

(2011) 04 J&K CK 0028

In the Jammu And Kashmir High Court

Case No : Criminal Apl. No. 18 of 2006, Cr. M.P. No's. 40 of 2006, 45 of 2008
and Confirmation No. 3 of 2006

Barkat Ali and Others

APPELLANT

Vs

State of Jammu & Kashmir

RESPONDENT

Date of Decision : 29-04-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 374, 512
Ranbir Penal Code, 1989 — Section 302, 307, 436

Citation : (2011) 2 JKJ 390

Hon'ble Judges : Virender Singh, J;Sunil Hali, J

Bench : Division Bench

Judgement

Virender Singh, J.—Barkat Ali S/o Bali Mohd., aged 30 years; Mohd. Sadiq S/o Jammu, aged 35 years; Mohd. Iqbal S/o Bali Mohd.,

aged 30 years; Mehandia S/o Haji Lal, aged 40 years; and Sain S/o Haji Lal, aged 80 years, all residents of village Morha Dandli, Tehsil Mahore,

District Udhampur; after having been convicted for the offences punishable under Sections 302/436/307/120-B RPC vide impugned judgment of

learned Sessions Judge, Udhampur dated 18.10.2006, are before us through Cr. Appeal No. 18/2006. It needs to be mentioned here that in the

memo of appeal, Appellant-Sain has been shown to be resident of a different village i.e. Budhan Harri Wala, Tehsil Mahore, District Udhampur.

2. All the aforesaid Appellants have been sentenced to undergo imprisonment for life and to pay a fine of Rs. 5,000/- each under Sections

302/120-B RPC, in default thereof, to further undergo rigorous imprisonment for one year each; seven years' rigorous imprisonment and a fine of

Rs. 5,000/- each under Sections 436/120-B RPC, in default thereof, to further undergo rigorous imprisonment for one year each; and seven years'

rigorous imprisonment and a fine of Rs. 5,000/- each u/s 307/120-B RPC, in default thereof, to further undergo rigorous imprisonment for one year each. However, all the sentences have been ordered to run concurrently. Sentence imposed upon them has been sent to this Court for confirmation by the trial Court u/s 374 Code of Criminal Procedure Hence Criminal Reference No. 03/2006.

3. It would not be out of place to mention that other persons namely Hussain S/o Haji Lala, Gulabu S/o Wali, both residents of Dandli, Ghulam Ali

S/o Haji Lala (declared as terrorist), Hussain & Muneer both sons of Ghulam Ali, residents of Hariwala, Danish S/o unknown and Abrar S/o

unknown (declared as terrorists) were also shown to be involved in the occurrence alongwith other thirty/thirty five assailants (whereabout not

known), but as the aforesaid persons could not be nabbed by the police, proceedings against them were initiated u/s 512-Code of Criminal

Procedure. This is how the aforesaid five Appellants only have faced the trial.

4. Prosecution case in brief:

In the present occurrence, eight persons have lost their lives, whereas five were injured. The deceased are Santosh Devi alias Chinto Devi, Soba

Ram, Ganpati Devi, Shankar Dass, Parshotam Lal, Lal Dai, Shrishta Devi and Sushma Devi, whereas injured are Mst. Lacho, Chain Singh,

Krishan Singh, Mst. Naseebo and Mst. Gabban. The place of occurrence is village Dansal Morha Dandli falling within the jurisdiction of Police

Post Arnas. Date of occurrence is of 7th April, 2002 and the time is about 8 P.M.

5. On 08.04.2002, in the morning hours, an information was received in Police Post Arnas from a reliable source to the effect that on the night

intervening 7th/8th of April, 2002 certain militants had entered village Dansal Morha Dandli, armed with ammunition and started indiscriminate

firing. Some of the members of Village Defence Committee retaliated the firing. Militants had killed certain persons and caused grievous injuries to

some of the residents of the village. They had also set on fire some houses in the village. The said information was entered in the Daily Diary

Register (DDR) of Police Post Arnas. The police immediately swung into action through PW Sabdar Hussain. The injured persons were

immediately airlifted to Govt. Medical College & Hospital Jammu for their treatment, where one of them namely Mst. Sushma Devi succumbed to

the injuries on 10.04.2002. Aforesaid Sabdar Hussain prepared the inquest reports of all the dead bodies lying on the spot, recorded the

statements of the witnesses present there and completed all other required investigation on the spot itself. The photo-graphs were also clicked

showing the place where the different dead bodies were lying.

6. During the investigation, from the statement of the witnesses, it revealed that the aforesaid Appellants had entered into criminal conspiracy with

militants Ghulam Ali S/o Haji Lala R/o Dandli, Hussain & Muneer, both sons of Ghulam Ali, residents of Hariwala and Danish & Abrar, both sons

of unknown (proceeded u/s 512-Code of Criminal Procedure) and certain other persons in order to endanger the security of the country and the

State and, as such, committed massacre of a particular community. They also set on fire eighteen houses. It also revealed that on the day of

occurrence, Appellant-Mohd. Sadiq had called Soba Ram from his house sometime before the occurrence and got him murdered by the militants.

His dead body was having slit marks. All the accused persons were also shouting slogan, 'Hindustan Murdabad' 'Pakistan Zindabad'.

7. After the completion of the investigation, a final report was filed against the Appellants only. They were consequently charged for the offences

falling under Sections 302/307/436/120-B/121/121-A/123/324/325 RPC read with Sections 7/25/26/27 Arms Act and 4/5 Explosive Substance

Act.

8. After the full fledged trial, they have now been convicted and sentenced under Sections 302/436/307/120-B RPC only and stands acquitted for

the other offences. State of Jammu & Kashmir has, however, not preferred any appeal against the acquittal earned by them for rest of the charges.

Therefore, the entire evidence produced by the prosecution will be appreciated by us in the context of the charges proved against the Appellants

and not beyond that.

9. The prosecution evidence on record:

PW-1 Krishan Singh

PW-2 Romal Singh

PW-3 Moti Ram

PW-4 Mst. Gaban

PW-5 Heeru
PW-6 Munshi Ram
PW-7 Mohd. Mushtaq
PW-8 Krishan Singh
PW-9 Mst. Sitan
PW10 Paras Ram
PW-11 Bal Krishan
PW-12 Lai Singh
PW-13 Gian Singh
PW-14 Chain Singh
PW-15 Kasho Ram
PW-16 Tirath Ram
PW-17 Dhani Ram
PW-18 Mst. Ishri Devi
PW-19 Jamal Din
PW-20 Munshi Ram
PW-21 Dr. Param Jeet Singh
PW-22 Sabdar Hussain
PW-23 Dr. L.D. Bhagat
PW-24 Dr. A.Q. Salaria
PW-26 M.K. Dhar

10. Before describing the evidence of any other witness produced of the prosecution, we, first of all, would like to refer to the medical evidence, in brief.

11. Dr. Paramjeet Singh PW-21 conducted the post mortem on the dead bodies of deceased Mst. Chinto, Mst. Ganpati, Shankar Dass, Parshotam Lai, Shrishta Devi, Lai Dai, Soba Ram and proved the post mortem reports also. In his opinion, the cause of deaths was because of gun shot injuries.

12. Similarly, Dr. L.D. Bhagat PW-23 conducted the post mortem examination on Mst. Sushma D/o Bishan Dass, who initially got severe injuries

and ultimately died in the Govt. Medical College Hospital Jammu on 10.04.2002. Her post mortem report is also proved.

13. Dr. A.Q. Salaria PW-24 has proved the certificate of Orthopedic Department indicating that Mst. Naseebo remained admitted in Ortho Unit-

1 w.e.f. 09.04.2002 to 01.06.2002 on account of fire arm injury sustaining soft tissue injuries to left leg, back and right forearm. The certificate was proved by this witness.

14. Statement of M.K. Shar PW-25 is with regard to producing the original medical record of aforesaid Mst. Naseebo in the Court.

15. Evidence of other witnesses, in brief, is as under:

PW-1 Krishan Singh has stated that he was a member of Village Defence Committee and was allotted one 303 rifle alongwith live cartridges for

the protection of the village. On 07.04.2002, at about 8 p.m., when he was sitting in the house of Lai Chand where all the inhabitants of the village

had gathered for protection, certain militants came there and started indiscriminate firing. They had hurled four grenades, out of which, two fell in

the compound resulting into uprooting of the roof of the house. He further states that he and certain persons went inside the room and retaliated the

firing. However, they ran out of ammunition. Thereafter, militants came inside the house and shot dead his father Shankeer Dass and his son

Parshotam Dass. They also killed the wife and children of Moti Ram. However, he got a chance to slip away and concealed himself in maize crop.

He further states that the militants set on fire their houses and grass. He could recognize Gulabu and Hussain in the light of burning houses. This

witness has further stated that Appellant Mohd. Sadiq had summoned Soba Ram (since deceased) prior to the occurrence and thereafter, he did

not come alive and his dead body was found, which was slitted with the sharp edged weapon. This witness then states that the carnage continued

till 3 a.m. and the police came on the next day morning at about 7 a.m. He then talks of the investigation conducted by the police on the spot with

regard to preparation of the inquest report and preparation of seizure memos.

16. In his cross-examination, this witness has stated that the accused belong to his village and, as such, they were known to him. He further states

that he named all the accused in his statement but the police had recorded the name of Mohd. Sadiq (Appellant herein) only.

17. Romal Singh PW-2, who stepped into witness box, stated that he knew all the accused persons in the Court as they were known to him

earlier. He then states that on the night intervening 7th/8th of April, 2002 when they were taking meals in the house of Chain Singh and Munshi

Ram, militants came there and started firing. He then states that he and his four brothers being members of the Village Defence Committee has also

retaliated the firing with their arms and ammunition, allotted to them, but after some time, they ran out of ammunition and, as such, his four brothers

ran away from the house and concealed themselves behind a stone, wherefrom house was visible. From the place where they had concealed

themselves, they had recognized the assailants. This witness then talks of militants' injuring Mst. Sushma Devi and Lai Dai He then states that the

militants were brought to the village by Barkat and Mohd. Iqbal. He also talks of calling Soba Ram by Appellant-Mohd. Sadiq at his house and

thereafter his dead body was found near the house of Heeru. According to him, in all, the twelve houses were set on fire by the militants/assailants.

18. Similarly, Moti Rain PW-3, who was also on protection duty, states that when they were taking meals in their house, militants had started firing

in which their family ran from the spot, in which four members of his family including his wife, daughter, mother and son of Krishan Singh were

killed. This witness also states that militants were raising slogans like 'Pakistan Zindabad' 'Hindustan Murdabad' and further states that Mehandia

alongwith Gulabu and Hussain were present alongwith the militants. He also talks of preparation of the seizure memos at the spot as he is signatory

to all those memos.

19. In his cross-examination, he states that his statement was recorded by the police on the second day of the occurrence and states that it was

wrongly written by the police that he did not name the accused.

20. Mst. Gaban PW-4 also depicts the prosecution case in the same manner as is stated by aforesaid witnesses. She then talks of deaths of her

daughter - Lai Dai and grand daughters namely Sushma and Shrishto. She has categorically stated that she had concealed themselves behind the

stone at a distance of about 100-150 feet from their house and from that place, they could recognize Ghulam Nabi, Mohd. Iqbal and others as

they could recognize them in the light of the fire set by the accused. This witness

has recognized accused Barkat Ali and Iqbal in the Court in her cross-examination.

21. Heeru PW-5 has stated that Appellants were known to him earlier. He gives the version of the occurrence almost in the same manner as unfolded by the other witnesses.

22. In his cross-examination, this witness has stated that police had examined him on the next day of the occurrence and if his statement was recorded after more than two months, he could not say anything about it. When asked about the visibility, this witness has categorically stated that because of the burning of the houses, the light was there.

23. Munshi Ram PW-6 & Mohd. Mushtaq PW-7 also unfold the prosecution case almost in the same manner.

24. Krishan Singh PW-8, when stepped into the witness box, stated that he knew Mehandia and Hussain as they were known to him. He then

talks of the occurrence and receiving of the injuries by different persons. He also talks of raising slogans by the militants at the time of occurrence.

25. Mst. Sitan PW-9 has stated in so many words that the accused present in the Court (Appellants herein) were known to her as they belong to her village. She then talks of calling of her husband (Soba Singh) by Mohd. Sadiq at about 5 p.m. and thereafter his dead body was found. She is

categoric in saying that her husband went inside the house of Appellant Mohd. Sadiq and then did not come back. She also talks of raising slogans

by the accused against the country. She is categoric in saying that she recognized the accused on the spot.

26. In her cross-examination, however, she states that except accused Mohd. Sadiq, other accused were not known to her.

27. Paras Ram PW-10 also states that the accused were known to him as they belong to his village. He then gives the full account of the incident

including the raising of slogans by the accused.

28. In his cross-examination, this witness has stated that it is wrongly written by the police that he has not recognized the accused.

29. Bal Krishan PW-11, while giving the entire account of occurrence, gives the names of the deceased and injured. He then talks of Appellant-

Mohd. Sadiq calling Soba Ram in his house, who was subsequently murdered. This witness is categoric in saying that the militants had encircled

their house in which Appellants-Mohd. Sadiq, Iqbal, Mehandia and Barkat Ali were amongst them. He also talks of Hussain and Gulabo (not nabbed by the police) alongwith the militants.

30. In his cross-examination, this witness has stated that he did not make any statement before the police that unknown militants had attacked the village and, if it is written, it was wrongly written by the police that he could not recognize them.

31. Lai Singh PW-12 also states that he recognizes the accused, but while giving the account of occurrence, he stated that the accused/Appellants herein were not present. In other sense, he exonerates them from the scene of occurrence.

32. Gian Singh PW-13 is also categoric in saying that he knew the Appellants as they belong to his village. He then talks of firing by the militants and throwing of grenades, which was retaliated by the Village Defence Committee members. He then states that certain houses were set on fire and he alongwith children had concealed themselves. Since he was very specific in saying that he did not see the Appellants at the place of occurrence, he was declared hostile and cross-examined by the Public Prosecutor.

33. Chain Singh PW-14 has also stated that he knew the Appellants-Iqbal and Barkat Ali as they live behind his house. He then talks of the occurrence. While giving the description of the occurrence, this witness has stated that the Appellants-Mehandia and Mohd. Sadiq were also in the second group of militants and they were coming from downward raising slogans 'Pakistan Zindabad' 'Hindustan Murdabad' saying further they would eliminate the 'Hindus' He then talks of death of Shrishta Devi and her mother Lai Dai. He then states that he had also received injury in his leg.

34. In his cross-examination, he stated that he had named all the accused in his statement before the police, which was recorded on 10th or 12th day of the occurrence, but did not know as to why the names were not written. He made it more clear that it was his duty to give true picture before the police, but he had no knowledge as to why it was not written by the police. He rather went to the extent of making it more clear that the cattle shed was set on fire by Barkat Ali and the second house was set on fire by Mohd. Iqbal, whereas the third house was set on fire by

remaining accused. He further states that when the accused were setting the houses on fire alongwith the militants, Hussain, Mohd. Munshi and Gulabu were also there.

35. Kesho Ram PW-15, Tirath Ram PW-16 and Dhani Ram-PW17 have been declared hostile.

36. Mst. Ishri Devi PW-18 has also stated that the accused were known to her as they belong to her village only. While giving the account of occurrence, she also states that Appellant-Mehandia and Sadiq had set on fire the dry grass and in the light she could see everything behind the bushes. She also talks of raising the slogans by the militants.

37. Jamal Din PW-19 and Munshi Ram PW-20 have also been declared hostile.

38. Safdar Hussain PW-22 is the investigating officer of this case. He states that in the month of April, 2002 he was posted at Police Post Arnas

and was entrusted the investigation of the present case, in which he went to the spot, prepared the inquest report of the dead bodies, got the post

mortem conducted, prepared the site plan and other seizure memos with regard to the taking into possession the clothes and other articles etc. He

then talks of the inquest report prepared by him with regard to the Mst. Sushma Devi, who died subsequently in GMC Hospital Jammu. He proves

all the seizure memos prepared by him during investigation. He then talks of the recording of the statements of the witnesses u/s 161 Code of

Criminal Procedure .

39. It is a case of total denial by all the Appellants as is clear from their statements recorded u/s 342 Code of Criminal Procedure The plea is that a

false case has been registered against them on the basis of enmity in the village and they had never accompanied the militants to a particular spot

(place of occurrence).

40. Heard Mr. R. K. Kotwal appearing for all the Appellants and Mr. B. R. Chandan & Mrs. S. Hakim, Dy. AGs appearing for the State. Trial

Court record also perused.

41. The main attack launched by Mr. Kotwal is that there is a delay of more than two days in lodging the F.I.R. with the police. The occurrence is

of night of 7th of April, 2002, whereas the formal F.I.R. is registered on 10.04.2002 at 6.30 a.m., which reached the Illaqa Magistrate on the

same day at 10 a.m. From this, learned Counsel wants to develop that till the lodging of the F.I.R., the prosecution was not aware about the participation of the present five Appellants. According to him, had they really been there, it was not possible that their names would not have occurred in the F.I.R. He goes on to submit that it is the case of the prosecution that the Appellants were known to the complainant side, who are otherwise from their village only, therefore, their names could not be missed in F.I.R. Learned Counsel then submits that if the names of the deceased and the injured could be mentioned in the F.I.R., the names of the present five Appellants atleast could also be incorporated. This shows that upto 10.04.2002, in fact, the police was not aware of the names of the Appellants and they have been subsequently booked in this case may be for the reason that the real culprits could not be nabbed by the police and the present case in which many persons have lost lives at the hands of militants does not go untraced.

42. Mr. Kotwal then submits that another vital flaw, which stares at the prosecution, is that before recording of the formal F.I.R., the police started investigating the case, inasmuch as, the statements of certain witnesses were also recorded u/s 161 Code of Criminal Procedure Some of the witnesses, who have appeared in the witness box, have categorically stated that on the next day of occurrence the police had reached the spot and their statements were recorded in which they had disclosed the names of the present Appellants.

43. Mr. Kotwal then submits that even during the preparation of the inquest proceedings, the names of the Appellants do not figure and this shows that no one had informed the police about the participation of the Appellants. Not only that even the formal F.I.R. is not proved in this case. The docket sent by Police Post Arnas for registration of case is also not proved. All these vital lacunae cannot be just ignored in this case.

44. Mr. Kotwal goes on to submit that, if the aforesaid flaw is taken into consideration, the legal consequence would be that the statements of some of the witnesses to the occurrence recorded prior to the registration of the case will not be treated as statements u/s 161 P.C., consequently, their evidence before the trial Court will not be read against the Appellants.

45. Mr. Kotwal then submits that it is not understandable that if the Appellants were really involved in the occurrence, then why their arrests have

been shown after the lapse of two months, in case of Barkat Ali, Mohd. Sadiq & Mohd. Iqbal and three months in the case of Mehandia and Sain.

For the purpose of arresting Mehandia and Sain, the basis with the prosecution was the statement of Mst. Naseebo, recorded on 27.06.2002 and

no other evidence. All the Appellants are residents of one village only, where the occurrence had taken place. It has also not come in the evidence

that they were running away from the police. Sain-Appellant at the time of occurrence was of the age of 80 years and he could not abscond. This

indicates that, in fact, there was no evidence with the police against the Appellants and when it could not catch hold of the real culprits '(assailants),

it took the present Appellants into its grip.

46. Mr. Kotwal, otherwise, submits that the prosecution has miserably failed to prove the participation of the Appellants by leading cogent

evidence. It was not possible for the witnesses to identify the accused at night. According to him, the prosecution has lead two different sets of

evidence as some of the witnesses have identified the accused and the others have not. Rather some of the witnesses have been declared hostile.

Not only that, considerable delay in recording their statements also creates lot of doubt in the case set up against the Appellants. All the main

witnesses were confronted from their previous statement with regard to the complicity of the Appellants at the time of occurrence, which fact is not

ignorable. He has drawn our attention to the statements of certain witnesses. He then submits that even the eye version account is running contrary

to the medical evidence. All these weaknesses, if taken, alongwith the other main flaws as already pointed out hereinabove, the prosecution case

deserves to be rejected.

47. Mr. Kotwal then submits that the present case, in fact, starts with a tainted investigation and ends with the same, which demolishes the entire

fabric of the prosecution case. According to him, may be, on the face of it, the present case appears to be of very heinous one, as many persons

have lost their lives and, that too, of a particular community at the hands of the militants, but when tested on the touchstone of criminal

jurisprudence, it is suffering from legal as well as factual flaws. Therefore, the

conviction of all the Appellants as recorded by the trial Court deserves to be set aside.

48. Another attempt made by Mr. Kotwal is to segregate the case of Appellant-Sain on facts stating that not only the involvement of this accused appears to be unnatural at the scene of crime as he would not involve himself alongwith his other co-accused (four Appellants herein) in such a heinous crime, that too at the age of 80 years, when he had no personal motive to take revenge against any of the deceased family, even otherwise, his involvement is not proved beyond doubts. He would possibly not join hands with his co-accused and come to a particular place, that too in the night hours and then render all possible help to the main assailants (militants) to accomplish their task. It appears that the prosecution agency has subsequently knitted the net wider so as to take him along. His case, therefore, appears to be one in which benefit of doubt is warranted.

Otherwise, the entire stress of Mr. Kotwal is that the prosecution has failed miserably to prove guilt against any of the Appellant and they deserve acquittal.

49. Per contra, both learned State counsel submit that it is an unfortunate case in which many persons have lost their lives at the hands of militants, in which present Appellants have rendered all possible assistance not only by calling them in the village, but also accompanying them to the place of occurrence. In other terms, the Appellants had facilitated them in the commission of offence and, therefore, even if they have not actually killed or injured any person at the site, their conviction for the main charges with the aid of Section 120-B RPC is not diluted in any manner. They further submit that the flaws as pointed out by Mr. Kotwal, perhaps, do not advance the case of the Appellants to their benefit. Even if there is some flaw in the investigation conducted in this case, still that would not cause any dent to the cogent evidence brought on record from the statements of the eye witnesses, who were from the family of the deceased. Therefore, according to learned State counsel, none of the Appellants has any case for acquittal.

50. After re-scanning the entire prosecution case by us in its right perspective, being Court of first appeal, we are of the considered view that the prosecution has been able to bring home the guilt to all the present five

Appellants beyond any shadow of doubt. However, we will now be entering into a detailed discussion in which all aspects touched by Mr. Kotwal in support of his case shall be dealt with.

51. Let us appreciate this case vis-a-vis the first argument advanced by Mr. Kotwal. We are conscious of the fact that the F.I.R. is registered on

10.04.2002 i.e. after two days of occurrence. It is after 58 hours. It is based on a written intimation dated 08.04.2002 sent from Police Post

Arnas in the shape of docket No. 3 (in police parlance 'Khat No. 3'). It is prepared on 08.04.2002 and shown to be written at 9.20 a.m. The

source is reliable information. It is to the effect that on the night intervening 7th/8th of April, 2002 certain militants (names not known) had entered

village Dansal Morha Dandli to create terror and had started indiscriminate firing on the members of Village Defence Committee. The police is also

informed about the names of the persons died in the incident and the persons receiving injuries. Beyond that no information is supplied to the

police.

52. Undoubtedly, as per the allegations, cognizable offences were made out and the concerned police of Arnas should have sent the intimation for

registration of the formal F.I.R. on that very day itself i.e. 08.04.2002. However, the same is not done in the present case. It is a serious lapse on

the part of the incharge of the police post, may be unintentional. What is the effect thereof, needs to be appreciated by us. Some times a few hours

delay in recording the F.I.R., changes the entire complexion of the case. There can be a situation on particular facts that even delay of 2 or 3 days

would not be fatal to the prosecution. It, therefore, depends upon the facts of each case. So simply that there is delay, that fact by itself would not

be sufficient to reject the prosecution case.

53. As stated above, in the present case, till the lodging of the F.I.R., none of the assailant is figuring by name, whereas the police had reached the

spot on 08.04.2002 itself in the morning hours and started verifying the facts. Not only that, even inquest proceedings were also initiated. It has

also come on record from the evidence of certain witnesses to the occurrence that the police had visited the spot on the very next day of the

occurrence and recorded their statements, in which they had disclosed the names of the assailants. From this, it can be inferred that the police was

made aware of some of the assailants including the Appellants. Under normal circumstances, it would give an impression that if the police had

come to know of the names of the assailants on 08.04.2002 itself, then why their names were not disclosed in the F.I.R., which is recorded on

10.04.2002 i.e. after the lapse of more than two days, but what we have noticed in this case is that in routine when an entry was made with regard

to the present occurrence in Police Post Arnas on 08.04.2002 at 9.20 a.m., the same was sent to Police Station in routine vide Docket No. 3

(Khat No. 3), least caring that even telephonically or through wireless, the message could be sent for registration of formal F.I.R. Otherwise, what

is borne out from record is that PW Sabdar the investigating Officer, without wasting any time, reached the spot and airlifted the injured to GMC

& Hospital Jammu for their instant treatment. He also prepared the inquest reports and verified the entire facts, in which he recorded the

statements of certain witnesses to the occurrence also. By that time, the report which was reduced into writing, was already sent for the registration

of the formal F.I.R. to the police station concerned. Perhaps, this is the reason that the names of the present assailants or as a matter of fact names

of some of the other assailants, who were also known to the witnesses, could not be incorporated in the initial Rukka sent for recording of F.I.R.

May be, F.I.R. or Rukka has not been formally proved, in our view, it will not be a serious flaw so as to discard the prosecution case.

54. We are fortified in our view by a latest judgment of Hon'ble Supreme Court in case 'Sambhu Das @ Bijoy Das and Anr. v. State of Assam'

reported in 2010 (6) Recent Apex judgments 161, in which, while dealing with almost the same situation on facts, where the F.I.R. was recorded

after the inquest report, their Lordships held that it is not a general proposition of universal application that F.I.R. recorded after the inquest

proceedings will lose its authenticity. It is further observed that when an information regarding cognizable offence is furnished to the police, that

information will be regarded as F.I.R. and all inquiries held by the police subsequent thereto would be treated as investigation, even though the

formal registration of the F.I.R. takes place only later.

55. Much has been said by Mr. Kotwal with regard to the statement recorded during inquest proceedings and made an attempt to derive

advantage out of it. In our view, it would be an attempt in futility. Proceedings u/s 174-Code of Criminal Procedure, have a very limited scope.

The object of the proceedings is merely to ascertain, whether a person has died under suspicious circumstances or an unnatural death and if so,

what is the apparent cause of the death. The question regarding the details as to how the deceased was assaulted or who assaulted him or under

what circumstances he was assaulted is foreign to the ambit and scope of proceedings u/s 174-Code of Criminal Procedure. Neither in practice

nor in law, it is necessary for the police to mention these details in the inquest report. This is the settled legal position and a reference can be made

in this regard to a judgment of Hon'ble Supreme Court handed down in case Pedda Narayana and Others Vs. State of Andhra Pradesh, .

Therefore, during preparation of inquest proceedings, if the investigating officer of this case has not gone into details of the entire prosecution case,

that would not be a ground to infer that the investigating officer was not sure about the facts of the case. Even otherwise, if any statement is

recorded by the police during investigation while preparing the inquest proceedings, that by itself, will not become admissible and the proper

procedure is to confront the witness with any contradiction when he is examined after stepping into witness box and then ask the investigating

officer regarding that particular contradiction.

56. Although the present case, in our view, does not call for that detailed discussion about the scope of proceedings u/s 174 Code of Criminal

Procedure, yet we have entered into discussion as Mr. Kotwal, in his wisdom, made this issue debatable.

57. Having discussed the aforesaid issues, we can now comfortably say that the investigation conducted by I.O.-Sabdar Hussain on 08.04.2002

itself, immediately after receiving the information is not a bad investigation in the eye of law and the statements recorded by him would not be just

brushed aside. However, an intelligent and experienced Investigating Officer could very well avoid all these irregularities. After all, he was

investigating a very serious case, in which there cannot be any scope for a casual approach. The investigation can change the fate of the case.

58. The next aspect to be appreciated by us is the credibility of the witnesses to the occurrence stepped into the witness box.

59. This case has unique features, in which many persons of a particular community have been massacred. The very case set up by the prosecution, as one finds from the statement of Krishan Singh-PW8 who has lost his father and son, is that, on the date of occurrence the members of the Village Defence Committee had collected in the house of Lai Singh-PW12 for the security of others. Many male and female members were also present there. It is at that time that the militants reached there and started indiscriminate firing. They threw grenades resulting into damage to certain houses. The members of the Village Defence Committee also retaliated the attack with the arms and ammunition supplied to them by the government. This all continued for more than one hour and when the members of the said Committee ran short of arms and ammunition, the militants entered the house, initially killed father and son of Krishan Singh and then went to the house of Moti Ram-PW3, where other persons were also killed. It was sheer luck of certain persons, who did not receive any injury or escaped receiving certain injuries. Therefore, the witnesses examined before the trial Court are the persons from different families, who had narrow escape by sheer luck.

60. Another fact, which is also worth noticing, is that in attempt to save themselves, the persons gathered at the scene had scattered hither-thither and remained as silent spectator to the occurrence as their attempt was to escape the notice of militants. Naturally they could not resist the indiscriminate firing by the militants especially when they were running short of arms and ammunition. In this situation, they could see some of the assailants in the light of burning of their houses, which were set on fire by the militants directly or indirectly. Evidence of all the witnesses to the occurrence on record is that they could recognize the present Appellants in that light as they belong to the same village. Some of them named the other persons also, who could not be nabbed by the police and declared proclaimed offender u/s 512-Code of Criminal Procedure.

61. Another fact, which also cannot lose sight of, is that it was an attack by the militants to create terror in the mind of a particular community unconcerned with the fact that it causes one death or many deaths. In the case at hand, it is on record that when the militants reached the house of Lai Singh-PW12, they were shouting slogans like 'Hindustan Murdabad' 'Pakistan Zindabad' . In such type of cases, necessarily everybody should

not be armed with one weapon or the other weapon or must actively participate in causing direct harm to the other. Rendering assistance in any

manner to accomplish the nefarious design by any of the member is also to be seen with the same yard stick. Undoubtedly, the present Appellants

are not shown to be in possession of any arm or ammunition and have also not assaulted anybody in particular, but their active involvement is there.

While rescanning the entire evidence by us for arriving at just conclusion, we cannot ignore noticing all aforesaid facts.

62. As stated above, Krishan Singh-PW1 is the person who has lost his two family members. He got chance to run away from the spot and

concealed himself in the wheat crop. Within his sight, the militants set on fire the houses. In his examination in chief, he has categorically stated that

he knew the assailants and they were also accompanying the militants. He has also categorically stated that in the light of burning houses, he had

identified the accused. In common parlance, he says 'Jalti aag ki roshni me in, muzhar ne hazir ijlal ko shanakhat kiya tha'. He is also very categoric

in saying that alongwith present Appellants, Gulabu and Hussain were also with them.

63. Much has been said by Mr. Kotwal with regard to his evidence, stating that he had improved his statement in the Court, whereas in his

previous statement recorded u/s 161 Code of Criminal Procedure he had named only Mohd. Sadiq.

64. We have the statement of Romal Singh-PW2 to the same effect. This witness also talks of identifying of the accused. However, this witness

states that dead body of Soba Ram was found outside the house of Heeru and his entire stomach was cut.

65. Moti Ram-PW3 has also identified all the Appellants. He also names Gulabu and Hussain alongwith them. With regard to the identification of

the accused, statement of Mst. Gaban-PW4 is that she had identified Mohd. Iqbal and Barkat Ali. So is the position of Heeru-PW5 & Kasho

Ram-PW15, whereas Krishan Singh-PW8, an injured in this case, identifies Mehanda and Hussain, but at the same time Mst. Sitan-PW9, wife of

Soba Ram (since deceased) and Paras Ram-PW10 have recognized all the accused (Appellants herein) stating that they are from their village only.

From the totality of evidence on record, the identification of all the accused at the scene of occurrence is established.

66. The argument advanced by Mr. Kotwal to demolish the evidence of main witnesses stating that they have improved their statements in the Court from their previous statements recorded u/s 161 Code of Criminal Procedure would be of no help to him for a very simple reason that these witnesses were not confronted from their previous statements on that particular aspect. We do find that in cross examination of some of the witnesses, their previous statement for the purpose of confrontation was read over to them, but that very particular portion has not been confronted as per the prescribed procedure. Not only that, the investigating officer was to be asked regarding those contradictions. Even that is not done by the defence. Therefore, legally it cannot be said to be a confrontation so as to say that the witness(s) has made improvement from his previous statement in order to dub him an unreliable witness on a particular material aspect. Being that the position, whatever is stated by the witnesses in their cross examination-in-chief has to be taken as correct. On this legal aspect, we are fortified in our view by basic judgment of Hon'ble Supreme Court handed down in case Tahsildar Singh and Another Vs. The State of Uttar Pradesh, , in which, their Lordships while referring to Section 162 Code of Criminal Procedure, have indicated the procedure, observing thus:

The procedure prescribed for contradicting a witness by his previous statement made during investigation, is that, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him. The proviso to S. 162 only enables the accused to make use of such statement to contradict a witness in the manner provided by S. 145 of the Evidence Act. It would be doing violence to the language of the proviso if the said statement be allowed to be used for the purpose of cross-examining a witness within the meaning of the first part of Section 145 of the Evidence Act. The argument that it would not be possible to invoke the second part of S. 145 of the Evidence Act without putting relevant questions under the first part thereof cannot be accepted.

The second part of Section 145 of the Evidence Act clearly indicates the simple procedure to be followed. To illustrate: A says in the witness box that B stabbed C; before the police he had stated that D stabbed C. His attention can be drawn to that part of the statement made before the

police which contradicts his statement in the witness box. If he admits his previous statement, no further proof is necessary; if he does not admit, the practice generally followed is to admit it subject to proof by the police officer. On the other hand, if the witness is asked, ""did you say before the police-officer that you saw a gas light?"" and he answers ""yes"", and then the statement which does not contain such recital is put to him a contradiction, the procedure involves two fallacies: one is, it enables the accused to elicit by a process of cross-examination what the witness stated before the police-officer. If a police-officer did not make a record of a witness's statement, his entire statement could be brought on record. This procedure, therefore, contravenes the express provision of S. 162 of the Code. The second fallacy is that there is no self-contradiction of the primary statement made in the witness-box, for the witness has yet not made on the stand any assertion at all which can serve as the basis. The contradiction, under the section, should be between what a witness asserted in the witness-box and what he stated before the police-officer, and not between what he said he had stated before the police-officer and what he actually made before him. In such a case the question could not be put at all: only questions to contradict can be put and the question here posed does not contradict; it leads to an answer which is contradicted by the police statement.

67. Their Lordships further held as under:

Section 145 of the Evidence Act indicates the manner in which contradiction is brought out. The cross-examining Counsel shall put the part or parts of the statement which affirms the contrary to what is stated in evidence. This indicates that there is something in writing which can be set against another statement made in evidence. If the statement before the police-officer and the statement in the evidence before the Court are so inconsistent or irreconcilable with each other that both them cannot coexist, it may be said that one contradicts the other.

68. The attack launched by Mr. Kotwal that the prosecution evidence is not getting any support from the medical Evidence is again of no advantage to him. It is a case of indiscriminate firing by different weapons. The witness could not know as to which particular weapon was in the hands of the assailants. Even otherwise, what is to be appreciated in this case is

the privy to the conspiracy hatched between the militants and the present Appellants, which, in our considered view, is proved to the hilt. The Appellants had brought them to the village in order to attack a particular community. Not only they rendered all assistance to the militants, but accompanied them also to the house of Lai Singh, where the members of the Village Defence Committee were sitting. Seeing it from that angle, all other contradictions as pointed out by Mr. Kotwal pale into insignificance.

69. The present case is to be seen in a broader spectrum ignoring certain flaws, if at all occurred on certain aspects. We are conscious of the fact that certain witnesses to the occurrence have not supported the case of the prosecution, but that would not at all bristle the case of the prosecution, which is proved to the hilt from other witnesses. It is the quality and not the quantity, which is to be appreciated. The prosecution is not supposed to produce all the witnesses, if it is in a position to prove the case from a particular set of evidence. At the cost of repetition, we may observe here that most of the witnesses are from the family of the deceased persons only and, therefore, their presence at the time of occurrence can not be doubted. The occurrence is about 8 p.m., which is normal time of all the family members to stay together, that too in the village. Simply that some of the witnesses have not received injuries at the hands of the militants, this does not make them unreliable witnesses.

70. As noticed above, we do find some laxity in the investigation conducted in this case, but keeping in view the entirety of facts, the same would not impeach the credibility of eye witnesses to the occurrence. Even otherwise, it is well settled that if the eye version account is trustworthy, the prosecution case should not be rejected merely on shoddy investigation on certain aspects. After all, Justice can not be made casualty at the hands of the Investigation Officer.

71. The last attempt made by Mr. Kotwal for segregating the case of Appellant-Sain, an old person of more than 80 years, by projecting certain distinguishable features, which attempt undoubtedly he can make, but, in our considered view, is a futile attempt. In fact, he wants to have advantage in favour of Appellant-Sain on humanitarian grounds, especially his age factor, but that aspect will not tilt any favour towards him. In

Criminal Jurisprudence, moral conviction or moral acquittal has no place. In the case at hand, identity of Appellant-Sain, as stated above, is

established to the hilt and at the same time role attributed to him is virtually the same, which is attributed to his four co-accused (Appellants herein),

one out of them is his son only. All the five accused had accompanied the militants at the scene of occurrence, facilitated them in their design and

disappeared from the scene of occurrence after killing many persons and causing injuries to several others. Therefore, the case of Appellant-Sain

does not call for segregation by extending him the benefit of doubt.

72. Perhaps, in our view, no other material aspect is left by us untouched in our discussion.

73. After churning the entire evidence once again by us, in its right perspective, we are of the considered view that the prosecution has been able to

prove its case against all the five Appellants/accused beyond any shadow of reasonable doubt and, as such, their conviction and sentence as

already recorded by the trial Court punishable under Sections 302/436/307/120-B RPC deserve to be upheld. Ordered accordingly.

74. Cr. Appeal No. 18/2006 stands disposed of in the aforesaid terms alongwith connected Cr.M.P.(s).

75. Confirmation No. 03/2006 also stands answered.