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KHILAN & ANR.

v.

STATE OF M.P.

(Criminal Appeal No. 1348 of 2007)

B MARCH 9, 2010

[V.S. SIRPURKAR AND SURINDER SINGH NIJJAR, JJ.]

Penal Code, 1860 – s. 302/34 – Conviction under – Eight accused persons armed with deadly weapons forming unlawful assembly to kill deceased – Infliction of fatal injuries on deceased – Conviction and sentence of four accused u/s. 302/34 – Upheld by High Court but acquittal of one of the accused – On appeal held: There is no infirmity either in the appreciation of evidence or apparent miscarriage of justice – Thus, order of conviction of three accused by courts below does not call for interference – Presence and participation of the accused acquitted by High Court in the crime doubtful, thus, order of High Court in that regard upheld – Constitution of India, 1950 – Article 136.

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According to the prosecution case, there was a land dispute between the parties. P, K, G, SS, D, KR, GL and B armed with deadly weapons formed an unlawful assembly and caused fatal injuries to TS. PR-PW2 and SB were the eye witness to the assault. The trial court convicted P, GL, K and SS u/s.302/34 IPC and sentenced to life imprisonment. The High Court upheld the conviction and sentence of P, K and GL but acquitted SS. Hence, the present cross appeals were filed. This Court by order dated 16.2.2010 dismissed the appeals.

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Now giving reasons for dismissing the appeals, the Court

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HELD:

Criminal Appeal No. 1348 of 2007:

1.1. The trial court concluded that the four accused namely P, K, G and SS had inflicted the fatal injuries on the deceased. It was upon the thorough consideration of the evidence that the trial court rendered its verdict. [Para 15] [230-E-F]

1.2. In appeal the High Court re-appreciated the entire evidence, even more elaborately. The High Court had independently reached its conclusions. It is noticed that the medical evidence given by the doctor clearly shows that the deceased had suffered five incised injuries. The injuries resulted in the instantaneous death of TS. The High Court reiterates the reason for disbelieving the testimony of SB. On examination of the evidence given by PW 2-PR it is noticed that PW2 had merely stated that his Mama goes to the fields in the morning after taking tea. He usually comes back to take lunch in the afternoon. The witness never stated that on that particular date also the deceased had only taken tea. No clarification with regard to this was sought from the doctor by either party. In any event this single factor would not be sufficient to falsify the evidence led by the prosecution. The High Court also discarded the evidence of SB on the ground that the identity of B has not been established. There was only one injury on the deceased which could have been caused by a blunt weapon. SB had insisted that B had assaulted the deceased with the lathi. The High Court also came to the conclusion that merely because the witnesses had been closely related to the deceased and there is enmity between the families is no reason to discard the evidence which is consistent and is corroborated. The weapons were recovered at the instance of the appellant. It is also concluded that TS had died due to the cumulative effect of all the injuries which

A were sufficient to cause death in the ordinary course of nature. The said conclusion is also buttressed by the circumstance that TS died immediately upon the injuries being inflicted. Therefore, the High Court had endorsed the approach of the trial court. Upon a close examination B of the evidence of PW2, the High Court came to a conclusion that the presence and participation of SS in the crime was doubtful. It is observed that although the evidence of PW2 and PW4-SL is consistent with regard to the role played and the weapons used by P, G and K. C However it suffers from material discrepancies/ inconsistencies in relation to the role played and the weapons used by SS. It is observed that the statement of P is inconsistent with his statement during investigation u/s. 161 Cr.P.C. In the report as well as in his statement u/s. 161 Cr.P.C. he has stated that SS was D carrying luhangi. However, in his statement he changed his version and stated that he was carrying and used farsa. This apart during investigation luhangi was recovered and seized from his possession. Even PW4 mentioned that SS was having luhangi in his hand. E Consequently he had been given been benefit of the doubt and acquitted. [Para 16] [230-G-H; 231-A-H; 232-A-B]

1.3. It becomes quite evident that appreciation of the F evidence by the courts below cannot be said to have resulted in grave injustice to the accused/appellants. The findings recorded by the trial court have been reaffirmed by the High Court on an independent appreciation of the evidence. In the absence of any infirmity either in the G appreciation of the evidence or apparent miscarriage of justice, it would not be appropriate for this Court to interfere with the judgments of the courts below. Both the courts have painstakingly examined the entire evidence led by the parties. Cogent reasons have been given in H support of the conclusions reached by both the courts.

In such circumstances this Court would be rather reluctant to intervene. Even though the powers of this Court under Article 136 of the Constitution are very wide, but they are exercised only in exceptional cases where substantial and grave injustice has been done to the aggrieved party. [Para 17] [232-C-E] A B

Arunachalam v. P.S.R. Sadhanantham **(1979) 2 SCC 297;** *State of U.P. v. Babul Nath* **(1994) 6 SCC 29;** *Ganga Kumar Srivastava v. State of Bihar* **(2005) 6 SCC 211, referred to.** C

1.4. On going through the evidence in the instant case, it cannot be concluded that the appellants have been able to establish any exceptional circumstances or any miscarriage of justice which would shock the conscience of this Court; and that the opinion expressed by the courts below was either manifestly perverse or unsupportable from the evidence on record. It is not possible for this Court to convert itself into a court to review evidence for a third time. Inspite of the strenuous efforts made by the counsel for the appellants, the instant case neither raises any exceptional issue nor has resulted in miscarriage of justice. [Para 21] [234-F, G, H] D E

Criminal Appeal No. 1540 of 2008:

The evidence of the prime witness PR-PW2 in relation to SS was inconsistent and contradictory in nature. There was a direct conflict in the evidence given by PW2 and PW4. There was also discrepancies in the statement made in Court and the statements made earlier during investigation as also in the report. Consequently, the High Court expressed an opinion that the presence and participation of SS in the crime is doubtful. This being a possible and a plausible view would not call for any interference in exercise of the jurisdiction under Article 136 of the Constitution of India. [Para 1] [235-C-D] F G H

A **Case Law Reference:**

(1979) 2 SCC 297	**Referred to.**	**Para 18**
(1994) 6 SCC 29	**Referred to.**	**Para 19**
(2005) 6 SCC 211	**Referred to.**	**Para 20**

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CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1348 of 2007.

From the Judgment & Order dated 10.4.2006 of the High C Court of Madhya Pradesh Jabalpur Bench at Gwalior in Criminal Appeal No. 120 of 1998.

WITH

Crl.A.No. 1540 of 2008

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Harinder Mohan Singh, Kaushal Yadav, Durgesh Yadav and Shabana for the Appellants.

S.K. Dubey, B.S. Banthia, Naveen Sharma, Yogesh Tiwari and N. Annapoorani for the Respondent.

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The Judgment of the Court was delivered by

SURINDER SINGH NIJJAR, J. 1. On 16.2.2010 this Court had passed the following order:

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"Mr. S.K. Dubey, learned senior counsel appearing for the respondent submitted that arising out of the same judgment, the State of M.P. has also filed another Criminal Appeal No.1540/2008 against the acquittal of Sangram Singh and requests that the said appeal may also be heard G along with the present appeal.

Criminal Appeal No.1540/2008 is taken on board.

The appeals are dismissed in terms of the signed order. The reasoned order will follow."

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2. We now proceed to give the reasons. A

3. This appeal has been filed by the two appellants against the judgment of the High Court of Judicature of Madhya Pradesh in Criminal Appeal No. 120/98 dated 10.4.2006. The High Court has been pleased to dismiss the appeal of the petitioner and upheld the conviction and sentence under Section 302/34 IPC. B

4. We may briefly notice the salient facts involved in this appeal. It was the case of the prosecution that eight accused persons, namely, Prema, Khilan, Gaindalal, Sangramsingh, Durzan, Kashi Ram, Gyarsia Lal and Bihari had formed an unlawful assembly. They armed themselves with deadly weapons and assaulted Toophan Singh, in furtherance of their common object to kill him, in which they succeeded. It was stated by the complainant, Prabhulal (PW2) that on 8.12.1991 when he had gone to the fields to answer a call of nature, he heard the cries of his Mama, Toophan Singh, shouting "mar diya-mar diya". He went running to the spot and saw that accused Prema, Gainda and Khilan armed with farsas and Sangram armed with luhangi along with Durzan, Kashi, Gyarsia Lal and Bihari armed with lathis, were assaulting his Mama, Toophan Singh. As a result of the assault Mama, Toophan Singh, fell on the ground. When he tried to intervene the appellant, Prema exhorted the other accused to kill the complainant also. All the accused tried to catch him but he ran away and reached his home. After hearing about the assault from the complainant (PW2), Phool Singh (PW7) and two other persons, Meharban and Rajaram went to the spot. However, the assailants ran away. On an examination of Toophan Singh, they found that he had died. He had received deep cut wounds over his head and blood was oozing out of them. Sushila Bai who was working in the field is said to be an eye-witness of the assault. It is also the case of the prosecution that the Prema and his sons had a dispute over land with the deceased and his family. The incident was reported by Prabhulal, son of Anant C D E F G H

A Singh, on the same day at about 1300 hrs. On the information being received, Crime No.108/91 was registered at Police Station, Kachnar under Sections 147, 148, 302/149 IPC. Upon conclusion of the investigation charge sheet was filed and all the eight accused were sent up for trial. All the accused B pleaded not guilty. They all took up the plea that due to enmity, they have been falsely implicated.

5. Upon conclusion of the trial the Addl. Sessions Judge acquitted Durzan, Kashi Ram, Gyarsia Lal and Bihari of all the charges. Prema, Gainda Lal, Khillan and Sangram Singh were C convicted of murder of Toophan Singh under Section 302/34 and sentenced to life imprisonment and Rs.500/- each as fine. It was further directed that in case of default they would undergo a further sentence of two months R/I.

D 6. Aggrieved by the aforesaid judgment the present petitioners/appellants along with Sangram Singh challenged the same in appeal before the High Court.

7. The High Court upon re-appreciation of the entire E evidence upheld the conviction and sentence of the appellants, Prema, Khillan and Gainda. However, the conviction and sentence of Sangram Singh was set aside and he was duly acquitted.

8. Against the aforesaid judgments, Khillan and Gainda Lal F have filed the present appeal.

9. We have heard the counsel for the parties. Learned counsel for the appellant submitted that the prosecution version is inherently improbable. The evidence of the prosecution G witnesses suffers from inherent contradictions. According to learned counsel it is a clear-cut case of false implication due to old enmity between the twofamilies. The presence of PW2, Prabhulal, in the field at 10 am isquite unnatural and doubtful. According to the learned counsel, in villages people go for their H ablutions early in the morning when it issemi-darkness. Nobody

would be seen answering a call of natureat 10 am. In any event, the statements of this witness are contradictory. He claims to have taken a utensil with him to wash his face. There was no occasion for him to go to the field for washing his face as the houses of the parties were located in the fields and were very nearby. Learned counsel further submitted that on the basis of the same evidence four persons were acquitted by the Trial Court and one by the Appeal Court. Therefore, for the same reasons the appellants were entitled to the benefit of doubt and acquittal. Making detailed reference to the evidence of the witnesses for the prosecution, learned counsel submitted that there are different versions given by the prosecution witnesses. Learned counsel submitted that Toophan Singh could not have gone to the fields at 7 o'clock in the morning without wearing any warm clothes. He could not have been wearing only underpants in the month of December. Learned counsel further submitted that Toophan Singh had actually seen Sushila Bai in a compromising position with Baba. He was, therefore, attacked by Baba of Toarai. According to the learned Counsel, Toophan Singh actually died when the tractor in which he was being taken for treatment overturned.

10. Learned counsel further submitted that the complainant Prabhulal (PW2) had categorically stated his Mama, Toophan Singh, used to take the buffaloes to the fields for grazing every day. On 8.12.1991, he had also gone to the fields at about 7 am. He had further stated that his Mama used to go to the fields after drinking tea and return in the afternoon for lunch. According to the learned counsel if the deceased had gone after only drinking tea, he would not have had half digested food in his stomach. In the post mortem report, it is quite clearly stated that the stomach of the deceased contained half digested food. This could only be if the deceased had eaten about 3 to 4 hours before he died.

11. In order to discuss the entire evidence the Trial Court formulated three main issues which needed to be decided in the case.

A Issue No.1 is "whether on 8.12.1991 at 10 am Toophan Singh died and his death is homicide?" The Trial Court notices the evidence of Dr. Natwar Singh (PW1) who had conducted the post mortem on the deceased on 9.12.1991. This witness stated that the following injuries B were found on the deceased:-

(i) An incised chopped wound over mid of the scalp on both the mid parietal region centrally of shape "c", of size 5cm x 5 cm x upto brain cut (meningitis and brain matter) clotted C blood present.

(ii) An incised wound 2.5 cm x 1.5 cm x bone deep over right arm lower 1/3rd on lateral aspect obliquely.

(iii) An incised wound transversely oblique over mid of left D thigh on lateral aspect of (illegible).

(iv) An incised wound over left thigh middle 1/3rd on lateral aspect transversely 5 cm x 3 cm x muscle cut 1 x = below the injury no 3.

E (v) An incised wound over mid of left leg on ant. Aspect of size 3 cm x 1.5 cm x bone deep.

(vi) A contusion over left scrotum on anterior lateral aspect 5cm x 3cm."

F This witness was of the opinion that cause of death of Toophan Singh was due to shock as a result of hemorrhage caused by the aforesaid injuries.

12. The second issue framed by the Trial Court was G "whether all the accused armed with Farsas, Luhangi lathi and Lathi on 08.12.1991 at 10 AM in furtherance of common object and knowledge assaulted Tufan Singh in Village Aam Khera Patharia?"

13. Thereafter Trial Court evaluated the evidence of H

Prabhulal (PW 2), Shrilal (PW 4), Phool Singh (PW 7). Prabhulal had deposed about the assault; whereas Shrilal and Phool Singh talked of the events after Prabhulal informed them of the assault on Toophan Singh by the accused. The Trial Court noticed that there was hardly any credible evidence about the assault by Durzan, Kashi Ram, Bihari and Gyarsia Lal. Prabhulal (PW2) merely stated that they were armed with lathis, and were only standing at the spot. They did not participate in the crime. Therefore, they have been acquitted.

14. The Trial Court rejects the submissions on behalf of the defence that independent witnesses have deliberately not been examined. It is concluded that merely because of enmity between the two groups and the close relationship of the witnesses with the deceased the evidence of Prabhulal (PW2) Shri Lal (PW4) and Phool Singh (PW7) cannot be disbelieved. For accepting their evidence the Trial Court notices that the report was immediately lodged in which Prabhulal and Phool Singh was shown. Investigation was also immediately started. The Statements of Shri Lal under Section 161 Cr.P.C. were recorded on the same day. The three witnesses are consistent on the material facts of the incident. The ocular evidence is corroborated by the evidence of Dr. Natwar Singh (PW1) with regard to the nature of the injuries, time and cause of death. The injuries which were found over the dead body were mainly caused by sharp edged weapon which may be farsas as well as luhangi. The Trial Court then notices the submission that semi digested food had been found in the intestine, even though, Prabhulal (PW2) had stated that usually the deceased was taking tea in the morning. The Trial Court was of the opinion that Prabhulal (PW2) had merely stated that the deceased usually consumed tea only but there was no statement to the effect that on that particular day the deceased had not eaten anything else. The Trial Court thereafter notices the evidence of Sushila Bai (PW9). It is noticed since she did notsupport the prosecution case she had been declared hostile. The Trial Court disbelieved the witness since 5 incised injuries had been

A caused on the body of the deceased which could only have been caused by a sharp weapon. Sushila Bai had said that Baba had assaulted the deceased with a lathi. The defence version that Baba had assaulted Toophan, because Sushila Bai had been found in a compromising position with the Baba, was B disbelieved as no question was put to her on behalf of the accused when she was examined as PW 9. The Trial Court also concludes that the injuries on the deceased were not the result of the tractor turning turtle on he was being carried. According to Dr. Natwar Singh (PW1), there were five incised C injuries on Toophan Singh. Only injury No.6 could have been caused by a blunt weapon. The Trial Court also noticed that the weapons of offence had been recovered at the instance of the accused. On the basis of the above the Trial Court concluded that the four accused namely Prema, Khillan, Gainda and D Sangram Singh had inflicted the fatal injuries on the deceased.

15. The third issue framed by the Trial Court is whether on the aforesaid date, time and place the accused persons formed unlawful assembly to kill Toophan Singh with deadly weapons and using the force and aggressions committed while assaulting E Toophan Singh. In considering this issue the Trial Court has reiterated that the murder was committed by the accused Prema, Khillan, Gainda and Sangram Singh. It is also noticed that the participation of Durzan, Kashi Ram, Gyarsia lal and Bihari is not proved by their mere presence. These persons had F no intention to kill Toophan Singh nor had they formed unlawful assembly to kill him. From the above, it is quite evident that it was upon the thorough consideration of the evidence that the Trial Court has rendered its verdict.

G 16. In appeal the high court re-appreciated the entire evidence, even more elaborately. The high court had independently reached its conclusions. It is noticed that the medical evidence given by Dr. Natwar Singh clearly shows that the deceased had suffered five incised injuries. The injuries have resulted in the instantaneous death of Toophan Singh. The H

High Court reiterates the reason for disbelieving the testimony of Sushila Bai. On examination of the evidence given by Prabhulal it is noticed that PW2 had merely stated that his Mama goes to the fields in the morning after taking tea. He usually comes back to take lunch in the afternoon. The witness never stated that on that particular date also the deceased had only taken tea. No clarification with regard to this was sought from the doctor by either party. In any event this single factor would not be sufficient to falsify the evidence led by the prosecution. The High court also discarded the evidence of Sushila Bai on the ground that the identity of Baba has not been established There was only one injury on the deceased which could have been caused by a blunt weapon. Sushila Bai had insisted that Baba had assaulted the deceased with the lathi. The High Court also comes to the conclusion that merely because the witnesses had been closely related to the deceased and there is enmity between the families is no reason to discard the evidence which is consistent and is corroborated. The weapons have been recovered at the instance of the appellant. It is also concluded that Toophan Singh had died due to the cumulative effect of all the injuries which were sufficient to cause death in the ordinary course of nature. The aforesaid conclusion is also buttressed by the circumstance that Toophan Singh died immediately upon the injuries being inflicted. Therefore the High court had endorsed the approach of the learned Trial Court. Upon a close examination of the evidence of PW2 Prabhulal, the High Court came to a conclusion that the presence and participation of Sangram Singh in the crime was doubtful. It is observed that although the evidence of PW2, Prabhulal, and Shri Lal PW4 is consistent with regard to the role played and the weapons used by Prema, Gainda and Khillan. However it suffers from material discrepancies/ inconsistencies in relation to the role played and the weapons used by Sangram Singh. It is observed that the statement of Prabhulal is inconsistent with his statement during investigation under Section 161 of Cr.PC (Ex.D1). In the report Ex.P2 as well as in his statement under Section 161 of Cr.PC he has stated

A that Sangram Singh was carrying luhangi. However, in his statement he had changed his version and stated that he was carrying and used farsa. This apart during investigation luhangi was recovered and seized from his possession. Even Shri Lal PW4 has mentioned that Sangram Singh was having luhangi
B in his hand. Consequently he had been given been benefit of the doubt and acquitted.

17. From the above, it becomes quite evident that appreciation of the evidence by the courts below cannot be said to have resulted in grave injustice to the accused/appellants.
C The findings recorded by the trial court have been reaffirmed by the High Court on an independent appreciation of the evidence. In the absence of any infirmity either in the appreciation of the evidence or apparent miscarriage of justice, it would not be appropriate for this Court to interfere with the
D judgments of the courts below. Both the courts □have painstakingly examined the entire evidence led by the parties. Cogent reasons have been given in support of the conclusions reached by both the courts. In such circumstances this Court would be rather reluctant to intervene. Even though the powers
E of this Court under article 136 of the Constitution are very wide, but they are exercised only in exceptional cases where substantial and grave injustice has been done to the aggrieved party.

F 18. The scope and ambit of the power of this Court under Article 136 of the Constitution of India to interfere in findings of acquittal or conviction recorded by the courts below has been a subject matter of discussion in a number of decisions of this Court. We may notice here only three of the earlier judgments.
G In the case of *Arunachalam v. P.S.R. Sadhanantham* (1979) 2 SCC 297 this Court has observed as follows:

> "The power is plenary in the sense that there are no words in Article 136 itself qualifying that power. But, the very nature of the power has led the court to set limits to

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itself within which to exercise such power. It is now the well-established practice of this Court to permit the *invocation* of the power under Article 136 only in very exceptional circumstances, as when a question of law of general public importance arises or a decision shocks the conscience of the court. But, within the restrictions imposed by itself, this Court has the undoubted power to interfere even with findings of fact, making no distinction between judgments of acquittal and conviction, if the High Court, in arriving at those findings, has acted `perversely or otherwise improperly."

19. Again in the case of *State of U.P. v. Babul Nath* (1994) 6 SCC 29 this Court, while considering the scope of Article 136 as to when this Court may possibly upset the findings of fact, it is observed as follows:

"5. At the very outset we may mention that in an appeal under Article 136 of the Constitution this Court does not normally reappraise the evidence by itself and go into the question of credibility of the witnesses and the assessment of the evidence by the High Court is accepted by the Supreme Court as final unless, of course, the appreciation of evidence and finding is vitiated by any error of law of procedure or found contrary to the principles of natural justice, errors of record and misreading of the evidence, or where the conclusions of the High Court are manifestly perverse and unsupportable from the evidence on record."

20. The aforesaid two judgments along with some other earlier judgments of this Court were considered by this Court in the case of *Ganga Kumar Srivastava v. State of Bihar* (2005) 6 SCC 211. In paragraph 10 of the aforesaid judgment this Court culled out the principles emerging from the earlier decisions in the following words:

"(i) The powers of this Court under Article 136 of the

A Constitution are very wide but in criminal appeals this Court does not interfere with the concurrent findings of fact *save in exceptional* circumstances.

(ii) It is open to this Court to interfere with the findings of fact given by the High Court, if the High Court has acted *perversely or otherwise improperly.*

(iii) It is open to this Court to invoke the power under Article 136 only in very exceptional circumstances as and when a question of law of general public importance arises or a decision shocks the conscience of the Court.

(iv) When the evidence adduced by the prosecution fell short of the test of reliability and acceptability and as such it is highly unsafe to act upon it.

(v) Where the appreciation of evidence and finding is vitiated by any error of law of procedure or found contrary to the principles of natural justice, errors of record and misreading of the evidence, or where *the conclusions of the High Court are manifestly perverse and unsupportable from the evidence on record."*

21. We have been taken through the evidence in the present case by the learned counsel for the parties. We are unable to conclude that the appellants have been able to establish any exceptional circumstances or any miscarriage of justice which would shock the conscience of this Court. We are unable to conclude that the opinion expressed by the courts below was either manifestly perverse or unsupportable from the evidence on record. It is not possible for this Court to convert itself into a court to review evidence for a third time. In spite of the strenuous efforts made by the learned counsel for the appellants, we are of the considered opinion that the present case neither raises any exceptional issue nor has resulted in

miscarriage of justice. A

22. For the reasons stated above, the appeal is dismissed.

Criminal Appeal No. 1540 of 2008 -

B

1. We have earlier noticed in the judgment rendered in Criminal Appeal No.1348/2007 that the evidence of the prime witness, Prabhulal (PW2) in relation to Sangram Singh was inconsistent and contradictory in nature. There was a direct conflict in the evidence given by Prabhulal and Shri Lal (PW4). C There was also discrepancies in the statement made in Court and the statements made earlier during investigation as also in the report Ex.P2. Consequently the High Court has expressed an opinion that the presence and participation of Sangram Singh in the crime is doubtful. This being a possible D and a plausible view would not call for any interference in exercise of our jurisdiction under Article 136 of the Constitution of India.

2. In view of the judgment passed in Criminal Appeal No.1348 of 2007, this appeal is also dismissed. E

N.J. Reasons given for dismissal of the Appeals.