

(1988) 09 PAT CK 0022

In the Patna High Court

Case No : Criminal Appeal No's. 387, 413, 436 and 594 of 1984

Awadheshwar Singh and Others, Rangnath Singh and Others, APPELLANT
Raghubansh Singh and Another and Surendra Singh and
Another

Vs

State of Bihar RESPONDENT

Date of Decision : 02-09-1988

Acts Referred:

Arms Act, 1959 — Section 27
Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 140, 141, 147, 148, 149

Citation : (1989) 37 BLJR 259

Hon'ble Judges : S.H. Shaukat Abidi, J;Prabha Shankar Mishra, J

Bench : Division Bench

Judgement

S.H. Shaukat Abidi, J.—All the appeals arise out of the same judgment and order and so with consent of the learned counsel for parties they have been heard together and are being disposed of by this common judgment.

2. Appellant Awadheshwar Singh has been convicted u/s 302/140 of the Indian Penal Code (in shore the "Code") and sentenced to undergo rigorous imprisonment for life. He has filed the Criminal Appeal No. 387/84. But at the time of hearing this appeal learned counsel for the appellant said that the appellant Awadheshwar Singh has died and this fact has not been controverted and as such this appeal (Cr. Appl. 387/84) has abated as against him.

3. Appellants Rangnath Singh, Bindeshwari Singh, Parsuram Singh, Triloki Singh, Satish Singh, Gandhi Singh, Jitendra Singh, Jwala Singh, Gyandutt Singh of Criminal Appeal No. 413/84 and Anil Singh, Raghubansh Singh of Criminal Appeal No. 436/84 have been convicted u/s 302/140 of the Code and sentenced to undergo rigorous imprisonment for life. Appellants Surendra Singh and Devendra Singh of Criminal Appeal No. 594/84 have been convicted u/s 302 of the Code and they have been sentenced to undergo rigorous imprisonment for life. These two appellants have further been convicted u/s 148 of the Code and

27 of the Arms Act and have been sentenced to undergo rigorous imprisonment for two years and six months each respectively under the said counts. Further appellants Anil Singh, Bindeshwari Singh, Parsurara Singh, Surendra Singh, Awadheshwar Singh and Bengali Singh have been convicted u/s 148 of the Code and have been awarded rigorous imprisonment for two years each. Appellants Rangnath Singh, Triloki Singh, Satish Singh, Gandhi Singh, Jitendra Singh, Jwala Singh and Gyandutt Singh have further been convicted u/s 147 of the Code and sentenced to rigorous imprisonment for one year each. All the sentences of the appellants have been ordered to run concurrently.

4. The case of the prosecution as appears from the Fardbeyan (Ext. 1) of Banwari Yadav (P. W. 7) recorded on 17-1-78 by Baidyanath Prasad Srivastava, S. I. of Karpi police station, is that there is a government boring to the north of his village which is used for the purpose of irrigating the fields of the villagers. There is a Karha for irrigation purpose which was constructed about 10 to 12 years ago and this Karha passes through the fields of Rangnath Singh, Triloki Singh, Raghubansh Singh and Bindeshwari Singh of the village. Subsequently these persons installed their own boring and they started putting obstruction to the flow of water in the Karha which was objected to by the villagers. This caused annoyance to the members of the Bhumihar community of the village and they used to say that they would stop the flow of water to the fields of the persons of lower castes. The operator of the Government boring is Baleshwar Kahar of the same village in the night preceding the alleged date of occurrence at about 11 p.m. when the electric line came, Baleshwar Kahar started the boring machine and water started flowing. When the field of Hitnarain Paswan was being irrigated, Rangnath Singh and his sons Surendra and Devendra went there and abused the operator Baleshwar Kahar and stopped the flow of water. Thereafter in the next morning i.e. in the morning of 17-1-78 Rangnath Singh, Triloki Singh, Surendra Singh, Devendra Singh, Parsuram Singh and Jitendra Singh went to the house of Baleshwar Kahar and assaulted his mother and nephew. Then the persons of the backward community collected and asked Baleshwar Kahar to file a case and sent the nephew of Baleshwar Kahar to the police station along with the village Chaukidar. On this score the members of the Bhumihar community felt annoyed and they abused and threatened the backward persons of the village.

5. It was in the noon of the same day that a mob came from the northern side of the village in which there were two firearms also. They came to the Gobardhan Asthan to the north of the Yadavtoli of the village and stopped there. At that time Kunchi Yadav, father of the informant, was cleaning the Nad for feeding cattle in front of his house which is towards northern side of his house and the informant was going to put fodder in the Nad. The Informant saw that several person i. e, the appellants had collected there with guns, lathis and Garasas, appellants Awadheshwar Singh and Bengali Singh had guns in their hands. They, were using abusive language and asking the backwards to leave the village. They also raised some slogans and Rangnath Singh ordered to kill by shooting upon which his son

Surendra Singh took the gun from the hand of Awadheshwar Singh and opened fire. Similarly his son Devendra Singh took the gun from the hands of Bengali Singh. From the firing of Surendra Singh Banwari Yadav was hit and he fell down dead. The informant hid himself behind the Nad to save his life. In the meantime he saw Bisso Sao of his village coming in the lane from the south going towards north and when he reached near the house of the informant Devendra Singh opened fire at him on account of which he also died. Some other persons of the village, namely, Hitnarayan Paswan, Maheshwar Yadav, Dilbodhan Yadav, Chhedi Kahar, Ram Asaray Nisadh and Fekan Yadav also collected. Rameshwar Yadav, Satnarayan Prasad and Phoolmati also sustained injuries with the pellets fired by the two persons namely, Surendra Singh and Devendra Singh.

6. Baidya Nalh Prasad Srivastava, S. I. of Police of Karpi police station came to the village and recorded the Fardbeyan of P. W. 7 at about 9 p.m. on 17-1-78 on the basis of which an F.I.R. was drawn up and investigation of the case started.

7. The I. O, sent the dead bodies for postmortem after inquest and the injured were sent to the Doctor for medical examination. The I. O. also recorded the statements of the witnesses and after completing the investigation he submitted charge-sheet against the appellants.

8. The appellants in defence denied the prosecution case and alleged that they have been falsely implicated in this case. According to them there was an incident in which the appellant Devendra was found to have illicit connection with Minto Kumari, daughter of Maheshwar Kahar, on 16-1-1978 which caused resentment among the persons of the backward community of the village Moglapura and so they were contemplating to take revenge from the appellant Devendra Singh who sensing trouble left the village. It was on 17-1-1978 that the family members of Devendra Singh, namely, his father Rangnath Singh and female members of his house were caught by the member of the backward community and they were taken to Yadavtoli and were shut inside the house of one Fekan Yadav, where they were also humiliated and assaulted.

This news spread in the locality and on 17-1-1978 & mob of Bhumihars came to the village Moglapura in order to rescue Rangnath Singh and his family members from the clutches of the backwards and when they came near the house of Madan Yadav, the backward people present there attacked them and so to save themselves some one in the mob fired from the country made pistol causing injuries to Munsu Yadav and Bissu Sao and the mob was also able to rescue Rangnath Singh and his family members. Since the members of the mob could not be identified by the Yadavas and the backward community, they implicated the appellants in this case out of enmity. On behalf of the deceased Awadheshwar Singh plea of alibi was taken that he was suffering from the illness and was under the treatment of Doctors at Gaya in December 1977 and January 1978.

9. Four witnesses in defence have been examined by the appellants, D.W.I is Dr.

Lalan Prasad who has deposed about the illness of Awadeshwar Singh, D.W. 2 is Dr. Abhay Narain Prasad who has also deposed that the said appellant Awadheshwar Singh was under his treatment from 24-6-1977 to 25-2-1978. D.W. 3 is Bipin Bihari Sharma who is a Mukhiya and he has tried to support the case of defence, about the illicit connection of Devendra with the daughter of Baleshwar Kahar, the confinement of family of Ranganath Mishra and thereafter the assault. D.W. 4 is Dr. Ram Kumar who has also deposed about the treatment of appellant Awadheshwar Singh.

10. The prosecution in support of its case examined 12 witnesses out of whom P. Ws. 1, 4, 5, 6, 7, 8 & 9 are the eye-witnesses of the occurrence. Subsequently P.W. 6 (Chhedi Ram) has been declared hostile. Bhola, Prasad (P.W. 2) and Bhidheswar Prasad (P.W. 3) are formal witnesses who have proved the Fardbeyan, P.W. 10 is Dr. Chandeshwar Prasad Sinha who has conducted the postmortem examination on both the deceased namely, Munshi Yadav and Bisso Sao on 19-14978 at 11 and 12 noon and had submitted postmortem reports (Exts. 4 and 4-A). P.W. 11 is Dr. Chandrashekhar Sharma who has examined the injured namely, Rameshwar Yadav, Phoolmati Kumari and Satnarain Prasad. He has also examined accused Ranganath Singh, Phoolmati Kumari, Pushpa Devi and Lakshmi, P.W. 12 is Prameshwar Prasad who has also proved the Fardbeyan, P.W. 13 is Baidyanath Prasad Srivastava, I. O. of this case, who was not examined in the beginning during the trial but it was during the course of the hearing of this appeal that this Court ordered for exami nation of Baidyanath Prasad Srivastava whose evidence was recorded on 5-8-1987. This P.W. 13 has said that he got information on 17-1-1978 at about 5 p.m. and so he went to the spot and recorded the Fardbeyan, prepared the inquest report, examined the informant, sent the FIR" for registration through village Chaukidar and also examined the witnesses. The trial court after considering the entire evidence has convicted and sentenced the appellants as said above.

11. The murder of Munshi Yadav and Bisso Sao has been well proved by the evidence of the eye-witnesses including the hostile witness as well as P.W. 13, the I. O. and Dr. Chandeshwar Prasad Sinha who has conducted the postmortem examination over the dead bodies, and the same has not been challenged by the defence. In the postmortem examination report (Ext. 4) of Bisso Sao it appears that the Doctor has found that there was a small area of lost skin with inverted margin and blood clots-two on right side of chest below nipple-one on upper part of right side of abdomen-one in the exilum-12 inch on the whole of right upper line-seven on right side of chest. On dissection he found about 800 c.c. of blood in the plural cavity and there were wounds penetrating on the surface of right upper and lower lobe of lung. The Doctor had found fracture of 7th right rib and partial fracture of the 8th rib. He has also removed the pellets from the right arm and four from the right lung and the right side of plural cavity. The opinion of the Doctor was that the injuries were antamortem in nature and were caused by gun-shots fired from distance of more than 6 feet. The death in his opinion was within 48 hours.

In the postmortem examination report of Munshi Yadav which was conducted the same day at about 11 a.m. the Doctor has found six wounds on the front of the chest on the right side. He has also found one incised wound on the outer side of left foot. There were one wound of entrance on the left side of the chest on the second intercoastal stage. The wound was deep to plural cavity and upper lobe of the lung with haematoma all around. There were wounds of entrance on the chest cavity on the right side of front in the second, third and fourth inter-coastal stage and there were penetrating wound on the front and side of the upper lobe of the lung with wounds of exit on the medial surface. These injuries in the opinion of the Doctor were caused by gun shots from a distance of about 30 feet except the wound on the left foot which was by a sharp cutting substances, and death in the opinion of the Doctor has taken place within 48 hours. Thus, from these postmortem reports it is clear that the victims were killed on account of firing from a distance of about 36 feet within a period of 48 hours.

12. P.W. 11 is Dr. Chandreshkhar Sharma who has examined the injured Rameshwar Yadav, Phoolmati Kumari and Satnarain Prasad. He has also examined appellant Rangnath, Pushpa Devi and Lakshmi.

13. The learned counsel for the appellants has urged that the manner of occurrence is different and the prosecution has not come out with clear picture. Further, the appellants have been falsely implicated in this case on account of enmity. It is also urged that no overt act has been assigned to the other accused except appellants Surendra and Devendra. It was also urged that there was delay of nine hours in lodging the report and though some one was sent to lodge the report but the F.I.R. was not lodged, and it was only at 9 p.m. when the I. O. reached the spot, then the Faydbeyan of P.W. 7 was recorded. It was also urged that in the beginning of the argument that during the trial the I. O. of this case namely, Baidyanath Prasad Srivastava was not examined and so the appellants have been prejudiced and their defence has suffered.

14. As regards the question of non-examination of the I. O., as said above under the direction of this Court Baidyanath Prasad Srivastava, I.O., was examined as P.W. 13 by the trial Court on 5-8-1987. From the statements of this I. O. (P. W. 13) it appears that this I. O. has been cross-examined by the appellants and so the contention that on account of the non-examination of the I.O. the appellants have been prejudiced, does not stand. Under what circumstances the I. O. of this case was not examined during the course of trial will be clear from the records of the trial Court. When inspite of the best efforts made by the trial Court the I. O. did not appear, summon was ordered to be issued to the I. O., through the Superintendent of Police, Singhbhum at Chaibasa, along with information to the Inspector General-cum-Director of Prosecution, Bihar. From the order sheet dated 15-3-1984 of the trial Court it appears that a wireless message was received from the Superintendent of Police, Gopalganj, saying that the said I.O. Sri Baidyanath Prasad Srivastava was posted at Gopalganj and he was intimated to appear on the date fixed in the trial Court. But further it appeared that

Baidyanath Prasad Srivastava was not the Investigating Officer of the case and so on intimation was directed to be given to the Superintendent of Police, Gopalganj, that he was not wanted in the case as a witness. It was on 30-8-1984 that no prosecution witness was in attendance. On 31-3-1984 the trial Court fixed 18-4-1984 with a direction to the A.P.P. to produce the remaining prosecution witnesses on the date failing which the Court shall have no option but to close the prosecution case. But on 18-4-1984 again the I. O. of this case was not produced and only Parmeshwar Prasad (P.W. 12) was examined who proved formal F.I.R. (Ext 6) and case diary from paragraphs 1 to 78 (Ext. 7). P.W. 12 was examined and discharged and then the prosecution case was closed.

15. This is the entire story as to how the I.O. of this case did not appear in spite of efforts made by the trial Court from the level of the Superintendent of Police to the Inspector General-cum-Director of Prosecution, Bihar.

16. In its judgment the trial Court was constrained to make observations and in my opinion rightly. The Court below has said :

The I.O. was transferred and his whereabouts could not be located for a pretty long period. Efforts were made to procure his attendance but when the efforts proved futile the same was given and the prosecution case was closed without evidence of the I.O .

There cannot be any doubt about it that in a case of this nature examination of the I.O. is essential and the non-examination of the I. O. is also fatal to the prosecution. But when the I. O. like any other witness cannot be easily available for his examination, the prosecution cannot be condemned. In this situation, I would like to observe that it is unfortunate that the police administration in this State has proved to be a stumbling block in the disposal of criminal cases. The police of this State is probably interested in the case till the submission of the charge-sheet only. The trial is delayed for want of examination of the Investigating Officer whose attendance sometimes is difficult during the trial. It shows non-cooperation on the part of the police administration of the State. Justice suffers on this account, but in special circumstances absolute result could not be allowed to depend on the attitude of the police if truth cannot emerge from the evidence on the records."

17. When this case was taken up by this Court on 24-7-1987 passed an order for the examination of the I. O. The portion of the said order will be relevant to be quoted here :

Sri Srivastava was in service until his superannuation on 27-12-1984 and was given extension of two years and thus until effective retirement being with effect from 27-12-1986. It cannot lie in the mouth of the State that Sri Srivastava could not be examined as a witness in the trial Court because he had no information. Informations, if any, including through the processes of the Court were required to be given to him by one or the other agency of the State of Bihar. That there is no effective machinery at work is a fault which the State

must immediately correct. If it does not do it miscarriage of justice shall be entirely due to the fault of the State of Bihar.

These observations show the scandalous, deliberate and rather apathetic attitude on the part of the police administration to put hindrance in the administration of Justice. The judicial records of this Court as well as the Court below will bear out that it is due to the non-examination of the I.O. that the disposal of this case was delayed. It will be in the fitness of things now that the courts below should adopt the attitude of coercive measures after giving due and reasonable allowance for non-appearance of the I.O. Service of notice should be effected through the S.Ps., I.Gs. or the D.I.Gs. of the range. The courts below must understand that the police witnesses are just like ordinary witnesses and they do not deserve any extra importance at the cost of justice. It is a case the judgment of which must be sent to the Chief Secretary, Bihar, Director General of Police, Bihar and the Inspector General of Prosecution, Bihar, for a serious consideration and to know as to which stage the incompetency, lethargy, slackness, inefficiency and to some extent collusion with the other side for the reasons best known to the officers concerned have gone and on account of this attitude of the police administration how far justice is suffering, back log of cases are increasing and the people of the State are losing faith in the institution of the courts and are thinking that it is a State in which there is no respect of law.

18. The prosecution has produced seven eye-witnesses to the occurrence i. e. P. Ws. 1, 4, 5, 6, 7, 8 and 9. P.W.I (Dilbodhan Yadav) has said that in the noon of 17-1-78 a mob consisting of about 16 persons armed with Lathi, Garasa, Farsa and guns arrived from the Bhumihar-toli at Gobardhan Asthan. Two of them namely Bengali and Awadheshwar had guns. Appellant Rangnath Singh ordered to shoot down the rascals whereupon appellant Surendra Singh took gun from the hand of Awadheshwar Singh and opened fire killing Munshi Yadav. Then Devendra took gun from the hand of Belgali Singh and fired killing Bisso Sao. P.W. 4 (Fekan Yadav) has also said that while at the time of the occurrence he was at his door, he heard a slogan of "Jai Bajrangbali" and saw a mob of about 30 persons coming towards the Gobardhan Asthan which was north of his house. Among (hem he identified 16 persons who had Garasa, Farsa, Bhala and 2 persons, namely, Awadheshwar and Bengali had guns. On arrival Rangnath Singh ordered to kill whereupon his son Surendra took the gun from the hands of Awadheshwar Singh and fired killing Munshi Yadav. Thereafter Devendra took the gun from Bengali Singh and opened fire killing Bisso Sao. Some persons namely Satnarain, Phoolmani and others had received injuries. P.W.5 (Chedi Ram) who has been declared hostile has said that on the date of occurrence in the noon when he was doing labour in the Khalihan of one Ratan Babu he heard a slogan of "Bajrangbali" and saw some 5 to 7 persons at the Gobardhan Asthan. He named appellant Rangnath Singh, Jwala Singh and Surendra Singh among them. According to him Surendra Singh opened fire with a gun killing Bisso Sao and Devendra opened fire killing Munshi Yadav. This witness was declared hostile as he has not given a complete picture. But from his evidence it appears that a mob

had come at the relevant time and Surendra and Devendra had fired killing Munshi and Bisso Sao.

19. Rameshwar Yadav (P.W.6) who is said to have sustained injury during the alleged occurrence has said that at the time of occurrence while he was present in his Marai, he heard the slogans of Bajrangbali and when he came out, he saw 20 to 25 persons at the Gobardhan Asthan and he identified some of them. He saw appellants Surendra and Devendra with guns. Surendra fired from his gun killing Munshi and Devendra fired killing Bisso Sao. He also received injuries from the pellets of the firing of Devendra Singh and then he went away to his Marai and when he came later he found Munshi Yadav and Bisso Sao lying dead.

Banwari Yadav, informant of this case (P. W. 7) is son of the deceased Munshi Yadav and he has said that at the time of occurrence he was going to put fodder in the Nad and the mob came. He has fully supported the version given by him in the Pardbeyan. Rameshwar Yadav, Satnarain Paswan and Phoolmani had received injuries from the pellets. He has also identified the Fardbeyan (Ext. 1) and the signatures thereon. Hitnarayan Paswan (P.W.8) says that he was carrying bundles in the Khalihan to the east of Gobardhan Asthan at the time of the occurrence. Then he saw 15-30 persons coming to the Gobardhan Asthan and raised the slogan of "Jai Bajrangbali". Out of the mob he identified the appellants including Bengali Singh and Awadheshwar Singh with guns in their hands and rest with Garasa, Farsa and Lathi. On the orders of Rangnath Singh to kill the backward persons, Surendra took the gun from the hand " of Awadheshwar Singh and fired at Munshi Yadav who died on the spot. Similarly Devendra took gun from the hand of Bengali Singh and on account of his firing Bisso Sao died. Phoolmani and Satnarain and Rameshwar Yadav received injuries on account of the firing.

Last eye-witness, namely, Ram Asray Paswan (P.W. 9) says that he was going from south to north through a lane to the east of the house of Munshi Yadav and when he reached near the house of Rupan Yadav, he saw 15-20 persons at Gobardhan Asthan at a distance of 15 to 20 Laggis from that place to the north. He identified the appellants as members of the mob in which Awadheshwar Singh and Bengali Singh had guns and the others had Lathi, Farsa and Garasa. On the orders of Rangnath Singh to kill appellant Surendra took the gun from the hand of Awadheshwar Singh and fired hitting Munshi Yadav who fell down and appellant Devendra took gun from the hand of Bengali hitting Bisso Sao who fell down and some appellants caused injuries to Satnarain and Rameshwar.

19-A. From these evidence it appears that these witnesses were eyewitnesses and one of them had received injuries and had fully supported the version of the prosecution given in the Fardbeyan of P.W.7, though with some discrepancy. From their evidence nothing comes out to show that they are unreliable and not truthful. Their evidence has got ring of truth as their statements are supported by the medical evidence which also shows that the victims were shot at and had received injuries at the Gobardhan Asthan which place of occurrence has not been disputed nor doubted and the same place has been said to be the place of

occurrence according to the defence story. So finding the ring of truth in their evidence it is safe to rely upon their evidence.

20. As regards the injuries of three persons namely Satnarain Paswan, Rameshwar Yadav and Phoolmati, P.W.11 Dr. Chandrashekhar Sharma, has said that he has examined them at the Karpi State Dispensary on 18-1-78. He had found one abrasion on the person of the injured: Phoolmati Kumari and that injury was simple and caused by hard and blunt substance. Satnarain Paswan had three abrasions which were simple in nature and X-ray was advised to him for ascertaining the cause of injuries but no X-ray seem to have been taken. He had also examined Rameshwar Yadav and did not find any injury on his person. Those three persons have not been examined as witnesses by the prosecution.

21. As regards the evidence of the witnesses who have been examined for the prosecution the trial court has not, found them worthy of reliance and has held that it has not been proved that these three persons had sustained injuries in course of the occurrence. So for that reason the prosecution case about the injuries having been received by the three persons cannot be said to be disproved, though not fully proved, in spite of the fact, that statement of Dr. Chandrashekhar Sharma (P. W. 11) is there who has got no reason to falsely depose. This very Doctor has said that he had examined four persons from the side of the accused namely Rangnath, Hitnarain, Pushpa and Lakshmi, but they are not accused nor even witnesses for the defence in this case as such receiving of their injuries does not have any effect upon the case of the prosecution as the prosecution is bound to explain the injuries of the accused, if received during the course of the same transaction and that the injuries were grievous in nature.

22. As regards the motive for the offence the prosecution has said that the entire occurrence took place on account of stopping of the flow of water in the drain of the government tube well by Rangnath Singh. According to the case of the prosecution there was Karha passing through the fields of Rangnath Singh, Triloki Singh, Raghubansh Singh and Bindeshwari Singh of the same village and these persons subsequently started their own boring and began to put obstruction in the flow of water in the same Karha and on several occasions flow of water had been stopped which was objected to by the villagers with the result it caused annoyance to the Bhumihar community of the village and they used to say that they would stop the flow of water to the fields of the persons of the lower caste. The operator of the boring was one Baleshwar Kahar. In the night preceding the day of occurrence at about 11 P.M. when the electric line came Baleshwar started the boring machine and water began to flow and the field of Hitnarain Paswan was being irrigated. Then Rangnath Singh, Surendra and Devendra came there and abused the operator and stopped the flow of water. On the next morning i, e. on 17-1-78 Rangnath Singh, Triloki Singh, Devendra Singh, Parsuram Singh and Jitendra Singh went to the house of Baleshwar Kahar and assaulted his mother and nephew whereupon the persons of the backward community collected and asked Baleshwar Kahar to file a case and sent the nephew of Baleshwar Kahar to

the police station along with the village Chaukidar. On this score the members of the Bhumihar community fell, annoyed and had abused and threatened the backward persons of the village.

23. Baleshwar Kahar has not been examined as a witness but Ext. 6 has been filed by the prosecution which is a certified copy of the judgment of G. R. Case No. 67/78 Tr. No. 560/83 of the court of Sri Chandrika Pd., Judicial Magistrate, Jehanabad, delivered on 15-9-83 which shows that War-Rit had taken place in the night of 16-1-78 regarding to flow of water in the drain and on account of that Rangnath and others had come to the house of Baleshwar Kahar and assaulted his mother and nephew. It is a case against Rangnath Singh and five others.

24. Though according to (he trial court the evidence of the witnesses on this point is not very consistent and the I, O. had not been examined then. But now the I, O. has been examined who has said in para 18 of his deposition that there is a tube-well in the village which has been fixed in the river Pumpun and this Karha is towards east from the place where the pump has been installed and this Karha has gone to the village passing through the middle of the fields of Rangnath Singh. Rangnath Singh has a cabin in the north eastern portion and the government tube-well is at a distance of about 50 steps towards west of the cabin of Rangnath Singh. There was an irrigated field towards west of cabin of Rangnath Singh at a distance of about 300 yards. Thus from this objective finding it appears that there was a field irrigated by Baleshwar Kahar and that there was a government tube-well and that the Karha passed through the field of Rangnath Singh.

25. Even if the evidence of the prosecution witnesses of the first occurrence may not be consistent, but it is not contrary and the Ext. 8 the judgment of the competent court cannot be ignored and so the prosecution version that on the earlier day the accused had threatened the members of the backward community is well proved.

26. The defence has tried to establish the story that there were some illicit relations between the daughter of Baleshwar Kahar and Surendra which was resented by Baleshwar and his party and they wanted to take revenge and on that scope the family members of Rangnath Singh were kept confined in the house of Fekan Yadav, and when the appellants with others went to rescue the family of Rangnath, this occurrence took place. F.I.R. is said to have been lodged by the side of the appellants but it was neither filed nor proved by any one of them, though some persons are said to have been injured on their side also.

27. For proving this defence case Bipin Bihari Sharma (D.W.3) has been examined. He says that he was an Ex-Mukhiya of the Gram Panehayat of village Mogalpura. It was on 16-1-78 in the morning when he met Sowaran, the father of Baleshwar. He had seen crowd near the house of Baleshwar. The mob was agitating and expressing anger over Devendra son of Rangnath Singh. The

members of the mob were saying that Devendra had teased Mintu daughter of Baleshwar Kahar. He had also seen Mintu who was teen aged about 15-16 years of age. Besides Baleshwar there were Munshi Yadav, Shaligram Paswan and Banwari Yadav and others and they were talking of taking revenge. He further says that he tried to pacify them to hush up the matter as it was between the children. The same day at about 7 P.M. he went to the door of Nagendra Babu of his village. There he saw Devendra and Surendra sons of Rangnath Singh. They were saying that Shaligram and others were holding meeting to assault them and so they had come to this place. Devendra and Surendra stayed there in the night. Next morning they went away to the house of their relation. On 17-1-78 a rumour spread that some persons were planning to assault Rangnath Singh and his family members and so this D. W. 3 went to village Mogalpura.

He (D. W. 3) went to the door of Rangnath Singh and did not find him at that place. It was known to him that he had been locked up in the house of Fekan Yadav, and so he went to the door of Fekan Yadav, where he saw 1045 persons at his door with Lathi and Bhalas. Among them the deceased Munshi Yadav and Bisso Teli were also there. He found that a group of about 12 persons came from the east side of the village, and when they entered the village Munshi Yadav and others started quarreling and they used weapons. In the meantime somebody used a country made pistol which caused injury to two persons and they fell down and thereafter there was a molee. Some peoples rescued Rangnath Singh and his family members and they went away crying with pain to their house. D.W.3 further said that the police had come to his place on 18-1-78 and he narrated the whole matter to it.

28. The defence has put some suggestions to the prosecution witnesses. P.W.4 denied the suggestion that Rangnath's wife and daughter etc. had been assaulted after being confined inside the house. The informant (P.W.7) in para 20 of his cross-examination has said that he does not know as to whether on 17-1-78 Baleshwar's mother had raised alarm that Mintu Kumari and appellant Devendra had been found in objectionable condition and that it is also incorrect that on this matter P.W.7 and others had held a meeting of the backwards at the house of Baleshwar. P.W.7 further said that it was not incorrect that he and others sent Baleshwar Kahar to the police station with Chaukidar to lodge a false case and it was also not correct that in the house of Rangnath Singh peoples of backward class had entered and thereafter assaulted Rangnath Singh, his wife, daughter and grand-daughter. He has also said that it was incorrect that he and others confined Rangnath Singh and his family members in the house of Fekan Yadav and that, on hearing this; matter peoples of Khautomi assembled near the house of Fekan Yadav. He has denied that when they were attempting to rescue the family members of Rangnath, then his father and Bisso stood there with Garasa to stop them and in that connection unknown persons fired and rescued the family of Rangnath. He has also denied that he and others sat for about 6 hours and consulted as to against whom case should be filed. It was also not correct that the filling of Karha and stoppage of the water story was imaginary.

This witness further admitted that before the occurrence there was no enmity between the family of Rangnath and his family.

29. In this background though suggestion has been put to P. W. 7 who has denied the same and D. W. 3 has been examined and an F.I.R. is said to have been lodged by Rangnath in support, of this version but the same has neither been filed nor proved. Though from the statements of the Doctor Chandrashekhar Sharma (P. W. 11) it appears that he had examined the injury of Rangnath, Pushpa Devi, Lakshmi and Hiramani and found following injuries on their person :--

Injuries found on the person of Ranganath Singh-

- (i) Abrasion 1/4"x 1/4" with swelling 2" x 1 3/4" on the right parietal side of head.
- (ii) Swelling on the whole left palm. (iii) Swelling on the whole right arm. Injuries found on the person of Pushpa Devi-

- (i) Swelling 2" x 1 3/4" with abrasion 1" x 1/2" on the back part, of right leg.
- (ii) Swelling 3"x2 1/2" on the right side of abdomen.

Injuries found on the person of Lakshmi-

- (i) Echymosis 3/4" x 1/2" on the front part of the left thigh.

Injuries found on the person of Hiramani-

- (i) Swelling of whole of the dorsum of left hand with abrasion 1" x 3/4.

All the above injuries according to the Doctor were simple in nature. This medical examination was done on 19-1-78.

30. From the statements of the I. O. (P. W. 13) examined under orders of this Court it appears that he on getting the information went to the place of occurrence and recorded the Fardbeyan of P. W. 7 the same evening and inspected the place of occurrence. He sent the dead body for postmortem and found the place of occurrence south-west to village Mogalpura and north to the house of Yadavtoli. He examined Mintu Kumari also. On 18-1-78 Rangnath Singh, his wife, daughter and Lakshmi Devi appeared before him at about 8 A.M. and he sent them for medical examination which was done by P. W. 11 as said above. He has also investigated into the Karpi P. S. case No. 8(1) 78 under Sections 147, 380 and 452 of the Code which was lodged as a counter case to the present case. He also examined Bipin Bihari Sharma (D. W. 3) Rangnath in his statement u/s 313, Cr. P.C. has said in reply to a question as to whether something has to be said by him, then he said that he would give them in writing. But on record there is nothing in writing on his behalf.

31. Thus from the statement of the I.O. it appears that there was a counter F. I. R. under Sections 147, 380 and 452, I.P.C. But Rangnath has not said anything nor the counter F. I. R. has been brought on record. Even the D, W. 3 does not

say that he had gone to the police station to lodge any report. He was a Mukhiya. His bona fide would have been more established if he would have himself lodged the report. Simply because he has come later on and was Mukhiya will not make him reliable person specially when two persons lost their lives. He being a Mukhiya should have done something which he failed to do. He even does not say as to what happened to the counter F. I. R. so it appears that as a counter blast to the killing of the two persons by the appellants the defence has lodged this report. Even the injuries on the side of the accused are simple. So for these reasons the story set up by the appellants and deposed by D. W, 3 does not inspire confidence.

32. Learned counsel for the appellants urged that though the appellants are said to have been armed with weapons and members of the assembly, but no overt act has been assigned to them and that the appellants were silent spectators and not participating and further there is no evidence of any pre-considered or pre-planned meeting of mind on the basis of which they could have been jointly held guilty for the offence of murder and so the appellants are liable to be acquitted of the charges under Sections 302/149, I, P.C. For the consideration of these submissions it may be pertinent to note that Section 149, I.P.C. is an independent offence. In the case of Bhajan Singh and Others Vs. State of Uttar Pradesh, it was observed :-

Section 149, I.P.C. constitutes, per se, a substantive offence although the punishment is under the section to which it stands being committed by the principal offender in the unlawful assembly known or unknown.

33. In another case of Bhudeo Mandal and Others Vs. State of Bihar, the Supreme Court held :-

Before recording a conviction u/s 149, I, P. C., the essential ingredients of Section 141 of the I.P.C. must be established, Section 149 creates a specific offence and deals with the punishment of that offence. There is an assembly of 5 persons or more persons having a common object and the doing of acts by members is in prosecution of that object. The emphasis is of common object.

Thus a common object is essential for an offence u/s 149, I.P.C. At times common object u/s 149 and common intention u/s 34 are wrongly taken together. In the case of Willie (William) Slaney Vs. The State of Madhya Pradesh, it was held :-

Section 34 does not by itself create any offence, whereas Section 149 does it. In a charge u/s 34, there is active participation in the commission of the criminal act; u/s 149 the liability arises by reason of the membership of the unlawful assembly with a common object, and there may be no active participation at all in the preparation or commission of the crime.

34. Thus in common intention there is prior meeting of mind, existence of pre-arranged plan and action in concert. But u/s 149 only sharing of any object

without any specific participation is the basis for bringing the accused under its clutches.

35. The Supreme Court in the case of Income Tax Officer, Gudur and Another Vs. Maramreddy Sulochanamma, observed :-

In order to attract the provisions of Section 149 the prosecution must establish that there was an unlawful assembly and that the crime was committed in prosecution of the common object of the assembly.

As regards the common object it is essential to give a finding as to what was the object of the unlawful assembly and as to whether object was to commit murder, grievous hurt or simple hurt. This common object is to be decided from the facts and circumstances of each case. In the case of State of U.P. Vs. Mahendra Singh and Others, it was observed :-

There can thus be no doubt that Mahipat Singh and such of the respondents whose presence in established formed an unlawful assembly, that the common object of the unlawful assembly was to commit the murders of Gajraj Singh and his men, that even assuming that the common object was to re-divert the water, if necessary by the use of force, the members of the assembly knew that in prosecution of such an object, murders of the opponents were likely to be committed and therefore, every member of the unlawful assembly would be vicariously liable for the acts committed by any member of that assembly.

In the case of Prabhakar Shankar Sawant and Others Vs. State of Maharashtra, it was observed;-

Before the accused could be convicted of sharing the common object of the assembly or of being members of the same at a time When the assembly became unlawful, it had to be proved by the prosecution that the accused were members of the unlawful assembly at the time when the assembly became unlawful and started pelting stones.

In the case of Bhe Ram Vs. State of Haryana, it was observed at page 958 :-

In the case of rioting u/s 149 it is not necessary that any specific act should be attributed. It is sufficient if it is proved that all the members of the unlawful assembly shared the common object of the said assembly which was undoubtedly to cause the murder of the two deceased.

36. In the case of Vithal Bhimashah Koli Vs. State of Maharashtra, the Supreme Court observed :-

The facts mentioned by us were substantially found by the High Court. Yet the High Court by a curious process of reasoning came to the conclusion that there was no unlawful assembly and that each of the accused persons was liable for his own individual act. The High Court thought that because the accused arrived on the scene at different times and at different stages of the assault, they could not be said to be animated by any common object. The reasoning appears to us to

be totally fallacious. It is obvious from the evidence that the several accused persons were lying in wait at different places near the Mahadev temple and Maruti temple. They had apparently split themselves into smaller groups, so that they might not attract attention. It was not as if there was any appreciable interval of time between their joining each other in the attack. It was a continuous process without any noticeable time lag.... Even if there was any interval of time between the various stages of the attack in which the several accused joined and participated it was a clear case where all of them must be held to have been animated by a common object. There was a point of time in which all of them took part in the assault simultaneously and they also took away the body together. Even if they had come to the scene of offences separately and without any prior arrangement, on the facts of the case, clearly they had become members of an unlawful assembly when they joined together to assault the deceased. The common object could and did develop constant. Unfortunately, the High Court has given a categoric finding that there was no common object and therefore, no unlawful assembly.

37. In the case of Dalip Singh and Others Vs. State of Punjab, the Supreme Court observed :-

Wherein the complainant group was returning in a jeep Amrik Singh fired whereafter others fired indiscriminately causing injuries and fatal injuries in which one of them died, the High Court accepted the finding of the trial court and dismissed the appeal.

The Supreme Court further held at page 317 :-

We agree with the High Court that the appellants along with Pyare Singh had formed themselves an unlawful assembly with the common object of fatally injuring the deceased and members of his party. There is clear motive; and once we reject the sole contention advanced by Mr. Frank Anthony the appeal has no merit and has to be dismissed.

38. Another question arises as to whether the accused had the knowledge that they are going armed with the weapons like Lathi, Farsa and Bhala in a group including the persons of different villages and further a class of persons going to village of another class of persons whom according to the prosecution case there was some altercation in the morning and further that a day before there was an altercation and threatening and assault on the mother and nephew of Baleshwar Kahar. The knowledge also assumes importance. In the case of Bhajan Singh v. State of U. P.," (supra) it was observed at page 567 :-

From the commencement of the interception of the complainant's party by the accused armed with deadly weapons and first accosting of the deceased by Bhajan Singh with a challenging posture upto the running away of the five accused together after causing fatal injuries on the deceased, there is no escape from the conclusion that all the five accused came and worked with one design and object and they were definitely in the know of the fatal consequence that

actually ensued as a result of the conjoint attack to make them all vicariously responsible u/s 149, I.P.C.

In the same case it was further observed :-

Even assuming that the unlawful assembly was formed originally only to best, it is clearly established in the evidence that the said object is well-knit with what followed as the dangerous finale of, call it, the beating. This is not a case where something foreign or unknown to the object has taken place all of a sudden. It is the execution of the same common object which assumed the fearful character implicit in the illegal action undertaken by the five accused.

39. Thus it is clear that the accused of a group and class consisting of persons of different village came together to a different village and having come together gone back together after killing two persons and all of them being armed with Lathi, Farsa and Bhala, They went back together after achieving the finale. From all this it can be concluded that these accused persons were animated by a common object of causing assault with deadly weapons. It is also established that all the persons came together with arms and none of them resisted the killing of two persons and so their finale came i.e. death of two persons. This is clear that all the persons who were members of the unlawful assembly and who did not even participate had not any specific overt act except being armed with deadly weapons through out the operation from the beginning to the end returning together after the finale are equally liable for all the acts done by any member of the assembly. It may also be said that the common object might have been to simply assault but the common object of killing could develop on instant. Thus all the members of the unlawful assembly along with Devendra and Surendra are equally liable for the offence of murder and so they except the two can be convicted u/s 308/149 of the Code.

40. As regards the appellant Devendra it has been said that he was a minor at the time of the occurrence being 16 years of age. Earlier in his bail application which was filed in this court this point was taken up and this court asked for medical report from the Civil Surgeon, Gaya. A report dated 12-4-85 was sent by the Civil Surgeon giving his opinion that appellant Devendra was 22 years of age on the date of his examination on 10-4-85 which clearly shows that this appellant was 16 years of age at the time of the occurrence. In view of this opinion of the Doctor the learned counsel for the appellants urged that this appellant Devendra is entitled to benefit of the provisions of the Bihar Children's Act.

41. No doubt the appellant Devendra was aged about 16 years at the time of the occurrence. He, under the provisions of the Bihar Children's Act should have been treated as a juvenile and his trial should have been separated. But this point has not been raised during the course of trial in the court below and so this Court in appeal has got the power to deal with the case of appellant Devendra in the same way as Children Court. For dealing with the Children provisions have

been made in Sections 21 and 22 of the Bihar Children's Act (in short the "Act"). Appellant Devendra has been found guilty for an offence punishable u/s 302 of the Code, so his case attracts the provisions of Section 22(1) of the Act, for keeping him in the safe custody and that safe custody will not be for more than the period to which he was liable to be sentenced.

42. The Bihar Children's Act has been repealed by the Juvenile Justice Act, 1986 being Act No. 53/86 and it has come into force in Bihar & all over India on 2-10-87. A look to the provisions of the said Act shows that it is virtually same as the provisions contained in the Bihar Children's Act. Section 22 provides for keeping of the juvenile who has attained the age of 14 years and has committed the offence and the Juvenile Court is satisfied that the offence committed is of so serious a nature...the Juvenile Court may order the delinquent juvenile to be kept in safe custody in such place and manner as it thinks fit and shall report the case for the orders of the State Government. Sub-section (2) of Section 22 provides :

On receipt of a report from a Juvenile Court under Sub-section (1), the State Government may make such arrangement in respect of the juvenile as it deems proper and may order such delinquent juvenile to be detained at such place and on which conditions as it thinks fit :

Provided that the period of detention so ordered shall not exceed the maximum period of imprisonment to which the juvenile could have been sentenced for the offence committed.

Thus, following the above provisions of the Juvenile Justice Act 1986 appellant Devendra is liable to be sent to the State Government for keeping him in safe custody in such place and manner as it thinks fit. Devendra is on bail, he may continue to be on bail till the State Government deals with Devendra under the said Act. Appellant Devendra is thus convicted u/s 302 of the Code but not sentenced. However, the State Government may keep him for a period of twenty years (the period of life imprisonment) in safe custody. It will be open to the State Government to consider the case of the appellant after keeping him in safe custody for a period of 14 years and if his conduct is good and satisfactory then he may be let off.

43. As regards the appellant Surendra, he has been found guilty for the offence as mentioned above and so his conviction u/s 302 of the Code and sentence of life imprisonment are maintained and his appeal i. e. Criminal Appeal No. 594/84 is dismissed.

44. As regards the appellants of Criminal Appeal Nos. 413 and 436 of 1984 they are said to be the members of the mob armed with Lathi, Farsa and Garasa. The entire evidence of the prosecution is that the persons of the mob except appellants Surendra and Devendra, did not do anything. The irresistible conclusion in the circumstances of the case keeping in view the caste politics and the local feelings, would be that the common object of this unlawful assembly

may have been to cause injuries, but Devendra and Surendra caused fatal injuries, which may be the individual act of the two only. Thus the appellants of these two appeals cannot escape the provisions of Sections 326/149 of the Code for which they are liable to be convicted and sentenced for seven years each. In this way the appellants of these two appeals are liable for conviction under Sections 326/149 of the Code and they are accordingly sentenced to undergo rigorous imprisonment for seven years besides their conviction under Sections 147 and 148 of the Code which has been recorded by the trial court, and their sentences of one year and two years under the said courts as recorded by the trial court is affirmed.

45. In the result all the appeals are dismissed subject to the modification of sentence of the appellants of Criminal Appeal Nos. 413 and 436 of 1984.

Prabha Shankee Mishra, J.

46. I entirely agree with the conclusions of S. H. S. Abidi, J., except with respect to the benefits of the provisions of the Bihar Children Act and the Juvenile Justice Act, 1986. Our difference of opinion, as to how the Bihar Childrens Act can be applied, has taken Criminal Appeal Nos. 401/84 with 576/84 with 584/84 and Cr. Appeal No. 478/84 to a Full Bench.

47. At the relevant time of the trial of the offences, the Bihar Children Act was in force. Juvenile Justice Act, 1986 was not in force at the relevant time. Settled law, in my view, is that notwithstanding the repeal, the provisions of the repealed Act continue to apply in so far as rights and liabilities created therein are concerned. Thus, the protection extended by the provisions of the Bihar Children Act to the juvenile appellant shall continue to govern him notwithstanding the repeal of the said Act by the Juvenile Justice Act, 1986. It is indeed necessary, before the sentence as awarded to appellant Devendra is imposed, to consider whether such provisions which protected him as a child shall exclude imprisonment as awarded by S. H. S. Abidi, J. or not. Devendra is no longer a child. How a person, who is not a child, can be kept in safe custody, is a question that this Court will have to finally determine.

48. With my reservations, as above, as to the sentence awarded to Devendra, I entirely agree with the judgment of S. H. S. Abidi, J., and order that any sentence to Devendra be imposed in accordance with law interpreted by this Court (Full Bench) in Criminal Appeal Nos. 401/84 with 576/84 with 584/84 and Criminal Appeal No. 478/84.