KRISHNA MOCHI AND ORS. A

v.

STATE OF BIHAR ETC.

APRIL 15, 2002

[M.B. SHAH, B.N. AGRAWAL AND ARIJIT PASAYAT, JJ.] B

Criminal Law:

Terrorists and Disruptive Activities (Prevention) Act, 1987/Penal Code, 1860—Section 3/Section 302 read with Section 149—Death sentence— C *Justification of—Accused belonging to militant group attacked members of a particular community pursuant to conspiracy hatched—Gruesome carnage wherein 35 persons of a community massacred and many other injured besides destruction of houses by fire—119 person charge-sheeted out of which 13 were put on trial—Trial Court acquitting four of the accused and convicting* D *others under TADA and IPC—Four of the accused convicted under Section 302 read with Section 149 IPC and sentenced to rigorous imprisonment of life and under Section 3 TADA with death sentence—Appeal and death reference—Whether 'rarest of rare case' warranting death sentence—Held, yes since crime not only ghastly but also enormous in proportion as 35 persons of one community were massacred in an extremely diabolic, revolting and dastardly* E *manner which affected the normal tempo of life of the community in the locality—Further culpability of the accused persons assumes the proportion of extreme deprivity that a special reason exists under Section 354 (3) Cr. P.C. for sentencing them to death penalty—Code of Criminal Procedure, 1973. Section 354 (3).*

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Criminal Trial :

Appreciation of evidence—Complicity of accused—Case involving large number of offenders and large number of victims—Only few witnesses—Whether proved by credible evidence—Held, yes since in the matter of appreciation of G *evidence of witness it is not the number of witnesses but quality of evidence that matters—Evidence Act, 1872—Section 134.*

Evidence Act, 1872 :

Evidence—Appreciation of—Duty of Court in appreciating evidence—Discussed.

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A *Witnesses—Evidence—Non-credibility of—Discussed.*

Accused persons belonging to militant group allegedly hatched conspiracy to massacre members of a particular community which led to gruesome carnage wherein 35 persons of a community lost their lives, many were injured besides destruction of houses by fire. On the basis of the
B **statement of the informants police instituted a case and in all 119 persons were charge-sheeted of whom 13 accused persons including appellants were tried under Terrorists and Disruptive Activities (Prevention) Act, 1987. On the basis of evidence of the prosecution witnesses and the post mortem examination Designated Court acquitted four of the accused persons and**
C **convicted the others under TADA and IPC. Appellant-accused have been convicted under Section 302/149 IPC and sentenced to rigorous imprisonment for life and Section 3 (1) of the TADA with death sentence. Hence the present appeal and death reference.**

On behalf of the appellants it was contended that the prosecution has
D **failed to prove the participation of the appellants in the crime by credible evidenc; that it was a fit case in which benefit of doubt should have been given to the appellants; that since the informant was not examined, the first information report could not be used as substantive evidence; that the names of the appellants did not find place in the confessional statement said to have been made by co-accused; that the investigating officer has not been examined;**
E **that no incriminating articles were recovered from the appellants; that identification of the appellants was not possible in the dead of night; that the appellants were not the assailants and that it was not a fit case for awarding the extreme penalty of death.**

Respondents contended that the prosecution has succeeded in proving
F **its case and complicity of the appellants with the crime by unimpeachable evidence and there was no infirmity in the conviction order and that the sentence of death awarded against the appellants was in accordance with law as the instant case falls in the category of 'rarest of the rare. '**

Dismissing the appeal and confirming the death reference, the Court.

G **HELD: (Per Agrawal, J.)**

1. In recent times there has been sharp decline of ethical values in public life even in developed countries much less developing once, life ows, where the ratio of decline is higher.

H **2. Even in ordinary cases, witnesses are not inclined to depose or their**

evidence is not found to be credible by courts for manifold reasons. One of the reasons may be that they do not have courage to depose against an accused because of threats to their life, more so when the offenders are habitual criminals or high-ups in the Government or close to powers, which may be political, economic or other powers, including muscle power. A witness may not stand the test of cross-examination which may be sometime because he is a bucolic person and is not able to understand the question put to him by the skilful cross-examiner and at times under the stress of cross-examination, certain answers are snatched from him. When a rustic or illiterate witness faces an astute lawyer, there is bound to be imbalance and, therefore minor discrepancies have to be ignored. These days it is not difficult to gain over a witness by money power or giving him any other allurance or giving out threats to his life and/or property at the instance of persons, in/or close to powers and muscle men or their associates. Such instances are also not uncommon where a witness is not inclined to depose because in the prevailing social structure he wants to remain indifferent. It is most unfortunate that expert witnesses and the investigating agencies and other agencies which have an important role to play are also not immune from decline of values in public life. Their evidence sometimes becomes doubtful because they do not act sincerely, take everything in a casual manner and are not able to devote proper attention and time. [24-A-F]

2. In a criminal trial a prosecutor is faced with so many odds. The Court while appreciating the evidence should not lose sight of these realities of life and cannot afford to take an unrealistic approach by sitting in ivory tower. In recent times the tendency to acquit an accused easily is galloping fast. It is very easy to pass an order of acquittal on the basis of minor points raised in the case by a short judgment so as to achieve the yardstick of disposal. Some discrepancy is bound to be there in each and every case which should not weigh with the Court so long it does not materially affect the prosecution case. In case discrepancies pointed out are in the realm of pebbles, court should tread upon it, but if the same are boulders, court should not make an attempt to jump over the same. These days when crime is looming large and humanity is suffering and society is so much affected thereby, duties and responsibilities of the Courts have become much more. Now the maxim "let hundred guilty persons be acquitted, but not a single innocent be convicted" is, in practice, changing world over and courts have been compelled to accept that "society suffers by wrong convictions and it equally suffers by wrong acquittals. "

[24-F-H; 25-A-B]

Inder Singh and Anr. v. *State (Delhi Administration),* AIR (1978) Supreme

A Court 1091; *State of U.P.* v. *Anil Singh,* AIR (1988) Supreme Court 1998; *State of West Bengal* v. *Orilal Jaiswal and Anr.*, [1994] 1 Supreme Court Cases 73, and *Mohan Singh and Anr.* v. *State of M.P.*, [1999] 1 Supreme Court Reports 276, referred to.

3. In the instant case where there was more or less a caste war between B haves and have nots, gruesome murder of 35 person of one community in which several persons were injured, great commotion in the locality, people became panicky as the accused persons were members of a very violent organisation, even if the complicity of the accused is proved by credible evidence of one or two witnesses, it would not be unsafe to convict an accused, rather a duty is enjoined upon the court not to acquit an accused on this C ground alone unless the prosecution case is otherwise found to be untrustworthy. It is well settled that in a criminal trial credible evidence of even a solitary witness can form basis of conviction and that of even half a dozen witnesses may not form such a basis unless their evidence is found to be trustworthy inasmuch as what matters in the matter of appreciation of D evidence of witnesses is not the number of witnesses, but the quality of their evidence. [25-G, H; 26-A-B]

Masalti v. *The State of Uttar Pradesh,* AIR (1965) SC 202, distinguished.

4.1. Regarding non-disclosure of names of the appellants in the confessional statement of co-accused there may be various reasons for the E same. They might not be fully known to the confessing accused or for reasons best known to him, with an oblique motive, to save the appellants, their names might not have been disclosed. Thus the participation of the appellants in the crime is not doubtful. [26-C, D]

4.2. The submission that the First Information Report cannot be used F as substantive piece of evidence since the informant has not been examined and thus appellants are entitled to an order of acquittal is totally misconceived since even if the first information report is not proved, it would not be a ground for acquittal, but the case would depend upon the evidence led by prosecution. [26-D-E]

G 4.3. Regarding non-examination of the Inspector, who was one of the investigating officers, he had neither taken over charge of the investigation of the case at any point of time, much less investigated the same and so no adverse inference can be drawn against the prosecution on account of his non-examination and non-furnishing of explanation for his not taking over charge H of investigation. Thus, he having not conducted any investigation, the evidence

of Inspector could not be of any avail either to the prosecution or the defence. It is well settled that non-examination of any witness would not affect the prosecution case, but in a given case non-examination of a material witness may affect the same. Further it is well settled that non-examination of investigating officer is not fatal for the prosecution unless it is shown that the accused has been prejudiced thereby which could not be pointed out in the instant case. [27-B-D]

Masalti v. *The State of Uttar Pradesh,* AIR (1965) SC 202, referred to.

4.4. Submission that nothing incriminating could be recovered from the appellant-accused goes to show that they had no complicity with the crime cannot be accepted, more so when their participation in the crime is infolded in ocular account of the occurrence given by the witnesses, whose evidence has been found to be unimpeachable. [27-E-F]

4.5. With regard to the identity of the accused person, witnesses stated that there was no electricity in the village during that night and consistently deposed and supported each other on the point that accused persons had set fire to houses and heaps of straw in the light of which they had identified the accused persons, including the appellants. In view of the fact that the night was not dark and there was sufficient light by virtue of setting fire to the houses and heaps of straw, it cannot be said that it was not possible for the witnesses to identify the accused persons much less any of the appellants. [27-G-H]

4.6. The submissions that the accused persons may be sight seers as no suggestion was given to any of the witnesses on this score cannot be accepted. According to the prosecution case and the evidence, the accused persons arrived at the village of occurrence, pursuant to a conspiracy hatched up by them, they divided themselves into several groups, different groups went to the houses of different persons in the village, entered the houses by breaking open the door, forcibly took away inmates of the house after tying their hands, taken them first to the temple and thereafter near the canal where their legs were also tied and there some of them were done to death at the point of firearm, but a vast majority of them were massacred by slitting their throats with pasuli. All these acts were done by the accused persons pursuant to a conspiracy hatched up by them to completely eliminate a particular community in the village and to achieve that object, they formed unlawful assembly and different members of that unlawful assembly had played different roles. Thus, merely because the appellants are not said to have assaulted either any of the deceased or injured persons, it cannot be inferred that they had no complicity with the crime, more

A so according to the evidence they were also armed with deadly weapons, like firearms, bombs etc., but did not use the same. [28-B-E]

Masalti v. *The State of Uttar Pradesh,* AIR (1965) SC 202, referred to.

5. The number of accused persons was vast but upon completion of
B investigation, charge sheet was submitted against 119 persons and too many persons were shown as prosecution witnesses. The accused persons also set fire to the houses of the members of a particular community in the village. As a result of this incident, there was great commotion in the locality. There cannot be any manner of doubt that the villagers were done to death in an
C extremely diabolic, revolting and dastardly manner and had affected the normal tempo of life of the community in the locality. The crime in the instant case is not only ghastly, but also enormous in proportion as 35 persons, all of whom belonged to one community, were massacred. Thus, after taking into consideration the balance sheet of aggravating and mitigating circumstances, in which 35 person have been deprived of their lives by the accused persons
D who were thirsty of their blood, there is no doubt in holding that culpability of the accused persons assumes the proportion of extreme depravity that a special person can legitimately be said to exist within the meaning of Section 354 (3) of the Code of Criminal Procedure in the case on hand and it would be mockery of justice if extreme penalty of death is not imposed. Thus, Designated Court was quite justified in upholding convictions of the appellants
E and awarding the extreme penalty of death which punishment alone was called for in the facts of the case. [33-E-H; 34-A]

Masalti v. *The State of Uttar Pradesh,* AIR (1965) SC 202 and *Bachan Singh* v. *State of Punjab,* AIR (1980) SC 898, referred to.

F *Machhi Singh* v. *State of Punjab,* [1983] 3 SCC 470, relied on.

Per Pasayat J. (Supplementing)

1.1. Stress was laid by the accused-appellants on the non-acceptance of
G evidence tendered by some witnesses to contend about desirability to throw out entire prosecution case. In essence prayer is to apply the principle of falsus in uno falsus in omnibus. This plea is clearly untenable. Even if major portion of evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, notwithstanding acquittal of number of other co-accused persons, his conviction can be maintained. It is the duty of Court to separate grain from
H chaff. Falsity of particular material witness or material particular would not

ruin it from the beginning to end. The maxim "falsus in uno falsus in omnibus" has no application in India and the witnesses cannot be branded as liar. The maxim "falsus in uno falsus in omnibus" (false in one thing, false in everything) has not received general acceptance nor has this maxim come to occupy the status of rule of law. It is merely a rule of caution. All that it amounts to, is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a Court may apply in a given set of circumstances, but it is not what may be called 'a mandatory rule of evidence.' The doctrine is a dangerous one specially in India for if a whole body of the testimony were to be rejected, because witness was evidently speaking an untruth in some aspect, it is to be feared that administration of criminal justice would come to a dead-stop. Witnesses just cannot help in giving embroidery to a story, however true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some respects the Court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well. The evidence has to be shifted with care. The aforesaid dictum is not a sound rule for the reason that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishment. [35-C-G, H; 36-A-C]

1.2. Material discrepancies are those which are not normal, and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so. Accusations have been established against accused-appellants in the case at hand. [36-F-G]

1.3. The gruesome acts were diabolic in their conception and cruel in execution. There was deliberate and planned destruction of extensive properties and annihilation of large number of persons. All this happened, on account of caste war. In a country like ours where discrimination on the ground of caste or religion is a taboo, taking lives of persons belonging to another caste or religion is bound to have dangerous and reactive effect on the society at large. It strikes at the very root of the orderly society which the founding fathers of our Constitution dreamt of. It has been conclusively held that accused persons were not innocent by-standers or onlookers. Chain of evidence clearly shows what their object was. [36-H; 37-A-B]

1.4. Criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal

A **conduct. It ordinarily allows some significant discretion to the Judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Punishment ought always to fit with the crime. Thus conviction in sentence awarded by the trial court are to be upheld and appeal deserves to be dismissed. [37-F, 38-A]**

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Masalti and Ors. **v.** *State of Uttar Pradesh,* **AIR (1965) SC 202, distinguished.**

Anil Phukan **v.** *State of Assam,* **AIR (1993) SC 1462;** *Magsoodan* **v.** *State of U.P.,* **AIR (1983) SC 126;** *Padamasundara Rao (dead) and Ors.* **v.** *State of Tamil Nadu and Ors.,* **JT (2002) 3 SC 1;** *Nisar Ali,* **v.** *State of Uttar Pradesh,* **AIR (1957) SC 366;** *Gurucharan Singh and Anr.* **v.** *State of Punjab,* **AIR (1956) SC 460;** *Sohrab s/o Beli Nayata and Anr.* **v.** *State of Madhya Pradesh,* **[1972] 3 SCC 751;** *Ugar Ahir and Ors.* **v.** *The State of Bihar,* **AIR (1965) SC 277;** *Zwinglee Ariel* **v.** *State of Madhya Pradesh,* **AIR (1954) SC 15;** *Balaka Singh and Ors.* **v.** *The State of Punjab,* **AIR (1975) SC 1962;** *State of Rajasthan* **v.** *Smt. Kalki and Anr.,* **AIR (1981) SC 1390 and** *Ram Deo Chauhan* **v.** *State of Assam,* **(2000) AIR SCW 2784, referred to.**

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Per Shah J., (Dissenting)

E **1. It is settled law that when accused are charged with heinous brutal murders punishable to the highest penalty prescribed by the Penal Code, the judicial approach in dealing with such cases has to be cautious, circumspect and careful. In case of defective investigation, the Court can rely upon the evidence led by the prosecution and connect the accused with the crime if found reliable and trustworthy. [50-H; 51-A]**

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2.1. In the instant case, it is apparent that the investigation is totally defective. Investigating officers have not taken any care and caution of recording the statement of witnesses immediately. No identification parade of accused was held. Even the investigating officer was not examined. Almost all witnesses have exaggerated to a large extent by naming number of persons as accused but they could identify only one or two accused. This would clearly reveal that for one or other reason, witnesses were naming number of persons as accused who were not known to them or whom they had not seen at the time of incident. Therefore, their evidence to a large extent becomes doubtful and/or tutored. Further the witnesses nowhere assign any specific role to the accused, except their presence in the mob at the time of offence and also

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nowhere stated that identified accused were having any weapon of offence. Even the investigating officers have not recovered any weapon of offence or any incriminating article from the possession of any of the accused. Therefore, in view of the short-comings in the investigation and the evidence, which only proves the presence of the accused at the scene of offence, it would not be a fit case for imposing death penalty. [50-B; 51-E-H; 52-A]

2.2. Appellant No. 2 is acquitted of the charges for which he was facing trial and conviction of appellant Nos. 1, 3, and 5 and is upheld; however, imposition of death penalty is altered to life imprisonment. [52-B]

State (Delhi Admn.) **v.** *Laxman Kumar,* **[1985] 4 SCC 476;** *Kamaksha Rai and Ors.* **v.** *State of U.P.,* **[1999] 8 SCC 701;** *Masalti* **v.** *State of Uttar Pradesh,* **[1964] 8 SCR 133;** *Binay Kumar Singh* **v.** *State of Bihar,* **[1997] 1 SCC 283;** *Re; Baddi Venkata Narasayya and Ors.* **v.** *State of A.P.,* **[1998] 2 SCC 329;** *State of A.P.* **v.** *Thakkidiram Reddy and Ors.,* **[1998] 6 SCC 554;** *Hukam Singh and Ors.,* **v.** *State of Rajasthan,* **[2000] 7 SCC 490;** *Jamuna Chaudhary and Ors.* **v.** *State of Bihar,* **AIR (1974) SC 1822;** *Kishore Chand* **v.** *State of Himachal Pradesh,* **AIR (1990) SC 2140 and** *Dilavar Hussain* **v.** *State of Gujarat,* **[1991] 1 SCC 253, referred to.**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 761 of 2001.

From the Judgment and Order dated 8.6.2001 of the Designated High Court Gaya at Bihar in G.R. No. 430 of 1992.

WITH

Death Reference No. 1 of 2001.

U.R. Lalit and Irshad Ahmed for Sanjay Jain for the Appellant.

H.L. Agrawal and Kumar Rajesh Singh for B.B. Singh for the Respondent.

The Judgments of the Court was delivered by

B.N. AGRAWAL, J. This is an unfortunate case of a gruesome carnage on the holy land of Buddha, within the district of Gaya in the State of Bihar, where he got enlightenment, wherein 35 persons of a community, which was the most powerful one in the State at one point of time and ruled Bihar for decades, have been massacred with the unholy alliance of members of another community leading to more or less an outburst of caste war between haves

A and have nots.

This appeal has been directed against judgment rendered by Sessions Judge, Gaya-cum-Designated Court under Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter referred to as the 'TADA Act') whereby thirteen accused persons including the appellants were tried, out of whom, B four of them namely, Nanhe Yadav (Accused No. 1), Nanhak Teli (Accused No. 10), Naresh Chamar (Accused No. 11) and Ramashish Mahto (Accused No. 12) have been acquitted whereas the four appellants, viz., Krishna Mochi-appellant No. 1 (Accused No. 8), Dharmendra Singh @ Dharu Singh-appellant No. 2 (Accused No. 9), Nanhe Lal Mochi-appellant No. 3 (Accused no. 13) C and Bir Kuer Paswan @ Beer Kuer Dusadh-appellant No. 4 (Accused No. 5) have been convicted under Sections 302/149 of the Indian Penal Code, 1860 (in short 'Penal Code') and sentenced to undergo rigorous imprisonment for life. They have been further convicted under Section 3 (1) of the TADA Act and awarded death sentence and the proceedings have been submitted to this Court for confirmation. Bihari Manjhi (Accused No. 2), Ramautar Dusadh @ D Lakhan Dusadh (Accused No. 4), Rajendra Paswan (Accused No. 6) and Wakil Yadav (Accused No. 7) have been convicted under Section 302/149 of the Penal Code and Section 3 (1) of the TADA Act and sentenced to undergo rigorous imprisonment for life on each count. However, sentences have been ordered to run concurrently. Out of these four accused persons, accused Nos. E 2, 4 and 7 have filed separate appeal before this Court bearing Criminal Appeal No. 752 of 2001 whereas accused No. 6 has filed Criminal Appeal No. 765 of 2001 which though, have been heard together but are being disposed of by a separate judgment. Ravindra Singh (Accused No. 3) has been convicted under Section 3 (4) of the TADA Act and sentenced to undergo rigorous imprisonment for ten years but he has not preferred any F appeal.

In this case, there was gruesome carnage in which 35 members of one particular community in the State of Bihar lost their lives and the prosecution case, as disclosed in the *fard beyan* of one Satendra Kumar Sharma recorded in the wee hour of 13th February, 1992, is that in the same night about 9.30 G p. m., he was about to go to bed, all of a sudden upon hearing sound of indiscriminate firing and explosion of bombs, he became terrorised and found the village ablaze. In the meantime, a mob consisting of 10 to 15 unknown persons arrived at his house and started knocking at the door violently. One of such persons stated that they had come to apprehend Dayanand and H Haridwar Singh as according to their information, both of them were in one

of houses of that village. Upon this, the informant opened the door out of fear and those unknown persons took him near the temple situated on the north eastern flank of the village where he found his father, two uncles and four brothers amongst others. All these persons were kept with their hands tied on the back. Some 50 to 60 unknown persons being variously armed were guarding the villagers. Hands of the informant were also tied and he was also made to sit there. The unknown terrorists formed several groups each consisting of 15 to 20 persons. Each group used to go to village and bring the villagers. In presence of the informant, Lalesh Singh @ Nawlesh Singh, Lal Singh, Bhulas Singh, Srikant Singh and Ramakant Singh were also brought from village. One of the terrorists was stating that no male member should be left alive in the village. In the meantime, female folk including wife of Parishan Singh, Ramesh Singh, Nagina Singh and Lakhan Singh arrived there weeping. At that time, Sumiran Singh, Mithilesh Singh, Ekbal Singh, Upendra Singh and Awadhesh Singh were also brought and their hands were also tied. At that time, 5 to 6 terrorists including Mahendra Ravidas, Jugal Mochi, Bugal Mochi arrived there and stated that their leader Kirani had directed to take all the villagers near the bridge on the canal. One terrorist who was being addressed as Manesajee asked the female folk to go to their houses. Thereafter, the villagers were taken near the canal where they were kept confined with their hands and legs tied. In the meantime, the informant heard sound of firing coming from western side of the village and in the light of the fire, he identified several accused persons including the appellants naming all of them. The terrorists slittered the villagers by cutting their neck with the help of pasuli which is a sharp cutting weapon. In the mean time, the terrorists having guessed arrival of the police, started fleeing away whereby anyhow the informant could save his life. The police with informant went to the place of occurrence and found 35 persons named in the *fard beyan* dead and some persons having serious injuries who were immediately sent to hospital for treatment. It has been alleged in the *fard-beyan* that the terrorists were armed with police rifles and some of them were in police uniform. The terrorists were about five hundred in number, out of which about two to three hundred persons were armed. When they made their retreat they shouted slogan of Maoist Community Center (hereinafter referred to as "M.C.C. ") Zindabad. The terrorists were talking among themselves that they had come to annihilate persons belonging to one particular community which was object of the unlawful assembly and they wanted to strike terror in that community.

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On the basis of the said *fard beyan,* police instituted a case under Sections 147, 148, 149, 302, 307, 326, 436, 452, 341 and 342 of the Penal

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A Code and Section 17 of Criminal Laws (Amendment) Act besides Sections 3, 4 and 5 of TADA Act. During investigation the police arrested many persons and confessional statement of accused Bihari Manjhi was recorded by the Superintendent of Police, Gaya making self inculpatory statement implicating himself and several other accused persons, including appellants of the other two appeals in the crime. Upon completion of investigation, the B police submitted charge sheet against 119 persons showing them as absconders besides 13 accused persons whose cases were separated and they were put on trial.

Defence of the accused persons was that they were innocent and had C no complicity with the crime, but have been falsely implicated in the case on hand.

During trial, the prosecution examined 34 witnesses and upon conclusion of the same, by the impugned order, four accused persons named above have been acquitted whereas the remaining, including the appellants, have been D convicted as stated above. Hence, the present appeal.

In order to prove the massacre of 35 persons, the prosecution has examined four doctors, namely, Dr. Kapildeo Prasad (PW 1), Dr. Arvind Kumar (PW 13), Dr. Arjun Singh (PW 14) and Dr. Mukti Nath Singh (PW E 15) who held postmortem examinations on the dead bodies of different persons and found incised injuries in front of the neck caused by pasuli which is a sharp cutting weapon. The doctors also found that some of the deceased died due to fire arm injuries. The postmortem examination was conducted within a few hours of the occurrence and the time which elapsed between the time of death and post mortem examination, as found by doctors, was consistent F with the time of occurrence and supports the prosecution case. In order to prove its case that the accused persons belonged to M.C.C., their intention was to create terror in the minds of persons belonging to a particular community in Bihar and to achieve that end, they used bombs, dynamites, fire arms, lethal weapons besides sharp cutting weapon *pasuli* and massacred G 35 members of a particular community and injured several persons after surrounding them, prosecution examined Maneshwar Devi (PW 3), Lal Badan Devi (PW 4), Belmati Devi (PW 5), Birendra Singh (PW 6), Lavlesh Singh (PW 7), Yogendra Singh (PW 8), Brajesh Kumar (PW 11), Gopal Singh (PW 12), Ram Sagar Singh (PW 16), Budhan Singh (PW 18), Dhananjay Singh (PW 19), Bunde Singh (PW 20), Ram Sumiran Sharma (PW 21), Krishna H Devi (PW 22), Rajmani Devi (PW 23) and Usha Devi (PW 30) as witnesses

and upon consideration thereof, the trial court came to the conclusion that there was a gruesome carnage which conclusion could be neither assailed by learned counsel appearing on behalf of the appellants nor I find any infirmity in the well reasoned judgment by the Designated Court on this count.

Shri U.R. Lalit, learned senior counsel appearing on behalf of the appellants in support of the appeal submitted that the prosecution has failed to prove the participation of the appellants in the crime by credible evidence. Learned counsel further submitted that it is a fit case in which benefit of doubt should be given to the appellants as informant was not examined, as such the first information report cannot be used as substantive evidence. It has been also submitted that names of none of the appellants find place in the confessional statement said to have been made by co-accused Bihari Manjhi before the Superintendent of Police, Gaya, the investigating officer Ram Japit Kumar has not been examined, no incriminating articles could be recovered from the appellants, identification of the appellants was not possible in the dead of night and the appellants were not the assailants, but mere sight seers. Learned counsel, in the alternative, submitted that in any view of the matter, it was not a fit case for awarding the extreme penalty of death.

On the other hand, Shri H. L. Agrawal, learned senior counsel appearing on behalf of the State, submitted that the prosecution has succeeded in proving its case and complicity of the appellants with the crime by unimpeachable evidence and there was no infirmity in their convictions and sentence of death awarded against the appellants was in accordance with law as the present case falls in the category of "rarest of the rare".

Thus, this Court is called upon to examine in this appeal evidence showing complicity of the appellants with the crime and consider their cases individually. All the appellants who were accused Nos. 5, 8, 9 and 13 in the present trial were named in the first information report. Krishna Mochi-appellant No. 1 (Accused No. 8) is said to have been identified by prosecution witnesses, namely, Belmati Devi (PW 5), Birendra Singh (PW 6), Yogendra Singh (PW 8), Ram Sagar Singh (PW 16), Dhananjay Singh (PW 19), Bunde Singh (PW 20) and Lalita Devi (PW 29). Belmati Devi (PW 5) stated in her very examination-in-chief that she could not identify any of the accused persons which obviously means this accused as well, though, she stated that she disclosed name of this appellant before the police as one of the accused who participated in the occurrence but in her cross-examination, this witness resiled from the statement aforesaid made in the examination-in-chief, as she

A admitted that she did not disclose name of the appellant before the police. Birendra Singh (PW 6) claims in Court for the first time after seven years from the date of the alleged occurrence that he identified this appellant as one of the persons who participated in the alleged occurrence, he having not identified this appellant before the police as would appear from the statement of investigating officer Suresh Chander Sharma (PW 17),inasmuch as the B occurrence is said to have taken place on 12th February, 1992 and the witness was examined on 17th April, 1999. Thus, the evidence of Belmati Devi (PW 5) and Birendra Singh (PW 6) on the question of participation of this appellant cannot be of any avail to the prosecution.

C Yogendra Singh (PW 8) who was an injured witness and resident of the village of occurrence claims to have witnessed the entire occurrence as during night when he was inside the house, the accused persons entered the house after breaking open the door, tied hands of this witness as well as his family members and they were taken near the canal where he found other villagers were already surrounded by accused persons and some more being brought D with their hands tied. The accused persons thereafter got some other villagers from the temple and they tied their legs as well as of this witness and his family members inasmuch as started slitting their throats. Immediately after the occurrence, when the police arrived at the village, it found this witness lying on the ground with bleeding injuries. This witness together with other E injured persons and the dead bodies was shifted to the hospital. This witness had to remain in the hospital for 24 days where the police recorded his statement. He identified this accused as one of the persons who participated in the occurrence. It has been submitted that no reliance should be placed on the evidence of this witness as he was examined by the police after 24 days. But I do not find any material in support of this submission as neither this F witness nor anybody else has anywhere stated that police recorded his statement after 24 days rather, on the other hand, from the evidence of this witness, it appears that he was examined by the police in the hospital itself. It would appear that he was a natural witness as he was resident of the same village, the accused persons broke open the door of his house, took him and his G family members away from the house after tying their hands and the family members along with others were slittered to death before arrival of police which found this witness lying on the ground with bleeding injuries whereafter he was shifted to the hospital and there the police recorded his statement. This would go to show that the witness was examined by the police in the hospital immediately after he was shifted there. This being the position, I do H not find any ground to disbelieve this witness.

Ram Sagar Singh (PW 16) who was also resident of village of occurrence stated that at the time of the alleged occurrence, when he was at his house, upon hearing sound of firing and heavy explosion from the western side of the village, he opened the door, came out of his house along with his family members and found about hundred people standing at some distance from his house and seeing this witness, one of the accused persons shouted at him whereupon he ran to the house of Hari Singh and climbed on the roof from where he had seen that the accused persons were passing through the streets after setting fire to houses in the entire village. Accused persons were armed with rifles and guns and amongst them, he identified this appellant as well in the light of the fire which was set in the village by the accused persons. He has consistently supported the prosecution case that all the accused persons including this appellant as well as appellant No. 3 Nanhe Lal Mochi entered the village with fire arms and set the entire village on fire, but nothing could be pointed out on behalf of the defence to disbelieve his evidence.

Dhananjay Singh (PW 19) who was another injured person and resident of the village of occurrence stated that on 12th February, 1992, when he was sleeping in his house with his brothers, in the night, at about 9. 00 O'clock, sounds of explosion of bombs from all sides of village were heard and immediately thereafter his brother Vidya Bhushan Singh went out from the house for hiding himself in the house of a villager but before this witness could take shelter in the house of another villager, a bomb was thrown on the house making space for the accused persons to enter the same and thereafter they did enter the house with deadly weapons. The hands of this witness and his three brothers were tied and thereafter, they were taken to the temple where some people had already been brought from the eastern side of the village whose hands had also been tied and these persons were also made to sit there. Thereafter, all those persons including this witness and his family members whose hands were tied were taken to a bridge upon the canal where many other villagers were made to sit and there the accused persons started slitting their throats with pasuli as a result of which, left ear and throat of this witness were slittered and he became unconscious as a result of the injuries inflicted. After he regained consciousness on the next day, he was examined by the police immediately and before whom, he disclosed names of the accused persons, including this appellant, as persons who have participated in the present occurrence on the fateful night. He has categorically stated that he knew this accused from much before the date of the alleged occurrence. Learned counsel appearing on behalf of the accused persons could not point out any infirmity in the evidence of this witness so as to reject his sworn

A testimony.

Bunde Singh (PW 20) is also resident of the village of occurrence and he stated that on the fateful night, when he was sleeping in his house with brothers, he heard sounds of firing and bomb explosion immediately where after the accused persons, including this appellant, as well as appellant No. B 3, whom he identified, after breaking open the door of his house, entered the same and took them, after tying their hands, to the canal where their legs were alsc tied and there the accused persons started slitting the throats of the helpless persons whose hands and legs were tied. Thereafter some people were shot dead on the southern side of the canal. He has also stated that the C accused persons were shouting the slogans 'Long Live MCC' and 'whoever would come in their way, would be done to death.' This witness was examined by the police two days after the occurrence and it cannot be said that there was inordinate delay in recording his statement in the facts and circumstances of this case as it was a case of caste war wherein 35 persons of one community having been massacred and several injured, there was great commotion and D several villagers had to be examined. Learned counsel appearing on behalf of the accused persons could not point out any infirmity in the evidence of this witness.

Last witness on the question of participation of this appellant is Lalita Devi (PW 29). This witness, though, stated that she could identify this appellant E but could not identify him in Court due to very weak eye sight. Thus, the evidence of this witness on the participation of this appellant can be of no avail to the prosecution. This being the position, I have no difficulty in holding that the participation of this appellant in the crime has been proved by credible evidence of Yogendra Singh (PW 8), Ram Sagar Singh (PW 16), F Dhananjay Singh (PW 19) and Bunde Singh (PW 20) though it is not possible to place reliance upon the evidence of Belmati Devi (PW 5), Birendra Singh (PW 6) and Lalita Devi (PW 29).

Turning now to the participation of appellant No. 2-Dharmendra Singh @ Dharu Singh (Accused No. 9), it may be stated that he is said to have been G identified by Brajesh Kumar (PW 11), Dhananjay Singh (PW 19) and Ram Sumiran Sharma (PW 21). So far as Brajesh Kumar (PW 11) is concerned, this witness has named him for the first time in Session Court after seven and a half years from the date of alleged occurrence as according to the evidence of Investigating Officer Suresh Chander Sharma (PW 17), the witness did not H disclose the name of the appellant in his statement made before the police

inasmuch as no explanation could be furnished by the prosecution for such a non disclosure. This being the position, it is not safe to place reliance upon the evidence of this witness in relation to participation of this appellant.

Dhananjay Kumar (PW 19) though claimed that he identified this appellant but when he was asked to identify the appellant in Court, he wrongly identified this appellant as accused Dina Yadav @ Nanhe Yadav and not Dharmendra Singh @ Dharu Singh. Thus, the evidence of this witness in relation to participation of this appellant in the crime cannot be acted upon.

Last witness on the participation of this appellant in the crime is Ram Sumiran Sharma (PW 21). This witness was a resident of village of occurrence and on the date of occurrence when he was at his house with his family members, he heard sounds of bomb explosion and firing of bullets in the village and immediately, thereafter his house was attacked and this witness and his family members went to the adjoining house belonging to one Pardeep Singh for hiding themselves where three persons had already taken shelter. The accused persons went to said house and shouted that if the doors were not opened, the same would be blasted by bombs and saying so, they started throwing the bombs whereupon the female inmates had no option but to open the doors. The accused persons thereafter entered the house and took away the male members, after tying their hands, near the temple where 50 to 60 persons were already made to sit from before from where this witness and his family members and others were taken near the canal. There other accused persons had already assembled from before. This witness claimed to have identified this appellant and appellant No. 4-Bir Kuer Paswan. There the accused persons started slitting the throat of the helpless persons including this witness. There was a stampede and some of the persons who were brought there for slitting tried to flee away resulting into firing by the accused persons causing death of three persons. Thereupon, accused persons declared that from amongst the persons brought there, those who were members of communities other than the targeted one, were set free and upon this, the witness also intentionally declared himself to be of member of another community and thereby could rescue himself. The other persons who belonged to one community including father, uncle and brothers of this witness were slittered to death by causing injuries by pasuli. The accused persons were shouting slogans 'Long Live MCC' and 'anybody who comes in their way, would be destroyed. ' This witness was examined by the police in the hospital, where he had gone to receive the dead bodies of his family members, on the next morning of the occurrence. The witness identified this appellant as well

A as accused Nanhe Lal Mochi-appellant No. 3 (accused No. 13) and Bir Kuer Paswan @ Beer Kuer Dusadh-appellant No. 4 (accused No. 5). So far as this appellant is concerned, the witness in his cross-examination pretended that he was not known to him from before the incident, although, it was admitted by him that this appellant had agriculture land in the village of occurrence which is at a distance of one and a half kilometers away from his land. As suggestion B was given to this witness that there was animosity between them, on account of the land dispute as a result of which this appellant was falsely implicated, which clearly shows that the witness was very well known to this appellant from much before the date of the alleged occurrence. In my view, this witness has stood the tests of cross-examination and there is nothing to discredit his C testimony as he was quite natural witness and consistently supported the participation of this appellant in the crime with all material particulars. Thus, so far appellant No. 2 is concerned, out of the three witnesses, it is not possible to place reliance on the evidence of Brajesh Kumar (PW 11) and Dhananjay Singh (PW 19) but the evidence of Ram Sumiran Sharma (PW 21) is unimpeachable and he can be treated to be a sterling witness for the D prosecution.

Now, I proceed to consider the case of Nanhe Lal Mochi-appellant No. 3 (accused No. 13) who is said to have been identified by Yogendra Singh (PW 8), Ram Sagar Singh (PW 16), Budhan Singh (PW 18), Dhananjay E Singh (PW 19), Bunde Singh (PW 20), Ram Sumiran Sharma (PW 21), Krishna Devi (PW 22) and Lalita Devi (PW 29). Out of the aforesaid witnesses, Yogendra Singh (PW 8) has duly identified this appellant and I do not find any ground to disbelieve his evidence in relation to participation of this appellant as well in the crime for the reasons enumerated while considering his evidence in relation to appellant No. 1-Krishna Mochi.

F

Ram Sagar Singh (PW 16) claimed to have identified this accused from the roof top and I have considered the evidence of this witness in detail and found the same credible while appreciating the case of appellant No. 1-Krishna Mochi. In my view, evidence of this witness in relation to participation of this appellant as well is free from any doubt.

G

Budhan Singh (PW 18) was a resident of the village of occurrence. At the time of incident, when he was in the cattle shed, he heard sound of bomb explosion and simultaneously, accused persons who were in police uniforms came there and told him that they had gone there to arrest this witness. The H three sons of this witness who were also there succeeded in fleeing away but

the accused persons tied the hands of this witness on the back and took him near the temple. He claimed to have identified the accused persons including this appellant in the light of the fire which was lit in the stack of harvested crop kept there and from there, this witness along with others was taken to the canal where his legs were also tied. In the mean time, somebody blew the whistle and said that the police had arrived. The witness stated that in the mean time, two of his sons were slittered to death and seeing this, he got perplexed and remained standing there as a silent spectator. He was examined by the police on the third day of the incident as would appear from his evidence. In this connection, reference is made to the statement of one Vijay Pratap Singh (PW 33) who, at the relevant time, was police inspector and posted as Station Incharge of Tekari Police Station within which the village of occurrence falls. During the course of cross-examination, this witness has stated the reasons why on the date of occurrence and on the next day, the statements of many witnesses could not be recorded as they were not in a position to give their statements in view of the fact that they were busy in performing the last rites of their family members who were slittered to death and relatives of the persons who died were not in a mental condition to make statement. Further, the witness stated that there were visits of various political leaders in the locality as a result of which law and order condition had become complicated. According to the witness, the statement of other witnesses could not be recorded due to the aforesaid reasons which were beyond the control of the police. So far as Budhan Singh (PW 18) is concerned, two of his sons were slittered to death in the present occurrence and in view of the aforesaid facts, if his statement could not be recorded by the police on the date of occurrence as well as on the next day but on the third day, it cannot be said that there was inordinate delay in recording the statement of this witness. This being the position, I do not find any infirmity in the evidence of this witness in relation to participation of this appellant in the crime.

Dhananjay Singh (PW 19) also claimed to have identified this appellant but in Court, he wrongly identified this appellant as Rajinder Paswan. Similarly, Bunde Singh (PW 20) has wrongly identified accused Nand Lal Mochi as this appellant. Thus, the evidence of Dhananjay Singh (PW 19) and Bunde Singh (PW 20) can be of no avail to the prosecution to show participation of this appellant in the crime.

Ram Sumiran Sharma (PW 21) identified this appellant and there is no reason to discard his evidence on the question of participation of this appellant in the crime for the reasons detailed hereinabove while considering the

A evidence of this witness in relation to appellant No. 2-Dharmendra Singh @ Dharu Singh (Accused No. 9).

Krishna Devi (PW 22) who is also a resident of the village of occurrence and an eye witness to the occurrence inasmuch as at the time of the occurrence, when she was at her house, the accused persons came there and had broken B the door open after setting the house on fire. The accused persons are said to have taken away her father-in-law and brother-in-law to the temple where they were made to sit and after some time, they were taken near the canal along with others. When the lady went near the temple, she was asked by the accused persons to go back to her house. Thereafter upon hearing slogans of C the accused persons, this witness and other lady witness went towards the canal where this witness claimed to have seen the accused persons slitting to death along with others her father-in-law and brother-in-law with pasuli. She also stated that 35 persons were slittered to death and 5 to 6 were injured all of whom belonged to one community. The witness identified this accused as having participated in the occurrence. This witness was examined by police D two days after the incident from which it cannot be inferred that there was inordinate delay in her examination by the police for the reasons enumerated while considering the evidence of Budhan Singh (PW 18).

Lalita Devi (PW 29) though claimed to have identified this accused but E could not identify him on account of very weak eye sight at the time of her examination in Court. Therefore, no reliance can be placed on the evidence of such a witness. Thus, on the point of participation of this appellant, out of the evidence of Yogendra Singh (PW 8), Ram Sagar Singh (PW 16), Budhan Singh (PW 18), Dhananjay Singh (PW 19), Bunde Singh (PW 20), Ram Sumiran Sharma (PW 21), Krishna Devi (PW 22) and Lalita Devi (PW F 29), the evidence of Yogendra Singh (PW 8), Ram Sagar Singh (PW 16), Budhan Singh (PW 18), Ram Sumiran Sharma (PW 21) and Krishna Devi (PW 22) is unimpeachable whereas no reliance can be placed upon the statements of Dhananjay Singh (PW 19), Bunde Singh (PW 20) and Lalita Devi (PW 29).

G Coming now to the participation of the last appellant, namely, Bir Kuer Paswan @ Beer Kuer Dusadh-appellant No. 4 (accused No. 5), it may be stated that this appellant, according to the prosecution, was identified by Lavlesh Singh (PW 7), Dhananjay Singh (PW 19) and Ram Sumiran Sharma (PW 21). Out of the aforesaid witnesses, Lavlesh Singh (PW 7) who was also H one of the injured and was resident of the village of occurrence stated that

at the time of occurrence, when he was sleeping in the outer verandah of his house after having heard the sounds of firing and explosion of bombs, started fleeing away. In the mean time, the accused persons came armed with fire arms, set fire in the heap of straw which was kept outside the house, after breaking open the door of the house, entered the same and took away his brother and sons along with him to the temple where there were other accused persons and all of them surrounded the villagers who had already been brought there from different directions of the village. Thereupon, the accused persons took the aforesaid persons towards the canal after surrounding them and they were made to sit near the canal after tying their hands and legs. The accused persons slittered to death several persons with pasuli and inflicted injuries with pasuli on the throat of this witness as a result of which he fell down. This witness claimed to have identified this appellant. He stated that he remained hospitalised in Magadh Medical College for 22 days and the police recorded his statement. It has been submitted by learned counsel appearing on behalf of the appellants that this witness was examined by the police after 22 days for which there is no foundation as this witness has nowhere stated that he was examined after 22 days of the alleged occurrence nor there is any other evidence to this effect. Rather it appears from the evidence of this witness that he was examined by the police in the hospital itself. Learned counsel appearing on behalf of the appellants pointed out that during the course of cross-examination in paragraph 7 of his evidence, the witness admitted that after the accused persons entered the house upon breaking open the door, he became unconscious and regained consciousness in the hospital. Therefore, it cannot be said that he witnessed anything after the accused persons entered the house. I have perused paragraph 7 of the statement of this witness from which it appears that after the accused persons entered the house upon breaking open the door, the witness was so much terrified that he became completely nonplussed and regained normalcy by the time, he arrived at the hospital. Thus, I do not find any ground to reject testimony of the witness on the point of participation of this appellant in the crime.

Dhananjay Singh (PW 19) though claimed that he identified this appellant but he wrongly identified one Bihari Manjhi as this appellant. Thus, the evidence of this witness cannot be used to show complicity of this appellant with the crime.

Last witness on the question of participation of this appellant is Ram Sumiran Sharma (PW 21). This witness claimed to have identified this appellant and on the point of participation of this appellant, there is nothing

A to doubt the credibility of the witness, especially in view of the grounds mentioned while considering the evidence of this witness in relation to appellant No. 2-Dharmendra Singh @ Dharu Singh (Accused No. 9). Thus, out of the three witnesses, namely, Lavlesh Singh (PW 7), Dhananjay Singh (PW 19) and Ram Sumiran Sharma (PW 21) on the question of participation of this appellant in the crime, no reliance can be placed on the evidence of
B Dhananjay Singh (PW 19) but I do not find any infirmity in the evidence of Lavlesh Singh (PW 7) and Ram Sumiran Sharma (PW 21).

From the above, it would be plain that in relation to appellant no. 1 evidence of four witnesses, appellant no. 2 one witness, appellant no. 3 five
C witnesses, appellant no. 4 two witnesses has been found credible. It has been submitted by learned counsel appearing on behalf of the appellants that though, in ordinary case, trustworthy evidence of a solitary witness may be enough to convict an accused, but where a criminal court has to deal with evidence pertaining to the commission of an offence involving a large number of offenders and large number of victims, like the present one, it is usual to
D adopt the test that the conviction could be sustained only if it is supported by two or three or more witnesses who give a consistent account of the incident inasmuch as in the present case as far as appellant no. 2 is concerned, evidence of only one witness and in relation to appellant no. 4 evidence of only two witnesses has been found to be credible. In support of his submission, learned
E counsel has heavily relied upon a 4-Judge Bench decision of this Court in the case of *Masalti* v. *The State of Uttar Pradesh,* AIR (1965) SC 202. That was a case in which five persons were murdered, 40 accused were put on trial and the prosecution examined 12 eye-witnesses in support of its case. Out of 40 accused persons, five were acquitted by the trial court and 35 convicted under Sections 302/149 of the Indian Penal Code. Out of the 35 persons
F convicted, 10 accused persons were sentenced to death whereas remaining 25 were awarded imprisonment for life. When the matter was taken in appeal to the High Court of Allahabad, out of the 12 eye-witnesses, 2 were disbelieved and reliance was placed upon the remaining 10. The High Court confirmed conviction of only those accused persons against whom four or more eye-
G witnesses had given a consistent account of the incident and by adopting this test, seven accused persons were acquitted as the number of eye-witnesses in relation to them was less than four. The High Court, however, maintained the conviction of the remaining 28 accused persons, out of whom 16 persons appealed to this Court and their conviction was upheld by this Court also. It may be stated that against the order of acquittal, no appeal was preferred by
H the State. On these facts, it was contended on behalf of the accused persons,

whose conviction was upheld by the High Court, that the Court was not justified in upholding the conviction by mechanically evolving a formula that four or more witnesses had given a consistent account of the incident in relation to them. In that light, to meet the submission, Gajendragadkar, C. J., speaking for the Court, observed in paragraph 16 at page 210 thus:-

> ".....where a criminal court has to deal with evidence pertaining to the commission of an offence involving a large number of offenders and a large number of victims, *it is usual to adopt the test that the conviction could be sustained only if it is supported by two or three or more witnesses who give a consistent account of the incident.* In a sense, the test may be described as mechanical; but it is difficult to see how it can be treated as irrational or unreasonable. Therefore, we do not think that any grievance can be made by the appellants against the adoption of this test. If at all the prosecution may be entitled to say that the seven accused persons were acquitted because their cases did not satisfy the mechanical test of four witnesses, and if the said test had not been applied, they might as well have been convicted. *It is, no doubt, the quality of the evidence that matters and not the number of witnesses who give such evidence.* But sometimes it is useful to adopt a test like the one which the High Court has adopted in dealing with the present case."
>
> [Emphasis added]

Thus, it appears that this Court laid down that in the matter of appreciation of evidence what matters is the quality of evidence and not the number of witnesses, but sometimes, in appropriate cases, Court may adopt a test like the one adopted by the Allahabad High Court in that case. Though in that case basis of conviction of the appellants before this Court was credible evidence of four or more eye-witnesses, but still the Court observed that, ordinarily, in cases where there were large number of offenders and large number of victims it would be safe to convict only if the case is supported by two or three or more witnesses who give consistent account of the incident. This Court has observed such a rule of caution ordinarily, which would obviously mean that there is no blanket ban or rule of universal application that if the number of eye-witnesses is less than two, in no case conviction can be upheld. That apart, as in that case the appellants were convicted on the basis of evidence of four or more eye-witnesses, as a matter of fact the apex Court was not called upon to go into this question, but even then it has made such observations. As noted above, no rule of universal application was

A intended to be laid down or has been laid down. The decision is, therefore, not applicable to the facts of the present case.

It is matter of common experience that in recent times there has been sharp decline of ethical values in public life even in developed countries much less developing one, like ours, where the ratio of decline is higher. B Even in ordinary cases, witnesses are not inclined to depose or their evidence is not found to be credible by courts for manifold reasons. One of the reasons may be that they do not have courage to depose against an accused because of threats to their life, more so when the offenders are habitual criminals or high-ups in the Government or close to powers, which may be political, C economic or other powers including muscle power. A witness may not stand the test of cross-examination which may be sometime because he is a bucolic person and is not able to understand the question put to him by the skilful cross-examiner and at times under the stress of cross-examination, certain answers are snatched from him. When a rustic or illiterate witness faces an astute lawyer, there is bound to be imbalance and, therefore, minor D discrepancies have to be ignored. These days it is not difficult to gain over a witness by money power or giving him any other allurence or giving out threats to his life and/or property at the instance of persons, in/or close to powers and muscle men or their associates. Such instances are also not uncommon where a witness is not inclined to depose because in the prevailing E social structure he wants to remain indifferent. It is most unfortunate that expert witnesses and the investigating agencies and other agencies which have an important role to play are also not immune from decline of values in public life. Their evidence sometimes becomes doubtful because they do not act sincerely, take everything in a casual manner and are not able to devote proper attention and time.

F

Thus, in a criminal trial a prosecutor is faced with so many odds. The Court while appreciating the evidence should not lose sight of these realities of life and cannot afford to take an unrealistic approach by sitting in ivory tower. I find that in recent times the tendency to acquit an accused easily is G galloping fast. It is very easy to pass an order of acquittal on the basis of minor points raised in the case by a short judgment so as to achieve the yardstick of disposal. Some discrepancy is bound to be there in each and every case which should not weigh with the Court so long it does not materially affect the prosecution case. In case discrepancies pointed out are in the realm of pebbles, court should tread upon it, but if the same are boulders, H court should not make an attempt to jump over the same. These days when

crime is looming large and humanity is suffering and society is so much affected thereby, duties and responsibilities of the courts have become much more. Now the maxim "let hundred guilty persons be acquitted, but not a single innocent be convicted" is, in practice, changing world over and courts have been compelled to accept that "society suffers by wrong convictions and it equally suffers by wrong acquittals". I find this Court in recent times has conscientiously taken notice of these facts from time to time. In the case *Inder Singh and Anr.* v. *State (Delhi Administration)*, AIR 1978 Supreme Court 1091, Krishna Iyer, J. laid down that "Proof beyond reasonable doubt is a guideline, not a fetish and guilty man cannot get away with it because truth suffers some infirmity when projected through human processes." In the case of *State of U.P.* v. *Anil Singh,* AIR (1988) Supreme Court 1998, it was held that a Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties which the Judge has to perform. In the case of *State of West Bengal* v. *Orilal Jaiswal and Anr.*, [1994] 1 Supreme Court Cases 73, it was held that Justice cannot be made sterile on the plea that it is better to let hundred guilty escape than punish an innocent. Letting guilty escape is not doing justice, according to law. In the case of *Mohan Singh and Anr.* v. *State of M.P.*, [1999] 1 Supreme Court Reports 276, it was held that the courts have been removing chaff from the grain. It has to disperse the suspicious cloud and dust out the smear of dust as all these things clog the very truth. So long chaff, cloud and dust remains, the criminals are clothed with this protective layer to receive the benefit of doubt. So it is a solemn duty of the courts, not to merely conclude and leave the case the moment suspicions are created. It is onerous duty of the court, within permissible limit to find out the truth. It means, on one hand no innocent man should be punished but on the other hand to see no person committing an offence should get scot free. If in spite of such effort suspicion is not dissolved, it remains writ at large, benefit of doubt has to be credited to the accused.

Thus, in the present case where there was more or less a caste war between haves and have nots, gruesome murder of 35 persons of one community in which several persons were injured, great commotion in the locality, people became panicky as the accused persons were members of MCC, which is a very violent organisation, even if the complicity of the accused is proved by credible evidence of one or two witnesses, it would not be unsafe to convict an accused, rather a duty is enjoined upon the court not to acquit an accused on this ground alone unless the prosecution case is

A otherwise found to be untrustworthy. It is well settled that in a criminal trial credible evidence of even a solitary witness can form basis of conviction and that of even half a dozen witnesses may not form such a basis unless their evidence is found to be trustworthy inasmuch as what matters in the matter of appreciation of evidence of witnesses is not the number of witnesses, but the quality of their evidence. Thus, I do not find any substance in the B submission of the learned counsel appearing on behalf of the appellants on this count.

Learned counsel next contended that participation of the appellants in the crime becomes highly doubtful as their names have not been enumerated C in the confessional statement of accused Bihari Manjhi wherein he is said to have named several accused persons. In our view, there may be various reasons for non-disclosure of names of these appellants in the confessional statement of co-accused; they might not be fully known to the confessing accused or for reasons best known to him, with an oblique motive, to save the appellants, their names might not have been disclosed.

D

It has been further submitted that the informant Satendra Kumar Sharma has not been examined as such, First Information Report cannot be used as substantive piece of evidence inasmuch as on this ground as well the appellants are entitled to an order of acquittal. The submission is totally misconceived. E Even if the first information report is not proved, it would not be a ground for acquittal, but the case would depend upon the evidence led by prosecution. Therefore, non-examination of the informant cannot in any manner affect the prosecution case.

It has been also contended that Inspector Ram Japit Kumar, who was F one of the investigating officers, has not been examined. The alleged occurrence had taken place on 12.2.1992 and in the same night on the basis of fard-beyan of the informant recorded by PW. 33, as stated above, Inspector of Police Ram Janam Singh drew the formal First Information Report. From the evidence of this witness, it would appear that the Superintendent of Police, Gaya directed Inspector Ram Japit Kumar to investigate this case and so long G he did not take charge of the investigation, this witness was entrusted to commence the investigation under verbal orders of the Superintendent of Police, Gaya. PW 33, thereafter, inspected the place of occurrence and seized blood stained earth, empties and reminiscence of bomb explosion. This witness further stated that as till 17th February, 1992 Inspector Ram Japit Kumar did H not make himself available for taking over investigation of the case, he

requested Superintendent of Police to give necessary direction whereupon the investigation was entrusted to one Suresh Chandra Sharma (PW. 17) who, at that time, was posted as Inspector, Chandauti Police Station and PW. 33 made over charge of the case to PW. 17 on 19.2.1992, who, after completing investigation which was supervised by the Superintendent of Police himself, submitted chargesheet. From the above facts it would be plain that as Inspector Ram Japit Kumar had neither taken over charge of the investigation of the case at any point of time, much less investigated the same, no adverse inference can be drawn against the prosecution on account of his non-examination and non-furnishing of explanation for his not taking over charge of investigation. Thus, he having not conducted any investigation, the evidence of Inspector Ram Japit Kumar could not be of any avail either to the prosecution or the defence. That apart, it is well settled that non-examination of any witness would not affect the prosecution case, but in a given case non-examination of a material witness may affect the same. Reference in this connection may be made to the decision of this Court in the case of Masalti (supra). It is well settled that non-examination of investigating officer is not fatal for the prosecution unless it is shown that the accused has been prejudiced thereby. In the case on hand, in any view of the matter, it could not be pointed out that the defence has been prejudiced in any manner by non-examination of Inspector Ram Japit Kumar.

It has been then submitted on behalf of the appellants that nothing incriminating could be recovered from them which goes to show that they had no complicity with the crime. In my view, recovery of no incriminating material from the accused cannot alone be taken as a ground to exonerate them from the charges, more so when their participation in the crime is unfolded in ocular account of the occurrence given by the witnesses, whose evidence has been found by me to be unimpeachable.

It was pointed out that as the alleged occurrence is said to have taken place during the night, it was not possible to identify the accused persons, much less any of the appellants. Firstly, I find that the witnesses have stated that there was no electricity in the village during that night and consistently they have deposed and supported each other on the point that accused persons had set fire in houses and heaps of straw in the light of which they had identified the accused persons, including the appellants. In view of the fact that the night was not dark and there was sufficient light by virtue of setting fire in the houses and heaps of straw, it cannot be said that it was not possible for the witnesses to identify the accused persons much less any of the appellants

A Learned counsel further pointed out that according to the prosecution case and evidence, none of the appellants are alleged to have assaulted either any of the 35 deceased or the injured persons and that from mere presence at the place of occurrence their participation in the crime cannot be inferred inasmuch as they may be even sight seers. In my view, there is absolutely no foundation for the submissions that the accused persons may be sight seers as no suggestion was given to any of the witnesses on this score. According to the prosecution case and the evidence, the accused persons arrived at the village of occurrence, pursuant to a conspiracy hatched up by them, they divided themselves into several groups, different groups went to the houses of different persons in the village, entered the houses by breaking open the door, forcibly took away inmates of the house after tying their hands, taken them first to the temple and thereafter near the canal where their legs were also tied and there some of them were done to death at the point of firearm, but a vast majority of them were massacred by slitting their throats with pasuli. One thing is clear that all these acts were done by the accused persons pursuant to a conspiracy hatched up by them to completely eliminate members of a particular community in the village and to achieve that object, they formed unlawful assembly and different members of that unlawful assembly had played different role. In view of these facts, merely because the appellants are not said to have assaulted either any of the deceased or injured persons, it cannot be inferred that they had no complicity with the crime, more so according to the evidence they were also armed with deadly weapons, like firearms, bombs, etc., but did not use the same. Reference in this connection may be made to a decision of this Court in the case of Masalti (supra) where it was laid down that where a crowd of assailants, who were members of an unlawful assembly, proceeds to commit the crime in pursuance of the common object of that assembly, it is often not possible for witnesses to describe actual part played by each one of them and a large crowd of persons armed with weapons assaults the intended victims, it may not be necessary that all of them have to take part in the actual assault as in that case several weapons were carried by different members of unlawful assembly and an accused who was member of such an unlawful assembly and was carrying firearm cannot take any advantage from the fact that he did not use the firearms, though other members of the unlawful assembly used their respective arms.

Learned counsel appearing on behalf of the appellants, in the alternative, submitted that the present case cannot be said to be rarest of the rare one so as to justify imposition of extreme penalty of death. This question has been examined by this Court times without number. In the case of Masalti (supra)

a 4-Judge Bench of this Court had examined the question as to whether a member of unlawful assembly, the object of which was to commit murder of certain persons and some of the members of which had assaulted and done five members of a family to death, and others, though armed with weapon did not use the same, can be absolved from extreme penalty of death. It was contended that such a member of the unlawful assembly, who was not the assailant, could not be awarded the extreme penalty of death. Repelling the contention, Gajendragadkar, C.J., observed at pages 211-212 thus:-

> *".....As a mere proposition of law, it would be difficult to accept the argument that the sentence of death can be legitimately imposed only where an accused person is found to have committed the murder himself.* Whether or not sentences of death should be imposed on persons who are found to be guilty not because they themselves committed the murder, but because they were members of an unlawful assembly and the offence of murder was committed by one or more of the members of such an assembly in pursuance of the common object of that assembly, is a matter which has to be decided on the facts and circumstances of each case. In the present case, it is clear that whole group of persons belonged to Laxmi Prasad's faction, joined together armed with deadly weapons and they were inspired by the common object of exterminating the male member in the family of Gayadin. 10 of these persons were armed with fire-arms and the others with several other deadly weapons, and evidence shows that five murders by shooting were committed by the members of this unlawful assembly. The conduct of the members of the unlawful assembly both before and after the commission of the offence has been considered by the courts below and it has been held that in order to suppress such fantastic criminal conduct on the part of villagers it is necessary to impose the sentences of death on 10 members of the unlawful assembly who were armed with firearms. It cannot be said that discretion in the matter has been improperly exercised either by the trial Court or by the High Court. Therefore, we see no reason to accept the argument urged by Mr. Sawhney that the test adopted by the High Court in dealing with the question of sentence is mechanical and unreasonable. "
>
> [Emphasis added]

In the case of *Bachan Singh* v. *State of Punjab*, AIR (1980) SC 898, before a Constitution Bench of this Court validity of the provision for death

A penalty was challenged on the ground that the same was violative of Articles 19 and 21 of the Constitution and while repelling the contention, the Court laid down the scope of exercise of power to award death sentence and the meaning of the expression 'rarest of the rare' so as to justify extreme penalty of death and considered that Article 6 Clauses (1) and (2) of the International Covenant on Civil and Political Rights to which India has acceded in 1979 B do not abolish or prohibit the imposition of death penalty in all circumstances. All that they required is that, firstly, death penalty shall not be arbitrarily inflicted; secondly, it shall be imposed only for most serious crimes in accordance with a law, which shall not be an ex post facto legislation. The Penal Code prescribes death penalty as an alternative punishment only for C heinous crimes which are not more than seven in number. Section 354 (3) of the Criminal Procedure Code, 1973 in keeping with the spirit of the International Covenant, has further restricted the area of death penalty. Now according to this changed legislative policy, which is patent on the face of Section 354 (3), the normal punishment for murder and six other capital offences under the Penal Code, is imprisonment for life (or imprisonment for D a term of years) and death penalty is an exception. The present legislative policy discernible from Sec. 235 (2) read with Section 354 (3) is that in fixing the degree of punishment or making the choice of sentence for various offences, including one under Section 302, Penal Code, the Court should not confine its consideration "principally" or merely to the circumstances E connected with the particular crime, but also give due consideration to the circumstances of the criminal. In many cases, the extremely cruel or beastly manner of the commission of murder is itself a demonstrated index of the depraved character of the perpetrator. And it is only when the culpability assumes the proportion of extreme depravity that "special reasons" can legitimately be said to exist. Judges should never be blood thirsty. It is, F therefore, imperative to voice the concern that courts, aided by the broad illustrative guidelines indicated, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354 (3), *viz.*, that for persons convicted of murder, life imprisonment is the rule and death sentence an exception.

G In the case of *Machhi Singh* v. *State of Punjab*, [1983] 3 SCC 470, a 3-Judge Bench of this Court following the decision in Bachan Singh (supra), observed that in rarest of rare cases when collective conscience of the community is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards H desirability or otherwise of retaining death penalty. The community may

entertain such a sentiment in the following circumstances: A

I. When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community. For instance, when the house of the victim is set aflame with the end in view to roast him alive in the house; when the victim is subjected to inhuman B acts of torture or cruelty in order to bring about his or her death; and when the body of the victim is cut into pieces or his body is dismembered in a fiendish manner.

II. When the murder is committed for a motive which evinces total depravity and meanness. For instance when a hired assassin C commits murder for the sake of money or reward or a cold-blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or *vis-a-vis* whom the murderer is in a dominating position or in a position of trust, or a murder is committed in the course for betrayal of the motherland. D

III. When murder of a member of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances etc., which arouse social wrath. For instance when such a crime is committed in order to terrorise such persons and frighten them into fleeing from a place or in order to deprive E them of, or make them surrender, lands or benefits conferred on them with a view to reverse past injustices and in order to restore the social balance. In cases of 'bride burning' and what are known as 'dowry deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation. F

IV. When the crime is enormous in proportion. For instance when multiple murders say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

V. When the victim of murder is (a) an innocent child who could G not have or has not provided even an excuse, much less a provocation, for murder (b) a helpless woman or a person rendered helpless by old age or infirmity (c) when the victim is a person *vis-a-vis* whom the murderer is in a position of domination or trust (d) when the victim is a public figure generally loved and H

A respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons.

In the said case, the Court further observed that in this background the guidelines indicated in the case of Bachan Singh (supra) will have to be B culled out and applied to the facts of each individual case and where the question of imposing death sentence arises, the following proposition emerge from the case of *Bachan Singh* (supra) :-

(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

C (ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.

(iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life D imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

E

(iv) A balance-sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

F

The Court thereafter observed that in order to apply these guidelines the following questions may be answered:-

(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?

G

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?

H Ultimately, in the said case of *Machhi Singh* (supra), the Court observed

that if upon an overall global view of all the circumstances in the light of the aforesaid proposition and taking into account the answers to the questions posed hereinabove, the circumstances of the case are such that death sentence is warranted, the Court would proceed to do so. A

In the light of the law already laid down by this Court referred to above, now this Court is called upon to consider whether the present case would come within the realm of the *rarest of the rare* or not. From the evidence adduced, it has been amply proved that the accused persons belonged to a militant group, being members of M.C.C. which is considered to be an organisation of militants, hatched up a conspiracy to massacre members of one particular community in the village in question and were raising slogans 'long live MCC' and 'whoever comes in their way, would be destroyed'. Pursuant to the conspiracy hatched up, the militants formed different groups and went to different localities in the village in police uniforms armed with fire arms and explosive substances, broke open the doors of houses of members of that particular community, took out the entire family members after tying their hands, had taken some of them to the temple and thereafter to the canal whereas others were directly taken to the canal after tying their hands where their legs were also tied and after surrounding them from all sides, when they were in most helpless condition and could not take recourse to save their lives, some of them were done to death by fire arms but vast majority were massacred by slittering their throats with pasuli which resulted into 35 casualties and several persons were injured including prosecution witnesses. The number of accused persons was vast but upon completion of investigation, charge sheet was submitted against 119 persons and so many persons were shown as prosecution witnesses therein. The accused persons also set fire to the houses of the members of the said community in the village. As a result of this incident, there was great commotion in the locality. There cannot be any manner of doubt that the villagers were done to death in an extremely diabolic, revolting and dastardly manner and had affected the normal tempo of life of the community in the locality. The crime in the present case is not only ghastly, but also enormous in proportion as 35 persons, all of whom belonged to one community, were massacred. Thus, after taking into consideration the balance sheet of aggravating and mitigating circumstances, in which 35 persons have been deprived of their lives by the accused persons who were thirsty of their blood, I have no doubt in holding that culpability of the accused persons assumes the proportion of extreme depravity that a special reason can legitimately be said to exist within the meaning of Section 354 (3) of the Code of Criminal Procedure in the case on hand and it would B C D E F G H

A be mockery of justice if extreme penalty of death is not imposed. Thus, I am clearly of the opinion that the Designated Court was quite justified in upholding convictions of the appellants and awarding the extreme penalty of death which punishment alone was called for in the facts of the present case.

In the circumstances of the case, the appeal fails and the same is
B dismissed but the reference is accepted and death penalty awarded against the appellants is confirmed.

ARIJIT PASAYAT, J. While I respectfully agree with Brother B. N. Agrawal that the appeal deserves dismissal, few aspects are indicated by me to supplement his conclusions and views.
C

Accused appellants have placed strong reliance on the decision of this Court in *Masalti and Ors.* v. *State of Uttar Pradesh,* AIR (1965) SC 202 to contend that since large number of accused persons were involved, evidence of one or two/three witnesses would not suffice.

D To bring home accusation against appellant No. 2 (A-9) Dharmendra Singh @ Dharu Singh, prosecution placed reliance on the evidence of Brajesh Kumar (PW11), Dhananjay Singh (PW19) and Sumiran Sharma (PW 21). Evidence of PWs 11 and 19 has not been considered credible. So PW 21 also pointed out accusing fingers at appellant No. 3 Nanhe Lal Mochi (accused
E No. 13) and appellant No. 4-Bir Kuer Paswan (accused No. 5). So far as accused-appellant No. 2 Dharmendra Singh @ Dharu Singh is concerned, PW21's evidence is the only material against him, while in case of the other two accused-appellants other witnesses have also corroborated the version of this witness. *Masalti's* case (supra) cannot be said to have laid down any rule of universal application as contended by learned counsel for accused-appellants
F that conviction cannot be made on the basis of a single witness's evidence, as large number of accused persons are on trial. It is a well settled principle in law that evidence is to be considered on the basis of its quality and not the quantity. Section 134 of Indian Evidence Act, 1872 is a pointer in that regard. This provision follows the maxim that evidence is to be weighed and not
G counted. In *Masalti's* case (supra), the desirability to have at least two witnesses has been stated to be a matter of prudence. Such a requirement can never be said to be inviolable, as would be culled out from *Anil Phukan* v. *State of Assam,* AIR (1993) SC 1462), *Maqsoodan* v. *State of U.P.,* AIR (1983) SC 126. Appreciation of evidence cannot conceive of any rule of universal application and is certainly not to be treated as a theorem, and there can be
H no empirical formula. The evidence on the facts of each case has to be

analysed and conclusions drawn, and there cannot be pigeon-holing of evidence on any set formula. It has not been shown by accused-appellants as to how evidence of PW 21 suffers from any infirmity. Since in *Masalti's* case (supra) a rule of caution was laid and not a mandatory rule of universal application, it is certainly not to be treated as a rule of law. There is always peril in treating the words of a judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. (See *Padamasundara Rao (dead) and Ors.* v. *State of Tamil Nadu and Ors.*, JT (2002) 3 SC 1. It is more so in a case where conclusions relate to appreciation of evidence in a criminal trial.

Stress was laid by the accused-appellants on the non-acceptance of evidence tendered by some witnesses to contend about desirability to throw out entire prosecution case. In essence prayer is to apply the principle of *falsus in uno falsus in omnibus.* This plea is clearly untenable. Even if major portion of evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, notwithstanding acquittal of number of other co-accused persons, his conviction can be maintained. It is the duty of Court to separate grain from chaff. Where chaff can be separated from grain, it would be open to the Court to convict an accused notwithstanding the fact that evidence has been found to be deficient to prove guilt of other accused persons. Falsity of particular material witness or material particular would not ruin it from the beginning to end. The maxim "falsus in uno falsus in omnibus" has no application in India and the witnesses cannot be branded as liar. The maxim "falsus in uno falsus in omnibus" (false in one thing, false in everything) has not received general acceptance nor has this maxim come to occupy the status of rule of law. It is merely a rule of caution. All that it amounts to, is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a Court may apply in a given set of circumstances, but it is not what may be called 'a mandatory rule of evidence'. (See *Nisar Alli* v. *The State of Uttar Pradesh,* AIR (1957) SC 366. Merely because some of the accused persons have been acquitted, though evidence against all of them, so far as direct testimony went, was the same does not lead as a necessary corollary that those who have been convicted must also be acquitted. It is always open to a Court to differentiate accused who had been acquitted from those who were convicted. (See *Gurucharan Singh and Anr.* v. *State of Punjab,* AIR (1956) SC 460. The doctrine is a dangerous one specially in

A India for if a whole body of the testimony were to be rejected, because witness was evidently speaking an untruth in some aspect, it is to be feared that administration of criminal justice would come to a dead-stop. Witnesses just cannot help in giving embroidery to a story, however true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some respects the Court B considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well. The evidence has to be shifted with care. The aforesaid dictum is not a sound rule for the reason that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any C rate exaggeration, embroideries or embellishment. (See *Sohrab s/o Beli Nayata and Anr.* v. *The State of Madhya Pradesh,* [1972] 3 SCC 751 and *Ugar Ahir and Ors.* v. *The State of Bihar,* AIR (1965) SC 277. An attempt has to be made to, as noted above, in terms of felicitous metapher, separate grain from the chaff, truth from falsehood. Where it is not feasible to separate truth from falsehood, because grain and chaff are inextricably mixed up, and in the D process of separation an absolutely new case has to be reconstructed by divorcing essential details presented by the prosecution completely from the context and the background against which they are made, the only available course to be made is to discard the evidence in toto. (See *Zwinglee Ariel* v. *State of Madhya Pradesh,* AIR (1954) SC 15 and *Balaka Singh and Ors.* v. E *The State of Punjab,* AIR (1975) SC1962. As observed by this Court in *State of Rajasthan* v. *Smt. Kalki and Anr.,* AIR (1981) SC 1390, normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. Material F discrepancies are those which are not normal, and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so. Accusations have been established against accused-appellants in the case at hand.

G The factual scenario highlighted and established by the prosecution shows how gruesome and macabre acts were perpetrated by the accused persons. Thirty five people lost their lives and several others have been seriously injured because of caste war. The gruesome acts were diabolic in their conception and cruel in execution. There was deliberate and planned H destruction of extensive properties and annihilation of large number of persons.

All these happened, as noted above, on account of caste war. In a country like ours where discrimination on the ground of caste or religion is a taboo, taking lives of persons belonging to another caste or religion is bound to have dangerous and reactive effect on the society at large. It strikes at the very root of the orderly society which the founding fathers of our Constitution dreamt of. It has been conclusively held that accused persons were not innocent by-standers or onlookers. Chain of evidence clearly shows what their object was.

The guidelines which emerge from *Bachan Singh's* case (supra) have to be applied to the facts of each individual case where the question of imposition of death sentence arises. In case at hand, in the minimum guidelines (1) and (4) which are as follows are clearly applicable:-

(1) When the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community.

x x x x x

x x x x x

(4) When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

The criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the Judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Punishment ought always to fit with the crime.

In *Ram Deo Chauhan* v. *State of Assam,* (2000) AIR SCW 2784), this court observed that though it is time that in a civilized society a tooth for tooth, and a nail for nail or death for death is not the rule, but it is equally true that when a man becomes a beast and menace to the society, he can be deprived of his life according to the procedure established by law, as Constitution itself has recognized the death sentence as a permissible punishment for which sufficient constitutional provisions for an appeal, reprieve and the like have been provided under the law. Above being the position, the accused-appellants deserve death sentence which has been

A awarded by the Trial Court. In conclusion, the conviction and the sentence as awarded by the Trial Court are to be upheld and appeal deserves to be dismissed.

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

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

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

(hereinafter referred to as "IPC"). After recording the evidence, by judgment and order dated 8. 6. 2001, the Designated Court

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

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

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

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

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

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

In heinous crime, where 35 persons lost their lives, prosecution has not examined the informant Satendra Kumar Sharma, therefore, it would be difficult to refer to the contents of the FIR. However, we would refer to evidence of PW33 Vijay Pratap Singh, Inspector, who was station-in-charge of police station Tekari. It is his say that on 12th February, 1992 at about 10.00 P.M. when he was ready for patrolling, all of a sudden he heard noise of explosions. He, therefore, along with the sub-inspector and other available armed force jawans left the police station for finding out as to what has happened. On the way, he met Sidheshwar Yadav, who was the mukhia of the village but he was not having any information with regard to the incident. He along with Sidheshwar Yadav started for going ahead. After going at some distance, they saw that the sky was red because of flames. Thereafter,

A they approached village Dihura and saw one Krishna Yadav and Bhola Paswan, Chowkidars of the village and Ram Yogesh Singh, Dafadar. PW33 enquired from them about the lit up village towards the east of village Dihura. It is his say that they were frightened and informed him that some party people have attacked the village Bara. They used the word "party" for militants. As he was hearing the noises of bombs and bullets, he gave information to the B Superintendent of Police who directed him to proceed towards the place of occurrence. They left the mobile jeep on the road and when they were proceeding towards village Bara they were attacked by the extremists from the western side of village Bara. They also opened fire in self defence. Meantime, Superintendent of Police reached there at about 11. 30 P.M. along C with police force. It is his say that thereafter they reached village Bara at about 1.00 A.M., where they heard the slogan "whoever comes near the village will be eliminated". After some shouts, one young person whose hands were tied at the back came running and on being asked he told that he was Shravan Kumar. After seeing that police has arrived, militants started running towards the East. When they entered the village there was total D quiteness. They found the bridge on the canal about 200 yards east of the village. They found dead bodies of people scattered in the fields. Their hands were tied at the back and their throats were slit. Thereafter, information was conveyed immediately to Inspector General of Police, Gaya and other senior police officers. He took the injured for medical treatment at Magadh Medical E College Hospital. Informant Satendra Kumar Sharma gave statement Ex. 8, which was recorded as fard-beyan. Thereafter, the formal F.I.R. Ex. 9 was written by Ram Janam Singh, Inspector of PS Tekri. It is his say that place of incident is village Bara which is about 5 km. from the police station Tekri. In the said village, there are 50 houses, out of which 5 are those of Brahmins, 1 of Harijan, 1 of Gwala community and the rest of the houses are those of F bhumihar community. The militants took the villagers from their houses in the field adjacent to Shiv Mandir situated at a distance of 20 yards on the northern side of the village, from there they took them in the grass field and then to the bridge on the eastern side of the canal and after tying their hands with their own clothes killed them by slitting their throats. It is his say that G one Nanhe Yadav, A-1, was arrested from Alipur bus stand on 17.2.1992. His statement was recorded and thereafter he was sent to judicial custody. The statement of other witnesses could not be recorded as no witness was under condition of giving statement. Thereafter, Superintendent of Police on 17.2.1992 directed that the investigation of the incident should be conducted by Inspector Ram Japit Kumar. As Ram Japit Kumar was not available, H investigation was handed over to Inspector Suresh Chander Sharma. In cross-

examination, he admitted that the entire investigation was conducted by Ram Japit Kumar. He had not recorded the statement of any witness including that of Chowkidars Krishna Yadav and Bhola Paswan and Dafadar Ram Yogesh Singh. He also admitted that daily diary entry no. 262 of 1992 was not with him. He admitted that he had not seen the notification of TADA. He had not taken approval of Superintendent of Police and Director General of Police before commencing investigation and he began investigation upon oral instructions of Superintendent of Police and thereafter handed over the investigation to Subhash Chander Sharma (PW17). He denied the suggestion that Ram Japit Kumar found the accused persons named in the FIR to be innocent and that to suppress the investigation done by Ram Japit Kumar and diary written by him, he had written an anti-dated diary and that was done to fill-up the gap of investigation carried out by Ram Japit Kumar.

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

PW2 Sunil Kumar, Superintendent of Police is also examined. It is his say that after receipt of the information he along with armed force reached village Bara at about 12.15 to 12.30 in the night on the day of incident. There he saw lot of people had been killed by slitting their throats. Some houses had also been set on fire. Some persons were lying injured and they were sent to hospital in police vehicle. On 27.2.1992, he received information of the arrest of Behari Manjhi of village Jhani Bigha, PS Bodhgaya. He went there and informed Behari Manjhi that whatever statement he wanted to give, he should make without fear or favour and thereafter he recorded the confessional statement of Behari Manjhi under TADA Act. That statement was recorded by Suresh Chander Sharma, Inspector PS Chandauti. Before the court, he could not identify who was Behari Manjhi. In cross-examination, he stated that all the police personnel of P.S. Tekri including the station-in-charge were involved in arresting the accused persons and that number of VIPs were visiting the place and the police officers were busy. Therefore, investigation was entrusted to Police Inspector of P.S. Chandauti. He did not remember as to whether they took written permission to invoke TADA Act. He also stated that he cannot say that under the TADA Act investigation can be carried out only by an officer of the rank of DSP or above.

PW32 Virendra Kumar Singh, who was posted as station-in-charge of

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

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

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

F

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

1. the identification of the accused is not reliable one;

G 2. even if it is held that accused were present in the mob of 600-700 persons, there is no justifiable reasons for connecting the accused with the crime;

3. no witness has stated that accused were armed with any deadly weapons;

H 4. no witness has stated that any of the accused took part in murder

of any of the deceased or of causing any injury to any witness or setting fire to the houses; A

5. there is no recovery of any arms or any incriminating articles from any of the accused;

6. the statements of witnesses are recorded after long lapse of time, mostly after more than 20-22 days; B

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

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

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

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

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

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

PW6 Birender Singh after narrating the facts has stated that on the day of incident, the militants took them to a place near the canal under the bridge. The militants were cutting the throats by a fasuli. Mahinder Ravi Das, Yugal Ravi Das and Bhugal Ravi Das were amongst the militants. He was hit by H

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

D

PW29 Lalita Devi stated that the incident is of about 8-9 years old. The militants surrounded their village and they were armed with guns and ammunition. The incident took place at 9:00 P.M. The militants entered into their house by breaking the door. Amongst the militants, she could identify E Krishna, Yugal, Bugal and Nanhe Lal Mochi. Her statement was recorded after 5/6 days. She however, stated that since her eye-sight has become weak, she cannot identify anybody.

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

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

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

G

PW8 Yogender Singh is another injured witness. It is his say that on 12.2.1992 between 9.00 and 9.15 p.m. extremists raided their house. He was sleeping along with his brothers Bunda Singh, Madan Singh and Mithilesh Singh and guests Nagender Singh, Satender Singh s/o Guriban Singh. All of a sudden, they heard the noise of bullets and bombs. The people of the H village started running here and there. Vidya Bhushan Singh of their village

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

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

PW16 Ram Sagar Singh stated that militants were armed with rifles, guns and bullets, they burnt the entire village and that he can identify Mahender Mochi, Krishna Mochi, Nanhe Lal Mochi, Yugal Mochi, Bugal Mochi who were amongst the militants. However, he could identify only Nanhe Lal Mochi and Krishna Mochi present in the court. It is his say in cross-

examination that he saw militants from the top of the roof. He denied the suggestion that there was a long standing dispute between him and Nanhe Lal Mochi and Krishna Mochi and, therefore, he has falsely implicated them.

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

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

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

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

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

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

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

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

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

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

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

A above.

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

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

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

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

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

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

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PW7 Lavlesh Singh also narrated the prosecution version and thereafter stated that among the people who were slitting throats were Mohinder Mochi, Nanhak Yadav, Nanhak Teli, Bir Kunwar Paswan, Rajinder Paswan, Bugal Mochi, Yugal Mochi, Vyas Ram, Akhileshwar Thakur, Gira Verma, Kirani @ Suraj Dev Yadav and lot of other people whose names he was not knowing. H However, in the Court, he could identify Bir Kunwar Paswan and stated that

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

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

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

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

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

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

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

However, from the evidence di cussed above, it can be stated as under:

B (1) It is apparent that the in estigation in the present case is totally defective. The investigat ng officers have not taken any care and caution of recording the tatement of witnesses immediately. No identification parade of a cused was held. Investigating officer is not examined. As obser d by this Court in *Jamuna Chaudhary and Ors.* v. *State of Bih r,* AIR (1974) SC 1822, it should not C be forgotten that the du y of the Investigating Officers is not merely to bolster up a p rosecution case with such evidence as may enable the Court to ecord a conviction but to bring out the real unvarnished truth. In the said case, the Court has also observed where neither he prosecution nor the defence come D out with the whole and u nvarnished truth to enable the Court to judge where the rights ar l wrongs of the set of incidents lay, the courts can only try to g ess or conjecture to decipher the truth if possible. But this ma y be done within limits to determine whether any reasonable doubt emerges on any point under consideration from prov d facts and circumstances of the case. E Further, this Court in *Kishore Chand* v. *State of Himachal Pradesh,* AIR (1990) SC 2140 observed that indulging in free fabrication of the record is a deplorable conduct on the part of an investigating officer w hich undermines the public confidence reposed in the investigat ng agency. Therefore, greater care and F circumspection are need d by the investigating agency in this regard. It is time that the investigating agencies evolve new and scientific investigating m ethods, taking aid of rapid scientific development in the field of investigation. It is also the duty of the State, i.e. Central or S ate Governments to organise periodical refresher courses for the in vestigating officers to keep them abreast G of the latest scientific dev elopment in the art of investigation and the march of law so that the real offender would be brought to book and the innocent w ould not be exposed to prosecution.

(2) It is also settled law that when accused are charged with heinous brutal murders punishab e to the highest penalty prescribed by H the Penal Code, the judic al approach in dealing with such cases

has to be cautious, circumspect and careful. In case of defective investigation, the Court can rely upon the evidence led by the prosecution and connect the accused with the crime if found reliable and trustworthy. In *Dilavar Hussain* v. *State of Gujarat,* [1991] 1 SCC 253, this Court dealt with a communal riot case which was considered by the court as tragic trauma of ghastly, inhuman and beastly behaviour of one community against another where burning, looting and killing became the order of the day, and observed -

> "But sentiments or emotions, howsoever strong, are neither relevant nor have any place in a court of law. Acquittal or conviction depends on proof or otherwise of the criminological chain which invariably comprises of why, where, when, how and who.
>
> Misgiving, also, prevailed about appreciation of evidence. Without adverting to submissions suffice it to mention that credibility of witnesses has to be measured with same yardstick, whether, it is ordinary crime or a crime emanating due to communal frenzy. Law does not make any distinction either in leading of evidence or in its assessment. Rule is one and only one namely, whether depositions are honest and true. "

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

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

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

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

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

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

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

N.J. Appeal and death Reference dismissed.