

In Re: Kalusingh Motisingh and ors.

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Court : Madhya Pradesh

Decided On : Oct-18-1962

Reported in : AIR1964MP30; 1964CriLJ198

Judge : H.R. Krishnan and ;S.B. Sen, JJ.

Acts : [Evidence Act, 1872](#) - Sections 3, 27, 32(1) and 154; [Code of Criminal Procedure \(CrPC\), 1898](#) - Sections 145 and 162; [Indian Penal Code \(IPC\), 1860](#) - Sections 141, 149 and 302

Appeal No. : Criminal Ref. No. 4 of 1962

Appellant : In Re: Kalusingh Motisingh and ors.

Advocate for Def. : S.L. Dubey, Addl. Govt. Adv.

Advocate for Pet/Ap. : L.S. Shukla, ;M. Bhatnagar and ;B.C. Jain, Advs.

Judgement :

Krishnan, J.

1. All the three proceedings arise out of the Judgment of 30-6-1962 by the learned Additional Sessions Judge, Ujjain, in the trials numbered 24 to 28 of 1962, on the consolidation of five separate commitments by the First Class Magistrate Khach rod, relating to a serious incident, on the 20th September, 1961, at village called Bhilsuda, in the police station area of Nagda. The death reference has been made

for the confirmation of the sentence of death under Section 302 read with 149 Indian Penal Code on six persons, namely, Kalusingh, Nir-bhayasingh, Ambaram, Jujharsingh, Ratansingh son of Hindusingh, and Chhatarsingh. They, as well as ten others, namely, Anarsingh son of Ramsingh, Bagdiram son of Bherusingh, Bherusingh son of Rupaji, Ramsingh son of Fakkaji, Pyarji son of Ghasi, Onkarsingh son of Bherusingh, Ratansingh son of Amarsingh, Hindusingh son of Narsingh, Navalsingh son of Sewaji and Dhanna son of Bheru-singh have appealed in two batches. Those who have not been sentenced to death, have also been convicted under Section 302 with 149 Indian Penal Code and awarded imprisonment for life. In addition, there are convictions of all these persons under Sections 147 and 149 Indian Penal Code with sentences respectively for two years and three years which are to run concurrently with the sentences under Sections 302/149. All the charges here, it may be noted, (are) as recast in the Sessions Court. One more accused was on trial, she being Nandibai wife of Hindusingh. She was acquitted by the learned Sessions Judge; but she will be referred in course of the Judgment in connection with the facts.

2. These sixteen appellants are all Bhils most of them closely inter-related and fall into three groups, the most important and numerous being that of Hindusingh and including Hindusingh himself and his two sons Ratansingh and Chhatarsingh and his two nephews Ambaram and Jujharsingh sons of his brother Tamsingh, and Kalusingh another nephew being the grandson of a first cousin, and Pyarji son of Ghansi who is the brother-in-law of Jujharsingh; the group of Bherusingh including Bherusingh himself and his three sons Dhanna, Bagdifam and Onkarsingh; in the same group there is Navalsingh who is Bherusingh's uncle and Anar-aingh Bherusingh's' first cousin through another uncle. The appellants Pyarji and Jujharsingh are also related to this group, having married two cousins of Navalsingh. The remaining three namely, Ramsingh son of Fakkaji, Nirbhayasingh son of Bhag-wansingh and Ratansingh son of Amarsingh, are not directly interrelated but are connected indirectly with members of one or the other of the two main groups, that is, Ratansingh son of Amarsingh is the brother-in-law of Nirbhayasingh who is a relation by marriage of the Hindusingh family. Eamsingh son of Fakkaji is a foster brother of Kalusingh's wife having ceremoniously tied a rakhi to her which in this group is said to imply brotherly loyalty. Of the whole lot,

the Hindusingh group and Hindusingh personally, are the virtual leaders and are spoken of as the patel's family and the patel, though it is not clear whether the particular office is held by Hindusingh himself or one of his brothers.

The largest element in the village are the Bhils who unlike their fellow tribesmen elsewhere in the State, are here a settled agricultural population with some modicum, of literacy; the point is that they claim to be, high caste Hindus, not much inferior to the Rajput Thakurs. Next in numbers in that village come the Bagris who are considered to be a much lower caste; besides, they are comparative new-comers to the village and the evidence shows that they are looked upon by the Bhils with some dislike and general unfriendliness; but till this incident the differences between the two groups in general have been little more than the usual type of village quarrels about cattle trespass and the like. The Bagris had throughout tacitly accepted a position of inferiority to the Bhils who, for their part, had been treating them with the contempt by no means unusual in a caste-ridden society. Besides the two castes, there do appear to be a few families in the village belonging to other castes like Balais, who also acquiesce in being treated as low in the scale as the Bagris, and a few artisans shopkeepers etc. As far as the other castes are concerned, we have three witnesses of comparatively little consequence, belonging to them; otherwise this story concerns Bhils and Bagris alone.

3. From Bhilsuda to the thana head-quarters at Nagda 6 to 8 miles away, the shortest means of approach is by a footpath across the fields going more or less due north. There is also something like a road but then one has to go somewhat to the east to another village and take a detour. Similarly, it is possible to cover part of the way by train going a few miles to a railway station at Piploda and then entraining to Nagda. The difficulty, however, is that trains are few and far between on that line, and anybody wanting to save himself the trouble of walking 5 or 6 or 8 miles, may have to wait for hours.

4. On the 20th of September, 1961, it was Dolgyaras, a festival celebrated with a procession at Nagda. There was no such celebration at Bhilsuda; but it is said by members of both the sides that men of that village used to go to Nagda to have a

look at the show. The further suggestion from the side of the Bhils is that there used to be akhadas at Nagda which by itself is not unusual. They suggest that anybody who cared to carry a sword or spear and coming from anywhere could go into one of the akhadas at Nagda and demonstrate his skill; this suggestion is part of the defence and will be considered for what it is worth at the proper place. It is common ground that on that day at Bhilsuda there was a very serious incident in which five Bagris were killed and at least ten more were injured, nearly everyone of them receiving cuts with swords or similar deadly weapons.

Ten out of them were involved in the main incident which took place at about mid-day or shortly before it at the field cultivated by Balya Bagri just across the northern boundary of the revenue village Bhilsuda and falling in the revenue village Bhatishura by the bank of the river Cham-bal. They are Balya himself, his brother Mehtab, Ganpat Bagri and Khemraj Bagri, four out of the five that were killed that day; their corpses in fact were found lying on different parts of the fields with sword cuts and other injuries which will be described later on; in addition, Bhagwan Bagri (P. W. 11), Anariya Bagri (P. W. 4) Gangaji Bagri (P. W. 3), Kaniram Bagri (P. W. 14) and Sarupa Bagri (P. W. 22), were also injured according to their account in the incident at that place. Further, Devchand Bagri who has a field near Balya's fields was also injured according to him, when the assembly of Bhils including these sixteen appellants had attacked these nine or ten persons at Balya's fields and was retreating to the village. Ragga Bagri (P. W. 16), Asaram Bagri (P. W. 7) and Gangaram Bagri (P. W. 10), the first of whom has a field adjoining Balya's field, saw the fight at close quarters but did not receive any injury. Three out of the other persons who are injured were Sukhram (P. W. 18), Ghasi (P. W. 17) and Dala. They were attacked somewhere near the abadi about two miles south of Balya's field sometime after mid-day by the same assembly obviously after their return from the scene of the main incident. Finally, the corpse of the fifth man who was killed at about that time was found by the police on the next day in a field about half-a-mile to the south or south-east of the abadi that is, more than two miles away from Balya's held with indications that he had been attacked and killed there. The witnesses to that attack are Govind (P.W. 8) and Anopa (P.W. 9) whose evidence, however, has not been accepted by the learned Sessions Judge. All this shows that there was an attack on the Bagris

mostly at Balya's held and in addition sporadically all over the village.

5. It is worth noting that one Bhil, namely Ratansingh, son of Amarsingh appellant, had some injuries that could have been received at about the time the Bagris had been attacked; they were a small cut on one of his fingers, and one cut mark on his head, and a small swelling which may or may not have been received from unfriendly hands. Another Bhil -- Mehtab D. W. 1 who has to be distinguished from Mehtab Bagri killed in the occurrence went to the dispensary at Nagda on the next day saying that he had some injury what and where it was is not known. He has come and deposed to the same effect; but it is difficult to say whether he had really any; it is, however certain that the injury, if any, he had, was quite insignificant. It is said by this Mehtab that a third Bhil Ramsingh -- also had injuries; but nobody knows whether it is true or false, there being nothing more than Mehtab's mere assertion to that effect. Strangely enough, Ratansingh son of Ramsingh has denied that he ever received any injury. Thus, whatever its origin and the identity of the individuals that took part on the Bails' side, it is clear that it was practically a one sided attack by a number of Bhils on the Bagris. The identity of the victims and the scene of the main attack are altogether beyond doubt. Injuries like those on Ratansingh son of Ramsingh appellant can be easily received in a crowded commotion, inadvertently even from the hands of the members of the same group of fighting assailants.

6. The material witnesses most of whom are Bagris, have described in detail the part of the occurrence that they actually saw and in which they and others received injuries. There is practically unanimity in regard to the membership of the Bhil assembly and also to those of the appellants who were in the assembly and carried swords that is Ratansingh son of Hindusingh, Chhatarsingh, Ambaram Jujharsingh and Nirbhaysingh. In regard to the rest, the allegation generally is that they were carrying lathis some of the lathis, it is stated though with a few discrepancies, were lohangis, that is to say, clasped with iron-rings near one end and one or two of them-were tipped with sharp points. Similarly, in regard to the occurrence at Balya's field and also the attack on all the others except Ghasi, there is general unanimity in regard to the parts played by individual assailants at the earlier stages of the attack. About later stages as will be referred to in details in

course of the judgment there is some vagueness and inconsistency in regard to the blows given by this or other individual assailant. Similarly, those of the witnesses who are found by the medical witness to have injuries received on that day carry in them a guarantee of their presence during at least one stage of the happening. Others who had no injuries like Rugga and Nagu alias Naguda (P W. 15) give a plausible account of their presence at their fields near which happened the incidents that they described which imparts a ring of truth to their evidence. Before making a detailed examination of their statements, it is necessary to deal with the alleged happening earlier on that day which according to the prosecution, set Bhil anger ablaze.

7. Apart from the direct evidence, it is obvious that there must have been some immediate occasion. No doubt, there was a general feeling of unfriendliness between the two castes and an attitude of caste superiority bordering on arrogance on the part of the Bhils and the meek acceptance of the inferior position by the Bagris. But these by themselves cannot at all account for this attack.

The prosecution account coming from the Bagris and in a very general manner supported by the two non-Bagri non-Bhil witnesses Murlidas (P. W. 12) and Ramchandra (P. W. 13) is to the following effect. The most important of them is Nagu alias Naguda Bagri who has a field adjoining that of Hindusingh, a mile or so to the north, or north-west of the abadi, about half way to Balya's field further north, where the main incident took place. At about 8-0 or 9-0 A. M, Nagu was grazing his cattle at his field while Hindusingh's wife Nandibai was here (sic) looking after the crop. The pathway going north lies between the two fields and about a mile beyond it crosses the boundary between Bhil-suda and Bhatisure, and passes by the side of Balya Bagri's field coming very close to the river at that place. It is called Tungni Ghat, Tungni itself being the village on the other side, that is, west of the river. The pathway goes farther north, still east of the river through other villages till it reaches Nagda about six miles from there and a mile or two more from the Bhilsuda village proper.

8. Balya and his brother Mehtab Bagri were walking along that-pathway, leading a buffalo cart to their own field. Like all such paths, this also consists of a slightly

elevated strip called 'med', and the other on lower level called 'galla'. An animal walking by the 'galla' cannot easily put out its mouth on the crop of the field on either side, while walking along the 'med' it can, if its caretaker does not stop it, snatch a mouthful here and there. The amount of damage it can do this way, is always insignificant; but village cultivators being what they are, at times this gives rise, to quarrels.

This is exactly what happened between Balya on the one side and Nandibai on the other. She began to scold him for taking his animal every day by the side of her field in a manner likely to cause damage. He, for his part, said that he was not causing any damage. This led to an altercation in course of which the woman seized the small stick Balya was carrying and beat the animal. Then she beat Balya also, whereupon he snatched the stick and pushed her down. A description of such a trifling incident is always bound to be vague; but two things emerge; neither of the two quarrellers received any conspicuous marks on their bodies. But the beating or the pushing down of Nandibai a woman belonging to the higher caste by a Bagri, admittedly inferior in caste was understood to be a terrible insult. What seems particularly to have infuriated the Bhils was that Nandibai was not an ordinary Bhil, but the wife of Hindusingh their leader with a courtesy title of patel, being either himself the headman or the brother of the headman; Nandibai herself is described throughout as the 'patelan'. While this was going on, her niece Kamla about ten years or so, ran up to the village to report to her people. Shortly after, Chatarsingh Nandibai's son and Ambaram and Jujharsingh -- brother's inter se and sons of Ramsingh son of Narsingh and brother of Hindusingh -- came there. Meanwhile, Balya and Mehtab had gone to their field, the only other person nearabout was Nagu Bagri whom these Bhils shouted at, threatening him and the Bagris in general with consequences because one of them had the 'cheek to lay, hands on the patelan'. Nagu was meek and putting his head-cloth at their feet begged them to forget what had happened and spare the poor Bagris. The patelan herself put in a good word for Nagu, because he, at any rate, had done nothing.

The scene ended for the time being and all the Bhils went back to the village. Two or three hours later the Bhils including these sixteen appellants collected in front of Hindusingh's house armed with different weapons shouting that they would finish

off all the Bagris and uproot that entire caste. While about the incident at Hindusingh's field we have the direct evidence of Nagu (P.W. 15) and the 'dying declaration' of Balya, about the collection of the Bhils we have the Chonlddar Bagdiram Bagri, and the two on-Bagri witnesses (P. Ws. 12 and 13) and the circumstance that the assembly did collect and march toward Balya's field in the north.

9. The collection of the Bhils with weapons at the village is not seriously questioned. There is a suggestion that they were going to Nagda to display their skill in some akhada; hut that is to be considered separately. However, the happening at Hindusingh's field in the morning is denied by all the Bhils including Nandibai, who was an accused in the lower court but was acquitted of the charge of murder and membership of tae unlawful assembly as also by her son Chhatarsingh and nephews Jujharsingh and Ambarain who according to Nagu, came to the field hearing of what had happened. According to the appellants, there was another provocation for the incident; though it was not they who attacked the Bagris. The Bhils were all going along the pathway by the side of Balya's field on their way to Nagda; they had armed themselves as they had to take part in an akhada. Balya picked up a quarrel with Ratansingh son of Ramsingh --the appellant -- and hit him with a cutting weapon. This infuriated some of the Bhils who attacked the Bagris. This is the story put in defence by D.W. 1, though Ratansingh son of Ramsingh denies it. Immediately, we are concerned with the denial on the part of the appellant of anything happening earlier on that day between Nandibai on the one side and Balya on the other.

10. The earliest report about the possibility of an incident was given at the thana by Bagiram choukidar who arrived there at about 3-0 P. M. Not that he was in the least aware of the probability of something serious or that he was going particularly to give -a report; it happened to be the day for his weekly attendance and he said to the officer that there had been a quarrel between the Bhils and the Bagris and the former were collecting and would not listen. The way in which the choukidar's report is recorded is very scrappy; because at that time there was no idea that a cognizable offence had been or was likely to be committed. It was just the usual report called 'sanha' recorded in a very summary manner. But the

choukidar in his evidence states that he found the Bhils collecting in the village shouting that they would kill all the Bagris and would not be pacified. There is altogether no doubt that the choukidar left the village before anything serious had happened at or near Balya Bagri's field; there had however, already been when he left, some other sensation in the village in which the Bhils collected with arms proclaiming an intention to attack the Bagris in general or some of them in particular. Considering that the attack was practically one-sided and the Bagris came very ill out of it, it is unthinkable that Bagdiram with all his natural sympathies with the Bagris would fail to report it at the thana if indeed there had been any attack on the Bagri? before he left the village; on the other hand, with a certain amount of alertness he could have reached the thana in less than three hours; in other words, he need have left only by mid-day. But then he was not at all in a hurry and went to the thana purely to make a routine report; obviously, he had left much earlier (he himself says at about 10-0 A. M.) and taken his own time resting on the way or loitering in the bazaar and, may be though it is not clear in the evidence, waiting for one of the rare trains at the railway station.

For our purpose, all that need be noted is that something had happened short of an actual attack on the Bagris, but amounting to a preparation for the same before the choukidar left. No doubt, the wording of the summary report in the station diary suggests that there was a 'marpit' and both parties were refusing to pay heed; the choukidar asserts in his evidence that he said nothing of the sort. It is difficult to check on this as the report is not anything even approximating to a verbatim one; but the circumstances already discussed show that what he said in his evidence is correct and he left when the Bhils were collecting to attack the Bagris. This is exactly what Nagu's evidence leads to. It is also what the two non-Bhil non-Bagri witnesses state. But for reasons given there, the learned Sessions Judge does not want to accept their evidence. At all events, the moment these two persons apprehended some commotion in the village, they took to their heels and concealed themselves in a neighbouring village. But apart from their flight, the circumstances support the evidence of these two persons.

11. There is another piece of evidence also that there was an immediate provocation and it was substantially in the one described by Nagu Bagri. That is a

statement by Balya to the other Bagris at his field which amounts to a 'dying declaration' admissible under Section 32(1) of the Evidence Act. The admissibility of this piece of evidence seems to have been questioned before the learned Sessions Judge and he has thought fit to write a lengthy order; it is better to examine fully both the admissibility and the effect of his statement to the others who came to his field before the attack.

To anticipate our story, the prosecution witnesses including those who were injured at Balya Bagri's field and have survived, is to the effect that they were all going one by one to Nagda to see the show. Balya and Mehtab were already at their fields and seeing them pass by Balya called them just to stop and have a chat in the language of the villagers, it was an invitation to smoke. They accordingly did so and were (immediately before the attack) about ten in number at or near the field. As they began to talk, Balya told them of the happening in the morning. Whether Balya was anxious to tell them because it was something very unusual and it had caused him some apprehension, or he spoke of it as they saw. the Bhils coming in a body from the south, is not of much consequence for our present purpose, though the latter is by no means unlikely. But the- point is that these witnesses are nearly unanimous in saying that Balya told them -

'there was a quarrel between me and Nandi Patelan today. My small buffalo calf happened to enter her field and she said that she would get all the Bagris cut down',

These are the words used by Anarsingh P. W. 4; but the other witnesses also speak the same thing to the same effect, though the exact words are slightly different. For example, Bhagwan P. W. 11 says:-

'Balya told me that that morning there had been a quarrel between him and Nandi Patelan about the 'buffalo calf. Balya said that she had threatened to get all the Bagris finished off today.

The others also state something to the same effect.

12. This piece of evidence is of very considerable importance because it is the only account before us of how all of sudden the Bhils were fired with a murderous fury against Balya and his people, and generally against all the Bagris. Both in the Sessions Court and before us it was urged very strenuously that this statement of Balya is not admissible under Section 32(i) Evidence Act. It is difficult to understand this because a dying declaration under Section 32(1) of the Evidence Act is -

'a statement made by a person as to the, cause of his death or as to any circumstance of the transaction which resulted in his death.'

Certainly, Balya Bagri's statement is not one regarding the cause of his death; but it is one regarding a circumstance of the transaction which resulted in his death; that being the entire continuity of events between the altercation near Hindu-singh's field in the morning and the attack a few hours later. There are no doubt some older rulings like *Autarsingh v. Emperor*, AIR 1924 Lah 253, where this type of statement was held inadmissible owing to one or other of the two reasons, a too narrow interpretation of the word 'transaction' and more, a mistaken view coloured by English law, that dying declaration cannot be admitted unless the declarant is actually apprehending death. It is unnecessary to consider the case *Taw* before 1939 in view of the Privy Council's ruling in *Narayana Swami v. Emperor*, AIR 1939 PC 47 which was then popularly known as the Berhampur Trunk Murder case. -

' 'Circumstances of the transaction' is a phrase no doubt that conveys some limitations. It is not as broad as the analogous use in 'Circumstantial evidence' which includes evidence of all relevant facts. It is on the other hand narrower than 'res gestae'. Circumstances must have some proximate relation to the actual occurrence and must be of the transaction which resulted in the death of the declarant But statements made by the deceased that he was proceeding to the spot where he was in fact killed, or as to his reasons for so proceeding or that he was going to meet a particular person would be admissible .The statement ... may be made before the cause of death has arisen or before the deceased has any reason to anticipate being killed."

In that case, the declarant has told his wife of his intention to go to a particular place to collect arrears due to him.

The same principle has been followed in later cases, for example in *Allijan v. State*, AIR 1960 Bom 290, the deceased had complained about the conduct of the accused person about two months before the actual murder. Following the Privy Council ruling, this was admitted as a dying declaration, certainly, not regarding the cause of the death, but as one of the circumstances of the transaction resulting in the declarant's death. Similarly, in *Rajmdrr. Kumar v. State*, AIR 1960 Punj 310, the deceased had made a statement before the police under Section 161 without immediately apprehending death. Still, it was admitted in accordance with these very principles.

Again in *Chinnavalayan v. State of Madras*, (1959) 1 Mad LJ 246, it was pointed out that the words 'resulted in his death' do not mean 'caused his death'.

'The statement made by witnesses for the prosecution that the deceased told them that he had broken the vessels of the accused a little while ago would afford a motive for the accused to commit the crime and is admissible under Sections 9 and 32(1) of the Evidence Act.'

Actually, similar statements have been admitted into evidence in quite a number of cases by this Court also without any objection being raised, Thus, the statement of Balya made to other Bagris before the attack but after the incident earlier; in the morning is admissible. In that context, Balya had altogether no motive to fabricate such a story; either because he had generally apprehended some sort of attack by the Bhils, or he and his companions actually saw the crowd of Bhils coming towards his field, he made this statement. iE that context this impresses one as quite true.

13. It is theoretically conceivable that both. Nagu and Balya are trying to soften the part played by the latter in that incident, and that he had really been ruder and more violent to the patelan than this story makes out. The Bhils for their part have just made a complete denial of any such happening. It was open to Nandibai herself, or as for that matter, her son Chhatar-singh and her two nephews to give

their account of the happening in the morning, and to show that Balya Bagri was particularly violent or rude. Actually, there were no marks on either side and there was at best a pushing of Nandibai with some justification by Balya Bagri. This was a few hours before the attack on the Bagris at Balya's field; but it shows that the Bhils had worked themselves into a fury, their resentment being not so much at the violence, if any as at the outrageous-ness of a low-caste Bagri 'laying hands' on a Bhilni, claiming a status similar to Rajput Thakurs and that too, on no other person than the wife of their patel.

14. That the Bhils had collected shouting that they would kill the Bagris, is deposed to by the choukidar. The choukidar did make a general reference to some such thing at the thana. In the circumstances already set out, it does not at all appear that he was exaggerating; the trouble on the contrary, was that he was not at all aware of the possibilities of the Bhils' anger. The two non-Bhil non-Bagri witnesses already named say nothing more than that they saw the Bhils collecting at Hindusingh's door. Considering that it is common ground that an armed crowd of Bhils did go at about mid-day to Balya's field, it is not of much consequence whether these witnesses are believed or not; but the reasons given for disbelieving them are not very impressive.

15. The next stage comes when the assembly of about 20 including these appellants marched from the abadi to Balya's field by the footpath, which about midway, passes by Nagu's field. Nagu says he was still there grazing his cattle which is by no means unlikely, He describes the assembly and also the membership making special mention of the five that were carrying the swords. He is certain that they were all shouting 'Kill the Bagris'. He is of course a Bagri; but that is no reason why he should be disbelieved as his observation is supported by what is really the common ground of the case, that an armed crowd of Bhils did go that way at about that time. He saw the assembly going to Balya's field and also returning after some time. But he himself was not attacked by them. He has described how he managed to escape their attention,

The question put to him as well as to other Bagris like Rugga is, why they were not attacked by the Bhils who were shouting that all the Bagris should be killed. As a

matter of fact, among the Bagris killed and injured, some belonged to Balya's family, and some were outside it; this shows that the intention of the assailants was to attack the Bagris with special attention to Balya Bagri and his relations. The statement of Nagu in this regard is consistent with the circumstances of the case. The assembly going about a mile to the north of Nagu's field, came to a place where the pathway crosses the boundary between the villages and goes alongside Balya's field which is, as it were, sandwiched between it and the river. The field is somewhat large and consisted at that time of three different strips, one that had not yet been cultivated, the other which was cultivated with cotton, and the third on which jwar had come up to some height. On the further side of the field there was river Chambal, which could not be crossed in that month. However, at the edge of the water, there were some places where people could conceal themselves. That locality is called the 'Tungni Ghat', Tungni itself being the village across the river, approachable in the dry season by crossing there. The abadi Bhatihura is itself at a considerable distance from there so that the people who are attacked at that field could not find refuge or help at hand. This has to be borne in mind while studying the account of the happening given by the eight witnesses, five at least of whom have marks of sword or lathi on their person.

16. All of them state that they were walking to Nagda. When passing this way, they found Balya and his brother Mehtab already there working. Naturally, some of the witnesses speak of those who had arrived earlier; but for the most part they arrived at about the same time. Balya asked them to stop and in course of the talk referred to the morning incident. Their account indicates that to begin with they were not at all fearing any mass attack by the Bhils; as for that matter, Balya himself though somewhat upset by the morning's happening, was not expecting anything serious at that time. While they were talking, the assembly of Bhils arrived. It is equally likely that on the sight of the Bhils piling towards them at a distance the conversation turned to the morning incident. Either way, the prosecution witnesses account is that they did not collect there with any purpose, least of all, any purpose of attacking the Bhils. This is what they would say in any event; but in the instant case, their account of their presence is corroborated by the results of the incident. If they had either expected some violence from the Bhils or had displayed any instinct of self-protection or made preparation to return force

with force, the results would have been altogether different. Such extreme results all on one side themselves show that as far as the attack went there was a surprise.

17. It is certainly easy for the witnesses to an occurrence like this, especially, if they happen to be the victims, either to exaggerate or to add or name among the members of the assailants assembly persons who were not really there. This is particularly so when we do not have any independent witnesses. But the fact is that that village consists for the most part of these two castes only; there is no abadi within some distance and the fields in that locality were being cultivated by Bagris and. no others. At short distance there are the fields of some of the Bhils; but there was no field nearby cultivated by persons belonging to other castes. Thus, the evidence that necessarily comes from Bagris has still to be checked up.

18-19. The defence account of the happening as given by the defence witnesses is not very helpful even to the accused themselves. (His Lordship perused the evidence and proceeded).

20. In this connection, arguments which are as lengthy as they are inconsequential, have been advanced in regard to the manner in which the investigation was started and the first information report recorded.

As already noted, on Bagdiram's statement at the thana, the head-constable came with him to the village accompanied by two or three other constables. Either the gravity of the possible occurrence could not be appreciated from the manner of the choudkar's report or most of the police officers of the thana were busy looking after the Dol Gyaras procession at the head-quarters. Any way, when the head-constable and the choudkar came to the village, they found it completely deserted. Women-folk were at the houses; but they were only crying and were not in a position to give any information. The men of neither caste the Bhils or the Bagris were to be found; they had just disappeared, the Bagris certainly concealing themselves in sheer fright, and the Bhils, whether guilty or innocent, evading being arrested by the police as it had already got abroad that the murders had been committed by the members of their caste. Even the few belonging to the other castes could not be contacted. The choudkar, however, went about searching and

brought news that four corpses were lying in Balya Bagri's field at a distance of two miles from the abadi. It was at this time that the head-constable sent a written message to the station officer through the same choukidar, the relevant parts of which are the following :-

'I, head-constable Ramsingh of Nagda, left at about 3-00. P. M. in company of three constables (named) and arrived at Bhilsuda at about 6-00 P. M. At the place which the choukidar showed as the scene of fight, things have settled down, but there are four corpses lying, of Mehtab, Ganpat, Balya and Khemraj, as named by the choukidar, with considerable wounds on their bodies. I could find nobody at the village as they seem to have concealed themselves here and there. I would, 'therefore, request you to come at once and investigate and ascertain the real course of events.'

This message seems to have reached the thana at about 9.00 P. M., the officer himself arriving at Bhilsuda at about mid-night after covering part of the distance by train.

21. An almost comic feature of the case is that this head-constable's report along with the endorsement of the Sub-Inspector, has been treated in quintuplicate as five first information reports, in five separate cases because there are five persons murdered. Actually, the whole thing, at all events, all but the killing of Gulab Bagri, is one transaction.

This is the earliest report of the happening based on what the head-constable saw and nothing more, Naturally, it does not shed any light either on the identity of the members of the assembly that killed these persons, or upon the manner and sequence of the attack. But this is inevitable when the earliest information is given by one who is not an eye-witness. It would certainly be a matter for consideration whether the failure of any of the eye-witnesses to run up to the police leads to an adverse inference against the story they give in Court. Again, when an eye-witness gives the earliest report, it can be used for his corroboration and in certain respect for contradiction as well. But when there is no first information that can be used for corroboration on details as is inevitable whenever it is given by somebody other than an eye-witness, the case has to be considered on the evidence

available without any bias. By the time the officer arrived, it was already very late at night; by then, there was some feeling of confidence and the Bagris began to come out from concealment and were examined without any avoidable delay. The injured persons were sent for medical assistance on the next morning and the examination of witnesses was done quite promptly in the manner already set out. It is therefore difficult to criticize the investigation which in fact has been as efficiently conducted as possible in the . circumstances.

23-29. It is convenient to deal with the evidence of the eight witnesses to the main occurrence with special attention given to the statements of the five who were actually injured. (His Lordship reviewed the evidence of these witnesses and proceeded).

30. It is convenient before subjecting the statements of the witnesses to a general scrutiny to summarise the later happenings; attacks on the Bagris, but one non-fatal, in course of the early afternoon. The assembly came back to the abadi after killing four and injuring five others at Balya's field. They met Dewa (P. W. 19) at his field just by the side of the pathway. It was near mid-day. He was grazing his cattle there and saw the assembly of Bhils going back to the village from the direction of Tungni Ghat. Among them he names all and describes them shouting that the Bagris should all be cut down. Seeing him, Ratan-singh son of Hindusingh hit him on the head with a sword while Chhatarsingh followed with another sword blow. Anarsingh, Kalusingh and Onkar-singh hit him with lathis on different parts of the body as a result of which he fell down and became unconscious. He only came to five or six days later when he found himself in the Ujjain Hospital. His statement sounds true, because he had two sword cuts on his head besides three blunt weapon injuries on different parts of the body. The doctor at Nagda thought it advisable to remove Dewa to the hospital at Ujjain. Because of this, the delay of four days in his examination was unavoidable. The point of his evidence is that even after leaving Balya's field, the assembly of Bhils including the appellants was out to teach a lesson to the Bagris thus showing that they had a general animus against the caste as a whole with of course a special animus against the Balya Brothers which had by then spent itself on all the four of them.

31. The next set of witnesses are about the happening to the south or to the east of the village an hour or two later when also some more Bagris were attacked by the Bhils and injured. The worst part of this happening is the killing of Gulab Bagri at a field about half-a-mile towards the south-east of the abadi; in other words, the direction just opposite of that of Balya's field. In any case, Gulab's murder was at a time and in circumstances altogether different from that of the four others; and as such not part of the charge. But there were on that day quite a number of Bhils moving about shouting that they would kill all Bagris.

About Gulab's attack itself two witnesses Anupa P. W. 9 and Govind P. W. 8 were examined. The learned Sessions Judge did not attach much credence to their statements; because, for one thing, he thought Anupa was of poor eye-sight and could not have identified the assailants even by day light, and for another, Govind who claims to have seen the attack, did not speak of it to anybody as soon as he came home. The explanation is that when he came, he found his own brother Dula so seriously injured that he had no inclination to speak of the murder of Gulab to others. Certainly, Dula who is not a witness before us, but who was examined by the medical officer, had been very seriously attacked having two sword cuts on the head besides five more injuries by blunt weapons elsewhere on the body. Whether or not Govind was so much, upset by the sight of Dula's injuries, and his failure to mention to others what he had seen does not affect his credibility still we do not have such direct evidence on, Gulab's murder as can, justify a separate conviction. When on the next day, that is, 21st, the different persons named in connection with the other incidents were arrested, Kalusingh son of Motisingh made over to the police a lathi which had marks of human blood, on it.

Besides, he gave information to them as a result of which they went to a field half-a-mile to the south-east of the abadi and found Gulab's corpse with sword cuts. This would certainly have been evidence of Kalusingh's complicity with, the killing of Gulab Bagri if there had been concealment of the corpse. But it was an open field and it cannot be urged that the police discovered the corpse as a result of Kalusingh's statement; they could have found it if they just went there. We have to leave the matter of the killing of Gulab at that with a feeling that the circumstances indicate that he had been killed by some of the very persons who had attacked the

other Bag-313 on that day.

32. Besides those named, some more were injured at or near the abadi shortly after the incident at Balya's field. Among them only Ghasi and Sukhram have been examined in the case, while Kama and Dula have not been called. (His Lordship reviewed their evidence and continued).

33. The statement of these witnesses shows that there was undoubtedly a concentrated attack on the Bagris who had collected at Balya's field; soon after it near that field by the abadi and, in a direction farther away from that field there were stray attacks on individual Bagris wherever they were found. The results as noted in the beginning were all practically one-sided except for two minor injuries on Ratansingh son of Amarsingh, which could easily have been received in the confusion of a scuffle where there are a number of assailants on his own side. The story propounded by the defence witness Mehtab Bhil is not at all reconcilable with the results.

34. It is only proper to see whether these witnesses are 'exaggerating or finding it convenient to implicate many more persons than did actually take part in the attack. Actually, all the witnesses are of the caste of the victims; but, on the other hand, they have either been injured themselves or have given a satisfactory account of their presence at the time of the happening. In all such occurrences the possibility of exaggeration is always there but the foregoing account shows that the Bhil assembly did so much of havoc that there is really no scope for 'actual' exaggeration.

One special feature is that in this connection the Public Prosecutor had invoked during the examination of more than one of the prosecution witnesses the amended clause in Section 162 (Proviso) of the Criminal Procedure Code. None of them had shown the least indication of having gone over to the side of the accused persons, or in any manner interested in minimising the seriousness of the happening. However, in giving evidence in the Sessions Court, some of them had forgotten some detail such as the presence of one or two of the persons named by them while examined by the police, one of the many blows given by the assailants to one or others of the victims of the attack. Such omissions and tricks of memory

are only too common when the witnesses speak about the occurrence again after some months, and where the occurrence itself is somewhat elaborate, and involves quite a number of assailants on one side and a number of victims on the other. It is altogether unnecessary for the Public Prosecutor to be upset by such slight omissions or to imagine that the witness concerned was intentionally trying to minimise things. The mere forgetting of a point of detail is not evidence of the witness's general disregard for truth or his having gone over to the side of the accused. On the contrary, it may at times be itself a proof that the witness is speaking the truth to the best of his recollection, subject to the obliteration by time of the less conspicuous elements of the picture.

35. All this is obvious; but after the amendment to Section 162, it seems to have become the practice for public prosecutors to examine the prosecution witnesses themselves with reference to the earlier statements to the police even in cases where the witness does not at all seem to have turned hostile and where at all events, the public prosecutor does not allege it. Section 162, proviso as amended runs

'When any witness is called for the prosecution in such inquiry or trial any part of his statement if duly proved may be used with the permission of the Court by the prosecution to contradict such witness in the manner provided by Section 145'

It is urged on behalf of the State that the mere fact of the public prosecutor using any such statement for contradiction does not mean he had declared the witness hostile in the manner understood under Section 154 of the Evidence Act and as such, this cannot in any manner make his evidence less acceptable to the Court. Broadly speaking, even if a witness is declared hostile and is cross-examined under Section 154, the value of his evidence would depend upon all the circumstances and would not merely because of the cross-examination become suspect. It is, however, to be noted that any such use of the previous statement for the purpose of contradiction is cross-examination properly so called. Though Section 162 does not use the word 'cross-examination', Section 145 which has referred to it, itself clearly provides that, 'the witness may be cross-examined as to

previous statements'. It is not conceivable how such statement can be used except for the purpose of contradiction by way of cross-examination. Now, cross-examination is normally the right of the party opposing the one which calls a witness. If, however, that party itself wants to cross-examine him, then it has to seek the leave of the Court for putting questions to him which might be put in cross-examination by the adverse party. This is under Section 154, and it is the established practice that a Court would not give leave to the party calling a witness to question him under Section 154 until it is satisfied that there is some hostility or adverseness displayed by the witness to the very party on whose behalf he has come to give evidence. If his memory plays a trick in regard to a detail, and he does not in any other manner go back on his previous statement, or show any disinclination to tell the truth, then he is not hostile or adverse. In other words, he cannot be cross-examined and therefore the statements made by him to the police cannot be used in the manner provided in the amendment.

The procedure which the lower Court has allowed the public prosecutors to adopt in this case as well as others that have come up recently, is even farther away from the intention of the present Section 162. The witness is all right from his view point; but they are anxious to bring out into evidence some points of detail which the witness has forgotten. He is therefore examined with the leave of the Court on his previous statement to the police. Then he says that at this stage he recollects that such-and-such thing had happened; in effect, the whole procedure under the proviso to Section 162 Criminal Procedure Code is thus an attempt to enable the witness to recollect, what he had stated to the police and what has been subsequently forgotten.

36. While summarising the evidence of the different witnesses, these prompted recollections have been ignored by us, and the evidence considered in the form in which it came at the earlier stages of the examination-in-chief. That way, all the witnesses are unanimous in regard to the main lines of the happening, namely, the impression created in the minds of Balya and Mehtab by the incident of the morning and their vague fear that the Bails might do something, though they were not really anticipating a mass attack on this scale; then the arrival of a crowd of these Bhils, about 15 to 20 in number, among whom practically all the witnesses

identify these 16 appellants. A few of them had spoken of the presence of Nandibai also, while some have omitted one or the other of the appellants while naming those who arrived but had subsequently attributed some part to them.

They are all unanimous in regard to the five who had the swords. In regard to the four that were killed at Balya's field, the picture is very clear in so far as the sword attack went and unanimous that it was Chhatarsingh who began. On the other hand it has been pointed out that they are extremely vague in regard to the later stages of the attack and in particular the alleged attack with lathis. It has been pointed out that the total number of injuries inflicted on all the nine persons injured at that place is between 20 and 25 for example, Balya had one incised wound and one contused wound, the former of course a bone-deep cut on the head which must have caused more or less immediate death. Mehtab had a deep sword cut on the head and a haematoma also on the head, which may have been the result either of a heavy lathi blow or one with the flat side of a sword. Ganpat had three cuts and one contusion; two of the sword cuts of a comparatively minor nature on the head and a third a deep one about the hand. Khemraj had one sword cut on the face, one haematoma on the head and a contusion on the chest, the haematoma possibly caused either by a lathi blow or a blow with the flat side of a sword. The injuries on the others who survived the attack are, Gangaji two sword cuts and one contusion; Ana-riya two sword cuts and one contusion; Kaniram one sword cut; Surupa one sword cut; Bhagwan two sword cuts and one contusion. About 15 out of the total were sword cuts while the remaining about 7 in number might have been caused by blunt weapons.

The argument seems to be that the total number of injuries and in particular, those attributable to blunt weapons, do not bear out the statement of the witnesses that after a few sword blows by each of the assailants that had that weapon, there was a general attack by the others. We do not find much force in 'this, because it supposes that every one of the assailants with lathis actually hit every one of the 9 victims of the attack. What is really meant' by the witnesses is that the initial stages of the attack were mostly with the swords many of the blows being so conspicuous that the witnesses could remark with some detail. After it, there was a general stampede and the others with lathis began to attack. In a crowd like that it

cannot be said with any precision how often each of these lifted his lathi and brought it on or the other of his victims and how many of the blows hit the target and how many got wide. As already noted, there is considerable vagueness and uncertainty about the later stages of the attack; but this is only natural. To have expected more precision about these stages especially from those who have themselves been injured would be to ask for the impossible.

37. All that we have to see at this stage is whether (witnesses?) are not making much too general statements and we have got some means of checking up their veracity. It is a well known fact that witnesses in our Courts do exaggerate and at times give wide omnibus statements; the Court should scrutinize with special care. This is only a rule of prudence but (sic) has been specially pointed out by the Supreme Court itself. As far as possible, we have to see whether the presence and the part attributed to any of the accused is given with a precision and circumstances that could be reasonably expected in the context. In the instant case, for example the picture of the five persons using swords is extremely vivid. There are quite a number of sword injuries and the manner of the infliction of the injuries as described by witnesses is supported by the medical evidence, taking it on broad lines which alone is possible in a context like that of this fight. As for lathi injuries, we have it that quite a number of others who did not have the swords took part in the fight. There are a number of lathi marks but none that would imply that each of the 10 or 15 others who did not have swords caused one or more injuries to the nine persons that were actually attacked. But such a result cannot be expected.

38-40. (His LordsEip reviewed the evidence of recoveries of blood stained weapons etc., and proceeded).

41. This takes us to the consideration of the legal implications of the facts already found. Apart from the cry which was repeated several times that the Bagris should be killed, we have it as a fact that the assembly of the appellants had come quite a long distance from their homes. Mere presence in a crowd cannot render anybody liable, unless there was a common object and he was actuated by the common object and that object is one of those set out in Section 141 Indian Penal Cpde.

The instant case is not the picture of persons going peacefully to Nagda each in his own way, just happening to go together; on the contrary, it is of a group coming with a particular common purpose, not in military formation, as has been pointed out, but within a few feet of one another. Then there is the question of arms and of the cries that, the Bagris should be attacked. Even half way from the village Naguda had heard the cry. Nearer the place of attack Rugga had also heard it and everyone of the survivors is certain that the cry was something to the effect that the Bagris should be killed or beheaded.

One argument seriously advanced is that while they were going, the Bhil assembly did not attack any Bagris, in particular, Naguda or Rugga. On the other hand, it is beyond doubt that quite a number of the Bagris outside Balaya's family were attacked, five of them at that field, one or two just outside at the time of retreat and, of course, another five or six later on. Leaving out of consideration this last set of victims, the results show that the assembly had, on the one hand, a particular animus against the Balya brothers, and a general animus against the Bagris. After the former animus spent itself on the fatal attack on two and serious though non-fatal attack on the two other of the brothers, the latter asserted itself and the other Bagris came in for their share of the punishment. On the side of the Bhils, it was the Hindusingh family which were immediately aggrieved; but the other Bhils in the assembly made a common cause with them. Thus, the statement of the witnesses and the results leave us in no doubt as to the existence of a common object of attacking with deadly weapons, the members of the Balaya family and also the other Bagris found with them. The question is not really whether the Bhils of that village used to go to Nagda to display weapons like swords in the procession; actually, there is no evidence of any akhada or recognized group from Bhilsuda, nor of the practice of the organizers of the procession at Nagada of allowing any and everybody to walk into the crowd and jump about with swords or other weapons which, if 'true, is fraught with very dangerous consequences. But the real point is not whether these things were allowed, but whether the assembly of the Bhils that came up to Balya's field and did the havoc already set out and returned to the village attacking some more Bagris, whether that assembly was going peacefully to Nagda and was pro-voked into a fight by Balya or whether it was at its inception one actuated by the common

object of attacking Balaya brothers and other Bagris.

42. In this connection case law has been cited to emphasize that a mere onlooker or passer-by cannot become a member of an unlawful assembly. About that proposition there is of course no doubt; in practice such question arises only when the riot is at a crowded built in area where innocent occupants of houses come out or happen to be present from before.

Sometimes as in the case reported in *Sukha v. State of Rajasthan*, (S) AIR 1956 SC 513 persons do come armed because of a fear that they may themselves be hurt, and are subsequently implicated as members of an unlawful assembly. If, for example, these men were really going in a peaceful manner, though carrying arms to some show at Nagda, and had stopped to have a look at some commotion, they would not have become members of an unlawful assembly. But, if they go in a single crowd most members of which are shouting that Bagris should be killed, and subsequently seeing eight or ten Bagris at one place set up on them, then the principle given in that ruling has no application. Some unmistakable overt act contributing to the prosecution of the common object should always be proved before a person is convicted for membership of an unlawful assembly or for rioting. Mere presence will not usually be that unmistakable act; but presence plus the carrying of weapons will bring him nearer to the common object, unless he explains why he carries the weapon concerned. If, in addition to presence and weapons, there are cries clearly indicating a determination to attack members of another group, the position is stronger still against him. Finally, while going in the crowd with the war cries, if he marches along with the others into the opposing group and uses his weapon, then it is complete evidence of membership of the assembly.

Recent rulings of the Supreme Court have made this position very clear, on the one hand, laying down the conditions for a conviction under Section 143 or 147 and 149; and demarcating the fields of operation of the last section and of Section 34 I.P.C. Thus, without any further argument, we agree with the learned Sessions Judge that all these sixteen appellants were members of the assembly which was unlawful, as its proclaimed common object was to attack Balya and other Bagris.

43. It became a riot when these Bagris were attacked by five members with swords and by some of the others at least with lathis; those who were not seen actually using their lathis, went into the thick of the fight along with the others. Even in regard to them it is not a case where in a crowded place the onlookers get themselves unintentionally drawn into a crowd, but one group actually marching into the ether. It is clear therefore that the five that were carrying the swords were guilty under Section 148 while the others were guilty under Section 147 IPC. But the evidence goes a step farther. We are not immediately concerned with the murder of Gulab though in the context there is no doubt that some Bhils were responsible for it. But out of the four killed outright at Balya's field three died as a result of sword cuts on their heads, and the fourth, though he had other injuries, died as a result of deep sword cut on one of his legs. Each of the sword cuts was sufficient in ordinary course of nature to result in death; but the point is that the assembly was grimly determined on killing. In other words, the unlawful common object was not merely to attack the Bagris, but to kill them. Actually in every case under Section 149, it is not necessary that the common object should directly be to commit a particular offence. It is sufficient that the particular result was such that the members of the assembly knew to be likely to be committed in the prosecution of that common object. Even supposing against all the appearances that the assembly of the Bhils in which there were at least five swords openly displayed, was minded to give a general thrashing to the Bagris without any idea of killing them still with so many deadly weapons they knew that death was likely to be committed in prosecution of that common object. We find it necessary to mention it because in course of the argument on behalf of the appellants the word 'chastisement' has been repeated often as if it is a harmless euphemism. Certainly, there are occasions on which the chastisement thought of by an assembly is something less than killing, and the weapons carried by the members are known to everyone of them to be in the hands of some members, such that the 'chastisement' would not go to that extent. But the present case is not of that type.

Whether we call it chastisement or killing, the assembly knew that five swords carried openly with shouts that the Bagris should be killed or beheaded was likely to be used for killing. As things appear in this case, it is really a common object of killing Balya and the other Bagris; but even if it is something milder than it, still the

weapons were such that the assembly knew that killing in this case was certain during the prosecution of the common object. What is even more serious is that after killing four and wounding the five, at the field, the assembly was crying for more blood and hit the Bagris they saw on their way back. This not only supports the finding that the common object was to kill, but also shows that it was to kill whichever Bagri came in their way. Thus, the conviction of all of them under Section 149 read with Section 302, Indian Penal Code was justified.

44. The committing Magistrate seems to have thought at one stage that Section 34 was also indicated. There is something to be said about it; but it is unnecessary to enter into a discussion as the case patently comes under Section 149. Whether these men also rendered liable under Section 34 IPC is unnecessary for us to examine now.

45. This takes us to the question of punishment. The case is a very hard one because six persons have been awarded the extreme penalty. On the principle the learned Sessions Judge himself has followed, Kalusingh should not have been included in the six because he did not have a sword. As for the blood-stained lathi, others also had similar blood-stained lathis; in the matter of awarding the death sentence the Sessions Judge himself drew the line at the use of swords. This sentence on Kalu-singh has obviously something to do with that Court's impression that Gulab's corpse was discovered as a result of his information and therefore he had had something to do with that killing also. But earlier in the judgment he had himself found the two eye-witnesses to Gulab's killing not quite-reliable. So, Kalusingh would in any event have to be put in the category of those sentenced to the lesser penalty.

But that does not take us very far because we would still have five of the appellants sentenced to death. In the instant case, the results on the other side are equally shocking as few men have been killed, at one place in the most brutal manner. Apart from the fact that there was no provocation as could reduce offence in the eyes of law, there is also no extenuating circumstance worth the name that could mitigate the punishment. All that had happened was that a Bagri had pushed (or may he, even slapped) a Bhil woman, who in that village society considered

herself of a superior caste on the same level as Rajput Thakurs. Ever, the Bagris had vague fears and regrets about it and if things had been managed more tactfully, they would have made amends. But we are not concerned directly with that. The Bhil woman for her part, had no-doubt beaten the Bagri though either way the injuries were not at all serious, nothing happened at that time. Actually the Bhil resentment was not at the injuries but at what they supposed to be a great insult by a member of a low caste. It is difficult in a caste-ridden country to impress on the villagers the absurdity and the injustice of such feelings; as long as they do not lead to acts of violence, such prejudices have to be left alone by law until general improvements of manners and education teach people the better social sense. The universality of such feelings is there though it rarely expresses itself in such a violent manner; but that cannot be taken as an extenuating circumstance.

46. In the instant case, the learned Sessions Judge was aware of the need of drawing a line at some point between those who for some clear reasons deserved the extreme penalty and those whose doings while still an offence under Section 302 read with 149 Indian Penal Code, did not really call for it. He drew it between those who had used the swords and those who had not; at any rate, whom the evidence did not show definitely to have used the swords. This is a sound principle because the man who rushes with a sword in a riot is more dangerous to society than the one who satisfies his passion for violence with a comparatively milder weapon like lathi. On the other hand, even this leads to a very distressing result here. All the five persons who used the swords are practically members of one family being the sons of one or the other of the three brothers. In addition, some more members including Hindusingh who seems to be the eldest and the head of the family are in for imprisonment for life. A strictly logical answer is that, after all, the members of that family chose to hack the Bagris with swords and they should take the consequences. But some consideration may be shown on purely humanitarian grounds on the fact that in our country caste madness is not the monopoly of one group. So, we would draw the line somewhat narrower than what the learned Sessions Judge has done.

Of the whole lot, Chhatarsingh was the first who opened the attack with the sword. If he had shown some restraint, it is conceivable (though one can never be sure)

that things might not have turned out so tragically. May be, the Bagris themselves being in a very submissive mood, would have begged pardon just as Nagda Bagri had done a few hours before and pacified the Bhils. But no occasion arose, for it. Even while going about it, Chhatar-singh laid on with the sword and was soon followed by his brother and cousins. At all events, his was the initial step which made the tragedy inevitable. We would, therefore, confirm the sentence of death on Chhatarsingh son of Hindusingh. In regard to the five others, the sentence of death is set aside and the sentence of imprisonment for life is substituted; the convictions and sentences under Sections 148 and 147 Indian Penal Code are also confirmed, but they are of no separate practical consequence. The convictions and sentences on the other appellants are confirmed. With this modification in regard to the death sentence of the five, namely Kalusingh, Nirbhaysingh, Ambaram, Jujhrsingh, Ratan-singh son of Hindusingh, the appeals are dismissed.

Sen, J.

47. I agree.