

IN THE HIGH COURT OF JUDICATURE AT PATNA
DEATH REFERENCE No.1 of 2017

Arising Out of PS. Case No.-22 Year-1999 Thana- KARPI District- Jehanabad

The State Of Bihar

... .. Petitioner

Versus

Dukhan Kahar @ Dukhan Ram Kahar, Son of Muni Ram, Resident of
Village- Kutubpur, P.S.- Kurtha, District- Arwal.

... .. Respondent

with

CRIMINAL APPEAL (DB) No. 72 of 2017

Arising Out of PS. Case No.-22 Year-1999 Thana- KARPI District- Jehanabad

Dukhan Kahar @ Dukhan Ram Kahar, Son of Muni Ram, Resident of
Village- Kutubpur, P.S.- Kurtha, District- Arwal.

... .. Appellant

Versus

The State Of Bihar

... .. Respondent

Appearance :

(In DEATH REFERENCE No. 1 of 2017)

For the Petitioner : Mr. Yongendra Prasad Sinha, AAG-7
Ms. Sashi Bala Verma, APP

For the Respondent : Mr. Sanjay Kumar, Adv.
Ms. Surya Nilambari, Amicus Curaie

(In CRIMINAL APPEAL (DB) No. 72 of 2017)

For the Appellant : Mr. Sanjay Kumar, Adv.
Ms. Surya Nilambari, Amicus Curaie

For the Respondent : Mr. Yongendra Prasad Sinha, AAG-7
Ms. Shashi Bala Verma, APP

CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

and

HONOURABLE MR. JUSTICE ARVIND SRIVASTAVA

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH)

Date : 21-05-2021

Appellant Dukhan Kahar @ Dukhan Ram Kahar has
been held guilty in Sessions Trial No.93/2013/281/2015 arising out
of Karpi P.S. Case No. 22 of 1999 by the learned 3rd Additional
Sessions Judge, Jehanabad for the offences punishable under



Sections 148, 302/149, 307/149 of the Indian Penal Code, 27 of the Arms Act and 3/4 of Explosive Substances Act vide judgment dated 10th November, 2016. Consequent upon conviction, vide order dated 18th November, he has been sentenced to death for the offence punishable under Section 302/149 of the Indian Penal Code, rigorous imprisonment for three years and a fine of Rs.10,000/- for the offence punishable under Section 148 of the Indian Penal Code and in default of payment of fine to undergo further imprisonment for six months, rigorous imprisonment for ten years and a fine of Rs.50,000/- for the offence punishable under Section 307/149 of the Indian Penal Code and in default of payment of fine to undergo further imprisonment for two years, rigorous imprisonment for three years and a fine of Rs.10,000/- for the offence punishable under Section 27 of the Arms Act and in default of payment of fine to undergo further imprisonment for six months and rigorous imprisonment for three years and a fine of Rs.10,000/- for the offence punishable under Sections 3/4 of the Explosive Substances Act and in default of payment of fine to undergo further imprisonment for six months. The Trial Court directed that all the sentences shall run concurrently.

2. Reference made by the Trial Court under Section 366 of the Code of Criminal Procedure (for short "Cr.P.C") for



confirmation of death sentence awarded in the aforesaid Sessions Trial has been registered as Death Reference No. 1 of 2017.

3. Appellant Dukhan Kahar @ Dukhan Ram Kahar has separately challenged his conviction and sentence imposed by the Trial Court by filing Cr. Appeal (DB) No. 72 of 2017.

4. The appeal preferred by the appellant as well as the reference made by the Trial Court has been heard together.

5. The Sessions Trial in which the impugned judgment and order were passed relates to the First Information Report (for short 'FIR') that had been registered at 10:00 AM on 19th March, 1999 in Karpi Police Station under Section 154 of the Cr.P.C in respect of an incident that had occurred at Senari situated at a distance of 18 km from the Police Station between 07:30 PM to 11:00 PM on 18th March, 1999. The formal FIR would indicate that the police had received the information regarding the occurrence through wireless message at 11:40 PM on 18th March, 1999.

6. The FIR giving rise to the Sessions Trial was registered on the basis of the oral statement of Chintamani Devi, wife of late Awadh Kishore Sharma, one of the persons, who died in the occurrence, which was reduced into writing by Jamuna Singh, the Sub-Inspector of Police-cum-Officer-in-Charge of



Karpi Police Station on 19th March, 1999 at 2:30 AM, at the house of Chintamani Devi, situated at Senari under the police station area Karpi of district Arwal, which was then part of Jehanabad district.

7. In her oral statement, the informant Chintamani Devi stated as under:-

“My name is Chintamani Devi, wife of late Awadh Kishore Sharma, resident of Senari, P.S.-Karpi, District-Jehanabad (Arwal). Today, on 19th March, 1999, at 02:30 AM, I am giving my statement before the SHO of Karpi Police Station that last evening at 7.30 PM, my son Madhukar @ Jhabbu was reading in the light of lantern on the roof and I was also there. My husband came out of the house after hearing some commotion. I and my son saw that many persons had reached in the lane near the house of Engineer Saheb Radhe Shyam Sharma and started knocking his door. At this point in time, my son informed them that there was no male member in the house. One person among them called my son. My son, under the impression that they intend to ask about someone, came down the roof taking lantern with him and opened the door. I also followed him and saw co-villagers (1) Ramashish Bhuiyan, son of Sona Bhuiyan, (2) Ramlakhan Bhuiyan, son of not known, (3) Sadhu Bhuiyan, son of not known, (4) Venkatesh Bhuiyan, son of Mati Bhuiyan, (5) Bhoda Bhuiyan, son of not known, (6) Biphan Bhuiyan son of Kulanjan Bhuiyan, (7) Murgi Bhuiyan, son of not known, (8) Genda Bhuiyan, son of not known and (9) Radhe Shyam Ramani son of Nathun Rawani and (10) Suresh Bhuiyan,



son of Ghoghar Bhuiyan, (11) Bhaglu Bhuiyan son of Lootan Bhuiyan, (12) Chamaru Bhuiyan son of Bodh Bhuiyan belonging to adjacent Tola-Azadbigha, P.S. Karpi, (13) Dukhan Kahar, son of not known of village Kutubpur, (14) Dulli Yadav and (15) Vyas Yadav, both sons of Janardhan Yadav, of village Gokhulpur and (16) Ramesh yadav son of Suryadeo Yadav, resident of Kurtha Police Station, District- Jehanabad present at my door in the lane. Among them, persons belonging to my village were dressed in lungi and ganji. Their lungi was half folded and Dukhan Kahar, Dulli Yadav, Vyas Yadav and Ramesh Yadav were in police uniform. Along with them, there were other persons also whom I could not recognize.

In the meantime, Murgi Bhuiyan caught hold of the hand of my son and was dragging him out. I implored before him, but he did not pay heed to my request and took him to Thakurbadi situated in the north-east direction. I started crying. In the meantime, I heard sound of 3-4 rounds of firing and the slogan- "MCC Zindabad". Then, I came to know that they were members of the MCC party. They took away my son to kill him. My husband had also gone out of the house after taking tea a little while ago. They took him away. I could not bear the shock of my husband and son being taken away by the extremists. I proceeded towards the Thakurbadi to set them free. I saw that hundreds of extremists had assembled there. Amongst them some were in police uniform and some were dressed in lungi and ganji and they were carrying pasuli and garasa (a sharp-edged weapon). They tied my husband and son by folding their hands. Genda Bhuiyan tied the legs of



my son and Murgi Bhuiyan tied the legs of my husband and about 3-4 persons pushed them on the ground and one person whom I did not recognize slit their throat with a Pasuli. When I raised alarm, they pushed me abruptly as a result of which I fell on a heap of straw and continued watching them committing the crime. I saw that they were bringing many persons of the village forcibly and slitting their throats. Thereafter I saw that the killings by cutting throats were mainly being done by the accused Dukhan Ram Kahar and Ramesh Yadav. I could not control myself any more viewing the scene. I came back to my house crying and beating my chest. After 2-3 hours, I heard a sound of explosion and the extremists left the place and went towards south of the village shouting the slogan "MCC Zindabad". Many persons raised hue and cry. I too went to Thakurbari where many villagers were crying. I saw many dead bodies lying besides the dead body of my son and dead bodies in large number were also at the northern side of the village. I came to know from the villagers that hundreds of MCC extremists had arrived and surrounded the village and took the villagers forcibly to Thakurbari in the north. I also came to know that they had committed murder of 3-4 persons by slitting their throat with pasuli after dragging them in the southern side of the village. The villagers told me that besides my husband and son, MCC people killed number of persons near Thakurbari and also in the southern direction of the village. I also came to know that some persons were injured. The extremists took away the DBBL licensee gun of Mukesh



Kumar son of Pashupati Singh. They also demolished his house and door by causing explosion with dynamite.

I claim that hundreds of extremists had assembled in the vicinity of my village last night at about 7.30 PM. They attacked my village being armed with rifle, gun and pasuli and committed this massacre outside the village and took away the DBBL gun of my villager Pashupati Singh. They also demolished his house by dynamite and committed massacre for four hours and left the place shouting “MCC Zindabad”.

8. Jamuna Singh, the Sub-Inspector of Police-cum-Officer-in-Charge of Karpi Police Station forwarded the recorded statement to the Karpi Police Station and took up investigation of the case himself.

9. Upon receipt of the duly recorded oral statement of the informant, a formal FIR, vide Karpi P.S. Case No. 22 of 1999 was instituted at 10.00 AM on 19th March, 1999 under Sections 147, 148, 149, 324, 307, 302, 452, 380, 120-B of the Indian Penal Code, 27 of the Arms Act, 17 of the Criminal Law Amendment Act and 3/4 of the Explosive Substances Act against the 15 named accused persons and others unknown by the Sub-Inspector of Police Arjun Minz.

10. During investigation, the police recovered 34 dead bodies and inquests were held at the spot between 06:00 AM and 09:50 AM on 19th March, 1999. Autopsy on the dead bodies was



conducted at the place of occurrence itself on 19th March, 1999 between 04:00 PM and 07:15 PM by P.W.7 Dr. Srinath Prasad, P.W.21 Dr. Harish Chandra Hari, P.W.22 Dr. Mithilesh Kumar and Dr. Vinay Prakash Keshav (not examined). Dr. Abhay Kumar Jha Suman, Senior resident in the Department of Surgery, Magadh Medical College and Hospital had examined five victims, who had sustained injuries in the incident. The Investigating Officer seized certain incriminating articles like residues present around the blast side, blood stained earth, a blood stained *farsa* and a blood stained *pasuli* from the place of occurrence.

11. After completing the investigation, the police submitted their report under Section 173(2) of the Cr.P.C before the court of Magistrate.

12. From a perusal of the Session Court's record, it would transpire that the appellant is facing a split-up trial. In the original trial though charges were framed against 45 accused persons, due to death and other reasons, only 38 accused persons faced trial. On perusal of the record, it would further transpire that the appellant's case was committed to the Court of Session on 21st February, 2013 and, vide order dated 5th December, 2013, the Trial Court framed charges against him under Sections 148, 149, 302, 307, 395 of the Indian Penal Code, 27 of the Arms Act, 3/4 of the



Explosive Substances Act and 17 of the Criminal Law Amendment Act.

13. Since the appellant did not plead guilty to the charges, the prosecution examined 23 witnesses and produced relevant materials in support of its case.

14. **Mukesh Kumar** (P.W.1) states in his evidence that the occurrence took place in the year 1999 at 7:30 PM. At that time, he was at his residence. Suddenly, 20-25 miscreants entered inside his house. They caught hold of a one year old child and placed *pasuli* (a sharp edged weapon) near his neck. They demanded the gun. His mother Lalmuni Devi brought the gun and handed it over to them. He somehow managed to conceal himself beneath the bed. Thereafter, the extremists moved out of his house raising slogan and putting dynamite on the road. There was mayhem everywhere. He also came out and went towards the Thakurbadi along with others. He saw that hands and legs of several persons were tied and their throats and stomach were cut. Amongst the victims, who were slaughtered, he identified his brother Neeraj Kumar and his uncle Birendra Kumar, a bank employee. There were 7-8 injured persons also. They were taken to Gaya. He further states that the miscreants were in police uniform. Some of them were wearing lungi. They were armed with pahsul,



khanti and hasia. He further states that he did not identify any of the miscreants as he had hidden himself beneath the bed. In cross-examination, he states that he did not identify the miscreants, but he came to know that they belonged to Maoist Communist Centre (MCC) cadre.

15. **Madhulika Kumari** (P.W.2) states in her deposition that the occurrence took place about 15 years ago on 18th March, 1999 at 6:30 PM. At that time, she was at her residence. Her parents were killed by the MCC extremists. She did not identify any one of them. At this stage, she was declared hostile by the Trial Court at the request of the prosecution. She was subjected to cross-examination by the prosecution. In her cross-examination, she states that her statement was never recorded by the police. She denied the suggestion made by the prosecution that she had identified Saligram Yadav, Nathu Yadav and Budhan Yadav in the light of lantern. She did not identify the appellant in the dock.

16. **Arjun Sharma** (P.W.3) states in his deposition that the occurrence took place on 18th March, 1999 at 7:30 PM. At that time, he was at the door of his house along with his brothers Suresh Sharma, Sachidanand Sharma, Naresh Sharma, Sheo Kumar, Kavindra and others. The extremists, who were in police uniform, arrived there and they caught hold of Kavindra and



Vimlesh and took them towards Thakurbadi. They killed them by cutting their throats. In all, they killed 34 persons on that day. They also blew up his house by using dynamite. They snatched the ornaments of his daughter-in-law Rina Devi. He states that later on he came to know that the extremists killed his nephew Ranjay Sharma. He states that on that day 34-35 persons were killed by the extremists. He states that the police had enquired from him during investigation. He did not claim to identify any of the extremists. He did not identify the appellant in dock.

17. **Manorma Kunwar** (P.W.4) states in her evidence that the occurrence had taken place on 18th in the month of Chaitra in the year 1999. It was the date of Amawasya. On that day, at 7:30 PM, when she was cooking meals, more than 50 persons entered inside her house. They caught hold of her sons Vimlesh and Kamlesh and took them towards Thakurbadi. She also followed them. She saw them mutilating the bodies of her sons by garasa and katta. She saw that they had slaughtered 34 persons. She states that the two accused persons present in the court, namely, Dully and Dukhan had caught hold of the persons and had taken them to Thakurbadi. In cross-examination, she admitted that it was a dark night. When the miscreants entered inside her house, shouting was being made. At that time, her daughter-in-law Usha Devi was



present in the house. She came out of the house and again went inside the house. She states that she did not remember that the police had taken her inside the jail to identify the accused persons. She admits to have stated earlier to the police that the miscreants had pushed her and took her sons away. She was confronted with the previous statement made before the police with respect to the occurrence. She denied the defence suggestion that in her previous statement made before the police she had stated that she did not identify the miscreants.

18. **Baliram Sharma (P.W.5)** states in his evidence that 16 years ago at the time of occurrence, there was hulla in the village that MCC Party members had arrived. He came out of his house and climbed a tree. The Party members were flashing torch light in which he identified Ram Lakhan Bhuiyan, Ramesh Yadav, Uma Paswan, one Pandit and others. His son Rajesh Kumar was caught and was taken away by the miscreants. At that time, he heard the name of Dully Yadav and Dukhan Ram Kahar. They took his son to Thakurbadi. Later on, when he went to Thakurbadi, he saw 34 dead bodies including the dead body of his son. He also saw six injured persons. He identified the appellant in the dock.

19. In cross-examination, he admitted that he was atop a tree for more than two hours and came down only after every one



had left the place. He admitted that after he descended from the tree and went inside his house, his wife Sharda Devi told him that his son had been taken away. Thereafter, he went towards the Thakurbadi. He states that after the occurrence, the police had recorded his statement as also of his wife. He admitted that he had not stated to the police that he identified the accused persons involved in the offence. He further states that he cannot say the name of the person, who was taking the name of Dully Yadav and Dukhan Ram Kahar on the date of occurrence. He admits in the cross-examination that he had not stated before the police that he had heard the name of Dully Yadav and Dukhan Ram Kahar, when his son Rajesh Kumar was being taken away by the accused persons. He also admits that he did not take the name of Dully Yadav and Dukhan Ram Kahar before the police, as the persons involved in the offence.

20. **Ravindra Sharma (P.W.6)** states in his deposition that at about 7:00-7:30 PM on 18th March, 1999, when he was at his house, some miscreants caught hold of his brother Jitendra Sharma and took him towards Thakurbadi. He ran away and hid himself in the house of a Rawani. After a while, he went towards the Thakurbadi, where he saw the dead bodies of 34 persons including the dead body of his brother. He states that three dead



bodies were lying in the south of the village and six persons had sustained injuries. He named Radhe Shyam Ram, Bhodu Manjhi, Mishri Manjhi and Budhan Yadav amongst the miscreants, who had taken away his brother. He did not identify the appellant in the dock.

21. **Girja Devi (P.W.8)** states in her evidence that about 16 years ago, on 18th March, 1999 at 7:00 PM, when she and her brother Chandra Bhushan Sharma were sitting at their door, about 11 persons wearing police uniform and armed with rifle and gun came there. They caught hold of her brother. She states that lamp was burning at the door. She states that she could identify only Dully Yadav amongst the miscreants and she did not identify any one else. Later on, after reaching at Thakurbadi, she saw there 31 dead bodies including that of her brother Chandra Bhushan Sharma. On seeing the appellant in the dock, she states that he was involved in the occurrence.

22. In cross-examination, she admits that it was a dark night. She further states that at the time of occurrence, apart from her, ten family members were present in the house. She did not follow the accused persons out of her house. She was confronted with her earlier statement made before the police in which she had



denied to recognize anyone. She admits that the police never took her to jail for identification of the accused persons.

23. **Rakesh Kumar** (P.W.9) states in his deposition that the occurrence took place on 18th March, 1999 at 7:30 PM. At that time, he was present in the house. Since MCC cadre had arrived, he ran away to save his life. He hid himself in the back of his house behind the heap of straw. MCC extremists caught hold of Rajesh, Kundan and Pintu and took them towards the Thakurbadi. After some time, he heard the sound of firing. When he went to the Thakurbadi, he saw that 34 persons were killed by slitting their throats and 5-6 persons were injured. He states that he did not recognize any of the accused persons. In cross-examination, he admits that it was a dark night.

24. **Vishwa Vijay Sharma** (P.W.10) states in his evidence that he does not know anything about the occurrence. At this stage, he was declared hostile by the Trial Court on the request of the prosecution and was cross examined. He states that he does not remember that he had identified Dully Yadav and Dukhan Ram Kahar. He denied that he was concealing the facts in collusion with the accused persons. He states that he does not remember anything which had happened in the past. Subsequently, he identified the



appellant in the dock and states that he was involved in the occurrence.

25. In cross-examination on behalf of the defence, he admits that he is suffering from the disease of forgetfulness since last one year. He also admits that he does not remember as to how the occurrence took place.

26. **Suresh Sharma** (P.W.11) states in his deposition that 10-12 persons came to his house at about 7:15 PM on 18th March, 1999 and took his son Ranjan Kumar to Thakurbadi and killed him. He states that they had killed 34 persons and injured 5-6 persons. He states that he was examined by the police. On seeing the appellant Dukhan Ram Kahar, he identified him as the person who had come to his house.

27. In cross-examination, he admits that he was never called upon by the police during investigation to identify the accused persons. He admits that he had not stated before the police that he can identify the accused persons on seeing them. He further admits that when the miscreants entered inside his house, he concealed himself under the bed so that he could not be seen by any one. He states that he came out of the house after one and a half hours.



28. **Krishna Bihari Sharma** (P.W.12) states in his evidence that he did not identify any accused persons. He identified his signature on the two inquest reports, which were marked as Exhibits-2 and 2/A. In cross-examination, he states that he came out of the house after the miscreants had left the village.

29. **Dinesh Sharma** (P.W.13) states in his evidence that the occurrence took place 16 years ago at 7:00 PM. At that time, he had returned with his child on a vehicle after getting him examined by a doctor. As soon as he reached his house, an alarm was raised and sound of firing was heard. He went to the terrace of his house and saw the extremists at a distance. One of them was knocking his door. His cousin sister came to the terrace of the adjacent house and advised him to conceal himself as the extremists had arrived in the village. He concealed himself behind 15-20 sacks at his terrace. When the door of his house was not opened, the extremists came on the roof of the adjacent house from where 15-16 miscreants came to his roof being armed with weapons. He identified one Ramesh Yadav amongst the miscreants. He also identified Godai Paswan, Adhik Paswan and Nathu Kasai amongst the miscreants. He claimed that he can identify others on seeing them. He states that the extremists went to the roof of the house of Awadhes Sharma from the roof of his house. They forced



Awadhesh Sharma out of his house. They also forced out other persons from their homes. He further states that sound of shouting slogan “MCC Zindabad” was coming from the southern side of the village at about 10.30 PM. He states that he came downstairs from his terrace only after the arrival of the police. On seeing the appellant in the dock, he identified him as one of the miscreants, who had come to his terrace.

30. In cross-examination, he admits that on being informed by his cousin sister that extremists had arrived he became frightened and with the help of his wife and cousin sister he hid under the sacks, which was covered with a thick blanket. He states that when he finally came out of his hiding on the arrival of the police, no accused person was present there. He admits that the police did not take him to identify the accused persons during investigation. He was confronted with his earlier statement made to the police with regard to identification of the accused persons. He denied the defence suggestion that he had not claimed to identify the miscreants before the police.

31. **Ajay Kumar (P.W.14)** states in his evidence that the occurrence had taken place on 18th March, 1999. On that day, at about 7:30 PM, while he was at his door, 15-20 outsiders came and took him, his younger brother Ranjan Kumar and his cousins to



Thakurbadi. They tied their legs and hands. They were surrounded by 30-35 persons armed with weapons and wearing police uniform. At Thakurbadi, the miscreants killed several persons. He states that the miscreants first cut the throat of the victims and thereafter they cut the stomach of those who were found alive through the flash of torch light. He recognized the appellant in the dock.

32. In cross-examination, he states that he was kept at Thakurbadi for two hours before he was injured. He states that he did not faint on being assaulted, but feigned loss of consciousness. He admits that as long as the miscreants were there he kept his eyes closed. He opened his eyes only after the miscreants left the place. He further admits that the police examined him 5-6 months after the date of occurrence. He was confronted with his earlier statement made to the Police. He denied the defence suggestion that he had not claimed to identify anyone before the police. He further denied that he claimed to identify the miscreants for the first time in court. However, he admits that during investigation the police had never asked him for identification of the accused persons.

33. **Sriniwas Sharma (P.W.15)** states in his evidence that on 18th March, 1999 he was in his house along with his brothers



Rajeev Sharma, Sanjeev Sharma and his father. He heard an announcement being made on mike that they were searching for members of Ranveer Sena and they would not harm the villagers. He states that he and his brother Rajeev Sharma concealed themselves in the heap of straw kept in khalihan. His brother Sanjeev Sharma was caught by the miscreants and was taken to the Thakurbadi through khalihan by ten miscreants. Out of them, he could identify Bachesh Singh Yadav and Radhey Shyam Ram. He states that the accused persons present in the dock were not amongst the miscreants, who had caught hold of his brother. Subsequently, when he went to the Thakurbadi, he saw mutilated bodies of his brother. He also saw 30 dead bodies near the Thakurbadi and three dead bodies in the southern side and one dead body towards northern side of the village. He identified his signature on the inquests of Vimlesh Sharma and Puttu Sharma, which were marked as Exhibits-2/8 and 2/9.

34. **Pankaj Kumar** (P.W.16) states in his evidence that on 18th March, 1999, in the evening at 7:00 PM, when he was watching T.V. at the house of Ramashish Sharma, he heard the sound of commotion. He first went upstairs and then came downstairs. He states that Ramashish Sharma came running and informed that since party members had arrived, he should run



away. Thereafter, he fled towards the varandah of Ram Swaroop Yadav and concealed himself. He saw the miscreants coming in group. He states that he could identify the miscreants whom he had seen on seeing them. He states that the miscreants were forcibly taking Ram Dayal Sharma and Tulsi Sharma towards Thakurbadi. He states that when the miscreants were retreating, they shouted the slogan “MCC Zindabad” and exploded bombs. He states that after the miscreants left, he went to the Thakurbadi where he saw that 33 villagers were killed by cutting their throats and stomach and six others were injured, who were taken to Magadh Medical College for treatment. He proved his signature on the inquest reports of five deceased persons, namely, Vimlesh Sharma, Upendra Kumar, Satyendra Kumar, Tulsi Sharma and Kavindra Sharma, which were marked as Exhibits- 2/10 to 2/14. He identified the appellant in the dock.

35. In cross-examination, he admits that the arrival of the miscreants created chaos and commotion. Every one ran to take refuge. He states that he saved his life by going to the house of Ram Swaroop Yadav. He admits that he stayed for two hours in the house of Ram Swaroop Yadav. He states that the police had arrived in the village after the occurrence. He admits that his evidence was recorded in the original case record relating to this case. He also



admits that he did not state the fact of identification of the appellant in his earlier deposition. He was also confronted with the previous statement made before to the police. He states that he claimed before the police that he would be able to identify the miscreants on seeing them.

36. **Mithilesh Sharma** (P.W.17) states in his evidence that the occurrence took place in the year 1999, at about 7:30 PM. At that time, he was at his house. He heard that MCC miscreants had arrived. He states that the villagers started running helter-skelter. He concealed himself behind the shelf rack of the room. The miscreants caught hold of villagers and took them towards the Thakurbadi. Later on, when he went to the Thakurbadi, he saw that 34 persons were killed by cutting their throats and six persons sustained injuries. He states that he did not recognize any of the miscreants.

37. In cross-examination, he admits that it was a dark night. On seeing the appellant, he states that he did not recognize him. He further states that he had not come to his house.

38. **Sharda Devi** (P.W.18) states in her evidence that the miscreants had entered inside her house at about 8:00 PM. They caught hold of her son Rakesh and took him towards Thakurbadi. She did not name the accused persons. She states that after the



miscreants left the village and the police arrived, she came out of her house.

39. **Arvind Kumar** (P.W.19) states in his evidence that he was at the house of Arjun Singh, when the miscreants had arrived. They flashed torch light and were looking for members of Ranveer Sena. He states that when he realized that they were naxalites, he hid himself in his house at a place where cattle were teethed. From that place, he saw the naxalites taking the villagers towards the Thakurbadi. He identified Bhonda Manjhi, Mishri Manjhi, Venkatesh Bhuiyan, Bigan Ram, Badan Manjhi, Sukun Manjhi, Budhan Yadav, Dully Yadav, Dukhan Manjhi and the appellant Dukhan Ram Kahar amongst the miscreants. He identified the appellant in the dock.

40. In cross-examination, he admits that he hid himself in the cattle shed till the naxalites did not leave the village. He also admits that before giving evidence he had seen the case diary. He conceded that in his previous statement made before the police, he had not named the appellant Dukhan Ram Kahar, as the person involved in the occurrence. He states that he does not remember whether he had taken name of the appellant in his earlier deposition made before the court.



41. **Vishambhar Singh** (P.W.20) had taken over the investigation from the first Investigating Officer Jamuna Singh on 18th June, 1999. He states that he had gone through the contents of the case diary written by the previous Investigating Officer. He states that during investigation, he had recorded the statements of Rakesh Kumar, Mohan Sharma, Arun Kumar @ Munna and Bibha Kumari. He had also received the injury reports of the injured Mohan and Munna Kumar from Magadh Medical College, Gaya. He states that he had handed over the charge of investigation to the police Inspector Alok Kumar on 14th October, 1999. He proved two seizure lists in the writing of his predecessor Jamuna Singh, which were marked as Exhibits-3 to 3/5. He also proved the inquests of the deceased Jitendra Sharma, Babu Lal @ Shyan Narayan Singh, Upendra Kumar, Rajesh Kumar, Om Prakash and Parikshit Sharma prepared in the writing of the aforesaid Jamuna Singh, which were marked as Exhibits-2/15 to 2/20 respectively. He proved the inquests of the deceased Lalan Sharma, Ram Pravesh Singh, Ramslok Sharma, Jwala Sharma, Nandlal Sharma, Awadhesh Sharma, Sachidanand Sharma and Sanjeev Kumar in the writing of police officer of Arwal K.P.Singh, which were marked as Exhibits -2/21 to 2/28 respectively. He proved the fardbeyan of the informant Chintamani Devi reduced in writing by



the aforesaid Jamuna Singh, which was marked as Exhibit-4. He also proved the formal FIR in the writing of Arjun Minz, which was marked as Exhibit-5. He states in his deposition that the two Investigating Officers, namely, Jamuna Singh and Alok Kumar have passed away.

42. In cross-examination, he admits that neither any Test identification parade (for short 'TIP') was conducted earlier nor he made any attempt in this regard. He also admits that the witnesses, whose statements he had recorded had not taken the name of the appellant Dukhan Ram Kahar, as the person involved in the offence.

43. **Dr. Srinath Prasad** (P.W.7), who was posted at Sadar Hospital, Jehanabad had conducted autopsy on the dead bodies of (1) Babu Lal Singh @ Shyam Narayan Singh, (2) Awadh Kishor Sharma, (3) Sanjeev Kumar, (4) Chandra Bhushan Sharma, (5) Parikshit Sharma, (6) Ramnath Sharma and (7) Jitendra Sharma on 19th March, 1999 between 4:00 PM and 7:15 PM under the orders of the District Magistrate at Senari village. He proved the respective post-mortem reports of the seven deceased persons, which were marked as Exhibits- 7 to 7/6. The respective post-mortem reports would reflect the following ante-mortem injuries on the bodies of the deceased: -



Babu Lal Singh @ Shyam Narayan Singh

Mouth and eyes partially opened.

Both upper arms tied on the back.

Incised wound at the level of C-3, from front of neck 8" x 1½" x bone deep from left side by sharp cutting weapon including neck muscles, carotid sheath, neck vessels & nerves & trachea.

Viscera pale, heart empty both sides, stomach contains partially digested food present.

Time elapsed after death- Eighteen to Twenty-four hrs. (18-24 hrs.) Mode of weapon-Sharp cutting weapon may be sickle.

Cause of death- Shock and haemorrhage leading to C/R failure due to above injuries.

Awadh Kishor Sharma

Both arms (upper) tied on the back.

Incised wound at the level of C-4, from front of the neck 8" x 1" x bone deep by sharp cutting weapon including neck muscles, carotid sheath, neck vessels & nerves & trachea.

Viscera pale, heart empty both sides, stomach contains partially digested food present.

Time elapsed after death- Eighteen to Twenty-four hrs. (18-24 hrs.) Mode of weapon-Sharp cutting weapon may be sickle.

Cause of death- Shock and haemorrhage leading to C/R failure due to above injuries.

Sanjeev Kumar

Mouth and eyes partially opened.

Both upper arms tied on the back.



Incised wound at the level of C-4, from front of neck from left side 5½” x 1” x bone deep by sharp cutting weapon including neck muscles, carotid sheath, neck vessels & nerves & trachea.

Viscera pale, heart empty both sides, stomach partially digested food present.

Time elapsed after death- Eighteen to Twenty-four hrs. (18-24 hrs.) Mode of weapon-Sharp cutting weapon may be sickle.

Cause of death- Shock and haemorrhage leading to C/R failure due to above injuries.

Chandra Bhushan Sharma

Both upper arms tied on the back.

Incised wound at the level of C-4, from front of neck 8” x 1½” x bone deep by sharp cutting weapon including neck muscles, carotid sheath, neck vessels & nerves & trachea.

Viscera pale, heart empty both sides, stomach partially digested food present.

Time elapsed after death- Eighteen to Twenty-four hrs. (18-24 hrs.) Mode of weapon-Sharp cutting weapon may be sickle.

Cause of death- Shock and haemorrhage leading to C/R failure due to above injuries.

Parikshit Sharma

Hands tied on the back.

Both legs tied.

Sharp cut wound at the level of C-4, from front of neck 6½” x 1” x bone deep by sharp cutting weapon including neck muscles, carotid sheath, neck vessels & nerves and trachea.

Viscera pale, stomach partially digested food present.



Time elapsed after death- Eighteen to Twenty-four hrs. (18-24 hrs.) Mode of weapon-Sharp cutting weapon may be sickle.

Cause of death- Severe Shock & haemorrhage leading to C/R failure due to above injuries.

Ramnath Sharma

Both hands tied on the back.

Incised wound at the level of C-5, from front of neck 6" x 1" x bone deep by sharp cutting weapon including neck muscles, carotid sheath, neck vessels & nerves and trachea. Viscera pale, heart empty both sides, stomach partially digested food present.

Time elapsed after death- Eighteen to Twenty-four hrs. (18-24 hrs.) Mode of weapon-Sharp cutting weapon may be sickle.

Cause of death- Shock & haemorrhage leading to C/R failure due to above injuries.

Jitendra Sharma

Hands tied on the back.

Legs tied.

Incised wound from the front of neck including neck muscles, carotid sheath, neck vessels & nerves 6" x 1" x bone deep at the level of C3 by sharp cutting weapon.

Trachea at the lower level sharply cut.

Viscera pale, stomach partially digested food present.

Time elapsed after death- Eighteen to Twenty-four hrs. (18-24 hrs.) Mode of weapon-Sharp cutting weapon may be sickle.

Cause of death- Severe Shock & haemorrhage leading to C/R failure due to above injuries.



44. **Dr. Harish Chandra Hari** (P.W. 21), who was also posted as Medical Officer at Sadar Hospital, Jehanabad had conducted autopsy on the dead bodies of (1) Awadesh Sharma, (2) Kundan Sharma, (3) Rajesh Kumar, (4) Sanjeev Kumar, (5) Ram Pravesh Singh, (6) Pintu Sharma, (7) Jwala Sharma, (8) Ramslok Sharma and (9) Nand Lal Sharma on 19.03.1999 between 4:00 PM and 7:15 PM at village Senari under the orders of the District Magistrate. He deposed about the injuries on the dead bodies, the time elapsed since death and the cause of death in the following manner: -

Awadhes Sharma

Mouth and eyes partially opened.

Both hands tied on back.

Sharp cut injuries were present on front of neck, extending from right to left of both lateral side of neck (Size-6" x 1½" x bone deep at level of C-4. All muscles sheath, nerve and vessels of front of neck & trachea & esophagus were cutting. All viscera pale, Heart empty, urinary bladder and stomach partial undigested food material present (empty)

Mode of death- Shock and haemorrhage caused by sharp cutting weapon.

Time elapsed since death-18-24 hours.

Death due to shock and haemorrhage caused by sharp cutting weapon.

Kundan Sharma

Mouth and eyes partially opened. Both hands tied on back.



(i) Sharp cut injuries on the front of neck, extending from right to left lateral side of neck. Size-6½” x 1½” x bone deep. Muscles sheath and nerve of front of neck and trachea and esophagus were cutting.

(ii) Sharp cutting injuries at middle of abdomen, size- 5” x 1” x peritoneal deep.

All viscerae pale, Heart empty, urinary bladder empty, stomach partial food material (undigested) present.

Mode of death- Shock and haemorrhage due to sharp cutting weapon.

Time elapsed since death-18-24 hours.

Death due to shock and haemorrhage due to sharp cutting weapon.

Rajesh Kumar

Mouth and eyes partially opened.

Sharp cutting injuries on front of neck, extending from left lateral side to right lateral side. Size-6” x 1” x bone deep (level C-3). All muscles vessels, nerve front of neck and trachea esophagus cut.

Viscera were pale, Heart empty, stomach empty, urinary bladder empty.

Mode of death- Shock and haemorrhage caused by sharp cutting weapon.

Time since death-18-24 hours.

Death due to C.R. fracture, shock and haemorrhage caused by sharp cutting weapon.

Sanjeev Kumar

Eye & Mouth were partially opened. Both the hands tied on back.



(i) Sharp cutting injuries on the front of neck at the level of C-4 of size-6" x 1½" x bone deep. All the muscles vessels & nerve of front of neck and trachea and esophagus were cutting upto lower bone.

(ii) Sharp cutting injuries on middle of abdomen of size- 5" x 1" x peritoneal deep. All viscera were pale, Heart was empty, urinary bladder and stomach were empty.

Mode of death- Shock and haemorrhage caused by sharp cutting weapon.

Time elapsed since death-18-24 hours.

Death due to shock and haemorrhage caused by sharp cutting weapon.

Ram Pravesh Singh

Mouth and eye partially opened. Both hands tied on the back.

Sharp cutting injuries over the front neck size-6" x 1½" x bone deep (C-4) with cutting injuries of neck muscle, vessels, nerve & trachea esophagus extending left lateral to right lateral side of neck. Sharp cutting injuries on the middle of abdomen with injuries to abdominal muscle and upto peritoneal size 6½" x 1" x peritoneal deep. All viscera pale, stomach empty, heart empty, urinary bladder empty.

Mode of death- Shock and haemorrhage caused by sharp cutting weapon.

Time since death-18-24 hours.

Death due to C.R. fracture caused by shock and haemorrhage leading by sharp cutting injuries.

Pintu Sharma

Eye and mouth partially opened. Both hand tied back.



(i) Sharp cutting injuries on the front of neck with injuries on the neck muscle, vessels, nerve and trachea and esophagus upto cervical bone, Size-5" x 1½" x bone deep (C-4).

(ii) Sharp cutting on the front of chest, size- 4" x 1" x 1".

(iii) Sharp cutting injuries at lower abdomen, size- 6" x 1" x peritoneal deep. Abdominal viscera were protruded out. Intestine was intact. Heart-empty, viscera-pale, Stomach empty, urinary bladder empty.

Mode of death- Haemorrhage and Shock caused by sharp cutting weapon.

Time since death-18-24 hours.

Death due to shock and haemorrhage due to sharp cutting weapon.

Jwala Sharma

Mouth and eye partially closed.

Sharp cutting injuries on the front of neck extending from both lateral side of neck, size-6" x 1½" x bone deep upto cervical bone at the level of C-3 with neck muscles, neck vessels, trachea, esophagus and both shoulders. Visceras were pale. Heart empty, stomach empty, urinary bladder empty.

Time elapsed since death-18-24 hours.

Mode of death- Shock and haemorrhage caused by sharp cutting weapon.

Death occurred due to C.R. failure and by shock and haemorrhage due to sharp cutting weapon.

Ramslok Sharma

Mouth and eyes closed.



Sharp cutting injuries on the front of neck at the level of C-4 extending from both lateral side of neck. Size-7" x 1½" x bone deep upto cervical bone. All the muscles & sheath, vascular nerve, trachea and esophagus of front of neck were cut. Heart empty, Viscera Pale, stomach empty, urinary bladder empty.

Mode of death- Shock and haemorrhage caused by sharp cutting weapon.

Time elapse since death- within 18-24 hours.

Death due to C.R. failure caused by shock and haemorrhage due to sharp cutting weapon.

Nand Lal Sharma

Mouth and eye partially opened. Both upper arms tied on back.

Incised wound at the level of cervical 4 from front of neck 7" x 1¼" x bone deep from left side by sharp cutting weapon including neck muscle, neck vessel and nerve and trachea and esophagus. All viscera pale, Heart empty, urinary bladder empty, stomach empty.

Time elapsed since death – 18-24 hrs.

Mode of death – by shock and haemorrhage caused by sharp cutting weapon.

Death due to shock and haemorrhage caused by sharp cutting weapon.

45. **Dr. Vinay Prakash Keshav** (not examined)
conducted post-mortem examination on the bodies of (1) Vimlesh Sharma, son of Kapildeo Sharma, (2) Upendra Kumar, son of Vyas Sharma, (3) Satyendra Kumar, son of Raghuraj Sharma, (4) Ram



Dayal Sharma, son of Anirudh Sharma, (5) Kamlesh Kumar, (6) Tulsi Sharma and (7) Kavindra Sharma.

46. **Dr. Harish Chandra Hari** (P.W. 21) has proved the post-mortem reports of the aforesaid nine persons, which were marked as Exhibits- 7/7 to 7/18. He further proved seven post-mortem reports prepared by Dr. Vinay Prakash Kesav (not examined), which were marked as Exhibits- 7/16 to 7/22. He also proved 11 post-mortem reports prepared by Dr. Mithilesh Kumar (P.W.22) which were marked as Exhibits- 7/23 to 7/33.

47. **Dr. Mithilesh Kumar** (P.W. 22), who was also posted as Medical Officer at Sadar Hospital, Jehanabad had conducted autopsy on the bodies of (1) Sukhalu Sharma, (2) Lalan Sharma, (3) Sukhan Sharma, (4) Sachidanand Sharma, (5) Jitendra Sharma, (6) Raju Sharma, (7) Om Prakash, (8) Jhabbal Kumar, (9) Pintu Sharma, (10) Birendra Sharma and (11) Rohit Sharma on 19.03.1999 under the orders of District Magistrate on the site of occurrence at village-Senari. He deposed about the ante mortem injuries on the dead bodies, the time elapsed since death and the cause of death in the following manner: -

Sukhalu Sharma

Incised wound over front of neck at level of Hyoid bone, 6” x 1” x 4” with cutting of wind pipe and carotid sheath with its content and related muscles.



Internal examination: - Both chambers of heart- Empty.
Liver, Lung, Spleen, Kidney- Pale, Bladder-Empty.
Stomach contains 3 oz. partially digested food.
Cause of death- Haemorrhage and shock due to sharp cut injuries over neck by sharp weapon.
Time since death-12-24 hours.

Lalan Sharma

Bruise- both wrists circumferentially about 1" wide.
Incised wound over front of neck at level of Hyoid bone by cutting of both carotid sheath with its content. Cutting of wind pipe with related muscles- 8" x ½" x 4".

Internal Examination: - Both chamber of Heart Empty, Liver, Lung, Spleen, Kidney- Pale. Bladder- Empty. Stomach contains about 3 oz partially digested food.
Cause of death- Haemorrhage and shock due to sharp cut injury of neck by sharp weapon.
Time elapsed since death-12-24 hours.

Sukhan Sharma

Incised wound over neck at level of thyroid cartilage, 8" x 2" x 4".
Cutting of both sides of carotid sheath with its content and wind pipe and related muscle.

Internal Examination: - Both Chamber of Heart Empty, Liver, Lungs, Spleen, Kidney-Pale. Bladder- Empty. Stomach contains semi digested food about 3 oz.
Cause of death- Haemorrhage and shock due to sharp cutting over neck by sharp weapon.
Time since death- 12-24 hours.



Sachidanand Sharma

Incised wound just below the right side of ear over face, 6'' x 1/4'' x 2'' and incised wound at level of thyroid cartilage over neck behind one side of the Sternomastoid to other side. Cutting of both side of carotid sheath with its content including muscle and cartilage.

Internal Examination: - Both Chamber of Heart – Empty, Liver, Lung, Spleen, Kidney- Pale. Stomach contains digested food. Bladder- Empty

Cause of death- Haemorrhage and shock due to sharp cut injury by sharp weapon.

Time elapsed since death- 12-24 hours.

Jitendra Sharma

Bruise both wrist circumferentially. Incised wound over front of neck at level of Hyoid bone, 10'' x 1/2'' x 4''. Cutting of both sides of carotid sheath with its content and related structure muscle and wind pipe.

Internal Examination: - Both Chamber of Heart Empty. Liver, Lung, Spleen, Kidney- Pale. Bladder- Empty. Stomach contains partially digested food about 2 oz.

Cause of death- Haemorrhage and shock due to sharp cut injury over neck.

Time elapsed since death-12-24 hours.

Raju Sharma

Incised wound over neck at level of thyroid cartilage, 8'' x 1/2'' x 5''. Cutting of both side of carotid sheath and its content and related muscle and cartilages of wind pipe.

Internal Examination: - Both chamber of Heart – Empty. Liver, Lung, Spleen, Kidney-Pale. Bladder- Empty



Cause of death- Haemorrhage and shock due to incised wound over neck by sharp weapon.

Time elapse since death-12-24 hours.

Om Prakash

Incised wound over neck thyroid cartilage 8" x 1" x 4".

Cutting of both side of carotid sheath with its content.

Cutting of wind pipe and muscle onward.

Internal Examination: - Both chamber of Heart – Empty.

Liver, Lung, Spleen, Kidney Pale. Bladder- Empty.

Stomach contains about 2 oz partially digested food.

Cause of death- Haemorrhage and shock due to sharp cut over neck by sharp weapon.

Time since death-12-24 hours.

Jhabbal Kumar

Incised wound over front of neck at level of Hyoid bone, 8" x 2" x 6". Cutting of both sides of carotid sheath with its content and wind pipe, structure and muscle cut in way.

Internal Examination: - Heart both chamber – Empty. Liver, Lung, Spleen, Kidney-Pale. Bladder- Empty. Stomach contains about 3 oz semi digested food.

Time elapse since death-12-24 hours.

Cause of death- Haemorrhage and shock due to sharp cut over neck by sharp weapon.

Pintu Sharma

Incised wound over the front of neck at level of thyroid cartilage at right side 8" x 1" 6". Incised cutting of Rt carotid sheath with its content and cutting of wind pipe and related muscle.



Internal Examination: - Both chamber of Heart – Empty, Liver, Lung, Spleen, Kidney-Pale. Bladder- Empty. Stomach contain about 3 oz semi digested food.

Cause of death- Haemorrhage and shock due to sharp cut injury over neck by sharp weapon.

Time elapse since death-12-24 hours.

Birendra Sharma

Bruise both wrists circumferential.

Incised wound front of neck to right side of back over neck about 8” x 1” x 4” with incised wound of thyroid, carotid sheath with its content and related muscle.

Internal Examination: - Both chamber of Heart Empty. Liver, Lung, Spleen, Kidney-Pale. Bladder-Empty. Semi digested food about 2 oz in stomach.

Cause of death- Haemorrhage and shock due to sharp cut injury over neck.

Time elapse since death- 12-24 hours.

Rohit Sharma

Incised wound over front of abdomen at level of Xiphisternum to umbilicus 6” x 1” x 6” with protrusion of jaw.

Incised wound over front of neck 6” x 2” x 4’ with incised wind pipe, Carotid sheath with its content of both sides.

Internal Examination: - Both chamber of Heart Empty, Liver, Lungs, Spleen, Kidney-Pale. Bladder-Empty. Stomach contains 3 oz semi digested food.

Cause of death- Haemorrhage and shock due to sharp cutting injury over neck and abdomen by sharp weapon.

Time since death-12-24 hours.



48. P.W.22 has proved his writings and signature over the aforesaid 11 post-mortem reports, which were already marked as Exhibits-7/23 to 7/33.

49. **Dr. Abhay Kumar Jha Suman** (P.W.23) had examined five injured persons, namely, (1) Rakesh Kumar, (2) Ajay Kumar, (3) Mathura Sharma, (4) Anil Sharma and (5) Bibha Kumari at Magadh Medical College Hospital, Gaya on 19th March, 1999. At that time, he was posted as Senior Resident in the Department of Surgery. He proved the injury reports of the aforesaid five injured persons, which were marked as Exhibits-8 to 8/4. He found the following injuries on their person: -

(1) Rakesh Kumar

- i) One incised wound over right iliac fossa 2.5" x 1.5" x communicating to peritoneal cavity through which part of small intestine protruding. At laparotomy peritoneal cavity was full of blood and fecal matter, perforation was found in ilium 2" x 1". The lower two ribs in right side were incised in the upper part of wound.
- ii) One incised wound over neck extending from right side to left side, 6" x ½" x muscle deep and on the cleft of wound in mid line thyroid cartilage was cut.
- iii) One incised wound over right Tina almost dissecting it.
- iv) One incised wound over right elbow 2" x 1" x ½".
- v) One incised wound over chin 1" x ½" x ¼".
- vi) One incised wound over neck in left lower part 2" x ½" x ½".



- vii) Multiple shallow incised wound over lower part of neck over upper part of chest.
- viii) One incised wound over right side of chest $\frac{1}{2}$ " x $\frac{1}{4}$ " x $\frac{1}{4}$ ".
- ix) Multiple incised wound over left upper part of neck.
- x) One incised wound over left upper part of chest 1.5" x $\frac{1}{2}$ " x $\frac{1}{2}$ ".
- xi) One incised wound over left upper part of middle of neck, $\frac{1}{2}$ " x $\frac{1}{4}$ " x $\frac{1}{4}$ ".

All above injuries were caused by sharp cutting weapon and injuries no. (i) and (ii) were grievous in nature, age of the injuries within 12 hours.

2. Ajay Kumar Sharma

- i) One incised wound over lower part on the right side of neck 2.5" x 1" x $\frac{1}{2}$ " muscle deep.
- ii) One incised wound over right iliac fosa, 2" x 1" x communicating to peritoneal cavity through which part of small intestine protruding. At laparotomy peritoneal cavity was full of blood and fecal matter, perforation was found in ilium.

Both the above injuries were caused by sharp cutting weapon and injuries were grievous in nature, age of the injuries within 12 hours.

3. Mathura Sharma

- i) Incised wound over neck in middle on upper part with skin flap hanging, 2" x $\frac{1}{2}$ " x $\frac{1}{2}$ ".
- ii) Incised wound over lower part of neck 1.5" x $\frac{1}{4}$ " x $\frac{1}{4}$ ".
- iii) Incised wound over right chick 1" x $\frac{1}{2}$ " x 1".
- iv) Incised wound over right upper part of neck 3" x 1.5" x 1".

All the injuries were simple in nature caused by sharp cutting weapon, age within 12 hours.



4. Anil Sharma

- i) One incised wound over upper part of left thigh 3” x 1.5” x 1”.

Injury was simple in nature caused by sharp cutting weapon, age within 12 hours.

5. Bibha Kumari

No evidence of external injury on her body was found.

50. After closure of the prosecution case, in order to enable the appellant to explain the circumstances appearing against him, the Trial Court recorded his statement under Section 313 of the Cr.P.C in which he denied the charges and pleaded his innocence. The questions put to the appellant by the Trial Court and their explanations given by him are being reproduced hereunder: -

“Q1. Have you heard the evidence of the witnesses?

Ans. Yes sir.

Q2. There is evidence against you that on 18.03.99 in the night at village Senari, P.S.-Karpi, District- Jehanabad, Present District- Arwal, you in association with other accused persons having common intention and being armed with deadly weapons committed murder of 34 persons of Senari and caused injury to other persons with intention to commit their murder.

Ans. No sir.

Q3. There is also evidence against you that you caught all the deceased and injured persons in their house and took them to Senari Thakurbadi from their house to commit their



murder and murdered them by slitting their neck and cutting their abdomen?

Ans. No sir.

Q4. There is evidence against you that you used illegal firearm to commit the said occurrence?

Ans. No sir.

Q5. There is evidence against you that with intention to commit occurrence and terrorize persons you exploded bomb with other accused persons?

Ans. No sir.

Q6. There is also evidence against you that you are a member of a banned extremist organization M.C.C. and while committing occurrence you raised slogan-MCC Zindabad with other persons?

Ans. No sir.

Q7. What have you got to say in your defence ?

Ans. I am innocent.”

51. The defence did not lead any oral or documentary evidence during trial.

52. After hearing the arguments advanced on behalf of the parties and appreciating the evidence on record, the Trial Court held the appellant guilty of the offences noted hereinabove, vide impugned judgment dated 10th November, 2016.

53. Assailing the impugned judgment of conviction and order of sentence, Mr. Sanjay Kumar, learned advocate appearing for the appellant submits that the defence is not challenging the



homicidal death of 34 persons and injuries sustained by five others in the occurrence, which took place between 7:30 PM to 11:00 PM on 18th March, 1999, at Senari village. The case of the defence is that the appellant is not the perpetrator of the offence. He contends that the informant Chintamani Devi died prior to the commencement of the trial. The police officer Jamuna Singh, who had recorded the oral statement of the informant and investigated the case first had also passed away prior to the commencement of the trial. Furthermore, Mr. Arjun Minz, the Sub-Inspector of Police, who had received the oral statement forwarded by the police officer Jamuna Singh was also not examined by the prosecution. He contends that the FIR, which contains the name of the appellant as one of the perpetrators involved in the offence cannot be used as substantive evidence. He urged that the prosecution has failed to prove the participation of the appellant in the crime by credible evidence. He contends that the witnesses never took the name of the appellant during investigation before the Investigating Officer. They have identified the appellant for the first time in the dock after 15 years of occurrence. He contends that the Trial Court failed to appreciate that the dock identification alone in absence of any further corroborative evidence cannot be treated as substantial piece of evidence. According to him, the



belated identification in dock could not be sufficient for conviction of the appellant. He contends that it is a fit case in which benefit of doubt should be given to the appellant. Lastly, he submits that the evidences led by the prosecution against the appellant do not put the case in the category of rarest of the rare case attracting death penalty.

54. In the reference made by the Trial Court under Section 366 of the Cr.P.C, we requested Ms. Surya Nilambari, learned advocate to assist the Court as *amicus curiae*. Ms. Nilambari not only readily accepted the responsibility but also took great pain to make detailed submissions and extended to the Bench commendable assistance.

55. Ms. Surya Nilambari, learned *amicus curiae* submits that the conviction only on the basis of identification of the appellant in court 15 years after the occurrence without any previous identification or any corroboration of the dock identification makes the dock identification an inherently weak evidence not sufficient to sustain conviction. While placing reliance on the judgments of the Supreme Court in ***Sukhbir Singh Vs. State of Punjab***, since reported in ***2011 (11) SCC 436*** and ***Mulla v. State of U.P.***, since reported in ***AIR 2010 SC 942***, she



submits that such dock identification appears to be evidence of weak character and cannot form basis of conviction.

56. She submits that apart from the testimony of the prosecution witnesses, the prosecution has not produced any material exhibit to show sufficiency of light on a dark night which could have facilitated a smooth identification in the circumstances of complete disarray and bedlam that the witnesses themselves admit had prevailed at the time of occurrence.

57. She submits that the appellant was not known to the prosecution witnesses from before as he is not a co-villager. There is no evidence by the prosecution to the effect that he was familiar to the witnesses since before the occurrence. The testimony of the witnesses relating to their respective positions at the time of occurrence makes their claim of identification of the appellant in court seriously doubtful.

58. She contends that as it was a dark night and there was no electricity in the village, it would not be possible for the witnesses to identify the miscreants. She contends that some of the witnesses state in their deposition that they identified the miscreants as the miscreants were carrying torches and were flashing them in order to identify the victims. She contends that under such circumstance, the prosecution witnesses would have



been partially blinded by the light of the torch and would not have been able to identify any body. In the above context, in support of her submission, she has placed reliance on the judgments of the Supreme Court in *Ashoksinh Jayendrasinh vs The State of Gujarat*, since reported in (2019) 6 SCC 535 and *Tamilselvan Vs. State*, since reported in (2008) 7 SCC 755.

59. Learned *amicus curiae* further contends that the Trial Court has recorded an erroneous finding in the impugned judgment that the extremists were using big torches and there were large lights. She contends that none of the witnesses examined during trial has averred like this in his deposition.

60. Learned *amicus curiae* submits that some of the prosecution witnesses have denied the suggestion by the defence that in their earlier statements they did not make any claim of identification of the culprits. The Investigating Officer (P.W.20) examined in this case revealed that he did not record the statement of the witnesses, who were examined in court, under Section 161 of the Cr.P.C during investigation. She submits that the defence lost the valuable right to highlight the contradictions in the deposition of the witnesses due to non-examination of Jamuna Singh. She further contends that due to the death of the first Investigating Officer, who had recorded the oral statement of the



informant, inspected the place of occurrence, prepared the seizure list and recorded the statements of the witnesses examined before the court, the case of the defence has been seriously prejudiced.

61. Lastly, she contends that since the Trial Court failed to put any material point or any circumstance in evidence to the appellant while examining him under Section 313 of the Cr.P.C, it was not open to the prosecution to place reliance upon the point or circumstance in the proof of his guilt. She submits that a perusal of Section 313 of the Cr.P.C questions would show that they are mere repetition of the charges and no evidence brought on record between the charge and the conviction had been put to the appellant. She contends that the Trial Court erred in law by taking into consideration the materials not put to the appellant for convicting him.

62. On the other hand, Mr. Yogendra Prasad Sinha, learned Additional Advocate General No.7 being ably assisted by Mr. Dilip Kumar Sinha, learned Additional Public Prosecutor submits that at 07:30 PM, on 18th March, 1999, hundreds of men in police uniform carrying *Pasuli*, *garasi*, *hasiya*, *khanti*, rifle and gun surrounded Senari village. The 34 victims were forced out of their houses and most of them were lined up near the Thakurbadi



on the outskirts of the village where their throats were slit like cattle by the cadre of the MCC.

63. He submits that the Trial Court discernibly and objectively considered the evidence in proper perspective. He contends that in the case at hand, it is clear that a premeditated killing of 34 persons of a particular community was carried out in the most barbaric manner. According to him, the witnesses examined are consistent on sequence of events. He further contends that the Supreme Court has sustained conviction even where the source of light was not disclosed in catena of cases.

64. He submits that in the case of *Nathuni Yadav And Ors. vs State of Bihar and Anr.*, since reported in *AIR 1997 SC 1808*, the Supreme Court sustained the conviction even when there was absence of artificial light. He further submits that in the case of *S. Sudershan Reddy & Ors. vs The State of Andhra Pradesh*, since reported in *AIR 2006 SC 2716*, it has been held that as the accused were known to the witnesses, identification was possible.

65. He has also placed reliance upon the judgments of the Supreme Court in *State of U.P. Vs. Babu & Ors.*, since reported in *(2003) 11 SCC 280* and *Kedar Singh & Ors. Vs. State of Bihar*, since reported in *1999 Cr.L.J. 601 (SC)* to submit that



identification of known persons is possible from the manner of speech, walking and gesticulating.

66. Mr. Yogendra Prasad Sinha, learned Additional Advocate General No.7 further contends that the conviction can be sustained even where the witnesses identified the accused for the first time in court.

67. Referring to the deposition of the witnesses examined during trial, he contends that 9 out of 23 identified the appellant in court. Their identification of the appellant in court is an admissible evidence. He contends that the accused persons and the victims were known to each other living in the same village or in the adjoining villages. They entered into the house of the victims, flashed their torches for identifying them and under such circumstance recognition was fully possible by the eye-witnesses, who saw the members of their family being dragged by the accused persons. He contends that P.W.14, an injured witness, identified the appellant as one of the miscreants, who had participated in the commission of the offence. He contends that it is well settled by now that the identification even in darkness was possible if the accused were known to the witnesses. He submitted that in *Sheo Shankar Singh vs State of Jharkhand & Anr.*, since reported in (2011) 3 SCC 654 and *Dana Yadav @ Dahu & Ors. vs*



State of Bihar, since reported in (2002) 7 SCC 295, it has been held by the Supreme Court that the identification of the accused in the court by the witnesses constitutes substantive evidence. It has been further held by the Supreme Court in the above noted cases that Cr.P.C does not oblige the investigating agency to necessarily hold TIP nor is there any provision under which the accused may claim a right to hold TIP.

68. Mr. Yogendra Prasad Sinha, learned Additional Advocate General No.7 further contends that the appellant was fully aware of the charges framed against him. Hence, any omission on the part of the court in bringing to the appellant's notice the circumstances, which came against him, would be of no consequence. According to him, non-examination of the first Investigating Officer, who had recorded the oral statement of the informant and the statements of the witnesses, was neither deliberate nor willful. As a matter of fact, Vishambhar Singh (P.W.20), who had taken over the charge of investigation has categorically stated in his deposition that Jamuna Singh (the first Investigating Officer) and Alok Kumar (another Investigation Officer) had passed away. He contends that non-examination of the deceased Investigating Officers has in no way prejudiced the case of the defence.



69. Lastly, he contends that the Trial Court has properly appreciated the facts and law involved in the case and rightly convicted and sentenced the appellant.

70. I have given my anxious consideration to the rival submissions and have carefully perused the evidence on record.

71. The undisputed facts of the case are as follows:-

- (a) The incident occurred between 7:30 PM and 11:00 PM on 18th March, 1999;
- (b) There was no electricity in the village. It was a dark night as stated by Manorma Kunwar (P.W.4), Girija Devi (P.W.8), Rakesh Kumar (P.W.9) and Mithilesh Sharma (P.W.17);
- (c) Some of the miscreants were carrying torches. According to some of the prosecution witnesses, they identified the miscreants in the flash of torch light;
- (d) No TIP was conducted during investigation; and
- (e) Conviction of the appellant is based on dock identification made more than 15 years after the incident.

72. It is submitted on behalf of the appellant that there was no TIP and conviction of the appellant is based on dock identification, which took place after 15 years of the occurrence. Referring to the various judgments of the Supreme Court, it has been argued that where the dock identification took place two



years after the incident the Supreme Court has held that such dock identification would not be made the basis of conviction. The purpose of TIP is to test the veracity and trustworthiness of the evidence of the witnesses. The idea behind the TIP is to test whether or not the witness, who claims to have seen the culprits at the time of commission of the offence, is reliable and can identify the culprits amidst other individuals without any date or other source.

73. Identification of an accused in the court of law is substantive evidence whereas the evidence of identification in TIP though a primary evidence, it is not substantive one and it can be used only to corroborate the identification of the accused in the court of law. It is pertinent to note that if the TIP is not conducted and the witness identifies the accused for the first time in court then evidence regarding identification in the court of law does not become inadmissible. Such evidence cannot be discarded on the ground that it was not preceded by TIP. The court identification of an accused without TIP is admissible, if the court finds it trustworthy.

74. In *Kanta Prashad Vs. Delhi Administration*, since reported in *AIR 1958 SC 350*, the Supreme Court observed that the purpose of TIP is to test the statement of a witness made in the



court when conducted during the time of investigation, it assures the investigating agency that the investigation is proceeding in the right direction.

75. In *Sheikh Hasib Alias Tabarak vs The State of Bihar*, since reported in (1972) 4 SCC 773, the Supreme Court observed that TIP during investigation is held to minimize the chances of the memory of the identifying witnesses fading away by reason of long lapse of time.

76. In *Dana Yadav @ Dahu* (Supra) relied upon by the State, the Supreme Court carved out certain exceptions to the ordinary rule that identification of an accused for the first time in court is a weak type of evidence. Relying on *State of Maharashtra Vs. Sukhdeo Singh* (Supra) and *Ronny alias Ronald James Alwaris and Ors. v. State of Maharashtra*, since reported in (1998) 3 SCC 625, the Supreme Court noticed that where the witness had a chance to interact with the accused or that in a case where the witness had an opportunity to notice the distinctive features of the accused which lends assurance to his testimony in court, the evidence of identification in court for the first time by such a witness cannot be thrown away merely because any test Identification parade was not held. In this regard, the Supreme Court held in paras 6 to 8 as under:-



“6. It is also well settled that failure to hold test identification parade, which should be held with reasonable despatch, does not make the evidence of identification in court inadmissible rather the same is very much admissible in law. Question is what is its probative value? Ordinarily identification of an accused for the first time in court by a witness should not be relied upon, the same being from its very nature, inherently of a weak character, unless it is corroborated by his previous Identification in the test identification parade or any other evidence. The purpose of test identification parade is to test the observation, grasp, memory, capacity to recapitulate what a witness has seen earlier, strength or trustworthiness of the evidence of identification of an accused and to ascertain if it can be used as reliable corroborative evidence of the witness identifying the accused at his trial in court. If a witness identifies the accused in court for the first time, the probative value of such uncorroborated evidence becomes minimal so much so that it becomes, as a rule of prudence and not law, unsafe to rely on such a piece of evidence. We are fortified in our view by catena of decisions of this Court in the cases of Kanta Prashad v. Delhi Administration, AIR (1958) SC 350, Vaikuntam Chandrappa (supra), Budhsen (supra), Kanan and Ors. v. State of Kerala, [1979] 3 SCC 319, Mohanlal Gangaram Gehani v. State of Maharashtra, [1982] 1 SCC 700, Bollavaram Pedda Narsi Reddy (supra), State of Maharashtra v. Sukhdev Singh and Anr., [1992] 3 SCC 700, Jaspal Singh alias Pali v. State of Punjab, [1997] 1 SCC 510, Raju alias Rajendra v. State of Maharashtra,



[1998] 1 SCC 169, Ronny alias Ronald James Alwaris, (supra), George and Ors. v. State of Kerala and Anr., [1998] 4 SCC 605, Rajesh Govind Jagesha, (supra), State of H.P. v. Lekh Raj and Anr., [2000] 1 SCC 247 and Ramanbhai Naranbhai Patel and Ors. v. State of Gujarat, [2000] 1 SCC 358.

7. Apart from the ordinary rule laid down in the aforesaid decisions, certain exceptions to the same have been carved out where identification of an accused for the first time in court without there being any corroboration whatsoever can form the sole basis for his conviction. In the case of Budhsen (supra) it was observed: -

"There may, however, be exceptions to this general rule, when for example, the court is impressed by a particular witness, on whose testimony it can safely rely, without such or other corroboration."

8. In the case of State of Maharashtra (supra), it was laid down that if a witness had any particular reason to remember about the identity of an accused, in that event, the case can be brought under the exception and upon solitary evidence of identification of an accused in court for the first time, conviction can be based. In the case of Ronny alias Ronald James Alwaris and Ors. (supra), it has been laid down that where the witness had a chance to interact with the accused or that in a case where the witness had an opportunity to notice the distinctive features of the accused which lends assurance to his testimony in court, the evidence of identification in court for the first time by such a witness cannot be thrown away merely because no test Identification parade was held. In that case, the concerned



accused had a talk with the identifying witnesses for about 7/8 minutes. In these circumstances, the conviction of the accused, on the basis of sworn testimony of witnesses identifying for the first time in court without the same being corroborated either by previous identification in the test identification parade or any other evidence, was upheld by this Court. In the case of Rajesh Govind Jagesha (supra), it was laid down that the absence of test identification parade may not be fatal if the accused is sufficiently described in the complaint leaving no doubt in the mind of the court regarding his involvement or is arrested on the spot immediately after the occurrence and in either eventuality, the evidence of witnesses identifying the accused for the first time in court can form the basis for conviction without the same being corroborated by any other evidence and, accordingly, conviction of the accused was upheld by this Court. In the case of State of H.P. (supra), it was observed that "...test identification is considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them. There may, however, be exceptions to this general rule, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely without such or other corroboration." In that case, laying down the aforesaid law, acquittal of one of the accused by High Court was converted into conviction by this Court on the basis of identification by a witness for the first time in court without the same being corroborated by any other evidence. In the case of Ramanbhai Naranbhai Patel and Ors. (supra), it



was observed "It, therefore, cannot be held, as tried to be submitted by learned counsel for the appellants, that in the absence of a test identification parade, the evidence of an eyewitness identifying the accused would become inadmissible or totally useless; whether the evidence deserves any credence or not would always depend on the facts and circumstances of each case." The Court further observed ".the fact remains that these eyewitnesses were seriously injured and they could have easily seen the faces of the persons assaulting them and their appearance and identity would well remain imprinted in their minds especially when they were assaulted in broad day light." In these circumstances, conviction of the accused was upheld on the basis of solitary evidence of identification by a witness for the first time in court." (emphasis mine)

77. In ***Sheo Shankar Singh vs State of Jharkhand*** (Supra) relied upon by the State, the Supreme Court observed that the Cr.P.C does not oblige the investigating agency to necessarily hold a test identification parade. The failure of the investigating agency to hold a TIP does not, in that view, have the effect of weakening the evidence of identification in the court. It further held that in appropriate cases the court may accept the evidence of identification in the court even without insisting on corroboration. In paras 46 to 48 the Supreme Court held as under:-

“46. It is fairly well settled that identification of the accused in the court by the witness constitutes the



substantive evidence in a case although any such identification for the first time at the trial may more often than not appear to be evidence of a weak character. That being so a test identification parade is conducted with a view to strengthening the trustworthiness of the evidence. Such a TIP then provides corroboration to the witness in the court who claims to identify the accused persons otherwise unknown to him. Test identification parades, therefore, remain in the realm of investigation.

47. The Code of Criminal Procedure does not oblige the investigating agency to necessarily hold a test identification parade nor is there any provision under which the accused may claim a right to the holding of a test identification parade. The failure of the investigating agency to hold a test identification parade does not, in that view, have the effect of weakening the evidence of identification in the court. As to what should be the weight attached to such an identification is a matter which the court will determine in the peculiar facts and circumstances of each case. In appropriate cases the court may accept the evidence of identification in the court even without insisting on corroboration.

48. The decisions of this Court on the subject are legion. It is, therefore, unnecessary to refer to all such decisions. We remain content with a reference to the following observations made by this Court in Malkhansingh v. State of M.P. [(2003) 5 SCC 746: 2003 SCC (Cri) 1247] : (SCC pp. 751-52, para 7)

“7. It is trite to say that the substantive evidence is the evidence of identification in court. Apart from the clear



provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration. (See



Kanta Prashad v. Delhi Admn. [AIR 1958 SC 350 : 1958 Cri LJ 698] , Vaikuntam Chandrappa v. State of A.P. [AIR 1960 SC 1340 : 1960 Cri LJ 1681] , Budhsen v. State of U.P. [(1970) 2 SCC 128 : 1970 SCC (Cri) 343] and Rameshwar Singh v. State of J&K [(1971) 2 SCC 715 : 1971 SCC (Cri) 638] .)”

78. In *Mulla & Another vs State Of U.P* (Supra), on which reliance has been placed by the learned *amicus curiae*, the Supreme Court observed that failure to hold TIP does not make the evidence of identification in court inadmissible, rather the same is very much admissible in law. However, where identification of an accused by a witness is made for the first time in Court, it should not form the basis of conviction. The relevant para 21 of the said judgment reads as under:-

*“21. Failure to hold test identification parade does not make the evidence of identification in court inadmissible, rather the same is very much admissible in law. **Where identification of an accused by a witness is made for the first time in Court, it should not form the basis of conviction.** As was observed by this Court in *Matru v. State of U.P.*, (1971) 2 SCC 75 : (AIR 1971 SC 1050), identification tests do not constitute substantive evidence. They are primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on the right lines. The identification can only be used as*



corroborative of the statement in Court. (Vide Santokh Singh v. Izhar Hussain, (1973) 2 SCC 406) : (AIR 1973 SC 2190).” (emphasis mine)

79. In ***Sukhbir Singh v. State of Punjab*** (Supra) on which also reliance has been placed by the learned *amicus curiae*, the Supreme Court observed that there is no inflexible rule that an identification made for the first time in court has to be always ruled out of consideration, but the broad principle is that if there is no other evidence against an accused, an identification in court made long after the event is not acceptable. Paras 13 and 14 of the said judgment read as under :-

“13. We have considered the arguments advanced by the learned counsel for the parties. It will be seen that the incident happened at about 9 p.m. on 26-12-1991. In the FIR recorded about 8 hours later, the appellants had been described as two Sikh youths 25/30 years of age wearing kurta-pajamas. The appellants were arrested on 21-5-1992 by Sub-Inspector Pyara Singh (who was not examined as a witness) and they were identified for the first time in court by Naranjan Singh on 21-9-1993. We are of the opinion that the physical description of the appellants given in the FIR would fit millions of youth in Punjab, and could not by itself pin the murder on them. The prosecution has also not come out with the steps in the investigation which had led to their identification as the primary assailants. It was, in this background, obligatory on the part of the prosecution



to have produced Sub-Inspector Pyara Singh who could have testified to the steps in the investigation made by him which had enabled him to identify the appellants as the killers. This was not done. In this view of the matter, the judgments cited by Mr Patwalia fully apply to the facts of the case.

*14. There is absolutely no evidence other than the identification in court made by Naranjan Singh long after the incident. It is true that there is no inflexible rule that an identification made for the first time in court has to be always ruled out of consideration; **but the broad principle is that (sic if) in the background there is no other evidence against an accused, an identification in court made long after the event is clearly not acceptable.** The judgment cited by Mr Kuldip Singh of Malkhansingh case [(2003) 5 SCC 746 : 2003 SCC (Cri) 1247] is on the facts of that particular case, as a prosecutrix, who was the victim of a gang rape, had identified some of the accused for the first time in court on which this Court opined that the identification was acceptable as a good piece of evidence.”*
(emphasis mine)

80. In *State of Maharashtra Vs. Sukhdeo Singh* (Supra), at para 25, it has been held by the Supreme Court that the “(i) identification for the first time after a lapse of considerable time in Court or (ii) identification at a test identification parade in the case of total strangers, it is not safe to place implicit reliance on the evidence of witnesses who had just a



fleeting glimpse of the person identified or who had no particular reason to remember the person concerned, if the identification is made for the first time in Court.”

81. In ***Vaikuntam Chandrappa and Ors. Vs State of Andhra Pradesh***, (Supra), the Supreme Court inter alia observed :

“It is true that when he came to give evidence in court, the witness did point out to the same three accused as having been seen by him at: the time of the murder. It is also true that the substantive evidence is the statement in court; but the purpose of test identification is to test that evidence and the safe rule is that the sworn testimony of witnesses in court as to the identity of the accused who are strangers to the witnesses, generally speaking, requires corroboration which should be in the form of an earlier identification proceeding.”

82. In ***George & Ors vs State of Kerala & Anr.***, since reported in ***AIR 1979 SC 1127***, the Supreme Court held that “... *though not fatal, absence of the corroborative evidence of prior identification in a T.I. parade makes the substantive evidence of identification in Court after a long lapse of time a weak piece of evidence and no reliance can be placed upon it unless sufficiently and satisfactorily corroborated by other evidence.*”

83. In ***Rabindra Kr. Pal @ Dara Singh vs Republic Of India*** since reported in ***(2011) 2 SCC 490***, the Supreme Court held



that “It is clear that identification of accused persons by witness in dock for the first time though permissible but cannot be given credence without further corroborative evidence. Though some of the witnesses identified some of the accused in the dock as mentioned above without corroborative evidence the dock identification alone cannot be treated as substantial evidence, though it is permissible.”

84. On a perusal of the ratio laid down by the Supreme Court, in the above noted cases, it would be evident that ordinarily an accused should not be convicted on the testimony of witnesses identifying for the first time in court without any corroboration either by previous identification in the TIP or any other evidence. It would further be evident that if there is no other evidence against the accused, identification in court made long after the incident should not form the basis of conviction as it is regarded as evidence of weak character. However, in appropriate cases, in exception to the general rule, if a witness has any particular reason to remember about the identity of an accused or the accused is known to a witness from before, the court may rely on such identification without other corroboration.

85. Thus, we see that the Supreme Court consistently took the view that the substantive piece of evidence of



identification of an accused is the evidence given during trial. Nevertheless, by the time the witness gets into the dock to depose, there would be substantial gap between the date of occurrence and the actual examination of the witness. If the accused was known to the witness from before and his identity was not in doubt, the time gap may not affect the quality of evidence, but if the accused was a stranger to the witness, a reasonable doubt may arise about the correctness of identification by the witness for the first time in court. If there is substantial time gap between commission of an offence when the witness had seen the accused and the trial of an offence or the actual date of examination of the accused, it may be difficult for the court to place complete reliance on such identification.

86. Now, coming to the facts of the instant case, it is reiterated that there is no dispute to the fact that the incident took place in the dark night. There is no evidence that there was sufficient light or there was electric pole or supply of electricity in the village. The identification of the appellant is being claimed by the witnesses in the flash of torch light. It has rightly been pointed out by the learned *amicus curiae* that there is no evidence on record that the extremists were flashing big torches or there were



huge lights with them. Such a finding of the trial court is apparently an error of record.

87. It has been argued on behalf of the State that the accused persons and the victims were known to each other living in the adjoining village. The State has placed reliance on judgments of the Supreme Court in *Sheo Shankar Singh vs State Of Jharkhand* (Supra) and *Dana Yadav @ Dahu* (Supra) to support its contention that the conviction can be sustained even where the witnesses identified the accused for the first time in court and they were known to him.

88. Learned Additional Advocate General appearing for the State has placed reliance on the judgments of the Supreme Court in *Nathuni Yadav* (Supra), *S. Sudarshan Reddy* (Supra), *State of U.P. Vs. Babu* (Supra) in support of his submission that possibility of identification in faint light or where source of light was not disclosed is possible, as the accused persons were known to the witnesses from before.

89. The submission made on behalf of the State has to be considered in the light of the evidence led before the court. The credibility and probative value of the identification of the appellant in dock by the witnesses is required to be tested in the light of their testimony.



90. **Manorma Kunwar** (P.W.4) clearly states that on the date of occurrence she was inside her house. About 50 persons entered her house and they caught hold of her sons Kamlesh and Vimlesh. She claims to have seen that her sons were being mutilated by 'persons' at Thakurbadi. She states that Dukhan, who was present in the court, had taken her son. In her examination-in-chief, she only claims to recognize the appellant as one who had taken her sons from her house and not as one who was cutting the bodies of her sons at Thakurbadi. In her cross-examination, she admits that at the time of occurrence it was dark.

91. P.W4 having admitted that it was dark at the time of occurrence, does not make any statement as to how she identified the appellant amongst the group of 50 persons, who came to her house. Any artificial source of light has been eluded in her statement, which could facilitate the identification. No seizures have been made with regard to artificial light. The absence of indication of any source of illumination at her house, at the time her sons were caught, which was the only time and place at which she claims to have identified the appellant, is particularly significant when considered in the light of the fact that the appellant was not a co-villager and there is no evidence that she was known to the appellant from before the incident. It was for the



prosecution to divulge how the identification could be made on a dark night without any artificial source of light and the failure to do so casts serious doubt about the identification of the appellant later in the court after 15 years from the incident. The Supreme Court time and again found that identification in dark night without reference to any other source of light makes the same questionable and unworthy of reliance. Learned *amicus curiae* has relied upon the decision rendered by the Supreme Court in ***Ashoksinh Jayendrasinh vs The State of Gujarat*** (Supra) in this regard. Para 12 thereof reads as under :-

“12. The occurrence was of 23-11-1997 at 9.00 p.m. in the agricultural field of complainant-Somabhai Rupabhai (PW 3), where it was dark. The panchnama of the scene of occurrence (Exhibits P-73) shows no indication of the electric light either in the animal shed situated behind the house of complainant or that there is any electric pole anywhere in the vicinity or that there is a light on the well which is supplying water. Case of prosecution is that the appellant and six other co-accused surrounded the complainant party and there were three gunshots fired. The injured witness (PW 6) in his cross-examination has admitted that he had not stated anything about the burning light either in the animal shed or anywhere in the vicinity. In the absence of any evidence as to the light aspect, the possibility of identifying the accused in the darkness of the agricultural field of the complainant, particularly at 9.00



p.m. becomes doubtful. It is also to be pointed out that there is no evidence as to whether there was moonlight on 23-11-1997 and complainant has also not stated that he has identified the appellant or other co-accused with the help of moonlight. In the absence of evidence as to the availability of sufficient light, the identification of the accused and the overt act attributed to the appellant becomes doubtful.”

92. Further, in ***Tamilselvan vs. State Rep. by Inspector of Police, Tamil Nadu*** (Supra) on which reliance has been placed by the learned *amicus curiae* to challenge the identification of the appellant in dark night, the Supreme Court held in paras 8 and 9 as under :-

“8. Before dealing with these glaring inconsistencies it may be pointed out that the incident occurred at 10.30 p.m. on 27.1.1996. It is alleged by the prosecution witnesses that they identified the accused in moonlight. We find it difficult to accept this version of the prosecution witnesses that they could have identified any of the accused merely by the moonlight. In the evidence of the prosecution witnesses it is stated that the accused were carrying torches, but there is no indication whether the victims, including the Forest Guard Swaminathan (deceased) and Raju, Gardener, who sustained fire injuries, carried torches.

9. Since it was the accused who allegedly carried torches, we find it difficult to believe how the prosecution witnesses could have identified the assailants. The position would have been different if the forest guards had been carrying



torches and had been pointing them at the assailants, but here the position is just the reverse. In fact due to the torches of the assailants the prosecution witnesses would have been partially blinded by the light of the torch light, and would not have been able to identify anybody.”

(emphasis mine)

93. The factual scenario under which the Supreme Court doubted the identification in *Ashoksinh Jayendrasinh vs The State of Gujarat* (Supra) and *Tamilselvan vs. State Rep. by Inspector of Police, Tamil Nadu* (Supra) is fully applicable in the present case.

94. Another mysterious aspect in the evidence of P.W.4 is the identification made by her of the appellant and the accused Dully Yadav in the court. In the case at hand, the Trial Court had taken up the trial of the appellant alone. It was the appellant alone, who was present in the court as an accused. Under such circumstance, we fail to understand as to how P.W.4 could identify another accused Dully in the court.

95. **Baliram Sharma** (P.W.5) has stated in his evidence that he climbed a tree at the time when the miscreants had come. He claims to have heard slogan shouting. Furthermore, he claims that torch lights were being flashed by the miscreants. He claims to have identified some of the miscreants in the torch light, namely,



Ram Lakhan Bhuiyan, Ramesh Yadav, Uma Paswan and one Pandit, but the appellant's name has not been taken in his statement. He states that he heard the appellant's name being mentioned when his son Rajesh Kumar was taken away. He has identified the appellant, who was part of the group of accused persons. In cross-examination, he states that he descended from the tree after everyone had left. Thereafter, when he went to his house, he was informed by his wife that his son has been taken away. His wife Sharda Devi (P.W.18) is not one of the witnesses, who have identified the appellant. At Thakurbadi, what P.W.5 saw was the dead bodies of the victims only. So, P.W.5, who was atop a tree, in the flash of light of torch being carried by the miscreants claimed to have identified Ram Lakhan Bhuiyan, Ramesh Yadav, Uma Paswan and one Pandit but not the appellant. He only claims to have heard the name of the appellant being uttered at the time his son was being taken away. Even his wife (P.W.18), who had informed him that his son has been taken to Thakurbadi by the miscreants and who appears to have been present and their son was taken to Thakurbari by the perpetrators has not named the appellant. There is no identification of the appellant by P.W.18 Sharda Devi in her testimony. So even if it is believed that P.W.5 identified some miscreants while he was atop a tree, he did not



claim to have identified the appellant from that position. Most importantly, what makes the identification of the appellant in court by P.W.5 even more unreliable is his acceptance that he had not claimed in his statement under Section 161 of the Cr.P.C that he could recognize any of the perpetrators of the massacre. Further, he had also not disclosed to the police that he had heard the appellant's name when his son was being taken away. He denies telling the police that the appellant had participated in the occurrence. The contradiction with the statement made under Section 161 of the Cr.P.C, which P.W.5 accepts, is sufficient to make his evidence unreliable.

96. **Girja Devi** (P.W.8) states that on the date of occurrence she was at the doorstep of her house along with her brother Chandra Bhushan Sharma. At that point of time, around 11 persons came to her house and took her brother. She claims that a lamp was burning at the door. Be it noted that she identified one Dully Yadav amongst those who took her brother. She also clearly states in her deposition that she did not identify any one else. Later on, when she went to Thakurbadi, she saw dead bodies of 34 persons including that of her brother. However, she identified the appellant in dock as being part of the incident. In cross-examination, she states that she did not have the occasion to go



outside her village. She states that other members of the family were present at the time of occurrence, but they have not been examined. She admits in cross-examination that she did not follow the miscreants.

97. From the evidence of P.W.8, it would appear that she had a chance to identify the perpetrators only when they had come to her house and took her brother Chandra Bhushan Sharma. She recognized only Dully Yadav and no one else. After the perpetrators left, she did not follow them and there is no evidence to demonstrate that she witnessed any part of carnage, which could afford any other opportunity of identification to her. When she finally went to Thakurbadi, the process of killing had already culminated. Since she did not identify the appellant as part of the 11 persons, who had come to her house and who took her brother, there was no other occasion in which she could witness participation of the appellant in the carnage as she admits that she did not follow the miscreants to any part of the village.

98. **Suresh Sharma** (P.W.11) states in his evidence that 10-12 persons had come to his house and they took his son Ranjan Kumar to Thakurbadi. On seeing the appellant in court, he identified him as one of the persons, who had come to his house. In cross-examination, he admits that in his statement made under



Section 161 of the Cr.P.C, he did not claim to identify any of the accused persons. He states that on the arrival of the miscreants the situation in the village became that of disarray and chaos with villagers running helter-skelter to take refuge. He concealed himself under the bed to prevent his detection. Explaining his position in cross-examination, he states that he was so well hidden under the bed that no one could see him. He finally came out of the bed only after one and a half hours.

99. It would be pertinent to note here that P.W.11 is the father of Ajay Kumar (P.W.14) (an injured witness). P.W.14 in his deposition states that he along with Ranjan Kumar (brother of P.W.14) and others was taken away by the miscreants to Thakurbadi from his house. However, P.W.14 does not refer to the presence of P.W.11 at his house at the time he was taken nor does P.W.11 make any mention of the taking away of P.W.14 in his deposition. In other words, P.W.11's presence at his house where he claims to have seen the appellant and which forms the basis of his identification of the appellant in the dock is not supported by P.W.14, who is an injured witness.

100. Even otherwise, P.W.11 identified the appellant in court on seeing him for the first time and in contradistinction to his earlier statement to the police wherein as per his testimony he had



not claimed to be able to identify the accused persons, if he would see them. Besides, he claims that to save himself he had hidden under the bed and was consequently not in a position to identify any of the miscreants. His identification of the appellant on seeing him in the dock does not have any sound basis and is also contrary to the statement made under Section 161 of the Cr.P.C. In fact, his very presence at his house at the time of occurrence is not corroborated by the injured witness.

101. **Dinesh Sharma** (P.W.13) states in his evidence that he had just returned after visiting the doctor. He heard the sound of firing and went to the terrace of his house and saw the extremists at a distance. He states that on being informed that extremists had come, he concealed himself under 15-20 sacks at his terrace. He claims to identify Ramesh Yadav, Godai Paswan, Adhik Paswan and Nathu Kasai amongst the miscreants at his terrace. He did not take the name of the appellant but claimed to identify others on seeing them. On seeing the appellant in the dock, he identified him as one of the miscreants, who had come to his terrace.

102. In his cross-examination, P.W.13 disclosed that with the help of his wife and cousin sister he concealed himself under the sacks which were covered on top with a thick blanket. He remained there for more than three hours.



103. Now, given the position of P.W.13 under layers of sack with a thick blanket on top, a position in which he claims he was at the time he saw the appellant and others, which is the context of his identification of the appellant in court for the first time, it certainly baffles the mind as to how could he have had the opportunity to see any faces so clearly through the impediments under which he was concealed in a desperate effort to save himself from falling prey. Any scope of identification is further hampered by the absence of any illumination in which any kind of identification could be made. His testimony does not refer to any source which could make it possible for him to see the appellant clearly enough to warrant his identification after 15 years from the date of occurrence more so when the appellant happened to be a stranger to him.

104. **Ajay Kumar** (P.W.14) states in his evidence that he was at his house when he was taken to Thakurbadi along with his brothers by 15-20 persons. At Thakurbadi, his hands and feet were tied and he and others were surrounded by 30-35 persons. He states that he was assaulted and then the perpetrators flashed torch lights to see who were alive so that they could finish them off. He identified the appellant in the dock. In the cross examination, he revealed that as long as he was at Thakurbadi, he kept his eyes



closed. He was first examined 5-6 months after the occurrence. There is no explanation for the delayed examination. As a matter of fact, since he is an injured witness, his testimony carries more weight. However, while identifying the appellant in dock for the first time after 15 years from the occurrence, his testimony contains material omissions as to where he saw the appellant, whether the appellant was amongst those who took him to Thakurbadi or one of those who slaughtered him and others. At Thakurbadi, he himself admits that he deliberately kept his eyes shut to simulate unconsciousness and did not open his eyes as long as the miscreants were there. Moreover, his statement was recorded by the police after 5-6 months of the occurrence. The undue delay in recording of statement may not itself be fatal, if the evidence is otherwise cogent and credible. However, despite being injured the evidence rendered by him is general and vague on the point of identification. Certainly, his delayed examination under Section 161 Cr.P.C does not make the prosecution story of the massacre doubtful, which has otherwise also not been disputed, but the delay in his examination does cast suspicion on his testimony with regard to the identification. Furthermore, despite being an injured witness, the evidence rendered by him is general and vague.



105. **Pankaj Kumar** (P.W. 16) states that he was at Ramashish Sharma's house when a furore was raised. On being informed by Ramashish Sharma that party members had come, he took refuge at Ram Swaroop Yadav's veranda, from where he witnessed the occurrence. He further states that he saw the extremists arriving in groups and that he could identify some persons. When he finally went to Thakurbadi he saw the dead bodies of the victims. On seeing the appellant in dock, he identified him. In his cross examination, he claimed that in the commotion created by the arrival of the miscreants everyone was looking for a safe place to hide to save their lives. He was hiding at Ram Swaroop Yadav's house and not at his veranda. From the testimony of P.W.14, it is evident that he lost no time in seeking a safe hiding place as soon as he learnt of the arrival of the miscreants. He hid in the house of one Ram Swaroop Yadav (not examined). The question arises whether in Ram Swaroop Yadav's house, he was suitably placed to see the appellant in a large group of persons, especially when he was not acquainted with him. Also, whether between realizing that miscreants had arrived and seeking a good hiding place, there was sufficient time for him to make any sort of identification, more so, of strangers and to remember clearly, after 15 years, who he had seen in such a situation of



complete confusion and chaos, not to mention at a time of darkness. He does state that extremists had taken one Ramdayal (deceased) and Tulsi (deceased), but he refers to a group of extremists, and does not claim to identify the appellant as having been seen in the act of taking these two persons. So, his identification of the appellant in dock for the first time after 15 years is based on shaky circumstances, which do not make such identification credible.

106. **Arvind Kumar (P.W.19)** states in his evidence that he was at Arjun Singh's house when the extremists came. The extremists were flashing lights to identify members of Ranvir Sena. He states that he escaped to his house where cattle were tied and watched persons being taken to Thakurbadi from there. He took the name of the appellant as one of the naxalites and also identified him in dock. In his cross examination, he states that he had seen the case diary before giving evidence and that the appellant's name is not included in his statement before the Police. The most significant weakness of his deposition is the omission to state the appellant's name in his statement under Section 161 of the Cr.P.C making his identification of the appellant in dock for the first time after 15 years of the occurrence contrary to the statement before police and therefore unworthy of reliance.



107. **Vishwa Vijay Sharma** (P.W. 10) also claims to identify the appellant, but his evidence is too cryptic and contradictory to make any reliance on the same. He was declared hostile by the court at the request of the prosecution.

108. The discussions made above make it abundantly clear that dock identification of the appellant by these witnesses after 15 years of the occurrence is itself based on circumstances, which make it hard to believe that the witnesses were favourably situated so as to recognize the appellant at a time of darkness where no source of identification has been pointed out and also in a situation where witnesses faced with the gravest danger were first and foremost preoccupied with finding places of shelter where they could be well concealed from the perpetrators. The dock identification was not preceded by any previous identification, which could bolster the identification of the appellant in court. There is nothing on record to suggest that the appellant was known to the prosecution witnesses from before rather there is evidence that the appellant is the resident of a different village falling under jurisdiction of a different police station. As seen above, the occurrence had taken place in village Senari, which falls under the jurisdiction of Karpi Police Station whereas the appellant is a resident of village Kutubpur, which falls under the jurisdiction of



Kurtha Police Station The witnesses examined in the case have not whispered a word about their previous acquaintance with the appellant. Under such circumstance, the judgments of the Supreme Court on which the State has placed its reliance are of no help. The identification of the accused for the first time in court after a long gap of time from the date of occurrence of a person not known to have been familiar to the witnesses has not been regarded by the Supreme Court as being safe to sustain conviction in *Mulla & Anr. (Supra)* *Sukhbir Singh Vs. State of Punjab (Supra)*, *State of Maharashtra Vs. Sukhdeo Singh (Supra)*, *Vaikuntam Chandrappa and Ors. Vs State of Andhra Pradesh, (Supra)* and *George & Ors vs State of Kerala (Supra)*.

109. The other factor to discard the dock identification is of course the omission in the statements made by some of the P.Ws, as highlighted above, before the Police, which amount to contradiction which such witnesses have accepted.

110. Another important feature of the case is the manner in which the appellant has been deprived of his statutory right to be heard, as provided under Section 313 of the Cr.P.C., which reads as under: -

“313. 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 questions 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 attendance of the accused, it may also dispense with his examination under clause (b).

(2) No oath shall be administered to the accused when he is examined under sub- section (1).

(3) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them.

(4) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

(5) The court may take help of Prosecutor and defence Counsel in preparing relevant questions which are to be put to the accused and the court may permit filing of written statement by the accused as sufficient compliance of this section.”

111. A plain reading of Section 313 of the Cr.P.C would demonstrate that the question under Clause (1)(a) is discretionary. It empowers the court to put such question to the accused as the court considers necessary for the purposes of enabling him personally to explain any circumstance appearing in evidence against him at any stage without previously warranting. However, Clause (1)(b) empowers the court to question the accused on the case after the witnesses or the prosecution has been examined and before is called upon for his defence. It casts a duty on the court to



give an opportunity to the accused to explain the incriminating material against him.

112. In ***State of U.P. Vs. Md. Iqram & Anr.*** Since reported in ***AIR 2011 SC 2296***, the Supreme Court held :

“...The attention of the accused must specifically be brought to inculpatory pieces of evidence to give him an opportunity to offer an explanation if he chooses to do so.

Therefore, the court is under a legal obligation to put the incriminating circumstances before the accused and solicit his response. This provision is mandatory in nature and casts an imperative duty on the court and confers a corresponding right on the accused to have an opportunity to offer an explanation for such incriminatory material appearing against him. Circumstances which were not put to the accused in his examination under Section 313 Cr.P.C. cannot be used against him and have to be excluded from consideration.”

113. In ***Nawal Kishore Vs. State of Bihar***, since reported in ***(2004) 7 SCC 502***, the Supreme Court observed:

“Under Section 313 Cr.P.C. the accused should have been given opportunity to explain any of the circumstances appearing in the evidence against him. At least, the various items of evidence, which had been produced by the prosecution, should have been put to the accused in the form of question and he should have been given opportunity to give his explanation. No such opportunity was given to the accused in the instant case. We deprecate the practice



of putting the entire evidence against the accused put together in a single question and giving an opportunity to explain the same, as the accused may not be in a position to give a rational and intelligent explanation. The trial judge should have kept in mind the importance of giving an opportunity to the accused to explain the adverse circumstances in the evidence and the Section 313 examination shall not be carried out as an empty formality. It is only after the entire evidence is unfurled the accused would be in a position to articulate his defence and to give explanation to the circumstances appearing in evidence against him. Such an opportunity being given to the accused is part of a fair trial and if it is done in slipshod manner, it may result in imperfect appreciation of evidence.”

114. In ***Dara Singh And Anr. vs The State of Punjab*** since reported in ***AIR 1952 P H 214***, the Supreme Court held “... *it is not sufficient compliance to string together a long series of facts and ask the accused what he has to say about them. He must be questioned separately about each material circumstance which is intended to be used against him. The whole object of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him. The questioning must, therefore, be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand. Even when an accused person is not illiterate, his*



mind is apt to be perturbed when he is facing a charge of murder. He is, therefore, in no fit position to understand the significance of a complex question. Fairness therefore requires that each material circumstance should be put simply and separately in a way that an illiterate mind, or one which is perturbed or confused, can readily appreciate and understand.”

115. In **Reena Hazarika Vs. State of Assam**, since reported in **AIR 2018 SC 5361**, the Supreme Court held:

“Section 313, Cr.P.C. cannot be seen simply as a part of audi alteram partem. It confers a valuable right upon an accused to establish his innocence and can well be considered beyond a statutory right as a constitutional right to a fair trial under Article 21 of the Constitution, even if it is not to be considered as a piece of substantive evidence, not being on oath under Section 313(2), Cr.P.C. The importance of this right has been considered time and again by this court, but it yet remains to be applied in practice as we shall see presently in the discussion to follow. If the accused takes a defence after the prosecution evidence is closed, under Section 313(1) (b) Cr.P.C. the Court is duty bound under Section 313(4) Cr.P.C. to consider the same. The mere use of the word ‘may’ cannot be held to confer a discretionary power on the court to consider or not to consider such defence, since it constitutes a valuable right of an accused for access to justice, and the likelihood of the prejudice that may be caused thereby. Whether the defence is



acceptable or not and whether it is compatible or incompatible with the evidence available is an entirely different matter. If there has been no consideration at all of the defence taken under Section 313 Cr.P.C. in the given facts of a case, the conviction may well stand vitiated.”

116. The membership of an unlawful assembly, allegation under the Arms Act, Explosive Substances Act and killing of 34 persons by the unlawful assembly were the charges on which the appellant was tried. They cannot, by any stretch of imagination be treated as evidence against the appellant. The evidence against the appellant is the material on which the Trial Court has relied upon to convict him.

117. The material relied upon by the Trial Court is nothing but identification of the accused (appellant) in dock by nine witnesses. A bare perusal of Section 313 of the Cr.P.C questions would show that it is mere repetition of charges. No evidence brought on record between the charge and conviction has been put to the appellant. There is no question regarding identification of the appellant in dock by the particular witnesses. Thus, in view of the settled law that the material not put to the accused cannot be taken into consideration for convicting the appellant. Hence, in view of the ratio laid down by the Supreme Court in above



mentioned cases relating to the requirements of compliance of the provisions prescribed under section 313 Cr.P.C., the identification of the appellant by the witnesses in the court cannot be relied upon to convict him.

118. The conviction in a criminal trial is required to be certain and not doubtful. The burden of proof of guilt of an accused is upon the prosecution. It must stand by itself. In the present case, on appreciation of evidence adduced during trial, I find that there is a real and reasonable doubt as to the guilt of the appellant.

119. Accordingly, the impugned judgment of conviction dated 10th November, 2016 and order of sentence dated 18th November, 2016 passed by the learned 3rd Additional Sessions Judge, Jehanabad in Sessions Trial No.93/2013/ 281/2015 arising out of Karpi P.S. Case No. 22 of 1999 are, hereby, set aside. The appellant is directed to be released forthwith, if he is not required in any other case.

120. The appeal stands allowed.

121. The reference made by the trial court under Section 366 of the Cr.P.C is rejected.



122. Before parting with the reference and the appeal, I would once again record my appreciation for the able assistance rendered by the learned *amicus curiae*.

123. The Patna High Court, Legal Services Committee is, hereby, directed to pay Rs. 10,000/- to Ms. Surya Nilambari, learned *amicus curiae* in Death Reference Case No. 1 of 2017 as a consolidated fee for the services rendered by her.

(Ashwani Kumar Singh, J)

Arvind Srivastava, J : I agree.

(Arvind Srivastava, J)

Pradeep/-

AFR/NAFR	AFR
CAV DATE	07.04.2021
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