

Harish Yadav Vs. Cbi

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Court : Delhi

Decided On : Jan-08-2007

Reported in : 137(2007)DLT62; 2009(93)DRJ672

Judge : R.S. Sodhi and; P.K. Bhasin, JJ.

Acts : Indian Penal Code (IPC) - Sections 109, 201, 396, 397 and 400; Code of Criminal Procedure (CrPC) - Sections 161, 164 and 313; Evidence Act - Sections 114

Appeal No. : Crl. A. Nos. 366 and 496/2006

Appellant : Harish Yadav;satinder @ Bawa

Respondent : Cbi;state Through Cbi

Advocate for Def. : R.M. Tiwari and; Jayant Tiwari, Advs.

Advocate for Pet/Ap. : Ashok Kumar Sharma, Adv. in Crl. A. No. 366/2006 an; B.S.Chaudhary, Adv. in Crl. A. 420/2006 an; Mohd.

Disposition : Appeal allowed

Judgement :

P.K. Bhasin, J.

1. These three appeals have been preferred against the judgment dated 18-03-2006 passed by the learned Additional Sessions Judge, Delhi in Sessions case No. 78/05 whereby the three appellants have been convicted under Sections 396/397/400/201 IPC and the order dated 05-04-2006 whereby life imprisonment has been imposed upon all of them for their conviction under Sections 396 and 400 IPC besides rigorous imprisonment for seven years and a fine of Rs. 1,000/- each, in default one month's simple imprisonment, for their conviction under Section 201 IPC. Since all the appeals arise out of the same judgment and were heard also analogously the same are being disposed of by this common judgment.

2. The facts leading to the trial and conviction of the appellants, as noticed by the learned Additional Sessions Judge in para Nos. 1 to 5 of the impugned judgment, are as follows:

1. The history of this case is that during the intervening night of 29/30.8.1998, a dacoity-cum-murder took place at the residence of one Mahesh Chand Gupta at D-50, Ganga Vihar, Gokul Puri, Delhi in which the said Mahesh Chand was killed and his wife Smt. Madhu Gupta and his sons Master Gaurav were injured. An FIR bearing No. 606/98 was registered at police station Gokul Puri Under Section 396/397 IPC and investigation was entrusted to Additional SHO Shri S.S. Rana, which was later on transferred to the SHO, PS Gokul Puri and then the same was further transferred to Inspector Rajesh Kumar of District Crime Cell, North-East District. The injured/Smt. Madhu Gupta moved the Hon'ble High Court alleging that fair investigation was not being done by Delhi Police, so Hon'ble High Court vide its order dated 15.3.1999 transferred the investigation of this case to CBI and accordingly the present case No. RC2(S)/99/SIC. I/New Delhi was registered Under Section 396/397 IPC and investigation was handed over to Shri H.C. Bisht, DSP, CBI, who conducted the investigation, arrested the accused persons and filed the challan.

2. This case has taken many twists and turns. Initial statement of injured Gaurav, aged 14 years was recorded in the hospital at about 7:00 AM in the morning of 30.8.1998 in which, he had stated that at about 3:00 AM, he heard the shouts of his father. When he woke up, he saw that one young person was standing at the

door of the room holding a revolver in his hand and two young persons had caught hold of his father and a third young man had put a knife on the neck of his father and he was asking about the keys of Almirah. Two more young persons were also there, out of which one had caught hold of his mother and other one had pointed a knife on the neck of his mother and that person was abusing and also asking about the keys of Almirah and was threatening to kill her. Mother of complainant shouted and on this, the person, who had caught hold of his mother, told others to attack them because they would not tell about the keys otherwise. On this, one of those assailants gagged the mouth of his mother and the other man gave several knife blows on the abdomen and legs of his mother. When father of complainant tried to rescue his mother, the two assailants who had caught hold of his father, gagged his mouth and the third boy holding the knife gave several knife blows on the person of his father.

3. In the meantime, the boy standing at the door, gagged the mouth of the complainant and when the complainant tried to catch hold of the hands of this person, at that time the person who was attacking his father with knife, gave a knife blow on the right hand of complainant and the person, who was holding him, hit his head with the revolver. The father of complainant fell down on the cot and his mother requested the assailants to leave them while handing over the keys of the Almirah to them and then his mother also fell down on the bed. Thereafter two boys kept on pressing the mouth of his father and mother and they did not allow them to move. The remaining three boys opened the iron Almirah and took out money and jewellery lying there.

4. Thereafter those three persons went to the room on the first floor and after 15-20 minutes, they came down and removed earrings and Pajabs of his mother. They took out the cold drink bottles from the Fridge and rank them. Thereafter the boy, who had caught hold of the complainant, threatened him to not to raise alarm otherwise all three of them would be shot dead. The complainant got frightened and after the assailants left, he came out and started weeping. Neighbours collected there and someone rang up the Police. The police vehicle took three of them to the hospital. As per complainant, he could recognize the assailants if they were shown to him. All the assailants were aged between 20-25 years having

average body built and height. Three of the assailants were wearing blue jeans pants and other three were wearing shirts and pants.

5. Police had visited the spot and found household goods scattered here and there. The MLCs were collected from the hospital. As per MLC No. C-3058/98, Mahesh Chand was declared as brought dead and as per MLCs No. B-3352/98 and B-3353/98 of Gaurav and Madhu respectively, both of them were declared to be 'fit for statement'. On the statement of Gaurav, rukka Ex. PW1/A was sent and case FIR No. 606/98 Ex. PW1/B was registered Under Section 396/397 IPC. Site plan Ex. PW1/C was prepared by the IO on 31.8.1998. The blood stained clothes and other articles were seized vide Ex. PW1/D. The sample of blood and underwear of deceased were received from the hospital vide Ex. PW1/E. Death Summary was prepared which is Ex. PW1/F and a request was sent to the hospital to get the post mortem on the dead body of Mahesh Chand Gupta conducted vide request Ex. PW1/G dated 31.8.1998.

3. After the completion of the investigation, which was initially undertaken by the police and then transferred to CBI pursuant to the directions of this Court in a writ petition filed by the widow of the deceased, CBI charge-sheeted the appellants and five other persons and in due course charges under Sections 396/397/400/201/109 IPC were framed against all of them except accused Anil s/o Pheru Singh, who was discharged.

4. To prove its case prosecution examined as many as 75 witnesses which, however, did not include either the first informant of the incident or even the widow of the deceased who had also been seriously injured during the incident by the dacoits. The accused persons in their statements recorded under Section 313 of the Code of Criminal Procedure denied the prosecution allegations in toto and pleaded false implication. In defense the accused had examined the Metropolitan Magistrate who had recorded the statements of the two injured eye witnesses Madhu Gupta and Gaurav under Section 164 Cr.P.C.

5. After analyzing the circumstantial evidence of some recoveries of looted property at the instance of the accused and extra judicial confession made by all the accused before their co-gangster PW-3 Pramod relied upon by the CBI the trial

Court found the three appellants and their co-accused Ravi Kumar and Ravinder guilty for the offences punishable under Sections 396/397/400/201 IPC and sentenced them in the manner already noticed. Accused Deepak and Devender were acquitted. Ravi kumar and Ravinder do not appear to have filed any appeal. So, we are to decide the fate of the three convicts Harish Yadav, Dilshad @ Kale and Satinder @ Bawa.

6. It was contended on behalf of the three appellants by their counsel that they have been convicted by the trial Court without any evidence against them. It was also contended that the prosecution case was liable to be rejected only on the ground that none of the two eye witnesses of the incident who are the widow and the son of the deceased has been examined and as far as some recoveries of looted property alleged to have been made at the instance of the appellants are concerned the same also do not connect any of the appellants with the crime since there is no evidence adduced by the prosecution to show that those articles had, in fact, been stolen from the house of the deceased or that the same belonged to the deceased or his wife or his son. It was also submitted that those articles, in any case, could be identified only by the widow or the son of the deceased who have not been examined in Court by the prosecution and when a TIP was got arranged by the CBI during investigation for identification of the recovered articles Smt. Madhu Gupta did not identify any of the recovered articles. Although some other relatives of the deceased had identified the recovered articles to be belonging to Smt. Madhu Gupta and her son Master Gaurav but that identification of those articles during the TIP is meaningless since Smt. Madhu Gupta whose articles were stolen has not claimed those articles to be hers and Master Gaurav was not even produced for the TIP. It was also contended by the learned Counsel that, in any case, merely on the basis of alleged recoveries of the looted property at the instance of the appellants they could not be held guilty for the death of the deceased since the recoveries were not effected soon after the incident of dacoity but after more than a year and as far as recoveries of some chhuris is concerned the same is also of no use since the same have not been shown to have been used in the incident in question. Another submission made was that the so called extra judicial confession of the appellants before PW-3 Pramod is also of no value because the prosecution has not even probalised that the accused persons

could have made a confession before this witness and that in any case the statement of PW-3 is highly vague and does not give even the date when the accused had confessed before him and also that PW-3 was, in fact, an accomplice and having a strong motive to falsely implicate the accused and further that same very evidence of PW-3 having been not relied upon by the trial Court against the two acquitted accused could not have been relied upon against the appellants. Learned Counsel also contended that there is no evidence adduced by the prosecution to establish that the appellants or anyone of them belonged to a gang of persons associated for the purpose of habitually committing dacoity and, therefore, they have been wrongly convicted under Section 400 IPC as well.

7. On the other hand, learned Counsel for the CBI submitted that there was no infirmity in the impugned judgment warranting interference by this Court against any of the three appellants. While contending that there was sufficient circumstantial evidence against all the appellants including the extra judicial confession made by them before PW-3 learned Counsel also sought to justify non-examination of the two eye witnesses. Regarding non-examination of the two eye-witnesses of the incident learned Counsel submitted that during investigation when their statements were got recorded under Section 164 Cr.P.C. it had transpired that both of them had falsely implicated some of their relatives with whom litigation was also going on in the present incident and, therefore, it was decided by the CBI not to examine them as prosecution witnesses and it was decided to examine those very relatives as prosecution witnesses and they were examined also. It was also contended that, in any event, their non-examination has no adverse effect on the prosecution case which stands established from strong and reliable circumstantial evidence adduced during the trial. In support of his submissions regarding the evidence of extra judicial confession and non-examination of the eye witnesses learned Counsel placed reliance on some judgments of the Hon'ble Supreme Court which are reported as : 1976 CriLJ1171 , Bhagwati and Ors. v. State of U.P. AIR 1978 SC 1558, Rameshwar Dayal and Ors. v. State of U.P. : 1998 CriLJ62 , Saudar Singh and Ors. v. State of Haryana 2004 SCC (Cri.) 999, Zahira Habibulla H. Sheikh and Anr. v. State of Gujarat : 1993(3)SCALE495 , Gokaraju Venkatanarasa Raju v. State of A.P. , Goverdhan Mahto v. State (Delhi Admn.) : [2002]SUPP2SCR112 , State of Karnataka v. M.N. Ramdas : 2004

CriLJ2870 , Vilas Pandurang Patil v. State of Maharashtra (2001) 2 SCC 205, Gura Singh v. State of Rajasthan : 1973 CriLJ989 , Kashinath Krishna Jadhav v. State of Maharashtra : 1976 CriLJ1578 , Hardayal v. State of U.P. and : AIR 1975 SC1320 , Maghar Singh v. State of Punjab

8. Having heard the submissions of the counsel for the parties we examined quite minutely the record of the trial Court to find out if really despite non-examination of eye-witnesses of the incident there was sufficient circumstantial evidence to sustain the conviction of the appellants which has been handed down by the learned Additional Sessions Judge in his judgment. The appellants were tried for having killed one Mahesh Chand Gupta while committing dacoity in his house in Ganga Vihar, Gokul Puri, Delhi during the night of 29/30-08-98. The investigation had started on the basis of statement, Ex. PW-1/A, of the son of the deceased who was also stabbed by the dacoits besides his mother Madhu Gupta. Both of them were material witnesses for establishing the identity of the dacoits but still none of them has been examined by the CBI. Since it was submitted by the counsel for CBI that there was sufficient circumstantial evidence to hold the appellants guilty and they have been rightly convicted we shall first take up the circumstantial evidence relied upon by the CBI and the trial Court for holding the appellants guilty and then would consider the effect of non-examination of the eye witnesses.

9. The main piece of circumstantial evidence is the extra judicial confession of the crime by the appellants made before PW-3 Pramod. Relying upon judgments of the Hon'ble Supreme Court in State of Karnataka v. M.N. Ramdas : [2002]SUPP2SCR112 and Gura Singh v. State of Rajasthan (2001) 2 SCC 205, Mr. R.M. Tiwari, learned Counsel for CBI had submitted that conviction of an accused can be based on an extra judicial confession of the accused. There is no quarrel over this proposition. However, before an accused is convicted on the basis of his extra judicial confession the Court has to be satisfied that the extra judicial confession was made before a person of credibility and can be safely believed. It has been held by the Hon'ble Supreme Court in the judgments cited by Mr. Tiwari that in a case of extra judicial confession all relevant circumstances such as the person to whom the confession is made, the time and place of making it, the circumstances in which it was made have to be scrutinized. We would now

examine the evidence of PW-3 Pramod to find out if his evidence can be safely relied upon for sustaining the conviction of the appellants.

10. PW-3 Pramod deposed that brother of accused Satender, namely, Sunder was residing in his locality and being a neighbour he was on visiting terms with Sunder and since Satender used to visit his brother Sunder he was also acquainted with him. He further deposed that one day Satender took him and introduced him to his friends Devender (who has been acquitted in this case), Ravinder, Yusuf (proclaimed offender), Kale, Anil (discharged accused) Chandu and others Satender told him that all of them were committing way-laying, looting and stabbing people and that he should also join them and he would be given food and money. He also deposed that Satender was head of the gang and they used to assemble on the bank of the canal of Gokul Puri and also at the jharna wala road and border wali nahar and used to commit crime in the locality of mohalla No. 2. PW-3 further deposed that Satender gave him a desi katta and Satender used to command him to put that katta on the neck of the person to be looted. The looted property was kept by Satender and if any person used to raise hues and cries Satender and Kale used to stab that person. He further deposed that on three-four occasions in his presence they had struck the victims in that manner. He thereafter deposed that about 21/2 years back when they were sitting on the bank of Gokul Puri canal all the accused persons told him that they had committed a big loot (mota hath) along with one Harish in the area of Ganga Vihar where they used ladder from the back portion of the house and made entry in the house where a woman with her husband and son were sleeping and they all attacked and stabbed those three persons and the man died but his wife and son sustained the assault and were alive. From that house they looted about Rs. 20,000/- in cash, jewellery, bidi, cigarettes, tobacco pouches from the shop in the house and ran through a nullah so that police or dog squad could not follow the course of their escape. Three or four of them went to Vaishno Devi to avoid arrest and that after coming from Vaishno Devi Rs. 10,000/- was given by Satender to Harish. He further deposed that accused Satinder gave him a country made pistol to be disposed of saying that he used that katta (Ex. P-1) in Ganga Vihar and few other dacoities but when he (PW-3) refused to accept the same accused Satinder threatened him to kill. He also deposed that after he became witness in the case

accused persons had threatened him that if he would depose against them in Court they would finish him. He then deposed that because of the fear of the accused persons he used to live in village Pather, District Muzaffarpur, UP where police brought accused Satinder who identified him (PW-3) saying that he had given the katta to him (PW-3) for being sold. PW-3 told the police that he had sold that katta to Amit for Rs. 500/- and he took the police to the house of Amit where on the pointing out of Amit katta was recovered.

11. In cross-examination PW-3 stated that he had not made any complaint to the police regarding the disclosures made to him by the accused persons.

12. PW-4 Kapil is the brother of PW-3. He has deposed that his brother Pramod was a member of the gang of accused Satender which was committing dacoities etc. He also deposed that about 2 1/2 -3 years back accused Satinder had given one katta to his brother Pramod for disposal but when his brother resisted he was threatened that in case he would fail to sell that off he would be shot dead by that very katta.

13. On a careful examination of the evidence of PW-3 Pramod we are of the view that this witness cannot be said to be an independent and reliable at all. He himself was an associate of accused persons. His brother has claimed that he(PW-3) was also a member of a gang of dacoits headed by accused Satender. Both the brothers have claimed that the accused persons had threatened Pramod with his life. So, these witnesses can be said to be having a motive to falsely implicate the appellants. For this reason alone the evidence about extra judicial confession needs to be discarded. However, there are other reasons also for not placing any reliance on the evidence of PW-3. He has not given any date when the confession was made to him. An extra judicial confession in order to inspire confidence should be shown to have been made by an accused soon after the particular incident for which that accused is tried. PW-3 has also not specified as to what was stated to him by a particular accused. He has given a general statement that all the accused had confessed before him about the incident in question. All the accused could not state at the same time the same words. It is highly improbable. So, no reliance can be placed in these circumstances on the so

called extra judicial confession relied upon by the CBI. We get fortified in this conclusion from a decision of the Hon'ble Supreme Court reported as AIR 1982 SC 1593, Heramba Brahma v. State of Assam in which case also there was a joint confession made by many accused persons but the concerned witness had not stated the exact words of the confession spoken by each of the accused. The relevant portion of the evidence of the witness before whom the accused persons had made a joint confession was reproduced by the Hon'ble Supreme Court in its judgment and the same reads as under:

I know Heramba Brahma (appellant 1) and Amar Singh (appellant 2). They were with me in Hajat. They told me that they had assaulted Amiya's son. Amar Singh, Heramba and Inder (accused 1 since acquitted) told me that they had assaulted Amia's son.

Rejecting this piece of evidence of extra judicial confession the Hon'ble Supreme Court observed like this in para No. 17 of the judgment:

17. This is all his evidence in examination-in-chief. Now, who is this witness? This witness Bistiram was arrested for having committed an offence of dacoity and while he was in jail, according to him, the afore-mentioned three accused including the present appellants were, possibly with him in jail, when this dubious extra-judicial confession is alleged to have been made to him. This extra judicial confession is vague and ambiguous because it is not clear whether each one spoke separately and what were the words used by each of the accused. Witness speaks of an extra-judicial confession by three accused persons having simultaneously made and when reproduced in his language, it makes no sense. It is dangerous to rely upon such extra-judicial confession even if the witness's credentials are not in question. The question that agitates our mind is what language was used by each accused, in what words confession was made and whether each used the same language? Evidence of the witness does not reproduce the words used by each accused. It is the witness's ipse dixit that is being deposed to....

14. In fact, same evidence of extra judicial confession before PW-3 has not been accepted by the trial Court in respect of two accused who have been acquitted.

But no reasons have been stated in the judgment as to why that evidence was sufficient in respect of the present appellants and not for the acquitted accused. There is yet another reason for discarding the evidence of extra judicial confession. As noticed already, PW-3 in his cross-examination admitted that he had not made any complaint to the police that the accused persons had made the confession before him. That conduct of this witness also makes his evidence unreliable. It appears that so long as everything was well between him and his cogangsters he did not bother to report to the police about the activities of his gang and the moment his relations became strained with them, he chose to side with the police. Learned trial Judge has also observed in para No. 45 of the judgment that this witness had claimed that he was with the gang of Satender because of the threats extended by Satender. This kind of a witness can hardly be relied upon for convicting an accused.

15. The CBI has also sought to link the appellants with the crime on the basis of certain recoveries of stolen articles and the learned trial Court has also relied upon the same while convicting the appellants. Learned Counsel for the CBI had submitted that on the basis of recovery of stolen articles at the instance of the accused a presumption had to be drawn that the accused were not only guilty of the offence of dacoity but also the murder of the deceased while committing dacoity. In this regard our attention was drawn to Section 114 of the Evidence Act. In order to draw a presumption as contemplated under this provision of law the prosecution is required to show that there was a theft and, secondly, on stolen articles being recovered the same were identified by the owner thereof from whose house the same were stolen. In case these facts are established and it is also proved by the prosecution that those recoveries were made soon after the incident of dacoity in which somebody was killed also then it can also be presumed that the person from whose possession the stolen articles are recovered or at whose instance the same are recovered was the thief as well as the murderer. In the present case the prosecution could have proved that some articles were stolen from the house of the deceased by examining his widow or his son. As noticed already, none of them has been examined and, therefore, the prosecution cannot be said to have proved that, in fact, any theft took place in the house of the deceased. Because of non-examination of the first informant of the incident,

namely, Master Gaurav, son of the deceased, even the first information statement of Gaurav on the basis of which prosecution is claiming that the dacoits had taken away cash and jewellery etc. from the house of the deceased cannot be said to have been proved. Since theft of articles belonging to the deceased or his family members cannot be said to have been established the evidence adduced by the prosecution regarding recovery of some items of jewellery at the instance of appellant Satender is of no help to the prosecution. In fact, as per the documents placed on record by the prosecution relating to the TIP of the recovered articles we find that the widow of the deceased had not identified any article to be belonging to her. So, in these circumstances the appellant Satender could not have been convicted on the basis of recovery of some articles at his instance alleged to be stolen ones. As far as appellant Harish Yadav is concerned he did not in any case get anything recovered and all that the prosecution is claiming against him is that he had accompanied the police team which was led by appellant Satender to the shop of one goldsmith Dinesh Verma (PW-5) where that Dinesh Verma had produced one bracelet which he claimed to have been sold to him by accused Satender. It is also the prosecution case that after the present incident the accused persons had gone to Vaishno Devi and they had stayed at Suraj Guest House in Katra. Harish Yadav is alleged to have led the police party to Katra and got recovered the guest register of the Guest House where they had stayed. We fail to understand as to how this piece of evidence incriminates the accused. Learned Counsel for the CBI had contended that the accused had gone there to evade the police. We, however, do not find any substance in this submission. As per the evidence adduced by the CBI four accused persons had stayed in Suraj Guest House in Katra on 31-08-98. However, no witness from Suraj Guest House has identified any of the accused and in any case even if it had been established that any of the accused had stayed in a Guest House in Katra on 31-08-98 that would not have been an incriminating circumstance much less a circumstance of the accused absconding because by that time they were not even been suspected by the police for involvement in the present incident. As far as appellant Dilshad is concerned the CBI claimed to have recovered from his house during the search on 16-10-99 some clothes but no witness has claimed that the same were of the deceased or any of his family members and so that piece of evidence is also of no

use for the prosecution.

16. Appellant Satender is also alleged to have got recovered four churis but prosecution has not shown as to how those churis could link him with the crime. Only the victims of the incident could identify the weapons of offence but since none of them has been examined the prosecution cannot get any benefit from this piece of evidence as well.

17. We are, therefore, of the view that from the circumstantial evidence adduced by the prosecution involvement of none of the three appellants in the dacoity in the house of the deceased and his murder gets established. In these circumstances the question of non-examination of the eye witnesses of the incident assumes significance and, therefore, we would now proceed to consider the justification given by the CBI for their non-examination. The Explanationn from the side of CBI for their non-examination is that in the first information statement Master Gaurav had not named any of the dacoits but when his statement was got recorded under Section 164 Cr.P.C. he had been tutored by his mother Madhu Gupta, whose statement under Section 164 Cr.P.C. was also got recorded, and also by her father Devi Dayal to name ten persons all of whom were related to them and there was serious litigation also going with them and that during investigation it transpired that the widow and son of the deceased had falsely implicated their relatives and that is why none of them was cited as a prosecution witness. In this regard our attention was drawn by the learned Counsel for CBI to the statements of Madhu Gupta and Gaurav under Section 164 Cr.P.C. and by comparing the same with the earliest statement given by Gaurav on 30-08-98 on the basis of which FIR of this case was recorded by the police it was contended by the counsel that both the statements were absolutely contradictory to each other. The learned trial Judge has also after making a detailed comparison of the first statement of Gaurav (FIR) and his statement as also of his mother recorded subsequently under Section 164 Cr.P.C.(which comparison was neither necessary nor permissible in law since the makers of those statements were not before the Court) observed that these eye witnesses had tried to use the unfortunate incident to settle their personal vendetta against the estranged relatives of Madhu Gupta (widow of the deceased) and they were not revealing the truth.

18. We, however, find the approach of the CBI as well as of the trial Court in condemning the victims of the incident not at all proper. If CBI had found during the investigation that the widow and son of the deceased had made false statements under Section 164 Cr.P.C. then steps should have been taken to prosecute them. The trial Court also could not have condemned them as liars, in absentia, by comparing their statements recorded during the investigation and then coming to the conclusion that their version of the incident as recorded in their statements under Section 164 Cr.P.C. was neither correct nor even probable. Statements of witnesses recorded during the investigation by the investigating agency under Section 161 or 164 Cr.P.C. can be used only for the purposes of corroboration or contradicting the makers thereof if they are examined during the trial and for no other purpose. The trial Court has also analysed the two statements under Section 164 Cr.P.C.(Ex. PW-75/DB & DC), as if the same were substantive evidence, and found them to be inconsistent. In our considered view, in the facts and circumstances of this case the trial Court was not justified in holding that non-examination of the two eye witnesses was inconsequential. The appellants deserved to be given the benefit of presumption and adverse inference against the prosecution due to non-examination of the two injured eye witnesses of the incident as contemplated under Section 114, Illustration (g) of the Evidence Act.

19. We have gone through the judgments cited by Mr. R.M. Tiwari, learned counsel for CBI, on the effect of non-examination of material witnesses and we find that in those judgments it was held by the Hon'ble Supreme Court that it is not necessary to examine all the witnesses of some crime named in the FIR. However, it has not been held that the prosecution need not examine any one of them including the maker of FIR.

20. No other piece of evidence was brought to our notice during the course of hearing of these appeals by the counsel for CBI and since the circumstantial evidence relied upon by the CBI and the trial Court has not been found to be of any value the conviction of the three appellants cannot be sustained and they deserve to be acquitted of all the charges.

21. In the result, we allow Criminal Appeal No. 366/2006 Harish Yadav v. CBI Criminal Appeal No. 420/2006 Dilshad @ Kale v. CBI and Criminal Appeal No. 496/2006 Satinder @ Bawa v. CBI and the judgment dated 18-03-2006 and order on sentence dated 05-04-2006 passed in Sessions case No. 78/05 in respect of the three appellants are set aside. Consequently they stand acquitted of all the charges framed against them and in case they are in custody they shall be released forthwith, if not required in any other case.

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