
(2003) 01 PAT CK 0082

In the Patna High Court

Case No : Death Reference No. 4 of 2001 with Criminal Appeal (DB) No's. 421 and 457 of 2001

The State of Bihar

APPELLANT

Vs

Ram Prit Rai
 Ram Prit Rai Vs The State of Bihar

RESPONDENT

Date of Decision : 03-01-2003

Acts Referred:

Arms Act, 1959 — Section 27

Penal Code, 1860 (IPC) — Section 148, 149, 302, 307, 380

Citation : (2003) 51 BLJR 397 : (2003) 2 PLJR 8

Hon'ble Judges : Sachchidanand Jha, J;P.N. Yadav, J

Bench : Division Bench

Advocate : P.N. Pandey, Kanhaiya Prasad Singh, Sachchidanand Choudhary, R. Griyaghey, Neelam Kumari, Lavkush Kumar, Ganesh Prasad Singh and Dinesh Prasad Verma and Lala Kailash Bihari, for the Appellant;

Judgement

S.N. Jha, J.—The sole appellant of Cr. Appeal No. 421/2001 Ram Prit Rai has been awarded death sentenced upon his conviction u/s 302 of the Penal Code. All the appellants including Ram Prit Rai have been convicted u/s 302/149 of the Penal Code and sentenced to rigorous imprisonment for life. They have also been convicted u/s 307/149, 380 & 148 of the Penal Code and Section 27 of the Arms Act and sentenced to rigorous imprisonment for ten years, three years, three years and three years respectively thereunder. The sentence have been ordered to run concurrently. The sentence of death awarded to Ram Prit Rai has been sent for confirmation u/s 306 Cr. P.C. and the same has been heard along with his appeal.

2. The night between 29th/30th November, 1994 was indeed an unfortunate night for Parmanand Rai, the informant of the case, and his unless Awadh Rai and Arjun Rai of village Shahpur Barant, district Samastipur when six member of their families were killed at the hands of the miscreants at about 1.30 a.m. The occurrence was reported by Parmanand Rai in the following morning i.e. the morning of 30-11-94 at 8.30 a.m. at the place of occurrence namely Shahpur

Barant, a village within Shahpur Patori Police Station of Samastipur district. Earlier Bhutto Rai, husband of one of the victims, also had made a statement about the occurrence at about 4.45 a.m. at Mohiuddin Nagar Hospital. However, the statement made by Parmanand Rai has been treated as the fardbeyan. I shall come to this aspect at the proper place later in this judgment.

3. The prosecution case briefly stated is as follows. At about 1.30 a.m. in the night of occurrence Parmanand Rai came out of his house to urinate. He saw flash of torch light coming towards the house. He became apprehensive. He also flashed his torch towards them. He saw the appellants and others variously armed near the well in front of the house. He requested two of them namely, Parichhan Rai and Ram Prit Rai not to commit any act of atrocity. Ram Prit Rai said that he would eliminate entire family and fired from his rifle. He (Parmanand Rai) somehow saved himself under the cover of wall and went into the courtyard of the house. Ram Prit Rai and Subhash Rai chased him and they also entered the courtyard. Meanwhile on hearing the sound of gun shot his wife, Indu Devi, had woken up. She begged and touched the feet of Ram Prit Rai requesting him not to do injustice. Subhash Rai (not put on trial and he absconded) shot at her from his country made pistol hitting on the side of abdomen and she fell down. Meanwhile Rit Lal Rai, Sainik Rai and Satto Rai also entered the house. They threw the house-hold articles and took away ornaments and cash worth Rs. 20,000/- kept in boxes. In the meantime Parmanand Rai had managed to hide himself behind pumpkin creeper hanging from the roof of adjacent house belonging to Arjun Rai. He heard shots of gun firing. Ram Prit Rai, Subhash Rai, Sainik Rai and Uma Rai went towards the house of Arjun Rai, his uncle. Mukesh Rai, grand son of Arjun Rai, aged about 10 years, started fleeing away when Ram Prit Rai shot at him. The miscreants had meanwhile entered the house of Arjun Rai and killed his daughter Sarita Devi aged about 20 years who was sleeping on the verandah. They kept firing shots from their guns etc. There also they took away ornaments kept, in boxes and scattered the articles. After the miscreants fled away, he found that they had also killed Wakil Rai, grand-son of Arjun Rai, aged 14 years. While fleeing away Parichhan Rai was saying that son of Moti Rai would be at the "Dera" about 1 Km away at a place known as Beni Bishanpur. At about 4 O'clock in the morning one Arjun Rai (another Arjun Rai son of Mishri Lal Rai) informed him that Parichhan Rai had shot his father Dorik Rai, aged 75 years, at his Dera. He also informed that Parichhan Rai was accompanied by 15-20 persons variously armed. The informant went towards the Dera along with the villagers and found his grand father dead.

Parmanand Rai stated that the reason of the occurrence was that Parichhan Rai and his sons namely Ram Prit Rai and Subhash Rai were notorious criminals of the area. During the last flood he along with his associates had kidnapped Saryug Thakur of village Jalapur. In the raid conducted by the police in connection with the occurrence he had helped the police party by ferrying them from one place to another in his boat. The members of his family used to oppose the criminal activities of Parichhan Rai and his sons. On account of this enmity

they committed the crime.

4. On the basis of aforesaid information recorded by the Officer Incharge of the Police Station, S.I. Jitendra Jha, the police registered Patori PS Case No. 106/94 at about 2 p.m. on 30-11-94. It may be mentioned that the distance between village Shahpur Barant and the Police Station is said to be 22 kms. Earlier, after recording the fardbeyan, J. Jha had held inquest on the dead bodies, taken steps for their post-mortem and recorded the statement of some of the witnesses. The investigation was taken over by SI Manoj Kumar on the direction of Superintendent of Police on 1-12-94. On his transfer he handed over the case to SI Dayanath Jha on 17-12-94. Immediately after taking over the investigation he recorded the statements of the left over witnesses such as Awadh Rai, Lakhia Devi and Ful Kumari Devi. The belated recording of their statements was one of the submissions of the Counsel for the appellants and I shall refer to the same at the appropriate place in this judgment. It may be mentioned here that Dayanath Jha too could not complete the investigation on account of his transfer. He handed over the investigation back to SI Manoj Kumar who after completing the necessary formalities submitted chargesheet and the appellants were put on trial.

5. At the trial the prosecution examined 21 witnesses to prove its case. Out of them PW 1 Uday Prasad Singh, PW 2 Suresh Prasad Singh, PW 3 Chakradhar Prasad Singh and PW 15 Babua Ram Mahto were declared hostile. PW 4 Arjun Rai, son of Mishri Lal Rai also did not support the prosecution case to some extent. He however, was not declared hostile. PW 13 Devendra Rai, PW 20 Md. Soaib and PW 21 Sunil Kumar Chaudhary were examined as formal witnesses. They proved respectively the seizure list, FIR and the handwriting of SI Chandrika Sharma who had recorded the aforementioned statement of Bhutto Rai at Mohidduin Nagar hospital on 30-11-94. Dr. Amar Nath Jha and Dr. Md, Jamaluddin who had held post-mortem on the dead bodies were examined as PWs 12 and 16. Dr. D.K. Roy who had examined the injuries of some of the injured was examined as PW 18. SI Manoj Kumar who had made part investigation and submitted the chargesheet and SI Dayanath Jha, the part I.O., who had taken up investigation on 17-12-94 were examined as PWs 17 & 19. The remaining witnesses, namely, PW 5 Awadh Rai, PW 6 Lakhia Devi, PW 7 Arjun Rai son of Ram Kishun Rai, PW 8 Dinesh Rai, PW 9 Bhutto Rai, PW 10 Jawahar Rai, PW 11 Phul Kumari Devi and PW 14 Parmanand Rai, the informant himself, are material witnesses in this case. Amongst them PW 6 Lakhia Devi and PW 11 Phul Kumari Devi had sustained injuries in course of occurrence. The first Investigating Officer SI Jitendra Jha was not examined in the case. The appellants too did not examine any witness in their defence. At the end of the trial the appellants were convicted and awarded sentences in the manner stated above.

6. Before adverting to the arguments made on behalf of the appellants it would be appropriate to notice certain salient features of the case. The occurrence took place in three houses those of the Parmanand Rai, Awadh Rai and Arjun Rai. The

houses of Parmanand Rai and Awadh Rai were adjacent to each other while the house of Arjun Rai was situated 20 Laggas, of 18-20 feet each, east of the house of Awadh Rai. The occurrence first took place in the house⁴ of Parmanand Rai from where the miscreants moved to the house of Awadh Rai and then to the house of Arjun Rai before they went to the "Dera" of Parmanand Rai one Km. away at Beni Bishanpur, described by some persons as Diara. In the house of Parmanand Rai the miscreants killed Indu Devi, his wife, and injured Pachhiya (not examined as witness) and PW 6 Rukhiya, his grand-mother and mother respectively. In the house of Awadh Rai they killed Wakil Rai and Nirmala Devi, his grand-son and daughter-in-law respectively. Said Nirmala Devi was wife of PW 9 Bhutto Rai, son of Awadh Rai, Pramila Kumari, grand-daughter of Awadh Rai. Pramila Kumari, grand-daughter of Awadh Rai and daughter of PW 9 Bhutto Rai, was injured. She was also not examined as witness at the trial. In the house of Arjun Rai the miscreants killed his daughter Sarita Devi and grand-son (son of another daughter) Mukesh. PW 11 Phul Kumari Devi, his wife, was injured. Dorik Rai, grand-father of Parmanand Rai, as seen above, was killed at his "Dera" at Beni Bishanpur, One Km. away.

7. A brief introduction pointing out inter se relationship between the eight material witnesses may also be given here. As a matter of fact all of them belong to the same stock representing the branch of Beeja Rai while the accused are descendants of Jogi Rai. Beeja Rai and Jogi Rai were brothers. Amongst the prosecution witnesses, PW 5 Awadh Rai and PW 7 Arjun Rai are uncles of PW 14 Parmanand Rai, PW 6 Lakhiya Devi, PW 8 Dinesh Rai and PW 10 Jawahar Rai are related to PW 14 Parmanand Rai as mother and brothers respectively. PW 5 Awadh Rai and PW 9 Bhutto Rai are father and son while PW 7 Arjun Rai and PW 11 Phul Kumari Devi are husband and wife.

8. The close relationship between the witnesses was one of the submissions which Counsel for the appellants made, albeit, half-heartedly. Having regard to the fact that the occurrence took place in the dead of night, inmates of the house along would have seen the same and therefore, the fact that the witnesses are closely related to each other cannot be a circumstance in favor of the appellants. Indeed, where the occurrence is seen by the relatives it is unlikely that they would name others as accused and thus allow the real guilty to escape.

9. It was submitted on behalf of the appellants that though the occurrence took place one after the other in three separate houses the witnesses claimed to have seen the entire occurrence. Considering that the houses of Parmanand Rai and Awadh Rai are separated by a high wall and that the house of Arjun Rai was situated 20 taggas away it is unlikely that they would have seen the occurrence which took place in others houses. The submission is attractive but does not hold the appellants at all.

10. We may in this regard to the evidence of Parmanand Rai, Awadh Rai his son Bhutto Rai and Arjun Rai describing the manner of occurrence. I have already mentioned above the fardbeyan version of Parmanand Rai. He firstly described

the manner in which the miscreants entered his house firing shots from their guns etc. He escaped to the house of Awadh Rai by crossing the wall. As seen above it is not in dispute that houses of Parmanand Rai and Awadh Rai are situate adjacent separated by a wall. He had thus no difficulty in watching the occurrence in the house of Awadh Rai. Parmanand Rai thereafter, stated about the occurrence in the house of Arjun Rai. He must have learnt the details of the occurrence from Arjun Rai and/or other witnesses. Where the occurrence takes place in house or houses of close relatives it is quite natural that they would interest and discuss the occurrence after the miscreants leave the place and in the FIR the substance of the occurrence is narrated.

PW 5 Awadh Rai stated that he heard the sound of gun firing coming from the house of Parmanand Rai. He and his wife hid themselves by the side of his house. He saw the appellants coming. They were variously armed. They broke the latch of the door and entered the courtyard and after dragging out his grandson Wakil Rai fired at him. When wife of Bhutto Rai i.e. his daughter-in-law, Nirmaia Devi, came to save Wakil Rai the miscreants fired at her too. They also broke open the boxes in the courtyard and took away ornaments etc. Other miscreants entered the house of his brother Arjun Rai and there fired shots at his wife Phul Kumari, daughter Sarita and (another) daughter's son Mukesh. The latter two succumbed to their injuries. Phul Kumari however survived. In the house of Parmanand also his wife Indu Devi had been shot at. While being taken for treatment she too succumbed to her injuries. The miscreants thereafter, went to Dorik Rai's residence at Beni Bishanpur and killed him there. PW 7 Arjun Rai and PW 9 Bhutto Rai also deposed to the same effect.

11. Phul Kumari Devi, wife of Arjun Rai and Rukhiya Devi mother of Parmanand Rai who suffered injuries in course of the occurrence also gave similar description of the occurrence. It is relevant to mention here that these two witnesses, amongst others injuries, were examined by PW 18 Dr. D.K. Roy respectively at 5.35 a.m. and 4.40 a.m. on 30-11-94. The doctor found fire arm injuries on both of them. On Phul Kumari Devi the injuries found were (i) One lacerated wound with smoky margin on right side neck 4" x 1" x 1/2"; (ii) One lacerated wound with smoky margin on right index finger; and (iii) One lacerated wound with smoky margin on right arm 1"x 1/2" x 1/3". On Rukhiya Devi the injuries were: (i) One rounded wound with smoky margin on ventral aspect of right forearm with passing through whole thickness of right arm 1/2" x 1/2": (ii) One rounded wound with smoky and burn margin on dorsal side of right arm in the line of first wound of right arm. Having regard to the nature of the injury and approximate of time of their medical examination their presence at the place and time of occurrence cannot be ruled out.

12. It is true that reading of the evidence of these eye- witnesses at the first instance gives an impression as if they had seen the entire sequence of occurrence with their own eyes. However, they were not specifically asked in cross-examination as to whether they had seen the occurrence which took place

in others houses themselves or they narrated the incidents as they came to know about it. It is to be kept in mind that these witnesses are close relatives and therefore, it is quite natural that after the occurrence was over and the miscreants had left the place they told each other about the details of the occurrence. But that does not mean that their version of the occurrence should be rejected. Even if the submission of the Counsel for the appellants is accepted and that part of the evidence of the witnesses which relates to the occurrence taking place in the house/houses of others is treated as hearsay, it would not affect that part of the evidence relates to occurrence in their own house which they had seen themselves. The events took place in quick succession, the miscreants first entered the house of Parmanand. Having fired shots and fatally injured Indu Devi, also injured PW 6 Rukhiya and Pachhiya, and looted the articles they went to the house of Awadh Rai and after committing the crime there they moved to the house of Arjun Rai. It is, therefore, plausible to think that the same group of persons which committed the crime in the house of Parmanand Rai, entered the house of Awadh Rai and Arjun Rai and committed the crime in their houses too. The appellants having been convicted under Sections 302 and 307 with the aid of Section 149 of the Indian Penal Code (apart from the conviction of appellant Ram Prit Rai u/s 302 simpliciter), if the presence of the appellants at the place and time of occurrence is proved they cannot escape the liability. Counsel for the appellants fairly did not dispute this legal position.

13. It was submitted that the prosecution has withheld the earlier version of the occurrence. Though as per the evidence of PW 5 Awadh Rai, statement of deceased Indu Devi was recorded by Sub-inspector of Police at Mohiuddin Nagar Hospital (at about 5 a.m.) the same has not been allowed to see light of the day. It was also submitted that the evidence suggests that the Chaukidar had come to the place of occurrence but he has been withheld too.

14. It is true that towards and of his cross-examination Awadh Rai did say that Sub-Inspector of Police had recorded the statement of Indu Devi wife of Parmanand Rai at the hospital but that seems to be a stray statement out of context. Even if it be assumed that Indu Devi did make statement which was recorded by Sub-Inspector of Police it is not in dispute that at about the same time at 5.45 a.m. 9 Bhutto Rai had made statement, Ext. 5/1, about the occurrence which was recorded by SI Chandrika Sharma of Mohiuddin Nagar PS vide evidence of PW 21 Sunil Kumar Choudhary. As a matter of fact, as seen above, a submission was made on behalf of the appellants that statement of Bhutto Rai should have been treated as fardbeyan, Ext. 5/1 shows that except the allegation of loot and taking away of the articles made in the fardbeyan of Parmanand Rai, Bhutto Rai also gave almost similar account of the occurrence. As a matter of fact, while replying to the submission of Counsel for the appellants that Ext. 5/1 should have been treated as fardbeyan, Counsel for the State boldly submitted that it matters little whether Ext. 5/1 or Ext. 4 i.e. fardbeyan of Parmanand Rai were the basis of the prosecution case.

15. Adverting to the point at issue if Bhutto Rai made similar statement as Parmanand Rai, the alleged suppression of the so called statement of Indu Devi cannot be of any advantage to the appellants. It is to be kept in mind that the fardbeyan of Parmanand Rai was recorded at the place of occurrence at 8.30 a.m. while Bhutto Rai had given the statement at 5.45 a.m. at Mohiuddin Nagar, 22 Km. away from the place of occurrence. He had taken the six injured (two of whom died later) to Mohiuddin Nagar hospital immediately after the occurrence for treatment, in all likelihood assuming that so called statement of Indu Devi was recorded by the Sub-Inspector of Police as stated by PW 5 Awadh Rai this must have been done by SI Chandrika Sharma who recorded Ext. 5/1. If the same police officer recorded Bhutto Rai's statement at a distance of 22 Kms shortly after the occurrence and about three hours before the fardbeyan of Parmanand Rai, I am inclined to think that the so called statement of Indu Devi must be similar as the statement of Bhutto Rai, 5/1. In any case, there being no material discrepancy, so far as the crime of murder is concerned, between two statements of Bhutto Rai and Parmanand Rai recorded at distant places at different times, the alleged suppression of the so-called statement of Indu Devi is of little consequence from the appellants' point of view.

16. As regards the submission that the Chaukidar has been withheld, it may be mentioned that from the case diary it does not appear that the Chaukidar had gone to the police station to inform about the occurrence. The Officer Incharge of Mohiuddin Nagar PS Jitendra Jha proceeded to the village of occurrence on hearing rumour about some occurrence taking place there. PW 7 Arjun Rai denied to have seen the Chaukidar or Dafadar at the place of occurrence. The submission of the Counsel relating to suppression of the so called earlier version has thus no substance.

17. Coming to the other aspect of the statement of Bhutto Rai it was submitted on behalf of the appellants that Parmanand Rai in his fardbeyan stated about loot of the articles by the miscreant but there is no. such allegation in the statement of Bhutto Rai. I have gone through the contents of Ext. 5/1. The statement of Bhutto Rai is to the effect that in the proceeding night at about 1 O'clock about 50-60 persons armed with guns etc. suddenly came at the darwaja of his house after surrounding the house of his uncle Arjun Rai and Moti Rai (father of PW 14 Parmanand Rai) started firing from their guns and hurling bombs as a result of which his wife Nirmala Devi, Parmanand Rai's wife Indu Devi, Arjun Rai's wife Phul Kumari Devi, Dorik Rai's wife Bachiya Devi and his daughter Pramila Kumari were injured while Wakil Rai and Sarita Devi had died in the village itself. All the injured were conscious in the hospital (Indu Devi and Nirmala Devi died later in the hospital). He named eight appellants as members of the mob. He claimed that his family members might have seen others and they would stated about them, He further stated that his family members and neighbours had seen the occurrence and they would narrate the same. He further stated that the cause of occurrence was old enmity between his family members and the family members of Parichhan Rai because they (Bhutto Rai's family) were co-operating with the

police.

I thus do not find any material difference in the two versions of Bhutto Rai and Parmanand Rai (Exts. 5/1 and 4) except, of course, that Ext. 4 refers to breaking open the boxes and taking away the articles and killing of Dorik Rai. As regards the killing of Dorik Rai, Bhutto Rai having taken the injured to Mohiuddin Nagar Hospital immediately after the occurrence some of them in critical condition by the time he left the village he had no idea that Dorik Rai too had been killed. As regards the element of dacoity, it appears to me that the articles might have been looted to appear as if crime was committed by professional dacoits. As fairly submitted on behalf of the appellants, the fardbeyan of Parmanand Rai suggests that murder was the dominant intention. This appears to be so. The loot of articles was definitely not as serious as murder and therefore, it was unnatural if Bhutto Rai referred to only killing part of the occurrence. In any view of the matter, if the evidence of the eyewitnesses who spoke about the murder of five out of six deceased (with the exception of Dorik who was killed at a different place) the appellants cannot escape the liability of the crime of murder.

18. It was submitted that it was a dark night and identification was difficult. I do not find any substance in the submission. Firstly, the miscreants were flashing torch light and atleast Parmanand Rai too claimed to have flashed his three-celled torch when he had come out of his house to urinate. Besides the appellants were not strangers. It was not as if the crime was being committed by unknown dacoits. The appellants are in fact agnates of the prosecution party. As mentioned above, all the appellants belong to the branch of Joji while the PWs belong to the branch of Beeja, both were full brothers. It was stated in course of hearing that all of them had built houses on the same plot of land measuring 26 Kathas. In fact, dispute was going on with respect to the land, Being agnates by relationship and close neighbours there was no difficulty in identifying the appellants in the torch light or even otherwise from close proximity. It is now judicially recognised that ability to see things or people in the darkness of night is more amongst the villagers than city-dwellers who are used to fluorescent light.

19. It was then submitted that there are discrepancies in the evidence of witnesses on the point of identification. This submission too in the facts and circumstances of the case cannot be accepted. Where the occurrence comprises of series of events at different places and houses, it is natural for the witnesses to describe the occurrence as they saw it from a particular and therefore, if some of the witnesses did not identify some of the appellants it would rather lend credence to the prosecution case than weaken it. As a matter of fact, as noted above, it was the submission of the Counsel for the appellants that the occurrence as a whole could not have been seen by the witnesses as it took places in the different houses. I have already dealt with this aspect of the case. I have observed that the crime was committed by the some group of persons at the same time and in the same transaction. If that is so, identification of some of the appellants by the witnesses may be sufficient to prove their presence.

Counsel for the State gave details of the identification. According to him appellant Parikshan Rai was identified by PWs. 5, 6, 7, 9, 10 and 14, Ramprit Rai was identified by PWs 5, 6, 7, 8, 9, 10, 11 and 14, Pokhran Rai and Maheshwar Rai were identified by P.Ws. 5, 6, 7, 8, 9, 11 and 14, Sukhdeo Rai was identified by PWs 8, 11 and 14, Sainik Rai was identified by PWs, 5, 6, 7, 9, Hand 14, Maheshwar Rai was identified by PWs. 7 and 8, Satto Rai was identified by PWs. 5, 7, 8 and 14, Bharat Rai was identified by PWs. 7 and 14, Ritlal Rai was identified by PWs. 5, 6, 8, 10, 11 and 14, Medani Rai was identified by PWs. 5, 7, Sand 11, Bhuneshwar Rai was identified by PWs. 5 and 14, and Raghubir Rai was identified by PW 6. In my opinion, the evidence on the point of identification in the above manner conclusively proves the presence of the appellants at the place and time of occurrence. Section 149 of the Indian Penal Code provides that if an offence is committed by any member of an unlawful assembly in prosecution of common object of that assembly, or such as the member of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of committing of that offence, is a member of the assembly is guilty of that offence. In the instant case there is evidence that the appellants were variously armed. If they came with arms forming an unlawful assembly and murders etc. were committed, it would follow that the common object of the assembly was to commit murder etc. and therefore, every person or member of the assembly would be equally guilty of the offence.

20. It was submitted that the alleged motive has not been proved as held by the trial Court, and therefore, the prosecution case becomes doubtful. I do not find any substance in this argument either. Motive is relevant in cases of circumstantial evidence, where the occurrence is seen by eye-witnesses subject to the reliability of the ocular evidence, the case of the prosecution cannot fail even if the alleged motive is not proved.

21. It was also submitted that if the appellants were indeed inimical towards the members of the prosecution party they would have killed the male members rather than the females and children. The arguments looks attractive but does not make the prosecution case doubtful. Awadh Rai, Arjun Rai and Parmanand Rai claimed to have hid themselves. The conduct cannot be said to be unnatural. The relationship between the two sides was inimical and when the witnesses saw the appellants and others coming in a group with fire arms in the dead of night they naturally tried to cover themselves. Finding none of them around (except Parmanand) the miscreants shot at whosoever came in their way. In this manner five persons were killed in the three houses while four were injured. It is to be kept in mind that it is sometimes difficult to explain human behavior. The behaviour depends on circumstance's and varies from person to person. Thus if the appellants killed the deceased, merely on the ground that male members were not killed or that Parmanand was not killed at first instance, the case of the prosecution would not become doubtful.

22. It was also submitted that PW 5 Awadh Rai in his evidence stated that he

was sleeping along with PW 15 Babua Ram Mahto (or Babua Lal Choudhary as described by him) on the same cot in the night of occurrence but Babua Lal Choudhary did not support the prosecution case. The submission has been noticed only to be rejected for the simple reason that Babua Ram Mahto turned hostile and if he thus did not support the prosecution case much would turn in favour of the appellants.

23. It was submitted that at least three material witnesses, PW 5 Awadh Rai, PW 6 Rukhiya Devi and PW 1 Phul Kumari Devi were examined after 18 days of the occurrence on 18-12-94 and that the main I.O. was not examined. The delay in examination prima facie was due to inaction on the part of the IO. At least one of them, SI Jitendra Jha, was relieved of the case on the direction of the S. P. (He was in fact suspended). So far as the second submission is concerned, SI Manoj Kumar and SI Daya Nath who remained in charge of the case, throughout from 1-12-94 and recorded the statements of most of the witnesses, came to depose as PWs 17 and 19 and the appellants therefore, cannot complain of any prejudice.

24. Lastly, as regards Ram Prit Rai who has been awarded death sentence, it was submitted that he was charged with killing Sarita Devi and Mukesh Kumar (whereas the evidence of the eye witnesses suggests that he had killed Wakil Rai and Indu Devi) and he has been convicted for committing murder of "others" as well. There thus appears to be discrepancy in the charge and the evidence and his conviction u/s 302 of the Penal Code simpliciter would not be justified. I find substance in this contention. In my opinion in the facts and circumstances of case, though Ram Prit Rai played a leading role in the entire occurrence, for the purpose of conviction and sentence he stands on the same footing as other appellants. He has also been convicted u/s 302 with the aid of Section 149 of the Penal Code apart from Section 302 simpliciter, and it would be sufficient to maintain his conviction u/s 302/149 and set aside his conviction u/s 302 of the Code. Once his conviction u/s 302 IPC is set aside it would follow that he cannot be awarded death sentence.

25. In the result, the conviction of the appellant Ram Prit Rai u/s 302 of the Penal Code is set aside. The sentence of death awarded to him accordingly stands set aside. His conviction u/s 302/149 and sentence of imprisonment for life, however, is maintained. The conviction of the other appellants u/s 302/149 IPC is also maintained. The conviction of all of them under Sections 307/149, 380 and 148 IPC and sentence awarded thereunder, are also maintained. Subject to the above modification in the conviction and sentence, Criminal Appeal No. 421/ 2001 is dismissed and the reference is answered accordingly. Criminal Appeal No. 457/2001 too is dismissed. All the appellants are in jail. They would serve remainder of the sentence.

P.N. Yadav, J.

26. I agree.