REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 121 OF 2019

NETAJI ACHYUT SHINDE (PATIL) & ANR. ….APPELLANT(S)

VERSUS

THE STATE OF MAHARASHTRA ....RESPONDENT(S)

WITH

CRIMINAL APPEAL NO (s). 328 OF 2021

JUDGEMENT

S. RAVINDRA BHAT, J.

1. The appellants, in these two appeals, impugn a common judgment of the Aurangabad Bench of the Bombay High Court convicting them of committing the offence punishable under Section 302 read with Section 34 of the Indian Penal Code. One appellant (all of them hereafter referred to by name), the second accused Samadhan Shinde, was convicted by the trial court, while the other two were acquitted. These acquittals were reversed by the impugned judgment which convicted all the accused (first accused Netaji Achyut Shinde (Patil), second accused Samadhan Shinde, and third accused Balasaheb Kalyanrao Shinde (Patil),

[hereafter referred to as A-1, A-2 and A-3 or by their names as Netaji, Samadhan and Balasaheb].

2. A first information report (FIR 80/2011) was registered at Kallam police station, alleging the commission of offences punishable under Section 302 read with Section 34 IPC, i.e., the murderous attack on one Suhas, the deceased. The statements of eyewitnesses as well as the dying declaration by the deceased Suhas were relied on in the charge sheet which was subsequently filed, implicating the accused. The learned Additional Sessions Judge, Osmanabad[1] framed charges against the accused for the offences alleged against them. All accused pleaded not guilty and claimed trial. The prosecution examined 21 witnesses in support of the charges. The defence of the accused was denial, and that they were falsely implicated due to political enmity and property dispute. The trial court, on consideration of the evidence led by the prosecution, convicted A-2 Samadhan; it however, found the evidence against A-1 Netaji Shinde and A-3 Balasaheb Shinde to be doubtful and acquitted them.

3. The High Court granted the state leave to appeal; A-2 Samadhan too appealed against his conviction and sentence. The High Court by the impugned judgment reversed the acquittal of A1 and A3 and affirmed the conviction of A-2 Samadhan. All three are therefore in appeal.

The essential facts and evidence considered by the courts

4. The prosecution alleged that on 5.7.2011, at about 5.30 PM at Shivaji Chowk, in front of one Raviraj Beer Bar at Kallam, district Osmanabad, all the accused appellants further to their common intention assaulted the deceased, Suhas and inflicted serious injuries with a sword as well as by fist blows and kicks. At about 7.15 PM, Suhas succumbed to his injuries, at the S.R.T.S. Medical College and Hospital, Ambajogai. Based on a complaint lodged by P.W.1 Ramhari Shinde, the

1Hereafter “the trial court”.

FIR was registered at 11.45 PM at Kallam police station. The FIR alleged the involvement of the four individuals- i.e. the three appellants/accused persons, and one Anant Balasaheb Shinde; he could not however be charged and tried, as he absconded. The FIR was registered upon the complaint lodged at 11.45 PM hours of Ramhari Ganpatrao Shinde, resident of village Kothala, Kallam stating that he was a social worker. The complainant, PW-1 Ramhari Shinde's brother, Prakash had two sons; (the deceased Suhas and one Vikas). Ramhari Shinde was Taluka President of the Nationalist Congress Party for Kallam, Chairman of Kallam Taluka Market Committee, and Sarpanch of his village; the deceased was taluka Vice President of the Youth Nationalist Congress party. He admitted that there was a police post near the Shivaji statue at Kallam. He was informed about the incident by PW-2, Balasaheb Kshirsagar. PW-2 deposed that he was in front of Padmasinh Patil Complex, which is in Shivaji Square. When the deceased was getting down from his motorcycle in front of Raviraj Beer Bar, the accused and absconding accused went there on a motor cycle, with a sword in hand. He gave sword blows on the face, neck and hand of the deceased and the other accused gave fist blows and kicks to the deceased. PW-2 stated that the deceased fell down. As he was crossing the road to reach the spot where Suhas was, he heard the accused saying that they would kill Suhas. Suhas got up and ran towards Sonar Galli. On the way, the absconding accused Anant warned bystanders not to intervene, or he would stab them. All accused followed the deceased Suhas, as he entered Kothavale Jewellers. PW-2 stated that Satish Tekale and Pradip Mete were present and when they asked the accused what they were doing, one of the accused asked to bring a motorcycle. Upon this, one of them brought a motorcycle (No.MH- 25/W-1744 which had the photograph of Anant Chonde on the front). All four accused left on that motorcycle. PW-2 then telephoned PW-1 Ramhari Shinde, and· informed about the incident; thereafter he went to Kothavale Jewellers, where Suhas was lying with injuries. Pradip Mete and Satish Tekale took the deceased to the government hospital; the doctor asked them to take the injured to Ambajogai for further treatment. Accordingly, Ramhari, Vikas Barkul, Prashant Lomate and Satish Tekale took Suhas

in the ambulance. At about 7.45 p.m., PW-2 learnt about the death of the deceased. During cross examination, PW-2 admitted that Ramhari (PW-1) was his maternal uncle. He stated that he did not inform the police immediately, though the police station was nearby. He further stated that 50-100 persons had gathered at the place of the incident. PW-3 Balkrishna Gangadhar Bhawar admitted to being the President of the Indian Nationalist Congress party for Kallam district and that he did not report the incident to the police, despite witnessing the incident. PW-4, similarly, corroborated the testimony of PW-2 and PW-3.

5. The prosecution relied on the testimonies of P.W.2 Balasaheb Kshirsagar, P.W.3 Balkrishna Bhawar, P.W.4 Shivraj Ritapure and P.W.18 Ravindra Mohanlal Oza as eye witnesses to the incident. The other main eyewitnesses were the doctor PW-12, who conducted the post-mortem report. PW-19 and PW-20 were police officers who deposed during the trial. Besides their statements, exhibits such as blood-stained clothes worn by the accused, and material objects i.e. weapons, blood stained soil, etc were produced.

6. The trial court treated the first information received at 17:45 hours on 05.07.2011 as the first information, and discarded the FIR recorded later during the night, at 11:30 PM. It rejected the accused's argument that the eyewitnesses were all partisan and therefore, unreliable. Yet, based predominantly on the medical evidence, which it read as negating any role of the accused Netaji (A-1) and Balasaheb (A-3),the trial court acquitted them of the charges levelled. It further held that in the absence of any injury of the kind attributed to these accused (who are also appellants before this court), no finding of their culpability, to warrant a conviction, could be returned. As far as A-2, Samadhan is concerned, the trial court held him guilty, on account of his participation with the absconding accused, i.e. Anant, with whom he went away on a motorcycle, driven by him (i.e. Samadhan).

7. An appeal was preferred by Samadhan, and the state (which was given leave to appeal by the High Court), against the findings of the trial court, absolving Netaji

and Balasaheb. At the High Court, these findings of acquittal were reversed; they were convicted of the offences charged, on an overall appreciation of the prosecution evidence. It was held that the trial court completely overlooked the depositions of eyewitnesses and gave no reasons why their statements were to be cast aside, and that it erred in giving overall primacy to medical evidence. The testimonies of eyewitnesses, some of whom had no connection with the deceased, as well as the recoveries made pursuant to the accused's statements, during investigation, had been ignored. On an overall appreciation and analysis of the evidence, therefore, A-1 and A-3 were convicted; A-2 Samadhan's conviction was affirmed.

Submissions of the accused/appellants

8. The appellants argued that the prosecution version, which is that the first information report was lodged at 11:30 PM, is false. Mr. S. Nagamuthu, learned senior counsel relied upon the findings of the trial court and highlighted that the first intimation about the crime was itself complete and was received by the police station at 5.30 p.m. in the evening. He drew the attention of this court to Ex. P. 82, which is the extract of the case diary, which at Entry 39[2], recorded the event. Learned counsel highlighted that once the police authorities knew of the occurrence of a serious incident, they were supposed to immediately lodge an FIR.

9. Counsel took exception to the testimony of PW 19 and PW 20, who had deposed that the FIR was in fact lodged later at 11:30 PM, as the intervening time between the intimation (05:30 PM) of the crime and lodging of FIR was spent in finding the whereabouts of the accused and gathering details of the crime. Learned counsel relied upon the testimony of PW 18, as well as PW 5 and argued that the police had in fact started investigation, soon after the event was known to them,

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2 Entry 39, part of Ex. 82, reads as follows:

"Ravi Harkar and Vishwajeet Thombre R/o. Kallam informed telephonically that, two persons who arrived on motorcycle assaulted one person at the corner of municipal counsel complex near vegetable market and the said person took shelter in the jewelery shop to save his life. He is unconscious and injured. Therefore, send the police immediately hence, entry is taken regarding communication to police station."

which supports the argument that the details of the crime were known at 5:30 PM. Drawing the attention of the court to the FIR, learned senior counsel submitted that the initial information talked of an attack by one motorcycle ridden by two persons. However, when the FIR was actually allegedly recorded, this version disappeared and an improvement, which had involved other accused in order that they be implicated, was registered. Also, learned counsel stated that the intervening time between the initial intimation and the recording of actual FIR was spent in spinning a yarn, and seeking support from entirely partisan witnesses who were in fact not witnesses to the incident, and were in some manner connected to the deceased or his family.

10. Learned counsel contended that the findings of the trial court with respect to the first intimation itself being an FIR are correct in law. He relied on the decisions in *Pradeep s/o Narayanrao Rajgure v. State of Maharashtra*[3] and *Nilesh Naik @ Mangushekhar v. State of Goa*[4] in aid of his argument that it is the first intimation of the crime which constitutes the first information report (FIR) and that the credibility of an "official" or formal FIR shown to have been registered later, is suspect as it affords considerable leeway to the police to cook up fictions and falsely implicate innocent persons.

11. It was contended next that the trial court's approach in rejecting or discarding the oral testimonies of witnesses, and giving primacy to the objective medical evidence, which pointed to the nature of injuries, was correct. Elaborating on this aspect, it was submitted that several witnesses such as PW-1, PW-3, PW-4 and Pw-6 were known to the deceased as well as PW-1. The Counsel urged this court to take into consideration the circumstance that there existed a long-standing political rivalry between members of the deceased's family and those of the accused. The deceased in fact lived at Kothala village. The other witnesses were partisan inasmuch as they could not explain why they were present at the scene of the crime. Emphasising on this aspect, the learned senior counsel pointed out that although

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3 2004 ALL MR (Cri) 1308
4 2010 (3) Bom CR (Cri) 201

these partisan witnesses are alleged to have witnessed the crime, they took no steps to report it to the police. Here it was submitted that the police station was barely hundred metres away and even according to the testimony of PW 19, could be accessed by a 5 minute walk. Furthermore, according to the prosecution, nearly a hundred people were present and had witnessed the event. Despite this, the prosecution was able to dig out witnesses who were blatantly partisan and had their own motives to implicate the accused.

12. It was submitted that each of the alleged eyewitnesses, such as PW-1, PW-2, PW-3, PW-4 and PW-6 could not offer any explanation as to why they were present. Pointing out to PW-3, it was submitted that being a professor in a college, the witness could not claim his presence at the scene of occurrence even though he lived a distance away. Similarly, PW-4 lived in an entirely different village and did not offer any explanation for why he came to the place of incident at that very moment of the occurrence. It was argued out that these two witnesses, despite their closeness to the deceased, neither sought to assist him or come to his aid, nor even reported to the police station –a serious and important omission that undermines their credibility as objective witnesses.

13. It was next argued that the dying declaration relied upon by the prosecution is unreliable and varies with the medical evidence; in fact, it is not corroborated by medical evidence. Senior counsel submitted that having regard to the nature of the injuries, it was not possible (for Suhas) to make any oral statement as the injuries were to the right side of the maxilla and mandible. If there were injuries to the upper jaw and lower jaw, it was not possible to give a dying declaration. If the deceased was in a fit condition to speak, he would have narrated the incident. He did not do so; the relatives gave the case history. Counsel stated that the deceased was under the influence of alcohol. In view of these facts, the dying declaration was unreliable, and could not be the basis of conviction of the appellants. P.W.1 complainant and P.W.7 doctor, have stated that the condition of the deceased was critical and he was in shock. P.W. 5, the jewellery shop owner stated that the deceased had fallen down in the shop. Thus, considering the entire documentary and oral evidence, it was

submitted that the dying declaration does not inspire confidence, and should not be relied upon.

14. It was further argued that the recovery of the accused's clothes – sought to be proved under Section 27 of the Evidence Act, was contrary to law and probability. It was submitted that the distance between the police station to Kothala is 15 to 20 K.M. The police allegedly travelled the 15- 20 K.M. within five minutes. This renders the *panchnama* regarding recovery of accused's clothes doubtful and liable to be rejected. Further, the recovery of the accused's clothes under Section 27 was from an open place and could not be considered. It was highlighted that the sessions court held that the recovery was contrary to the inquest and seizure *panchnamas*. Different clothes were shown in the seizure and inquest *panchnama*s. The prosecution did not give any explanation about change of the deceased's clothes in the inquest *panchnama*. Likewise, the delay in furnishing the *muddemal* articles for testing more than two months after they were sealed (on 06.02.2011) was not explained, giving rise to the possibility of tampering.

15. It was submitted that the nature of the wounds on the person of the deceased, according to the medical evidence, only established that the absconding accused had caused fatal injuries. There was no evidence in the medico-legal report or the post mortem report to substantiate the prosecution story about the appellants' involvement in the crime; indeed, the doctor PW-7 nowhere supported the prosecution theory by deposing that the kind of injuries attributable to the appellants were present on the body. That apart, the prosecution could not prove any prior concert, or meeting of minds between the absconding accused and the present appellants, to implicate them for the crime under Section 34. In the absence of any proof of common intention, their conviction had to be upset; the acquittal of two of the accused, should not have been interfered with by the High Court.

16. It was submitted that almost all the prosecution witnesses, barring official witnesses and four independent witnesses, were related to the complainant, and could not by and large, explain the reason for their presence at the site. This created a suspicion that the complainant made out a story to falsely implicate the

accused/appellants, who were nowhere in the picture. Two vital eyewitnesses were not examined. Given that the deceased was critically wounded and could not have given a dying declaration, the police used the 6-7 hours interval to spin a story and falsely implicate the appellant, as was correctly surmised by the trial court. That the appellants were not named in the first intimation during the early part of the evening when the police received information of the crime, clearly showed that they were not involved.

17. It was lastly urged that the recovery of the motorcycle too could not be proved, as is seen from a close reading of the contradictory evidence of PW-6 and PW-11. Besides, the eyewitness accounts showed that the motorcycle belonged to the absconding accused.

18. Counsel for the state urged this court not to interfere with the findings in the impugned judgment. It was submitted that the trial court was heavily influenced by the arguments on behalf of the accused that the first intimation about the crime, itself constituted the first information report; therefore, it discarded the evidence of PW-1 that he had complained to the police about the offence at 11:30 PM, and, instead treated that as a statement under Section 161. It was urged that the evidence of PW-8 with respect to alleged theft of the motorcycle was correctly disbelieved; the trial court was convinced that Samadhan, one of the accused, was a participant in the crime, and shared the common intention. The trial court also gave credence to medical evidence, particularly the testimonies of PW-7 and PW-12, with respect to the nature of injuries. It was submitted that however, the trial court acquitted the other accused, i.e. Netaji Shinde A-1 and Balasaheb (A-3) by disbelieving the dying declaration and also by holding that there were no injuries answering to the acts attributed to these accused, on the deceased.

19. Learned counsel for the state emphasized that the trial court acted in complete error, in overlooking the ocular evidence of PW-2, PW-3, PW-4, PW-5 and PW-18. These individuals were present at the moment, though in different places, and witnessed the sequence of events, whereby the accused went together, leading to the second accused attacking the deceased with a sword, and the motorcycle number

on which the absconding accused was seated with Samadhan (A-2). The exhortation of the other accused at the time of the attack, and afterwards, as well as the role played by them were clearly deposed by these witnesses. PW-5 was the owner of the jewellery shop into which the injured Suhas rushed, bleeding copiously. Apart from witnessing the collapse of Suhas, this witness also deposed to the seizure of various articles from his shop. Similarly, PW-18 was the owner of Raviraj Beer Bar, and was standing near the place where the entire episode occurred. These witnesses were all consistent regarding the nature of the attack upon Suhas, and the role played by the accused.

20. The state argued that the trial court had erred in ignoring these vital pieces of evidence, and had gone by suspicions. Its rather simplistic conclusion that the absence of any physical injuries (due to blows, beatings etc) indicated that there was no common intention, was clearly wrong. It was submitted that the High Court correctly held that an overall appreciation of the evidence showed that the accused who stood trial were guilty beyond reasonable doubt.

Analysis and Conclusions

21. The first issue which this court considers is whether the appellants are correct, in arguing that the initial intimation received by the police on telephone (at 5.45 P.M.) on the day of the incident, constituted an FIR. According to counsel, the information about the attack was sufficient, and the entry made in the police register was sufficient to be treated as an FIR. It was submitted that the subsequent statement (registered late in the night at 11.45 P.M.) of the complainant, had to be treated as a statement under Section 161 of the Cr.PC. A cryptic phone call without complete information or containing part-information about the commission of a cognizable offence cannot always be treated as an FIR. This proposition has been accepted by this Court in *T.T. Antony v. State of Kerala*[5] and *Damodar v. State of*

5(2001) 6 SCC 181

Rajasthan[6]. A mere message or a telephonic message which does not clearly specify the offence, cannot be treated as an FIR.

22. In *Surajit Sarkar v. State of West Bengal*[7], this Court held as follows:

> *"37. A bare reading of this makes it clear that even though oral information given to an officer-in-charge of a police station can be treated as an FIR, yet some procedural formalities are required to be completed. They include reducing the information in writing and reading it over to the informant and obtaining his or her signature on the transcribed information.*
>
> *38. In the case of a telephonic conversation received from an unknown person, the question of reading over that information to the anonymous informant does not arise nor does the appending of a signature to the information, as recorded, arise."*

23. Exhibit 85 – extract of the police station diary, Item 39 has been extracted above). That entry at 17.45 hours merely states that Ravi Harkar and Vishwajeet Thombre informed telephonically that two persons arrived on a motorcycle and assaulted one individual at the corner of municipal council complex. This intimation *per se* is incomplete. The subsequent entries relevant for this purpose are numbers 42 at 18.45 hrs (enclosing the recording receipt of MLC from the Rural Civil Hospital Kallam) that one Suhas had been seriously injured and shifted to Ambajogai for further treatment. Enquiry was handed over to HC Bansode. The next entry talks of arranging *bandobast* at Kothala. Entry 50 recorded the departure of striking force of PSI Karle which left for Kothala. The last relevant entry is at 23.45 hrs, which is the complaint that ultimately got converted into the FIR, recorded by PW-1. This lists out the details of the accused and the incident.

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6 (2004) 12 SCC 336
7 (2013) 2 SCC 146

24. It is quite evident from the record, therefore, that the intimation given by two individuals - Ravi Harkar and Vishwajeet Thombre merely set out the bare facts of an attack; the information was incomplete; neither the name of the victim nor the names of the alleged attackers nor even the precise location where the incident occurred were mentioned. Applying the tests indicated by the judgments of this Court (referred to previously), this court is of the opinion that the High Court, in the appeal before it, correctly inferred that the first information recorded at 17.45 hrs could not be treated as an FIR. In these circumstances, the details of the event which occurred, the nature of the attack, the place of the attack, the names and identities of the accused were set out fully when PW-1 recorded the statement at 23.45 hrs – that constitutes the FIR.

25. This court is also of the opinion that there is no merit in the arguments that the police sought to improve the initial version and somehow roped in the accused falsely. In this regard, the reliance placed upon Entry 39 at Ex. 85 which talks of two assaults (in the initial telephonic intimation) is unfounded. Quite often, depending upon how and what people see and perceive about an incident, when they narrate it subsequently, the rendition might not be accurate in describing the sequence or even the facts completely. Much would depend on the relative distances and the angles where those individuals might have been placed or located, relative to the incident or event. Therefore, the inclusion or omission of more than two accused cannot be a matter of grave suspicion. It may be in the given case, an aspect to be kept in mind when other circumstances pointing to false implication might well exist. *Per se*, however, it cannot be said that the omission to mention four assailants falsifies the prosecution story.

26. The appellants had urged that the medical evidence was not in consonance with the prosecution version about their role in the attack upon Suhas. The Trial Court was convinced that the absence of any injury which corroborated the evidence of eye witnesses that the accused had beaten Suhas, was sufficient to conclude that

they were not involved. The evidence of PW-7, i.e. the doctor who had examined Suhas immediately after the attack indicated the following injuries:

> 1. *"Cut would over left side head extending towards mandible interiorly. Bleeding was there. Since was 20x4 c 2 cm. Having shape of spindle, vertical, edges were clean cut and everted out.*
>
> 2. *Cut wound over left side arm posterior aspect medically bleeding present. Since 10 cm x 4 cm 2cm spindle shape, vertical, edges clean cut, everted out.*
>
> *3. Cut wound over right force arm anterior, 4 x2 x ½ cm. Bleeding was there, Edges were regular, everted, spindle shape.*
>
> *All the injuries were caused within six hours. Cause of injuries was hard object with sharp cutting edge. All the three injuries were grievous in nature."*

27. PW-12, who was the doctor who conducted the postmortem noticed that there were four injuries. The relevant part of PW-12's deposition is extracted below:

> *"I found following external injuries on the body.*
>
> *1. Stab wound present over right side of maxilla and mandible upto bone deep, 30 cm x 3 cm in length. Oblique in direction towards left eye, edges inverted, margins clean cut. Angle right angel, reddish colour blood adherent at side.*
> *2. Stab wound present over left posterior aspect 25cm x 14 cm in length. Vertical in direction, exposing bone and muscles edges irregular in direction, reddish colour blood adherent at site.*
> *3. Stab would present over right forearm anterior aspect, 8 cm x 3 cm length horizontal in direction 4 cm above to wrist joint, angles right angle, edges inverted. Reddish coloured blood adherent at site.*
> *4. Abrasion present over left side of back 9 cm x 0.3 cm size vertical in direction 19 cm above to PSIS reddish in colour.*
>
> *All injuries were anti- mortem in nature."*

28. It is evident from the record that PW-2, PW-3, PW-4, PW-6 & PW-18 were eye witnesses according to the prosecution. The deposition of PW-2 (closely related to PW-1) and that of PW-4 appears to have been doubted to some extent by the Trial Court. However, what is clear from the entire reading of the record – including the

judgment of the trial court is that there is no doubt that PW-6, PW-2 and PW-18 had in fact witnessed the entire incident. PW-18, Ravindra Oza, owned Raviraj Beer Bar and was clear about the assault by a sword by the absconding accused. He also mentioned that the present appellants had assaulted Suhas with fist blows. PW-6, Satish Shahji Tekale was standing in front of a tea stall when Suhas burst in, running from Shivaji Chowk. He was bleeding and was chased by the appellants and Anant Shinde who were shouting loudly that Suhas ought to be caught and killed. PW-6 claimed that he and one Pradip Mete intervened and, in the meanwhile Suhas entered "Kothavale Jewellers", after which all the accused left on a motorcycle. The deposition of PW-6 was corroborated by that of PW-18; the latter also deposed the number of the motorcycle (No.MH-25/W-1744) by which the accused went after the attack.

29. PW-5 was the owner of the shop *"Kothavale Jewellers"* and though not a direct witness, immediately witnessed the events connected with the incident. He deposed as to Suhas entering the shop and asking him to save him. He also deposed that Suhas was severely bleeding and that some people had surrounded his shop and one was armed with a sword. He deposed that the absconding accused had also given him (Suhas) sword blows and further that he had been chased by them. PW-5 also deposed that Satish Tekale and Pradip Mete took Suhas to the hospital.

30. In the cross-examination of these eyewitnesses, nothing significant was elicited on behalf of the accused. The general line of questioning appeared to be that the eye witness had not reported to the police despite knowledge of identity of the deceased. In the opinion of this Court, if any minor inconsistencies are found with respect to details of the accused, they are inconsequential, having regard to the fact that the overall weight of evidence clearly points to the role of the accused as those who attacked the deceased Suhas. No physical injury could be attributed to the present accused since the MLC and postmortem did not reveal any corresponding wound on account of fist blows or kicks. However, that does not conclude the issue

in favour of the appellants. The consistent testimony of all the eyewitnesses was clearly that the present appellants were part of the attack; they played an active role in assaulting Suhas and chasing him, which eventually forced him to run into PW-5's shop and collapse there. The material objects recovered from the site as well as PW-5's shop which included bloodstains clearly supported the story of these eyewitnesses. Having regard to these circumstances, this court is of the opinion that the absence of any overt injury on the person of the deceased did not in any manner diminish the role played by the present appellants. The prosecution had alleged a common intention on their part, with the absconding accused. According to PW-13, on 11.07.2011 accused Samadhan Shinde made a statement to police in his presence and disclosed that he had taken motorcycle from Parmeshwar Patil and thereafter they went to Sonesangavi Phata and recovered Bajaj make Discover Motorcycle No.MH-25/W-1744, which was parked there, under *panchanama* Ex. 71. Ex.69 was prepared between 10.30 to 10.55 p.m. and Ex.70 between 11.00 to 12.45 noon.

31. What constitutes proof of common intention, may differ from situation to situation and much depends on the facts of each case and the role played by each accused. This was highlighted in *Ramaswami Avyangar v. State of Tamil Nadu*[8] , where, to establish common intention it was held that:

> "*12.... The acts committed by different confederates in the criminal action may be different but all must in one way or the other participate and engage in the criminal enterprise, for instance, one may only stand guard to prevent any person coming to the relief of the victim, or may otherwise facilitate the execution of the common design. Such a person also commits an "act" as much as his co-participants actually committing the planned crime. In the case of an offence involving physical violence, however, it is essential for the application of Section 34 that the person who instigates or aids the commission of the crime must be physically present at the actual commission of the crime for the purpose of facilitating or promoting the offence, the commission of which is the aim of the joint criminal venture. Such presence of those who in one way or the other facilitate the execution of the common design, is itself tantamount to actual*

8(1976) 3 SCC 779

participation in the 'criminal act'. The essence of Section 34 is simultaneous consensus of the minds of persons participating in the criminal action to bring about a particular result. Such consensus can be developed at the spot and thereby intended by all of them....”

32. In *Nandu Rastogi v. State of Bihar*[9], highlighting how there can be inference regarding common intention this court observed that:

“17.... They came together, and while two of them stood guard and prevented the prosecution witnesses from intervening, three of them took the deceased inside and one of them shot him dead. Thereafter they fled together. To attract Section 34 Indian Penal Code it is not necessary that each one of the Accused must assault the deceased. It is enough if it is shown that they shared a common intention to commit the offence and in furtherance thereof each one played his assigned role by doing separate acts, similar or diverse....

33. Recently, in *Subed Ali And Others v. The State Of Assam*[10] this court ruled that

“Common intention consists of several persons acting in unison to achieve a common purpose, though their roles may be different. The role may be active or passive is irrelevant, once common intention is established. There can hardly be any direct evidence of common intention. It is more a matter of inference to be drawn from the facts and circumstances of a case based on the cumulative assessment of the nature of evidence available against the participants. The foundation for conviction on the basis of common intention is based on the principle of vicarious responsibility by which a person is held to be answerable for the acts of others with whom he shared the common intention. The presence of the mental element or the intention to commit the act if cogently established is sufficient for conviction, without actual participation in the assault. It is therefore not necessary that before a person is convicted on the ground of common intention, he must be actively involved in the physical activity of assault.”

9(2002) 8 SCC 9
102020 (10) SCC 517

34. Here, the physical presence of the accused (including Appellant Nos. 1 and 3) at the site of the actual commission of the crime and the deposition of independent witnesses about their role, clearly establishes that it was for the purpose of facilitating the offence, the commission of which was the aim of the joint criminal venture. The presence of these accused, to facilitate the execution of the common design amounts to actual participation in the criminal act. The evidence – i.e. the exhortation by these accused, their active role in attacking the deceased, chasing him and leaving the crime scene together, clinches that there was a consensus of the minds of persons participating in the criminal action to bring about a particular result. It was this aspect which the trial court glaringly overlooked, and instead, misdirected itself grossly in focusing upon the first intimation, treating it as the FIR, and therefore, proceeding to doubt the prosecution version. It found no lacunae in the testimonies of the eyewitnesses discussed above. However, proceeding on the thesis that the first intimation was the FIR, and that it did not describe the role of four persons, but only mentioned two, the trial court acquitted the two accused.

35. This court would now consider whether the High Court fell into error in re-appreciating evidence and arriving at a different conclusion than the trial court, and convicting the present appellants. Long ago, in *Sanwat Singh v. State of Rajasthan*[11]this court dealt with the powers of an appellate court, in cases where trial courts in India record acquittal. The court quoted the decision of the Privy Council with approval:

> *"7. The scope of the powers of an appellate court in an appeal against acquittal has been elucidated by the Privy Council in Sheo Swarup v. King-Emperor [LR 61 IA 398] . There Lord Russell observed at p. 404 thus:*
>
> > *"… the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses,(2) the presumption of innocence in favour of the accused, a presumption certainly*

11(1961) 3 SCR 120

> *not weakened by the fact that he has been acquitted at his trial, (3) the right of the accused to the benefit of any doubt, and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses…."*

Adverting to the facts of the case, the Privy Council proceeded to state,

> *"… They have no reason to think that the High Court failed to take all proper matters into consideration in arriving at their conclusions of fact."*

These two passages indicate the principles to be followed by an appellate court in disposing of an appeal against acquittal and also the proper care it should take in re-evaluating the evidence. The Privy Council explained its earlier observations in Nur Mohammad v. Emperor [AIR 1945 PC 151] thus at p. 152:

> *"Their Lordships do not think it necessary to read it all again, but would like to observe that there really is only one principle, in the strict use of the word, laid down there; that is that the High Court has full power to review at large all the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed."*

These two decisions establish that the power of an appellate court in an appeal against acquittal is not different from that it has in an appeal against conviction; the difference lies more in the manner of approach and perspective rather than in the content of the power".

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36. In Balbir Singh v. State of Punjab[12] this Court observed much to the same effect thus at p. 222:

> *"It is now well settled that though the High Court has full power to review the evidence upon which an order of acquittal is founded, it is equally well settled that the presumption of innocence of the accused person is further reinforced by his acquittal by the trial court and the views of the trial Judge as to the credibility of the witnesses must be given proper weight and*

12 AIR 1957 SC 216

> *consideration; and the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge*
>
> *who had the advantage of seeing the witnesses must also be kept in mind and there must be substantial and compelling reasons for the appellate court to come to a conclusion different from that of the trial Judge.*
>
> *These observations only restate the principles laid down by this Court in earlier decisions. There are other decisions of this Court where, without discussion, this Court affirmed the judgments of the High Courts where they interfered with an order of acquittal without violating the principles laid down by the Privy Council."*

37. Again, in *Babu* v. *State of Kerala*[13] this court held that "*findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material*" or if they are '*against the weight of evidence*' or if they suffer from the "*vice of irrationality*".

38. This court, after considering the reasoning in the impugned judgment, is of the opinion that the High Court was quite correct in reversing the acquittal of the two appellants who are now before this court. The eyewitness testimonies which clearly implicated them in the crime, established their participation, and the depositions which showed that they played a part in achieving the common intention of carrying the murderous assault on the deceased, Suhas, was overlooked by the trial court for trivial and immaterial reasons. The appreciation of the evidence and all the circumstances appearing from the record, was clearly unreasonable and irrational. The High Court quite correctly reversed the acquittal, and recorded the conviction against all the appellants.

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13 2010 (9) SCC 189

39. For the above reasons, there is no merit in the present appeals; they are dismissed without order on costs.

……...J
[L.NAGESWARA RAO]

.....J
[HEMANT GUPTA]

…….....J
[S. RAVINDRA BHAT]

New Delhi,
March 23, 2021.