

(2015) 11 GUJ CK 0004
In the Gujarat High Court

Case No : Criminal Appeal Nos. 1337, 1572, 2792 of 2008 and 42 of 2009

Dharmiben Premji Rava Koli

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 02-11-2015

Acts Referred:

Arms Act, 1959 — Section 23(1)(a), 25(1), 25(1)(A), 27
Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 143, 147, 148, 149, 302
Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 —
Section 3(1)(v)

Citation : (2015) 11 GUJ CK 0004

Hon'ble Judges : M.R. Shah and K.J. Thaker, JJ.

Bench : Division Bench

Advocate : Hemant B. Raval, Advocate, for the Appellant; H.K. Patel, Addl. Public Prosecutor, for the Respondent

Judgement

M.R. Shah, J.—As all these appeals arise out of the impugned judgment and order passed by the learned Additional Sessions Judge (Fast Track Court No. 5), Kutch at Bhuj (hereinafter referred to as the "learned trial Court") in Sessions Case No. 27 of 2002 but by different accused who are convicted and one by the State against the order of acquittal passed by the learned trial Court acquitting some of the accused, all these appeals are heard, decided and disposed of together by this common judgment and order.

2. Feeling aggrieved and dissatisfied with the impugned judgment and order of conviction and sentence passed by the learned trial Court convicting the original accused Nos. 3 to 6, 8 to 10, 14, 16 to 20, 23 to 25, 38 to 41 and 44 for the offences punishable under Sections 143, 147, 148, 447, 324, 504, 506(2), 307, 302 r/w. Section 149 of the Indian Penal Code, the aforesaid original accused have preferred present Criminal Appeal No. 1337 of 2008.

2.1. Feeling aggrieved and dissatisfied with the impugned judgment and order of conviction and sentence passed by the learned trial Court convicting the original

accused Nos. 15, 25 and 40 for the offences punishable under Sections 143 , 147 , 148 , 447 , 324 , 307 , 302 r/w. Section 149 of the Indian Penal Code, the aforesaid original accused have preferred present Criminal Appeal No. 2792 of 2009.

2.2. Feeling aggrieved and dissatisfied with the impugned judgment and order of conviction and sentence passed by the learned trial Court convicting the original accused No. 29 for the offences punishable under Sections 143 , 147 , 148 , 447 , 324 , 307 , 302 r/w. Section 149 of the Indian Penal Code, the aforesaid original accused has preferred present Criminal Appeal No. 42 of 2009.

2.3. Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the learned trial Court passed in Sessions Case No. 27 of 2002, by which, the learned trial Court has acquitted the original accused Nos. 1, 2, 7, 11, 12, 13, 21, 26, 27, 28, 30, 31, 33 to 37, 42, 43, 47 and 48, the State has preferred Criminal Appeal No. 1572 of 2008.

3. Brief facts of the prosecution case are as under:

3.1. The complainant namely Laxmanbhai Karmanbhai Gadhvi (PW No. 5) was residing at Bhachau and his uncle is also residing at Bhachau. His grandfather Dhanabhai Dosabhai was having land admeasuring 244 acres of village Sarbavandh which was given to Koli Rava Pancha (Accused No. 6) on mortgage for a period of 40 years and the documents were also registered. The said land was demanded back by his uncle from the accused in the year 2001 as the mortgage/lease was over. Before the day of incident they talked to Reva Pancha but he had not answered. On 12.06.2001 his uncle Ratanbha received a message at Bhachau that there is rain in the village, so he along with six persons went to the village Nani Rav to see the land and to worship the Mataji.

3.2. On the next day 13.07.2001 at 8 O'clock in the morning he along with his uncle Devabha Dhanabha, Ratanbha Dhanabha, Rajbha Dhanabhai, Jethabha Dhanabha, Vishalbha Dhanabha, younger brother Naranbha Dhanabha, Rambha Kaarmanbha, cousin brother Devbha Sajanbha, brother Govindbha Sajanbhai and Rambha Labhabha and gone to see the land in village Surbhavandh and at 9 O'clock they reached in the field of Bhurabha Dhanabha. They saw that four Koli women were collecting the wooden sticks from the field. So his uncle told them not to collect the wooden stick from the field because they had not relations. Thereafter, they went to worship Mataji and returned after 15 to 20 minutes to the field of Bhurabha Dhanabha, at that time a mob of 40 to 50 persons of Koli community rushed towards them. The mob was having guns, sticks, Dharia, knives, axe, Gatar, Iron Rods etc. They were pelting stones and telling that no one should be left alive and all of them attacked on the complainant and other persons. Koli Sartan Dhana gave blow by spear on his left side of the waist so he hid himself behind the tree and he saw that the mob had attacked on the rest of persons by weapons in their hands and nine persons have been done to death on the spot. Thereafter, the accused persons left the place of incident. So he along

with his cousin brother Devubha came out from behind the tree and saw that nine persons of his family were murdered.

3.3. Immediately thereafter, PW No. 5 lodged the complaint at Rapar Police Station being CR-I-48 of 2001 for the offences punishable under Sections 143 , 147 , 148 , 149 , 447 , 324 , 504 , 506(2) , 307 and 302 of Indian Penal Code and Section 25(1)(A) and 27 of the Arms Act. The aforesaid FIR was investigated by the Police Inspector of Rapar Police Station - PW No. 87 - Shri Piyush Parshotamdas Patel. During the course of investigation, the Investigating Officer recorded the statement of the concerned witness including Doctors, he also prepared panchnama of place of incident; panchnama of recovery/discovery of weapons and he also collected other documentary evidence such as report of the concerned deceased persons, FSL report etc. After conclusion of the investigation, the Investigating Officer filed the charge sheet against all the accused i.e. in all against 48 persons including 10 lady accused for the offences punishable under Sections 143 , 147 , 148 , 148 , 447 , 324 , 504 , 506(2) , 307 and 302 of the Indian Penal Code r/w. Section 149 of the Indian Penal Code and Section 25(1)(a) and Section 27 of the Arms Act. That the Investigating Officer filed the aforesaid charge sheet against all the accused in the Court of learned JMFC, Rapar. As the case was exclusively triable by the learned Court of Sessions, the learned JMFC, Rapar committed the case to the learned Sessions Court, Kutch, Bhuch and subsequently was transferred to the learned Additional Sessions Judge (Fast Track Court), Kutch-Bhuj. That the learned trial Court framed the charge against all the accused at Exh. 1 for the offences under Sections 143 , 147 , 148 , 447 , 324 , 504 , 506(2) , 302 and 307 of the Indian Penal Code and Sections 25(1)(a) and 27 of the Arms Act. All the accused pleaded not guilty and therefore, they came to be tried by the learned trial Court for the aforesaid offences.

3.4. To prove the case against all the accused, prosecution examined as many as following 87 witnesses:

3.5. Through the aforesaid witnesses, prosecution brought on record the following documentary evidence:

3.6. After closure of the evidence by the prosecution, statement of the accused under Section 313 of the Code of Criminal Procedure came to be recorded in which accused denied having committed any offence as alleged and they pleaded that they are innocent.

3.7. Thereafter on appreciation of evidence and after giving fullest opportunity to the prosecution as well as defence, by impugned judgment and order the learned trial Court has held original accused Nos. 3 to 6, 8 to 10, 14, 15, 16, 20, 23, 25, 29 and 38 to 41 guilty for the offence punishable under Sections 143 , 147 , 148 , 447 , 324 , 307 , 302 and 149 of the Indian Penal Code and all of them are sentenced to undergo for the aforesaid offence and by impugned judgment and order the learned trial Court has acquitted the aforesaid accused for the offences

under Sections 504 and 506(2) of the Indian Penal Code. Out of the aforesaid accused, learned trial Court has convicted the original accused No. 6 (Ravabhai Koli), original accused No. 17 (Khodabhai Koli), original accused No. 18 (Mahadevbhai Koli) and original accused No. 38 (Momaiya Koli) also for the offence under Sections 25(1) and 27 of the Arms Act. That by impugned judgment and order the learned trial Court has acquitted the original accused No. 1, 2, 7, 11, 12, 13, 21, 26, 27, 28, 30, 31, 33 to 37, 42, 43, 47 and 48 for the offence under Sections 143 , 147 , 148 , 447 , 324 , 504 , 506(2) , 307 , 302 r/w. Section 149 of the Indian Penal Code and Sections 23(1)(a) and 27 of the Arms Act. That against the impugned judgment and order passed by the learned trial Court original accused who are convicted have preferred Criminal Appeal Nos. 1337 of 2008, 2792 of 2009 and 42 of 2009 and against the order of acquittal acquitting the aforesaid accused, State has preferred Acquittal Appeal being Criminal Appeal No. 1572 of 2008.

4. Shri Raval, learned advocate has appeared on behalf of the respective appellants in Criminal Appeal No. 1337 of 2008 i.e. original accused Nos. 3 to 6, 8 to 10, 14, 16 to 20, 23 to 25, 38 to 41 and 44. Shri Y.J. Thakore, learned advocate has appeared on behalf of the respective appellants in Criminal Appeal Nos. 2792 of 2008 and 42 of 2009 i.e. original accused Nos. 15, 25, 40 and 29. Shri Barot, learned advocate has appeared on behalf of respective respondents-i.e. original accused who are acquitted in Criminal Appeal No. 1572 of 2008 preferred by the State. Shri H.K. Patel, learned Additional Public Prosecutor has appeared on behalf the State in respective Appeals filed by the original accused as well as appellant in Criminal Appeal No. 1572 of 2008.

4.1. The learned advocates appearing on behalf of the respective convicted accused have vehemently submitted that the learned trial Court has committed an error in convicting the accused for the offences under Sections 143 , 147 , 148 , 447 , 324 , 504 , 506(2) , 307 , 302 r/w. Section 149 of the Indian Penal Code.

4.2. It is vehemently submitted by learned advocates for the appellants - convict accused that the learned trial Court has materially erred in relying upon the testimony of injured complainant i.e. his cousin brother Devubha who has seen the incident from behind the tree which is highly improbable in view of the fact in the manner in which fight took place with the deadly weapon and they have been left to witnesses against the accused. It is submitted that as such PW Nos. 5, 6 and 11 have not seen the incident and PW Nos. 5 and 6 reached the hospital for the treatment rather than to go to the village to inform them about the incident.

4.3. It is further submitted by learned advocates for the accused that the learned trial Court has not appreciated the fact that there was a delay in lodging the complaint by original complainant and that no reasonable explanation has been given by the original complainant. It is submitted that complaint has been recorded after 7 hours and that too and after seeing injuries on the dead body and bodies of 9 persons.

4.4. It is further submitted by learned advocates appearing on behalf of the original accused that the learned trial Court has materially erred in not appreciating the fact that there was a free fight and 11 persons on the side of the accused also sustained injuries and there was a cross case. It is submitted that therefore, the learned trial Court has not properly appreciated the fact that as such there was no intention on the part of the accused to commit the murder 9 persons, who died.

4.5. It is submitted that 11 persons on the accused side also sustained injuries in the scuffle and prosecution has not explained the injuries on the persons of the accused. It is submitted that therefore, genesis of the incident is doubtful and the prosecution has not come out with a true version as to how the incident happened and therefore, testimony of the complainant and the injured Devubha ought to have been discarded.

4.6. It is further submitted by learned advocates for the original accused that looking to the deposition/evidence of the PW No. 5, he has not seen the incident and he has tried to rope the accused persons. It is further submitted that as such there are material contradiction in the deposition of PW Nos. 5 and 6. It is further submitted that learned trial Court has materially erred in not properly appreciating the fact that there was free fight between two communities i.e. Darbar and Koli and whereby the accused though filed the complaint, their complaint was not registered. However, Janvajog entry was made and thus there was complaint filed by both the sides and that there was no ulterior object and/or motive to commit the murder.

4.7. It is further submitted by learned advocates appearing on behalf of the accused that learned trial Court has materially erred in holding that there was unlawful assembly formed by the accused with a common a object of committing murder of deceased persons and thereby convicting the accused for the offences under Sections 143 , 147 , 148 , 447 , 324 , 504 , 506(2) , 307 , 302 r/w. Section 149 of the Indian Penal Code.

4.8. It is further submitted by Shri Raval, learned advocate for the lady accused i.e. original accused Nos. 3 to 5 that in any case learned trial Court has materially erred in holding those lady accused for the offence punishable under Sections 302 of the Indian Penal Code with the aid of Section 149 of the Indian Penal Code and in holding that they were also part of the mob and/or part of the unlawful assembly having a common object to kill the deceased persons. It is vehemently submitted by Shri Raval, learned advocate for those lady accused that their presence at the time of second incident is not established by the prosecution by leading cogent evidence and/or beyond doubt. It is submitted that there are general and vague allegations against the lady accused that they were part of the mob and that they were pelting stone. It is further submitted that however there is no positive evidence against those lady accused that in the second incident which took place, in which, 9 persons died they were also part of the mob and/or there is no specific overt act alleged against them. It is

submitted that as such the very learned Judge has acquitted the original accused No. 47-Badhiben Khoda by giving benefit of doubt. It is submitted that therefore, similar benefit doubt ought to have been given to the original accused Nos. 3 to 5 who are convicted by the learned trial Court and thereby learned trial Court ought to have acquitted at least those lady accused by giving them benefit of doubt also.

Making above submissions, it is requested to allow the present Criminal Appeals filed by the accused who are convicted.

5. Shri H.K. Patel, learned Additional Public Prosecutor has opposed the appeals preferred by the respective convict accused. It is submitted that the findings recorded by the learned trial Court holding the convict accused guilty for the offences, for which, they are convicted is on appreciation of evidence, more particularly, deposition of PW Nos. 5, 6, 10 and 11 who are the eyewitnesses.

5.1. It is further submitted that as such no error has been committed by the learned trial Court in relying upon the deposition of PW Nos. 5, 6, 10 and 11 who are the eyewitnesses to the incident.

5.2. It is further submitted by Shri Patel, learned Additional Public Prosecutor that even according to the accused there was a free fight and 11 to 12 persons sustained injuries on the side of the accused meaning thereby presence of the accused has been established and proved. It is submitted that in the further statement recorded under Section 313 of the Code of Criminal Procedure, accused have not stated correct facts and in fact they never come out with a case that it was a free fight between two groups and that on their side also, some persons were sustained injuries. It is submitted that in the further statement recorded under Section 313 of the Code of Criminal Procedure of the accused denied having present at the time of incident.

5.3. It is further submitted by Shri Patel, learned Additional Public Prosecutor that all those accused who are convicted, are specifically named by the prosecution witnesses in their deposition i.e. PW Nos. 5, 6, 9 and 10 and therefore, their identity have been established beyond doubt. It is submitted that as the accused were known to the witnesses by name, even in absence of TI Parade and all those accused are specifically name with weapon by the prosecution witnesses whose presence at the time of incident is natural, no error has been committed by the learned trial Court in holding the accused guilty including the lady accused. Now, so far as submission on behalf of the lady accused i.e. original accused Nos. 3 to 5 who are convicted by the learned trial Court that on the similar set of facts and circumstances and the evidence the learned trial Court has acquitted the original accused Nos. 47-Badhiben Khodabhai Koli by giving benefit of doubt and therefore, the original accused Nos. 3 to 5 were also required to be acquitted by the learned trial Court by giving benefit of doubt is concerned, it is vehemently submitted by Shri Patel, learned APP that the State has preferred appeal against the acquittal of the said

Badhiben-original accused No. 47. It is submitted that as such original accused No. 47 is wrongly acquitted by the learned trial Court by giving her benefit of doubt. It is vehemently submitted that all the accused were part of the unlawful assembly and all of them attacked with deadly weapon and actually participated in commission of offence, in which, 9 persons died, the learned trial Court has rightly held all the accused guilty for the offences punishable under Sections 143 , 147 , 148 , 447 , 324 , 504 , 506(2) , 307 , 302 with aid of Section 149 of the Indian Penal Code.

5.4. Shri H.K. Patel, learned Additional Public Prosecutor appearing on behalf of the appellant - State in Criminal Appeal No. 1572 of 2008, in which, the State has challenged the impugned judgment and order passed by the learned trial Court acquitting the original accused Nos. 1, 2, 7, 11, 12, 13, 21, 26, 27, 28, 30, 31, 33 to 27, 42, 43, 47 and 48 has vehemently submitted that learned trial Court has materially erred in acquitting the aforesaid accused.

5.5. It is submitted that all those accused were part of the unlawful assembly and actually participated in commission of offences, in which, 9 persons died and therefore, learned trial Court ought to have acquitted all the accused with the aid of Section 149 of the Indian Penal Code.

5.6. It is further submitted by Shri Patel, learned Additional Public Prosecutor that learned trial Court has materially erred in acquitting original accused No. 1 Ramiben, though the prosecution has been successful in proving that even the said Ramiben was found in injured conditions, it is proved by the medical certificate produced at Exh. 477. It is submitted that therefore, presence of the said Ramiben came to be established and proved by the prosecution and therefore, she being part of the unlawful assembly, the learned trial Court ought to have convicted her with the aid of Section 149 of the Indian Penal Code. It is submitted that the learned trial Court has acquitted the said original accused No. 1 by giving benefit of doubt solely on the ground that PW No. 6 did not said that any weapon was in possession of the accused No. 1. It is submitted that when the presence of the accused No. 1 has been established at the time of incident and she also sustained injuries, she being member of the unlawful assembly, any further overt act was not required to be proved by the prosecution and therefore, the learned trial Court ought to have convicted the said original accused No. 1 also.

5.7. It is further submitted by Shri Patel, learned APP that even learned trial Court has materially erred in acquitting the original accused No. 47-Badhiben by giving her benefit of doubt. It is submitted that the PW Nos. 5, 6 and 10 have been categorically named the said accused and stated that she was also present at the time of incident and was member of the unlawful assembly and she along with other lady accused was pelting stones. It is submitted that therefore, the findings recorded by the learned trial Court acquitting the original accused No. 47 - Badhiben is perverse and the contrary to the evidence on record and that resulted into mis-carriage of justice.

Making above submissions, it is requested to allow Criminal Appeal No. 1572 of 2008 preferred by the State and set aside the impugned judgment and order of acquittal and has requested to convict the other accused also who are acquitted by the learned trial Court.

6. Criminal Appeal No. 1572 of 2008 preferred by the State against the impugned judgment and order of acquittal acquitting some of the accused is opposed by Shri Mrudul Barot, learned advocate for those acquitted accused.

6.1. It is submitted that on appreciation of evidence when the learned trial Court has acquitted the accused by giving them benefit of doubt by giving cogent reasons, same is not required to be interfered with by this Court in exercise of appellate jurisdiction against the order of acquittal.

6.2. It is vehemently submitted by Shri Barot, learned advocate for those acquitted accused that this being the appeal against the acquittal unless it is found that the findings recorded by the learned trial Court are perverse and/or absolutely contrary to the evidence on record, the Appellate Court would be very slow to interfere with the order of acquittal. It is submitted that even in a cases where two views are plausible on appreciation of evidence and the learned trial Court has accepted one plausible view and on re-appreciation of evidence Appellate Court is of the view that there could have been second view in that case also, the Appellate Court is not justified in reversing the order of acquittal. In support of his above submissions, he has relied upon the following decisions of the Hon''ble Supreme Court:

(1). in the case of Raj Singh and Others Vs. State of Haryana and Others .

(2). In the case of Golbar Hussain and Others Vs. State of Assam and Others .

6.3. It is further submitted by Shri Barot, learned advocate for the acquitted accused that in the present case though it was case on behalf of the prosecution that all the accused were known to prosecution witnesses even by name and despite the same, prosecution witness did not specifically named those acquitted accused and did not show anything with respect to any weapon armed with any of the acquitted accused and there being no specific role attributed to them, the learned trial Court has not committed any error in acquitting the accused by giving benefit of doubt. It is submitted that those accused who are specifically named with particular weapons and with specific role attributed to them are convicted by the learned trial Court. It is submitted that therefore, the impugned judgment and order passed by the learned trial Court acquitting the accused who are acquitted is not required to be quashed and set aside. Therefore, it is requested to dismiss the appeal preferred by the State.

7. Heard the learned advocates for the respective parties at length. This Court has re-appreciated the entire evidence on record oral as well as documentary evidence.

8. At the outset, it is required to be noted that in the present case 9 persons died

on the spot. As per the case of the prosecution about 40 to 50 persons may be attacked them including lady accused and used the deadly weapon. That out of 11 persons, two persons who can save themselves who took shelter behind the trees are the eyewitnesses, who are PW Nos. 5 and 6. PW No. 5 is the original complainant. Thus, in this regard, as such, there are four eyewitnesses i.e. PW Nos. 5, 6, 10 and 11 relying upon whose depositions, learned trial Court has convicted the accused and learned trial Court has convicted only those accused who are specifically named with specific weapon and overt act and those who are not specifically named, the learned trial Court has acquitted them by giving benefit of doubt.

8.1. To prove the case against the accused, the prosecution has examined one Laxmanbhai Karmanbhai Gadhvi - PW No. 5 at Exh. 105; one Devabha Sajanbha Gadhvi - PW No. 6 at Exh. 120; Karmanbha Dhanabha Gadhvi - PW No. 10 at Exh. 176 and Gelubha Aambaji Jadeja - PW No. 11 at Exh. 185. On considering the depositions of the aforesaid prosecution witnesses, it appears that they are trustworthiness and reliable. From the cross examination, the defence has failed to establish and/or create anything against the said witnesses, on the basis of which, there can be a doubt about their creditworthiness and/or trustworthiness. Prosecution has been successful in proving the presence of PW Nos. 5 and 6 at the time of incident. They are the persons who were as such along with other 9 persons who went to the temple and while returning from temple, the mob of 40 to 50 persons attacked all of them and on seeing them, two persons took shelter behind the tree, therefore, they could be saved and therefore, as such they are the eyewitnesses to the incident. PW Nos. 5 and 6 have specifically given the names of those accused with weapons, who are convicted by the learned trial Court. All of them are consistent in their case and the depositions. From the depositions of PW Nos. 5 and 6, the incident can be bifurcated in two parts. First incident at about 9 a.m. in the morning and when those 11 persons went to the field of Bhurabhai Dhanabha, four ladies of Koli community were collecting wooden logs. According to the said witnesses, there were Badhiben Khoda (Accused No. 47), Gangaben Deva (Accused No. 5), Dharmiben Premji Koli (Accused No. 3) and Samaben Raymal Deva (Accused No. 4) and at that time one Virsangbhai uncle of Laxmanbha (PW No. 5) told them not to collect wooden logs from the field. That thereafter, they went to temple for worshipping and after worshipping when they were returning at about 10 a.m. second incident took place, in which, a mob of approximately 40 to 50 persons of one community (Koli) including ladies and gents attacked them by using abusive and filthy language, out of aforesaid 40 to 50 persons some were having deadly weapon like Gun, Tamancha, Sticks, Dhariya, Knife, Axe etc. They started pelting stones and as per the said witness, all of them were telling that nobody should be spared. He has specifically stated that he knows all the accused by name and by face. He has specifically given the names of some of the accused with weapons (who are convicted). He has identified those accused in the Court. He has also identified those aforesaid lady accused who were member of the mob also and

who were present at the time of first incident. From the said witnesses, he along with injured Devubha thereafter went to Bhachau Hospital at about 3 p.m. and thereafter police came to be hospital and recorded his complaint. The said witnesses has been fully and thoroughly cross examined by the defence. In the cross examination, the defence could bring only one thing that he could not state that which accused used which weapon. From the deposition of the said witness read as a whole his presence at the time of incident has been established and proved and he is reliable and trustworthy witness.

8.2. That the prosecution has examined PW No. 6 - Devabha Sajambha Gadhvi at Exh. 120. He has fully corroborated the deposition of PW No. 5. Prosecution Witness No. 6 along with PW No. 5 and other 11 persons had gone to temple for worship and while returning mob of approximately 40 to 50 persons attacked all of them. In his deposition, he has specifically that all the four ladies who were even at the time of first incident i.e. collecting fire logs at about 9 a.m. were also member of unlawful assembly and part of the mob of 40 to 50 persons. He has specifically stated that ladies were pelting stone. In para 6, he has specifically named Badhiben Khoda (Accused No. 47) and Gangaben Deva (Accused No. 5). The said witnesses has been fully cross examined by the defence, however defence has not been brought out anything against the said witnesses, by which, their depositions is required to be discarded. At this stage, it is required to be noted that both the witnesses i.e. PW Nos. 5 and 6 also sustained injuries and they took treatment at Bhachau Hospital and thereafter Rajkot Hospital, prosecution has been able to prove their presence at the time of incident.

8.3. The prosecution has also examined PW Nos. 10 and 11 who also can be said to be eyewitnesses of the mob. He has also identified and/or named some of the accused, more particularly those accused who are convicted by the learned trial Court. He has also specifically named Badhiben Khoda (Accused No. 47), Gangaben Deva (Accused No. 5), Dharmiben Premji Koli (Accused No. 3) and Samaben Raymal Deva (Accused No. 4) and he stated that they were also member of the mob. The aforesaid two witnesses - PW Nos. 10 and 11 also fully cross examined by the defence however defence has been unsuccessful in proving anything in the cross examination against the case of the prosecution.

8.4. In view of the aforesaid overwhelming evidence in the form of deposition of PW Nos. 5, 6, 10 and 11 who are eyewitnesses and as observed herein above, who are reliable and trustworthy, the learned trial Court has not committed any error in convicting the appellants - accused.

9. At this stage, it is required to be noted that even according to the case of the defence, on their side 11 persons sustained injuries and therefore, there was a free fight. Meaning thereby, the presence of the injured on the side of the accused have been established and proved. At this stage, it is required to be noted that in their further statement recorded under Section 313 of the Code of Criminal Procedure, as such, the accused had not stated anything with respect to free fight and/or any injuries sustained on the side of the accused and/or they

have not pleaded and/or come out with a self defence. It is required to be noted that there was a cross case which was culminated into Special Case No. 32 of 2002, in which, PW Nos. 5, 6 and 10 were also shown as accused and they were tried for the offence under Sections 143 , 147 , 148 , 149 , 323, 325, and 504 of the Indian Penal Code and Section 3(1)(v) of the Schedule Castes and Schedules Tribes (Prevention of Atrocities) Act. It is required to be noted that in the said case Ravabhai Panchabhai Makwana (Koli)- was complainant i.e. (original accused No. 6 in the present case). That in the said cross case, the learned Special Court has acquitted all the accused, more particularly, PW Nos. 5, 6 and 10 of the present case. The judgment and order passed by the learned Special Court in Special Case No. 32 of 2002 is placed on record. From the aforesaid, it appears that according to the case on behalf of the accused that in the very incident in question one Karshan Ravabhai Koli (Original accused No. 23 in the present case), Narshibhai Devabhai Koli (original accused No. 24 in the present case), Deva Pancha Koli (original accused No. 9 in the present case), Mohan Deva (original accused No. 14 herein), Shartanbhai Dana (original accused No. 15 herein), Raymal Deva (original accused No. 10 herein), Rava Pachanbhai (original accused No. 6 herein), Gangaben Deva Pancha (original accused No. 5 herein), Ramiben Khoda (original accused No. 1 herein), Dharmiben Premji (original accused No. 3 herein) and Samaben Raymal (original accused No. 4 herein) sustained injuries. Thus, the presence of the aforesaid accused who according to the defence were also injured, their presence is established and proved. Out of the aforesaid accused, original accused No. 1 - Ramiben has been acquitted by the learned trial Court despite her presence established and proved and she being member of the unlawful assembly and having participated in committing offence. As observed herein above, though, the learned advocates for the accused who are convicted have vehemently submitted that the learned trial Court has materially erred in not properly appreciating the fact that there was free fight on the side of the accused, some 11 persons sustained injuries, the learned Judge has materially erred in holding that all the accused were member of unlawful assembly and/or there was any intention on the part of the accused to commit murder of 9 persons, nothing has been stated by the accused in their further statement under Section 313 of the Code of Criminal Procedure. They have not even pleaded self defence. From the deposition of PW Nos. 5 and 6 who are injured eyewitnesses, it has been established and proved that mob of 40 to 50 persons attacked with deadly weapons thereby 9 persons died on the spot. Presence of the accused at the time of incident has been established and proved by the prosecution beyond doubt. All those who are named with the weapon and member of the unlawful assembly are convicted by the learned trial Court including three ladies i.e. original accused Nos. 3 to 5.

10. Now, so far as the submission on behalf of the original accused Nos. 3 to 5 lady accused that as original accused No. 47-Badhiben has been given benefit of doubt and has been acquitted and therefore, similarly they ought to have been

acquitted by the learned trial Court by giving benefit of doubt is concerned, considering the deposition of PW Nos. 5, 6 and 10 and that they are specifically named by those witnesses and their presence at the time of incident being a member of unlawful has been established and proved it cannot be said that learned trial Court has committed any error in convicting them. So far as acquittal of original accused No. 47 Badhiben is concerned, the same shall be dealt with hereinafter while considering the appeal preferred by the State being Criminal Appeal No. 1572 of 2008. As observed herein above, even according to the accused and their cross case original accused Nos. 3 to 5 also sustained injuries. Therefore, even otherwise the presence at the time of incident and they being member of the unlawful assembly has been established and proved. They were pelting stones and therefore, they have actively participated in commission of offence. As they being member of the unlawful assembly, they can safely be convicted with the aid of Section 149 of the Indian Penal Code and they can also be held liable for the death of 9 persons being member of unlawful assembly. Once it is held and proved that they were also part of unlawful assembly and mob of 40 to 50 who attacked 11 persons in which, 9 persons died, the prosecution is not required to specifically prove their overt act and they can be held liable for the act done by other members of unlawful assembly. Under the circumstances, no error has been committed by the learned trial Court in convicting the accused Nos. 3 to 5 - lady accused also.

11. Under the circumstances, the appeals preferred by the original convict accused being Nos. 3 to 6, 8 to 10, 14, 15, 16, 20, 23, 25, 29 and 38 to 41 deserves to be dismissed by confirming the judgment and order of conviction and sentence.

12. Now, that takes us to Criminal Appeal No. 1572 of 2008 preferred by the State against the impugned judgment and order of acquittal passed by the learned trial Court acquitting original accused No. 1, 2, 7, 11, 12, 13, 21, 26, 27, 28, 30, 31, 33 to 37, 42, 43, 47 and 48 respondents in Appeal.

13. Having heard the learned advocates for the and reasoning given by the learned trial Court while acquitting aforesaid accused vis-a-vis the evidence on record, it appears that learned trial Court has acquitted all of them by giving benefit of doubt on the ground that either they are not specifically named by the Prosecution Witnesses, though according to the witnesses all of them were known to them by name and by face and/or no IT parade has been held with respect to those who are not named by them or on the ground that the prosecution witnesses have not stated anything that they have having weapon and/or any overt act by them. Therefore, this being Criminal Appeal against order of acquittal and when the view taken by the learned trial Court is plausible, the impugned judgment and order passed by the learned trial Court acquitting the accused No. 47 is not required to be interfered with by this Court except acquitting original accused No. 1 Ramiben. As observed herein above, so far as original accused No. 1 Ramiben is concerned, even according to the accused

side, she sustained injuries. Her medical certificate has been produced at Exh. 477 in the present case and Exh. 26 in the Special Case No. 32 of 2002. Therefore, as such her presence at the time of incident is established and proved. She being member of the unlawful assembly and mob of 40 to 50 persons has been established and proved. Despite the above, learned trial Court has acquitted original accused No. 1 Ramiben by giving benefit of doubt, which has resulted into miscarriage of justice. The findings recorded by the learned trial Court while acquitting original accused No. 1 Ramiben and giving benefit of doubt to her is perverse and contrary to the evidence on record. Once her presence at the time of incident along with mob of 40 to 50 persons and being member of the unlawful assembly has been established and proved, she is also required to be convicted with the aid of Section 149 of the Indian Penal Code along with other accused persons including for the offence under Section 143 and other offences for which other accused are convicted. Now, so far as other accused who are acquitted are concerned, the learned trial Court has acquitted them by giving benefit of doubt by observing that either they are not named by the prosecution witnesses, though according to the prosecution witnesses all of them were known to them by name and by face and either they are not named and/or TI parade is not held and they are not specifically identified in the Court and nothing has been stated by the prosecution witnesses in respect of the said accused who are acquitted and considering the above when the learned trial Court was acquitted, the said accused (except original accused No. 1) and the view taken by the learned trial Court while acquitting those accused persons who are acquitted (except original accused No. 1) is plausible, this Court will not be justified in reversing the order of acquittal. As such, no error has been committed by the learned trial Court while acquitting those accused persons who are acquitted by giving benefit of doubt (Except original accused No. 1).

13.1 Under the circumstances Criminal Appeal No. 1572 of 2008 preferred by the State acquitting original accused Nos. 1, 2, 7, 11, 12, 13, 21, 26, 27, 28, 30, 31, 33 to 37, 42, 43, 47 and 48 deserved to be dismissed (except original accused No. 1 - Ramiben). To the aforesaid extent i.e. qua original accused No. 1 Ramiben Koli Criminal Appeal preferred by the State is required to be allowed by convicting original accused No. 1 also with the aid of Section 149 of the Indian Penal Code i.e. for the offences punishable under Sections 143 , 147 , 148 , 447 , 324 , 504 , 506(2) , 307 and 302 of the Indian Penal Code.

14. Net result of the aforesaid discussions and for the reasons stated above, Criminal Appeal Nos. 1337 of 2008, 2792 of 2008 and 42 of 2009 preferred by the original accused Nos. 3 to 6, 8 to 10, 14, 15, 16 to 20, 23 to 25, 29, 38 to 41 and 44 are hereby dismissed and their conviction is hereby confirmed. Criminal Appeal No. 1572 of 2008 preferred by the State is hereby dismissed except original accused No. 1-Ramiben Khoda Natha Koli and acquitting respondents-original accused in Criminal Appeal No. 1572 of 2008 is hereby confirmed except accused No. 1-Ramiben Koli. The impugned judgment and order passed by the learned trial Court acquitting original accused No. 1-Ramiben Koli is hereby

quashed and set aside and original accused No. 1 Ramiben is held guilty for the offence under Sections 143 , 147 , 148 , 447 , 324 , 504 , 506(2) , 307 , 302 r/ w. Section 149 of the Indian Penal Code and she is sentenced to undergo life imprisonment with fine of Rs. 1000/- and in default to undergo one month SI. As it is reported that original accused Nos. 3 to 5 are on bail, their bail bond stand cancelled. Time to surrender to the original accused Nos. 1, 3 to 5 is hereby granted upto 2.1.2016 and all of them i.e. original accused Nos. 1, 3 to 5 are granted time upto 2.1.2016 to surrender before the concerned jail authority, failing which concerned Jail Authority to take steps to arrest them. It goes without saying that all the accused shall be entitled to set off, of the sentence already undergone in accordance with law.