PETITIONER:
B. SUBBA RAO & ORS.

Vs.

RESPONDENT:
PUBLIC PROSECUTOR,HIGH COURT OF ANDHRA PRADESHAT HYDERABAD

DATE OF JUDGMENT: 07/08/1997

BENCH:
M. K. MUKHERJEE, S. SAGHIR AHMAD

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T

Mukherjee. J.

This appeal under Section 2 of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970 read with Section 379 of the Code of Criminal Procedure, 1973 is directed against the judgment and order dated December 31, 1992, rendered by the Andhra Pradesh High Court in Criminal Appeal No. 256 of 1991 whereby it reversed the order of acquittal recorded in favour of the seven appellants herein by the Sessions Judge, Ongole in respect of charges under Section 148 and 302/149 IPC and convicted them thereunder. The gravamen of the charges was that on February 26, 1988 at or about 6.30 P.M. the appellants (who were arrayed as A-1, A-2 and A-4 to A-8 respectively in the trial Court and hereinafter will be so referred to) along with A-3 (who died during the pendency of the trial), formed and unlawful assembly in the office of the Mandal Revenue Officer, Peda Cheriopalli ('P.C. Palli' for short) village armed with deadly weapons with the common object of committing the murder of Nailuri Thirpathaiah of village Marella and in furtherance of that common object did commit his murder. The charges were based on the following prosecution case:

2(a) A-1 to A-5, A-6 and A-7 and A-8 were residents of villages Marella, Peda Alavalapadu and Gudevaripalem respectively. A-1 was the President of Telugu Desam party of P.C. Palli Mandalam and A-2 to A-8 were his friends and associates. The deceased, Tirupathayya (P.W. 1) and Brahmayya (P.W. 2) were residents of Marella Village whereas Gangayya (P.W. 3) was a resident of Pothavaram village. Both these villages were within the jurisdiction of P.C. Palli Mandalam. Suryanarayan Rao (P.W. 4) was the Mandal Revenue Officer of P.C. Palli Mandalam at the material time.

(b) Since 1984, two rival political groups were functioning in Marella village, one led by A-1 and the other by the deceased; and a number of criminal case instituted by the groups against each other were pending. In February 1987, elections were held there for the Mandal Praja Parishad in which wife of A-1 was elected the President of the Parishad while the deceased was elected as the President of Single

Window Society of P.C. Palli Manadalam.
(c) In the following year, i.e. 1988, February 27, was fixed as the date for filling nomination papers for the panchayat election. Some of the candidates for such election were to file, along with their nomination papers, extracts of voters list and their caste certificates. As such, on February 26, 1988 a number of people came to the office of P.W. 4 to obtain those documents. One of them was A-1, who approached P.W. 4 for caste certificate and extracts of voters list for his party members. Following him came the deceased, P.W. 1, P.W. 2 and P.W. 3 at or about 6 P.M. with a similar request. While they were sitting in the office of P.W. 4, A-1, who had left this (P.W.4) office in the meantime, came back and requested P.W. 4 to visit Pothavaram Village to consider the inclusion of about 40 person, who were his followers, as voter. The deceased however insisted that P.W. 4 could not leave the office without issuing the voters' lists and caste certificates asked for by him. A-1 then left the office saying he would come back within half-an-hour and asked P.W. 4 to complete his job in the meantime.
(d) Sometime later (at or about 6.30 P.M.) the seven appellants along with A-3 rushed into the office of P.W. 4 armed with deadly weapons and started beating the deceased. While A-1 beat him with an axe on his neck, A-2 beat him with a similar weapon on his right forearm and head. Thereafter the others stabbed the deceased indiscriminately with knives resulting in his instantaneous death. Then they fled away in a jeep and a car.
(e) On the following morning P.W. 1 went to Kanigiri Police Station at or about 8.30 A.M. and submitted a written report of the incident (Ex.P-1) to S.I Sankara Reddy (P.W. 10). On that report P.W. 10 registered a case (Crime No. 26/88) and sent copies of the report to all concerned. On receipt of a copy of all report Srihari Rao, Inspector of Police, Kanigiri (P.W. 11) left for Kanigiri at 9 A.M. He visited the scene of offence, prepared observation report (Ex.P-2) in the presence of Kasavarao (P.W. 6) and other mediators, prepared rough sketch of the scene of offence (Ex. P.15) and seized some articles (M.O. 4 to 10) under a seizure list (Ex. P-2) P.W. 11 also conducted inquest over the dead body of the deceased in presence of P.Ws. 1, 2 and 3 and other and then sent the corpse of post-mortem examination.
(f) Dr. Rammohana Reddy (P.W. 7) Civil Assistant Surgeon, Government Hospital, Kanigiri, conducted the post-mortem examination on February 28, 1988 and found 45 injuries on the person of the deceased including 40 incised wounds. He issued a post-mortem certificate (Ex. P-9) opining that the deceased died due to shock and haemorrhage as a result of the injuries about 36 hours prior to the post-mortem examination.
(g) In course of investigation P.W. 11 seized a jeep bearing No. AAN- 6152 on February 29, 1988 from the garage of one S. Prasad Rao. He also seized a car bearing registration No. APN-7953 on the same day at 8.00 P.M. In the presence of G. Ramesh, driver of the said car. On March 7, 1988, P.W. 11 arrested A-8 and on March 31, 1988, A-2, A-4 to A-6, A-2, A-4 to A-6 made statements (Ex. P-4 to P-7) respectively) before P.W. 11 pursuant to which he seized two battle axes and two knives (M.Os. 11 to 14 respectively) under a Panchnama (Ex.P-8) in the presence of P.W. 6 and another witness. After completion of Investigation, successor of P.W. 11 filed the charge-sheet.
3. The defence of the appellants was that they were innocent and were falsely implicated due to political

rivalry. A-7 took a further defence of alibi and contended that at the material time he was working as Village Assistant in Chennupalli village, which was far off from the place of the incident.

4. In support of their respective cases, the prosecution examined eleven witnesses of whom P.Ws. 1 to 4 figured as eye witnesses A-7 examined one witness (D.W. 1) and exhibited some documents to prove his plea of alibi

5. On going through the judgment of the trial Court we find that it put forth the following reasons for acquitting the appellants:

i) P.W. 1 to 3 were partisan, interested and procured witnesses;

ii) the non seizure of the hurricane lamp, which was said to be burning at the time of the incident and with the light of which eye-witnesses claimed to have seen the incident, by the police during investigation clearly indicated that there was no such lamp and hence story of identification by its light was untrue.

iii) the earliest report that was sent by P.W. 4 to the Police Station which could be the F.I.R. was not produced during trial; and, Exhibit P-1 which was brought into existence during investigation of the case could not be legally admissible as F.I.R. in view of the provisions of Section 162 Cr. P.C. ;

iv) the non-examination of the (i) jeep driver in which the accused persons allegedly fled away, (ii) the village servant through whom P.W.4 claimed to have sent his report to the Police Station and (iii) other villagers, who lived in and around the office of P.W. 4, raised an adverse presumption against the prosecution;

v) the prosecution case suffered from the same infirmity also for non-examination of the fair price shop dealer, who according to it (the prosecution) was present just prior to the commission of the offence in the office of P.W. 4; and

vi) the alleged confessional statements of some of the appellants were deliberately concocted and therefore, no reliance could be placed on the alleged recovery of weapons of offence pursuant thereto.

6. In setting aside the order of acquittal, the High Court first demonstrated that each of the above reasons was perverse and then, on discussion of the evidence held, the prosecution succeeded in proving its case beyond all reasonable doubts and that the plea of alibi raised by A-7 was without any basis whatsoever.

7. We have heard Mr. Lalit and Mr. G. Prabhakar, the learned counsel for the appellants and respondent respectively and with their assistance gone through the record. Mr. Lalit submitted that having regard to the fact that the trial Court detailed and appraised the entire evidence and gave cogent grounds for acquitting the appellants the High Court was not justified in upsetting the same merely because another view of the evidence could be taken. In support of his above contention, Mr. Lalit took us through the finds recorded by the trial Court to impress upon us that were the outcome of a proper appreciation of the evidence.

8. That in the evening of February 26, 1988, the deceased met with a homicidal death in the office of PW 4 stands established by overwhelming evidence on record. We need not however detail or discuss the evidence on this point for both the Courts below recorded concurrent findings in this regard and those findings were not challenged before us. Since, however, the findings of the trial Court in this regard have an important bearing on its other findings we extract the same:

> "PWs 1 to 3 stated that all the accused entered into the office Room of P.W. 4 and attacked the deceased with axes and knives. P.W. 4 who is the Mandal Revenue Officer sitting in front of the deceased thought did not implicate these accused specifically testified, that ten (10) persons armed with iron rods attacked the deceased. So, regarding the attack on the deceased by the assailants with deadly weapons in the Office Room of P.W. 4 is proved. Admittedly, the deceased died in the Office Room of P.W. 4, at Peda Cherlopalli. Peda Cheriopalli will herein after called as 'P.C. PALLI'. The evidence of P.W. 6 coupled with Ex.P3 Inquest report would show that the deceased had 'homicidal death'. In Column-15 of Ex.P3 Inquest report, the cause of death of the deceased is mentioned, as 'HOMICIDAL'. The evidence of P.W. 7 (Doctor) who conducted the post mortem examination over the dead body of the deceased and who issued Ex. P9 post-mortem certificate would go to show, that the deceased had as many as 45 (forty five) external injuries an opined, that the deceased would appear to have died of shock and haemorrhage, due to multiple injuries. The date of incident and the place of incident, and the factum of the death of the death of the deceased in the Office Room of P.W. 4, instantaneously, are undisputed."
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> (emphasis supplied)

9. The next and the crucial question that falls for our consideration is whether the appellants caused the above

death in the manner alleged by the prosecution. If the answer given by the trial Court to the above question is found to be based on a reasonable view of the evidence the impugned judgment has got to be set aside, for law is now well settled that if two reasonable conclusions can be reached on the basis of the evidence, the appellate Court should not disturb the order of acquittal. If, however, it is found that the finding of acquittal is manifestly wrong leading to miscarriage of justice as has been found by the High Court the convictions of the appellants have got to be upheld. Keeping in view the above principles we now proceed to consider evidence of the four eye witnesses, namely, P.Ws. 1 to 4. Since the incident took place in the office of P.W. 4 we first take up his evidence for discussion.

10. P.W. 4 detailed the prosecution case, as narrated earlier except that he did not name any of the appellants as the miscreants. There is nothing on record to show that he was interested in the cause of the prosecution or inimically deposed toward appellants. Indeed, it was not even suggested to him in cross examination that he was deposing falsely. It can not be gainsaid also that he was the most natural and probable witness as the incident took place in his office. His evidence clearly establishes that about 10 miscreants entered inside his office and one of them dealt a blow on the head of the deceased, who was sitting in front of him, with an iron instrument. He further testified that when he saw one of the assailants raising his hand to give anther blow to the deceased he ran away towards the field to save himself. In cross examination he stated that one Fair Price Shop dealer obtained a release order for palmolive oil at 6.30 P.M. Culling his evidence we get that the incident took place between 6.30 and 7.00 P.M. and at that time P.Ws. 1 to 3 were also waiting in his room. Besides, A-1 was also in his room sometime before the incident but left the room saying that he would be back within half an hour. As noticed earlier, the trial Court disbelieved the evidence of P.Ws. 1 to 3 on the ground that they did not see the occurrence, but due to enmity with the party of the deceased concocted a false story. The unimpeachable evidence of P.W. 4 that P.Ws. 1 to 3 were present at the material time clearly shows that the above finding of the trial Court is patently wrong. While on this point we may also profitably refer to the earlier quoted passage from the judgment of the trial Court where, besides other evidence, it relied upon the evidence of P.Ws. 1 to 3 to conclude that the incident took place in the office of P.W. 4. Mr. Lalit, however, drew our attention to the statement of P.W. 4 recorded by a Magistrate under Section 164 Cr.P.C wherein he had stated that by 7 P.M. on the date of offence all the persons left his office except the deceased and P.W. 3, and contended that the above statement contradicted his statement in Court that all the three witnesses (P.Ws 1 to 3) were present. According to Mr. Lalit P.W. 4's earlier statement negatived the presence of P.Ws. 1 and 2 at the material time. We do not find any substance in this contention; firstly because the above statement recorded under Section 164 Cr.P.C. only indicates that P.Ws 1 and 2 were not in his office at 7 P.M. (by which time the incident was already over) and, secondly because, the earlier statement did not materially affect the sworn testimony of P.W. 4 that P.Ws 1 to 3 were present when the incident took place.

11. As regards the comments of the trial Court that the non-seizure of the hurricane lamp from the office of P.W. 4 materially affected the prosecution case, we can only say that the same is baseless. Undoubtedly, at the material time

P.W. 4 was engaged in issuing copies of voters lists and caste certificates and if by then, darkness has set in it can be legitimately inferred (leaving aside the positive evidence of P.W. 4 in this regard) that there would be some source of light to enable him to perform his job. In that context, it was immaterial whether the police seized the hurricane lamp, which according to P.W. 4 was burning inside the office as it was not electrified.

12. Coming new to the criticism of the trial Court that the failure of the prosecution to produce the report that was sent by P.W. 4 to the police station in that very night which according to it was the F.I.R. made its case suspect, we may first refer to the evidence of P.W. 4 on this point. He testified that after the incident he ran to the field and thereafter went to the house of the Village servant at 11 P.M. and gave a written report to him with a direction to have over the same to Kanigiri Police Station. Relying on the above testimony the trial Court held that that report sent to the police station was the first in point of time and, therefore, the report that was subsequently given to the police station by P.W. 1 (Ex. P-1) would be inadmissible in evidence as F.I.R. in view of the provisions of Section 162 Cr.P.C. This aspect of the matter was dealt with by the High Court in extenso and the finding of the trial Court was taken exception to, with the following comments:-

> "The learned Judge has extracted the evidence of P.W. 4 to support his contention that Ex.P-1 is hit by Section 162 of the Code and in fact there was an earlier report given by P.W. 4 on record. But the learned Judge has not correctly quoted the relevant evidence of P.W. 4 and only relied upon part of it. It is true that P.W. 4 in his evidence stated that he sent a report on the night of 26.2.1988 at about 11 P.M. through the village servant to Police Station, Kanigiri. Regarding the receipt of Ex. P-1, the evidence of P.W. 10, S.I of Police, Kanigiri during the relevant period, read as follow :-
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> 'Prior to P.W. 1 giving Ex.P-1 to me, I had no information about this crime. None of the persons acquainted with this crime, appeared before me prior to Ex. P.1..... After registering this crime and I issued Ex.P-14 F.I.R. I received a report from P.W. 4 through village servant.
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> This statement of P.W. 10 clearly shows that Ex.P-1 was the report received by P.W. 10 at the earlier point of time regarding this crime and consequently P.W. 10 registered the same as F.I.R. and before P.W. 10 receiving Ex.P-1, they did not have any information regarding this crime. His evidence is also specific to show that after P.W. 10 received Ex.P-1 and after P.W. 10 issued Ex.P-14 F.I.R basing on Ex.P-1, he received another report

> from P.W. 4 through village servant and probably he has not taken any action thereon since the same was hit be section 162 of the Code. Thus what was received by P.W. 10 regarding this crime at the earliest point of time was only Ex. P-1 which P.W. 10 correctly registered as F.I.R. and set the law in motion."

13. Apart from the above comments of the High Court, with which we are in complete agreement, we find that the evidence of P.W. 10 clearly shows that the repot sent by P.W.4, through the village servant, was received by him only after investigation was taken up. In other words, the report sent by P.W.4 would be a statement recorded under Section 162 Cr.P.C and consequently it could not be admitted in evidence. This aspect of the matter can be viewed from another angle also. Having regard to the fact that P.W.4 did not name any of the assailants, suppression of the report sent by him to the Investigating Agency did not and would not have helped the prosecution in any way. In other words, the prosecution would not have been benefited in any way by suppressing the report that was made by P.W.4, more so when, the fact that the incident took place inside the office of P.W.4 in the evening of February 26, 1988 was not challenged by the defence. Judged in that perspective even if that report was produced and treated as F.I.R. the prosecution case would not have been impaired in any way much less on the ground canvassed by the trail Court.

14. That bring us to the evidence of P.Ws.1,2 and 3. All of them claimed to have accompanied the deceased who, according to them, was the leader of the Congress party of village Marella, to the office of P.W.4 on the fateful evening to obtain caste certificates and copies of voters' list of Marella and Pothavaram villages so as to enable them to file nominations on the next day for the Gram Panchayat elections. As their such claim is fully supported by P.W.4, whom we have no reason whatsoever to disbelieve, it must be said that they were the most natural and probable witness to the incident. However, their evidence has to be examined with utmost care and caution as they belong to the rival group of the appellants and, hence, are partisan witnesses. In narrating the incident they stated that while four of them were inside the office of P.W.4, A-1 came there and asked P.W.4 to go to Pothavaram to verify the voters' lists. The deceased, however, insisted that only after furnishing the lists and certificates for which they had come, P.W.4 could go to Pothavaram. A-1 then went out of the room. Sometime later all the appellants and A-3 entered the room of P.W.4, and A-1 dealt two successive blows, one on the head and another on the neck of the deceased. A-2 then beat him with an axe on the right forearm and the others started stabbing the deceased with knives. At that stage all three of them ran away for fear of their lives. While P.Ws. 1 and 3 first went towards the road and then the fields, P.W.2 ran to his village. P.Ws. 1 and 3 next stated that on the following morning they reached Kanigiri by foot, got a report of the incident written by a person of Cheriopalli whom they met there (Kanigiri) and then to the police station at or about 8.30 A.M. and handed over the report (Ex.P-1) to S.I. Sankara Reddy (P.W. 10). It is their further evidence that accompanied by the Circle Inspector of Police (P.W. 11) they came to the scene of occurrence and in their presence he (P.W. 11) held the inquest.

15. We have carefully gone through the evidence of the above three witnesses and found that except some minor contradictions, the defence could not elicit any answer to discredit them. Besides, the F.I.R. fully corroborated the testimonies of P.Ws. 1 and 3. It was, however, contended by Mr. Lalit that the unusual delay of 14 hours in lodging the F.I.R. clearly indicated that P.Ws. 1 and 3 concocted a story to implicate the appellants, who admittedly were their political rivals. We do not find any substance in the above contention of Mr. Lalit. The evidence of P.Ws. 1 and 3 clearly indicates that they spent the night in the fields, then walked the entire distance to kanigiri which is 10 miles got the report written there and lodged it at the police station at 8.30 A.M. Having seen the ghastly murder being committed by their rivals, it was too much to expect of P.Ws. 1 and 3 to rush to the police station, for reasonable apprehension to their lives in the event of their taking such a step could not be excluded. Obviously, for that purpose P.Ws. 1 and 3 took shelter in the fields in the darkness and proceeded to the police station in the small hours of the following day. We are, therefore, of the opinion that there was no avoidable delay in lodging the F.I.R. On the contrary, in our view, it was lodged at the earliest opportunity.

16. Another submission that was made by Mr. Lalit was that thought P.Ws 1 to 3 claimed to have seen A-1 to be one of the assailants, P.W. 4, who spoke of A-1's earlier presence in his office, did not mention that A-1 was one of the miscreants. This contention of Mr. Lalit is also unmerited. From the sequence of events we get that the trouble originated when A-1, who was the leader of the appellants group requested P.W. 4 to visit Pothavaram village while the deceased insisted that the voters list and caste certificates sought for by him should be handed over before A-1's request could be entertained. Immediately thereafter A-1 left the place obviously to call his associates and to come fully prepared with arms. It seems to us that lest it be said that he was supporting either of the parties, P.W. 4 did not name A-1 and for that matter any of the miscreants. We therefore find no reason to disbelieve the evidence of P.Ws 1 to 3 that A-1, the leader of the group, started the assault, followed by the other appellants.

17. As earlier noticed, the trial Court discarded the prosecution case also for non-examination of the driver of the jeep in which the appellants fled away, the village servant and the persons present nearby, more particularly, the Fair Price Shop dealer. The High Court dealt with this aspect of the matter in details and made the following observation with which we are in agreement:

> "It is the case of the prosecution that the accused sped away in a jeep after the offence. It is the submission of the learned counsel for the accused that non-examination of the driver of the said jeep speaks against the prosecution. The jeep driver is not an eye witness to the crime and consequently he could not have spoken anything crime proper. At the most he would have stated that the accused has travelled in his jeep soon after the offence. That evidence would have been an additional piece of evidence to

strengthen the prosecution case. But the question which we have to consider is whether the trial Judge is assuming that the non-examination of the jeep driver has the effect of displacing the evidence of eye witnesses about what they actually witnessed. We are of the opinion that the trial Judge was wrong in his assumption that the jeep driver was a material witness. Consequently, inference adverse to the prosecution could not have been drawn from the non-examination of the driver of the jeep.

P.W. 1 to 4 in their evidence stated that while P.W.s 1 to 3 and the deceased came to the office of P.W. 4 the fair price shop dealer and some persons were coming and going to the room of P.W. 4, but there is no evidence to show that those persons were present when the occurrence took place. Accordingly to the prosecution, P.Ws. 1 to 4 along were present when the offence took place and witnessed the occurrence. Neither the fair price shop dealer nor anybody else, who visited the office of P.W. 4 earlier were present at the time of the offence. In view of that, non-examination of the fair price shop dealer or other who visited the office of P.W. 4 in the evening hours on the fateful day, is of no consequence and inference adverse to the prosecution cannot be drawn from their non-examination.

18. As regards the non examination of the village servant to whom, P.W. 4 handed over a written report of the incident for onward transmission to the police station, we may reiterate that the report did reach the hands of the Police, but only after the F.I.R. was lodged and therefore, there was no need for the prosecution to examine him.

19. So far as the alibi of A-7 is concerned both the Courts below dealt with the evidence given in support thereof at length and found the same unacceptable. Indeed, Mr. Lalit also did not advert to this aspect of the matter.

20. Having carefully gone through the evidence of the four eye witness, the F.I.R. and the medical evidence which fully corroborates the ocular version, we are of the opinion that the prosecution has been able to prove its case beyond all reasonable doubts. We need not therefore, go into the question whether the finding of the trial Court regarding alleged recovery of weapons pursuant to the statements of some of the appellants is perverse or not.

21. For the foregoing discussion, we do not find any merit in this appeal and dismiss the same.