

**IN THE HIGH COURT OF JUDICATURE AT PATNA**

**Criminal Appeal (DB) No.202 of 1990**

- =====
1. Md. Muslim son of Kalimuddin,
  2. Azam son of Naushad,
  3. Asarul son of Jhagru,
  4. Sattar son of Tasnif,
  5. Udua son of Mohiuddin,
  6. Razaque son of Tasnif,
  7. Md. Mashiyat son of Mohiuddin,
  8. Allu alias Alauddin son of Ghafur,
  9. Hoda son of Dabir,
  10. Sallu @ Salahuddin son of Ghafur,
  11. Md. Mujiya son of Kalimuddin,
  12. Md. Mister son of Gharibul,
  13. Aftab Alam son of Kalimuddin,
  14. Zainul son of Dabir,
  15. Shahabuddin son of Dabir,
  16. Md. Khaja son of Naushad,
  17. Barik son of Kalimuddin,
  18. Md. Sikandar son of Tasnif, All residents of village, Mahila, P.S. Azam Nagar  
in the district of Katihar

.... .... Appellant/s

Versus

The State of Bihar

.... .... Respondent/s

with

**Criminal Appeal (DB) No. 269 of 1990**

- =====
1. Kaimuddin son of Dabir Uddin, resident of village-Mahila, P.S. Azam Nagar in  
the district of Katihar

.... .... Appellant/s

Versus

The State of Bihar

.... .... Respondent/s

**Appearance :**

**(In CR. APP (DB) Nos. 202+269 of 1990)**

For the Appellant/s : Mr. Ashutosh Kumar, Adv  
Mr. Shoeb Alam, Adv  
Mr. Sajid Salim Khan, Adv  
Ms. Fauzia Shakil, Adv.

For the Respondent/s : Mr. Ajay Mishra &  
Mr. D.K. Sinha, APPs.

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**CORAM: HONOURABLE MR. JUSTICE SHYAM KISHORE SHARMA**

**and**

**HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI**

CAV JUDGMENT


**(Per: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI)**

**Date: 17-07-2013**

Since these two appeals arise out from common judgment dated 24.05.1990 passed by Sessions Judge, Katihar in connection with Sessions Trial No. 124/1989, hence these on being heard together are being disposed of by a common judgment with the consent of the parties.

2. Appellant Kaimuddin has been found guilty for an offence punishable under Sections 302 of the IPC and directed to undergo R.I. for life for offence under Section 148 of the IPC he has been directed to undergo R.I. for one year, under Section 307 IPC directed to undergo R.I. for 10 years while no separate sentence has been inflicted under Sections 302/149 IPC. Md. Muslim, Habib Azam, Asarul, Sattar, Udua, Razaque, Md. Mashiyat, Allu alias Alauddin, Hoda, Sallu @ Salahuddin, Md. Mujiya, Md. Mister, Aftab Alam, Zainul, Shahabuddin, Gharibul, Md. Khaja, Barik, Md. Sikandar have been found guilty for an offence punishable under Sections 148 IPC and directed to undergo R.I. for one year, under Section 302/149 IPC and directed to undergo R.I. for life and under Section 307 of the IPC whereunder directed to undergo R.I. for ten years with a further direction to run the sentences concurrently, have challenged the finding by filing above referred two appeals.

3. The prosecution case, in brief, as per Fardbeyan (Ext-4) of PW-20, Jagdish Mahto recorded on 20.11.1988 at about 1.30 P.M. at State Dispensary, Azamnagar before O/C, Azamnagar



disclosing therein that he along with his brother Meghu Mahto had gone to see his field as was being grazed by the animals. After seeing absence of she-buffalo they came to sweet potato field and sat there which they had taken on 'Adhiya' from one Aslam. Some lands were settled in their favour by the Government. On 19.11.1988, he had harvested the paddy crop therefrom and in the aforesaid background, Jainul Sarkar, Muslim Sarpanch, Barik, Aftab of Village-Mahila along with 400-500 persons who were sitting under hidden condition and were armed with deadly weapons i.e., gun, country-made pistol, farsa, garasa, sword, suli, lathi, sik-har. Some of them were also armed with stone and some of them were indulged in cutting remaining paddy crops from the aforesaid settled land, encircled him along with his brother and indulged in pelting stones. He had claimed identification of Masimad, Azam, Khaja, Sk. Alladdin, Sk. Karim, Hoda, Manoriya, Asarul, Ejaz, Sikandar, Allu, Sallu, Israel, Munshi, Sk. Muslim, Sk. Barik, Sk. Jainul, Sk. Mustafa, Sk. Aftab out of whom Manoriya was armed with three knot, Abu Nasar was armed with gun, Ghulam was armed with Suli while rest were armed with Lathi, Bhala, Garasa, Sword, Farsa and stones.

4. He along with his brother ran there-from raising alarm. He fell down after sustaining one stone. Ghulam gave suli blow over his 'Panjar'. Others also began to assault him as well as his brother with lathi and farsa over which his brother Meghu Mahto tried


to escape but was shot at with fire-arm by Ibrahim. He fell down after sustaining injury. On hue and cry, Dudhnath Mahto, Phaiju Mahto, Sripati Mahto, Dasu Mahto, Sarjug Mahto came in his rescue who were also assaulted by accused persons. During course thereof, Sarjug Mahto was also shot at and on account of which he died. Meghu Mahto also died. Dudhnath, Phaiju, Sripati, Dasu also disclosed presence of Alauddin, Abbas, Shafaque, Bashir, Phuli, Hakimul, Mahtab, Khalil, Sattar, Mister, Matru, Motia, Wasim, Nizam, Ishaque, Shakur, Habib, Dhelu, Dablu, Nijam, Kalimuddin, Mukhia, Mahmuddin, Asauddin, Sahab, Jamal, Mustapha, Kamik, Imamuddin, Faizuddin, Pachhru, Nazim, Jabir, Arif, Majibul, Jamil, Ayyub, Farooque, Ashraful, Aslam, Mokhtar, Sipahi, Mulha Master as members of the mob. After death of Sarju Mahto and Meghu Mahto, they tried to take away dead body of Sarju and Meghu but seeing presence of ladies and gents in the field near Bandh, they made Sripati captive to save themselves who was later on released. After departure of the accused persons all the injured including the informant were taken to State Dispensary, Azamnagar where they were undergoing treatment.

5. On the basis of the aforesaid Fardbeyan Azamnagar P.S. Case No. 148/1988 was registered followed with investigation and after concluding the same, charge-sheet was submitted against the appellants including others who have faced trial

and ultimately met with the consequence, subject matter of these two appeals.

6. The defence case as is evident from mode of cross-examination as well as from the statement of the appellants recorded under Section 313 of the Cr.P.C. is of complete denial of occurrence as well as of false implication. Habib as well as Alauddin during course of statement have stated that the land belonged to them and on the alleged date and time of occurrence when they had gone to see their field, they found the prosecution party indulged in harvesting the paddy crop which was protested by them and during course thereof they were assaulted by the prosecution party. Some persons intervened into the matter who might have assaulted the prosecution party in order to save the life and property of Habib and Alauddin. To support the same, DWs coupled with series of documents have been produced before the court.

7. While challenging the judgment impugned, the first and foremost ground taken on behalf of the appellants is with regard to manner of recording of statement under Section 313 Cr.P.C by the learned trial court and referring the same, it has been submitted that the learned trial court had not identified the incriminating materials against respective appellants individually as well as independently rather formed the questionnaire in consolidated form which the learned trial court confronted the same to the individual



appellants. By such process the appellants have felt aggrieved and they have found their interest at stake because of the fact that the judgment impugned contains those incriminating materials which independent appellants have not been confronted during course of statement recorded under Section 313 Cr.P.C. On account thereof, those incriminating materials which have not been placed before respective appellants is found to be forbidden for future use in terms of Subsection- 1 of Section 313 of the Cr.P.C. To put stress over the point learned counsel for the appellants has referred J.T. 2002 (6) SC 28, (2009) 7 SCR 653, AIR 2009 SC 2955, (2011) SCC 1, (1988) 4 SCC 116, AIR 2010 SC 3570, AIR 1968 SC 609, AIR 2010 SC 2839.

8. Then it has been submitted that genesis of occurrence as suggested by the prosecution on account of harvesting over the land under dispute on the basis of the settlement made by the Government just two or three months prior to the date of occurrence had not given absolute right to the prosecution party to go over land in the background of the fact that there is admission on the part of the prosecution that before settlement, the land was under peaceful possession of Habib and Alauddin. There is no disclosure by any of the PWs that delivery of possession was ever effected at the hands of Government machinery. Therefore, having the settlement, out and out a paper work, will not wash away status of Habib and Alauddin having in possession over land and on account thereof having the

prosecution party coming over the land certainly amounts to illegal activities giving a right of private defence to the appellants to safeguard their interest for preserving the property.

9. In the aforesaid background, it has been submitted that apart from admission on the part of Habib and Alauddin during course of statement under Section 313 of the Cr.P.C. that they have sustained injury at the hands of prosecution party, the defence had also exhibited Ext-B series to show that injuries was over the person of Alauddin and Habib and in the aforesaid background the prosecution was duty bound to explain the same. Having failed on that score, perhaps, gives a clear cut impression that prosecution has not come with the clean hands and by such omission it has tried to change the manner as well as genesis of occurrence.


10. It has further been submitted that witnesses whosoever have been examined represent a particular group, carry animosity since long against the appellants and on account thereof, at least their evidences are subject to close scrutiny. Having minute scrutiny of their evidences, it clearly speak not only material contradiction, embellishment rather it demolish their status as an eyewitness to occurrence.

11. It has further been submitted that when the evidence in its entirety is gone through, it gives a clear cut impression that there was no occasion for the appellants to cordon and assault the

prosecution party because of the fact that as per its own version, the prosecution was not at all indulged in cutting of paddy crop causing annoyance to the appellants which probalizes the defence version that after forming an unlawful assembly, the prosecution party raided the field of the accused and when intervened, the prosecution party assaulted Habib and Alauddin for which a substantial case had already been instituted.

12. It has further been submitted that the falsity of the prosecution version is itself found on a cursory perusal of the deposition of the respective witnesses towards identification of the appellants when there happens to be mob consisting of 400-500 persons. The Fardbeyan consists of names of 75 persons out of whom only appellants along with acquitted accused have been put on trial and that shows as to how the prosecution party behaved since inception of the instant case which certainly has been filed in retaliation to the case instituted by Habib for the injury caused at the hands of prosecution party on the alleged date and time of occurrence.

13. Then it has been submitted that when there happens to be a case involving a large number of persons arrayed as accused, the involvement of innocent cannot be ruled out and on account thereof it is expected that individual case of the appellants should have been properly scrutinized to see really, he had shared a common object with main accused being member of an unlawful



assembly. In the aforesaid background it has been submitted that no allegation lies against appellant, Azam, Asarul, Aftab Alam, Shahabuddin, Barik, Md. Sikandar, Md. Khaja. Moreover, elaborating this plea argued that the court is bound to see and for that purpose should have scrutinized the evidence to arrive to a conclusion that the mob really was carrying a common object to commit murder because of the fact that the assailants, namely, Ibrahim as well as Kaimuddin have kept concealed the weapons of assault (firearm) since before and it was taken out by them at the relevant juncture when they fired a shot at Meghu as well as Sarju Mahto. Further strengthen the submission by referring a decision reported in *1974 AIR SC 902*.

14. It has further been submitted that the prosecution was apprehending right from the inception of the case that it happens to be a house of cards and on account thereof, innovated so many stories including that of oral dying declaration as is evident from the evidence of PW-7, PW-8, PW-11 which, after having analytical approach found fictitious one. Therefore, the version of prosecution is found to be shaky, inconsistent, and full of embroidery and as such is fit to be rejected. Consequent thereupon, these appeals are to be allowed.

15. To buttress such contention the learned counsel for the appellants also relied upon (2010) 8 SCC 430, AIR 1981 SC 765.

16. Furthermore, it has been pleaded that admission of Habib and Allauddin during course of their statement under Section 313 Cr.P.C. will not be used against other appellant and for that relied upon (1979) 1 SCC 535.

17. Per contra, it has been submitted on behalf learned APP that the evidence should not be read in a piecemeal manner picking certain lines from hither and thither and use it by twisting as per own wisdom.

18. It is apparent from the evidence including the cross-examination that the land which initially was part and parcel of a river came out from its main stream was illegally occupied by the accused persons using their muscle power. The prosecution party who are landless persons belonging to lower strata of the society applied for settlement of land before the competent authority which was accordingly, granted and so the prosecution party on the basis of the settlement became rightful owner, found entitled to exercise their legal rights wherein they have sown paddy crop. It is apparent from the evidence of the PWs that a day prior to the occurrence they have harvested paddy crop from certain area of that land and so there was imminent cause to the accused persons to become annoyed therewith and on account thereof, to eliminate the prosecution party so that they could not be able to continue with their physical possession formed an unlawful assembly with an object to commit murder which was


ultimately achieved. Therefore, each and every member of unlawful assembly as is evident from the evidence was sharing a common object to commit murder and accordingly, they have rightly been convicted.

19. It has further been submitted that there happens to be no material contradiction. A contradiction, as is evident on the record, is on account of natural conduct of the witnesses who were rustic, illiterate and was examined after so many years of the occurrence and therefore was subject to perception, mindset, strength of memory including other concerned circumstances. Parrot-like statement has been deprecated and so the witnesses are trustworthy, creditworthy and their testimonies are full of reliability.

20. It has also been submitted that presence of the witnesses was fairly possible at the time of commission of the occurrence as their presence in the surrounding was natural. Even considering that they represent a particular group will not make their testimony inadmissible in the eye of law rather happens to be subject to close scrutiny even then, as it appears, they stood firm and supported the case of the prosecution.

21. Consequently thereupon, the appeal is fit to be dismissed.

22. In order to substantiate its case the prosecution had examined 24 PWs out of whom PW-1, Suraj Mahto, PW-2, Ram



Surat Mahto, PW-3, Dasu Mahto, PW-4, Chhedi Mahto, PW-5, Faizu Mahto, PW-6, Sripati Mahto, PW-7, Munilal Mahto, PW-8, Chinta Devi, PW-9, Ram Nath Mahto, PW-10, Dudh Nath Mahto, PW-11, Maharania Devi, PW-12, Tilaki Devi, PW-13, Samudri Devi, PW-14, Tusia Devi, PW-15, Bhubaneshwar Mahto, PW-16, Suresh Mahto, PW-17, Uttam Mahto, PW-18, Radhey Mahto, PW-19, Arjun Mahto, PW-20, Jagdish Mahto, PW-21, Dr. Birendra Pd. Gupta, PW-22, Dr. Narayan Mishra, PW-23, Arvind Kumar Jha, PW-24, Surendra Pd. Singh. Side by side the prosecution had also exhibited Ext-1 series, signature of witnesses over respective documents, Ext-2 series, purchase granted by State to respective prosecution party, Ext-3 series, Postmortem report, Ext-6 series, Injury report, Ext-7, Formal First Information Report, Ext-8 series, injury report, Ext-9 series, inquest report, Ext-10 series, seizure list.

23. Defence had also examined 6 DWs out of whom DW-1, Sk. Matiuddin, DW-2, Satyendra Kumar Sinha, DW-3, Md. Amiruddin, DW-4, Badruddin, DW-5, Jagernath Singh, DW-6, Md. Khatib Khan. The Defence had also exhibited these documents, Ext-A, tress map, Ext-B Series, injury report, Ext-C, complaint petition, Ext-D series, First Information Report, Ext-E series, ....., Ext-F series old Khatian, Ext-G series, New Khatian, Ext-H series, petition filed by PW-2, Ext-I series, deposition of PWs, 5,7,12,13,16 and 17 in Sessions Trial No. 55/64.

24. PW-21, Dr. B.P. Gupta had conducted post mortem over both the deceased namely, Sarju Mahto as well as Meghu Mahto and found following ante mortem injuries:-

(a) Sarju Mahto:- 1. One circular charred wound  $\frac{1}{2}$  c.m. in diameter x skin deep on upper lip.

2. Circular charred wound  $\frac{1}{2}$  c.m. in diameter x skin deep on top of head.

On dissection of both injuries the skin, superficial fascia and deep fascia found charred but no pellet or foreign body was found in the wound or below it.

3. Whole back was found with multiple bruise. On dissection skin was found lacerated and superficial fascia, blood and clot was found below whole of back beneath bruises.

4. On further dissection the chest cavity was found full of blood and clot with fracture of left 3<sup>rd</sup> and 4<sup>th</sup> ribs along with laceration of pleural and left side of lung. The left whole chest was found laceration of superficial fascia, deep fascia and blood and clot over ribs. Right lung found pale.

5. On further dissection the abdominal cavity was found full of blood and clot. The spleen found ruptured and lacerated.

6. On dissection of skull the whole skull (below skin) was found blood and clot. On further dissection the left parietal bone found fractured along laceration of meninges and brain matter with presence of blood and clot over it.

All these injuries were ante-mortem in nature. The death was caused due to shock and haemorrhage as a result of above injuries. Time elapsed since death within 36 hours. He has proved the postmortem report marked Ext.5. (b) Meghu Mahto:-

1. One charred circular wound  $\frac{1}{2}$  cm. in diameter on right side of upper abdomen. On dissection the wound was found skin deep and charring of skin, superficial fascia and deep fascia. But no pellet or foreign body was found in the wound.

2. One bruise 3 cm.X 1 cm. on the right side neck.

3. One bruise 8 cm.x 1 cm. on right side of upper chest.

4. One bruise  $\frac{1}{2}$  cm.X  $\frac{1}{2}$  cm. on right side forehead. On dissection of these bruises the

skin, superficial fascia found lacerated and presence of blood and clot beneath it.

5. One incised wound 5 cm. X ½ cm. X skin deep on the temporal prominence.
6. On further dissection the skin of skull was found lacerated specially on both parietal bones. On further dissection superficial fascia deep fascia was found lacerated with blood and clot over parietal bones and fracture of both parietal bone was found along with laceration of meninges and brain matter.
7. On dissection of abdominal cavity found full of blood and clot along with hematoma of whole of base of abdominal wall, that is posterior wall, the bilateral kidney were found to be buried in hematoma clot. The kidneys found pale. All these injuries will be ante mortem in nature. The death was caused due to shock and haemorrhage as a result of above injuries. Time elapsed since death within 36 hours.

25. PW-22 had examined all the injured and found

following injuries on their persons which are as follows:-

(a) **Dudhnath Mahto:-**

1. One incised wound on the back of neck 4"x1"x1 ½" (deep) with bending of neck.
2. One incised wound on the back 1"x1/4"x1/4" deep.
3. One incised wound on the scalp back side 1"x1/4".
4. One incised wound on the right wrist joint 1 ¼"x1/4"x muscle deep.

(b) **Faizu Mahto:-**

1. One incised wound on the right forearm measuring 2 ½"x ½" x muscle deep.
2. Incised wound on the middle of scalp ½"x1/4"x bone deep.

(c) **Jagdish Mahto:-**

1. Incised wound on the right side scalp 1"x1/4"x bone deep.
2. Lacerated wound on the scalp 2 ½"x ½" x bone deep.
3. Punctured wound on the right side of the back ¼" diameter x ½" deep.
4. One bruise in the right thigh ½"x ½".

5. Bruise on the left wrist joint 1 ½"x1 ½".

6. Bruise on the left wrist joint 1"x 1 ½".

7. Bruise on the left side chest 3" x ½".

(D) **Sripati Matho**:- 1. Once incised wound 1 ½"x bone deep over root of right finger.

2. Incised wound 1"x1/4" over right side of injury no.1.

3. Incised wound ¾"x1/6"x muscle deep over right middle finger.

4. One lacerated wound ¾" x ¼" over right side of scalp.

5. One abrasion 1" diameter over right chick.

6. One abrasion over right chick ½"x ¼".

7. One incised wound with cut of radius bone 1 ½"x1/2"x over left forearm.

(E). **Dasu Matho**:- 1. One lacerated wound on the forehead 1 ½"x ½" x bone deep.

2. One bruise over left scapular reason 2 ½" x1/2".


3. Bruise over left thigh outer aspect 3"x1/2".

4. One bruise over left knee joint outer aspect 2"x1/2".

26. Now coming to the ocular evidence PWs, 1, 2 and 10 though have supported the factum of occurrence whereunder deceased Sarju Mahto and Meghu Mahto were done to death while Jagdish, Dasu, Sripati and Faizu were injured but failed to identify any of the appellants on account thereof were declared hostile. During cross-examination nothing could be obtained.


27. PW-3, Dasu Mahto is one of the injured. He had stated that on the alleged date and time of occurrence he was over Bandh lying at Mohall, Mauza. Giddhaur Mauza was by its side. Jagdish, Meghu had gone to watch their paddy crop standing over the land which they had got from Bihar Sarkar. He, after hearing uproar, rushed followed by Faizu, Sripati, Dudh Nath and Sarju. He reached to the field where Jagdish and Meghu were present. So many persons

of Mahila village were also present. Sallu had given one Lathi blow over his head while Allu had inflicted Garasa blow over his leg but not caused injury. Kaimuddin was armed with three-not. Muslim Sarpanch was armed with Bhala, Jainul Sarkar was armed with gun. Hoda was armed with Suli. He failed to identify others as he had fallen down. These persons were also assaulting other. Jagdish, Faizu, Dudhnath and Sripati also sustained injuries while Sarju, Meghu were murdered. He identified the accused. During cross-examination at para-4, he had stated that the lands which were settled with Jagdish and Meghu by the State of Bihar was previously a river bed. After change of stream, the land came out. He along with Jagdish, Meghu, Dharmu, Lalu had applied for settlement of land which was made in their favour. He had shown those documents before the police. In para-5 had stated that a Amin had come to prepare trace map regarding the land which was allotted to them. He had shown map to the police. Then had submitted the dispute arose on account of harvesting of paddy crop. Paddy covering an area of 6-7 Bighas was harvested which was taken away by the members of the unlawful assembly after the occurrence. He had admitted presence of Prithvi Singh, Tiwari Singh, Kirauri Singh, Tara Singh, Ramkaran Singh and Parma Tiwari in the same vicinity. He had denied that Prithvi Singh had instituted loot case against Dharma, Meghu and others three or four days prior to the occurrence. In para-6, he had detailed




occurrence stating that while he was at his Darwaza, he heard two firing sound. Out of curiosity, he rushed and then had seen that his family members are being assaulted. When he reached near to the place of occurrence, he found Jagdish lying on the earth. As soon as he reached there, he was assaulted by Lathi. At that moment itself, he had identified the accused as a member of mob. He fell down and became unconscious. He regained his sense at the place of occurrence itself. In para-7, he had further stated that he had not named 40 persons as accused. In para-8, he had denied the suggestion regarding institution of case relating to cutting of paddy as well as Maar-peet at the end of Habibur Rahman.

28. PW-4 is Chhedi Mahto. He had deposed that on the alleged date and time of occurrence he was weeding at sweet potato field. He had seen so many persons belonging to Mahila village engaged in harvesting paddy from the field allotted by the State of Bihar in favour of Jagdish, Dasu and others. He had identified Kaimuddin and Samuddin out of whom Kaimuddin was armed with three-not while Samuddin was armed with Garasa. They were engaged in Maar-peet. Sarju was shot at by Kaimuddin. Dudh Nath, Sripati, Dasu, Meghu, Jagdish and Faizu became injured out of whom Meghu succumbed to his injuries. He had also identified Garibul armed with Garasa and Jamir Sheikh with Suli who had assaulted. They also claimed identification. During cross-examination, he



showed his ignorance regarding filing of case by Habibur Rahman. In para-3 of his cross-examination, he had disclosed that about 15-20 days ago Jagdish and others have received purcha in favour of the land. He denied that the land was Raiyati which in due course of time became river and after shifting of stream of river it has become land of the State of Bihar. In para-4 of the cross-examination, he had disclosed that the paddy crop was sown in the month of Baisakh. The land whereunder he was weeding lies south to the P.O. land. In para-5 of his cross-examination, virtually, he showed his interestedness towards the defence by accepting their suggestion as well as disowning to have seen the assault over Meghu. In para-6, he had stated that Samiudding was armed with Lathi. So many persons were assembled there, as such, he is unable to say as to who were members of mob and who were spectators. Kaimuddin had also shot at Sarju who were armed with three-not. He had not seen anybody else than Kaimuddin armed with three-not. People had taken away the injured to hospital. He had not gone to hospital.

29. PW-5, Faizu Mahto is another injured witness. During his examination-in-chief, he had stated that on the alleged date and time of occurrence while he was at his house which was over embankment, he heard sound of uproar coming towards southern side over which he rushed along with Sripati, Sarju, Meghu, Jagdish. Dasu was proceeding a few steps ahead. When they reached, Aslam



inflicted Farsa blow over his right hand. Saiyab had inflicted Farsa blow over his head. Rajjak, Sikandar and Sattar assaulted him by Lathi over his head. On account of which he fell down. He was taken to hospital subsequently, where he came to know regarding murder of Sarju and Meghu as well as assault over Jagdish, Sripati and others. During cross-examination in para-2 had disclosed that he had heard two firing sounds. P.O. was a mile away from his house. Then thereafter, he along with others rushed. While he was away from that place, he was cordoned and was assaulted. He fell down and became unconscious. He regained sense over bed and then found that he along with Sripati, Dudh Nath, Dasu and Jagdish were being carried to hospital. First of all, they had gone to police and then were referred to the hospital. He had also denied during his cross-examination at para-3 that Habib was ever injured. He had also denied to have seen the paddy field of Nizam.

30. PW-6, Sripati Matho is another injured. He had stated that on the alleged date and time of occurrence while he was at his house which was on the Bandh, he heard uproar coming from the land which they had taken by way Purcha. So many persons rushed. He was behind Dasu. Faizu, Dudh Nath also accompanied them. Before arrival at the plot the member of the mob began to assault. He was assaulted by Garibul with Farsa causing injury over his left hand. Mister had given sword blow causing injury in his right hand.

Samudding, Udawa, Habib, Matru, Jamshed and Mukhiya assaulted him with Lathi. He fell down. One of them had directed to carry him to their village where he would be killed and on his direction 8 to 10 persons lifted and proceeded to Mahila village. However, during midst way, on the instruction of one Maulvi Saheb, all of them threw him and left. Till then his wife arrived there, after hiring a *Tumtum*, took him to Azamnagar hospital where he was treated. During cross-examination, he had admitted that he had not taken settlement nor has he got any concerned with the land. He further disclosed that he happened to be a labourer. He further disclosed that after hearing hue and cry about 15-20 villagers began to see what was going on and during said course they had seen a huge mob and further they found that even, it may cost their lives. However, they all proceeded. They have not gone inside rather while they were one Rassi away from the P.O. land a member of mob began to assault him. His other associates were standing 15-16 Katthas away therefrom at that very time. He had identified only those who have come near him and indulged in his assault. Blood had oozed out on account of which his shirt became blood stained. The accused persons left him after covering 1 and ½ miles. His wife had taken him to Azamnagar Hospital where police had come to record his statement but on that day he had not given his statement rather after some time he had made statement before the police. Then he denied that Habibur Rahman had file any criminal

case against his father and others with regard to the said occurrence.

31. PW-7, Munnilal Mahto is not an eyewitness to occurrence. He is father of deceased Sarju Mahto. He had stated that on the alleged date and time of occurrence while he was going towards Salmari Village, he was informed in the midst of way that his son has been murdered over the land which they had taken on settlement. He rushed to see his son. On arrival at the place of occurrence, he found his son Sarju lying in the paddy field and was wailing and asking for water. On query, Sarju narrated that Kaimuddin has shot at him with 3-not. At that very time, Jainul Sarkar, Sallu, Mallu, Mister, Maqbool and others were present. He lifted him to Azamnagar Hospital and during midst of way, he died. In para-2, he had admitted that he was prosecuted for dacoity committed in the house of Samiruddin, grand father of Kaimuddin wherein Kaimuddin, Alimudding and Hafizuddin had deposed. In para-3, he had stated that he received information when he was at village, Damdama and came to the P.O. where he found 3/4<sup>th</sup> women and children. None other than Sarju was present. He has further stated that he had not found 'Kalai' crop near the place of occurrence. He can not say the area of land which they had taken on settlement. He had taken settlement about a month ago. The P.O. was inspected by the police at the instance of Jagdish. In para-6, there is contradiction on others including over dying declaration. He further stated that he is not


aware with the fact where Habib or Prithvi Singh had lodged a case for cutting of paddy crop. He further admitted that Sarju was apprehended by the police in dacoity case.

32. PW-8, Chinta Devi happens to be the wife of Sarju Mahto. She had stated that on the alleged date and time of occurrence, she along with her husband were planting sweet potato. At that very time, Meghu had raised alarm over which her husband had gone to see him. She also followed him. The persons belonging to Mahila village surrounded her husband. Samuddin had provided 3-not to Kaimuddin from which Kaimuddin had shot at her husband on account of which her husband fell down. Thereafter, Mister had assaulted him with Suli. Hoda had assaulted him with Farsa. Her husband asked for water over which Allu and Sallu urinated in his mouth as well as also assaulted with lathi. Jainil had also assaulted with Suli. Thereafter, she rushed to see her villager and raised alarm. The accused person dragged her husband towards their field. During cross-examination, she had stated that Meghu had raised alarm from eastern side when they both stood up, they found a large number of persons. He husband had gone to the place where Meghu was being assaulted. The mob comprised of 400 to 500 persons who were armed with lathi, Bhala and other weapons. Some were also empty hand. She had seen the occurrence. She had begged to spare her husband. She had seen the accused persons assaulting her husband even after falling, her husband was being

assaulted. In para-3, there is contradiction. In para-4, she had stated that she had not named Sarful, Hamju, Mujammil, Tullu, Shakil, Faltu, Nasir, Azimuddin, Ishaq, Chhotia before the police.

33. PW-9, Ram Nath Mahto is not an eyewitness rather he happens to be the evidence of search and seizure. In his presence, I.O. had seized blood stained Lathi, soil with blood stain, Dhaan ki baali having blood stain, leaves of 'Kalai' crop with blood stain and prepared the seizure list over which he had put his signature. During cross-examination, he had disclosed that the field where Kalai crop was, belonged to Aslam and the field of Dhaan ki baali belonged to the Bihar Sarkar.

34. PW-11, Maharania Devi is the wife of Meghu Mahto. She also is not an eyewitness to occurrence. She had deposed that her husband and Bhainsur, Jagdish and Devar, Dasu Mahto had gone to see the paddy crop which they have planted over the land taken on settlement. After hearing alarm, she had gone. None of the assailants were present. Her husband was asking for water. On query, her husband disclosed that Jainul Sarkar had assaulted him with Suli. So many injuries were over the person of her husband. Her husband had fallen in the field of Aslam. Her Bhainsur-Jagdish and Devar-Dasu as well as Sarju, Dudh Nath were injured. Accused persons had taken away Sripati. Her husband died. During cross-examination, she had stated in para-3 that on hearing alarm she rushed. After disclosing




name of one of the assailants, her husband died. In para-4, she had stated that her husband was lying in the 'Kalai' field of Aslam which was adjacent to the paddy field. The field in which her husband was lying was not the land taken on purcha rather the same was by the side of aforesaid land. He is not remembering with regard to presence of others at the time disclosure of name of assailant by her husband as she was not in a fit condition. She had seen the injuries over the person of her husband. Blood was oozing out. She cannot say whether Jagdish was conscious or unconscious. For the first time, she stated before the police.

35. PW-12 Tilaki Devi is the wife of Faizu Mahto, one of the victims who had stated that after hearing hue and cry, she rushed to the place of occurrence where residents of Mahila village have had assaulted her husband. Her husband had disclosed that Asarul had assaulted with Farsa over head while Saiyab had assaulted him with Farsa on head. Thereafter, he was taken to hospital. During cross-examination, she had stated that when she reached at the place of occurrence, she had not found members of mob. Only female folk had gone there because of the fact that no male members were present. She had seen the other injured also. Her husband had fallen in the paddy field where other injured were also lying.

36. PW-13 Samudri Devi is the wife of Sripati Mahto who was lifted by the members of the unlawful assembly. She had stated

that while she was at her house, she heard sound of alarm over which she had gone to place of occurrence. She had not found any of the assailants. She had found 4-5 persons in injured condition. Her husband was not there. On query the injured had disclosed that the resident of Mahila village took away her husband towards Damdama. She rushed and after covering some distance she found her husband was lying by the side of road in injured condition. On query, her husband disclosed that Gharibul had assaulted him with Farsa, Mister with swort, Samuddin with Lathi. He had also disclosed that after assaulting, the members of the mob were taking him away but on the intervention of one Maulvi Saheb, they left him. Thereafter, she took her husband to the hospital where he was treated. During cross-examination, she had stated that there was a rumour that Sarju, Meghu along with her husband had been murdered over which she along with Maharaniya Devi, Chinta Devi rushed to the place of occurrence where they had seen only injured. Subsequently thereof, so many persons also came. Meghu and Sarju were dead. Dasu and Nankia have disclosed regarding lifting of her husband by the members of the mob. After covering a distance of two miles she saw her husband lying by the side of road alone. That place was near Mahila village. She was along at the time when her husband had disclosed the names of his assailants. She took her husband with the help of one passerby. She remained with her husband where police took her statement.



37. PW-14 Tusia Devi is wife of Jagdish Mahto, she had stated that on the alleged date and time of occurrence while she was at her house, she heard some hue and cry and rushed to the P.O. where she found her husband in injured condition. On query, he disclosed that Allu had assaulted him with Farsa and Sallu with lathi and Muslim Sarpanch with Garasa and Hoda with Bana. He was taken to Azamnagar Hospital for treatment. During cross-examination at para-2 had narrated that at the time of disclosure by her husband, she was alone. Other female members have not arrived at the place of occurrence earlier than she had.

38. PW-15 Bhubneshwar Mahto has simply stated that he had seen Meghu and Sarju dead while Dasu, Dudhnath, Sripati and Faizu injured. He had not found any of the assailants and on account thereafter he was declared hostile. From para-6 of his cross-examination, it is evident that he had found all the injured persons lying in the paddy crop belonging to Habib which was claimed by the Sarju and others to be their own on account of settlement by means of Purcha. He had also found Habib in injured condition and for that he had registered a case.

39. PW-16 Suresh Mahto had simply stated that he had followed his brother Sripati who was assaulted by Gharibul by Farsa and then thereafter he escaped therefrom. Accordingly, he was declared hostile. During cross-examination at para-4 had disclosed

that his brother Sripati was assaulted while he was fleeing.

40. PW-17 Uttam Mahto is an inquest report witness relating to Sarju and Meghu (deceased), while PW-18, Radhey Mahto happens to be one of the seizure list witnesses.

41. PW-19 is Arjun Mahto who had stated that though he heard sound of alarm that a mob consisting of 500-600 persons had assembled over the land which they had taken on settlement, even then, he had not gone there. He came to know regarding death of Sarju and Meghu as well as having five persons being injured and on account thereof, he was declared hostile.

42. PW-20 Jagdish Mahto is the informant. He had stated that deceased Meghu was his full brother. Dharmu also happened to be his full brother. Dasu and Lalu are his cousins. Some lands of village, Giddhaur have been settled by the State in their favour and accordingly, exhibited those documents. The land which was settled in their favour by the State was coming under their possession for the last 8-10 years. They used to grow crop. At the time of occurrence, they had grown paddy crop and the crop was ripe for harvesting. He also stated that he had taken land belonging to the Alauddin at Batai wherein he had planted sweet potato. He had further stated that a day prior to the occurrence they had harvested paddy crop over an area of 10-15 katthas. On the day of occurrence, he along with Meghu had gone to see his paddy crop and then thereafter they came to sweet


potato field where he saw Jainul Sarkar, Muslim Sarpanch, Barik, Aftab roaming around the land which they had taken on settlement. He also found persons either moving or sitting having variously armed with guns, pistols, suli, garasa, bhala, sickle etc at some distance. 10-11 persons out of them came at his land and began to cut the paddy crop over which he along with Meghu had gone to oppose. As soon as they protested, they began to pelt stones as well as they also surrounded them from all sides. He had identified, Masinad, Azam, Alauddin, Khaja, Asarul, Sikandar, Razzaque, Sattar, Kaimuddin, Samuddin, Hoda, Allu, Sallu, Abbas, Shafaque, Niyazuddin, Jahruddin, Ismael, Muslim Sarpanch, Jainul Sarkar, Barik, Aftab and Gulam. He fell down after sustaining injury of stone pelting followed by assault with Suli inflicted by Ghulam at his ribcage, by Farsa over his head by Allu, by Lathi through Sakku, by Garasa through Muslim Sarpanch and by Bana blown by Hoda. His brother Meghu was separately assaulted which he could not see. At that very moment, Dasu, Dudhnath, Faizu, Sarju, Sripati came in their rescue, who were also assaulted by the members of the unlawful assembly. His brother Meghu died. He was assaulted by means of fire arm as well as by means of Suli. Sarju also died. The accused persons then thereafter escaped therefrom. Sripati was also abducted by them. They were taken to Azamnagar hospital where Sripati was already there. They all were treated there. The police had come and recorded

his statement. He has also stated that accused person have got no concerned with the land which was settled in their favour by the Government. During cross-examination, he had admitted that during course of survey the land was shown as river. He cannot say as to how many years thereafter, the river shifted its bed. He also failed to divulge the nature of land to be Raiyati since before it has gone to the bed of river. He is also not aware of the fact that the lands which have been settled in their favour happens to be part and parcel of which survey plot number. He is also not aware of the exact area of the land belonging to the State of Bihar. He had volunteered that he only knows the area which has been settled in their favour. In para-8, he had narrated that they have filed petitions for settlement of the land about 5-6 years ago over which inspection was already held about 1 and ½ years ago. The land was measured by the Amin which they had borrowed. No Amin from block had ever come for measurement. Purcha was granted about four months from the date of occurrence on that very time paddy crop was already planted by them. Then had shown the previous animosity with the accused persons. Then had denied that they have gone to the field of Nizam after forming an unlawful assembly. He is unable to say whether any injured had fallen in the field of Nizam or not. He is unaware of the fact as to whether Habib was assaulted on that very day. He is unable to say as to whether Habib had instituted a case against them. In para-11, he had

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disclosed that at the time of inspection of the P.O. by the police, he was lying at the hospital. He had handed over the document relating to settlement after having discharged from the Hospital. Para-13 happens to be contradiction. In para-14, he had disclosed that they have cut away the paddy crop relating to an area of 10-15 Katthas on Saturday. He is unable to say as to whether any of the residents of Mahila village had seen or not. He had denied the suggestion that they have harvested paddy crop of Prithvi Singh about 4-5 days ago for which Prithvi Singh had instituted Azamnagar P.S. Case No. 147/88. In para-15, he had stated that while both the brothers were sitting in the field of Aslam, at that very moment the resident of Mahila village began to cut paddy from the land which was settled in their favour. The persons who were engaged in cutting were the labourers whom they did not identify. As soon as they began to cut, he along with his brother had gone there to forbid whereupon they were assaulted. He was assaulted by bricks, stone chips. He rushed but was cordoned. After being injured, he fell down followed with assault by Suli as well as Farsa. He had sustained two injuries over his head by Farsa and one lathi blow. Then thereafter, he became unconscious. He regained his sense till then the accused persons have already left the place. In para-16 he had divulged that he had seen Dasu, Dudhnath, Faizu, Sarju, Sripati but he cannot say the manner wherein they were also assaulted. In para-17, he had admitted that the injured have disclosed





names of their assailants to him in the hospital. I.O. had also taken statement from them. He had further disclosed that he had mentioned in the Fard-e-beyan that particular injured have disclosed particular accused to be his assailants. In para-20, he had denied the suggestion that it is false to say that they have got no possession over the land which have been settled to them by the Government. He had further denied the suggestion that they have got no idea with regard to the land under settlement. He had further denied the suggestion that after forming an unlawful assembly they have gone illegally over C.S. plot number 14 belonging to Habibur Rahman, Alaudding and their Pattidar for harvesting the paddy crop illegally and during course thereof they indulged in Maar-peat. He had also denied the suggestion that he had not made correct narration of the occurrence as alleged.

43. P.W.23 happens to be Investigating Officer. He had deposed that after getting O.D. slip on 20.11.1988 at about 1.25 P.M. He rushed to state dispensary, Azamnagar and took Fard-e-beyan to Jagdish Mahto, son of Jamun Mahto of village-Baharkhar. He had inspected other injured, Sripati, Dudhnath, Faiju, Dasu and issued injury report with regard thereto (Ext-A). He had also sent the dead body of two persons, namely, Meghu and Sarju. For that he directed and A.S.I. Surednra Prasad Singh to prepare inquest report as well as to send the dead body for postmortem and while he proceeded to P.O.


therefrom. He reached at the place of occurrence at 3.30 P.M. and inspected the same in presence of family members of injured. The P.O. lies one and half kilometer from the Baharkhar village over the land which has been settled by the government. The P.O. is expanded in between the field of Aslam to the field of Nizam covering the land having been settled. He had found copious blood over soil as well as also found blood stained over leaves of *Kalai* crop. The land of Meghu Mahto covering an area of 10 Katthas which has been settled in his favour lies north to this plot. East to this plot lies the plot of Hakimul therein paddy crop was standing as well as there was one hut. Paddy crop was standing in the land which was settled. At western side he had found the field having paddy crop harvested. He had found the dragging mark extending up to 50 yards north-east corner near the field of Sheikh Nizam where he had found blood stain at three places. He had found trampling mark in the surrounding paddy field. He had found a blood stained *lathi*, brick particles, stone particles etc. and seized the same. He has recorded statement of the witnesses. Some of them were at hospital itself. However, as the injured were not in a position to give their statement therefore he could not recorded their statement. After visiting the place of occurrence, he returned to hospital where he again tried to record their statement(injured) who were not in a position to give statement. However, he had recorded statement of others who were present there.

The document of the settlement was produced before him and he corroborated the same in detail. Subsequently, on 21.11.1988 he had recorded the statement of injured. During course of investigation, received injury report, postmortem report and after completing investigation submitted chargesheet. During cross-examination, he had admitted that though he had seen the relevant document relating to settlement but he had not gone to the office of C.O. to get it verified. He had not matched with the survey map. Then had admitted that he had taken photograph of the P.O. He had also made sketch map of the P.O. He had not mentioned in the P.O. the exact date on which paddy crop was harvested. He had not found stone particles at the place of occurrence rather he found *Mitti Ka Dhela*. Para 14 to 17 are contradictions of relevant witnesses. In paragraph-18 he had denied the suggestion that he had done collusive investigation.

44. P.W.24 happens to be an A.S.I. who is formal in nature on account of deposing to the extent of preparing inquest report.

45. From the record, it is also evident that defence had examined altogether six D.Ws. out of whom, D.W.1 is Sk. Matiuddin, an Amin who had prepared the tress map of C.S as well as R.S.

46. D.W.3 is Md. Amiruddin who had deposed that he had seen the disputed land which was earlier part of Mahanand river. In 1963-64, the land came out and since thereafter Habibur Rahman, Allauddin, Sallu, Masiuddin, Yakub, Jabbar and others began to



cultivate along with persons of Belanda village, namely, Tara Singh, Lakhi Singh and others. In the year 1988 the lands were in possession of these persons who have sown paddy. Jagdish Mahto had applied for settlement in the month of July, 1988. Application was scribed in his presence. During cross-examination he had disclosed that the land came out in the year 1957-58 but cultivation began in the year 1963-64. He is aware in whose name the C.S. *Khatian* of the respective land stands.

47. D.W.4 Badruddin is at the point of genealogical table of the accused persons.

48. D.W.5 Jagarnath Singh had deposed that he knew Jagdish and Meghu(deceased) but does not know Laloo, Dasu and Dharmu. He had not seen the disputed land under possession of Jagdish, Meghu, Dasu and others. He had further stated that Jagdish and Meghu had got no oxen and plough. During cross-examination he had accepted that he happens to be cousin of Prithvi Singh but he was not aware whether Prithvi Singh was an accused in this case. He had further admitted that he had got no knowledge with regard to the land under dispute but has said that the land is being cared by residents of Mahila village.

49. D.W.6 happens to be Md. Khatib Khan, a law clerk who had simply accepted the complaint petition which was sent to the police under Section 156(3) of the Code of Criminal Procedure over

which a substantial case was registered with regard to assault over the person of Habib as well as Alauddin. During cross-examination he had shown his status only to the extent of being formal.

50. D.W.2 is the doctor who on the relevant time, i.e., 21.11.1988 was posted at Katihar block. He had examined Alauddin on the same day at about 10.30 A.M. and found following injuries:-

1. Bruise over right hand 3"x1".
2. Bruise over right side face 3"x1".
3. Bruise over back 2"x1.

On the same day he had examined Shiekh Habibur Rahman and found the following injury:-


1. Sharp cut injury over mid-scalp 3"x1/4". It was stiched.
2. Sharp cut injury over left side scalp 2"x1/4".
3. Bruise over right forearm 3"x1". X-ray was advised.
4. Bruise over right forearm lower part 4"x1".
5. Bruise over left elbow with swelling 3"x1".
6. Bruise over left side back 3"x1".

51. The basic rule of the criminal jurisprudence demands prosecution to prove its case beyond all reasonable doubt. Therefore, primarily duty is cast upon the prosecution to prove its case by means of cogent, reliable and clinching evidence. To discharge such burden, the prosecution has adduced altogether 24 P.Ws. out of whom only the evidence of some of the witnesses appears to be relevant on this

score being material one.

52. This case suffers from some sort of peculiarity and that is with regard to its origin. The origin happens to be connected with the right to possess actual physical possession of the land under dispute. The position would have been very much clear, had the defence allowed the prosecution to sail on its boat without pouncing upon the same but as is evident, the defence was not satisfied with the suggestion whatever they have during course of cross-examining the P.Ws. They jumped into fray and advanced their plea that the land was possessed by them and to support the same, they have exhibited trace-map, C.S. Khatian, R.S. Khatian. Not only this by having Ext-I to I/4 the defence had also brought on record the petitions filed by the respective prosecution witnesses for settlement of the land and by such action the defence had admitted its propriety, genuineness and on account thereof the defence had accepted validity of Ext-2 series, the Purcha granted by State Government in favour of the prosecution party. It is no where the case of the defence that they have had ever challenged Ext-2 series, Parcha before the competent authority. That means to say, there happens to be acceptance of the aforesaid Ext-2 in its conclusiveness.

53. When particular act is performed in pursuance of mandate of specific law then its genuineness, its propriety, its effectiveness, its execution will be accepted unless and until contrary



is proved. The defence had nowhere challenged or tried to rebut the genuineness of purcha as well as even having purcha issued in favour of prosecution party, they never came over the land side by side when there happens to be specific claim on behalf of defence, then in that event it should have been proved at least to such extent to cast doubt with regard to the prosecution version relating to possession over the land brought under Ext-2 series, Ext-2 relates to Meghu Mahto which discloses settlement of 1.25 Acres of land of Khesra no. 29/3 of Khata No. 94 of village, Giddhaur, 2/1 relates to Jagdish Mahto to the extent of area 1.50 Acre of Khesra no. 29/1 of Khata No. 94 of village, Giddhaur, 2/2 relates to Dharmu Mahto covering an area of 1 Acre of Khesra no. 108 (MI) of Khata No. 94 of village Giddhaur, 2/3 relates to Dasu Mahto of area of 1 Acre of Khesra no. 29/5 of Khata No. 94 of village, Giddhaur, 2/4 relates to Lalu Mahto to the extent of area 1 acre under Khesra no. 29/4 of Khata No. 94 (MI) of village, Giddhaur.

54. The contention of defence relating to the land under dispute is found to be completely demolished after going through para-1 of the Complaint petition no. 932/88 (Ext-C). From para-1 of the Complaint petition, it is evident that the defence had claimed the land under Khata no.14 which was not ever allotted to the prosecution party. For better appreciation para-1 of the complaint petition is incorporated herein below:-


“ That your petitioner and is nephew Alauddin owned and possessed Khesra No. 36, 37, 39, 40, 96, 101, 102, under Khata No.14 covering .05 Acre

situated in Mauja Giddhaur within Azamnagar P.S.”

55. None of the exhibits, that means to say, Ext-F series, Ext-g relates to Khata No. 94, the Khata having under Purcha and not Khata No. 14 so claimed under Ext-C. The defence by exhibiting respective petitions filed by the prosecution party under Ext-I series, in real sense had shown their status acknowledging Khata No, Khesra No. incorporated therein and by such measure they have virtually sacked their own status to advance their claim or having their claim with regard to land covered under Khata No.94, the Khata having been allotted in favour of prosecution party.

56. Because of the fact that the defence on the basis of the documents which they have had exhibited in their defence and by having the witnesses examined on that very score, really posed a question before us who in true sense are the rightful person having possession and the ultimate result of the trial in the aforesaid background must be found to be guided by the finding having on the aforesaid issue. Neither the oral nor the documentary evidence having adduced on behalf of the appellants accept their legal identity with regard to Khata No. 94.

57. A certified copy of Azamnagar P.S. Case has been filed Ext-C-1 on the pretext that Prithvi Pal Singh had filed case against the prosecution party but after perusal of the written report, it is evident that the same happens to be with regard to Khata No.17, Khesra No.



105, 96. Ext- C-1 is of no use on this very score. As such, the documents Ext-2 series on account of its legal identity gives complete control over the land incorporated therein with the respective areas to be availed by the prosecution party without having adverse impact at the end of the defence. Accepting for a moment that being uncared land, same was under possession of defence will not give them any legal right to remain furthermore as soon as Ext-2 series came into existence and on account thereof, it has become irrelevant whether paddy crop was being harvested by the prosecution party having grown at the end of the appellants. That means to say by having the Ext-2 series in their favour , the prosecution party not only have become rightful owner rather presumption of law with regard to the possession will also lean in their favour which is also found supportive with the objective finding of the I.O. PW-23.

58. Now coming to the category of the prosecution witnesses, it could safely be bifurcated under these categories i.e., A. the injured, B. hearsay, C. over dying declaration.

59. Now coming to the evidence on the score of oral dying declaration it is apparent from the evidence of the PWs that none of the injured have supported the same. Moreso, the theme of dying declaration has individually and independently been flashed by PW-7 with regard to his son, PW-11 with regard to her husband, PW-12 and there happens to be non corroboration at any end rather happens to be

a contradiction developed during trial as is evident from evidence of PW-23 para-11. Therefore, it is very difficult to accede with the prosecution version so far oral dying declaration is concerned.

60. Coming to the remaining witnesses, as stated above, PWs, 3, 4, 5, 6 and 20 are injured witnesses whose presence cannot be doubted. After going through their testimony, it is found reliable and trustworthy because of the fact that from their testimony it is apparent that they have not tried to inter-mingle their evidence with any sort of development or going beyond their status what they have perceived as eyewitnesses as well have been victimized at the hands of appellants during course of occurrence. It has also been found from their evidence that they are inter-related. Whether on this very ground the evidence of witnesses should be discarded has been taken into account in the case of *Shyam Babu v U.P. reported in 2012 Cr.L.J 4550, para-14 and 15.*

14. This Court has repeatedly held that the version of an eyewitness cannot be discarded by the court merely on the ground that such eyewitness happened to be a relative or friend of the deceased. It is also stated that where the presence of the eyewitnesses is proved to be natural and their statements are nothing but truthful disclosure of actual facts leading to the occurrence, it will not be permissible for the court to discard the statement of such related or friendly witnesses. To put it clear, there is no bar in law on examining family members or any other person as witnesses. In fact, in cases involving family members of both sides, it is a member of the family or a friend who comes to rescue the injured. If the statement of witnesses, who are relatives or known to the parties affected is credible, reliable, trustworthy and corroborated by other witnesses, there would hardly be any reason for the court to reject such evidence merely on the ground that the witness was a family member or an interested witness or a person known to the affected party or friend, etc. These principles have been reiterated in *Mano Dutt v. State of U.P.*, (2012) 4 SCC 79 and *Dayal Singh v. State of Uttaranchal* 2012 (7) Scale 165: (2012 AIR SCW 4488).

15. In the case on hand, Nathu Ram (PW 1) is closely related to all the deceased as he is the son of the deceased Pahunchi Lal and nephew of deceased Lalta Prasad. It is also true that Prayag Singh (PW 3), the injured witness, is the real brother of the deceased Pahunchi Lal and Lalta Prasad. Mukut Singh (PW 6) has also admitted in his cross-examination that he has some land in joint khata with the victims but their testimony cannot be discarded on the ground of relationship alone as they appeared to be honest and truthful witnesses and their testimony has not been impaired in their cross-examination. We have already referred to the lengthy cross-examination of all these persons and nothing has come out to impair their credibility. We have also observed that among these three eyewitnesses, PW 3 is an injured witness and his evidence stands on a higher pedestal. There is no reason to either disbelieve his version or his presence at the place of occurrence. On the other hand, we agree with their statement and hold that the High Court was justified on relying upon their evidence.

61. In *Kanhaiya Lal & Ors v. State of Rajasthan*

reported in *2013 (6) SCALE 242* at para 20 it has been held:-

20. In the case at hand, the witnesses have lost their father, husband and a relative. There is no earthly reason to categorise them as interested witnesses who would nurture an animus to see that the accused persons are convicted, though they are not involved in the crime. On the contrary, they would like that the real culprits are prosecuted and convicted. That is the normal phenomena of human nature and that is the expected human conduct and we do not perceive that these witnesses harboured any ill motive against the accused persons, but have deposed as witnesses to the brutal incident. We may proceed to add, as stated earlier, that this court shall be careful and cautious while scanning their testimony and we proceed to do so.

62. In *Subal Ghorai & Ors. V. State of West Bengal*

reported in *2013(5) 275*, it has been observed under para-18,19,20

which are as follows:-

18. In the cross-examination of PW-19 PI Ghosh - the investigating officer, certain omissions in the evidence of prosecution witnesses have been brought on record. Surprisingly, his attention was not drawn to the evidence of PW-1 Promila at all. The evidence of PW-19 PI Ghosh

has not been happily recorded. In any case, the omissions are minor omissions pertaining to non-mentioning of weapons carried by the accused or not referring to the parts of the bodies of the deceased on which the assault was made. Some of the witnesses have omitted to mention the names of some of the accused. But, in our opinion, on the substratum of the prosecution story, there are no omissions or contradictions. While analyzing the evidence, we have kept in mind the manner in which several accused persons armed with weapons attacked the deceased. In an attack of this type, in the nature of things, there are bound to be some omissions or discrepancies in the evidence of witnesses. Experience shows that witnesses do exaggerate and this Court has taken note of such exaggeration made by the witnesses and held that on account of embellishments, evidence of witnesses need not be discarded if it is corroborated on material aspects by the other evidence on record. Therefore, the fact that some witnesses have not

referred to certain accused in their police statements but have attributed role to them in the court, does not lead us to conclude, in the peculiar facts of this case, that the said witnesses are not credible witnesses. In this connection, we may usefully refer to Leela Ram on which reliance is placed by learned counsel for the State. The following observations of this Court are material.

“12. It is indeed necessary to note that one hardly comes across a witness whose evidence does not contain some exaggeration or embellishment – sometimes there could even be a deliberate attempt to offer embellishment and sometimes in their overanxiety they may give a slightly exaggerated account. The court can sift the chaff from the grain and find out the truth from the testimony of the witnesses. Total repulsion of the evidence is unnecessary. The evidence is to be considered from the point of view of trustworthiness. If this element is satisfied, it ought to inspire confidence in the mind of the court to accept the stated evidence though not however in the absence of the same.”

19. It is true that the prosecution has relied on the evidence of interested witnesses but, interested witness is not necessarily a bad witness. In fact, if the witness is related to the deceased, there is less chance of his leaving aside the real assailants. The evidence of interested witness has to be analyzed with care. But, once the court comes to the conclusion that it is truthful and in accord

with the relevant circumstances on record, the court should not hesitate to accept it and record conviction on the basis thereof. In this case, all the eye-witnesses are consistent about the prosecution case as regards assault on the deceased and setting on fire of the houses of Dharas. We are, therefore, not inclined to reject their evidence on the ground that they are related to the deceased. As already noted, two of the eye-witnesses i.e. PW-12 Jamini and PW-13 Mandakini are injured witnesses, whose presence at the scene of offence cannot be doubted. They completely bear out the prosecution case.

20. Counsel for the appellant submitted that the identification of the accused in the court should not be relied upon. We have no hesitation in rejecting this submission. The attack was dastardly. It is difficult to forget such heinous episode. The injuries suffered by the deceased show how brutally they were attacked. The eye-witnesses had seen the accused from close quarters. There is, therefore, nothing unusual if the eye-witnesses identified some of the accused in the court. This Court has accepted the evidence of identification in the court in several cases (see Malkhansingh.) This submission must, therefore, be rejected. It is pertinent to note that some witnesses have honestly stated that they could not identify some of the accused. That shows that they were not tutored. It was argued that the prosecution has not been able to establish motive. The incident appears to have taken place because juvenile delinquent-Gopal was detained by deceased-Hemanta. Assuming, however, that this is a case of weak motive or that the prosecution has not established motive, that will not have adverse impact on its case because when there is credible evidence of eye-witnesses on record, the motive pales into insignificance.

63. Much emphasis has been drawn on behalf of the appellants over recording of statement in accordance with Section 313 of the Cr.P.C. submitting that the same has been exercised in extremely perfunctory manner causing prejudice to the appellants. To buttress the plea a bunch of citation has been referred. From the L.C. record it is apparent that although no such infirmities in true sense is

found, however, no such plea was ever raised before the trial court and that has been taken into account in *Fahim Khan v. State of Bihar now Jharkhand as reported in 2011 Cr.L.J. 3352 relevant para-9.*

15. It is indeed true that the statements of the accused recorded under Section 313 CrPC are extremely perfunctory and do not satisfy the requirement of Section 313 CrPC. We, however, find that no argument whatsoever in this regard had been raised at any stage although the matter had travelled up and down the appellate ladder several times earlier. We should not however be held to mean that an argument with regard to a defective Section 313 statement cannot be raised at the SLP stage but we have gone through the grounds of SLP in this matter and find that no ground has been raised even before us in the SLP. In the absence of any complaint on this score, we must assume that the appellant had suffered no prejudice on account of a defective Section 313 statement. The cases cited by Mr Sushil Kumar, undoubtedly talk about the importance of a Section 313 statement and the implications for the prosecution, should there be some defect. It is, however, equally well settled that an objection as to prejudice must be taken at the earliest [see *Shobhit Chamar v. State of Bihar* (1998 (3) SCC 455)]; (AIR 1998 SC 1693: 1998 AIR SCW 1469) and prejudice must be shown before a trial could be said to be invalidated [see in this connection *Shivaji Sahabrao Bobade v. State of Maharashtra* (AIR 1973 SC 2622 and *Santosh Kumar Singh v. State through CBI* (2010 (9) SCC 747)]. No prejudice to the accused has been pointed out even at this belated stage. It must therefore be presumed that no prejudice has in fact occurred.

64. The scope of 313 Cr.P.C. has again been considered in the case of *Satyavir Singh Rathi, ACP v. State through CBI, as reported in 2011 Cr.L.J. 2908, relevant paras 27, 28,29,30,31.*

27. The learned counsel for the appellants have also argued on the failure of the court in putting all relevant questions to them when their statements under Section 313 CrPC had been recorded. Mr Sharan has also given us a list of fifteen questions which ought to have been put to the ACP as they represented the crux of the prosecution story. It has been submitted that on account of this neglect on the part of the court the appellants had suffered deep prejudice in formulating their defence. Reliance has been placed on *Hate Singh Bhagat Singh*, (AIR 1953 SC 648) *Vikramjit Singh* (2006 AIR SCW 6197) and *Ranvir Yadav's cases* (AIR 2009 SC (supp) 1439: 2009 AIR SCW 3475) (*supra*). It has however been pointed out by the learned ASG that the fifteen questions referred to were largely inferences drawn by the courts and relatable to the evidence on record, and the inferences were not required to be put to an accused. He has further submitted even assuming that there had been some

omission that by itself would not a fortiori result in the exclusion of evidence from consideration but it had to be shown further by the defence that prejudice had been suffered by the accused on that account inasmuch that they could claim that they did not have notice of the allegations against them. In this connection, the learned ASG has placed reliance on *Shivaji Sahabrao Bobade v. State of Maharashtra*, AIR 1973 SC 2622 and *Santosh Kumar Singh and Shobhit Chamar's cases* (AIR 1998 SC 1693; 1998 AIR SCW 1469)(supra).

28. Undoubtedly, the importance of a statement under Section 313 CrPC insofar as the accused is concerned, can hardly be minimised. This statutory provision is based on the rules of natural justice for an accused must be made aware of the circumstances being put against him so that he can give a proper explanation and to meet that case. In *Hate Singh's case*, (AIR 1953 SC 648) (supra) it was observed that:

"the statements of an accused person recorded under Ss. 208, 209 and 342 are among the most important matters to be considered at the trial. It has to be remembered that in this country an accused person is not allowed to enter the box and speak on oath in his own defence. This may operate for the protection of the accused in some cases but experience elsewhere has shown that it can also be a powerful and impressive weapon of defence in the hands of an innocent man. The statements of the accused recorded by the Committing Magistrate and the Sessions Judge are intended in India to take the place of what in England and in America he would be free to state in his own way in the witness box. They have to be received in evidence and treated as evidence and be duly considered at the trial.

This means that they must be treated like any other piece of evidence coming from the mouth of a witness and matters in favour of the accused must be viewed with as much deference and given as much weight as matters which tell against him. Nay more. Because of the presumption of innocence in his favour even when he is not in a position to prove the truth of his story, his version should be accepted if it is reasonable and accords with probabilities unless the prosecution can prove beyond reasonable doubt that it is false. We feel that this fundamental approach has been ignored in this case."

29. It must be highlighted that the judgment in that case was rendered in the background that in the absence of any provision in law to enable an accused to give his part of the story in court, the statement under Section 342 CrPC, 1898 (now Section 313 CrPC, 1973) was of utmost importance. The aforesaid observations have now been somewhat whittled down in the light of the fact that Section 315 CrPC now makes an accused a competent witness in his defence. In *Vikramjit Singh's case* (2006 AIR SCW 6197) this Court again dwelt on the importance of the Section 313 statement but we see from the judgment that it was primarily based on an overall appreciation of the evidence and the acquittal was not confined only to the fact that the statement of the accused had been defectively recorded.

In *Ranvir Yadav's case* (AIR 2009 SC (supp) 1439; 2009 AIR SCW 3475) (supra) this Court has undoubtedly observed that even after the incorporation of Section 315 CrPC, the position remains the same (insofar as the statements under Section 313 are concerned) but

we find that the judgment was one of acquittal by the trial court and a reversal by the High Court and this was a factor which had weighed with this Court while rendering its judgment. In any case the latest position in law appears to be that prejudice must be shown by an accused before it can be held that he was entitled to acquittal over a defective and perfunctory statement under Section 313. In *Shivaji's case* (AIR 1973 SC (supp) 2622: (supra) a judgment rendered by three Hon'ble Judges, it has been observed in paragraph 16 as under

“It is trite law, nevertheless fundamental, that the prisoner's attention should be drawn to every inculpatory material so as to enable him to explain it. This is the basic fairness of a criminal trial and failures in this area may gravely imperil the validity of the trial itself, if consequential miscarriage of justice has flowed. However, where such an omission has occurred it does not ipso facto vitiate the proceedings and prejudice occasioned by such defect must be established by the accused. In the event of evidentiary material not being put to the accused, the court must ordinarily eschew such material from consideration. It is also open to the appellate court to call upon the counsel for the accused to show what explanation the accused has as regards the circumstances established against him but not put to him and if the accused is unable to offer the appellate court any plausible or reasonable explanation of such circumstances, the court may assume that no acceptable answer exists and that even if the accused had been questioned at the proper time in the trial court he would not have been able to furnish any good ground to get out of the circumstances on which the trial court had relied for its conviction. In such a case, the court proceeds on the footing that though a grave irregularity has occurred as regards compliance with Section 342 CrPC, the omission has not been shown to have caused prejudice to the accused.”

30. The judgment in *Santosh Kumar Singh's case* (supra) is to the same effect and is based on a large number of judgments of this Court.

31. It is clear from the record herein that the appellants, all police officers, had been represented by a battery of extremely competent counsel and in the course of the evidence, the entire prosecution story with regard to the circumstances including those of conspiracy and common intention had been brought out and the witnesses had been subjected to gruelling and detailed cross-examinations. It also bears reiteration that the incident has been admitted, although the defence has sought to say that it happened in different circumstances. It is also signally important that all the accused had filed their detailed written statements in the matter. All these facts become even more significant in the background that no objection had been raised with regard to the defective Section 313 statements in the trial court. In *Shobhit Chamar's case* (AIR 1998 SC 1693: 1998 AIR SCW 1469)(supra). this Court observed:

“We have perused all these reported decisions relied upon by the learned advocates for the parties and we see no hesitation in concluding that the challenge to the conviction based on non-compliance with Section 313 CrPC first time in this appeal cannot be entertained unless the appellants demonstrate that the prejudice has



*been caused to them. In the present case as indicated earlier, the prosecution strongly relied upon the ocular evidence of the eyewitnesses and relevant questions with reference to this evidence were put to the appellants. If the evidence of these witnesses is found acceptable, the conviction can be sustained unless it is shown by the appellants that a prejudice has been caused to them. No such prejudice was demonstrated before us and, therefore, we are unable to accept the contention raised on behalf of the appellants.”*

These observations proceed on the principle that if an objection as to the Section 313 statement is taken at the earliest stage, the court can make good the defect and record an additional statement as that would be in the interest of all but if the matter is allowed to linger on and the objections are taken belatedly it would be a difficult situation for the prosecution as well as the accused. In the case before us, as already indicated, the objection as to the defective Section 313 statements had not been raised in the trial court. We must assume therefore that no prejudice had been felt by the appellants even assuming that some incriminating circumstances in the prosecution story had been left out. We also accept that most of the fifteen questions that have been put before us by Mr Sharan, are inferences drawn by the trial court on the evidence. The challenge on this aspect made by the learned counsel for the appellants, is also repelled.

65. Any sort of deficiency or infirmity persisting during course of recording of statement of an accused under Section 313 of the Cr.P.C. has been taken into consideration in the case of ***Paramjeet Singh @ Pamma v. State of Uttarakhand***, as reported in ***2011 Cr.L.J. 663*** and it has been decided after taking into account the earlier decisions under paragraphs-23, 24, 25, 26, 27, 28, 29, 30 and 31.

**23.** An accused can be questioned under Section 313 CrPC only for the purpose of enabling him personally to explain any circumstance appearing in the evidence against him. No matter how weak or scanty the prosecution evidence is in regard to certain incriminating material, it is the duty of the court to examine the accused and seek his explanation on incriminating material which has surfaced against him. Section 313 CrPC is based on the fundamental principle of fairness. 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 CrPC cannot be used against him and have to be excluded from consideration. (Vide *Sharad Birdhichand*( AIR 1984 SC 1622) *Supra*); and *State of Maharashtra v. Sukhdev Singh & Anr.*, ( AIR 1992 SC 2100 ;(1992 AIR SCW 2486)).

24. In *S. Harnam Singh v. State (Delhi Admn.)* .) AIR 1976 SC 2140 this Court held that non-indication of inculpatory material and its relevant facts by the trial court to the accused adds to the vulnerability of the prosecution case. The recording of the statement of the accused under Section 313 CrPC is not a purposeless exercise.

25. If any appellate court or revisional court comes across the fact that the trial court had not put any question to an accused, even if it is of a vital nature, such an omission alone should not result in the setting aside of the conviction and sentence as an inevitable consequence. An inadequate examination cannot be presumed to have caused prejudice. Every error or omission in compliance with the provisions of Section 313 CrPC, does not necessarily vitiate trial. Such errors fall within the category of curable irregularities and the question as to whether the trial is vitiated, in each case depends upon the degree of error and upon whether prejudice has been or is likely to have been caused to the accused. Efforts should be made to undo or correct the lapse. (Vide *Wasim Khan v. State of U.P.* AIR 1956 SC 400, *Bhoor Singh v. State of Punjab*, AIR 1974 SC 1256; *Labhchand Dhanpat Singh Jain v. State of Maharashtra* AIR 1975 SC 182; *State of Punjab v. Naib Din*, AIR 2001 SC 3955: (2001 AIR SCW 3928); and *Parsuram Pandey v. State of Bihar*, (2004) 13 SCC 189: (AIR 2004 SC 5068: 2004 AIR SCW 5779.))

26. In *Asraf Ali v. State of Assam* (2008) 16 SCC 328: (AIR 2009 SC (supp) 645: 2008 AIR SCW 5608), this Court observed: (Para 13 of AIR, AIR SCW)

Section 313 of the Code casts a duty on the court to put in an enquiry or trial questions to the accused for the purpose of enabling him to explain any of the circumstances appearing in the evidence against him. It follows as a necessary corollary therefrom that each material circumstance appearing in the evidence against the accused is required to be put to him specifically, distinctly and separately and failure to do so amounts to a serious irregularity vitiating trial, if it is shown that the accused was prejudiced.”

27. In *Shivaji Sahabrao Bobade v. State of Maharashtra*, AIR 1973 SC 2622, this Court observed as under (para 16):

*It is trite law, nevertheless fundamental, that the prisoner's attention should be drawn to every inculpatory material so as to enable him to explain it. This is the basic fairness of a criminal trial and failures in this area may gravely imperil the validity of the trial itself, if consequential miscarriage of justice has flowed. However, where such an omission has occurred it does not ipso facto vitiate the proceedings and prejudice occasioned by such defect must be established by the accused. In the event of evidentiary material not being put to the accused, the court must ordinarily eschew such material from consideration. It is also open to the appellate court to call upon the counsel for the accused to show what explanation the accused has as regards the circumstances established against him but not put to him and if the accused is unable to offer the appellate court any plausible or reasonable explanation of such circumstances, the*

*court may assume that no acceptable answer exists and that even if the accused had been questioned at the proper time in the trial court he would not have been able to furnish any good ground to get out of the circumstances on which the trial court had relied for his conviction.”*


**28.** In *Ganesh Gogoi v. State of Assam* (2009) 7 SCC 404: (AIR 2009 SC 2955: 2009 AIR SCW 4720), this Court, relying upon its earlier decision in *Basavaraj R. Patil v. State of Karnataka* (2008) 8 SCC 740: (AIR 2000 SC 3214: 2000 AIR SCW 3692), held that the provisions of Section 313 CrPC are not meant to nail the accused to his disadvantage but are meant for his benefit. The provisions are based on the salutary principles of natural justice and the maxim *audi alteram partem* has been enshrined in them. Therefore, an examination under Section 313 CrPC has to be of utmost fairness.

**29.** In *Sk. Maqsood v. State of Maharashtra* (2009) 6 SCC 583: (AIR 2009 SC (Supp) 1060: 2009 AIR SCW 4308); and *Ranvir Yadav v. State of Bihar* (2009) 6 SCC 595 : (AIR 2009 SC (supp) 1439: 2009 AIR SCW 3475),, this Court held that it is the duty of the trial court to indicate incriminating material to the accused. Section 313 CrPC is not an empty formality. An improper examination/inadequate questioning under Section 313 CrPC amounts to a serious lapse on the part of the trial court and is a ground for interference with the conviction.

**30.** In *Suresh Chandra Bahri v. State of Bihar*, AIR 1994 SC 2420 : 1004 AIR SCW 3420) this Court rejected the submission that as no question had been put to the accused *on motive*, no motive for the commission of the crime could be attributed to the accused, nor the same could be reckoned as circumstance against him observing that it could not be pointed out as to what in fact was the real prejudice caused to the accused by omission to question the accused *on the motive* for the crime. No material was placed before the Court to show as to what and in what manner the prejudice, if any, was caused to the accused. More so, the appellant-accused was aware of the accusation and charge against him.

**31.** Thus, it is evident from the above that the provisions of Section 313 CrPC make it obligatory for the court to question the accused on the evidence and circumstances against him so as to offer the accused an opportunity to explain the same. But, it would not be enough for the accused to show that he has not been questioned or examined on a particular circumstance, instead he must show that such non-examination has actually and materially prejudiced him and has resulted in the failure of justice. In other words, in the event of an inadvertent omission on the part of the court to question the accused on any incriminating circumstance cannot ipso facto vitiate the trial unless it is shown that some material prejudice was caused to the accused by the omission of the court.

66. During course of argument, learned counsel for the appellants though argued that a common question has been formulated



for the purpose of recording statement of appellants without distinguishing their individual status during course of commission of occurrence. When individual case has been gone through, it is apparent that against appellant Kaimuddin, there is specific questionnaire present over committing murder of Sarju Mahto by means of fire arms while remaining questions are admittedly consolidated. So far other appellants are concerned, they only faced consolidated questionnaire comprising of the incriminating material on the basis of the evidence whatsoever adduced during course of trial against them being members of unlawful assembly possessing common object during commission of murder of Sarjoo, Meghu.

67. Even putting much stress at this stage that on account of diminution at the part of learned trial court at the stage of recording of statement the learned counsel for the appellants did not succeed in placing as to how appellants felt prejudiced having confronted with present form of questionnaire during course of statement recorded under Section 313 Cr.P.C. Therefore, no more controversy lies on this score.

68. It is true and has rightly been relied upon by the learned counsel for the appellants that explanation whatever been given by an accused during course of statement under Section 313 Cr.P.C. is not going to bind the others. During course of statement under Section 313 Cr.P.C. accused Habib and Alauddin have had admitted an

occurrence whereunder, according to their version they were assaulted when they intervened into illegal act of prosecution party while forcibly cutting paddy crop there-from over which some persons intervened into to save them who might have assaulted the prosecution party. This theme is not going to encircle the others, however, brings into a scene suggesting that on the alleged date and time an occurrence had taken place. After all, it is an obligation of the prosecution to prove its case which could get additionally benefited from the answers made by the accused during course of statement recorded under Section 313 of Cr.P.C.

69. Though the prosecution is not bound to explain and answer all the hypothesis so raised by the defence, as has been held by the Hon'ble Apex Court reported in AIR 1992 SC 840 but even for a moment keeping aside, the injuries found on the person of two of the accused Habib and Abdullah having not explained at the end of prosecution is not going to dent upon the prosecution case because of the fact that: (a) The injury report is found suspicious. (b) The injuries are superficial in nature. (C) Defence could not be able to substantiate its claim over the land having settled in favour of prosecution. (d) The prosecution witnesses are firm and consistent, so far factum of occurrence is concerned.

70. In *Laxman v. State of Maharashtra* reported in (2012) 11 SCC 158, it has been observed at para 17 which is as follows:-

17. Insofar as the injuries sustained by some of the

accused are concerned, it is seen from the evidence of Dr D. Trimabak (PW 2) that those injuries are minor in nature. This Court on various occasions has held that in the case of minor injuries, merely because the prosecution has not furnished adequate reasons, their case cannot be rejected. Considering the fact that the injuries sustained by some of the accused were minor in nature, even in the absence of proper explanation by the prosecution, we hold that the prosecution story cannot be disbelieved.

71. Apart from the fact that prosecution by unimpeachable evidences have supported its case.

72. Now coming to applicability of Sec 149 IPC, In *Kanhaiya Lal & Ors v. State of Rajasthan* reported in **2013 (6) SCALE 242** at para 22 it has been held:-

22. It is next contended by Mr. Jain that the witnesses have not specifically stated about the exact role played by each of the accused persons inasmuch as they have not mentioned who assaulted on which part of the body and with what weapon. On a perusal of the evidence, it transpires that the witnesses have mentioned about the weapons used, the assault made and the parts of the body where injuries were inflicted. True it is, there are some discrepancies but they are absolutely minor. That apart, they had formed an unlawful assembly with a common object to put an end to the lives of the deceased persons. Their common object is writ large because they had the knowledge and they shared the common object from the beginning to the end. Applying the principles laid down in *Masalti and others v. The State of Uttar Pradesh*[AIR 1965 SC 202], *Lalji and others v. State of U.P.*[(1989)1 SCC 437] and *Ramachandran and others v. State of Kerala*[(2011) 9 SCC 257], we conclude that all the accused persons were a part of the unlawful assembly with the knowledge of the common object and, accordingly, we unhesitatingly repel the contention of the learned counsel for the appellants.


73. In *Subal Ghorai & Ors v. State of West Bengal*

(supra) dealing with earlier decisions, concluded under para 29, 30.

29. The above judgments outline the scope of Section 149 of the IPC. We need to sum-up the principles so as to examine the present case in their light. Section 141 of IPC defines unlawful assembly to be an assembly of five or more persons. They must have common object to commit an offence. Section 142 of the IPC postulates that whoever being aware of facts which render any assembly an unlawful one intentionally joins the same would be a member thereof. Section 143 of the IPC provides for punishment for being a member of unlawful assembly. Section 149 of the IPC provides for constructive liability of every person of an unlawful assembly if an offence is committed by any member thereof in prosecution of the common object of that assembly or such of the members of that assembly who knew to be likely to be committed in prosecution of that object. The most important ingredient of unlawful assembly is common object. Common object of the persons composing that assembly is to do any act or acts stated in clauses 'First', 'Second', 'Third', 'Fourth' and 'Fifth' of that section. Common object can be formed on the spur of the moment. Course of conduct adopted by the members of common assembly is a relevant factor. At what point of time common object of unlawful assembly was formed would depend upon the facts and circumstances of each case. Once the case of the person falls within the ingredients of Section 149 of the IPC, the question that he did nothing with his own hands would be immaterial. If an offence is committed by a member of the unlawful assembly in prosecution of the common object, any member of the unlawful assembly who was present at the time of commission of offence and who shared the common object of that assembly would be liable for the commission of that offence even if no overt act was committed by him. If a large crowd of persons armed with weapons assaults intended victims, all may not take part in the actual assault. If weapons carried by some members were not used, that would not absolve them of liability for the offence with the aid of Section 149 of the IPC if they shared common object of the unlawful assembly.

30. But this concept of constructive liability must not be so stretched as to lead to false implication of





innocent bystanders. Quite often, people gather at the scene of offence out of curiosity. They do not share common object of the unlawful assembly. If a general allegation is made against large number of people, Court has to be cautious. It must guard against the possibility of convicting mere passive onlookers who did not share the common object of the unlawful assembly. Unless reasonable direct or indirect circumstances lend assurance to the prosecution case that they shared common object of the unlawful assembly, they cannot be convicted with the aid of Section 149 of the IPC. It must be proved in each case that the person concerned was not only a member of the unlawful assembly at some stage, but at all the crucial stages and shared the common object of the assembly at all stages. The court must have before it some materials to form an opinion that the accused shared common object. What the common object of the unlawful assembly is at a particular stage has to be determined keeping in view the course of conduct of the members of the unlawful assembly before and at the time of attack, their behaviour at or near the scene of offence, the motive for the crime, the arms carried by them and such other relevant considerations. The criminal court has to conduct this difficult and meticulous exercise of assessing evidence to avoid roping innocent people in the crime. These principles laid down by this Court do not dilute the concept of constructive liability. They embody a rule of caution.

74. Thus after meticulously examining the evidence of PWs, including that of injured witnesses, it is found and held that prosecution has succeeded in proving its case beyond reasonable doubt. However, appellants Azam, Asarul, Aftab Alam, Shahabuddin, Md. Khaza, Barik, Md. Sikandar find their involvement as a member of an unlawful assembly but without having any sort of allegation at the end of prosecution and as revealed by the prosecution on its own showing presence of large numbers of persons, then in that

circumstances presence of person as spectators at the place of occurrence cannot be ruled out.

75. Consequent there upon, they should at least are found entitled for benefit of doubt and accordingly are acquitted. They are on bail. Hence, they are directed to be discharged from the liability of bail bond.

76. With regard to remaining appellants, we do not see merit in the appeals, consequent thereupon, the same are dismissed. They are on bail, hence their bail bonds are cancelled with a direction to surrender before the learned lower court to serve out remaining part of sentences.

**(Aditya Kumar Trivedi, J)**

**I agree**  
**Shyam Kishore Sharma, J**

Patna High Court  
The 17<sup>th</sup> of July 2013  
Md.Perwez Alam/AFR

**(Shyam Kishore Sharma, J)**