

(2002) 07 AHC CK 0073

In the Allahabad High Court

Case No : Capital Sentence No. 4 of 2001 with Criminal Appeal Nos. 830 and 943 of 2001

State; Bahadur and Ors.; Chhatra Pal and five Ors.

APPELLANT

Vs

Bahadur & Ors.; State

RESPONDENT

Date of Decision : 25-07-2002

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 366
Penal Code, 1860 (IPC) — Section 147, 148, 149, 302, 307

Citation : (2002) 07 AHC CK 0073

Hon'ble Judges : Vishnu Sahai, J and R.C.Pandey, J

Final Decision : Partly Allowed

Judgement

Vishnu Sahai, J.—For committing a carnage wherein twentyone persons were killed and a large number of houses were set on fire eleven persons, namely, Chandrika, Mahabir, Puttu, Bahadur, Ram Pal, Chhatrapal, Dayal, Jagganath, Kallu, Ram Prasad and Mahesh were tried by the Additional Sessions Judge, Sitapur.

Chandrika, Mahabir and Puttu died during the pendency of the trial. The remaining eight others, namely, Bahadur, Ram Pal, Chhatrapal, Dayal, Jagganath, Kallu, Ram Prasad and Mahesh were found guilty by the learned trial Judge for various offences.

2. Criminal Appeal No. 830 of 2001 has been preferred by Bahadur and Ram Pal and Criminal Appeal No. 943 of 2001 by Chhatrapal, Dayal, Jagannath, Kallu, Ram Prasad and Mahesh. The aforesaid appeals have been directed by the said persons against the judgment and order dated 2582001, passed by Addl. Sessions Judge, Sitapur, in Sessions Trial No. 79 of 1985, whereby they have been convicted and sentenced in the manner stated hereinafter:

Dayal Jagganath Chhatrapal; under Section 147 IPC to one year's R.I. each.

Bahadur, Ram Pal, Kallu, Ram Prasad and Mahesh; under Section 148 IPC to two

years" R.I. each.

Chhatrapal, Kallu, Jagannath, Dayal, Ram Prasad and Mahesh; under Sections 302 IPC read with Section 149 IPC. 436 IPC read with 149 IPC, 440 IPC read with 149 IPC and 307 IPC read with 149 IPC to imprisonment of life under the first count, to 10 years R.I. and to pay a fine of Rs. 2,000 in default to undergo one year's S.I. under the second count, to three years R.I. and a fine of Rs. 1,000 in default to under go one year's S.I. under the third count and to ten years" R.I. and to pay a fine of Rs. 2,000 in default to undergo one year's S.I. under the fourth count.

Ram Pal, Bahadur, Chhatrapal, Dayal and Ram Prasad; under Section 452 IPC to five years" RI. and to pay a fine of Rs. 2,000, in default to undergo one year's S.I.

Bahadur and Ram Pal; under Section 436 IPC read with 149 IPC, 440 IPC read with 149 IPC and 307 IPC read with 149 IPC to ten years" R.I. and to pay a fine of Rs. 2,000 in default to under go one year's S.I. under the first count, to three years" R.I. and to pay a fine of Rs. 1,000, in default one year's S.I. under the second count, and to ten years" R.I. and to pay a fine of Rs. 2,000, in default to undergo one year's S.I. under the third count.

Bahadur; under Section 302 IPC to sentence of death.

Ram Pal; under Section 302 IPC read with 149 IPC to sentence of death.

Capital Sentence No. 4 of 2001 arises from the reference made by the learned trial Judge under Section 366 IPC for confirmation of death sentences of Bahadur and Ram Pal.

3. Since Criminal Appeal Nos. 830 of 2001 and 943 of 2001 and Capital Sentence No. 4 of 2001 arise out of a common factual matrix and judgment, we are disposing them off by one judgment.

4. The prosecution case, as contained in the FIR, runs as under:

The informant Ram Lal P.W. 2, Mathura P.W. 3, Jagannath P.W. 4, Smt. Ram Shree P.W. 5, the twenty one deceased persons, and appellants, at the time of the incident, were residing in village Mohiuddinpur within the limits of Police Station Sidhauli, District Sitapur. There was enmity between the informant's cousin Shiv Lal and accused Chandrika, who died before the conclusion of the trial, on account of cutting of a tree. About 11/4 years prior to the incident, Chandrika's sons Bhagwan Din and Barati had been murdered and another son of Chandrika Bhagawati alias Bhabhooti had lodged the FIR in respect of the said murders against ten persons amongst whom were the informant's brother, his family members and associates.

On the date of the incident, i.e. 21/11/1985, at about 9.45 a.m. news spread in village that Bhagawati alias Bhabhooti had been murdered and his corpse was lying in an Arhar field near the village. Fifteen minutes later, Chandrika armed

with lathi, his son Bahadur armed with a gun, another son of his Chhatrapal empty handed, his family members Ram Pal and Mahabir armed with gun, Kallu armed with Kanta, Jagannath, Puttu and Dayal armed with lathis, Prasad and Mahesh armed with Bhala, challenging and abusing the informant came to the door of Shivalal and exhorted ?Aaj Kisi Ko Zinda Nahin Choodengey?. Saying this, those armed with guns started indiscriminately firing resulting in Dwarika, his wife Chhedana and his granddaughter Phoolbasa, who were sitting there, sustaining fire arm injuries and falling dead. Understandingly a commotion was created. The informant Ram Lal, Shiv Din, Shivalal, women and children, and others, who were present there, ran inside the houses. At that juncture, Chandraka's voice was heard. He was saying ?In Sabke Charoon Ko Phook Do aur Sab Gharoon Mein Jal Kar Mar Jayen?. Thereafter, the accused persons set fire to the houses of the informant and others. This incident was seen by number of villagers. When the informant's house was engulfed in flames the aforesaid accused persons ran away firing. Thereafter, the informant came out of the house and saw Dwarika, Chhedana and Phoolbasa lying dead. As a result of a burning Chappar falling over Phoolbasa her dead body was burnt. As a consequence of the act of the accused persons, houses of the informant and others were burnt and women and children could not come out of them.

In the meantime Chhanga son of Lalla of Laxmanpur came running and told the informant that Bahadur, Ram Pal Mahabir and Puttu had come to his village enquiring about the whereabouts of his associate Sardar and on not learning about them, chased Sardar's son Raju and when Lalla asked them not to chase him, Bahadur fired on Lalla.

5. The evidence of the informant Ram Lal shows that after the incident, he got the FIR scribed by Lekhai P.W. 7, who after scribing it read it over to him and thereafter he affixed his thumb impression on it. Thereafter, he proceeded to police station Sidhauri, to lodge it.

6. The evidence of constable clerk Tikam Singh PW6 shows that on 21/11/85 he was posted as constable clerk at police station Sidhauri and at 11.30 a.m., the same day, the informant Ram Lal came and lodged his written FIR, on the basis of which he registered the offence vide C.R. No. 6A, under Sections 147, 148, 149, 436 and 302 IPC; copy of the G.D. entry pertaining to it being Ext. Ka109.

The evidence of Tikam Singh also shows that when the FIR was lodged Inspector Rizwan Haider P.W. 10 was present at the police station and he took over the investigation.

7. The evidence of Rizwan Haider P.W. 1 shows that on 21/11/85 he was posted as Inspector at Police Station Sidhauri and the case was registered on the said date in his presence at the police station and he took over the investigation. His evidence shows as under:

He immediately rushed to the place of the incident and sent information to the higher authorities about the incident. When he reached the place of the incident,

the houses of Ram Lal and his family members were burning and he tried to extinguish the fire. He asked S.I. Balbir Singh PW9 to perform the inquest on the corpse of Dwarika, Chhedana and Phoolbasa. He took out Smt. Ramshree, Kumari Rajey and Kumari Munni from the houses. After getting some control over the fire, he took out Shivdin, Jadunath and Laxmi Narain from the houses where they were confined. House of Shivilal was also burning and after breaking a portion of his western wall, he took out the corpse of Km. Shami, Rakesh and Smt. Vishna. He also took out the corpse of Smt. Manjhloo and Chhiddu from his house and that of Smt. Kailasha from the Chappar of Munna. He, thereafter, recorded the statement of the informant Ram Lal and then went to Laxmanpur where Lalla had been murdered. At night he stayed in the village of the incident, Mohiuddinpur.

On 311985, he recorded the statements of Smt. Ramshree, Laxminarain, Jadunath, Shivdin, Mathura, Ram Autar and some others. From the house of Shivilal, he took out the corpse of Kuber, Sahajram, Rajbeer, Putana, Sarveash, Rajpatti, Ram Kala, Dinesh, Savitri and Phoolkali and S.I. R.C. Dubey performed the inquest on them. He prepared the site plan. He found the houses of Dwarika, Vishram, Parmeshwar, Shivilal, Chiddu, Hajari, Kishan, Tula and Munna burning.

On 411985, he searched for the accused but could not find them. He submitted report for taking action against them under Section 8283 Cr. P.C.

On 511985, he returned to the Police Station and heard that S.I. R.B. Lal had arrested accused Chandrika and Ram Pal on 31 1985 and had sent them to Jail. On 711985 he interrogated Shiv Lal and some others. On 1011985 he learnt that Jagannath, Ram Pal, Chandrika, Prasad alias Ram Prasad, Mahabir, Kallu, Mahesh, Dayal and Chhatrapal had surrendered in the Court and he recorded their statements. On 1111985, he interrogated Lekhai Ram.

On 1511985, he submitted the chargesheet Ext. Ka172.

8. Going backwards, the autopsy on the dead bodies of Chhedana, Dwarika, Phoolbasa, Smt. Kailsha, Km. Sharkai, Km. Vishna, Manjhuli, Phoolmati, Rajpatti, Sahajram, Rajbir, Dinesh and Km. Phoolana were conducted on 411985 by Dr. A.A. Khan P.W. 1 at District Hospital, Sitapur.

On the person of Smt. Chhedana the doctor found the following antemortem injuries:

- (1) Lacerated wound 8 cm x 5 cm x bone deep on the right side joint of the right ear on parietal region (paper torn).
- (2) Lacerated wound 5 cm x 1 cm x bone deep on the middle of forehead, 4 cm above the lip of nose.
- (3) Lacerated wound 6 cm x 1 cm x bone deep left side of face over the zygomatic bone, parietal (paper torn) with fracture of zygomatic bone.
- (4) Lacerated wound 1/2 cm x 1 cm x bone deep on left face in front of left ear 1

cm above the tragus.

(5) Lacerated wound 4 cm x 1 cm x bone deep on occipital region, vertical in the scalp.

(6) 12 degree burn black in an area of 26 cm x 10 cm in front of middle of left fore arm.

(7) 12 degree burn in area of 20 cm x 7 cm in the back of Rt. fore arm extending from the elbow.

(8) 12 degree burn in area of 29 cm x 11 cm on the middle of scalp, temporal bone both sides fractured and base fractured.

In the opinion of doctor, Injuries No. 6, 7 and 8 could be caused, as a result of burning Chappar falling on the body; Injury Nos. 1, 2, 3 and 4 could be attributable to a Lathi and Injury No. 5 to a firearm.

On the person of Dwarika the doctor found the following ante mortem injuries:

(1) Lacerated wound 4 cm x 3 cm x bone deep on right parietal region 8 cm above the right ear, fracture of right parietal bone.

(2) Lacerated wound 9 cm x 4 cm x bone deep on left frontal region 2 cm above the left outer end of the eye with fracture parietal bone of.....sick.....pieces.

(3) Fire arm wound of entrance of pellets in an area of 10 cm x 4 cm on the forehead on right face, each 0.33 cm x 0.3 cm in size, two pellets recovered from muscle.

(4) Lacerated wound 5 cm x 1 cm x bone deep on right side of back of ear and right pinna is cut through and through.

(5) Abraded....sic.....in an area of 12 cm x 6 cm on the right side of back of shoulder.

Injury No. 3 was attributable to a firearm and the remaining injuries to weapon like lathi.

On the person of Km. Phoolbasa the doctor found the following antemortem injuries:

(1) Fire arm wound of entrance 3 cm x 3 cm x cavity deep on right side back with blackening 2 cm x 3 cm all around oval shaped and more below side with fracture of 5, 6, 7 in the back and 23 in front of right side of back of chest 16 cm below the 7th cervical spine and 1 cm from central line. Shots recovered from middle and upper zone of lung and muscle of upper part of chest from middle zone of lung, 1 lb of blood front.

(2) Antemortem burn I to IV degree, with blackening and hair of all body areas, scalp and pubic hair burned skin and dermis charred, all over the body about 80% burn except in front of chest and upper area. Remaining all body burned

face saved.

Injury No. 1 was attributable to gun shot and Injury No. 2 to burnt straw.

On the persons of Smt. Kailasha, Shami, Bishura, Manjhula, Phoolmati, Rajpatti, Sahajram, Rajbir, Dinesh and Putana the doctor found burns.

9. On 411985, autopsy on the deadbodies of Chhiddu, Sarvesh, Smt. Ram Kala, Ram Kumar and Smt. Savitri, was conducted by Dr. S.K. Srivastava, PW 11 who found all of them to be 100% burnt.

The postmortem on the deadbodies of Chhittari, Rakesh and Raju was also conducted on 411985. On the bodies of Chhittari and Rakesh the doctor found burns. On the person of Raju doctor did not found any antemortem injury but found smoke and carbon particles present in mouth, nose, anus, urethra, trachea, and larynx. In the opinion of doctor deceased died on account of asphyxia due to suffocation.

10. The case was committed to the Court of Sessions in the usual manner, where the appellants Chandrika, Mahabir and Puttu, who died prior to the conclusion of the trial, were charged on a number of counts. They pleaded not guilty to the charges and claimed to be tried. Their defence were of denial.

During trial, in all, the prosecution examined eleven witnesses. Four of them, namely, Ram Lal, Mathura, Jadunath and Ramshree, P.Ws. 2, 3, 4 and 5 respectively were examined as eyewitnesses. Excepting Mathura, who turned hostile, and only implicated appellants Bahadur and Ram Lal, the remaining three witnesses furnished credible evidence.

The learned trial Judge placed reliance on the ocular account produced before him and convicted and sentenced the appellants in the manner stated in para1.

11. Aggrieved by their convictions and sentences, the appellants have preferred these appeals. As mentioned earlier, Criminal Appeal No. 830 of 2001 has been preferred by appellants Bahadur and Ram Pal and Criminal Appeal No. 943 of 2001 by appellants Chhatrapal, Dayal, Jagannath, Kallu, Ram Prasad and Mahesh.

As also mentioned earlier Capital Sentence No. 4 of 2001 arises out of the reference made by learned trial Judge under Section 366 Cr. P.C. for confirmation of the death sentence of Bahadur and Ram Pal.

12. We have heard learned Counsel for the parties. We have also perused: the depositions of the prosecution witnesses; the material exhibits tendered and proved by the prosecution; the statement of the appellants recorded under Section 313 Cr. P.C.; and the impugned judgment"

In our view, excepting appellant Kallu, who deserves the benefit of doubt, the learned trial Judge acted correctly in finding the involvement of the appellants established in the incident.

13. We have seen that the basis of the conviction of the appellants is ocular

account furnished by the informant Ram Lal, Mathura, Jadunath and Smt. Ramshree P.Ws. 2, 3, 4 and 5 respectively. In our judgment, it inspires confidence. All these witnesses lived in close proximity of one and another in village Mohiuddinpur, where the incident took place and wherein also the appellants lived at that time. Since none of these witnesses have seen the complete incident and have been separate parts of the same, we propose examining their evidence individually.

14. We begin with that of the informant Ram Lal P.W. 2. His evidence shows as under:

There was enmity between him and the accused Chandrika. In between their fields, there was a mango tree, which according to Chandrika belonged to him. Chandrika and his son Barati had got it cut. His brother Chhiddu (informant's brother) lodged an FIR, and on the basis of the case arising therefrom Chandrika and Barati were prosecuted and fined.

About 1 1/4 years prior to the incident, Chandrika's sons Bhagwandin and Barati had been murdered and the FIR in respect of the said murders was lodged by another son of Chandrika Bhagauti alias Bhabhooti, against Shiv Lal, Chhotey Lal, Meva Lal, Ram Swaroop, Brij Mohan, Baikunth Kumar and Sirdar, who were his (informant's) family members. At the time of the incident, said case was pending.

On 21/11/85 at about 10.00 a.m. when he (Ram Lal) and others were talking and sitting at the door of Shivilal, news spread that corpse of Chandrika's son was lying in Arhar field. At that time, Chandrika, Jagannath, Dayal, Puttu armed with lathis, Mahesh armed with Bhala, Prasad and Kallu armed with Kanta, Bahadur, Ram Pal and Mahabir armed with gun and Chhatrapal empty handed came. They were abusing and saying 'Sabko maar daalo kisi ko zinda nahi choodo?'. At that juncture Ram Pal, Bahadur and Mahabir started firing from their guns, resulting in him and those, who were sitting there running inside their houses and Phoolbasa, Dwarika and Chhedana sustaining fire arm injuries and falling down dead. He (Ram Lal) came behind Bhusaili and thereafter hid inside his house in South West Kothari (small room). He bolted its door from inside. He heard the cries of Chandrika, who was saying 'Sabhi ko gharoon mein phook do ghar mein jalkar mar jaen?'. Thereafter in the light of Lukta (a cluster of burning patawar leaves) he saw Bahadur and Ram Pal, who were standing on his and Ram Lal's roof, saying 'Jo nikle use goli maar do?'. He also heard sound of fires. He saw his that all the houses started burning. After 10 to 15 minutes he came out from the Kothri. He saw eastern Chappar burning and the houses of Chhedana, Phoolbasa, Dwarika, Parmeshwar, Shivilal, Brij Mohan and Shividin burning. None was to be seen in the village. At that time Chhanga son of Lalla, resident of Laxmanpur came running and told him that Puttu, Ram Pal, Bahadur and Mahabir had committed the murder of Lalla. Thereafter, he got the FIR scribed by Lekhai P.W. 7 and went to police station Sidhauri and lodged it.

15. We have gone through the evidence of Ram Lal and find him to be an implicitly truthful witness. The manner of incident furnished by him is corroborated by medical evidence and circumstances. His evidence shows that on the date of incident, at about 10 a.m. while he and some others were sitting at the door of Shivilal and Dwarika, Chhedana and Phoolbasa were also sitting nearby, appellants Bahadur and Ram Pal along with Mahabir (who died prior to the conclusion of the trial) started firing from guns resulting in Dwarika, Chhedana and Phoolbasa sustaining firearm injuries. His evidence shows that thereafter he went and hid in the West South Kothri (small room) of his house.

It is pertinent to mention that this part of his evidence is corroborated by the evidence of Dr. A.A. Khan, P.W. 1 who performed the autopsy on the corpse of Dwarika, Chhedana and Phoolbasa and found fire arm injuries on their person. Earlier, we have extracted in entirety the antemortem injuries suffered by Chhedana, Dwarika and Phoolbasa. The evidence of Dr. Khan is that Injury No. 5 suffered by Chhedana, Injury No. 3 suffered by Dwarika and Injury No. 1 suffered by Phoolbasa were caused as a result of firing from the gun.

It is true that Ram Lal's evidence does not explain the blunt weapon injuries suffered by Chhedana and Dwarika and the burn injuries suffered by Phoolbasa but the reason for the same is that he has not seen the entire incident. We may mention straightaway that blunt weapon injuries suffered by the said deceased have been explained by Smt. Ramshree P.W. 5, who stated that the appellants Puttu and Jagannath assaulted Dwarika and Chhedana with lathis.

It is also pertinent to mention that the autopsy surgeon Dr. Khan in his crossexamination stated that Injury Nos. 1 to 5 suffered by Chhedana and Injury Nos. 1, 2, 4 and 5 suffered by Dwarika (blunt weapon injuries) could be caused if bamboos and ballis of Chappar fell from height.

The burn injuries of Phoolbasa, in our view, were possible on account of burning of Chappars and houses in the proximity of the place where her corpse was found lying.

16. Again the evidence of witness Ram Lal to the effect that on account of firing, the people who were sitting near Shivilal's door ran inside the houses, which were set on fire by the accused persons is corroborated by the evidence of the Investigating Officer P.W. 10, Inspector Rizwan Haider, who on the date of incident, itself, reached the place of incident found the houses and Chappers burnt; and took out eleven dead bodies from the houses.

17. Assurance to the ocular account furnished by Ram Lal also forthcoming from the circumstance that there was a very plausible motive for the appellants and Chandrika, Mahabir and Puttu, who died prior to the commencement of the trial, to commit the crime. The appellants belong to the family of Chandrika and their interse relationship has been deposed to by Ram Lal in his examination in chief but we do not want to burden our judgment by reiterating it. We have earlier furnished the details in respect of the acute enmity between the members of the

family of Chandrika and the informant. We have seen that about 11/2 years prior to the incident two sons of Chandrika namely Bhagwan Din and Barati had been murdered and in respect of the said murders another son of Chandrika namely Bhagauti alias Bhabhooti lodged the FIR against the informant's brother and family members. We have also seen that on the date of the incident at about 10 a.m. news spread in the village that the corpse of Bhabhooti alias Bhagauti was found in the Arhar field. Chandrika, Mahabir Puttu and the appellants thought that the family members of the informant were responsible for Bhabhooti's murder. Consequently they went berserk, committed carnage; set fire to houses; resulting in the death of twenty one persons and a number of houses being set on fire.

18. Assurance to the ocular account furnished by Ram Lal is also forth coming by the circumstance that the FIR of the incident was very promptly lodged by him. We have seen that the incident took place on 21/9/85 at about 10 a.m. and the same day at 11.30 a.m. Ram Lal lodged the FIR at police station Sidhauri the distance between the place of incident and the police station being five kilometres. It is pertinent to mention that in the FIR the appellants are named and specific overt acts to some of them have also been attributed. Another circumstance which lends assurance to the evidence of Ram Lal is that on the date of incident, itself, he was interrogated under Section 161 Cr. P.C. by Investigating Officer, Inspector Haider P.W. 10.

19. It is pertinent to mention that Criminal Courts attach great importance to the prompt lodging of the FIR and interrogation of the witnesses under Section 161 Cr. P.C. because they substantially diminish the possibility of embellishments and concoctions creeping in the prosecution story.

20. For the aforesaid reasons, in our view, the evidence of Ram Lal inspires confidence.

21. We now come to the statement of Jadunath P.W. 4. His evidence shows that: At the time of incident he was sitting at the door of his house, where informant Ram Lal and others were also sitting. At that time it was heard that Bhabhooti had been murdered and his corpse was lying in Arhar field. Fifteen minutes later, Chandrika, Mahabir and Puttu, along with the eight appellants, came there. They were abusing and saying 'Aaj kisi sale ko Choodeingey Nahi.' At that juncture, Bahadur, Ram Pal and Mahabir started firing from guns, resulting in those who were sitting there, rushing inside their houses. He and Laxmi Narain went and hid in the northern kothari (small room) of Chhiddu and bolted it out from inside. From the space between the doors he could see what was happening outside. He heard Chandrika saying 'Inke sabke gharoon mein aag laga doo sab jalkar mar jaen.' He saw Mahabir, appellant Chhatrapal carrying Lukta (bundle of Patawar burning leaves) in their hands and setting fire to the Chappar and the westsouth Kothri (small room) of the house. He also saw that Prasad and Dayal were setting fire with Lukta to Chappar on the east south Kothari of Ram Lal. He further saw that Ram Pal and Bahadur were firing and saying that if any one came out, he

would be killed. Twenty to twenty five minutes later, he and Laxmi Narain came out and saw that the houses of Ram Lal, Jogmohan, Shivdin, Parmeshwar, Dwarika and Vishram were burning. They also saw that at the door of Parmeshwar, Phoolbasa's corpse was lying; north of it Drawika's corpse was lying; and north of Dwarika's corpse, Chhedana's corpse was lying.

22. We have gone through the evidence of Jadunath and find him to be an implicitly reliable witness. His evidence to the effect that as a consequence of Bahadur, Ram Pal and Mahabir firing from the gun, those sitting there, rushed inside their houses, which were set on fire by Mahabir, Chhatrapal, Prasad and Dayal and his evidence that Bahadur and Ram Pal were saying that if any one came out from the house, he would be killed, is corroborated from the fact that eighteen deadbodies were taken out by the Investigating Officer Inspector Haider P.W. 10 from inside, his own house and that of Ram Lal, Brijmohan, Shivdin, Parmeshwar, Dwarika and Vishram and some Chappars were also found burnt. As a matter of fact the evidence of Inspector Haider is that when he visited the place of incident same afternoon, he found the houses burning.

23. Another circumstance, which excludes the possibility of his being a gotup witness, is that Investigating Officer Rizwan Haider interrogated him under Section 161 Cr. P.C. very next day i.e. on 321985. It is pertinent to mention that the evidence of Investigating Officer leaves not even an iota of doubt in our minds that since on the date of the incident he was busy taking out eleven deadbodies and doing some other work, he must not have had any time to interrogate him.

24. In our view, his evidence also inspires confidence.

25. We now come to the evidence of Smt. Ramshree P.W. 5. Her evidence shows thus:

She is the daughterinlaw of the deceased Dwarika and Chhedana and the mother of the deceased Phoolbasa. On the date and time of the incident, she was sitting at her house along with Dwarika, Chhedana and Phoolbasa. At that time, Chandrika, Mahabir, Puttu and eight appellants came and appellants Ram Bahadur and Ram Pal, who were armed with guns, started firing resulting in Dwarika, Chhedana and Phoolbasa sustaining fire arm injuries and falling down. Thereafter, Puttu and Jagannath assaulted Dwarika and Chhedana with lathis. She, thereafter, followed appellant Mahesh, who was carrying a Lukta and was setting fire to the Chappar of her house and she hid in the kothri (small room) in southern portion of her house and bolted the door.

26. We have gone through the statement of Smt. Ramshree and find her to be an implicitly reliable witness. It is significant to mention that the manner of incident furnished by her is corroborated by the medical evidence. It is significant to point out that she stated that appellants Ram Pal and Mahabir fired on Dwarika, Chhedana and Phoolbasa and appellants Jagannath and accused Puttu assaulted Dwarika and Chhedana with lathis and the autopsy surgeon found

corresponding injuries on their person. Earlier, we have extracted in entirety the injuries suffered by them.

Again her statement that Mahesh set fire to the Chapper is corroborated by the circumstance that the Chapper was found burnt.

27. For the aforesaid reasons, we find her to be a truthful witness.

28. It is pertinent to mention that although Ram Pal, Jadunath and Smt. Ramshree P.Ws. 2, 4 and 5 respectively were subjected to extensive crossexamination but nothing could be elicited therefrom which could effect their credibility.

29. We now take up of the evidence of the last witness Mathura P.W. 3. His evidence shows that on the date and time of the incident he, along with his brother Laxman, had gone to his field to take out grass etc. and he heard noise and commotion from the door of Shivilal and sound of firing. Consequently, he rushed there. He found that fire had spread towards his house. Thereafter, he went on his roof and from there saw appellants Bahadur and Ram Pal standing on the roof of Shivilal and Hazari and both of them were armed with guns. When he asked them, they replied that they were avenging the murder of their brother. He also stated that thereafter he saw the houses of Shivilal, Chiddu, Shividin, Brij Mohan and Hazari burning. Since he did not name accused other than Bahadur and Ram Pal, he was declared hostile and was cross examined by the State Counsel. During his crossexamination he stated that Bahadur and Ram Pal were firing and were saying that if any one came out, he would be killed. He also candidly stated therein that excepting them, he saw no other accused person. During his crossexamination, he was confronted with that portion of his statement under Section 161 Cr. P.C. wherein he had implicated the other accused but he disowned having made it.

30. We have gone through the statement of Mathura and in our view it lends assurance to the ocular account furnished by Ram Lal, Jadunath and Smt. Ramshree in respect of the participation of the appellants Bahadur and Ram Pal.

31. It is well settled that the testimony of a hostile witness is not altogether useless. To the extent to which it receives reassurance from other credible evidence, it can safely be acted upon. Since the evidence of Ram Lal, Jadunath and Smt. Ramshree squarely incriminates Bahadur and Ram Pal, the evidence of Mathura, vizaviz the said appellants can be safely relied upon.

32. A perusal of the ocular account furnished by the four eye witnesses Ram Lal, Jadunath, Smt. Ramshree and Mathura, which we have set out in detail earlier, vizaviz the appellants, would show as under:

Ram Lal; He has attributed to appellants Bahadur and Ram Pal the specific overt act of firing from guns resulting in gun shot injures being caused to Dwarika, Chhedana and Phoolbasa. He has also stated that the said appellants were standing on his and Shivilal's roof, which were contiguous, and shouting that if

any one came out, he would be killed.

Jadunath; He has specifically attributed the role to Bahadur and Ram Pal of firing from gun and shouting repeatedly that if any one came out he would be killed. He has also assigned to appellant Chhatrapal the specific overt act of setting fire to the Chappar on his westsouth kothari (small room) with a lukta. He also attributed specific role to appellants Prasad and Dayal of setting fire with a lukta to the Chappar on eastsouth room of Ram Pal.

Smt. Ramshree; She has specifically stated that Ram Pal and Bahadur fired from guns resulting in Dwarika, Chhedana and Phoolbasa receiving gun shot injuries. She has specifically stated that thereafter appellant Jagannath assaulted Dwarika and Chhedana with lathi. She has further stated that appellant Mahesh followed her when she ran inside the house and set fire to her Chappar.

Mathura; He has attributed the specific role to appellants Bahadur and Ram Pal, who armed with guns were standing on the roof of Shivilal and Hazari and saying if anyone come out he would be killed.

33. It would thus become manifest that the ocular account furnished by four eyewitnesses gives specific overt acts to appellants Bahadur, Ram Pal, Chhatrapal, Dayal, Jagannath, Ram Prasad and Mahesh; and the said witnesses have not attributed any specific overt act to appellant Kallu. Some of them stated that he was armed with Kanta.

34. In our view in riot cases, in faction ridden villages, where interested evidence is forthcoming, as is the case here, it is only prudent to convict those accused persons to whom witnesses attribute specific overt acts, which are corroborated by medical evidence or circumstantial evidence. The rationale for such a view is that there is always the scope for witnesses to falsely implicate accused persons. In the instant case, on the person of none of the deceased persons, the doctor found any incised wound. As a matter of fact the eyewitnesses do not State that appellant Kallu used the Kanta.

In this view of the matter it would be safe to accord benefit of doubt to appellant Kallu.

35. For the reasons mentioned above, we are implicitly satisfied that the learned trial Judge acted correctly in finding the involvement of the appellants Bahadur, Ram Pal, Chhatrapal, Dayal, Jagannath, Ram Prasad and Mahesh established in the incident.

As mentioned above, appellant Kallu deserves benefit of doubt.

36. We are also squarely satisfied that, except finding appellant Bahadur guilty for the offence punishable under Section 302 IPC simplicitor, the learned trial Judge was perfectly justified in convicting the aforesaid seven appellants for various offences.

37. We make no bones in observing that the learned trial Judge erred in

convicting appellant Bahadur for the offence punishable under Section 302 simplicitor. In our view, he could have convicted him thereunder only if the evidence on record conclusively established that he inflicted fatal injuries on one or some of the deceased persons. The evidence, which we have accepted, is that an unlawful assembly comprising of eleven persons, one of the members of which was appellant Bahadur, on 2 11985 at about 10 a.m. came to the door of Shiv Lal in village Mohiuddinpur where informant Ram Lal and others were sitting. The evidence of the eyewitnesses, which we have also accepted, is that three of the members of the unlawful assembly namely appellants Bahadur and Ram Pal and accused Mahabir, who died prior to the conclusion of the trial, indiscriminately fired from guns killing Dwarika, his wife Chhedana and his granddaughter Phoolbasa, who were sitting at their house which was situated near the houses of Shiv Lal. The evidence of the eyewitnesses does not show as to whose shot caused the death of the said deceased persons. In this view of the matter, in our judgment, appellant Bahadur deserves to be acquitted for the offence punishable under Section 302 and instead should be convicted for that punishable under Section 302 IPC read with 149 IPC. We may mention that no prejudice would be caused to him on account of his being convicted for the said offence because we find that during the trial he was charged for the said offence.

As a matter of fact we are surprised that on the same evidence on which the learned trial Judge had convicted appellant Bahadur for the offence punishable under Section 302 IPC simplicitor, he convicted appellant Ram Pal for that punishable under Section 302 IPC read with 149 IPC.

38. The next question is the quantum of sentence to be awarded to the appellants. In our judgment, sentences of the appellants Ram Pal, Chhatrapal, Dayal, Jagannath, Ram Prasad and Mahesh on all the counts and that of appellant Bahadur on counts other than Section 302 IPC read with 149 IPC, on which we have to decide what sentence should be awarded to him, cannot be castigated as being excessive.

39. Mr. Virendra Bhatia, learned Counsel for the appellants, emphatically urged we should not impose death penalty on appellant Bahadur for the offence punishable under Section 302/149 IPC and the said penalty imposed on appellant Ram Pal for the offence punishable under Section 302/149 IPC by the trial Judge should be reduced to imprisonment for life.

We have given our anxious consideration to Mr. Bhatia's submission and are partly inclined to accept it. We are of the judgment that whereas appellant Bahadur does not deserve death penalty, appellant Ram Pal does.

40. Mr. Bhatia emphatically urged that the law as it stands today is that life imprisonment is the rule and death sentence an exception; restricted to ?rarest of rare cases?. He invited our attention to the decision of the Apex Court rendered in the case of Machchi Singh v. State of Punjab, reported in 1983 SCC (Cri.) 631, wherein the Supreme Court in para 39 has held that before deciding

whether death penalty should be awarded the following questions may be asked and answered:

(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?

41. Mr. Bhatia urged that in the instant case circumstances on record do not show that learned trial Judge had no alternative but to impose penalty. He contended that they show that the sentence of imprisonment for life was not inadequate in the instant case.

Mr. Bhatia also invited our attention to the decisions of the Apex Court in the cases of *Bachan Singh v. State of Punjab*, reported in 1980 SCC (Crl.) page 580 and *Sheikh Ishaq and others v. State of Bihar*, reported in 1995 SCC (Crl.) page 543.

In the former decision (*Bachchan Singh's*) Mr. Bhatia invited our attention to para Nos. 202, 206 and 207 which read thus:

?(202) Drawing upon the penal statutes of the States in U.S.A. framed after *Furman v. Georgia*, in general, and Clauses 2(a), (b), (c) and (d) of the Indian Penal Code (Amendment Bill passed in 1978 by the Rajya Sabha, in particular, Dr. Chitale has suggested these aggravating circumstances?:

Aggravating circumstances: A Court may, however, in the following cases impose the penalty of death in its discretion:

(a) if the murder has been committed after previous planning and involves extreme brutality; or

(b) if the murder involves exceptional depravity; or

(c) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed

(i) while such member or public servant was on duty; or

(ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or

(d) if the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the Code of Criminal Procedure, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code.

(206) Dr. Chitale has suggested these mitigating factors:

Mitigating circumstances: In the exercise of its discretion in the above cases, the Court shall take into account the following circumstances:

(1) That the offence was committed under the influence of extreme mental or emotional disturbance.

(2) The age of the accused. If the accused is young or old, he shall not be sentenced to death.

(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.

(4) The probability that the accused can be reformed and rehabilitated.

The State shall by evidence prove that the accused does not satisfy the conditions (3) and (4) above.

(5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.

(6) That the accused acted under the duress or domination of another person.

(7) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct.

(207) We will do no more than to say that these are undoubtedly relevant circumstances and must be given great weight in the determination of sentence. Some of these factors like extreme youth can instead be of compelling importance. In several States of India, there are in force special enactments, according to which a "child", that is, "a person who at the date of murder was less than 16 years of age", cannot be tried, convicted and sentenced to death or imprisonment for life for murder, nor dealt with according to the same criminal procedure as an adult. The special Acts provide for a reformatory procedure for such juvenile offenders or children.?

In the latter decision (Sheikh Ishaque's), Mr. Bhatia drew our attention to para 11 wherein the Supreme Court has held that the number of persons who had lost their lives at the hands of the assailants by burning and the motive for the commission of crime, were not the only considerations, which have to be kept in view for imposing the death penalty.

42. Mr. Bhatia contended that the solitary aggravating circumstance in the instant case is circumstance (b) referred to in para 202 of Bachchan Singh's case. He did not dispute that murders were undoubtedly committed with exceptional depravity but urged that the said aggravating circumstance is offset by mitigating circumstances especially Nos. 1, 2 referred to in para 206 of Bachchan Singh's case supra. Mr. Bhatia urged that cause for the multiple murders was that some times in the morning of 21/1/85 the corpse of Bhagauti

alias Bhabhooti was found. He contended, as is manifest from the evidence on record, the Chandrika (father of Bhagauti alias Bhabhooti) and others had a feeling that the family members of the informant Ram Lal were responsible for the said murder and therefore, on 21 1985 at about 10.00 a.m. itself committed these multiple murders to avenge it. He contended that when these multiple murders are judged in this perspective it can safely be held that Chandrika, his son appellants Bahadur and his real nephew appellant Ram Pal committed them under the influence of extreme mental and emotional disturbance and under duress and domination of another person in terms of 1 and 6 of para 206 of Bachchan Singh's case (supra). Mr. Bhatia also urged that the evidence on record shows that at the time of the incident appellant Bahadur, was aged about 16 1/2 years and appellant Ram Pal about 25 years. Mr. Bhatia invited our attention to para 9 of the statement of the informant Ram Lal recorded on 21.5.1986, wherein during the course of his cross-examination, it was suggested to him that the appellant Bahadur was aged about 18 years. At first he denied such a suggestion and stated that he was not aged about 18 years but was aged about 20 years, but, thereafter, went on to say that he could not definitely say whether he was aged 18 years. The actual reply of Ram Lal reads thus: Mulzim Bahadur 18 varsh ka us samai nahin hoga, balki wah 20 varsh ka hoga. Main sahi nahi bata sakta ki wah 18 saal Ka bhi sakta hai ki nahi.

Mr. Bhatia urged that the cases of appellants Bahadur and Ram Pal would also be covered by the Circumstance No. 2 in para 206 of Bachchan Singh's case (supra).

Mr. Bhatia urged that if the aggravating and mitigating circumstance are balanced, the latter would outweigh the former and therefore, the appellants deserve benefit of doubt.

43. On the converse, Mr. Jyotendra Misra, learned Public Prosecutor strenuously urged that the cases of appellants Bahadur and Ram Pal would fall under (a) and (b) of para 202 of Bachchan Singh's case (supra). He also contended that their cases would not fall under circumstance (1) in para 206 of the said case and at the best only the case of Bahadur would fall within the four corners of circumstances 2 and 6 of the said decision. Mr. Misra urged that though the immediate cause for these multiple murders was the murder of Bhagauti alias Bhabhooti son of accused Chandrika, but there was nothing on record to show that the accused persons got knowledge of his murder immediately before committing these multiple murders. He contended that, therefore, it cannot be said that they committed these murders under the influence of extreme mental or emotional disturbance. He also contended that circumstances show that the appellants and others committed these murders after meticulous planning. He urged that excepting appellant Chhatrapal, all of them came armed with deadly weapons and thereafter committed these multiple murders and set a large number of houses on fire. Mr. Misra urged that these appellants cannot be only said to have committed the murders of Dwarka, Chhedana and Phoolbasa but were also responsible for the murders of eighteen others. He urged that the

evidence of the eyewitnesses shows that the appellants Bahadur and Ram Pal, armed with guns, were standing on the roof of Shiv Lal and Hazari and were saying that if any one came out he would be killed. He contended that on account of this none dared to come out and eighteen other human lives were also lost. He also urged that twenty five years, which was the age of the appellant Ram Pal at the time of the incident in Mr. Bhatia's contention cannot be said to be a young age, on the facts of this case, for converting sentence of death to imprisonment for life.

In short the submission of Mr. Misra is that the gravity of the overt acts of the appellants Bahadur and Ram Pal are such that the only appropriate sentence would be death penalty.

44. We have reflected over the rival contentions and as observed earlier, in our judgment, appellant Ram Pal deserves sentence of death, but appellant Bahadur imprisonment for life.

In the first place, we would like to point out that the submission of Mr. Bhatia that appellant Ram Pal was aged about 25 years at the time of the incident is not necessarily correct. Mr. Bhatia canvassed it on the basis of the age furnished by him in his statement under Section 313 Cr. P.C. We find that he was twice interrogated under Section 313 Cr. P.C.; the first time on 781995 and he second on 12101995. The second statement was occasioned because the evidence of Dr. S.K. Srivastava had not been put to him in his first statement. It is pertinent to mention that in his first statement he gave out his age as 35 years but in the second as 42 years. Since the incident took place on 211985 according to the first statement he would have been about 25 years of age at the time of the incident, but according to the second over 27 years of age at that time. In view of the conflicting age emerging from his statement under Section 313 Cr. P.C. it cannot be definitely said that he was aged about 25 years at the time of the incident. At any rate, in our view, considering the brutality with which he committed the crime age of 25 years cannot be said to be tender enough to earn him clemency of imprisonment for life.

The evidence of the eyewitnesses, which we have accepted, shows that appellant Ram Pal committed multiple murders with exceptional depravity. He not only alongwith appellant Bahadur and Mahabir with guns committed murders of Dwarika, Chhedana and Phoolbasa, but compounded those of eighteen others because the evidence of the eyewitnesses shows that the houses, wherein the persons were hiding, were engulfed in flames and he and Bahadur were standing on the roof of informant Ram Lal and Shivilal, armed with guns and were saying that if anyone came out, he would be done to death. In our view, it was on account of this threat given by him that eighteen persons, who were inside the burning houses, did not muster courage of coming out therefrom and were roasted to death by fire. Considering the dastardly and heartless manner in which he was responsible for multiple murders, the only sentence, which he deserves, is that of death.

In our view, the case of appellant Ram Pal would fall under the category of ? rarest of the rare? and the aggravating circumstances far outweigh mitigating ones. We feel that in Ram Pal's case there can be no alternative to death sentence.

We find no merit in Mr. Bhatia's submission that since appellant Ram Pal has been convicted for the offence punishable under Section 302/149 IPC and the authorities of the Apex Court are to the effect that if a person is vicariously convicted for the offence of murder he should be sentenced to imprisonment for life, he deserves sentence of imprisonment for life and not of death.

To bring home his submission, Mr. Bhatia invited our attention to para 26 of the decision of the Apex Court, rendered in the case of Ediga Anamma v. State of A.P., reported in AIR SC 799, where one of the considerations given out by the Apex Court for converting death sentence into life imprisonment, was where the offence is only constructive being under Section 302 IPC read with 149 IPC.

We are constrained to observe that this authority and for that matter none lays down the ratio that a person who has been convicted under Section 302/149 IPC cannot be sentenced to death. In our view, it would all depend on the nature of the constructive liability; for instance if the accused has not been assigned the role of assaulting the deceased or a minor role relating to it has been assigned to him, his sentence can be downgraded from death to imprisonment for life. But, in a case such as that of appellant Ram Pal where brutality and depravity is writ large the only appropriate sentence for the offence punishable under Section 302 read with 149 IPC would be one of death and not imprisonment for life.

45. For the aforesaid reasons, in our view, the learned trial Judge acted correctly in sentencing appellant Ram Pal to death for the offence punishable under Section 302 read with 149 IPC.

46. But, in our view, since appellant Bahadur was aged about 16 1/2 at the time of the incident if not less, bearing in mind the fact that in view of his impressionable age he must have acted under duress or domination of his father Chandrika he deserves to be sentenced to imprisonment for life. We have reached the view that he was aged about 16 1/2 years at the time of the incident for the following reasons. On 2151986, during the course of crossexamination the suggestion given to the informant Ram Lal was that appellant Bahadur was aged about 18 years. To the said suggestion, Ram Lal first replied that he was 20 years of age and thereafter stated that he could not correctly say whether he was or not of 18 years of age. If on 2151986 Bahadur was aged about 18 years it logically follows that on 21 1985, the date when incident took place, he was aged about 16 1/2 years. In fact we feel that he could have been less than the said age because in the second statement recorded under Section 313 Cr. P.C., on 12 101999, he stated that he was aged about 30 years, though in his first statement recorded on 781995 he stated that he was aged about 25 years. From both his statements, it would become manifest that he was aged less than 16 1/2

years at the time of the incident. Hence, considering the said facts it would be reasonable to hold that he was not more than 16 1/2 years of age at the time of the incident.

47. In our view, since appellant Bahadur was aged about 16 1/2 years at the time of the incident and being the son of Chandrika must have acted under his moral influence, it would be appropriate to sentence him to imprisonment for life. In this connection, we also feel appropriate to refer to the oft quoted decision of the Supreme Court rendered in the case of Masalti and others v. State of U.P., reported in AIR 1965 Supreme Court page 2002. A perusal of para 4 of the said decision would show that five persons were murdered in a most brutal manner. A perusal of para 20 of it would show that ten of them, who were armed with guns, were sentenced to death, merely because they were members of an unlawful assembly. A perusal of para 21 thereof makes it manifest that the Supreme Court reduced the sentence of three of them namely Ram Saran, who was aged 18 years; Asha Ram, who was aged 23 years; and Dev Prasad, who was aged about 24 years from death to imprisonment for life because these young men must have joined the unlawful assembly under pressure and influence of the elders of the respective families.

48. For the said reasons, in our view, appellant Bahadur deserves to be sentenced to imprisonment for life for the offence punishable under Section 302 read with Section 149 IPC.

49. We would be failing in our fairness if before proceeding to the operative part of our judgment, we do not refer to the principal submissions canvassed by Mr. Virendra Bhatia, learned Counsel for the appellants.

Mr. Bhatia firstly contended that a number of circumstances show that the FIR is an antedated document. He urged that the evidence of the informant shows that the incident took place at 10 a.m.; for 10 to 15 minutes he hid in the kothari; and thereafter came out. Mr. Bhatia urged that he would have taken some time to compose himself and in getting the FIR scribed by Lekhai and, therefore, the FIR could not have been lodged at 11.30 a.m. the same day. We do not find any merit in this submission because police station Sidhauri where the FIR was lodged was only five kilometres from the place of the incident. In our view the FIR could have been lodged at 11.30 a.m.

Mr. Bhatia urged that another circumstance which shows that the FIR is antedated, is that although in the FIR the distance between the place of incident and the police station Sidhauri is mentioned as five kilometres in some of the inquest reports, it is mentioned as six and seven kilometres and in some of them Section 201 IPC is not mentioned. Mr. Bhatia urged that said things show that the FIR had not been lodged. We regret that we do not find any merit in this submission. In our view considering that twentyone persons had been murdered in the instant case and twentyone inquest reports were prepared, from the aforesaid discrepancies, in some of the inquest reports it cannot be concluded

that the FIR had not not been lodged. In our judgment, the aforesaid discrepancies occurred on account of remissness in the investigation and the carelessness of the Investigating Officer who must have been flustered in a crime of this magnu In this connection, we feel it pertinent to refer to the decision of the Apex Court rendered in the case of Dr. Krishna Pal and another v. State of U.P., reported in 1996 SCC (CrL.) 249, wherein, as is manifest in para 9, there was omission of crime number in the inquest report and the Supreme Court took the view that it was on account of carelessness of the Investigating Officer and held that the said infirmity would not effect the credible ocular account. In our view the said decision would squarely apply to our case because here also the ocular account is beyond reproach.

Mr. Bhatia next urged that the special report was sent after delay. He also urged that the prosecution case that the special report was sent by constable clerk Tikam Singh through constable Veerpal Singh to the Magistrate on the date of the incident, itself, on 211985 at 2.00 p.m. is untenable. He urged that the evidence showed that Veerpal Singh handed over the said report to another person on 311985 and himself came back to the police station. In our view even if there was some delay in the sending of special report it is of no consequence. In this connection it would be necessary to advert to the observations contained in para8 of the decision of Supreme Court rendered in the case of Betal Singh v. State of M.P., reported in 1996 SCC (CrL.) 571, wherein, as is manifest from para8, FIR was lodged within 30 minutes of the occurrence and the Supreme Court held that the delay in sending its copy to the Magistrate was of no consequence.

Mr. Bhatia also urged that in the radio transmission message which was sent to the superior officers after the lodging of the FIR, there was only mention about the houses being burnt and not of murders and this showed FIR was not. In our view from this circumstance also it cannot be inferred that the FIR was not in existence. We have perused the G.D. Entry No. 109, which was made by constable clerk Tikam Singh after lodging of the FIR and therein we find that the FIR was registered under Sections 147/148/149/302/201 IPC. In our view, the omission to mention about the murders in the radio transmission message is not material because firstly there is reference to Section 302 IPC in Ext. Ka109, and secondly it is quite understandable that on receiving the FIR pertaining to such a ghastly crime constable clerk Tikarm Singh may have become nonplussed, and therefore in our view if he failed to inform the superior officers about the murder, no capital can be made of.

Mr. Bhatia also urged that the evidence on record shows that when on 211985 at 11.30 a.m. the informant Ram Lal lodged the FIR at police station Sidhauili, Chandrika, who had gone to lodge the FIR in respect of the murder of his son, was already at police station Sidhauili and his FIR had been lodged vide Crime No. 6. Mr. Bhatia contended that had the informant Ram Lal lodged his FIR at 11.30 a.m., there was no reason why Chandrika was not arrested. Even

assuming for argument's sake that this was so, we fail to see how merely on this lapse the FIR can be said to be antedated.

For the said reasons, in our view, the first submission of Mr. Bhatia fails.

50. Mr. Bhatia next contended that the prosecution case in the FIR that deceased Dwarika, Chhedana and Phoolbasa were fired in front of their houses, is belied by the circumstance that their deadbodies were not recovered from there. We find no merit in this submission. The evidence of Ramshree P.W. 5 daughterinlaw of the deceased Dwarika and Chhedana and the mother of the deceased Phoolbasa shows that they were fired upon in front of their houses. It is pertinent to mention that a perusal of the site plan shows that the deadbodies of Dwarika and Chhedana were recovered from near the house of Dwarika. It is true that corpse of Phoolbasa was recovered at some distance from there but then, the prosecution case, itself, is that when firing was resorted to by the appellants Bahadur and Ram Pal and accused Mahabir, people started running helter skelter. Thus, in our view, there is nothing surprising if Phoolbasa also ran and her corpse was not recovered from front of her house.

51. Mr. Bhatia next contended that the three credible witnesses of the incident namely Ram Lal, Jadunath and Smt. Ramshree P.Ws. 2, 4 and 5 respectively are interested and Mathura P.W. 3 turned hostile. We find no merit in this submission either. In faction ridden villages, in our experience, it is impossible to get independent witnesses. At any rate the circumstance that the witnesses are interested, would only make us to evaluate their evidence with caution and not mechanically reject it. We have exercised the said caution and find their evidence to be credible.

52. Mr. Bhatia next contended that appellants Kallu and Chhatrapal deserve benefit of doubt. For the reasons furnished by us in para 34 of this judgment, we have already extended the benefit of doubt to Kallu and consequently do not want to burden our judgment by reiterating those reasons.

Mr. Bhatia contended that Chhatrapal deserves to be given benefit of doubt because the evidence is that his right hand had been cut by a fodder cutting machine before the incident and therefore, the prosecution case that he was carrying a lukta (cluster of burning patawar leaves) with which he set fire to the Chappar on the westsouth kothari of Jadunath, cannot be believed. Mr. Bhatia also urged that Jadunath's evidence that he was carrying a lukta cannot be accepted because in his statement under Section 161 Cr. P.C., there is no mention of this. We are constrained to observe that we do not find any merit in the submission of Mr. Bhatia.

It is pertinent to mention that the evidence of constable clerk Tikam Singh, who registered the FIR shows that on the right palm of Chhatrapal as is manifest from G.D. entry there was an old injury attributable to fodder cutting machine. It is also pertinent to mention that evidence of Jadunath (PW4) shows that he did not see any injury or bandage on the hand of Chhatrapal. In our view, the injury of

Chhatrapal must have healed by the time of incident and, therefore there was no improbability in his holding a lukta in his hand and setting fire to the Chappar of Jadunath.

The submission of Mr. Bhatia that in his statement under Section 161 Cr. P.C. Jadunath has not mentioned this, cannot be accepted. In his crossexamination Jadunath stated that he had mentioned it to the Daroga and could assign no reason if it is not there in the said statement. However, we find that S.O. Rizwan Haider, who recorded the statement of Jadunath under Section 161 Cr. P.C., stated that Jadunath had not stated in so many words that Chhatrapal had set fire to his Chappar on the west and south side. Since S.O. Rizwan Haider's reply was vague, we felt that the interests of justice warranted that we should peruse the statement of Jadunath under Section 161 Cr. P.C. to find out whether this omission was there. Hence, we perused the statement of Jadunath recorded under Section 161 Cr. P.C. and found that he had stated therein that from behind his door he and Laxmi Narain saw that Mahabir and Chhatrapal carrying Lukta (cluster of burning patawar leaves) entering inside his house and setting fire to his Chappar.

For the said reasons, in our view, it cannot be said that the story of appellant Chhatrapal carrying a lukta with which he set fire, is an improvement.

We may also mention that since he was the son of Chandrika, and his brother Bhabhooti alias Bhagauti had been murdered and his corpse was discovered that very moshing there was sufficient reason for him to have participated in the incident.

For the said reasons, in our view, this submission fails.

53. Mr. Bhatia finally urged that since the informant in his FIR and his statement during trial has failed to explain blunt weapon injuries suffered by Chhedana and Dwarika, his claim of having seen the incident, cannot be accepted. We regret we do not find any merit in this submission. As we have mentioned earlier that none of the eyewitnesses have seen the entire incident; all of them saw a part of it. It is pertinent to mention that both in the FIR and in the statement during trial informant Ram Lal had stated that after Bahadur, Ram Pal and Mahabir had fired from guns resulting in Dwarika, Chhedana and Phoolbasa sustaining fire arm injuries, he went inside the house and hid. Therefore, it is unfair to fault him for not explaining the blunt weapon injuries on the said persons. However, we find that in the ocular account furnished by Ramshree P.W. 5 blunt weapon injuries sustained by the said persons have been explained. Smt. Ramshree stated that after Ram Pal and Bahadur had started firing, resulting in Chhedana, Phoolbasa and Dwarika sustaining fire arm injuries and falling down, appellant Jagannath and accused Puttu assaulted Dwarika and Chhedana with lathis. In our view, the evidence of Smt. Ramshree explains blunt weapon injuries sustained by said persons. Hence this submission also fails.

54. In the result:

(A) Capital Sentence Reference No. 4 of 2001:

Reference made by the learned trial Judge for confirmation of the death sentence of Bahadur is rejected and that made for confirmation of death sentence of Ram Pal is accepted.

(B) Criminal Appeal No. 830 of 2001:

The convictions and sentences of the appellant Bahadur on counts, excepting Section 302 IPC, are confirmed. He is acquitted for the offence punishable under Section 302 IPC and his sentence of death thereunder is set aside. Instead he is found guilty for the offence punishable under Section 302 read with 149 IPC and is sentenced to undergo imprisonment for life for the same. His sentence of imprisonment for life thereunder, shall run concurrently with the substantive sentences imposed on him by the trial Court on other counts.

The convictions and sentences of appellant Ram Pal on all the counts are confirmed. His substantive sentences shall run concurrently.

Appellants Bahadur and Ram Pal are in Jail and shall serve out their sentences.

(C) Criminal Appeal No. 943 of 2001:

Appeal is partly allowed. Appellant Kallu is given the benefit of doubt on all the counts and is acquitted thereunder. In case, he has paid the fine, it shall stand refunded to him.

Appellant Kallu is in Jail and shall be released forthwith unless wanted in some other case.

The convictions and sentences of appellants Chhatrapal, Dayal, Jagannath, Ram Prasad and Mahesh are confirmed on all the counts. Their substantive sentences thereunder shall run concurrently. In case they have not paid the fine, they shall pay the same. They are in Jail and shall serve out their sentences.

Reference partly accepted.

Appeal Nos. 830 of 2001 partly allowed.

Appeal No. 943 of 2001 partly allowed.