A

DILAVER HUSSAIN SON OF MOHAMMADBHAI LALIWALA ETC.

v.

STATE OF GUJARAT AND ANR.

OCTOBER 5, 1990

B

[B.C. RAY, S.R. PANDIAN AND R.M. SAHAI, JJ.]

Indian Penal Code: Section 302—Crime emanating from communal Frenzy—Law makes no distinction in leading of evidence or of its assessment—Held on facts prosecution left important lacuna—Failed to prove beyond doubt dreadful crime committed by appellants.

C

Terrorist and Disruptive Activities (Prevention) Act, 1985—Section 3(2)(i). Murder Reference for confirmation.

The agitation that started in February 1985 against government

D **policy of reservation in the State of Gujarat turned into communal riots of shocking magnitude between Hindus and Muslims in March 1985, and resulted in mass exodus of Dabgars, a Hindu community, from their houses in the affected locality. When calm was partially restored, some of them returned. Maniben one of the deceased however continued to live in her house with other members of her family.**

E

On 9th June, 1985, due to absence of military which had been stationed there, members of minority community converged from two sides and indulged in most cowardly and shameful act of pushing open the door of Maniben's house, setting fire to it, and then chaining it from outside resulting in death of the lady, her two daughters, four grand-

F **children and son of a neighbour. Next house set ablaze was of Navin and then many others.**

Charge was framed against sixty three under Terrorist and Disruptive Activities (Prevention) Act, 1985 and various offences including section 302, Indian Penal Code. Fifty six were acquitted by the Trial

G **Judge. Those convicted have come up in appeal. At the same time, a reference has been made for confirmation of death sentence.**

Allowing the appeals and acquitting the accused and discharging reference. this Court,

H **HELD: (1) Sentiments or emotions, howsoever strong, are neither**

relevant nor have any place in a court of law. Acquittal or conviction depends on proof or otherwise of the criminological chain which invariably comprises of why, where, when, how and who. Each knot of the chain has to be proved, beyond shadow of doubt to bring home the guilt. Any crack or loosening in it weakens the prosecution. Each link must be so consistent that the only conclusion which must follow is that the accused is guilty. Heinousness of crime or cruelty in its execution howsoever abhorring and hateful cannot reflect in deciding the guilt. [110H; 111A-B]

(2) Credibility of witnesses has to be measured with same yardstick, whether it is an ordinary crime or a crime emanating due to communal frenzy. Law does not make any distinction either in leading of evidence or in its assessment. [111C]

(3) To bring home the guilt the prosecution was required to prove the presence of witnesses, possibility of seeing the incident by them and identification of the appellants. [115C]

(4) From the location of Ambalal's house it is clear that one could see front of Maniben's house only if he stood in front of it with face towards west-south. But that is not the prosecution case. In fact prosecution is silent on this aspect. There is no whisper of the place from where the incident was seen by the witnesses. Was it front of house of Ambalal or inside or roof? This was very relevant as every witness admitted that from interior of Ambalal's house the front of neither Maniben's nor Navin's house could be seen. Evidence thus regarding possibility of seeing the appellants from house of Ambalal is very shaky. The prosecution left an important lacuna. [116A-C]

(5) Indentification of accused from out of the mob even if they were known from before becomes highly doubtful. [116G]

(6) The finding of the Judge that even though the house of Ambalal is slightly obliquely situated as compared to the house of Maniben, it would not at all be difficult for the witnesses who had hid themselves in the house of Ambalal to have correctly identified the accused, is not based on appreciation of evidence but on imagination. [117G-H]

(7) The prosecution version suffered from serious infirmity. Its failure to bring on record evidence which could establish the possibility or even probability of the witness seeing the occurrence demolishes the whole structure. [118A]

A CRIMINAL APPELLATE JURISDICTION: Criminal Appeal Nos. 259-64 of 1987.

From the Judgment and Order dated 20.4.1987 of the Designated Court, Ahmedabad in Terrorist Criminal Case No. 3 of 1985 with Terrorist Criminal Case Nos. 13 of 1985 and 6 of 1986.

B

T.U. Mehta, A.S. Quereshi, Salman Khurshid, S.H. Kureshi, Mrs. Vimla Sinha, Irshad Ahmed, Imtiaz Ahmed, Gopal Singh and S.M. Qureshi for the Appellants.

C P.S. Poti, M.N. Shroff, Anip Sachthey, Bimal Roy, Kailash Vasdev, Ms. A. Subhashini, Chava Badri Nath Babu, Girish Chandra, Biman Jad and Ashish Verma for the Respondents.

The Judgment of the Court was delivered by

D **R.M. SAHAI, J.** Tragic trauma of ghastly, in human and beastly behaviour of one community against another depicted for weeks and weeks, in this criminal appeal, forcefully, at times, emotionally still hangs heavily. What a tragedy? Eight human lives roasted alive. Five in waiting for gallows. Neighbours residing peacefully for generations sharing common happiness and sorrow even playing cricket togehter suddenly went mad. Blood thirsty for each other. Burning, looting and E killing became order of the day. Even ladies attempted to prevent fire brigade from extinguishing fire. How pathetic and sad.

F Still sadder was the manner in which the machinery of law moved. From accusation in the charge sheet that accused were part of unlawful assembly of 1500 to 2000 the number came down to 150 to 200 in evidence and the charge was framed against sixty three under Terrorist and Disruptive Activities (Prevention) Act, 1985 (in brief TADA Act) and various offences including Section 302 under Indian Penal Code. Even from that fifty six were acquitted either because there was no evidence, and if there was evidence against some it was not sufficient to warrant their conviction. What an affront to funda- G mental rights and human dignity. Liberty and freedom of these persons was in chains for more than a year. For no reason. One even died in confinement.

H All this generated a little emotion during submissions. But sentiments or emotions, howsoever, strong are neither relevant nor have any place in a court of law. Acquittal or conviction depends on proof

or otherwise of the criminological chain which invariably comprises of why, where, when, how and who. Each knot of the chain has to be proved, beyond shadow of doubt to bring home the guilt. Any crack or loosening in it weakens the prosecution. Each link, must be so consistent that the, only conclusion which must follow is that the accused is guilty. Although guilty should not escape. But on reliable evidence truthful witnesses and honest and fair investigation. No free man should be amerced by framing or to assuage feelings as it is fatal to human dignity and destructive of social, ethical and legal norm. Heniousness of crime or cruelty in its execution howsoever abhorring and hateful cannot reflect in deciding the guilt.

Misgiving, also, prevailed about appreciation of evidence. Without adverting to submissions suffice it to mention that credibility of witnesses has to be measured with same yardstick, whether, it is an ordinary crime or a crime emanating due to communal frenzy. Law does not make any distinction either in leading of evidence or in its assessment. Rule is one and only one namely, if depositions are honest and true: Whether the witnesses, who claim to have seen the incident in this case, withstand this test is the issue? But before that some legal and general questions touching upon veracity of prosecution version may be disposed of.

Trial under TADA Act was assailed, both, because of the Act being *ultra vires* of the fundamental right guaranteed under Constitution and absence of circumstances justifying its extension to the State of Gujarat. For the latter no foundation was laid therefore it was not permitted to be raised. And the former is awaiting adjudication before Constitution Bench from where this appeal was got delinked. Invoking of provisions of TADA Act, in communal riot, was attacked and it was submitted that a combined reading of Sections 3 and 4 with explanation indicated that the Legislative intention was to confine the applicability of the Act to secessionist or insurgency activities against the State and not to ordinary crimes for which provisions exist in the Penal Code. Since the Constitution Bench is already ceased of the matter we are of the opinion that these aspects too can, well be raised there.

From acquittal of thirty seven accused for lack of evidence even though they were arrested in rounding off operation by the military, after cordoning off the area immediately after the incident, it was vehemently argued that it demonstrated that prosecution was not fair and there was deliberated attempt to rope in appellants who were well-to-do persons of the community not because they had any hand in

A the crime but for extraneous reasons. It was emphasised that if persons arrested on the spot residing in the same locality could not be identified nor any evidence could be produced against them then it was clear that the case against the appelllants was also not trustworthy and they were implicated either because of enemity or for oblique motive. Although the argument did appear to be attractive on the first flush B but it was dispelled soon by the learned counsel appearing for the State who submitted that the mistake in charge-sheeting those accused along with appelllant was bloated out of proportion. According to him the incident for which the appellants have been convicted and sentenced was part of a different transaction, although it took place on the same day, than the incident in which thirty seven persons were rounded off. The learned counsel explained with help of Colonel Sudhakar PW 2 I's C statement and, in our opinion, rightly, that these arrests were made in consequence of action taken by the military, on a different mob, as it included many ladies who did not form part of earlier mob, while attempting to bring situation under control after the incident. Therefore, it is not possible to draw any adverse inference against prosecu- D tion on this score.

Time, place, background and manner in which dastardly crime was committed on 9th June, 1985 in broad daylight at 2.30 p.m. was by and large not in dispute. What started as agitation in February 1985 against government policy of reservation, in the State of Ahmedabad, E turned into communal riots between Hindus and Muslims in March, 1985 which went on, continuously, for long spell resulting in enormous loss of life and property of both the communities. Situation deteriorated so much that military had to be called and stationed in sensitive areas, in April, 1985, including Dhabgarwad, a large area with Hindus and Muslims residing at places side by side and others exclusively. In F March 1985 riot of shocking magnitude had taken place in this area resulting in mass exodus of Dabgars, a Hindu community, who earned their livelihood by manufacturing musical instruments such as drums and also umbrellas and kites. When calm was partially restored, due to the military being stationed, some of them returned and some used to visit their houses in day time to look after their property or business. G Maniben, a dabgar, whose one of the daughters had married a muslim but was having strained relations with him, continued to live in her house either because she had no other place to go or she was confident that she shall not be harmed. However despite stationing of military incidents went on whenever or wherever least opportunity was available with the result that curfew was clamped, continuously, in the area H from 7th June, 1985. As ill luck would have it the military stationed in

the area left for some other place at about 1.30 p.m. on 9th June, 1985. Taking advantage of the vulnerability, due to absence of military, members of minority community converged from two sides and when they intermingled in the corner somewhere near the house of Maniben or electric power sub-station they indulged in most cowardly and shameful act of pushing open the door of her house setting fire to it and then chaining it from outside resulting in death of the lady, her two daughters, four grand-children and son of a neighbour. Next house set ablaze was of Navin and then many others.

Prosecution version can thus be divided in three parts one, entry of mob from two sides one from Magadom Pole and other kalupur Panchpatti shouting 'kill' 'cut' pelting stones, throwing acid bulbs and flambeaus on houses of Hindus while approaching towards Nani Ali Pole. The second was meeting of the two groups on the corner of Nani Ali Pole and then pushing open the door of Maniben's house by five appellants armed with burning flambeau, iron pipe, stick, kerosene and bottle of petrol sprinkling of kerosene or petrol inside the house setting it ablaze then coming out of the house closing and shutting the door and chaining it from outside. The third was entry of appellants thereafter in the house of Navin setting it on fire and then entering in Nani Ali Pole with other members of mob and attacking houses of Kantilal, Kalidas and others.

To prove it the prosecution examined twenty two witnesses which were grouped by the trial judge in seven. One and the main group consisted of Navin PW 1, Ambalal PW 8, Ratilal PW 9, and Kalidas PW 13. These were the witnesses who were said to have collected at the house of Ambalal from where they witnessed the occurrence and the participation of the appellants in it. The second group consisted of Kalidas PW 7, Ramanlal PW 10, Manchharam PW 12, who were said to have witnessed the incident from the house of Kalidas Chhaganlal. The third group consisted of Arun Kumar PW 11, Jaswantlal PW 14, Dilip Kumar PW 17 and Sanmukhbhai PW 20, who were witnesses who are said to have arrived on hearing the shouts and commotion and witnessed the occurrence from near Dabgarwad Police gate. The other groups comprised of official witnesses.

No witness was examined from any of the house situated on either side of road from where the two mobs entered or from any of the houses situated on the route through which the mob passed before it reached the corner of Nani Ali Pole to establish identity of accused. Mod which entered from Magadom Pole side was admitted by

A Ambalal to have passed from the front of his house. But he stated that he could not recognise anyone out of them. Appellants according to prosecution were in the mob which came from Kalupur Panchpatti. From the place from where the mob entered and to the corner of Nani Ali Pole the mob had to pass from a long route which is inhabited by houses on both sides but not one witness was produced from any of B these house nor it was clearly brought out that inmates of all these houses were of minority community only.

For the second group of witnesses who according to prosecution, saw the occurrence from the house top of Kanti Lal the Judge himself found that they were not in a position to see the road in front of house of Navin nor they were in a position to see the road in front of house of C Maniben. He, therefore, observed that so far evidence of these witnesses in respect of attack by the mob on house of Maniben and Navin was concerned it could be relevant only generally that they set fire to the house. That is they could not be taken to be witnesses to prove that appellants broke open the door of Maniben's house or set fire to it or D chained it from outside.

Nor is the evidence of third group of witnesses helpful as they had collected near the gate of police outpost. Distance between the gate and place of incident appears to be not less than 200 to 250 feet. Moreover they collected after the house of Maniben was set on fire. E And it was admitted by PW 1, 8, 9 and 13 that the house of Navin, Kantilal, Ambalal could not be seen from police outpost. Their testimony thus cannot be taken into account for proving second part of the incident which resulted in death of inmates of Maniben's house.

Fate of the appellants, therefore, hangs on credibility of first F group of witnesses. For its better appreciation it is necessary to set out topography of the place of the incident. From the map it is clear that the house of Maniben alongwith cluster of six other houses in surrounded on all sides by lanes and roads. Immediately above her house is house of Navin in North. Then there are two houses, parallel to each other, in south of her house. There are three more houses one G after the other, in south. On west side of these is lane. So is a lane in north side after which there is electric sub-station. On the left of sub-station there is gap and then there is one house and in its north is the house of Kantilal. On the east of Maniben's house is the Dabgarwad road which runs somewhat in semi circle running from Kalupur Panchpatti situated in extreme south east towards west, taking turn H from near Dabgarwad Police outpost in the South moving up towards

north east in angle tilting slightly from somewhere near cluster of houses round Maniben's house and then proceeding towards Daryapur. House of Ambalal from where first set of witnesses had seen the occurrence is on this road from where the road tilts. It was admitted by PW 1 that house of Ambalal was obliquely situated. That is clear from the map as well. If from the two ends of the house, south and north facing the road straight lines are drawn towards west they shall pass through the lane in front of Navin's house and power station respectively. Navin PW 1 whose house is situated in north of Maniben's house admitted that electric sub-station was in front of Ambalal's house. Rati Lal PW 9 stated that on one side of the road was his house and on other of Ambalal. The house of Ambalal was thus above Maniben's house towards north-east.

To bring home the guilt the prosecution was required to prove the presence of witnesses, possibility of seeing the incident by them and identification of the appellants. Importance of first arose as due to riots in March 1985 there was mass exodus of Hindus from Dabgarwad. Therefore presence of these witnesses was attempted to be challenged as curfew having been imposed from 7th June and Col. Sudhakar, PW 21, incharge of Military stationed, in the area, having stated that no passes were issued to anyone it was not probable that any of the witnesses who claim to have seen the occurrence could have been present. But it appears to be devoid of any merit in view of unimpeachable testimony of the witnesses that they were present in their houses either because they had come earlier after restoration of partial calm or they had come on the day of occurrence to see their business and they were not prevented by the police even if they did not have any pass. The Judge had examined this aspect in detail and found from various circumstances, namely, restoration of partial calm due to presence of military personnel, death of eight persons in Maniben's house including children, rescuing of many persons trapped in the house of Kalidas Chhagan which too was set on fire, admission by accused in their statements under section 313 Criminal Procedure Code etc. that presence of these witnesses could not be doubted. Further if the Dabgads had not returned and the area was deserted then where was the occasion for the mob to indulge in this vendetta.

But mere presence of witnesses was not sufficient. More important was if they saw the incident. It assumed importance due to two reasons one because entire set of witnesses saw the incident from house of Ambalal which was situated upwards on the road towards north-east as compared to the house of Maniben, and second that each

A of the witnesses including Ambalal admitted that the exterior of Maniben's or even Navin's house could not be seen from interior of the house. From the location of Ambalal's house it is clear that one could see front of Maniben's house only if he stood in front of it with face towards west-south. But that is not the prosecution case. In fact prosecution is silent on this aspect. There is no whisper of the place from B where the incident was seen by the witnesses. Was it front of house of Ambalal or inside or roof. Prosecution did not make any effort to remove this defect, obviously, because the investigation itself suffered from this flaw.Although the defence, also, did not make any attempt to get it clarified, may be as a part of clever design as to from where these witnesses saw the occurrence but the disadvantage, if any is of C prosecution. As stated earlier, this was very relevant as every witness admitted that from interior of Ambalal's house the front of neither Maniben's nor Navin's house could be seen. Evidence thus regarding possibility of seeing the appellant from house of Ambalal is very shaky. The prosecution left an important lacuna.

D Unfortunately, each witness not only stated that he saw the appellants but they went on to describe with remarkable similarity in detail the article which each accused had in his hand: What is surprising is that accused had come from Kalupur side therefore they could not have been seen prior to their arrival near electric sub-station before which everyone had entered house of Ambalal yet it is they and E they alone who could be identified from the entire mob. PW 1 admitted that when he rushed from his house in fear the mob of Kalupur side was 40 or 50 feet away. He also admitted that he saw these accused for the first time from the house of Ambalal from a distance of 20 feet. No subsequent witness tried to explain it. Others had reached admittedly prior to Navin. Therefore, they could not have had occassion to see the F Kalupur mob and if they saw then it must have been at a longer distance. Statement of PW 9, therefore, that the appellants were leading the mob is very difficult to be acceppted. And if they saw for the first time from house of Ambalal, as stated by Navin and not improved upon by others, then it is very difficult to accept that they could have identified these appellants. PW 1 further admitted that if anyone stood G with his face towards house of Maniben his then his back only could be visible from Ambalal's house. That is clear from map as well. Therefore identification of accused from out of the mob even if they were known from before becomes highly doubtful.

Out of persons who had collected at house of Ambalal only four H were examined. It was admitted by every witness that the last to enter

the house were Navin and his father. Time of entry as given by witnesses was before mixing of the mob at the corner except Ambalal who stated that he came after the mob had collected. But that appears to be improbable as he was so scared that he ran with his father without even closing door of his house. And if he would have come out when mob had collected then it is difficult to believe that he would have been spared when his house too was burnt. Navin was the first witness to be examined. He stated, categorically, that when he entered the house of Ambalal it was closed from inside. It was attempted to be improved upon by Ambalal who stated that he kept the door ajar. But apart from normal human behaviour to close the door, for protection in the beckground of incident of March and fear generated by shout of 'kill', and 'cut', the other witnesses PW 9 and PW 13 too stated that the door was closed after entry of Navin. In any case the incident having taken place after entry of Navin and the door having been closed thereafter or even ajar or half closed it was necessary for prosecution to establish how did the witnesses see the occurrence when they admitted that the exterior of Maniben's house or even of Navin could not be seen from inside of Ambalal's house. The deficiency in prosecution version was attempted to be explained by the judge by adverting to evidence of PW 13 that Ambalal was opening and closing the door every now and then, therefore there was nothing improbable in witnesses having seen the occurrence. But the approach was, both, faulty and illegal. The conclusion by picking up isolated sentence without adverting to other parts of his statement where he admitted that after entry, of all, the doors of the house were closed, and, he was able to identify the appellants when they were effecting entry in house of Maniben and that he did not identify anyone out of the mob till he entered the house of Ambalal was contrary to rule of appreciation of evidence. Reading the whole statement together makes it consistent with evidence of other witnesses and leaves no room for doubt that opening and closing the door was resorted to let in the persons who were reaching house of Ambalal due to fear of mob. And the exercise of opening and closing being over after entry of Navin seeing the mob or identifying the accused in process of opening and closing was out of question. The finding of the judge, thus, that 'it is not as if that once the door of the house of Ambalal was closed it was never opened again at any time before these persons escaped from the house of Ambalal ..... Therefore, even though the house of Ambalal is slightly obliquely situated as compared to the house of Maniben, it would not at all be difficult for these witnesses who had hid themselves in the house of Ambalal to have correctly identified the accused', is not based on appreciation of evidence but on imagination.

A Thus prosecution version suffered from serious infirmity. Its failure to bring on record evidence which could establish the possibility or even probability of the witness seeing the occurrence demolishes the whole structure. Since it was admitted to all the P.W.s that the exterior of Maniben's house could not be seen from interior of Ambalal's house the prosecution could succeed in establishing its case only if B it could prove that witnesses even then could have seen the occurrence. The only possibility of seeing the occurrence could be either from the road or standing in front of Ambalal's shop or if there was any source from inside house of Ambalal. Evidence is lacking for either. Possibility of the first two alternative from where incident could have been seen is out of question. Witnesses were so terrified due to C incident of March 1985 that they could not remain outside. PW 1 was so afraid that he rushed with his father without even closing door of his house. And if he would have come out when mob had reached house of Maniben was stated by Ambalal then there would have been every possibility of his being attacked. PW 9 and 13 too were afraid and rushed to Ambalal's house. Every time these witnesses reached the D door was opened and after entry it was closed. Last man to enter was Navin Chandra. No witness has stated that it was opened thereafter even once to look outside. How did then these witnesses see pushing open of Maniben's door by appellants, setting fire to her house and chaining from outside. It was for prosecution to explain. It could not be taken for granted merely because each witness repeated that they E knew the appellant from childhood and each of them was armed with articles mentioned in their hand. Ambalal did state that the door of his shop had seven planks joined by hinges. But the prosecution stopped there. It did not dare to come out with the case that the witnesses saw from the crevices. Therefore the prosecution version suffered from a lacuna which was fatal. The doubt thus created if the witnesses saw the F occurrenc at all is strengthened by subsequent conduct and behaviour of these witnesses. The prosecution version was that the moment the mob moved from house of Maniben to house of Navin Chandra towards Nani Ali Pole side the witness came out of Ambalal's house and dashed towards police gate where large number of persons had collected. But strangely not one of them told it to anyone present there or G even to police personnel that Maniben's house was burnt by appellants. It was against normal human behaviour as all the appellants were known from before. The incident had taken place due to communal frenzy. It is, therefore, difficult to believe that once these witnesses reached Dabgarwad Police gate they would not have shouted at top of their voice that the appellants known as Lallewallas had killed H Maniben. What is further surprising is that they did not disclose the

names even to Manchharam whose son had been burnt alive in house of Maniben, nor to anyone in the hospital and kept their mouth sealed till 11th June 1985 and opened it for the first time in the Police Station when their statement was recorded giving graphic description step by step. Not only that the PW 9 and 13 broke down in cross examination and admitted that they had not seen the appellants setting fire to the house of either Maniben or Navin. They were saying so by inference as they had seen smoke coming from the houses. Thus witnesses and circumstances both are against prosecution version. Although there are contradiction on material aspects in statement of these witnesses and arguments were addressed on late recording of evidenc, failure to produce the Chief Fire Officer, to establish if house was chained from outside, delay in preparation of panchnama of Maniben's house etc. but we consider it unnecessary to discuss them as the prosecution, in our opinion, failed to prove beyond shadow of doubt that the dreadful crime was committed by appellants. There is thus no option but to acquit these accused. We, however, hope that our order shall bring good sense to members of both the communities residing in Dabgarwad and make them realise the disaster which such senseless riots result in and they shall in future take steps to avoid recurrence of such incidents and try to resort to the atmosphere that prevailed before March 1985.

For the reasons stated above all these appeals succeed and are allowed. Reference No. 1 of 1987 for confirmation of death sentence is discharged. The conviction and sentences of appellants herein under section 3(2)(i) of Terrorist and Disruptive Activities (Prevention) Act, 1985 read with section 34 of the Indian Penal Code, 302 Indian Penal Code read with sections 34, 436/149, 449, 143 and 148 of Indian Penal Code are set aside. The conviction and sentence of Haroon S/o Kalubhai Laliwala, under section 3(2)(ii) of the TADA Act 1985 is also set aside. The appellants shall be set at liberty forthwith unless they are required in any other connection.

R.S.S. Appeals allowed.