A JOGINDER SINGH

v

STATE OF HARYANA

(Criminal Appeal No. 1148 of 2007)

B OCTOBER 24, 2013

[K.S. RADHAKRISHNAN AND DIPAK MISRA, JJ.]

Penal Code, 1860 – ss. 302 and 307 r/w. s. 34 – Arms Act, 1959 – ss. 25 and 27 – Prosecution under – Of three C *accused including appellant-accused – Acquittal of all the accused by trial court giving them benefit of doubt – High Court convicted the appellant-accused while maintaining the acquittal order in respect of other accused – Held: The High Court has unsettled the reasonable findings of trial court in a* D *cryptic manner – Trial court has rightly acquitted the accused in view of the material contradiction in oral evidence and ballistic report, non-examination of material witnesses including injured witnesses – Conviction set aside.*

E *Appeal – Appeal against acquittal – Scope of jurisdiction of appellate court – Discussed.*

Appellant-accused alongwith other two accused were prosecuted for the offences u/ss. 302 and 307 r/w. s. 34 IPC and u/ss. 25 and 27 of Arms Act, 1959. As per F **the prosecution case accused persons attacked the victim party with firearms resulting in death of one and injuries to three persons. PWs 1, 2 and 3 were the eye-witnesses to the incident. The accused in their statements denied the incriminating evidence and stated** G **that it were the people belonging to Harijan community who came to their house armed with firearms and fired at them indiscriminately and that they did not use any firearm. The trial court giving benefit of doubt acquitted all the accused of all the charges. The high Court relying**

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on the evidence of eye-witnesses convicted the appellant-accused, while acquitted the other accused persons giving them benefit of doubt. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1.1. The High Court can exercise the power or jurisdiction to reverse an order of acquittal in cases where it finds that the lower court has "obstinately blundered" or has "through incompetence, stupidity or perversity" reached such "distorted conclusions as to produce a positive miscarriage of justice" or has in some other way so conducted or misconducted himself as to produce a glaring miscarriage of justice or has been tricked by the defence so as to produce a similar result. [Para 13] [461-D-E]

1.2. In the present case, the High Court has compartmentalized the reasons ascribed by the trial Judge and thereafter dislodged the same one by one. The approach of the High Court in this regard cannot be flawed, but a pregnant one, it is required to be examined whether the High Court while dislodging the reasons and substituting the findings has appositely reappreciated the oral and documentary evidence brought on record to come to the conclusion that the view taken by the trial Judge is neither a plausible nor a reasonable one. [Para 16] [463-F-H]

Sheo Swarup and Ors. vs. King Emperor **AIR 1934 PC 227**; *Balbir Singh vs. State of Punjab* **AIR 1957 SC 216**; *Khedu Mohton and Ors. vs. State of Bihar Ganesh Bhavan Patel and Anr. vs. State of Maharashtra* **(1978) 4 SCC 371: 1979 (2) SCR 94**; *Awadhesh and Anr. vs. State of Madhya Pradesh* **(1988) 2 SCC 557: 1988 (3) SCR 513**; *Ram Kumar vs. State of Haryana* **1995 Supp (1) SCC 248: 1994 (4) Suppl. SCR 335**; *Bhagwan Singh and Ors. vs. State of M.P.*

A **(2002) 4 SCC 85;** *State of Goa vs. Sanjay Thakran and Anr.* **(2007) 3 SCC 755: 2007 (3) SCR 507;** *Puran Singh vs. State of Uttaranchal* **(2008) 3 SCC 795: 2008 (1) SCR 491;** *Shivasharanappa and Ors. vs. State of Karnataka* **(2013) 5 SCC 705;** *State of Rajasthan through Secretary, Home* B *Department vs. Abdul Mannan* **(2011) 8 SCC 65: 2011 (7) SCR 1099;** *Murugesan S/o Muthu and Ors. vs. State through Inspector of Police* **2012 (10) SCALE 378 – relied on.**

2.1. Though there has been compartmentalization of the reasoning, basically there are aspects which require C **scrutiny. The trial Judge had not accepted the credibility of the prosecution witnesses about the involvement of the accused in firing as a result of which the deceased and the injured persons sustained injuries. For supporting the same he had given emphasis on certain discrepancies.** D **The trial Judge had recorded the discrepancies and referred to the ballistic report to support his conclusion that the prosecution had not established the case and in all possibility had tried to protect the real assailants. On a perusal of the ballistic report, it is manifest that they** E **were not fired from the weapon, Ext.-15, seized from the house of the accused-appellant. The trial Judge had taken note of the fact that the pellets marks were there on the walls of the house of the appellant, which were visible from the photographs, Ext.-DA to DC. These** F **aspects show that there were also other persons present at the spot who had come with arms. It is demonstrable from the material brought on record that there were people from the Harijan community who had come to the disputed land and fired at the house of the accused** G **persons. The said conclusion is buttressed from the fact that the empties found from the spot were not fired from the gun of the accused. The High Court while lancinating the finding of the trial Judge on this score has only given a cryptic opinion without any reason that it does not** H **create a dent on the prosecution case. Such unsettling**

of a reasonable finding in a cryptic manner is not acceptable. It creates a grave dent on the version advanced by the prosecution. [Para 17 and 18] [465-D-H; 466-A-C, D-E]

2.2. The trial Judge on the analysis of the material on record had not accepted the prosecution version that the accused persons forcibly entered upon the land and installed the combine harvester. In fact, as the evidence would reveal, the combine harvester was installed much prior to the date of occurrence. The view taken by the trial Judge in this regard for the aforesaid limited purpose is a plausible one. The said finding by itself is of no consequence but it has been recorded to support and sustain the finding that the accused-appellant and his relations did not by force enter upon the disputed land and put the combine harvester. The trial Judge, on the aforesaid base, had held that there was no intention on the part of the accused persons and the High Court has opined that the question of motive or intention is inconsequential when there is direct evidence on record. It is settled in law that when there is direct evidence, the proof of intention is not necessary. However, the analysis of the trial Judge would go a long way to show that he had meticulously scrutinized the evidence relating to factum of possession of the land to highlight that the accused persons had no intention to forcibly enter upon the land and assert their right. As is evincible from the deposition of the witnesses that the combine harvester was there on the disputed land and the accused persons had not encroached upon the land to assert their possession. To that extent the finding of the trial Judge cannot be found fault with. [Para 16] [464-E-H; 465-A-D]

2.3. The trial Judge has disbelieved the version of the prosecution relating to firing by the appellant on the deceased and other injured persons on two counts,

A namely, the range from which it was fired on the deceased and there was no material on record to connect the injuries with the seized fired arms. As far as the facet of the distance is concerned, the opinion of the High Court seems to be sound. But the fact remains that B there is no material on record to connect that the gunshot injuries suffered by the deceased are due to the shots fired from the gun of the appellant. It is also discernible that though the pellets were recovered but the same have not been connected with the weapon. Thus, there is a C material contradiction in the oral evidence adduced by the prosecution on one hand and the ballistic report on the other. [Para 19] [466-E-H; 467-A]

Brijpal Singh vs. State of Madhya Pradesh (2003) 11 SCC 219 – relied on.

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2.4. In the present case, the ballistic report, Ext. P.UU, though refers to the mutilated pellets stated to have been recovered from the body of the deceased and also the two different leads pellets from the body of another E injured person, but is not definite that .12 bore DBBL gun, Ext. W/1, that was seized from the appellant, was used for firing such gunshots. This fact has been totally ignored by the High Court in an extremely cryptic manner. [Para 21] [468-B-C]

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2.5. The prosecution has not examined husband of the deceased, a relevant eye witness and three other injured witnesses. Non-examination of the material witness is not a mathematical formula for discarding the weight of the testimony available on record howsoever G natural, trustworthy and convincing it may be. The charge of withholding a material witness from the court levelled against the prosecution should be examined in the background of the facts and circumstances of each case so as to find whether the witnesses are available for being

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examined in the court and were yet withheld by the prosecution. [Para 22] [468-D-F] A

State of H.P. vs. Gian Chand **(2001) 6 SCC 71: 2001 (3) SCR 247;** *Takhaji Hiraji vs. Thakore Kubersing Chamansing* **(2001) 6 SCC 145;** *Manjit Singh and Anr. vs. State of Punjab and Anr.* **JT 2013 (11) SCALE 394 – relied on.** B

2.6. In the present case, non-examination of the material witnesses is of significance. It is so because PW-11 is really an interested witness though the High Court has not agreed with the same. It appears from the material brought on record that he had an axe to grind against the appellant. That apart, husband of the deceased, who was present from the beginning, would have been in a position to disclose more clearly about the genesis of the occurrence. There is no reason why the prosecution had withheld the said witness. Similarly, the other three witnesses who are said to be injured witnesses, when available, should have come and deposed. Therefore, in the obtaining factual matrix that their non-examination gains significance. [Para 25] [470-C-D] C D E

2.7. The case of the prosecution was that accused 'M'had snatched away the gun and fired at two persons. The trial Judge disbelieving the prosecution version had acquitted him. The High Court has given him benefit of doubt. Regard being had to the totality of evidence, both oral and documentary, there was no reason not to extend the said benefit of doubt to the appellant. The High Court has fallen into error on that score. [Para 26] [470-E-F] F

Chandu vs. State of Maharashtra **(2002) 9 SCC 408;** *Rathinam @ Rathinam vs. State of Tamilnadu and Anr.* **(2011) 11 SCC 140: 2010 (11) SCR 871;** *Ram Narain Singh vs. State of Punjab* **(1975) 4 SCC 497: 1976 (1) SCR 27;** *Mahendra Pratap Singh vs. State of Uttar Pradesh* **(2009) 11 SCC 334: 2009 (2) SCR 1033;** *Ram Bali vs. State of Uttar* G H

A *Pradesh* AIR 2004 SC 2329: 2004 (1) Suppl. SCR 195 – referred to.

Case Law Reference:

(2002) 9 SCC 408	referred to	Para 11
2010 (11) SCR 871	referred to	Para 11
1976 (1) SCR 27	referred to	Para 11
2009 (2) SCR 1033	referred to	Para 11
2004 (1) Suppl. SCR 195	referred to	Para 12
AIR 1934 PC 227	relied on	Para 13
AIR 1957 SC 216	relied on	Para 14
1979 (2) SCR 94	relied on	Para 14
1988 (3) SCR 513	relied on	Para 14
1994 (4) Suppl. SCR 335	relied on	Para 14
(2002) 4 SCC 85	relied on	Para 14
2007 (3) SCR 507	relied on	Para 14
2008 (1) SCR 491	relied on	Para 14
(2013) 5 SCC 705	relied on	Para 14
2012 (10) SCALE 378	relied on	Para 15
2011 (7) SCR 1099	relied on	Para 15
(2003) 11 SCC 219	relied on	Para 20
2001 (3) SCR 247	relied on	Para 22
(2001) 6 SCC 145	relied on	Para 23
JT 2013 (11) SCALE 394	relied on	Para 24

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1148 of 2007. A

From the Judgment & Order dated 09.05.2007 of the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 702-DBA of 1997. B

Neeraj Jain, Akshat Goel, Shree Pal Singh for the Appellant.

Rajeev Gaur 'Naseem', Naresh Bakshi for the Respondent.

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The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. The present appeal under Section 379 of the Code of Criminal Procedure, 1973 (for short "CrPC") is directed against the judgment of conviction and order of sentence dated 9.5.2007 passed by the High Court of Punjab D and Haryana at Chandigarh in Criminal Appeal No. 702-DBA of 1997 whereby the High Court has partly reversed the judgment of acquittal dated 9.6.1997 recorded by the learned Additional Sessions Judge, Kaithal in Sessions Trial No. 15 of 1993 instituted for offences punishable under Sections 302 and E 307 read with Section 34 of the Indian Penal Code (IPC) and under Sections 25 and 27 of the Arms Act against the appellant and two others and convicted the appellant alone under Section 302 IPC and sentenced him to undergo rigorous imprisonment for life. F

2. Filtering the unnecessary details the broad essential facts, as put forth by the prosecution, are that there was a dispute about the vacant plot of shamlat land where the complainant and his family members used to store their G respective kurris (heap of rubbish). The said land was given to Guru Ravidass Mandir by the Gram Panchayat vide resolution dated 22.03.1989. Accused Joginder Singh and Mohinder Singh, both real brothers kept on asserting their ownership over the said land and were not prepared to surrender it. Both the accused were booked twice under sections 107 and 151 of H

A CrPC relating to the said land. On 15.11.1991 about 4:00 pm., Joginder Singh parked his combine harvester on the disputed land which was objected to by deceased Kamla wife of Chander, Murti, wife of Dharambir, Bala, daughter of Sita Ram and other ladies present at that time. But Joginder Singh did B not pay any heed to the objection raised by the women, and abused them. In the meantime Chander, Dharambir, PW-3, and Mithan Singh, PW-2, came outside and asked accused Joginder Singh not to park his combine harvester on the disputed land. At that juncture, Mohinder Singh and Anokh C Singh, nephew of the accused, arrived at the scene and all of them started abusing the complainant and other women. The initial altercation took a violent turn and both the parties grappled with each other. During the fight accused persons ran away to their houses and returned with weapons. Joginder D Singh came armed with a DBBL .12 bore gun while the other two accused did not bring any weapon. As the prosecution story proceeds, both of them raised a 'lalkara' in filthy language to kill the members of other side. Accused Joginder Singh fired two shots from his gun pellets of which hit in the chest of Kamla and Bala and also in the chest and mouth of Mithan Singh, PW- E 2. Accused Mohinder Singh snatched the gun from Joginder Singh and fired two shots that hit the back of Bimla and the stomach region and thigh of Murti. The injured persons fell down on the ground on receipt of gunshot injuries. After hearing the gunshot number of villagers came to the place of occurrence F whereafter the accused persons took to their heels. Kamla succumbed to her injuries on the spot and her husband was asked to stay back to guard the dead body of his wife. Pritam Singh, PW-1, Karambir, Mamu Ram and others took the other injured persons in a vehicle to Civil Hospital, Kaithal. Pritam G Singh went to Police Station to lodge the FIR and his statement was recorded by the Inspector of Police, Prem Chand, PW-16, and an FIR was registered at 8:30 pm.

3. After the criminal law was set in motion, the investigating H agency commenced the investigation and in course of

investigation, Prem Chand, PW-16, prepared the inquest report, got the site plan done, collected the blood-stained earth and the pellets lying at the spot, sent the dead body for the post mortem and forwarded the articles to the Forensic Science Laboratory for examination, arrested the accused persons, recovered DBBL .12 bore gun and live cartridges, recorded the statements of other witnesses and after completing all other formalities laid the charge sheet for the offences punishable under Sections 302 and 307 read with Section 34 IPC and Sections 25 and 27 of the Arms Act before the competent court which, in turn, committed the same to the Court of Session. The accused persons pleaded not guilty to the charges and claimed to be tried.

4. To substantiate the charges the prosecution examined as many as 16 witnesses. The main witnesses are Pritam Singh, PW-1, the complainant, Mithan Singh, PW-2, Dharambir, PW-3, the eye witnesses to the occurrence, Dr. B.B. Kakkar, PW-4, who examined the injured, Dr. A.K. Leel, PW-8, who had conducted the post-mortem and also had examined the other injured witnesses; Zile Singh, PW-11, Sarpanch of the Gram Panchayat and Inspector Prem Chand, PW-16, the investigating officer of the case. The prosecution had exhibited number of documents which included the report of the Chemical Examiner, Ex. P.TT and report of Serology, Ex. P.TT/1 and report of Ballistic Expert, Ex. P.UU.

5. The accused in their statements recorded under Section 313 CrPC denied the incriminating evidence appearing against them. They admitted that Joginder Singh and Mohinder Singh are real brothers and Anokh Singh is their sister's son. Accused Joginder Singh took the plea that he had been using the land where the combine harvester was installed since long and the Harijan community wanted to forcibly occupy the said land. On the date of occurrence, people belonging to Harijan Community, both men and women, armed with fire-arms and other weapons came to his house and fired and he was compelled to hide

A himself in his house to save his life. Persons of Harijan community started firing indiscriminately at his house where he was hiding. In that process the injured and deceased received injuries. He did not use his gun at all nor was his gun taken by Mohinder Singh at any time. Accused Mohinder Singh and
B Anokh Singh took the plea that they had no concern with the land or with the combine harvester and they were not present at the spot.

6. Learned Addl. Sessions Judge, Kaithal, considering the evidence brought on record, acquitted all the accused of the
C charges under sections 302 and 307 read with Section 34 IPC and Sections 25 and 27 of the Arms Act on the ground that the prosecution had failed to prove its case against the accused beyond all reasonable doubt. To come to such a conclusion the learned trial Judge, after due perusal of the evidence and
D material brought on record, took note of various aspects, namely, a litigation was pending as regards the possession between the Guru Ravidass Mandir Sabha and the accused persons and the complainant had nothing to do with the land; that there had been dispute between Joginder Singh on one
E hand and Harijan community on the other with regard to the plot which is situate in front of the house of Joginder where the alleged occurrence had taken place; that after coming from Pakistan the father of the accused Joginder Singh had settled in the village at the very site; that a Civil Suit No. 191 of 1990
F titled as "Guru Ravidass Sabha Sangan vs. Joginder Singh and Mohinder Singh" was filed in the Court of Civil Judge, Senior Division, Kaithal and an interim order of stay was passed in favour of the Sabha which was vacated by order dated 15.3.1991 directing the parties to maintain status quo till the
G decision of the suit and, eventually, the suit was dismissed on 24.10.1994 for want of prosecution; that though some resolutions were passed by the Gram Panchayat in favour of the Guru Ravidass Sabha, yet the land was in possession of Joginder Singh and there was no record that Panchayat had
H delivered possession to anyone; that the complainant, Pritam

Singh, PW-1, was concealing the truth from the court inasmuch as he denied the obvious fact reflectible at a mere glance of the photographs, Exts. DA to DC, to the effect that there were pellets marks on the wall of the house of the accused; that Mithan Lal, PW-2, who had stated that he had received injury on his left eye and had lost his eye sight though was able to identify other things yet expressed his inability to identify the photographs Exts. DA to DC that show the house of the accused; that Zile Singh, PW-11, was an interested witness as Joginder Singh had got an enquiry conducted against him while Zile Singh was the Sarpanch of the village and he had deliberately not identified the house of the accused in the photographs, Exts. DA to DC, on the ground that his eye sight was weak. These findings were recorded to highlight that the accused-appellant was in possession of the land in dispute and the members of the Harijan community came armed with weapons to forcibly take possession.

7. The learned trial Judge thereafter addressed to the injuries sustained by various injured persons and found that the case that was put forth initially by the prosecution and the medical report were different and he did not think it prudent to believe such evidence. He also noticed that there were irreconcilable discrepancies between the weapon used and the injuries sustained. He also noticed that Dr. Leel, PW-8, had sent a report, Ext. P2 by which he had sent two pellets recovered from the body of Murti in a sealed parcel to the SHO, Police Station, Sadar, but the serology report Ext. P.TT/1 showed that there was no blood on the pellets and further the said witness had deposed that he had not put any identification mark on the pellets.

8. Thereafter, the learned trial Judge, relying on the ballistic report, Ext. P.UU, opined that the .12 bore fired cartridges cases C1 to C4 were fired from a fire-arm but not from DBBB gun W/1, Ext 15, the weapon that was seized from the custody of the accused Joginder Singh. He also took note of the fact

A that the ballistic report though referred to the mutilated pellets that had hit the deceased, yet did not give any opinion. These findings were recorded to form an opinion that the members of Harijan community armed with weapons were present at the spot and the injuries inflicted upon the deceased occurred in a B different way than the one projected by the prosecution. Being of this view he found that the prosecution had failed to establish its case beyond reasonable doubt against the main accused Joginder Singh and resultantly against the other accused persons also and, accordingly, acquitted all of them.

C 9. The High Court, in appeal, enumerated the reasons of acquittal given by the learned trial Judge and thereafter came to hold that rejection of the version of the eye witnesses was not valid; that factum of motive was of no significance as there was direct evidence on record; that the discrepancies which D were taken note of by the learned trial Judge were incorrect; that the learned trial Judge had misdirected himself by relying on the medical opinion when the account of the eye witnesses was credible and trustworthy; that the learned trial Judge had not kept himself alive to the principle that while appreciating the E evidence that injuries when caused by fire-arms there can be variety of wounds depending upon the nature of fire-arm used, distance, direction, manner and other factors; that the trial Judge had also erroneously appreciated the nature of gunshot injuries, for such appreciation is contrary to the medical F jurisprudence; that there was a serious dispute with regard to possession and the trial court had wrongly presumed the factum of possession; that the reason given that when the accused persons had left the place of occurrence it is a normal conduct of a person to go back to his house is contrary to the G acceptable norms of appreciation of evidence; that the pellet marks on the wall shown in the photographs do not improbablise the version of the prosecution, more so, when none of the accused persons were injured; that the discrepancy noted in the injuries sustained by Pritam Singh, PW-1, was H inconsequential; that there was no justification to reject the

testimony of Zile Singh, PW-11, on the ground that he was inimically disposed towards the accused; that the nature of injuries sustained by Dharambir, PW-3, should not have been disbelieved on the ground that the nature of weapon described was different; that the report of ballistic expert showed that the cartridges were fired from the same weapon but not from W-1, would not belie the prosecution version; and that the discrepancy of range of gun and distance of the injured as found by the learned Judge was not material. After unsettling the said reasons the High Court opined that the view expressed by the learned trial Judge was not a plausible one and the case of the prosecution stood fully established against the appellant, as far as causing the death of Kamla is concerned and, accordingly, convicted him under Section 302 IPC and sentenced him to suffer life imprisonment and also to pay a fine of Rs.5000/-, in default of payment of fine, to further undergo rigorous imprisonment for one year. However, the High Court gave benefit of doubt to Mohinder Singh and Anokh Singh.

10. We have Heard Mr. Neeraj Jain, learned senior counsel appearing for the appellant and Mr. Rajeev Gaur 'Naseem', learned counsel appearing for the State of Haryana.

11. Mr. Neeraj Jain, learned counsel for the appellant, has submitted that the High Court has fallen into grave error by opining that the view expressed by the learned trial Judge was perverse and not a plausible one though the learned trial Judge has scrutinized the evidence in a detailed manner and the opinion expressed is a well reasoned one. It is urged by him that though the High Court has enumerated the reasons given by the trial court and thereafter unsettled them, yet the reasons ascribed by the High Court for taking a different view is not sound inasmuch as there has been really no proper consideration of the evidence which is obligatory on the part of the appellate court to do while dislodging the findings recorded by the trial court. It is urged that the major discrepancies in the statement of three star witnesses of the prosecution, namely, Pritam Singh, PW-1, Mithan Singh, PW-

A 2, and Dharambir, PW-3, with regard to the genesis of occurrence has been overlooked by the High Court. He has further put forth that the photographs of the site plan were taken by the investigating agency and nothing had come on record that the accused persons had caused the pellet marks and, B therefore, when the witnesses deliberately did not identify the photographs despite being proven and brought on record makes the version of the defence that the complainant party was also armed with weapons and attacked on the house of the accused-person cannot be ignored. The learned counsel C would emphatically argue that the High Court has cryptically ignored the ballistic report which clearly showed that the empty cartridges recovered from the spot were found not to have been fired from the gun of the accused-appellant which fortifies the defence version that the accused never fired. That apart, D submitted Mr. Jain, that the ballistic report has not been discussed by the High Court, for the said report does not connect the mutilated pellets found from the body of the deceased with the weapon seized from the appellant. He also canvassed that an important aspect has not been taken note of by the High Court, as is evincible from the evidence of E Inspector Prem Chand, PW-16, the Investigating Officer, that he was pressurized to proceed against the appellant and his relations and it is further obvious as the prosecution has not examined Chander, husband of the deceased, and three other women, namely, Bala, Murti and Bimla who were alleged to F have sustained injuries in the occurrence. To bolster his contentions, he has commended us to the decisions rendered in *Sheo Swarup & others v. King Emperor,*[1] *Chandu v. State of Maharashtra,*[2] *Murugesan S/o Muthu and others v. State through Inspector of Police*[3], *Rathinam @Rathinam v. State* G *of Tamilnadu and another,*[4] *Ram Narain Singh v. State of*

1. AIR 1934 PC 227.
2. (2002) 9 SCC 408.
3. 2012 (10) SCALE 378.
H 4. (2011) 11 SCC 140.

Punjab[5], *Brijpal Singh v. State of Madhya Pradesh*[6] and *Mahendra Pratap Singh v. State of Uttar Pradesh.*[7]

12. Mr. Rajeev Gaur 'Naseem', learned counsel appearing for the State, supporting the judgment of the High Court, submitted that though there is a discrepancy in the ballistic report, yet the substantive evidence of the three eye witnesses, including one injured eye witness, cannot be rejected. He has relied on the authority in *Ram Bali v. State of Uttar Pradesh*[8]. It is his further submission that the High Court has correctly opined that the judgment of acquittal rendered by the learned trial Judge was perverse and deserved to be interfered with.

13. Before we proceed to consider the rivalised contentions raised at the bar and independently scrutinize the relevant evidence brought on record, it is fruitful to recapitulate the law enunciated by this Court pertaining to an appeal against acquittal. In *Sheo Swarup* (supra), it has been stated that the High Court can exercise the power or jurisdiction to reverse an order of acquittal in cases where it finds that the lower court has "obstinately blundered" or has "through incompetence, stupidity or perversity" reached such "distorted conclusions as to produce a positive miscarriage of justice" or has in some other way so conducted or misconducted himself as to produce a glaring miscarriage of justice or has been tricked by the defence so as to produce a similar result. Lord Russel, authoring the judgment for the Prevy Council, opined thus: -

> "Sections 417, 418 and 423 of the Code give to the High Court full power to review at large 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. No limitation should be placed upon that power, unless it be found expressly stated in the Code.

5. (1975) 4 SCC 497.
6. (2003) 11 SCC 219.
7. (2009) 11 SCC 334.
8. AIR 2004 SC 2329.

A But in exercising the power conferred by the Code and before reaching its conclusions upon fact, 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 B presumption of innocence in favour of the accused, a presumption certainly 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 C a judge who had the advantage of seeing the witnesses. To state this, however, is only to say that the High Court in its conduct of the appeal should and will act in accordance with rules and principles well known and recognized in the administration of justice."

D 14. The said principle has been followed in subsequent pronouncements in *Balbir Singh v. State of Punjab*[9], *Khedu Mohton and others v. State of Bihar*[10], *Ram Narain Singh* (supra), *Ganesh Bhavan Patel and another v. State of Maharashtra*[11], *Awadhesh and another v. State of Madhya* E *Pradesh*[12], *Ram Kumar v State of Haryana*[13], *Bhagwan Singh and others v. State of M.P.*[14], *State of Goa v. Sanjay Thakran and another*[15], *Puran Singh v. State of Uttaranchal*[16], *Mahendra Pratap Singh (supra), Murugesan C/o Muthu (supra) and Shivasharanappa and others v. State of* F *Karnataka*[17].

9. AIR 1957 SC 216.
10. (1970) 2 SCC 450.
11. (1978) 4 SCC 371.
G 12. (1988) 2 SCC 557.
13. 1995 Supp (1) SCC 248.
14. (2002) 4 SCC 85.
15. (2007) 3 SCC 755.
16. (2008) 3 SCC 795.
H 17. (2013) 5 SCC 705.

15. It is also worth noticing that in *Murugesan's* case the Court referred to the decision in *State of Rajasthan through Secretary, Home Department v. Abdul Mannan*[18] wherein distinction between the statutory appeal and the legislative intent was dealt with. The subsequent Division Bench reproduced a passage from *Abdul Mannan's* case which is extracted below:-

> "12. As is evident from the above recorded findings, the judgment of conviction was converted to a judgment of acquittal by the High Court. Thus, the first and foremost question that we need to consider is, in what circumstances this Court should interfere with the judgment of acquittal. Against an order of acquittal, an appeal by the State is maintainable to this Court only with the leave of the Court. On the contrary, if the judgment of acquittal passed by the trial court is set aside by the High Court, and the accused is sentenced to death, or life imprisonment or imprisonment for more than 10 years, then the right of appeal of the accused is treated as an absolute right subject to the provisions of Articles 134(1)(a) and 134(1)(b) of the Constitution of India and Section 379 of the Code of Criminal Procedure, 1973. In light of this, it is obvious that an appeal against acquittal is considered on slightly different parameters compared to an ordinary appeal preferred to this Court."

16. In the case at hand, it is noticeable that the High Court has compartmentalized the reasons ascribed by the learned trial Judge and thereafter dislodged the same one by one. The approach of the High Court in this regard cannot be flawed, but a pregnant one, it is required to be examined whether the High Court while dislodging the reasons and substituting the findings has appositely reappreciated the oral and documentary evidence brought on record to come to the conclusion that the view taken by the learned trial Judge is neither a plausible nor a reasonable one. The learned trial Judge, analyzing the

18. (2011) 8 SCC 65.

A evidence on record, had recorded a finding that neither the complainant nor his family members nor the members of the Harijan community had any right on the land inasmuch as the controversy in the civil suit was between Guru Ravidass Mandir Sabha and the accused persons. The trial court had observed
B that no document was brought on record to show that possession of the disputed land was handed over to the complainant or his family members in pursuance of the alleged resolution of the Gram Panchayat. The learned trial Judge had also observed that the plea of the accused persons that they
C had settled there since the time of their predecessors-in-interest who had migrated from Pakistan was acceptable. Thus, the learned trial Judge returned a finding in favour of the accused persons. This finding, needless to say, has been arrived only to nullify the allegation of the prosecution that the accused
D persons forcibly put their combine harvester on the disputed land. The High Court, as is perceptible, has observed that there is a serious dispute with regard to possession. The High Court has failed to appreciate that on earlier occasion there was an order of injunction which was vacated and the suit stood dismissed. It may be noted that even if there was a serious
E dispute relating to possession, the learned trial Judge on the analysis of the material on record had not accepted the prosecution version that the accused persons forcibly entered upon the land and installed the combine harvester. In fact, as the evidence would reveal, the combine harvester was installed
F much prior to the date of occurrence. The view taken by the learned trial Judge in this regard for the aforesaid limited purpose is a plausible one. The said finding by itself is of no consequence but it has been recorded to support and sustain the finding that the accused-appellant and his relations did not
G by force enter upon the disputed land and put the combine harvester. The learned trial Judge, on the aforesaid base, had held that there was no intention on the part of the accused persons and the High Court has opined that the question of motive or intention is inconsequential when there is direct
H evidence on record. It is settled in law that when there is direct

evidence, the proof of intention is not necessary. However, the analysis of the learned trial Judge would go a long way to show that he had meticulously scrutinized the evidence relating to factum of possession to highlight that the accused persons had no intention to forcibly enter upon the land and assert their right. True it is, it has come on record that both the parties were fighting over possession, the complainant and others, on the ground that it was given to them by Guru Ravidass Mandir Sabha to construct a temple thereon and the accused persons were resisting the construction of temple. The said controversy was the subject-matter of the civil lis. As is evincible from the deposition of the witnesses that the combine harvester was there on the disputed land and the accused persons had not encroached upon the land to assert their possession. To that extent the finding of the learned trial Judge cannot be found fault with.

17. At this juncture, we are obliged to state that though there has been compartmentalization of the reasoning, basically there are three aspects which require scrutiny. The learned trial Judge had not accepted the credibility of the prosecution witnesses about the involvement of the accused in firing as a result of which the deceased and the injured persons sustained injuries. For supporting the same he had given emphasis on certain discrepancies, which the learned counsel for the State would submit, are absolutely minor in nature. It is worthy to note that the learned trial Judge had recorded the discrepancies and referred to the ballistic report to support his conclusion that the prosecution had not established the case and in all possibility had tried to protect the real assailants. To test the justifiability of the said finding and the ultimate conclusion it is necessary to evaluate the evidence brought on record. PW-16, the investigating officer, had clearly deposed that he had seized four empty cartridges – C-1 to C-4 from the spot where he arrived in quite promptitude. On a perusal of the ballistic report, it is manifest that]they were not fired from the weapon, Ext.-15, seized from the house of the accused-appellant. The

A learned trial Judge had taken note of the fact that the pellets marks were there on the walls of the house of the appellant, which were visible from the photographs, Ext.-DA to DC. These aspects show that there were also other persons present at the spot who had come with arms. It is demonstrable from the B material brought on record that there were people from the Harijan community who had come to the disputed land and fired at the house of the accused persons. The said conclusion is buttressed from the fact that the empties found from the spot were not fired from the gun of the accused.

C 18. Quite apart from the above, cross-examination of the eye-witnesses it is also clear that the members of the Harijan community had licensed guns and they hearing the shout had gathered at the spot. The High Court while lancinating the finding of the learned trial Judge on this score has only given a D cryptic opinion without any reason that it does not create a dent on the prosecution case. In our considered opinion, such unsettling of a reasonable finding in a cryptic manner is not acceptable. We are of the considered view that it creates a grave dent on the version advanced by the prosecution.

E 19. Another aspect needs to be addressed. The learned trial Judge has disbelieved the version of the prosecution relating to firing by the appellant on deceased Kamla and other injured persons on two counts, namely, the range from which it F was fired on deceased Kamla, and there is no material on record to connect the injuries with the seized fired arms. The High Court has overturned the distance part but has not really dwelled upon the other aspect. As far as the facet of the distance is concerned, the opinion of the High Court seems to be sound. But the fact remains that there is no material on G record to connect that the gunshot injuries suffered by the deceased are due to the shots fired from the gun of the appellant. It is also discernible that though the pellets were recovered but the same have not been connected with the weapon. Thus, we find there is a material contradiction in the H oral evidence adduced by the prosecution on one hand and the

ballistic report on the other. A

20. In *Brijpal Singh's* case, the High Court had affirmed the conviction of the appellant therein. It was the case of the prosecution that A-1 at the exhortation of A-3 shot the deceased from point plank range on the head of the deceased from a mouser gun which shattered the right side of the head causing B death on the spot. This Court, after examining the ballistic report, opined that on a perusal of the said report it was clear that the weapon alleged to have been used in causing the fatal injury would not have been the mouser gun carried by A-1 because the definite report of the ballistic expert that the discharged C empties of cartridge found near the dead body were not that fired from the mouser gun. The Court also took note of the fact that A-2 therein who had fired which missed him but got embedded in the wall of the house, according to the ballistic report the embedded cartridges could have been fired from the D mouser gun and not from a .12 bore gun which was used for firing. This was treated as a serious contradiction between the oral evidence and the ballistic report. Be it noted, a contention was advanced by the learned counsel for the State that if the oral evidence is found to be acceptable by the court any E contradiction to the ballistic reports, the acceptable oral evidence should always be preferred. Dealing with the contention the court agreed with the argument by stating that normally, if the eye witness's evidence is acceptable, the argument of the State would be accepted but as the factual F position revealed the witnesses were interested persons and independent witnesses had not been examined and further there was inter se contradiction in the evidence of certain eye witnesses. Eventually, the Court while acquitting the appellant therein observed thus: -

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> "Then, we notice the prosecution has not bothered to clarify the report of the ballistic expert even though the same was contradictory to the oral evidence which creates a very serious doubt in our mind as to the presence of eye-witnesses at the place of incident. Keeping in mind the H

A partisan nature of eye-witnesses and contradictions in their evidence, we think this appellant is also entitled to benefit of doubt."

21. In the instant case, the ballistic report, Ext. P.UU, though refers to the mutilated pellets stated to have been recovered B from the body of the deceased Kamla and also the two different leads pellets from the body of Murti, but is not definite that .12 bore DBBL gun, Ext. W/1, that was seized from the appellant, was used for firing such gunshots. This fact has been totally ignored by the High Court in an extremely cryptic manner.

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22. At this juncture, we may note with profit another aspect that has been highlighted by the learned counsel for the respondent. The prosecution has not examined Chander, husband of the deceased, a relevant eye witness, Bala, Murti and Bimla, three other injured witnesses. No explanation has D been given by the prosecution. Though there have been certain suggestions to PW-16 in the cross-examination, but his answer is evasive. It is well settled in law that non-examination of the material witness is not a mathematical formula for discarding the weight of the testimony available on record howsoever E natural, trustworthy and convincing it may be. The charge of withholding a material witness from the court levelled against the prosecution should be examined in the background of the facts and circumstances of each case so as to find whether the witnesses are available for being examined in the court and F were yet withheld by the prosecution. (See: *State of H.P. v. Gian Chand*[19])

23. In this context, we may also note with profit a passage from *Takhaji Hiraji v. Thakore Kubersing Chamansing*[20]: -

G "19... It is true that if a material witness, who would unfold the genesis of the incident or an essential part of the prosecution case, not convincingly brought to fore

19. (2001) 6 SCC 71.

H 20. (2001) 6 SCC 145.

otherwise, or where there is a gap of infirmity in the prosecution case which could have been supplied or made good by examining a witness who though available is not examined, the prosecution case can be termed as suffering from a deficiency and withholding of such a material witness would oblige the court to draw an adverse inference against the prosecution by holding that if the witness would have been examined it would not have supported the prosecution case. On the other hand if already overwhelming evidence is available and examination of other witnesses would only be a repetition or duplication of the evidence already adduced, non-examination of such other witnesses may not be material. In such a case the court ought to scrutinize the worth of the evidence adduced. The court of facts must ask itself – whether in the facts and circumstances of the case, it was necessary to examine such other witness, and if so, whether such witness was available to be examined and yet was being withheld from the court? If the answer be positive then only a question of drawing an adverse inference may arise. If the witnesses already examined are reliable and the testimony coming from their mouth is unimpeachable the court can safely act upon it, uninfluenced by the factum of non-examination of other witnesses."

24. Recently in *Manjit Singh and Anr. v. State of Punjab and Anr.,*[21] this Court, after referring to earlier decisions, has opined thus: -

"...it is quite clear that it is not the number and quantity but the quality that is material. It is the duty of the Court to consider the trustworthiness of evidence on record which inspires confidence and the same has to be accepted and acted upon and in such a situation no adverse inference should be drawn from the fact of non-examination of other

21. JT 2013 (11) SCALE 394.

witnesses. That apart, it is also to be seen whether such non-examination of a witness would carry the matter further so as to affect the evidence of other witnesses and if the evidence of a witness is really not essential to the unfolding of the prosecution case, it cannot be considered a material witness (see: *State of U.P. v. Iftikhar Khan and others*[22])."

25. In the case at hand, non-examination of the material witnesses is of significance. It is so because PW-11 is really an interested witness though the High Court has not agreed with the same. It appears from the material brought on record that he had an axe to grind against the appellant. That apart, Chander, who was present from the beginning, would have been in a position to disclose more clearly about the genesis of the occurrence. He is the husband of the deceased and we find no reason why the prosecution had withheld the said witness. Similarly, the other three witnesses who are said to be injured witnesses when available should have come and deposed. Therefore, in the obtaining factual matrix that their non-examination gains significance.

26. In this regard, another aspect requires to be taken note of. The case of the prosecution was that Mohinder Singh had snatched away the gun and fired at Mithan Singh and Bimla. The learned trial Judge disbelieving the prosecution version had acquitted him. The High Court has given him benefit of doubt. We are of the considered opinion that regard being had to the totality of evidence, both oral and documentary, there was no reason not to extend the said benefit of doubt to the appellant. The High Court has fallen into error on that score.

27. In view of the aforesaid analysis, the appeal is allowed, the judgment passed by the High Court is set aside and that of the learned trial Judge is restored. As the appellant is in custody, he be set at liberty forthwith unless his detention is required in connection with any other case.

K.K.T. Appeal allowed.

22. (1973) 1 SCC 512.