
(2004) 11 PAT CK 0018

In the Patna High Court

Case No : Government Appeal No. 5 with Criminal Appeal (DB) No. 73 of 2001

State of Bihar

APPELLANT

Vs

Chunna Rajak and Others
 Prabhe Yadav Vs The State
of Bihar

RESPONDENT

Date of Decision : 11-11-2004

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 313, 391
Evidence Act, 1872 — Section 134
Penal Code, 1860 (IPC) — Section 142, 147, 148, 149, 201

Citation : (2005) 1 PLJR 357

Hon'ble Judges : P.N. Yadav, J;Mridula Mishra, J

Bench : Division Bench

Advocate : Rajesh Kr. Singh, Rana Pratap Singh No. 2, Brij Nandan Prasad in 73, Mr. P.N. Pandey with M/s Dinesh Pd. Verma, Brajesh Verma in 80, 82, with Mr. Amarnath Mishra in 87, 93, with Mrs. Nutan Mishra in 144, Mrs. Nutan Mishra, Mr. Ajit Kumar Ojha in 95, 124, Mrs. Sabita Kumari, Mr. Ranjan Kumar Jha, Mr. Indeshwar Pd. Mand in 165; Mr. Amarnath Mishra in 166, 196; Mr. Sonu Srivastava, Mrs. Nutan Mishra, Mr. Ajit Kumar Ojha in 175; M/s Vivekanand Vivek, Devesh Kumar Poddar in 176, Mr. Ranjeet Sahay in 177, M/s Krishna Murari and Harish Kumar in 185, 186, for the Appellant; Md. Salauddin Khan, Humayoun Ahmad Khan and Attiulla for the State and M/s Nageshwar Prasad, Anand Kr. Ojha, S.N.L. Das, Krishna Mohan, Uma Kant Prasad, Mrs. Susma Saran and Sivesh Chandra Mishra (in 5), for the Respondent

Judgement

Mridula Mishra, J.—Thirty eight persons belonging to a village faction and constituting unlawful assembly were put on trial before the 7th Additional Sessions Judge, Bhagalpur, u/s 302 read with 149 of the Indian Penal Code and other sections thereof for murdering 55 persons of other faction with lathi, Bhala, Garasa and other weapons. The trial judge found 15 persons guilty and sentenced them rigorous imprisonment for life. 22 persons identified by one witness only were acquitted. All sixteen appeals have been preferred against common judgment dated 5.2.2001, passed by the 7th Additional District & Sessions Judge, Bhagalpur in Sessions Trial No. 342 of 1991 (R) convicting the

appellants under sections 302/149 and 201 of the Indian Penal Code and awarding sentence to undergo rigorous imprisonment for life.

2. Government Appeal No. 5 of 2001 has been preferred by the State against same judgment by which 15 respondents have been acquitted. All 15 appeals and Govt. Appeal No. 5 of 2001 heard and are being disposed of by this common judgment.

3. Sessions Case No. 342 of 1991 (Riot) relates to Bhagalpur communal riot of 1989 of village Chanderi under Sabaur Police Station in the district of Bhagalpur. On 28.10.1989 at 1.30 P.M. one Chaukidar Babulal Paswan gave his fardbeyan before the S.I. Kailash Chaudhary of Sabour police station to the effect that when he reached village Rajpur, Mirjapur in connection with controlling law and order situation, arising out of communal tension he heard a rumor that on the preceding day there was an incident of arson and altercation in village Rajpur Chanderi amongst thousand people belonging to Hindu and Muslim community. On hearing the said rumor he came to village Chanderi where he was told by the villagers that dead bodies were lying on the bank of pond. When he went to the pond he saw one or two dead bodies which were covered with Jalkumbhi but the legs of the dead bodies were visible. The local people assembled there and they took out dead bodies of six unknown persons. This was witnessed by the local people and the Dy. S.P. of C.R.P.F. who reached there. He guessed that the incident must have taken place in between Hindus and Muslims belonging to several villages of the locality.

4. On the basis of the said fardbeyan of Chaukidar Babulal Paswan (P.W. 14) Sabaur P.S. Case No. 180 of 1989 was registered on 28.10.1989 under Sections 147, 148, 149, 323, 324, 448, 302, 201 and 295 of the Indian Penal Code against unknown. The case was being investigated by S.I. Kailash Chaudhary, the Officer-in-charge of Sabaur P.S. in the meantime a writ application being Cr.W.J.C. No. 315 of 1989 was filed before the High Court by the council for Protection of Public Right and Welfare in respect of carnage of village Chanderi in the district of Bhagalpur in October, 1989. In this criminal writ application a direction was issued for protection of a victim of such carnage namely Malika Begum. She was produced before the court and on the basis of direction issued in criminal writ her statement regarding the said carnage was recorded on 15.12.1989 by Joint Registrar (Judicial), High Court, Patna.

5. In her fardbeyan Malika Begum (P.W. 9) named several persons as killers and rioters who participated in this communal riot. She gave eye witness account of the occurrence which took place on 27.10.1989 as well as on 28.10.1989 in which her father, mother relations and other villagers were killed by the rioters. The Hon''ble Judges in criminal writ application also directed that the statement of Malika Begum should be kept on record and authenticated copy of this report should be sent to the Director General of Police, Bihar for taking necessary steps to get the case registered against the persons named in this report as assailants. The Director General of Police, Bihar was also directed to get the case

investigated by a senior Police Officer belonging to the C.I.D. after criminal case is registered. In compliance of the direction of the High Court and on the direction of the Director General of Police, Bihar Sabour P.S. Case No. 25 of 1990 was registered on the basis of statement of Malika Begum under sections 148, 149, 323, 324, 448, 302, 201 and 295 I.P.C. Earlier I.O. was suspended and one Narmdeshwar Sharma (P.W. 15) was authorised to investigate the case.

6. The prosecution story in the F.I.R, of Sabour P.S. Case No. 25 of 1990 is that on 27.10.1989 at about 3 P.M. rioters surrounded the village Chanderi and started brick batting and pelting stones. Malika Begum and other muslims assembled in the house of one Minnat Mian to save their lives. The rioters looted and burnt the houses. The police party reached and the rioters fled away. When the police went away rioters again came and at 10 O'clock in the night armed forces came to the house of Minnat where the muslims have assembled for their protection. Force remained there for one hour and thereafter they went away stating that they will come in the morning. About 100 people had assembled in the house of Minnat. In the morning on 28.10.1989 the Mukhia, Sarpanch and some respectable people of village Chanderi came at the house of Minnat. They had some talk with the people who had taken shelter in the house of Minnat. They assured the people of muslim community that they will be reached to safer place where the Muslims are larger in number. Malika Begum and others proceeded with them and when they reached near the shop of Prabhu Yadav, the rioters surrounded them and started killing. The muslim people began to run away hither and thither. The informant's father and mother were killed. She along with her cousin sister entered into the house of Muni Yadav for shelter and from there also she ran away and jumped into the pond and concealed herself in Jalkumbhi. Her legs were out of water. Binod Yadav and Shambhu Pandit assaulted and cut her leg with Garasa and sword. In the meantime Military force came and the rioters fled away. The force went to the house of Minnat where all people had assembled for shelter. The rioters again came and Binod Yadav uttered that the girl is alive, kill her. In the meantime again police force came and she asked them for help. Police force stopped there and pulled her out from the pond. She has further started that Ram Bilash Yadav killed Md. Ahmad, her cousin. Ahshan was killed by Hari Ram Jha, Munnu was killed by Gopalji and Ajjo was killed by Ashok Mandal. Prakash Mandal killed her father, and Bijli Yadav killed her mother.

7. By order dated 15.5.1990 the Chief Judicial Magistrate, Bhagalpur amalgamated both Sabaur P.S. Case No. 180 of 1989 and Sabour P.S. Case No. 25 of 1990. Both the cases were investigated by N. Sharma (P.W. 15) who submitted charge sheet and supplementary charge sheet in the case. Charge sheet was submitted against 44 accused persons. Two of the accused against whom charge sheet was submitted died before framing of the charge, another accused died during the trial and 38 accused faced the trial. Out of 38 accused 16 were convicted under sections 302/149 and 201 of the Indian Penal Code and they were sentenced to undergo rigorous imprisonment for life. Against rest 22

accused the trial court gave a finding that the prosecution has not been able to prove the charges leveled against them so they are entitled for the benefit of doubt. They were acquitted of the charges framed against them.

8. To prove the charges the prosecution examined 15 witnesses. Out of them P.W. 2 Md. Kamdurddin and P.W. 7 Khursheed Alam were declared hostile by prosecution. P.W. 2 Rukhsana was examined as court witness as she was also declared hostile. P.W. 1 Md. Suleman, P.W. 4 Md. Hasubuddin, P.W. 6 Md. Hameed, P.W. 8 Md. Nazibuddin, P.W. 9 Malika Begum and P.W. 10 Md. Samshuddin were examined as eye witness. P.W. 4, P.W. 8, P.W. 9 and P.W. 10 also claimed to have received injury during the occurrence. P.W. 11 Dr. H.L. Ansari P.W. 12 Dr. Kailash Jha are doctors who performed post mortem over unidentified dead bodies. P.W. 13 Srikant Mandal a clerk in Mayaganj Hospital Bhagalpur proved the injury report, as doctor who had treated the injured witnesses was not examined. P.W. 14 Babulal Paswan is Chowkidar and informant of 1 st F.I.R. P.W. 15 Narbadeshwar Sharma is the second I.O. who investigated the case under the direction of I.G. Police in view of direction passed in Cr.W.J.C. No. 315/89 and submitted charge sheet. Kailash Choudhary, the 1st I.O. was not examined by prosecution. At the instance of defence notice was issued to Kailash Choudhary, but he did not appear to depose.

9. The defence of all accused persons was of innocence and false implication. They denied having anything to do with the offence charged and took the plea that being villagers of the witnesses and informant. Malika Begum they have been roped on account of previous grudge and enmity.

10. P.W. 1 in his deposition before the court said that the occurrence took place on 27.10.1989 on the same day he went to village Rajpur and remained there only. Since the charge related to the occurrence which took place on 28.10.1989, the trial court discarded the evidence of P.W. 1, he failed to depose anything relating to an occurrence dated 28.10.1989 and he himself admitted his absence on the day of occurrence. The counsel for State has vehemently argued on this point and stated that occurrence in question commenced on 27.10.1989 at 1.30 P.M. which continued and concluded on 28.10.1989 at 10 A.M. So occurrence of 27.10.1989 and 28.10.1989 were facts forming of same transaction. The trial court erroneously refused to consider evidence of P.W. 1 on this count that he deposed about the occurrence which took place on 27.10.1989, when in fact the same occurrence which commenced on 27th October, 1989, continued and concluded on 28th. This Court do not find any illegality in it as both the F.I.R., were instituted with regard to occurrence of 28th October, 1989, P.W. 1 deposed with regard to occurrence of 27th October, 1989, which was not the subject matter of this case. Error has been committed if evidence of P.W. 1 was not taken into consideration by trial court. P.W. 4 was a student of law at the time of deposition in court. He stated that his statement was recorded by the police for the first time after one and half month of occurrence. He gave an eye witness account of the occurrence and said that on 27th October, 1989, people thousands

in number surrounded Muslim tola in village Chanderi. All muslims of the village assembled at the house of Minnat. Some people like Sahadat, Muneer and Shaheed wanted to flee towards village Rajpur. Shaheed fell down in paddy field. He was killed by Changuri Yadav, Sudha Yadav, Susheel Yadav, Ram Bilash Yadav and Ambika Yadav. Rioter surrounded the house of Minnat in the night and they remained there till the morning of 28th. In the night Army and police force visited the village but they were not willing to take them out from there. In the morning Mukhia and Sarpanch came at Minnat's house and assured them that they will help the muslims, who had taken shelter at Minnat's house, to reach at some safer place. Initially they were apprehensive but on assurance of Mukhia and Sarpanch people came out and under the guidance and protection of Mukhia and Sarpanch proceeded for village Rajpur. As soon as they reached near the shop of Prabha Yadav, they were surrounded by the 800-1000 armed rioters, who started cutting, killing and assaulting people started fleeing hither and thither in order to save their lives. Some persons jumped into the pond. He was also assaulted and he jumped into the pond. He hide himself in pond. He received injury and was rescued by Army people who brought him to hospital. P.W. 4 denied the suggestion that he was not present in the village at the time of occurrence. He also denied the suggestion that his statement was recorded in hospital in presence of D.I.G. Md. Naseem, when he did not name any accused.

11. P.W. 5 admitted that he was only 8 years old at the time of occurrence. He stated that in his village Chanderi occurrence took place on 27.10.1989 and 28.10.1989. He had gone to offer Namaz at Maszid and was coming back to his house. He saw a group of rioter raising slogan and pelting stones and brick bats. They were coming towards him. He hide himself in the house of Minnat. From there he saw that Maszid was set on fire and houses of muslims were also burning. He saw Sahadat, a boy of his Mohalla, being chased, caught and killed by Domi Ram Yadav, Rambilash Yadav, Changuri Yadav, Sudha Yadav. Rioters were pelting stones, at the house of Minnat. People from Minnat's house also started pelting stones and brick bats. Military force visited and consoled them in the night and assured that in the morning they will be reached to some safer place. In the morning some important people of village came and informed that arrangements have been made to take them to some safe place, they were Mithu Yadav (Mukhia) Shivendra Dutt, Ramdeo Mandal Rohin Yadav. In the company of these persons, the muslims started for village Rajpur, on way to Rajpur rioters surrounded them from all directions. They started killing and assaulting people who started fleeing in all directions to save their lives. He wanted to run away to village Rajpur but Bijli Yadav did not allow him to go and assaulted him with lathi on his leg. He jumped into pond, concealed himself under Jalkumbhi and from there only he saw Bholi son of Changuri Yadav, killing Maulvi Saheb. His brother Badruddin was killed by Rambilash Yadav alias Bouna Yadav and Changuri Yadav. He out of fear stopped looking at them. He saw many rioters having blood stains on their clothes. They were shouting that "no one should be left and all should be killed." He identified several other rioters like Mithu Yadav (Mukhia), Surya

Yadav, Ganga Yadav, Shivendra Dutt, Bipin Dutt, Manoj Dutt, Ram Dutt, Gopal Dutt, Fakre Yadav, Bijli Yadav, Gopia Yadav, Sudha Yadav, Dumra Yadav, Bhulva Yadav, Soshba Yadav, Binod Yadav, Shenthana, Sanjay, Prabha Yadav, Rohim Yadav, Shivpahia Yadav, Suresh Mandal and Sohini Mandal of village Rajpur. After some time Military people came, rioters fled away. Military people pulled out Shamshuddin, Hasibuddin Nazibuddin, Malika Begum, Kamruddin and him from pond. Dead bodies were taken out from pond among whom he identified Israful and Kulsum. He alongwith other injured was taken to Mayaganj Hospital where he remained for three days. His statement was recorded by C.I.D. He could not remember that police has recorded his statement after six months or one year of occurrence. He denied the suggestion that no disclosure was made by him before the police regarding identification of accused. He denied the suggestion that he was not present in village on the date of occurrence.

12. P.W. 6 said that in the year 1989 on a Friday occurrence took place. He had gone to offer Namaz of Zuhra when heard slogans raised by people coming from eastern direction. They were thousands in number. Rioters started setting fire to the houses. He alongwith others ran into the house of Minnat. He saw Shahadat fleeing, being assaulted and killed by Daroga Yadav, and Changuri Yadav. The B.S.F. personnel came at the house of Minnat in the night where muslims had taken shelter. Villagers who were involved in rioting also came there and assured that they will be taken to some safer place like Rajpur. People proceeded with them but only after going to some distance rioters surrounded them near the shop of Prabha Yadav. They were assaulted by them with lathi, Bhala and Farsa. Gulam Rasool was killed by Ram Paswan. Dingo Yadav killed Kulsum, Shambhu Pandit killed his father Md. Jaleel. He identified Suresh Mandal of village Kharkitta, Manoj Jha of Chanderi, among the rioters. He fled away to village Rajpur. His statement was recorded by the police after six months. He admitted that relationship among the Muslims and Hindus in the village was cordial, prior to the occurrence. They used to visit each other, but when riot began Muslims became apprehensive and started going to some safe place to save their lives. He admitted that after 4-5 days of occurrence police had recorded his statement and again after six months of occurrence his statement was recorded by police. Statement of Sadruddin, Sulemn and other witnesses were also recorded on that very date. He admitted that he did not name any accused persons before police.

13. P.W. 8 was 11 years old at the time of occurrence. He stated that on 27.10.1989 he was coming after offering his namaz. He saw 20-25 persons raising alarm and coming towards village. He identified Rambilash Yadav, Fakra Yadav, Changuri Yadav and others among rioters. They were armed with lathi, Bhala, Farsa, stone and brick bats. He alongwith others went to the house of Minnat and from there he saw that his house and houses of others were on smoke. He remained in the house of Minnat till next morning. On 28th morning people of village like Mukhia, Mithu Yadav, Sarpanch Dina Nath Sahay, Mahabir Mandal, Sohini Mandal, Ramdeo Mandal, Shivendra Dutt and others came and

informed that they will reach them to some safe place. These people accompanied them but on way rioters surrounded them near the pond. He was assaulted by Rambilash on his back and Changuri Yadav assaulted with Bhala on his leg below the knee. Shambhu Pandit assaulted with lathi and he became unconscious. He regained consciousness after 10-15 minutes and was taken to Mayaganj Hospital for treatment by military personnel. For one and half months thereafter he remained at Fatehpur where his statement was recorded by police. Malika Begum, Shamshuddin and Kamruddin were also hospitalized at that time. He said that Sohin Mandal was known to him from before and he had named him before the police. He admitted that he had not named Sarpanch Deena Nath Sahay before the police.

14. P. W. 9 is the most important witness in this case. She has stated that occurrence is of 27.10.1989. She was in her house when heard alarm coming from Maszid's direction. She came out and saw that rioters were raising slogan of Jai Bajrangbali. They were pelting stones and brick bats. She alongwith her mother and father came to Minnat Mian's house where other villagers had also assembled. Rioters started setting fire to houses. She identified 10-15 persons among the rioters. Police came there and rioters fled away. For some time police party stayed there but as soon police left, rioters again came and started looting and setting fire to houses. B.S.F. People also came, and talked to her grand father and uncle. Next day in the morning rioters surrounded the house from all directions. She identified Doma Yadav, Changuri Yadav, Vakeel Yadav, Susheel Yadav, Binod Yadav, Shambhu Pandit, Bishnu Yadav, Guddan Vermna, Ramjee Verma, Gopaljee, Hareram Pandit, Sohan Mandal and Mahabir Mandal, who were also among rioters on previous day. Her grand father, asked for help and the rioters said that they will help them in reaching to some other safe place. About 100-125 persons proceeded for safe place but they were stopped by rioters near the shop of Parbha Yadav. Rioters started assaulting and killing people. Rambilash Yadav cut Sahjad. Prakash Mandal killed his father, Bijli Yadav killed her mother. Suresh Mandal killed her maternal uncle Maquabool, her aunt Sakina was killed by Changuri Yadav. At that time Mukhia Mithu Yadav and Sarpanch Deena Nath were standing there. She went towards house of Munni Yadav to take shelter but again came back and jumped into pond to save her life. Some part of her leg remained out side water which was assaulted by Binod Yadav with Garasa Shambhu Pandit also attacked and chopped off her leg. Immediately thereafter Military force came and rioter fled away. The Military force rescued her and others who were hiding in the pond. She became unconscious and when regained consciousness found herself at Jawahar Lal Nehru Medical College, Bhagalpur. Her statement for the first time was recorded at Mayaganj Hospital after 15 days of occurrence. She denied that her statement was again recorded in presence of her family members and D.I.G. of police, and she did not name any other accused persons except her own assaulter and killer of her father and mother. She admitted that she could not remember about her statement before the police.

15. P.W. 10 has also deposed in the similar way and has supported the case on material points.

16. P.W. 11 H. I. Ansari, conducted the post mortem examination on the dead bodies of unknown persons on 31.10.1989. Bodies were brought by constables and Chowkidar who identified them as dead bodies of muslims taken out from pond in the village Chanderi. The dead bodies were of unknown male, female, girl and boys. P.W. 12 conducted post mortem on the dead bodies on 4.11.1989, which were of male, female, girl and boys. P.W. 11 and P. W. 12 found ante mortem injuries on the dead bodies caused by sharp cutting weapons, sharp pointed weapon and hard blunt substance. P.W. 12 also received one sealed gunny bag vide F.M.T. receipt No. 1018 dated 30.12.1989 which contained skeleton of dead bodies highly decomposed, with foul smell and only tender part of soft tissues were attached to skeleton. He also received a skeleton with female clothes, hair and bangles. On examination he found injuries caused by sharp cutting weapon and fracture. Time elapsed since death was estimated to be 8 to 10 weeks from date of receipt. P.W. 11 and P.W. 12, admitted that there was nothing for coming to the conclusion that dead bodies were of muslim female or male except the inquest report, which was prepared on the basis of its recovery from village Chanderi, the place of occurrence.

17. P. W. 13 a clerk in Surgical Department of J.L.N.M.C.H. Bhagalpur has proved injury reports prepared by "Dr. B. C. Sihna and Dr. A.L.Agrawal.

18. P.W. 14 is the informant of Bhagalpur P.S. Case No. 180 of 1989. He proved his fardbeyan and did not state any material thing regarding occurrence.

19. P.W. 15 is the I. O. who took up investigation of the case on 8.11.1989. Para 83 onwards of the case diary were prepared by him. He visited the place of occurrence, recorded statement of P.W.1, P.W. 2, P.W. 6, P.W. 8 and P.W. 9. P.W. 15 said that Malika Begum (P.W. 9) had only named Binod Yadav and Shambhu Pandit, whom she identified when they assaulted and cut her leg. She had stated that her mother was killed by Prakash Mandal and father by Bijli Yadav. She did name 20 persons as rioters but did not claim to have identified any one as killer of any other deceased. P.W. 7 only said that Shahadat was killed but did not claim to have identified the killer. P.W. 1 had stated before him that he did not see any accused killing any one, as he fled away to Rajpur on 27.10.1989. P.W. 4 claimed to have identified Deena Nath Sahay among the rioters and also said that his brother Hasibuddin was killed by Susheel Yadav and Prabha Yadav. P.W. 2 Md. Kamruddin did not state about killing of any one. P.W. 2 and P.W. 5 did not say about killing of any one. P.W. 15 also recorded statement of previous I.O.. Kailash Choudhary, CO. and other officials. He received post mortem report and submitted charge sheet and supplementary charge sheet against 41 accused persons.

20. All appellants have filed separate appeal and have tried to make out same special feature of their individual case, as such it is necessary that in short facts

of their cases be taken up.

Criminal Appeal No. 73 of 2001

Appellant Prabhe Yadav son of Sudeen Yadav was not named as an accused either in Sabaur P.S. Case No. 180 of 1989 or Sabaur P.S. Case No. 25/1990. First charge sheet was submitted on 3.5.1990 against 23 persons, but his name was not there as accused. On 10.9.1990 2nd charge sheet was submitted but there also his name did not figure as accused. Even then he was arrested and put on trial. In the charge his name was at serial No. 34 and name of one Prabhu Yadav son of Deoshish Yadav was at serial No. 33. A chart was prepared by the trial court, which formed part of judgment. In that chart his name is at serial No. 14, which indicates that P.W. 4 and P.W. 10 have identified him as killer of Habibuddin and Sahabuddin. From perusal of evidence of P.W. 4 and P.W. 10 it will be clear that they identified Prabhu Yadav, not Prabhe Yadav son of Sudin Yadav. This appellant was not named and identified by P.W. 4, P.W. 10. Trial court erroneously convicted this appellant and acquitted Prabhu Yadav, who was identified by P.W. 4 and P.W. 10 as assailant. Govt., appeal No. 5 of 2001 has also been filed against acquittal of Prabhe Yadav (Respondent No. 12 in Govt. Appeal) on the ground that he is killer of Habibuddin and Sahabuddin. There is no evidence against him and his case is fit for acquittal.

Cr. Appeal No. 80 of 2001

Appellant Deena Nath Sahay was Sarpanch of Mirjapur Gram Panchayat at the relevant time. Case of prosecution is that on 28.10.1989 this appellant alongwith Mukhia and other respectable persons of village came at the house of Minnat Mian, gave assurance to these persons, who had taken shelter in the house of Minnat Mian, that they would be taken to some safe place, where muslims are in larger number. Muslims who had taken shelter in the house of Minnat, came out of the house, and in the leadership of this appellant and other respectable persons proceeded for village Rajpur. On way the muslims were surrounded, attacked and killed by the rioters in presence of this appellant and others. First F.I.R, was against unknown. Witness like P.W. 4, P.W. 9, P.W. 5, P.W. 6, P.W. 8, P.W. 10 were examined by the I.O. within 2-3 days of occurrence. None of witness disclosed the name of this appellant. Subsequently in the 2nd F.I.R, recorded on the direction of Hon'ble High Court and on the basis of fardbeyan, name of this appellant was disclosed after three months of occurrence. His conviction on the basis of 2nd F.I.R, it illegal as the F.I.R, itself was not proved and contents of this F.I.R, should not have been looked into for conviction. His name is not taken by witnesses as assaulter or killer, rather the witnesses have stated that he was taking the muslims to some safe place in order to save their lives. His conviction is illegal and fit to be set aside.

Criminal Appeal No. 87 of 2001

Appellant Susheel Yadav's name is at serial No. 8 in the chart annexed with the judgment and he is said to have been identified by P.W. 4 as killer of Sahadat

and P.W. 9 as killer of her aunt Sakina. P.W. 8 and P.W. 10 have identified him as rioter. P.W. 9 in her evidence has stated that she did not remember, whether she had stated before the police that Shusheel Yadav killed her aunt Sakina. P.W. 15 the I.O. stated that Mallika Begum in her statement recorded on 11.11.1989 did not say that she identified any one as killer of any other person, except killer of her parents. She also did not disclose the name of any killer, other than her parents killer in her statement recorded by Joint Registrar, Patna High Court. For the first time in Court P.W. 9 has named this appellant as killer of. Sakeena her aunt. A petition u/s 391 Cr.P.C. has also been filed by this appellant for additional evidence, on the ground that Bibi Sakina alias Hasina, aunt of P.W. 9 is alive and living with her husband Md. Usman at Godda, who is in Government service. So far P.W. 4, P.W. 8, P.W. 10 are concerned, they have also disclosed for the first time in court that they identified this appellant as killer of Sahadat and as member of unlawful assembly as rioter. If allegation of killing of Sakina is falsified, entire prosecution case will be falsified.

Criminal Appeal No. 82 of 2001

Appellant Bipin Pd. Dutta name is at serial ho. 3 in the chart annexed with the trial court judgment, indicates his identification by P.W. 4 and P.W. 9 as rioter. P.W. 4 did not mention name of this appellant in his statement recorded u/s 161 Cr.P.C. For the first time in court he claimed to have identified this appellant as rioter. Trial court committed error by coming to this finding that P.W. 9 has identified this appellant. P.W. 9 could not identify him. She identified him in court as Guddu Verma, though he has not alias name as Guddu Verma. Such identification cannot be a ground for conviction. P.W. 9 in her earlier statement recorded by 1st I.O. and P.W. 15 and 2nd I.O. did not name this appellant as accused. Naming as accused by P.W. 9 for the first time in court specially when she failed to identify him as Bipin Pd. Dutt, in court, is sufficient to prove that P.W. 9 cannot be counted as identifying witness of this appellant. P.W. 4 though named this appellant, but he did not allege any overt act against this appellant. Even this statement was made after 10-11 years of occurrence,, for the 1st time in court. Such inconsistent, delayed, and unreliable evidence is not sufficient for conviction.

Criminal Appeal No. 95 of 2001

Appellant Fakra Yadav was not named as accused in the F.I.R, of Sabour P.S. Case No. 180 of 1989 and Sabour P.S. Case No. 25 of 1990. In the chart, which forms the part of trial court judgment, this appellant is at serial No. 6 named Fakra alias Fakira alias Ramjatan and identified by P.W. 4 and P.W. 8 as rioter. In evidence of P.W. 5 he was identified as killer of Sahadat. There is material contradiction in the evidence of prosecution witness regarding killer of Sahadat. P.W. 4 names other accused as killer of Sahadat but not this appellant. P.W. 5 identifies this appellant as killer of Shahadat, who admitted that he was only 8 years old at the time of occurrence. P.W. 5 claimed to have identified 17 accused persons, which is unexpected from a boy of 8 years in a riot like situation. It is

well settled that absolute consistency from a child witness cannot be expected and accordingly evidence of this witness should not be relied upon. P.W. 8 has identified this appellant as an accused who assaulted him with sword. Since there is serious contradictions in the evidence of P.W. 4, P.W. 5 and P.W. 8, and also because they did not name this appellant in their statement before I.O. u/s 161 Cr. P.C. conviction of this appellant is fit to be set aside.

Criminal Appeal No. 124 of 2001

Bijli Yadav is named as accused in 2nd F.I.R, i.e. Sabour P.S. Case No. 25 of 1990 as killer of the mother of Malika Begum (P.W. 9). As per chart annexed with the judgment he has been identified by P.W. 5 as an accused who assaulted him and caused injury. P.W. 9 as killer of her mother, by P.W.10 as killer of Sahabuddin, father of P.W. 10. This findings is erroneous as P.W. 5 in his evidence only said that Bijli Singh Yadav prevented him from going to Rajpur. P.W. 5 did not say that his father was killed by Bijli Singh, he only said that Bijli Singh and others started assaulting his father. P.W.10 did not say that his father was killed. P.W. 9 in her evidence stated that Prakash Mandal chopped off the head of her father and Bijli Yadav chopped off the head of her mother. This statement of P.W. 9 is falsified by the evidence of P.W. 11, Dr. A.H. Hai, who conducted post mortem over the dead bodies. He specifically stated that no headless dead body was brought for post mortem. P.W. 15 the I.O. also stated that he received ten post mortem reports but none of them related to any headless body. P.W. 15 also stated that P.W.10 was not examined by him and he did not name any accused before the previous I.O. To sum up there is no evidence on record for his conviction u/s 302/149 and 201 I.P.C.

Criminal Appeal No. 144 of 2001

Rambilash Yadav was identified by P.W. 4, P.W. 5, P.W. 8 and P.W. 9. P.W. 9 in her evidence stated that Rambilash Yadav had killed Saiyad but in court she failed to identify him though he was present in dock. P.W. 4 stated that Rambilash Yadav killed Shahadat, who was killed on 27.10.1989. No charge was framed with regard to the occurrence which took place on 27.10.1989. P.W. 5 said that he was assaulted by Rambilash Yadav. He also named him as killer of Sahadat. P.W. 5 was examined by I.O. after one and half months of occurrence. Such delayed examination, made his evidence doubtful. P.W. 4, P.W. 5, P.W. 8 all named this appellant as killer of Sahadat. Killing of Sahadat took place on 27.10.1989. No charge was framed for any occurrence which took place on 27.10.1989. There cannot be any conviction for an occurrence which took place on 27.10.1989. P.W. 15 has said that P.W. 5 did not name any accused in his statement u/s 161 Cr. P.C. Evidence which is against him on record, is insufficient for his conviction u/s 302/ 149 and 201 I.P.C.

Criminal Appeal No. 165 of 2001

Appellant Changuri Yadav was identified by P.W. 1, P.W. 4, P.W. 5, P.W. 6, P.W. 9 and P.W. 10. Evidence of PW. 1 has not been taken into consideration by the trial

court as such it has no relevance. P.W. 4 has identified him as killer of Sahadat, which relates to an occurrence on 27.10.1989 with regard to which no charge has been framed and no conviction order can be passed for that. PW. 4 made his statement after one and half months of occurrence. P.W. 5 identified him as killer of his brother Badruddin. This witness was 8 years old at the time of occurrence. He said that, he did not made any statement before police at Mayaganj Hospital. He did not remember whether his statement was recorded by police after six months or one year of occurrence. He admitted that he did not say anything regarding identification of accused prior to recording of his statement before the police. This witness who is a child witness is much prove to be tutored. He made statement for the first time after six months or one year of occurrence before police. Such evidence should not have been given any credence. P.W. 8 identified Changuri Yadav as member of mob who assaulted him with Bhala, This witness was 10-11 years of age at the time of occurrence. Suggestion was given to P.W. 9 that Reena is still alive which was denied.

P.W. 10 said that Changuri assaulted him with Bhala which hit on his right hand finger. No injury report was produced. This witness admitted that he was examined at Fatehpur and he failed to disclose name of any assailant before the police. P.W. 8, P.W. 9, P.W. 10 did not name Changuri Yadav in their statement recorded u/s 161 Cr. P.C. P.W. 15 admitted that these witnesses did not name Changuri Yadav either assailant or as member of mob in their statement recorded u/s 161 Cr.P.C. The evidence clearly indicated that for the 1st time in court witnesses have developed the prosecution story and named this appellant as assailant killer or member of mob. Evidence of this quality is not sufficient for conviction.

Criminal Appeal No. 166 of 2001

Appellant Suresh Mandal as per chart was identified by P.W. 9, P.W. 6 and PW. 10. P.W. 9 in the second F.I.R, named him as killer of his maternal uncle Md. Maquabool. In court also she identified him. P.W. 6 and 10 named him as one of the rioter. Argument has been advanced that P.W. 9 in her statement before police prior to institution of 2nd F.I.R, or after institution of 2nd F.I.R, did not name this appellant as killer of Maquabool. P.W. 15 in his evidence specifically stated that Mallika Begum did not disclose names of Ashok Mandal and Suresh Mandal before the Police. She did not make any such statement that Maquabool was killed by Suresh Mandal. Statement of P.W. 10 recorded on 30.10.1989 just after the occurrence, he did not claim to have identified any one including this appellant. His statement was recorded on the second occasion after two months on 25.12.1989 in which he named this appellant among the rioter.

P.W. 10 stated before police that he was assaulted by Bhola Yadav and in order to save his life he jumped into the pond. He concealed himself under Jalkumbhiand from there he identified Suresh Singh, Ambika Mandal and Susheel Yadav among rioter. P.W. 15 has deposed that P.W. 10 was not examined by him. He was examined by previous I.O. and before him he did not name any accused. P.W. 6

simply stated that he identified his villager Suresh Mandal among the rioter. Except belated statement of interested witness, there is no evidence against this appellant.

Criminal Appeal No. 175 of 2000

Appellant Tuntun Yadav was not named in any F.I.R, as accused. As mentioned in the chart annexed with judgment, he was identified by P.W. 4 as rioter and P.W. 10 as killer of Sahabuddin P.W. 4 did not allege any specific overt act.

He was merely an onlooker. Innocent presence cannot be termed as being part of unlawful assembly. It has been further submitted that it happens often in group rivalry to rope in as many persons as possible and the reliance has been placed on a decision reported in AIR 1972 S.C. 464 (Baldeo Singh vs. State of Bihar). Further it has been stated that P.W. 4 made his statement before the I.O. after one and half months of the occurrence and such belated statement should not have been considered for the purpose of conviction. Reliance has been placed in the case of Kantilal @ K.L. Gordhandas Soni Vs. State of Gujarat, Maruti Rama Naik Vs. State of Maharashtra, So far the evidence of P.W. 4 regarding the killing of other persons by this appellant is concerned such evidence, specially when there was melee should not be relied upon. Another witness who identified this appellant is P.W. 10. The trial court on the statement of P.W. 10 has held this appellant killer of Sahabuddin. P.W. 10 in his evidence has not stated that Sahabuddin was killed. He simply stated that accused persons started assaulting Sahabuddin. The dead body of Sahabuddin was also not found during investigation. Evidence of P.W. 4 and P.W. 10 should not have been relied considering the evidence of P.W. 15 who in his deposition has stated that P.W. 4 or P.W. 10 did not name any one in their statement recorded on 30.10.1989 as killer or assaulter. P.W. 15 in his evidence has stated that P.W. 10 was not examined by him. He was only examined by earlier I.O. and in his statement before the previous I.O. he did not name any one as killer or assaulter. Since the evidence which is on record against this appellant do not prove the case of prosecution beyond all reasonable doubt as well as considering that the witnesses are not trustworthy and reliable his conviction should be set aside.

Criminal Appeal No. 176 of 2001

This appellant was not named either in the first F.I.R, by P.W. 14 nor in the second F.I.R, instituted on the basis of fardbeyan of P.W. 9 Mallika Begum wherein 15 persons have been named as accused. Subsequently he was implicated in this case and the charge was framed against one Sai Mandal alias Sri Mandal. No charge was framed against Sohan Mandal. It has been stated that this appellant Sohan Mandal has no alias name as Sai Mandal or Sh Mandal. Subsequently at the stage of trial his statement was recorded u/s 313 Cr. P.C. naming him as Sohan Mandal. This discrepancy in framing of charge against him has prejudiced him. On this count this appellant has challenged his conviction. In the chart annexed with the trial court judgment this appellant is shown to have

been identified by P.W. 1, P.W. 4, P.W. 5, P.W. 8, P.W. 9 and P.W. 10. So far the evidence of P.W. 1 is concerned, it has not been relied upon by the trial court..P.W. 9 has not named him in her first statement recorded at Mayaganj Hospital after 4-5 days of the occurrence. Her statement was again recorded on 11.11.1989 at Hospital before her family members and D.I.G. There also she did not name this appellant. Statement of P.W. 9 was recorded by the Joint Registrar (Judicial) Patna High Court on 15.12.1989. There also she did not name this appellant. P.W. 9 for the first time named and identified this appellant in court and such identification cannot be treated as reliable evidence. P.W. 4 in her evidence identified this appellant as Sohini Mandal and not as Sohan Mandal, though he is Sohan Mandal. The statement of P.W. 4 was recorded after one and half month of occurrence. This witness has admitted this fact in his evidence as such no reliance can be placed on the evidence of this witness. P.W. 5 in his statement in paragraph 14 of his evidence has named several persons including this appellant and said that they were all in the group of rioters. This part of evidence has been disbelieved by the trial court as such it cannot be counted for conviction of this appellant. P.W. 5 has admitted that his statement was recorded by the police. P.W. 8 and P.W. 10 in their evidence has stated that this appellant alongwith Sarpanch, Mukhia and other influential persons of the village came in the morning of 28.10.1989 to assure them that they will be taken to some safe place P.W. 8 has not named this appellant before the I.O. P.W. 15 has stated in his evidence that none of the witnesses have named this appellant in their statement recorded u/s 161 Cr.P.C. Even in court the statement of this witness was that he alongwith Dina Nath Sahay and others wanted to rescue the victims who had taken shelter in the house of Minnat. This appellant has not participated in looting, arson or assault as such his conviction u/s 302/149 is fit to be set aside.

Criminal Appeal No. 177 of 2001

Rohini Prasad Yadav alias Rohini Mandal is at SI. No. 12 in the chart annexed with the trial court judgment and according to chart this appellant was identified by P.W. 4 as rioter and P.W. 9 simply identified him as Rohini Mandal without assigning any specific overt act. This appellant has also challenged the charge framed against him as charge was framed against Rohini Yadav in his statement recorded u/s 313 Cr.P.C. also he was named as Rohini Yadav, but has only been convicted as Rohini Prasad Yadav. In the court he was identified by P.W. 4 as Rohini Mandal. There is vast difference in the name of Yadav and Mandal. Mandals are Kurmi and Yadav belong to other caste. P.W. 4 identified him as Rohini Mandal and it cannot be treated that he identified this appellant. P.W. 5 has stated that this appellant came alongwith Dina Nath Sahay Sarpanch and Mukhia in the morning of 28th to give assurance to the people that they will be taken to some safer place. A combined reading of the evidence of P.W. 4 and 5 will indicate that their evidence should not be counted for conviction as P.W. 4 and P.W. 5 are child witnesses such witnesses become an easy prey for being tutored. This appellant was not among the rioters. He was as per evidence the rescuer; as such, he has

wrongly been convicted u/s 302/149 I.P.C, specially when P.W. 15 has stated that neither P.W. 4 or P.W. 5 have named this appellant in their statement u/s 161 Cr. P.C. His case is fit for acquittal.

Criminal Appeal No. 185 of 2001

Appellant Shambhu Pandit was identified by P.W. 4, P.W. 6, P.W. 8 and P.W. 9. First F.I.R, was against unknown. He is named in the second F.I.R, which is not admissible on two counts firstly it was instituted after four months of the occurrence and secondly that the original faro beyan was not produced and it was not legally proved. Simple photo copy of the original fardbeyan was produced and marked as "Y" for identification. Reliance has been placed on AIR 2004 S.C. 175. It has been argued that since the document was marked for identification with objection the contents of this F.I.R, could not have been looked into for the purpose of evidence. P.W. 9 has identified this appellant as her assaulter stating that Shambhu assaulted with sword and some part of her leg which had already been assaulted by Binod Yadav was chopped off. P.W. 9 named him as her assaulter, but she failed to identify him in court though he was present. As such simply naming this appellant by P.W. 9 has no relevance for the purpose of identification. P.W. 6 in his evidence stated that Shambhu Pandit has killed his father Md. Jalil. The statement of this witness was recorded after six months of occurrence. He admitted that his first statement was recorded after 4-5 days of the occurrence where he did not name any one as accused. His second statement was recorded after six months where he named some persons including this appellant as accused. P.W. 6 has also admitted that his statement was twice recorded by police. First time it was after 4-5 days of occurrence and second time after six months of the occurrence. P.W. 4 has admitted that his statement was recorded after one and half month of the occurrence. P.W. 8 has stated that Shambhu Pandit assaulted him with lathi but no injury report was produced for such assault. P.W. 15 has stated in his evidence that none of these witnesses have named any accused in their statement recorded u/s 161 Cr. P.C. He has been convicted for killing Jalil but no specific charge was framed against him for killing Jalil. On consideration of these entire material his conviction is bad and fit to be set aside.

Criminal Appeal No. 186 of 2001

Appellant Manoj Jha has been identified by P.W. 6 and P.W. 10 as per the chart annexed with the impugned judgment. P.W. 6 identified him as rioter. P.W. 10 stated that this appellant came alongwith those people who came at Minnat's house to assure people that they will be reached to some safe place. P.W. 6 was examined by I.O. after six months. P.W. 10 was only examined by first I.O. where he did not name any accused and he was not examined by the second I.O. P.W. 15. Both the witnesses for the first time disclosed in court the name of this appellant placing reliance on such evidence for the purpose of conviction is bad and accordingly his conviction is fit to be set aside.

Appellant Ambika Mandal was not named as accused in any F.I.R. In the chart annexed with the judgment, this appellant is at SI. No. 9 and he was identified by P.W. 4 as killer of Sahadat. So far as his identification as killer of Sahadat is concerned that relates to an occurrence of 27.10.1989 with regard to which no charge has been framed and there cannot be any conviction. Further it has been stated that P.W. 1 and P.W. 5 did not name this appellant as killer of Sahadat. They named others as killer of Sahadat as such there is serious discrepancies in between the witnesses on this point. In the chart it has wrongly been shown that this appellant was identified by P.W. 9 which is an error of record. P.W. 9 did not mention his name as accused in the F.I.R. Even in court she did not name this appellant as rioter. The trial court convicted this appellant by committing error of record. P.W. 10 in his evidence has stated that on 28.10.1989 Dina Nath Sahay alongwith other persons including Manoj Jha came at the house of Minnat to assure people that they will reach them to some safe place. Besides this there is no statement against this appellant in the evidence of P.W. 10. PW. 15 has stated that no such statement was made by P.W. 10 before the 1st I.O. and he was not examined by him. P.W. 10 has also stated that his statement was recorded only once and no second statement was recorded. Plea taken by this appellant is that his case is of single identification. Identification of P.W. 10 and P.W. 4 as killer of Sahadat cannot be taken into consideration for his conviction.

21. In the back drop of this evidence, main contention of all appellants is that they have falsely been implicated by the prosecution after much delay, being tutored by some muslim organizations. The first information report instituted by P.W. 14 was against unknown. Immediately after institution of Sabour P.S. Case No. 180 of 1989, the witnesses P.W. 4, P.W. 5, P.W. 6, PW. 8 and P.W. 9 were examined by the police in Hospital. None of them named any accused or claimed to have identified any one. Malika Begum P.W. 9 named Binod Yadav and Shambhu Yadav who cut her leg with sword. She also named Prakash Mandal as killer of her mother and Bijli Yadav as killer of her father. She did not name or identify any one as killer of others. P.W. 9 was again examined on 9.11.1989 at J.M.C.H. Bhagalpur in surgical ward in presence of her relatives and D.I.G. Naseem Ahmad. There also she only claimed to identify her assailant and killer of her father and mother. She did not name any other accused as assailant or killer of other victims. Subsequently after being tutored she developed the story before the Assistant Registrar, Patna High Court, wherein she attributed overt act of killing of different person to different accused persons. Sabour P.S. Case No. 25 of 1990 was instituted on the basis of her fardbeyan wherein she made further development. After institution of Sabour P.S. Case No. 25 of 1990, some witnesses who had not claimed to have identified any one, made different statement before the I.O., after six months of occurrence. For the first time in court witnesses deposed naming the accused persons as assailants, killer as well as member of unlawful assembly. Credibility of evidence of such witness, considering their statement u/s 161 Cr.P.C. cannot be treated as reliable and

trustworthy. Suggestion was given to all these witnesses, that they have for the first time named the accused persons as assailant, killer and member of mob, which was denied by them. Attention of P.W. 15 the I.O. was drawn regarding their statement made u/s 161 Cr. P.C. and he stated that none of them had named any accused alleging specific overt act. The trial court while considering the evidence of witness, failed to consider the reliability and quality of evidence of these witnesses. Witnesses who have not named the appellants before I.O. in their statement u/s 161 Cr.P.C. if disclosed names for the first time in court it should have been disbelieved. Appellants placed reliance on Maruti Rama Naik Vs. State of Maharashtra, wherein it has been held that testimony of injured witness cannot be relied, where such witness does not mention names of accused in their statement before police, recorded on next day of incident. Considering said omissions and unwarranted delay, testimony of injured witness cannot be relied on. Delayed statement of witnesses is fatal for prosecution.

The contention of the appellants has been controverted by the counsel for the State. It has been stated that evidence of P.W. 15 for questioning the quality and credibility of the evidence of prosecution witnesses is unfounded. Attention of P.W. 15 was drawn only with regard to statement of prosecution witnesses recorded by 1st I.O. whose integrity was discredited and investigation of the case was taken away from him. All prosecution witnesses have named the accused persons in their statement recorded by P.W.15. It is not a fact that witnesses for the 1st time named the appellants in court. It has also been stated that the delay in recording the statement is not fatal. Considering the circumstances prevailing in the district of Bhagalpur at the relevant period of time. Due to serious communal riot curfew had been imposed which continued till 6.12.1989. Every where there was loot, killing and arson. Administration was busy in maintaining law and order as well as rehabilitation of riot victims. P.W. 15 himself admitted in his evidence that villagers of Chanderi both Hindus and Muslims had left the village and it was difficult to locate them and obtain their address. In this abnormal situation it was quite natural that statement of witnesses were recorded after some delay. The decisions which have been relied by the appellants have no application with the facts of present case. The circumstances of those cases were totally different from the circumstances of the present case. Reliance has been placed on decision report in Kantilal @ K.L. Gordhandas Soni Vs. State of Gujarat, and in the case of Ranbir and Others Vs. State of Punjab, wherein it has been held that merely because the evidence of a witness is recorded by the police under 161 Cr. P.C. belatedly, by itself, does not make the evidence unacceptable, provided there is some logical or acceptable explanation for the same. It is a fact that at the relevant time in the district of Bhagalpur there was atmosphere of loot, arson, killing. In such situation it is not expected that people will come forward for recording their statement, taking risk of their lives. Witnesses came out of their protected places, when situation normalized and got their statement recorded by the I.O. Considering the circumstances prevailing at the relevant time, delay is not fatal. Delay in all cases is not fatal,

and it depends on the facts relating to each case.

22. Appellants have challenged the credibility of prosecution witnesses on account of being interested witnesses. It has been submitted that most of the prosecution witnesses viz P.W. 1, P.W. 4, P.W. 8, P.W. 9 and P.W. 10 come from same family, all are interested and co-related to each other. Their evidence is not reliable and trustworthy rather they had been tutored in order to falsely implicate the appellants. It is submitted that occurrence took place in the day time, and as per prosecution case, there was assemblance of 800-1000 people. Not a single independent witness has come to support the prosecution case. There is no hard and fast rule that evidence of partisan witnesses cannot be acted upon but in assessing the evidence of interested and partisan witnesses the court must be careful, that whether or not there are discrepancies. Reliance has been placed by the appellants on 1990(2) P.L.J.R. 285, (State of Bihar vs. Mithilesh Rai and others) and on a decision reported in Muthu Naicker and Others Vs. State of Tamil Nadu, Evidence of partisan witnesses must be scrutinised with more than ordinary care. The court must focus its attention on whether there are discrepancies in the evidence. It has been submitted that the trial court failed to take cautious approach while dealing with the evidence of these interested and partisan witnesses. They have contradicted each other. P.W. 4 and P.W. 5 are child witnesses aged about 8 and 11 years old on the date of occurrence as such prove to being tutored. They are related and partisan, but this was totally ignored by trial court. The argument is fallacious. The witnesses are though interested and partisan they are also injured. The Apex Court in the case of Narendra Nath Khaware vs. Parasnath Khaware and others reported in 2003 S.C.C.1144 has held that injured witness cannot be lightly treated as their presence at the time and place of occurrence cannot be doubted. In the present case all eye witnesses are injured witness as such their presence at the place of occurrence cannot be doubted. There is no evidence that witnesses were inimical to appellants rather the witnesses have deposed that they used to live in the village as good neighbor. There is no reason for them to falsely implicate the appellants. Witnesses have consistently supported the case. Even if the witnesses are interested and related to each other that in itself cannot be a ground for throwing their evidence. The special reason for not disbelieving them is that all of them are injured. Witnesses have fully corroborated each other on all material point and have proved the case of prosecution as an eye witness. The other reason for believing the evidence of these witnesses is that their evidence has fully been corroborated by the evidence of P.W. 11 and P.W. 12, the doctor who conducted post-mortem on unidentified dead bodies. The ante-mortem injury found on the person of unknown dead bodies were found to be caused by sharp cutting weapon and hard blunt substance. All witnesses have stated that the appellants assaulted the deceased with Farsa, Sword and lathi. Accordingly we find the argument advanced by appellants not sufficient to disbelieve the evidence of the witnesses. In AIR 1993 S.C. 1544 (Paresh Kalyan Das Bhavson vs. State of Gujrat) it has been held that mere interestedness is not a ground to

reject the evidence of the eye witness particularly those who are injured. Firstly their presence during the occurrence cannot be doubted. Secondly they would be last person to leave the real culprit and implicate other. Accordingly we find that argument advanced by appellants do not make out sufficient ground for disbelieving the prosecution evidence.

23. The appellants have also argued that the prosecution has fabricated the story. After one and half months of occurrence, the manner of occurrence and the place of occurrence was changed by Mallika Begum, (P.W. 9) in her statement before the Joint Registrar, Judicial, Patna High Court. In the first F.I.R. P.W. 14 has said that only six bodies were taken out from the pond. Mallika Begum came out with a new story that 60 people were killed near the pond. The Investigating Officer did not find any mark of violence near the pond. He did not find 60 dead bodies. All together 10 dead bodies were recovered and sent for post-mortem. As per allegation several persons were killed near the pond, but no blood was found there. The bodies which were recovered, they were not identified whether they were the same people regarding whose killings the allegation was made by the prosecution. Witnesses who claimed themselves to be an injured and related to the dead persons did not identify the dead bodies at the time of post-mortem though they were present in the same hospital where post-mortem was being done. The evidence of the doctor and the post-mortem report clearly indicate that the post-mortem were done on the dead body of unidentified persons. The evidence clearly show that the place of occurrence has not been proved. It is not possible that not a drop of blood will be there at the place where so many people had been killed. The evidence of the doctor has not helped the prosecution in proving that the post mortem were conducted over the dead bodies of those people who were killed in Chanderi incident because not a single body was identified. Appellant should not have been convicted u/s 302/149 due to non production of corpus delict of the alleged murder. Strict proof of identification of dead body was required for conviction of the accused persons. Reliance has been placed by the appellants in 1999(3) S.C.C. 471. Counsel appearing for the State vehemently refuted this argument and stated that it is undisputed that P.W. 11 had conducted postmortem over the dead body which were identified by Constable No. 40 Nageshwar Pandey and Homeguard Gaurishanker Pandey as dead bodies of muslims from village Chanderi. P.W. 12 had also conducted the post-mortem on 4.11.1989 on decomposed dead body which were identified by Havildar Kalu Murmu and Mahendra Paswan six dead bodies recovered from village Chantieri. Simply because all 60 bodies were not identified. It is not fatal for prosecution as the conviction of the accused is u/s 201 of the Indian Penal Code and production of corpus delicti is not essential for conviction u/s 201 of the Indian Penal Code. Regarding non finding of blood it is argued that non finding of blood near the pond has no relevance as this is not the prosecution story that all 60 persons were killed near the pond only. Witnesses have also deposed that there was assemblance of 800-1000 people. In these circumstances presence of blood on the ground is simply impossible and it

is most natural that blood marks will disappear by trampling of foot steps. Place of occurrence was not only near the pond but through out the village there was arson assault and killing. The witnesses saw only some of the killings out of total killings. The total 60 number was assessed on account of missing of persons after the occurrence. On consideration of entire evidence and the arguments we find that argument advanced by the appellants has no leg to stand. The prosecution has been able to prove the place of occurrence and the manner of occurrence. Appellants have assailed the conviction u/s 302/149 of the Indian Penal Code. It has been contended that the witnesses have not alleged any overt act against most of the appellants. The evidence shows that appellants like Dina Nath Sahay, Sohin Mandal and Rohin Mandal can be categorised simply as on lookers. There is no allegation that they were holding any arm or they participated in looting, assaulting or killing of people, as such they should not have been convicted u/s 302/149 of the Indian Penal Code. There are other appellants who are also said to be only member of unlawful assembly without any specific allegation of overt act as such they should not have been held that they participated in pursuance of the common object. At the relevant time Dina Nath Sahay was Sarpanch of Mirjapur Gram Panchayat. Rohin Mandal and Sohin Mandal as stated by witnesses are respectable and influential person of the village. They came at Minnat's house persuaded and assured the people taking shelter in the house to come out so that they might be safely reached to some protected place. On their assurance people came out of the house. They were asked to proceed through a wrong route. While proceeding on this route 125 people were assaulted and killed by rioters in presence of Dina Nath Sahay, Rohin Mandal and Sohin Mandal and Mukhia of the panchayat near the shop of Prabhe Yadav. From the evidence of P.W. 4, 5, 6, 8, 9, and 10 it transpires that these people were instrumental in bringing people out of their protected shelter which gave an opportunity to the rioters to kill and assault them. These appellants were present with the mob sharing common object. Though it is settled law that mere presence in assembly does not make a person liable for conviction with the aid of 149 of the Indian Penal Code unless the case falls u/s 142 of the Indian Penal Code. Section 142 of the Code provides that who ever being aware of objects which renders an unlawful assembly intentionally joins and continues in it is said to be the member of an unlawful assembly. The member of unlawful assembly must have knowledge that such an offence is likely to be committed in prosecution of common object. The facts of the case is that a communal riot had started in the village in the district of Bhagalpur as well as in the adjacent villages of village Chanderi on 27.10.1989. The evidence on record would show that on 27.10.1989 rioters in large number assembled, set fire to houses and chased people to assault and kill. People coming from one community took shelter in Minnat's house due to which rioters had no access to them and they were not succeeding in their attempt to assault or kill them. It was necessary that people who were inside Minnat's house should come out. In these circumstances people like Dina Nath Sahay, Sohin Mandal, Rohin Mandal, Bipin Dutta, Manoj Jha and Mukhia in whom the people had confidence assured

and brought those people out of their protected shelter on the pretext of reaching them to some safe place. People hiding in the Minnat's house, having faith on these people came out which gave rioters opportunity to kill them. The common object of that unlawful assembly was to kill the people of a particular community and all appellants who were present there shared this common object. Appellant Dina Nath Sahay, Rohin Mandal and Sohin Mandal being influential persons of the village were giving courage and strength to those who actively participated by assaulting and killing, on overt act is required for conviction with the aid of section 149 of the Indian Penal Code. Mere presence is enough for members of unlawful assembly who shared common object. Apex Court has also held in the case of Kishori Vs. State of Delhi, and in the case of Jaswant Singh and Ors. vs. State of Haryana reported in 2000(3) P.L.J.R. (SC) 172, "once the case of persons falls within the ingredients of the section the question that he did nothing with his own hands would be immaterial.....It must be noted that the basis for relying guilt u/s 149 is mere membership of the unlawful assembly with requisite common object or knowledge."

24. Identification of appellants by the prosecution witnesses as rioters, assaulters as well as killers for the first time in court has also been assailed, as not enough for their conviction. Reliance has been placed in the case of Binay Kumar Singh and others Vs. State of Bihar, and in the case of State of U.P. Vs. Ashok Dixit and Another, Attention of P.W. 4, 5, 6, 8, 9 and 10 was drawn towards their statement made u/s 161 Cr. P.C. that none of them have named any accused in their statement u/s 161 Cr. P.C. before the I.O. PW. 15 has specifically stated in his evidence that none of these witnesses had named any accused either as assailant or killer in their statement recorded u/s 161 Cr. P.C. They for the first time in the court have disclosed the names of the accused. The argument is that this omission amounts to contradiction, which is very significant, making evidence of witnesses in court regarding identification of accused unreliable.

Counsel appearing for the State submitted that it is not a fact that witnesses did not disclose the names of accused, in their statement u/s 161 Cr. P.C. the first I.O. Kailash Choudhary who investigated the case up to paragraph 84 of the case diary was full of bias. He was in collusion with the accused persons. He did not investigate the case properly, statement of witnesses were not being recorded correctly which resulted into his suspension and he was asked to leave the investigation on the direction of the High Court in Cr.W.J.C. No. 315 of 1989. In such a situation the benefit of laches in investigation will go to prosecution. All witnesses have stated about bias and collusive attitude of first I.O. Subsequently when P.W. 15 was authorised to investigate the case all witnesses have named the accused persons specifically stating about their overt act. Defence cannot take the benefit of the statement recorded by first I.O. Kailash Chowdhary and delayed recording of the statement of the witnesses by the second I.O. P.W. 15 before whom witnesses have named accused persons, principle applicable in general criminal case has no application in cases of organized crime or a crime against the society. The Apex Court in the case of Ram Bihari Yadav Vs. State of

Bihar and Others, has held:--The question of delay in examining a witness during investigation is material only if it is indicating and suggesting of some uniform practice by the investigating agency for the purpose of introducing a got up witnesses to falsely support the prosecution case. Evidence of witness does not become untrustworthy merely because he was examined after delay by the I.O. So far delayed recording of statement is concerned, the delayed recording of statement of witnesses is not fatal in all cases. Specially in a situation like present one, where appellants in the prosecution has been benefited on account of delayed recording of statement of witnesses. On close scrutiny of evidence we are of the view that it is wrong to say that the witnesses did not name the accused persons during investigation. The attention of P.W. 15 was drawn only towards the statement made by the witnesses before the first I.O. Kailash Choudhary and not regarding their statement recorded by P.W. 15. Almost all the witnesses like P.W. 4, 5, 8, 9 and 10 examined by P.W. 15 in paragraph 161-164 of the case diary have named the accused persons. These witnesses made similar statement in court. P.W.15 on consideration of their statement had submitted charge sheet as such this contention has not much force for altering the judgment of conviction.

25. Institution of 2nd F.I.R, i.e. Sabour P.S. Case No. 25 of 1990 has also been assailed by the appellants. Fact is that on the direction of Patna High Court in Cr. W. J.C. No. 315 of 1989 fard beyan of Malika Begum was recorded by Registrar, Judicial, Patna High Court and on that basis second F.I.R, as Sabaur P.S. Case No. 25 of 1990 was instituted against the accused, named in the F.I.R. In the case of Binay Kumar & other vs. State of Bihar reported in 1997(1) P.L.J.R. 24 S.C. in the similar circumstances it has been held that institution of second F.I.R, on eye witness account of any person is not illegal if first F.I.R, has been instituted on taking statement of any person having no personal knowledge about the occurrence. Though two F.I.R, were instituted, but in fact they became one. Both F.I.R, were amalgamated by the judicial order passed by C.J.M. Bhagalpur on 15.5.1990. After amalgamation one agency investigated the case, one charge sheet with supplementary charge sheet was submitted, one sanction was accorded and cognizance was taken by one order as well as by one order the case was committed for trial and single trial was conducted, so there is no illegality and argument seems to be fallacious. Appellants have placed reliance on a decision in the case of T.T. Anthony vs. State of Kerala reported in 2001(5) Supreme 13, but this decision is not applicable in the present case because in that decision one and the same person lodged two F.I.R, for the same incident for the same accused before the same police station which is not permissible under the law. In the present case two persons instituted two F.I.R. The second one on the direction of the High Court. The first case was instituted by P.W. 14 who gave vague description of occurrence without naming any accused whereas P.W. 9 being an injured eye witness gave a detailed description of occurrence with quality naming accused persons. In the eye of law statement given by P.W. 9 will be deemed to be an F.I.R. In similar situation the Apex Court in the case of

Bilkis Bano of Gujrat directed C.B.I. to start fresh investigation of the case which was concluded up to the High Court. The efforts should be to impart justice and not the technicality. In the facts and circumstances of the case we do not find any infirmity in this regard.

26. It has been argued that since no charge was framed for the occurrence of 27.10.1989 as such conviction of certain appellants have vitiated. Some of the appellants have been convicted for killing of Sahadat and the evidence is that Sahadat was killed on 27.10.1989. It has been argued that the trial court while calculating the number of witnesses for identification of the accused has taken account of that part of evidence of the witnesses where they have identified the accused as killer of Sahadat. This contention has no force as the chart annexed with the trial court judgment sufficiently indicate that no accused has been convicted for killing or chasing of Sahadat. Appellant Changuri was identified by P.W. 5 as assaulter of Sahadat as well as killer of Badruddin. Besides P.W. 5 he was identified by P.W. 6, 8, 9 and 10. Appellant Rambilas Yadav alias Dongra was identified by P.W. 4 as assaulter of Sahadat, but he has also been identified by P.W. 5, 6 and 9. Appellant Ambika Mandal has been identified by P.W. 4 as killer of Sahadat, but he has two more identification of P.W. 9 and P.W. 10 as rioter also. Thus it is not a fact that the trial Court has Convicted the accused for the occurrence of 27.10.1989 with regard to which no charge was framed.

27. It has further been argued that the prosecution has failed to prove the killing of persons whose names have been given in the deposition of the witnesses for which the appellant have been convicted. No. post-mortem was done over the dead bodies of those persons for whose killing the appellants were convicted. P.W. 15 the I.O. stated that non of the dead bodies were identified. The post-mortem report also corroborates this fact that the dead bodies remained unidentified. Since the dead bodies of those persons were not produced neither identified the appellants cannot be held guilty of killing of a particular person whose dead body was neither produced nor identified. Further it has been argued that the appellants have been convicted for assaulting the injured persons, but the injury of the injured eye witnesses remained unproved on account of non production of injury reports. No injury report came forward for corroboration of alleged injury except one injury report alleged to be of P.W. 9 Malika Begum. In reply to the argument advanced, the counsel for the State has stated that since the accused persons have been convicted u/s 302/ 149 and 201 of the Indian Penal Code as such they can be convicted even without production of the dead bodies and there is no illegality in this regard.

28. Much has been argued by the defence that no charge for the occurrence of 27.10.1989 was framed and thus conviction of certain appellants has vitiated and the trial court should not have considered the evidence of P.W.1 which was for the occurrence of 27.10.1989. Simply non framing of charge will not vitiate conviction if no prejudice is caused thereby to the accused. In the present case the chart which has been prepared by the trial court which is annexed with the

impugned judgment clearly indicates that not a single appellant has been convicted for their identification by P.W.1. Several witnesses who have deposed regarding the occurrence of 27th as well as 28th October, 1989 that has been considered as a part of evidence for conviction. There is no reason for causing any prejudice to the appellants. In the case of Kammari Brahmaiah and Others Vs. Public Prosecutor, High Court of A.P., it has been held that non framing of charge would not vitiate conviction if no prejudice is caused thereby to the accused. The trial should be fair to the accused, fair to the State and fair to mass of the people for whose protection penal laws are made and administered. Criminal Procedure Code is procedural law and is designed to fair ends of justice and not to frustrate them by introduction of endless technicalities. In the present case also the trial court has properly observed the principle decided by the Supreme Court and we do not find any illegality on account of framing of charge for mere technicalities entire prosecution as well as conviction of the appellants cannot be vitiated.

29. Further it has been argued by the appellants that naming and identifying all accused persons is doubtful specially when the witnesses themselves have admitted that there was assemblance of 800-1000 people. Considering the mental state of the appellants and the accused at the time of alleged occurrence it is not possible or probable for the prosecution witnesses to identify the appellants. The argument has no force because the occurrence had taken place in the broad day light. Accused persons were known to the witnesses from before and most of the witnesses have named only those persons who are their own assaulter, assaulter of their relatives. The witnesses have also identified the accused persons in dock which was not challenged by the defence. Thus the plea of defence is not tenable in the eye of law.

30. It has been argued that though trial court has adopted the principle laid down in 1997(1) P.L.J.R. (SC) 24 Binay Kumar Singh vs. The State of Bihar and Ors. and in the case of Masalti vs. State of Uttar Pradesh AIR 1965-202, but has totally ignored the quality aspect of the evidence. In these two decisions it has been held that "the evidence is not to be counted but to be weighed and it is not quantity of evidence, but quality that matters." It is settled law that even the testimony of one single witness if wholly reliable is sufficient to establish the identification of accused; but identification of an accused as member of unlawful assembly when the size of unlawful assembly is quite large and many persons have witnessed the incident, it would be prudent to insist on at least two reliable witnesses to vouch the identification of accused as participant in rioting. The trial court simply counted the number of witnesses but totally ignored the quality of evidence of such witnesses. In both the decisions it has been specifically held that witnesses must be reliable and trustworthy. In the present case the quality of evidence is that the witness are not reliable and trustworthy. They are interested and co-related. They have named the accused persons at much belated stage. Some of the witnesses have claimed identification of the accused for the first time in court and some of the witnesses though named accused, but

failed to identify them in court. Considering the quality of such evidence the conviction of the appellants following the principles laid down in 1997(1) P.L.J.R. (SC) 24 i.e. identification by two or more witnesses has caused failure of justice and as such the judgment of conviction is fit to be set aside. It is true that it is not universal Rule that the persons can be convicted only after he is identified by two or more persons. Spirit of Section 134 of the Evidence Act is that a person can be convicted on a single testimony of trustworthy and reliable witnesses, but in a riot case like the present one considering the prevailing situation which is different from the normal test for coming to the conclusion for conviction and the principles adopted by the trial court is the most befitted one. So far as reliability and trustworthiness of the witnesses are concerned it cannot be questioned as the witnesses are the injured and sufferer. Their presence cannot be doubted simply because they are co-related and interested witnesses. Most of the witnesses have identified their own assailant and their dear ones. Some time this view has been taken by the Supreme Court in the case of Kutumbaka Krishna Mohan Rao and others Vs. Public Prosecutor, High Court of A.P. and another, wherein it has been held in large scale riot cases presence of accused and evidence of injured witnesses in respect of their own assailant cannot be doubted.

31. The plea has been taken by the appellant Sohan Mandal and Prabhey Yadav that they have different names and they are not the same people against whom the witnesses have deposed as such their conviction is not sustainable. The defence taken by the appellants have no force. Sai Mandal, Sri Mandal and Sohan Mandal is one and the same person as he was identified in court by P.W. 9. In course of investigation itself this controversy was resolved. In paragraphs 247 and 249 of the case diary itself this controversy has been settled that Hare Ram Pandit is Hare Ram Jha son of Deep Narain Pandit. Prabhu Yadav son of Mithu Yadav is Prabha Yadav Sai Mandal son of Daso Mandal, resident of Rajpur is Sohan Mandal. P.W. 9, P.W. 4, P.W. 10 and P.W. 8 all witnesses have said that Sohan Mandal resident of village Rajpur. Village Rajpur and Chanderi are the adjoining villages. House of Sohan Mandal is on the border of Chanderi and Village Rajpur. Appellant Sohan Mandal himself has admitted in his statement u/s 313 Cr.P.C. that he is resident of village Rajpur. Since the controversy was settled during investigation itself as such taking same plea during trial as well as before the appellate court has not much force and it cannot be a ground for acquittal. Appellant Prabhe Yadav has also taken the plea that he is not the person who has been identified by the witnesses. It has been argued that Prabha Yadav who has been acquitted is the person who was identified by the witnesses and against him there is no evidence. This submission is absolutely wrong. It is apparent that Prabhe Yadav son of Sudin Yadav has been named in F.I.R, at SI. No. 3 and he is of village Chanderi. He is the owner of the shop and the occurrence took place near his shop. Charge sheet was submitted against him. All the witnesses have stated in their evidence that the occurrence took place near the shop of Prabhe Yadav. P.W. 4 has stated that he has killed one Habib. P.W. 10 has said that he killed Sahabuddin, P.W. 4, PW. 5, P.W. 9 and P.W. 10 had identified him in court.

PW. 4 has specifically stated in paragraph 10 of his evidence that another Prabhu Yadav son of Dewarsi Yadav is not the resident of village Chanderi. He is resident of Village Mirjapur and is not the shop keeper. The identity of this appellant has been fully established because he is of village Chanderi and he is the shop keeper. He has been identified as killer of two persons as such there is no doubt about his identification and there is no illegality in his conviction.

32. Appellant Dina Nath Sahay, Sohan Mandal, Rohin Mandal, Bipin Dutt, Manoj Jha all have taken this plea that they have falsely been implicated and also that the evidence of prosecution witnesses taken into consideration, there is no evidence against them that they have participated in the crime. They can be considered simply onlookers. It has also been stated that in case of group rivalry and animosities there is general tendency to rope as many persons as possible as having participated in assault and this is the duty of the court in these circumstances to scrutinise evidence carefully and if there arise any doubt, benefit should be given to accused. Reliance has been placed by the appellant in the case of Baldeo Singh & others vs. State of Bihar reported in AIR 1972 S.C. 464. We do not find that the appellants can take advantage of the decision relied on by them. The witnesses have consistently stated in their evidence that these appellants were responsible for persuading the victims to come out from Minnat's house. They were present all through in the mob of accused persons. They gave strength and encouragement to other accused persons who actually committed the crime. Their presence itself was enough for offence u/s 149 of the Indian Penal Code. They were not simply onlooker, but they hatched up conspiracy for committing the crime. In Krishna Mochi and Others Vs. State of Bihar, it has been held that the acts done by the accused persons pursuant to a conspiracy hatched up by them to eliminate members of particular community, and to achieve that object if they form an unlawful assembly and different members of that unlawful assembly played different roles in view of these facts, merely because appellants are not said to have assaulted either any of the deceased or injured persons, it cannot be inferred that they had no complicity in crime. The case of these appellants is fully covered by the decision of Apex court and they cannot take plea of their innocence for their acquittal. Appellant Sushil Yadav (Cr. Appeal No. 87 of 2001) has filed an application u/s 391 Cr. P.C. for additional evidence. In the application it has been stated that P.W. 9 has deposed that her aunt Bibi Sakeena alias Hasina was killed by Sushil Yadav. The appellant has come to know that Bibi Shakeena alias Hasina is still alive and living in Godda town alongwith her husband Md. Usman. If this evidence is brought on the record then the evidence of almost all the witnesses i.e. PW. 1, P.W. 4, P.W. 5, P.W. 9, and PW. 10 who are from the same family and are interested and co-related is bound to be disbelieved, resulting into acquittal of the appellants.

The language of section 391 Cr. PC. does not put any restriction on the power of the appellate court, but it may be allowed only in the interest of justice where there is likelihood of failure of justice without it. The word "necessary" has been used in the section to mean that this power is an exception of general rule and

must be exercised with great care and caution, so that it may not operate prejudicial to the defence or prosecution. Legislative intent enacting Section 391 Cr. P.C. appears to be the empowerment of the appellate court to see that justice is done between prosecution and the persons prosecuted by arriving at the truth i.e. prevention of guilty man through careless negligent proceedings. In the present case there is no necessity for passing an order for enquiry u/s 391 Cr.P.C. for additional evidence. This is not only the evidence of P.W. 9 on consideration of which appellant Sushil Yadav has been convicted by the trial court. Sushil Yadav as per the chart annexed with the impugned judgment has been identified by P.W. 4 as killer of Hasibuddin, P.W. 8 as rioter, P.W. 9 as killer of Shakeena, P.W. 10 as rioter. Even if the evidence of P.W. 9 is left still he has three identification on his count. Section 391 Cr.P.C. cannot be exercised in such circumstances when we are convinced that it is not a case of miscarriage of justice. The witnesses are trustworthy and they have deposed truthfully before the trial court unless we are satisfied that any prejudice is going to be caused to the appellant, there is no good ground for allowing the application for additional evidence u/s 391 Cr.P.C. Considering the entire evidence as well as the nature of the crime committed by the appellants, in which innocent people, child, women and old persons were brutally killed without any provocation, we are of the view that Prosecution has been able to prove the involvement of the appellant in the commission of crime. The witnesses are trustworthy and all of them are consistent. P.W. 5 and P.W. 8 who are child witnesses their evidence has been corroborated by the evidence of other witnesses as well as by medical evidence. There is no reason either to alter or modify the conviction of the appellants. The judgment of the trial court so far conviction of appellants in all 15 appeals are concerned are affirmed and all sixteen criminal appeals are dismissed. Appellant Prabhe Yadav in Cr. Appeal No. 73 of 2001, Dinanath Sahay in Cr. Appeal No. 80 of 2001, Bipin Prasad Dutta in Cr. Appeal No. 82 of 2001, appellant Mithu Yadav alias Mittu Yadav in Cr. Appeal No. 93 of 2001, Fakru Yadav alias Fakira, alias Ramjatan Yadav alias Fakira Yadav, in Cr. Appeal No. 95 of 2001 Bijli Yadav alias Bijli Singh Yadav in Cr. Appeal No. 124 of 2001, Suresh Prasad Singh alias Suresh Mandal in Cr. Appeal No. 166 of 2001, Tuntun Yadav in Cr. Appeal No. 175 of 2001, Sohan Mandal in Cr. Appeal No. 176 of 2001, Rohin Prasad Yadav in Cr. Appeal No. 177 of 2001, Manoj Jha in Cr. Appeal No. 186 of 2001, Ambika Mandal in Cr. Appeal No. 196 of 2001, are on bail, their bail bond be cancelled and they are directed to be taken in custody. Appellant Shambhu Pandit in Cr. Appeal No. 185 of 2001, Chhanguri Yadav in Cr. Appeal No. 165 of 2001, Sushil Prasad Yadav in Cr. Appeal No. 87 of 2001 and Ram Bilash Yadav in Cr. Appeal No. 144 of 2001 are in jail and they will remain in custody till the residual period of their sentence.

State has preferred Govt. Appeal No. 5 of 2001 against the judgment of acquittal, passed by the trial court. Though 22 accused persons were acquitted, but acquittal of only 15 respondents have been challenged by the State on the ground that the judgment is based on error of law, error of record as well are

inconsistent appreciation of evidence. Error of law is that the trial court though relied on the principle adopted by the Supreme Court in Parasbiga case reported in 1997(1) (SC) 24. The principle decided has not been followed in its true spirit and perspective. The Supreme Court has held that the criminal courts deciding a case involving large number of victims should adopt the useful test that the conviction can be sustained only when two or more witnesses reliable and consistent have supported the case of the prosecution. In the present case accused persons who have been identified by two or more have also been acquitted. The trial court has acquitted the respondents on discarding the evidence of P.W.1 on the ground that he has deposed with regard to the occurrence which took place on 27.10.1989 for which no charge was framed. The occurrence in fact started on 27th itself which continued up to 28th simply because no charge was framed with respect to 27th occurrence, even though there was sufficient evidence on record with regard to 27th occurrence the evidence of P.W.1 should not have been discarded. The discarding of evidence of PW. 1 has resulted into acquittal of so many accused persons as well as miscarriage of justice. It has further been argued that the trial court committed error of law by adopting the principle laid down in Masalti Vs. State of U.P., without distinguishing the facts of the present case with the facts of the case in Masalti Vs. State of U.P., In that case occurrence took place in the night, there was no means of identification. The accused were not known to the victims and witnesses as they were residents of distant villages and also that there was enmity in between the accused and the witnesses. Considering the circumstances in that case the Apex court held that single identification for conviction adopted by trial court was not sufficient to sustain the conviction. When there was large number of accused, witnesses and victims. Conviction can be sustained at least where there is identification of two and more witnesses. In the present case occurrence took place in between 8-10 A.M. in the morning. The offenders were co-villagers known to the victims and witnesses. There was no animosity in between the parties till the date of occurrence there was no chance of any confusion in identifying those who were the assailants or killer. In this background the formula of identification by two or more witnesses was not applicable for conviction. The trial court should have convicted even those accused who were identified by a single witness as killer and assailant. The acquittal is illegal on this count. Further it has been argued that some formula which is applicable in general normal case should not have been applied by the trial court in the present case which is crime against society and crime against humanity. On consideration of the argument advanced by the counsel for the State as well as on consideration of the materials on record, we are of the view that the judgment of acquittal is not based on error of record or inconsistent appreciation of evidence. The trial court has relied on the sound principle laid down by the Supreme Court in the case like the present one where there are large number of witnesses, large number of victims and large number of offenders. No distinction can be made in between one accused and another on the ground that they have been identified as killer or assaulter or rioter. It is

difficult to identify any accused in a melee and conviction on single identification is not prudent in case of group rivalry. There is general tendency to rope as many persons as possible as an accused to have participated in a assault. The court in such circumstances have to scrutinize the evidence carefully and for that it is essential to prevent the miscarriage of justice that at least two witnesses should identify any person as accused participating in any manner in the occurrence for the purpose of conviction. It has also been argued by the counsel for the State that in a case where the trial court has taken view ignoring the admissible evidence, the duty is caste upon the High Court to re-appreciate the evidence in appeal against acquittal for the purpose of ascertaining as to whether any of the accused has committed any offence or not. It is a fact that the High Court can re-appreciate the evidence but only in such case where the acquittal of accused is based on surmises and conjectures ignoring trustworthy evidence of witnesses and reaching perverse conclusion regarding facts of the case. But in the present case we do not find that any such error has been committed by the trial court in acquitting the respondents. The view taken by the trial court is probable and not erroneous as well as it is not based upon inadmissible evidence or excluding the evidence otherwise admissible.

Thus we find most of the reason given by the counsel for the State for rejecting the conclusion of the learned sessions Judge unacceptable. At this juncture, we would like to bear in mind the law laid down by the Apex Court in regard to re-appreciation of evidence by the High Court in *Dhanna, etc. Vs. State of Madhya Pradesh*, that though High Court has full power to review the evidence and to arrive at its own independent conclusion whether the appeal is against conviction or acquittal. While doing so it ought to bear in mind, first that there is general presumption in favour of innocence of the accused in criminal cases and that presumption is only strengthened by the acquittal. Secondly, it should bear in mind that every accused is entitled to the benefit of reasonable doubt regarding his guilt and when trial court acquitted him, he would retain that benefit in the appellate court also. Thus, the appellate court in appeal against acquittals has to proceed more cautiously and only if there is absolute assurance of the guilt of the accused, upon the evidence on record, that order of acquittal is liable to be interfered with or disturbed.

In the present case trial court has not committed any error in recording the acquittal of the respondents. The judgment do not suffer from the vice of perversity. Accordingly the Government Appeal No. 5 of 2001 is dismissed.

P.N. Yadav, J.

34. I agree.