

**(2006) 11 PAT CK 0093**

**In the Patna High Court**

**Case No : Criminal Appeal No. 566 of 1993 (D.B.)**

Surang Lal Yadav and Another

APPELLANT

Vs

The State of Bihar

RESPONDENT

**Date of Decision : 23-11-2006**

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 145, 313  
Penal Code, 1860 (IPC) — Section 141, 142, 147, 149, 302

**Citation : (2007) 2 PLJR 267**

**Hon'ble Judges : Jayanandan Singh, J; Chandramauli Kr. Pd., J**

**Bench : Division Bench**

**Advocate : Dinesh Prasad Sharma, J.P. Sinha and Upendra Prasad, for the Appellant; Lala Kailash Bihari Prasad, for the Respondent**

**Final Decision : Dismissed**

## Judgement

1. All the appellants of Criminal Appeal No. 566 of 1993, being aggrieved by their conviction for offence under Sections 302/149, 436/149, 380/149 and 323/149 of the Indian Penal Code and sentence of rigorous imprisonment for life, five years, two years and one year respectively and appellant Surang Lal Yadav being further aggrieved by his conviction u/s 147 of the Indian Penal Code and sentence of rigorous imprisonment for six months by judgment dated 30.11.1993 passed by the 8th Additional Sessions Judge, Purnia in Sessions Trial No. 28 of 1978 and sole appellant Chandra Hansda of Criminal Appeal No. 45 of 1996 being aggrieved by his conviction under Sections 302/149, 436/149 and 147 of the Indian Penal Code and sentence of rigorous imprisonment for life, seven years and one year respectively by judgment dated 23.1.1996 passed by the 2nd Additional Sessions Judge, Purnia in Supplementary Sessions Trial No. 28 of 1979, have preferred these appeals. On 25.9.1974 the Badhyas (a Muslim minority) of village Singhimari awaiting the sun to rise, saw a mob of 300-400 persons mostly Santhals variously armed with bows and arrows, ballam, bhala, kulhari, dabia and burning flames led by appellant Surang Lal Yadav riding on a horse back and armed with sword. It started looting the properties of the

villagers, setting their houses on fire and killing the innocent persons indiscriminately. In the occurrence fourteen persons have been killed, forty-seven houses have been burnt and properties looted. The criminal case was set in motion by P.W. 2 Amzad Ali, who gave a written report to the Assistant Sub-Inspector of Police on 25.9.1974 at 1 P.M. in the village Singhimari and according to that on 25.9.1974 in the morning appellant Surang Lal Yadav on a horse back with sword in his hand, with a mob of about 400 mostly Santhals, all armed with bows and arrows, ballam, bhala, kulhari, dabia and burning flame raided village Singhimari, set the houses ablaze, chopped off the heads of villagers and looted away the properties. In the first information report, the informant claimed to have identified 33 persons and the names of those persons identified have been mentioned in the written report which include the name of all the appellants, excluding appellant no. 4 of Cr. Appeal No. 566 of 1993, i.e. Kalu Rajbanshi and sole appellant Chandra Hansda in Cr. Appeal No. 45 of 1996. In the written report, it was further alleged that the mob invaded several tolas and lastly it went to Janta Hat where Rampal Singh and his sister's son Ramratan Singh were done to death and their shops looted along with the shops of Munilal Choudhary, Uzir Yadav and Devendra Yadav.

2. On the basis of the aforesaid report, the police took up investigation and during the investigation it was found that the occurrence had taken place in various tolas, namely, Lohakanti, Haribhitha, Simaldangi, Haldibari and Janta Hat, which are commonly known as Singhimari. It also came during the investigation that seven persons were killed in village Lohakanti, five persons in village Haribhitha and two persons in village Janta Hat. Apart from that, 47 houses were found to be burnt in these villages and the movable properties looted.

3. Police after investigation submitted charge-sheet against several persons including the appellants and many others showing them as absconders. Ultimately 27 persons including the appellants were committed to the Court of Sessions to face the trial. The trial commenced by framing charge against 18 accused persons including the appellants as the remaining accused persons committed to the Court of Sessions to face trial had jumped bail and absconded. Ultimately the statements of seven accused persons (Appellants in Criminal Appeal No. 566 of 1993) and that of Chandra Hansda (Appellant in Criminal Appeal No. 45 of 1996) were recorded u/s 313 of the Code of Criminal Procedure, but thereafter Chandra Hansda absconded and his trial was separated. Later on said Chandra Hansda was apprehended and convicted and sentenced as indicated above.

4. In order to bring home the charge, prosecution has examined altogether 38 witnesses. Out of whom, P.W. 2 Amzad Ali is the informant of the case. P.W. 5 Majrooi Haque, P.W. 7 Abul Manan, P.W. 21 Abdul Halim and P.W. 23 Md. Alfaz have been tendered for cross-examination. P.W. 36 Rajendra Singh, a Constable is a formal witness. P.W. 1 Dr. V.N. Sinha and P.W. 35 Dr. T.P. Chatterjee have

conducted post mortem examination on six and eight dead bodies respectively. P.W. 37 Rana Krishna Singh is the Investigating Officer of the case, whereas P.W. 38 Sheojee Singh is the Assistant Sub-Inspector of Police, who had visited the village on the date of occurrence and to whom the written report of the occurrence was given.

5. P.W. 1 Dr. V.N. Sinha, at the relevant time, was posted as Civil Assistant Surgeon at Sadar Hospital, Purnia and under instruction of Civil Surgeon, Purnia went to Kishanganj and conducted post mortem examination on 27.9.1974 on the dead bodies of six persons, namely, Sikandar, (Ext. 1), Ilias Mohammad (Ext. 1/1), Ram Swarath Singh (Ext. 1/2), Ram Ratan Singh (Ext. 1/3), Nasir Uddin (Ext. 1/4) and Sohrab Ali (Ext. 1/5) and have proved the postmortem reports. The injuries found by the doctor in the post mortem examination are indicated below:

Sikandar:

- (i) A sharp edged piercing injury 3" x 1/2" cutting through the fourth left costal cartilage and the anterior wall of the left ventricle of heart,
- (ii) The anterior abdominal wall, most of the contents of the abdomen and pelvic and the anterior portion of thigh were missing, probably eaten away by animals.

Ilias Mohammad:

- (i) Sharp cutting 4" x 2 1/2" x 4" deep on the outer aspect of middle of right thigh,
- (ii) Sharp cutting injuries 3" x 2 1/2" x 4" deep, 2" below injury no. (i).
- (iii) Haematoma on the right scalp 4" in diameter. The bone underneath was intact but a huge sub-dural haematoma containing approximately 150 mililitre of dark clotted blood was found. Other organs were normal.

Ram Swarath Singh:

- (i) Sharp cutting wound 6" x 4" over the front of the neck cutting through the carotid vesseles on both sides and on the front of trachea.
- (ii) Piercing wound 2 1/2" x 1" over left fourth space cutting through the costal cartilage and puncturing the anterior surface of the left ventricle. Other organs were normal.

Ram Ratan Singh:

- (i) Sharp cutting wound 1" x 2 1/2" x 3" deep over right cheek.
- (ii) Sharp cutting wound 2 1/2" x 2 1/2" x 4" deep in the right and anterior aspect of the neck cutting through the major carotid vesseles.
- (iii) Sharp cutting wound 2 1/2" x 2 1/2" x 3" on the right neck 2" below the injury no. (ii) also cutting the carotid vesseles.

Nasiruddin:

The body was bloated and decomposed. The skin over face, trunk and both arms were charred at places blebs present.

Cut section of the skin showed redness of the edges along with edema. Besides he had a sharp cut wound 3" x 1" on the back side of the skull cutting through the bone and underlying brain matter. Other organs were normal.

Sohrab Ali:

(i) Sharp cutting vertical wound 4" x 1" on the back of the skull cutting through the underlying bone and brain matter deeply.

(ii) Sharp cutting vertical wound 2" x 1" on the back of the skull 1" to the left of injury no. (i). This has also cut through the brain and the brain matter.

6. In the opinion of the doctor, the aforesaid persons died on account of the ante mortem injuries sustained by them and time elapsed since death was 48 hours to 72 hours.

7. P.W. 35 Dr. T.P. Chatterjee, at the relevant time, was posted as Deputy Superintendent of Kishanganj Hospital and on 27.9.1974 he held post mortem on the dead bodies of eight persons, namely, Satla (Ext. 1/6), Rehana Khatoon (Ext. 1/ 7), Majid Mandal (Ext. 1/8), Mansur Ali (Ext. 1/9), Arshad Ali (Ext. 1/10), Imajuddin (Ext. 1/11), Umar Ali (Ext. 1/12) and Ayub Ali (Ext. 1/13) and proved the post mortem reports. Ante mortem injuries found on each of them are indicated below :

Satla:

Skin over face trunk and extremities were charred at places. Blebs present. Cut section shows redness of edges along with edema. Right foot from ankle point was found missing. Both bones of left legs were found fractured. Right forearm was also found missing. Skull on left side completely burnt and fractured making a hole of 2" x 2 1/2". Brain matter melted and came out through the opening.

Rehana Khatoon:

It was decomposed, bloated and partially charred body. Skin on the face, trunk and extremities were burnt and charred. At places blebs were present. On dissection of skin he found redness of edges along with edema. Skull burnt and fractured. Brain matters melted and came out through the opening from skull.

Majid Mandal:

It was a decomposed bloated body with maggots present. One perforating wound 2" x 1" x bone deep on right side of head in the occipital region with haemotoma 2 1/2" in diameter with fracture of occipital bone 2 1/2" x 1" and injury to the brain matter. One sharp cutting wound in back in 2" x 1 1/2" x vertical column of thoracic region cutting the spinal cord.

Mansur Ali:

- (i) One sharp cutting wound on the left side of scalp in 2"x 3/4" x brain deep in the front of temporal bone region with haematoma 4" in diameter. It cut the brain matter deeply.
- (ii) Left forearm bones were found fractured with extra vacation of blood in the tissues and muscles.

Arshad Ali:

- (i) One sharp cutting 1 1/2" x 1" x brain deep on the right side of the scalp in the temporal parietal bony region with haemotoma 2" in diameter cutting to the bone and underlying brain matter.
- (ii) Fracture of right arm.
- (iii) One penetrating wound 1 1/2" x 1/2" x 1" in the right leg.

Imajuddin:

- (i) One sharp cutting injury 3" x 1" x muscle deep on the back of the left knee joint and left leg.
- (ii) One sharp cutting injury 1 1/2" x 1/2" x muscle deep on the external surface of left forearm.
- (iii) One sharp cutting injury 2" x 1" x muscle deep on the external surface of left forearm.
- (iv) One sharp cutting injury 2" x 1" x bone deep cutting the underlying bone and the spinal cord on right side of neck.
- (v) One sharp cutting injury 1 1/2" x 1/2" x brain deep in the right side of skull cutting the occipital bone and the brain matter. Brain matter was found coming out.

Umar Ali:

- (i) One sharp cutting injury 3" x 1" x bone deep on the neck from right to the left cutting all structures, including trachea, the underlying bone and the spinal cord.
- (ii) One sharp cutting injury 1 1/2" x 1/2" x muscle deep in the chin.
- (iii) One penetrating wound in 4" x 1 1/2" x brain deep in the left side of scalp in the front perital region with injury to the underlying bone and the brain. The brain matter coming out.
- (iv) One penetrating wound in 1 1/2" x 1/2" x lung deep. The arrow was taken out. Blood was found in thoracic cavity.
- (v) One penetrating wound 4" x 1 1/2" x brain deep. One arrow was found in the back of head in the occipital region. The arrow was taken out and sealed.

Ayub Ali:

(i) One penetrating injury 1 1/2" x 1" x abdomen deep piercing the rectum including the external illiac. One arrow was taken out from this injury and sealed.

(ii) One incised wound 5" x 1" x abdomen deep. It was surgical wound for taking out the arrow.

8. In the opinion of the doctor, they died on account of the injuries sustained by them and time elapsed since death is within 72 hours.

9. P.W. 2 Amzad Ali is the informant of the case and according to him on 25.9.1974 when he had gone to watch his paddy field, at the time of sunrise he saw a mob of about 400 persons, mostly Santhals coming towards village Lohakanti from Janta Hat side and the mob was led by appellant Surang Lal Yadav carrying a sword and riding on a horse back. The other members of the mob were variously armed with bows and arrows, bhala, kuthari, dabia, ballam, lathi and burning wooden pieces. The mob set on fire the houses and looted the movables. According to this witness, after setting fire to the house of Lokman the mob proceeded towards western tola of Lohakanti. This witness claims to have concealed himself in a paddy field and seen the occurrence from there. According to him, thereafter the mob went towards east and reached village Haribhitha and after sometime he saw flames coming from the said village. He narrated the incident to his co-villagers. The mob later came to his tola and started setting on fire the houses and looting the movables from there. According to this witness, the mob reached his village at about 8 A.M. and he was told that mob had killed 10-12 persons.

10. According to him, at about 10.30 A.M. he went to the house of Dr. Samsuddin in village Haldaban and while he was waiting he came to know that mob had killed Ram Swarath and Ramratan at Janta Hat. The doctor was not at his residence and according to this witness he met his son-in-law Muzaffar to whom he asked to write application so that it may be sent to the Police Station. On his dictation, Muzaffar wrote the written report which was read over to him and he signed the same. He came to know that an Assistant Sub-Inspector of Police (P.W. 38 Sheojee Singh) had arrived in the village Lohakanti, he went there and handed over the written report to him. He had identified 33 persons in the mob and disclosed their names in the written report. It does not include the names of appellant no. 4 Kalu Rajbanshi and appellant Chandra Hansda. During evidence, he had disclosed the names of several accused persons including the appellants, excepting Kalu Rajbanshi.

11. In his evidence this witness had further stated that on 27.9.1974 in the morning he was proceeding to the house of his daughter in village Haribhitha, he met the Assistant Sub-Inspector of Police at about 5 A.M. west to village Lohakanti where he saw the dead body of Sikandar lying there and he is a witness to the Inquest report. According to this witness, another dead body, that of Iliyas was lying at a distance of 300-400 yards south to village Lohakanti and

he is a witness to the Inquest report prepared by the Assistant Sub-Inspector of Police also. According to this witness, the genesis of occurrence is land dispute with Badhia Muslims. He has stated in his evidence that plot no. 945 having an area of 85-86 acres is recorded in the name of State of Bihar over which his house and those of 20-25 Badhiya Muslims and many Santhals have been constructed. He has further stated that in relation thereto a proceeding u/s 145 of the Code of Criminal Procedure was initiated.

12. P.W. 3 Abdul Sattar is a resident of village Lohakanti and according to his evidence, on the fateful day in the morning, he was at his residence and on hearing hulla, when he came out, he saw a mob of about 400 persons coming towards his house setting fire to the houses of Badhiya Muslims in the southern direction. According to his evidence, when the mob was at a little distance (15-20 arms), one lathi blow was given to him from behind over his head by one of the accused. Sustaining injury, he ran for safety and hid himself in the paddy field at a distance of about 250 yards. From there, according to this witness, he saw the mob setting on fire the 30-31 houses and looting the property. After looting and setting on fire the houses of his Tola, the mob proceeded towards village Haribhitha, where also several houses were burnt and many persons killed. In the incident, according to this witness, his house was burnt and his uncle killed. He had identified appellant Surang Lal Yadav, Anup Lal Yadav beside other accused persons in the mob. In cross-examination, he had reiterated that some of the members of the mob were setting on fire the houses while others looting the property and many of them were engaged in killing the innocent victims.

13. P.W. 4 Abdul Mokim is another eye witness to the occurrence and is a resident of village Haribhitha and like other eye witnesses, he had stated that on the date of incident when he woke up in the morning, the houses in Village Lohakanti were burning and a mob of about 400 persons variously armed with lethal weapons coming towards his Tola. According to this witness, when the mob reached at a distance of 20-25 arms he ran away for safety and hid himself in the paddy field. After setting on fire to the houses of the village, according to this witness, the mob proceeded towards Kutub Tola. He had specifically stated that the-houses of native Muslims were not burnt by the members of the mob. When he returned to his house, after about one and half hours, he found his house burnt besides the houses of 15-16 persons in the village. He also found injuries on various persons and according to this witness, his uncle Mansoor was killed in the occurrence and the dead bodies of the two daughters of Mansoor Ali, namely, Rutla and Rana were found in the house of Halaluddin. Apart from the aforesaid, three persons, according to this witness, Majid and Ayub Ali were also killed. Besides other accused persons, he had identified appellants Chandra Hansda and Surang Lal Yadav as perpetrator of crime.

14. P.W. 6 Mujibur Rahman and P.W. 8 Altaf Hussain are brothers and resident of Village Hribhitha and they claim to have seen the mob coming towards his

village. They have also stated that seeing the mob they fled away in the nearby paddy field to save their lives. According to them, when they returned back to their houses after the mob left the village, they found their father Abdul Suhan in an injured condition. P.W. 6 Mujibur Rahman had identified appellants Surang Lal Yadav, Anup Lal Yadav, Sahdeo Das, Kalu Rajbanshi besides other accused persons from amongst the members of the mob. P.W. 8 Altaf Hussain, from amongst the mob, had identified appellants, Chandra Hansda, Surang Lal Yadav, Anup Lal Yadav and Sahdeo Das.

15. P.W. 9 Abul Baser is resident of village Singhimari and according to him, when he came out of his house on hearing hulla, he saw a mob of 400 persons led by appellant Surang Lal Yadav, armed with sword in his hand. According to this witness, the mob started setting on fire the houses and looting the immovable and when he tried to run away from the place of occurrence, he was assaulted by the mob by means of khunta and lathi. However, according to this witness, he managed to run away to save his life and when he returned to his village after about 3 hours, he found his house burnt and other houses of the village in burning condition. He has also stated that the members of the mob killed his father Arshad Ali and other persons of the village were also assaulted. He has also stated in his evidence that the dead bodies of Sabir Ali and Imajuddin were found in the field of Sabir Ali and from the said field, the Assistant Sub-Inspector of Police had seized blood stained earth in his presence. According the evidence of this witness, dead bodies of two daughters of Mansoor were recovered from the house of Jalaluddin with burn injuries apparent on their faces. Further, the dead body of Mansoor was found in the field of Mumtaz Ali in village Haribhitha. According to him, the dead body of Nasim Uddin was found in village Lohakanti in the south of the house of Imajuddin with burn injuries and arrow stuck on the left side of the deceased. He had also seen the dead body of Sohrab Ali north to the house of Arshad and west to the house of Imajuddin in the field, The dead body of Umar Ali was found on the road in the south of the house of Daud Ali whereas the dead body of Md. Ilyas was recovered from the field of Kadir Haji on 26.9.1974 by the Assistant Sub-Inspector of Police. He had identified appellant Surang Lal Yadav beside other accused persons from amongst the members of the mob.

16. P.W. 10 Abdul Sattar, P.W. 11 Sheikh Shamayul, P.W. 12 Abdul Latif, P.W. 14 Abdul Kasim claim to be the eye witnesses to the occurrence and have clearly stated that a mob of about 400 persons, mainly Santhals, led by appellant Surang Lal Yadav on a horse back armed with sword, came to the village, set on fire the houses, looted the property and killed the innocent inhabitants. They have identified appellants, Surang Lal Yadav, Anup Lal Yadav, Sahdeo Das besides other accused persons.

17. It is relevant here to state that all the witnesses examined during the course of trial, have supported the case of the prosecution in material particulars. Appellant Chandra Hansda has been identified by five eye witnesses, namely P.W.

2 Amjad Ali, P.W. 4 A. Mokim, P.W. 8 Altaf Hussain, P.W. 18 Naziruddin and P.W. 22 Shamsul Haque from amongst the members of the mob who perpetrated the crime.

18. Out of 38 witnesses examined by the prosecution, 26 witnesses have stated about the participation of appellant Surang Lal Yadav in the crime. They are, P.W. 2 Amjad Ali, P.W. 3 Abdul Sattar, P.W. 4 A. Mokim, P.W. 6 Mujibur Rahman, P.W. 8 Altaf Hussain, P.W. 9 Abul Baser, P.W. 10 Abdul Sattar, P.W. 11 Sheikh Shamayul, P.W. 12 Abdul Latif, P.W. 13 Imanuddin, P.W. 14 Abdul Kasim, P.W. 15 Abdul Hakim, P.W. 16 Kalu alias Kalimuddin, P.W. 17 Akbdul Kabir, P.W. 18 Naziruddin, P.W. 19 Abul Kuddus and P.W. 20 Ainul Haque. P.W. 22 Shamsul Haque, P.W. 24 Devendra Prasad Yadav, P.W. 25 Reyazuddin, P.W. 28 Dhanik Lal Sah, P.W. 29 Member Lal Singh, P.W. 30 Md. Halaluddin, P.W. 31 Azad Ali, P.W. 32 Saud Ali and P.W. 34 Makbool Hussain.

19. Appellant Anup Lal Yadav has been identified by altogether 14 witnesses from amongst the members of the mob and they are, P.W. 2 Amjad Ali, P.W. 3. Abdul Sattar, P.W. 6 Mujibur Rahman, P.W. 8 Altaf Hussain, P.W. 10 Abdul Sattar, P.W. 12 Abdul Latif, P.W. 13 Imazuddin P.W. 14 Abdul Kasim, P.W. 17 Abdul Kabir, P.W. 20 Ainul Haque, P.W. 24 Devendra Prasad Yadav, P.W. 28 Dhanik Lal Sah, P.W. 31 Azad Ali and P.W. 32 Saud Ali.

20. Appellant Sahdeo Das has been identified by altogether 11 witnesses to be the perpetrator of the crime and they are, P.W. 2 Amjad Ali, P.W. 6 Mujibur Rahman, P.W. 8 Altaf Hussain, P.W. 10 Abdul Sattar, P.W. 11 Sheikh Shamayul, P.W. 13 Imazuddin, P.W. 14 Abdul Kasim, P.W. 16 Kalu alias Kalimuddin, P.W. 24 Devendra Prasad Yadav, P.W. 29 Member Lal Singh and P.W. 31 Azad Ali.

21. Appellant Kalu Rajbanshi has been identified by only one witness, that is, P.W. 6 Mujibur Rahman whereas appellants Gopal Soren and Raja Murmu have been identified by two witnesses each. They have been identified by P.W. 2 Amjad Ali and further by P.W. 14 Abdul Kasim and P.W. 13 Imazuddin respectively.

22. Mr. J.P. Sinha, appearing on behalf of the appellant Chandra Hansda in Cr. Appeal No. 45 of 1996 and Mr. Dinesh Prasad Sharma appearing as amicus curiae on behalf of appellants in Cr. Appeal No. 566 of 1993, very fairly state that in view of the overwhelming evidence, the factum of occurrence cannot be denied. However, they contend that appellants participation in the crime has not been proved beyond all reasonable doubt. Assailing the conviction of appellant Kalu Rajbanshi, Mr. Sharma contends that he has not been named in the first information report and further, he has been identified by a solitary witness, namely, P.W. 6 Mujibur Rahman as a member of the mob and as such, the prosecution has not been able to bring home the charge against this appellant beyond all reasonable doubt.

23. Mr. Lala Kailash Bihari Prasad, Additional Public Prosecutor, appearing on behalf of the State, however, submits that simply because this appellant has been identified by only one witness, his conviction cannot be said to be illegal.

24. Having appreciated the rival submission, I find substance in the submission of Mr. Sharma. So far as appellant Kalu Rajbanshi is concerned, he has not been named in the first information report and solitary witness who had identified him from amongst the members of the mob which consisted of about 400 persons, is P.W. 6 Mujibur Rahman. In a case of such nature, when a mob consisted of about 400 persons and this appellant having not been named in the first information report and further that he has been identified by only one witness, it shall be unsafe to sustain his conviction on the basis of the sole testimony of P.W. 6 Mujibur Rahman.

25. Appellant Gopal Soren has been named as the member of the mob by informant P.W. 2 Amjad Ali and identified during trial by him and P.W. 13 Imazuddin. P.W. 13 Imazuddin although had named this appellant Gopal Soren as one of the members of the mob, however, in cross-examination, he had admitted that the brother of Surang Lal Yadav was murdered a day earlier to the occurrence in which his brother was made an accused. Thus, this witness is an interested witness and as such, I consider it highly unsafe to consider this witness to be wholly reliable. In case, the evidence of P.W. 13 Imazuddin is ignored, this appellant Gopal Soren has been identified by only one witness, that is, P.W. 2 Amjad Ali. As stated earlier, the crime has been committed by a mob consisting of about 400 persons and in such a situation, it shall be unsafe to sustain the conviction of appellant Gopal Soren on the basis of solitary evidence of P.W. 2 Amjad Ali. Accordingly, I am of the opinion that the prosecution has not brought home the charge against this appellant beyond all reasonable doubt and as such, he deserves to be given the benefit of doubt.

26. Reference in this connection can be made to a decision of the Supreme Court in the case of Binay Kumar Singh and Others vs. The State of Bihar 1997(1) P.L.J.R. 24(SC) in which the Supreme Court in paragraph nos. 30 and 31 has held as follows:

"30. xxx Even the testimony of one single witness, if wholly reliable, is sufficient to establish the identification of an accused as member of an unlawful assembly. All the same, when the size of the unlawful assembly is quite large (as in this case) and many persons would have witnessed the incident, it would be a prudent exercise to insist on at least two reliable witnesses to vouchsafe the identification of an accused as participant in the rioting. In Masalti Vs. State of U.P., , a Bench of four Judges of this Court has adopted such a formula. It is useful to extract it here:

"Where a criminal court has to deal with evidence pertaining to the commission of an offence involving a large number of offenders and a large number of victims, it is usual to adopt the test that the conviction could be sustained only if it is supported by two or three or more witnesses who give a consistent account of the incident."

31. We feel that the said proposition can profitably be followed in this case also

as the said proposition has stood the test of time."

27. Mr. Sharma contends that appellant Raja Murmu has also been identified by only two witnesses, namely, P.W. 2 Amjad Ali and P.W. 30 Md. Halaluddin and as such, he also deserves to be given the benefit of doubt. I do not find any substance in this submission of the learned counsel. P.W. 2 Amjad Ali and P.W. 30 Md. Halaluddin have not only supported the case of the prosecution in all material particulars, but they have also identified this appellant from amongst the members of the mob which had committed the crime. In my opinion, the evidence of P.W. 2 Amjad Ali and P.W. 30 Md. Halaluddin is reliable and as such, the prosecution has brought home the charge against appellant Raja Murmu beyond all reasonable doubt.

28. Appellants Chandra Hansda, Surang Lal Yadav, Anup Lal Yadav and Sahdeo Das have been identified by as many as five, twenty six, fourteen and eleven witnesses respectively. They have clearly stated that a mob consisting of Santhals led by appellant Surang Lal Yadav with sword in his hand and on a horse back came, set on fire the houses in village, looted the property and killed persons. From amongst the mob, they have been identified by a large number of witnesses. In view of overwhelming evidence, their presence in the mob, which perpetrated the crime, is proved beyond all reasonable doubt.

29. Mr. Sinha, submits that even if the case of the prosecution is accepted in its entirety, the appellants can be said to be present with other persons in the mob and according to him, mere presence in the assembly will not make them members of the unlawful assembly to bring their act within the mischief of Section 149 of the Indian Penal Code. In support of the submission, reliance has been placed on a decision of the Supreme Court in the case of Baladin and Others Vs. State of Uttar Pradesh, and my attention has been drawn to the following passage of paragraph no. 19:

"19. xxx If members of the family of the appellants and other residents of the village assembled, all such persons could not be condemned "ipso facto" as being members of that unlawful assembly. It was necessary, therefore, for the prosecution to lead evidence pointing to the conclusion that all the appellants before us had done or been committing some overt act in prosecution of the common object of the unlawful assembly.

The evidence as recorded is in general terms to the effect that all these persons and many more were the miscreants and were armed with deadly weapons, like guns, spears, pharsas axes, lathis, etc. This kind of omnibus evidence naturally has to be very closely scrutinised in order to eliminate all chances of false or mistaken implication. That feelings were running high on both sides is beyond question.

That the six male members who were done to death that morning found themselves trapped in the house of Mangal Singh has been found by the courts below on good evidence. We have, therefore, to examine the case of each

individual accused to satisfy ourselves that mere spectator who had not joined the assembly and who were unaware of its motive had not been branded as members of the unlawful assembly which committed the dastardly crimes that morning.

It has been found that the common object of the unlawful assembly was not only to kill the male members of the refugee families but also to destroy all evidence of those crimes. Thus even those who did something in connection with the carrying of the dead bodies or disposal of them by burning them as aforesaid must be taken to have been actuated by the common objective."

30. My attention has also been drawn to the decision of the Supreme Court in the case of Bishna alias Bhiswadeb Mahato & Ors. vs. State of West Bengal 2005 AIR(6) SCW 5798 in which it has been held as follows :

"62. For the purpose of attracting Section 149 of the IPC, it is not necessary that there should be a pre-concert by way of a meeting of the persons of the unlawful assembly as to the common object. If a common object is adopted by all the persons and shared by them, it would serve the purpose."

31. Reliance has also been placed on a judgment of the Supreme Court in the case of Masalti & Others vs. The State of Uttar Pradesh and my attention has been drawn to paragraph no. 17 which reads as follows:

"Mr. Sawhney then attempted to urge that the High Court failed to give effect to the principles enunciated by this Court in the case of Baladin and Others Vs. State of Uttar Pradesh, . In that case, it was observed by Sinha, J., who spoke for the Court-that it is well settled that mere presence in an assembly does not make a person, who is present, a member of a unlawful assembly unless it is shown that he had done something or omitted to do something which would make him a member of an unlawful assembly, or unless the case falls under S.142, I.P.C. The argument is that evidence adduced by the prosecution in the present case does not assign any specific part to most of the accused persons in relation to any overt act, and so, the High Court was in error in holding that the appellants were members of an unlawful assembly. The observation of which Mr. Sawhney relies, prima facie, does seem to support his contention; but, with respect, we ought to add that the said observation cannot be read as laying down a general proposition of law that unless an overt act is proved against a person who is alleged to be a member of an unlawful assembly, it cannot be said that he is a member of such an unlawful assembly. In appreciating the effect of the relevant observation on which Mr. Sawhney has built his argument, we must bear in mind the facts which were found in that case. It appears that in the case of Baladin and Others Vs. State of Uttar Pradesh, the members of the family of the appellants and other residents of the village had assembled together; some of them shared the common object of the unlawful assembly, while others were merely passive witness. Dealing with such an assembly, this Court observed that the presence of a person in an assembly of that kind would not necessarily show

that he was a member of an unlawful assembly. What has to be proved against a person who is alleged to be a member of an unlawful assembly is that he was one of the persons constituting the assembly and he entertained along with the other members of the assembly the common object as defined by S.141, I.P.C., Section 142 provides that whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly. In other words, an assembly of five or more persons actuated by, and entertaining one or more of the common objects specified by the five clauses of S.141, is an unlawful assembly."

32. Mr. Prasad, however, appearing on behalf of the State, submits that for bringing the offence within the mischief of Section 149 of the Indian Penal Code, it would not be necessary that before a person is held to be a member of an unlawful assembly, it must be shown that he had committed some illegal overt act or has been guilty of some illegal omission in pursuance of common object of the assembly. He points out that all the accused persons variously armed raided the village one after another, set the houses on fire, looted properties and killed innocent persons. The members of the mob knew that such offence is likely to be committed and hence, each member of the assembly shall be guilty of the offence.

33. Having appreciated the rival submission, I do not find any substance in the submission of Mr. Sinha and the decisions relied on, in no way, support the case of the appellants. Section 141 of the Indian Penal Code defines unlawful assembly to mean an assembly of five or more persons the common object of which is to do various acts as indicated in the said section. Section 142 of the Indian Penal Code makes liable every person aware of the facts intentionally joining the assembly to be a member of unlawful assembly. Section 149 of the Indian Penal Code puts constructive criminal liability on every member of unlawful assembly guilty of offence committed in prosecution of common object guilty of that offence. It creates vicarious liability of the members of the unlawful assembly for the unlawful acts committed pursuant to the common object by any other member of that assembly. However, a word of caution needs to be emphasised at this stage, the vicarious liability of the unlawful assembly extends only to the cause done in pursuance of the common object of the unlawful assembly or to such offences as the members of unlawful assembly knew to be likely to be committed in prosecution of that object. In my opinion, once the case of an accused falls within the aforesaid category, a question that he did nothing with his own hands, would be immaterial.

34. The point under consideration is not *res Integra* and, in fact, had been the subject matter of decision by the Supreme Court in large number of cases. In case of *Bikau Pandey and Others vs. State of Bihar* AIR 2004 SC 997[: 2004(1) PLJR (SC)124], the question was succinctly answered in the following words:

"10. A plea which was emphasised by the respondents relates to the question whether S.149, I.P.C. has any application for fastening the constructive liability

which is the sine qua non for its operation. The emphasis is on the common object and not on common intention. Mere presence in an unlawful assembly cannot render a person liable unless there was a common object and he was actuated by that common object and that object is one of those set out in S. 141. Where common object of an unlawful assembly is not proved, the accused persons cannot be convicted with the help of S. 149. The crucial question to determine is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects, as specified in S. 141. It cannot be laid down as a general proposition of law that unless an overt act is proved against a person, who is alleged to be a member of unlawful assembly, it cannot be said that he is a member of an assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of S. 141. The word "object" means the purpose or design and, in order to make it "common". It must be shared by all. In other words, the object should be common to the persons, who compose the assembly, that is to say, they should all be aware of it and concur in it. A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. The expression "in prosecution of common object" as appearing in S. 149 have to be strictly construed as equivalent to "in order to attain the common object". It must be immediately connected with the common object by virtue of the nature of the object. There must be community of object and the object may exist only up to a particular stage, and not thereafter. Members of an unlawful assembly may have community of object up to certain point beyond which they may differ in their objects and the knowledge, possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence of this the effect of S. 149, I.P.C. may be different on different members of the same assembly."

(underlining mine)

35. The Supreme Court had the occasion to consider this question in the case of Chanda and Others Vs. State of U.P. and Another, wherein it has been held as follows:

"13. xxx It is not really necessary to determine as to which of the accused persons forming part of the unlawful assembly inflicted that particular or specific injury in the course of the occurrence. That the number of actually convicted persons is less than five or that the case projected certain one as having inflicted the injury but the same could not vis-a-vis that person actually be proved to have been committed or that such person came to be acquitted for some reason or the other peculiar to him does not in any manner prejudice the case of the

prosecution or the liability of others who formed the unlawful assembly to be convicted for having carried out the object by merely being the members of the unlawful assembly, as long as the participation of others in furtherance of the common object of the unlawful assembly remained sufficiently substantiated."

36. The Supreme Court, after referring to a large number of decisions rendered earlier, in the case of *Dani Singh & Ors. vs. State of Bihar* 2004(4) PLJR 1(SC), laid down the law in the following words:

"21. The plea that some of the accused persons, did not commit any overt act would really of no consequence. They were not mere sightseers as claimed. There is nothing to show that they had dissuaded the persons from committing the criminal act or withdrew at any point of time during the course of the incident constituting by itself or as a step in furtherance of the ultimate offence. There is nothing unusual in deceased Gopi running after the deceased Kishun and other eye witnesses. In order to ascertain as to what was the cause of the explosion and to run after the deceased seeing him towards house of P.W. 6. The eye witnesses have identified the accused person's and have stated about their presence inside the house of P.W. 6. There is no discrepancy so far as the identification is concerned and about the weapons carried by the identified accused persons. It has also come in evidence that the targeted victims were the deceased persons with whom the animosity is admitted. The objective findings recorded by the I.O. on spot verification also are in line with the evidence of eye witnesses."

37. From the decision of the Supreme Court referred to above, it can be safely inferred that when definite role is not attributed to the accused, Section 149 of the Indian Penal Code, shall not be applicable, is untenable in law. Common object of the unlawful assembly, in my opinion, can be gathered from the nature of the assembly, arms used by them and the behaviour of the assembly at or before the scene of occurrence. It is an inference to be deduced from the facts and circumstances of each case to ascertain whether the particular person shared the common object of the unlawful assembly. It is not essential to prove that he committed some illegal overt act or has been guilty of some illegal omission in pursuance of the common object. Once the facts of a given case establish that an accused shared the common object of the unlawful assembly in furtherance of which some offence is committed or he knew it is likely to be committed by any person, he should be guilty of that offence.

38. Bearing in mind the aforesaid, when I proceed to examine the facts of the case, it is evident that the mob consisted of about 400 persons and they were variously armed. They came to the village, set on fire houses, looted the properties and killed innocent persons. The conduct of the accused persons prior and during the course of occurrence, clearly demonstrate that their common object was to commit loot, arson and murder. In that situation, every member of the unlawful assembly, shall be guilty of offence committed by another member of that unlawful assembly. Accordingly, in my opinion, the learned Judge rightly

applied Section 149 of the Indian Penal Code.

39. Now, referring to the decision of the Supreme Court in the case of Baladin (supra) relied on by the appellants, same is clearly distinguishable.

40. To put the record straight, the judgment of the Supreme Court in the case of Baladin (supra) was analyzed by four Judge's Bench of the Supreme Court in the case of Masalti (supra) in which it has been held that the observation in the case of Baladin (supra) was made in the background that some persons who were merely passive witnesses and joined the assembly as a matter of idle curiosity without intending to entertain the common object of the assembly, cannot be held guilty with the aid of Section 149 of the Indian Penal Code. In the said case, it has specifically been observed that the observation made in the case of Baladin (supra) must be read in the context of the said facts of that case and cannot be treated as laying down an unqualified proposition of law that mere presence in the assembly does not make a person a member of unlawful assembly unless it is shown that he had done something or omitted to do something which would make him a member of an unlawful assembly. This would be evident from the following passage from paragraph no. 17 of the judgment of the Supreme Court in the case of Masalti (supra) which reads as follows :

"17 xxxx. While determining this question, it becomes relevant to consider whether the assembly consisted of some persons who were merely passive witnesses and had joined the assembly as a matter of idle curiosity without attending to entertain the common object of the assembly. It is in that context that the observations made by this Court in the case of Baladin and Others Vs. State of Uttar Pradesh, assume significance; otherwise, in law, it would not be correct to say that before a person is held to be a member of an unlawful assembly, it must be shown that he had committed some illegal overt act or had been guilty of some illegal omission in pursuance of the common object of the assembly. In fact, S. 149 makes it clear that if any offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence; and that emphatically brings out the principle that the punishment prescribed by S. 149 is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly. Therefore, we are satisfied that the observations made in the case of Baladin and Others Vs. State of Uttar Pradesh, must be read in the context of the special facts of that case and cannot be treated as laying down an unqualified proposition of law such as Mr. Sawhney suggests."

41. From what has been stated above, it is evident that the decision of the Supreme Court in the case of Masalti (supra) relied by the appellants, instead of supporting their case, goes against them, so is the decision rendered by the Supreme Court in the case of Bishna @ Bishwadeb Mahto (supra).

42. Taking into consideration the entire evidence on record, I am of the opinion that the prosecution has brought home the charge beyond all reasonable doubt against all the appellants excepting appellants Kalu Rajbanshi and Gopal Soren. In the result, Cr. Appeal No. 566 of 1993, so far as it relates to appellant Kalu Rajbanshi and Gopal Soren, is allowed. Their conviction and sentence is set aside. Kalu Rajbanshi and Gopal Soren are on bail. They shall be discharged of their bail bonds. Cr. Appeal No. 566 of 1993 filed by appellants, other than Kalu Rajbanshi and Gopal Soren and Cr. Appeal No. 45 of 1996 preferred by Chandra Hansda are dismissed. They are on bail. Their bail bonds are cancelled and they are directed to surrender to serve out the remainder of sentence.

J.N. Singh, J.

I agree.