

(2012) 05 BOM CK 0045

In the Bombay High Court

Case No : Criminal Appeal No. 249 of 2011 and Criminal Appeal No. 393 of 2011

Pravin Divte

APPELLANT

Vs

The State of Maharashtra and District Yavatmal
 State
of Maharashtra Vs Vikas Zanjali, Jaggu alias Jagdish Kadu and
Mohammad Tarique

RESPONDENT

Date of Decision : 02-05-2012

Acts Referred:

Arms Act, 1959 — Section 25, 4
Criminal Procedure Code, 1973 (CrPC) — Section 164
Evidence Act, 1872 — Section 145, 27
Penal Code, 1860 (IPC) — Section 120B, 147, 148, 149, 302

Citation : (2012) BomCR(Cri) 34

Hon'ble Judges : Sadhana S. Jadhav, J;A.H. Joshi, J

Bench : Division Bench

Advocate : Sunil Manohar and Mr. A.A. Naik, in Criminal Appeal No. 249 of 2011, Mr. Anil S. Mardikar, in Criminal Appeal No. 285 of 2011, Mr. S.V. Sirpurkar, in Criminal Appeal No. 312/2011 and Mr. R.S. Nayak, APP, for the Appellant; T.A. Mirza, Additional Public Prosecutor for the respondent-State and Mr. V.M. Deshpande, Advocate for Assisting to Prosecution, in Criminal Appeal No. 249 of 2011, Mr. T.A. Mirza, Additional Public Prosecutor for the respondent-State and Mr. V.M. Deshpande, Advocate for Assisting to Prosecution, in Criminal Appeal No. 285 of 2011, Mr. T.A. Mirza, Additional Public Prosecutor for the respondent-State and Mr. V.M. Deshpande, Advocate for Assisting to Prosecution, in Criminal Appeal No. 312/2011 and Mr. A.S. Mardikar, Advocate for Respondent No. 1 and Mr. R.M. Daga, Advocate for Respondent No. 3, in Criminal Appeal No. 393 of 2011, for the Respondent

Final Decision : Dismissed

Judgement

Smt. Sadhana S. Jadhav, J.—The appellants herein are original accused nos. 1,3,5,6 and 7 in Sessions Case No. 28/2008 decided by Sessions Judge, Yavatmal by a judgment and order dated 21.5.2011. Eight accused persons were facing the trial in Sessions Case No. 28/2008. Original accused nos. 2,4 and 8 are acquitted of all the charges levelled against them. The State has filed

Criminal Appeal No. 393/2011 challenging the acquittal of original accused nos. 2,4 and 8. The accused/appellants are convicted for offences punishable under Section:- (a) 147 of Indian Penal Code and sentenced to suffer R.I. for 1 year.

(b) 148 of Indian Penal Code and are sentenced to suffer R.I. for 2 years.

(c) 302 read with Section 149 of Indian Penal Code and sentenced to imprisonment for life and to pay fine of Rs. 1,000/- each in default to suffer further R.I. for 1 year.

The original accused no. 6 i.e. Pravin Dattuji Divte is convicted for offence punishable u/s 120B of IPC and sentenced to suffer imprisonment for life and to pay fine of Rs. 1000/- in default to suffer further R.I. for 1 year. The appellants are acquitted of the offence punishable u/s 4 read with Section 25 of the Arms Act.

2. The facts of the case as alleged by the prosecution are that:-

(a) On 3.6.2007 at about 7.30 p.m. Parmanand Mishra (since deceased) lodged a report at Wadgaon Road Police Station, Yavatmal alleging therein that on 3.6.2007 at about 5.30 p.m., he and Sachin Harankhede were the pillion riders on the motorcycle being driven by Prasant @ Guddu. They were proceeding towards the Vidarbha Housing Society.

(b) At about 5.45 p.m. when they reached near Vidarbha Housing Society, he saw Pravin Divte, Mohd. Tariq, Vikky Kanake, Raghu Nakshane, Deepak Meshram, Ammu @ Amir, Vikas Zanjali and two muslim boys from Amravati suddenly came from the opposite direction on their respective motorcycles. They halted and proceeded towards Prashant. Sachin Harankhede and the complainant alighted from the motorcycle. Deepak Meshram and Vikas (acquitted accused) assaulted Prashant with the swords. Prashant fell on the ground. Pravin fired at Prashant with the gun and the rest of the accused assaulted Prashant with the swords with which they were armed. Therefore, Sachin, Sunil and the complainant made good their escape. They straightway went to the house of Prashant and informed his elder brother Manish about the incident. Manish and Chandrashekhar who are the brothers of deceased Prashant came to the spot and took Prashant to Civil Hospital. Prashant succumbed to the injuries in the hospital.

(c) On the basis of the said information, Crime No. 180/2007 was registered at Wadgaon Police Station against eight persons for offences punishable under Sections 147, 148, 302 read with 149 of I.P.C. and Section 120B of I.P.C. The investigation was set in motion and the charge sheet was filed on 31.8.2007. The case was committed to the Court of Sessions and registered as Sessions Trial No. 28/2008. The prosecution examined 19 witnesses to bring home the guilt to the accused. The accused examined defence witness Sk. Razzak from whose field the weapons and motorcycle were recovered.

3. Deceased Prashant @ Gattya Dube and accused no. 6 Pravin Divte were

elected as members of the Municipal Council, Yavatmal. Prashant was elected as President of the Planning Committee of the said Municipal Council. Accused no. 6 could not digest the election of Prashant as the President of the Planning Committee. Accused no. 6 was annoyed with deceased Prashant as he was giving tap connections in the ward from which accused no. 6 was elected and thereby gaining popularity in the ward. According to prosecution, accused no. 6 was, therefore, nurturing the idea of eliminating Prashant. The incident which occurred on 3.6.2007 was the outcome of the ill-intentions of accused no. 6. In this background, the charge was framed against original accused nos. 1 to 8 as follows:-

Fourthly, on 31.5.2007 absconded accused Mahesh Thakur reached at Saiba Hotel at Yavatmal you accused nos. 1 to 8 along with absconding accused Sheikh Juned Shahanoor @ Shanu also reached at Saiba hotel, Yavatmal and agreed with absconding accused no. 10 Mahesh Thakur to do an illegal act to wit to commit murder of Prashant Dube, and you accused did the same act to wit commit murder beside the agreement in pursuance of said agreement to commit offence of murder of Prashant Dube punishable with death sentence and thereby committed an offence punishable u/s 120B of Indian Penal Code and within the cognizance of this Court of Sessions.

4. In this background, we would examine the prosecution witnesses relied upon by the prosecution to prove the charge u/s 120B of I.P.C.

5. To substantiate the charge u/s 120B of I.P.C., the prosecution has examined PW3 Wasudeo Lakhani who has been declared hostile.

6. Discussion as regards testimony of PW5 is as follows:-

(a) The prosecution has examined PW5 Ashish Dobade. According to PW5, he is working as a Painter. On 31.5.2007, he had been to Hotel Sahiba along with his friend Kiran Thakur in the afternoon. On the adjacent table, 4-5 persons were consuming alcohol. At that time, accused nos. 5,6 and 8, Shanur and three to four other persons came and joined them. At that time, he heard accused no. 6 Pravin Divte telling one man that Prashant @ Gattya has progressed in politics due to which their income has suffered and Prashant is becoming a prominent personality. He had also heard Pravin Divte saying that with the help of Mahesh, he intends to eliminate Prashant. PW5 has stated that thereafter he consumed cold-drinks and went away. He has identified accused no. 8 in the Court.

(b) In the cross-examination, he has stated that almost all the tables in the hotel were occupied by the customers. That all the customers were having conversation. They were in the hotel for about 20 minutes.

(c) It is elicited in the cross-examination of this witness that till his statement was recorded by the Police, he had not disclosed about this conversation to anybody that he went to Police Station on the say of Parmanand Mishra. He has also admitted that he had not even disclosed to Parmanand Mishra about the

conversation which he had heard. There is one more admission that on 31.5.2007, he was in the Police Station upto 5.30 p.m.

(d) PW5 has admitted his criminal antecedents. He was the co-accused of Parmanand Mishra. He has further admitted that if Parmanand Mishra had not told him, he would not have given the statement to the Police. An inference can be drawn that he was coaxed by Parmanand Mishra to state accordingly. The statement is not voluntary. The truthfulness of the said statement is doubtful and hence does not inspire confidence. In any case, it is only accused no. 6 who is convicted for offence punishable u/s 120B of I.P.C. and the other accused named by PW5 i.e. original accused nos. 5 and 8 are acquitted of the said charge.

7. The prosecution has examined PW14 Rajesh Dube, PW15 Sunil Dube and PW16 Manish Dube to prove the charge u/s 120B of I.P.C. Prosecution witness Nos. 14, 15 and 16 are the brothers of deceased Prashant @ Gattya.

8. Discussion as regards testimony of PW14 is as follows:-

(a) According to PW14, 4-5 days prior to the incident when he was in Sharda Square, Pravin Divte approached him and told him that his brother Prashant was progressing in politics by giving tap connections in his ward. Accused no. 6 Pravin asked PW14 to convince his brother Prashant @ Gattya or else he would be eliminated. According to him, he was threatened of dire consequences in the eventuality of lodging report.

(b) In the cross-examination, it is stated by PW14 that accused no. 6 had contested the election from the Congress Party whereas deceased Prashant was elected as representative of Bhartiya Janta Party.

9. Discussion as regards testimony of PW15 is as follows:-

(a) PW15 Sunil Dube has deposed before the Court that in the past there had been an altercation between the accused no. 6 and deceased and both of them were arrested by the Police.

(b) According to PW15, on 3.6.2007 at about 1 to 1.30 p.m. he was passing from Anglo Hindi School. He had seen accused no. 6 and his friend and, therefore, he had inquired the whereabouts of his brother Prashant and Prashant had come home. On the same day at about 4.30 p.m., Prashant had called PW15 in Jaibharat Square and at that time PW15 had given Rs. 3,000/- to him and asked him to come home. While he was returning from Jaibharat Square, he had seen all the accused persons present near the house of accused no. 6. He, therefore, informed his brother Manish about the presence of the accused persons near the house of accused no. 6. At about 6.30 p.m., Manish informed him that Gattya had been stabbed and was taken to the hospital. PW15, therefore, went to the hospital and learnt about the death of Gattya.

(c) PW15 has been confronted with his previous statement, in which he had stated that he along with his brothers Manish and Chandrashekhar went near

Vidarbha Housing Society and has seen Prashant lying in a pool of blood and then they had taken him to Civil Hospital. The contradiction is marked as portion mark A.

(d) The omissions is elicited to the extent that he has seen accused no. 7 Vikky and others coming from opposite direction and motorcycle of his brother was lying on the spot near Anglo Hindi High School. The omissions are material omissions as far as they relate to PW15 seeing the accused persons near about the scene of offence just prior to the incident. The presence of accused no. 6 near his own house cannot be an incriminating circumstance. The other accused were his friends and these allegations are not sufficient to prove the charge of conspiracy.

10. On the basis of the testimony of PW5, PW14 and PW15, it cannot be held that the allegations are sufficient to prove the charge of conspiracy and that too only against PW6. On the other hand, it appears that there was political rivalry between the deceased and PW6. The deceased also had criminal antecedents. According to PW14, accused no. 6 had given a warning to him just 4-5 days before the incident. He had asked PW14 to convince the deceased. It could be a threat but it cannot be said to be conspiracy.

11. Criminal conspiracy within the meaning of Section 120B of I.P.C. postulates an agreement between two or more persons to do or cause to be done an illegal act or an act which is not illegal, by illegal means. Mere agreement is an offence, even if no step is taken to execute the agreement. A conspiracy from its very nature is hatched in secret. To prove the charge of conspiracy, the prosecution has to prove the essential ingredient i.e. the agreement to commit an offence. It has to be an agreement between two or more persons. In the present case, there is no incriminating material to show even prima facie that a conspiracy had been hatched between the accused and some other person, as there is no second party to the agreement since the other accused are acquitted of the charge. At the most, the act of accused no. 6 may be considered as a threat and nothing beyond that.

12. The prosecution in order to prove the charge of offence punishable u/s 302 read with 149 of I.P.C., has examined PW1 Sunil Tiwari and PW2 Rajesh Atram as eyewitnesses and PW16 Manish Dube to prove that PW1 and PW2 had disclosed to PW16 immediately the names of assailants and the incident as seen by them.

13. Discussion as regards testimony of PW1 is as follows:-

(a) PW1 Sunil Tiwari has deposed before the Court that on the day of incident at about 5 to 6 p.m., he was going on his Pulsar motorcycle from Tiwari Square to Vidarbha Housing Society. Prashant, Parmanand and Sachin were on Pulsar motorcycle. When they reached near Vidarbha Housing Society, accused no. 7, accused no. 3, absconding accused Shanu, accused no. 5 accompanied by 4-5 other persons came from the opposite direction. One of the accused had kicked the motorcycle of Prashant Dube. All the three persons fell down and thereafter

accused no. 7, accused no. 1, accused no. 5 and 3-4 others assaulted Prashant with knife and sword. He escaped along with Parmanand Mishra and saw the incident from a distance of 20 ft. He had seen Prashant being assaulted by accused no. 7, accused no. 1 and accused no. 5. Then they went to the elder brother of Prashant and narrated the incident to him. Then they went to Civil Hospital and there he had disclosed the names of assailants to Manish Dube who is the brother of Gattyia.

(b) He had admitted in the cross-examination that in his previous statement, he had not stated the names of original accused no. 2 (acquitted), accused no. 6 and accused no. 8. However, he has disclosed the names of accused nos, 1 and 3 to 5. Original accused no. 4 is acquitted. PW1 was confronted with his previous statement and he has stated that the portion mark A,B,C and D are incorrect. The portion mark A is in respect of the names of accused nos. 6 and 8. Portion mark B is in respect of name of accused no. 2. Portion mark C is in respect of the word MusalmanLi.

(c) The relevance of these contradictions are to show that he has seen these persons named in the contradictory portion as the persons whom he had seen coming from opposite direction at the time of incident. The portion mark D is that he had seen accused no. 6 firing at Prashant from his country made Pistol. These are material contradictions as they would lead to the identity of the accused persons.

(d) PW1 has admitted that he had not stated the name of accused no. 8 Mohd. Tariq to the Police as he did not know him. It is further elicited in the cross-examination that when they reached Civil Hospital, there was a large mob of people. There were about 70 to 80 Police officials in the hospital. PW1 had learnt that Prashant had expired. Sachin Harankhede and Rajesh Atram were present in the hospital. PW1 has admitted that he had not disclosed about the incident to the Police Officials although he was present even at the time of inquest panchanama. According to him, PW16 had asked him to leave the hospital. According to him, except Manish Dube, he had not disclosed about the incident to anybody till his statement was recorded. One of the accused kicking the motorcycle is by way of omission. The most glaring admission by PW1 is that he was not knowing the assailants prior to the incident. We have verified the vernacular version and it reads thus:-

(e) In view of this admission, it cannot be believed that he had disclosed the names of the assailants to Manish Dube. The investigating officer has not conducted test identification parade and, therefore, the identity of the assailants as far as this witness is concerned, would be doubtful.

(f) The statement of PW1 was recorded u/s 164 Cr.P.C. on 26.6.2007. PW1 was confronted with his statement u/s 164 Cr.P.C. The said statement is marked as Exh.171. The identity of the assailants is an omission in the statement u/s 164 Cr.P.C. PW1 has admitted that the contents were read over to him and he has

signed the same to verify its correctness. He has admitted the omissions in his statement u/s 164 Cr.P.C. He has admitted that he has not stated in his statement u/s 164 Cr.P.C. that Prashant, Parmanand and Sachin fell from the motorcycle and were then assaulted by accused no. 7, accused no. 1 and accused no. 5 and 3-4 others. In Exh.171, there is an omission to the extent that he along with Parmanand Mishra and Sachin had run away for some distance and then waited for 2 to 4 minutes after crossing distance of 20 feet. Another material omission in Exh.171 is as follows:-

I have stated that we went to elder brother of Prashant Dube and narrated incident to him and I had told names of assailants to Manish Dube who is brother of Gatta Dube but these facts are not mentioned in my statement at Exh.171.

14. Discussion as regards testimony of PW2 is as follows:-

(a) PW2 Rajesh Atram has also been examined as an eyewitness. PW2 has deposed before the Court that he sells vegetable on a handcart. On 3.6.2007 between 5 to 6 p.m., he was coming from Vidarbha Housing Society towards the water tank. About 5 to 6 persons came from his back side and went towards Prashant Dube and assaulted him by sharp edged weapon. Accused Nos. 1,3,5 and 7 were amongst the assailants. He had witnessed the incident but since he was frightened, he left the spot. The tenor of the evidence of this witness shows that he was a chance witness.

(b) PW2 was confronted with his previous statement. The portion mark A is in respect of identity of accused no. 6. The witness has stated that the said version is incorrect. It is marked as portion mark A. The portion mark B pertains to the names of accused nos. 2 and 6. Portion mark C pertains to the names of accused Shanu and portion mark D is in respect of accused no. 2. The direction in which the witness was proceeding is also a contradiction. Portion mark F is that he was proceeding from Datta Chowk, via Mainde Chowk to Anglo Hindi High School and near Anglo Hindi High School.

(c) PW2 has admitted his criminal antecedents and has admitted that he is a co-accused with Devanand Mishra and Parmanand Mishra for commission of murder of Amol Ghugre and attempted to commit murder of Prakash Langote.

(d) The material omissions elicited in the cross-examination are as follows:-

At the time of recording statement, I had stated to the police that 5-6 persons had come from my back side and went towards Prashant @ Gatyia Dubey and he was assaulted by sharp edged weapon but this fact is not mentioned in my statement recorded by police. I cannot assign any reason why it is not mentioned in my statement. At the time of recording my statement, I had not stated to the police that I had witnessed the incident for 3-4 minutes.

(e) PW2 was confronted with his statement u/s 164 Cr.P.C. and the said statement is marked as Exh.172. He has admitted that the statement was read over to him and he has signed the said statement after verifying the contents.

According to him, the Police were standing outside the Court hall when his statement u/s 164 of Cr.P.C. was recorded. In spite of it, he has not mentioned the names of the assailants. It is an omission in Exh.172 that he has seen 5-6 persons came from behind and went towards Prashant and that he had witnessed the incident for 3 to 4 minutes.

15. In view of the admissions of PW1 that he did not know the assailants prior to the incident, it cannot be believed that he had disclosed the names of the assailants to the Police. That the assailants also had criminal antecedents and, therefore, it cannot be said that the prosecution has succeeded in establishing the identity of the accused persons through the evidence of PW1. PW2 is a chance witness. He is an accused in several serious cases. He belonged to the group of the deceased and Parmanand Mishra and appears to be a got up witness.

16. The admissions in respect of omissions and contradictions as noted in the statements of PW1 and PW2 u/s 164 Cr.P.C. are duly proved. The statement of a witness recorded u/s 164 Cr.P.C. is not a substantive piece of evidence but it can be used to corroborate the witness or to contradict him u/s 145 of the Indian Evidence Act. In the present case, the witnesses i.e. PW1 and 2 are confronted with their previous statement and they have admitted the omissions and contradictions. Even if it is held that PW1 and PW2 had seen the incident, the question of the identity of the accused/assailants needs to be proved by the prosecuting agency beyond reasonable doubt. In respect of PW2, room for concoction at his behest cannot be ruled out.

17. PW16 Manish Dube is the brother of deceased Prashant. Discussion as regards testimony of PW16 is as follows:-

(a) According to PW16, on 3.6.2007 at about 6 to 6.15 p.m., Parmanand Mishra, Sunil Tiwari and Sachin Harankhede came to his house and informed him that his brother Gattya was assaulted. PW16 then called upon his elder brother Chandrashekhar and went towards Water Tank in Vidarbha Housing Society and saw that Prashant was lying on the road in an injured condition. They took Prashant to the hospital in an auto-rickshaw. The doctor had declared him dead. Sunil Tiwari, Parmanand Mishra and Sachin Harankhede met him in the hospital and told him that accused nos. 1,2,3,5,6,7 and 8 and two muslim boys residents of Amravati had assaulted Prashant on the road in front of Vidarbha Housing Society. Accused nos. 2 and 8 are acquitted.

(b) PW16 has deposed before the Court that he had accompanied Parmanand Mishra to the Police Station. He admits that at the first instance when Parmanand Mishra, Sachin and Sunil came to his house, he had not asked them about the identity of the assailants. According to him, the clothes of his elder brother as well as his own clothes were stained with blood when they lifted Prashant to take him to the hospital. However, the Police had not seized the clothes of PW15 or his elder brother Chandrashekhar. He also admits that he had not told the names of the assailants to any Policeman out of 100 policemen at the hospital. That Sachin

Harankhede and Sunil Tiwari have not accompanied him to the Police Station. Sachin Harankhede is a witness to inquest panchanama. However, the prosecution has withheld this witness.

(c) The fact of PW1 going to the house of PW16 is material omission in the statement of PW1 in his statement u/s 164 Cr.P.C. which is marked at Exh.171. The prosecution has made a frail attempt to rely upon the recovery of weapons at the instance of the accused persons. However, on perusal of the record, we find that the recovery of weapons has been done without following the procedure contemplated u/s 27 of the Indian Evidence Act.

(d) Moreover, the accused have examined defence witness Sk. Razzak from whose field the weapons were recovered. The defence witness Sk. Razzak is resident of village Hivra Sangam. On 5.6.2007, he had seen one motorcycle and some arms in his field and accordingly informed about the same to the Police Patil. The Police Patil had transmitted the information to Mahagaon Police Station immediately. On 5.6.2007 itself, the Police had come to his field and had taken away the motorcycle and the arms. Even according to the prosecution, the weapons were recovered at the instance of the accused from a field at village Hivra Sangam.

18. PW17 Ishratulla Pathan, who was working as PSI at Mahagaon Police Station has admitted that on 5.6.2007 he had seized an abandoned motorcycle and a sheath from the field of Sk. Razzak as can be seen from Panchanama Exh.129. The memorandum leading to recovery was recorded three days prior to the actual recovery u/s 27 of the Indian Evidence Act. The memorandum was recorded on 3.6.2007 whereas the actual recovery was made on 9.6.2007 from accused nos. 2,3 and 5. The memorandum of accused no. 1 was recorded on 9.6.2007 and the actual recovery is made on 10.6.2007. The prosecution has cross-examined the defence witness but nothing material is elicited to hold that the recovery of the weapons to be an incriminating circumstance against the accused.

19. The prosecution has examined PW13 Dr. Dhurve who had examined accused no. 1 on 4.6.2007 at 7 a.m.. The injury certificate of accused no. 1 is at Exh.156. The injury certificate is proved by PW13 Dr. Nilima Dhurve. There are three abrasions noticed on the person of accused no. 1 and they are

(i) abrasion on posterior aspect on right elbow 1 x 1c.m. abrasion on right knee 1/2 x 1/2c.m.

(ii) abrasion on left toe size 1/2 x 1/2c.m. with history of fall.

These injuries would not in any way indicate that they were sustained by the accused in the same transaction in which Prashant had died a homicidal death. Accused no. 1 was examined practically after 14 hours of the alleged incident and there is nothing on record to establish the nexus of these injuries with the incident which occurred at about 5 p.m. on 3.6.2007. The investigating officer

has proved the omissions and contradictions of the witnesses.

20. The counsel appearing for original accused no. 6 i.e. Pravin Divte has relied upon the judgment delivered by the Apex Court in the case of:

(a) State of Orissa vs. Brahmananda Nanda reported in AIR 176 S.C. 2488.

(b) Kaliram Ram vs. State of Himachal Pradesh, reported in AIR 1973 S.C. 2772.

(c) Hari Nath and Another Vs. State of U.P., .

(d) Baldev Singh Vs. State of Punjab, .

21. We have considered the citations. We have already observed that the prosecution has failed to establish the charge u/s 120B of I.P.C. The learned counsel appearing for the State has relied upon the case of State of Andhra Pradesh Vs. K. Srinivasulu Reddy and Another, . The learned APP has relied upon the said judgment to substantiate his contention that the testimony of an independent witness cannot be implied thereby that their evidence is suspicious and their presence at the scene doubtful.

22. We have considered this submission to appreciate the evidence of PW2 Rajesh Atram. The said judgment cannot be made applicable to the present case since the witness has categorically stated that he had gone to the Police Station to get his statement recorded at the behest of Parmanand Mishra. PW2 is a co-accused with Parmanand Mishra. Even when the statement of PW2 was recorded u/s 164 Cr.P.C, Sunil Tiwari and Parmananad Mishra were present. We have considered the omissions and contradictions in the statements of PW2 recorded u/s 164 of Cr.P.C. The said contradiction would be an estoppels for the witness to depose otherwise before the Court at the time of trial.

23. The learned APP has also relied upon the judgment delivered by the Apex Court in the case of Mrinal Das and Ors vs. State of Tripura reported in 2011 ALL MR (Cri) 3256 (S.C.). The learned APP has relied upon the citation (supra) to fortify his submissions challenging the acquittal of original accused nos. 2,4 and 8. The Apex Court has held that :

In an appeal against acquittal in the absence of perversity in the judgment and order, interference by this Court exercising its extra ordinary jurisdiction is not warranted. However, if the appeal is heard by an appellate court, being the final court of fact, is fully competent to reappraise, reconsider and review the evidence and take its own decision. In other words, law does not prescribe any limitation, restriction or condition on exercise of such power and the appellate court is free to arrive at its own conclusion keeping in mind that acquittal provides for presumption in favour of the accused. If two reasonable views are possible on the basis of the evidence on record, the appellate court should not disturb the findings of acquittal.

24. There is nothing on record to separate the case of the present appellants from that of the acquitted accused and, therefore, the challenge to the acquittal

of the acquitted accused would fail as a natural corollary.

25. We have observed (supra) PW1 Manish Tiwari has categorically admitted in his testimony before the Court that prior to the incident he was not knowing any of the assailants. In this background, he could not have disclosed the identity of the assailants to PW16 Manish Dube, since he has stated before the Court that except Manish Dube, he had not disclosed the incident to anybody. It, therefore, appears that due to subsisting political rivalry, Manish Dube and PW1 had presumed that the accused persons were the assailants. We are discarding the evidence of PW2 not just as a chance witness but because there are inherent discrepancies in his testimony before the Court. The Apex Court in the case of Kali Ram vs. State of H.P. (supra) has held that:

The guilt of the accused has to be adjudged not by the fact that a vast number of people believe him to be guilty but whether his guilt has been established by the evidence on record. Indeed, the courts have hardly any other yardstick or material to adjudge the guilt of the person arraigned as accused.

26. In the present case, we rely upon the observations of the Supreme Court in the judgment cited supra, which are as follows:-

It is no doubt true that wrongful acquittals are undesirable and shake the confidence of the people in the judicial system, much worse, however, is the wrongful conviction of an innocent person. The consequences of the conviction of an innocent person are far more serious and its reverberations cannot be felt in a civilised society. All this highlights the importance of ensuring, as far as possible, that there should be no wrongful conviction of an innocent person. Some risk of the conviction of the innocent, of course, is always there in any system of the administration of criminal justice. Such a risk can be minimised but not ruled out altogether.

27. There is no doubt that Prashant @ Gattya has died a homicidal death. However, it is incumbent on the prosecution to establish beyond reasonable doubt that the present appellants are the perpetrators of the crime and for this the prosecution ought to have proved the identity of the assailants as the persons who were present on the scene of offence and had formed an unlawful assembly with a common object to cause the homicidal death of Prashant and actually caused his death in prosecution of common object. The very fact that there was political rivalry between both the groups, the tendency to implicate the political rivals cannot be ruled out. Moreover, the prosecution witnesses and the deceased had criminal antecedents and, therefore, the Court has to be at guard while scrutinizing the evidence adduced by the prosecution to prove its case.

28. In the present case, in view of the aforesaid discussion, we hold that the accused/appellants are entitled to benefit of doubt and hence the appeals preferred by the accused/appellants succeed.

29. Criminal Appeal Nos. 249/2011, 285/2011 and 312/2011 are allowed. The

conviction and sentence recorded by the Sessions Judge, Yavatmal in Sessions Case No. 28/2008 against the appellants/accused is hereby quashed and set aside. The appellants/accused are in jail. They shall be set at liberty forthwith, if not required, in any other case. Fine amount, if paid, shall be refunded to the appellants. Since the appeals challenging the conviction filed by the appellants are allowed, it follows that the appeal filed by the State i.e. Criminal Appeal No. 393/2011 is hereby dismissed. The bail bonds of accused nos. 2,4 and 8 stand cancelled.