

CASE NO.:
Appeal (crl.) 761 of 2001

PETITIONER:
KRISHNA MOCHI AND OTHERS

Vs.

RESPONDENT:
STATE OF BIHAR

DATE OF JUDGMENT: 15/04/2002

BENCH:
M.B. Shah

JUDGMENT:

WITHDEATH REFERENCE NO. 1 OF 2001

J U D G M E N T

Shah, J.

With respect I regret for my inability to agree with the judgment rendered by my learned brother Justice Agrawal. At the outset, it requires to be stated that this case illustrates how faulty, delayed, casual, unscientific investigation and lapse of long period in trial affects the administration of justice which in turn certain shakes the public confidence in the system. Is it not possible for the authorities to find out ways and means for speedy, efficient, scientific investigation in at least heinous brutal carnage and for trying the case within few months of occurrence? If this is not done, it is of no use to complain that accused are not punished in such cases. In any case, for deciding such criminal case, it is the bounden duty of the court to appreciate the evidence brought on record, as it is, in accordance with established law without being influenced by the allegations levelled by the prosecuting agency or by the incident. Before appreciating the evidence, I would refer to the observations of this Court in State (Delhi Admn.) v. Laxman Kumar [(1985) 4 SCC 476 at 505] observed as under:-

"Mankind has shifted from the state of nature towards a civilized society and it is no longer the physical power of a litigating individual or the might of the ruler nor even the opinion of the majority that takes away the liberty of a citizen by convicting him and making him suffer a sentence of imprisonment. Award of punishment following conviction at a trial in a system wedded to rule of law is the outcome of cool deliberation in the court room after adequate hearing is afforded to the parties, accusations are brought against the accused, the prosecutor is given an opportunity of supporting the charge and the accused is equally given an opportunity of meeting the accusations by establishing his innocence. It is the outcome of cool deliberations and the screening of the material by the informed mind of the Judge that leads to determination of the lis"

In the present case, in gruesome carnage, 35 persons lost their lives, some houses/huts were burnt, number of persons were injured and in that case charge-sheet was submitted against 119 persons. Out of them, 13 were tried by the Designated Court of Sessions Judge, Gaya in G.R. Case No.430 of 1992, Tekari Police Station Case No.19 of 1992 under the provisions of Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter referred to as "TADA Act") and under Section 302/149 etc. of Indian Penal Code (hereinafter referred to as "IPC"). After recording the evidence, by judgment and order dated 8.6.2001, the Designated Court

(a) acquitted A-1 Nanhe Yadav @ Dina Yadav, A-10 Nanhak Teli, A-11 Naresh Chamar and A-12 Ramashish Mahto;

(b) convicted A-5 Bir Kuer Paswan, A-8 Krishna Mochi, A-9 Dharmendra Singh @ Dharu Singh, A-13 Nanhe Lal Mochi and sentenced to death;

(c) convicted A-2 Bihari Manjhi, A-4 Ramautar Dusadh @ Lakhan Dusadh, A-6 Rajendra Paswan, A-7 Wakil Yadav and imposed life imprisonment;

(d) convicted A-3 Ravindra Singh and imposed RI for ten years. He has not filed any appeal.

A-2 Bihari Manjhi, A-4 Ramautar Dusadh @ Kakhan Dusadh, A-6 Rajendra Paswan and A-7 Wakil Yadav have challenged impugned judgment and order in Criminal Appeals No.752 and 765 of 2001 and by a separate judgment of even date, these accused stand acquitted by this Court on the ground that there is no evidence against them except the confessional statement of A-2 Bihari Manjhi which we have not relied upon for the reasons recorded therein.

By this judgment and order, Criminal Appeal No.761 of 2001 filed by A-5 Bir Kuer Paswan alias Beer Kuer Dusadh, A-8 Krishna Mochi, A-9 Dharmendra Singh alias Dharu Singh, A-13 Nanhe Lal Mochi and the Death Reference No.1 of 2001 filed by the State against these accused, are disposed-of.

In heinous crime, where 35 persons lost their lives, prosecution has not examined the informant Satendra Kumar Sharma, therefore, it would be difficult to refer to the contents of the FIR. However, we would refer to evidence of PW33 Vijay Pratap Singh, Inspector, who was station-in-charge of police station Tekari. It is his say that on 12th February, 1992 at about 10.00 p.m. when he was ready for patrolling, all of a sudden he heard noise of explosions. He, therefore, along with the sub-inspector and other available armed force jawans left the police station for finding out as to what has happened. On the way, he met Sidheshwar Yadav, who was the mukhia of the village but he was not having any information with regard to the incident. He along with Sidheshwar Yadav started for going ahead. After going at some distance, they saw that the sky was red because of flames. Thereafter, they approached village Dihura and saw one Krishna Yadav and Bhola Paswan, Chowkidars of the village and Ram Yogesh Singh, Dafadar. PW33 enquired from them about the lit up village towards the east of village Dihura. It is his say that they were frightened and informed him that some party people have attacked the village Bara. They used the word "party" for militants. As he was hearing the noises of bombs and bullets, he gave information to the Superintendent of Police who directed him to proceed towards the place of occurrence. They left the mobile jeep on the road and when they were proceeding towards village Bara they were attacked by the extremists from the western side of village Bara. They also opened fire in self defence. Meantime, Superintendent of Police reached there

at about 11.30 p.m. along with police force. It is his say that thereafter they reached village Bara at about 1.00 a.m., where they heard the slogan "whoever comes near the village will be eliminated". After some shouts, one young person whose hands were tied at the back came running and on being asked he told that he was Shravan Kumar. After seeing that police has arrived, militants started running towards the East. When they entered the village there was total quiteness. They found the bridge on the canal about 200 yards east of the village. They found dead bodies of people scattered in the fields. Their hands were tied at the back and their throats were slit. Thereafter, information was conveyed immediately to Inspector General of Police, Gaya and other senior police officers. He took the injured for medical treatment at Magadh Medical College Hospital. Informant Satendra Kumar Sharma gave statement Ex.8, which was recorded as fard-beyan. Thereafter, the formal F.I.R. Ex.9 was written by Ram Janam Singh, Inspector of PS Tekri. It is his say that place of incident is village Bara which is about 5 km. from the police station Tekri. In the said village, there are 50 houses, out of which 5 are those of Brahmins, 1 of Harijan, 1 of Gwala community and the rest of the houses are those of bhumihar community. The militants took the villagers from their houses in the field adjacent to Shiv Mandir situated at a distance of 20 yards on the northern side of the village, from there they took them in the grass field and then to the bridge on the eastern side of the canal and after tying their hands with their own clothes killed them by slitting their throats. It is his say that one Nanhe Yadav, A-1, was arrested from Alipur bus stand on 17.2.1992. His statement was recorded and thereafter he was sent to judicial custody. The statement of other witnesses could not be recorded as no witness was under condition of giving statement. Thereafter, Superintendent of Police on 17.2.1992 directed that the investigation of the incident should be conducted by Inspector Ram Japit Kumar. As Ram Japit Kumar was not available, investigation was handed over to Inspector Suresh Chander Sharma. In cross-examination, he admitted that the entire investigation was conducted by Ram Japit Kumar. He had not recorded the statement of any witness including that of Chowkidars Krishna Yadav and Bhola Paswan and Dafadar Ram Yogesh Singh. He also admitted that daily diary entry no.262 of 1992 was not with him. He admitted that he had not seen the notification of TADA. He had not taken approval of Superintendent of Police and Director General of Police before commencing investigation and he began investigation upon oral instructions of Superintendent of Police and thereafter handed over the investigation to Subhash Chander Sharma (PW17). He denied the suggestion that Ram Japit Kumar found the accused persons named in the FIR to be innocent and that to suppress the investigation done by Ram Japit Kumar and diary written by him, he had written an anti-dated diary and that was done to fill-up the gap of investigation carried out by Ram Japit Kumar.

It is to be stated that Ram Japit Kumar is not examined by the prosecution, even though he was the Inspector of Tekari police station and it is on the record that he also conducted investigation of this case, nor his case diary is brought on record.

PW2 Sunil Kumar, Superintendent of Police is also examined. It is his say that after receipt of the information he along with armed force reached village Bara at about 12.15 to 12.30 in the night on the day of incident. There he saw lot of people had been killed by slitting their throats. Some houses had also been set on fire. Some persons were lying injured and they were sent to hospital in police vehicle. On 27.2.1992, he received information of the arrest of Behari Manjhi of village Jhani Bigha, PS Bodhgaya. He went there and informed Behari Manjhi that whatever statement he wanted to give, he should make without fear or favour and thereafter he recorded the confessional statement of Behari Manjhi under TADA Act. That

statement was recorded by Suresh Chander Sharma, Inspector PS Chandauti. Before the court, he could not identify who was Behari Manjhi. In cross-examination, he stated that all the police personnel of P.S. Tekari including the station-in-charge were involved in arresting the accused persons and that number of VIPs were visiting the place and the police officers were busy. Therefore, investigation was entrusted to Police Inspector of P.S. Chandauti. He did not remember as to whether they took written permission to invoke TADA Act. He also stated that he cannot say that under the TADA Act investigation can be carried out only by an officer of the rank of DSP or above.

PW32 Virendra Kumar Singh, who was posted as station-in-charge of P.S. Bodhgaya, stated about arrest of Behari Manjhi, Ravindra Singh and Raghubir Kahar in connection with Bodhgaya Police Station Case No.28/92 under the Arms Act. In cross-examination, he admitted that he is accused in a murder case and that he has filed appeal before Supreme Court for quashing of cognizance taken against him in connection with death of one Vasuki Yadav, nephew of Wakil Yadav, who is one of the accused in the present case.

From the aforesaid evidence of police officers, it appears that in a carnage where brutal and heinous murders took place, the investigation was not proper and statements were not recorded immediately for one or the other reason. The prosecution has also failed at least to examine the informant Satendra Kumar Sharma. Keeping these facts in background, I would now refer to the contentions raised by the learned counsel for the appellants. The case of the prosecution against these convicted accused depends upon the evidence of PW5 Belmati Devi, PW6 Birendra Singh, PW7 Lavlesh Singh, PW8 Yogendra Singh, PW11 Brajesh Kumar, PW12 Gopal Singh, PW16 Ram Sagar Singh, PW18 Budhan Singh, PW19 Dhananjay Singh, PW20 Bunda Singh, PW21 Sumiran Sharma, PW22 Krishna Devi, PW23 Rajmani Devi and PW29 Lalita Devi. Hence, rest of the evidence is not required to be discussed.

Apart from these witnesses, to prove the injuries to the dead and injured witnesses, the prosecution has examined four doctors namely, PW1 Dr. Kapildeo Prasad, PW13 Dr. Arvind Kumar, PW14 Dr. Arjun Singh and PW15 Dr. Mukti Nath Singh. Learned counsel for the appellants-accused has not disputed the injuries caused to the deceased or to the witnesses, therefore, that aspect is not required to be dealt with in this appeal.

Mr. U.R. Lalit and Mr. Sushil Kumar, senior counsel appearing on behalf of accused mainly submitted that

1. the identification of the accused is not reliable one;
2. even if it is held that accused were present in the mob of 600-700 persons, there is no justifiable reasons for connecting the accused with the crime;
3. no witness has stated that accused were armed with any deadly weapons;
4. no witness has stated that any of the accused took part in murder of any of the deceased or of causing any injury to any witness or setting fire to the houses;
5. there is no recovery of any arms or any incriminating articles from any of the accused;
6. the statements of witnesses are recorded after long lapse

of time, mostly after more than 20-22 days;

7. all the witnesses are 'got up' witnesses.

8. none of the witnesses stated that accused were members of Maoists Community Centrean extremist group;

9. in any set of circumstances, presuming that accused are identified but mere presence in the mob would not justify imposition of death sentence.

The evidence of witnesses who identified the accused before the court can be divided as under

It is the say of PW5 Belmati Devi that before 8-years when they were sleeping, they heard bullets and guns booming. Some terrorists broke open their doors and entered into the house. They took her husband, whose both hands were burnt, along with them. The militants were holding torches and were shouting "long live red salute, and whoever comes in our way would be eliminated". After her attention was drawn to police statement, she stated that she could identify Raja Ram Mochi, Nand Lal Mochi, Naresh Paswan and Krishna Mochi, all residents of Bara Bhat Bigha. Thereafter, in the cross-examination, she admitted that militants came in police uniform and that they were unknown persons. She had not seen militants or naxalities earlier or subsequent to the incident. She denied the suggestion that she had not stated before the police that militants took her husband in their laps and they were shouting slogans. She also admitted that she had not stated before the police about identifying Raja Ram, Naresh Paswan, Krishna Mochi and Nanhe Lal Mochi.

In view of aforesaid admissions, no reliance can be placed upon her evidence to connect any accused with the crime.

PW6 Birender Singh after narrating the facts has stated that on the day of incident, the militants took them to a place near the canal under the bridge. The militants were cutting the throats by a fasuli. Mahinder Ravi Das, Yugal Ravi Das and Bhugal Ravi Das were amongst the militants. He was hit by fasuli on the neck, he fell down and the militants left him untouched thinking that he was dead. The names of the persons to whom he identified were given to the police. He again stated that Nanhe Yadav, Mahender Ravi Das, Yugal Ravi Das, Bhugal Ravi, Kirani Yadav alias Suryadev Yadav, Janeshwar Ji alias Bholaji, Vyas Ram, Akhileshwar Thakur, Girija Mochi, Naresh Chamar, Vyas Yadav, Suresh Yadav, Vinod Singh, Dharu Singh, Ramashish Mahto, Suraj Pandit, Krishna Mochi, Rajender Paswan, Ramrup Chamar were amongst the militants. He could identify only Krishna Mochi, A-8, who was present in the mob, and stated that since a long time has lapsed he cannot identify others. It is his say in the cross-examination that the persons whose names he has mentioned, were seen by him every day and that some of the militants used to come to work in their houses. It is his say that after he returned from hospital, his statement was recorded after 25 days of the occurrence. However, PW17 Investigating Officer Suresh Chander Sharma has specifically stated that witness did not name Krishna Mochi among the accused persons in his police statement. Hence, no reliance can be placed on evidence of this witness to connect any of the accused with the crime.

PW29 Lalita Devi stated that the incident is of about 8-9 years old. The militants surrounded their village and they were armed with guns and ammunition. The incident took place at 9:00 p.m. The militants entered into their house by breaking the door. Amongst the militants, she could identify Krishna, Yugal, Bugal and Nanhe Lal Mochi. Her statement was recorded after 5/6 days. She however,

stated that since her eye-sight has become weak, she cannot identify anybody.

Even though this witness had named Krishna Mochi (A-8) and Nanhe Lal Mochi (A-3) but as she could not identify any of the accused in the Court, her evidence is of no value.

Evidence Against Appellant no.1 Krishna Mochi (A-8)

For identification of this accused, there is evidence of PW8, PW16, PW19 and PW20.

PW8 Yogender Singh is another injured witness. It is his say that on 12.2.1992 between 9.00 and 9.15 p.m. extremists raided their house. He was sleeping along with his brothers Bunda Singh, Madan Singh and Mithilesh Singh and guests Nagender Singh, Satender Singh s/o Guriban Singh. All of a sudden, they heard the noise of bullets and bombs. The people of the village started running here and there. Vidya Bhushan Singh of their village came and hid himself in their house. The extremists armed with the weapons attacked his house. When he went out of his house, he saw that there was fire everywhere. The extremists broke open the doors of their house, entered the house and tied their hands. Thereafter, the extremists took them to the canal and there they saw that a number of residents of the village were already present there and the extremists were surrounding them. After reaching there, they saw Muneshwar Singh, Siaram Singh, Ashudev Singh and Suresh Singh of their village were being brought by the extremists. Their hands were also tied at the back. Then the extremists brought some villagers from the Mandir. Thereafter, they started tying their legs with the help of 'dhoti' and 'ghamchi'. Thereafter, the extremists started slitting their throats. His throat was also slit. He stated that he can identify the accused who were slitting the throats. Among those persons, there were Mahender Mochi, Yugal Mochi, Bugal Mochi, Kirani Yadav @ Surajdev Yadav and Nanhak Teli. Further, Raja Ram, Naresh Paswan, Naresh Chamar, Kirani Yadav, Maksudan Sharma, Akhilesh Thakur, Nanhe Lal Mochi were also present at the scene of offence. However, he could identify only Krishna Mochi (A-8) and Nanhe Lal Mochi (A-13) out of 13 accused present in the court, but could not identify other accused because of passage of time. He also stated that the accused identified by him were of Tola Bhat Bigha of village Bara and that they used to work in agricultural land as labourers. It is his say in the cross-examination that he stayed in Magadh Medical College Hospital for 24 days because of injuries on throat and leg. It was also suggested to him in cross-examination that he had named the other accused falsely because of the politics of village and that he had not identified any of the accused at the time of occurrence.

From the evidence of this witness, it appears that he had named number of persons but thereafter could identify only two persons. Hence, there was no reason for the witness to say that he could identify the other accused persons whom he has named. This would indicate that he falsely deposed to a large extent involving number of persons. Further, this witness has not stated Krishna Mochi's name in first part of his statement. Name of Nanhe Lal Mochi is given only as a person, who was present at the scene of occurrence.

PW16 Ram Sagar Singh stated that militants were armed with rifles, guns and bullets, they burnt the entire village and that he can identify Mahender Mochi, Krishna Mochi, Nanhe Lal Mochi, Yugal Mochi, Bugal Mochi who were amongst the militants. However, he could identify only Nanhe Lal Mochi and Krishna Mochi present in the court. It is his say in cross-examination that he saw militants from the top of the roof. He denied the suggestion that there was a long standing dispute between him and Nanhe Lal Mochi and Krishna

Mochi and, therefore, he has falsely implicated them.

Next witness is PW19 Dhananjay Kumar, who also stated that extremists started slitting their throats and he was attacked with fasuli, as a result of which his left ear and throat were slit. He became unconscious and gained consciousness at medical college hospital. After regaining consciousness he informed the police about accused persons, which included Nanhe Yadav, Naresh Chamar, Bir Kuer Paswan, Nanhe Lal Mochi, Ramashish Mahto, Dharu Singh @ Dharmender Singh, Krishna Mochi, Mahender Ravi Das, Yugal Mochi, Bugal Mochi, Girija Mahto, Kirani Yadav, Suraj Pandit, Ramroop Chamar, Suresh Yadav, Janeshwarji @ Bhola Ji, Vinod Singh, Akhilesh Thakur, Rajinder Paswan. Thereafter, he stated that he can identify the persons whose names he has stated. He wrongly identified Nanhe Lal Mochi and Bir Kuer Paswan. However, he identified Krishna Mochi correctly and thereafter he stated that it was difficult to identify accused after 8 years. In cross-examination, to the suggestion given to him that he did not give names of Krishna Mochi and Nanhe Lal Mochi to the police, he stated that he gave their names to the police and if the police did not record their names, he was not knowing about it. He further denied the suggestion that there was long pending dispute about a passage through his and Dharu Singh's village. He has also denied the suggestion that there was a dispute between him and Krishna Mochi and, therefore, he had named him.

Similarly, PW20 Bunda Singh has stated that among the extremists, there were Kirani Yadav, Mahender Mochi, Maksudan Sharma, Raja Ram Mochi, Akhilesh Thakur, Nanhak Teli, Naresh Paswan, Naresh Mochi, Bugal Mochi, Yugal Mochi, Nanhe Lal Mochi and Krishna Mochi, whom he had identified. It is his further say that Satendra Singh, the informant was member of his family. He could identify only Krishna Mochi in the Court and wrongly identified Nanhe Lal Mochi. He stated that because of long lapse of time there has been a change and, therefore, it was difficult for him to identify them. A suggestion was given to him in the cross-examination that there was a long standing dispute with regard to construction of road. He stated that he had not suffered any injury and that his statement was recorded after two days of the incident. He further stated that accused Nanhe Lal Mochi and Krishna Mochi belong to Bhat Bigha and other accused belong to various other villages. He denied the suggestion that he had not named the militants who entered in his house.

From the aforesaid evidence, it would be apparent that almost all witnesses have named number of persons but have failed to identify them. Only one or two accused are identified in the court. Their identification parade was not held by the police. However, at the most, it can be said that PW8 and PW16 have identified A-8 Krishna Mochi and A-13 Nanhe Lal Mochi, PW19 and PW20 have identified A-8 Krishna Mochi.

Evidence Against Appellant no.2 Dharmendra Singh @ Dharu Singh (A-9)

PW11 Brajesh Kumar after narrating the facts of the incident stated that he saw Mahender Ravi Das, Yugal Mochi, Bugal Mochi, Kirani @ Surya Dev Yadav, Janeshwar, Nanhak Teli @ Mudkatwa, Ram Janam Singh, Dharmender Singh @ Dharu Singh. He identified Dharmendra Singh @ Dharu Singh in the Court. He wrongly identified Dina Yadav as Nanhak Teli. He stated that since a lot of time has lapsed, he is unable to identify Nanhak Teli.

Even though this witness had identified A-9 in the dock but his statement cannot be relied on the ground that PW17 IO Suresh Chander Sharma has specifically stated that this witness did not name

A-9 Dharu Singh @ Dharmender Singh in his statement given to the police.

PW21 Ram Sumiran Sharma after narrating story stated that at the time of incident he could identify Nanhe Yadav, Yugal Mochi, Bugal Mochi, Rajender Paswan, Beer Kuer Paswan, Dharu Singh @ Dharmender Singh, Suraj Pandit, Ram Janam Singh, Nahak Teli, Kirani Yadav, Vyas Ram and Vyas Yadav and that he was not remembering names of other persons to whom he identified there. In the Court, he could identify only A-5 Beer Kuer Paswan, A-9 Dharu Singh @ Dharmender Singh and A-13 Nanhe Lal Mochi.

As stated above, no reliance can be placed on the evidence of PW11. The evidence of PW21 shows that he had named number of persons seen by him at the scene of offence but in the Court he could identify only three accused including A-9.

Evidence Against Appellant no.3 Nanhe Lal Mochi (A-13)

For identification of this accused, there is evidence of PW8, PW16, PW18, PW21 and PW22.

PW8 and PW16 have identified A-13. Their evidence is dealt with above.

PW18 Buddhan Singh stated that at the time of offence, he saw one militant took out fasuli and slit the neck of his son Sunil Singh, Ramjanam Singh and Shivjanam Singh. He saw about 15 persons involved in slitting the throats of the people assembled there by using fasuli. He became unconscious. It is his say that police recorded his statement and that amongst the militants there were Nanhe Lal Mochi, Yugal and Bugal, whom he identified. In the court, he identified Nanhe Lal Mochi by going close to him. In cross-examination, it was suggested to him that he had not given the name of Nanhe Lal Mochi to the police and that he had not identified anybody. He denied the suggestion that because of an old animosity with Nanhe Lal Mochi he gave his name in the case.

PW21 has also identified this witness and his evidence is dealt with above.

Next witness is PW22 Kishna Devi. After narrating the prosecution story, she stated that persons who had been killed and injured belonged to bhumihar community and that she had given the names of certain extremists but as long time had lapsed, she cannot give their names and was having difficulty in identifying them. However, she identified Nanhe Lal Mochi. She denied the suggestion that she had not given the name of Nanhe Lal Mochi to the police amongst the persons who were present at the scene of offence.

From the evidence of the aforesaid witnesses, it is apparent that despite naming number of persons, they could identify only one or two persons in the Court and gave the reason that due to lapse of long time, they were not able to identify the others.

Evidence Against Appellant no.4 Bir Kuer Paswan (A-5)

For identification of this accused, there is evidence of PW7 Lavlesh Singh and PW21 Ram Sumiran Sharma.

PW7 Lavlesh Singh also narrated the prosecution version and thereafter stated that among the people who were slitting throats were Mohinder Mochi, Nanhak Yadav, Nanhak Teli, Bir Kunwar Paswan, Rajinder Paswan, Bugal Mochi, Yugal Mochi, Vyas Ram, Akhileshwar Thakur, Gira Verma, Kirani @ Suraj Dev Yadav and lot

of other people whose names he was not knowing. However, in the Court, he could identify Bir Kunwar Paswan and stated that he cannot identify others. In the cross-examination, he stated that he had seen the accused only on the date of occurrence and that is why he had taken their names. He also used to see those people in market and used to hear their names. He further stated that Bir Kuer Paswan was not working in his village as labourer. He clarified that when militants entered his house, he became unconscious and regained consciousness at Medical College Hospital.

PW21 has also identified this accused and his evidence has been dealt with above. PW7 could identify only A-5 and PW21 could identify A-5, A-9 and A-13.

Likewise, both the witnesses named number of persons but could not identify all the named persons.

In such state of evidence, the question would be who could be convicted and what sentence could be awarded?

This Court in *Kamaksha Rai and others v. State of U.P.* [(1999) 8 SCC 701] dealt with the incident where large number of people exceeding 500 in number were alleged to have taken part in attacking backward class persons by upper class, and observed that considering the nature of the attack and the possibility or otherwise of the identification of these accused persons by the prosecution witnesses and bearing in mind the principles laid down by this Court in *Masalti v. State of Uttar Pradesh* [(1964) 8 SCR 133], which was followed in *Binay Kumar Singh v. State of Bihar* [(1997) 1 SCC 283], it is not safe to rely on the evidence of witnesses who speak generally and in an omnibus way without specific reference to the identity of the individuals and their specific overt acts in regard to the incident that took place in the Harijan basti. The Court also observed that as a rule of prudence it is necessary to fix a minimum number of witnesses needed to accept the prosecution case to base a conviction. The decision in *Masalti's* case (Supra) enunciating rule of caution is well established law uniformly followed all throughout. [Re: *Baddi Venkata Narasayya and others v. State of A.P.* [(1998) 2 SCC 329], *State of A.P. v. Thakkidiram Reddy and others* [(1998) 6 SCC 554] and *Hukam Singh and others v. State of Rajasthan* [(2000) 7 SCC 490].

The aforesaid rule of prudence is also required to be applied in the present case. As discussed above, A-9 Dharmendra Singh alias Dharu Singh is identified by only PW21. There is no other corroborative piece of evidence connecting the said accused with the crime. Hence, he is required to be given benefit of doubt.

For identification of rest of the accused i.e. A-5 Bir Kuer Paswan, A-8 Krishna Mochi and A-13 Nanhe Lal Mochi, there is evidence of two or more witnesses.

However, from the evidence discussed above, it can be stated as under

(1) It is apparent that the investigation in the present case is totally defective. The investigating officers have not taken any care and caution of recording the statement of witnesses immediately. No identification parade of accused was held. Investigating officer is not examined. As observed by this Court in *Jamuna Chaudhary and others v. State of Bihar*

[AIR 1974 SC 1822], it should not be forgotten that the duty of the Investigating Officers is not merely to bolster up a prosecution case with such evidence as may enable the Court to record a conviction but to bring out the real unvarnished truth. In the said case, the Court has also observed where neither the prosecution nor the defence come out with the whole and unvarnished truth to enable the Court to judge where the rights and wrongs of the set of incidents lay, the courts can only try to guess or conjecture to decipher the truth if possible. But this may be done within limits to determine whether any reasonable doubt emerges on any point under consideration from proved facts and circumstances of the case. Further, this Court in *Kishore Chand v. State of Himachal Pradesh* [AIR 1990 SC 2140] observed that indulging in free fabrication of the record is a deplorable conduct on the part of an investigating officer which undermines the public confidence reposed in the investigating agency. Therefore, greater care and circumspection are needed by the investigating agency in this regard. It is time that the investigating agencies evolve new and scientific investigating methods, taking aid of rapid scientific development in the field of investigation. It is also the duty of the State, i.e. Central or State Governments to organise periodical refresher courses for the investigating officers to keep them abreast of the latest scientific development in the art of investigation and the march of law so that the real offender would be brought to book and the innocent would not be exposed to prosecution.

(2) It is also settled law that when accused are charged with heinous brutal murders punishable to the highest penalty prescribed by the Penal Code, the judicial approach in dealing with such cases has to be cautious, circumspect and careful. In case of defective investigation, the Court can rely upon the evidence led by the prosecution and connect the accused with the crime if found reliable and trustworthy. In *Dilavar Hussain v. State of Gujarat* [(1991) 1 SCC 253], this Court dealt with a communal riot case which was considered by the court as tragic trauma of ghastly, inhuman and beastly behaviour of one community against another where burning, looting and killing became the order of the day, and observed

"But sentiments or emotions, howsoever strong, are neither relevant nor have any place in a court of law. Acquittal or conviction depends on proof or otherwise of the criminological chain which invariably comprises of why, where, when, how and who.

Misgiving, also, prevailed about appreciation of evidence. Without adverting to submissions suffice it to mention that credibility of witnesses has to be measured with same yardstick, whether, it is ordinary crime or a crime emanating due to communal frenzy. Law does not make any distinction either in leading of evidence or in its assessment. Rule is one and only one namely, whether depositions are honest and true."

(3) In the present case, it can be said without any doubt that almost all witnesses have exaggerated to a large extent by naming number of persons as accused but they could identify only one or two accused. This would clearly reveal that for one or other reason, witnesses were naming number of persons as accused who were not known to them or whom they had not seen at the time of incident. In that set of circumstances, their evidence to

a large extent becomes doubtful and/or tutored.

(4) Nowhere the witnesses assign any specific role to the accused, except their presence in the mob at the time of offence.

(5) The witnesses nowhere state that identified accused were having any weapon of offence.

(6) Investigating officers have not recovered any weapon of offence or any incriminating article from the possession of any of the accused.

In view of the aforesaid short-comings in the investigation and the evidence which only proves the presence of the accused at the scene of offence, this would not be a fit case for imposing the death penalty.

In the result, appeal filed by appellant no.2 Dharmendra Singh alias Dharu Singh (A-9) is allowed, he is acquitted of the charges for which he was facing trial and is ordered to be released forthwith, if not required in any other case. Appeal filed by the remaining accused i.e. by appellant no.1 Krishna Mochi (A-8), appellant no.3 Nanhe Lal Mochi (A-13) and appellant no.4 Bir Kuer Paswan (A-5) is partly allowed, their conviction is upheld, however, imposition of death penalty is altered to life imprisonment.

Appeal stands disposed-of accordingly. For the reasons stated above, Death Reference filed by the State of Bihar is dismissed.

J.
(M.B. SHAH)

April 15, 2002.