

A

SAJJAN SINGH

v.

STATE OF MADHYA PRADESH

SEPTEMBER 2, 1998

B

[M.K. MUKHERJEE AND D.P. WADHWA, JJ.]

Criminal Law :

Criminal Procedure Code, 1973 : Section 392.

C

Offence—Conviction or acquittal—Appeal against—Both the Judges of the Division Bench of the High Court were in agreement with the conviction of some of the accused persons—There was difference of opinion in respect of the remaining—Hence, matter referred to third Judge—Held, third Judge not bound by the opinion of the two Judges where there is no difference—Third

D

Judge is required to consider whole of the case independently—Criminal Procedure Code, 1898, S. 429—Constitution of India, 1950—Arts. 136 and 134.

Criminal Trial :

E

Witness—Eyewitness—Testimony of—Contradiction in—Appreciation of evidence—Principles of—Enmity between accused and deceased—Held : Possibility of false implication cannot be ruled out—Therefore, to appreciate the evidence of witnesses whole scene has to be reconstructed on the basis of statements of witnesses to ascertain the truthfulness—Penal Code, 1860, S.

F

302.

The appellants along with seven accused persons were convicted by the trial court for offence under Section 302/149 of the Penal Code, 1860 and sentenced to undergo imprisonment for life. However, the Judges of the Division Bench of the High Court were divided in their opinion. The

G

Judges agreed with the conviction of three of the appellants but differed as regards the other seven. Hence the matter was referred to a third Judge under Section 392 of the Criminal Procedure Code, 1973. The Third Judge did not examine the appeals of the three appellants whose conviction was unanimously upheld by the two Judges of the Division Bench as he felt that

H

he was bound by such an unanimous opinion. Ultimately, the third Judge

convicted six persons and acquitted the remaining four persons. Hence this appeal. A

According to the prosecution the appellants and the deceased had previous enmity regarding the purchase of a land. A day before the incident one of the accused persons had come to the house of one P and left a message with his brother to send P and the deceased to the village to settle their dispute. Accordingly, P and the deceased came to the village on two scooters each with a pillion rider, P following the deceased at a little distance. As soon as the scooter of the deceased reached near the field of the appellants, the deceased was signalled to stop his scooter. The pillion rider of the deceased fled from the scene. The appellants then started beating the deceased with swords, *pharsa* and *lathis* (sticks) on his head and body as a result of which the deceased fell dead. P saw the incident for some time before he turned away his scooter along with the pillion rider. While witnessing the incident, the engine of the scooter was running, and P and his pillion rider were able to identify one of the appellants from his shout. B
C
D

Disposing of the appeals, this Court

HELD : 1. Statement of law is now quite explicit. It is the third Judge whose opinion matters; against the judgment that follows therefrom that an appeal lies to this Court by way of special leave petition under Article 136 of the Constitution or under Article 134 of the Constitution or under Section 379 of the Criminal Procedure Code, 1973. The Third Judge is, therefore, required to examine whole of the case independently and it cannot be said that he is bound by that part of the two opinions of the two Judges comprising the Division Bench where there is no difference. As a matter of fact third Judge is not bound by any such opinion of the Division Bench. He is not hearing the matter as if he is sitting in a three-Judge Bench where the opinion of majority would prevail. Hence, the third was not right in his approach and his hands were not tied as far as the three appellants before him were concerned in respect of whom both the Judges of the Division Bench opined that they were guilty and their conviction and sentences were to be upheld. [328-A-C] E
F
G

Babu v. State of U.P., AIR (1965) SC 1467, followed.

Hethuba v. State of Gujarat, [1970] 1 SCC 720; *Union of India v. B.N.* H

A *Ananti Padmanabiah*, [1971] 3 SCC 278; *State of A.P. v. P.T. Appaiah*, [1980] 4 SCC 316; *Bhagat Ram v. State of Rajasthan*, AIR (1972) SC 1502; *State of U.P. v. Dan Singh*, [1997] 3 SCC 747 and *Tanviben Pankajkumar Divetia v. State of Gujarat*, [1997] 7 SCC 156, relied on.

B *Balku v. Emperor*, AIR (1948) All 237; *Nemai Mondal v. State of W.B.*, AIR (1966) Cal 194 and *Dharam Singh v. State of U.P.*, (1964) 1 Cr.L.J. 78, cited.

C 2.1. There are apparent contradictions in the statements of the eyewitnesses regarding the identity of the accused. Both the pillion riders would certainly bear ill-will towards the accused and his family members and their servants because of the inimical relations which P and the deceased on the one hand and the accused party on the other hand. Statements of the eyewitnesses would, therefore, have to be scrutinized with caution though they cannot be thrown out merely because the witnesses got ill-will towards the accused party. It will, however, be seen that P D wanted to throw the net wide enough to implicate the accused. A story was, therefore, introduced in the prosecution version that a day before one of the accused persons had come to the house of P who was not there and he left a message with his brother to send both P and the deceased to the village to settle their dispute. [331-G; 332-D-F]

E 3.2. One has to reconstruct the whole scene to appreciate the evidence of the witnesses. In fact, scene is to be reconstructed on the basis of the statement of the witnesses and other evidence on record. The land in the village was purchased by P and the deceased in July, 1985 and the occurrence took place in November, 1986. They did not have much interaction F with the accused party and it is difficult to imagine that when P turned away his scooter with his pillion rider, they would be able to hear the shout and would be able to identify the shout to be that of one of the accused persons. Both P and his pillion rider have not stated as to how they were able to identify the shout of one of the accused persons. This part of the version G appears to be rather doubtful and seems to have been introduced to implicate one of the accused persons. When one of the accused persons attacked the deceased with his sword, which he had hidden in his shawl which he was wearing, and the other accused persons went towards the babool tree nearby to get their weapons, all the three witnesses fled from the scene. P had enough time to think and involve all the ten accused by, stating as to what H part each of them played, which in the circumstances he or witnesses could

not have witnessed. [333-F-H; 334-A]

A

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 137 of 1997 Etc.

From the Judgment and Order dated 24.2.96 of the Madhya Pradesh High Court in CrI.A. No. 204 of 1990.

B

WITH

Criminal Appeal No. 138/97.

S.K. Sinha for the Appellant in CrI.A. No. 137/97.

C

U.R. Lalit, S.K. Jain, Ms. Pratibha Jain and Umesh Bhole for the Appellant in CrI.A. No. 138/97.

K.N. Shukla, (Sakesh Kumar) for Uma Nath Singh for the Respondent.

D

The Judgment of the Court was delivered by

D. P. WADHWA, J. Sajjan Singh (Appellant in Criminal Appeal No. 137/97), Dule Singh and Meharban Singh (Appellants in Criminal Appeal No. 138/97) are aggrieved by judgment of the Madhya Pradesh High Court convicting them for offences under Section 302/149 Indian Penal Code ('IPC' for short) and sentencing them to undergo imprisonment for life.

E

Originally before the Sessions Court, there were 11 accused being tried including the appellants. Two of the accused were also charged for offence under Section 404 IPC. After the conclusion of the trial, Sessions Judge acquitted Banesingh and convicted rest of the 10 sentencing each of them to life imprisonment. These 10 went in appeal before the High Court. State also filed appeal against the acquittal of Banesingh. Appeals were heard by a Division Bench comprising of Shukla and Chitre, JJ. Both the Judges upheld the acquittal of Banesingh and dismissed the appeal filed by the State. So far as the 10 appellants were concerned, the Judges were divided in opinion. While Chitre, J. gave his opinion that the conviction of all of them should be upheld and their appeal dismissed, Shukla J. felt that conviction of three of them should be upheld and the rest acquitted. The matter was then referred to a third Judge, Prasad, J. under Section 392 of the Code of Criminal Procedure (for short, the 'Code') who by judgment dated February 24, 1996 upheld the conviction of six persons and dismissed

F

G

H

A their appeal while remaining four were acquitted. Out of the six appellants whose appeals have been dismissed by the High Court, three are before us. Remaining three, it appears, did not appeal. As to how these persons were armed as per prosecution and how the trial ended in conviction and/or acquittal can be described appropriately as per the statement given below:

Sl. No.	Name	Weapon used	JUDGMENT AND ORDER OF			
			Trial Court	Division Bench	Third Judge	
			Sukle, J.	Chitre, J.	Prasad, J.	
1.	Banesingh son of Kalu Singh	Nil	Acquittal	upheld	upheld	--
2.	Meharban Singh son of Banesingh	Sword	Conviction	Conviction	Conviction	Conviction
3.	Dule Singh son of Banesingh	Pharsa	-do-	Acquittal	-do-	-do-
4.	Sajjan Singh son of Devi Singh	Lathi Stick	-do-	Acquittal	-do-	-do-
5.	Baboo Singh son of Sajjan Singh	Sword	-do-	Conviction	-do-	-do-
6.	Gajraj Singh son of Antar Singh	Sword	-do-	-do-	-do-	-do-
7.	Kriparam) All	Pharsa	-do-	Acquittal	-do-	Acquittal
8.	Kalu) employees	Lathi(stick)	-do-	-do-	-do-	-do-
9.	Atmaram) of Bane	-do-	-do-	-do-	-do-	-do-
10.	Gulab) Singh	Pharsa	-do-	-do-	-do-	-do-
11.	Kesu)	Lathi(stick)	-do-	-do-	-do-	Conviction

The incident out of which these proceedings arose occurred on November 30, 1986 at about 10.20 a.m. in village Baniyakhedi within the jurisdiction of Police Station Depalpur, District Indore in the State of Madhya Pradesh. Prosecution alleged that 11 persons in conspiracy with each other and ten of them armed with various weapons caused the death of one Abdul Hadi @ Munna Pehalwan (Munnabhai). First Information Report of the crime was lodged at about 1.00 O'clock on November 30, 1986 itself by Gulamahmad Khan @ Pyareman (Pyareman).

Prosecution alleged that Pyareman along with Munnabhai purchased agricultural land in auction in 1985 in village Baniyakhedi. Banesingh of the same village was not happy on this purchase of land in his village and he instigated members of his caste against Pyareman and Munnabhai. This led to various litigations between the parties and ultimately a settlement was reached and Pyareman and Munnabhai started harvesting operations in the land. Banesingh came to the house of

Pyareman on the evening of November 29, 1986 and not finding him there left a message with his brother for Pyareman and Munnabhai to come to the village to settle dispute with Baboo Singh as well. Next day, i.e., on November 30, 1986 Pyareman and Munnabhai along with their servants Ismile and Sajid @ Painter left their houses to go to Baniyakhedi to look after their crops. They came on two scooters. One scooter was driven by Pyareman, with Ismile on the pillion seat and the other scooter was being driven by Munnabhai and on the pillion seat Sajid was sitting. At certain point of time, they were proceeding on Kachcha Path. Munnabhai was ahead on scooter. Pyareman was following him at a little distance. As soon as the scooter of Munnabhai reached near the field of Banesingh, Meharban Singh, Dule singh, both sons of Banesingh, Sajjan Singh and his son Baboo singh, Gajraj singh and their servants Gulab, Kriparam, Kesu, Kalu and Atmaram who were standing under a Babool tree signalled Munnabhai, who stopped his scooter. All these 10 persons started beating Munnabhai with swords, pharsa and lathis (sticks) on his head and body. As a result, Munnabhai fell down. Even then, they did not stop and beat him continuously. Seeing the beginning of the occurrence Ismile, who was on the pillion seat of the scooter of Munnabhai, got off the Scooter and fled towards the fields. Pyareman whose scooter was at about 30 or 35 yards behind also turned back his scooter and left the place with Sajid on the pillion seat. Pyareman also saw the incident and said that when he turned the scooter, he heard the shout of Sajjan Singh to the effect that Munnabhai be burnt if he had died and that Banesingh would take care of everything. He stated that Meharban Singh, Baboo Singh and Gajraj Singh were armed with 'swords', Dule Singh, Gulab and Kriparam were armed with 'pharsa and the remaining persons were armed with 'lathis' and that they went on attacking Munnabhai. When Police reached the spot, Munnabhai was found dead. His body was also extensively burnt. Post Mortem examination was conducted. After completion of the investigation, 11 persons were sent for trial. The case of the prosecution mainly depended upon the statements of three eye witnesses, namely, Pyareman (PW-2), Sajid (PW-8) and Ismile (PW-13) and the doctors who conducted the post mortem examination of the body of the deceased Munnabhai; they are - Dr. O. L. Mimrot (PW-3) and Dr. M.G. Dindorkar (PW- 16) and lastly the investigating officer, Girish Kumar (PW-21).

We have seen above that ultimately six persons were convicted and sentenced to life imprisonment. Both Shukla, J. and Chitre, J. comprising

- A the Division Bench who heard the appeal in the first instance, were of the opinion that the conviction of Meharban Singh, Baboo Singh and Gajraj Singh should be upheld. The difference of opinion was regarding the remaining seven appellants before them. When the matter was referred to Prasad, J. under Section 392 of the Code, he did not at all examine the cases of Meharban Singh, Baboo Singh and Gajraj Singh as he was of the
- B opinion that since there was unanimity between the two Judges that appeal of these three persons be dismissed and their conviction and sentence be upheld, he was not called upon to decide their cases. It was submitted before Prasad J. that in view of Section 392 of the Code he was not bound by the opinion of the two Judges of the Division Bench upholding the
- C conviction of these three persons and he has to independently examine their appeal. This contention was negated by Prasad, J. Section 392 of the Code is as under:

"Procedure where Judges of Court of Appeal are equally divided.

- When an appeal under this Chapter is heard by a High Court
- D before a Bench of Judges and they are divided in opinion, the appeal, with their opinions, shall be laid before another Judge of the Court, and that Judge, after such hearing as he thinks fit, shall deliver his opinion, and the judgment or order shall follow that opinion:

- E Provided that if one of the Judges constituting the Bench, or, where the appeal is laid before another Judge under this section, that judge, so requires, the appeal shall be re-heard and decided by a larger Bench of Judges."

- F In Code of Criminal Procedure, 1898 Section 429 contained a similar provision which was as follows :-

- "When the Judges composing the Court of Appeal are equally
- G divided in opinion, the case, with their opinions thereon, shall be laid before another Judge of the same Court, and such Judge, after such hearing (if any) as he thinks fit, shall deliver his opinion and the judgment or order shall follow such opinion."

- In the present Code it would be seen that now proviso has been added to Section 392. But for this proviso effect of Section 429 of the old Code and
- H Section 392 of the present Code would appear to be the same. Prasad, J.,

the third Judge, after referring to the decisions of this Court in *Babu and Others v. The State of Uttar Pradesh*, AIR (1965) SC 1647, *Hethubha v. State of Gujarat*, [1970] 1 SCC 720, *Union of India v. B.N. Ananti Padamanabiah* (1971 (3) SCC 278), *State of Andhra Pradesh v. P.T. Appaiah*, [1980] 4 SCC 316 and *Bhagat Ram v. State of Rajasthan*, AIR (1972) SC 1502, was of the view that the conviction and sentence of the three appellants before him (only one of them now before us) was final and could not be re-opened by him as both the judges comprising the Division Bench held them to be guilty and convicted them under Section 302/149 IPC and sentenced them to undergo life imprisonment. Prasad, J., therefore, refused to hear their appeal on merit. He considered the case on merit of the other appellants before him. It is not necessary for us to refer to all the earlier decisions of this Court except that of the Constitution Bench in *Babu and Others v. The State of Uttar Pradesh*, AIR (1965) SC 1467, as later two judgments of this Court in *State of U.P. v. Dan Singh and Others*, [1997] (3) SCC 747 and *Tanviben Pankajkumar Divetia v. State of Gujarat*, [1997] 7 SCC 156 considered all the earlier decisions. In *Babu and Others v. The State of Uttar Pradesh*, AIR (1965) SC 1467, the appellants were convicted under Section 302 read with Section 34 IPC by the Sessions Court. In the appeal before the High Court, which was heard by a Division Bench, the Judges differed in their opinion. while one judge (Mathur, J.) was for dismissing the appeal, the other judge (Gyanendra Kumar, J.) was for allowing it. The appeal was referred to the third judge in view of Section 429 of the old Code. Third judge was for dismissing the appeal. There was yet difference of opinion between the judges as to whether certificate of fitness for appeal to Supreme Court under Article 134(1)(c) of the Constitution should be granted. The matter was then referred to the third judge who was for granting such a certificate. When the matter came before this Court an objection was raised by the State that the certificate granted by the High Court was incompetent. The appellants contended that the question involved the interpretation of Article 134(1) (c) of the Constitution and on this the matter was referred to the Constitution Bench. It was in this context that this Court considered the manner in which the third judge was required by law to proceed when there was a difference of opinion between two judges in the High Court in the decision of an appeal. This Court said that Section 429 (of old Code) contemplated that it was for the third judge to decide on what points he should hear arguments, if any, and that postulates that he is completely free in resolving the difference as he thinks fit.

A

B

C

D

E

F

G

H

A In *State of U.P. v. Dan Singh and Others*, [1997] 3 SCC 747 the respondents were tried in the court of session for various offences under Sections 147, 302/149, 436/149 and 307/149 IPC and Sections 4 and 5 of the Protection of Civil Rights Act, 1955. There were as many as 32 accused. Sessions Judge acquitted all of them. Aggrieved State filed appeal before the High Court of Allahabad. There was difference of opinion between the two judges comprising the Division Bench. Katju, J. except for two respondents acquitted all the other respondents and upheld the judgment of the Sessions Judge to that extent. He convicted the two respondents whom he held guilty of offences under Section 325/34 IPC and sentenced them to undergo rigorous imprisonment for five years. Rajeshwar Singh, J. was of the opinion that appeal against six respondents be allowed and he convicted them for the offences for which they were charged and sentenced them to undergo imprisonment for life. He set aside the acquittal of four lady accused under the Protection of Civil Rights Act and sentenced them to undergo simple imprisonment for one month each and to pay a fine of Rs. 100 each. Thus both the judges agreed on the acquittal of 22 accused and there was difference of opinion with regard to six other accused and four lady accused. Appeal was then heard by the third judge (Mathur, J.), who agreed with the opinion of Katju, J., the result being that only two respondents stood convicted under Section 325/34 IPC and sentenced to undergo five years' rigorous imprisonment. The State of U.P. sought special leave to appeal in this Court against the judgment of the High Court against all the 32 accused. Leave was, however, refused regarding the four lady accused. It was granted for other 28 accused. An argument to the following effect was raised before this Court :-

F "At the outset it was sought to be contended on behalf of the respondents that the appeal against the 22 respondents, qua whom the State's appeal was dismissed by the Division Bench of B.N. Katju and Rajeshwar Singh, JJ. vide order dated 15-4-1987, had become final and no appeal has been filed against the said decision. The appeal had only been filed against the final order dated 19-5-1988, pursuant to the opinion of the third Judge. This order only pertains to the four ladies and six other respondents. Special leave not having been granted against the acquittal of the four ladies, this appeal, it was submitted, should be confined only to the case relating to the six accused in respect of whom there was a difference of opinion which was referred to the third Judge."

G

H

This Court, after examining the provision of Section 392 of the Code, held as under :- A

"According to this section if there is a difference of opinion amongst the Judges of the Bench, then their opinions are laid before another Judge. It is only after the third Judge gives his opinion that the judgment or order follows. It is clear from this that a judgment or order which can be appealed against, under Article 136 of the Constitution, is only that which follows after the opinion of the third Judge has been delivered. What B.N. Katju and Rajeshwar Singh, JJ. wrote were not their judgments but they were their opinions. Due to disagreement amongst them, Section 392 of the Code of Criminal Procedure required the appeal as a whole to be laid before the third Judge (V.P. Mathur, J. in this case) whose opinion was to prevail. The first order of 15-4-1987 was clearly not contemplated by section 392 of the Code of Criminal Procedure and is, therefore, *non est*. B C D

When the appeal as a whole is heard by the third judge, he not only has an option of delivering his opinion but, under the proviso to Section 392 of the Code of Criminal Procedure he may require the appeal to be reheard and decided by a larger Bench of Judges. This was an option which, under the proviso, was also open for any one of the two Judges, namely, B. N. Katju and Rajeshwar Singh, JJ. to exercise, but they chose not to do so. What is clearly evident is that the appeal is finally disposed of by the judgment and order which follows the opinions of the third Judge. This being so special leave petition could only have been filed after the appeal was disposed of by the High Court vide its final order dated 19-5-1988. Even though the said order purports to relate only to ten out of thirty-two accused the said order has to be read along with the earlier order of 15-4- 1987 and, in law, the effect would be that the order dated 19-5- 1988 will be regarded as the final order whereby the appeal of the State was partly allowed, with only two of the thirty-two accused being convicted under Section 325 read with Section 34 IPC, while all the other accused were acquitted." E F G H

A In *Tanviben Pankajkumar Divetia v. State of Gujarat*, [1997] 7 SCC 156, the appellants were convicted under Section 302 read with Section 34 IPC. On an appeal by the appellants the Division Bench was divided. One Judge was for allowing the appeal the other for dismissing the same. When the matter was referred to the third Judge under Section 392 of the Code

B he agreed that appeal be dismissed and upheld the conviction of the appellants. When the matter came to this Court an argument was raised that in view of finding of one of the members of the Division Bench that the appellants were entitled to acquittal, such view in favour of acquittal, as a rule of prudence, should be accepted by the third Judge hearing the appeal

C of Section 392 and the question of acceptance of the view in favour of acquittal, as rule of prudence or on the score of judicial etiquette by the third Judge. This Court referred to all the earlier decisions of this Court as were rendered under Section 429 of the old Code and Section 392 of the present Code and held as under : -

D

"The plain reading of Section 392 clearly indicates that it is for the third Judge to decide on what points he shall hear arguments, if any, and it necessarily postulates that the third Judge is free to decide the appeal by resolving the difference in the manner, he

E thinks proper. In *Babu v. State of U.P.*, AIR (1965) SC 1467, it has been held by a Constitution Bench of this Court that where the third Judge did not consider it necessary to decide a particular point on which there had been difference of opinion between the two Judges, but simply indicated that if at all it was necessary for

F him to come to a decision on the point, he agreed with all that had been said about by one of the two Judges, such decision was in conformity with law. That the third Judge is free to decide the appeal in the manner he thinks fit, has been reiterated in *Hethubha v. State of Gujarat*, [1970] 1 SCC 720 and *Union of India v. B.N. Ananti Padmanabiah*, [1971] 3 SCC 278. In *State of A.P. v. P.T. Appaiah*, [1980] 4 SCC 316 it has been held by this Court that even

G in a case when both the Judges had held that the accused was guilty but there was difference of opinion as to the nature of offence committed by the accused, it was open to the third Judge to decide the appeal by holding that the accused was not guilty by

H considering the case on merit.

Where a case is referred to a third Judge under section 392 CrPC, such Judge is not only entitled to decide on what points he shall hear the arguments, if any, but his decision will be final and the judgment in the appeal will follow his decision. Precisely for the said reason, it has been held by the Allahabad High Court that if one of the judges, who had given a different opinion ceases to be Judge, the judgment may be pronounced by another Bench of the High Court, the reason being that the ultimate decision in the appeal is to abide by the decision of the third Judge and pronouncement of the decision in conformity with the decision of the third Judge is only a formality *Balku v. Emperor*, AIR [1948] All 237.

Section 392 CrPC clearly contemplates that on a difference of opinion between the two Judges of the Division Bench, the matter is to be referred to the third Judge for his opinion so that the appeal is finally disposed of on the basis of such opinion of the third Judge. In the scheme of Section 392 CrPC, the view that the third Judge, as a rule of prudence or on the question of judicial etiquette, will lean in favour of the view of one of the Judges in favour of acquittal of the accused, cannot be sustained. The Calcutta High Court has held in the *Nemai Mondal v. State of W.B.* AIR (1966) Cal 194 that the third Judge need not as a matter of fact, lean in favour of acquittal even if one of the Judges had taken such view. It has been held that benefit of doubt may be given only if the third Judge holds that it is a case where accused is to be given benefit of doubt. There is no manner of doubt that the third Judge has a statutory duty under Section 392 CrPC to consider the opinions of the two Judges whose opinions are to be laid before the third Judge for giving his own opinion on consideration of the facts and circumstances of the case. In *Dharam Singh v. State of U.P.*, [1964] 1 CrL. L.J. 78 this Court has indicated that it is the duty of the third Judge to consider the opinion of his two colleagues and to give his opinion. Therefore the learned third Judge has rightly discarded the contention that as a rule of prudence or on the score of judicial etiquette, he was under any obligation to accept the view of one of the Judges holding in favour of acquittal of the accused appellant."

- A Statement of law is now quite explicit. It is the third Judge whose opinion matters; against the judgment that follows therefrom that an appeal lies to this Court by way of special leave petition under Article 136 of the Constitution or under Article 134 of the Constitution or under Section 379 of the Code. The third Judge is, therefore, required to examine whole of the case independently and it cannot be said that he is bound by that part
- B of the two opinions of the two Judges comprising the Division Bench where there is no difference. As a matter of fact third Judge is not bound by any such opinion of the Division Bench. He is not hearing the matter as if he is sitting in a three Judge Bench where the opinion of majority would prevail. We are thus of the opinion that Prasad, J. was not right in his
- C approach and his hands were not tied as far as three appellants, namely, Gajraj Singh, Meharban Singh and Baboo Singh before him were concerned in respect of whom both Judges of the Division Bench opined that they were guilty and their conviction and sentences were to be upheld.
- D Of them only Meharban Singh and Dule Singh are the appellants before us. Perhaps in normal circumstances we would have remanded the case back for the third Judge to examine the matter afresh as far as the case of these two appellants is concerned. We would not, however, like to adopt this course in respect of the third appellant, namely, Sajjan Singh whose case was considered by Prasad, J. independently and he is also now
- E appellant before us. Since we have heard the matter in respect of all the three appellants at length we do not think it is desirable now at this stage to remand the matter when only some of the appellants could be said to have been prejudiced because of the approach adopted by Prasad, J.
- F Of the 21 prosecution witnesses examined relevant would be the three eye witnesses, namely, Pyareman (PW-2), Sajid (PW-8) and Ismile (PW-13). It is not disputed that death of Munnabhai was homicidal. He suffered multiple injuries by sharp edged weapon and his body was extensively burnt as well. Dr. Dindorkar (PW-16), who conducted the post mortem examination, however, did not find any injury caused by lathi
- G blows. When asked in cross-examination he stated that bruises caused by blows of wooden stick on the body, which is burnt, will get obliterated. However, he could not say if lacerated wounds caused by lathi blows would also be not visible on a burnt body. Dr. Mimrot (PW- 3) assisted Dr. Dindorkar in the conduct of post mortem examination of the dead body of
- H Munnabhai.

Following injuries were found on the body of the deceased Munnabhai :- A

- (i) Incised wound 4-1/2" x 2-1/2" x 1-1/2" at right side of the head in which front parietal bone is found cut and was 2" away from middle line. B
- (ii) Incised wound 3-1/2" x 2" x 1-1/4" on right side of the head on dorsal of occipital parietal bone which was situated on it and its bone was found cut. C
- (iii) Dorsal side of frontal bone and left side of pariparietal bone and front side of occipital bone was totally burnt, in addition to it complete portion of brain was destroyed after getting burnt, from where base of the skull (Bone) was visible. C
- (iv) Incised wound 6" x 2" x 2" was present in the middle of left thigh at dorsal and enternal side. D
- (v) Incised wound 2-1/2" x 1" x 1/4" was present on the back side of lateral malleolus bone of the left foot. Blood was clotted over this wound. E
- (vi) Incised wound 8"x 3"x 1" was present on the dorsal and middle side of right foot. E
- (vii) Incised wound 3"x 1-1/2" x 1/2" was present on the front and side portion of the left arm. F
- (viii) Incised wound 3-1/2" x 1-1/2"x 1/2" was present on the front and side portion at the middle of left foot. F

All injuries were ante mortem. Body was burnt after the occurrence. It was stated by Dr. Dindorkar that injuries were caused by sword, pharsa or sharp edged weapon and injuries No. 1, 2 and 3 jointly and severally were sufficient in the ordinary course of nature to cause death. G

Of the three eye witnesses Ismile (PW-13) was sitting on the pillion seat of the scooter driven by the deceased. In his deposition he stated that when they reached near the farm of Banesingh all the ten accused gave signal by hand to Munnabhai to stop. Meharban Singh attacked Munnabhai H

A on his head by sword which was hidden in his shawl. Baboo Singh and Gajraj Singh also took out swords hidden behind a babool tree which was nearby. Ismile said that seeing that he got off the scooter and fled as he was afraid that he might also be killed. He said while running he heard somebody shouting "kill cut down, none should escape". Pyareman (PW-2)

B in his deposition stated that an evening earlier to the date of incident he got a message from his brother that Banesingh, who was also one of the accused before the trial court on a charge of conspiracy, had come to his house and told his brother that Pyareman and Munnabhai be sent to the village so that dispute of Baboo Singh is also settled. He said it was on

C account of this message that he had gone to the village on November 30, 1986. Munnabhai was going in his scooter with Ismile sitting on the pillion seat. Pyareman was driving his own scooter and Sajid (PW-8) was sitting on the pillion seat. Pyareman said that he was about 100 feet behind the scooter of Munnabhai. He said that when Munnabhai reached near the farm of Banesingh, he was attacked. All the ten accused except Banesingh

D attacked Munnabhai. Pyareman said that as a matter of fact when Munnabhai stopped his scooter and he saw the accused persons he pointed to Sajid by raising his hands and also telling him "see attack is likely". Pyareman said he got frightened and turned back his scooter. Then he

E deposed that Meharban Singh and Baboo Singh attacked Munnabhai with swords; Dule Singh, Gajraj Singh and *Atmaram* assaulted Munnabhai with pharsa; and Sajjan Singh, Gulab, Kesu and Kriparam with sticks. Prasad, J., the third Judge, in his judgment noticed observations of Shukla, J. comprising the Division Bench as to what Pyareman stated about the participation and assault by the accused. According to him Pyareman

F (PW-2) stated that accused Meharban Singh, Kalu and Baboo Singh attacked by swords; Dule Singh, Gajraj Singh, *Atmaram* with pharsa; and Sajjan Singh, Gulab Kesu and Kriparam with lathis. Prasad, J. then said that PW-2 had stated about the role played by each of the accused. He had said that it was Meharban Singh, who first assaulted Munnabhai by sword which hit him on his head and thereafter Baboo Singh gave him blow with

G sword which also caused injury on the head of Munnabhai. Gajraj Singh then assaulted Munnabhai on his shoulder with sword. Thereafter Dule Singh, Kriparam and Gulab assaulted Munnabhai by pharsas and rest of the accused, namely, Kesu, Kalu, *Atmaram* and Sajjan Singh assaulted the deceased by lathis. Pyareman stated that deceased was assaulted one after

H the other by the accused and the manner he sustained injuries. Pyareman

said that he did not see the face of Sajjan Singh clearly and only saw his face from the side. All the accused had encircled the deceased. As soon as Munnabhai stopped his scooter Ismile, who was sitting on the pillion seat ran away towards the fields. He then said that he heard Sajjan Singh saying "kill him and burn him if he is dead, Banesingh Darbar will face all the consequences". Pyareman thereafter went to the police station and lodged the report of the crime at about 1.00 p.m. when occurrence took place around 10.00 a.m.

Sajid (PW-8) in his deposition said that Munnabhai, who was driving the scooter, was about 100 feet ahead of the scooter driven by Pyareman of which he was the pillion rider. He said when Munnabhai reached near Banesingh's farm he was surrounded by ten accused while the eleventh accused Banesingh was not there. He said Pyareman raised alarm "see Sajid assault is being made". Sajid then deposed that they saw the attack being made for a while. He said Meharban Singh, Baboo Singh and Gajraj Singh were armed with swords; Dule Singh, Gulab Singh and Kriparam with pharsas; and Sajjan Singh, Atmaram, Kesu and Kalu with lathis. He said that the first blow was given by Meharban Singh on the head of Munnabhai and then Gajraj Singh gave a sword blow at the shoulder part by side of head of Munnabhai. Dule Singh, Kriparam and Gulab, started beating Munnabhai with Pharsas, Kesu, Kalu, Atmaram and Sajjan Singh started beating Munnabhai with sticks. The witness is silent about the part played by Baboo Singh. Sajid then said that when Pyareman turned his scooter, they heard Sajjan Singh shouting "if dead burn him. Banesingh Darbar would face the things in the last". In cross- examination Sajid said that the first blow was given by Baboo Singh. A suggestion was put to him that after the first blow was given by Baboo Singh he and Pyareman left the scene, which suggestion he denied. When confronted how they could see whole of the occurrence when they were there only for a short while the witness said that Pyareman had stopped the scooter but he had not turned off the engine and that he got off from the Scooter. He was unable to identify as to who was Banesingh and who was Meharban Singh.

There are apparent contradictions in the statements of the eye witnesses, for example, Pyareman identified the accused Kesu as Nandu. Sometime he said that it was Gajraj Singh who was armed with Pharsa and other time he said that he was having sword. He had also stated earlier that Gulab was having stick and thereafter said he was in fact having

A Pharsa. He identified accused Kriparam as Atmaram.

Considering various contradictions in the statements of the eye witnesses Prasad, J. acquitted accused Kriparam, Kalu Atmaram and Gulab. It has come on record that there had been enmity between Banesingh and his sons and that of Pyareman and Munnabhai (deceased) because of the latter two purchasing the land in auction in village Baniyakhedi which was not to the liking of Banesingh, resident of that village. There had been various litigations between them and no love last between them. Pyareman and Munnabhai (deceased) had been partners in business and had together purchased the land. Sajid was working as conductor with Pyareman in one bus which he was owning. Ismile was a coolie in the bus stand and used to earn about Rs. 20 or 25 per day. Evidence shows that both these PWs were at the beck and call of Pyareman and Munnabhai. They also used to help them in tilling the land. Both Sajid and Ismile would certainly bear ill-will towards Banesingh and his family members and their servants because of inimical relations which Pyareman and Munnabhai on the one hand and the accused party on the other hand had. Statements of the eye witnesses would, therefore, have to be scrutinized with caution though they cannot be thrown out merely because the witnesses got ill-will towards the accused party. It will, however, be seen that Pyareman wanted to throw the net wide enough to implicate Banesingh even though, according to him Banesingh was not one of the persons who assaulted Munnabhai (deceased). A story was, therefore, introduced in the prosecution version that a day before Banesingh had come to the house of Pyareman who was not there and he left a message with his brother to send both Pyareman and Munnabhai to the village to settle their dispute with Baboo Singh as well. This part of the version of Pyareman has not been believed by both the Sessions Judge and the High Court. It would, therefore, appear that to charge Banesingh under Section 120-B IPC, this fact was brought in the evidence. Ismile (PW-13) who was the pillion rider of the deceased Munnabhai when he saw the assault on the deceased by a sword by Meharban Singh and saw Baboo Singh and Gajraj Singh going towards the Babool tree to take out their swords which they had hidden there, he fled from the scene. He also said that Meharban Singh was having the sword hidden in the Shawl which he was wearing. He said as much that he saw Baboo Singh and Gajraj Singh going towards the Babool tree and taking out the swords. Ismile had also admitted that he had not stated in his statement under Section 161 of the Code that he heard the shout "kill, cut down, none should escape". Pyareman and Sajid were about 100 feet behind on the scooter. They said they saw occurrence "for a while" or "for a short while".

Pyareman said that as soon as the scooter of Munnabhai (deceased) was stopped and Ismile sitting behind him ran away, he pointed to Sajid who was sitting behind him 'see attack is likely'. He said he got so frightened that he turned back his scooter and also fled from the scene with Sajid sitting behind him. It would, therefore, appear that Pyareman took a 'U' turn and just fled. On the other hand, Sajid said he, in fact, got down from the scooter, saw the whole occurrence and then they left. It is difficult to reconcile these two versions. A suggestion has been put to these witnesses that as soon as Meharban Singh attacked Munnabhai (deceased) they fled from the scene which suggestion, of course, they have denied. There are, thus, two versions before us (1) that when Pyareman and Sajid saw the attack coming and Meharban Singh struck the first blow, they ran away; and (2) that Pyareman stopped the scooter, Sajid got down and after seeing the whole of the occurrence as to the part played by each of the 10 accused, they ran away while Munnabhai deceased was still being given blows. If we accept first version, they both would be said to have a fleeting glance of the occurrence and would not be in a position to identify what part each accused played in the crime and further it would have been too early for Sajjan Singh to have shouted to burn Munnabhai, if he had died. If we accept the second version, it is difficult to believe that both Pyareman and Sajid would stand immobilized at the spot, would act as mute spectators and after having seen the whole occurrence would then run away from the scene. Sajid said that engine of the scooter was all the time running and while they fled, they heard the shout of Sajjan Singh. It is difficult to imagine that at a distance of 100 ft. and with the sound of engine of the scooter coming out and the attack still going on, both these PWs would be able to hear and identify the shout that of Sajjan Singh, particularly when he was having his back towards them. One has to reconstruct the whole scene to appreciate the evidence of the witnesses. In fact, scene is to be reconstructed on the basis of the statement of the witnesses and other evidence on record. The land in the village was purchased by Pyareman and Munnabhai in July, 1985 and the occurrence took place in November, 1986. They did not have much interaction with the accused party and it is difficult to imagine that when Pyareman turned away his scooter with Sajid as Pillion rider, they would be able to hear the shout and would be able to identify the shout to be of Sajjan Singh. Both Pyareman and Sajid have not stated as to how they were able to identify the shout of Sajjan Singh. This part of the version appears to be rather doubtful and seems to have been introduced to implicate Sajjan Singh. We are further of the view that when Meharban Singh attacked Munnabhai with his sword, which he had hidden in his shawl which he was wearing, and Baboo Singh and Gajraj

- A Singh went towards the babool tree nearby to get their weapons, all the three witnesses fled from the scene. Pyareman had enough time to think and involve all the ten accused by stating as to what part each of them played, which in the circumstances he or other witnesses could not have witnessed.
- B As seen above, various contradictions were there in the statements of the witnesses with the result that High Court acquitted four of the accused. As far as the case of Meharban Singh is concerned both Ismile and Pyareman implicate him that he was first person to assault deceased Munnabhai with sword. Sajid was, however, unable to say whether the first blow was by Meharban Singh or Baboo Singh and he was also unable to identify any of these two accused. That will not, however, make any difference as two witnesses are categorical that it was Meharban Singh who assaulted the deceased with sword on his head which injury according to Dr. Dindorkar was sufficient in the ordinary course to cause death. Meharban Singh has been rightly convicted and sentenced. Case of appellant Dule Singh is no different than that of Kriparam and Gulab Singh, who have been given benefit of doubt and acquitted. Considering the whole spectrum of events we are of the view that appellants Dule Singh and Sajjan Singh are entitled to benefit of doubt.
- C
- D

E Accordingly, we dismiss the appeal filed by Meharban Singh and allow that of Dule Singh and Sajjan Singh. Dule Singh and Sajjan Singh are given benefit of doubt and are acquitted. They shall be released forthwith unless required in any other case.

V.S.S.

Appeals dismissed.