Gulab Vs. State

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Court : Allahabad

Decided On : Oct-04-1950

Reported in : AIR1951All660

Judge : Sankar Saran, ;Harish Chandra and ; Bind Basni Prasad, JJ.

Acts : Indian Penal Code (IPC), 1860 - Sections 34, 84 and 149; Code of Criminal Procedure (CrPC) , 1898 - Sections 423(1)

Appeal No. : Cr. A. No. 611 of 1949

Appellant : Gulab

Respondent : State

Advocate for Def. : D.G.A.

Advocate for Pet/Ap. : Vishwa Mitra, Adv.

Judgement :

Sankar Saran, J.

1. The following two questions have been refd. to us by a Bench for our decision :

'1. An act is alleged to have been committed by & number of specified persons, five or more in number, in furtherance of the common intention of all of them. They are prosecuted for rioting & for the commission of the alleged act in view of the

provisions of Section 149, Penal Code. The Ct. acquits all except the applt. giving them the benefit of the doubt. At the same time its definite finding is that the applt. was associated with some at least of those acquitted persons in the commission of the alleged act. It accordingly convicts the applt. of the commission of the alleged act applying the provisions of Section 34, Penal Code. Can such conviction be upheld ?

'2. Whether in such a case it is open to the appellate Ct. to find, there being no Govt. appeal against the acquittal of such acquitted persons, that, although it cannot interfere with such acquittal, each persons or some of them had been wrongly acquitted & had in fact taken part in the commission of the alleged act in assocn. with the applt. & on this ground hold that the applt. was rightly convicted ?'

2. The facts of the case so far as they are necessary for the purposes of this reference very briefly are that a serious riot took place in which one Bhoja lost his life & several persons received grievous & simple hurts. Fifteen persons were on their trial, some Under Section 147 & Section 302 read with Section 149, I. P. C. & others Under Section 147 & Sections 323 & 324 read with Section 149, I. P. C. The learned Ses. J. however, acquitted all of them except one man Gulab whom he convicted of an offence Under Section 302 read with Section 34, I. P. C. In doing so he came to the following finding :

'There is no doubt that Gulab who had been named by all the prosecution witnesses was certainly one of the assailants. His name was mentioned on the first opportunity in the telegram given by Banwari soon after the assault. In my opinion, the prosecution witnesses's evidence about the participation of Gulab accused in assaulting Bhoja must be believed. I find that Gulab was one of the assailants of Bhoja.'

3. The learned Ses. J. gave the other applts. the benefit of doubt & observed as follows :

'The result is that it has not been possible for the prosecution to conclusively prove who were the other associates of Gulab, but there is no doubt that there were such associates since Gulab had only a sword & there were only two injuries on the

person of the deceased which could have been caused by such a weapon & which were not mainly responsible for his death. The wounds with the sword were not sufficient to cause by themselves his death, which was caused by multiple injuries inflicted on him by Gulab & others. The question, therefore, is what offence has been committed by Gulab. He cannot be said to have committed an offence Under Section 302, I. P. C. alone since the injuries caused by him were not in themselves sufficient to cause the death of Bhoja, but if it is proved that he was a member of an unlawful assembly the common object of which was to beat Bhoja & Bhoja was killed by the unlawful assembly or any member thereof in prosecution of that common object, Gulab is certainly guilty of an offence Under Section 302, I. P. C. read with Section 149, I. P. C. However it has not been possible for me to come to a definite conclusion that the other associates of Gulab were at least four in number. In the absence of such evidence it cannot be said that there was an unlawful assembly & Gulab was a member thereof.'

4. For the conviction of .Gulab, however, the learned Ses. J. came to the following conclusion ;

'In my opinion, therefore, the death of Bhoja was due to his beating by Gulab & his confederates who had a common intention to cause his death or to cause such 'bodily injuries to him as were likely to cause his death, He is, therefore, guilty Under Section 302, I. P. C. read with Section 34, I. P. C.'

5. The findings in this case amount to this that Gulab was certainly in the fight in which more persona than one participated. The number of the participants might or might not have been five. Section 147, I. P. C. cannot apply unless it can be established that the participants were five or more in number, but Section 34 would apply if the finding of the Ct. that including Gulab there were persons more than one in the fight & that death was caused in furtherance of the common intention of them all, is correct. As the learned Ses. J. has acquitted the applt. of an offence Under Section 147, all we are concerned with is the question of applicability of Section 34 on the findings arrived at by him.

6. This case would have presented no difficulty upon the authorities had not all the participants in the fight been named. If there were some unspecified persons in the

fight, the position would have been simple & it could have easily been held that Gulab along with certain unknown persona was responsible for the offence. In this case, however, the position is that all the participants were named & the learned Ses. J. has not been able to find as a fact which of those named persons barring Gulab were actually engaged in the fight. That Gulab had companions who participated in the fight has been found by the Judge, but he is not able to make up his mind as to who they were. It is a case where the Judge has not held that the prosecution evidence with regard to the complicity of the persons named is disproved. All that he has found is that the case against the individual accused persons whom he has acquitted is net proved. Had the Judge said that these persons were not there, the position would have been different. He has, however, held that it is doubtful whether they were there. In these circumstances it cannot be asserted that these men were not in the fight. The effect, of course, of the acquittal is that they are not guilty, but I am unable to subscribe to the view that they can be said to be wholly innocent.

7. It frequently happens that in a Ct. of law an accused person is acquitted 'without a stain on his character. On the other hand, there are acquittals in which it is held that 'upon a consideration of all the circumstances it is safe to give the accused the benefit of doubt.'

8. Our attention has been invited to a few English & Indian cases on the subject. The latest is an unreported case of this Ct., Gumani v. Rex, Cri. Appeal No. 413 of 1949, in which there was a difference of opinion between the learned Chief Justice & Dayal J. The case was refd. to me & I adopted with approval a passage from the judgment of the learned Chief Justice upon which I shall rely. The passage is reproduced below :

'Where the prosecution has mentioned the names of all those who formed an unlawful assembly & the Ct. is satisfied that 'only some of them, less than five, are guilty & the rest are not guilty, then Sections 147 & 149 cannot be applicable. If, however, the Ct. is satisfied as regards the identity of some, but is not able to fix the identity of the others, though it is satisfied on the evidence that there were more than five persons, to my mind, to such a case also Sections 147 & 149 would

be applicable.'

9. The controversy has arisen in this Ct. on account of an apparent difference of opinion between the judgments of this Ct. in Sadho v. Emperor, (1934 A. L. J. 640) and Ram Rup v. Emperor, (1944 A. L. J. 447). The facts in both the cases were similar in that in both cases all the assailants had been specified & in neither case was it said that there were any persons other than those who had been recognised or identified in the riot. In Sadho's case Bajpai J. expressed himself in a very general manner & observed as follows :

'If the finding of the learned Judge is that more than five persons on each side took part in the riot the mere fact that on the evidence he is not able to convict five persons on each side could not result in the acquittal of the convicted persons also Under Section 147, I. P, C. The finding in the present case undoubtedly is that there were more than five persons on each side.'

In the latter case Waliullah, J., laid emphasis on the fact that the assailants seven in number had all been named & he came to the following conclusion :

'.....it is impossible to hold on the one hand, that five of the accused persons who were acquitted by the learned Ses. J. were not guilty of the offences charged & at the same time to hold that these very five persons were in a sense participating in the crime.....To my mind it would be utterly illogical & also unsound in law to hold that the other five men were not guilty of the offences charged but they were there for a subsidiary purpose, mainly for the purpose of convicting the remaining two of the riots & of the offence of simple hurt u/s. 323 read with Section 149, I. P. C.'

The learned Judge consd. a Bench case of this Ct. Emperor v. Ramadhin (A. I. R. (18) 1931, ALL. 439) & distinguished that case from the one which he was considering. In Ramadhin's case the evidence disclosed that in addition to the men who were actually on trial, there were others, known or unknown, who were not before the Ct. & it was held that in such circumstances the conviction u/s. 147 would be permissible.

10. As I have pointed out above, the fact that all the assailants had been named was not brought out in the judgment of Bajpai J. When he laid down the general proposition of law quoted above. His decision was more on the lines of Ramadhin's case, although that case was not mentioned by the learned Judge & he did not consider the distinction which has been pointedly brought out in the judgment of Waliullah J. The proposition of law laid down in Ramadhin's case has not been disapproved by Waliullah J. & one might, therefore, say that there is no vital difference between the earlier case of Sadho decided by Bajpai J. & the later case of Ram Rup decided by Waliullah J.

11. These two cases have; however, been discussed at length in Harchanda v. Rex, 1950 A.L.J. 220 where, upon a difference of opinion between Dayal & Agarwala JJ., the ease was refd. to Wanchoo J. In this ease seven persons were charged for offences, Under Section 148 & 302 read with Section 149, I. P. C. It was not the prosecution case that there were any unidentified persons amongst the assailants. The learned S. J. had given the benefit of doubt to five accused & convicted the two applts. Under Section 302 read with Section 34, I. P. C. Dayal J. also in discussing the case of Sadho v. Emperor (ubi supra) & Ram Rup v. Emperor (ubi supra) does not seem to have found much of a contradiction between these two cases. Referring to Sadho's case he observed.

'It was held that if the Ct. finds that there were at least five persons who took part in the transaction, the Ct. can still record a finding of conviction Under Section 147 against such persons who are proved to have taken part in the incident even if the number of such persons be less than five & the number of persons who have taken 'part in the incident was limited, & after giving the benefit of the doubt to certain people, the number left becomes less than five. It is unnecessary at this stage to say anything about the correctness of this view. There is nothing wrong with this view if it be practically possible for a Ct. to find as a definite fact that though persons less than five in number have been proved to have taken part in the incident & that the case against the others of having taken part in the incident is doubtful, yet it feels satisfied that at least five persons had taken part in that incident. As pointed out in the 1944 case, there is soma illogicality in convicting persons less than five for am offence of riot, if the remaining persons alleged to

have taken part in the- incident have been acquitted. It will, however, to my mind, be a greater illogicality if the convicted persons be held to be the only assailants & yet beheld not to have caused all the injuries merely because the prosecution witnesses alleged the causing of certain, injuries to have been by such persons who have been acquitted. I am, therefore, of opinion that whatever line of reasoning be adopted, the practical view to which I find no legal objection is that in cases like the one before us the convicted persons must be held to be responsible: for the result of the injuries which are alleged to have been caused by the persons who had been acquitted '

Agarwala J. on the other hand was of the opinion that the learned Ses. J. had not held that

'the incised wounds were caused by one or the other of the five accused acquitted by him. Although it is true-that the learned Ses. J. does not definitely say, in so many words, that none of the five persons were responsible for the injuries yet he clearly envisages the possibility of none of them having been so responsible & definitely came to the conclusion that the two applts, were responsible for all the injuries.'

Having expressed himself thus, the learned Judge went on to observe that inasmuch as no Govt. appeal had been filed against the acquittal of the other accused:

'Therefore, we have to take the findings of the learned Ses. J., so far as those five accused are concerned, as correct.'

He has emphasised this fact by subsequently again referring to it in his judgment in the following terms:

'Having regard to the fact that there is no appeal against the acquittal of the other five accused before us & having regard to the fact that we cannot interfere with the finding of the learned Ses. J. so far as it concerns those accused, we cannot hold that either Durga Das or Sukhoir was responsible for inflicting the incised wounds: & since it was not the prosecution case that there was some unknown persons

along with the accused, who was also holding a sharp-edged weapon, we cannot ascribe the infliction of the incised wounds to some such unknown person.'

The learned Judge went on to observe as follows:

'When the evidence on the record is conclusive-against an accused, we hold that he is guilty. When it is conclusively in favour of an accused, & also when it is inconclusive-neither conclusive this way or that-in both cases we hold the accused 'not guilty'& acquit him. When there is a verdict of not guilty of acquittal, an accused person is entitled to say that he must be presumed to be absolutely innocent whatever be the nature of the finding. Unless it can be conclusively established against an accused that he is guilty, lie is entitled to be pro claimed free from blemish & his honour cannot be sullied by any suspicion on Ct.'s mind. Thus in the present case each of the five acquitted persons can say, 'I did not participate in the assault & I am innocent.' If each one of thorn can say that, it cannot be held that some one or more of them were participants in the crime. The applts. cannot be held guilty for the action of some one or more of these five acquitted persons, in the face of the verdict of not guilty & acquittal of every one of those five persons.'

In support of his view the learned Judge placed reliance upon certain English cases. He reld. particularly upon a dictum of Bruce J. in King v. Plummer, (1902) 2 K. B. 839, which runs as follows:

'As to the note by Mr. Greaves in Rusell on Crimes, Edn, 4, Vol. III, p. 146, refd. to in the judgment of Wright J. where it is suggested that a verdict of not guilty is net to be taken as establishing the innocence of the persons acquitted, because the verdict may have been arrived at simply in consequence of the absence or evidence to prove his guilt, I think it is a very dangerous principle to adopt to regard a verdict of not guilty as not fully establishing the innocence of the person to whom it relates.'

The learned Judge also refd. to another case with approval, Rex v. Thompson, (1851) 117 E. R. 1100: 16 Q. B. 832. That was a case of, conspiracy between Thompson and one other, either Tillotson or Maddock who were both acquitted.

Lord Camphell C. J., in the course of his judgment observed:

'Prima facie, therefore at least, where the indictment is that three defts. conspired the acquittal of two involves the acquittal or the third for, when the jury declare that neither of those two conspired with the third, it is difficult to fee how the third can have conspired with the other two, or with either of them.'

12. Bajpai J., in his judgment distd. the case of a conspiracy & observed that it 'requires a clear mention of the conspirators & if on the paucity of evidence an acquittal follows regarding the rest of the accused it is not possible to convict a single man on a charge of conspiracy.'

In Thompson's case as the result of the acquittal of Tillotson & Maddock only one man was left & he could not have conspired by himself. As a matter of fact that acquittal in Plummer's case was upon the view expressed by Bruce J. that when two persons are tried together upon a charge of conspiracy with one another & one is acquitted the conviction of the other obviously cannot stand.

13. Wanchoo J. to whom this case was refd. upon a difference of opinion, found himself in general agreement with the view expressed by Agarwala J. He consd. that there was a difference between the case of Sadho v. Emperor (ubi supra) decided by Bajpai J. and the ease of Ram Rup v. Emperor, decided by Waliullah J- and chose the view expressed in Ram Rup v. Emperor (ubi supra).

14. Having given respectful consideration to the views expressed by the learned Judges of this Ct. I have come to the conclusion that there is no reason for me to alter the following view that I had expressed in Gumani and Peetam v. Rex, (Cr. Appeal No. 413 of 1949) :

'Where the prosecution has mentioned the names of all those who formed an unlawful assembly & the Ct. is satisfied that only some of them leas than five, are guilty & the rest are not guilty, then Sections 147 & 149 cannot be applicable. If, however, the Ct. is satisfied as regards the identity of some, but is not able to fix the identity of the others, though it is satisfied on the evidence that there were more than five persons, to my mind, to such a case' also Sections 147 & 149

would be applicable.'

In the view that I take, I would answer the first, question in the affirmative.

15. With regard to the second question, I consider it necessary to refer to Section 423 (1) (b), Cr. P. C. which deals with the powers of an appellate Ct.. in an appeal from a conviction which runs as. follows :

'In an appeal from a conviction, (1) reverse the finding; and sentence, & acquit or discharge the accused or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Ct. or committed for trial, or (2) alter the finding, maintaining the sentence, or with or without altering the finding, reduce the sentence, or (3) with or without such reduction & with or without, altering the finding alter the nature of the sentence, but subject to the provisions of Section 106. . .'

It would thus appear that it is open to an appellate Ct. to uphold a conviction not only upon the findings of facts arrived at by the Ct. below but even after altering the findings of the Gt. below. In this connection I would refer to the decision, of a F. B. of this Ct. Zamir Qasim v. Emperor, A. I. R. (31) 1944 ALL. 137. In this case, after an elaborate discussion of the authorities, the F. B. held by majority that the appellate Ct. could alter a finding of acquittal into one of conviction even; though no appeal has been preferred by the State Govt. subject, of course, to the limitation that the appellate Ct. cannot enhance the sentence imposed by the trial Ct. The mere omission of the State, Govt. to appeal against an order of acquittal does not, in all cases, give finality to such finding & it can be altered by the H. C. There is no limitation imposed upon the powers of the Ct. to alter any finding so long as it does not involve an enhancement of sentence. It seems to me that in the words of Sale J. in Bawa Singh v. The Grown, I. L. R. (1942) Lah. 129, alteration means 'change in form, without changing the underlying character of the thing to be changed,' & in that view there does not seem to be, in my judgment, any prohibition upon the Ct. against the alteration of a finding of acquittal into one of conviction. In the words of Iqbal Ahmad C. J.

'The power to 'alter the finding is not circumscribed; by any words or limitation & as there is nothing in Cl. (b) of Section 423, to prohibit the appellate Ct. from going behind a finding of acquittal, the answer to the question (whether a Ct. of appeal is empowered Under Section 423(1)(b), (2) to alter a finding of acquittal into one of conviction) ..... must in my opinion be in the affirmative,'

16. It would thus appear that there is nothing to bar the Ct. from holding that the acquittal of some of the accused persons was wrong & that they or some of them had taken part in the crime in assocn. with the applt. & that, therefore, the conviction of the applt. was correct.

17. For the reasons stated above, I would answer the second question also in the affirmative.

18. Bind Basni Prasad J.

I had the advantage of going through the judgments of my learned brothers. I entirely agree with the answers which they propose to give to the two questions refd. to this F. B. & desire to add the following :

19. The cases of Sadho v. Emperor, 1934 A.L.J. 640, Ram Rup v. Emperor, 1944 A. L. J. 447 and Harchanda v. Rex, 1950 A.L.J. 220 have already been discussed by my learned brothers in their judgments. In the first two cases learned Ses. J. had convicted the applts. for a certain substantive offence read with Section 149, Penal Code, whereas in the third one the applts. were convicted by the Ses. J. Under Section 302 read with Section 34, Penal Code. In Gumani v. Rex, Cri. Appeal. No 413 of 1949, which has also been refd. to by my learned brother, 'Sankar Saran, the applts. had been convicted Under Sections 147 & 302 read with Section 149, Penal Code. In the present case the applt. was prosecuted along with 14 other persons. Some of them were charged Under Section 147 & Section 302 read with Section 149, Penal Code & others Under Section 147 & Sections 323 & 324 read with Section 149, Penal Code. The applt. alone has been convicted & sentenced to transportation for life Under Section 302 read with Section 34, Penal Code. The findings of the learned Ses. J. as regards the remaining fourteen, who were acquitted, have been quoted in extenso by my

learned brother, Justice Sankar Saran. In substance, the finding is that some out of these fourteen were certainly associated with the applt, in the commission of the offence. It was not possible, however, to say definitely whether the number of these participants along with the applt. was five or more, hence Section 149, Penal Code could not be applied. While the learned Ses. J. was definite that some of the acquitted persons were the confederates of the applt. in the commission of the offence, on the evidence produced before him he could not fix them. It was in these circumstances that he acquitted the remaining fourteen. It may be noted that it was not the prosecution case that any unidentified persons, who were not before the Ct. also took part in the commission of the offence. It was the definite case of the prosecution that only the 15 named persons took part in the offence.

20. There is a certain resemblance between Sections 34 & 149, Penal Code. Both the sections deal with liability for constructive criminality. Both deal with combinations of persons who become punishable as sharers in an offence. They overlap to some extent. The difference between the two sections is that Section 149 is applicable only where an offence is committed by any member of an unlawful assembly whereas for the application of Section 34 the existence of an unlawful assembly is not necessary. Another distinction between these two sections is that Under Section 34 a criminal act must be done by several persons 'in furtherance of the common intention of all', whereas Under Section 149 the mere membership of an unlawful assembly, any member of which commits an offence 'in prosecution of the common object of that assembly', is punishable. In so far as the oases Under Section 149, Penal Code lay down the principle of constructive criminality, they are applicable to the present case also in which we have to consider the pro-visions of Section 34. There has recently been a decision of the F. C. also in Kapildeo Singh v. The King, 1950 S. C. J. 143. The following observations of Mukherjea J. who delivered the judgment in that case are important:

'The essential question in a case Under Section 147 is whether there was an unlawful assembly its defined in Section 141, Penal Code, of five or more than five persons. The identity of the persons comprising the assembly is a matter relating to the determination of the guilt of the individual accused, & even when it is

possible to convict less than five persons only. Section 147 still applies if upon the evidence in the case the Ct. is able to hold that the person or persons who have been found guilty were members of an assembly of five or more persons, known or unknown, identified or unidentified.'

21. The same principle is applicable to a case where a person has been charged for a substantive offence read with Section 34, Penal Code. The dictum laid down by the F. C. in Kapildeo Singh's case mutatis mutandis would then read as follows :

'The essential question where a person is charged with a substantive offence read with Section 34, Penal Code, is whether or not a criminal act was done by several persona in furtherance of the common intention of all. The identity of the persons is a matter relating to the determination of the guilt of the individual accused & even when it is possible to convict one person only, Section 34 still applies, if upon the evidence in the case the Ct. is able to hold that the criminal act was done by some other persons also, known or unknown, identified or unidentified, in furtherance of the common intention of all.'

22. The view expressed by Bajpai, J. in Sadho v. Emperor, 1934 A. L. J. 640 & by Malik, C. J. & Sankar Saran, J. in Gumani's case (ubi supra) is in accord with the principle laid down by the F. C. in Kapildeo Singh's case. The observations of the F.C. mean that where several persons are charged for having jointly committed an offence, the case should be approached in the following manner : (1) Did several persons, no matter whether they are known or unknown, identified or unidentified, do the criminal act 'in furtherance of the common intention of all'? The Ct. should first see whether there were more than one person. (2) If there were several such persons, Section 34, I. P. C. will apply, even if only one of them is found guilty & others cannot be ascertained. Such others may be untraced or may even be among the acquitted persons. If however the Ct. finds that the criminal act was done by one person only, Section 34 will not apply, (3) The case of each individual accused should then be examined. If he participated, he will be guilty of the substantive offence read with Section 34. If he did not participate he will not be guilty.

23. For application of Section 149, I. P. C., the further question to be examined is whether or not there were five or more than five participants, any one of whom committed an offence in 'prosecution of the common object' of all. If there were five or more than five, no matter whether known or unknown, identified or unidentified, Section 149, I. P. C will apply. The Ct. may be able to fix less than five, bat if it is certain that five or more than five participated it must apply Section 149, I. P. C. even though the unascertained persons may be among these whom it acquits on account of its inability on the evidence to fix them. The authorities are unanimous that if, such un-ascertained persons are untraced, than Section 149 applies.

24. It will be noted that in Ram Rup's case the conviction of the appellants was maintained, but it was altered from one Under Section 147 & Section 323 read with Section 149, I. P. C. to one Under Section 323 read with Section 34, I. P. C. The case is distinguishable from the present one. In that case eight & only eight persons were alleged to have taken part in the Commission of the offence. One of them died after the occurrence. Of the remaining seven, five were given the benefit of doubt & were acquitted. There was no definite finding of the Ses. J. that out of the acquitted persons any of them had participated in the commission of the offence. Waliullah, J. while discussing Sadho's case observed:

'To my mind the facts of that case were wholly distinguishable from the facts of the present case. The principle laid down in that case can be applicable to my mind only to cases where evidence discloses that in addition to the men who were actually put upon their trial there were others, known or unknown, who were not before the Ct.'

In the present case, there is a definite finding that some of the accused who have been acquitted also did the criminal act along with the applt in furtherance of a common intention of all, but the Ct. is not in a position to fix these confederates as they have been mixed with innocent persona. The generality of the principle laid down in Ram Rup's case and followed in Harchanda's case is modified by the observations of the F. C. in Kapildeo Singh's case.

25. I would, therefore, answer the first question in the affirmative.

26. The answer to the second question is concluded by the decision of the majority in the F. B. case of Zamir Qasim v. Emperor, A. I. R. (31) 1944 ALL. 137 & I would answer it also in the affirmative, subject to the condition that the appellate Ct. cannot enhance the sentence imposed by the trial Ct.

Harish Chandra J.

27. In view of the judgment written by my learned brother Sankar Saran, it is unnecessary for me to mention the facts of the case. The authorities seem to be agreed that when the finding of the Ct. is that an accused person committed a crime along with a number of others known or unknown who were not on trial, he may be convicted of an offence, with the aid of either Section 149 or Section 34, Penal Code, according to circumstances. If, however, all the other persons who are alleged to have been associated with him in the commission of the crime were named & were on trial along with him, but were acquitted, the view taken in certain cases is that Section 149 or 34 cannot be brought into aid to find the accused guilty of any offence. Waliullah J. observes in the case of Ram Rup v. Emperor, 1944 A. L. J. 447 :

' .... it would be utterly illogical & also unsound in law to hold that the other five were not guilty of the offences charged but that they were there for a subsidiary purpose, namely, for the purpose of convicting the remaining two of riot & of the offence of simple hurt Under Section 323 read with Section 149, I. P. C.'

28. Agarwala J. in his judgment in Harchanda v. Rex, 1950 A. L. J. 220 observes :

'When the evidence on record is conclusive against an accused, we hold that he is guilty. When it is conclusive in favour of an accused, & also when it is inconclusive--neither conclusive this way or that--in both cases we hold the accused 'not guilty'--& acquit him. When there is a verdict of not guilty or acquittal, an accused person is entitled to say that he must be presumed to be absolutely innocent whatever be the nature of the finding Unless it can be conclusively established against an accused that he is guilty, he is entitled to be proclaimed free from blemish & his honour cannot be sullied by any suspicion in Ct.'s mind Thus, in the present case, each of the five acquitted persons can say, 'I did not

participate in the assault & I am innocent.' If such one of them can say that, it cannot be hold that some one or more of them were participants in the crime. The applts. cannot be held guilty for the action of some one or more of these five acquitted persons, in the face of the verdict of not guilty & acquittal of every one of those five persons.'

29. With all respect my view is that the distinction that has been drawn between the two classes of cases mentioned above is not substantial. An accused person may be acquitted of an offence for a variety of reasons. In a conceivable case there may be a finding of fact against him that he had committed the crime, but he may still be acquitted because of certain defects in the manner in which the case was instituted or for want of sanction by the proper authority where such sanction was necessary before the institution of the case. An accused person may be acquitted in a case honourably and without any blemish on his character. It may also be otherwise. It not infrequently happens that although an accused person who is a public servant has been acquitted by a Ct. of law, still departmental proceedings are taken against him & he may be punished departmentally even on the findings of the very Ct. that acquitted him. The acquittal of an accused person in a case does not prevent another Ct. which may be trying another person in connection with the same crime from holding that such person had not been properly acquitted & to make use of such finding in judging the guilt of the person accused before it.

30. Bajpai J. has in the case of Sadho v. Emperor, 1934 A. L. J. 640 favoured the contrary view & the following is reproduced from his judgment:

'In the present case, however, the judgment of the Gt. below satisfies me that he was of the opinion that more than five men undoubtedly took part in the riot. The three men who have been convicted on each side & the two dead men also took part in the riot & the feeling of the learned Judge was that some of the others who were named in the cases were also involved in the offence, but as is very common in these oases some innocent persons might have been roped in, the learned Judge adopted certain sure tests for convicting the applts. He, however, was undoubtedly of the opinion that more than five persona were involved on each

side. I am, therefore, of the opinion that there is no force in the plea that an offence Under Section 147, Penal Code, is not made out.'

31. To my mind the view taken by Bajpai J. in Sadho's case is perfectly sound. Agarwala J. in taking a different view of the matter was guided by certain authorities of the Courts in England.

32. In Rex v. Sadbury, 88 E. R. 1309 ; 12 Mod 262, several persons were indicted for rioting. Two of them alone were found guilty while all the others wore acquitted. It was held that the two could not commit a riot & could not be convicted of rioting. It does not however appear in what circumstances the other persons were acquitted in that case.

33. In Rex v. Thompson, (1851) 117 E.R. 1100 : 16 Q. B. 832 one Thompson was indicted for conspiracy with two others by name Tillotson & Maddock & certain other persons. The evidence, however, was that he had conspired with Tillotson & Maddock. The jury found Tillotson & Mad-dock not guilty but gave a verdict of guilty against Thompson. It was held that Thompson was entitled to an acquittal. Obviously, the jury had not indicated on what grounds they found Thompson guilty although they had acquitted Tillotson & Maddock. The Judge took into consideration the possible reason which may have led the jury to convict Thompson in spite of its having acquitted Tillotson & Maddock that Thompson had conspired either with Tillotson or with Maddock, but that the jury did not know with whom. In the view of the Judge this was a bad finding & the following is reproduced from the judgment:

'The only mode which occurred to me of supporting the indictment under the circumstances of this case was by taking the verdict to be, in effect, that Thompson had conspired with Tillotson or Maddock, but the jury did not know with which. But, that would be, I think, a bad finding. I cannot conceive how, if an indictment to that effect would be bad, such a special verdict could be good. But then it is said that the verdict supports the indictment, inasmuch as this charges Thompson to have conspired with other persons unknown. But I find it difficult to say that Tillotson or Maddock can fall within the category of other persons'; that could not be the meaning of the grand or petty jury.'

34. Bajpai J. in Sadho's case, took the view that a conspiracy was different from a riot & distd. that case. I, however, find myself unable to agree with the view expressed in that case. If the finding distinctly was that Thompson had conspired with either Tillotson or Maddock, there is no reason why he should not have been convicted of conspiracy.

35. In the case of King v. Plummer, (1902) 2 K. B. 339, Plummer was prosecuted along with two other persons on an indictment of conspiracy. It was not alleged that there were any other unknown persons. Plummer pleaded guilty while the other two pleaded not guilty & were acquitted'. Plummer was convicted upon his plea of guilty. It was held that the conviction of Plummer was bad. In that case Bruce J. observed :

' .... I think it is a very dangerous principle to adopt to regard a verdict of not guilty as not fully establishing the innocence of the person to whom it relates. If it is to be applied at all, it would apply to persons tried at the same time, & jet it is perfectly clear upon the authorities that, if two persons are tried together upon a charge of conspiracy with one another, & one is acquitted by the jury & the other convicted, the conviction cannot stand, although it is perfectly clear that the verdict of acquittal may have been obtained simply upon, the ground that there was a failure of evidence to establish the charge against the person who was acquitted,'

36. As has been pointed out by Malik C. J., in the case of Gumani v. Rex, Cri. Appeal No. 413 of 1949, these English cases are in fact not a proper guide in a matter of this nature. They were all jury trials & after the jury had found a number of accused persons not guilty, the conviction of others who could not have been found guilty except on a finding that they were associated ins the commission of the crime with the other accused persons who were acquitted, could not be-upheld inasmuch as the verdict of the jury would in no case specify whether while acquitting some of the accused persons it was of the view that at least some of them had taken part in the crime so as to justify the conviction of the accused person who was found guilty by it for the offence with which he had been charged along with the other accused persons. The following is reproduced from the judgment :

'The case of King v. Plummer, (1902) 2 K. B. D. 339, may also be mentioned, but there is great difference between a trial with the aid of a jury & a trial by the Judge. If the jury returned a finding of not guilty & if the Judge had not divided the question into two parts, (i) whether there were more than five persons who had taken part in the riot, & (ii) the persons named, or which of them, were there, it may not be possible to convict the accused Under Section 147. But where the question had been divided into two parts, & the jury returned a finding on the first part in favour of the prosecution & on the second part in favour of the accused that they were not satisfied about the identity of some of the accused, it would be difficult in such a case to hold that those whom the jury had held to be guilty could not be convicted of rioting.'

37. The observation of Agarwala J. reproduced in an earlier part of the judgment would no doubt apply to an acquittal by a jury. For no reasons are given by the jury for holding the accused not guilty. But in a case where there is a clear finding that although the Ct. acquitted some of the accused persons it was satisfied on the evidence that some of them had in fact taken part in the crime in assocn. with the convicted persons so as to attract the provisions of Section 149 or 34, such conviction ought not to be interfered with.

38. No doubt, an order of acquittal cannot be revsd. except in an appeal from such order. But an appellate Ct. has full liberty to maintain a conviction on grounds other than those upon which the conviction was based by the Ct. below & in doing so to alter its finding, if necessary, with respect to the other accused persons who may have been acquitted by it & to hold that the applt. who could not have been convicted except on a finding that he was associated with certain other persons in the commission of the crime had been rightly convicted.

39. I would therefore answer both the questions which have been refd. by the Bench in the affirmative.

40. Our answer to both the questions is in the affirmative.

41. Let the case be laid before the Bench concerned.