

NOUSHAD @ NOUSHAD PASHA AND OTHERS

A

v.

STATE OF KARNATAKA

(Criminal Appeal No.119 of 2013)

DECEMBER 03, 2014

B

**[FAKKIR MOHAMED IBRAHIM KALIFULLA AND
ABHAY MANOHAR SAPRE, JJ.]**

Penal Code, 1860 – ss.143, 147, 148, 448 and 302 r/w/ s.149 – Prosecution under – Of the appellants-accused (A-1, A-2 and A-3) alongwith 40 others – Conviction of 6 accused including the appellants-accused by trial court while rest of the accused acquitted – High Court confirmed conviction of the appellants-accused while acquitting the three accused – On appeal, held: In view of the conclusion by the trial court in respect of the eye-witnesses that they were unreliable and unbelievable, it would be unsafe to rely on them to confirm the conviction of appellants-accused – The High Court without assigning any reason perfunctorily held that they were believable, trustworthy and natural witnesses – Since the very version of the eye-witnesses resulted in acquittal of all the accused, for the very same reasoning, conviction of the appellants-accused also cannot stand – Conviction set aside.

C

D

E

Allowing the appeal, the Court

HELD: 1. The High Court has totally omitted to note relevant findings of the trial Court as regards the evidence of PWs-14, 15, 19, 24, 30, 43 and 44 by stating that there was no reason to disbelieve their evidence except that it suffered from little variations. The High Court without assigning any reason perfunctorily held that except minor variations those witnesses were eye witnesses and that their version was believable, trustworthy, natural which finding was not supported by any convincing reason. Thus, with reference to the so-called star witness PW-11 and the other so-called eye-

F

G

H

- A witnesses with reference to whom the trial Court has made it clear that they were all unreliable and unbelievable, it will be wholly unsafe to rely on such evidence in order to confirm the conviction imposed on A-1 to A-3. [Paras 36 and 37][518-D-H; 519-A-B]**
- B 2. Keeping in view the various factors stated by PW-11 (the star witness) and also as noted in the Exhibit P-18, the complaint, the mahazar as well as P-55 sketch read along with the version of PW-15, the evidence of PW-11 could not have been believed insofar as it related**
- C to the actual occurrence, which admittedly was taking place inside his banana shop, the length and breadth of it being 11 ft. x 8 ft. which place was admittedly surrounded by nearly 30 persons while 15 persons were stated to be inside the said shop of small size. It would**
- D have been next to impossible for PW-11 to have witnessed the actual occurrence that was taking place inside such a small place which was already occupied by 15 persons and surrounded by 30 others outside the shop, taking note of the fact that he was located in a**
- E place away from the shop. PW-11 was also not consistent with reference to the weapon stated to have been found in the possession of A-2 and A-3. A cumulative consideration of his version discloses that PW-11 could not have witnessed the occurrence as spoken to by him.**
- F Therefore, the evidence of PW-11 was full of inconsistencies and the trial Court as well as the High Court completely ignored such inconsistencies while holding the appellants guilty of the offence alleged against them. [Paras 32 and 35][516-C-F; 518-B-D]**
- G 3. Though the very version spoken to by the said witnesses persuaded the trial Court to acquit all other accused, except A-1 to A-5 and A-29 and the High Court to acquit A-4, A-5 and A-29, for the very same reasoning,**

**the conviction of A-1 to A-3 cannot also stand. A
Consequently, the conviction and the sentence imposed
on the appellants are set aside. [Para 38][519-C-D]**

**CRIMINAL APPELLATE JURISDICTION : Criminal
Appeal No(s). 119 of 2013.**

**From the Judgment and Order dated 01.03.2012 of the B
High Court of Karnataka at Bangalore in Criminal Appeal No.
787 of 2007.**

**Altaf Ahmad, Sr. Adv., E. C. Vidya Sagar, Ms. Bansuri
Swaraj, Ms. Jennifer John, Ms. Kheyali Sarkar, Advs. for the C
Appellants.**

**Parikshit Angadi, V. N. Raghupathy, Advs. for the
Respondents.**

**The Judgment of the Court was delivered by D
FAKKIR MOHAMED IBRAHIM KALIFULLA, J.**

**1. This appeal, at the instance of accused Nos.1 to 3 is
directed against the judgment of the Division Bench of the High
Court of Karnataka at Bangalore in Criminal Appeal No.787
of 2007 dated 01.03.2012 by which conviction and sentence E
imposed on the Appellants for offences under Sections 143,
147, 148, 448 and 302, Indian Penal Code (IPC) read with
Section 149 of IPC was confirmed.**

**2. The case of the prosecution was that the accused along
with 40 others formed themselves into an unlawful assembly F
with the common object of committing murder of the
complainant Mahadeva (PW-11) and the deceased Lingaraju
apart from committing other offences. It was alleged that with
the above common object of such assembly, they also hatched G
a criminal conspiracy prior to 3 p.m. on 13.02.1999 and all the
accused went to the shop of the deceased and the
complainant, committed trespass armed with deadly weapons
like swords, choppers, longs, clubs etc., with an intention to
kill them and intentionally committed the murder of deceased
Lingaraju by assaulting him all over his body with the use of H**

- A deadly weapons possessed by them and that when the deceased Lingaraju in his injured condition tried to escape and run away towards the police station, he was further assaulted by the accused by chasing him down. The deceased Lingaraju ultimately fell down with multiple severe injuries in front of Surya Prabha Hardware shop. Thereafter, the accused alleged to have run away from the scene with the weapons in different vehicles in different directions. When the victim Lingaraju was immediately shifted to the Government Hospital, he was declared dead on examination by the doctors.
- B
- C 3. Exhibit P-18 was the complaint which was lodged at 3.30 pm, while the occurrence was stated to have happened at 3 p.m. on 13.02.1999. Altogether 44 accused were proceeded against. In the course of trial, A-8 died. The trial Court convicted A-1, A-2, A-3, A-4, A-5 and A-29 and rest of the accused were all acquitted. The Criminal Appeal No.787 of 2007 was preferred by the present Appellants along with A-4, A-5 and A-29 while Criminal Appeal No.1775 of 2007 was preferred by the State of Karnataka. By the impugned judgment, the Division Bench of the High Court, while confirming the conviction and sentence imposed on the Appellants, allowed the appeal preferred by A-4, A-5 and A-29 and acquitted them of all the charges. As many as 49 witnesses were examined on the side of the prosecution.
- D
- E
- F 4. We heard Mr. Altaf Ahmad, learned Senior Counsel for the Appellants and Mr. Parikshit Angadi, learned counsel for the Respondent. Mr. Altaf Ahmad, learned Senior Counsel in his submissions stated that of the 49 witnesses, reliance was mainly placed upon PWs-11, 14, 15, 19, 24, 30, 42, 43 and 44 out of whom many turned hostile and quite a number of them were found to be chance witnesses and unreliable. PW-11 was relied upon by the prosecution as star witness who was the complainant himself and Exhibit P-18-complaint was lodged by him. Apart from PW-11, PWs-19, 30 and 32 were also claimed to be eye-witnesses. The learned Senior Counsel
- G
- H also submitted that no test identification parade was held.

According to him, though PW-11 was claimed to be an eye-witness along with PWs-19, 30 and 32, there were serious deficiencies in their evidence and, therefore, they cannot be accepted to have witnessed the occurrence even going by what they have deposed before the Court. The learned Senior Counsel also contended that going by the complaint Exhibit P-18, there were serious contradictions as compared to the oral evidence led before the trial Court and, therefore, the conviction of the Appellants cannot be sustained. The learned Senior Counsel contended that whatever reason which weighed with the Courts below for the acquittal of the other accused equally applied to the Appellants and consequently, they are also entitled for acquittal on the very same reasoning.

5. The learned Senior Counsel pointed out that what weighed with the High Court in confirming the conviction against A-1 were the evidence of PWs-11, 19, 42 and 44, which were found to be not trustworthy to confirm the conviction of A-4, A-5 and A-29 and in such circumstances, as the said evidence was *mutatis mutandis* applied to A-1 also, the conviction as against A-1 could not have been singled out for confirming the conviction. The learned Senior Counsel pointed out that similarly in respect of A-2, the High Court relied upon PWs-11, 14, 15, 24, 43 and 44 which again contained very serious infirmities in order to acquit the other accused by the trial Court and A-4, A-5 and A-29 by the High Court and consequently, the reliance placed upon those witnesses for convicting A-2 was not justified. The learned Senior Counsel further contended that the High Court relied upon PWs-11, 15, 19, 24, 30, 43 and 44 for confirming the conviction of A-3 and since the evidence of those witnesses were not sufficient for confirming the conviction of A-4, A-5 and A-29 and that their said evidence could not be relied upon for the conviction of the other accused, the confirmation of the conviction of A-3 alone by the High Court cannot be confirmed. The learned Senior Counsel in support of his submission took us through the contents of the complaint Exhibit P-18, the evidence of

A PWs-11, 19, 30, 32, 42, 44 and the sketch Exhibit P-55 to point out the serious discrepancies in their version which, according to him, could not have been relied upon by any stretch of imagination to support the conviction of the Appellants.

B 6. As against the above submissions, Mr. Parikshit
Angadi submitted that the evidence of PWs-11, 15, 32 and 44
who were eye witnesses to the incident were sufficient enough
to support the case of prosecution. The learned counsel
pointed out that PW-15 was truly an eyewitness as he was a
C hawker who was doing vending business of Bananas by
stationing his four wheeled pushing *Gadi* in front of Anjuman
complex building at Ambedkar Road opposite to which the
shop of the deceased was located. He also contended that
PW-44, who was also doing fruit business as a hawker in his
D four wheeled pushing *Gadi* in front of Dr. Mahadevswami Clinic
on the very same Ambedkar Road also witnessed the said
incident and that since they were regularly doing their vending
business on the said road opposite to the place of occurrence,
their version was rightly relied upon by the trial Court. The
E learned counsel further contended that PW-11 was able to
identify the Appellants by their names and his complaint Exhibit
P-18 was based on what he actually witnessed at the place of
occurrence and, therefore, the complicity of the Appellants in
the crime was established beyond reasonable doubt. The
F learned counsel for the Respondent State, therefore,
contended that the conviction and sentence imposed on the
Appellants by the trial Court and confirmed by the High Court
does not call for any interference.

G 7. Having heard learned counsel for the Appellants and
the Respondent, we wish to note the relevant provisions under
which the conviction was ordered by the trial Court in its
judgment dated 21.04.2007. In its ultimate conclusion, the trial
Court convicted A-1 to 5 and 29 for the offences under Sections
143, 147, 148, 448 and 302 read with Section 149, IPC. The
H said accused persons were acquitted of the offences

punishable under Section 120B and 153B read with 149, IPC. A
The High Court in the impugned judgment confirmed the above
said conviction of the Appellants while setting aside the
conviction relating to A-4, A-5 and A-29.

8. In the first instance, while considering the submission B
of learned Counsel, we want to note the finding of the trial Court
with reference to some of the witnesses who were relied upon
by the High Court while confirming the conviction of the
Appellants. Those witnesses were PW-11, 14, 15, 19, 24, 30,
42, 43 and 44.

9. Insofar as PW-19 was concerned, when we peruse C
the judgment of the trial Court, we find that in its conclusion the
said witness who was a chance witness has been held to be
wholly unreliable and unbelievable for stated reasons. In the
opinion of the trial Court, the said witness did not inspire D
confidence and, therefore, it was wholly unsafe to rely upon
the said witness. Having regard to the said categoric findings
of the trial Court that he was a chance witness and that his
evidence was wholly unreliable and unbelievable, the reliance
placed upon the said witness by the High Court for the guilt of E
A-2 cannot also be accepted. As far as the said witness was
concerned, the trial Court while considering his evidence has
specifically stated as under:

"therefore, the evidence of PW-19 given before the Court
by identifying A1, A3, A4 and A29 as the persons present F
in the said assembly, in absence of specific evidence
as to the carrying of or possessing deadly weapons with
them and assaulting the deceased with the said
weapons, do not appear to be reliable."

10. After stating so, the trial Court proceeded to state as G
under:

"therefore, the evidence of PW-19 do not inspire any
confidence, as it appears to be weak and unbelievable
as against all accused."

A 11. After arriving at the above conclusion as regards the
reliability of PW-19 in the very next passage, it proceeds to
state that the evidence of PW-19 was corroborated by the other
eyewitnesses as regards the presence and acts done in the
commission of crime by A-1, A-3, A-4, A-6 and A-29 and,
B therefore, though the evidence of PW-19 was not reliable as a
whole, his evidence insofar as identifying A-1, A-3 A-4, A-6
and A-29 as the persons present in the said assembly, was
believable as corroborative evidence. It must be noted here
C that for making such a sweeping and contradictory statement,
the trial Court has not adduced any convincing and cogent
reasons to substantiate its conclusion. When we consider the
said conclusion of the trial Court, it must be stated that such a
conflicting conclusion reached by the trial Court without any
strong convincing reason will be wholly unsafe and it would be
D dangerous to accept such a blank conflicting conclusion for
returning the finding of guilt. When once the trial Court finds
that the evidence of a particular witness was unreliable and
unbelievable, we fail to understand as to how the said Court
can in the same breath state that such an unreliable and
E unbelievable version can be accepted as a corroborative
piece of evidence to prove their complicity in the commission
of the crime.

12. Therefore, once the trial Court arrived at the
conclusion that the evidence of PW-19 was unreliable and
F unbelievable, it cannot subsequently turn around and state that
such an unreliable and unbelievable version can be supportive
of the version of other witnesses and that too without assigning
any convincing reasons. It does not appeal to any logic or
reason for us to accept such a conclusion. Therefore, that part
G of the analysis made by the trial Court by which it reached the
conclusion that PW-19 was an unreliable and unbelievable
witness, should go to the benefit of the accused. In the said
circumstances, the reliance placed upon by the High Court on
PW-19 to confirm the conviction of A-1 and A-3 cannot also
H be accepted.

13. Further the trial Court while referring to the evidence of PWs-19, 24, 30 and 43 stated that all of them were chance witnesses since they had gone to the place of incident on the date of occurrence and time by chance in connection with their personal work or business. Therefore, when PW-19 was a chance witness and in the conclusion of the trial Court he was an unreliable and unbelievable witness, it will lead to a travesty of justice if the version of the said witness is to be relied upon to support the guilt of A-1 and A-3.

14. When we come to the evidence of PW-24 whose version was relied upon to support the guilt of A-2 and A-3, the trial Court while examining his evidence stated as under:

"PW-24 specifically stated that, before giving statement to police he had ascertained the names and addresses of such persons known to him by face from the radio repairer, by going to his shop and by giving him the factual identity and their professions within two minutes of the incident. This version of PW-24 appears to be exaggerative and therefore do not inspire any confidence. Hence renders unreliable as against all the accused whose names he has referred in his statement before the police"

(underlining is ours)

15. PW-24 had referred about A-1 to A-4, A-29 and A-44. The trial Court having analyzed his evidence had come to the above conclusion. Admittedly, he was not knowing the names of any of the accused persons. To support his stand that he saw A-1 to A-4, A-29 and A-44 he claimed that before giving his statement to the police, he contacted a nearby shop owner who was also a Muslim and through whom he ascertained the names of those individuals and that such ascertainment was made within a short span of two minutes and that is how he was able to identify those accused persons. The trial Court, under this circumstance, had rightly concluded that such a claim of PW-24 was highly exaggerative and, therefore, the same cannot be relied upon.

A 16. After reaching the above conclusion, here again the
trial Court took a contrary conclusion that his evidence as
against A-1 to A-4 and A-29 was acceptable as a
corroborative piece of evidence of other eye-witnesses. Such
B a conclusion is diametrically opposite to its own earlier
conclusion that PW-24 was not knowing any of the accused
referred to by him on his own. The said contrary conclusion of
the trial Court is, therefore, liable to be rejected, in which event
there was no scope to rely upon the evidence of PW-24.
C Consequently, the reliance placed upon PW-24 by the High
Court for confirming the conviction of A-2 and A-3 cannot be
accepted.

17. When we come to the evidence of PW-30, as stated
earlier, PW-30 was also found to be a chance witness as he
had gone to the place of incident on the date of occurrence
D and time by chance in connection with his personal work or
business. As regards his evidence, after a detailed reference
to his version, the trial Court has concluded as under:

E ".....But, the said witness nowhere stated for having
seen any of the accused referred to by him in his
statement assaulting the deceased with any weapon
alleged to be possessed by him, either inside the shop
of the deceased or on the road by chasing. Therefore,
F the evidence of PW-30 which is self contradictory cannot
be relied upon as a whole, except the evidence stated
about presence of accused No.3, 4 and 29 at the said
place, which is corroborated with evidence of other
independent eye witnesses....."

G 18. When the said conclusion arrived at by the trial Court,
relating to PW-30 that he was a chance witness and that his
version was self-contradictory and, therefore, not reliable, his
version about the presence, in particular of A-3 with whom we
are presently concerned, cannot also be adverted to inasmuch
as A-3 has otherwise been held to have been directly involved
H in the commission of the crime, namely, inflicting of injuries on

the person of the deceased Lingaraju. Such act of inflicting of injuries was stated to be inside the shop of the accused, which was already surrounded by nearly 35 to 40 persons as stated by PW-11. Therefore, there was no scope for placing any reliance upon PW-30 as well, either by the trial Court or by the High Court to confirm the conviction of A-3. A B

19. The next witness which has been referred to and relied upon by the High Court in the impugned judgment as against A-1 and A-3 was PW-43. In fact, with reference to PW-43, the conclusion of the trial Court as against him was highly derogatory. In paragraph 18 of the trial Court judgment, the nature of evidence rendered by PW-43 has been mentioned and it has been observed as under: C

"PW-43 also stated that he was working then in Pandavapur and used to visit Kollegal once in a week. Therefore, the chance of witnessing of such incident by being present at the said place, time and date by PW-43 appears to be doubtful and the evidence of PW-43 given by identifying all the accused persons as the persons and members of said group which fled away from the said place appears to be an exaggeration, when as admitted by said witness in cross-examination that he had never seen any of the accused before that day." D E

(Underlining is ours)

20. When such is the caliber of the witness, namely, PW-43 and his version relating to the occurrence, we fail to understand as to how the High Court was able to rely upon the said witness in order to find the guilt as against A-2 and A-3. F

21. The next witness who was relied upon by the High Court was PW-44 as against all the three Appellants, namely, A-1 to A-3. It was startling to note that with reference to the said witness, the trial Court has remarked that his version was contradictory in material aspects as against the case of the prosecution which was otherwise claimed to be supported by the other eye-witnesses. Therefore, the version of PW-44 was G H

23. After such a categoric conclusion relating to the unreliability and suspicious version of PW-14, the trial Court in one breath concluded that his evidence, as regards the presence and acts of A-2 and A-4 done in commission of the offences, is considered for corroboration with evidence of eye witnesses, along with the prosecution witnesses examined as eye witnesses to the incident. In the light of the earlier detailed reference to the nature of evidence tendered by PW-14 along with PWs-5 and 13 and the ultimate conclusion of the trial Court in having held that their evidence was unreliable, unbelievable and suspicious, it was wholly improper on the part of the trial Court to ultimately state without any justifiable reason that their version can be accepted for corroboration. Therefore, the reliance placed upon the said witness, namely, PW-14 both by the trial Court as well as the High Court cannot be accepted.

24. When we come to the evidence of PW-15, as noted by the trial Court, he used to sell bananas by stationing his puller *Gadi* in front of Anjuman Complex on Ambedkar Road and that he saw 40 to 45 persons going towards the shop of the deceased armed with knives, choppers and swords. He further stated that out of the said group, 15 persons trespassed into the shop of the deceased while around 20 persons were standing outside the shop. He stated that those who trespassed into the shop assaulted the deceased Lingaraju with choppers, knives, longs and swords all over the body (viz.) chest, neck, left hand, back etc. Significantly, he also stated that when he saw the deceased Lingaraju escaping from the shop and running towards the police station, he collapsed in front of Surya Prabha Hardware shop and at that point of time, PWs-11 and 24 were running towards that spot. The trial Court has also specifically noted that the version of PW-15 in the course of the cross examination that PW-11 arrived at the place of occurrence only after the fall of the deceased near the hardware shop was contrary to the version of PW-11. The trial Court, therefore, stated that if the said statement of PW-15 is to be believed, then the evidence of PW-11 would be unreliable

A as regards his witnessing the incident of assault of the deceased inside the shop, as well as, outside the shop. The above factors, therefore, disclose that the evidence of PW-15 and PW-11 are self contradictory in nature.

25. When we analyse the evidence of PW-15 vis-à-vis the evidence of PW-11, we are convinced that the version of both the said witnesses cannot be relied upon for reaching a definite conclusion as to the guilt of the accused, in particular, the Appellants herein. Moreover, admittedly PW-15, the deceased and PW-11 are closely related. The trial Court has also held that the version of PW-15 that he saw A-6 present in the group of 15 persons who trespassed into the shop of the deceased and assaulted him was contrary to the prosecution story and the evidence of other eye witnesses. Admittedly, no weapon was recovered at the instance of A-6, while according to PW-15, A-6 was not only in possession of a weapon but also used it in the commission of the offence. In the light of the above analyses made by the trial Court as regards the version of P-15, which consists of very many incongruities relating to the factum of occurrence, the presence of witnesses and the overt act alleged against some of the accused, it will be highly unsafe to place reliance upon the said witness as regards the guilt of the Appellants/Accused.

26. Having noted the above features relating to PWs- 14, 15, 19, 24, 30, 43 and 44, we are left with the so-called star witness, namely, PW-11 who was none other than the elder brother of the deceased Lingaraju. Since, the prosecution heavily relied upon the said witness, it is necessary to examine the version spoken to by the said witness in some details as regards the motive, the place of occurrence, the manner in which the act was said to have been committed by the various accused, his claim about his presence at the place of occurrence and also the extent of the overt act attributed to different accused including the Appellants and the subsequent conduct of the said witness. After making reference to these factors as narrated by him in his evidence as well as noted by

the trial Court in its judgment, it can be examined as to whether the heavy reliance placed upon the said witness can be held to be justified. A

27. In order to analyse the evidence of the said witness in the first instance, the location where the occurrence took place as spoken to by PW-11 in his complaint and as to how many of the accused according to him were involved in the commission of offence has to be noted. The complaint is Exhibit P-18. The sum and substance of the contents in the said document was that on 13.02.1999 at about 3 p.m. when PW-11 was coming from Shringar Hotel after taking coffee towards his shop, noticed all of a sudden that about 15 persons trespassed into his shop and assaulted his younger brother Lingaraju, the deceased with knife, choppers and the like mercilessly on his body, back, neck and leg etc. and that while he was proceeding towards the place of occurrence, simultaneously screaming, all the accused persons ran away from the shop proclaiming that their vengeance was fulfilled and that the deceased was murdered. He also stated that, while so, his younger brother, namely, the deceased was running towards the police station from the shop and fell down near the old post office. He, however, stated that from among the accused persons who were running away he could note the three Appellants and that he did not know the names of the other persons, though he would be in a position to identify them if he gets an opportunity to see them. B C D E F

28. Keeping the said version of PW-11 immediately after the occurrence in mind, when we examine the mahazar prepared at the place of occurrence, it has been noted therein that the place of occurrence pointed out by PW-11 was situated inside the banana shop of PW-11 himself. The size of the shop was described as North-South 11 feet and East-West 8 feet with Mangalore tiled roof top. A cement platform of 3 feet width and 2½ feet height with 9 feet length was stated to be there in front of the said shop. The mahazar also mentions that the occurrence took place at the time when the deceased was G H

- A carrying on his business activity of selling bananas inside the South-East corner of the said shop. Again keeping the above specific particulars noted in the mahazar based on the instructions given by PW-11, it will be necessary to note the place where PW-11 was taking coffee, namely, Shringar Hotel,
- B vis-à-vis the exact place where the deceased fell down after he was allegedly assaulted by the accused inside the shop and the approximate distance as between the shop of PW-11, namely, where the deceased was carrying on the business of selling bananas and the place where the deceased fell down
- C by referring to the sketch mark, namely, Exhibit P-55 before the trial Court.

29. The above mentioned sketch discloses that the banana shop of PW-11 was situated on the eastern side of the main road called Ambedkar Road while the Shringar Hotel

D was on the western side i.e. on the opposite side where the banana shop was located. The distance approximately stated to be around 150 feet. PW-11 claimed that when he was returning from Shringar Hotel after taking coffee and was approaching near the Mahadevswami Clinic, he noticed the

E crowd which was assembled in front of his banana shop. As per the Exhibit P-18 complaint, he noticed not less than 15 persons who trespassed into his shop. Before the Court, he stated that when he was returning back from Shringar Hotel along with his friend Parmesh near Geeta Bhawan Hotel, he

F saw a group of about 40 to 45 persons who were coming from Nalanda Gas Agency in front of his banana shop and from among them, 15 persons were shouting "*Mar do Mar do*" who were holding two swords like long, axes and small knives in their hands. He also narrated that the deceased Lingaraju was

G alone in the shop and the mob went inside the shop and assaulted him with the said weapons. Considering the said version of PW-11, in contrast to the version of PW-15 who was stated to be present even before the occurrence took place, PW-15 stated in clear terms that when PW-11 arrived,

H

the deceased had already left the Banana shop running towards the Police Station and fell down in front of Surya Prabha Hardware shop. A

30. When we examine the deposition of PW-11, the relevant factors to be noted are that his banana shop was situated near Geeta Bhawan on Ambedkar Road, that Surya Prabha hardware shop where the deceased ultimately fell down was at a distance of 140-150 feet from his banana shop. The Shringar hotel where PW-11 was taking coffee was situated in a lane and that while he was returning from the said hotel after taking coffee he saw 35-40 persons surrounding his shop and 15 persons forcibly entered his shop armed with axe, knife and long (meaning a long knife) who were assaulting the deceased Lingaraju. According to him, after the deceased was attacked inside the banana shop, he somehow escaped and was running towards the police station after crossing Geeta Bhawan and near Surya Prabha hardware shop where he collapsed and fell down. B C D

31. He would state that A-1 who was present and who assaulted his deceased brother was holding an axe, that A-2 who was assaulting his deceased brother was holding a long (meaning a long knife), that A-3 was assaulting his deceased brother with a long and A-29 was also assaulting his deceased brother with a sword. After saying so, in the later part of his evidence, he stated without any ambiguity that M.O.5 sword, which was shown to him in the Court was found in the hands of A-3. He also stated that the axe shown to him marked as M.O.19 was in the hands of A-2. However, he stated that it was not possible for him to state the weapons held by any of the accused by identifying the same. He went on to state that his younger brother i.e., the deceased was assaulted inside the shop with the aid of long axe, knife that all the remaining accused who were 35-40 in number, were standing outside the shop shouting 'maro maro' and that when his brother was attempting to escape from the shop the assault continued. He would further state that when he saw 15 persons entering his E F G H

- A shop and another group of 30 persons standing outside his shop, he was frightened by such a large group formed outside his shop and that he could see his brother who was standing in front of his shop in order to escape from their clutches, running towards Surya Prabha hardware shop. He also stated that after seeing the assault made by the persons in the group on his younger brother, he did not run towards his shop but ran towards Surya Prabha hardware shop where his brother fell down.

32. Keeping the various above factors stated by PW-11 and also as noted in the Exhibit P-18, the complaint, the mahazar as well as P-55 sketch read along with the version of PW-15; it will have to be stated that PW-11, who was taking coffee in Shringar hotel, which was located in a lane situated beyond Surya Prabha hardware shop, even by accepting the fact that he was approaching near Mahadevswami Clinic, which was in between the said Shringar hotel and his banana shop, the evidence of PW-11 could not have been believed insofar as it related to the actual occurrence, which admittedly was taking place inside his banana shop, the length and breadth of it being 11 ft. x 8 ft. which place was admittedly surrounded by nearly 30 persons while 15 persons were stated to be inside the said shop of small size. We say so because it would have been next to impossible for PW-11 to have witnessed the actual occurrence that was taking place inside such a small place which was already occupied by 15 persons and surrounded by 30 others outside the shop, taking note of the fact that he was located in a place away from the shop near Mahadevswami Clinic.

33. It is necessary to examine and find a definite answer to the said question in the light of various allied facts with reference to the number of persons, the place from where he was witnessing such an assembly, the nature of movement of the persons gathered in front of his banana shop, his own statement that he was frightened while looking at such a large group of persons and that even according to him he saw his

brother running away from the shop with a view to escape and that he did not run towards the shop but was eager to follow his brother who was running towards Surya Prabha hardware shop where he ultimately fell down and collapsed. In this context, the evidence of PW-15, another so called eye witness, was very categoric to the effect that when PW-11 came to the spot, the deceased had already reached Surya Prabha Hardware Shop where he collapsed. A
B

34. It was beyond controversy that the actual occurrence of assault on the deceased Lingaraju took place inside the banana shop, the area of which going by the description, could not have been beyond 90-100 sq. feet. If inside such a small place assuming 15 persons had entered and by the time PW-11 was approaching near the Mahadevswami Clinic, the occurrence had already taken place, it would have been next to impossible for anyone, much less PW-11 to have gone inside the shop and to have noticed as to who was assaulting the deceased with what weapon. While looking at the place of occurrence, even if it is from a nearby place, when the particular place of occurrence was surrounded by not less than 35-40 persons of whom 15 persons stated to have already entered the place of occurrence, the scope for PW-11 to have witnessed the incident with that much of exactitude, as to which accused assaulted his brother with what weapon in his hand cannot be said to have been really witnessed by him. That apart, even by his own version he saw his deceased brother coming out of the shop and trying to escape from the assault of persons gathered there who continued to inflict injuries on him and on seeing his brother running towards the police station, which was beyond Surya Prabha hardware shop, PW-11 himself instead of going towards the shop was following his injured brother who fell down near Surya Prabha Hardware and collapsed. The said part of his evidence is consistent with the evidence of PW-15. C
D
E
F
G

35. Apart from the above inconsistencies which could be gathered from the evidence of PW-11, his specific overt H

A act as against A-3 that he was holding a long in his hand, was
falsified by his own statement while identifying M.O.5, which
was a sword which he stated was found in the possession of
A-3. Similarly, with reference to A-2 while in the earlier part of
B with the aid of a long (a long knife) when he identified M.O.-18,
he stated that it was the said axe which was found in the hands
of A-2. Here again, PW-11 was not consistent with reference
to the weapon stated to have been found in the possession of
C A-2. and A-3. A cumulative consideration of his version
discloses that PW-11 could not have witnessed the occurrence
as spoken to by him. We, therefore, find that the evidence of
PW-11 was full of inconsistencies and unfortunately the trial
Court as well as the High Court completely ignored such
D inconsistencies while holding the Appellants guilty of the offence
alleged against them.

36. As has been narrated in the earlier part of this
judgment, the High Court placed reliance upon PWs-11, 14,
15, 19, 24, 30, 43 and 44 to hold that the offence as against A-
1 to A3 was sufficiently established. When we peruse the
E judgment, we find that the High Court seemed to have totally
omitted to note relevant findings of the trial Court as regards
the evidence of PWs-14, 15, 19, 24, 30, 43 and 44 by stating
that there was no reason to disbelieve their evidence except
that it suffered from little variations. On the other hand, as has
F been noted by us, by extracting the relevant part of the findings
of the trial Court wherein the trial Court has given categoric
finding with reference to each of the above said witnesses,
that many of them were chance witnesses and were not able
to give a real picture of what transpired in the place of
G occurrence because of glaring inconsistencies in their evidence
and, therefore, their evidence was totally unreliable and
unbelievable. Unfortunately, the High Court without assigning
any reason perfunctorily held that except minor variations those
witnesses were eye witnesses and that their version was

H

believable, trustworthy, natural which finding was not supported by any convincing reason. A

37. Having regard to the above analysis made by us with reference to the so-called star witness PW-11 and the other so-called eye witnesses with reference to whom the trial Court has made it clear that they were all unreliable and unbelievable, it will be wholly unsafe to rely on such evidence in order to confirm the conviction imposed on A-1 to A-3. B

38. For the above stated reasons, we find force in the submission of Mr. Altaf Ahmed, learned Senior Counsel that though the very version spoken to by the said witnesses persuaded the trial Court to acquit all other accused, except A-1 to A-5 and A-29 and the High Court to acquit A-4, A-5 and A-29, for the very same reasoning, the conviction of A-1 to A-3 cannot also stand. Consequently, the appeal is allowed. The conviction and the sentence imposed on the Appellants are set aside. The Appellants shall, therefore, be set at liberty forthwith unless their detention is required in any other case. C D

Kalpana K. Tripathy

Appeal allowed.