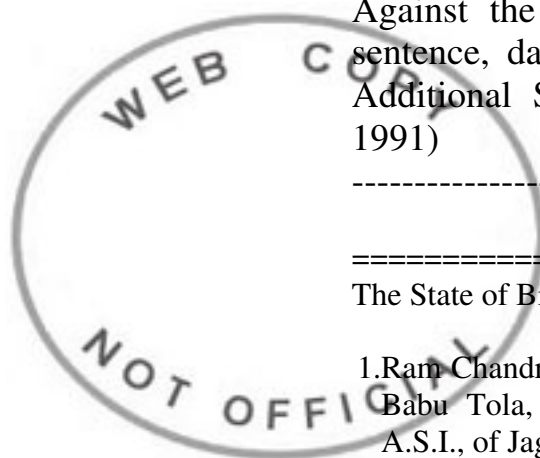




IN THE HIGH COURT OF JUDICATURE AT PATNA

Against the judgment of conviction dated 18.6.2007 and order of sentence, dated 7.7.2007, passed by Shri Shambhu Nath Mishra, 7th Additional Sessions Judge, Bhagalpur in Sessions Case No.589 of 1991)

Govt. Appeal (DB) No.29 of 2007

The State of Bihar Appellant

Versus

1.Ram Chandra Singh son of late Saudi Singh, resident of Village- Nai Dariyapur, Babu Tola, P.O. Dariyapur, P.S. Muffasil-Munger, District Munger, Former A.S.I., of Jagdishpur Police Station, District Bhagalpur

2.Ramdeo Mandal, son of Bhaggi Mandal, resident of village-Logain, P.S. Jagdishpur, District Bhagalpur

3. Jai Prakash Mandal

4. Prabhash Mandal

Both sons of Kamleshwari Mandal, residents of village Logain, P.S. Jagdishpur, District Bhagalpur

5. Kuldip Mandal @ Kullu, son of Sukhdeo Mandal, residents of Village- Logain, P.S. Jagdishpur, District Bhagalpur Respondents

with

Criminal Appeal (DB) No. 1013 of 2007

1. Thakur Paswan son of Late Lakshman Paswan, resident of Village- Hemara, P.S. Gauradih, P.O. Tarcha, District Bhagalpur (Village-Choukidar)

2. Ram Chandra Singh son of late Saudi Singh, resident of Village- Nai Dariyapur, Babu Tola, P.O. Dariyapur, P.S. Muffasil, District Munger (Former A.S.I., Jagdishpur Police Station, District Bhagalpur) Appellants

Versus

State of Bihar Respondent

with

Criminal Appeal (DB) No. 1050 of 2007

Prabhash Mandal son of late Kamaleshwari Mandal, resident of Village Logain, P.S. Jagdishpur, District Bhagalpur ... Appellant

Versus

State of Bihar Respondent

With

Criminal Appeal (DB) No. 1113 of 2007

1.Ajab Lal Mandal son of Sri Ramdeo Mandal

2. Arjun Mandal, son of late Nirpati Mandal

Both residents of village Logain, P.S. Gordih (Jagdishpur), District Bhagalpur
.... **Appellants**

Versus

State of Bihar

.... **Respondent**

with

=====

Criminal Appeal (DB) No. 1117 of 2007

=====

1. Sukhdeo Mandal, son of Late Jhaktu Prasad Mandal
 2. Jaddu Mandal son of late Bisohi Mandal
 3. Sarjug Prasad Mandal @ Sarju Prasad Singh, son of late Puran Mandal @ Late Puran Prasad Singh
 4. Ramdeo Mandal son of late Bhangi Mandal
- All residents of village Logain, P.S. Jagdishpur (Goradih), District Bhagalpur
.... **Appellants**

Versus

State of Bihar

.... **Respondent**

with

=====

Criminal Appeal (DB) No. 1118 of 2007

=====

1. Subhash Mandal, son of late Bhukhar Mandal
 2. Shiblal Mandal, son of late Gauri Mandal
 3. Naresh Mandal. Son of Bhakku Mandal
 4. Kuldeep Mandal. Son of Sukhdeo Mandal
- All residents of village Longai, P.S. Goradih (Jagdishpur), District Bhagalpur
.... **Appellants**

Versus

State of Bihar

.... **Respondent**

=====

Appearance :

(In G. APP. (DB) No. 29 of 2007)

For the Appellant/s : Mr. Prashun Kumar Sinha, Advocate
For the Amicus curie: Mr. Niraj Kumar @ Sanidh, Advocate
For the Respondents: M/s Ranjan Kumar Singh, Krishna Mohan,
Praveen Kumar, Lal Bahadur Pandey

(In CR. APP (DB) No. 1013 of 2007)

For the Appellant/s : Mr. Ranjan Kumar Singh
Mr. Rajesh Kumar

For the Respondent/s : Mr. Salahuddin Khan, Special P.P.
Mr. Saurabh Kumar, Advocate

For the Informant : Mr. Atiullah, Advocate

(In CR. APP (DB) No. 1050 of 2007)

For the Appellant/s : Mr. Ansul, Advocate,
Mr. Rajesh Kumar
For the Respondent/s: Mr. Salahuddin Khan, Special P.P.

Mr. Saurabh Kumar, Advocate
Mr. Atiullah, Advocate

(In CR. APP (DB) No. 1113 of 2007)

For the Appellant/s : Mr. Ansul, Advocate
M/s. Praveen Kumar. Chandra Mohan Jha
For the Respondent/s : Mr.Salahuddin Khan, Special P.P.
Mr. Saurabh Kumar, Advocate
Mr. Atiullah, Advocate

(In CR. APP (DB) No. 1117 of 2007)

For the Appellant/s : Mr. Ansul, Advocate
M/s. Praveen Kumar. Chandra Mohan Jha
Nihar Nandan Ambasta, Chandra Mohan Jha
For the Respondent/s : Mr.Salahuddin Khan, Special P.P.
Mr. Saurabh Kumar, Advocate
Mr. Atiullah, Advocate

(In CR. APP (DB) No. 1118 of 2007)

For the Appellant/s : Mr. Subodh Kumar Jha, Advocate
M/s. Praveen Kumar. Chandra Mohan Jha
Nihar Nandan Ambasta, Chandra Mohan Jha
For the Respondent/s : Mr.Salahuddin Khan, Special P.P.
Mr. Saurabh Kumar, Advocate
Mr. Atiullah, Advocate

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CORAM: HONOURABLE MR. JUSTICE SAMARENDRA PRATAP SINGH

And

HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL

C.A.V. JUDGMENT

(Per: HONOURABLE MR. JUSTICE SAMARENDRA PRATAP SINGH)

Date: 15-10-2015

All the five Criminal Appeals are filed against the common judgment of conviction, dated 18.6.2007 and order of sentence, dated 7.7.2007, passed by the 7th Additional Sessions Judge, Bhagalpur in Sessions Case No.589 of 1991, whereby all the 13 appellants along with one absconding appellant, Jai Prakash Mandal were convicted under sections 302 and 302/149 of the Indian Penal Code and Section 436, 436/149, 201/149, 380/149,153A and 295/149 of the Indian



Penal Code. For the offence under Section 302 and 302/149 of Indian Penal Code, the appellants have been directed to under go life imprisonment, and for the offence under section 436/149 of Indian Penal Code, they have been sentenced to under go 10 years R.I. and fine of Rs.10,000/- each and in default to under go three months additional imprisonment. However, no separate sentence was passed for the rest of the offences. The sentences were directed to run concurrently.

2. Criminal Appeal (DB) No.1013 of 2007 was preferred by Thakur Paswan and Ramchandra Singh; Criminal Appeal (DB) No. 1050 of 2007 was preferred by Prabhash Mandal, Criminal Appeal (DB) No.1113 of 2007 was preferred by Azablal Mandal and Arjun Mandal, Criminal Appeal (DB) No. 1117 of 2007 was preferred by Sukhdeo Mandal, Jaddu Mandal, Sarjug Prasad Mandal and Ramdeo Mandal, Criminal Appeal (DB) No. 1118 of 2007 was preferred by Subhash Mandal, Shiblal Mandal, Naresh Mandal and Kuldeep Mandal.

3. It is relevant to state herein that out of 14 convicts, one Jai Prakash Mandal fled on the day of judgment. During the pendency of these appeals, appellant Ramchandra Singh of Criminal Appeal No.1013 of 2007 and appellant Sukhdeo Mandal of Criminal Appeal No.1117 of 2007 died and the case as against them stood

abated.

4. Another appellant namely Ajab Lal Mandal of Criminal Appeal No.1113 of 2007 made a claim of his juvenility before this Court in his appeal which was enquired into, and by order, dated 11.10.2012 passed in Criminal Appeal No.1113 of 2007, he was held juvenile in conflict with law. His trial by the learned Court below, therefore, becomes contrary to law and fictitious. On this score itself, the appeal filed on his behalf succeeds and the judgment and order of conviction and sentence recorded against him are set aside. This takes us to the next question whether the aforesaid appellant be directed to be tried afresh in accordance with the provisions contained in Juvenile Justice (Care and Protection of Children) Act. We, however, restrain ourselves from doing so for two reasons. Firstly, the occurrence was committed in the year 1989, and since then more than two and a half decades have passed and secondly, the said accused/appellant, as argued before us, has remained in care and custody of the government for more than five years. Even if the competent court finds him guilty, punishment for more than three years could not have been imposed on him at the maximum.

5. The appeals, thus, survive only on behalf of the following ten appellants:

Appellant No.1 (A/1) Ramdeo Mandal (also referred at some places as Ramda)



Appellant No.2 (A/2) Arjun Mandal
Appellant No.3 (A/3) Prabhash Mandal
Appellant No.5 (A/5) Subhash Mandal
Appellant No.7 (A/7) Shibblal Mandal
Appellant No.8 (A/8) Naresh Mandal
Appellant No.9 (A/9) Jaddu Mandal
Appellant No.10(A/10) Sarjug Prasad Mandal
Appellant No.12(A/12) Thakur Paswan
Appellant No.14 (A/14) Kuldeep Mandal

(Serial Nos. of the accused/appellants in the judgment of the trial court has not been disturbed)

6. On the other hand, the State of Bihar has preferred appeal being Government Appeal (DB) No.29 of 2007 for enhancement of sentence awarded to appellants Ramdeo Mandal, Prabhash Mandal, Kuldeep Mandal, Ram Chandra Singh (since dead) and Jai Prakash Mandal (who absconded after the judgment)

7. Coming to the facts of the case; the dawn of 27th day of October, 1989 was not fated to be like any other morning, in the tiny village Logai, in the district of Bhagalpur in the State of Bihar, with little indication of the storm that was to engulf the surroundings and leave indelible blot on our rich pluralistic heritage and made us forever to question our heritage and civilization, which we proudly boast of. The riot which would shame even the most inhuman and savage, took a toll of as many as 115 people of one community as per estimate of District Administration.



8. The village Logai, a hamlet of nearly 150-170 houses situated a few Kilometers from the district town of Bhagalpur is the scene of occurrence. As per the evidence on record, it consists of 22 to 25 houses of Muslim community situated close to each other in separate Tola. In the morning of 27.10.1989 the inhabitants of village witnessed rioting, loot and arson of heinous nature, causing killing of more than 100 persons of one community. The dead bodies were either buried or thrown in the pond and well, to conceal the crime. The most unfortunate part of the incident was that the frenzied mob of sizable number was captained by the Police Officer of the Police Station under which the village falls, who was under a legal obligation to ensure life and safety of the victims. Not only the gruesome crime was committed under his tutelage, but a concerted effort was made to cover up the same by misdirecting the investigation from its very inception. How such effort was made shall be dealt with later in the judgment.

9. The incident that occurred on the fateful date, gave rise to two First Information Reports. One was lodged by the appellant Thakur Paswan, who was the Village Chaukidar, recorded on the date of occurrence itself at 10.00 A.M. by Mr. P.C. Ram, the Officer-in-Charge of Jagdishpur Police Station vide Jagdishpur Police Station Case No.164 of 2007, dated 27.10.1989 against unknown



under Sections 147, 436, 427, 380 and 297A of Indian Penal Code of which Ram Chandra Singh, ASI (accused-appellant since deceased) was made the Investigating Officer who later turned out to be the prime accused of the case. The incident evoked widespread furore and complete loss of public order in and around the village, which called for imposition of curfew, which lasted for several days. The government machineries were put in gear and the situation was gradually brought under control.

10. In wake of providing scenario, one Shri Ajit Dutta, IPS (P.W. 17) was deputed as D.I.G. and sent to Bhagalpur to monitor the situation arising out of widespread rioting in an around the township of Bhagalpur. He reached Bhagalpur on 27.11.1989 and started his efforts to restore normalcy, in course whereof, he found surviving villagers of village Logai taking shelter in a nearby village called Babura. Shri Ajit Dutta (P.W. 17) visited the said village on 3.12.1989, when a written report (Ext. 4) was submitted to him by P.W. 11 (Md. Azraf Ali), on which he endorsed lodging of the First Information Report, to be investigated by another police officer of the said police station. He also directed for amalgamation of both the *First Information Reports* and the investigation. On such written report and under his direction Jagdishpur P.S. Case no.202 of 1989 was registered under section 302 of the Indian Penal Code and other

allied sections on 4.12.1989 against some named accused person including the Village Chaukidar and the Investigating officer of the previous case, namely, Ram Chandra Singh, ASI being Jagdishpur P.S. Case No.168 of 1989.

11. Before, we proceed further in the matter and examine the evidence, we would prefer to delineate the background in which the occurrence was committed. It has come in deposition of prosecution witnesses that prior to the present incident of mass destruction, the nearby district town of Bhagalpur and the nearby village called Barhari had already witnessed such communal riot (s) in recent past. The entire area was, therefore, pregnant with growing apprehensions, which loomed large within the minorities, residing in that part of the State.

12. Flipping through the pages of the case, though was not a pleasant exercise, nonetheless, conscious of our judicial responsibility, we proceed to deal with the appeals without being swayed by emotions.

13. The first F.I.R., namely, Jagdishpur P.S. Case No. 164 of 1989, dated 28.10.1989 under sections 147, 436, 427, 380, 295A of the Indian Penal Code, instituted on the statement of Thakur Prasad, on the date of occurrence, in short, is as follows:

The informant, namely, Thakur Paswan, a Chawkidar,



stated that on 27.10.1989 between 1:00-2:00 P.M. village Logai was ablaze in flames. A mob of two to three thousands were raising slogan of “Bajrang Bali”. Since there were a large number of persons, he could not identify any of the miscreants. He asked the rioters not to indulge in any misdeeds; otherwise they would be implicated in the cases. But they did not listen and set fire to the heap of straws stacked in front of the houses. No member of the Muslim community was visible, as they might have left the place in advance.

14. The prosecution case as unfolding in the report of Azraf Ali (P.W.11), dated 03.12.1989, in short is as follows:

In his report, Azraf Ali stated that on 27.10.1989, at about 7 A.M., he took shelter in the nearby paddy field, out of fear. He saw a mob of thousands of people, led by one Ramchandra Singh, ASI, Jagdishpur Police Station, armed with a pistol, menacingly surging towards the village. He was instigating the Hindus not to spare Muslims. Some of the co-villagers, namely, Ramdeo Mandal, Kamleshwari Mandal (since dead), Prabhash Mandal, Jai Prakash Mandal (absconding), Gautam Mandal (whose case is separated on the ground of juvenility), Azablal Mandal (who too was declared juvenile by the Court’s order dated 11.10.2012), Saryug Prasad Singh, Dayanand Harijan (not before us), Prakash Pandit (not before us), Suraj Mandal (not before us), Arjun Mandal, Thakur Paswan



(Chaukidar) were also in the mob. The accused persons killed Bibi Manira with sword and also killed five members of her family and some more Muslims, with deadly weapons, in presence of a number of witnesses. Apart from co- villagers, the rioters also included persons from village Mir Nagar, Hemra, Damuchak, Harna, Beldari, Babhangama, Milky and some other villages, whom he could recognize on seeing them. Besides him, the occurrence was witnessed by Md. Jabbar (P.W. 7), Md. Amir (P.W. 9), Md. Chedi (not examined), Bibi Sakina (P.W. 13), Md. Ansar (not examined) etc.

15. The second report of even date, which was addressed by Md. Azraf Ali to the Superintendent of Police, was more in clarification of the first letter. He stated that at the relief camp in Babura, he made statement before the Police on 02.12.1989, considering the same, to be his re-statement. He alleged that 114 people were killed by Hindu rioters, a list of which is annexed with this letter. The riot was led by Ramchandra Singh, ASI, Jagdishpur P.S. He stated that prior to 02.12.1989, the police took his L.T.I. as also L.T.Is. of some others, in order to institute cases, to save their own skin. The informant and others had made statements in village Babura on 02.12.1989, which too were not recorded correctly. The police gave copies to him as well as to Bibi Sakina (P.W. 13) stating



that a *First Information Report* would be lodged. On reading his statement, a copy of which was given by the police, he could make out that it did not contain the same statements that he had made. He alleged that the rioters set fire and looted properties at the instigation of Darogaji, causing loss of properties worth Rs.10-15 lacs. They did not return to their village out of fear. All modes of communication had come to a stand still in the area. Now, that the D.I.G. Police had come to the Camp, a written statement of the incident is being made for appropriate actions.

16. On the basis of report of Azraf Ali, a *First Information Report*, being Jagdishpur P.S. Case No.202 of 1989 was instituted under Sections 147, 148, 149, 302, 324, 380, 295A, 436, 428 of the Indian Penal on 4.12.1989 against the named accuseds and others. The case was investigated by Ram Sekhar, ASI of Jagdishpur P.S. up to 20.02.1990. The investigation thereafter was taken over by Jagdish Kumar Pal (P.W. 14), who submitted charge sheet no.33, dated 23.3.1990. The second charge sheet, bearing Charge Sheet No.6290, was submitted against 11 accused persons on 20.8.1990. The last supplementary charge sheet no.71 was submitted on 10.10.1990 with some more names. In all 24, accused persons were charge sheeted, out of which 14 were named in the *First Information Report*, whereas 10 were named in course of investigation. The Chief

Judicial Magistrate took cognizance of offence on 18.5.1990 and committed the case to the Court of sessions for trial on 19.9.1991.

17. Charges were framed against 24 accused persons. Accused Ramchandra Singh stands charged for the offence punishable under section 302 of the I.P.C. for murder of Amida, Firoj, Moin and mother of Bibi Rabina; Prabhash Mandal stands charged for the offence under section 302 of the I.P.C. for murder of Salim Mian; Jai Prakash Mandal stands charged for the offence under section 302 I.P.C. for murder of Sahina; Sarjug Prasad Singh and Kuldeep Mandal stands charged under section 302 I.P.C. for murder of Islam. Ajab Lal Mandal stands charged for the offence under section 302 I.P.C. for murder of Bibi Sitara. Thakur Paswan stands charged for the offence under section 302 IPC for murder of Bibi Amina Khatoon and Md. Riyaz. Subhash Mandal stands charged for the offence under section 302 IPC for murder of Sirajuddin, Kuldeep Mandal stands charged for the offence under section 302 IPC for murder of Mangali. Ramdeo Mandal stands charged for the offence under section 302 IPC for murder of Bibi Moinara, Tetri, Mustaque and Sudhia. Beside this, Prabhash Mandal and Arjun Mandal stand charged for the offence under section 436 of the IPC for setting fire to the mosque and other houses belonging to the Muslim community. All the 24 accused persons stood charged for



the offence under Sections 302/149, 436/149, 147, 148, 153A, 295B/149 IPC and section 201/149 IPC. Accused Ramdeo Mandal, Jai Prakash Mandal, Prabhash Mandal, Ajab Lal Mandal, Sarjug Prasad Singh @ Sarjug Prasad Mandal, Arjun Mandal, Thakur Paswan, Ramchandra Singh, Yaddu Mandal, Naresh Mandal, Subhash Mandal, Kuldeep Mandal, Shiblal Mandal and Sukhdeo Mandal were charged section 380/149 IPC. The accused Ramchandra Singh also stood charged for the offence under section 112 IPC. However, the accused persons pleaded not guilty to the charge (s) and claimed to be tried.

18. Out of 24 charge sheeted accused persons, Dayanand Harijan and Suresh Pandit were shown as absconders, whereas accused P.C. Ram, the then Officer Incharge of Jagdishpur P.S. were discharged. Kamleshwari Mandal died during the trial and the case of accused Gautam Mandal was separated on the ground of juvenility vide order, dated 17.11.2006. Rest of 18 accused persons was put on trial. However, four accused persons namely Suraj Mandal, Prakash Pandit, Kishun Pandit and Pratap Pandit absconded after evidence of prosecution witnesses, and were declared absconder vide order, dated 28.11.2006. As such, 14 accused persons finally faced the trial.

19. The prosecution in support of its case examined altogether 18 witnesses, out of whom, P.W.1 Md. Yasin, P.W.2 Bibi



Rabina, P.W. 3 Md. Sohail, P.W. 6 Md. Riaz (injured), P.W. 7 Md. Jabbar, P.W. 8 Md. Ibrahim, P.W.9 Md. Amir, P.W. 10 Md. Nayeemuddin, P.W. 11 Md. Azraf (informant), P.W. 12 Bibi Jilabi, P.W. 13 Bibi Sakina have claimed to be the witnesses to the occurrence. P.W.4 Dr. Kailash Jha conducted seven post mortem examinations in the department on 16.12.1989 and 90 post mortem examinations in the village itself on 9.12.1989. 7 nos. of post mortem examinations conducted by him in the department/hospital were marked as Ext.2 to 2/6, whereas page nos. 319 to 336 of the case diary containing post mortem examination reports of 90 dead bodies which too have been marked as exhibits. P.W. 5 Dr. H.I. Ansari, Assistant Professor of Jawaharlal Nehru Medical College, Bhagalpur conducted post mortem examination on the identified bodies of Bibi Sajida, Bibil Kalima (Ext. 2/8), Bibi Azwa (wife of Md. Yasin) (Ext. 2/9), Sajrun daughter of Md. Nasim (Ext.2/10), Md. Sahabuddin (Ext.2/11) and Md. Sirajuddin (Ext.2/12). P.W. 14 is Jagdish Kumar Pal, the Dy. S.P. CID was the Investigating officer of the case, P.W. 15 (Sudarshan Rai) is a formal witness of the case who has proved some documents. P.W. 16, Mahendra Rai, is a Clerk in Bhagalpur Collectorate and a formal witness of the case. P.W. 17 is Ajit Dutta, the DIG, Home guard, who was deputed at Bhagalpur to control the situation and monitor the investigation of the cases arising out of

wide spread rioting and killing in and around the township of Bhagalpur. He also conducted local enquiry and submitted his report, which he has proved as Ext.8. P.W. 18 is Girja Nandan Sharma, D.I.G., Bhagalpur who proved sanction order of forensic report as a formal witness of the case.

Ext.1 is post mortem reports of ninety dead bodies and three scalps, conducted by Dr. Kailash Jha on 9.12.1989. Exts. 2 to 2/14 are fifteen post-mortem reports conducted by Dr. Kailash Jha. Ext.3 to 3/25 are twenty six inquest reports with signature of witness Mr. Jabbar in twenty six sheets. Ext. 4 is fardbeyan of Azraf Ali. Ext.5 is formal First Information Report. Ext.6 to 6/43 are signature(s) of Azraf Ali on forty four inquest reports. Ext.7 to 7/14 is signature of Rajendra Harijan on 15 inquest report. Ext.7/A is direction of Ajit Dutta, D.I.G. (P.W.17) on the register. The application of Md. Azraf Ali is marked as Ext.4. Ext.8 is report of Ajit Dutta, D.I.G. Ext.9 is whole report of C.I.E., Bihar, Patna vide memo No. SK S-2, dated 10.10.1992. Ext.10 is whole seizure list dated 6.12.1989 and Exts 11 and 12 are Serological Laboratory Report(s), dated 10.4.1990.

20. Upon conclusion of the prosecution evidence, the statements of the accused(s) were recorded under Section 313 Cr.P.C., wherein they abjured the guilt. Oral evidence was adduced

on behalf of the accused (s) and ten defence witnesses were examined besides exhibiting ten documents in support of their defence. On conclusion of trial, the Trial Court held them guilty and sentenced as noted, hereinabove. Hence, the appeal.

21. Heard Mr. Ansul, learned counsel who has appeared on behalf of all the appellants except the appellant Shiblal Mandal (A/7), who is represented by Mr. Subodh Kumar Jha, Mr. Md. Salahuddin Khan, Special P.P. and Mr. Attaullah, who appeared on behalf of the informant. We also heard Mr. Prasoon Sinha, G.A.6 for the appellant State of Bihar in Government Appeal No.29 of 2007 and Mr. Neeraj Kumar Singh, learned *Amicus Curiae* on behalf of the accused(s) respondents. The Government Appeal has been filed for enhancement of sentence to capital punishment of those five appellants/convicts, who have been held guilty under section 302 of the Indian Penal Code. Out of them, two appellants, namely, Ram Chandra Singh and Sukhdeo Mandal have already died.

22. As noticed earlier, the prosecution in support of its case examined 18 witnesses, out of these 18 witnesses, 11 of them, namely, P.Ws 1, 2, 3, 6, 7, 8, 9, 10, 11, 12 and 13, who are all residents of village Logai, have claimed to be the eye witnesses of the occurrence.

P.W. 1, Md. Yasin, stated in his evidence that on the date of



incident, he was present at the door of his house. At about 7 A.M., he saw a mob of four to five thousands persons coming from southern direction setting fire to the village. He hid himself in eastern Ada of pond. He identified one Kishun Mandal, Sukhdeo Mandal, Prakash Mandal, Prakash Pandit, Daynand Harijan, Ramchandra Singh, Daroga of local Police Station, Kamleshwari Mandal, Ramdeo Mandal and Kuldeep Mandal. The rioters killed about 100-125 Muslims, including most of his family members. Amongst the rioters, Ram Chandra Singh killed Bibi Sudhia; Kamleshwari Mandal and Ramdeo Mandal killed Bibi Sakina; Prakash Mandal and Kuldeep Mandal killed Mojiba. He identified the accused present in Court and claimed to identify other accused persons, who were represented by their counsel.

P.W. 2, Bibi Rabina, too stated that on the date and time of occurrence at about 7 A.M., she was present in village and on seeing the rioters she hid in the near paddy field. The rioters were ten to twelve thousands in number, coming from Southern side of the village. Amongst the rioters Ram Chandra Singh, Daroga, killed her mother with farsa. Kamleshwari Mandal killed her sister Sakina; Prakash Mandal cut Mangali with a sharp cutting weapon. Kuldeep Mandal killed her elder mother Mojiba. She too identified all the appellants in Court.



P.W. 3, Md. Sohail, stated that on the relevant date of incident at about 7 A.M., he was feeding his cattle. He saw a mob of three to four thousand persons coming from southern side and were raising slogan of “Mahavir Swami Ki Jai”. The mob was led by local Daroga and Chaukidar. The Daroga was instigating that no Muslim should be spared. He hid himself out of fear in a paddy field. The accused persons ruthlessly killed people and also set fire to his house. He identified Kamleshwari Mandal, Prakash Mandal and Ramdeo Mandal, as accused, who killed his sons Mustaque and Mostakim Riaz, his wife Hasina Khatoon and mother Jabida.

P.W. 6, Md. Riaz, stated that on the date of incident at about 7 A.M., he was present at his home. He saw eight to ten thousand rioters coming from southern side of the village and raising slogan of “Bajrang Bali”. They were setting fire to the houses. He along with others locked themselves in a house. He stated that Kamleshwari Mandal killed one Aslam with Bhala; Dina Mandal killed Akhtar with Bhala; Sarjug killed Asma with Bhala; Dukha killed Jaffar with Bhala; Ramdeo killed Nasim; Yugeshwar Mandal killed Sadrul; Dukha Mandal killed Aurangzeb with Bhagal; Vijay Mandal struck Usman with Bhala; Basudeo killed Momin with Bhala; Shivilal killed wife of Saiful with farsa. Naresh struck Rozi with farsa; Mahesh Mandal killed Saibul with farsa and Kaila Paswan assaulted Fazlu

with Bhala.

P.W. 7, Md. Jabbar, stated that on the relevant date and time of incident, he was feeding his cattle in front of his house. He stated that Jai Prakash Mandal and Prabash Mandal killed his daughter Sahin; Shukhdeo Mandal killed Nizam; Naresh Mandal killed Usman; Ram Chandra Singh killed Mohid; Thakur Paswan burnt village mosque. He also named Ramdeo Mandal as one of the accuseds amongst the rioters.

P.W. 8, Md. Ibrahim, stated that on the ill fated date, he was feeding his cow at his house. He saw large number of mob coming from southern and western side. The local Chaukidar and Jamadar were also with them. Out of fear, he hid himself in the paddy field. He saw Kalim sustaining a fire shot injury. He has identified Ramdeo Mandal, Prabhash Mandal, Jai Prakash Mandal, Thakur Paswan, Ram Chandra Singh as persons, who were present amongst the rioters. However, he could not identify Shivlal Mandal and Kuldeep Mandal in the Court.

P.W. 9, Md. Amir, stated that at 07:00 A.M. on the date of occurrence, he was at the field of Jetan. He saw a mob of 2000 persons emerging from southern side of village Logai. The police force were also with them. He identified Ramdeo Mandal, Arjun Mandal, Prabhash Mandal, Sukhdeo Mandal, Jai Prakash Mandal,

Thakur Paswan, Ram Chandra Singh, amongst the rioters. One Kishun Mandal set fire to the Mosque. The accused persons killed six persons of his family including his wife and small children.

P.W. 10, Md. Nayeemuddin, stated that on the fateful date, on seeing the mob of thousand rioters coming from western side, he too hid himself in a paddy field. He has named Prabhash Mandal, Naresh Mandal, Sarjug Mandal, Jai Prakash Mandal as the assaulters.

P.W. 11, Md. Azraf Ali, who is informant of this case, has reiterated the prosecution case as contained in the First Information Report. He stated that Ramdeo Mandal assaulted Bibi Munira by sword; Arjun Mandal set fire to the house, Prabhash Mandal killed Bibi Saira, Sarjug Mandal assaulted Bibi Hashima with fists and kicks, Jai Prakash Mandal killed Shaheen, Ram Chandra Singh (now dead) assaulted his mother with butt of revolver and Kuldeep Singh killed Islam. He identified his written report/fardbeyan which was marked as Ext.4.

P.W. 12, Jalebi Khatoon, stated that on the date of incident, she too was at her house. On seeing a surging mob she hid herself in a paddy field. She did not name any one as an accused.

P.W. 13, Bibi Sakina, like most of the witnesses to hid herself in the nearby paddy field. On seeing a mob of thousands of rioters coming towards the village, she stated that Ramdeo Mandal killed

her husband Mohiuddin; Arjun Mandal killed her father-in-law; Sukhdeo Mandal killed Nijam with his son; Subhash Mandal killed Murshid and Halim. Ajab Lal Mandal killed Ameena Khatoon. Sarjug Mandal killed mother and wife of Ibrahim along with his two sons.

23. In view of the depositions of the prosecution witnesses, the following position emerges with respect to the role played by accused persons in the incident:

Name of accused

Ramdeo Mandal	P.W.1 stated that he killed Sakina P.W. 2 stated that he killed her mother P.W. 3 named him as co-assailant P.W. 11 stated that he killed Monira P.W. 13 stated that he killed her husband P.W.s 6, 10 and 12 do not name him P.Ws 7, 8 and 9 named him but without any specific allegation
Arjun Mandal	P.W. 11 stated that he put fire to house P.W. 13 stated that he killed her father-in-law with two other persons PWs 1,2,3,6,7,8,9,10 and 12 do not name him.
Prabhas Mandal	P.W. 7 stated that he killed Sahin with accused Jai Prakash Mandal P.W. 10 named him as assaulter P.W. 11 stated that he killed Bibi Saira P.W.s 8 and 9 just named him P.W.s 1, 2, 3, 6,12 and 13 do not name him.
Sukhdeo Mandal	P.Ws 7 and 13 stated that he killed Nizam P.W.s 1 and 9 just named him P.W.s 2, 3,6, 8, 10, 11 and 13 do not name him.
Subhash Mandal	No witnesses have named him
Shivlal Mandal	P.W.6 stated that he assaulted wife of Maimul with farsa P.W. 13 stated that he killed Amina Khatoon P.Ws 1, 2, 3, 7, 9, 10, 11, 12 do not name him. P.W.8 did not identify him in Court



Naresh Mandal	P.W.6 stated that he assaulted Rozi with farsa P.W.7 stated that he killed Usman P.W.10 named him as assaulter
Jaddu Mandal @ Jugeshwar Mandal	None named him. P.W.6 names him as one Jugeshwar P.W.13 names him as Jagarnath
Sarjug Mandal	P.W. 7 stated that he put fire P.W. 6 stated that he assaulted Ashma P.W. 10 named him as assaulter P.W. 11 stated that he assaulted Nasima with kicks P.W. 13 stated that he killed mother and wife of Ibrahim with help of his two sons. P.Ws 1, 2, 3,12 did not name him P.W. 8 just named him.
Thakur Paswan	P.W.7 stated that he burnt mosque P.W.s 1, 2, 3, 4,10, 11 and 13 do not name him P.Ws. 8 and 9 just named him.
Kuldeep Mandal	P.Ws 1 and 2 state that he killed Moziba P.W. 11 stated that he killed Islam P.Ws. 3, 6, 7,9, 10, 12 and 13 do not name him. P.W.8 could not identify him in Court.

24. Mr. Ansul, learned counsel for the appellants, while making submissions in support of the appeals has contended that the facts emanating from the records would disclose that there was a large scale communal riot in and around Bhagalpur, wherein several persons belonging to a particular community were killed. The same was perpetrated on account of communal fury created in the region. The atmosphere was surcharged with communal bias leading to the incident which took a toll of 114 life. Nonetheless, the judicial scrutiny should confine to ascertain, whether the appellants actually committed the offence. In order to demonstrate the innocence of the



appellants, it has first been argued that there has been delay of more than one month in lodging the case which creates a serious doubt on the claim of the informant depicted through the written report which was submitted on 3.12.1989, at the nearby village Babura. The delay, being gross and unexplained would take away the sheen off the *First Information Report*, being the earliest version of the occurrence. The First Information Report is also hit by Section 162 of the Code of Criminal Procedure (in short 'the Code'). The *First Information Report* of the incident was first lodged on the day of occurrence itself by the village Chowkidar, namely, Thakur Paswan who later became the prime accused of the case. The informant has claimed to have recorded another fardbeyan/written report on 2.12.1989, which is not brought on record. There is at least some evidence on record to demonstrate that the State Agency had come into play and the normalcy was restored. A special District Magistrate was appointed for the district of Bhagalpur and P.W. 17 was deployed in the month of November itself to Bhagalpur as DIG (Rural) to monitor the situation. Again there is some evidence on record that the Police protection was afforded to those who were taking shelter at nearby village Babura. Yet, the informant did not lodge the case at the earliest possible opportunity. In order to buttress his submissions he has relied on the judgment reported in *A.I.R. 1995 SC Vol-I 176*.

25. The learned Special P.P. conversely argued that the



delay in lodging the First Information Report has to be considered in the backdrop of the particular facts of the case. The informant in the written report lodged on 3.12.1989 gave adequate explanation that prevented him from presenting himself before the police authority for lodging the case. The contention of the appellants that the First Information Report initially lodged by the accused Thakur Paswan should be treated as the First Information Report of the case has also been seriously disputed by learned Special P.P. as it is vague and has been lodged more to protect the accused than to bring the accused to taste has always the right of the victims to lodge the First Information Report. He submits that the main prosecution case unfolded in the written report of P.W. 11 submitted to the DIG on 3.12.1989 at village Babura, who was there to monitor the situation. He directed for lodging of the *First Information Report*. The D.I.G. Police (P.W.17) further considering the fact that earlier First Information Report with vague allegation(s) not disclosing the true fact was an effort to hush up the misdeeds/criminal acts, directed for amalgamation of both the *First Information Reports*, which was allowed by the learned Chief Judicial Magistrate on 6.1.1990, on the request of the Investigating Officer. The learned counsel for the State in this regard has relied upon a decision of this Court in the case of *State of Bihar vs. Chunna Rajak, reported in 2005(1)PLJR 357* .

26. On a consideration of the rival submissions, it



appears to this Court that the delay in lodging of the First Information Report is substantially explained by the prosecution and would not be a fatal blow to the prosecution case. The purpose of the First Information Reports is to initiate an investigation by the police agency to find out the guilt or otherwise of the accused(s). There is enough material on records, including Ext. 8, to decipher that the situation prevailing after the occurrence was such which prevented the informant from lodging the written report. On 3.12.1989, the D.I.G. (P.W.17) visited the village Babura which inspired confidence in the informant to open his mouth and dared to file written report relating to the occurrence being the sufferer of the mayhem in which he lost many of his family members. We do not find any evidence that actually a camp (shelter home) was installed/put up under the aegis of the district administration or the police administration at village Babura, where the informant had the occasion to open his mouth and lodge the Fardbeyan/written report. Even if we accept the contention of the counsel for the appellants that few witnesses had deposed in presence of the police prior to 3.12.1989 at village Babura, we do not find that any police officer who could receive/institute the First Information Report was present there. Given the prevailing situation in which the victims of the riot were placed in, as appearing from the record the delay in lodging the First Information Report, in our view, is not gross and fatal.

27. In **Chunna Rajak** (*supra*), this Court taking into consideration peculiar facts of the case, got recorded the statements of the applicant before the High Court several months after the occurrence and transmitted to the authority for institution of the First Information Report. The particular facts of the case, therefore, require to be appreciated while considering such submissions of the parties. In the case at hand both the First Information Reports of Jagdishpur P.S. Case No.168 of 1989 and Jagdishpur P.S. Case No.202 of 1989 lodged on 3.12.1989 were amalgamated and one investigation was carried out leading to filing of the charge sheet(s) and one trial. In this context, this Court would extract hereinbelow paragraph 26 of the judgment (*supra*):-

*“26. 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 fardbeyan of Malika Begum was recorded by Registrar, Judicial, Patna High Court and on that basis second F.I.R. as Sabour P.S. Case No.25 of 1990 was instituted against the accused named in the F.I.R. In the case of **Binay Kumar & another vs. State of Bihar** reported in 1997(1) PLJR 24 Sc 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 his 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 witnesses 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 Gujarat directed C.B.I. to start fresh investigation of the case which was concluded up to the High Court. The efforts of the Court is always to impart justice and not to defeat the purpose of criminal administration of justice....”*

28. P.W. 11 is the victim who suffered loss of several family members. The earlier case was lodged in hurry without disclosing the real facts, by person, (the local Chowkidar), who later became the



accused of the crime. It is not a case, where two F.I.Rs have been lodged by the same person relating to the same occurrence. We, therefore, do not find substance in the submissions of the appellants that the case lodged by P.W.11 was hit under Section 162 Cr.P.C. The same, as argued, cannot be treated as the fatal blow to the prosecution case. The Hon'ble Apex Court in the case of Shiv Shankar Singh Vrs. State of Bihar, reported in 2012 (2) BBCJ (4) (SC) 01, observed that the law does not prohibit the registration and investigation of First Information Reports in respect of same incident in case the version are different. The Hon'ble Apex Court further in the case of Upkar Singh Vrs. Ved Prakash and others, reported in 2004(4)PLJR (SC) 157, observed that in case prior complaint is already registered, the counter claim is permissible. It would be apt to quote para-25 of the judgment, which reproduced herein below:

“25. In the instant case, it is seen in regard to the incident which took place on 20th May, 1995, the appellant and the 1st respondent herein have lodged separate complaints giving different versions but while the complaint of respondent was registered by the concerned police, the complaint of the appellant was not so registered, hence on his prayer the learned Magistrate was justified in directing the police concerned to register a case and investigate the same and report back. In our opinion, both the learned Additional Sessions Judge and the High Court

erred in coming to the conclusion that the same is hit by Section 161 or 162 of the Code does not refer to registration of a case, it only speaks of a statement to be recorded by the police in the course of the investigation and its evidentiary value.”

29. At the risk of repetition, this Court would like to indicate that the purpose of lodging the First Information Report is to ignite investigation into the allegation/charges leveled therein. First Information Report is not the substantive piece of evidence. The Hon’ble Apex Court in the case of ***Harbansh Kaur vs. State of Punjab and Haryana, reported in 2005 Cr. L.J.2199*** reiterated the position in law as under:

“7. There is no proposition in law that relatives are to be treated as untruthful witnesses. On the contrary, reason has to be shown that the witnesses had reason to shield actual culprit and falsely implicate the accused. No evidence has been led in this regard. So far as the delay in lodging the FIR is concerned, the witnesses have clearly stated that after seeing the deceased in the injured condition immediate effort was to get him hospitalized and get him treated. There cannot be any generalization that whenever there is delay in lodging the F.I.R., the prosecution case becomes suspect. Whether delay is so long as to throw a cloud of suspicion on the seeds of the prosecution case, would depend upon the facts of each case. Even a long delay can be condoned if the witnesses have no motive of implicating the accused and have given a plausible reason as to why the report was lodged belatedly. In the

instant case, this has been done. It is to be noted that though there was cross-examination at length no infirmity was noticed in their evidence. Therefore, the trial court and the High Court were right in relying on the evidence of the prosecution witnesses”.

30. The appellants, in alternative, contended that in his another letter, dated 3.12.1989, the informant Azraf Ali stated that he had already made a statement about the incident on 2.12.1989, which, for reasons best known to the prosecution, had not been produced. In this view of the matter, the first report, which only mentions the date 3.12.1989 in the body of the complaint, could not have been constituted as *First Information Report*. In our view, the letter, dated 3.12.1989 of the informant, which has been clubbed with his earlier letter of even date, is merely by way of clarification in continuance of first report on which terms the basis of Jagdishpur P.S. Case No. 202 of 1989. Further more, the role of the Police has been suspicious inasmuch as the local Chowkidar and the Officer Incharge of the local Police Station were made an accused along with Sub-Inspector P.C. Ram. The non recording of the earlier statement by the police would in no manner cast a shadow on the prosecution case in view of enormous evidence on record supporting the incident.

31. It has next been argued that the witnesses who have deposed about the participation of the appellants in the crime were



not in a position to see the same inasmuch as the exact place of killing or assault has not been claimed / disclosed. The place of occurrence has, therefore, not been proved. Almost all the witnesses in their respective examination-in-chief have stated that seeing the mob of rioters in the village armed with various weapons and raising communal slogans, they escaped from the places and ran to take shelter in the nearby paddy field. The place of their hiding has not been shown to the Investigating Officer. In the evidence of the prosecution witnesses it has come that the paddy grown in the field was up to chest height. Nonetheless, surprisingly, none of them claimed presence of the other witness in the field, although quite a number of them were taking shelter in the paddy field.

32. The Special P.P. on the other hand, contended that in a melee, like this, which engulfed the village it would be highly inappropriate on the part of the Court to expect the witnesses to memorize and spell out each and every detail in which the mass killing was executed and the actual place thereof. The entire occurrence was committed in quick succession inside the Tola situated distinctly in the village. The conduct of the witnesses in detailing the situation in which he/they made efforts to hid themselves and thereafter witnessing as to how many of their kith and kin are being slaughtered/ butchered, is natural being resident of the same village.



33. We find some force in the submissions of the State. From the evidence on record, it is apparent to the Court that Tola (cluster of houses) of Muslims is separate from the houses belonging to the other community and the Muslim Tola has paddy fields adjoining thereto, at least, on two sides. It is a Tola consisting of 22-25 houses/ huts only. The normal conduct of a witness in such a situation would be to first save his life and then to see, who killed whom. Even thoughts of such sight and raising of communal slogans are enough, to raise hair. The first version of the occurrence was got registered with vague facts in a bid to cover up the ghastly act of the accused (s) who constituted the mob to do away with the lives of all and sundry belonging to the one religion. The investigation ensued thereafter was obviously tainted. None recording or non disclosure of the actual place of hiding by the witnesses, during the initial stage of investigation, would, therefore, not be a circumstance to deny their claim of having witnessed the occurrence. Even if we consider the same to be a flaw in the investigation in not recording the aforesaid fact, the benefit thereof would not go to the accused. This may be a case of faulty investigation which was tailored to happen. In ***Amar Singh vs. Balwinder Singh, reported in (2003) 2 SCC 518***, the Apex Court in paragraph 15 held as under:

“15. Coming to the last point regarding certain



omission in DDR, it has come in evidence that on the basis of the statement of P.W. 4 Amar Singh, which was recorded by P.W. 14 Sardara Singh, SI in the hospital, a formal FIR was recorded at the police station at 9.20 pm. In accordance with Section 155 Cr.P.C. the contents of the F.I.R. were also entered in DDR, which contained the names of the witnesses, weapons of offence and place of occurrence and it was not very necessary to mention them separately all over again. It is not the case of the defence that the names of the accused were not mentioned in DDR. We fail to understand as to how it was necessary for the investigation officer to take in his possession the wire gauze of the window from where A-1 is alleged to have fired. The wire gauze had absolutely no bearing on the prosecution case and the investigating officer was not supposed to cut and take out the same from the window where it was fixed. It would have been certainly better if the investigating agency had sent the firearms and the empties to the Forensic Science Laboratory for comparison. However, the report of the ballistic expert would in any case be in the nature of an expert opinion and the same is not conclusive. The failure of the investigating officer in sending the firearms and the empties for comparison cannot completely throw out the prosecution case when the same is fully established from the testimony of eye witnesses whose presence on the spot cannot be doubted as they all received gunshot injuries in the incident. In Karnet Singh vs. State of M.P. it was held that in cases of defective investigation

the court has to be circumspect in evaluating the evidence but it would not be right in acquitting an accused person solely on account of the defect and to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective.....”.

34. It has been submitted on behalf of the appellant(s) that the manner of occurrence has not been proved by the prosecution. The exact place (s) where the deceased (s) was/were assaulted and by what weapons and by whom is/are not clearly decipherable from the deposition of the prosecution witnesses. The witnesses have made material/ significant improvements in their depositions on the point of actual assault by the accused(s)/ appellant(s), who did not state so before the Investigating Officer. On a deeper scrutiny of the evidence, what appears to this Court is that the Muslim Tola of the Village Logai is indisputably the place of occurrence. We cannot be unmindful of the fact that a mob consisting of more than thousand rioters emerged at the scene of occurrence and went berserk. Almost all the houses located in close proximity were broken/destroyed and looted, some of them were put ablaze and each and every found, either in the house, veranda or lane was ruthlessly assaulted. It is not expected of a witness seeing the brutal killing of his family members to say with precision the actual place in and around the Muslim Tola, where the deceased (s) was/were done to death. The

recovery of the dead bodies, the remnants of the huts as found by the Investigating Agency and the serological report (Ext.12) conclusively proves the place of occurrence.

35. It has next been argued that although the F.I.R. was registered on 4.12.1989 but it does not appear that the same was promptly sent to the court. The said submission has been made on the strength that the F.I.R. is torn on edges and the endorsement of the court is not apparent/ visible. We have personally perused the F.I.R., which is in a very shoddy condition and torn at edges. Normally the court, where the F.I.R. is sent, puts initial on the top right corner of the FIR which is torn. There is no other material on record to support the contention of the appellant (s) that there was inordinate delay in dispatch of the F.I.R. It may be noticed that the F.I.R. was registered under the direction of the D.I.G., who was specially deputed by the State Government to control the situation arising out of the large scale rioting that gripped/ engulfed the township of Bhagalpur and its adjoining villages and monitor the investigation. It would be a travesty of justice if dilapidation part/ portion of the record (F.I.R.) is made basis for contending that the F.I.R. was dispatched belatedly to the Court. That apart, delay in sending the F.I.R. is not always fatal to the prosecution case and the same cannot vitiate the trial. The Hon'ble Apex Court in case of *Munshi Prasad Vrs. State of Bihar, reported in (2001) 4 SCC 18,*

observed that in appropriate cases, delay in despatch and receipt of F.I.R. cannot be a ground to deny justice to the victim.

36. Much stress has laid by the appellant (s) that their trial would vitiate as all incriminating circumstances appearing on record was/ were not put to the accused(s) to solicit their response as required under section 313 of the Code. The counsel has relied in this regard on *Sharad vs. State of Maharashtra, reported in A.I.R. 1984 SC 1622*. Per contra, the learned Special P.P. as well as the counsel for the informant have submitted that the accused were present in dock during the examination of entire oral evidence and therefore conversant with them. In such a situation, the accused were confronted with the question as to whether they had heard the evidence which has been adduced. The answer of the accused(s) was 'yes'. Thereafter, they were confronted with the question that they had been charged to have formed an unlawful assembly on 27.10.1989 in the village and were armed with lethal weapon(s) and indulged in the acts of loot, arson and killing of host of persons to which they replied in the negative. The accused was further questioned as to whether he/ they would like to say anything in defence. The answer was that they would lead evidence in defence. Actually they entered into defence and led as many as 10 DWs besides exhibiting some documents. We have not referred to those depositions since the appellants have not chosen to place them.

37. Section 313(1) of the Code is itself clear when it provides as follows:

Power to examine the accused.- (1) *In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court*

(a) may at any stage, without previously warning the accused, put such question to him as the Court considers necessary;

(b) shall after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case:

Provided that in a summons case, where the court has dispensed with the personal appearance of the accused, it may also dispense with his examination under clause (b)''.

38. Even if the accused are represented by a lawyer the law contemplates giving an opportunity to the accused to explain any circumstances appearing in evidence against him. Clause (b) of section 313(1) provides that the Court shall after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case. The charge which appears on the record is that the accused accentuated by the surcharged communal atmosphere in the zone in general, and in and around the township of Bhagalpur in particular, constituted an unlawful assembly, the common object thereof was to kill all the



Muslims without any distinction. It would, therefore, be unjust to expect from the prosecution to put each and every circumstance or the entire evidence of the prosecution to the accused (s) and seek their response. The procedure prescribed in law is to advance the cause of justice and not to nab the prosecution case. It would at best be a procedural flaw which would not vitiate the trial particularly when no serious prejudice has been caused to the accused (s). The entire testimony need not to be put to the accused. The accused, in fact, knowing the circumstances appearing against them, led oral evidence in support of their defence. In this context, this Court recalls the observations of the Apex Court made in paragraph 126 of ***Sidhartha Vashisht @ Manu vs. State (NCT of Delhi)* reported in (2010 (3) BBCJ 01 (SC)** relevant part whereof extracted herein below (at page 68 of the report):-

“The questioning of the accused is done to enable him to give an opportunity to explain any circumstances which have come out in the evidence against him. It may be noticed that the entire evidence is recorded in his presence and he is given full opportunity to cross-examine each and every witness examined on the prosecution side. He is given copies of all documents which are sought to be relied on by the prosecution. Apart from all these, as part of fair trial the accused is given opportunity to give his explanation regarding the evidence adduced by the prosecution. However, it is not necessary that the entire prosecution evidence need be put to him and answers



elicited from the accused. If there were circumstances in the evidence which are adverse to the accused and his explanation would help the court in evaluating the evidence properly, the court should bring the same to the notice of the accused to enable him to give any explanation or answers for such adverse circumstances in the evidence. Generally, composites questions shall not be asked to the accused bundling so many facts together. Questions must be such that any reasonable person in the position of the accused may be in a position to give rational explanation to the questions as had been asked. There shall not be failure of justice on account of an unfair trial”.

39. The appellants also assailed the prosecution case on the ground that no person came to identify the dead bodies, the post mortem of which was done by P.W. 4. Such dead bodies were more than 90 in numbers. Merely because the dead bodies have not been identified, the same would not demolish the prosecution case in view of specific evidence of the family members and other witnesses that more than 114 peoples were killed during the riot on the fateful morning of 27.10.1989. In our view, even if corpus delicti is not found, still an accused can be convicted if there is direct/ circumstantial evidence conclusively showing that the victim had died and accused committed the murder. Reference can be made to the decision of the Apex Court in the case of ***Ram Gulam Choudhary and others Vrs. State of Bihar, reported in (2001) 8 SCC 311.***



40. Mr. Ansul next argued that the evidence of the witnesses are contradictory to each other and not reliable. For instance, P.W. 1, Md.Yasin, in his evidence deposed that his statement was recorded within ten days of the incident, which is not on record. P.W. 2, Bibi Rabina, was under age of 8 years on the date of occurrence and after 12 long years, it is very unlikely that she would be remembering the incident which she has seen as a small child. Like P.W. 1, P.W. 3, Md. Sohail, in paragraph 9 of his deposition stated that his statement was taken after 10-12 days of the occurrence, which is also not there on record. P.W. 6, Md. Riaz, was also 10 years of age at the time of occurrence. He was one, who locked himself in a house out of fear. It would be almost impossible for him to watch the proceedings from inside the house. Further more, P.W. 7, Md. Jabbar, in paragraph 8 of his deposition stated that though Police came to the camp at Babura, still his statement was not recorded. P.W. 9, Md. Amir, in paragraph 16 of his deposition stated that he did not hear any fire sound. Similarly, P.W. 3 in paragraph 15 and P.W.9 in paragraph 16 too did not state about any firing sound. P.W. 11, Md. Azraf Ali, in paragraph 5 of his deposition stated that he gave statement on 2.12.1989 to P.C. Ram, Officer Incharge of Jagdishpur Police Station and had also put his signature. However, the said statement has not been produced on record and as such an adverse inference should be drawn against



the prosecution. Further more, non-examination of Raj Shekhar Prasad, the first Investigating Officer of the case has caused prejudice to the defence side and adverse inference should be drawn under Section 114(G) of the Evidence Act, 1872. He submits that the prosecution has purposefully withheld Raj Shekhar Prasad to obviate the earliest statement of the witnesses recorded by him.

41. Per contra, Mr. Khan, learned Special P.P., submits that evidence of a witness cannot be discarded, only on the ground that he was 8 to 10 years old on the date of occurrence. He reiterated his earlier submission, that faulty investigation on the part of the Police Officer cannot be a ground for rejecting the prosecution case of such heinous nature when there is enormous evidence in support of the case.

42. We have considered the submission of learned counsel for the parties. P.W. 1, Md. Yasin, who was 8 years old, has given vivid description of the occurrence in which rioters killed a number of his family members. A child of 8 years of age cannot be said, not to remember an incident of such a heinous nature, wherein his family members have been killed one after the other within his notice. It is true that the some of the witnesses stated that they made statement just after 10 to 12 days of the occurrence, which are not on record. It is relevant to state that the local Chaukidar, who lodged the first case on the date of occurrence i.e. 27.10.1989, the



Officer-in-Charge of the Police Station (Ram Chandra Singh) as well as P.C. Ram, the first Investigating Officer of the case, became accused in the case lodged by Azraf Ali, P.W. 11 on 03.12.1989. We have already observed that the role of the Police was partisan and not fair, which was the reason, the D.I.G., P.W. 17 directed amalgamation of both the F.I.R.s and further directed another Police Personnel, namely, Raj Shekhar Prasad to conduct the investigation. Much argument has been advanced that non-examination of Raj Shekhar Prasad, the first Investigating Officer, after amalgamation of the case, has caused prejudice to the defence and as such, adverse inference should be drawn against the prosecution. In our view the submission is only to be noted to be rejected. Evidence of all relevant witnesses, whose evidence were recorded by Raj Shekhar Prasad, were again recorded by Jagdish Kumar Pal, the 2nd Investigating Officer, who took over investigation of the case from former on 21.02.1990. As such, we are of the considered view that the appellants have failed to establish that non-examination of Raj Shekhar Prasad, has caused any prejudice to them. The submissions of the Appellants that P.W. 6, Md. Riaz, locked himself in a house and as such could not have possibly seen the occurrence requires due consideration. It appears that P.W. 6, nowhere, in his evidence stated that as to how he witnessed the occurrence, while he locked himself a room. Even we

discard his evidence, still the evidence of the other ten eye witnesses, who have claimed to have seen the occurrence, hold good.

43. It is relevant to state here that, the prosecution has not been able to elicit any material contradictions, which may cast shadow on the authenticity of the evidence of these witnesses. The witnesses are natural witnesses and the defence has rightly not questioned their presence, as they belong to the same village.

44. It is well settled that the testimony of a child, aged 8 to 10 years, cannot be rejected on the ground of his/her being a tender age, if the same is otherwise credible and inspires confidence in view of authoritative pronouncement of Hon'ble Apex Court in the case of ***Golla Yelugu Govindu Vs. State of Andhra Pradesh, reported in (2008) 16 SCC 769***. The Apex Court, while rejecting the contention of the appellant that the testimony of a child of tender age should not be taken into consideration, while pronouncing the judgment of conviction, observed in para 11, which reads as under:

11. "6. The Evidence Act, 1872 (in short the [Evidence Act](#)) does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, [Section 118](#) of the Evidence Act envisages that all persons shall be competent to testify, unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to these questions, because of tender years, extreme old age,



disease- whether of mind, or any other cause of the same kind. A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto. This position was concisely stated by Brewer J in Wheeler v. United States (159 U.S. 523). The evidence of a child witness is not required to be rejected per se, but the Court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction, based thereon. (See Surya Narayana v. State of Karnataka (2001 (1) Supreme 1).

The aforesaid view was reiterated by the Hon'ble Apex Court in the case of ***State of Karnataka Vs. Shantappa Madivalappa Galapuji & Others, reported in (2009) 12 SCC 731.***

45. Mr. Ansul, learned counsel appearing for the appellants submits that in any view of the matter even as per the prosecution witnesses, there is no evidence against Subhash Mandal and Jaddu Mandal. In fact, no witnesses have named them as accused during the trial. He further submits that Arjun Mandal has been named by only two witnesses namely, P.W. 11 and P.W.13.

46. We find force in the submission of learned counsel for the appellants so far as it is relatable to appellant Subhash Mandal of Criminal Appeal No.1118 of 2007 and appellant Jaddu Mandal of Criminal Appeal No.1117 of 2007. None of the witnesses have named them as an accused during the course of evidence. Even the informant does not name them as accused in his First Information Report.



47. Mr. Salauddin Khan, learned Special P.P. appearing for the State has not been able to controvert the submission of learned counsel for the appellants that none has named Subhash Mandal as an accused during the trial. However, he submits that two of the witnesses, namely, P.W.6, Md. Riaz and P.W. 13 Bibi Sakina have named one Jugeshwar and Jagarnath respectively, which invariably were referred to Jaddu Mandal.

48. It is difficult for us to accept the submission on behalf of learned State counsel in absence of any concrete material that Jaddu Mandal was also known as Jugeshwar or Jagarnath or as both. In this view of the matter, we acquit appellant Subhash Mandal of the charge. We also acquit appellant Jaddu Mandal by giving him benefit of doubt.

49. In the result, Criminal Appeal No.1118 of 2007 and Criminal Appeal No.1117 of 2008, so far as it relates to appellants Subhash Mandal and Jaddu Mandal are allowed. The judgment of conviction and sentence, passed against them by the Trial Court, are set aside.

50. So far as appellant Arjun Mandal is concerned, we find that P.W. 11 has named him as one of the miscreants who set fire to his house, where as P.W. 13 accused him of killing her father-in-law along with two other persons. The main thrust of learned counsel for the appellant in his defence is that the rest nine witnesses did not



name him in the trial. In our view, in case of mass killings, identification by two witnesses held to be sufficient to warrant conviction if otherwise their evidence is reliable. The Hon'ble Apex Court in the case of *Krishna Mochi and others Vrs. State of Bihar, reported 2002 (2) PLJR (SC) 305*, observed that conviction can be sustained on the basis of evidence of two witnesses, in case where there are large number of offenders and large number of victims. In the case of *Binay Kumar Singh Vrs. State of Bihar, reported in 1997(1) PLJR (SC) 24*, observed that evidence is not to be counted, weighed and it is not the quantity of evidence but quality that matters. Even testimony of one single witness wholly reliable, is sufficient to establish identification of accused as a member of unlawful assembly.

51. Situated thus and in view of the foregoing reasons, we are of the considered view that rest of the appellants along with a large number of rioters, with a common object, converged on village Logai in the morning of 27.10.1989 with lethal weapons and attacked Muslims population, who were in minority. In pursuit of the common object, they set fire to the houses, killed more than hundred persons including women and children; and thereafter, buried some and threw others in pond and well, with a view to cover their crime. We are, thus, satisfied that the prosecution has succeeded in bringing home the charge under Sections 147, 302 or 302/149, 436 or



436/149, 201/149, 380/149, 153A and 295/149 of the Indian Penal Code and Section 235 Cr.P.C. beyond all doubt against the rest of the appellants. We, accordingly, uphold the judgment of conviction and sentences passed by learned Trial Court in Sessions Trial No. 589 of 1991, against the rest eight appellants, namely, Ramdeo Mandal, Prabhash Mandal, Kuldeep Mandal, Thakur Paswan, Arjun Mandal, Sarjug Prasad Mandal, Shiblal Mandal and Naresh Mandal and dismiss their Appeals. The appellants would remain in custody to serve out the remaining period of sentences. We have already allowed the Criminal Appeals, of Subhash Mandal, Jaddu Mandal and Ajab Lal Mandal, whereas the Appeal of Ram Chandra Singh stood abated against him on account of his death, during the pendency of these appeals.

52. The State has preferred Government Appeal (DB) No.29 of 2007 for enhancement of sentence of the respondents, namely Ram Chandra Singh (now dead), Ramdeo Mandal. Jai Prakash Mandal, Prabhash Mandal and Kuldip Mandal @ Kullu. Out of the five appellants, one of them, Ram Chandra Singh is already died, the another Jai Prakash Mandal is absconding and the 3rd appellant Ram Deo Mandal is about 78 years old. Besides this, accused respondents are not instigators of the crime, nor they were leading the mob. There was no prior enmity between the parties. They seem to have been swayed by communal furor, incited by

persons who were leading the mob. The two other convicts are now fairly aged. All of them suffered diverse excruciating circumstances having mitigating effects. We are, thus, of the view that their case would not fall in the category of Rarest of rare case warranting capital punishment in the light of the decisions of the *Hon’ble Apex Court in the case of Shankar Kisan Rao Khade vs. State of Maharashtra, reported in (2013)5 SCC 846, Md. Manan vs. State of Bihar reported in 2011(3) Supreme 409 and Mulla vs State of Bihar, reported in 2010(1) Supreme 606*. The Government Appeal for enhancement of sentence is, accordingly, dismissed.

(Samarendra Pratap Singh, J)

I agree
(Kishore Kumar Mandal, J)

(Kishore Kumar Mandal, J)

Md.Jamaluddin Khan
A.F.R.

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