

(1990) 07 PAT CK 0014

In the Patna High Court

Case No : Criminal Appeal No's. 462, 499, 521, 527, 531, 544, 545, 546 and 548 of 1987

Nagina Sharma and Others

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 10-07-1990

Acts Referred:

Arms Act, 1959 — Section 25, 27
Criminal Procedure (Amendment) Act, 1955 — Section 251A, 251A(11), 251A(7)
Criminal Procedure Code, 1973 (CrPC) — Section 161, 238(2), 242(2), 254(2), 294
Evidence Act, 1872 — Section 134, 32, 44, 45, 47
Explosive Substances Act, 1908 — Section 3, 5
Penal Code, 1860 (IPC) — Section 141, 147, 148, 149, 302

Citation : (1991) CriLJ 1195 : (1991) 1 PLJR 238

Hon'ble Judges : S. Haider Shaukat Abidi, J;Birendra Prasad Sinha, J

Bench : Division Bench

Advocate : Rajendra Singh and Prakash Narayan Pandey, Ram Pravesh Sharma, Akhileshwar Pd. Singh, Anil Singh and Gyanoo Singh, for the Appellant; Ganesh Prasad Jaiswal, Assistant Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

S. Haider Shaukat Abidi, J.—In Cr Appln. 544/87, Dudheshwar Sharma, Cr. Appln. 545/87 Darshi Sharma, Ram Krit Sharma, Haridwar Sharma and Bagesh Sharma alias Bageshar Sharma, Cr. Appln. 546/87 -- Baikunth Sharma and Cr. Appln. Awadhesh Sharma have been convicted u/s 302 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for life. Though they have further been sentenced u/s 27 of the Arms Act, but no separate sentence has been awarded in that regard. In Cr. Appln. 462/87 Nagina Sharma, Gr. Appln. 521/87 Baliram Sharma alias Bali Ram Singh, Cr. Appeal 527/87- Nawal Singh, Raj Kishore Sharma, Mahendra Singh, Gaya Singh, Jairam Sharma, Braj Nandan Singh, Ramadhar Sharma and Rajendra Sharma, Cr. Appln. 531/87-- Lal Singh, Bhukamp Singh, Rama Singh and Dinesh Singh, Cr. Appln. 532/87-- Fudari Sharma and Ram Bilash Sharma have been convicted u/s 302/149 of the Indian

Penal Code and sentenced to undergo rigorous imprisonment for life. Originally thirty six persons have been prosecuted. Out of whom the above twenty four have been convicted, ten have been acquitted; one Sudama Sharma died prior to the framing of charges and Nand Kishore and Alakh Sharma are said to have died after the framing of charge.

2. A fard-beyan has been given by Kameshwar Prasad Yadav (P.W. 20) to Nagendra Singh the then Sub-Inspector of Police, Goh Police-Station on 10-6-1977 at about 1 p.m. in the Goh Hospital, on the basis thereof a case was registered under Sections 147, 148, 149, 302, 307, 326, 324 and 323 of the Indian Penal Code and Section 25 of the Arms Act and Section 3/5 of the Explosive Substance Act, the same day at about 2.30 p.m. against the said accused appellants and others. In the fard-beyan it has been said that the informant Kameshwar Pd. Yadav resident of village Pali along with his villagers Jagdeo Yadav, Deven Singh, Bidyabilas Singh, Krishna Yadav and others had gone to Sagarpur polling station for casting their votes in the Assembly election on 10-6-1977 at about 6.30 a.m. The voters of villages Sagarpur, Khaira, Jujharpur, Pali, Govindpur, Rampur, Digrahi and others were to cast their votes at the polling station or Sagarpur. As the election had not started, the informant and his co-villagers sat on a field to the east of the said polling booth. In the meantime Sohan Yadav, Dharamdeo Yadav, Rajdeo Yadav, Mitar Yadav, Charitar Yadav, Sohan Yadav, Jagdeo Yadav and Bindeshwar Yadav all of village Rampur, Dukhan Yadav, Dasruth Yadav, Briksh Yadav, Rajdeo Yadav, Jagdeo Yadav and Ramnarain all of village Govindpur, Ramratan Yadav, Chander Yadav, Rambilin Yadav and Simran Yadav of village Digrahi, Bindeshwar Yadav, Rampati Yadav, Kailash Yadav, Sheonandan Yadav, Nanhe Yadav, Ramchandra Yadav, Ramrup Yadav, Sohrai Yadav and others had also come. All these persons were waiting for casting their votes. Then about fifty persons armed with lathis, bhalas, garasas, bombs came to the west of the polling booth. Out of them, the informant identified accused Ramkrit Sharma, Baikunth Sharma, Awadhesh Sharma, Hardwar Sharma armed with country made guns, Rajendra Singh, Alakh Singh, Dudheshwar Singh, Ramadhar Singh, Caya Singh, Jairam Singh, Brijnandan Singh, Rajkishore Singh, Nawal Singh, Mahendra Singh all of village Sagarpur, Brijnandan Singh, Rambilash Singh, Baliram Singh, Darsi Sharma and Fudani Sharma all of village Barpa, Mukhan Singh, Lal Singh, Madan Singh, Rama Singh and Binod Sharma of village Khaira armed with country made guns, Dinesh Singh of village Khudwa, Nand Kumar Singh of village Murera, Kishun Singh of village Rukundi and Dudheshwar Sharma of village Mujhara armed with guns. When the informant and others proceeded towards polling booth to cast their votes, then the aforesaid persons began to abuse and asked them not to cast their votes. In spite of their warnings the informant and others continued proceeding towards the polling booth. Thereupon Nand Kumar Singh of village Murera ordered to assault them and then Nand Kumar Singh himself opened fire causing gun shot injuries to Jagdeo Yadav who fell down as a result thereof. Other accused also started firing from their guns. Jagdeo Yadav of village Pali was hit by the firing of

Ramkrit Sharma. Sohan Yadav of village Rampur was hit by the firing of Bageshar Sharma, Baikunth Sharma fired and injured Dharamdeo Yadav of village Rampur whereas Awadhesh Sharma fired and hit Dukhan Yadav of village Govindpur, Dueshwar Sharma hit Briksh Yadav of village Govindpur and Darsi Sharma hit Chandbudar Yadav. The accused and others were firing indiscriminately at the informant and other persons causing injuries to the informant and the witnesses by their gun shots. Then the informant and others began to flee towards east, the accused assaulted them with bombs and garasas. Nand Kumar Singh had ordered to kill them. In the meantime the patrolling party came on hearing gun fire and bomb explosion. Thereupon the accused persons made good their escape towards west. The informant and others went thereafter to the place and found Sohan Yadav and Dharamdeo Yadav of village Rampur, Dukhan Yadav, Dasrath Yadav, Rambriksh Yadav and Jagdeo Yadav of village Govindpur and Chandbudar Yadav of village Kujwan, dead there. Many persons had received injuries. The injured were taken to Goh Hospital on a tractor where Jagdeo Yadav of village Pali also died. Accused Nand Kumar Singh, who is dead now, was one of the candidates in the said election and he wanted all the votes to be cast in his favour which resulted in the said occurrence.

3. After registration of the said first information report, the investigation was taken up by Nagendra Singh, Sub-Inspector of Police, Post-mortem examination had been done on the deceased, namely, Jagdeo Yadav of village Pali, Sohan Yadav, Dharamdeo Yadav, Dukhan Yadav, Cahandgudar Yadav, Briksh Yadav, Jagdeo Yadav of village Gopipur and Dasrath by Dr. S. Jamilal Rahman (P. W. 8). Thirty two persons were also said to have been medically examined. After completing the investigation charge-sheet was submitted by the Investigating Officer.

4. The accused in defence denied the prosecution case and alleged that they have been falsely implicated in this case due to enmity and that the prosecution has not been able to prove charge against them and so they are entitled to acquittal. Four witnesses in defence have been examined by them. D. W. 1 Surya Nath Tiwary is a typist in the office of the Superintendent of Police, Aurangabad who proved memo No. 916 dated 21-6-1977 (Ext. A), wireless message (Ext. B) and endorsement of memo No. 1047 dated 17-6-1977 (Ext. C). D.W. 2 is Dr. Jafer Ali Imam, Patrolling Party Magistrate, who was deputed at Sagarpur polling booth, claims to have reached the spot within half an hour of the occurrence. D.Ws. 3 and 4 Bhola Pd. Singh and Balmiki Pd. Kashyap had been examined to prove the alibi of Nand Kishore Singh accused since deceased.

5. The prosecution, in support of its case, produced 23 witnesses. Out of them Sheonandan Yadav, Rampati Ram, Kailash Nath Yadav, Sohrai Yadav, Ramnarain Yadav, Rajdeo Yadav, Bindeshwari Yadav, Ramdeo Yadav, Ranuku Yadav, Charitar Yadav, Ramratan Yadav, Jageshwar Yadav, Surya Ram Yadav, Rambali Yadav, Vidya Bilash Yadav, Kameshwar Yadav and Ram Sewak Yadav P.Ws. 1 to 7, 9 to 13, 15, 17 to 21 are the eye-witnesses. Among them P. W. 20 is the informant

himself. P.W. 8 is Dr. Jamilal Rahman who had conducted postmortem examination. Jagdeo Yadav and Ramnarayan Yadav (P.Ws. 14 and 16) had been tendered. P.W. 22 Rampeyare Singh had proved the carbon copy of first information report (Ext. 2), carbon copy of fard-beyan (Ext. 3) and carbon copy of the case diary (Ext. 4). P.W. 23 is Umesh Mishra who proved the signature of the informant on the fard-beyan.

6. The learned trial Court after considering the entire material on the record has convicted and sentenced the appellants as said above.

7. Sri Rajendra Singh, Senior Advocate has appeared for the appellants except Nagina Sharma in Cr. Appln. 462/87 for whom Shri Prakash Narayan Pandey had appeared. Shri Singh has argued that the order of conviction is bad; that there is omnibus statement about the accused in the statements and no specific part has been specified by the witnesses; that the offence u/s 302, I.P.C. is (not made out against the appellants; that seven appellants have been convicted u/s 302, I.P.C. simpliciter have also been acquitted u/s 302/149, I.P.C. and even if an offence u/s 302 is not made out then they cannot be convicted even u/s 302/149 on account of the acquittal; that the Investigating Officer has not been examined in this case on account of which the prosecution has not been able to get the material from him specially, the map in which brick-bats are said to have been found there; that material witnesses have been withheld, specially, the presiding officer and the police party on duty, who were independent witnesses and would have given out the materials which could have been of benefit to the appellants and would have deposed about the occurrence; that the genesis of the occurrence has not been given; that no details have been put to the accused in statement u/s 313, Cr. P.C. and so that material not put to the accused cannot be looked into; that the witnesses in this case are interested and partisan as members of one party are said to have been killed and assaulted and for that witnesses of that party have come to depose and no independent witness has come forward to depose for them; that the Doctor in this case has also not been examined in support of the prosecution case that the witnesses had been assaulted and in the absence of the Doctor the oral testimonies of these witnesses about the injuries cannot be accepted; that even the informant has not been able to prove that it was the same first information report which was given out by him and so even lodging the first information report by the informant is doubtful; that in respect of some accused the naming and identification by only one person or single identification and naming should be ignored in the circumstances of the case. Mr. Prakash Narayan Pandey for his client argued that he was not in the first information report and he is said to have been identified by two witnesses and one of the witnesses, namely, P.W. 19 has said that he had not named the appellant before the police, though he had identified the appellant in court and so this single identification against Nagina Sharma should not be accepted.

8. To appreciate these contentions of the learned counsel, the evidence led by

the prosecution will have to be scrutinised with care and caution to find out as to whether there is ring of truth; whether it inspires confidence and whether it is worthy of reliance.

9. P.W. 20 Kameshwar Yadav is the informant in this case. He has said that on 11-7-1977 the voting was going to be held at Sagarpur polling booth since morning. 25-30 persons were sitting there. Announcement for beginning of casting votes was done. Then they started to proceed towards booth. People from Rampur, Digarahi, Govindpur and Pali were sitting there. When they proceeded towards the polling booth then 50-60 persons of village Sagarpur emerged from the west, armed with lathis, bhalas, garasas and guns. These 50 to 60 persons captured the polling booth. He claimed to recognise Ramkrit Singh, Bagesh Singh, Baikunth Singh, Awadhesh Singh, Haridwar Singh, Alakh Sharma, Ranjan Singh, Mithileshwar Singh, Ramadhar Singh, Gaya Singh, Jairam Singh, Brijnandan Singh, Ram Kishore Singh, Nawal Singh, Mahendra Singh, Brijnandan Singh, Ram Bilash Singh, Baliram Singh, Darshi Sharma, Fudani Sharma, Lal Singh, Ram Singh, Bhukamp Singh, Binod Singh, Dinesh Singh, Umeshwar Singh, Haridwar and Shri Kishun Singh. These 50 persons did not allow the informant and others to cast vote whereupon the informant and others said abusing that they would cast their votes. Then Nand Kumar Singh (since deceased) exhorted to kill "Salon Ko Markar Goli Se Ura Do". Nand Kumar Singh himself fired hitting Jagdeo Yadav of village Govindpur. Ramkrit fired at Jagdeo of village Pali. Bagesh Singh fired at Sohan Yadav of Rampur. Baikunth Singh fired his gun hitting Dharamdeo Yadav of Rampur. Awadhesh Singh fired at hitting Dukhan Yadav of Govindpur, Dudheshwar Sharma fired at hitting Ram Briksh of village Gobindpur. Darshi Sharma fired at Chandbudar Yadav of village Ghegna. After receiving the gun shot injuries all the aforesaid persons fell down and died on the spot. 25 to 30 persons were also injured due to gun-shot injuries. On account of firing the informant and others began to flee from the polling booth. On hearing the firing the patrolling party came to the spot, and then these 50-60 persons ran away from the spot. On coming of the patrolling party the informant and others again went to the polling booth and saw the dead and injured persons. The dead and the injured were taken on a tractor to Goh, Hospital. At Goh Hospital the statement of the informant was recorded by the police. It was read out to him and he put his signature. He had also said that Munshi Singh, Ram Shaman Yadav, Nand Kumar Singh, Shriniwas Singh and others, were candidates in the election and Nand Kumar Singh was an independent candidate. The informant says that his brother Rajeshwar Yadav was polling agent of Ram Saran Yadav. He and his two brothers were voters and so he had gone to cast his vote. He denied the suggestion that no occurrence had taken place at Sagarpur polling booth. About 250 persons has cast their votes which had taken about 15 minutes time. Besides the police officer and the presiding officer some constables were also at the polling booth. He also said that he did not complain to the Presiding Officer, the polling officer or the police that the accused were not allowing them to vote. He said that his village is adjacent to the village of

Sagarpur. He has also said that the firing had been done in the presence of the polling officer, presiding officer and the police. He has also said that lathi, garasa and bhala were at his residence but he and others did not go to bring the same from there. The accused had fired from the eastern side of the polling booth. The members of the mob were armed with lathi, bhala, garasas and guns. The assault was done by the gun not by lathi, bhala and garasa. There was no spectator but all were voters. After the firing the polling was stopped, though earlier than that it was done for 15 minutes. He has also said that the firing was done one after the other. At the first firing 15-20 persons started running. The persons running were also hit by pellet and so were injured. He had not seen those persons getting pellet injuries but had seen persons getting fire-arm injuries. On getting the pellet injury he sat towards east of the ghera which was up knee-high. He then became unconscious. He had a bleeding injury and where he sat blood had fallen. He had not shown the place to the investigating officer where he was sitting. Five constables of the patrolling party had chased the persons who had fired. He had not gone to the patrolling magistrate or the constables to narrate about the occurrence. He has also deposed about the distance and place where the dead persons had fallen and blood had also fallen from their bodies. The investigating officer had come to the place of occurrence when he was in hospital. At the time of the mar-pit bombs were also exploded. By the explosions 12 persons had been injured. After ten minutes of occurrence he started for Goh police-station and the hospital is about ten bansh away from the police-station. He said one Bansh means 5 to 6 feet. The injured by pellets were in a position to move. 28 to 30 persons were carried to Hospital by tractor first.

10. Besides this informant (P.W. 20) the other eye-witnesses, as mentioned above, appear to be from different villages. At the polling booth of Sagarpur villagers of seven villages had to cast their votes, namely, Sagarpur, Khaira, Jujharpur, Pali, Govindpur, Rampur and Digrahi, as some of the witnesses including P.W. 1 have said so. Looking to the evidence of the witnesses it will appear that P.Ws. 1, 2, 3, 4, 6 and 7 are residents of village Govindpur. P.Ws. 9, 10, 11, 13 and 14 are residents of village Rampur. P.Ws. 12, 17 and 18 are of village Bigrahi. P.Wa. 15 and 21 are residents of village Sagarpur while P.Ws. 5, 19 and 20 are of village Pali.

As regards appellant Ramkrit Sharma, Bagesh, Baikunth, Awadhesh, Haridwar, Hawal Singh, Ram Kishore Sharma, Mahendra Singh, Gaya Singh, Jairam Singh, Brij Nandan Singh, Ramadhar Sharma and Rajendra Sharma are residents of village Sagarpur, Darsi Sharma, Ram Bilash Sharma, Brijnandan Sharma, Fudani Sharma and Baliram Sharma are residents of village Barpa. Budheshwar Sharma is resident of village Mujhar. Lal Singh, Bhukump Singh, Rama Singh are residents of village Khaira. Dinesh Singh is resident of village Khudwa. It has come out in evidence that Khudwa, Barpa and Mujhar are adjacent villages of Sagarpur.

11. P.W. 1 Sheonandan Yadav said that he had gone to cast his vote. He and others were sitting on a Pind to cast their votes. When he proceeded to cast his vote then he saw 50 to 60 persons, sitting under the tamerind (Imali) tree who said that they would not allow others to cast their votes. Persons along with him proceeded to cast their votes. But the persons, who were sitting under the Imali tree, fired. Out of them he identified Baikunth Sharma. When he started running they exhorted to kill. He got gun-shot injury below his left knee. On account of firing the said eight persons died. He had gone to hospital where he was given medical aid. He identified Baikunth Sharma present in court. He denied the suggestion that Yadavas had attempted to capture the booth during Lok Sabha election and also denied that he had collected any brick-bats near the polling booth. By the time firing was done some votes had been cast. He and others were standing in the queue. He denied to have gone along with others with lathi, bhala farsa and gun. No brick-bats were thrown upon the voters. He said that it was incorrect to say that Yadav had been throwing brickbats on the voters. At the time of incidence the polling officer, presiding officer and other officers were present at the booth. He denied to have any knowledge as to whether the accused had said before the police that the brickbats were thrown by Yadavas at the voters and that they were armed with lathi, bhala, farsa and guns. He denied the suggestion that Yadavas were armed with weapons and that they wanted to capture booth and get the vote cast in favour of Ram Sharan Yadav. He further said that the entire voting was done from the eastern side of the polling booth. He says that on the first firing he started running towards east. While firing was going on the Magistrate and police came to the spot. He further said that he did not tell the Magistrate about Baikunth Sharma as he was feeling uneasy on account of the injuries received by him. He had gone to the hospital in a tractor. On that date no police officer had come to the hospital. He was in the hospital till noon. The Sub-Inspector of Police of Goh had come to him after one day or two of the incidence. He had recorded his statement.

P.W. 2 Rampati Rai has also said that he had gone to booth to cast his vote and he was waiting for the polling to start. He saw 50-60 persons sitting. Out of whom Nand Kumar said that he would not allow them to vote. When he said that he would cast his vote then Nand Kumar Singh said that no one would be allowed to vote. Nand Kumar Singh then fired from his gun. From the firing of Nand Kumar one Jagdeo Yadav of village Govindpur and by the firing of Ramkrit Singh one Jagdeo Yadav of village Pali were injured and fell down and died on the spot. He got pellet injuries on his left elbow. He identified Nand Kumar and Ramkrit who were present in court. In cross-examination he denied to be the supporter of the Communist Party of India and stated to have gone to vote for Ram Sharan Yadav. Besides him, Harijans of village Sagarpur had also gone to cast their votes. He denied the suggestion that he had gone to Sagarpur along with other Yadavas to capture booth. He also denied to have pelted stone from the side of Yadavas and had not seen stock of the brickbats. He said that he knew Chandrbudar Yadav who was, at the time of occurrence, coming from Bazar with

cloth and that he was killed in this case. Dead body of Chandrabudar Yadav was taken to the hospital. He could not see and from whose firing he was injured. There was no alarm or talk before firing. Nand Kumar Singh was old man of about 60 to 70 years. When firing started he started running towards east and at that time patrolling party had come.

P.W. 3 has also said that on the day of occurrence he had gone to the polling booth to cast his vote and he was sitting towards east from the polling station. After sometime 50-60 persons armed with bhala, garasa and gun came from Sagarpur village towards west of the polling booth. Out of those 50-60 persons Nand Kumar Singh said that the booth had been captured. This resulted into exchange of abuses. Nand Kumar Singh fired. Haridwar Singh also fired hitting Dasratha Yadav who fell down. He and others ran towards east. He got lathi injury on his shoulder. The patrolling party came and he and others went to the booth and found the said eight persons dead. He also went to the hospital where he was treated. He identified Haridwar Singh who was in court. He was not going to vote but Dasrath and Dukhan had asked him to vote as it is a very valuable right. Not only persons of his village but persons of Pali, Rampur, Jujharpur and Digrahi had gone to vote. He denied that he and others had collected brickbats near the Pind. He denied to have shouted "Bajrang Bali Ki Jai". At the first firing he was bewildered and started running with others towards east. Some persons began firing and injuring. Five to seven persons of his village had gone running to Pokharbigaha. When the firing started some votes were cast. The persons firing were at a distance of about two bansh towards east of the polling booth. He recognised Ramkrit Sharma, Gaya Sharma, Mahendra Sharma and Ramswarup Sharma of village Sagarpur. He had also gone to the police-station along with patrolling party on a tractor on which injured and dead persons were also taken. He had met the Sub-Inspector of Police at police-station. The police had recorded the statement of Rameshwar Yadav and Ramratan Yadav. He denied to have said to the police that Nand Kumar Singh had said that the booth had been captured. He denied the suggestion to have falsely deposed or that Nand Kumar was not at the spot.

P. W. 4 had also gone to the booth as other P.Ws. had gone and he was waiting for the polling. He saw 40-45 persons from Sagarpur had collected towards southern and western corner. He identified Haridwar Singh, who was in court. These 40-45 persons were sitting armed with lathi, bhala and garasa. When he and others moved towards the polling booth those 40-45 persons said that the booth had been captured and no one would be allowed to vote. He and others said that everybody had to vote. Thereupon some person of the mob said to kill by firing. The firing started in which some people were killed and some injured. He also got injuries on his back and the left thumb. He found the aforesaid persons dead. He had also gone to the Hospital where he was treated. When he had gone to vote officers and police were there. He said that he one had become afraid seeing 40-45 persons collected with arms. He had also not gone to the officers to tell them as to why 40-45 persons had collected there with arms.

None of the persons collected with this witness had said to bring lathi, bhalaetc. to face these 40-45 persons collected with arms. He said that along with the officers the dead and the injured were brought to the hospital on tractor. On the tractor nobody discussed as to who had fired at whom. He had received injury from the backside and so he could not identify the person who had hit him. Before going to hospital he along with others had gone to the police-station. No statement was given by him at the police-station. He had given his statement when the officer had come to the hospital.

P. W. 5 Ramnarain Yadav has also said that he had also gone to vote and had reached the polling booth earlier and was waiting for polling to start. 40-50 persons came armed with various weapons from Sagarpur village and they said that the booth had been captured and no one would be allowed to cast his vote. The witness and others said that they would cast their vote. Some people of the mob said to shoot. Then firing started from west of the polling booth. When the firing stopped then he found some persons injured and some dead. He identified Ramkrit Sharma, Haridwar Sharma, Ragesh Sharma, Baikunth Sharma, Ramadhar Sharma, Alakh Sharma, Raj Kishore Sharma and Arjun Sharma of village Rampur. He said that he was sitting near the Aal. He denied the suggestion that brickbats (rora-pattar) had been collected there. 20-25 persons, who fired, came from the side of the tree and 30-35 persons from the side of Sagarpur village. Seeing them he got the apprehension that they would fire. He did not run away but went near the police at the polling station. After 15-20 minutes of firing the patrolling party had come to the spot. He also said to the presiding officer to stop the persons from firing with the help of the force armed with rifle. Thereupon the presiding officer said whether he should save his service or his life or to stop the firing of persons. The polling continued for sometime even after coming of the patrolling party. After an hour arrangement was being made to send the injured and the deceased to police-station and Goh Hospital. He had gone to the place where the injured and the dead were being loaded on the tractor. He had been to the police station at 4 p.m. The dead body of the Chandrabudar Yadav was at the place of occurrence till about 4 p.m.

P.W. 6 Rajdeo Yadav also says that firing was done at the polling booth and on account of firing the polling could not be done. He also knew Nand Kumar Singh, Krit Singh, Haridwar Singh and Bagesh Singh. He said that he was also injured by pellet and so he had gone to the hospital where he was treated. Not he but his brother Indradeo Yadav has got a licensed gun. He denied the suggestion that they had got information that there would be trouble at the polling booth and that one should go ready for it. No stock of brickbats was piled from before. When the polling started the persons sitting on the pind proceeded towards the polling booth somebody stopped and threatened. He also said that when he was stopped from polling then he got frightened and started running towards east. While running he got firing injury from behind. Some people were being injured and some also killed. He went running to Narakbigha where also others ran for life.

P. W. 7 Bindeshwar Yadav too had gone to the polling booth along with his villagers and he too could not cast his vote as people of Sagarpur gave out that the booth had been captured. He recognised Krit Singh of Sagarpur among them. His father Dasrath Yadav had been killed. He too had received gun shot injury. Seven people were killed at the polling booth and one succumbed to the injury later on. He was treated in the hospital. Among the killed persons was by the name of Jagdeo Yadav. He has said that Sagarpur was polling centre for the villagers of villages Govindpur, Pali, Rampur, Digrahi, Sagarpur, Kheira and Jujharpur. He denied that he had gone ready to the polling station. He was therefore about 10 minutes and thereafter he ran. There were no brickbats kept or scattered near the pind. He also said that whose firing hit him he could not see.

P. W. 9 Ramdeo Yadav too had gone to the polling station along with his father and villagers before the polling started after sometime 40-50 persons from Sagarpur had come armed with weapons and he stopped near the tree. Among them he identified Krit Sharma, Bagesh Sharma, Baikunth Sharma, Awadhesh Sharma. When he and others moved towards booth then somebody from Sagarpur gave out that the booth had been captured and no body would be allowed to cast vote. Upon that he and others said that they would cast their votes. The accused thereafter said to fire. Then firing started and eight persons were killed. He also received pellet injuries on leftside of neck, cheek, rightside of the leg, below the knee, left wrist and left side chest. His village is to the east of the village Sagarpur. Among the mob there were some persons of Sagarpur and some of different villages and they were armed with weapons.

P.W. 10 Panchu Yadav is father of Ramdeo Yadav who too had gone to the polling booth and he has also stated like P.W. 9 about capturing of the booth and presence of the mob which had not allowed to vote and then firing done. He said that his brother had received injuries from the firing of Bagesh Sharma. He identified Nand Kumar Singh, Haridwar Sharma, Krit Sharma, Bagesh Sharma and Alakh Sharma. Bagesh Sharma fired hitting his brother Sohan Yadav. Baikunta Sharma's firing hit Dharamdeo Yadav who died. He also received pellet injuries in his chest. Thereafter he did not see as to who hit him. After sometime patrolling party arrived. He was taken to hospital for treatment. His brother Sohan Yadav died at the polling booth he has said that he did not know any person of Sagarpur except the above mentioned persons. He had seen those 50-60 persons coming from Sagarpur side. Nand Kumar Singh had exhorted the people to kill. At the time of firing police party was also standing and polling party people were also standing at some distance. Bomb was also exploded by which many persons were injured. They ran away and did not return. He said for the first time before the police that Bagesh Sharma fired at his brother. He was firing from a very close range. Neither he showed his shirt and vest (baniain) to the investigating officer nor he seized it. He claims to have land in village Sagarpur and so knew people of that place.

P.W. 11 Charitar Yadav too has said about going to the polling booth and then 40-50 people coming out from village Sagarpur with arms and saying that the booth had been captured. When he insisted to vote then Nandkumar Singh fired and he also exhorted to others to fire. Bagesh Sharma fired hitting Sohan Yadav. He too got pellet injury in his hand. Eight persons (deceased) were also killed. He has also received injury on his both thighs and middle finger of his left hand. He was also treated in the hospital. The Police had come on a jeep when people had been killed. He also said that bomb had also been exploded at the time of occurrence. The dead body of Chandrabudar Yadav was taken to the police station on a tractor. The dead body was taken to the police station but the same was not brought down. No statement was recorded at the police station.

P.W. 12 is Ramratan Yadav. He also says that when he moved towards polling booth to cast his vote, then 40-50 persons armed with weapons moved towards polling booth from the Imali tree. Nandkumar Singh stopped them from voting. Upon that he and others also said to cast their vote and then Nandkumar Singh exhorted his people to kill. From the firing of Nandkumar Singh Jugdeo Yadav of Govindpur got injured and died. He also received pellet injury by the firing of someone on his chest, thighs and leg. Bomb was also exploded. On account of firing eight persons, as stated above, were killed. Besides him Chandradeo Yadav of village Digrahi, Rambali Yadav, Siaram Yadav, Lakhan Yadav, of Rampur, Rajdeo Yadav, Jagdeo Yadav and Panchu Yadav of village Govindpur had received injury. He had also gone to the hospital where he was treated. Chandrabudra Yadav had also been killed. He denied the suggestion that he had not identified any one from the mob. Seeing the mob armed with weapons he had got frightened but he could not try to escape. He said that 30-40 persons were sitting east of the polling booth on a pind. On the arrival of the patrolling party the mob fled away. From the explosion of bomb by the mob various people had been injured. The injured had not talked as to who injured whom. He denied the suggestion that Yadav had gone to polling station armed with lathi, bhala and gun to capture the booth.

P.W. 13 Ramlakhan Yadav too had said about 40-50 persons coming to booth with arms. Out of them he identified Ramkrit Sharma, Begesh Sharma, Raj Kishore Sharma, Nawal Sharma, Mahendra Sharma, Gaya Sharma, Rajendra Sharma, Nandkumar Sharma, Darshi Sharma and Rama-Sharma. Nand Kumar had exhorted to kill. Nand Kumar fired which hit Jagdeo Yadav of Govinpur. Thereafter several persons fired also bombs were exploded. He had also received pellet injuries on his shoulder right-side, below the shoulder and on the knee and eight persons were killed as well as many persons were injured. He had also gone along with others to Goh police-station and thereafter to hospital where he was treated. From before the occurrence there was no apprehension from Bhumihars about assault. Besides bombs, lathi, bhala and garasa had also been brought. Nobody had talked on the factor as to who injured whom. He denied the suggestion that brickbats had been collected from before.

P.Ws. 14 and 16 have been tendered.

P.W. 15 Jageshar Yadav also says about his going to the booth and 50-60 persons coming with weapons to the polling booth. Among them he also identified Nandkumar, Ramkrit Sharma, Haridwar Sharma, Sharath Singh, Alakh Singh, Awadhesh Sharma, Gaya Sharma, Begesh Sharma, Baikunth Sharma Ramadhar Sharma, Gaya Singh, Jairam Singh, Brijnandan Singh, Raj Kishore Singh, Nawal Singh, Mahesh Sharma Lal Sharma, Bhudeo Sharma, Mahesh Sharma, Rama Sharma, Ram Bilash Sharma, Baliram Sharma, Fudani Sharma, Dinesh Sharma, Dudheshwar Sharma. The accused said that booth had been captured and no body would be allowed to vote, whereupon the voters insisted to vote and then Nand Kumar gave out that nobody would be allowed to go alive. Then Nand Kumar fired from his gun hitting Jagdeo who fell dead. Others also fired. He and others started running towards east and when the magistrate came then he also returned. He found eight persons dead and many persons injured. He had received pellet injury in his left leg. Some of the persons whom he identified were present in court and others were not. He said that his house was also 20 bansh from Sagarpur polling booth. He denied the suggestion that his cattle used to graze the field of the accused and so he was falsely deposing against the accused. The police was not moving on jeep. He said that he could not count as to how many had garasa and bhala. The members of the mob had not used garasa and Bhala. Bomb was exploded. No body was injured by bomb splinter. It is not correct to say that he had given out to the police that the members of the mob used lathi, garasa and bhala upon the victim party. He was fired at by a person from a distance of 50 feet. He could not recognise as to who had fired. The assaulters were towards west of the polling booth the victim and the injured towards east of the polling booth where from they were taken to Goh hospital on a tractor. The injured did not say as to who fired at whom. The village Hujhar is at a distance of four miles from village Sagarpur. He denied the suggestion that he and others had lathi and bhala.

24. P.W. 17 is Siyaram Yadav. He too was (sic) when he had gone to vote at Sagarpur by the mob. He had also named a large number of the persons amongst the mob whom he had recognised. Nandkumar Singh exhorted and he also fired which had Jagdeo Yadav and thereafter others also fired hitting several including this witness to his left hand. Many people were injured. The mob ran away the persons had been (sic) and when patrolling party had come. After running he had stopped at 100 feet when the patrolling party had come (sic) he and others went to the polling booth and (sic) and the injured. He received pellet (sic) the deceased had been killed. No body attempted to apprehend the assaulters. No persons from the village had come to see the assault. About 30 persons had received gun shot injuries. No injured said before him as to who had assaulted whom. No medical aid was given to any one at the polling booth. Blood had fallen there. Patrolling party of police had not enquired from anyone as to who had assaulted them.

25. P.W. 18 Ram Bali Yadav had also gone to vote and an account of firing by Nagina Sharma he received injury and became unconscious and there after he was treated. After his return from the hospital his family members came to know about his injury. He went to Goh hospital where he stayed four 4-5 days. On account of the pellet injury his clothes had become blood-stained which were not shown to the police. There was no talk among the injured as to who injured whom. He denied the suggestion that he used to graze the crop of Nagina Sharma by his cattle.

26. P.W. 19 Vidya Bilash Yadav had gone to cast his vote when people from Sagarpur (village) emerged from west and started assaulting. He recognised among the mob Nagina Sharma and Bagesh Sharma. He had received pellet injury in his arms. Eight persons had been killed and 25-50 persons had been injured. He could not identify the person who fired at him. The informant-Kameshwar Yadav and Rajeshwar Yadav are his own brothers. He is separate from them. He had received pellet injury from behind which caused hole in the clothes which was seen by the police.

27. P.W. 21 is Ram Sewak Yadav who had gone to vote and since mar-pit had started he could not vote. He did not know the deceased. He denied the suggestion that he had given out the name of the accused to the police. It was also not correct that he was concealing the names in collusion with the (illegible).

28. The (illegible) these evidence the prosecution has tried to (illegible) as the assault had been done by the accused persons who had come armed with bhala garasa, lathi and (sic) to capture the booth and that they fired from the ? causing deaths of eight persons and injuries to about 50 persons.

29. About the evidence of the witnesses enumerated above, the learned Counsel for the appellants have urged that they are partisan and relation witnesses and so their evidence is not worth reliance, specially when independent and other witnesses were on the spot and they have not been examined like the Presiding Officer, patrolling Magistrate, the police party and members of other castes who had assembled at the polling booth. In the case of Dalip Singh and Others Vs. State of Punjab, the Supreme Court in para 26 at page 366 observed as follows:--

"Witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused wish to implicate him falsely. Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However we are not attempting sweeping generalisation. Each case must be judged on its own fact. Our observations are only made to combat what is so often put forward in cases

before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own fact."

In the case of Masalti Vs. State of U.P., the Supreme Court has observed at page 209 in para 14 :--

"There is no doubt that when a criminal Court has to appreciate evidence given by witnesses who are partisan or interested, it has to be very careful in weighing such evidence. Whether or not there are discrepancies in the evidence whether or not evidence strikes the Court as genuine whether or not the story disclosed by the evidence is probable, are all matters which must be taken into account. But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witness. Often enough, where factions prevail in villages and members are committed as a result of enmity between such factions, criminal Courts have to deal with evidence of a particular type. The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence should be rejected because it is partisan cannot be accepted as correct."

In the case of Sadhu Singh alias Surya Pratap Singh Vs. State of U.P., it has been observed by the Supreme Court in para 9 at page 1510 that the fact that the witnesses were inimically disposed towards the accused persons by itself cannot be ground for total rejection of their evidence. In the case of Raman Kalia v. State of Gujarat AIR 1970 SC 1261) it has been observed by the Supreme Court that "the only comment against the witnesses was that they were inimical to the accused but that by itself was not a sufficient ground for rejecting their testimony. "In the case of State of Gujarat Vs. Naginbhai Dhulabhai Patel and Others, the Supreme Court in para 5 at page 840 has observed :--

"The mere fact that the witnesses were relations or interested would not be itself be sufficient to discard their evidence straightway unless it is proved that their evidence suffers from serious infirmities which raises considerable doubt in the mind of the court."

In the case of Sharad Birdhichand Sarda Vs. State of Maharashtra, the Supreme Court in para 48 at page 1636 observed:--

"In view of the close relationship and affection any person in the position of the witness would naturally have a tendency to exaggerate or add facts which may not have been stated to them at all. Not that this is done consciously but even unconsciously the love and affection for the deceased would create a psychological hatred against the supposed murderer and, therefore, the Court has to examine such evidence with very great care and caution. Even if the witnesses were speaking a part of the truth or perhaps the whole of it, they would be guided by a spirit of revenge or any nemesis against the accused

person and in this process certain facts which may not or could not have been stated may be imagined to have been stated unconsciously by the witnesses in order to see that the offender is punished. This is human psychology and no one can help it."

In the villages faction and party politics for various reasons have become so much rampant that even independent witnesses do not dare risk their life or interest or safety by giving out truth and they avoid giving evidence in court for one or the other reason and so the witnesses, who are of the same party or those witnesses, who want their own interest to save from jeopardy, come forward in the Court. In the case of *Badri and Others Vs. The State of Uttar Pradesh*, their Lordships have been pleased to observe in para 6 at page 1989 :--

"The learned Sessions Judge overlooked the fact which he himself took great care to emphasise in his judgment, that there were two factions in the village bitterly opposed to each other and their enmity had already taken a toll of twelve lives, and, therefore, it would be ideal to expect independent persons to come forward to give evidence and only partisan witnesses would be available, as they would even otherwise, be natural and probable witnesses to the incident. It would not be right to reject their testimony out of hand merely on the ground that they belonged to one faction or another. This Court pointed out in *Raghubir Singh Vs. State of U.P.*, that "in this connection the general reluctance of an average villager to appear, as a witness and get himself involved in cases of rival village factions when spirits on both sides are running high has to be borne in mind." The learned Sessions Judge was, therefore, plainly and indubitably in error in rejecting the evidence of Ramdayal, Ghanshyam, Ramdas and Khemraj without even caring to assess it on its own merit."

In the case of *Muthu Naicker and Others Vs. State of Tamil Nadu*, at page 1652, para 6) the Supreme Court observed:--

"In a faction ridden society where an occurrence takes place involving rival factions it is but inevitable that the evidence would be of a partisan nature. In such a situation to reject the entire evidence on the sole ground that it is partisan is to shut one's eyes to the realities of the rural life in our country. Large number of accused would go unpunished, if such an easy course is charted."

Again in the case of *State of U.P. Vs. Ballabh Das and Others*, the Supreme Court in paras 3 and 5 at page 385 observed:--

"There is no law which says that in the absence of any independent witness, the evidence of interested witnesses should be thrown out at the behest or should not be relied upon for convicting an accused. What the law requires is that where the witnesses are interested, the court should approach their evidence with care and caution in order to exclude the possibility of false implication. We might also mention that the evidence of interested witnesses is not like that of an approver which is presumed to be tainted and requires corroboration but the said evidence

is as good as any other evidence. It may also be mentioned that in a faction ridden village, as in the instant case as mentioned by us earlier, it will really be impossible to find independent persons to come forward and give evidence and in a large number of such cases only partisan witnesses would be natural and probable witnesses."

"The dominant question to be considered in the instant case is whether the witnesses, despite being interested, have spoken the truth and are credit worthy. Once it is found by the court, on an analysis of the evidence of an interested witness that there is no reason to disbelieve him then the mere fact that the witness is interested cannot persuade the court to reject the prosecution case on that ground alone."

In the case of State of U.P. Vs. Brahma Das, the Supreme Court in para 5 at page 1972 observed:--

"...We are told that there were two factions and there was history of enmity between them. Each faction had lost one of its members in the course of the murder which were committed in the past. But then this is possibly the root cause of the occurrence resulting in the murder of the victim. And the evidence of the witnesses cannot be disbelieved solely on this ground as per the law declared by this Court in numerous pronouncements (Badri and Others Vs. The State of Uttar Pradesh, ; Raghubir Singh Vs. State of U.P.,). To use the language of Jaganmohan Reddy, J. (in Himachal Pradesh Administration Vs. Om Prakash,), there is in our view no justification for the High Court in jettisoning this cogent evidence of a conclusive nature on mere conjectures and on the omnibus ground that the witnesses were not independent or impartial which as we have shown is without justification."

Again in the case of State of U.P. Vs. Ram Swarup and Others, the Supreme Court in para 10 at page 1030 observed :--

"There is no rule of law to the effect that the evidence of partisan witnesses cannot be accepted. The fact that the witnesses are associated with the faction opposed to that of accused by itself does not render their evidence false. Partisanship by itself is no ground for discharging sworn testimony. Interested evidence is not necessarily false evidence. In a small village like the one under consideration where people are divided on caste basis the prosecution may not be able to get any neutral witness. Even if there is such neutral witness he will be reluctant to come forward to give testimony to support one or the other. Therefore merely because the eye-witnesses are associated with one faction or the other, their evidence should not be discarded. It would, no doubt, be subjected to careful scrutiny and accepted with caution. We may also point out that law does not lay down different standard of appreciation of evidence when the prosecution witnesses and the accused are of different castes. The principles are the same as in other cases."

30. As to the contention that the other witnesses, namely, the presiding officer,

the patrolling officer and the police party have not been examined by the prosecution, it appears from the evidence of the witnesses as referred to above that the occurrence had taken place outside the polling booth though inside the campus of the polling station. The presiding officer was inside the booth. Further the patrolling party had also come after the occurrence. Some constables were also at the polling booth and when the patrolling party came, as said by the informant, the constables of the patrolling party had chased the persons who had done the firing. P.W. 1 has said that at the same time of the incident the polling officer, the presiding officer and other officers were present at the booth. P.W. 5 Ramnarain had said that after 15-20 minutes of firing the patrolling party came to the spot. He also said to the presiding officer to save the persons from firing with the help of the force armed with rifles but the presiding officer said that whether he should save his service or his life or to stop the the firing of the persons. How far non-examination of such witnesses can affect the prosecution case is to be considered. In the case of Appabhai and Another Vs. State of Gujarat, the Supreme Court has been pleased to observe:--

"It is no doubt true that the prosecution has not been able to produce any independent witness to the incident that took place at the bus-stand There must have been several of such witnesses. But the prosecution case cannot be thrown out or doubted on that ground alone. Experience reminds us that civilised people are generally insensible when a crime is committed even in their presence. They withdraw both from the victim and the vigilant. They keep themselves away from the court unless it is inevitable. They think that crime like civil dispute is between two individuals or parties and they should not involve themselves. This kind of apathy of the general public is indeed unfortunate but it is there everywhere whether in village life, towns or cities. One cannot ignore this handicap with which the investigation agency has to discharge its duties. The court, therefore, instead of doubting the prosecution case for want of independent witnesses must consider the broad spectrum or the prosecution version and the search for the nugget of truth with due regard to probability if any, suggested by the accused."

In the case of State of U.P. Vs. Anil Singh, the Supreme Court observed in para 13 at page 2001:--

"In some cases, the entire prosecution case is doubted, for not examining all witnesses to the occurrence. We have recently pointed out the indifferent attitude of the public in the investigation of crimes. The public are generally reluctant to come forward to depose before the court. It is, therefore, not correct to reject the prosecution version only on the ground that all witnesses to the occurrence have not been examined. Not it is proper to reject the case for want of corroboration by independent witnesses if the case made out is otherwise true and acceptable. With regard to falsehood stated and embellishments added by the prosecution witnesses, it is well to remember that there is a tendency amongst the witnesses in our country to back up a good case by false or exaggerated version."

In the case of Raghbir Singh Vs. State of U.P., the Supreme Court has been pleased to observe in para 10 at page 2161:

"...What has often been ruled that the prosecution is not found to produce all the witnesses said to have seen the occurrence. Material witnesses considered necessary by the prosecution for unfolding the prosecution story alone need be produced without unnecessary and redundant multiplication of witnesses. The appellants counsel has not shown how the prosecution story is rendered less trustworthy as a result of the non-production of the witnesses mentioned by him. No material and important witness was deliberately kept back by the prosecution. Incidentally we may point out that the accused too have not considered it proper to produce the persons as witnesses for controverting prosecution version. In this connection general reluctance of an average villager to appear as a witness and get himself involved in cases of rival village factions when spirits on both sides are running high has to be borne in mind.."

This becomes the duty of the Court to find out after scrutiny of the evidence as to whether there is truth in the evidence and whether it inspires confidence. If after scrutiny the Court finds the evidence trustworthy then Court will have to accept the same. The court is to have regard to the broad probabilities of the case and the evidence as a whole is to be considered. There should be no hypertechnical approach. The minor discrepancy and deficiency are bound to occur in truthful and natural witnesses. The main thing is to be considered is as to whether the inconsistencies and improbabilities, if at all, go to the root of the matter. If the evidence gives glaring inconsistencies or the evidence does not inspire confidence of the Court then definitely such evidence is to be ignored, otherwise reliable trustworthy evidence cannot be brushed aside.

In the case of The State of Punjab Vs. Jagir Singh, Baljit Singh and Karam Singh, the Supreme Court observed in para 23 at page 2414:--

"In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the court has to judge evidence by the yardstick of probabilities, its intrinsic worth and the animus of the witnesses. Every case in the final analysis would have to depend upon its own facts. Although the benefit of every reasonable doubt should be given to the accused, the courts should not at the sometime reject evidence which is ex facie trustworthy on grounds which are fanciful or in the nature of conjectures."

In the case of Bava Hajee Hamsa and Others Vs. State of Kerala, the Supreme Court has further, been pleased to observe in para 29 at page 909 :--

"...In such cases where a large number of persons are involved and in the commotion some persons cause injury to others and the evidence is of a partisan character, it is often safer for the Judge of fact to be guided by the compass of probabilities along the rock-ribbed contours of the case converging on the heart of the matter. Once the Court goes astray from the basic features of the case, it is apt to lose itself in the labyrinths of immaterial details desultory discussion and

vacillation arising from unfounded suspicions."

In the case of Inder Singh and Another Vs. The State (Delhi Administration), the Supreme Court observed in para 2 at page 1092 :--

"Credibility of testimony, oral circumstantial, depends considerably on a judicial evaluation of the totality, not isolated scrutiny. While it is necessary that proof beyond reasonable doubts should be adduced in all criminal cases, it is not necessary that it should be perfect. If a case is proved too perfectly, it is argued that it is artificial if a case has some flaws, inevitable because human beings are prone to err, it is argued that it is too imperfect. One wonders whether in the meticulous hypersensitivity to eliminate a rare innocent from being punished, many guilty men must be callously allowed to escape. Proof beyond reasonable doubt is a guideline, not a fetish and guilty man cannot get away with it because truth suffers some infirmity when projected through human processes. Judicial quest for perfect proof often accounts for police presentation of fool-proof connection. Why fake up? Because the court asks for manufacture to make truth look true? No, we must be realistic."

In the case of State of U.P. Vs. M.K. Anthony, the Supreme Court observed in para 10 at page 54 :--

"While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once the impression is formed, it is undoubtedly necessary for the Court to scrutinise the evidence more particularly keeping in view the deficiency, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor or the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of case hypertechnical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. If the Court whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate Court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial Court and unless there are reasons weighty and formidable it would be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retentions and reproduction differ with individuals. Cross-examination is an unequal duel between a rustic and refined lawyer. Having examined the evidence of this witness, a friend and well wisher of the family carefully giving due weight of the comments made by the learned Counsel for the respondent and the reasons assigned to by the High Court for rejecting his evidence simultaneously keeping in view the appreciation of the evidence of this witness by the trial Court. We have no hesitation in

holding that the High Court was in error in rejecting the testimony of witness Nair whose evidence appears to us trustworthy and credible."

In the case of *State of U.P. v. Anil Singh* (supra) at page 2002 in para 15 the Supreme Court observed:--

"It is also our experience that invariably the witnesses and embroidery to prosecution story, perhaps for the fear of being disbelieved. But that is no ground to throw the case of overboard, if true, in the main. If there is ring of truth in the main, the case should not be rejected. It is the duty of the court to cull out the nuggets of truth from the evidence unless there is reason to disbelieve that the inconsistencies or falsehood are also glaring as utterly to destroy confidence in witnesses. It is necessary to remember that a Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties which the Judge has to perform."

31. It has also been argued that the witnesses have deposed parrot like, although they have not been able to see the occurrence. As to this contention the witnesses have said that they have gone to cast their votes as it was a polling day. So they had reason to be there which has not been challenged or disproved. They also said that the accused were known to them and whatever they had seen, they have given out. The place of occurrence was definitely within the range of their sight and the occurrence had taken place in broad day light. Further these witnesss had been there from the beginning till the finale that is the running of the accused after killing the deceased and injuring the witnesses. As they were natural witnesses, their evidence has been uniform as seen above and little variations which have been noted above, are bound to be in the natural and truthful witnesses. Perceptiveness and noticing of the details of the same occurrence by a number of persons is bound to be a bit similar and also a bit at variance which may lead to the conclusion after appreciation of that evidence that evidence is natural, truthful and without tutoring. In the case of *Banshi Lal Yadav Vs. State of Bihar*, the Supreme Court observed in para 3 at page 1232:--

"Another feature of the case which makes us doubt the credibility of the witnesses is the photographic and somewhat dramatic account which they have given of the incident with minute details of the attack on each of the victims. According to the account fo the witnesses it was as if each of the victims of the attack came upon the stage one after the other to be attacked by different accused in succession each victim and his assailant being followed by the next victim and the next assailant. Surely the account of the witnesses is too dramatic and sounds obviously invented to allow each witness to give evidence of the entire attack. But the witnesses themselves admit in cross-examination that they were all attacked simultaneously. If so, it was impossible for each of them to have noticed the attack on every one else."

In the case of *Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat*, their

Lordships of the Supreme Court have observed that over much importance cannot be attached to minor discrepancies. Out of the various reasons some are being quoted below (at page 755 and 756 in paras 5 and 6).

"Para 5 (1). By and large a witness cannot be expected to possess a photographic memory and to recall the detail of an incident. It is not as if a video tape is replayed on the mental screen.

(2) Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties, therefore cannot be expected to be attuned to absorb the details.

(3) The powers of observations differ from person to person. What one may notice, another may not. In object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another.

(4) Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on."

In the case of State (Delhi Administration) Vs. Laxman Kumar and Others, the Supreme Court observed at page 502 in para 45:--

"It is common human experience that different persons admittedly seeing an event give varying accounts of the same. That is because the perceptiveness varies and a recount of the same incident is usually at variance to a considerable extent. Ordinarily, if several persons give the same account of an event, even with reference to minor details, the evidence is branded as parrotlike and is considered to be the outcome of tutoring. Having read evidence of these witnesses with great care, we are of the view that the same has the touch of intrinsic truth and the variations are within reasonable limits and variations instead of providing the ground for rejection, add to the quality of being near to truth."

Thus the photographic and dramatic account is to be looked with suspicious eyes in the facts and circumstances when attacks are being made on different deceased and injured in succession. But mental faculty and power of observation differ from person to person and events get imprinted in the memory even in critical and dangerous situations. A person may be in such a place as to notice the events and may give out a dramatic and photographic account. That is why the Court has to search for the intrinsic truth in the narration and if the narration shows minor discrepancy on the touch of an intrinsic truth the Court can rely upon the same. It varies from case to case. That is why despotic formula of acceptance of such in evidence or rejection thereof cannot be laid down.

32. Learned counsel for the appellant has urged that omnibus statement has been made about the appellants and others and the part played by the accused should have been particularised and given out with specificatin and if some of the

witnesses have deposed about the same that too is only by one or two witnesses and not by other witnesses and so there should have been at least 2 or 3 witnesses each for the parts said to have been played by the accused and so it is difficult to believe in these circumstances that the witnesses were able to recognise the appellants and that so why they are falsely implicating the accused. Learned counsel for the appellants has referred to a decision in the case of Lala Ram and others Vs. State of U.P., , wherein their Lordships of the Supreme Court referred (at page 172 para 7) to the observations made in Pandurang, Tukia and Bhillia Vs. The State of Hyderabad, .

"Unless therefore a witness particularises when there are a number of accused it is ordinarily unsafe to accept omnibus inclusions like this at their face value."

Their Lordships further observed in paragraph 8:--

"We have perused the evidence of P.Ws. 8 and 12 also. They simply fall in line with the prosecution case that they saw the accused being present there. If the occurrence has taken place during right time even the evidence of these witnesses also become highly doubtful. Even these two witnesses make an omnibus allegation that all the accused were there but they have not witnessed the actual occurrence. What is more these witnesses to the extent of saying that about 15 shots were fired but the other persons including P.W. 1 who were sitting in close proximity to the two deceased persons were not at all injured. Besides all these infirmities the glaring circumstance in this case is that P.W. 1 a highly partisan has implicated as many as 1 accused making an omnibus allegation and confirm the conviction of all the 10 accused. Such a confirmation, in our view, is bound to result in injustice and there is, no other way of scrutinising evidence of these interested witnesses to separate grain from the chaff."

33. Learned counsel for the appellants has also referred to the decision of the Supreme Court in Masalti v. State of U. P. (infra) where their Lordships have referred to the judgment of the High Court in appeal which has held that unless, at least four witnesses are shown to have given a consistent account against any of the appellants, the case against them cannot be said to have been proved beyond reasonable doubt.

34. As to these contentions the evidence of the witnesses has been scanned and scrutinised more so for the reason that they are said to be interested partisan and inimical. The witnesses have said about the accused both for the named in the first information report as well as not named and these witnesses have identified the accused in court also, besides naming them for the reason that the accused were already known to the witnesses. Out of 25 accused, except, appellants Nagina Sharma resident of village Jhuharpur (in Cr. Appl. 462/1987) and Bhukamp Singh Bhudeo resident of village Mo? (in Cr. Appeal No. 531/1987), all the accused have been named in the first information report and about 50 persons including the appellants are said to have come with weapons like fire

arms, lathi, bhala, garasa and bombs. All the appellants except appellants Nagina Sharma and Bhukamp Singh are said to have been with guns.

Nagina Sharma (in Cr. Appl. 462/87) has been identified in Court by P.Ws. 18 and 19, Brijnandan Sharma (in Cr. Appl. 490/87) by P.Ws. 17 and 20, Baliram Sharma alias Baliram Singh (in Cr. Appl. 521/1987) by P.Ws. 13, 15, 17 and 20 and out of eight appellants (in Cr. Appl. 527/87) Nawal Kishore Singh, Brajnandan Singh, Ramadhar Sharma by P.Ws. 13, 15, 17 and 20, Raj Kishore Sharma by P.Ws. 5, 13, 15, 17 and 20, Mahendra Singh by P.Ws. 13, 15, 17 and 20 Gaya Singh by P.Ws. 13, 15, 1 and 20, Jai Ram Sharma by P.Ws. 13, 15, 17 and 20, Brijnandan Singh by P.Ws. 15, 17 and 22, Ramadhar Sharma by 5, 15 and 20, Rajendra Sharma by P.Ws. 5, 13, 15, 17 and 20, in Cr. Appl. No. 531/87 Lal Singh by P.Ws. 15, 17 and 20, Bhukamp Singh (not in first information report) by P.Ws. 15, 17, 20, in Cr. Appeal 532/87 Fudan Sharma by P.Ws. 15, 17 and 20, Ram Bilash Sharma by P.Ws. 15, 17 and 20, in Cr. Appeal 544/87 Dudheshwar Sharma by P.Ws. 15, 17 and 20, in Cr. Appeal 545/87 Darsi Sharma by P.Ws. 12, 15, 17 and 20, in Cr. Appeal 546/87, Ramkrit Sharma by P.Ws. 2, 5, 6, 7, 9, 10, 13, 15, 17 and 20(2) Harudwar Sharma by P.Ws. 3, 4, 5, 6, 9, 10, 15 and 20(2) Bajgesh Sharma alias Bageshwar Sharma by P.Ws. 5, 6, 9, 10, 11, 13, 15, 17, 19 and 20(4), Baikunth Sharma by P.Ws. 1, 5, 9, 13, 15, 17 and 20 and in Cr. Appl. 548/87 Awadhesh Sharma by P.Ws. 9, 13, 15, 17 and 20.

18. It has come in evidence of P.Ws. 1, 3, 6 and 7 that at polling booth of Sagarpur voters from seven villages were to cast their votes, namely, Sagarpur, Khaira, Jujharpur, Pali, Gobindpur, Rampur and Digrahi. Further P.Ws. 1, 2, 3, 4, 6 and 7 are residents of village Govindpur. P.Ws. 9, 10, 11, 13 and 14 are residents of village Rampur. P.Ws. 12, 17 and 18 are residents of village Digrahi. P.Ws. 5, 19 and 20 are residents of village Pali and P.Ws. 15 and 21 are of village Sagarpur. Further as regards accused-appellants; Nagina Sharma is resident of village Jujharpur; Brijnandan, Baliram, Fudani Sharma, Ram Bilash Sharma and Darshi sharma are residents of village Barpa; Lal singh, Bhukamp Singh and Rama Singh are residents of village Mohankhera; Dinesh Singh of village Khudawa, Dudheshwar Sharma of village Mujahar and; rest of the accused-appellants, namely, Nawal Singh, Raj Kishore Sharma, Mahendra Singh, Gaya Singh, Jairam Sharma, Brijnandan Singh, Ramadhar Sharma, Rajendra Sharma, Ramkrit Sharma, Haridwar Sharma, Bagesh Sharma, Baikunth Sharma and Awadhesh Sharma are residents of village Sagarpur. It has come in the evidence of the witnesses that village Khudawa, Barpa and Jujbar are adjacent villages though their residents were not voters at the said Sagarpur booth. The witnesses have said that they had seen the persons and except two of the appellants all are named in the first information report. The witnesses claimed to have identified the accused in the occurrence at the polling booth where these witnesses had come for casting their votes. Most of the witnesses had come for casting their votes. Most of the witnesses claimed to have received injuries. So the possibility of their coming in contact and seeing the known accused from a close range cannot be ruled out and so is the possibility of recognising the appellants

specially when these witnesses claim to have been there throughout and seen the finale. In the case of H.P. Gupta Vs. Hiralal, , Supreme Court has observed at page 298 in para 7:--

"So far as the possibility of recognising the ten appellants is concerned, all the witnesses have stated that they arrived within a distance of about 50 steps while the assault was still going on. All the appellants were well-known to the witnesses and there is no reason to doubt their evidence that they were able to recognise all the ten of them. Persons well-known can be recognised within a very short time. The appellants were seen by them while continuing the attack on Mahadeo and while they were going away after completing the assault."

19. The learned Counsel for the appellants argued that when a criminal Court has to deal with evidence rebutting to an offence involving a large number of offenders and a large number of victims, it is usual to adopt the test of having the evidence of two or three witnesses with a consistent account of the incident for believing the same, as done in the case of Masalti v. State of U.P. and in this case also there should have been at least four witnesses, before conviction should have been recorded by the trial Court. As to this contention, in the case of Masalti, their Lordships of the Supreme Court in Masalti's case at page 228 (AIR) in para 7 have referred to the method of approach by the High Court to the effect that "unless at least four witnesses are shown to have given a consistent account against any of the appellants, the case against them cannot be said to have been proved beyond reasonable doubt". Later at page 210 (para 16) observed:-- "Mr. Sawhney also urged that the test applied by the High Court to convicting the appellants is mechanical. He argued that under the Indian Evidence Act, trustworthy evidence given by a single witness could be enough to convict an accused person, whereas evidence given by half a dozen witnesses which is not trustworthy could not be enough to sustain the conviction and a doubt is true; but where a criminal Court has to deal with evidence pertaining to the commission of an offence involving a large number of offenders and a large number of victims, it is usual to adopt the test that the conviction could be sustained only if it is supported by two or three witnesses who give a consistent account of the incident. In a sense the test may be described as mechanical; but it is difficult to see how it can be irrational or unreasonable. Therefore, we do not think that any grievance can be made by the appellants against the adoption of this test. If at all, the prosecution may be entitled to say that all the seven accused persons were acquitted because their cases did not satisfy the mechanical test of four witnesses and if the said test had not been applied, they might as well have been convicted. It is, no doubt, the quality of the evidence that matters and not the number of witnesses who give such evidence. But sometimes it is useful to adopt a test like the one which the High Court has adopted in dealing with the present case." Section 134 of the Indian Evidence Act lays down that "no particular number of witnesses shall in any case be required for proof of any fact". The Supreme Court besides the case of Masalti, in several cases as said that quality and not quantity is the basis of belief. In the case of

Jose alias Kolli Jose Vs. The State of Kerala, their Lordships have been pleased to observe:--

"There is no impudent in law in a conviction being based upon testimony of a single witness provided the Court comes to the conclusion that his evidence is honest and trustworthy."

In the case of Shivaji Sahabrao Bobade and Another Vs. State of Maharashtra, , at page 2634 (Para 19) the Supreme Court has observed :--

"Even if the case against the accused hangs on the evidence of a single eye-witness the conviction given on sterling testimony of a competent, honest man, although as a rule of prudence Court should call for corroboration. It is a platitude to say that the witnesses have to be watched and not counted. Since quality matters more than quantity in human affairs. We are persuaded that the P.W. 5 is a witness for truth but in view of the circumstances that he is interested, we would still want corroboration in this case to reassure ourselves. And that we have done in this case."

In the case of Maksuddan v. State of U.P. 1983 SC 126: 1983 Cri LJ 218) at page 128 in para 6 it has been observed at page 128(6):

"It is not the number of witnesses examined nor the quantity of witnesses adduced by the prosecution that counts. It is the quality that counts."

Thus the Supreme Court has laid down that quality and not quantity matters. Numerical strength of the evidence has no value in face of a qualitative evidence. A Court is not to count, but to weigh the evidence. The counting of witnesses is a mechanical method, but if such method is adopted it is not irrational or unreasonable (sic) can be made by an accused. Though their Lordships have not laid down a rule of law that there should be more than one truthful reliable and trustworthy witness to believe, but if there is more than one trust-worthy and reliable evidence, then it would give further strength to already reliable and strong evidence. Such method was adopted by the High Court which Supreme Court appreciated as useful and not as necessary. There may be cases that there may be only one reliable and trustworthy evidence and to disbelieve him in such a situation may be denial of justice. If more evidence is found, then it is no doubt welcome as useful and the method of accepting the same is wise, natural and reliable. So the learned counsel cannot contend that in this case as a rule of law there should be at least four witnesses. If more than one witness are coming forward, they should be well appreciated and considered. Appellants Nagina Sharma and Bhukump Singh and Bhudeo have not been named in the first information report, but they have been identified. For Nagina Sharma are the identifications of P.Ws. 18 and 19, while for Bhukump are those of P.Ws. 17 and 20. As regards other appellants, except Brijnandan Sharma who had two identifications, they have been identified by three or more persons. The rest of the appellants have been named in the first information report. As seen earlier in the instant that case also more than two witnesses have deposed about the

occurrence and given consistent account which shows the participation of the accused in offences of this occurrence. Their evidence has been subjected to severe cross-examination and they have not been shaken and so their evidence has to be relied on.

20. Shri Prakash Narain Pandey, learned counsel for appellant Nagina Sharma (Cr. Appeal No. 412 p 87) has argued that the appellant Nagina Sharma was not in the first information report and he was identified by P.Ws. 18 and 19, but actually only one witness has identified him and so his evidence should not be relied on. As to this contention it appears that P.W. 18 Rambali Yadav has identified him in court and he has given his specific role also. P.W. 19 Vidya Bilash Yadav also has identified Nagina Sharma in court though he has not named him before the police. It is the identification (illegible) courts and not the naming or identification before the police specially when Nagina Sharma was not named in the first information report, and P.W. 19 is not the informant. So the contention that there is only one identification, has got no force. The evidence of P.Ws. 18 and 19 on scrutiny does not suffer from any infirmity.

21. As regards the role of the seven appellants for the killing of the seven victims though it has been detailed earlier but it is being given in brief again, for the sake of reference at the cost of repetition. P.Ws. 2 and 7 have said that Ramkrit Sharma fired at Jagdeo Yadav of village Pali as a result of which he died in the hospital P.W. 2 also said that Nand Kumar fired at Jagdeo Yadav of village Govindpur. P.W. 3 has said that Haridwar Sharma fired at Dasarath Yadav. P.Ws. 10 and 11 have said that Bagesh Sharma fired at Sohan Yadav P.W. 10 further said that Baikunth Sharma fired at Dharamdeo Yadav. P.Ws. 4, 5 and 9 have said that there was indiscriminate firing by the appellants. P.W. 9 has said that by the indiscriminate firing Sohan Yadav, Dharamdeo Yadav, Dukhan Yadav, Dasarth Yadav, Ramprit Yadav and Jagdeo Yadav of village Govindpur and Chandbudhar Yadav died. P.Ws. 13, 15 and 17 have said about indiscriminate firing P.W. 10 has said that eight persons had been killed and 25 to 30 persons were injured. P.W. 20 has said that Awadhesh Sharma had killed Dukhan Yadav. He also said that Dudheshwar Sharma's firing killed Rambrikch Yadav. He further said that Darshi Sharma had killed Chandgudar Yadav. In these circumstances, the firing and killing of the appellants has been given out by all these witnesses. Quality and not quantity being the criteria, and so of the evidence of certain witnesses corroborated by the medical evidence and other circumstances inspires confidence then that is to be believed and hereafter scrutiny of evidence inspires confidence so believed and in the result the conviction of the appellants u/s 302 of the Indian Penal Code deserves to be maintained.

22. It was also argued that the fard-beyan which is the basis of first information report, and not been given by the informant and if given was not proved to have been given by the informant and so the very basis of the case goes away.

As to this contention, fard-beyan (Ext. 3) is the carbon copy of the original which is said to have been sent to the High Court in election case. This fard-beyan is

said to have been given to the police by Kameshwar Yadav (P.W. 20). Kameshwar Yadav, as seen above, has said that he is the informant in this case and that he was injured and after the occurrence he along with other injured and the deceased were taken to the hospital where his statement was recorded. P.W. 20 has stated (in para 2) that on Goh Hospital his statement was recorded by the police which he has signed. The investigating officer or the police officer who had recorded the fard-beyan has not been examined but P.W. 23 Umesh Mishra a taid (clerk) has said that he knew Kameshwar Yadav and the fard-beyan bears the signature of Kameshwar Yadav and that he is acquitted with the writing and signature of Kameshwar Yadav. He has also said in his cross-examination that Kameshwar Yadav was not related to him nor has he even done pairvi in any of his cases. Though the investigating officer of this case has not been examined but P.W. 22-Rampeyare Singh, Assistant Sub Inspector of Police (for short A.S.I.) has proved the carbon copy of the first information report (Ext. 2) carbon copy of the fard-beyan (Ext. 3) and carbon copy of the case diary (Ext. 4). This witness also said that he had seen Nagendra Singh's writing and signing. He has categorically said that the carbon copy of the first information report had been written by Nagendra Singh and it also bears his signature. He has said that he was then in Aurangabad for about one year but he had been in that range about 12 years ago and that he had worked with Nagendra Singh in Gaya. Learned counsel for the appellants has said that the provisions of Section 47 of the Evidence Act have not been complied with. But this contention is not maintainable as Section 47 of the Evidence Act says that when the Court has to form an opinion as to the person by whom any document was written or signed, then the opinion of any person acquainted with the hand writing of the person by whom it is supposed to be written or signed is a relevant fact. The explanation to the section also says that a person is said to be acquainted with the handwriting of another person when he had seen that person writing. Here P.W. 20 Kameshwar Yadav is categorical in saying that he had given his statement in the hospital and he had signed it. P.W. 23 is clear in saying that the fard-beyan bears the signature of Kameshwar Yadav and P.W. 22 says that he was acquainted with the hand writing of Nagendra Singh. So in this way the compliance of the provisions of Section 47 of the Evidence Act has been done and from this evidence it can be said that the fard-beyan was given by Kameshwar Yadav to Nagendra Singh, investigating officer that he had also put his signature on the fard-beyan and that the signature and writing of Narendra Singh (I.O.) are on the fard-beyan.

23. It was also argued that the first information itself has not been proved as the investigating officer has not been examined to say that he registered the first information report. As to this point, as seen earlier, P.W. 23 Rampeyare Singh, A.S.I, has proved the carbon copy of the first information report as well as carbon copy of the fard-beyan. He has said that he had seen Nagendra Singh's writing. Further the informant himself had admitted the contents of the first information report in all its entirety and particulars. He also admits to have put

his signatures on the fard-beyan on the basis of which the first information report has been registered. Further P.W. 22 Ram Payare identified the signatures of the police officer who has signed on the report. The handwriting and signature of the police officer who had registered the first information report have been formally proved by this witness. The prosecution has thus discharged its duty to produce it and finally proved it like any other document to be tested and considered by the Court. Further there does not appear to be any reason to the prosecution for changing the first information report or fabricating the same when all the witnesses have deposed accordingly and the circumstances of the case speak in support thereof. In these circumstances, the Court cannot presume that the fard-beyan and the first information report are spurious or fabricated documents and the non-examination of the officer registering the first information report has any effect fatal to the prosecution.

24-25. It was said that in this case the investigating officer has not been examined and on account of non-examination of the investigating officer the accused are suffering as they have not been able to put questions to him, specifically, in respect of the map which had been prepared by him and in which existence of the brickbats has been mentioned by him. The investigating officer in this case has definitely not been examined. The evidence was closed by the learned Public Prosecutor as the investigating officer was not available for evidence. P.W.2 Rampyare Singh, A.S.I, as said earlier, has proved the carboncopy of the first information report, carbon copy of the fard-beyan and carboncopy of the case diary. He has said that paragraphs 1 to 114 have been written by Nagendra Singh, Sub-Inspector of Police and paragraphs Nos. 129 to 227 have been written by Rammohan Singh, A.S.I. In the case of Basant Singh and Others Vs. State of Bihar, a Division Bench of this Court has observed at page 1460 (paras 26, 27, 30 & 31 about the non-examination of the I.O. and the use of the case diary by the Court as follows:--

"(26) So the use and perusal of case diary by a Court is within limitations and restricted ambit. It must be summed as follows :--

- (a) It is for aiding an enquiry or trial.
- (b) It shall not be used for corroboration or adopting of certain facts transplanted like by conduit pipe.
- (c) Use should be sparingly but not as a matter of rule on the principle as at (a).
- (d) If Investigating Officer not examined, prejudice to the accused as claimed by the defence has to be considered and looked into and even after perusal of the diary, so permitted, the element of prejudice persists, benefit should be given to the accused of course depending upon the facts and circumstances of each case.

(27) Of course, it is true, the Investigating Officer is an important witness, but cannot be substituted for an inevitable witness. If on account of certain compelling circumstance his attendance could not be procured, the extent of

impact upon the prosecution case or account of absence of the Investigating Officer shall depend upon the facts and circumstances of each case.

(30) Non-examination of the Investigating Officer will not make the place of occurrence vague and doubtful because the evidence of the witnesses are sufficient to fix the place of occurrence as unfolded by the prosecution. Moreover, in the facts and circumstances of the case, no exception or exoneration can be awarded to the appellant Bhagwan Singh for any justification for the use of the gun.

(31) Absolutely, no contradiction has been pointed out and thus no case of prejudice has been made out in absence of the examination of the Investigating Officer, and, therefore, non-examination of the Investigating Officer cannot be said to have prejudiced the defence to the extent that the allegations directed against appellant Bhagwan Singh has to be rejected."

In the case of *Brahmdeo Hazra and Others Vs. State of Bihar*, a Division Bench of this Court has observed at page 344 in para 11:--

"Non-examination of the investigating officer is a serious lapse on the part of the prosecuting agency which we find in this case. The obscurity appearing in the case remained unexplained. We could not get what were the objective findings noted by the police officer which would have been helpful in appreciating the correctness or otherwise of the prosecution version..... Not only that the investigating officer was not examined, even the police diary was not put in evidence or proved to enable the court to consider the admissible part of the record to analyse and appreciate and to test the credibility of oral testimony of the witness."

In another Division Bench decision in the case of *Sk. Rashid v. State of Bihar* 1987 BBCJ 1504) it has been observed at page 155 para 6: "True, non-examination of investigating officer is not necessarily fatal to the prosecution. A Court had to see whether the evidence of the investigating officer is essential for the case of the prosecution to succeed or not. The Court has to see at the same time that the accused is not unnecessarily harassed and unless it sees that for inevitable reasons the prosecution fails to produce the investigating officer, it may pronounce the judgment without evidence of the investigating officer. The Court, if it is satisfied that the evidence of the investigating officer is essential must take coercive measures to compel his attendance as a witness. Difficulty, however, which the Court in Bihar feels, is that even for executing the process of the Court help of police hierarchy is necessary. Without them and without they desiring to implement the summons and warrants of the Courts, all efforts of the Courts for securing the attendance of the witnesses fail. What has alarmed us, however, is the decessive tendency of the police personnel they are taking the processes of the Courts as lazily and as casually as they can, as they have no priorities for the proceedings in the Courts one before attending to the other works for which they have their reasons of preference. As in this case in many of

cases Courts have to face a predicaments which the prosecution alone can solve, where it does, however, but to tell the Court that it has no other witnesses to examine and to take summon only to inform the Court that it has heard nothing from the police about the service thereof. Several adjournments given by the Courts at the instance of the prosecutor only for ensuring the attendance of the official witnesses including the investigating officer to help the trial pending for years and even after inordinate wait, the Courts are compelled to decide the cases without their evidence. A certain amendment has been made in the Code of Criminal Procedure by the State of Uttar Pradesh and for such defaulting witnesses adequate provisions have been made to punish both judicially and administratively. It is high time that in the State of Bihar also some provisions as made and in the case it is found that a certain officer of the State has ignored the summons or warrant of the Court, adequate action is taken against him. The Administration of the State, even without any such amendment, is fully empowered and competent to take notice of the defaults of its officers in responding to the summons and warrants of the Court and it can immediately start taking notice of conduct of the investigating officers of the police by suitably punishing thereby a wording or remarks at least two for default in each case."

In the case of Laxmi Narain Singh v. State of Bihar (1987 PLJR 804) a Division Bench of this Court has observed in para 5 at page 806 :--

"It is only for the prosecution to produce and examine the I.O. We get from the judgment of the Court below that the I.O. of this case was dead and in that circumstance the prosecution should have fairly got the relevant part of the Diaries proved in evidence to avoid prejudice."

In the case of Awadheshwar Singh v. State of Bihar (1989 BLJR 259) a Division Bench of this Court has observed in paras 16 and 17:--

"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 chargesheet 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 record."

After referring to the order sheet of the court below dated 24-7-1987 the Division Bench again said:--

"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."

In the case of *Bishandeo Mishra v. State of Bihar* (1989 PLJR 405) I had occasion to deal in detail with this malady of the non-appearance of the investigating officer and the other Government witnesses. It is a material witness whose evidence becomes essential in certain sections and so his non-examination becomes fatal to prosecution. But in certain situations his non appearance is not fatal and the prosecution does not suffer and the accused is at no disadvantage and prejudice on account of his non-examination. Further court has taken steps to secure the attendance of defaulting official witnesses by adopting coercive measures as provided Under Sections 242(2) and 350 of the Code of Criminal Procedure, 1973.

26. Thus from all this, it is clear that the investigating officer is a material witness as he investigates the case, maintains the case diary, goes to the place of occurrence sends the dead body after preparing inquest report for postmortem examination and also sends the injured for medical examination and then gets the post mortem report and the injury report as the case may be, he collects the materials and evidence for the prosecution so that on the basis thereof the prosecution may stand on its own legs. It is he who has to explain each and every action at every stage of the investigation. His objective findings become relevant for the prosecution as well as the defence. He collects the blood from the spot. He examines witnesses u/s 161 Cr. P.C. and then appears in court himself in support of what he has done during investigation. Thus the investigating officer is a material witness whose non-examination cannot be ignored and the court cannot collect material for conviction of an accused from the investigation report or case diary unless he has been examined as a witness. In case, investigating officer does not appear for valid and legal reasons, as being dead, or not being available easily, then investigation done by him has to be proved otherwise in accordance with law and it has to be put in evidence to enable the court to consider the admissible part of the record to analyse and appreciate and test the credibility of the oral evidence. If the examination of the investigating officer is very essential, and he is not appearing, then the court under law has power to adopt coercive measures for the appearance of the investigating officer as and when needed. But every non-production and non-appearance of investigating officer is not fatal to the interest of prosecution. When the statements of the eyewitnesses and the evidence produced by the prosecution are trustworthy and reliable, then this lacuna cannot have any fatal

effect. The non-examination of the investigating officer will not make place of occurrence vague and doubtful if the evidence of the witnesses is such which fixes the place of occurrence. Similarly, if no contradiction is pointed out in the statement of the witnesses in the light of the statement given to the I.O. then non-examination of the I.O. has no effect. If some matters are deposed before the court which have not been earlier said u/s 161 Cr. P.C. then it becomes improvement or embellishment and the Court can ignore the same. The non-examination of the I.O. becomes relevant matter when the place of occurrence, site plan and other materials and other objective findings are concerned. On account of non-examination of the I.O. if prejudice is caused to the accused in respect of such matters, then the Court will give benefit of the same to the accused. Otherwise every non-examination is not fatal.

27. Similarly doctor is also one of the important witnesses. The evidence of the doctor is relevant as an expert u/s 45 of the Evidence Act. But by virtue of Section 44 he has to state his opinion as a witness in court. In the case of Sheo Govind Bin v. State of Bihar 1985 BBCJ 632 this Court has observed in paras 14 and 17 :--

"The post mortem report is an extremely relevant and important document in a trial for murder both for the prosecution and the defence. All hurts are not punishable under the Indian Penal Code. Different types of hurts have been put under different categories linked with different extent of punishments. In addition that such reports apparently may speak out a few details, the existence of certain connected facts invariably necessitate explanation, elucidation and making available expert's opinion. By and large they are needed and if that is shut up, a definite prejudice is caused to the accused and the prejudice is to the extent that it will have adverse impact upon the charge of assault fastened upon an accused.

Therefore, proof of writings and reports by any other person than the real author, the Doctor, who had written out and signed the report, be by such who can be said to be "a competent person" to answer or give out such explanations based upon the technical knowledge connected with the medical jurisprudence. Such document should not be brought in evidence mechanically only for the sake of empty formality, but if taken in evidence it should be meaningful and purposeful. Under the circumstances, in case of injury reports and post mortem reports, the right person for substituting in place of the doctor another would be a Doctor competent to reply the questions to be put on behalf of both the prosecution and the accused, or a witness having technical knowledge only can be said to be the competent person to even say about the writings of the Doctor who had written out such report for admitting it in evidence."

In the case of Ramdeo Yadav v. State of Bihar (1987 BBCJ 775) it has been observed in para 6:

".....Evidently, the doctor had seen the injuries and, so the evidence should have

been given by the doctor himself as to what he had seen and found. Section 294 of the Code of Criminal Procedure has been provided in the Code for obviating the difficulty of formal proof of certain document and not for providing a substitute for direct evidence of witnesses like the doctor. This section simply says that where the genuineness of a document is not disputed it may be read in evidence in any inquiry or trial. It is significant that Section 294 Cr. P.C. does not refer to a document, which even if exhibited, cannot be read as a piece of evidence. The injury report by itself does not prove anything, it is not a substantive piece of evidence. It is the evidence of the doctor on oath in regard to the injuries which alone is substantive evidence. The injury report can only be used to corroborate or contradict the doctor and it cannot be a substitute for the evidence of the doctor. Of course, Section 32 of the Evidence Act provides an exception to this general principle but evidently, the present case does not come within any of the clauses of Section 32 of the Evidence Act. That being so, the injury reports of the witnesses as also of accused Dukhi Yadav referred to by the learned trial court in its judgment have to be excluded from consideration. But, even if these injury reports are excluded from the evidence, there remains sufficient material on the record to prove in general way the fact that these witnesses had sustained injuries in course of the occurrence. Indeed, their own evidence is also there on this point. Then there is also the evidence of the investigating officer who had found injuries on their persons and had referred them to the doctor for medical examination. Of course, these materials cannot be enough to prove the specific injuries said to have been sustained by them but they are sufficient to establish the broad fact that they had sustained some injuries in course of dacoity."

A doctor, who conducts a post mortem examination or one who examines the injuries of an injured has to depose in court about the report he has prepared, post mortem or injury report and the basis thereof. His objective findings of injuries are subjected to cross-examination by the accused. In case the doctor appears and gives out the reasons for his opinions in the post mortem or injury reports, the nature of the injuries, the manner of receiving injuries, the weapons through which the injuries have been received and such other allied matters then the same becomes a very corroborative piece of evidence to the testimonies of the witnesses of facts.

28. It has been found that not only the I. Os but the doctors also do not appear to depose in court for various reasons causing prejudice to the prosecution as well as defence. The reasons for their appearance may be genuine or otherwise, but the fact remains that the cases suffer on account of their non-appearance. But when these witnesses have got justification under law for non-appearance then their objective findings are taken into consideration as provided under the Evidence Act.

In cases where the failure on the part of the I.O. or the doctor or such other officials witnesses is there, it has to be seen as to why failure has occasioned and

who is responsible for that. If it is laches on the part of the prosecution or in spite of the several opportunities having been given or when there is no laches on the part of the prosecution and in spite of their best efforts, the officials concerned do not appear so as to defeat cause of justice, then the court is to exercise its powers as provided under the law. Courts are to exercise their powers in the ends of justice and should not allow any one to thwart the even course of justice. The court is to take resort to the provisions of law in this regard.

29. u/s 332(2) of the old Code of 1898 the court could issue summon of witnesses in cases, started otherwise of police report at the request of the prosecution. There was no provision for a case on police report. Section 251A was brought in by amending Act XXVI of 1955. In spite of that provision courts have been holding divergent views. In the case of Smt. Jyotermayee Bose v. Birendra Nath Pradhan (AIR 1969 Calcutta 263) a Division Bench of the Calcutta High Court said that it was not the duty of the magistrate to compel the attendance of any witnesses unless applied for by the prosecution. In the case of State of Orissa v. Sheocharan Singh (1962 Cri LJ 200) it was said that the court was not powerless when the parties fail to produce evidence and the duty of the court to enforce the attendance of the witnesses as provided under the Code of Criminal Procedure, and that it was not proper to acquit an accused without making effort to secure the presence of the material witness and the prosecution alone could not be said responsible for producing of witnesses. In the case of The State of Bihar Vs. Polo Mistry and Others, this Court held that when the prosecution through its agency fails to procure the witnesses, the court could take coercive measures under law to compel the attendance of the witnesses as provided u/s 90(b) of the Code. In the case of Public Prosecutor Vs. M. Sambaing Mudaliar and Others, , it was said that in spite of the laches of the prosecution to produce witnesses the court could exercise its power u/s 540 of the Code of Criminal Procedure to summon the material witnesses. In the case of State of Mysore v. N.C. Narsihme Gowada (1969 Cri LJ 8) it was held that the court should take necessary steps for the service of the summons where it is found that there was no laches on the part of the prosecution.

In the case of State Vs. Nandkishore and Another, it was held that u/s 251A(7) the court is empowered to issue summons when required and the court could Under Sub-section (11) issue necessary process and could also exercise powers u/s 540 of the Code in the ends of justice. In the cases of The State of Mysore Vs. Kalilulla Ahmed Shariff and Another, State of Mysore v. B. Ramu (1975 Cri LJ 1257) it was said that when the witness does not come, the court should issue warrant and it was not the entire responsibility of the prosecution and so the court could issue coercive process. In the case of State Vs. Mangilal Ram and Another, a Division Bench of this Court held that in warrant case also the court could issue the summons when prayed for. The same view also finds support from a decision reported in The Public Prosecutor Vs. Gundu Rao, . However in the case of State Vs. Kali Ram Nand Lal, it was held that it was not the duty of

the court to summon the prosecution witnesses and so is the view also held in the case of *State of Gujarat v. Bhadia* (1964 Cri LJ 537) and *Laxminarayan Khemchand Vs. State*, .

30. In the new Cr. P.C. of 1973 Section 242(2) has provided for the courts to issue summons to any of the prosecution witnesses to attend and produce documents. Further Section 352, Cr. P.C. provides that if the witness so summoned does not appear then the court may take cognizance of the offence and may punish the person so summoned and sentenced him to a fine not exceeding Rs. 100/ -. The prosecution is to make applications to the court u/s 242(2) or 254(2) of the Code. A Full Bench decision of the Madras High Court in the case of *The State (Tamil Nadu) Vs. Veerappan and Others*, has held that it was the duty of the Magistrate to compel for the attendance of the witnesses if the prosecution did not produce the witness and that the court should enforce the attendance of such witness by process as provided in the Code including coercive method in case of failure to appear in response to the summons. This, however, does not absolve the prosecution to produce its witnesses. It has to move an application to the court and the court is to exercise its power. Thus the prosecution is first to make attempts to produce its witnesses, namely, investigating officer, doctor or any other Government witnesses. In case of failure in their appearance on the basis of summons issued on the request of the prosecution, the prosecution agency is to apply to the court for adopting other coercive measures as provided under the law and the court is to exercise its powers including coercive measures for attendance of such witnesses and in case of failure punish that witness who is defaulting in appearance in the court for just and legal cause. The court should also exercise its inherent power u/s 311, Cr. P.C. in the interest of justice and to serve the cause of justice. Acquittal or discharge without following such measures will be a negation of justice. However, in cases in which, in spite of efforts, the witnesses do not come and the evidence on record is otherwise sufficient for going to the conclusion about the guilt of the accused, then order of acquittal should not follow. But if it is found that the non-appearance of said witness has caused material and reasonable prejudice to the accused, the benefit of the same is to be given to the accused, which may be even acquittal or discharge, as the case may be.

31. In the instant case, neither the I.O. nor the doctor has been examined. As regards the I.O. it has been said that in the site plan he has shown the existence of some brick-bats and so it was said that if the I.O. would have been examined, then he could have deposed about the brick-bats and so prejudice has been caused. As to this contention the witnesses themselves have said, as seen above, that some brick-bats had been found, but there was no use of brick-bats by any one from the side of the injured or killed or any one present there nor any one used brick-bats on the side of the accused. As such the mere showing of the brick-bats in the site plan and thereafter non-examination of the I.O. in respect of the showing in the map of the collected brick-bats cannot cause any prejudice to the accused. The witnesses have been subjected to cross-examination and

nothing has come out from the prosecution evidence to show that any prejudice has been caused or something very relevant and material was to be obtained from the I.O. As such the non-examination of the I.O. has got no effect. Yet the fact remains that in this case the eight persons have lost their lives and a large number of persons injured, yet the investigating officer has not appeared as a witness in spite of the efforts made by the prosecution, which is a serious matter and deserves a departmental action by the Director General of Police against the defaulting investigating officer.

32. Similarly, only P.W. 7 the doctor, who has conducted post mortem examination of the deceased, has appeared, but the doctor, who is said to have examined the injured in this incident has not been examined. Not only that even the injury reports have not been brought on record although P.Ws. 1, 2, 3, 5, 6, 7, 9, 10, 11, 12, 13, 15, 17, 18, 19 and 20 have claimed in evidence in court to have been injured during the occurrence. The case diary (Ext. 4) has been brought on record, which mentions about the examination of the witness by doctors and the injury reports are contained therein. But these reports are no evidence to be considered because they are not admissible evidence. The injury reports or the post mortem examination reports are not by themselves substantive evidence unless the doctor, who has examined the injured or conducted post mortem examination, is produced in court. This corroborative piece of evidence is missing, yet the evidence of the witnesses in court throughout is that they have received injuries and they have given out about their having been injured. What is the nature of the injuries, that cannot be said, but this much can be accepted from the evidence of these injured witnesses that they received injuries in course of the same transaction. Thus in this case the conduct of the doctor, who had examined the injuries of the injured, by not appearing in the court, is also not appreciable and that too needs a probe by the Director of Health Services for suitable action as provided under law. Their non-appearance is a deliberate and without any just and legal cause. It appears that these days it has become a fashion for the Government witnesses, be it I.O. or doctor or other such persons, not to appear in court and be not available to court for dispensation of justice, for various reasons best known to them. This situation and conduct is deplorable and is not to be allowed to survive rather this tendency is to be curbed with firm hands by the courts in accordance with law as and when needed.

33. It was next contended that in this case the conviction u/s 302, I.P.C. is not maintainable and the appellants could not be convicted even u/s 302/149, I.P.C. if it is found that they are members of the unlawful assembly and that they have committed the offence in prosecution of the common object of the unlawful assembly for the reason that the seven appellants have impliedly been acquitted by the learned trial court and no Government appeal has been preferred against the implied acquittal. Further during the course of hearing of this appeal, when that very judgment of implied acquittal was under consideration by this Court, the case of the seven appellants" convicted u/s 302, IPC could not be considered

for conviction u/s 302/149, IPC. In support of this contention the learned counsel for the appellants has referred to the case of Kishan Singh v. Emperor (1928 P C 254): 26 ALJ 1099 wherein it was observed at page 255 :

"The charge, as already stated, was that the appellant had committed an offence punishable u/s 302, IPC viz., murder.

It is, however, provided by Section 238(2), Cr PC that when a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it.

It was, therefore, legitimate for the learned Judge to convict the appellant of the offence punishable u/s 304, I.P.C. viz., culpable homicide not amounting to murder, although there was no charge in respect of that offence framed against the appellant.

The learned Judge did not record an express finding of acquittal in respect of the charge of murder, but their Lordships are of opinion that the conclusion at which the learned Judge arrived amounted to an acquittal in respect of that charge.

The only charge framed against the appellant was one of murder; he certainly was not convicted of murder. On the contrary, he was found guilty of culpable homicide not amounting to murder.

The appeal, therefore, must be decided upon the assumption that the appellant was acquitted of charge of murder, and that he was convicted of the offence punishable u/s 304, IPC.

Further at page 258 it was observed in the said decision:

"They are of opinion that the learned Judges of the High Court, in converting the finding of acquittal of the appellant on the charge of murder into one of conviction, and in sentencing him to death on the application for revision, were acting without jurisdiction, and in such circumstances it is impossible to hold that no injustice was done. Their Lordships are of opinion that this case comes within the exception to the rule stated in the judgment of Lord" Watson In re Abraham Mallory Dillet."

The next decision relied on by the learned counsel for the appellant is that in the case of The State of Andhra Pradesh Vs. Thadi Narayana, , wherein it was observed at page 243 para 7 :

"In our opinion Section 423(1)(b)(2) is, therefore, clearly confined to cases of appeals preferred against orders of conviction and sentence, and the powers exercisable under it are therefore conditioned by the said consideration. It is impossible to accede to the argument that the powers conferred by this clause can be exercised for the purpose of reversing an order of acquittal passed in favour of a party in respect of an offence charged in dealing with an appeal preferred by him against the order of conviction in respect of another offence charged and found proved. There can thus be no doubt that the order passed by

Mr. Justice Naidu cannot be justified under this clause."

The other decision referred to by the learned counsel for the appellants is that in *Lakhan Mahto and Others Vs. State of Bihar*, wherein at page 1745 in para 7 their Lordships have been pleased to observe:--

"It has been held by this Court in *The State of Andhra Pradesh Vs. Thadi Narayana, ,* that Section 423(1)(b) Criminal Procedure Code is clearly confined to cases of appeals preferred against orders of conviction and sentence and that the powers conferred by this clause cannot be exercised for the purpose of reversing an order, of acquittal passed in favour of a party in respect of an offence charged while dealing with an appeal preferred by him against the order of conviction in respect of another offence charged and found proved. It was also pointed out in that case that where several offences are charged against an accused person the trial is no doubt one; but where the accused person is acquitted of some offences and convicted of others the character of the appellate proceedings and their scope and extent is necessarily determined by the nature of the appeal preferred before the Appellate Court. If an order of conviction is challenged by the convicted person but the order of acquittal is not challenged by the State then it is only the order of conviction that falls to be considered by the Appellate Court and not the order of acquittal. In exercising the powers conferred by Section 423(1)(b) the High Court cannot therefore convert the order of acquittal into one of conviction and that result can be achieved only by adopting procedure prescribed u/s 439 of the Criminal Procedure Code. In our opinion, the principle of this decision applies to the present case and it must accordingly be held that the High Court acted without jurisdiction in altering the finding of acquittal of Lakhan on the charge u/s 302 Indian Penal Code and convicting him on the charge u/s 326 Indian Penal Code and imposing a sentence of imprisonment on that charge."

Further in para 8 the Supreme Court has observed:

"The observation of Lord Summer was quoted with approval by this Court in *Nanak Chand Vs. The State of Punjab, ,* in which it was pointed out that by framing a charge u/s 302 read with Section 149, Indian Penal Code against the appellant it was not charging the appellant with the offence of murder and to convict him for murder and sentence him u/s 302 of the Indian Penal Code was to convict him of an offence with which he had not been charged. It was accordingly held that the conviction of the appellant u/s 302, I.P.C. was illegal. The same view has been reiterated by this Court in a later case in *Suraj Pal Vs. The State of Uttar Pradesh, "*

34. As to these contentions in this case the seven appellants have been charged u/s 302, IPC and they have also been charged along with appellants u/s 302/149 IPC. The learned trial court has convicted the seven appellants u/s 302 and has not given any order of conviction of the said seven persons u/s 302/149 though other appellants have been convicted and sentenced u/s 302/149 IPC which in

effect amounts to acquittal of the said seven appellants u/s 302/149 IPC and the fact is that the State Government has not preferred any appeal against the order of acquittal u/s 302/149, IPC. But the appellants have preferred these appeals against their convictions u/s 302 (by seven appellants) and 302/149, IPC by the rest of the appellants besides challenging their conviction and sentences under the other provisions of law.

35. In an appeal against conviction or acquittal the High Court has got full power to judge the evidence. The High Court is to examine the correctness or otherwise of the findings arrived at by the trial court. Reappraisal of the evidence cannot be precluded and if there is any finding not based on the material on record or is contrary to the material on record, the Court can interfere with the same. The High Court is to arrive at its own independent conclusion as to the guilt or innocence of the accused.

36. In a case where accused has been charged with several offences and acquittal of some of them and conviction for some of them and thereafter he files appeal against the conviction, then can the Court while judging the legality or otherwise of the conviction for the remaining offence look into the findings arrived at by the trial court about his acquittal or of some of the accused, specially, when it is to deal with the same evidence in respect of conviction of the remaining accused, and when no appeal against acquittal has been filed and in so doing can a finding of acquittal be reversed in the absence of any appeal having been filed by the State or revision by the complainant against the said acquittal? There is divergence of opinion in this aspect. Some Courts in India had been holding that the Court has power to do so, while some others held that it was not open to do so. Ultimately, the matter has been set at rest by the Supreme Court in the case of *State of Andhra Pradesh v. Thadi Narayana* (supra) that the power cannot be exercised for the purpose of reversing an order of acquittal passed in favour of a party while deciding the appeal of the same appellant for conviction under other section and so it has been held in *Lakhan Mahto v. State of Bihar* (supra) also.

37. In spite of this bar u/s 423(1)(b) of Cr.P.C. the appellate Court while considering the appeal of the accused against their conviction, has power to consider the evidence, in the same appeal, which relates to an acquitted accused and can hold that the order was bad on the face of evidence, though acquittal cannot be reversed. In the case of *Marachalil Pakku and Another Vs. State of Madras*, the Supreme Court observed at page 652 in para 8 :

"We have not been able to understand how the High Court could acquit these persons having held that the evidence of P. Ws. 5 and 6 as to how Kannan was murdered by accused 1 and 2 stabbing him and the others holding him by his hands and legs was true. It also said that with regard to participation of accused 3 to 7 they could not say that the prosecution evidence was unreliable. On these findings, in our opinion, no scope was left for introducing into the case the theory of the benefit of doubt. We think that accused 3 to 7 were wrongfully acquitted.

Though their acquittal stands, that circumstance cannot affect the conviction of the appellants u/s 302 read with Section 149 I.P.C."

In another decision in the case of *Sunder Singh and Others Vs. The State of Punjab*, , the Supreme Court observed at page 1215 (para 9) as follows :--

"If in dealing with the case presented before it on behalf of the appellants it became necessary for the High Court to deal indirectly or incidentally with the case against Rachhpal Singh, there is no legal bar at all. It may be that in considering the evidence as a whole, the High Court may have come to the conclusion that the evidence against Rachhpal Singh was unsatisfactory and if it had come to such a conclusion, it would have examined the said evidence in the light of this infirmity. On the other hand, after considering the evidence, the High Court may well have come to the conclusion, as it has, in fact, done in the present case, that the evidence against Rachhpal Singh is also good and need not have been discarded. In our opinion, there is no doubt that if in appreciating the points made by the appellants before it the High Court had to consider the whole of the evidence in respect of the accused persons, it was free to come to one conclusion or the other in respect of the said evidence, so far as it related to Rachhpal Singh. That is why we think that the point made by Mr. Sethi that Section 423(1)(a) precluded the High Court from considering the merits of the order of acquittal even incidentally or indirectly cannot be upheld."

A Division bench of Bombay High Court in the case of *Nana Gangaram Dhore v. State* (1970 Cri LJ 621) held at pages 625 (para 10) 629 (para 37) and 632 (para 44) as follows :--

"(10) Since we will point out that there is no legal impediment in the way of this Court sitting as Appellate Court in the matter of examination of the entire evidence and giving findings of fact, we would proceed to examine evidence first, give our findings and then point out how in law those findings can be utilised for the purpose of either acquitting or convicting the accused.

(37) According to us, the correct legal position is that in an appeal by some of the convicted persons, it is open to the High Court as an appellate Court to examine the entire evidence. The powers of the Appellate Court u/s 423 of the Code of Criminal Procedure are the same as of the trial Court. It is true that the trial Court being a primary Court of facts has the advantage of observing the witnesses. The appreciation of evidence made by such a Court is entitled to be considered with respect. However, that will be an approach to examine the evidence, but that is not a limitation upon the powers of this Court. If after examining the evidence the High Court is in a position to say that the findings arrived at are erroneous, contrary to evidence and must be set aside, not only there is no legal prohibition to do so, but in the interest of justice, that must be done.

(44) However, the examination of all the judgments above stated, itself leads to the conclusion that there is no bar in this country to the appellate Court acting u/

s 423 of the Code of Criminal Procedure to appreciate the whole evidence in a given case for the purpose of accepting or rejecting the appeal before it. If for that purpose, the evidence examined as a whole shows that the appellants are guilty u/s 34 of the Indian Penal Code having shared a common intention with the other accused who are acquitted, and that the acquittal of these persons was bad, there is nothing to prevent the appellate Court from expressing that view and giving that finding. Such findings if they could be given in a given case would be a proper basis of maintaining the conviction of the appellant before the Appellate Court."

38. In spite of this limitation u/s 432, the appellate Court cannot be a silent and helpless spectator to the illegality and a clear miscarriage of justice committed by the trial Court by adopting open and shut method by brushing aside reliable evidence and not giving a finding, thus making it as an implied acquittal when material on the record demands a finding for conviction. The High Court has got a revisional jurisdiction which can be resorted to, if necessary, in the interest of justice to prevent miscarriage of justice. The Supreme Court in the case of *Lakhan Mahto v. State of Bihar* (supra) has dealt with this aspect, as referred to earlier, but for the sake of the particular sentence at page 1745 (para 7) is being quoted as under:--

"In exercising the powers conferred by Section 423(1)(b) the High Court cannot therefore convert the order of acquittal into one of conviction and that result can be achieved only by adopting procedure prescribed u/s 439 of the Criminal Procedure Code.

In the case of *The State of Kerala Vs. Narayani Amma Kamala Devi*, their Lordships have been pleased to observe at page 1532 in para 5 :--

"The opening words of Section 439 of the Criminal Procedure Code, viz. "in the case of any proceedings the record of which has been called for by itself or which has been reported for orders or which otherwise comes to its knowledge", produce the result that revisional jurisdiction can be exercised by the High Court by being moved either by the convicted person himself or by any other person or suo motu, on the basis of its own knowledge derived from any source whatsoever without being moved by any person at all. All that is necessary to bring the High Court's powers of revision into operation is : such information as makes the High Court think that an order made by a Subordinate Court is fit for the exercise of its powers of revision. But says Mr. Pathak, look at the words that follow in this section stating that powers can be exercised. These words, viz., the High Court may in its discretion exercise any of the powers conferred on a Court of appeal by Sections 423, 426, 427 and 428... make it clear that a High Court's power of revision does not extend to anything more than what the court of appeal can do. When therefore a court of appeal cannot give any relief in respect of an order of conviction and sentence of fine or any other order made against an accused person after the accused person is dead, how can the High Court in revision give any such relief after the accused person's death. This argument

confuses the definition of the extent of power with the conditions for the exercise of the power. The conditions for the exercise of the power of revision are laid down in the opening clause of Section 439 which has just been set out above, while the next clause that the High Court may exercise any of the powers conferred on a court of appeal u/s 423, Section 426, Section 427 and Section 428... define the extent of the power. The fact that the extent of the power of a court in revision does not extend -- except as regards the power of the courts by Section 439 enhancement of the sentence more than what the appellate court's power, does not affect the position that while the condition for the exercise of the powers of courts of appeal is that an appeal must be preferred by the convicted person, that condition is conspicuous by its absence where the conditions of the exercise of the powers of the revision are laid down in Section 439...."

Again the Supreme Court in the case of Rameshchandra J. Thakkar Vs. Assandas Parmanand Jhaveri, State of Maharashtra, observed at page 87 in para 7 :

"It is no doubt true that the High Court acted suo motu in setting aside the acquittal of the appellant, but that fact would not show that there was any irregularity in the procedure adopted by the High Court. The opening words of Section 439 of the Code of Criminal Procedure, viz., "in the case of any proceedings the record of which has been called for by itself or which has been reported for orders or which otherwise comes to its knowledge", as observed by this Court in the case of The State of Kerala Vs. Narayani Amma Kamala Devi, produce the result that revisional jurisdiction can be exercised by the High Court by being moved either by the convicted person himself or by any other person or suo motu on the basis of its own knowledge derived from any source whatsoever without being moved by any person at all. All that is necessary to bring the High Court's powers of revision into operation is such information as makes the High Court think that an order made by a Subordinate Court is fit for the exercise of its powers of revision.

Further in the case of Municipal Corporation of Delhi Vs. Girdharilal Sapuru and Others, the Supreme Court observed in para 5 at page 1170 :--

"Without going into the nicety of this too technical contention, we may notice that Section 397 of the Code of Criminal Procedure enables the High Court to exercise power of revision suo motu and when the attention of the High Court was drawn to a clear illegality the High Court could not have rejected the petition as time barred thereby perpetuating the illegality and miscarriage of justice. The question whether a discharge order is interlocutory or otherwise need not detain us because it is settled by a decision of this Court that the discharge order terminates the proceeding and, therefore, it is revisable u/s 397(1), Cr. P.C. and Section 397(1) in terms confers power of suo motu revision on the High Court and if the High Court exercises suo motu revision power the same cannot be denied on the ground that there is some limitation prescribed for the exercise of the power because none such is prescribed. If in such a situation the suo motu power is not exercised what a glaring illegality goes unnoticed can be

demonstrably established by this case itself."

39. Thus while appraising the evidence in an appeal against conviction if glaring illegality, miscarriage of justice, an open and shut method are found to have been adopted in the appreciation of evidence, then the appellate court may exercise the suo motu power in spite of the fact that no appeal or revision has been preferred by the State or the complainant against the acquittal or implied acquittal, the Court cannot shut eyes and cannot refuse to exercise suo motu power when the matter has come to it in the appreciation of the evidence. In the instant case the evidence shows that the seven appellants who are impliedly acquitted u/s 302/149, from the very beginning till the final had been there armed with weapons and had actually used the weapons, killing eight persons and also injuring others as members of unlawful assembly and fully sharing the common object of the unlawful. Their active participation from the beginning till the end is well proved by the evidence scrutinised above and after achieving their object they retreated. The conduct of these seven appellants along with other convicted appellants in coming together, going together and being animated by the common object of the unlawful assembly is well proved. It is strange that the court below in spite of such findings has refrained from giving a finding of conviction u/s 302/149 IPC against the said appellants.

40. All the appellants have been charged u/s 302/149 IPC. Section 149 is declaratory of vicarious liability of the members of the unlawful assembly for the prosecution of the common object of the unlawful assembly or for such offence as the members of the unlawful assembly knew before likely to be committed in prosecution of the common object. Offence u/s 149 I.P.C. is not per se a substantive offence although punishment thereunder is under the section to which it is tagged and that under which the principal offender has committed the offence. It creates a specific offence and is not enabling section for imposing vicarious liability. For the imposition of sentence under this section there must be an assembly of five or more. That assembly should have a common object and that object should be to commit an offence or an unlawful act by an unlawful means. The offence committed must have nexus with the common object and the act should be in direct prosecution of the common object. The members of the assembly must share the common object though not actually participating in it. It does not require a prior concert or meeting of the mind. It may develop eo instanti on the spur of the moment. But they must know that an offence was likely to be committed in prosecution of the common object. So besides other awareness and knowledge, the sharing of the common object is also essential. Till the members of the assembly share common object they are within the clutches of Section 149 of vicarious liabilities, even if there is no particular overt act. Unlawful assembly can be gathered from the nature of the assembly, the arms used by them and the conduct of the members of the assembly from the beginning till the final. I am tempted to refer to three recent decisions of the Supreme Court of the year 1989. In the case of Lalji and Others Vs. State of U.P., the Supreme Court has observed in paras 8, 9 and 10 at pages 756:--

"Section 149, IPC provides that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of the assembly knew to be likely to be committed in prosecution of that object, every person, who at the time of committing of that offence is a member of the same assembly, he is guilty of that offence. As has been defined in Section 141, IPC an assembly of five or more persons is designated an "Unlawful Assembly", if the common object of the person composing that assembly is to do any act or acts stated in clauses "First, "Second, Third, Fourth and "Fifth" of that section. An assembly, as the explanation to the section says, which was not unlawful when it assembled, may subsequently becomes an unlawful assembly. Whoever being aware of facts which render any assembly an unlawful assembly intentionally joins that assembly, or continues in it, is said to be a member of an of rational and firm men any reasonable apprehension of violence, then even though they ultimately depart without doing anything whatever towards carrying their common object, the mere fact of their having thus met will constitute an offence. Of course, the alarm must not be merely such as would frighten any foolish or timid person, but must be such as would alarm person of reasonable firmness and courage. The two essentials of the section are the commission of an offence by any member of an unlawful assembly and that such offence must have been committed in prosecution of the common object of that assembly or must be such as the members of that assembly knew to be likely to be committed. Not every person is necessarily guilty but only those who share in the common object. The common object of the assembly must be one of the five objects mentioned in Section 141, IPC. Common object of the unlawful assembly can be gathered from the nature of the assembly, arms used by them and the behaviour of the assembly at or before scene of occurrence. It is an inference to be deduced from the facts and circumstances of each case.

Section 149 makes every member of an unlawful assembly at the time of committing of the offence guilty of that offence. Thus this section created a specific and distinct offence. In other words, it created a constructive or vicarious liability of the members of the unlawful assembly for the unlawful acts committed pursuant to the common object by any other member of that assembly. However, the vicarious liability of the members of the unlawful assembly extends only to the acts done in pursuance of the common object of the unlawful assembly, or to such offences as the members of the unlawful assembly knew to be likely to be committed in prosecution of that object. Once the case of a person falls within the ingredients of the section the question that he did nothing with his own hands would be immaterial. He cannot put forward the defence that he did not with his own hands commit the offence committed in prosecution of the common object of the unlawful assembly or such as the members of the assembly knew to be likely to be committed in prosecution of that object. Every one must be taken to have intended the probable and natural results of the combination of the acts in which he joined. It is not necessary that all the persons forming an unlawful

assembly must do some overt act. When the accused persons assembled together, armed with lathies, and were parties to the assault on the complainant party, the prosecution is not obliged to prove which specific overt act was done by which of the accused. This section makes a member of the unlawful assembly responsible as a principal for the acts of each, and all, merely because he is a member of an unlawful assembly. While overt act and active participation may indicate common intention of the person perpetuating the crime, the mere presence in the unlawful assembly may fasten vicariously criminal liability u/s 149. It must be noted that the basis of the constructive guilt u/s 149 is mere membership of the unlawful assembly, with the requisite common object for knowledge.

Thus once a court holds that certain accused persons form an unlawful assembly and offence is committed by any member of that assembly in prosecution of the common object of that assembly, or such as the members of the assembly knew to be likely to be committed in prosecution of that object, every person who at the time of committing of that offence was a member of the same assembly is to be held guilty of that offence. After such a finding it would not be open to the Court to see as to who actually did the offensive act or require the prosecution to prove which of the members did which of the offensive acts. The prosecution would have no obligation to prove it."

In the case of *Allauddin Hian v. State of Bihar* their Lordships of the Supreme Court observed in para 8 at page 1463 :--

"Therefore in order to fasten vicarious responsibility on any member of an unlawful assembly the prosecution must prove that the act constituting an offence was done in prosecution of the common object of that assembly or the act done is such as the members of that assembly knew to be likely to be committed in prosecution of the common object of that assembly. Under this section, therefore, every member of an unlawful assembly renders himself liable for the criminal act for acts of any other member or members of that assembly provided the same is/are done in prosecution of the common object or is/are such as every member of that assembly knew to be likely to be committed. This section creates a specific offence and makes every member of the unlawful assembly liable for the offence or offences committed in the course of the occurrence provided the same was/were committed in prosecution of the object or was/were such as the members of that assembly knew to be likely to be committed. Since this section imposes a constructive penal liability, it must be strictly construed as it seeks to punish member of an unlawful assembly for the offence or offences committed by their associate or associates in carrying out the common object of the assembly. What is important in each case is to find out if the offence was committed to accomplish the common object of the assembly or was one which the members knew to be likely to be committed. There must be a nexus between the common object and the offence committed and if it is found that the same was committed to accomplish the common object every member

of the assembly will become liable for the same. Therefore, any offence committed by a member of an unlawful assembly in prosecution of any one or more of the five objects mentioned in Section 141 will render his companions constituting the unlawful assembly liable for that offence with the aid of Section 149, I.P.C."

Again in the case of Ram Bilas Singh and Others Vs. The State of Bihar, their Lordships of the Supreme Court observed in para 7 at page 1596 :--

".....It is true that in order to convict persons vicariously u/s 34 or Section 149, IPC, it is not necessary to prove that each and every one of them had indulged in overt acts. Even so, there must be material to show that the overt act or acts of one or more of the accused was or were done in furtherance of the common intention of all the accused or in prosecution of the common object of the members of the unlawful assembly."

The conduct of the appellants in this case from the very beginning was that they came armed with deadly weapons, namely, bhalas, garasas, lathis and guns and they were in waiting and they captured booth, did not allow the voters to cast votes, they fired and according to the evidence eight accused including the seven appellants caused death of eight persons. Other accused also fired causing injuries to a large number of persons. They had been together from the beginning till the finale, thus animated by the common object, and withdrew after achieving the same. They knew full well when they came armed with the weapons like guns, bhalas, lathis and farsas that these weapons were likely to be used and they were actually used, causing 8 deaths and injuries to a large number of persons.

41. Learned counsel for the appellants also urged that specific questions have not been put to the appellants u/s 313, Cr. P.C. and circumstances not put to the accused in his cross-examination cannot be used against him. He has referred to the observations of their Lordships of the Supreme Court made in the case of Sharad Birdhichand Sarda Vs. State of Maharashtra, . As to this contention, no doubt, in the said decision of Sharad Birdhichand Sarda it has been said that the circumstances not put to the appellants in this case u/s 313, Cr. P.C. must be completely excluded because the appellants did not have any chance to explain them. Their Lordships have referred to the decisions in the cases of Hate Singh Bhagat Singh Vs. State of Madhya Bharat, , and Shamu Balu Chaugule Vs. State of Maharashtra, and Harijan Magha Jesha Vs. State of Gujarat, . These observations are law of the land and we respectfully follow the same. But in this particular case the position is not so. Looking to the questions u/s 313, Cr. P.C. material details have been put to the appellants and minor things which do not go to the root of the matter have not been asked. Their Lordships did not mean to say that the entire statement of the witnesses should be put to the appellants u/s 313, Cr. P.C. for answer. Only material facts and circumstances which bring the accused under the clutches of law and for which they have to face trial must definitely be put to them. The purpose is that having regard to all the questions

put to the accused, whether he got an opportunity to say in respect of the prosecution case against him. Broad questions shall be put to him so that he may have got every opportunity to explain the circumstances against him. The observation of the Supreme Court in the case of *Jai Dew. State of Punjab* (AIR 1962 SC 612) at page 620 (para 21) : 1963 Cri LJ 495) may be referred :--

"In support of his contention that the failure to put the relevant point against the appellant Hari Singh would affect the final conclusion of the High Court, Mr. Anthony has relied on a decision of this Court in *Hate Singh Bhagat Singh Vs. State of Madhya Bharat*, . In that case, this Court has no doubt referred to the fact that it was important to put to the accused each material fact which is intended to be used against him and to afford him a chance of explaining it if he can. But these observations must be read in the light of the other conclusions reached by this Court in that case. It would, we think, be incorrect to suggest that these observations are intended to lay down a general and inexorable rule that wherever it is found that one of the points used against the accused person has not been put to him, either the trial is vitiated or his conviction is rendered bad. The examination of the accused person u/s 342 is undoubtedly intended to give him an opportunity to explain any circumstances appearing in the evidence against him. In exercising its power u/s 342, the Court must take care to put all relevant circumstances appearing in the evidence to the accused person. It would not be enough to put a few general and broad questions to the accused, for by adopting such a course the accused may not get opportunity of explaining all the relevant circumstances. On the other hand, it would not be fair or right that the Court should put to the accused person detailed questions which may amount to his cross-examination. The ultimate test in determining whether or not the accused has been fairly examined u/s 342 would be to enquire whether, having regard to all the questions put to him, he did get an opportunity to say what he wanted to say in respect of prosecution case against him. If it appears that the examination of the accused person was defective and thereby a prejudice has been caused to him, that would no doubt be a serious infirmity. It is obvious that no general rule can be laid down in regard to the manner in which the accused person should be examined u/s 342. Broadly stated, however, the true position appears to be that passion for brevity which may be content with asking a few omnibus general questions is as much inconsistent with the requirements of Section 342 as anxiety for thoroughness which may dictate an unduly detailed and large number of questions which may amount to the cross-examination of the accused person. Besides, in the present case, as we have already shown, failure to put the specific point of distance is really not very material."

After scrutiny of the evidence it appears that the details have been put to the twentythree appellants and as such this contention has got no force.

42. In the result, the conviction of the seven appellants u/s 302, I.P.C. is maintained and so their sentence of life imprisonment. In exercise of the

revisional powers suo motu during the course of suing of this appeal, these appellants are further convicted u/s 302/149, IPC and they are sentenced to life imprisonment. Both the sentences are ordered to run concurrently. Their conviction and sentence u/s 27, Anns Act is also maintained. The conviction of the rest of the appellants u/s 302/149, IPC and sentence of life imprisonment is also upheld. All the appeals are dismissed. The appellants are on bail, they will be taken into custody to serve out their sentences.

Birendra Prasad Sinha, J.

43. I agree.