ANAND MOHAN

*v.*

STATE OF BIHAR

(Criminal Appeal Nos. 1804-1805 of 2009 etc.)

JULY 10, 2012

**[A.K. PATNAIK AND SWATANTER KUMAR, JJ.]**

*Penal Code, 1860 – ss. 147, 302/149, 307/149 and 302/109 – Prosecution of 36 accused – Murder of District Magistrate – In funeral procession of political leader who was murdered by unknown criminals – By brother of the deceased leader, at the instigation of the accused – FIR by Police Officer – Ten of the fourteen witnesses near the place of occurrence deposing that only A-1 exhorted the shooter and not A-2, A-3 and A-4 – Trial court convicting A-1 to A-7 of all the charges – A-1, A-3 and A-4 sentenced to death and A-2, A-5, A-6 and A-7 sentenced to life imprisonment – Rest of the accused acquitted – High Court acquitting all the accused u/ss. 147 and 302/149, acquitting A-2, A-3 and A-4 u/s. 302/109, and convicting A-1 u/s. 302/109 – A-1 sentenced to life imprisonment – Appeal by A-1 against conviction and by the State against acquittal order and against the order reducing sentence of A-1 – Held: Prosecution case against A-1 supported by prosecution witness – High Court rightly acquitted A-1 to A-7 u/s. 302/149 rejecting the prosecution case that there was unlawful assembly with the object of killing the deceased – The majority of the prosecution witnesses did not support the prosecution case that A-2, A-3 and A-4 exhorted the shooter while supported the case that A-1 exhorted the shooter – A-1 also not able to prove that he was not at the place of occurrence, the burden to prove which was on him – He did not take such plea u/s. 313 Cr.P.C. – Therefore, A-2 to A-4 rightly acquitted u/s. 302/109 and A-1 rightly convicted thereunder – As the District Magistrate was*

A *killed as an occupant of a car by chance, on account of mob fury and since the accused was not the assailant himself, RI for life is appropriate – Code of Criminal Procedure, 1973 – s. 313 – Evidence Act, 1872 – s. 103.*

B *Evidence – Evidence of exhortation, is a weak piece of evidence – Therefore, unless the evidence in this regard is clear, cogent and reliable, no conviction for abetment can be recorded – Penal Code, 1860 – s. 109.*

**36 accused including the appellants-accused No. 1,**
C **were prosecuted u/ss. 147, 302/149, 307/149, 302/109. The prosecution case was that 'C' a political leader was murdered by certain unknown criminals. His funeral procession was led by A-1 (an MLA), A-2 (an M.P), A-3 and few others in their respective vehicles. A-1, A-2 and A-3**
D **had given speeches instigating the crowd to take revenge of the murder and teach the administration a lesson. When the procession moved further, the shouts 'Maro Maro' were heard from the midst of the procession. When the informant (a police official on duty) reached there,**
E **found that car of the District Magistrate of some other district had turned turtle and the District Magistrate was lying on the ground. A-1, A-2, A-3 and some others were there provoking 'B' the brother of 'C' to kill the Magistrate and take revenge. 'B' fired at the Magistrate and fled**
F **away. The Magistrate succumbed to the injuries, in the Hospital. In the meantime 15 persons, including A-1 and A-2 were arrested. The informant had sent information about the incident through wireless, soon after the incident. The informant later sent a typed report about the**
G **incident which was lodged as FIR.**

**Trial Court convicted A-1 to A-7 u/ss. 147, 302/149, 307/149 and 327/149 IPC; further convicted A-1, A-2, A-3 and A-4 u/s. 302/109 IPC, and rest of the accused were acquitted of all the charges. A-1, A-3 and A-4 were**
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sentenced to death. A-2, A-5, A-6 and A-7 were sentenced to life imprisonment. A

High Court held that the prosecution was not able to establish a case of unlawful assembly with common object of causing death of the deceased, hence none of the accused is liable to be convicted u/ss. 147 and 302/149; that A-1 alone was responsible for exhorting the lone shooter to kill the deceased and hence, he alone was guilty of the offence u/s. 302/109 IPC. However, the court sentenced A-1 to R1 for life. Hence the present appeals by A-1 against his conviction, and by the State against the acquittal of A-2 to A-7 and against conversion of death sentence of A-1 to life imprisonment. B C

The appellant-accused *interalia* contended that the information sent through wireless disclosed the first account of occurrence and therefore should have been treated as the FIR and not the typed report of the information which was sent later; that High Court having held that FIR was doubtful, should have disbelieved the entire prosecution case; that as per the medical evidence the deceased was shot in a standing position belies the evidence of prosecution witnesses who stated that the deceased was shot when he was lying injured on the ground; and that High Court did not take into consideration the evidence of PW17 and PW21 the driver and the bodyguard of the deceased, who did not support the prosecution case. D E F

Dismissing the appeals, the Court

HELD: 1.1 It is clear from the language of sub-section (1) of Section 154 Cr.P.C. that every information relating to the commission of a cognizable offence whether given in writing or reduced to writing shall be signed by the person giving it. Hence, the person who gives the information and who has to sign the information has to G H

A choose which particular information relating to the commission of a cognizable offence is to be treated as an FIR. In the present case, PW-14, the informant has chosen not to treat the wireless message but the subsequent typed information as the FIR and the police B has also not treated the wireless message but the subsequent typed information as the FIR. Moreover, the wireless message sent soon after the incident was cryptic and did not sufficiently disclose the nature of the offence committed much less the identity of the persons C who committed the offence. Unless and until more information was collected on how exactly the deceased was killed, it was not mandatory for either PW-14 to lodge the same as FIR or for the Officer Incharge of a Police Station to treat the same as an FIR. The trial court and D the High Court have rightly treated the subsequent typed written information lodged by PW-14 and not the wireless message as the FIR. [Para 28] [26-E-H; 27-A-B, F]

*Sheikh Ishaque and Ors. v. State of Bihar* (1995) 3 SCC 392: 1995 (2)SCR 692; *Binay Kumar Singh and Ors. v.* E *State of Bihar* (1997) 1 SCC 283: 1996 (8) ) Suppl. SCR 225 – relied on.

1.2. On the basis of all the evidence on record, the High Court did not accept the version of the prosecution F that the FIR was lodged at 10.10 p.m. on 05.12.1994 and has instead rightly held that the evidence creates a reasonable suspicion about the FIR being ante-dated and ante-timed. [Para 29] [28-F-G]

1.3. If the date and time of the FIR is suspicious, the G prosecution version is not rendered vulnerable but the court is required to make a careful analysis of the evidence in support of the prosecution case. In the present case, soon after the incident, information was sent from the place of the incident to the District

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**Headquarters that the people mixed with the funeral procession have injured the deceased by a revolver and fled towards Hajipur by different vehicles. At least this part of the prosecution case which finds place in the subsequent typed FIR lodged by PW-14 cannot be discarded as false. [Paras 30 and 31] [29-F-G, H; 30-A-B]**

*State of M.P. v. Mansingh and Ors.* **(2003) 10 SCC 414: 2003 (2) Suppl. SCR 460 – relied on.**

*Ganesh Bhavan Patel v. State of Maharashtra* **(1978) 4 SCC 371;** *Marudanal Augusti v. State of Kerala* **(1980) 4 SCC 425;** *Awadesh v. State of M.P.* **AIR 1988 SC 1158: 1988 (3) SCR 513 – referred to.**

*Erram Santosh Reddy and Ors. v. State of Andhra Pradesh* **(1991) 3SCC 206;** *Amar Singh v. Balwinder Singh and Ors.* **(2003) 2 SCC 518: 2003 (1) SCR 754;** *Bhagaloo Lodh and Anr. v. State of Uttar Pradesh* **(2011) 13 SCC 206: 2011 (6) SCR 1037;** *Om Prakash v. State of Haryana* **(2006) 2 SCC 250: 2006 (1) SCR 423 – cited.**

**2. The High Court rightly rejected the contention of the prosecution that A-1 to A-7 were liable for conviction u/s. 302/149 IPC. The High Court also has not accepted the entire version of the FIR lodged by PW-14 and has rejected the case of the prosecution in the FIR that there was an unlawful assembly and that A-1 to A-7 were part of that unlawful assembly with the object of killing the deceased. From the evidence on record and the circumstances it is not established that even the members of such mob shared the common object of killing the deceased. The High Court has also held that there were no allegations that the processionists were carrying any arms and there was insufficient evidence about the exact behaviour of the assembly at the scene of occurrence. The High Court has further held that the statements of the driver and the bodyguard of the**

A deceased show that the attack on the car of the deceased and its occupants was a sudden act of the mob which had gathered to watch the funeral procession. The High Court has thus held that the processionists, who were going with the dead body on motor vehicle, did not have B any common object and therefore did not constitute an unlawful assembly and hence A-1 to A-7 could not be held liable for the offence under Section 302/149 IPC on the ground that they were members of an unlawful assembly which had the object of killing the deceased C or any other person. [Para 32] [30-C-H; 31-B-D]

3. Evidence of exhortation is, in the very nature of things, a weak piece of evidence and there is often quite a tendency to implicate some person in addition to the actual assailant by attributing to that person an exhortation to the D assailant to assault the victim and unless the evidence in this respect is clear, cogent and reliable, no conviction for abetment can be recorded against the person alleged to have exhorted the actual assailant. Since the majority out of the fourteen prosecution witnesses comprising both E civilian and police personnel accompanying the procession do not support the prosecution version that A-2, A-3 and A-4 also exhorted the shooter to shoot at the deceased, it will not be safe to convict A-2, A-3 and A-4 for the offence of abetment of the murder of the deceased. F Therefore, the High Court was right in acquitting A-2, A-3 and A-4 of the charge under Section 302/109 IPC. [Para 34] [32-F-H; 33-A]

*Jainul Haque v. State of Bihar* AIR 1974 SC 45 – relied G on.

4.1. Where a criminal court has to deal with the evidence pertaining to the commission of offence involving large number of offenders and large number of victims, it is usual to adopt a test that the conviction could H be sustained only if it is supported by two or three or

**be sustained only if it is supported by two or three or more witnesses who give a consistent account of the incident. In the present case, ten out of the fourteen witnesses who were accompanying the procession and were near the place of occurrence have given a consistent version that A-1 exhorted the shooter to shoot at the deceased. PW-1, PW-3, PW-4, PW-6, PW-7, PW-8, PW-9, PW-10, PW-11 and PW-14, have consistently deposed that A-1 exhorted to shoot at the deceased. The remaining four witnesses may be at the place of occurrence but for some reason or the other may not have heard the exhortation by A-1 to shoot at the deceased. Hence, just because four of the fourteen witnesses have not deposed regarding the fact of exhortation by A-1, it cannot be held that the ten witnesses have falsely deposed that A-1 had exhorted to shoot at the deceased. [Para 35] [33-B-E]**

*Masalti v. State of U.P.* **1964 (8) SCR 133 – relied on.**

**4.2. It cannot be held that the medical evidence is such as to entirely rule out the truth of the evidence of the prosecution witnesses that the deceased was shot when he was lying injured on the ground. The evidence of the ten witnesses who have deposed that the deceased was shot when he was lying injured on the ground cannot be discarded on the ground that the medial evidence establishes that the bullets were fired when the deceased was in the standing position. [Para 36] [33-F-G]**

*Abdul Sayeed v. State of Madhya Pradesh* **(2010) 10 SCC 259: 2010(13) SCR 311;** *Budh Singh v. State of U.P.* **AIR 2006 SC 2500: 2006 (2) Suppl. SCR 715 – cited.**

**4.3. Both PW-17 and PW-21, the driver and the bodyguard respectively were silent with regard to exhortation by A-1, A-2, A-3 and A-4 to shoot at the deceased. It appears that PW-17 and PW-21 were not**

A aware of any shooting incident at all and they were under the impression that the deceased had been injured by the assault of the mob after he was pulled out from the car. PW-17 and PW-21, do not seem to know what exactly happened after they were pulled out from the car and
B beaten up by the mob. On the basis of their evidence, the court cannot discard the evidence of ten other witnesses that the deceased was shot with the revolver on the exhortation of A-1 when the medical evidence established that the cause of death of the deceased was on account
C of the bullet injuries on the deceased and not the assault by the mob. Moreover, PW-17 and PW-21 may not have supported the prosecution case but their evidence also does not belie the prosecution case that the deceased was shot on the exhortation by A-1. [Para 37] [35-F; 36-C-F]
D

4.4. The prosecution has been able to adduce evidence through its witnesses that at the time of shooting of the deceased, A-1 was at the spot and was exhorting to shoot at the deceased. If A-1 wanted the
E court to believe that at the time of the incident, he was in the car in the front of the procession and not at the spot, he should have taken this defence in his statement under Section 313 Cr.P.C. and also produced reliable evidence in support of this defence. Section 103 of the Evidence
F Act, 1872 provides that the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. If A-1 wanted the court to reject this prosecution
G version as not probable, burden was on him to lead evidence that he was not at the spot and did not exhort to shoot at the deceased. Since he has not discharged this burden, the High Court was right in holding that A-1 was guilty of the offence under Section 302/109 IPC. [Para 38] [36-H; 37-A-D]
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**deceased was a District Magistrate, he was killed in another district as an occupant of a car by chance, on account of mob fury and exhortation by A-1 and firing by a person and as A-1 was not the assailant himself, death sentence would not be the appropriate sentence. This was not one of those rarest of rare cases where the High Court should have confirmed the death sentence on A-1. A-1 was liable for rigorous imprisonment for life. [Para 39] [37-E-F]**

*Girja Prasad v. State of M.P.* **(2007) SCC 625;** *Sikandar Singh and Ors. v. State of Bihar* **(2010) 7 SCC 477: 2010 (8) SCR 373;** *Virendra Singh v. State of Madhya Pradesh* **(2010) 8 SCC 407: 2010 (9) SCR 772;** *Rizan and Anr. v. State of Chhattisgarh* **(2003) 2 SCC 661: 2003 (1) SCR 457– cited.**

**Case Law Reference:**

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|---|---|---|
| **(1991) 3 SCC 206** | **Cited** | **Para 15** |
| **2003 (1) SCR 754** | **Cited** | **Para 15** |
| **2010 (13) SCR 311** | **Cited** | **Para 16** |
| **(2007) SCC 625** | **Cited** | **Para 17** |
| **2010 (8) SCR 373** | **Cited** | **Para 18** |
| **2010 (9) SCR 772** | **Cited** | **Para 18** |
| **2003 (1) SCR 457** | **Cited** | **Para 19** |
| **2011 (6 ) SCR 1037** | **Cited** | **Para 20** |
| **2006 (2) Suppl. SCR 715** | **Cited** | **Para 23** |
| **2006 (1) SCR 423** | **Cited** | **Para 25** |
| **1995 (2) SCR 692** | **Relied on** | **Para 28** |
| **1996 (8) Suppl. SCR 225** | **Relied on** | **Para 28** |

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| A | **2003 (2) Suppl. SCR 460** | **Relied on** | **Para 30** |
| | **(1978) 4 SCC 371** | **Referred to** | **Para 30** |
| | **(1980) 4 SCC 425** | **Referred to** | **Para 30** |
| B | **1988 (3) SCR 513** | **Referred to** | **Para 30** |
| | **AIR 1974 SC 45** | **Relied on** | **Para 34** |
| | **1964(8) SCR 133** | **Relied on** | **Para 35** |

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal C Nos. 1804-1805 of 2009.

From the Judgment & Order dated 10.12.2008 of the High Court of Judicature at Patna in Death Reference No. 12 of 2007 and in Criminal Appeal (DB) No. 1345 of 2007.

D

WITH

Crl. Appeal Nos. 1536, 1537, 1538, 1539, 1540, 1541, 1542 & 1806 of 2009.

E Ram Jethmalani, Surinder Singh, Nagendra Rai, Ranjit Kumar, Ashok Kumar Singh, Kumar Ranjan, Shantanu Sagar, Kripa Shankar Pd., M.P. Jha, Mohit Kumar Shah, Shilpi Shah, Tungesh, Gopal Singh, Samir Ali Khan, Manish Kumar, Anant Sharma, Deepak Prabhakaran, Shaikh Chand Saheb, F Vijendra Kumar, M.P. Jha, Ram Ekbal Roy, Harshvardhan Jha, Dileep Pillai, Baban Kumar Sharma, Chandan Ramamurthi, Hari Shankar K., for the appearing parties.

The Judgment of the Court was delivered by

G **A.K. PATNAIK, J.** 1. These are all appeals by way of special leave under Article 136 of the Constitution against the common judgment of the Patna High Court in Death Reference No.12/2007 and Criminal Appeals (DB) Nos. 1282, 1308, 1318, 1327, 1345, 1354 of 2007.

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**FACTS**

2. The facts are that a typed report was lodged by Mohan Rajak, Deputy Superintendent of Police (East), Muzaffarpur (for short 'the informant') on 05.12.1994 at 22.10 hours (10.10 p.m.) at PS Sadar, District Muzaffarpur (East), which was treated as FIR. The prosecution case in the FIR briefly was as follows: On the night of 04.12.1994, certain unknown criminals had murdered Shri Kaushlendra Kumar Shukla @ Chhotan Shukla and his associates at NH-28 and the *post mortem* on Chhotan Shukla and the other deceased persons was done on 05.12.1994 at the SKM College Hospital. The supporters of Chhotan Shukla belonging to the Bihar Peoples Party gathered in large numbers at the hospital. Considering the possibility of breakdown of law and order, the officers of the civil and police administration remained present with armed force and *lathi* force at the hospital. After the *post mortem,* the dead bodies were taken in a procession to the house of Chhotan Shukla. The procession was led by Arun Kumar Singh, Ramesh Thakur, Shashi Shekhar Thakur, Ram Babu Singh, Harendra Kumar, Vijay Kumar Shukla @ Munna Shukla and others and was escorted by the officers of the civil and police administration. When the procession reached the house of Chhotan Shukla, Anand Mohan, MLA, and Lovely Anand, M.P., and others who were present there, offered flowers to the dead body of Chhotan Shukla. At about 3.30 p.m., the dead body of Chottan Shukla was taken in a procession to his ancestral house in village Jalalpur under Lalganj Thana in Vaishali district where about 5000 people gathered. Thereafter, the procession was led by Anand Mohan, Lovely Anand, Professor Arun Kumar Singh, Akhlak Ahmad, Harender Kumar, Rameshwar Wiplavi and others and they were all in different vehicles. Anand Mohan and Lovely Anand were sitting in their Contessa car. An Ambassador car and a white coloured Gypsy were moving in front of the procession. When the procession reached the Bhagwanpur Chowk, the dead body of Chottan Shukla was kept for a while and Anand Mohan, Lovely Anand and Professor

A Arun Kumar Singh gave speeches instigating the crowd to take revenge of the murder of Chhotan Shukla and others by murder and to teach the administration a lesson if it created any hurdle. After listening to the speeches, the people became aggressive. The procession then moved from Bhagwanpur Chowk towards
B Ram Dayal Nagar through the National Highway. At about 4.15 p.m. when the procession came near Khabra Village on the National Highway, the shouts *"Maro Maro"* were heard from the midst of the procession. When the informant along with other officers reached the place from where the shouts were being
C heard, they found that on the right hand side of the road the Ambassador car of the District Magistrate, Gopalganj, G. Krishnaiyyah (coming from the opposite direction) had turned turtle and the District Magistrate was lying on the ground. They also saw Anand Mohan, Lovely Anand, Professor Arun Kumar
D Singh and some others were loudly provoking Bhutkun Shukla (brother of Chhotan Shukla) to kill the District Magistrate and take revenge. Thereafter, Bhutkun Shukla drew out a revolver from his waist and fired three shots and then escaped into the crowd. The District Magistrate got wounded. Looking at the
E gravity of the situation, the Sub-Divisional Officer (East) ordered *lathi* charge and the police and other officers present started charging *lathi* at the crowd. The District Magistrate, Gopalganj, was sent in a Gypsy to the SKM College Hospital for treatment. Information was sent through wireless to the District Headquarters of Vaishali District about the incident. In
F the meantime, the assailants fled to Hajipur and the informant and the Sub-Divisional Officer (East) chased the assailants and reached Hajipur where they found 15 persons including Anand Mohan and Lovely Anand caught by the Hajipur police. All the 15 persons were arrested and their vehicles were seized. After
G the informant came back to Muzaffarpur, he got information that the District Magistrate, Gopalganj, died at the SKM College Hospital.

3. Pursuant to the FIR, investigation was carried out by the
H police and a charge-sheet was filed against 36 accused

persons. The learned Chief Judicial Magistrate, Muzaffarpur, committed the case to the Sessions Court. The Sessions Court framed charge under Section 147 and Sections 302/149 of the Indian Penal Code (for short 'the IPC') against all the 36 accused persons (A-1 to A-36) for being members of unlawful assembly with the common object of committing the murder of the District Magistrate, Gopalganj, G. Krishnaiyyah, (for short 'the deceased') as well as the charge under Section 307/149 IPC for being a member of the unlawful assembly with the common object of attempting to commit murder of the photographer, the bodyguard and the driver of the deceased. All the 36 accused persons were also charged for the offence under Sections 302/109 for abetting the commission of the murder of the deceased. Anand Mohan, Lovely Anand and Professor Arun Kumar Singh (A-1, A-2 and A-3 respectively) were further charged under Sections 302/114 IPC.

4. At the trial, the prosecution examined as many as 25 witnesses. PW-1 to PW-14 were police officials who claimed to be with or behind the procession till the incident occurred. PW-15, PW-16 and PW-23 were doctors who proved the injury reports and the *post mortem* report. PW-17 and PW-21 are the driver and the bodyguard of the deceased. PW-18 and PW-19 are the Director and employee of the Forensic Science Laboratory, Patna, who collected the blood-stained earth and broken pieces of glass from the place of occurrence. PW-20 is the Executive Magistrate who accompanied the procession. PW-22 is the Assistant Sub-Inspector, Muzaffarpur District, who investigated the case from 14.12.1994 to 16.12.1994. PW-25 is the Additional S.P. Muzaffarpur who investigated the case for a few hours and PW-24 is the second investigating officer. The defence also examined twelve witnesses at the trial.

5. The Additional Sessions Judge-I, Patna (for short 'the trial court') found Anand Mohan, Lovely Anand, Professor Arun Kumar Singh, Akhlak Ahamad, Vijay Kumar Shukla @ Munna Shukla, Harendra Kumar @ Harendra Pd. Sahi and Shashi

A Shekhar Thakur (A-1, A-2, A-3, A-4, A-5, A-6 and A-7 respectively) guilty of the offences under Sections 147, 302/149, 307/149 and 427/149 of the IPC. The trial court also held Anand Mohan, Lovely Anand, Professor Arun Kumar Singh and Akhlak Ahamad (A-1, A-2, A-3 and A-4 respectively) guilty of B the offence of abetment to commit murder under Sections 302/109 IPC. The trial court acquitted the remaining accused persons A-8 to A-36 of all the charges. After hearing on the question of sentence, the trial court sentenced A-1, A-3 and A-4 to death for the offence under Sections 302/149 and 302/109 C of the IPC and further sentenced them for one year R.I. for the offence under Section 147 IPC, 5 years R.I. for the offence under Section 307/147 IPC and one year R.I. for the offence under Section 427/149 IPC and all the sentences were to run concurrently. The trial court, however, sentenced A-2 to life D imprisonment for the offences under Sections 302/149 and 302/109 IPC and a fine of Rs.25,000/-, for one year R.I. for the offence under Section 147 IPC, 5 years R.I. for the offence under Section 307/149 IPC and one year R.I. for the offence under Section 427/149 IPC and all the sentences were to run E concurrently and in default of payment of fine she was to undergo simple imprisonment for a period of two years. The trial court sentenced A-5, A-6 and A-7 for life imprisonment for the offence under Section 302/149 IPC and to pay fine of Rs.25,000/- each, R.I. for five years for the offence under Section 307/149 IPC, R.I. for one year for the offence under F Section 147 IPC and R.I. for one year for the offence under Section 427/149 IPC and in default of payment of fine to undergo simple imprisonment for two years and all the sentences were to run concurrently.

G 6. The sentence of death on A-1, A-3 and A-4 were referred to the High Court. Criminal appeals were also filed by the convicts before the High Court. The High Court held in the impugned common judgment that the prosecution has not been able to establish a case of unlawful assembly with common H object of causing death of the deceased, or any other person

and thus there could be no conviction under Sections 147 and 302/149 IPC. The High Court, however, held on the basis of evidence of PW-1, PW-3, PW-4, PW-9, PW-10 and PW-14 that A-1 had exhorted the lone shooter to kill the deceased and hence he alone was guilty of the offence of abetment of murder under Section 302/109 IPC. Accordingly, the High Court acquitted A-2 to A-7 of all the charges and sustained the conviction of A-1 but converted the sentence of death on A-1 to one of rigorous imprisonment for life.

7. Aggrieved, A-1 has filed Criminal Appeal No.1804-1805 of 2009 challenging the impugned judgment of the High Court in so far as it sustained his conviction under Section 302/109 IPC and imposed the punishment of rigorous imprisonment for life. The State of Bihar has filed Criminal Appeal Nos. 1536, 1537, 1538, 1539, 1540, 1541, 1542 and 1806 of 2009 challenging the impugned judgment of the High Court insofar as it acquitted A-2 to A-7 and insofar as it converted the death sentence on A-1 to life imprisonment.

**CONTENTIONS**

8. Mr. Ram Jethmalani, learned senior counsel appearing for A-1 submitted that the occurrence took place at 4.15 P.M. on 05.12.1994 and soon thereafter information was sent through wireless to the District Headquarter, Vaishali District about the incident and hence this information was the real FIR and would disclose the first account of the occurrence. He vehemently argued that this wireless message sent soon after the incident to the District Headquarters of District Vaishali clearly stated that the people who got mixed with the funeral procession of the cremation of Chhotan Shukla have injured the deceased by shooting him with a revolver and fled towards Hajipur by different vehicles and this was the real FIR of the case but the High Court has not even applied its mind to this real FIR of the case.

9. He submitted that instead of this wireless message, a

A typed report of the informant PW-14 has been treated as the FIR. He argued that this typed report of PW-14 treated as FIR is stated to have been lodged in the Sadar P.S. at 22:10 hrs. (10.10 P.M.) on 05.12.1994, but the evidence of PW-11 would show that the informant PW-14 returned to Muzaffarpur only after B 2.00 A.M. on 06.12.1994. He submitted that the High Court has also noticed in the impugned judgment that the FIR mentioned the name of Dy.S.P.-Dhiraj Kumar as the Investigating Officer who joined after leave on duty on 06.12.2004 and took up investigation at 8.15 A.M. from the first I.O. PW-25 He argued C that all these facts clearly establish that not only the FIR was ante-dated and ante-timed as 05.12.1994, 10.10 P.M. but also fabricated by PW-14 making false allegations against A-1 and against the members of his political party on the instructions of political superiors. He contended that the High Court having D held that there was evidence to suspect that the FIR was ante-dated and ante-timed should have also come to the conclusion that the entire prosecution case as stated in the FIR by PW-14 was false.

10. Mr. Jethmalani next submitted that the High Court has E rightly rejected the prosecution version that there was an unlawful assembly with the object of murdering the deceased and, therefore, the offences under Section 147 and 302/149 were not made out against any of the accused persons. He contended that having come to this finding, the High Court could F not have held A-1 guilty of the offence of abetting the murder under Section 302/109 IPC on the ground that A-1 had incited Bhutkun Shukla to commit the murder. He submitted that almost all the prosecution witnesses have stated that the deceased was shot by Bhutkun Shukla when he was lying injured on the G ground, but the medical evidence establishes that he was shot when he was in a standing position and thus the prosecution witnesses have not actually seen the incident nor heard any exhortation by A-1 to Bhutkun to kill the deceased. He argued that the High Court having recorded the finding that PW-11 was H a false witness could not have believed the other witnesses

supporting the case that was put forward by PW-11 in his evidence. He relied on the station Diary entry Nos. 92, 94, 97 and 102 of the Police Station of PW-11 to show that PW-11 was not even there in the procession accompanying the dead body of Chhotan Shukla but had gone for some investigation at the University where he was stationed as a police officer.

11. He argued that the High Court failed to realize that A-1 along with his wife A-2 were in a white Contessa Car which was almost at the front of the procession behind the police car and the Tata Maxi carrying the dead bodies of Chhotan Shukla and another, whereas the shouts of "*maro maro*" came from the rear of the procession and the witnesses have all deposed that when they reached there they found that the Car was over-turned and the deceased was lying injured on the ground. He submitted that the deceased was, therefore, dead before A-1 Anand Mohan could come from his Contessa car to the place of occurrence and the entire prosecution story that Bhutkun was incited by A-1 to kill the deceased must necessarily be false.

12. Mr. Jethmalani submitted that the High Court failed to appreciate the following circumstances:

(i) There is no evidence that A-1 knew the deceased and, therefore, when the car of the deceased came from the opposite direction and crossed the Contessa Car in which A-1 was sitting he did not know that it was the deceased who was sitting in the car and there was no reason for him to incite any one to kill him;

(ii) There is no evidence that A-1 got out of his Contessa Car which was in front of the procession and went towards the rear of the procession to incite the killing of the deceased;

(iii) The provocative speech attributed to A-1 were at Bhagwanpur Chowk and the police officers are the only witnesses who have deposed with regard to such

A provocative speech by A-1 and their deposition that the speech was provocative was the opinion of the police officers and hence the High Court rightly did not rely on the provocative speech of A-1 to convict him;

B (iv) There were discrepancies in the evidence of witnesses with regard to the exhortation by the accused persons to Bhutkun to shoot and thus the High Court should have rejected the story of the prosecution that A-1 incited Bhutkun to shoot the deceased;

C (v) The prosecution story that the procession wanted to seek vengeance on the administration is falsified by an independent witness PW-12 (Tara Razak), the SDO who accompanied the procession;

D (vi) The High Court did not take into consideration the evidence of PW-17 and 21, the driver and the body guard of the deceased, who did not support the prosecution case.

E He submitted that had the High Court considered these circumstances, it would have acquitted A-1 of all the charges.

13. Mr. Ranjeet Kumar, learned senior counsel appearing for the State of Bihar, submitted that the court must appreciate the facts which have led to the occurrence in this case. He F submitted that Chhotan Shukla was a candidate in the ensuing State Assembly elections on behalf of the Bihar Peoples Party of which A-1 and A-2 were leaders and on 04.12.1994 Chhotan Shukla and his four associates were killed by some unknown persons in Muzaffarpur. He submitted that the gathering on G 05.12.1994 at the SKM College Hospital where the bodies of Chhotan Shukla and others were taken for *post mortem* was of people belonging to the Bihar Peoples Party and the procession which accompanied the dead bodies of Chhotan Shukla and others was a show of political strength displayed H by A-1 and A-2 and his political associates. He submitted that

the provocative speeches delivered by A-1, A-2 and others of the Bihar Peoples Party at the Bhagwanpur Chowk aroused the emotions in the crowd of almost 5000 people to take revenge by bloodshed and this was the cause for the violence on the car of the deceased which was coming from the opposite direction when the procession reached Village Khabra. He submitted that the violent crowd pulled out the occupants of the car, beat them, overturned the car and finally Bhutkun Shukla shot the deceased on the exhortation of A-1 to A-4 because the deceased represented the State administration. He submitted that the High Court has not appreciated these background facts which led to the murder of the deceased and has acquitted A-2 to A-7 and has sustained only the conviction of A-1 under Section 302/109 IPC.

14. In reply to the submissions of Mr. Jethmalani that the wireless message sent to the District Headquarters, Vaishali district soon after the incident on 5.12.1994 was the real FIR, Mr. Ranjeet Kumar submitted that the wireless message was very cryptic and could not be treated as an FIR. He cited the decision of this Court in *Binay Kumar Singh and others v. State of Bihar* [(1997) 1 SCC 283] in which it has been held that the officer in-charge of the police station is not obliged to accept as FIR any nebulous information received from somebody which does not disclose any authentic cognizable offence and it is open to the officer in-charge to collect more information containing details of the occurrence, if available, so that he can consider whether a cognizable offence has been committed warranting investigation.

15. On the delay in lodging the FIR, he referred to the evidence of the informant, PW-14, to show that he had to first send the deceased in the Gypsy car for treatment to the SKM College Hospital and he had to go to Hajipur to arrest the accused persons and only after the accused persons were taken to custody at Hajipur, he came back to Muzaffarpur and prepared the typed report and lodged the same as FIR in the

A Sadar P.S. at about 10.00 P.M. in the night. He submitted that there was thus sufficient explanation for the delay in lodging the FIR. He cited *Erram Santosh Reddy and others v. State of Andhra Pradesh* [(1991) 3 SCC 206] in which there was a delay of six hours in lodging the FIR and the prosecution B explained that the police had to raid, effect recoveries and thereafter submit a report in the concerned police station and on these facts this Court held that no adverse inference could be drawn because of the delay in lodging the FIR. He submitted that in *Amar Singh v. Balwinder Singh & Ors.* [(2003) 2 SCC C 518] this Court has held that a delay of 26 hours in lodging the FIR from the time of the incident was fully explained from the evidence on record and, therefore, no adverse inference could be drawn against the prosecution.

16. Mr. Ranjeet Kumar submitted that the medical evidence D did not altogether make the ocular evidence improbable. He argued that the ocular evidence of different witnesses categorically states that Bhutkun Shukla came out from the crowd and fired 3 shots and PW-16, who conducted the *post mortem,* has stated that there were three bullet injuries in the E body of the deceased. He submitted that no one can predict how a human body would respond to the first bullet shot and therefore from the nature of the bullet injuries in the body of the deceased who was shot from a very close range, one cannot conclude that the deceased could not have been shot after he F fell on the ground as contended by Mr. Jethmalani. He cited the decision of this Court in *Abdul Sayeed v. State of Madhya Pradesh* [(2010) 10 SCC 259] for the proposition that ocular testimony has greater evidentiary value vis-à-vis medical evidence. He submitted that in the present case the medical G evidence does not go so far as to rule out the truth of the ocular evidence.

17. He submitted that the oral evidence in this case is consistent that A-1, A-2, A-3 and A-4 not only delivered H provocative speeches against the administration and aroused

the emotions of the crowd to resort to bloodshed but also exhorted Bhutkun Shukla to shoot at the deceased who represented the State administration. He referred to the evidence of PWs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 who have deposed about the provocative speeches and exhortation of A-1 to A-4. He cited *Masalti v. State of U.P.* [1964(8) SCR 133] wherein this Court has held that where a criminal court has to deal with the evidence pertaining to the commission of offence involving large number of offenders and large number of victims, it is usual to adopt a 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. He also referred to the decisions of this Court in *Binay Kumar Singh and others v. State of Bihar* (supra) and *Abdul Sayeed v. State of Madhya Pradesh* (supra) in which the test laid down in *Masalti v. State of U.P.* (supra) has been reiterated. He submitted that unfortunately the High Court disbelieved the police witnesses and preferred to rely on the evidence of only the civilian officials and acquitted A-2 to A-7 of all the charges and sustained only the conviction of A-1 although there was sufficient evidence against A-2 to A-7. He cited *Girja Prasad v. State of M.P.* [(2007) SCC 625] wherein it has been held by this Court that it is not the law that police witness should not be relied upon and their evidence cannot be accepted unless it is corroborated in material particulars by other independent evidence.

18. He submitted that the High Court also acquitted A-1 to A-7 of the charges under Sections 147 and 302/149 IPC on the ground that there was no unlawful assembly with common object to commit the murder of the deceased or any other person. He cited the decisions of this Court in *Sikandar Singh and others v. State of Bihar* [(2010) 7 SCC 477] and *Virendra Singh v. State of Madhya Pradesh* [(2010) 8 SCC 407] to contend that the A-1 to A-7 had formed an unlawful assembly with the common object of murdering the deceased and the other occupants of the car at the spur of the moment.

A 19. He relied on the decision of this Court in *Rizan and Another v. State of Chhattisgarh* [(2003) 2 SCC 661] to argue that normal discrepancies in evidence are likely to occur due to normal errors of observations, normal errors of memory due to lapse of time and due to mental disposition such as shock B and horror at the time of occurrence but these discrepancies do not make the evidence of a witness untrue and it is only the material discrepancy which affect the credibility of a party's case. He submitted that had the High Court overlooked the minor and normal discrepancies in the evidence of different C witnesses who had given their account of the incident as observed by them from different places at the spot at the time of occurrence it would have come to the conclusion that the witnesses gave a consistent account of the involvement of A-1 to A-7 in committing the offence under Sections 302/149 and D 302/109 IPC. He submitted that High Court, therefore, could not have set aside the findings of the trial court and should have sustained also the death sentence on A-1, A-3 and A-4.

20. Mr. Surinder Singh, learned senior counsel appearing for the respondents in Criminal Appeals Nos. 1536, 1537, E 1538, 1540, 1541 and 1542 of 2009, submitted in reply that the fact that the FIR was not lodged soon after the incident at 4.15 P.M. on 05.12.1994 indicates that the informant and all other officers accompanying the procession had no inkling whatsoever as to who committed the murder of the deceased. F He cited the decision of this Court in *Bhagaloo Lodh and Another v. State of Uttar Pradesh* [(2011) 13 SCC 206] in which it has been held that prompt and early reporting of the occurrence by the informant with all its vivid details gives an assurance regarding the truth of its version and where there is G a delay in lodging the FIR without any explanation a presumption can be raised that the allegations in the FIR were false and that it contains a coloured version of the events that had taken place. He also relied on *Awadesh v. State of M.P.* [AIR 1988 SC 1158], in which this Court found that the FIR was H lodged belatedly because the names of the assailants were not

known and a lot of deliberation took place before lodging the FIR and this Court held that the prosecution has failed to prove its case beyond reasonable doubt. He also cited *Ganesh Bhavan Patel v. State of Maharashtra* [(1978) 4 SCC 371] in which this Court has held that the inordinate delay in the registration of the FIR and further delay in recording the statement of material witnesses caused a cloud of suspicion on the credibility of the entire warp and woof of the prosecution story. He submitted that in *Marudanal Augusti v. State of Kerala* [(1980) 4 SCC 425] this Court gave the benefit of doubt to the accused and acquitted him after it found that the FIR was fabricated and brought into existence long after the occurrence.

21. He submitted that the High Court was right in coming to the conclusion that no case of unlawful assembly was established against A-1 to A-7. He argued that the speeches made at Bhagwanpur Chowk were not provocative but rhetorical and in any case since an Executive Magistrate was also present all through along with the procession the Court could not come to the conclusion that the accused persons constituted an unlawful assembly either at Bhagwanpur Chowk where the speeches were delivered or at Khabra where the incident took place.

22. He referred to the evidence of PW-12 & PW-13 who were sub-divisional officers and to the evidence of PW-21 who was the bodyguard of the deceased to show that these independent witnesses have not said anything about the exhortation by A-1 to A-7 to Bhutkun to kill the deceased. He also submitted that the evidence of the prosecution witnesses are not consistent on the point as to who exhorted Bhutkun to kill the deceased and, therefore, the decision of this Court in *Masalti v. State of U.P. (supra)* does not apply to the facts of the present case. He submitted that in *Jainul Haque v. State of Bihar* [AIR 1974 SC 45] this Court has held that evidence of exhortation is in the very nature of things a weak piece of evidence and there is often quite a tendency to implicate some person in addition to the actual assailant by attributing to that

A person an exhortation to the assailant to assault the victim and unless the evidence in this respect is clear, cogent and reliable, no conviction for abetment can be recorded against the person alleged to have exhorted the actual assailant. He submitted that considering the proposition of law laid down in this decision, B and considering the fact that there are discrepancies with regard to who exhorted Bhutkun to shoot at the deceased, the conviction of A1-A7 would not be unsafe.

23. He submitted that if as has been deposed by the C prosecution witnesses the deceased was lying on the ground when Bhutkun shot at him, then the first injury on the deceased could not have at all been caused by shooting and, therefore, the witnesses were lying. He cited *Awadesh v. State of M.P. (supra)* in which this Court did not believe the prosecution witnesses because of the opinion of the doctor that the person D who had caused the injuries on the deceased was at a higher level than the deceased and this opinion was wholly inconsistent with the testimony of the eye-witnesses and the medical expert's opinion corroborated other circumstances which indicated that the eye-witnesses had not seen the actual E occurrence. He also relied on *Budh Singh v. State of U.P.* [AIR 2006 SC 2500] in which this Court has held that from the medical evidence it appeared that the direction of the injury was from upwards to downwards and this belies the statements of prosecution witnesses that the accused and the deceased were F in a standing position and were quarrelling with each other.

24. He finally submitted that the High Court lost sight of the fact that although the procession started from Muzaffarpur and the speeches were delivered at Bhagwanpur Chowk the G incident took place at Khabra Village and the car could have been overturned and deceased could have been shot not by any person coming in the procession but by a person from amongst the crowd of Khabra Village who had gathered to see the procession.

H 25. Mr. Nagendra Rai, learned senior counsel appearing

for the respondent in Criminal Appeal No.1539 of 2009 (A-4 Akhlak Ahmad), submitted that it has come in evidence that the Chief Minister of Bihar was present at the SKM College and Hospital, Muzaffarpur. He cited the decision of this Court in *Om Prakash v. State of Haryana* [(2006) 2 SCC 250], in which this Court considered the presence of Dy. S.P. at the place of occurrence for about three hours and also considered the fact that there was no explanation for the long delay in lodging the FIR and gave the benefit of doubt to the accused persons. He also relied on *Ganesh Bhavan Patel v. State of Maharashtra* (supra) wherein this Court took into consideration the delay in registration of the FIR as a circumstance for acquitting the accused of the charges.

26. He submitted that the High Court has rightly held that there was no unlawful assembly with the object of murdering the deceased or any other person. He submitted that the accused persons could not have shared the object of Bhutkun to kill the deceased and, therefore, there was no "common object" which is a necessary ingredient of an unlawful assembly and hence the offences under Section 147 and 302/149 IPC have not been made out against the accused persons.

27. He also referred to the evidence of PWs 12, 13 and 20 to show they have not supported the prosecution case that the killing of the deceased took place before them and they have stated in their evidence that when they reached the spot, the shooting incident had already taken place. He submitted that even PW-1 has stated that no police personnel had reached the spot where the shooting took place. He argued that PW-21, the bodyguard of the deceased who is the most material witness had not supported the case of the prosecution that A-1, A-2, A-3 and A-4 had exhorted Bhutkun to shoot at the deceased. He submitted that it is difficult to believe that the police personnel would not have prevented the killing of the deceased if the killing was about to take place in their presence. He finally submitted that the photographer, who

A accompanied the deceased, though a material witness, has not been examined in Court and an adverse inference should be drawn against the prosecution for withholding the photographer from giving evidence in Court.

B **FINDINGS**

28. The first question that we have to decide is whether the wireless message sent soon after the incident on 05.12.1994 is the real FIR as contended on behalf of the defence or whether the typed report subsequently lodged by C PW-14 in the Muzaffarpur Sadar Police Station is the FIR as contended on behalf of the prosecution. Sub-section (1) of Section 154 Cr.P.c. which provides for the First Information Report is quoted hereinbelow:

D "(1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced E to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf."

It will be clear from the language of sub-section (1) of F Section 154 Cr.P.C. that every information relating to the commission of a cognizable offence whether given in writing or reduced to writing shall be signed by the person giving it. Hence, the person who gives the information and who has to sign the information has to choose which particular information G relating to the commission of a cognizable offence is to be treated as an FIR. In the present case, PW-14, the informant has chosen not to treat the wireless message but the subsequent typed information as the FIR and the police has also not treated the wireless message but the subsequent typed H information as the FIR. Moreover, the wireless message sent

soon after the incident on 05.12.1994 stated only that the people mixed with the crowd of funeral procession for the cremation of Chottan Shukla have injured the deceased by shooting him with revolver and have fled towards Hajipur by different vehicles. This wireless message was cryptic and did not sufficiently disclose the nature of the offence committed much less the identity of the persons who committed the offence. Unless and until more information was collected on how exactly the deceased was killed, it was not mandatory for either PW-14 to lodge the same as FIR or for the Officer Incharge of a police station to treat the same as an FIR. Such cryptic information has been held by this Court not to be FIR in some cases. In *Sheikh Ishaque and Others v. State of Bihar* [(1995) 3 SCC 392] Gulabi Paswan gave a cryptic information at the police station to the effect that there was a commotion at the village as firing and brick batting was going on and this Court held that this cryptic information did not even disclose the commission of a cognizable offence nor did it disclose who were the assailants and such a cryptic statement of Gulabi Paswan cannot be treated to be an FIR within the meaning of Section 154 Cr.P.C. Similarly, in *Binay Kumar Singh and others v. State of Bihar* (supra) information was furnished to the police in Ex.10/3 by Rabindra Bhagat that the sons of late Ram Niranjan Sharma along with large number of persons in his village have set fire to the houses and piles of straws and have also resorted to firing. This Court held that Ex.10/3 is evidently a cryptic information and is hardly sufficient to discern the commission of any cognizable offence therefrom. In our considered opinion, therefore, the trial court and the High Court have rightly treated the subsequent typed written information lodged by PW-14 and not the wireless message as the FIR.

29. The second question that we are called upon to decide is whether the typed report of PW-14 which has been treated as the FIR was lodged at 10.10 p.m. on 05.12.1994 as claimed by prosecution or was actually lodged at the Muzaffarpur Sadar Police Station in the morning of 16.12.1994 as contended by

A the defence. We have perused the evidence of PW-14, the informant. He has stated that after the deceased was injured by a person with his revolver at about 4.15 p.m. on 05.12.1994, the mob starting escaping from the main road to Lalganj and some people ran towards Hajipur and he along with others B followed the mob and reached Hajipur at 6 O' Clock and went to the Circuit House and stayed there for one hour and then left for Muzaffarpur at 7 O' Clock. In the impugned judgment, the High Court did not accept this evidence of PW-14 that he left Hajipur for Muzaffarpur at 7.00 P.M. as it found that most of the C other witnesses had admitted that they left Hajipur at 9.00 P.M. and PW-11 had admitted that he left Hajipur at 12.00 in the midnight so as to reach Muzaffarpur at 2.00 A.M. in the night along with others. Though PW-11 has stated in his evidence that all the people returned from Hajipur Circuit House at 7 O' D Clock, he has also stated in his evidence that he was with the SDO till 12 in the midnight and he went to Garoul, Hajipur, and after apprehending the accused he returned to Muzaffarpur. PW-11 has further stated that he returned to the Sadar Police Station at Muzaffarpur at 2 O' Clock at night and the DM, SP, E SDO, DSP (PW-14) and other officers also returned with him. Hence, the High Court has held that PW-14 along with other officers including PW-11 reached Muzaffarpur at 2.00 pm in the night. After reaching the Sadar Police Station at Muzaffarpur, PW-14 has taken some more time to lodge the lengthy typed written FIR. PW-14 has stated that for lodging the FIR at the F Muzaffarpur Sadar Police Station he took help from all the officers present and in fact took the statements of 4-5 officers. He has stated that he made a typed FIR and he took half an hour to complete the statement and it took one hour to lodge the FIR. On the basis of all these evidence on record, the High G Court did not accept the version of the prosecution that the FIR was lodged with the Muzaffarpur Sadar Police Station at 10.10 p.m. on 05.12.1994 and has instead held that the evidence creates a reasonable suspicion about the FIR being ante dated and ante timed. We do not find any error in this finding of the H High Court.

30. We now come to the main contention on behalf of the defence that the High Court should have totally discarded the prosecution story once it held that the evidence creates a reasonable suspicion about the FIR being ante-dated and ante-timed. In none of the cases cited by the defence, we find that this Court has discarded the entire prosecution story only on the ground that the FIR was ante dated and ante timed. In *Ganesh Bhavan Patel v. State of Maharashtra* (supra) relied on by the defence this Court considered the inordinate delay in recording the statements of witnesses under Section 161 Cr.P.C. and other circumstances along with the fact that the FIR was lodged belatedly without proper explanation and then held that the prosecution case was not reliable. Again, in *Marudanal Augusti v. State of Kerala* (supra) cited by the defence, this Court disbelieved the prosecution story not because of unexplained delay in the dispatch of the FIR to the Magistrate only but also because the FIR which contained graphic details of the occurrence with the minutest details did not mention the names of the witnesses and there were other infirmities to throw serious doubt on the prosecution story. In *Awadesh v. State of M.P.* (supra) relied on by the defence, besides finding that the delay in lodging the FIR was suspicious, this Court also found that the empty cartridges were recovered from the place of occurrence one day after the incident and the medical evidence established that the witnesses had not actually seen the incident and considering all these circumstances this Court held that the prosecution had not proved the case beyond reasonable doubt. This Court has, on the other hand, held in *State of M.P. v. Mansingh and others* [(2003) 10 SCC 414] that if the date and time of the FIR is suspicious, the prosecution version is not rendered vulnerable but the court is required to make a careful analysis of the evidence in support of the prosecution case. Thus, we will have to make a careful analysis of the evidence in this case to find out how far the prosecution case as alleged in the FIR is true.

31. In the present case, the fact remains that soon after

A the incident at about 4.15 P.M. on 05.12.1994 information was sent from the place of the incident to the District Headquarters of Vaishali district that the people mixed with the funeral procession for the cremation of Chottan Shukla have injured the deceased by a revolver and fled towards Hajipur by different B vehicles. At least this part of the prosecution case which finds place in the subsequent typed FIR lodged by PW-14 in the early hours of 06.12.1994 cannot be discarded to be false and the court will have to decide on the basis of evidence as to who amongst the people in the funeral procession for cremation of C Chottan Shukla are responsible for the injury caused to the deceased.

32. In fact, the High Court also has not accepted the entire version of the FIR lodged by PW-14 and has rejected the case of the prosecution in the FIR that there was an unlawful D assembly and that A-1 to A-7 were part of that unlawful assembly with the object of killing the deceased. The High Court has held in the impugned judgment that the mob which surrounded the car of the deceased caused damage to the car by throwing brickbats and caused injuries to its occupants after E pulling them out and had turned into an unlawful assembly but from the evidence on record and the circumstances it is not established that even the members of such mob shared the common object of killing the deceased. The High Court has further held that some of the processionists who were in the F vehicles close to the place of occurrence could have come out from their vehicles to find out the reasons for the commotion but when nobody was even aware that the deceased would be passing through the place such persons cannot be held to be members of unlawful assembly actuated by the common object G of killing the deceased. The High Court has also held that there were no allegations that the processionists were carrying any arms and there was insufficient evidence about the exact behaviour of the assembly at the scene of the occurrence. The High Court has further held that the driver and the bodyguard H of the deceased have stated in their evidence that the car could

not pass on the left side of the road because of presence of a mob on the flank of the road while the funeral procession was moving and this shows that the attack on the car of the deceased and its occupants was a sudden act of the mob which had gathered to watch the funeral procession near Khabra Village. The High Court has found that the driver and the bodyguard of the deceased have not said anything in their evidence on what led to the anger of the mob and instead they had been anxious to show that they had committed no mistake due to which the deceased was killed. The High Court has thus held that the processionists, who were going with the dead body on motor vehicle, did not have any common object and therefore did not constitute an unlawful assembly and hence A-1 to A-7 could not be held liable for the offence under Section 302/149 IPC on the ground that they were members of an unlawful assembly which had the object of killing the deceased or any other person. In our considered opinion, the High Court rightly rejected the contention of the prosecution that A-1 to A-7 were liable for conviction under Section 302/149 IPC.

33. The High Court after carefully scrutinizing the evidence of the witnesses has also discarded the prosecution story in the FIR lodged by PW-14 that A-2, A-3 and A-4 had exhorted Bhutkun Shukla to kill the deceased. The High Court has held that none of the eye-witnesses of Category-II comprising the civil officials, the driver and the bodyguard, namely, PW-12, PW-13, PW-17 and PW-21 have supported the allegations of exhortation by A-1 to A-7 and out of the Category-I witnesses comprising Police Personnel, PW-5 and PW-9 have not heard anyone exhorting Bhutkun Shukla to kill the deceased. The High Court has further held that out of the seventeen alleged eye-witnesses, six witnesses do not speak of exhortation and out of the remaining eleven prosecution witnesses, six witnesses namely, PW-1, PW-3, PW-4, PW-9, PW-10 and PW-14, have said that only A-1 exhorted Bhutkun Shukla to shoot at the deceased. Accordingly, the High Court has recorded the finding that only A-1 exhorted the lone shooter to kill the

A deceased and was guilty of the offence of abetment under Section 109 IPC and was liable for punishment under Section 302/109 IPC for the murder of the deceased and A-2, A-3 and A-4 have to be acquitted of the charges under Section 302/109 IPC.

B

34. We have gone through the evidence of the witnesses and we find that this finding of the High Court that A-2, A-3 and A-4 cannot be held guilty of the offences under Section 302/109 IPC is based on a correct appreciation of evidence of the C prosecution witnesses. Out of fourteen witnesses who accompanied the procession, only four witnesses, namely, PW-6, PW-7, PW-8 and PW-11 have said that A-2 along with A-1 exhorted Bhutkun Shukla to shoot at the deceased, whereas the remaining eight do not say that A-2 also exhorted Bhutkun Shukla to shoot at the deceased. Similarly, out of the fourteen D witnesses who accompanied the procession, only PW-7 and PW-8 have spoken of exhortation by A-3 to Bhutkun Shukla to shoot at the deceased and the remaining eleven witnesses have not said that A-3 also exhorted Bhutkun Shukla to shoot at the deceased. Again out of the fourteen witnesses examined E by the prosecution, only PW-7 and PW-11 have said that A-4 also exhorted Bhutkun Shukla to shoot at the deceased, but the remaining twelve witnesses have not said that A-4 also exhorted Bhutkun Shukla to shoot at the District Magistrate. This Court has held in *Jainul Haque v. State of Bihar* (supra) that F evidence of exhortation is in the very nature of things a weak piece of evidence and there is often quite a tendency to implicate some person in addition to the actual assailant by attributing to that person an exhortation to the assailant to assault the victim and unless the evidence in this respect is G clear, cogent and reliable, no conviction for abetment can be recorded against the person alleged to have exhorted the actual assailant. Since the majority out of the fourteen prosecution witnesses comprising both civilian and police personnel accompanying the procession do not support the prosecution H version that A-2, A-3 and A-4 also exhorted Bhutkun Shukla to

shoot at the deceased, it will not be safe to convict A-2, A-3 and A-4 for the offence of abetment of the murder of the deceased. In our view, therefore, the High Court was right in acquitting A-2, A-3 and A-4 of the charge under Section 302/ 109 IPC.

35. In *Masalti vs. State of U.P.* (supra), this Court has held that where a criminal court has to deal with the evidence pertaining to the commission of offence involving large number of offenders and large number of victims, it is usual to adopt a 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 this case, ten out of the fourteen witnesses who were accompanying the procession and were near the place of occurrence have given a consistent version that A-1 exhorted Bhutkun Shukla to shoot at the deceased. PW-1, PW-3, PW-4, PW-6, PW-7, PW-8, PW-9, PW-10, PW-11 and PW-14, have consistently deposed that A-1 exhorted Bhutkun Shukla to shoot at the deceased. The remaining four witnesses may be at the place of occurrence but for some reason or the other may not have heard the exhortation by A-1 to Bhutkan to shoot at the deceased. Hence, just because four of the fourteen witnesses have not deposed regarding the fact of exhortation by A-1, we cannot hold that the ten witnesses have falsely deposed that A-1 had exhorted Bhutkun to shoot at the deceased.

36. We have also considered the submission of the defence that these witnesses have deposed that the deceased was shot by Bhutkun Shukla when he was lying injured on the ground but the medical evidence establishes that the bullets were fired when the deceased was in the standing position and on this ground the evidence of these ten witnesses who have deposed with regard to exhortation by A-1 to Bhutkun Shukla to shoot at the deceased should be discarded. We find that PW-16, Dr. Momtaj Ahmad who carried out the *post mortem* on the dead body of the deceased on 05.12.1994 at 4.40 P.M. has

A described in his evidence the following three *ante mortem* injuries on the body of the deceased:

> "(1)(a) Due oval wound 1/3" in diameter with inverted margin and burning of the area on lateral side of the left
B eye brow.
>
> (b) lacerated injury internal cavity deep with inverted margin was found on central part of forehead just above eye brow 3" x 1.2" into internal cavity from which fractured piece of frontal bone and brain material was prodding out.
C
> On dissection the two wound were found interconnected.
>
> (ii) One oval wound ¼" in diameter with inverted margin was found at left cheek.
>
D On dissection maxilla and mandible were found fractured and tongue and inner part of lower lip was found lacerated. The projectile after entering the left cheek and damaging above organs have passed away from oval cavity.
>
E (iii) One oval wound with interverted margin and singling and burning of the margin ¼" in diameter was found on right parietal region of head;
>
> (b) One oval wound 1.3" x ½" into internal cavity deep with everted margin was found on left parietal region of head.
F
> On dissection two wounds were found interconnected with facture of skull bone into so many pieces and laceration of brain tissue."

G PW-16 has further stated in his evidence that out of these 3 wounds, 2 were on the left side and one on the right side of the body. In his cross examination, PW-16 has stated:

> "34. The projectile may travel in the body even in standing or sleeping position.
H

38. Injury No.II indicates that the patient may be able to move his face. From my postmortem report it appears that only after causing injury No.II the other injury No.III was caused. After sustaining injury No.III the one could not be moved and as such injury No.1 might not have been inflicted. On parity of logic vice versa is also correct. Thus injury No.(i) was caused before injury No.II (Volunteers that instead of definite was or were, if they should be read may and might)"

The evidence of PW-16 is clear that the projectile may travel in the body even in standing or sleeping position. PW-16 has stated that injury No.I may have been caused and thereafter injury No.II may have been caused. Moreover, injury No.II indicates that the deceased may have been able to move his face. He has also stated that from the postmortem report it appears that only after causing injury No.II the other injury No.III may have been caused. Thus, the argument of Mr. Ranjeet Kumar that after the injury No.II on his left cheek, the deceased may have turned his face and thereafter injury No.III on the left parietal region of his head may have been caused cannot be rejected. We cannot, therefore, hold that the medical evidence is such as to entirely rule out the truth of the evidence of the prosecution witnesses that the deceased was shot when he was lying injured on the ground.

37. We may now deal with the contention of the defence that the High Court did not take into consideration the evidence of PW-17 and PW-21, who were the driver and the bodyguard of the deceased respectively, and who did not support the prosecution case. We have gone through the evidence of PW-17 (driver) who has stated that the people participating in the procession surrounded the car of the deceased and were shouting '*maro maro*' and that they pulled out the deceased and the bodyguard and then began to assault them, but he escaped and hid behind the vehicle and after a gap of five to six minutes when he returned he found the procession was not there but

A the police was present there with their vehicles and he saw the deceased lying on the road in injured condition and the car of the deceased was lying inverted and thereafter the deceased was carried to the Hospital in the police vehicle and he also went in the same vehicle to the Hospital and later on he came
B to know that the deceased was dead. We have also gone through the evidence of PW-21 (bodyguard) who has deposed that the crowd was shouting *'maro maro'* and they beat him, the driver as well as the deceased and turned the vehicle and they sustained injuries and after some time the police came
C over there and the stampede started and police sent the deceased and him to the Hospital and he came to know that the deceased was dead. Both PW-17 and PW-21, therefore, are silent with regard to exhortation by A-1, A-2, A-3 and A-4 to Bhutkun to shoot at the deceased. It appears that PW-17 and
D PW-21 were not aware of any shooting incident at all and they were under the impression that the deceased had been injured by the assault of the mob after he was pulled out from the car. PW-17 and PW-21, in our considered opinion, do not seem to know what exactly happened after they were pulled out from the car and beaten up by the mob. On the basis of their evidence,
E the Court cannot discard the evidence of ten other witnesses that the deceased was shot by Bhutkun with the revolver on the exhortation of A-1 when the medical evidence established that the cause of death of the deceased was on account of the bullet injuries on the deceased and not the assault by the mob.
F Moreover, PW-17 and PW-21 may not have supported the prosecution case but their evidence also does not belie the prosecution case that the deceased was shot by Bhutkun on the exhortation by A-1.

G 38. We now come to the submission of Mr. Jethmalani that as A-1 was sitting in a Contessa car which was in the front of the procession and as the killing of the deceased took place in the middle of the procession, the evidence of the eye-witnesses should be discarded as not probable. The
H prosecution has been able to adduce evidence through its

witnesses that at the time of shooting of the deceased, A-1 was at the spot and was exhorting Bhutkun Shukla to shoot at the deceased. If A-1 wanted the Court to believe that at the time of the incident he was in the Contessa car in the front of the procession and not at the spot, he should have taken this defence in his statement under Section 313 Cr.P.C. and also produced reliable evidence in support of this defence. Section 103 of the Indian Evidence Act, 1872 provides that the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. The prosecution by leading evidence through its several witnesses has established that A-1 was at the place of occurrence and had exhorted Bhutkun Shukla to shoot at the deceased. If A-1 wanted the Court to reject this prosecution version as not probable, burden was on him to lead evidence that he was not at the spot and did not exhort Bhutkun Shukla to shoot at the deceased. Since he has not discharged this burden, the High Court was right in holding that A-1 was guilty of the offence under Section 302/109 IPC.

39. Regarding the sentence, the High Court has held that though the deceased was a District Magistrate, he was killed in another district as an occupant of a car by chance on account of mob fury and exhortation by A-1 and firing by Bhutkun Shukla and as A-1 was not the assailant himself, death sentence would not be the appropriate sentence. We agree with this view of the High Court and we are of the view that this was not one of those rarest of rare cases where the High Court should have confirmed the death sentence on A-1. In our considered opinion, A-1 was liable for rigorous imprisonment for life.

40. In the result, we do not find any merit in either the appeal of A-1 or the appeals of the State and we accordingly dismiss all the criminal appeals.

K.K.T. Appeals dismissed.