PETITIONER:
DHANNA ETC.

Vs.

RESPONDENT:
STATE OF MADHYA PRADESH

DATE OF JUDGMENT: 25/07/1996

BENCH:
THOMAS K.T. (J)
BENCH:
THOMAS K.T. (J)
ANAND, A.S. (J)

CITATION:
JT 1996 (6) 652 1996 SCALE (5)467

ACT:

HEADNOTE:

JUDGMENT:
THE 25TH DAY OF JULY, 1996
Present :
Hon'ble Dr. Justice A.S. Ananad
Hon'ble Mr. Justice K.T. Thomas
V.K. Jain and M.S. Ganesh, Adv. for the appellants. Uma Nath Singh, Adv. for the Respondent
J U D G M E N T
The following Judgment of the Court was delivered:
Dhanna
V.
State of Madhya Pradesh
(With Criminal Appeal No. 252 of 1984)
J U G M E N T
THOMAS, J.

A youngman, by name Nanji, was murdered on 23.8.1980, near Government Degree College Dhar. The police arraigned five persons for the said murder and the Sessions Judge, after trial, convicted the first two among them (kannaiyalal-first accused and Maniram- second accused) of the offence under Section 302 IPC, and acquitted the remaining three persons. State filed an appeal challenging the acquittal and the convicted persons filed another appeal. High Court of Madhya Pradesh while confirming the conviction and sentence reversed the order of acquittal of 5th accused (Dhannal and convicted him also of the offence under Section 302 IPC. Sentence of imprisonment for life was awarded to all the convicts. We have before us two appeals by special leave, one jointly filed by Kannaiyalal and Maniram and the other separately filed by Dhanna.

Prosecution set up the following case against five accused. Around 3.30 P.M. deceased Nanji, PW-1 Gopilal and PW-5 Narainlal were proceeding on bicycles along Dhar-Indore Road. Their cestination was Nanji's house at Jetpura. As they reached near Government Degree College, all the five accused emerged from the roadside and made a blits on Nanji. Kannaiyalal and Maniram were armed with Dhariya. 3rd accused

had a pistol and 4th and 5th accused (Dhanna) had sickles with them. Deceased tried to escape but was again attacked by the assailants with their cutting weapons. PW-1 and PW-5 cried for help and thus Nanuram (PW-6) the Peon of the College rushed to their rescue. But by then Nanji had sustained a number of serious wounds on his head and he fell down dead at the spot itself.

Sessions court framed a charge against the accused for offences under Sections 302 and 148 read with Section 149 of the Indian Penal Code. The accused denied having participated in the occurrence. After trial learned sessions Judge concluded that prosecution has failed to prove that there was an unlawful assembly, but found that Kanhaiyalal (first accused) and Maniram (second accused) have inflicted cut injuries or the deceased with Dhariyas and convicted them under Section 302 IPC and sentenced them each to imprisonment for life.

Out of the four eye witnesses examined by the prosecution Jawarilal (PW-4) did not support the case and the other three witnesses spoke to the prosecution version. Learned sessions Judge found the evidence of Nanuram (PW-6) quits acceptable and hence the conviction was based on his testimony. Nonetheless the trial judge was not inclined to convict Dhanna (5th accused) on the strength of the evidence of Naruram (PW-6). Evidence of the other eye witnesses was found to be not very reliable.

High Court on a re-evaluation of the evidences felt that the trial court to have placed reliance on the testimony of Gopilal (PW-1) and Narainlal (PW-5) also. Learned judges expressed the view that sessions judge has given undue importance to certain discrepancies and contradictions noted in their evidence. This is what the High Court said about it:

> "The discrepancies and contradictions are not in regard to the fact that the accused participated in the incident put in regard to the sequence of events and minor and inconsequential details of the occurrence and other collateral facts which do not make their testimony untrustworthy."

Thus relying on the evidence of PW-6 (Naruram) as corroborated by PW-1 and PW-2 the High Court found Dhanna also guilty of murder and convicted him and sentenced him as aforesaid.

Learned counsel for the appellants contended that the High Court committed a basic error in seeking the aid of Section 34 IPC for confirming the conviction of the appellants for the offence under Section 302 IPC. So long as the charge framed against them did not mention Section 34 of IPC. the High Court was not Justified in using the said provision for convicting the appellants, according to the learned counsel.

The High Court found that there was no unlawful assembly as the strength of the assembly was insufficient to constitute it into "unlawful assembly". But if the court enters upon a finding that any of the remaining persons who participated in the crime had shareo common intention with the main perpetrators of the crime, the court is not helpless in seeking the aid of Section 34 (IPC) to enter a conviction against such persons arraigned as accused. This is despite the difference between the scops of Section 34 and Section 149, yet they have some resemblance between each other and are to some extent overlapping (Barendra Kumar

Ghosh vs. Emperor, 1925 PC 1).

Legal position on this aspect remained uncertain for a time after this court rendered a decision in Nanak Chand v. The State of Punjab. 1955 (1) SCR 1201. But the doubt was cleared by a constitution bench of this court in Willie Slaney v. State of M.P., AIR 1956 SC 116. Where this court observed at para 86, thus:

> "Sections 34, 114 and 149 of the Indian Penal Code provide for criminal liability viewed from different angles as regards actual participants, accessories and men actuated by a common object or a common intention: and the charge is a rolled-up one involving the direct liability and the constructive liability without specifying who are directly liable and who are sought to be made constructively liable.
>
> In such a situation, the absence of a charge under one or other of the various heads of criminal liability for the offence cannot be said to be fatal by itself, and before a conviction for the substantive offence, without a charge, can be set aside, prejudice will have to be made put. In most of the cases of this kind, evidence is normally given from the outset as to who was primarily responsible for the act which brought about the offence and such evidence is of course relevant."

It is, therefore, open to the court to take recourse to Section 34 of IPC even if the said section was not specifically mentioned in the charge and instead Section 149 IPC has been included. Of course a finding that the assailant concerned had a common intention with the other accused is necessary for resorting to such a course. This view was following by this court in later decisions also, (Amar Singh v. State of Haryana. AIR 1973 SC 2221. Bhoor Singh and Anr. v. State or Punjab, AIR 1974 SC 1256). The first submission of the learned counsel for the appellant has no merit.

While dealing with the case of appellant Dhanna, we may point out that High Court chose to believe the evidence of PW-1 and PW-2 and found that their evidence supports the testimony of PW-6 who said that Dhanna was also a participant in the crime. In this context it is to be remembered that learned sessions judge was disinclined to convict Dhanna because PW-6 Naruram did not mention anything about Dhanna in his statement recorded under Section 161 of the Code of Criminal Procedure for short the Code). When cross- examined, PW-6 was asked this omission and he had no explanation to offer. PW-14, the Investigating Officer who interrogated PW-6, had stated that Dhanna's name was not mentioned by Nanuram (PW-6) when the latter was questioned during investigation. Learned sessions Judge found it difficult to convict accused Dhanna on the above evidence of PW-6, but the High Court chose to act on the said evidence. Learned counsel for the appellant -Dhanna seriously assailed the aforesaid course adopted by the High Court and contended that it is not open to the appellant court to interfere with

the finding made by the trial court in favour of an accused so lightly as that. Learned counsel further contended that in an appeal against acquittal there must be compelling reasons to disturb a fact finding made by the trial court and that unless the view of the trial court is perverse or at least unreasonable no interference shall normally be made.

Though the Code does not make any distinction between an appeal from acquittal and an appeal from conviction so far as powers of the appellate court are concerned, certain unwritten rules of adjudication have consistently been following by Judges while dealing with appeals against acquittal. No doubt, the High Court has full power to review the evidence and to arrive at its own independent conclusion whether the appeal is against conviction or acquittal. But while dealing with an appeal against acquittal the appellate court has to bear in mind: first, that there is a general presumption in favour of the ignorance of the person accused in criminal cases that presumption is only strengthened by the acquittal. The second is, every accused is entitled to the benefit of reasonable doubt regarding his guilt and when the trial court acquitted him. He would retain that benefit in the appellate court also. Thus, appellate court in appeals against acquittals has to proceed more cautiously and only if there is absolute assurance of the guilt of the accused, upon the evidence on record, that the order of acquittal is liable to the interfered with or disturbed. (Durgacharan Naik and ors. v. State of Orissa, AIR 1966 SC 1775, Caetand Piedade Fernandes & Anr. v. Union Terriroty of Goa, Daman & Diu, Panaji. Goa, AIR 1977 SC 135, Tota Singh and Anr. v. State of Punjab, AIR 1987 SC 1083, Awadhesh and Anr. v. State of M.P. , AIR 1988 SC 1158, Ashok Kumar v. State of Rajasthan, AIR 1990 SC 2134).

Trial court which relied on the evidence of Nanuram (PW-6) pointed out that the witness did not refer to any role played by Dhanna when he gave statement to the police during investigation and hence a conviction for the offence of murder cannot be passed against Dhanna on the strength of improvement made at the trial. The said sound reasoning should not have been sidelined by the High Court without providing sufficient and convincing reasons. None has been given. We have scrutinized the evidence and we too are satisfied that PW-6 Nanuram has, in fact, omitted to mention anything about Dhanna when PW-6 was questioned by police and has later on tried to give an improved version.

We are, therefore, of the opinion that the order of acquittal passed by the trial court in favour of Dhanna should have been maintained by the High Court. So far as the case of Kanhaiyalal and Maniram is concerned, the appreciation of evidence by the courts below is sound and proper. We agree with the findings recorded by the courts below and are of the opinion that their conviction and sentence are well merited. There is no merit in their appeal.

In the result, we dismiss Criminal Appeal No. 252/84 filed by Kanhaiyalal and Maniram, but we allow Criminal Appeal No. 170A/84, filed by Dhanna. We set aside the conviction and sentence passed on Dhanna and restore the order or acquittal passed by the Sessions Court in his favour.