesaid courts or in any of the said offices who could have been best witnesses in support of the prosecution case have been withheld by the prosecution for the reasons best known to it. That apart, neither any advocate nor any advocate's clerk, who could have been independent witnesses in support of the prosecution case have been examined. In the present case, Rajiulla, who was the informant and examined as P W- 1, and, according to the F I R , was an eyewitness to the alleged occurrence, did not support the prosecution case and accordingly was declared hostile. Prosecution witnesses Sheru [P W- 3], Asif [P W- 4] and Mukhtiyar [P W- 9], who were also eyewitnesses to the occurrence, did not support the prosecution case and as such they were also declared hostile. These four eyewitnesses, who were independent persons in support of the prosecution case, have not supported the same.

2 6. Prosecution placed reliance upon the evidence of Amar Bah adur Singh [P W- 2], Sambh a ji Rao P atil [P W- 5], Lavkush Shar m a [P W- 7], Surendra Nath Tiwari [P W- 8], Ra mes h Dubey [P W- 15] and Balr a m P ath a r i [P W- 1 9], all of whom, undisputedly, were police witnesses and they claimed to be eyewitnesses to the alleged occurrence.

2 7. Specific case of the prosecution in the F I R was that the red shirt boy was thrown by some of the accused persons from the first floor of the court building to its ground floor. The prosecution has given suggestions to the prosecution witnesses, viz., P W s 3 and 9 to the effect that the red shirt boy was thrown from the first floor of the court building to its ground floor which they have denied, although they made such statements before the police. Dr. Ashok Shar m a [P W-

17], who conducted the post-mortem examination on the dead body of red shirt boy on the date of occurrence itself, i.e., 10.07.1996 at 4.45 pm, in his post-mortem report [Ext. P- 20] opined that the deceased received injuries by sharp-edged weapons. In his evidence, the doctor [P W- 17] stated that he did not find any injury on the deceased that could be said to have been caused as a result of fall, which gives death blow to the prosecution case that red shirt boy was thrown from first floor of the court building to its ground floor.

28. It appears that in view of the fact that according to the post-mortem report [Ext. P- 20] the deceased did not receive any injury on account of being thrown from first floor to the ground floor, P W s 2, 5, 7, 8, 15 and 19, who were all police witnesses and examined by the investigating officer - R. K . Bajpayee [P W- 25], did not make any statement to the effect that the deceased was thrown by some of the accused persons from the first floor of the court building to its ground floor. They have also not made statement before the police as to how his dead body was found on the ground floor when the deceased was assaulted on the first floor. For the first time, after about a year, P W s 8, 15 and 19 in their statements made before the Sessions Court disclosed that the deceased was dragged by some of the accused persons from first floor which is neither supported by medical evidence nor objective finding of the investigating officer. The doctor [P W- 17] has not stated either in the post-mortem report or in his evidence that the deceased received any injury by dragging. Investigating Officer [P W- 25] has nowhere stated that he found any trail of blood from the first floor to the place on the ground floor from where the dead body was recovered. This witness stated that he did not find any blood marks on the clothes of any of the accused persons from whose possession knives are said to have been recovered immediately after the occurrence. The prosecution has completely failed to explain as to how the dead body of the

red shirt boy who is said to have been assaulted on the first floor of the court building was brought to the ground floor.

29. The identity of the deceased red shirt boy, for whose murder the appellants were tried, could not be established by the prosecution, that is, whether red shirt boy was Munneybul Hasan or Umar Izhar or any other unknown person. Rehman [P W- 13] who was an inquest witness stated that he knew Munneybul Hasan, who was resident of Kallashah Campus which is in Jahangirabad, one of the quarters of the towns of Bhopal, for about 10 to 15 years. He further stated that on 10.07.1996 between 8 to 9 A.M. he came to know that the aforesaid Munneybul Hasan had been murdered and on receiving the said information he found him lying dead in the said campus. This witness also stated that he took the dead body of Munneybul Hasan to the Hamidia Hospital where police prepared the inquest report and after the post-mortem examination the dead body was made over to him between 5 to 6 P.M. and at about 7 P.M. on the date of occurrence itself it was engraved in the graveyard which is in the said locality. In the inquest report as well as in the post-mortem report name of the deceased has been shown as Munneybul Hasan.

30. Regarding the identity of the dead body, another version was that of constables Dunjan Singh [P W- 21] and D.N. Nagvanshi [P W- 23], who, on the directions of the investigating officer [P W- 25], took the dead body of the red shirt boy to Hamidia Hospital where the doctor [P W- 17] declared him dead and there inquest report was prepared which was marked as Ext. P- 16. P W- 23 stated in his evidence that the doctor [P W- 17] found out license from the pocket of the red shirt boy which was in the name of Munneybul Hasan and made over the same to this witness, but this fact has been denied by the said doctor in his evidence wherein he has categorically stated that he did not find any driving license, much less making over the same to P W- 23. P W s 21 and 23, even according to their statements, were not examined by the police and the story

that the license was found out by the doctor [P W- 17] from the pocket of the deceased and made over to P W- 23 was introduced for the first time in Sessions Court.

3 1. Wali m a Begum [P W- 20], who is resident of Fatehpur district in the State of Uttar P r adesh, stated that she had two sons and the name of her elder son was Qama r Rab and that of the younger one Umar Izhar. The deposition of this witness was recorded on 1 8. 0 5 . 1 9 9 8 and she stated that about two yeas ago her son Umar Izhar started for Bombay in the month of July with a cash sum of Rs. 2 2, 0 0 0 /- and she learnt at Allahabad that he was murdered. She further stated that somebody came to her house and told her that Umar Izhar had been murdered at Bhopal Railway Station after snatching the cash that he was carrying, whereupon she went to Bhopal along with her son- in-law and there she learnt that her son was admitted in hospital. She then went to Bhopal hospital, found the dead body of her son Umar Izhar and identified the same which was made over to her. She stated in the cross- examination that her son never came to Bhopal. She then stated that there is no nick name of her son Umar Izhar. It is not clear from the evidence on record as to whether the dead body, which was made over to P W- 2 0, was that of red shirt boy. Fro m the aforesaid facts it appears to us that the prosecution has failed to prove beyond reason able doubt identity of the dead body of red shirt boy, i.e., as to whether it was that of Munneybul Hasan or Umar Izhar or any other unknown person.

3 2. Investigating Officer, P W- 2 5 stated that he seized bloodstained knives in the court premises itself from the possession of appellants Haseen, Badsh a h, Sadiq and Sajid on the date and place of occurrence itself between 12. 2 5 to 1 2. 4 0 P.M. and took them to the police station but the arrest memo [Ext. P- 3 4] shows that they were arrested on the date of occurrence at 8.1 5 P.M. In case the bloodstained knives were seized from the possession of these persons, there was no reason of their not being arrested by the police at that

point of time which makes the time of recovery of the bloodstained knives and the arrest of these accused persons, as mentioned in the seizure and arrest memos, doubtful. P W- 2 5 further stated that from the possession of appellant - Guddu a knife was recovered on 1 9 . 0 7 . 1 9 9 6 and he was arrested also on the same day. Knives seized from the possession of these five accused persons were sent to the FS L for examination and the same were marked as articles 'A', 'B', 'C', 'D' and 'E'. According to FS L report [Ext. P- 40], no blood was found on articles 'A', 'B', 'C' and 'E' but blood was found on the knife marked as article 'D'. The Serologist has nowhere reported that it was human blood.

3 3. Mohan [P W- 14], who was posted in the court of the 3 rd Additional District Judge stated that on the date of occurrence at 1 2 noon he was inside the courtroom and appellant Munne P a inter was sitting on a bench in that very courtroom from before and soon after the firing he entered the chamber of the P residing Officer. The prosecution made a prayer to declare this witness hostile, but trial court rejected the same. This statement of the witness makes the complicity of appellant Munne P a inter with the crime highly doubtful. Apart from this, according to the prosecution case and evidence, appellants Munne P a inter and Mazhar were not armed with any weapon much less any knife or firearm. Neither any overt act has been attributed to anyone of them nor any incriminating article recovered from their possession.

3 4. In view of the foregoing discussion, we are of the view that it would not be safe to place reliance upon the evidence of P W s 2, 5, 7, 8, 1 5 and 1 9 and, accordingly, we hold that the prosecution has failed to prove its case beyond reasonable doubt and the High Court was not justified in reversing the judgment of acquittal as the view taken by the trial court was reasonable one and the same could not be said to be perverse in any manner.

3 5. We are unhappy to note that such a ghastly crime of brutal

murder of three persons in broad day light in the temple of justice, which is campus of District Court in Bhopal, Capital City of the State of Madhya Pradesh, is going unpunished because of lapses on the part of the prosecuting agency in conducting the investigation and trial, apart from uncooperative attitude of the private prosecutors, who appear to have connived with the culprits, leaving us with no other option but to painfully convert convictions of the appellants, some of whom were even condemned prisoners, into acquittal.

36. In the result, all the three appeals are allowed, the impugned common Judgment of conviction rendered by the High Court is set aside and the judgments of acquittal passed by the trial court are restored. The appellants, who are in custody, are directed to be released forthwith if not required in connection with any other case.

.....J.
[B.N. AGRA W A L]

.....J.
[G.S. SIN G H V I]