

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.80 of 2019

Arising Out of PS. Case No.-319 Year-2018 Thana- BIHIA District- Bhojpur

Md. Mumtaz Mansuri @ Taj, son of Md. Naimuddin Mansuri Village- Sandaur, P.S-Bihiya, District-Bhojpur.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

with

CRIMINAL APPEAL (SJ) No. 4274 of 2018

Arising Out of PS. Case No.-319 Year-2018 Thana- BIHIA District- Bhojpur

1. Rakesh Rai @ Piyush Rai @ Vikky, Son of Siyaram Rai.
2. Raja Sah, Son of Ashok Sah
Both, resident of Village- Damodarpur, P.S. Shahpur (Bahoranpur), District- Bhojpur.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

with

CRIMINAL APPEAL (SJ) No. 4785 of 2018

Arising Out of PS. Case No.-319 Year-2018 Thana- BIHIA District- Bhojpur

Vickey Singh @ Deepak Kumar Yadav, Son of Dinanath Singh, Resident of Village - Saheb Tola, Bihiya, P.S.- Bihiya, District – Bhojpur.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

with

CRIMINAL APPEAL (SJ) No. 4856 of 2018

Arising Out of PS. Case No.-319 Year-2018 Thana- BIHIA District- Bhojpur

Vinod Kumar Keshri @ Marai Keshri @ Murai Keshri, Son of Kaushal Prasad Kesri, Resident of Mohalla -Teachers Colony, Ward No. 2, P.S.- Bihiya, District – Bhojpur.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

with

CRIMINAL APPEAL (SJ) No. 92 of 2019

Arising Out of PS. Case No.-319 Year-2018 Thana- BIHIA District- Bhojpur



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Pintu Singh @ Pintu Kumar Singh, son of Pashupati Nath Singh @ Pashupati Nath Tomer, Resident of Village- Kauria, P.S.- Bihia, Dist.-Bhojpur.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

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with

CRIMINAL APPEAL (SJ) No. 114 of 2019

Arising Out of PS. Case No.-319 Year-2018 Thana- BIHIA District- Bhojpur

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1. Raja Sah, Son of Ashok Sah, R/o Village- Damodarpur, P.S. Shahpur (Bahoranpur) District- Bhojpur.
2. Rakesh Rai @ Piyush Rai @ Binni @ Vickky, Son of Siyaram Rai, R/o Village- Damodarpur, P.S. Shahpur (Bahoranpur), District- Bhojpur.
3. Munni Sah, Son of Anant Sah, Resident of Village- Jamuya, P.S.- Bihiya, District-Bhojpur

... .. Appellant/s

Versus

The State of Bihar Bihar

... .. Respondent/s

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with

CRIMINAL APPEAL (SJ) No. 161 of 2019

Arising Out of PS. Case No.-319 Year-2018 Thana- BIHIA District- Bhojpur

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Amit Kumar Jaiswal @ Bikku, S/o Late Uma Shankar Prasad Rahi, resident of Mohalla-Durga Mandir, Behiya, P.S and P.O- Behiya, District-Buxar.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

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with

CRIMINAL APPEAL (SJ) No. 162 of 2019

Arising Out of PS. Case No.-319 Year-2018 Thana- BIHIA District- Bhojpur

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1. Rajesh Sharma @ Imarti, son of Nand Kishor Sharma, resident of village- Jamuan, P.S- Bihiyan, District- Bhojpur.
2. Shubham Sharma, son of Binod Kumar Sharma, resident of village- Dafali, Mohalla- Raja Bazar Bihiyan, Ward no.13, P.S- Bihiyan, District-Bhojpur.
3. Sonu Kumar, son of Sanjay Singh, resident of Village- Phingi, P.S-Bihiyan, District-Bhojpur.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s



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with
CRIMINAL APPEAL (SJ) No. 214 of 2019

Arising Out of PS. Case No.-319 Year-2018 Thana- BIHIA District- Bhojpur

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Ranjit Kumar, son of Suresh Pd. Gupta @ Suresh Pd. Resident of Mohalla-
Gupta Mandi, Bihiya, P.S.- Bihiya, District- Buxar.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

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with
CRIMINAL APPEAL (SJ) No. 230 of 2019

Arising Out of PS. Case No.-319 Year-2018 Thana- BIHIA District- Bhojpur

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Lakhan Kumar, son of Sri Bhagwan Prasad, resident of Village - Saheb Tola
Bihiyan Sabji Mandi , Ward no. 1, PS- Bihiyan, District- Bhojpur.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

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with
CRIMINAL APPEAL (SJ) No. 234 of 2019

Arising Out of PS. Case No.-319 Year-2018 Thana- BIHIA District- Bhojpur

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Rajbali @ Rajbali Kumar @ Barak, son of Parsuram Prasad, resident of
Mohalla- Sahebtola, Ward No.01, Village- Bihia, PS- Bihia, District- Bhojpur.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

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with
CRIMINAL APPEAL (SJ) No. 244 of 2019

Arising Out of PS. Case No.-319 Year-2018 Thana- BIHIA District- Bhojpur

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Satya Narayan Prasad @ Satya Narayan, Son of Late Chhathu Prasad Gupta,
Resident of Mohalla-Sabji Mandi, Bihiya, P.S.-Bihiya, District-Buxar.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

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with
CRIMINAL APPEAL (SJ) No. 302 of 2019

Arising Out of PS. Case No.-319 Year-2018 Thana- BIHIA District- Bhojpur

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- 1. Bishnu Kumar @ Mithun, son of Dinesh Prasad, Resident of Village - Raja Bazar (Bihiya), PS- Bihiya, District - Bhojpur.
- 2. Sikandar Kumar, son of Dinesh Prasad, Resident of Village - Raja Bazar (Bihiya), PS- Bihiya, District - Bhojpur.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

with
CRIMINAL APPEAL (SJ) No. 342 of 2019

Arising Out of PS. Case No.-319 Year-2018 Thana- BIHIA District- Bhojpur

Suraj Kumar @ Pappu Kumar, S/O Dinesh Prasad, Resident of Village- Raja Bazar (Bihiya), PS- Bihiya, District- Bhojpur.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

with
CRIMINAL APPEAL (SJ) No. 353 of 2019

Arising Out of PS. Case No.-319 Year-2018 Thana- BIHIA District- Bhojpur

Kishori Yadav, son of Lal Mohan Yadav, Resident of Village- Jamua P.S.- Bihiya, District- Bhojpur.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

with
CRIMINAL APPEAL (SJ) No. 1091 of 2019

Arising Out of PS. Case No.-319 Year-2018 Thana- BIHIA District- Bhojpur

VIKASH RAJAK, Son of Late Moti Rajak, Resident of Village - Bihiya, PS- Bihiya, District- Bhojpur.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

with
CRIMINAL APPEAL (SJ) No. 4251 of 2019

Arising Out of PS. Case No.-319 Year-2018 Thana- BIHIA District- Bhojpur

Babua @ Gunga @ Babuajee, Son of Late Shiv Mangal Singh Yadav, Resident of Village - Sirajee Tola, P.S.- Dhangai, District- Bhojpur.



... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

(In CRIMINAL APPEAL (SJ) No. 80 of 2019)
For the Appellant/s : Mr. Satyendra Narayan Singh, Adv.
For the Respondent/s : Mr. Binoy Krishna, APP
(In CRIMINAL APPEAL (SJ) No. 4274 of 2018)
For the Appellant/s : Mr. Amarendra Kumar, Adv.
For the Respondent/s : Mr. Binay Krishna, APP
(In CRIMINAL APPEAL (SJ) No. 4785 of 2018)
For the Appellant/s : Mr. Surendra Kumar Singh, Adv.
Mr. Prabhat Kumar Singh, Adv.
For the Respondent/s : Mr. Binay Krishna, Spl. PP (SC/ST)
(In CRIMINAL APPEAL (SJ) No. 4856 of 2018)
For the Appellant/s : Mr. Anil Kumar, Adv.
For the Respondent/s : Mr. Binay Krishna, APP
(In CRIMINAL APPEAL (SJ) No. 92 of 2019)
For the Appellant/s : Mr. Sudha Chandra, Adv.
For the Respondent/s : Smt Usha Kumari No-1, APP
(In CRIMINAL APPEAL (SJ) No. 114 of 2019)
For the Appellant/s : Mr. Amarendra Kumar, Adv.
For the Respondent/s : Ms. Usha Kumari No1, APP
(In CRIMINAL APPEAL (SJ) No. 161 of 2019)
For the Appellant/s : Mr. Awadhesh Prasad Sinha, Adv.
Mr. Kumar Mrityunjay Narain, Adv.
For the Respondent/s : Mr. Sri Sadanand Paswan, APP
(In CRIMINAL APPEAL (SJ) No. 162 of 2019)
For the Appellant/s : Mr. Bibhakar Tiwary, Adv.
For the Respondent/s : Mr. Binay Krishna, Spl. PP(SC/ST)
(In CRIMINAL APPEAL (SJ) No. 214 of 2019)
For the Appellant/s : Mr. Awadhesh Prasad Sinha, Adv.
Mr. Kumar Mrityunjay Narain, Adv.
For the Respondent/s : Mr. Sri Bipin Kumar, APP
(In CRIMINAL APPEAL (SJ) No. 230 of 2019)
For the Appellant/s : Mr. Bibhakar Tiwary, Adv.
For the Respondent/s : Mr. Binay Krishna, APP
(In CRIMINAL APPEAL (SJ) No. 234 of 2019)
For the Appellant/s : Mr. Ashutosh Kumar Vinayak, Adv.
For the Respondent/s : Mr. Sri Sadanand Paswan, APP
(In CRIMINAL APPEAL (SJ) No. 244 of 2019)
For the Appellant/s : Mr. Awadhesh Prasad Sinha, Adv.
Mr. Kumar Mrityunjay Narain, Adv.
For the Respondent/s : Mr. Sri Sadanand Paswan, APP
(In CRIMINAL APPEAL (SJ) No. 302 of 2019)
For the Appellant/s : Mr. Surendra Kumar Singh, Adv.
Mr. Prbhat Kumar Singh, Adv.
Ms. Tulika Singh, Adv.
For the Respondent/s : Mr. Binay Krishna, Spl. PP (SC/ST)
(In CRIMINAL APPEAL (SJ) No. 342 of 2019)
For the Appellant/s : Mr. Surendra Kumar Singh, Adv.
Mr. Prbhat Kumar Singh, Adv.
Ms. Tulika Singh, Adv.
For the Respondent/s : Mr. Binay Krishna, Spl. PP (SC/ST)



(In CRIMINAL APPEAL (SJ) No. 353 of 2019)

For the Appellant/s : Mr. Surendra Kumar Singh, Adv.
Mr. Prbhat Kumar Singh, Adv.
Ms. Tulika Singh, Adv.

For the Respondent/s : Mr. Binay Krishna, Spl. PP (SC/ST)

(In CRIMINAL APPEAL (SJ) No. 1091 of 2019)

For the Appellant/s : Mr. Praveen Kumar, Adv.

For the Respondent/s : Mr. Binay Krishna, APP

(In CRIMINAL APPEAL (SJ) No. 4251 of 2019)

For the Appellant/s : Mr. Prabhat Kumar Singh, Adv.

For the Respondent/s : Ms. Usha Kumari 1, APP

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date : 24-10-2019

Since all these appeals arise out of the same judgment of conviction dated 28.11.2018 and order of sentence dated 30.11.2018 passed by the learned 1st Additional District and Sessions Judge, Bhojpur at Ara in connection with SC/ST Case No.194 of 2018 arising out of Bihiya P.S. Case No.319 of 2018, on account thereof, have been heard together and are being decided by a common judgment.

2. All the appellants namely, Md. Mumtaz Mansuri @ Taj in Cr. Appeal (SJ) No.80 of 2019, Rakesh Rai @ Piyush Rai @ Vikky, Raja Sah in Cr. Appeal (SJ) No.4274 of 2018, Vicky Singh @ Deepak Kumar in Cr. Appeal (SJ) No.4785 of 2018, Vinod Kumar Keshri @ Marai Keshri @ Murai Keshri in Cr. Appeal (SJ) No.4856 of 2018, Pintu Singh @ Pintu Kumar Singh in Cr. Appeal (SJ) No.92 of 2019, Raja Sah, Rakesh Rai @ Piyush Rai @ Binni @ Vickky and Munni Sah in Cr. Appeal (SJ) No.114 of 2019, Amit



Kumar Jaiswal @ Bikku in Cr. Appeal (SJ) No.161 of 2019, Rajesh Sharma @ Imarti, Shubham Sharma and Sonu Kumar in Cr. Appeal (SJ) No.162 of 2019, Ranjit Kumar in Cr. Appeal (SJ) No.214 of 2019, Lakhan Kumar in Cr. Appeal (SJ) No.230 of 2019, Rajbali @ Rajbali Kumar @ Barak in Cr. Appeal (SJ) No.234 of 2019, Satya Narayan Prasad @ Satya Narayan in Cr. Appeal (SJ) No.244 of 2019, Bishnu Kumar @ Mithun and Sikandar Kumar in Cr. Appeal (SJ) No.302 of 2019, Suraj Kumar @ Pappu Kumar in Cr. Appeal (SJ) No.342 of 2019, Kishori Yadav in Cr. Appeal (SJ) No.353 of 2019, and Babua @ Gunga @ Babuajee in Cr. Appeal (SJ) No.4251 of 2019 except Vikash Rajak in Cr. Appeal (SJ) No.1091 of 2019 have been found guilty for the offences punishable under Section 3(i)(d) as well as Section 3(i)(s) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act and, each one has been directed to undergo RI for two years as well as to pay fine appertaining to Rs.2,000/- and in default thereof, to undergo S.I. for two months additionally and, all the appellants excluding Vikash Rajak though found guilty for an offence punishable under Section 147 of the IPC but they have not been sentenced therefor. So far Vikash Rajak is concerned, he has been found guilty for an offence punishable under Section 147 of the IPC and has been sentenced to undergo R.I. for 2 years as well



as to pay fine appertaining to Rs.2,000/- and in default thereof, to undergo S.I. for 2 months additionally.

Furthermore, appellants Kishori Yadav, Md. Mumtaz Mansuri @ Taj, Vinod Kumar Keshri @ Marai Keshri @ Murai Keshri, Bishnu Kumar @ Mithun, Sikandar Kumar have been found guilty for an offence punishable under Section 354(B) of the IPC and each one has been sentenced to undergo R.I. for 7 years as well as to pay fine appertaining to Rs.10,000/- and in default thereof, to undergo S.I. for 4 months.

3. Guriya Devi @ Guddi Devi filed a written report on 20.08.2018 disclosing therein that when she returned back from Brahmpur Mandir at about 9.00 A.M. and then while was taking sleep after breakfast, at about 3.00 PM she heard some sort of commotion wherefrom she perceived that a dead-body was lying near about railway track where, a large number of persons have assembled. They were trying to identify the dead-body, but failed. She also failed to identify the dead-body and so returned back to her house. After sometime, a mob consisting of 200-250 persons (unknown) armed variously raided her house, pelted stones and then lit fire in her house. Any how she came out from her house and rushed to Bihiya Police Station and informed orally. On the basis of the information given by her, the police personnel



proceeded towards her house. She also rushed towards her house.

As soon as she reached near the shop of Sharma Lohar, (1) Kishori Yadav, son of Lal Mohan Yadav of village Jamua, (2) Binod Kumar Keshari @ Marai, son of Kaushal Prasad Keshari of Ward No.2, Shikshak Colony, (3) Ranjeet Kumar, son of Suresh Prasad Gupta @ Suresh Gupta of Mohalla- Gupta Mandi, (4) Rajbali @ Barak, son of Parshuram Prasad of Mohalla Saheb Tola, Ward No.1, (5) Satya Narayan Prasad @ Raushan, son late Chhathu Prasad Gupta of Mohalla Sabji Mandi, Ward No.13, (6) Lakhan Kumar, son of Sri Bhagwan Prasad of Mohalla- Sabji Mandi, Ward No.1, (7) Rajesh Sharma @ Imarti, son of Nand Kishore Sharma of village- Jamua, (8) Munni Shah, son of Anant Sah of Village Jamua, (9) Md. Mumtaz Mansuri @ Taj, son of Md. Naimuddin Mansuri of Village Sandaur, (10) Shubham Sharma, son of Binod Kumar Sharma of village Dafali, Ward No.13, (11) Amit Kumar Jaiswal @ Pikku, son of late Uma Shankar Prasad Rahi of Mohalla in front of Durga Mandir, Behiya, (12) Sonu Kumar, son of Sanjay Singh of village Phingi, (13) Vicky Singh @ Deepak Kumar Yadav, son of Dinanath Singh of Village- Saheb Tola, Bihiya, Ward No.8, (14) Gautam Kumar @ Ganesh Kumar, son of Baban Prasad of Saheb Tola, Ward No.1,(15) Suraj Kumar @ Pappu Kumar, son of Dinesh Prasad of Ward no.8 along with more



than 100 unknown persons encircled her, abused her and then all of them began to tear off her clothe as a result of which, she became naked. Then she was assaulted with fists, slaps and Danda. They were also calling her by caste name and were also saying '*Randi*'. She in order to save her life rushed towards the over bridge but the members of the unlawful assembly continued to chase her. During midst thereof, the police officials reached there and rescued her. She was kept at a shop. The police personnel provided her clothe. It has also been disclosed that all the accused persons along with other unknown members of the unruly mob prepared video and then it was made viral. The members of the unlawful assembly also attacked upon the police personnel but anyhow the police personnel succeeded in getting her rescued. After sometime, she got an information that apart from her house, the houses of her neighbours have also been victimized. They also set on fire her motorcycle.

4. After registration of Bihiya P.S. Case No.319 of 2018 investigation commenced and concluded by way of submission of charge-sheet against some of the accused, keeping investigation pending against others who have been put on trial, convicted and sentenced in a manner as indicated hereinabove, the subject matter of the instant appeals.



4. The defence case as is evident from the mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is of complete denial. It has further been pleaded that actually the police in order to save their skin and further having some sort of grievances persisting since before got all the persons named in this case irrespective of the fact that none of the appellants were/have been identified as a members of the unlawful assembly nor there could be an occasion for identification as, the majority of the appellants are residents of different village without having proper access. Furthermore, the specific case of appellant Satya Narain Prasad @ Satya Narayan is that he happens to be correspondent of a media house and as, he used to report against the police, on account thereof he has been implicated and to substantiate the same two DWs have also been examined at his end.

5. In order to substantiate its case, prosecution has examined altogether 8 PWs who are PW-1, Ram Naresh Yadav, PW-2, Phulkeshari Devi, PW-3, Paramhans Rai, PW-4, Kunwar Prasad Gupta, PW-5, Guriya Devi @ Guddi Devi (informant), PW-6, Sanjay Kumar Sharma (I.O.), PW-7, Dr. Anil Kumar and PW-8 Kshipranjali. Side by side also exhibited, written report (Ext. 1), seizure list relating to Pen Drive (Ext. 2), seizure list relating to



mobile phone (Ext. 3), F.S.L. report of Chandigarh (Ext.4), Enquiry report of Guriya Devi (Ext. 5) and statement under section 164 of the Cr.P.C. of the informant (Ext.6). Apart from these, the material exhibits Samsung screen touch mobile has been made as a Material Ext. 1 and Pen Drive as Material Ext. 2.

Two DWs, DW.1, Dhanji Yadav and DW2, Angad Ojha have also been examined on behalf of the defence. Ext. A, the letter of appointment of Satnarayan Prasad as correspondent and Ext. A/1 photograph of Satnarayan Prasad have been brought up on record.

6. All these appeals have been heard in the background of the fact that during course of hearing of bail matters relating to all the appellants independently as well as conjointly, evidences, material exhibits, documentary evidences have been addressed at the end of the rival parties whereupon instead of going through repeatedly it has been considered prudent to decide these appeals on merit. That being so the rival submissions have been heard in length.

7. The learned respective counsel representing the appellants have submitted that from the judgment impugned, it is evident that the learned lower court, as was very much anxious to record judgment of conviction and sentence and so, right from



inception proceeded in such matter which ultimately caused prejudice to the appellants as on account of non-consideration of the materials in accordance with law. To justify such plea, it has been submitted that although there happens to be absence in the order-sheet, but from the statement of the accused under Section 313 of the Cr.P.C. it is apparent that one of co-accused Babua @ Gunga @ Babuajee would not have been proceeded because of the fact that he was unable to understand the proceeding on account of his mental infirmity and that happens to be the reason behind that during the course of statement, assistance of experts have been taken up and with the help of those experts, statement has been recorded. In the aforesaid background, the whole trial vitiates as it suggests non-application of judicious mind.

8. Furthermore, the learned lower court failed to consider that the FIR happens to be ante-dated and the same is properly exposed from the evidence of respective PWs. To justify the same, it has been submitted that though there happens to be some sort of infirmity at their end as defence could not be able to draw attention of the I.O. (PW-6) on that very score nor the O/C (PW-4) but the fact remains that the FIR was recorded on 20.08.2018 and reached at the office of 1st Additional Sessions Judge cum Special Judge, SC/ST on 22.08.2018. Furthermore,



Guriya Devi as is apparent from her signature happens to be an illiterate and, she failed to disclose who had scribed the written report nor PW-4, the Officer Incharge has divulged the name of the scribe. That happens to be with a purpose because of the fact that when evidence of PW-1, PW-2 and PW-3 is properly scrutinized then, in that circumstance, it became crystal clear that the FIR happens to be ante-dated and further, irrespective of the fact that the victim was not capable to identify any of the member of the unlawful assembly, it happens to be police officials who got the appellants named including others in order to save their skin, having known to them since before on political pressure having so as there was much more media hue and cry, and in the aforesaid background the correspondent Satya Narayan has also been made accused in order to teach a lesson.

9. Then, it has also been submitted that the aforesaid eventuality met the identification of the appellants doubtful. Whereupon irrespective of the fact that there happens to be no challenge at the end of the appellants over the commission of offence but the manner whereunder the police officials have acted, conducted the investigation, did not justify the finding so recorded by the learned trial court. Consequent thereafter the judgment impugned is fit to be set aside.



10. On the other hand, the learned Additional Public Prosecutor while repelling the submission having made on behalf of the respective learned counsel has submitted that from the evidence available on record it is apparent that occurrence is not denied nor it could be. The only thing over which much stress has been made is over identification and, from the evidence as well as after proper appreciation it is evident that the members of the unlawful assembly have been identified with their names so the appeals having at their end are to be dismissed.

11. PW-1, Ram Naresh Yadav has stated that the occurrence is dated 20.08.2018 on which date one lady, namely, Guriya Devi was forced to walk in naked condition. A motorcycle was burnt at her house. Her house was also put on fire. He was called upon and then directed to identify the persons on screening the video and during course thereof, he had identified Kishori Yadav, son of Lal Mohar Yadav, Munni Sah, son of Anand Sah and Rajesh Sharma, son of Nand Kishore Sharma. In video he had seen Kishori Yadav twisting with the dancer. He had also seen two more persons but, failed to identify. The witness has also identified Kihori Yadav in dock. He also identified Rajesh Sharma and Munni Sah. He has identified some more persons but unable to disclose their names. During course of cross-examination at



paragraph 3, on behalf of Rajesh Sharma, he has disclosed that he screened video in the night on 20.08.2018 at about 8.00 PM itself, but he is unable to say how much time he consumed in screening the video. The Officer Incharge was along with him. As per video footage, Rajesh Sharma was standing but he is not remembering at that very time about apparel which he was wearing. He has also stated that he could not identify the place where Rajesh was standing. In likewise manner he is unable to disclose the boundary. The Officer Incharge had called upon to identify on the basis of the video footage. He was called upon through phone. Then he denied the suggestion that he has falsely deposed at the instance of superior officials.

On behalf of Amit Kumar Jaiswal, Satya Narayan Prasad and Ranjit nothing really has been cross-examined. On behalf of Rajbali at paragraph 5 he has stated that he is not in a position to disclose regarding the others except the persons whom he identified. On behalf of Mumtaz Ansari nothing substantial has been cross-examined. On behalf of Vikas Rajak and Sonu Kumar at paragraph 7 he has stated that he had not identified the others save and except whom had named. On behalf of Kishori, Pappu, Bishnu and Sikandar at paragraph 8 he has stated that video footage on the basis of which had identified the persons, is not



available before him. Accused Kishori happens to be his co-villagers. He has stated that on the date of occurrence he had come to court along with an accused but he is not remembering the name of the court and accused. On behalf of Rakesh Rai @ Piyus, Raja Sah and Munni Sah at paragraph 10 he has stated that Munni Sah, his co-villager was apprehended by him. In paragraph 11 he has stated that he had apprehended Muni Sah on the date of occurrence at about 10.00 PM. Then he denied the suggestion that on account of dispute over purchase/sale of goods he got Munni Sah implicated in this case.

12. PW-2, Phul Keshari Devi has stated that the occurrence is dated 20.08.2018. It was about 3.00 or 4.00 PM. At that very time she was at the police station. The Officer Incharge came out from the police station and during course thereof, he said that there happens to be uproar in the market so he proceeded along with other police officials. She also accompanied them. When they reached at Dafali mohalla they have seen the house of Guriya Devi under fire. They have also seen one motorcycle was set ablazed. They have also seen five persons engaged in forcibly marching Guriya Devi in naked condition. She had identified one Marai of Shikshak Colony, 2nd Shubham of Dafali Mohalla, 3rd Ranjit of Gupta Mandi, 4th Deepak Kumar of Saheb Tola and 5th



Ganesh of Saheb Tola. A large number of persons were along with them but she had not identified them. Then she identified in dock; the accused who on query disclosed their identity as Vinod Keshari, Amit Kumar Jaiswal, Gautam Kumar, Mumtaz Mansuri and Rajit Kumar. During course of cross-examination on behalf of Mumtaz, Suraj Kumar, Sikandar, Bishnu, Kishori Yadav, Rajbali Vickey Singh, Munni Sah, Rakesh Kumar Rai, Raja Sah, Shubham Sharma and Sonu Kumr cross-examination has been declined. On behalf of Mrai and Ranjit at paragraph 6 she has stated that the tea-stall of Marai lies by the side of the police station. Marai used to run the shop along with his family members. She has further stated that eye sight of Marai is weak. At paragraph 7 there happens to be cross-examination relating to distance of Mohalla- Dafali from the police station. In paragraph 9 she has stated that she is unable to disclose at which hours she arrived at the place of occurrence and in likewise manner with regard to the Officer Incharge. In paragraph 10 she has stated that tea-stall of Ranjit also lies by the side of the police station. In paragraph 11 there happens to be contradiction but, attention of the I.O. (PW-6) has not been drawn and so, the aforesaid contradiction has no legal identity. Then has denied the suggestion that Marai and Ranjit has been falsely



implicated as they declined to serve free of cost. On behalf of remaining accused again cross-examination has been declined.

13. PW-3 is Paramhansh Rai. He has stated that the occurrence is of dated 20.08.2018. He had gone to Bihiya Police Station on 21.08.2018 carrying Dak. At that very time, the Officer Incharge was screening video on mobile. He had seen in the video that one lady was moving in naked condition. So many persons were following her. Out of them he had identified two persons, namely, Raja Sah and Rajesh @ Vickey. He identified Raja Sah and Piyush Rai in dock. During cross-examination, at the end of the Raja Sah and Rajesh @ Vicki he has stated that he had carried the Dak from Bahoranpur O.P.. Then at paragraph 7 he has stated that after delivery of the Dak, he also participated during course of screening the video. 4-5 persons were screening the video since before but he is unable to disclose their names. They were screening over mobile. He had screened about 4-5 minutes. In paragraph 8 he has stated that he is unable to disclose the place where Raja Sah and Rakesh Rai were seen in the video.

14. PW-4 is the Officer Incharge. He during his examination-in-chief has stated that on 20.08.2018 he was Officer Incharge of Bihiya Police Station. At about 16.00 hours the informant Guriya Devi came at the police station and disclosed



that about 200-250 persons have attacked upon her house, are engaged in pelting stones and are engaged in arson. At that very time he was engaged in Shanti Samiti meeting presided over by the Block Development Officer, Bihiya, respectable persons of the locality and people representatives. Just after receiving information he along with other police officials, armed police personnel rushed. After reaching at the house of the informant, the members of the mob began to pelt stone over them also. They have tried their best to take the confidence of the members of the mob but, none were adamant to concede. While they were engaged in protecting the house of the informant, they received information that some of the members of the mob after assaulting Guriya Devi are engaged in parading her in naked condition. Then, with the help of police personnel as well as with the help of lady Chowkidar, Guriya Devi was given clothe to wrap herself. Then she was rescued. In order to control the mob, they have used tear gas as well as they have also fired in air. He had identified Kishori Yadav, Vinod Keshari @ Marai, Ranjit Kumar, Rajbali, Satya Narayan, Munni Sah, Rajesh Sharma, Sonu, Vicki, Gautam and Shubham Sharma amongst the members of the mob. Others were also identified on screening the video footage. Further, he disclosed that some persons are known by their names but, with



regard to others he may have some sort of confusion. Then he identified Kishori Yadav, Munni Sah and Vinod Keshari @ Marai, Amit Jaiswal with name as well as face. He also identified Sonu. With regard to others he claimed identification by face. Then has stated that he had made statement before the I.O.. During course of cross-examination on behalf of Md. Mumtaz Ansari (paragraph 7), Rajbali Kumar (paragraph 8) there happens to be nothing substantial. At paragraph 9 on behalf of Rajesh Sharma, Shubham Sharma, Vicky Singh @ Deepak he has stated that he had not stated before the I.O. with regard to the identification on the basis of video footage. At the end of Satya Narayan Prasad, Marai and Amit Jaiswal at paragraph 10 he has stated that the relevant video footage is not before him on the basis of which he had identified the accused. He has further stated that he had not received the video footage. It was shown by the police official. He is unable to disclose who had shown him. Then, he has stated at paragraph 11 that he is not knowing whether Satya Narayan is a news correspondent. He has admitted that Ranjit and Vinod Kumar @ Marai have tea stall by the side of the police station. He has further stated that he is unable to say on the basis of the video footage with regard to the activity of each of the member of the unlawful assembly. In paragraph 12 he has stated that three cases have been



instituted relating to the occurrence so alleged on the same day but, he is not remembering the exact case number as well as the names of the accused persons. In paragraph 13, he has stated that one eye of Marai is completely damaged. In paragraph 14 on behalf of the Munni Sah, Rakesh Rai, Raja Sah and Lakhan, he has stated that with regard to Gautam he is unable to say anything. He has further stated that before the occurrence he had got information with regard to lying of a dead-body within the jurisdiction of G.R.P. He had mentioned the same in the station diary. He has further disclosed that arrival of Guriya Devi is mentioned in the station diary. Even from the disclosure by Guriya Devi cognizable offence was made out even then no FIR was recorded on that very basis. He, after instructing Guriya Devi to sit in the police station, they had proceeded from the police station. In paragraph 15 he has stated that first of all they had gone to the house of the informant. There was pelting of stones from the side of the railway line. They had gone towards the western direction in order to pacify the mob. They halted just 10-20 feet away from the house of the Guriya Devi. In paragraph 16 he has stated that they have fired tear gas as well as in air from that place alone. Thereafter, the unlawful assembly dispersed. He has further stated that they have seen Guriya Devi in naked condition at a distance of



2/3rd kilometer east to the police station. The persons engaged in parading her were tried to be arrested but, they managed to succeed. On court query, that when they had left Guriya Devi at the police station then how she came out from the police station, he answered that he is not remembering under whose custody they had left Guriya Devi. In paragraph 17 he has stated that the house of Guriya Devi was burning and they had tried to extinguish the fire. Then has stated that he met with the lady near Gupta Mandi. He had inquired from her that when she was left at the police station then how she came out whereupon. She disclosed that after their departure she came out from the police station to go to her house. He has stated that during the intervening period that means to say, right from meeting with Guriya Devi at the police station to at Gupta Mandi in naked condition, they were engaged. The members of the unlawful assembly were scattered all around the house of Guriya Devi. For the present he is not remembering at which time tear gas was fired. In paragraph 19 he has stated that he is not knowing the village of Munni Sah. He has further stated that clothe was brought by the female Chowkidar and then it was handed over to the victim. At paragraph 20 on behalf of remaining he has denied the suggestion that Kishori Yadav was known to him since before the occurrence. Then he has stated that he had not



seen him prior to the occurrence. He has seen him after occurrence as well as at the time of arrest. Kishori Yadav is of Village Thingi. He identified Sonu but he failed to disclose the parentage and village. Then has stated at paragraph 22 that he is unable to disclose whether Guriya Devi is an accused of murder case or not. In paragraph 23 he has stated that he has not prepared the seizure list relating to stone. He had not prepared the seizure list relating to the articles having burnt during the course of arson.

15. PW-5 is the victim/Guriya Devi. She has claimed to be the informant of this case. The occurrence is of dated 20.08.2018. At a *Lagga* from her house, a dead-body was lying. It was about 9.00 AM. At that very time she was at her house. Her children have gone to Brahampur. At that very moment there was an uproar that one person was lying. Again some people had disclosed that murder has been committed. The dead-body was lying in front of railway track. She had seen the dead-body from her *Kotha*. Thereafter, the doors of respective houses began to close one by one. She also closed her house. About 2-3 hours pelting of stones began. When door plank began to damage she, after opening her door, came out in order to verify why her door planks are being damaged. She tried to ask a query but, none responded. There were Sohijan tree in front of her house. Kishori,



after plucking one of the branches began to assault her. Mumtaz also joined. Then she rushed to Bihiya Police Station where she met with the Officer Incharge whom she disclosed the occurrence. She also requested him to come to her house in order to save her. The Officer Incharge proceeded on vehicle towards her house. She followed on barefoot. People began to pelt stone at the police station also. She rushed from there in order to save herself. While she rushed towards Durga Mandir from the police station she had seen her motorcycle and grossery shop under flame. Then she rushed towards the house of Ramji Sharma. The mob including Kishori, Sikandar, Marai and Mumtaz began to chase her and during course thereof also assaulted. They torn her blouse. She tried to cover herself with the Sari but they had also snatched away the same. She claimed that after seeing the others she could identify as she is not knowing their names. She has further stated that Kishori has also snatched away her Sari. She has further stated that Kishori caught her hair and then, in naked condition paraded her and during course thereof she was also assaulted. She was brutally assaulted during the course thereof, as a result she was unable to identify the others. Then, thereafter the members of the unlawful assembly took her towards the over bridge where one Munmunji rescued her. He has given one nighty and towel from



which she covered her body. Meanwhile police-jeep came and she was taken to the police station. She has identified Deepak, Rajesh Sharma and Suraj with face. She has further stated that her statement before the Magistrate was recorded over which she had given her RTI. She has further stated that there was assemblage of 200-300 persons so she could not identify all of them. During cross-examination on behalf of Md. Mumtaz Ansari she has stated at paragraph 10 that her house lies south to railway line in the red light area. At paragraph 11 she has disclosed the boundary of her house north- railway line, south- house of Prabhawati Devi, East- Parti land of Prabhawati Devi and West-house of Sanjay, her maternal uncle. At paragraph 12 she has stated that all about 20-25 persons are inhabitants of red light area. She has further stated that the dead-body was lying near about one *Lagga* from her house. She came to know with regard to the dead-body at about 10.00 to 11.00 AM. People were seeing the dead-body since morning and in due course of time there was assemblage. In paragraph 13 she has stated that none of her Mohalla people had gone to see the dead-body. Then has stated that while she was sleeping at that very moment pelting of stone begin. In paragraph 14 she has stated that at that very time none of the family members was present. When she came from her house to enquire, at that very time 100-150



persons were there. All were empty hand. During course of query 5-6 persons came and after plucking the branches of Sahjan they began to assault her. In paragraph 15 she has stated that she had gone to police station at about 1.00 PM. She followed the police. She had not come to her house. While she was in between the house of Ram Bachan and Durga Mandir, the police was near to her house. She tried to escape towards the house of Ramji Sharma then again moved towards the police station. She was caught by her hair. Then, she disclosed that for the last 2 months she has not gone to her house as her house is completely burnt. In paragraph 16 she has stated that she has sustained 4-5 blow of Sahjan stick. She was medically examined. In paragraph 17 she has stated that Kishori was saying to Mumtaz to assault. At the time when people were assaulting her, her eyes were closed but she was hearing. She is not knowing the village of Mumtaz. She has not met with person known as Mumtaz. She has not named Mumtaz in the statement made under Section 164 of the Cr.P.C. In paragraph 18 she has said that 4 persons of red light area have gone to jail relating to murder case. One of them happens to be Sani and rest are Babita and Chandani. In paragraph 20 of cross-examination on behalf Marai, Amit Kumar Jaiwal, Satya Narayn Prasad and Ranjit she has stated that during the course of statement before the Magistrate



she has named Kishori, Marai, Bishnu, Mumtaz. At paragraph 21 she has stated that today the persons having named by her out of them she is identifying only one. She used to see him while she was going to temple. In paragraph 22 she has stated that police station lies west to her house. The tea stall of Marai lies there. She also used to see Marai in a way to temple. Then, has stated that Marai is not blind rather his both eyes are normal. She identified Marai. But she is unable to say whether his eye is normal or not. She after seeing on his eyes stated that his eye is normal. Again said that it appears to be damaged. At the end of Rajesh Sharma, Deepak Kumar Yadav and Vicky at paragraph 24 she has stated at paragraph 25 that she rushed to police station in order to save herself. She rushed through the Darwaja of Ram Bachan Singh. The same happens to be the main road. The members of the unlawful assembly were half kilometer away from the house of Ram Bachan Singh. There was no assemblage of mob at the Gali passing through the house of Ram Bachan Singh. At paragraph 26 she has stated that she had seen the members of the mob and further, who were its member. She has seen while she was being chased by the members of the mob. Again said that while she was running in order to save herself so, she could not see who were the members. In paragraph 28 on behalf of Rajbali Kumar and



Shubham Sharma cross-examination has been declined. In paragraph 29 on behalf of Suraj Kumar, Sikandar, Bishnu, Kishori and Sonu she has stated that she had gone to custody in connection with Bihiya P.S. Case No.68 of 2014. At paragraph 30 she has stated that she has got two sons whose names are in the voter list. Her husband namely, Mithilesh Kumar Singh is now dead. He was of *Nat* caste. At paragraph 31 she has stated that she was knowing Kishori Yadav since before. After the occurrence she has seen him for the first time in dock. She is not knowing the father's name of Kishori. In paragraph 32 she has stated that she is deposing for the first time after the occurrence. Then she denied the suggestion that she happens to be the murderer. Then she has stated that no seizure list was prepared with regard to her house. Then she has stated that she is unable to say whether any seizure list was prepared or not. At the end of Lakhan, Sonu Kumar, Munni Sah, Rakesh Rai and Raja Sah at paragraph 33 she has stated that after going to police station she returned back to her house. After coming to her house she had again gone to police station. Then thereafter she remained at the police station. After registration of the case so many persons were apprehended and brought at police station. In paragraph 34 she has stated that she is not remembering who had scribed the written report. Then, she stated that she has got no information



with regard to the application having scribed at the police station over which she had signed. She again said that she was not knowing who scribed the same but her statement was recorded. At the time of statement night had fallen.

16. PW-6, Sanjay Kumar Sinha is the last I.O. of the case. He has stated that on 20.08.2018 he was Police Inspector of Bihiya Circle. After registration of Bihiya P.S. Case No.319 of 2018 on the statement of Guriya Devi, investigation was entrusted to A.S.I. Ram Nath Paswan of Bihiya Police Station, who recorded the further statement of the victim, inspected the place of occurrence, procured the injury report, got the informant examined under section 164 of the Cr.P.C.. He took up investigation on 25.08.2018. Thereafter he had re-visited the place of occurrence. The place of occurrence lies at Mohalla- Dafali, Bihiya having boundary East- PCC road and gate of Durga Sharma, west- PCC road proceeding towards Bihiya railway station, north- boundary wall of Ram Narayan Sharma and south- Welding shop and house of Vinod Sharma, son of late Ramji Sharma. The second place of occurrence happens to be the multi-storied building of the informant which lies at Mohalla- Dafali having boundary east- house of Rinku Nat, West- house of Prabhawati Devi, north- Sanjay Nat and south- PCC road. On 25.08.2018 A.S.I. Ravindra



Kumar produced a Pen Drive of San Disk company (8 GB) which was seized and then for getting it examined by the FSL (Chandigarh) made prayer before the court concerned. After getting an order, he transmitted the same on 27.08.2018 with special messenger. On 30.08.2018 he received the report but, again sent the Pen Drive for re-examination. On 31.08.2018 Shrikant Kumar, son of Kamlesh Prasad of village- Panchwati Nagar had produced Samsung J-5 mobile whereunder video footage of the occurrence was there and for that production cum seizure list was prepared and the same was seized. Again he had applied for getting an order from the court for examination of the Samsung J-5 mobile and after getting an order, the same was sent to Chandigarh on 02.09.2018 through special messenger. On 05.09.2018 after completing the investigation, submitted charge-sheet. Exhibited the relevant seizure list as well as also exhibited the material exhibit (Pen Drive, Samsung mobile). He has placed the report submitted by the FSL (Chandigarh) (Ext.-4). During cross-examination at the end of Rajbali Kumar at paragraph 14 he has stated that the persons who produced the mobile was neither examined by him nor made him witness of this case. On behalf of Mumtaz Ansari in paragraph 15 he has stated that the mobile and Pen Drive was sent to Chandigarh in a sealed condition. He has



not recorded the same. Who had recorded, he is unable to say. Shrikant Kumar had produced the same and so his signature was taken. On behalf of Amit Kumar Jaiswal, Satya Narayan Prasad, Ranjit and Vinod Kumar at paragraph 17 he has stated that he does not know any of the accused personally. He has further stated that during statement none had disclosed personally who lit fire. They had stated that it was conjoint effort of the mob but, during course of statement under Section 164, the victim had disclosed who had lit fire. Kishori Yadav and Rajesh Sharma were the persons who lit fire and against whom there happens to be positive assertion of proper identification. Then on court question, that there happens to be disclosure with regard to arson relating to houses of others also even then whether the owners of those houses have identified or not and the answer is not. In paragraph 18 he has stated that only once he visited the place of occurrence. In paragraph 19 he has stated that he received the Pen Drive on 25.08.2018. He had not recorded the statement of Shrikant Kumar. On behalf of Shubham Sharma, Rajesh Sharma, Vicky Singh @ Deepak Kumar Yadav at paragraph 23 he has stated that witness Kuwar Prasad Gupta had disclosed the names of Rajesh Sharma, Vicky Singh and Shubham Sharma. He had not disclosed the identification after seeing the video footage. He had not recorded the statement of



Guriya Devi. At the end of Suraj Kumar, Sikandar, Bishnu, Kishori and Sonu there is nothing substantial. Cross-examination at paragraph 26 at the end of Munni Sah, Rakesh Rai @ Piyush, Raja Sah, Lakhan and Sonu he has stated at paragraph 27 that on the alleged date of occurrence he was not present at the office. At paragraph 28 he has stated that both the place of occurrence lies in the same Mohalla- Dafali. Under paragraph 29 he has stated that he had made query regarding the date from Ravindra Kumar, the police personnel who had produced the Pen Drive. He had not recorded his statement. In paragraph 30 he has stated that the persons who handed over the mobile, had personally handed over the same.

17. PW-7 is Dr. Anil Kumar who had examined the victim at 1.53 PM and found the following injury:

- (1) Pain and Tenderness over her both legs;
- (2) Multiple Bruises over back of different size (Linear, Rectangular and Irregular) of approximately 10 to 20 in number.

During course of cross-examination, nothing substantial is found, save and except at paragraph 5 wherein he has stated that pain and tenderness does not come within the category of injury. Then has stated that some area was covered by the blouse. He had not seen after removing the blouse.



18. PW-8 is Kshiprachala Anjali, the Magistrate who had recorded the statement of the victim. She during course of her examination-in-chief has stated that on 24.08.2018 she was S.D.J.M. at Civil Court, Bhojpur at Ara and on that date, she had recorded the statement of the victim Guriya Devi @ Guddi, wife of late Mithlesh Kumar Nat under section 164 of the Cr.P.C. and got it exhibited on record having in her pen and signature. During cross-examination, at paragraph 3 she has stated that the victim had disclosed that by seeing anybody she could identify. Names of accused were scribed on the disclosure by the victim.

19. First of all, the case of Babua @ Gunga is taken independently. From the order-sheet as well as till the statement of the accused, there happens to be nothing on record showing application of mind by the learned lower court regarding proper identification of the accused to be doubts but during course of statement, as is evident from the format of statement services of 2 experts, namely, Smt. Pushpa Sinha, the Principal and Rekha Sinha of Ara Deaf and Dumb school have been requisitioned and then, through whom the statement was recorded. The order-sheet dated 02.11.2018 divulges the fact that the statement of accused Babua @ Gunga could not be recorded as he was unable to speak and then, the order dated 03.11.2018 divulges that with the help of



aforesaid two experts the statement of Babua @ Gunga has been recorded. However, there happens to be no finding at the end of the learned lower court with regard to his mental capability much less whether he was able to understand the proceeding.

Chapter XXI of the Cr.P.C. deals with the subject covering unsoundness of mind of an accused. Unsound has been defined under Black's Law Dictionary as "not healthy", not mentally well, also classified as insane person. So far the status of 'Dumb' is concerned, as per Oxford Concise Medical Dictionary means 'mutism', means inability or refusal to speak, dumbness, innate speechlessness most commonly occurs in those who have been totally deaf since birth (deafmutism). Inability to speak may result from brain damage. It may also be caused by depression or psychological trauma in which case the patient either does not speak at all or speak only to particular persons or in particular situation. This latter condition is called elective mutism.

So, the learned lower court should have before commencement of trial that means to say, at the stage of framing of charge, should have traced out whether the accused was in a position to understand the proceeding and failure on the part of the court is bound to give bonanza in favour of appellant Babua @ Gunga.



20. It is further evident from the lower court records that no plea has been raised at the end of any of the appellants during course of trial as well as at the present moment over juvenality. However, from the column of the formal FIR as well as from the written report, it is evident that appellant/accused Ranjit Kumar, Lakhan Kumar have been shown to be aged about 19 years while Gautam Kumar has been shown to be aged about 18 years. Lakhan Kumar was produced on 22.08.2018 on which date his age was shown to be approximately 20 years while Gautam Kumar @ Ganesh Kumar to be aged about 19 years, Bishnu who has surrendered before the learned lower court (not named in the FIR) has been estimated as 19 years, Ranjit as 20 years. It is further evident that a prayer has been made on behalf of Shubham Sharma on 15.09.2018 to declare him juvenile but, neither aforesaid petition was moved nor the lower court took cognizance of the same with any initiative. However, from the order dated 12.09.2018, it is evident that a prayer was made on behalf of accused Gautam @ Ganesh Kumr whereupon vide order dated 13.09.2018 the case of Gautam Kumar was separated and transmitted to the J.B. Board.

21. Now coming to the merit of the case, it is evident that PW1 and PW-3 are not an eye witness to occurrence rather



they have identified the culprit after seeing the video footage. PW-1 had seen video footage in the night of 20.08.2018, while PW-3 had screened the video footage in the day time on 21.08.2018. From their evidence, it is manifest that video footage were being seen by the police official including the Officer Incharge (PW-4) since before. But PW-4 (O/C) has not stated with regard to screening of video footage either on 20.08.2018 or on 21.08.2018 rather he deposed in vagueness that identification of remaining were on the basis of video footage. The Pen Drive and the Samsung mobile were produced on 25.08.2018 as well as on 31.08.2018 respectively. That means to say before production of aforesaid two electronic equipment video footage were already seen by the police official and the reason best known to the police official, they kept silence with regard thereto and in likewise manner the aforesaid video footage has not been seized by the I.O., nor produced before the I.O. That means to say, the aforesaid video footage was different than the whatever been on record and with regard thereto there happens to be no positive assertion of the O/C (PW-4) and so it speaks a lot with regard to proper identification of the accused. Apart from, casting doubt over genuineness as well as the legality of evidence of PW-1 and PW-3.



22. Now, there happens to be evidence of PW-2, another Chowkidar whose evidence is to be seen in the background of evidence of PW-4 (Officer Incharge), PW-5 (informant). PW-5 (informant) has disclosed that after coming to police station she disclosed about the activity of an unlawful assembly who were indulged not only in pelting stone but, in arson and after having such information, the Officer Incharge along with other police officials as well as armed police personnel proceeded on a jeep, while PW-4, the Officer Incharge has not spoken whether he had proceeded on jeep. He has in paragraph 22 stated that after receiving information he proceeded towards the house of the informant along with other police personnel as well as armed police force. While PW-2 has not shown presence of informant at the police station rather, she has stated that the Officer Incharge had said that there happens to be commotion towards the market and then the Officer Incharge along with other police personnel including herself proceeded on barefoot. She also accompanied them and when they reached at Mohalla Dafali, they had found the house of Guriya Devi under fire including that of a motorcycle. At that very moment she had seen few persons engaged in parading Guriya Devi in naked condition. Out of them she claimed identification of Marai, Shubham, Ranjit, Deepak Kumar and



Ganesh. When the evidence of PW-4, Officer Incharge is gone through, it is evident that both are contradictory to each other and that happens to be reason behind that in dock, she failed to identify the others save and except Ranjit. On the other hand, she made dock identification of Vinod Keshri, Amit Kumar Jaiswal, Gautam Kumr, Mumtaz Mansuri and Ranjit Kumar.

23. So far PW-4 is concerned, apart from being Officer Incharge, he has not shown presence of PW-2 at the police station nor disclosed to have accompanied PW-2. He has not named any police official and in likewise manner, the armed constables whom he carried along with him. These events have got relevancy because of the fact that in spite of the fact that there happens to be disclosure at his end that tear gas was fired and there was also firing in the air to disperse the unruly mob, no such disclosure has been made. That means to say how tear gas shells were brought, who fired the tear gas and the names of the constable who fired in the air how many rounds as none has claimed including the Officer Incharge that as per his order firing was made. Although from his evidence, it is evident that peace committee meeting was going on under the Presidentship of the Block Development Officer but whether the Block Development Officer transformed himself to be a Magistrate and for that whether there was any order of the



S.D.M., whether on an order of the Block Development Officer firing was made or the firing was made on the order of PW-4, the Officer Incharge or the personnel by himself fired, how many rounds. There happens to be some sort of slackness at the end of the defence during course of cross-examination who completely failed to cross-examine PW-4, on which date had screened the video footage, who was the Magistrate at whose order firing was made, non-examination thereof. It has got purpose much less in the background of disclosure having at the end of the informant (PW-5) that written report was scribed by somebody else. She had not deposed nor claimed that written report was scribed on her dictation. That means to say somebody else was managing the whole scenario. But again, the defence failed to highlight save and except PW-5 at paragraph 34. However, PW-4 in his examination-in-chief at paragraph 5 has stated that amongst the mob he identified Kishori Yadav, Vinod Keshri @ Marai, Ranjit Kumar, Rajbali, Satya Narayan, Munni Sah, Rajesh Sharma, Sonu, Vikki, Gautam and Shubham Sharma. Rest were also identified on the basis of video footage but during the course of dock identification as is evident from paragraph 6 she identified Kishori Yadav, Munni Sah, Vinod Keshri @ Marai, Amit Jaiswal and Sonu. Out of whom



Amit Jaiswal was not named at an earlier occasion and further, also claimed identification with regard to others through face.

24. P.W. 5 is the informant. Her conduct is also to be seen in the background of the fact that the police official after having been informed at her end that she is being victimised by unruly mob who was engaged in pelting stone as well as, some of the members, namely, Mumtaz and Kishori, when she came out of her house to know about the reason, assaulted her after plucking the branch of Sahijan (green stick), when she was directed by the police official to take seat in the police station itself, she left and in order to explain why she left the police station, stated that unruly unlawful assembly also began to pelt stone over the police station which is found not supported by any of the PWs much less PW-4, the Officer Incharge and PW-6, the I.O. cum Inspector whose office is also adjacent to the police station, is a surprising. The reason so assigned at her end is found not at all substantiated. However, authenticity of her evidence is to be seen wherein she has stated that there was brick batting at the police station. She ran therefrom in order to save herself and while she was going towards Durga Mandir, she had seen her motorcycle as well as grossery shop under flame whereupon, she rushed towards the house of Ramji Sharma. From the evidence of PW-4, the Officer Incharge



as well as from the evidence of PW-6 it is evident that there happens to be no corroboration at their end over setting a blaze the grossery shop and the motorcycle of the informant. From their evidence, it is also crystal clear that she had not gone towards her house rather she was in a way towards the house of Ramji Sharma and during midst thereof, she fallen at the hand of certain segment of unlawful assembly, out of whom she identified Kishori Yadav, Sikandar, Marai, Mumtaz who chased her, assaulted her, torn her blouse and while she was unsuccessful to cover her body by Sari they also untied and further, Kishori pulled her Saya. Kishori assaulted her in naked condition after having caught hold of her hair but when the matter came up for dock identification as is evident from paragraph 8, she identified Deepak, Rajesh and Suraj only whom she had not named.

25. With regard to the evidence of PW6, the last I.O. less said as better. The first I.O. has not been examined. The second I.O., PW-6 claimed to have revisited the place of occurrence, shown two place of occurrence, identified the same through proper boundary but there happens to be no objective finding relating thereto. When there happens to be specific claim that the multi-storied house of the informant/victim was put on fire, the motorcycle has been burnt then remnants should have been there.



There happens to be no finding with regard thereto. Apart from this, there also happens to be the allegation of brick-batting but there happens to be no seizure with regard to any of the aforesaid events.

26. The evidence in court, that means to say, identification in dock is the substantive evidence. Neither under Cr.P.C. nor under the Evidence Act there happens to be any direction upon the prosecution to have conduction of T.I. parade though its relevancy happens to be in accordance with Section 9 of the Evidence Act and so, times without number it has been held by the Apex Court that it is dock identification which has got edge irrespective of the fact that prosecution had failed to conduct T.I. parade during course of investigation. In **State of Rajasthan vs. Daud Khan** reported in (2016) 2 SCC 607 it has been held as follows:

“42. It was contended by Daud Khan that the three chance witnesses, PW-7 Mahabir Singh, PW-23 Narender Singh and PW-24 Rishi Raj Shekhawat were all from out of town. As such, they could not have identified Daud Khan or Javed. It was further contended that no test identification parade (for short “TIP”) was conducted and reliance could not have been placed only on their dock identification.

43. No such argument was raised by Daud Khan either in the Trial Court or in the High Court and we see no reason to permit such an argument being raised at this stage.

44. That apart, it was recently held in [Ashok Debbarma v. State of Tripura](#) [(2014) 4 SCC 747: (2014) 2 SCC (Cri) 417] that while the evidence of identification of an accused at a trial is admissible as a substantive piece of



evidence, it would depend on the facts of a given case whether or not such a piece of evidence could be relied upon as the sole basis for conviction of an accused. It was held that if the witnesses are trustworthy and reliable, the mere fact that no TIP was conducted would not, by itself, be a reason for discarding the evidence of those witnesses. In arriving at this conclusion, this Court relied upon a series of decisions [*Kanta Prashad v. Delhi Admn.*, AIR 1958 SC 350: 1958 Cri.LJ 698; *Harbajan Singh v. State of J & K*, (1975) 4 SCC 480: 1975 SCC (Cri.) 545; *Jadunath Singh v. State of U.P.* (1970)3 SCC 518: 1971 SCC (Cri.) 124; *George vs. State of Kerala*, (1998) 4 SCC 605: 1998 SCC (Cri) 1232; *Dana Yadav v. State of Bihar*, (2002) 7 SCC 295: 2002 SCC (Cri.) 1698]. Earlier, a similar view was expressed in *Manu Sharma v. State (NCT of Delhi)* [(2010) 6 SCC 1 : (2010) 2 SCC (Cri) 1385, paras 255, 258].”

27. When there happens to be presence of unlawful assembly consisting of large number of persons then in what manner the evidence should be at the end of prosecution and, how the court is to perceive the evidence in order to identify culpability of accused persons. A larger Bench of the Apex Court in **Masalti vs. State of Uttar Pradesh** reported in **1965 SC 202** has observed as follows:

16. Mr. Sawhney also urged that the test applied by the High Court on convicting the appellants is mechanical. He argues that under the Indian Evidence Act, trustworthy evidence given by a single witness would be enough to convict the accused person, whereas evidence given by half a dozen witnesses which is not trustworthy would not be enough to sustain the conviction. That, no doubt is true, but where a criminal court has to deal with evidence pertaining to the commission of an offence involving a large number of offenders and a large number of victims, it is usual to adopt the test that the conviction could be sustained only



if it is supported by two or three or more witnesses who give a consistent account of the incident. In a sense, the test may be described as mechanical; but it is difficult to see how it can be treated as irrational or unreasonable. Therefore, we do not think that any grievance can be made by the appellants against the adoption of the test. If at all the prosecution may be entitled to say that the seven accused persons were acquitted because their cases did not satisfy the mechanical test of four witnesses and if the said test had not been applied, they might as well have been convicted. It is, no doubt, the quality of the evidence that matters and not the number of witnesses who give such evidence. But sometimes it is useful to adopt a test like the one which the High Court has adopted in dealing with the present case.”

28. Following the aforesaid principles in **State of U.P. vs.**

Dan Singh reported in (1997) 3 SCC 747 it has been held:

“48. it would be safe if only those of the respondents should be held to be the members of the unlawful assembly who have been specifically identified by at least four eyewitnesses.”

29. In **Inder Singh vs. State of Rajasthan** reported in

(2015) 2 SCC 734 it has been held as follows:

“14. The main issue that now requires consideration is whether the courts below have rightly applied [Section 149](#) IPC against the appellants for convicting them for the death of four persons and for murderous assault on the informant. The principle of law governing application of [Section 149](#) IPC has been explained by this Court in many judgments including those cited by learned Senior Counsel for the appellants. In the case of *Kuldip Yadav [Kuldip Yadav v. State of Bihar, (2011) 5 SCC 324: (2011) 2 SCC (Cri) 632]* the law was stated in paragraph 39 in the following words (SCC p. 336):

"39. It is not the intention of the legislature in enacting [Section 149](#) to render every member of unlawful



assembly liable to punishment for every offence committed by one or more of its members. In order to attract [Section 149](#), it must be shown that the incriminating act was done to accomplish the common object of unlawful assembly and it must be within the knowledge of other members as one likely to be committed in prosecution of the common object. If the members of the assembly knew or were aware of the likelihood of a particular offence being committed in prosecution of the common object, they would be liable for the same under [Section 149](#) IPC."

15. In *Busi Koteswara Rao* [*Busi Koteswara Rao v. State of A.P.*, (2012) 12 SCC 711: (2012) 4 SCC (Cri) 192] the facts showed involvement of large number of persons and, therefore, while approving the view taken in the case of *Masalti* [*Masalti v. State of U.P.*, AIR 1965 SC 202: (1965) 1 Cri.LJ 226] this Court cautioned in paragraph 11 of the judgment that the courts should be cautious in cases of arson and murder where the number of accused is large, to rely upon the testimony of the witnesses speaking generally without specific reference to the accused or the specific role played by them.

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17. The ingredients of [Section 149](#) IPC require presence of an unlawful assembly which is defined under [Section 141](#) of the IPC as an assembly of five or more persons, if the common object of the persons composing that assembly is any of the five objects fully enunciated in [Section 141](#) IPC. The third object is "to commit any mischief or criminal trespass, or other offence." The explanation to [Section 141](#) clarifies that an assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly. As per [Section 149](#), even if any one member of an unlawful assembly commits an offence in prosecution of the common object of that assembly, every person who at the time of committing of that offence was a member of the unlawful assembly is guilty of that offence.

18. Since it was vehemently contended that courts below have not applied their mind as to whether the appellants were members of an unlawful assembly or not, it is our duty to remind ourselves of the law on the



subject. It is settled law, as held in *Roy Fernandes v. State of Goa* [(2012) 3 SCC 221: (2012) 2 SCC (Cri) 111] that to determine the existence of common object, the court is required to see the circumstances in which the incident had taken place, the conduct of members of unlawful assembly as well as the weapon of offence they carried or used on the spot. It is also established law, as held in *Ramchandran v. State of Kerala* [(2011) 9 SCC 257: (2011) 3 SCC (Cri) 677] that common object may form on the spur of the moment. Prior concert by way of meeting of members of unlawful assembly is not necessary.

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... ..

20. So far as the principle of caution as enunciated in the case of *Masalti* [*Masalti v. State of U.P.*, AIR 1965 SC 202: (1965) 1 Cri.LJ 226] is concerned, we find ourselves in agreement with the submission advanced by learned Senior Counsel Mr. Basant that in the peculiar facts of the case, the courts below should have further decided as to how much corroboration was required for accepting the presence and participation of individual accused person. The informant had though claimed presence of 29 persons but subsequently five were acquitted by the trial court and one was acquitted by the High Court. On this issue, on going through the charts disclosing number of witnesses who have deposed against individual appellants to show their presence, participation, weapon and overt act, if any, we find that the test approved in *Masalti* case [*Masalti v. State of U.P.*, AIR 1965 SC 202: (1965) 1 Cri.LJ 226] and subsequently followed in several other cases including *Busi Koteswara Rao* [*Busi Koteswara Rao v. State of A.P.*, (2012) SCC 711: (2012) 4 SCC (Cri) 192] needs to be followed in this case also. In the latter judgment in paragraph 13 the law on the subject has been expounded in very clear terms: (*Busi Koteswara Rao* case, (2012) 12 SCC p.715)

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



21. Since the accused persons and the six material eyewitnesses in this case are co-villagers, it is expected that at least three witnesses should be in a position to name individual accused persons for sustaining his conviction. Applying that test, it is found that Accused 9 Bhagwan Singh, son of Prabhu Lal; Accused 18 Suresh Kumar, son of Ram Dhakad; Accused 20 Kanhi Ram, son of Prabhu Lal; Accused 27 Prahlad Singh, son of Nathu Lal; and Accused 28 Ram Prasad, son of Bheru Lal deserve to be acquitted by granting benefit of doubt. This benefit of doubt arises in their favour because although they have been named specifically by informant P.W.15 as persons who were members of the unlawful assembly and who participated in assault but such claim of the informant has not been supported by more than one witness. In other words, there is no clear and cogent evidence of three witnesses against the aforesaid accused persons. So far as Accused 28 Ram Prasad is concerned, no doubt his name has been taken by P.W.12 and P.W.24 also but they have not specified as to whether it was Ram Prasad, son of Bheru Lal or another accused by the same name, i.e. Accused 25 Ram Prasad, son of Jeth Ram.”

30. The judgment impugned did not refer consideration of the evidence originated on the basis of screening of video but, being an appellate court and further, the appeal happens to be continuation of trial it looks desirable that proper discussion over the mode of appreciation of the evidence should be in consonance with its legal propriety. Proper recognition of the computer is based on the Information Technology Act and the Section 2(1) (i) defines the ‘computer’ as:

“2(1) (i) “computer” means any electronic, magnetic, optical or other high-speed data processing device or system which performs logical, arithmetic and memory functions by manipulations of electronic, magnetic or



optical impulses, and includes all input, output, processing, storage, computer software or communication facilities which are connected or related to the computer in a computer system or computer network;”

Section 4 falling under Chapter-III of the I.T. Act validates the recognition of electronic record and that happens to be the reason behind amendment having in the Evidence Act, more particularly that of Section 3 as well as Section 65. After going through Section 65 (b) of the Evidence Act it is evident that the condition so enumerated in sub-section (2) unless and until being fulfilled, there would not be proper recognition of electronic evidence. The aforesaid Section 65 has been subject to consideration before the Apex Court by a three Judges Bench in **Anvar P.V. vs. P.K. Basheer** reported in (2014) 10 SCC 473 and, the recognition of the aforesaid evidence has been in tune with secondary evidence and further, for its admissibility, the following principles have been laid down:

“20. Proof of electronic record is a special provision introduced by the IT Act amending various provisions under the Evidence Act. The very caption of Section 65A of the Evidence Act, read with Sections 59 and 65B is sufficient to hold that the special provisions on evidence relating to electronic record shall be governed by the procedure prescribed under Section 65-B of the Evidence Act. That is a complete code in itself. Being a special law, the general law under Sections 63 and 65 has to yield.

21. In State (*NCT of Delhi*) v. *Navjot Sandhu* [(2005) 11 SCC 600; 2005 SCC (Cri) 1715] a two-Judge Bench of this Court had an occasion to consider an issue on



production of electronic record as evidence. While considering the printouts of the computerized records of the calls pertaining to the cellphones, it was held at Paragraph-150 as follows: (SCC p. 714)

“150. According to Section 63, “secondary evidence” means and includes, among other things, ‘copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies’. Section 65 enables secondary evidence of the contents of a document to be adduced if the original is of such a nature as not to be easily movable. It is not in dispute that the information contained in the call records is stored in huge servers which cannot be easily moved and produced in the court. That is what the High Court has also observed at para 276. Hence, printouts taken from the computers/servers by mechanical process and certified by a responsible official of the service-providing company can be led in evidence through a witness who can identify the signatures of the certifying officer or otherwise speak of the facts based on his personal knowledge. Irrespective of the compliance with the requirements of Section 65-B, which is a provision dealing with admissibility of electronic records, there is no bar to adducing secondary evidence under the other provisions of the Evidence Act, namely, Sections 63 and 65. It may be that the certificate containing the details in sub- section (4) of Section 65-B is not filed in the instant case, but that does not mean that secondary evidence cannot be given even if the law permits such evidence to be given in the circumstances mentioned in the relevant provisions, namely, Sections 63 and 65.”

It may be seen that it was a case where a responsible official had duly certified the document at the time of production itself. The signatures in the certificate were also identified. That is apparently in compliance with the procedure prescribed under Section 65-B of the Evidence Act. However, it was held that irrespective of the compliance with the requirements of Section 65-B, which is a special provision dealing with admissibility of the electronic record, there is no bar in adducing secondary evidence, under Sections 63 and 65, of an electronic record.”



For having its transposition as primary evidence, again certain criteria have been laid down and for better appreciation the same is quoted below:

“24. The situation would have been different had the appellant adduced primary evidence, by making available in evidence, the CDs used for announcement and songs. Had those CDs used for objectionable songs or announcements been duly got seized through the police or Election Commission and had the same been used as primary evidence, the High Court could have played the same in court to see whether the allegations were true. That is not the situation in this case. The speeches, songs and announcements were recorded using other instruments and by feeding them into a computer, CDs were made therefrom which were produced in court, without due certification. Those CDs cannot be admitted in evidence since the mandatory requirements of [Section 65-B](#) of the Evidence Act are not satisfied. It is clarified that notwithstanding what we have stated herein in the preceding paragraphs on the secondary evidence of electronic record with reference to [Section 59](#), [65-A](#) and [65-B](#) of the Evidence Act, if an electronic record as such is used as primary evidence under [Section 62](#) of the Evidence Act, the same is admissible in evidence, without compliance of the conditions in [Section 65-B](#) of the Evidence Act.”

31. This matter has again been subject to consideration in **Tomaso Bruno vs. State of U.P.** reported in **(2015) 7 SCC 178** wherein it has been held as follows:

24. With the advancement of information technology, scientific temper in the individual and at the institutional level is to pervade the methods of investigation. With the increasing impact of technology in everyday life and as a result, the production of electronic evidence in cases has become relevant to establish the guilt of the accused or the liability of the defendant.



Electronic documents *stricto sensu* are admitted as material evidence. With the amendment to the [Indian Evidence Act](#) in 2000, [Sections 65-A](#) and [65-B](#) were introduced into Chapter V relating to documentary evidence. [Section 65-A](#) provides that contents of electronic records may be admitted as evidence if the criteria provided in [Section 65-B](#) is complied with. The computer generated electronic records in evidence are admissible at a trial if proved in the manner specified by [Section 65-B](#) of the Evidence Act. Sub-section (1) of [Section 65-B](#) makes admissible as a document, paper print out of electronic records stored in optical or magnetic media produced by a computer, subject to the fulfillment of the conditions specified in sub-section (2) of [Section 65-B](#). Secondary evidence of contents of document can also be led under [Section 65](#) of the Evidence Act. PW-13 stated that he saw the full video recording of the fateful night in the CCTV camera, but he has not recorded the same in the case diary as nothing substantial to be adduced as evidence was present in it.

25. The Production of scientific and electronic evidence in court as contemplated under [Section 65-B](#) of the Evidence Act is of great help to the investigating agency and also to the prosecution. The relevance of electronic evidence is also evident in the light of [Mohd. Ajmal Mohammad Amir Kasab vs. State of Maharashtra \[\(2012\) 9 SCC 1: \(2012\) 3 SCC \(Cri\) 481\]](#), wherein production of transcripts of internet transactions helped the prosecution case a great deal in proving the guilt of the accused. Similarly, in the case of [State \(NCT of Delhi\) vs. Navjot Sandhu \[\(2005\) 11 SCC 600: 2005 SCC \(Cri\) 1715\]](#), the links between the slain terrorists and the masterminds of the attack were established only through phone call transcripts obtained from the mobile service providers.”

32. So far the record is concerned, it is evident that PW-6, the I.O. has brought F.S.L. report on record with regard to mobile as well as pen drive, but the totality of prosecution to have evidence of PWs on that very score and further production of



aforesaid phone on 25.08.2018 as well as on 31.08.2018, was not the source of identification as video clips were already seen by the police officials including PW-1 and PW-3 on 20.08.2018 as well as on 21.08.2018. On account thereof, Exhibit-4 loses its relevancy and, on account of non-production of the video clips which were seen by PW-1, PW-3 as well as the Officer Incharge, happens to be one of the major short-fall of the prosecution case. Furthermore, in accordance with Section 114(g) of the Evidence Act, if the party withhold the best piece of evidence then in that circumstance inference has to be drawn against him and the same has elaborately been dealt with in **Tomaso Bruno vs. State of U.P.** (supra) and for better appreciation the relevant paragraph 20 is quoted below:

“20. The defence plea offered by the appellants was that in the wee hours of 4-2-2010, they had gone out and returned to the hotel only to find out the serious condition of Francesco Montis. The appellants being foreign nationals who visited India as tourists, it would not have been possible for them to examine any witness either from the hotel or from the place which they are said to have visited as they were tourists in India. In the facts and circumstances of the case and in the light of the statement explanation offered by the accused that in the wee hours of 4-2-2010 they had gone out to see “Subah-e-Banaras”, in our considered view, the burden was for the prosecution to establish that they remained inside the Hotel room from 3-2-2010 till the next day morning 8.00 a.m. in the hotel.”

33. From the evidence available on record as discussed hereinabove it is abundantly clear that the instant prosecution is



nothing but a farce. The prosecution has simply completed its paraphernalia only to avoid the curse of the administration as, a lady has been outraged by a violent mob whereunder the State machinery completely failed to protect and which could be a black spot. Consequent thereof, the judgment impugned is set aside.

All the appeals are allowed. The appellants, who are on bail they are discharged from the liability of bail bonds while the appellants who are in custody hence they are directed to be released forthwith if not required in any other case.

Re: **Cr. Appeal (SJ) No.4274 of 2018**
with
Cr. Appeal (SJ) No.92 of 2019

The aforesaid two appeals have wrongly been listed along with the batch of appeals as, those are already disposed of records concerned with prayer for bail having been filed on account of presence of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, whereunder appeal is provided.

(Aditya Kumar Trivedi, J)

skpathak/-

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