

(2011) 07 SC CK 0008

In the Supreme Court Of India

Case No : Criminal Appeal No. 1256 of 2011 (Arising out of SLP (Criminal) 1971 of 2010)

Noorul Huda Maqbool Ahmed

APPELLANT

Vs

Ram Deo Tyagi and Others

RESPONDENT

Date of Decision : 04-07-2011

Acts Referred:

Bombay Police Act, 1951 — Section 161, 197

Criminal Procedure Code, 1973 (CrPC) — Section 161, 169, 170, 227, 228

Penal Code, 1860 (IPC) — Section 107, 111, 113, 120B, 141

Citation : (2011) 3 ACR 2383 : (2011) AIRSCW 4014 : (2011) 3 Crimes 69 : (2011) 7 JT 189 : (2011) 3 RCR(Criminal) 550 : (2011) 6 SCALE 644 : (2011) 7 SCC 95 : (2011) 3 SCC(Cri) 31 : (2011) 7 SCR 782 : (2011) 4 Supreme 611

Hon'ble Judges : V.S. Sirpurkar, J;T.S. Thakur, J

Bench : Division Bench

Advocate : Vijay Pardhan, U.R. Lalit, Huzefa Ahmadi, Javed Rashi Patel, Garima Kapoor, Ejaz Maqbool, Suwadi, Rajiv Tyagi, Shrikant Shivade, Shivaji M. Jadhav, Prashant B., Amit Mittal, Chinmoy Khaladkar and Sanjay V. Kharde, for Asha Gopalan Nair, for the Appellant;

Final Decision : Allowed

Judgement

V.S. Sirpurkar, J.—Leave granted.

2. The order passed by the Bombay High Court confirming the order passed by the Additional Sessions Judge, Greater Bombay allowing the discharge application preferred by Accused No. 1, Ram Deo Tyagi, Lahane Bhagwan Vyankatrao (A-2), Sawant Subhash Namdeo (A-4), Santosh S. Koyande (A-6), Chandrakant B. Raut (A-8), Anil Narayan Dhole (A-14), Satish Kumar B. Naik (A-15), Ganesh Bhaskar Satvase (A-16) and Anant Keshav Ingale (A-17) is in challenge here. Against the aforementioned order of discharge passed by the Trial Court, the present Appellant Noorul Huda Maqbool Ahmed had filed a revision before the Bombay High Court and the High Court dismissed the said revision. That is how the Appellant is before us. We would prefer to refer to the

accused persons by their respective positions before the Trial Court.

3. It has to be noted that the aforementioned discharge order by the Trial Court was not challenged before the High Court by the State of Maharashtra and in fact they chose to support the order. Even before us on a specific plea having been made, the learned Counsel appearing for the State of Maharashtra has chosen to support both the orders by the Trial Court as well as the High Court.

4. The city of Mumbai, which is otherwise known to be a cosmopolitan city was rocked by communal riots in early 1993. On 09.01.1993 the said riot was at its peak and it engulfed various parts of city of Bombay coming within the jurisdiction of number of police stations. In the present matter, we are concerned with two police stations, namely, Pydhonie Police Station and Dongri Police Station. A road called Mohd. Ali Road divides the respective areas of these two police stations. There was one bakery called Suleman Bakery. This bakery has a Mosque in its immediate neighbourhood as also a Madarasa where admittedly the students belonging to Islamic faith used to reside and were being trained. The said Mosque is called Chuna Bhatti Mosque. It is an admitted position that Suleman Bakery, the Mosque as also the Madarasa came within the control of Dongri Police Station. They are situated at the aforementioned Mohd. Ali Road and since there were severe disturbances, a police picket was set up diagonally opposite to the said Suleman Bakery. But in the area of Pydhonie Police Station, seeing that some miscreants were firing at the picket at the road from the terrace of Suleman Bakery, the police warned the miscreants to stop their nefarious activities. However, the same went on unhindered by these warnings. A police officer from the Pydhonie Police Station, therefore, reported this incident to the control room and asked for help. One wireless van allegedly came to the spot and also noticed that some shots were fired from the building of the Suleman Bakery. On receipt of the wireless message to the control room, Joint Commissioner of Police Shri R.D. Tyagi, Respondent No. 1 herein came to the spot along with a team called the Special Operations Squads (SOS). Such squads were formulated to control communal riots. The persons in the bakery were not deterred by the presence of Tyagi or the members of the SOS and continued to pelt bottles, acid bulbs and stones towards the police. Therefore, Joint Commissioner Tyagi ordered the squad to enter the bakery. Needless to mention that the door of the bakery was bolted from inside and the inmates did not open the door though they were asked to do so. Respondent No. 1, Tyagi, therefore, directed the police force to break open the door of the bakery and to arrest the miscreants. The police squad was told to use minimum force. Accordingly, the door was broken and the members of the SOS team entered the Suleman Bakery but in the process they had to resort to firing due to which 12 persons inside got injured and 8 persons succumbed to death. Admittedly, the members of the team could not recover any fire arm except swords and sticks.

5. Shri Tyagi then left the place and complaints were lodged after the riots against the police force. There was an enquiry under the Commission of Inquiries

Act headed by Hon'ble Shri Justice B.N. Srikrishna, as His Lordship then was. Justice Srikrishna found that in this particular incident and some other incidents police were responsible for using more than necessary force and the Government of Maharashtra, therefore, decided to lodge prosecutions against the police officers who had taken law in their hands. In the present case, the State had lodged a complaint against 18 police personnel for the offences punishable under Sections 302 and 307 read with Section 34 of the Indian Penal Code. A Sessions Case being No. 1171 of 2001 was, therefore, lodged in which the 18 accused persons moved an application for discharged u/s 227 of the Criminal Procedure Code. The Sessions Judge discharged the accused persons named and dismissed the application of rest of the accused persons and directed that the prosecution shall continue against the others as has been stated. The State of Maharashtra had not challenged the order. However, the same came to be challenged by a private party who claims to be a victim. The High Court having dismissed the said revision, the same private party has come up before us by way of the present appeal. Before we proceed to appreciate the contentions raised by the learned Senior Counsel appearing for the Appellant Shri Vijay Pradhan, we must also note a few more facts. On the basis of the incident which took place on 09.01.93, an FIR was lodged against as many as 78 persons by Anant Keshav Ingale who is none else but accused No. 10 in Dongri Police Station. All these accused were committed to Sessions Court in the year 2002. The said Sessions case is Trial No. 930 of 2002. Out of the 78 persons, as many as 70 persons are shown to be absconding. The remaining persons were charged for the various offences under Sections 143, 144, 145, 147, 149, 307 read with Section 307, Section 34 as also Section 120B, IPC and 325, 327 of the Arms Act on 22.12.2004. The said order was challenged in the High Court where it is still pending.

6. The prosecution in this case was launched on the basis of the FIR C.R. No. 198 of 2001 in Pydhonie Police Station on 25.5.2001. It is on the basis of the statement of one Mirza Azamtullah Beg. On the basis of this FIR, subsequent investigation proceeded and a charge sheet came to be filed against the 17 accused persons. It was at this stage that applications came to be filed on behalf of the accused persons u/s 227 of the Code of Criminal Procedure which resulted in the discharge of the present Respondent Nos. 1 to 9 which order was then challenged before the High Court and was confirmed by the same.

7. Shri Pradhan appearing on behalf of the private person launched a scathing attack on the order of discharge as well as the confirming order passed by the High Court. In his address, he tried to point out that both the Courts had erred in relying on the circumstance that the accused who were discharged had not fired a single bullet. As regards the Respondent No. 1, the contention was that he was the leader of the team who had gone to quell the riots. According to Shri Pradhan, in fact, there was absolutely no reason for the SOS firstly to go in front of the Suleman bakery as the story, that there was stone pelting throwing of glass bottles and firing from the terrace of the Suleman bakery, was nothing but

a myth. Shri Pradhan was at pains to point out that the situation was perfectly under control and there was no evidence to suggest that the coming on the scene of the SOS was in any manner warranted. Shri Pradhan further argued that if at all there was any wireless message sent from the picket to the Pydhonie Police Station, it was absolutely a false message because there was no question of firing from the Suleman bakery, particularly, on the backdrop of the fact that the team which entered Suleman bakery did not find any firing arm or ammunition. The contention raised was that admittedly all the persons alleged to be hiding in Suleman bakery were Mohammedans and the Special Operations Squad wanted to teach a lesson to the Mohammedans who were held up in the Suleman bakery. Shri Pradhan pointed out that there was a complete curfew and it is not as if the unruly mob had come on the streets breaching the curfew order. He pointed out that there were number of persons admittedly studying in Madarsa who were innocent Mohammedan students. Shri Pradhan further pointed out that the entry of the whole team of 17 or 18 police men, particularly, after breaking open the front door of the Suleman bakery and their firing and killing 8 persons was nothing but an act of revenge against the Mohammedans. Shri Pradhan also took us in great details through the topography of the area as also the inside details of Suleman bakery. He argued that there was a single staircase for going above the ground floor of the Suleman bakery and the ground floor itself was a small area. He, therefore, suggested that the presence of so many persons in the ground floor was not possible. He further pointed out that the staircase was so narrow that only one person could have at a time gone up and there was no scope for so many persons to go up. From this, he derived an argument that the team which entered after breaking open the front doors had gone up and then shot dead 8 defenceless persons and also injured others. Therefore, Shri Pradhan was at pains to point out that all those injured had suffered bullet injuries. From this, he extended his argument further suggesting that all this was not possible unless there was a common object on the part of the police personnel to teach lesson to the innocent members of Muslim community. He further pointed out that there was nothing which justified the wanton and mindless firing. He urged that some persons of the police force who may not have fired a single bullet, it was enough to rope them in with the aid of Section 34 or Section 149, IPC as the whole assembly had turned illegal in firstly breaking open the doors without any purpose and then going up and firing at the defenceless persons hiding in Suleman bakery. Shri Pradhan very strenuously argued that merely because Respondent No. 1 had not entered the shop, it does not absolve him at all as he was the leader of the SOS and had to take the full responsibility. He pointed out that in fact there was no reason for Respondent No. 1 to come on the spot at all and then to order his team to break open the doors and to enter the Suleman bakery. Shri Pradhan, therefore, firstly suggested a common intention and argued that the act of entering, by itself, was sufficient to hold that those accused who entered were participants in crime. In that view, Shri Pradhan argued that the mere fact that they did not fire was not a relevant factor. He alternatively argued that at any rate this was an unlawful assembly

again on account of Clause thirdly of Section 141 of IPC and hence all the discharged accused persons were the members of the unlawful assembly and had to be at least charged and inquired into by the Courts below.

8. Replying this Shri U.R. Latit, learned senior counsel pointed out that to suggest that the situation was under control and everything was calm and quiet, would be a travesty of facts. Shri Lalit pointed out that the situation was extremely tense and a wireless message was sent from the picket in front of the bakery to Pydhonie Police Station. Shri Lalit argued that the whole police force could not be attributed with the motive of teaching lesson to a particular community. He suggested that the members of the picket and, more particularly, Ingale who sent the message had full idea of the topography since he was able to see himself the whole situation prevalent in Suleman bakery and its terrace from the building which was opposite Suleman bakery. He pointed out that the picket was set up only to quell the violence and the very existence of the picket was a pointer to the fact that everything was not calm and quiet and under control in that area which is predominantly a Muslim area and which was a greatly disturbed area. Shri Lalit pointed out that by no stretch of imagination could the SOS be called an unlawful assembly as their very duty was to establish peace. He further pointed out that it is not as if Respondent No. 1 had carried the SOS without any reason or justification. He had in fact gone there on account of the wireless message. He further pointed out that insofar as Respondent No. 1 is concerned, there was hardly any question of his having entertained any motive to teach lesson to the Muslim community. Insofar as others who entered the building, Shri Lalit pointed out that if even under that explosive situation the police personnel did not use weapon and did not fire a single bullet, there was no question of attributing any motive to such personnel. On the other hand, these police personnel even at the risk of their own lives had chosen to enter the building. Shri Lalit said that on the basis of the evidence available, the entry into the Suleman bakery by breaking the locks was fully justifiable. He further pointed out that the topography was such that the miscreants could have easily run away with the guns and ammunition as the building there are connected to each other and it was very easy for the miscreants to escape with ammunition. From all this, Shri Lalit pointed out that the discharge order passed by the Trial Court and confirmed by the High Court was perfectly justified.

9. It is on this basis that we have to examine the respective claims. We must at this point consider the First Information Report and its contents. A close scrutiny therein suggests that it was an admitted position that the riots in the two communities were going on from 6th to 10 December again started on 6th January and subsided only on 16th or 17th January. It is also an admitted position that severe damage was caused to public and private property and there was also loss of lives and since the riots assumed serious proportions, the curfew was imposed for 24 hours in several parts of the city during the said period and police pickets were maintained at various places. It is also mentioned in the FIR that the Special Operations Squads were formed by the police and that

Respondent No. 1 at that time was the Joint Commissioner of Police (Crime), Greater Bombay and that all the other accused were Inspector of police, Sub-Inspector of Police, Police Constables etc. It was also an admitted position that Shri Anant Keshav Ingale accused No. 17 (before Sessions Judge) was then attached to Pydhonie police station and all the accused were attached to Special Operations Squads. The FIR describes the topography of Suleman bakery as also of the mosque which is called Chuna Bhatti and the Madarsa called Darul Uloom. The FIR says about the firing at the picket and the conversation between ASI Nagare In-Charge of the picket with Anant Keshav Ingale (A-17 before Sessions Court). Regarding the said gun shots coming from the direction of the terrace of the Suleman bakery, though it asserts that there was no record regarding any untoward incident which allegedly commenced at 9.30 and went on for three hours, it is pointed out that no bullets or cartridges were traced near about the picket and no injury was caused to anybody. The FIR then refers to the wireless message from the picket to Pydhonie police station about firing as also the information communicated to Respondent No. 1, R.D. Tyagi by the control room about the firing. It also refers to the conversation on the part of Respondent No. 1 referring to a man with a stengun being present. It is mentioned that the said stengun man was neither caught nor the stengun was recovered. The FIR also refers to the further orders issued by Respondent No. 1 to enter the bakery after breaking open the front doors. The FIR then makes a reference to the Dongri police station and also refers to the FIR lodged against 78 persons arrested by SOS. Specific mention is also made in the FIR that 10-15 persons escaped with weapons and the attempts on their part to commit murder rioting etc. There is a specific reference made in the FIR CR No. 46 of 1993. There is then a reference made to the further investigation conducted by one P.I. Patil. Then a reference is made to the report of Justice Srikrishna. It is further mentioned that Anwar Ali Mohd. Islam, a witness examined by the Commission received injury by gun shot. A reference is made to the dialogue between the police personnel regarding the hidden weapons. A reference is also made to the evidence of Mohd. Qutubuddin, Noorul Huda and Abdul Wafa Hahibulla Khan etc. who have deposed before the Commission regarding the entry of the police into Suleman Bakery. It is then mentioned in the Panchnama that seven empties and two live cartridges were recovered from the place of offence which were fired by the miscreants. An assertion is then made that no fire arms were recovered during the Panchnama. A reference is then made to the injuries suffered by the 8 dead persons. A reference is made to the observation that it was impossible for 78 persons to fit themselves in the bakery building. Then it was impossible for 17 persons to break into the bakery and catch hold of the 78 persons. It is also pointed out that in the topography, it is clearly mentioned that the entire version is exaggerated and incapable of taking place. It was pointed out that not a single serious injury was sustained by any member of the SOS nor was there any injury by the fire arm. It is also mentioned that it was impossible for the miscreants to escape with fire arms as there was no way of escape from the mosque. It is then mentioned that the entire FIR No. CR 46 of 1993 recorded with the Dongri Police

station is a got up document in attempting to justify the death of nine persons caused by them. It is also mentioned further that Anant Keshav Ingale could not have been at the picket at 9.30 as the entry at the station diary made at 12.45 p.m. on 9.1.93 at Pydhonie police station shows that Ingale and API Jadhav left police station at 10.20 a.m. and he was nowhere near the Suleman bakery until about 12.45 p.m. A reference is made to the record of the Commission, the FIR and the Panchnama in Dongri Police Station Cr. No. 46 of 1993 and the material collected in that crime.

10. Motives are attributed then to the accused persons that they took undue advantage of the authority given to them and abused the power to cause the death of 9 innocent persons. Heavily relying on this FIR, Shri Pradhan pointed out that the prosecution on the basis of the FIR in Dongri Police Station was nothing but a facade created by the police for screening themselves and justifying the firing in Suleman bakery. There can be no dispute that the FIR heavily relies on the evidence given before the Commission of Inquiry. When we see the application u/s 227 and especially by the first accused, it is pointed out therein that in those riots more than 1500 persons had lost their lives and also the property of crores of rupees was damaged. It is pointed out that the entire police force was working under tremendous pressure and during those riots seven police officers were killed and 496 officers/policemen were injured. It was also pointed out that sophisticated fire arms and other lethal bombs were used by the violent mob and the police officers had to make Herculean efforts to bring the situation under control and that the police were relentlessly targeted by the violent mob. A detail reference has been made to the Dongri, Pydhonie, Nagpada and Agripada police stations which are predominantly Muslim areas and were communally hypersensitive. The application further refers to the bombs being hurled at police in the firing directed at them. About 9th January, it is specifically contended that the Commissioner of Police and the Respondent No. 1 were patrolling the concerned area. The situation grew extremely volatile and explosive, particularly, in the areas of the four aforementioned police stations and, therefore, a wireless message was given to the Commissioner that almost a civil war type situation had arisen and in fact it was thought of handing over of the area to the military. It is pointed out that the Commissioner of Police, therefore, left the area to attend a meeting while Respondent No. 1 reached along with the SOS while prosecution witness Ajit Deshmukh continued to patrol the area in Pydhonie. Relying on the statement of prosecution witness Ajit Deshmukh, it is further pointed out that the miscreants were challenging from the roof top of Suleman bakery. It also refers to one round being fired towards the SOS when they were alighting from the vehicle. A reference is also made to the shot being returned by Ajit Deshmukh in self defence from his service revolver. Reference is also made to the observations made by Anant Keshav Ingale (A-17 before Sessions Court) from above a shop and also confirming that the miscreants were using automatic fire arms and three persons carrying revolvers. A reference is then made to the entry which was based mainly on the

further fact that the witness Deshmukh sustained injury on his left hand as he was hit with a hard object like glass bottle and it was that circumstance that door was ordered to be broken. A reference is made to the three injured persons who had jumped and also the further investigation against those who were taken into custody. The reference is made to the recommendation in the Commission that no prosecution should be initiated against R.D. Tyagi (A-1 herein) as he had acted in discharge of his official duty. In his application, Shri R.D. Tyagi had taken a defence of acting in discharge of his duties. It was also pointed out that the accused did not go on his own but in response to a wireless call and on arrival he faced a gun shot and fire at witness Ajit Deshmukh. It was further mentioned that R.D. Tyagi had also reported about having seen the arm carrying miscreants on the rooftop of Suleman bakery. It is also pointed out that the information was got verified on the other police picket and that Respondent No. 1 herein had taken full precaution and had issued warnings to miscreants at Suleman bakery and asked them to surrender and when this did not yield any results, the bakery was ordered to be broken open by force. It is also pointed out that Ajit Deshmukh was also hit hard by missile and, therefore, the operation had to be done without there being any alternative. It is on this basis that the application was moved. By way of legal submissions, it was urged that there was already an FIR lodged at the Dongri police station about the happenings in Suleman bakery, therefore, there could be no second FIR in respect of the same incident. Section 161 of the Bombay Police Act was also pressed in service. Section 197 was also pressed in service, particularly, in respect of Shri R.D. Tyagi. The Civil Service Rules were also pressed in service to suggest that he could not now be proceeded after his retirement which took place in the year 1997. Almost to the same effect with a little difference were the other applications made by accused Nos. 2 to 18.

11. It cannot be disputed and was not really disputed by Shri Pradhan that the situation in Bombay on 9.1.1993 was extremely volatile though Shri Pradhan insisted everything was calm and quiet on account of the curfew. It is not possible to come to that conclusion at least on the basis of the material available which suggests that the miscreants were trying to breach the curfew by coming on the road and by making women as their shields and there was constant exhortation at the instance of miscreants and they were encouraging people to come on the road to breach the curfew. A very existence of the picket in front of the Suleman bakery and the conversation from the picket to the control room at the Pydhonie police station would give the idea as to how grim the situation was. We have also carefully seen the Trial Court's order. The Trial Court has rightly relied on the decision of this Court in T.T. Antony Vs. State of Kerala and Others, wherein it is held that the observations and findings in the report of the Commission are only meant for the information of the Government. Acceptance of the report of the Commission by the Government would only suggest that being bound by the Rule of law and having duty to act fairly, it has endorsed to act upon it. It was further observed that the investigation agency may with

advantage make use of the report of the Commission in its onerous task of investigation bearing in mind that it does not preclude the investigation agency from forming a different opinion u/s 169/170 Code of Criminal Procedure of Code of Criminal Procedure if the evidence obtained by it supports such a conclusion. However, the Courts were not bound by the report of the finding of the Commission of Inquiry and the Courts have to arrive at their own decision on the evidence placed before them in accordance with law. The Trial Court has also relied on Kehar Singh and Others Vs. State (Delhi Administration), to hold that the report of the Commission referred the consideration of the government and it is the opinion of the Commission based on the statement of the witnesses and other material but has no evidentiary value in the criminal case. The Trial Court then proceeded to examine the prima facie case and relied on the wireless message given by Anant Keshav Ingale to the control room and the arrival of R.D. Tyagi in pursuance of the message along with the team. The whole message was then quoted by the Trial Court from which the Trial Court came to the conclusion that there was firing from the roof top of the Suleman bakery and the door was closed from inside and in spite of the repeated orders, the inmates refused to open the door and, therefore, R.D. Tyagi ordered squad to break open the door and apprehend the miscreants. The Trial Court then went on to accept the police report to suggest that 7 of the accused persons did not fire a single bullet. From this, the Trial Court came to the conclusion that though the police officers were in possession of 638 rounds, some of them fired from 1 to 7 rounds while some others did not fire a single round. The Court also relied on the statement of the inmates and came to the conclusion that the policemen did not enter with the intention to kill the inmates. The Trial Court then went on to exclude the application of Section 34, IPC and ruled out the possibility that the SOS had made any pre-arranged plan of opening fire and killing the innocent persons. The Trial Court has also analyzed the orders issued by R.D. Tyagi to break open the doors and came to the conclusion that he was justified in directing the doors to be broken open. The Trial Court also relied on the statement of Ajit Deshmukh API who was an inured police officer and ultimately came to the conclusion that there was no question of application of Section 34, IPC, particularly, when the Joint Commissioner A-1 had directed to take precaution for the safety of the SOS team and also specifically directed to resort to minimum force. It is on this basis that the Trial Court came to the conclusion that if even after the entry same accused persons did not fire a single bullet, they were clearly acting in discharge of their duties and, therefore, they were entitled to the protection u/s 161 of the Bombay Police Act. The Trial Court found that there was no justifiable case against the police officials who even in the volatile situation did not open fire at all. Consideration was also made to the fact that the persons who died had died only of gun shot injuries and that accused had not fired a single bullet.

12. The High Court also referred to the scope of revisional jurisdiction as also the scope of Section 227 Code of Criminal Procedure The High Court relied on State

of Maharashtra Vs. Priya Sharan Maharaj and Others, and the observations made in paragraph 8 to the following effect:

The law on the subject is now well settled, as pointed out in Niranjan Singh Karam Singh Punjabi and Others Vs. Jitendra Bhimraj Bijja and others, that at Sections 227 and 228 stage the Court is required to evaluate the material and documents on record with a view to finding out if the facts emerging there from taken at their face value disclose the existence of all the ingredients constituting the alleged offence. The Court may, for this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case. Therefore, at the stage of framing of the charge the Court has to consider the material with a view to find out if there is ground for presuming that the accused has committed the offence or that there is not sufficient ground for proceeding against him and not for the purpose of arriving at the conclusion that it is not likely to lead to a conviction.

The Court also referred to the observations made in Yogesh @ Sachin Jagdish Joshi Vs. State of Maharashtra,

16. However, in assessing this fact, the Judge has the power to sift and weigh the material for the limited purpose of finding out whether or not a prima facie case against the accused has been made out

The broad test to be applied is whether the materials on record, if unrebutted, make a conviction reasonably possible.

13. A very relevant observation has thereafter been made by the High Court that the truthfulness of the statements or circumstances or documents of the prosecution is not questioned by the defence. Then the High Court proceeded to consider the scope of Section 34, IPC as also the scope of Section 47(2) of the Code of Criminal Procedure The High Court then considered the scope of alternative argument made by the revisional Court that the matter should be remanded for adding new charges u/s 111, IPC u/s 442 read with Section 111 and 113 of IPC against R.D. Tyagi and the other accused who were discharged. Ultimately, the High Court rejected the argument and, in our opinion, rightly so. Even Section 107 was referred by the High Court. In that the High Court rightly came to the conclusion that the acts of R.D. Tyagi (A-2 before the High Court) and other Respondents did not fall u/s 107, IPC as neither of the three requirements u/s 107 was fulfilled. Even Shri Pradhan did not press that point before us.

14. We, after seeing the depth at which Shri Pradhan argued the matter, invited Shri Pradhan to justify the application of Section 34, IPC particularly on the part of accused No. 1 and those who did not fire a single bullet. Considering the question of firstly breaking open of the door there can be no dispute that there is nothing on record to suggest that everything was alright with the Suleman bakery and that there was huge disturbance going on from the precincts of the

same. There can also be no dispute about the fact that wireless messages were sent and on the basis of that, the action was taken by the SOS which was being led by Respondent No. 1. In our opinion, therefore, the accused No. 1 was perfectly justified in directing the breaking open of the front doors of Suleman bakery. We have examined the record ourselves which suggest that the police personnel had directed the opening of the door but the same were not being opened. Shri Pradhan was fair enough to admit that there were persons in Suleman bakery. His only contention is that they were not committing any mischief. From the material on record, it was clear that the missiles were being thrown at the police inasmuch as API Shri Deshmukh was actually injured and there is material to support that in that situation when after breaking of the doors the police men entered and yet some of the policemen did not fire the bullets, they certainly could not be clothed with common intention. In our opinion, the Trial Court as well as the revisional Court have already taken the view that there could be no common intention shared on the part of those who did not even fire a single bullet. Shri Pradhan also saw the hollowness of the claim of the prosecution that these accused persons could be roped in with the aid of Section 34, IPC. He, therefore, argued that the assembly of the police at least till the time they break open the door was lawful object as it was their duty but they should not have broken open the door and trespassed the Suleman bakery and all those who entered Suleman bakery formulated an unlawful assembly as they illegally trespassed into the Suleman bakery since A-1 herein, Shri Tyagi had ordered them to break open the doors even he was a part of that unlawful assembly who had the common object. Now the question is whether this assembly could be called an unlawful assembly. There can be no dispute that they were all the members of the SOS and had the duty to quell the riots. They were not doing anything illegal in coming out and trying to control the riots. There is also no dispute that by Shri Pradhan that the riots were undoubtedly going on. We out rightly reject the claim of Shri Pradhan that everything was calm and quiet and yet the SOS came. There was no reason for the Trial Court and the revisional court and even for us to believe that the SOS squad came on its own without there being any apprehension of the further troubles. Those apprehensions are apparent enough in the wireless message on which the Trial Court wholly relied on and, in our opinion, rightly. Therefore, there is no point in holding that the SOS itself was an unlawful assembly.

15. Further question is the object of the SOS. A wild argument was addressed that the SOS were out to teach lesson to the rioters. There is absolutely no material about the same. Shri Tyagi had no reason whatsoever to be inimical towards a particular community merely because he belonged to a different community. There is no material on record to suggest that any of the SOS personnel had any personal agenda. Therefore, till that point of time at least there can be no question of the assembly being unlawful. Again if the first accused directed the breaking open of the door, he had solid reason behind it. It was his job and duty to quell the riots and to control the rioters. In pursuance of

that he ordered the breaking open of the door. In our opinion, he was perfectly justified in doing so. If he had ordered the SOS to break open the door, there was no alternative for them but to break open the door. Therefore, in the breaking open the door he did not commit any illegality. Once the doors were broken up they had to enter. Therefore, the entry could not amount to trespass. A trespass becomes a criminal trespass if it is with an intention to annoy or to do something illegal which is not the case here. There was no question of the so-called entry amounting to criminal trespass. If some of the members did not fire a single shot, could it be said that they had a common object of killing the people much less innocent people? Those who fired the bullets and caused the death, whether that act will amount to murder is entirely a different question. That will have to be established on the basis of the evidence that they had specific agenda for doing so or they had the intention to do so or that they acted in excess of their powers, that is purely a matter of evidence. But in case of those who did not fire a single shot, it had to be said that they had the common objection or that the common object of intention of killing them. After all, the police who entered were risking their own lives. There is evidence on record to suggest that the miscreants were not the mute bystanders or were hiding there without doing any mischief. Under such circumstance, if in that volatile situation also some of the personnel did not fire a single bullet could they be made vicariously liable for the act of some others which acts are also not shown to be with a common object of killing the people? The answer would have to be in the negative. Therefore, in our opinion, there was no question of there being an unlawful assembly and any act having been committed by the Respondent in pursuance of that common object. Whether there was an object on the part of others to fire and kill the mob inside is to be examined by the Trial Court. But insofar as the present Respondents are concerned, not firing a single bullet would certainly take them out of the prosecution area. We do not agree that on that account they could not be discharged. In fact, the Trial Court and revisional Court have not relied only on that circumstance. That circumstance has been considered in the light of other attending circumstances and, therefore, we do not find any reason to take a different view than the one which has been taken by the High Court.

16. Shri Lalit tried to argue about the Bombay Police Act. However, Shri Pradhan has not gone to that aspect and it is unnecessary for us to consider the effect of Section 161 of the Bombay Police Act. We find that on merits itself it cannot be said that there was any prima facie case against these Respondents who had not fired a single bullet and who were thoroughly acting in pursuance of orders of their superiors and were doing their duty.

17. Shri Pradhan, however, contended that there was lot of material against the accused persons about their having actively taken part in the incident and in support of his contention he took us through a few statements of the witnesses recorded u/s 161 Code of Criminal Procedure They are statements of Shri Abdul Sattar Suleman Mithaiwala, Abdul Wafa Khan Habibullah Khan, Mohd. Kutubuddin s/o Mohd. Musa Siddiq, Hasan Razakudin Mohd, Gulam Mohd. Farukh

Shaikh, Abdulla Abul Kasim and the Appellant himself. Besides these, Shri Pradhan also relied on the statements of Sabre Alam Jamaluddin Balwor, Mohd. Hussain Aulad Ali Dafali, Mohd. Islam Mohd. Kuddus Shaikh, Budul Abdul Latif Khan and Mohd. Rafiq s/o Mahebook Ali. We have carefully gone through all these statements. Barring the first statement, all the statements have come by way of additional documents attached to the rejoinder. All the statements appear to be of the residents of the Madarsa. Significantly enough, in no statement any specific act on the part of any of the Respondents is mentioned. Generally, it is mentioned in the statements that the persons concerned heard shouting of policemen who were shouting Darwaja Kholo, Darwaja Kholo (open the door) and were also asking Hathiyaar Khah Chhupa hai (where is the weapon hidden). In the statement of Abdul Wafa Khan Habibullah Khan it is mentioned "one of the policemen pressed the rifle's nozzle under the chick and shouted 'sabko maar dalo' but the other policemen stopped him from doing so". The description in the statements is that some persons were shot dead by the police. In all the statements the act of shooting and killing is attributed to the police without identifying them. Some of these statements are of those who were injured. In short, in all the statements, the only act attributed to the police who entered the Suleman bakery was of firing at the persons and inmates and some of the inmates dying due to that. There is not a single statement identifying those policemen who fired or suggesting that those who did not fire committed any other mischief by beating by rifle butts etc. All the statements referred to the order of the police to take out the hidden weapons. We have expressed earlier and even at the cost of repetition, we may mention that indeed no weapon was found in Suleman bakery but that does not solve the problem because Shri Lalit explained to us in great details that the weapons could have been easily removed as the buildings there were so connected that one could easily run away from Suleman Bakery through connected rooftops of the other buildings. We put a specific query to Shri Pradhan as to whether there appeared even a single statement against Respondent No. 1 herein or Respondent No. 9 herein. Shri Pradhan was fair enough to admit that there was no specific act attributed either to Shri Tyagi (Respondent No. 1 herein) or Shri Ingale (Respondent No. 9 herein). In short, the statements, even if they were to be believed completely, would only provide material against those who actually fired the gun shots. Under such circumstances, if admittedly the Respondents did not fire a single bullet, it cannot be said that they had a common object to kill the innocent insiders in Suleman Bakery or the Madarsa and Mosque attached thereto. We are quite convinced that the Trial Court and the revisional Court were not wrong in relying on this very material circumstance that none of the Respondents, though armed, fired a single bullet.

18. Shri Pradhan then claimed that if after reading the evidence if some material is found against some others, then the complainant should have the liberty to apply for action u/s 319 Code of Criminal Procedure It would be speculative on our part to say anything on this matter. It will be for the Trial Court to consider

any such application, if made, on its own merit. There will be no question of giving liberty for that purpose. No other points were argued.

19. Under the circumstances, we do not find any merit in this appeal and proceed to dismiss the same. The appeal is dismissed.