

(2012) 04 PAT CK 0093

In the Patna High Court

Case No : Death Reference No 7 of 2010 with Criminal Appeal (DB) No 640 of 2010

State of Bihar

APPELLANT

Vs

Ajay Singh, Manoj Singh and Narendra Singh @ Nagendra Singh
 Sanjay Singh Vs The State of Bihar

RESPONDENT

Date of Decision : 16-04-2012

Acts Referred:

Arms Act, 1959 — Section 27
Constitution of India, 1950 — Article 20, 21
Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 147, 148, 149, 302, 307
Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 — Section 3

Citation : (2012) 2 PLJR 601

Hon'ble Judges : Navaniti Prasad Singh, J; Ashwani Kumar Singh, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Hon"ble Mr Justice Navaniti Prasad Singh

1. On 11.07.1996, in the afternoon at about 2 pm, a carnage took place at Bathani Tola in village Barki Kharaon under Sahar Police Station (PS) in the district of Bhojpur in which allegedly about 33 named persons alongwith about 35 unknown persons massacred and killed 18 persons on the spot who were all ladies and children. Two more died subsequently, one being a boy of 25 years and another child of 6 years in course of treatment. Even though police and other high officials reached the village not long thereafter, the Fardbayan, which formed the basis of the first information report (FIR), was recorded only at 4.30 am, the next day that is 12.07.1996. At what time, the FIR was registered is not known. It is alleged to have been dispatched to the Court on 13.07.1996 reaching the Chief Judicial Magistrate (CJM), Bhojpur at Ara on 14.07.1996. In the afternoon on 12th July, 1996 itself allegedly some of the accused persons

were arrested from their houses from Barki Kharaon with licensed arms and ammunitions. Police Inspector of Agiaon, on the same day, arrested some other persons and brought them to Barki Kharaon but they were produced in Court for remand on 14.07.1996. On 15.07.1996, 23 more accused persons were allegedly arrested from a lodge in Kariman Tola nearby the place of occurrence. Upon completion of investigation, chargesheets were submitted and charges were framed against 62 persons for having come assembled with deadly weapons with intention to kill and brutally killed 20 persons and were, accordingly, charged under various sections of Indian Penal Code (IPC), Arms Act and Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, (SC ST Act). Trial was apparently in relation to 53 accused persons as some died, some absconded and as against some, proceedings were quashed and/or dropped. Upon conclusion of trial, out of the 53 persons, 30 were acquitted and 23 were convicted. Out of the 23 so convicted, 3 persons were sentenced to death giving rise to the present death reference and criminal appeals. It may be noted that prosecution, in almost over a decade and a half, examined only 13 witnesses to establish its case. Out of the 13, 3 are doctors who conducted the post mortem examination and one, the Investigating Officer (IO). Evidence of one witness was discarded as he did not turn up for cross examination effectively leaving only 8 witnesses in relation to the occurrence. The trial Court rejected the evidence of these private witnesses with exception of two for the purposes of convicting these 23 persons. While the appeals were pending before this Court, on behalf of 4 persons, applications were filed claiming juvenility. This Court, prima facie being satisfied, referred their cases to the Juvenile Justice Board for determination of their age on the date of occurrence. Report being received, 3 of them were declared juvenile which included one Manoj Singh of Cr Appeal (DB) No 688 of 2010 who was sentenced to death. The result is that all these cases and the death reference is relevant for 20 convictions with two death sentences included therein. The persons, who have been found to be juvenile, are Bela Singh in Cr Appeal (DB) No 652 of 2010, Manoj Singh in Cr Appeal (DB) No 688 of 2010, who has been sentenced to death, Dilip Singh, appellant No 3 in Cr Appeal (DB) No 727 of 2010. The other persons, who have been sentenced to death, are Narendra Singh @ Nagendra Singh in Cr Appeal (DB) No 680 of 2010 and Ajay Singh in Cr Appeal (DB) No 693 of 2010. All the other convicted persons have been sentenced to life imprisonment in the connected 15 appeals including appeals of the condemned persons.

2. Briefly, the prosecution case is based upon an alleged Fardbayan (Exhibit 3) of Kishun Choudhary (PW 12) of Bathani Tola, P S Sahar, District Bhojpur recorded by SI Umesh Kumar Singh, the Officer-in-charge, Sahar PS and the IO (PW 13) at Bathani Tola at 4.30 am on 12.07.1996 which, upon registration, gave rise to Sahar PS Case No 0098 of 1996 dated 12.07.1996 instituted under Sections 147/148/149/302/307/324/326/436 of IPC, Section 27 of the Arms Act and Section 3 (v) of SC ST Act. In the Fardbayan, it is stated that while the informant was in his house, on 11.07.1996 at 2 pm, he found large number of persons

coming from village Barki Kharaon through Shisam orchard who appeared to be members of Ranvir Sena. They were firing and approaching the village. Out of fear, the informant ran out of the house and hid himself in a ditch near the house of Marwari Choudhary (PW 6). His wife with his two children ran into the neighbour Marwari Choudhary's house to save themselves. The mob of about 50 to 60 entered the village and the houses and shot or slaughtered all ladies and children. They set fire to the houses having surrounded the village. He saw the entire incident while hiding in the ditch and after the mob killed everybody inside the village, they returned. He came out and he found all ladies and children shot or slaughtered lying all over the village including his family. 5 to 6 ladies and children were seriously injured who were taken by the villagers to Piro for treatment. Several named villagers had seen the occurrence. The reason for the carnage was that the villagers were sympathizers of MALE and the aggressors were of Ranvir Sena between whom fight for dominance has been going on for quite sometime. This is Exhibit 3. It is witnessed by one Hiralal Choudhary with thumb impression of the informant. Notably, Hiralal Choudhary has not been examined. In the Fardbayan, 33 persons are named with their parentage and address as the accused persons apart from 30-35 unknown. 25 are of Barki Kharaon, 3 of village Paradeep both falling under Sahar PS and 3 of village Dullam Chak, 2 of village Comparhi both under Chauri PS of district Bhojpur.

3. At this juncture, it may also be noted that out of the total 23 convicted persons, 4 are not named in the Fardbayan, namely, Bachcha Singh @ Hareksishna Singh of Cr Appeal No 729 of 2010, Digree Singh, appellant No 2 in Cr Appeal No 823 of 2010, Kamlesh Singh of Cr Appeal No 675 of 2010 and Bela Singh, who has been declared juvenile, of Cr Appeal No 652 of 2010.

4. It may be noted that though the informant claims that he had hid himself in a ditch and escaped death at the hands of the miscreants who ransacked the village, killed or attempted to kill everybody inside and in sight, he has not stated in the Fardbayan as to why he gave his Fardbayan only in the next morning, i e, 12 hours after the carnage.

5. Briefly stated, the defence is of complete false implication. There is no denial of the carnage. Based on evidence recorded, their case is that police were informed by police personnel about the carnage taking place in writing at about 4.30 pm on 11.07.1996 at the Sahar PS by personnel sent from the police picket of Barki Kharaon which was transmitted by wireless to various people in the district including the Officer-in-charge of Sahar PS who reached the village Bathani Tola where massacre took place at about 6.30 pm on 11.07.1996 itself. Soon thereafter, the Zonal IG, the District Magistrate and other officials also reached. Injured people were moved for treatment, with arrangement made by the district administration, first to Piro Primary Health Centre and then to Ara Sadar Hospital but no information was recorded though statements were made by different people at different places in regard to carnage which is admitted by the prosecution. In all, there are about 8 such statements of different persons.

The defence is that it was much later, on the next day having thoughtfully planned the accusation, that the Fardbayan was recorded which was later shown to be recorded at 4.30 am on 12.07.1996. For almost 12 hours, allegedly all the bodies were lying all over the place with all senior officials there without there being any Fardbayan. Most of the persons accused are then said to have been arrested peacefully as sitting ducks either from their house at Barki Kharaon or a few days thereafter from nearby village. Even those, who were arrested allegedly in the afternoon of 12.07.1996, were produced for remand before learned CJM, Ara only on 14.07.1996 or thereafter. Notwithstanding directions from the Court, no test identification parade (TIP) was ever arranged for. The IO states that people were not ready for TIP whereas the prosecution witnesses say that they were never called for TIP. In substance, the defence is that though the carnage took place, they were not responsible and the persons responsible were in fact never investigated much less proceeded against. They all have been falsely implicated. Their convictions are wrong and unsustainable.

6. Now, in view of substantial arguments from both sides being made with regard to the starting point of the prosecution that is the Fardbayan (Exhibit 3) and the FIR registered thereon on which prosecution heavily relied and the defence challenged its authenticity, correctness and reliability, it would be appropriate to discuss first those issues. There is no dispute that the carnage took place at Bathani Tola at about 2.30 pm on 11.07.1996 and officially, as per prosecution, the Fardbayan was first recorded on the statement of Kishun Choudhary (PW 12) by Umesh Kumar Singh (PW 13), the Officer-in-charge and IO, Sahar PS at 4.30 am on the next day that is 12.07.1996. The first thing to be noticed is that though the Fardbayan was being registered on the statement of a person who was alleged to be witness to the entire carnage, there is no whisper in the Fardbayan as to the delay of 12 hours. It was, admittedly, recorded at Bathani Tola itself. There are four persons relevant for these parts of the prosecution's transactions. The first is Umesh Kumar Singh (PW 13), the IO, the second is the informant Kishun Choudhary (PW 12), the third is Raghuraj Tiwary who was Incharge of the police picket at village Barki Kharaon whom the prosecution did not choose to examine in Court for reasons that would be clear when we discuss his evidence and was examined as DW 1 and Nirmal Yadav who was the Chaukidar of village Barki Kharaon who again was not examined in Court by the prosecution for reasons that would be indicated later and was examined as DW 2.

7. Now coming to the specifics. The IO (PW 13), in the very opening of his examination-in-chief, admits that he received information at 4.30 pm on 11.07.1996 about the carnage at Bathani Tola and reached there immediately. He allegedly found no one in the village. At 4.30 am on the next morning that is 12.07.1996, he recorded the Fardbayan of the informant Kishun Choudhary (PW 12) which was witnessed by Hiralal (not examined). Fardbayan is Exhibit 3. He immediately sent it to Sahar PS for registering the FIR. He started investigation thereafter. In course of investigation, he recovered about 18 dead bodies. On his direction, inquest reports were prepared with the help of Police Inspector

Raghuraj Tiwari (DW 1), Kishun Choudhary (PW 12) and large number of other police officials and villagers virtually none of whom have been examined. The inquest reports were prepared between about 5.30 am to 6.30 am. He, thereafter, took the statements of all the witnesses to the inquest, some of whom have been examined as Lal Chand Choudhary (PW 5), Marwari Choudhary (PW 6), Paltan Ram (PW 8), Satyendra Prasad (PW 9) and several others who were not examined in Court. This prime prosecution witness has been cross examined at length by defence and interesting facet comes out on this initial aspect of the matter. He admits that in the afternoon of 11.07.1996, he, alongwith Sadar SDO, was at Narhi village about 6 kilometers from Sahar PS on law and order duty by his jeep. While he was at Narhi village with Sadar SDO at about 4 pm on 11.07.1996 on his wireless, he received information from Sahar PS about the carnage at Bathani Tola. The wireless message was transmitted to all police officials including senior police officials of the district. He admits that the said information was clearly information about cognizable offence. He admits that there was a police picket of Bihar Military Police established at Barki Kharaon for last 6 to 8 months of which Raghuraj Tiwari (DW 1) was the Incharge. He admits that it was first Raghuraj Tiwari (DW 1) who had sent a written information with Choukidar Nirmal Yadav (DW 2) about the carnage to the Sahar PS on basis of which wireless message was transmitted. He admits that on basis of the said written information, neither any case was registered at PS nor was it preserved nor was the contents thereof mentioned in the case diary nor he had cared to read the same. On receiving the wireless information, he immediately proceeded to Bathani Tola. He first came to Khaira village at about 5 pm where he met Dy SP, Piro, Sub Inspector of Police, Agiaon and armed police group and they all proceeded to Bathani Tola in a tractor inasmuch as because of incessant rain, they could not move in their official jeep. He admits that he reached Bathani Tola at about 5.45 to 6 pm on 11.07.1996.

8. He then specifically admits that one hour after his arrival at Bathani Tola, the District Magistrate, Bhojpur and the Superintendent of Police, Bhojpur also arrived. He states that even after arrival of senior officers, he conducted no investigation till after he recorded the Fardbayan of the informant Kishun Choudhary, the next morning as there was no one in the village. He then states that after recording the Fardbayan at 4.30 am on 12.07.1996, he prepared the inquest reports (Exhibit 4 series) with the help of PW 12, the informant, DW 1 Raghu Raj Tiwari and recorded the further statements of witnesses of the village who had arrived by then.

9. He, thereafter on 12.07.1996, went to Barki Kharaon and arrested various persons from their houses. Inspector of Police, Agiaon also arrested some accused and brought to Barki Kharaon. He denies specific suggestion that all this, that is recording of Fardbayan and arrest were done and made after Inspector General of Police and Chief Minister arrived. This has special significance in view of two things. Firstly, learned counsel for the defence, with reference to the original records of the Fardbayan, pointed out that the entry of time of making

and recording of the Fardbayan has been obviously interpolated. Further, when we see the evidence of the informant (PW 12), it would be seen that he states that when he came into the village in the morning, all dead bodies had already been removed meaning thereby, inquest having prepared, the dead bodies were sent to Ara Sadar Hospital for post mortem examination and it is thereafter that his Fardbayan was recorded which is inconsistent as he himself was witness to several inquest reports which are said to have been prepared after recording the Fardbayan. Further, learned defence counsel have shown from the records that the accused persons were said to have been arrested on 12.07.1996 in the afternoon, were in fact produced before the learned CJM only on 14th and thereafter for remand. There is no explanation where they were kept for two days after arrest.

10. We would also notice at this stage that though by this time, that is, when the Fardbayan was allegedly recorded at 4.30 am on 12.07.1996, there was definite information of commission of cognizable offence from different sources i.e. written report of Raghu Raj Tiwary (DW 1), the incharge of police picket at Barki Kharaon on basis whereof the wireless message was sent out in the entire district at 4.30 am on 11.07.1996 itself, then Raghu Raj Tiwary (DW 1) and the village Choukidar Nirmal Yadav (DW 2) met the IO (PW 13) at Bathani Tola and informed him that at about 2.30 pm on 11.07.1996, there was cross firing between people of Bathani Tola and Barki Kharaon and several houses at Bathani Tola had been set on fire but still no FIR was recorded. It would also be seen from prosecution evidence that various injured people of the village were then sent in the evening of 11.07.1996 itself to Piro Primary Health Centre and, with the aid of State machinery in the night itself, they were taken to Ara Sadar Hospital. Statement of Naimuddin (PW 11) was recorded at Primary Health Centre, Piro at 8 pm on 11.07.1996 which is Exhibit C/1 but that was not recorded as the FIR. One Radhika Devi (PW 4) was injured and injury report was sought for by the police and she was examined at 7.35 pm on 11.07.1996 at Piro Primary Health Centre and she was referred to Ara Sadar Hospital which injury report is Exhibit 5/D but no effort was made to record their statements inspite of the aforesaid facts. Subsequently Radhika Devi's statement was recorded at Patna Medical College Hospital (PMCH) at 10.30 am on 12.07.1996 which is Exhibit A. None of these were taken to be Fardbayan or formed the basis of the FIR.

11. These facts would also show as we would see that the district administration, having reached the carnage site in the evening itself, they were busy arranging for transporting the injured to Hospital yet for some inexplicable reason, the IO (PW 13) states that till the next morning, there was no one of the village in the village and the entire group of senior district officials waited the whole night, with about 20 dead bodies all over the place, for the informant to turn up next morning to record the Fardbayan.

12. Now we may come to the evidence of the informant himself. Informant has

been examined in Court as PW 12 on 01st September, 2008 that is more than 11 years after the occurrence. He states that hearing gun shot and seeing a group of about 50 people approaching the village, he ran out of his house and hid himself in a ditch. He saw the miscreants shooting and killing people, poured kerosene oil on the houses of Marwari Choudhary and others and lit them. He now names various persons and includes therein several new names. It may be recalled that the occurrence was of about 2.30 pm on 11.07.1996 and his Fardbayan was recorded at 4.30 am on 12.07.1996. In the Fardbayan, there is not a whisper as to where was the informant all this time i.e. between 2.30 pm on 11.07.1996 to 4.30 am on 12.07.1996. Realizing this apparently, in his deposition, he builds up a story. He states that after the miscreants killed everybody in the village, he came out of his hiding. He went to the house of Marwari Choudhary (PW 6) and found his wife, his children and several other persons slaughtered and shot. He states that there were about 16 bodies in the house of Marwari Choudhary (PW 6). He found two injured persons, one was son of Naimuddin (PW 11) and the other was daughter of Shiv Kumar. It may be noticed here that these two persons subsequently died. Naimuddin's son Md Saddam Hussain, six years old died on 07.08.1996 at PMCH. His inquest report is Exhibit 4/T and the other, who was in fact daughter of Lal Chand Choudhary (PW 5) being baby of 9 months, died on 02.08.1996 at Sadar Hospital, Ara. Her inquest report is Exhibit 4/R. It is curious to note that he makes no mention of Radhika Devi (PW 4). This is important inasmuch as she claimed to be in the house of Marwari Choudhary (PW 6) and was allegedly seriously injured and had seen some of the killings from inside the house itself but had been spared her life. In his deposition, he now gives the reason for his long absence. He states that seeing the dead bodies including of his wife and two children, he became sick and went to a nearby village Colodih to Dr Patiram for treatment which is about half a kilometer away. He spent the whole night at the residence of Dr Patiram who administered him two bottles of intravenous fluid during the entire night. Curiously, this doctor has not been examined or any prescription in support thereof has not been produced by the prosecution nor is there any corroboration of these facts from any source whatsoever. He then specifically states that when he returned to the village in the morning, he found police personnels making enquiries and drawing up papers which he did not know. He then states that it is only in the afternoon of 12th July that whole lot of police officials and senior officials arrived. He now states that the Chief Minister came to the village after 4 or 5 days and denies suggestion that he had earlier arrived in the village itself. He admits that where he was hiding was only 10 to 15 yards from Bathani Tola in a ditch which was over 5 feet deep. He states that all men folk had run away from Bathani Tola and hid themselves. He admits that at Barki Kharaon, there was police picket. He denies specific suggestion that on the next day after the Chief Minister arrived, a statement was prepared on which his thumb impression was taken. He states that where he was hiding in a ditch, there was grass and trees but admits that he had never shown that place to any person much less to the IO. He denies suggestion that he had seen injured

people being moved to Hospital because he says that he had already left the village much before. He specifically admits that when he made his statement, police had already removed all the dead bodies. But curiously he himself is a witness to several inquest reports which are shown to be drawn up after 5.30 am and after the Fardbayan was recorded. The said inquest reports are, inter alia, Exhibit 4 prepared at 5 am, Exhibit 4/I drawn up at 5.05 am, Exhibit 4/H drawn up at 5.15 am, Exhibit 4/L drawn up at 5.10 am which include the inquest of his wife and his children. This, apart from other things, would show that all that is being said does not tally. We may also notice that the IO, in his cross examination, has admitted that he has not seen where the informant was hiding but he says that he had inspected the entire area and found no jungle or any ditch. Prosecution evidence has also established that for more than a year, there were no agricultural activities being carried out in and around the village because of the dispute between the villagers. It is also admitted by the informant and the IO that within a very short distance at Barki Kharaon, there is a police picket and there are other police pickets around the village as well, all within a radius of about a kilometer.

13. Now we come to Raghuraj Tiwary (DW 1). He was the officer-in-charge of the police picket at village Barki Kharaon adjacent to Bathani Tola and within site thereof. As noticed earlier, prosecution should have examined him but chose not to examine him as a witness instead the defence has examined him. He states, as has been accepted by the IO, that seeing cross firing between villagers, he had sent a written information through Nirmal Yadav (DW 2) to the Sahar PS about the occurrence. He states that he, with other policemen, tried to take position but as the miscreants were ready to retaliate and outnumbered then he retreated. He stated that the cross firing continued about 15-20 minutes and hundreds of rounds were fired by both sides and houses in Bathani Tola were set on fire. He admits that police pickets, at all the three camps surrounding the village Bathani Tola, were unable to prevent the carnage. He states immediately after the carnage, he was suspended. He admits that he had reached Bathani Tola in the evening itself and was there all along. He has drawn up some of the inquest reports as well. He had described the incident with some names to the IO.

14. We then have Nirmal Yadav as DW 2. He was the village Chowkidar of Barki Kharaon. He states that at about 2.30 pm when firing started, Raghuraj Tiwary (DW 1) gave him a written report to be immediately given to Sahar PS. He immediately left for Sahar PS and delivered the same. It may be noticed that it is this message upon receipt whereof from Sahar PS, wireless message was flashed all over the district but neither this message nor the wireless message has been brought on record by the prosecution. He makes one startling revelation. Even though there was hundreds of rounds fired from both sides for over half an hour, not a single cartridge was seized by the police. We may note that no weapons, firearms have been seized and proved to be weapons or arms used in the massacre. Prosecution has failed to explain why these two, i e, DWs 1 and 2 were not examined as prosecution witness though shown as chargesheet

witness. They have failed to explain why the initial report of DW 1 or the wireless message based thereon were never brought on record or proved in Court.

15. From the above sequence of events coming from the four witnesses aforesaid, it is apparent that the story, as propounded by the prosecution, appears to be far from truth. There was a carnage in which about 20 people lost their lives. They were brutally massacred but what actually happened has not been truthfully and correctly recorded. The information, first received, was never brought by the prosecution to Court. The Fardbayan is obviously some thing prepared much later with clear interpolation with regard to time of its recording. Arrests were made later and people were detained without being produced before a Magistrate for almost two days. People were arrested as sitting ducks. All along administration was present but no statements were recorded till much later. What were the DM, the SP and other senior officers doing at the site during whole night is not explained. The administration was evacuating injured without recording their statements. The dead bodies were left lying unattended for the whole night without explanation. Though the Fardbayan is said to have been recorded at 4.30 am on 12.07.1996, when was the FIR registered is not known. The FIR is said to have been dispatched to Court on 13.07.1996 but reaches the CJM, Ara only on 14.07.1996. The witness to Fardbayan Hira Lal Choudhary is not examined in the case. The informant is conspicuous by his unexplained absence for about 12 hours in between the occurrence and recording of the Fardbayan. Informant is able to identify over 30 persons of different villages with their parentage from his hiding without being detected by the mob who were intent upon killing everybody including infants, having surrounded the village. So much for the Fardbayan and the foundation of the prosecution case. In such circumstances, the only thing that we would like to say is that there has been a deliberate attempt to conceal the truth in its material particulars. There was enough time and latitude given before the Fardbayan was shown to have been recorded.

16. Now, let us test the correctness of the prosecution stand through the IO (PW 13) as to the reason for the delay of almost 12 hours in recording the Fardbayan which is Exhibit 3. Exhibit 3 was the Fardbayan given by Kishun Choudhary (PW 12) allegedly at 4.30 am on 12.07.1996 whereas the massacre took place at about 2.30 pm on 11.07.1996. The IO (PW 13) has taken a stand that when he reached the place of occurrence that is Bathani Tola at about 6 pm on 11.07.1996, he found no living person. The District Magistrate, Bhojpur, the Superintendent of Police, Bhojpur, the Incharge of Barki Kharaon police picket (DW 1) were all there by then but still it is said that the first person who was in know of the event, they met only at 4.30 am, the next day being Kishun Choudhary (PW 12). As noted earlier, for some conspicuous reason, the written information sent by the Officer-in-charge (DW 1) of the police picket of Barki Kharaon about 4 pm on 11.07.1996, was the first information which the prosecution also admitted on basis of which wireless messages were flashed pursuant to which everyone came but unfortunately it has been withheld from

the Court with no explanation. We then have a Fardbayan of one Naimuddin who has been examined as PW 11. This Fardbayan has been proved through the IO (PW 13) himself and is Exhibit C/1. It is recorded by the Officer-in-charge, Piro PS Nisar Ahmad at the Primary Health Centre, Piro at 8 pm on 11.07.1996 and forwarded to Sahar PS immediately. The prosecution did not examine Nisar Ahmad nor placed it on record and left it to the defence to bring it on record. Naimuddin is said to have escaped the massacre by hiding about 150 yards from the house of Marwari Choudhary where his entire family and others were massacred. In his statement, as recorded, he clearly states that there were about 300 people who surrounded the village and indiscriminately fired. They were shouting for killing all the family members of Naimuddin. He could name only two persons out of the large number of miscreants, namely, appellant Santosh Singh being appellant in Cr Appeal No 676 of 2010 and Hare Ram Singh being one of the appellants in Cr Appeal No 727 of 2010. He states that he had seen Radhika Devi (PW 4), Kusum Kumari, daughter of Balchand Choudhary, injured, and his minor son of about six years gravely injured. He states that the injured were moved to the Piro Primary Health Centre by Maxi. This clearly shows that by this time, State officials had become active in evacuating injured persons and he was present contrary to what the prosecution through the IO (PW 13) states.

17. Then is the Exhibit 3, the Fardbayan recorded at 4.30 am on 12.07.1996. The next is the Fardbayan of Radhika Devi (PW 4) as recorded by ASI R P Singh of Pirobore PS at PMCH at 10.30 am on 12.07.1996 which has been proved through the IO (PW 13) as Exhibit A. It may be noticed here that allegedly being injured in a point blank shoot out in the house of Marwari Choudhary, she was first taken to Primary Health Centre, Piro and at the request of ASI of Piro PS, she was examined at 7.35 pm on 11.07.1996 by doctor and an injury report Exhibit 5/D was prepared. For alleged suspected gunshot wound, she was referred to Ara Sadar Hospital. She was then taken to Ara Sadar Hospital and forwarded for medical examination by ASI of Ara Town PS where at the Sadar Hospital, she was examined at 10.40 pm on 11.07.1996 from where she was referred to PMCH. The doctor reserved opinion upon report from PMCH as to the nature of injury. This injury report is Exhibit 2. It is upon reaching PMCH that her Fardbayan is recorded. In her statement, she says that at the time of occurrence, she was working as a labourer in the village. Her mother was also there. About 200 miscreants, variously armed, had come. Bachcha Singh, appellant in Cr Appeal No 729 of 2010 fired on her chest at point blank range with his double barrel gun. She could identify Digree Singh, one of the appellants in Cr Appeal No 823 of 2010, Kamlesh Singh, appellant in Cr Appeal No 675 of 2010, Aksheyabar Singh, one of the appellants in Cr Appeal No 727 of 2010, Dilip Singh, one of the appellants in Cr Appeal No 727 of 2010 who has been found to be juvenile, Bela Singh, who is the appellant in Cr Appeal No 652 of 2010 who has also been found to be juvenile and Bachcha Singh, who is the appellant in Cr Appeal No 729 of 2010. Her this statement first recorded is of some importance because

subsequently in Court when she is examined as PW 4, she gives graphic details placing herself inside the house of Marwari Choudary (PW 6) and seeing the slaughtering all around her in the house. For the present, this statement and the injury report would show that she was available to the authorities and the police right through the night but no effort was made to record her statement immediately.

18. We then come to the second Fardbayan given by Naimuddin (PW 11), this time at PMCH, which was recorded by ASI R P Singh of Pirbahore PS at 8.45 pm on 30.07.1996 which is Exhibit C/2 and forwarded to Sahar PS. This time, he adds new names and identifies Manoj Singh, appellant in Cr Appeal No 688 of 2010 as having cut the neck and face of his six years old son with a sword. He states that his son is unable to speak. It may be noticed that Manoj Singh is one of the three accused who have been sentenced to death but has been found to be juvenile.

19. Then we have the third Fardbayan of Naimuddin (PW 11) again recorded by ASI R P Singh at PMCH at 7.30 pm on 07.08.1996 immediately after death of his six years old son which is Exhibit C/3. It may be noticed here that ASI R P Singh, who had also recorded the earlier Fardbayan Exhibit C/2, has not been examined. In his this third statement, he admits giving the earlier statement Exhibit C/2, adds new names allegedly disclosed by his six years old son and now he names Sanjay Singh, appellant in Cr Appeal No 640 of 2010 as the assailant of his son instead of Manoj Singh, as stated earlier. It may be noted here that this witness had lost his wife, his minor son and his minor daughter in the carnage. This, apart from others, shows that Naimuddin (PW 11) was also available to the authorities all along but his statement was never recorded at the earliest though his son was attended at the instance of the police at Piro Primary Health Centre first time at about 8 pm on 11.07.1996 itself. The injury reports of Saddam Hussain, the minor son of Naimuddin (PW 11) are Exhibit 5/E prepared at 7.20 pm on 11.07.1996 at Piro Primary Health Centre and at 10.10 pm on 11.07.1996 itself at Ara Sadar Hospital (Exhibit 2/A) from where he was referred to PMCH.

20. We then have the seventh written statement. This time, it has been given in writing by Naimuddin (PW 11) being his fourth written statement to the Officer-in-charge of Sahar PS which is witnessed by one Kapil Sah and Bhagwan Sah, none of whom have been examined. This statement was given on 31.08.1996 and is Exhibit C wherein he acknowledges having given three earlier statements and now lists the names of 43 persons. At this juncture, it may be noted that the IO (PW 13), in his cross-examination in paragraph-91, states that this was in fact written by Kapil Sah after picking up names from the case diary at the PS itself.

21. We then have the statement of one Bhukan Choudhary recorded by Sub Inspector of Police at Ara Town PS at 4.15 am on 02.08.1996 at Ara Sadar Hospital. Bhukan Choudhary has not been examined. He is the brother of one Lal Chand Choudhary who has been examined as PW 5. He has stated that his sister-

in-law, wife of Lal Chand Choudhary (PW 5) ran for covering nine months old daughter but both were killed but he could not name any of the persons.

22. These reports, which all have been brought on record by defence, would show that these persons had been in touch with the administration and the police yet their statements were not recorded at the earliest and it is said for the Court to believe that no one was present for over 12 hours so that the statement could be recorded.

23. Now we must note that the occurrence is of 11.07.1996 and the prosecution examined in all 13 witnesses out of whom three are the doctors, who conducted primarily the post mortem examinations being PWs 1, 2 and 7. PW 13 is the IO. Remaining nine are witnesses in relation to the occurrence. Prosecution started the evidence with the doctor (PW 1) on 23.11.2000 and ended with the examination of IO on 29.01.2009 virtually taking nine years to examine these 13 witnesses. One witness PW 10 Ram Lagan Ram was discarded as he did not turn up for cross examination leaving only 8 witnesses of the carnage and as trial Court itself has held that only evidence of PW 4 Radhika Devi and PW 11 Naimuddin are reliable, we must examine the depositions of all the witnesses.

24. So far as the three doctors are concerned that is PW 1 Dr Rohit Ram Kanojia, PW 2 Dr Virendra Kumar Rai and PW 7 Dr Arjun Prasad, they were all doctors at the Ara Sadar Hospital who basically conducted the post mortem examinations. What is of significance is the deposition of PW 1 Dr Rohit Ram Kanojia. Apart from proving various injury reports and post mortem reports, he proves post mortem report (Exhibit 1) of one Balchand Choudhary, the only adult male who had been killed in the carnage whose body was received for post mortem at 1.30 am on 12.07.1996 alongwith inquest (Exhibit 4/S) prepared at 8.15 pm on 11.07.1996 at Piro Primary Health Centre. To say that none was available for recording statement, prior to the official Fardbayan, is thus belied once again. This is also one of the first inquest reports long before the Fardbayan (Exhibit 3) which was recorded the next morning. He has proved some of the injury reports including that of Radhika Devi (PW 4) where he has reserved opinion as to the nature and cause of injury while referring her to PMCH. State has not brought any evidence of treatment or injury report of the said Radhika Devi (PW 4) from PMCH. One other significant fact that is revealed by these doctors are that though this massacre took place at about 2.30 pm on 11.07.1996, with the exception of the body of Balchand Choudhary, the rest of the bodies, over 20 in number, were received at the Sadar Hospital, Ara for post mortem at 3.45 am on 13.07.1996 that is nearly 36 hours after the carnage and about 24 hours after the inquest was prepared. The post mortem reports are Exhibit 1 series and the inquest reports are Exhibit 4 series. What took all this time is not explained when the travelling distance between the Bathani Tola and Ara, we are told, is about 2 to 3 hours and the entire district administration had already reached in the evening of the carnage itself.

25. Now we come to the deposition of PW 3 Imam Hussain @ Imamuddin. He is

the son of Naimuddin (PW 11). He was examined in Court on 09.07.2001. He also happens to be the husband of one Najma Khatoon and whose sister had also been killed as also his minor brother Saddam Hussain, son of Naimuddin (PW 11) who also died later. In his examination-in-chief, he states that he was in the village when about 50 to 60 people came and surrounded the village firing. He names 8 persons which include appellants Sanjay Singh, Dilip Singh, Aksheyabar Singh, Ajay Singh, Kanhaiya Singh, Nagendra Singh (who has been sentenced to death) but fails to identify the appellants Kamlesh Singh and Nagendra Singh who were present in the Court. He states that on seeing the people coming, he ran out of the village and hid behind an Ahar. He suspected that the miscreants were of Ranvir Sena. In his cross-examination, he was questioned about the statement given in course of investigation to the IO (PW 13) who contradicts him. He admits that at Barki Kharaon, Chotki Kharaon and Patalpura, on the three sides of the village, there are police pickets. He maintains that he alongwith others remained in hiding right through the event and denies that he had told the IO (PW 13) that he had run away to another village. He states that there were firings of about 500 rounds for over one and a half hours. He states that after the incident, he returned to the village but did not find any empty cartridge or cartridges in the village. He states that there was no firing from his village. He admits that the Ahar (irrigation channel) was about his height. He admits that while evacuating the injured, there were lots of people in the village. In paragraph-29 of his deposition, he states that his father Naimuddin (PW 11) was made to sign on a blank paper presumably referring to Exhibit C/1, the first statement of Naimuddin (PW 11) so that treatment of his minor son could start. He admits that he has been coming to the Court several times where he had seen the accused persons before deposing. He agrees that he had settled in the village only six months before the occurrence upon land allotted by the State Government and was now working as a peon in the office of the District Magistrate at Ara.

26. Considering that this witness (PW 3) had deposed in course of investigation for the first time on 13.07.1996 to the IO (PW 13) where he had stated that he had gone out of the village and on return, he had found the dead bodies, he had further not disclosed the name of any person nor of seeing any injured person including Radhika Devi (PW 4) he, having admitted that he had been seeing the accused persons in Court on various dates and still though he claims to have identified some of the appellants even though they were present in the Court, he could not identify them. He claimed in Court that he lived with his father and family in the house of Marwari Choudhary (PW 6) but, in his cross examination, admits that he was living on a piece of land allotted to him by Government six months prior to the occurrence, it is not safe to rely upon this witness for identification of the accused persons.

27 Now we come to the deposition of important witness Radhika Devi (PW 4) who has been examined in Court on 25.07.2001. She is supposed to be an injured witness. In her examination-in-chief, she states that she was cutting mud

from land adjacent to the Ahar. She saw people coming from the side of the village Barki Kharaon firing and seeing that she, along with others, ran into the house of Marwari Choudhary (PW 6) which had three rooms. The miscreants, after breaking the door, entered the house and killed all people there. She and her mother hid under a cot. Appellant Bachcha Singh asked her to come out on assurance that she would not be hurt. She saw appellant Manoj Singh who has been found juvenile and has been sentenced to death, slaughtering Naimuddin's two months old daughter. She states that Bachcha Singh shot her in chest with his double barrel gun and then crushed her fingers. Appellant Manoj Singh is said to have told Bachcha Singh to kill her. She identifies Manoj Singh. In her cross-examination, she states that she was cutting mud and taking to her house at Barki Kharaon. She admits that she had seen the miscreants coming from about 500 yards and could not identify them. She states that police from police picket had come but they were not helping them. In paragraph-8 of her cross-examination, she states that she had given a statement before the IO (PW 13) before which she had not given any statement to any person. She had given her statement on the next day of the occurrence to the IO (PW 13). She states that after she returned from Patna after her treatment, she again gave her statement to the IO (PW 13). It may be pertinent to note here that in fact she had given her first statement at 10.30 am on 12.07.1996 which was recorded as Fardbayan by ASI R P Singh of Pirbahore PS at the PMCH which has been admitted and proved by the IO (PW 13) himself as Exhibit A. In fact, at the request of the police itself, she was medically examined at 7.35 pm on 11.07.1996 at Piro Primary Health Centre and the injury report is Exhibit 5/D from where she was referred to Ara Sadar Hospital with lacerated injury on her chest. She was, thereafter, examined at Ara Sadar Hospital by PW 1 Dr R.R. Kanojia at 10.40 pm on 11.07.1996 itself at the instance of police which injury report is Exhibit 2 and again the doctor found lacerated injury on her chest but gave no opinion and referred her to PMCH. Curiously though she was treated at PMCH and discharged from there, not a chit of paper with regard to her treatment or the nature of injury found and treated at PMCH has been brought on record. Though at the instance of police, she was being examined throughout the night intervening 11th and 12th July, 1996 and she had given her statement (Exhibit A) as well but curiously in paragraph-10 of her cross-examination, she states that after receiving gunshot injury, she fainted and only after treatment on the next day, she regained consciousness. Another important thing to be noted is though she alleges that her fingers were crushed to see whether she was alive, none of the injury reports show any injury on the fingers. She admits that there was no charring mark on her blouse though her skin on her chest was burnt by gun fire. She had been shot from a distance of about 3 feet by a gun. She admits in her cross-examination that she had not disclosed to the IO (PW 13) that she had gone into the house of Marwari Choudhary (PW 6) and hid herself. IO (PW 13), in his cross-examination in paragraph 23, contradicts her statement and clearly states that she had not stated anything about entering into the house of Marwari Choudhary (PW 6) and seen the shoot out or massacre therein. Curious, in her

first statement Exhibit A recorded at 10.30 am at PMCH on 12.07.1996, she does not even state of hiding in the house of Marwari Choudhary or seeing the massacre therein.

28. We find, as the trial Court has also found that she has much improved upon her statement in course of time and added new dimension too. In paragraph-12 of her cross-examination, she admits that police personnels were also firing but she did not know if they had injured anyone. In our opinion, considering that, how and where she was injured not having been established, her presence in the house of Marwari Choudhary itself being doubted because of her contradictory statements, she is totally unreliable witness.

29. Now we come to the deposition of Lalchand Choudhary being PW 5 which was recorded on 06th January, 2003. In his examination-in-chief, he categorically states that he and his brother Telchand, on seeing miscreants coming from Barki Kharaon towards Bathani Tola, ran out of their house and hid in Banswari (bamboo cluster) from where he identified large number of persons. From there, he saw his wife Sanjharia Devi with his child Baby ran out of the house but were intercepted by appellant Nagendra Singh (sentenced to death) who fired at her because of which half of her head exploded and the child also received fatal injuries. His other brother Balchand was also shot in the ribs. When we come to his cross-examination, he admits that to the police, he had deposed that he had hid in the jungle at the back of his house where no one could see him. In paragraph-29 of his cross-examination, he admits that he had hid himself in his house and came out of the house after miscreants left. He had heard about 10 to 12 rounds being fired in which his wife, his child and his brother were injured. He admits, in paragraph-18 of his cross-examination, that he remained in the village till police came. He learnt that his brother Balchand Choudhary died in Piro Hospital. He admits that he remained in the village for 2-3 days and, thereafter, went to Ara to see his daughter and his brother. He forgets that his brother Balchand had died in evening itself. In paragraph-39 of his cross-examination, he categorically states that police came to Bathani Tola only in the early morning at about 4 am. He admits that he alongwith other persons including Kishun Choudhary (PW 12), the informant, met police personnel at about 11 or 12 o'clock on 12.07.1996 when the first statement of Kishun Choudhary (PW 12), the informant was recorded. All this is clearly false as the IO (PW 13) admits that at about 5.30 pm, he, alongwith SDO, had reached Bathani Tola. The DM and SP had reached soon thereafter. The Fardbayan of Kishun Choudhary (PW 12), the informant is said to have been recorded at 4.30 am on 12.07.1996. He denies that police knew where the injured had gone and to which hospital and it is only after arrest of various persons, names were supplied by the police.

30 In view of material contradictions in his own statement as to where he was hiding whether in bamboo cluster or jungle behind his house or locked himself in the house, he cannot be relied for any identification. Further, he is not the truthful witness because he states that police came only on the next morning. He

creates serious doubt about the time when the Fardbayan of Kishun Choudhary, the informant (PW 12) was recorded because he categorically states that it was about 12 noon on the next day.

31. Now we come to PW 6 Marwari Choudhary in whose house, large number of ladies and children were found slaughtered. He is examined in Court on 01.02.2003. He states that having seen about 50 to 60 people coming from the side of Barki Kharaon village variously armed, he alongwith several other villagers fled away and hid in bushes from where he identified over 20 people amongst the miscreants. He saw them setting fire to various houses including his house. After the miscreants left, he found 15 persons slaughtered in his house which included his daughter-in-law and his grand child apart from five persons of the family of Naimuddin (PW 11), three persons from the family of Kishun Choudhary (PW 12) and others. He adds the name of Radhika Devi (PW 4) as an injured. Contrary to the earlier prosecution story set up that the miscreants were of Ranvir Sena and had come to liquidate people of this village on the ground that they were MALE supporters, he categorically states that the dispute was with regard to daily wages for agriculture work. They were demanding Rs 25/- per day but were being paid only Rs 12/- per day by the people of Barki Kharaon. Because of this, for last two years, no cultivation was being done. He identified some of the appellants. He admits in his cross-examination that he used to work lifting sand at Koilwar about 15 to 16 kilometers away during the period and every day used to go there. In his cross-examination, he further admits that his statement in course of investigation was first recorded at 6 am and the police had come about 10 minutes prior to it. He admits that after the occurrence, he had hidden away till police came. He admits that before the occurrence, he had hidden himself behind bushes and had not seen the occurrence. He states in his cross-examination that the IO (PW 13) had come to the hospital but did not record any statement but obtained signature of Naimuddin (PW 11) on a blank paper. He admits that from Piro, police had arranged for vehicles. He did not know who paid for the vehicles. Vehicles were arranged from Mufti Bazar which is about two miles from Bathani Tola. From the hospital, he reached back Bathani Tola at about mid night till which time police had not reached there. He admits that at Barki Kharaon, there is a police outpost that is one kilometer away from Bathani Tola. He admitted that at Chotki Kharaon, there is a police outpost as also at Patalpura, all within a radius of one kilometer. He is confused with regard to any statement made at Piro but states that in the night itself, he came back to Bathani Tola and it is only in the next morning that the police arrived. He admits in paragraph 27 that after the police arrived, Fardbayan of Kishun Choudhary (PW 12) recorded. From the aforesaid, it would be apparent that this witness is totally unreliable especially for identification of any of the accused persons. He had hid himself. He agrees he had not seen the occurrence still he managed to identify large number of people. He deliberately lies about presence of police. He creates a doubt with regard to time of Fardbayan of Kishun Choudhary (PW 12), the informant.

32. Now we come to Paltan Ram (PW 8) who is examined on 06.10.2004. He is aged about 60 years. His daughter Phul Kumari was killed. He states that on the date of occurrence, 50 to 60 people, variously armed, came firing. He got scared and hid behind bamboo clamps. He saw various people entered the house of Marwari Choudhary (PW 6) and heard screaming from there. He specifically names that his daughter Phul Kumari ran out of his house when Ajay Singh shot her and Nagendra Singh cut her arms. Nagendra Singh also shot the mother of Satyendra Prasad (PW 9). It may be noted that appellant Ajay and Nagendra have been sentenced to death. He identifies, apart from others, these two. When we come to cross-examination, he states that police arrived at about 8-10 am, the next morning and took his statement. He states that in his statement to the police, he had named Ajay and Nagendra apart from others. This is contradicted by the IO (PW 13) in paragraph 25 of his cross-examination. In his further cross-examination, he admits that the miscreants had surrounded the house and were killing everybody. He was scared and had been hiding. He admits that he had seen the miscreants for the first time on the date of occurrence and because of age, his eye sight was weak. He states that after the incident, he remained in his house. He gave his statement to the IO (PW 13). We find that what he stated is apparently a bundle of lies. Police state that they had reached the village in the evening itself. He states that they had come in the next morning. Police state that there was no one in the village. He states that he was all along in the village. He admits that because of age, he had weak eye sight and he had seen the miscreants for the first time on that day but still he was able to identify them and given graphic details from his hiding place of what had happening. He is totally unreliable at least for the purpose of identification.

33. Now we come to Satyendra Prasad (PW 9) who deposed on 06th April, 2005 in Court. He was about 14 years of age at the date of occurrence. The first thing to be noted is that he admitted that his statement was never recorded by the police in course of investigation and, thus, it is apparent that for the first time, he is deposing in Court after about nine years about the incident. His mother Ram Ratia Devi was one of those who were killed. He states that he had hidden behind bushes and is said to have identified several persons. He admits that he had signed some inquest reports. He states, in his cross-examination, that he was alone hiding in the bushes. He later met Marwari Choudhary (PW 6) and Kishun Choudhary, the informant (PW 12). He admits that the Chief Minister had come. He does not remember when statements were recorded by the police. He admits that he was never called to participate in any TIP. He admits that all the witnesses of Bathani Tola have been given Government jobs. He fails to identify some of the appellants who were in the dock. In his cross-examination, he states that it is in the next morning that police came. He states that he had returned only in the morning but then he states that he was in the village all along. He had not met any police officer. Marwari Choudhary (PW 6) was with him. He denies suggestion that he was not in the village at that time.

34. In our view, from his statement itself, it is apparent that his presence in the

village itself was doubtful and, as such, his identification of any of the accused persons is of no value. He had not even been examined in course of investigation.

35. Now we come to Ram Lagan Ram (PW 10). He is supposed to have identified many people but as he did not turn up for cross-examination, his evidence cannot be of any use and has to be discarded.

36. Now, we come to another important witness for the prosecution. He is Naimuddin who was examined as PW 11 on 25.08.2008. His two daughters, daughter-in-law, sister and two sons including the child Saddam Hussain, who later died at PMCH, were victims of the massacre. In his examination-in-chief, he states that when he was in his house, he heard firing and slogans. He came out of his house and saw 50 to 60 people variously armed and firing coming from Bathani Tola. He was 20 to 25 yards from the miscreants when he panicked and with his son Imamuddin (PW 3) ran out and hid himself in the irrigation channel which he later admits was about 6 to 8 feet in depth. From there, he saw the miscreants putting fire to various houses, entered into the house of Marwari Choudhary (PW 6), started shooting. He names about 20 people whom he alleges he recognized. The miscreants returned to Barki Kharaon. He then came out and saw dead bodies littered everywhere. He alleges that he found some injured people including Radhika Devi (PW 4) with bullet injury. He then states that he took his minor son Saddam who was gravely injured to Piro Primary Health Centre. There the doctor refused to treat him upon coming to know how he had sustained the injury till police was called. Police came and wanted him to give statement. He refused as he was in no mental state. Police told him that unless he gave statement, treatment would not start. He signed a blank paper for the police where upon treatment started. This paper obviously is his first statement Exhibit C/1 recorded by Officer-in-charge, Piro PS Nisar Ahmad at 8 pm on 11.07.1996 itself which had been forwarded to Sahar PS and proved by the IO (PW 13) himself. In this statement, he had named only two people out of about 300 alleged to be there. The reason for disowning this statement is obvious. He then states that the doctor referred him to Ara for treatment but from there, he was referred to Patna where he reached at 1 am at the PMCH. He admits that at Patna, the IO (PW 13) had come and he refused to give any statement but states that again he was made to sign on a blank piece of paper. This was obviously his statement recorded by ASI R P Singh of Pirbahore PS at PMCH at 8.45 pm on 20.07.1996 which is Exhibit C/2. As earlier, the recording officer has not been examined by the prosecution. In this statement, he lists the names of about 20 persons clearly stating that his son, because of injury on the face and the neck, could not speak. He then states in his examination-in-chief that on three occasions, he was made to sign on blank paper. The third is his statement Exhibit C/3 recorded at PMCH after the death of his son on 07.08.1996 at 7.30 pm. Earlier in Exhibit C/2, he had named appellant Manoj Singh as the person who had inflicted injuries with sword on his son. Now he names appellant Sanjay Singh. In his third statement, he admits having made a statement earlier. He, for the first time, identifies several persons in the dock but

is unable to identify 22 persons also present in the dock.

37. Now we come to his cross-examination. In paragraph 34, he admits that he had carried his son on a cot to Mufti Bazar with the help of villagers where Dy SP was there from before having detained a Maxi on which injured people were sent to Piro Primary Health Centre. He states that he had reached Mufti Bazar at about 6 pm. Police, with armed force, was already there. He states that at Piro Primary Health Centre, he saw the injury on his son and he fainted. He states that he had seen the injury before. He admits that he had been coming to Court regularly for giving his evidence. He states that what he had stated in his evidence, he had given in writing to the police but after one and half months of the occurrence. This is obvious reference to Exhibit C which is a written statement signed by him given to the Officer-in-charge of Sahar PS who was the IO (PW 13). To Court question, he replies that at the instance of the IO (PW 13), Kapil Sah (not examined) had written statement on which he had signed on 31.08.1996. In this statement, it may be noted, he had listed the names of 43 persons. He has also noticed that he had given three statements earlier. He states that he had given no other statement but merely signed on blank papers. He admits that he had not complained to any authority about having been forced to sign blank papers. He was asked specifically why there was delay of 12 years in coming to the Court to depose and he was suggested that it was because prosecution could not find any explanation for the multiple statements made by him. He admits that blood-stained clothes were not given to the police. He admits that there are police pickets all around Bathani Tola in the villages of Barki Kharaon, Chotki Kharaon and Patalpura within a radius of one kilometer. He admits that he is about 5'2" tall and the Bandh in which he was hiding was about 6 to 7". In paragraphs 107 and 108 of his cross-examination, he admits that Kishun Choudhary (PW 12), the informant, Shiv Mangal Choudhary apart from others had remained back in Bathani Tola because their family members were all lying dead there. They had not gone to Piro. He admits that he had signed the statement drawn up by Kapil Sah which is Exhibit C on which he had signed. We may notice here that when the IO (PW 13) was cross-examined on this aspect, he clearly stated that Kapil Sah picked up the names from the case diary and drew the statement which was signed by this witness and witnessed by Kapil Sah and Bhagwan Sah both of whom have not been examined by the prosecution.

38. If we analyze the evidence of this witness in totality, we find that though a large number of his family members were killed, he has not been at all consistent in his statements. He has given as many as four statements at different times, all in writing signed by him varying in material particulars adding names at every step. In one statement, he names appellant Manoj Singh as assailant of his son. Then he names appellant Sanjay Singh as the assailant. The fact is that his son was not assaulted in his presence at all. It was in the house of Marwari Choudhary (PW 6), this happened and he was far away outside it. We, thus, find that at least for the purposes of identification, it is not safe to rely upon him.

39. One important fact to be noted is that he admits that when he alongwith other injured persons reached Mufti Bazar at about 6 pm on 11.07.1996, Dy SP was already there with armed force and requisitioned private vehicles to move the injured to hospital but no effort was made to record their statements of what had happened. There were large numbers of villagers with injured people who were being evacuated for treatment.

40. Now, we come to the deposition of Kishun Choudhary (PW 12), the informant who is examined on 01.09.2008. It may be noted that his brother, his wife, his daughter were victims in this carnage. He states that upon hearing a sound of firing, he came out of his house and found about 50 people variously armed coming from Bathani Tola. He panicked, ran out and near the irrigation channel in bushes, he hid himself. He saw the miscreants killing people, pouring kerosene oil on houses and litting them. He names a large number of people whom he saw including many new names which is not in his FIR. He states that after the miscreants returned, he came out and saw large number of people lying all over the place dead including his brother Balchand Choudhary. It may be noted that as per inquest report, Balchand Choudhary died at the Piro Primary Health Centre having been brought there grievously injured. He was the only male adult who had been killed. He names injured people and dead people in the house of Marwari Choudhary (PW 6) but conspicuously does not name Radhika Devi (PW 4) as one of the injured persons. He identifies some of the people in the Court but fails to identify about 35 people who were also in the dock. He admits giving his Fardbayan to the police which is the basis of the FIR in this case. He admits that at three sides of Bathani Tola, in three villages, there were police pickets. He admits that for over a year, there had been no agricultural activities around the village because of dispute and the fields were lying fallow. He states that the fields were covered with high grass which is later contradicted by the IO (PW 13) in his cross-examination. Now, he spins a story which is not stated in his Fardbayan. He stated that seeing the dead bodies, he became sick and he alone walked to Colodih, a village nearby and was attended by Dr Pati Ram who is not examined in the case by the prosecution. This village is about half a kilometer from Bathani Tola. He spent the whole night under treatment where two bottles of saline was given as infusion after which he became better and returned to Bathani Tola in the morning to find police there making enquiries. He admits having signed many papers, some of which are inquest reports. He states that it was in the afternoon (of 12.07.1996) that police in large number and officers arrived. He states that that the Chief Minister arrived after four days and denies suggestion that the Chief Minister had arrived much earlier itself. He states that before he gave statement to the police, police made no enquiry from anybody. He states that he was hiding in a ditch which was about 5 feet deep but the IO (PW 13), in his cross-examination, contradicts him clearly stating that he was shown no ditch. He states that he had seen the miscreants from about 150 yards. He admits that he was always aware of the date fixed in the case because he was staying at Ara after the incident. He denies suggestion that police officials

had reached the place of occurrence in the evening and in the night itself and that on the next day after the Chief Minister came, his statement was prepared introducing names of accused and his LTI was taken. He denies suggestion that for 12 years, he did not come to depose in the Court because he could not prepare any statement in that regard. He states that it is only in the next morning that police arrived contradicting himself that when he returned to the village after his treatment, he found police already there making enquiries. He admits that he had not gone to Sahar PS to give any information but he knew that people from Bathani Tola had gone to the PS to give information but did not remember who had gone. He states that before injured people were moved to hospital, he had left Bathani Tola being sick. This is contradicted by Naimuddin (PW 11) who has clearly stated that this witness had remained at Bathani Tola with the dead bodies of his relatives when the injured were taken for treatment. In paragraph 139, he makes a startling revelation. He states that when his Fardbayan was recorded at the door steps of his house at Bathani Tola at 4.30 am on 12.07.1996, the dead bodies have already been removed. This, we think, is suggestive that the Fardbayan was recorded much later as all the inquest reports were prepared later than 5 am. We may here note again that when we saw the original Fardbayan, there has been clear interpolation on the time of its recording. Further, as stated earlier, the time of registering the FIR is not stated anywhere.

41. Having considered the deposition of this witness (PW 12), we have no manner of doubt that he is totally unreliable. In the Fardbayan, he does not state as to where he was in the whole night. It is as if the police arrived in the morning and he was there to give statement but when we see the deposition of the other witnesses including the IO (PW 13), we will find that the IO (PW 13) and other senior police officers including the Superintendent of Police and the District Collector were all at Bathani Tola from the evening of the occurrence itself. In the Court, for the first time, he spins out the story of falling sick and going for treatment in a nearby village to a doctor who is never examined nor any other witness to support or corroborate this fact. All this is when he himself admits that virtually entirely his family was lying dead at Bathani Tola. He is clearly not a truthful witness and cannot be relied at least for the purposes of identification of the accused persons. Police and administration had allowed him to mark time, meet people and come up with names and stories. As discussed earlier, his Fardbayan is not worth the paper on which it is written. Even the trial Court found it fit to reject his evidence.

42. Now, we come to the last prosecution witness examined being Umesh Kumar Singh (PW 13) who was examined on 29.01.2009. He is the IO. In his examination-in-chief, he states that he had recorded the statement of the informant (PW 12) Kishun Choudhary at 4.30 am on 12.07.1996 which was witnessed by Hiralal who has unfortunately not been examined. The Fardbayan is Exhibit-3. He states he sent the Fardbayan for registering FIR immediately but we find that neither from the case diary nor from the FIR so registered any time

of registering is available. He states that in Bathani Tola, he had found about 18 dead bodies at different places. After recording the Fardbayan on his directions, with the assistance of Raghuraj Tiwary (DW 1) who was the Officer-in-charge of Barki Kharaon police outpost and Kishun Choudhary (PW 12), the informant and several others who were not examined, he prepared the inquest report which is Exhibit 4 series. He immediately took the statements of various witnesses, some of whom have not been produced in Court. He admits that he had received the injury report of PW 4 Radhika Devi and Kusum Kumari (not examined) from PMCH where they had been referred and were treated. It may be noted that even though he admitted this fact, the prosecution did not bring this on record at all and there was no explanation for that. This is important because Radhika Devi (PW 4) had claimed that she was in the house of Marwari Choudhary witnessing the brutal slaughtering and had been shot from very close range on her chest and her fingers have been crushed to see her response if she was dead. Neither the two injuries stand corroborated. There are no papers with regard to her treatment at PMCH available on record. The injury reports of various other people have been proved by him as Exhibit 5 series.

43. Now we come to his cross-examination. He first contradicts the deposition of PW 3 Imam Hussain, son of PW 11 Naimuddin as to his presence in the village. He then contradicts the deposition of Radhika Devi (PW 4). He admits that he had received the statement of Radhika Devi (PW 4) as given by her at PMCH at Patna on the next day which he proved as Exhibit A. He then contradicts the statement of PW 8 Paltan Ram that he had never deposed in course of investigation disclosing the names of appellants Ajay Singh, Nagendra Singh and others of shooting and killing people in the house of Marwari Choudhary (PW 6). He admits that on the date of occurrence, he alongwith SDO Sadar, Ara were on law and order duty at Narhi village where at about 4.10 pm on 11.07.1996, he received wireless message about the carnage at Bathani Tola from his PS that is Sahar PS. He did not record or recollect the exact message but remembered that the message indicated that there was firing in Bathani Tola and houses had been set on fire. The wireless message was received on the wireless set installed in his police jeep. The wireless message, he admits, is conveyed to all police officials in the district simultaneously. He agreed that the information clearly disclosed commission of cognizable offence but it was never recorded as such. He admits that the wireless message was based on a written report received from ASI Raghuraj Tiwary (DW 1) who was the Incharge of police camp, Barki Kharaon through Chaukidar Nirmal Yadav (DW 2) but also admits that no record of this written information has been kept and he has not seen the written message nor recorded it in the case diary nor was any FIR instituted on basis thereof even though that was the earliest information of cognizable offence received. Here, we may note that upon completion of investigation, Raghuraj Tiwary and Chaukidar Nirmal Yadav have been shown as prosecution witnesses but prosecution chose not to examine them and, accordingly, the defence examined them as DW 1 and DW 2 respectively. From Narhi village, where he received the wireless message,

he proceeded to Khaira village which is about 7 to 8 kilometers where he found Dy SP, Piro, Sub Inspector of Police, Agiaon with armed force already there and they all then proceeded to Bathani Tola on a tractor because of incessant rain, the road was not motorable which took them about 45 minutes. He admits the entire party had reached Bathani Tola at about 5.45 to 6 pm. On way, he met Raghuraj Tiwary (DW 1) alongwith police force and he admits that Raghuraj Tiwary (DW 1) disclosed the entire event to him and the Dy SP. In paragraph 54, he admits that Raghuraj Tiwary (DW 1) disclosed to him that two groups had commenced firing. Police force took position to intervene but as they were greatly outnumbered, they could do little. Raghuraj Tiwary (DW 1) found that the firing from both the sides continued for over half an hour after which he saw smokes rising from Bathani Tola which was followed by incessant rain. He admits that even upon this information, no FIR was registered or Fardbayan recorded. He admitted that Raghuraj Tiwary (DW 1) was an eye witness. He also admits that alongwith Raguraj Tiwary (DW 1), the Chaukidar Nirmal Yadav (DW 2) and Chaukidar Sheonath Yadav (DW 3) had also narrated about the incident but no Fardbayan was recorded nor any FIR recorded. He states that Nirmal Yadav (DW 2) and Sheonath Yadav (DW 3) had not disclosed any name. In paragraphs 62 and 63 of his cross-examination, he admits that the Superintendent of Police and the District Magistrate and other police officials reached the place of occurrence after one hour of his arrival which would be at 7 pm on 11.07.1996. He admits that even though he was there before them, he took no steps to make any enquiry because there was no one in the village till Kishun Choudhary (PW 12), the informant came in the next morning. He states that Kishun Choudhary (PW 12) had come himself to make a statement which is clearly in contradiction to the deposition of Kishun Choudhary (PW 12) where he states that the Officer-in-charge, Sahar PS had come to his house at Bathani Tola to record his statement. He admits that in the case diary, he has not entered the time even with regard to statement recorded in course of investigation of various people. He admits he did not know the time when the statements were recorded. On Court question, he admits that in the case diary, nowhere has he recorded at what time he did what. He then admits that he arrested about 8 persons from their house in Bathani Tola on the 12th. The Sub Inspector of Police, Agiaon also brought some of the accused persons after arresting them to Barki Kharaon. He admits that after he had made arrest when he returned to Bathani Tola, he found that the Inspector General of Police, Patna and other senior officials had already reached Bathani Tola. The Chief Minister had also come. In paragraph 81, he immediately then clarifies that arrests had already been made and the Chief Minister arrived in the evening. He denies suggestion that the arrests were made after Chief Minister had come and reprimanded them as to why no one was arrested even after such a long time. He denies suggestion that the Fardbayan of the informant Kishun Choudhary (PW 12) was in fact recorded much later after people were arrested and names were made available.

44. We may point out once again that there is obvious interpolation in the time

of recording of Fardbayan. We have seen the original. Large number of persons are said to have been arrested on 12th but we find that they were produced before the Chief Judicial Magistrate for remand only after two days on 14th July, 1996 and thereafter. He admits that pursuant to orders of the High Court, he had attempted to organize TIP on various dates but no witness was found present and it could not be done. He admits that on 15.07.1996, he arrested from a lodge at Karimantola 26 accused persons and denied suggestion that had TIP been done immediately, the witnesses were not in a position to identify the accused persons.

In paragraph 89, he clearly contradicts the informant Kishun Choudhary (PW 12) in regard to the statement that he had gone for treatment. He states that he took the Fardbayan of the informant when he came out of his hiding. In paragraph 91 of his cross-examination, he admits that on 31.08.1996, Naimuddin (PW 11), Kapil Sah (not examined), Bhagwan Sah (not examined) came to the PS. He wanted to record their statements but they insisted that they would give it in writing. They went through the case diary and Kapil Sah noted the names and it is this written statement which was then signed by Naimuddin (PW 11) witnessed by Kapil Sah and Bhagwan Sah which was taken on record in the investigation. This is Exhibit C, the fourth written statement of Naimuddin (PW 11). He admits that on the place of occurrence, he did not find any jungle, bushes or ditches which have obvious reference to the various hiding places witnesses have disclosed. So much for investigation of such a carnage is the deposition on behalf of prosecution.

45. Upon analysis of this deposition of the IO (PW 13), though the carnage stands established, it is crystal clear that information of cognizable offence written and oral were received by the police right from 4.30 pm on the date of occurrence itself but all those were kept out of record. Police personnel, high officials of the Government had reached the place of occurrence within about four hours but no statements were being recorded till the Fardbayan of the informant next morning giving enough time to the people to meet, discuss, plan out the story. Defence has rightly argued that prosecution has deliberately concealed the first information allowing time for story to be built up which discredits the correctness of the involvement of the appellants. Why this concealment was done is not explained. All along the night, injured were being evacuated, examined at the instance of police but statements were not being taken about the occurrence. Persons are arrested and not produced before Magistrate for almost 48 hours. The Fardbayan, which is the foundation, is recorded after undue delay with interpolation in time of its recording. All we can say in this regard is that the prosecution was being given time to come up with story as the earliest versions were some how not palatable. The Court would, in such circumstances, not only reject the accusation but would draw adverse inference also in relation to the investigation.

46. At this stage, it may be pertinent to point out that so many people were

killed, hundreds of rounds of gunshot fired but not a single cartridge shell seized. Even the licensed rifles and guns seized from the alleged accused were never tested for their use. Accused persons were all arrested as virtually sitting ducks from their houses or from a lodge. These are serious matters especially when we see how mercilessly people were killed. All we can say is thanks to the investigating agency and the administration the true culprits have escaped gauntlet.

47. Now we may come to the three defence witnesses. We may notice that all these defence witnesses were in fact cited in the chargesheet as prosecution witnesses. They were important witnesses but without any explanation, prosecution failed to examine them. Raghuraj Tiwary, the Officer-in-charge, Police Camp at Barki Kharaon has been examined as DW 1. Nirmal Choudhary, the village Chaukidar of Barki Kharaon has been examined as DW 2 and Sheonath Yadav as DW 3 who was also a village Chaukidar. They were the first persons to witness the occurrence and gave report thereof.

48. DW 1 states that seeing cross-firing between groups of MALE and Ranvir Sena, he tried to take a position but being outnumbered, he immediately sent a written report to the Sahar PS through Chaukidar Nirmal Yadav (DW 2). After the firing ceased, he came to Bathani Tola and found houses burnt, people slaughtered. When he reached Bathani Tola, found it deserted but immediately seeing police arrive, people started coming. In his cross-examination by the prosecution, he clearly states that there was cross-firing. The cross-firing went on 45 minutes from both the sides. He could not control the situation because he, with his force, was greatly outnumbered. He admits that though there were three Police Camps in the vicinity, they were unable to control the situation because they were outnumbered. He admits that immediately after the incidence at the place of occurrence itself, he was suspended because of which he did not take statements. In response to Court query, he states that his statement was recorded by the IO (PW 13). He had recognized some people. He further states that Nirmal Yadav (DW 2) who was a resident of Barki Kharaon had disclosed the names of persons to the IO (PW 13) which he did not remember.

49 From this evidence, it is clear that he was the first witness who had seen the occurrence. He was the first who reached the place of occurrence but for some curious reason, the information sent by him, statements made by him, were never recorded and have been withheld by the prosecution.

50. Then we have Nirmal Yadav (DW 2). He clearly states that he was given a written report to be delivered to Sahar PS by DW 1. He gave the report in the Sahar PS on basis whereof presumably the wireless message was flashed at about 4.30pm on 11.07.1996. In his cross-examination, he clearly states that having given the written information at Sahar PS, it was given to a person sitting on the wireless. He corroborates that not a single cartridge was seized. To Court question, he clearly states that after the occurrence, no one from the village Barki Kharaon left the village and people were arrested from their houses in

Barki Kharaon itself. In cross-examination, prosecution tried to discredit the fact that no information was given by DW 1. We fail to see the reason. The IO (PW 13) has categorically admitted these facts.

51. DW 3 Shivnath Yadav is the another Chaukidar. Prosecution has tried to discredit his presence unsuccessfully.

52. Before proceeding further, we must notice some aspects of the examination of the accused persons u/s 313 of the Criminal Procedure Code (CrPC). Firstly, it must be noticed that though some of the accused persons were examined immediately after the close of the prosecution evidence, some have been examined only after close of the defence case which is curious. They all have been consistent that they have been falsely prosecuted by their neighbors. They were all arrested from their houses.

53. We would like to note one disturbing aspect. Appellant Manoj Singh has been upon conviction, sentenced to death. He is appellant in Cr Appeal No 688 of 2010. When we look to his statement u/s 313 of CrPC, we find that the trial Judge recorded his statement on 07th of April, 2010 that is long after defence had closed its case which is curious. Then the Court assessed his age to be 30. He declared his age on that day to be 27 but when he was asked about his defence, he clearly stated that on the date of occurrence, he was only about 12 to 13 years old and used to study in a school outside the village. He had been falsely implicated. Noticing this, the trial Judge immediately overwrote and changed his age to 35 failing to discharge his duty as contemplated under the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred to as the Act). Upon death reference and appeals being filed, specific plea of juvenility was raised on behalf of condemned appellant Manoj Singh. Enquiry was entrusted to the Juvenile Justice Board which gave a finding that he was a juvenile in conflict with law on the date of occurrence which has been accepted by this Court. Notwithstanding the aforesaid not only the trial Court found him guilty but imposed the extreme punishment of death notwithstanding there prohibition under the Act in this regard. The result is that he has remained in custody even though he was a juvenile in conflict with law for almost 15 years. Similar is the tragedy with regard to accused Bela Singh, appellant in Cr Appeal No 652 of 2010. In his statement u/s 313 of CrPC recorded on the 07th April, 2010, he had disclosed his age to be 27 years. The Court assessed it at 35. In his statement, he clearly stated that he was 13 to 14 years at the time of occurrence and did not know anything about the occurrence still he was convicted and sentenced to life. He raised the plea of juvenility before this Court. The matter was sent to the Juvenile Justice Board for enquiry. He has been found to be juvenile. Similar is the tragedy with Dilip Singh who is one of the appellants in Cr Appeal No 727 of 2010. His statement was recorded on 04th of November, 2009 when he gave his age as 24 and the Court assessed him on that day to be 30. That would have made him a juvenile on the date of occurrence but the Court ignored it. Before this Court, the plea of juvenility was

raised and upon enquiry by the Juvenile Justice Board, he was found to be juvenile in conflict with law. Each of these juveniles in conflict with law has spent a long time in prison contrary to law because of insensitivity of the trial Judge on this issue. We, on our part, could only express regret and apology on behalf of this institution for this serious lapse.

54. Having thus seen the evidence that has been brought on record, we must now consider the rival contentions. As noted above, there is a death reference made by the learned trial Judge for confirmation of death sentence, as awarded to Narendra Singh @ Nagendra Singh being also appellant in Cr Appeal No 680 of 2010, Manoj Singh who has been found to be juvenile in conflict with law being appellant in Cr Appeal No 688 of 2010 and Ajay Singh, appellant in Cr Appeal No 693 of 2010. Apart from death reference, there are 15 criminal appeals, as noted earlier in respect of the 20 other appellants who have been sentenced to life imprisonment for their alleged involvement in the aforesaid carnage. We permitted Shri Rajesh Singh, learned counsel, who had entered appearance on behalf of the informant and learned APP who assisted us both in the death reference and the appeals for the prosecution and we have heard Shri Surendra Singh, Senior Advocate, Shri Rana Pratap Singh, Senior Advocate, Shri Kanhaiya Prasad Singh, Senior Advocate, Shri Krishna Prasad Singh, Senior Advocate, Shri Akhileshwar Prasad Singh, Senior Advocate, Shri Rajendra Prasad Singh, Senior Advocate, Shri Ajay Kumar Thakur, Shri Puhkar Narain Shahi and Shri Vindhyachal Singh, Advocates for the defence.

55. In sum and substance, the argument on behalf of the prosecution and the informant was that the prosecution was able to bring on record evidence of eight people which included one injured witness Radhika Devi (PW 4) as well who were able to identify the accused persons, though not all the accused persons. As such, the convictions and the sentences are fully justified and should not be interfered with by this Court considering the barbaric and gruesome manner in which ladies and children were massacred; imposition of capital sentence was fully justified. We must first record that considering the nature and the manner in which the offence is said to have been committed of which we have no doubt and which has virtually not been challenged by the defence, the extreme punishment of death for the barbaric act was fully called for but the question is who perpetuated the crime.

56. Firstly, reliance was placed by the prosecution on the evidence of Radhika Devi (PW 4) said to be an injured witness who was allegedly in the house of Marwari Choudhary (PW 6) and saw a good part of the barbaric incident where, in the house itself, about 18 people including infants of the age of three months were slaughtered. We have noted her evidence and once again we would reiterate that she has rendered herself totally unreliable by her shifting stands. She virtually feigned ignorance to her statement recorded at PMCH which is Exhibit A at 10.30 am on 12.07.1996. In her statement (Exhibit A), she does not even mention that she was in the house of Marwari Choudhary (PW 6) which she

later claims in her deposition. She is contradicted by the IO (PW 13) in his cross-examination on this issue. She claims to have received a bullet injury on her chest fired from 3 feet away. Her fingers crushed. She survived to see the entire episode in the house but unfortunately her injury report and her treatment at PMCH were never brought on record to establish the alleged injuries. The informant in the Court does not name her as one of the injured persons whom he saw in the house of Marwari Choudhary (PW 6) when he returned to the house. For these reasons, we have declined to rely upon her evidence. Then reliance was placed on the evidence of PW 6 Marwari Choudary in whose house most of the killing had taken place. He himself, in paragraphs-12 and 13, said that he had left the place and appeared only in the next morning to give statement to the police and he states that police had arrived in the morning. Then reliance was placed on the evidence of PW 9 Satyendra Prasad who was a boy of 14 years at the time of occurrence but, as admitted by himself, in course of investigation, he had never been questioned. Great reliance was placed on the evidence of Naimuddin (PW 11) but as we have noted earlier, he had given four written statements at different times. In the earliest statement made by him at 8 pm on 11.07.1996 (Exhibit C/1), he named only two persons and his last written statement (Exhibit C) was given on 31.08.1996, as deposed by the IO (PW 13), the said statement was written by one Kapil Sah, who was not examined, after copying names from the case diary and it was signed by Naimuddin (PW 11). In one of the statements, he names appellant Manoj Singh to be the person who cut his minor son with the sword who later died. In his next written statement, he ascribes the role to appellant Sanjay Singh. Inter alia, for the aforesaid reasons, we have found him to be untrustworthy. Lastly, reliance was placed on informant Kishun Choudhary (PW 12). As we have noted earlier, he was present in the village in hiding till police arrived. His statement was recorded more than 12 hours after the occurrence and also 10 hours after the police and high district officials had arrived at the scene. What was he doing all this time was not stated in his Fardbayan (Exhibit 3). In his Court deposition 12 years later, he gives a fanciful explanation without any corroboration. We found him also untrustworthy.

57. In this connection, we may refer to a recent judgment of the Apex Court in the case of Eknath Ganpat Aher and others Versus State of Maharashtra and others since reported in (2010) 6 SC Cases 519 and, in particular, what is said in paragraph-26 thereof which is quoted hereunder:

It is an accepted proposition that in the case of group rivalries and enmities, there is a general tendency to rope in as many persons as possible as having participated in the assault. In such situations, the courts are called upon to be very cautious and sift the evidence with care. Where after a close scrutiny of the evidence, a reasonable doubt arises in the mind of the court with regard to the participation of any of those who have been roped in, the court would be obliged to give the benefit of doubt to them.

58. In this judgment itself, in paragraphs 23 and 24, their Lordships have held

that when there is such a riotous act then witnesses would first be more interested in concealing themselves rather than sticking their neck out to see who were the miscreants and what type of injuries they were causing. In the present case, we find it quite conflicting that the allegation and the act are such that the miscreants had come to eliminate everyone in the village. After killing, they set fire to the houses. How could they did not bother to look for people in hiding in close vicinity of the village itself? The witnesses and the accused are neighbours and of neighbouring Tola. They would not be exposing their identity in broad day light giving people opportunity to identify them. Some prosecution witnesses say they hid in a ditch. IO (PW 13) says no ditch was shown nor was it there which could show a hiding place. Ahar (irrigation channel) is conspicuous place but surprisingly the witnesses hide there and, from time to time, were able to peep out unconcerned of their safety which is quite unnatural. Some witnesses are said to have hidden in bushes like jungle but on objective finding of the IO (PW 13), there was no such place. People, who were intent to liquidate everybody, naturally would have seen that there were no male members, they would have searched for male members who were all hiding in very close proximity to the village itself. This is unnatural for the prosecution witnesses. Because of these reasons, we have found the identifications made by the prosecution witnesses not worthy of reliance for the purposes of this extreme punishment of either death or life imprisonment.

59. The prosecution was unable to explain why the first written statement of the incident sent by DW 1, Incharge of the police picket at Barki Kharaon, was not registered as an FIR and not even brought on record rather DW 1 was immediately suspended. The defence has submitted, with some vehemence, that this written statement was an unpalatable truth for the administration/prosecution. Statements even made thereafter were not recorded as FIR though police and high district officials were all on the spot arranging for evacuation of injured people. Statements were not recorded. This clearly shows that the prosecution case, as set up, was highly suspicious. Witnesses were given time to come up with names and stories.

60 In this connection, we may refer to the judgment of Babubhai Versus State of Gujarat and others since reported in (2010) 12 SC Cases 254, relevant paragraphs are quoted hereunder:

32 The investigation into a criminal offence must be free from objectionable features or infirmities which may legitimately lead to a grievance on the part of the accused that investigation was unfair and carried out with an ulterior motive. It is also the duty of the investigating officer to conduct the investigation avoiding any kind of mischief and harassment to any of the accused. The investigating officer should be fair and conscious so as to rule out any possibility of fabrication of evidence and his impartial conduct must dispel any suspicion as to its genuiness. The investigating officer "is not merely to bolster up a prosecution case with such evidence as may enable the court record a conviction

but to bring out the real unvarnished truth.

44 A charge-sheet is the outcome of an investigation. If the investigation has not been conducted fairly, we are of the view that such vitiated investigation cannot give rise to a valid charge-sheet. Such investigation would ultimately prove to be a precursor of miscarriage of criminal justice. In such a case the court would simply try to decipher the truth only on the basis of guess or conjectures as the whole truth would not come before it. It will be difficult for the court to determine how the incident took place wherein three persons died and so many persons including the complainant and the accused got injured.

45 Not only fair trial but fair investigation is also part of constitutional rights guaranteed under Articles 20 and 21 of the Constitution of India. Therefore, investigation must be fair, transparent and judicious as it is the minimum requirement of rule of law. The investigating agency cannot be permitted to conduct an investigation in a tainted and biased manner.

61. We may then refer to the judgment of Dilavar Hussain and others Versus State of Gujarat and another since reported in (1991) 1 SC Cases 253, relevant parts are quoted hereunder:

1 Tragic trauma of ghastly, inhuman and beastly behaviour of one community against another depicted for weeks and weeks, in this criminal appeal, forcefully, at times, emotionally still hangs heavily. What a tragedy? Eight human lives roasted alive. Five in waiting for gallows. Neighbours residing peacefully for generations sharing common happiness and sorrow even playing cricket together suddenly went mad. Bloodthirsty for each other. Burning, looting and killing became the order of the day. Even ladies attempted to prevent fire brigade from extinguishing fire. How pathetic and sad.

3 All this generated a little emotion during submissions. But sentiments or emotions, howsoever strong, are neither relevant nor have any place in a court of law. Acquittal or conviction depends on proof or otherwise of the criminological chain which invariably comprises of why, where, when, how and who. Each knot of the chain has to be proved, beyond shadow of doubt to bring home the guilt. Any crack or loosening in it weakens the prosecution. Each link, must be so consistent that the only conclusion which must follow is that the accused is guilty. Although guilty should not escape (sic). But on reliable evidence, truthful witnesses and honest and fair investigation. No free man should be amerced by framing or to assuage feelings as it is fatal to human dignity and destructive of social, ethical and legal norm. Heinousness of crime or cruelty in its execution however abhorrent and hateful cannot reflect in deciding the guilt.

4 Misgiving, also, prevailed about appreciation of evidence. Without adverting to submissions suffice it to mention that credibility of witnesses has to be measured with same yardstick, whether, it is ordinary crime or a crime emanating due to communal frenzy. Law does not make any distinction either in leading of evidence or in its assessment. Rule is one and only one namely, whether

depositions are honest and true. Whether the witnesses, who claim to have seen the incident in this case, withstand this test is the issue?

62. Now coming to the arguments on behalf of the convicted persons, the appellants. Shri Surendra Singh, learned Senior Counsel leading the arguments which was adopted by others, first submitted that it is undisputed that there were three police pickets within one kilometer of the place of occurrence (Bathani Tola) which had been especially established because of the unrest in the area. When the ghastly occurrence took place, it could not have been a surprise because, except for one male adult, not a single male adult person was killed. A written report was immediately sent pursuant to which wireless message flashed all over the district. Both these important informations have been concealed by the prosecution without any explanation whatsoever. The person, who is shown as a prosecution witness in the chargesheet and who gave the first written information, was first suspended immediately after the occurrence and then not examined as prosecution witness at all. He was brought in as a defence witness (DW 1). No explanation is offered. This clearly establishes that if those informations, which ought to have been recorded as the FIR were produced, they would show a different story which was not palatable to the administration or the prosecution. This obliges the Court to draw an adverse inference against the prosecution and the entire prosecution of at least the involvement of the appellants becomes highly suspicious.

63. In our view, reliance was rightly placed on the decisions of the Apex Court in the cases of *Sevi and Another Vs. State of Tamil Nadu* and *Another, , Sheikh Meheboob @ Hetak and Others Vs. State of Maharashtra*, and *State Inspector of Police, Vishakhapatnam Versus Surya Sankaram Karri* since reported in (2006) 7 SC Cases 172. We would like to refer to the judgment of the Apex Court in the case of *Sheikh Maheboob alias Hetak and others (supra)*, the relevant part thereof of paragraphs 4, 5, 10 and 16 are quoted hereunder.

4 From the sequence of events narrated by Hanumandas it would appear that the written report made by Hanumandas to the Police would be the first contemporaneous document putting on record the true facts pertaining to the incident. That would have been the touchstone on which the credibility of Hanumandas could have been tested. Unfortunately, that document appears to have been suppressed. It was obligatory on the prosecution to place the document on record for a fair trial. Not only did the prosecution fail to produce the document voluntarily, but the prosecution failed to produce the document despite an application for production of the said document by the accused and the order made thereupon by the Sessions Court for its production.

5 Three contentions have been urged by the learned counsel for the appellants. First, that the failure of the prosecution to produce the document, whose existence is affirmed by the witness, PW-2, leaves a yawning gap in the story of the prosecution. Second, it gives rise to an adverse inference that, had it been produced, it would have disproved the case of the prosecution. Third, the said

report, being the first information given to the Police, ought to have been treated as the FIR.

... ..

10 So much for the gaping holes in the prosecution story based on the eye-witness account. Doubts arising from the eye-witness accounts left too many question marks and too many unexplained circumstances, which contra-indicated their acceptance without corroboration. Corroboration was available in the form of a document, which was not deliberately placed on record by the prosecution. This by itself should have sufficed for the court to induce a reasonable doubt as to the discharge of the onerous burden by the prosecution.

... ..

16 Shadows, there are; dark enough to eclipse the truth. Both the courts have ignored a number of reasonable doubts which legitimately arose on the evidence led by the prosecution, and its conduct in suppressing the vital document and witnesses. We are not satisfied that the evidence led on record by the prosecution proves the guilt of the accused-appellants beyond reasonable doubt.

64. We may then refer to what is said in paragraph 18 in the case of State Inspector of Police, Vishakhapatnam (supra):

It is now well settled that when a document being in possession of a public functionary, who is under a statutory obligation to produce the same before the court of law, fails and/or neglects to produce the same, an adverse inference may be drawn against him. The learned Special Judge in the aforementioned situation was enjoined with a duty to draw an adverse inference. He did not consider the question from the point of view of statutory requirements, but took into consideration factors, which were not germane.

65. Reliance has rightly been placed on the judgment of the Apex Court in the case of Ganesh Bhavan Patel and Another Vs. State of Maharashtra, and, in particular, what is stated in paragraphs 27 and 29 thereof which paragraphs are quoted hereunder:

27 The most important of these circumstances is the conduct of S I Patil in not recording that "first information" allegedly given by Shinde and Ravji on that occasion. S I Patil admitted that he did not record the information given to him by Shinde and Ravji about the occurrence, on that occasion. The information, which he then received, was about the commission of a cognizable offence. It was, therefore, the duty of S I Patil (who was incharge of the Police Station) to record it in accordance with the provisions of S 154 Cr P C; but he did not do so. The explanation given by him was that it was the practice of this Police Station not to record such information until a message was received from the Hospital with regard to the condition of the injured person. This explanation of Patil's failure to do what was his statutory duty, was mere moonshine and was rightly

repelled by the learned trial Judge.

29 Thus considered in the light of the surrounding circumstances, this inordinate delay in registration of the "F I R? and further delay in recording the statements of the material witnesses, casts a cloud of suspicion on the credibility of the entire warp and woof of the prosecution story.

66. In our view, Mr Surendra Singh has rightly submitted that the fact that the first written information was never recorded, the wireless message was not recorded and produced in Court, the IO (PW 13), senior police and district Officials having arrived at the scene within four hours, no efforts having been made to record the statements even though the administration was busy evacuating the people, raise suspicion about the prosecution story. The suspicion becomes greater when it is said that there was no one available till the next morning when the Fardbayan is recorded, which is contrary to record. The deponent of the Fardbayan states that police had come to his house to record the statement after the dead bodies have been removed whereas the prosecution case through the IO (PW 13) is that he was the first person to turn up next morning to give a statement after which inquests were prepared. Fardbayan has interpolation in the time of its recording. As if this was not enough, there is no record as to when the FIR was formally registered. Even the case diary is silent on this aspect. Some of the persons were arrested on 12.07.1996 but they were produced for the first time for judicial remand only on 14th. The FIR reaches Court on 14th though the Fardbayan was recorded at 4.30 am on 12th. There is no explanation for this.

These are enough to nail the coffin for the prosecution.

67. Thus, having considered the entire material, we regret that though such a ghastly incident took place where over 20 people, only one of them being a man, were brutally slaughtered, infant of three months not left alive, the investigation was not fair in respect of the persons who perpetuated this ghastly crime. Apparently, investigation was directed in a particular direction far from truth and not above suspicion. Truth was deliberately suppressed by the investigating agency and the prosecution, only to project an involvement of the accused persons, examined witnesses who were totally unreliable. Unfortunately, in this exercise, who actually perpetuated the crime, got away with it. People suffered, their families obliterated with no solace as to the punishment to the perpetrators. Thanks to the misguided investigation and prosecution. We say no more.

68. The result is that we are unable to confirm the death sentence and for the reasons noted above, we allow all the appeals as well and set aside the conviction of all the appellants.

69. As all appeals have been allowed and conviction set aside, we are required not to pass any order with regard to the three persons who were found to be juvenile in conflict with law. It is a matter of regret that even though they had

pleaded before the trial Court, as noticed above, that they were juvenile, not only were they convicted and sentenced to life imprisonment, one of them was sentenced to death as well.

70. All appeals are allowed as prosecution has failed to prove the involvement of the appellants in the crime beyond reasonable doubt and the death reference is rejected and discharged. All appellants who are in custody shall be released forthwith, if not required in any other case. All bail bonds of all the appellants, who are on bail, stands discharged.