

The State of Bihar Vs. Jhari Sharma,

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Court : Patna

Decided On : Apr-30-2007

Judge : Chandramauli Kr. Prasad and Abhijit Sinha, JJ.

Acts : Arms Act - Sections 27(1); Indian Penal Code (IPC) - Sections 34, 148, 149, 201 and 302; Code of Criminal Procedure - Sections 366

Appeal No. : Death Reference No. 3 of 2004 and Criminal Appeal No. 92 of 2004 (D.B.)

Appellant : The State of Bihar Jhari Sharma

Respondent : Jhari Sharma, Kailash Singh and Rana Singh The State of Bihar

Advocate for Pet/Ap. : Rana Pratap Singh, Sr. Adv., Sumant Singh and Aruni Singh, Adv. in Cr.A. No. 92/2004 and Kanhaiya Prasad Singh, Sr. Adv., Ashutosh Kumar, Paras Nath, Atal Bihari, Chandra Mohan Jha and Reeva Singh, A

Prior history : Chandramauli Kr. Prasad and Abhijit Sinha, JJ. 1. Jhari Sharma, Kailash Singh and Rana Singh were put on trial for commission of the offence under Section 148, 302/149 and 201 of the Indian Penal Code and 27(1) of the Arms Act. Additional Sessions Judge. Fast Track Court No. II. Khagaria by judgment dated 29th of January, 2004 passed in Sessions Trial No. 351 of 1999 held all of them guilty under Section 148, 302/149 and 201 of the Indian Penal Code and 27(1) of the Arms Act. By order dated 30

Judgement :

Chandramauli Kr. Prasad and Abhijit Sinha, JJ.

1. Jhari Sharma, Kailash Singh and Rana Singh were put on trial for commission of the offence under Section 148, 302/149 and 201 of the Indian Penal Code and 27(1) of the Arms Act. Additional Sessions Judge. Fast Track Court No. II. Khagaria by judgment dated 29th of January, 2004 passed in Sessions Trial No. 351 of 1999 held all of them guilty under Section 148, 302/149 and 201 of the Indian Penal Code and 27(1) of the Arms Act. By order dated 30.1.2004 he awarded sentence of 2 years rigorous imprisonment for offence under Section 148 of the Indian Penal Code, death for offence under Section 302/149 of the Indian Penal Code, 5 years rigorous imprisonment and fine of Rs. 5000/-, in default of payment of fine to suffer simple imprisonment for one year under Section 201 of the Indian Penal Code and further sentenced them to undergo rigorous imprisonment for 3 years and fine of Rs. 3000/-, in default to suffer simple imprisonment for 6 months under Section 27(1) of the Arms Act. Sentences of imprisonment were directed to run concurrently.

2. The sentence of death had necessitated reference under Section 366 of the Code of Criminal Procedure and, accordingly the learned Judge has transmitted the record to this Court for confirmation of death sentence, which has been registered as Death Reference No. 3 of 2004. Kailash Sinha and Rana Singh aggrieved by their conviction and sentence have also preferred appeal, which has been registered as Criminal Appeal No. 92 of 2004, whereas the Criminal appeal preferred by Jhari Sharma has given rise to Criminal Appeal No. 105 of 2004.

3. As the Death Reference as also the Criminal appeals have arisen out of the same judgment, they were heard together and are being disposed of by this common judgment.

4. Prosecution started on the basis of a statement given by one Suresh Singh (P.W.8) before the Sub-Inspector of Police of Beldaur Police Station on 21.5.1998 at 7.30 A.M. at Ramnagar Bazar Samiti, Maheshkhoont. According to the informant, fee of the Bazar Samiti is realised in the name of his son. On the date of

occurrence at 6 A.M. he alongwith his sons Sunil Singh (P.W.4), Shambhu Singh (P.W.6), brothers Sudhakar Singh (deceased), Sudhir Singh (P.W.1), nephew Jitendra Singh (deceased), Bijay Kumar Singh (P.W.2), Ranjeet Kumar Singh (P.W.5) and few others including a man from Bhagalpur, whose name was not known to him, were sitting inside the room of the Bazar Samiti and on chair outside it. According to him, Sudhakar Singh (deceased), Ram Briksh Singh (deceased) and Jitendra Singh (deceased) were sitting outside and at that time Kushweri Choudhary @ Kishori Choudhary besides fourteen other accused persons including appellant Jhari Sharma but excluding appellants Kailash Singh and Rana Singh came suddenly from eastern side and at the same time ten other persons came from western side armed with weapons like rifle, gun, pistol and musket and surrounded them. According to the informant, accused Kishori Choudhary and Mangal Singh killed Sudhakar Singh at that very place by fire arm and rest of the accused persons resorted to indiscriminate firing causing death of Ram Briksh Singh and another person. On hearing the sound of firing and hulla, many people gathered and accused Kishori Choudhary and others asked Nageshwar Singh at gun point to start his tractor and after putting the dead bodies of three persons, namely, Sudhakar Singh, Ram Briksh Singh and the unknown person fled towards Gawas river in the west. After accused Kishori Choudhary and other accused persons left the place of occurrence villagers gathered and the informant saw Jitendra Singh living in injured condition in a maize field situated behind the Bazar Samiti who was sent to Khagaria Hospital for treatment. According to the informant, accused Kishori Choudhary fired about 25 shots and the reason of the occurrence is that said Kishori Choudhary and other accused persons are criminals and had enmity with deceased Sudhakar Singh from before. On the basis of the aforesaid information, Beldaur P.S. case No. 32 of 1998 was registered under Section 302/201/34 of the Indian Penal Code against fifteen accused persons which included Jhari Sharma but excluded Kailash Singh and Rana Singh.

5. Police after investigation submitted charge sheet against all the accused persons named in the first information report showing Jhari Sharma in custody and rest of the accused persons as absconders. However investigation against appellants Kailash Singh and Rana Singh was kept pending but later on they were

also charge-sheeted. They were ultimately committed to the Court of Sessions, where they have been charged for rioting with deadly weapons likely to cause death punishable under Section 148 of the Indian Penal Code. They were further charged for intentionally causing the death of four persons, namely, Sudhakar Singh, Ram Briksh Singh, Jainarain Mahto and Jitendra Singh in furtherance of their common object punishable under Section 302/149 of the Indian Penal Code. All of them have also been charged for causing disappearance of evidence with the intention of screening them from legal punishment punishable under Section 201 of the Indian Penal Code. Besides they have also been charged for illegally possessing arms for its use for unlawful purposes of committing murder punishable under Section 27(1) of the Arms Act, Appellants pleaded not guilty and claimed to be tried.

6. Prosecution in support of its case had altogether examined ten witnesses. The Investigating Officer of the case Rajendra Prasad Yadav has been examined as court witness No. 1. P.W. 1 Sudhir Prasad Singh, P.W.2 Vijay Kumar Singh, P.W.3 Ved Bhushan Prasad Singh, P.W.4 Sunil Singh, P.W.5 Ranjeet Kumar Singh, P.W.6 Shambhu Singh, informant P.W.8 Suresh Singh claim to be the eye-witnesses to the occurrence. P.W.7 Dr. S.K. Pansari had conducted postmortem examination on the dead bodies of deceased Jitendra Singh and Jainarain Mahto, whereas P.W.9 Dr. Purshottam Kumar Sinha had conducted postmortem examination on the dead bodies of deceased Sudhakar Singh and Ram Briksh Singh. P.W.10 Ram Pravesh Choudhary is an advocate's clerk and a formal witness, who had identified the signature of the Officer-Incharge, who had drawn the formal first information report.

7. Appellants denied to have committed any offence and pleaded false implication. From the trend of the cross-examination their defence seem to be that on 21.5.1998, exchange of fire took place for taking control of Gawanbira Ghat between two groups of criminals and deceased Sudhakar Singh and others belonged to one criminal group and in the exchange of fire, he besides other persons were killed. From the trend of the cross-examination as also from the evidence of the witnesses, their defence further appears to be that the deceased Sudhakar Singh was a notorious criminal and murdered in gang-war and since

Ram Briksh Singh and Jainarain Mahto did not become witnesses, they have also been murdered and these appellants have been falsely implicated in the case on account of land dispute. In support of the case, four defence witnesses have been examined.

8. First, I will refer to the evidence of the prosecution witnesses.

9. P.W.1 Sudhir Prasad Singh is the brother of the informant as also the deceased Sudhakar Singh and stated in his evidence that on 21.5.1998 at 5.45 A.M. he was sitting at Bazar Samiti, a little away from his house alongwith his family members, namely, P.W.2 Vijay Kumar Singh, P.W.3 Ved Bhushan Prasad Singh, P.W.4 Sunil Singh, P.W.5 Ranjeet Kumar Singh, P.W.6 Shambhu Singh and deceased Sudhakar Singh, Jitendra Singh, Ram Briksh Singh and Jainarain Mahto were also sitting at a nearby place. Aforesaid deceased persons were cleaning their mouth, whereas others were gossiping in front of the main gate. He saw accused persons including appellant Jhari Sharma variously armed with pistols, guns and rifles coming from the eastern and western direction whereas appellants Kailash Singh and Rana Singh armed with guns, pistols and rifles from the northern direction. According to this witness, all the accused persons surrounded Sudhakar Singh and others and started firing at them causing death of Sudhakar Singh, Ram Briksh Singh and Jainarain Mahto at the place of occurrence itself. According to this witness, Jitendra Singh also sustained gun shot injury but he ran for safety and fell down in the maize field.

10. According to this witness, accused persons brought the tractor of Nageshwar Singh which was being driven by him, put the three dead bodies on the tractor and went towards the north. On hulla, witnesses came and when the search was made, Jitendra Singh was found lying in the maize field besmeared with blood. He was lifted and on way to the Hospital he died.

11. The motive of occurrence, according to this witness, is that while deceased Sudhakar Singh was in jail, he had taken loan from Kishori Choudhary which he was not repaying. Further Bazar Samiti was settled in the name of his nephew Sunil Singh (P.W.4) and Kishori Choudhary was demanding four annas share therein. In addition thereto, Kishori Choudhary was also demanding a sum of Rs. 1

lac from deceased Sudhakar Singh. In the cross-examination he has stated that he was sitting a little away from the gate of Bazar Samiti and the houses of appellants Kailash Singh and Rana Singh are situated in the middle of the village. In the cross-examination he had further stated that he had seen the wife of the informant Suresh Singh at the place of occurrence and the police had come there on being informed by P.W.4 Sunil Singh and P.W.6 Shambhu Singh, who had gone to give information on a motorcycle.

12. In the cross-examination he had stated that deceased Jitendra Singh had fallen at a distance of 10 to 15 yards to the west of the place where he was sitting and its distance is 25 to 30 yards from the place of occurrence. According to him, Ram Briksh Singh and Jainarain Mahto were not partners in the Bazar Samiti and Jainarain Mahto was killed first while he was sitting on a chair and blood was oozing out from his body. According to this witness, Sudhakar Singh was killed even before Jainarain Mahto was killed.

13. According to this witness, Jitendra Singh received shots in the field of Sikandar Singh from where he was lifted by him and put on a jeep for being taken to Hospital for treatment and before that he was put on a cot belonging to him. The cot, according to this witness, had blood-stains and was shown to the Sub-inspector of Police. According to him, Jitendra Singh sustained gun shot injury in the maize field. This witness had not seen any-one placing chair or taking it away. According to him, 20 to 25 rounds were fired but he could not state as to the number of firing resorted to by each of the accused. In the cross-examination he had asserted that the first shot was fired by Kishori Choudhary which hit deceased Sudhakar Singh and he being scared, hid himself in the house of Prabhakar and remained there for about half an hour. He denied the suggestion that appellants Rana Singh and Kailash Singh have been falsely implicated in the case and they were not concerned with the activities of either deceased Sudhakar Singh or accused Kishori Choudhary. He admitted having stated before the police that there was old enmity with deceased Sudhakar Singh and accused Kishori Choudhary. Sudhakar Singh had taken money from Kishori Choudhary on loan while he was in jail. The distance of village Gawas, according to this witness, is two miles to the west of Bazar Samiti.

14. P.W.2 Vijay Kumar Singh is the son of deceased Sudhakar Prasad Singh and claims to be an eye-witness to the occurrence. According to him, on the date of occurrence at 5.45 A.M. while he was sitting at a distance of about ten yards from the Bazar Samiti, he saw 30 to 40 persons coming from eastern and western side armed with rifles and guns and amongst them he identified Kishori Choudhary and the three appellants herein who came near the office of Bazar Samiti and resorted to firing causing the death of Sudhakar Singh, Ram Briksh Singh, Jainarain Mahto and Jitendra Singh, who were sitting on chairs in front of Bazar Samiti. According to this witness, three persons died at the spot whereas Jitendra Singh after sustaining injury fled to a maize field in the western direction. After killing the aforesaid persons, according to this witness, accused persons went to the hut of Nageshwar Singh and came with the tractor threatening to kill him if he does not bring the tractor, kept the dead bodies of Sudhakar Singh, Ram Briksh Singh and Jainarain Mahto on that and went in the northern direction. According to this witness, after the accused persons left the place of occurrence they started looking for Jitendra Singh and saw him in a maize field besmeared with blood and he was sent to Khagaria Hospital by jeep. According to this witness, at the time of occurrence besides him P.W.8 Suresh Singh, P.W.1 Sudhir Prasad Singh, P.W.6 Shambhu Singh, P.W.4 Sunil Singh, Jai Kirpal Singh, Sanoj Singh, wife of informant Suresh Singh and Ranjeet Singh (P.W.5) were also present. In paragraph 8 of the cross-examination he has stated that chairs were not kept where he was sitting and he did not see Sudhir Singh sitting on the chair there. In the cross-examination he has also stated that maize crops of human height was standing towards eastern and the western direction. He denied the suggestion that he was not in the village at the time of occurrence. In paragraph 13 of the cross-examination he has stated that appellants Kailash Singh and Rana Singh had not come and had seen them in the south. He admitted that he had not stated before the Sub-Inspector of Police that he had seen Kailash Singh and Rana Singh in the south.

15. P.W.3 Ved Bhushan Prasad Singh is the brother of the informant who claims to be an eye witness to the occurrence. According to him, on the date and time of occurrence, while he was sitting at a tea stall situated in front of Bazar Samiti, accused persons, which included appellant Jhari Sharma, came at about 5.45

A.M. from the eastern and western side and resorted to firing indiscriminately, which hit Sudhakar Singh, Ram Briksh Singh, Jitendra Singh and Jainarain Manto. According to him, excepting Jitendra Singh, all the three persons died at the spot and Jitendra Singh fled towards the maize field in the west. After that, accused persons put the dead bodies of Sudhakar Singh, Ram Briksh Singh and Jainrain Mahto on the Tractor of Nageshwar Singh and drove it towards west. Thereafter, Jitendra Singh was picked up from the maize field, brought in front of the Bazar Samiti and from there, sent to Khagaria Hospital for treatment. He identified appellant Jhari Sharma and other two appellants, namely, Kailash Singh and Rana Singh in the dock but clearly deposed that he had not seen the latter two appellants with the other accused persons. In the cross-examination, he had admitted that there are many cases against the deceased Sudhakar Singh and Kushweri Choudhary alias Kishori Choudhary. It is said that earlier, they were accomplices but later on, became enemy.

16. As regards deceased Ram Briksh Singh and Jainarain Mahto, this witness has stated that they were not criminals and showed ignorance as to why they have been killed. He denied the suggestion that they were trying to acquire the land in respect of which Parcha was granted to appellant Jhari Sharma. He has also stated about the presence of Pagal Sao and his mother along with him at the time of occurrence. According to this witness, in the cross-examination, he had stated that he did not see Jitendra Singh falling down after the gun shot injury and the other three deceased were killed on the chair but the gun shots did not make holes in the chairs.

17. P.W.4 Sunil Singh is the son of the informant and according to his evidence, on the date and time of the incident, P.W.5 Ranjeet Kumar Singh as also his father Suresh Singh (P.W.8) were sitting in the office of the Bazar Samiti, whereas the four deceased, i.e. his uncle Sudhakar Singh, brothers Jitendra Singh, Ram Briksh Singh and relative Jainarain Mahto were sitting outside the office. At that time, assailants which included the three appellants herein, as also Kushweri Choudhary came and started firing at Sudhakar Singh and the other persons sitting outside, Sudhakar Singh, Ram Briksh Singh and Jainarain Mahto, according to this witness, died at the spot, whereas Jitendra Singh, after sustaining the gun

shot injury, fled to the maize field. The appellants put all the three dead bodies on the tractor of Nageshwar Singh parked nearby and drove it away. Thereafter, the villagers assembled and they saw Jitendra Singh lying in an injured condition in a maize field from where he was lifted, brought on the road and sent to Khagaria for treatment. In cross-examination, he has stated that Sunita Devi, wife of the informant had gone with Jitendra Singh in the Jeep and she returned in the evening at about 3-4 P.M. but before that, he knew that Jitendra Singh had died. He denied the suggestion that the Bazar Samiti was not settled with him. However, he did not disclose the date on which the auction was held for its settlement. He also did not remember the date on which the room was constructed but had admitted that he had not obtained permission from the Public Works Department for constructing the room over the land which belonged to the said Department. The size of the room, according to this witness, was 30 cubits long and 10 cubits wide. According to him, none of the persons sitting in the room of Bazar Samiti received any injury and all the deceased persons were at a distance of about 2 cubits outside the door of the room and none of them fled inside the room. According to this witness, 30-40 shots might have been fired during the incident and he had not seen Jitendra Singh receiving gun shot injury. He said that the accused persons had surrounded them from all the sides. He said that except the four deceased, nobody had sustained any injury at the occurrence.

18. P.W.5. Ranjeet Kumar Singh is an employee of the Bazar Samiti. According to him, on the date and time of the occurrence, he was present near the Bazar Samiti and saw the assailants, including the three appellants coming from northern and eastern direction and resorting to indiscriminate firing causing death of Sudhakar Singh, Ram Briksh Singh and Jainarain Mahto at the spot. Thereafter, the accused persons brought the tractor of Nageshwar Singh, put the three dead bodies on it and drove it towards the north.

19. In the cross-examination, this witness failed to disclose as to why Sudhakar Singh was killed and admitted that he had not given any statement earlier. He also denied the suggestion that he had given false evidence as one and half bigha land of Kushewari Choudhary was given to him by the informant for cultivation.

20. P.W.6 Shambhu Singh is another son of the informant and according to him, on the date and time of the occurrence, he was at Bazar Samiti, where besides other persons, deceased Sudhakar Singh, Jitendra Singh, Ram Briksh Singh and one guest, namely, Jainarain Mahto were also present. There a large number of accused persons, which included Kushewari Choudhary alias Kishori Choudhary and three appellants, came variously armed with rifles and guns and resorted to firing causing the death of Sudhakar Singh, Ram Briksh Singh and Jainarain Mahto at the spot. Thereafter, the accused persons threatened Nageshwar Singh and brought his tractor, kept three dead bodies on its trailer and drove towards the west. After that, the villagers assembled and on search, Jitendra Singh was found in injured condition in the maize field from where he was brought on the road and sent to Khagaria Hospital for treatment. In paragraph No. 11 of his cross-examination, he had stated that he did not have the chance to read the fardbeyan of Sunita Devi and he claimed to have disclosed the name of appellants Rana Singh and Kailash Singh who had resorted to firing. In paragraph No. 22 of the cross-examination, he had admitted that the Taat (wall made of bamboo) of Bazar Samiti was battered by gun shots.

21. P.W. 8 Suresh Singh is the informant of the case and in the evidence, he has supported the case of the prosecution. According to him, the four brothers had taken settlement of the Bazar Samiti jointly. He along with the witnesses, namely, P.Ws. 1, 4, 5, 6 and the deceased were sleeping in the office of the Bazar Samiti. At 5.45 A.M. on 21.5.1998, after they wake-up, he along with the deceased Sudhakar Singh, Jitendra Singh, Ram Briksh Singh and Jainarain Mahto were sitting on the chairs. In the meantime, about 30-40 persons came from the eastern and western directions variously armed arrived and surrounded them and started firing indiscriminately. From amongst the assailants, this witness identified a large number of accused persons including the three appellants herein. As a result of firing, four persons who were sitting on the chairs, namely, Sudhakar Singh, Ram Briksh Singh and Jainarain Mahto died at the spot, whereas Jitendra Singh, after receiving injury, fled in Janera field situated to the west of the place of occurrence but the accused persons chased him and fired at him. After sustaining the injury, said Jitendra Singh fell down.

22. Thereafter, according to this witness, accused persons forcibly brought the tractor and trailer of Nageshwar Singh, put the dead bodies of Sudhakar Singh, Ram Briksh Singh and Jainarain Mahto on it and drove it towards the west of Gawasveera Ghat. He proved the statement which led to the registration of the first information report in presence of P.W.5 Ranjeet Kumar Singh. According to him, Jitendra Singh was sent to Khagaria Hospital for treatment but he died on the way. He also proved the signature on the first information report marked Ext.2.

23. In paragraph No. 8 of the cross-examination, he had admitted that the settlement of the Bazar Samiti was made in the name of his son in which deceased Sudhakar Singh had also four annas share. He was told by his son Shambhu Singh that accused Kushwari Choudhary alias Kishori Choudhary wanted a share in the Bazar Samiti. In paragraph No. 11 of the cross-examination, he claimed to have recognized the appellants Kailash Singh and Rana Singh from amongst the persons who resorted to indiscriminate firing after surrounding them. He has further admitted that appellants Kailash Singh and Rana Singh are cousins (sons of father's brother). He has further admitted that no possession was obtained for constructing the office of Bazar Samiti from any authority. According to him, the office of the Bazar Samiti was located in a room which had a door and was surrounded by fencing made of bamboo thatch from three sides. According to him, none was murdered in the office room. He claimed to have shown the chairs to the Sub Inspector of Police on which the deceased were sitting. He has also stated that the chairs were seized by the Sub Inspector of Police. In paragraph No. 22 of the cross-examination, he has deposed that his wife had also given her fardbeyan but she had not told him about it.

24. P.W. 7 Dr. S.K. Pansari, at the relevant time, was posted as Civil Assistant Surgeon at Sadar Hospital, Khagaria and according to his evidence, he conducted the post mortem examination on the dead body of Jitendra Singh on 21.5.1998 gave post mortem report (Ext.1) and found the following:

1. Rigor Mortis present in all the limbs and neck,
2. Mark of gun powder over face, right arm, right half of abdomen, right side of chest, both thigh and left arm,

3. One lacerated wound over right half of vault of skull 2' above right ear, margin inverted, size-1' x 1/2' x cranial cavity deep. Blood clot present around the wound (wound of entry).

4. One lacerated wound over posterior surface of right upper arm margin inverted, mark of gun powder around the wound, size 1' x 1/2' x bone deep (wound of entry).

5. One lacerated wound over interior surface of upper third part of right upper arm margin inverted. Size 3/4' x 3/4' x bone deep (wound of exit),

6. One lacerated wound over right side of abdomen in right interior axillary line at the level of umblicus. Margin inverted. Mark of gun powder present around the wound Size 3/4' x 3/4' x abdominal cavity deep.

7. One lacerated wound over right half of abdomen in right mammary line 2.1/2' right to umblicus margin everted, size 1' x 1' x abdominal cavity deep (wound of exit).

8. One lacerated wound over right side of upper third of right thigh margin inverted. Mark of gun powder present around the wound. Size 1' x 1/2' x muscle deep. (wound of entry).

9. One lacerated wound over medial part of right buttock 1' right to mid line. Margin everted. Size 1' x 1' x muscle deep (wound of exit).

10. One lacerated wound over dorsum of right hand below the left of index and middle finger. Margin inverted. Size 3/4' x 3/4' x whole thickness of hand (wound of entry).

11. One lacerated wound over palm surface of right hand in the middle. Size 2' x 1' x whole thickness of hand, Margin everted (wound of exit).

25. In the opinion of the doctor, injury Nos. 4 and 5, 6 and 7, 8 and 9 and 10 and 11 were communicating to each other and the doctor found one bullet lodged in the cranial cavity under the right parietal bone. He also found right humerus, right femur and pelvic bone fractured.

26. In his opinion, the death had occurred on account of shock and haemorrhage due to the injuries found on the person of the deceased which were caused by fire-arm and time elapsed since death was 24 hours.

27. This doctor had also conducted the post mortem examination on the dead body of Jainarain Mahto on 22.5.1998 and proved the post mortem report (Ext.1/1). He found the dead body headless and rigor mortis present at the stage of putrefication and foul smell coming out from it. He found the following injuries on his person:

(i) Incised wound over lower third of neck cutting completely muscles, nerves, vessels, trachia, oesophagus and vertebra cervical sixth and other structure of neck. Head and upper part of neck was not sent with the body. There was no clot in surrounding tissues around the injury site,

(ii) Incised wound over middle of abdomen 6" x 1' x abdominal cavity deep. Intestine was protruding out through the wound. There was no clot in the surrounding tissues at injury site,

(iii) One lacerated wound over left half of back over left infra scapular area at left seventh inter costal space just below the interior angle of left scapula size 1/2' x 1/2' x chest cavity deep. Blood and clot present around the tissues, margin was inverted (wound of entry),

(iv) One lacerated wound over right side of chest in right anterior axillary line 4 inches lateral to right nipple. Size 1 x 1/2' x 1' x chest cavity deep margin everted. Blood and clot present around the wound (wound of exit).

28. On dissection, he found the tissues of injury Nos. 3 and 4 and both the lungs lacerated and injury Nos. 3 and 4 communicating to each other. He also found fracture of left 8th rib posteriorly and right 4th rib in right side of chest.

29. In his opinion, injury Nos. 1 and 2 were post-mortem in nature and injury Nos. 3 and 4 ante mortem in nature. He further opined that injury Nos. 1 and 2 were caused by sharp cutting weapon. Death, according to the doctor, had taken place due to shock and haemorrhage on account of injury Nos. 3 and 4 caused by fire-

arms which were sufficient in ordinary course of nature to cause death.

30. P.W.9 Dr. Purshottam Kumar Sinha, is another Civil Assistant Surgeon who had conducted the post mortem examination on the dead body of Sudhakar Singh without head and neck on 22.5.1998 at 4.50 P.M. and proved the post mortem report (Ext.1/2) He found following injuries on his person:

1. Incised wound size 7' x 6' over lower part of the neck completely separating head and upper part of the neck and exposing all structures of neck vessels, nerves, spinal chord, sixth cervical vertebra, oesophagus trachea cut.

2. Lacerated wound size 1/2' x 1/2' circular inverted margin chest cavity deep over left side of the chest lateral aspect 3' below left axilla,

3. Lacerated wound size 1/2' x 1/2' chest cavity deep circular inverted margin over left side of chest, lateral aspect 5' below left axilla,

4. Lacerated wound size 1.1/2' x 1' everted margin over right side of the chest interior lateral aspect chest cavity deep upper part.

5. Lacerated wound size 1.1/2' x chest cavity deep over right side of the chest. Lateral aspect in midele part everted margin.

6. Lacerated wound size 1/2' x 1/2' x abdominal cavity deep over lower part of back inverted margin,

7. Lacerated wound size 1.1/2' x 1' over right side of abdomen lateral aspect, everted margin abdominal cavity deep,

8. Incised wound size 5' x 1' x abdominal cavity deep with protrusion of intestine through wound over front of abdomen.

31. On internal dissection, he found the 2nd and 4th injuries communicating to each other whereas 3rd and 5th injuries were communicating both lungs. He also found injury Nos. 6 and 7 to be communicating to each other and in his opinion, injury No. 6 was the wound of entry whereas injury No. 7 was the wound of exit. He found both lungs, heart, liver and intestine lacerated. In his opinion, injuries

Nos. 2 to 8 were ante mortem injuries caused by fire arm, whereas injury Nos. 1 and 8 were post mortem injuries caused by sharp cutting weapon. In his opinion, death had occurred due to shock and haemorrhage resulting from ante mortem injury Nos. 2 to 7 which. Death had occurred within 24 hours from the time of post mortem examination.

32. This doctor had also conducted the post mortem examination on the dead body of Ram Briksh Singh on 22.5.1998 at 8.30 P.M. and found the head and upper neck back missing from the body. He found the following injuries on his person:

1. Incised wound 6'x5' over lower part of the neck 1/2' adjacent to trunk completely separating head and upper part of neck exposing all cut structures of neck such as vessels, nerves, trachea and oesophagus, 6th cervical vertebra and spinal chord,
2. Lacerated wound 1/2'x 1/2' and circular inverted chest cavity deep over right chest upper part,
3. lacerated wound 1.1/2' x 1' x chest cavity deep over right side of upper part of neck,
4. Incised wound 6' x 1.1/2' x abdominal cavity deep with protrusion of coils of intestine,
5. Incised wound 1.1/2' x 1/2' x muscle deep over left shoulder interior aspect.

33. On internal dissection, the 2nd and 3rd injuries were found communicating to each other and passing through right, middle and upper lobe of lung whereas injury No. 2 was wound of entry, injury No. 3 wound of exit. In his opinion injury Nos. 2 and 3 were ante mortem in nature caused by fire arm, whereas injury Nos. 1, 4 and 5 post mortem in nature caused, by sharp cutting weapon. In his opinion, death had taken place within 36 hours of his examination on account of shock and haemorrhage as a result of the ante mortem injuries found on the person of the deceased which were sufficient in ordinary course of nature to cause death.

34. P.W.10 Ram Pravesh Choudhary is an Advocate Clerk and a formal witness, who had identified the signature of the Officer-in-charge of the Police Station, who had drawn the formal first information report (Ext.3). Investigating Officer of the case, namely, Rajendra Prasad Yadav, at the relevant time, was posted as the Officer-in-charge of Beldaur Police Station and examined as Court witness No. 1. According to him, he heard that four persons including Sudhakar Singh, have been killed at Ram Nagar Bazar Samiti. He made entry in the Station Diary and proceeded to the place of occurrence along with an armed force and after reaching the place of occurrence, recorded the statement of the informant. On information that the accused persons had taken three dead bodies on a tractor towards river Gawas he proceeded towards that direction and when he had travelled a distance of 8 kms, he saw the tractor coming from the opposite direction. On inquiry, Nageshwar Singh informed that the accused persons had beheaded the dead bodies and thrown them in river Kari Kosi near the Basa (Farm house of Mishirjee). With the help of the fishermen, the dead bodies of Ram Briksh Singh and Jainarain Mahto were fished out from the river and after inquest, same were sent to Sadar Hospital, Khagaria for post mortem examination. According to this witness, the dead body of Ram Briksh Singh was identified by his brother Pradeep Singh. He also identified the dead body of Jainarain Mahto.

35. This witness visited the place of occurrence and found the huts of a large number of persons close to the place of occurrence. He also found maize crop in the field on both sides of the road. He found huge quantity of blood at the place of occurrence and four empty cartridges at the main gate of Bazar Samiti. In course of investigation, he also recovered the dead body of Sudhakar Singh from Kamathan Gawas. In the cross-examination, he had admitted that deceased Sudhakar Singh and accused Kushwari Choudhary were criminals of the same gang and were charge-sheeted accused in murder, abduction, dacoity and loot cases. He has also stated that deceased Sudhakar Singh had unlicensed rifle and accused Kushwari Choudhary wanted to take that rifle from him. In the cross-examination, he has further stated that he had recorded the statements of all the witnesses mentioned in the charge sheet before registering the case and the informant had not disclosed the names of appellants Rana Singh and Kailash Singh in his fardbeyan. In the cross-examination, this witness had asserted that he

saw blood at the place of occurrence but did not see blood at any other place. He had also not stated about the presence of blood on the tractor. He had denied the suggestion that exchange of fire had taken place between deceased Sudhakar Singh and Julo Rai over the issue of Jalkar in which he was killed. He has admitted to have not sent the blood stained earth and the empty cartridges for forensic examination.

36. D.W.1 Janardan Singh has stated in his evidence that appellants Rana Singh and Kailash Singh are own brothers and cousins of P.W.1 Sudhir Prasad Singh and thier father Chandradeo Singh had purchased land over which deceased Sudhakar Singh and P.W.1 Sudhir Prasad Singh were keeping their cattle. He has further stated that a Panchayati was held in which it was decided to get the land vacated from them and on account thereof, P.W.1 Sudhir Prasad Singh had falsely implicated appellants Rana Singh and Kailasa Singh.

37. D.W.2 Kartik Sharma has stated in his evidence that P.W.3 Ved Bhushan Prasad Singh and the informant Suresh Singh (P.W.9) are brothers and appellant Jhari Sharma had purchased land from one Prabhat Kumar Singh on 23.12.1997 and before that, Ved Bhushan Prasad Singh and informant Suresh Singh were in possession thereof. After the purchase, a Panchayati was held in which the Panches asked aforesaid Ved Bhushan Prasad Singh to vacate the land which he vacated. He has further deposed that on 21.5.1998, hulla was raised that deceased Sudhakar Singh and others were killed over the dispute of Jalkar and no occurrence had taken place at Ram Nagar. In the cross-examination, he had admitted that he is the brother of appellant Jhari Sharma.

38. D.W.3 Bilas Singh has stated in his evidence that on 21.5.1998 when he had gone to attend the call of nature, he heard the sound of firing coming from the Jalkar of Kosi river at Gawasveera Ghat and although he did not go there out of fear, but came to know at about 9-10 A.M. that firing had taken place between the two groups over the dispute of Jalkar in which Sudhakar Singh and others have been killed.

39. D.W.4 Bhujangi Prasad Yadav is an Advocate Clerk and has stated about the execution of sale deed in favour of Chandradeo Singh by Rajesh Kumar Sinha and

in favour of Ashok Kumar Sharma son of appellant Jhari Sharma by Prabhat Kumar Singh.

40. The Court below, on appreciation of evidence, came to the conclusion that the prosecution has been able to prove its case beyond all reasonable doubt and accordingly, convicted and sentenced the appellants as above.

41. Mr. Rana Pratap Singh, Senior Advocate appears on behalf of appellants Kailash Singh and Rana Singh, whereas appellant Jhari Sharma is represented by Mr. Kanhaiya Prasad Singh, Senior advocate. Mr. Lala Kailash Bihari Prasad, Additional Public Prosecutor appears on behalf of the State.

42. They state that according to the prosecution the occurrence had taken place at the Bazar Samiti office which consists of a room made of bamboo sticks and mud and accused persons have allegedly resorted to indiscriminate firing to the extent of 25-30 shots but the Investigating Officer had not found any mark of firing at the place of occurrence or on the wall of the Bazar Samiti. They submit that the Investigating Officer had only found four empty cartridges and although he had found huge quantity of blood there, but same were not sent for forensic examination. They also point out that no blood was found on the tractor on which the dead bodies were carried. These infirmities, according to them, show that the occurrence had not taken place at the place alleged.

43. Mr. Prasad, however, contends that the presence of the empty cartridges as also huge quantity of blood at the place of occurrence, clearly go to show that the occurrence had taken place in the Bazar Samiti. He submits that all the witnesses have consistently stated that the occurrence had taken place at the Bazar Samiti and there is no reason to disbelieve them.

44. Having appreciated the rival submission, we do not find any substance in the submission of the learned Counsels for the appellants and consistent evidence of the prosecution witnesses can not be thrown out on the basis of the infirmities pointed out above. True it is that all the prosecution witnesses have stated that indiscriminate firing was resorted to but the Investigating Officer of the case had not found any bullet mark in the building of the Bazar Samiti. However, he has

found huge quantity of blood at the place of occurrence and empty cartridges. So far as the absence of blood in the tractor, according to the prosecution, the dead bodies were taken in that and thrown in the river. It is expected that after throwing the dead bodies in the river, same would be washed and hence, absence of blood on the tractor itself, cannot be said to be anything unusual. In my opinion, the presence of huge quantity of blood and the cartridges at the place of occurrence and the consistent evidence of the eye witnesses, clearly go to show that the occurrence had taken place at the Bazar Samiti office as disclosed by the prosecution.

45. Learned Counsels appearing on behalf of the appellants drew our attention to the evidence of the informant Suresh Singh (P.W.8) in paragraph No. 22 of his cross-examination, where he has stated that his wife had also given her fardbeyan but she did not tell him about that. Our attention has also been drawn to the evidence of P.W.1 Sudhir Prasad Singh in paragraph No. 18 of his cross-examination supporting the presence of the wife of the informant Suresh Singh at the place of occurrence and that of P.W.6 Shambhu Singh in paragraph No. 11 of his cross-examination stating that he did not have the occasion to read the fardbeyan of Sunita Devi. From the evidence aforesaid, it is evident that Sunita Devi wife of the informant had given fardbeyan. She must have given account of the occurrence in that, but the prosecution, in order to conceal the truth, has withheld the same, contend learned Counsels for the appellants.

46. We do not find any substance in the submission of the learned Counsels for the appellants. Mere presence of Sunita Devi or the witness saying that he did not read the fardbeyan given by her, shall not mean that, in fact, Sunita Devi had given an account of the occurrence. It is well settled that cryptic information disclosing commission of an offence itself is not sufficient to register a case. Nothing has been pointed out by the Investigating Officer from which it can be inferred that in fact Sunita Devi had given any fardbeyan. In the absence thereof, it cannot be said that any fardbeyan containing the details of the occurrence was given by Sunita Devi, which the prosecution had withheld from the court. Hence, only on this ground, we are not prepared to reject the case of the prosecution.

47. Learned Counsels for the appellants submit that according to the prosecution, accused persons surrounded the deceased, the witnesses and all present at the place of occurrence from all sides and resorted to indiscriminate firing, but excepting the four deceased, none of the prosecution witnesses, although they claim to be present at the place of occurrence, had sustained any injury, which, is quite unnatural and the prosecution story deserves to be rejected on this ground alone. In this connection, our attention has been drawn to the evidence of P.W.8 Suresh Singh in paragraph No. 1 of the examination-in-chief, where he has stated that assailants surrounded them and started firing shots indiscriminately.

48. We do not find any substance in the submission of the learned Counsels for the appellants. When the witnesses said that all the deceased, the witnesses and all persons were surrounded by the accused persons, same does not mean that they made human-walls. In my opinion, when the witnesses stated that the accused persons surrounded them, it would mean that they came from all directions. The indiscriminate firing alleged by the prosecution had resulted in the death of four persons. Merely the fact that number of persons killed is not equal to the number of shots fired shall not mean that the accused persons had not resorted to indiscriminate firing

49. Learned Counsels appearing on behalf of the appellants, then submitted that according to the evidence of P.W.8 Suresh Singh in paragraph No. 12 of his cross-examination, five accused persons including accused Kushwari Choudhary had entered into the office of the Bazar Samiti but none was murdered there, which clearly shows that the prosecution has not come out with the true story.

50. We do not find any substance in the submission of the learned Counsels for the appellants. It is not the case of the prosecution that after the accused persons entered into the office, they resorted to firing. In fact, according to the prosecution, accused persons came from different directions and resorted to indiscriminate firing causing death of three persons who were in the verandah of the office of the Bazar Samiti. It seems that thereafter few accused persons had entered into the office but did not fire shots and hence, question of anybody being killed inside the office or in the room of the Bazar Samiti, did not arise at all.

51. Learned Counsels for the appellants submitted that according to the prosecution, deceased persons were sitting on chairs at the verandah of the office of the Bazar Samiti and were subjected to indiscriminate firing. They draw our attention to the post mortem report and submit that the doctor had found injury on different parts of the body and in case, the prosecution story is accepted that they were sitting on the chairs, they ought to have got injuries on the front portion of the body and not at other places. They also point out that the chairs on which they were allegedly sitting, were not found by the Investigating Officer when he inspected the place of occurrence. These infirmities render the case of the prosecution doubtful, submit learned Counsels.

52. We do not find any substance in the submission of the learned Counsels. The Investigating Officer had found huge quantity of blood and four empty cartridges at the place of occurrence. It is quite natural that when a person is threatened and sustains gun shot injury, in reflex, makes movement of the body and in the process, may sustain injuries on different parts of the body. Hence, in our opinion, there is nothing unusual in the deceased persons sustaining injuries on different parts of their body. The witnesses have stated about the presence of the chairs at the place of occurrence. The failure on the part of the Investigating Officer to seize those chairs, is in the realm of the investigation. It is well settled that mere irregularity in investigation itself shall not be sufficient to discard the case of the prosecution. Accordingly, we reject this submission of learned Counsels for the appellants.

53. Learned Counsels for the appellants submitted that names of Sanoj Singh and Jai Kishun Singh find place in the First Information Report as eye witnesses to the occurrence, but they have not been examined by the prosecution. They point out that Sanoj Singh is also a witness to the fardbeyan. They also point out that Jai Kishun Singh is the nephew of P.W. 8 Suresh Singh, which would be evident from paragraph No. 3 of his examination but the prosecution has withheld such an important witness in order to conceal the truth. They also draw our attention to the evidence of C.W.1 Rajendra Prasad Yadav, in paragraph No. 4 of his examination-in-chief, where he has admitted the presence of a large number of persons near the place of occurrence. Our attention has also been drawn to the evidence of

P.W.3 Ved Bhushan Prasad Singh in paragraph No. 9 of his cross-examination, where he has admitted the presence of Pagal Singh and his mother along with him. They also point out that from the case of the prosecution itself, the dead body was taken in the tractor driven by Nageshwar Singh, but neither he nor the witnesses aforesaid, have been examined to support the case of the prosecution. Learned Counsels submit that non-examination of all these witnesses clearly go to show that prosecution intended to suppress the truth and adverse inference is fit to be drawn.

54. We do not find any substance in the submission of the learned Counsels for the appellants. It is well settled that for bringing home the charge, it is not the quantity but quality of the evidence which is decisive. The case of the prosecution will not fail on the ground that the witnesses, if examined, would not have supported the case of the prosecution. In our opinion, the case of the prosecution shall rest on the evidence on record and not on the basis of the testimony of such witnesses who ought to have been examined.

55. Learned Counsels for the appellants submit that the dead bodies of Ram Briksh Singh and Jainarain Mahto were identified by Pradeep Singh, but he has not been examined and as such, it cannot be said that the dead bodies were of the person said to have been murdered by the appellants.

56. We do not have the slightest hesitation in rejecting the submission of the learned Counsels. From the evidence of the eye witnesses, it is evident that Sudhakar Singh, Ram Briksh Singh and Jainarain Mahto were murdered and thereafter their dead bodies were out in the tractor and taken towards the west. These witnesses have not at all been cross-examined in regard to the identity of the dead bodies and merely on the ground that two persons, who had identified the dead bodies have not been examined, will not go to show that the dead bodies recovered, were not of the persons said to have been murdered.

57. Learned Counsels for the appellants contend that there is vital contradiction as to the place, where Jitendra Singh was shot at. In this connection, our attention has been drawn to the evidence of P.W.1 Sudhir Prasad Singh in paragraph No. 24 of his cross-examination, where he has stated that Jitendra Singh sustained

gun shot injury in the maize field, whereas according to P.W.8 Suresh Singh, in paragraph No. 1 of the examination-in-chief, he has stated that on account of gun shot injury Jitendra Singh besides Sudhakar Singh and Jainarain Mahto died at the place of occurrence.

58. We do not find any substance in the submission of the learned Counsels for the appellants. P.W.8 Suresh Singh had although stated in paragraph No. 1 of his examination-in-chief that Sudhakar Singh, Jitendra Singh and Jainarain Mahto died at the place of occurrence, but in the next line, he corrected himself that it was not Jitendra Singh rather Ram Briksh Singh who died after sustaining the gun shot injury. He then stated that Jitendra Singh fled to a maize field. Thus, in our opinion, by mistake, P.W.8 stated that Jitendra Singh died at the same place where others had died, but in the next line, he clarified the mistake and clearly deposed that Jitendra Singh was shot dead in the maize field. From the evidence of P.W.1 Sudhir Prasad Singh, P.W.2 Vijay Kumar Singh, P.W.4 Sunil Singh and P.W.8 Suresh Singh, who are eye witnesses to the occurrence, Jitendra Singh sustained gun shot injury at the verandah of the office of the Bazar Samiti, where he was sitting and sustaining the gun shot injury, he fled to the maize field of Sikandar Singh to save his life, where he was shot dead. Thus, from the aforesaid, it is evident that there is no contradiction whatsoever in regard to the place where Jitendra Singh sustained gun shot injury. In fact, all the eye witnesses are consistent that Jitendra Singh, after sustaining injury in the verandah of the office of the Bazar Samiti, fled to the maize field to save his life and there, he was shot dead. Thus, there is no merit in the submission of the learned Counsels for the appellants.

59. Learned Counsels for the appellants point out that according to the prosecution Jitendra Singh sustained injury at Bazar Samiti and thereafter he fled to maize field. According to them it is impossible for a person to flee away after sustaining gun-shot injury. They point out that in such case, trail of blood ought to have been found from the office of the Bazar Samiti to the maize field, but nothing was found. Not only that the informant had clearly stated that Jitendra Singh was being searched, which goes to show that nobody saw him fleeing away. All these infirmities entitle the appellants, the benefit of doubt, submit learned Counsels.

60. We do not find any substance in the submission of the learned Counsels for the appellants. It is human instinct to survive and when the prosecution witness have consistently stated that Jitendra Singh, after sustaining injury fled to the maize field, their evidence can not be rejected, merely on the surmises and conjecture that he could not have run to the maize field. It is not the case of the prosecution that after sustaining the gun shot injury in the verandah of the office of the Bazar Samiti, Jitendra Singh was bleeding profusely and in that condition, fled to the maize field and hence, trail of blood being not found from the Bazar Samiti to maize field itself shall not render the case of the prosecution doubtful.

61. Learned Counsels for the appellants point out that the prosecution story is absolutely vague as there are general and omnibus allegations against all the accused persons including the appellants. They further point out that the witnesses have not stated as to the weapon which the individual accused were carrying. Further who assaulted whom and by which weapon, have also not been disclosed by the prosecution. In such a situation, they can not be said to be the members of an unlawful assembly having committed the murder in prosecution of their common object and as such, they cannot be held guilty of murder with the aid of Section 149 of the Indian Penal Code.

62. Mr. Prasad, however, contends that for bringing home the charge with the aid of Section 149 of the Indian Penal Code, individual overt act is not necessary and, in case, it is proved that the accused persons being a member of unlawful assembly in prosecution of common object committed the crime, every person of that assembly shall be guilty of the offence committed. He points out that there is consistent evidence of the eye witnesses that all the accused persons variously armed came from different directions, surrounded the deceased and resorted to indiscriminate firing causing death of three persons at the place of occurrence and Jitendra Singh in the maize field. The very fact that all the accused persons came together armed with deadly weapons and resorted to indiscriminate firing, clearly goes to show that each accused shared the common object and the four deceased have been killed in furtherance of their common object and each of them are liable for the offence of murder with the aid of Section 149 of the Indian Penal Code. However, this conclusion can not be construed to mean that in fact all the

appellants had participated in the crime. This we will deal when we take up the case of the appellants individually.

63. In addition to the aforesaid submissions, Mr. Rana Pratap Singh submits that according to the prosecution the occurrence had taken place as accused Kushwari Choudhary wanted share in the Bazar Samiti collection, but there is no documentary evidence on record to establish that the Bazar Samiti, in fact, was settled with P.W.4 Sunil Singh. He submits that, in fact, the prosecution party was making illegal collection and four persons died in the gang-war in that connection.

64. We do not find any substance in the submission of Mr. Singh. True it is that the prosecution has not brought on record any document to show that the Bazar Samiti was settled, with P.W.4 Sunil Singh, but not only said Sunil Singh, all other witnesses have stated about the settlement made. In this case, settlement of the Bazar Samiti is not an issue, but the murder of four persons is and hence, failure on the part of the prosecution to produce the documentary evidence supporting settlement of Bazar Samiti, in no way, can discredit the case of the prosecution.

65. While assailing the conviction of appellants Kailash Singh and Rana Singh, Mr. Singh contends that although they were known not only to the informant, but to P.W.6 Shambhu Prasad Singh also, who is the witness to the fardbeyan, yet they have not been named in the First Information Report. He also points out that these two accused persons are residents of the same village and there is no earthly reason as to why they will join hands with the gang of Keshwari Choudhary and other accused persons to commit the crime.

66. Mr. Prasad, however, contends that although the names of the aforesaid accused persons have not been given in the First Information Report, but that by itself, shall not be fatal to the case of the prosecution so far as these accused persons are concerned. In support of his submission, he has placed reliance on a judgment of the Supreme Court in the case of P. Venkataswarlu v. State of A.P. and Ors. (2003) Supreme Court Cases (Cri) 1414 and our attention has been drawn to paragraph No. 6 of the judgment, which reads as follows:

6.--So far as the FIR, Ext. P-6 is concerned, the version contained therein is supported by the evidence of P.W.1 who in fact, had lodged the FIR. The crime was committed around midnight i.e. about 12.00 O'clock in the night whereas the FIR was handed over to P.W.7 as soon as he came to the village after receiving information about the incident in the early morning hours. The police station is said to be 5 km away from the place of occurrence, therefore, it cannot be said that there was any delay in lodging the FIR. In the FIR names of accused A-1 to A-11, A-17 were mentioned. The FIR further mentions that there were other accused also involved. It was quite natural that all the names could not have been given in the FIR. There is mention in the FIR of the overt acts on the part of accused A-1 to A-5 and A-7. We are therefore inclined to accept the argument of the learned Counsel for the appellants that no fault can be found with the FIR, Ext.P-6. Mere non-mention of names of all the 24 accused persons and details of injuries said to have been suffered by some of the accused in the FIR does not render the FIR weak or unreliable.

(Underlining ours)

67. Having considered the rival submission. We do not have the slightest hesitation in accepting the broad submission of Mr. Prasad that mere non-mentioning of the names of aforesaid two persons shall not itself render the case of the prosecution unreliable, but in the facts of the present case, we are of the opinion that it creates serious doubt to the case of the prosecution. From the evidence on record, it is evident that these two accused persons are the residents of the same village and not only known to the informant, but witness to the fardbeyan Shambhu Prasad Singh (P.W.6). The First Information Report has given the details of the accused persons numbering 15 as also the graphic manner in which the occurrence had taken place. True it is that the First Information Report is not an encyclopaedia but at the same time, when these appellants were known to the informant and the witnesses to the fardbeyan from before being the residents of the same village and further there being no reason for them to join hands with the gang of Kushweri Choudhary, we are of the opinion that this omission becomes vital and creates doubt about their participation in the crime. Not only this P.W.3 Ved Bhudhan Prasad Singh, an eye witness to the occurrence, has,

although knowing appellants Kailash Singh and Rana Singh and in fact identifying them in the dock but categorically stated that they were not amongst the accused persons. Accordingly, we are of the opinion that the prosecution has not been able to prove its case beyond all reasonable doubt, so far as these two appellants, namely, Kailash Singh and Rana Singh are concerned. In the aforesaid background, the evidence of D.W.1 Janardan Singh that these two appellants have been falsely implicated in the case on account of land dispute becomes relevant. Cumulative effects of all these leave us in doubt.

68. So far as accused Jhari Sharma is concerned, he has been named in the First Information Report. All the witnesses who are eye witnesses to the crime, have stated about his participation in the crime. They are consistent in their evidence and there is nothing to discredit their testimony. As suggested to some of the prosecution witnesses, D.W.2 and D.W.3 had deposed that the four deceased were killed in gang-war over settlement of Jalkar but none of them claim that they in fact had seen the occurrence. In the absence thereof, the eye witness account can not be discarded on the basis of what the defence witnesses had heard. Accordingly, we are of the opinion that the prosecution has been able to bring home charge against appellant Jhari Sharma beyond all reasonable doubt.

69. Now we will consider the question of sentence. Mr. Singh submits that the case does not come within the purview of rarest of the rare cases and as such, extreme penalty of death, is not called for.

70. There is nothing on the record to suggest that this accused shall be a menace to the society and can not be rehabilitated and shall be a continuing threat to the society. Although the crime committed is heinous and brutal, yet, in our opinion, it does not fall in the category of the rarest of the rare cases. Accordingly, we do not find it safe to confirm the sentence of death awarded to him. Following the precedent of the Supreme Court in the case of Prakash Dhawal Khairnar (Patil) v. State of Maharashtra and Ors. : 2002 CriLJ928 , we reduce the sentence of death to that of rigorous imprisonment for life with the condition that he shall not be released before completing the actual term of 20 years including the period already undergone by him.

71. In the result, Cr. Appeal No. 92 of 2004 is allowed, conviction and sentence of the appellants Kailash Singh and Rana Singh is set aside. As they are in jail, they be set at liberty forthwith, unless required in any other case. Cr. Appeal No. 105 of 2004 preferred by appellant Jhari Sharma is dismissed with the aforesaid modification in the sentence. The reference is answered accordingly.

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