

State Vs. Kalu and ors.

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Court : Madhya Pradesh

Decided On : May-13-1963

Reported in : AIR1964MP182; 1964CriLJ185

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

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 32, 239, 252, 286 and 537; [Evidence Act, 1872](#) - Sections 114; [Indian Penal Code \(IPC\), 1860](#) - Sections 147, 149, 302, 323 and 325

Appeal No. : Death Reference No. 1 of 1963 and Criminal Appeal No. 29 of 1963

Appellant : State

Respondent : Kalu and ors.

Advocate for Def. : D.P. Bhargava, Adv.

Advocate for Pet/Ap. : Balwant Singh, Govt. Adv.

Judgement :

Krishnan, J.

1. These 35 appellants, all residents of a village called Kachotiya about 6 miles from the thana headquarters at Khilchipur in Rajgarh District, were put on trial and all convicted under Section 302 read with Section 149, Indian Penal Code for the

membership of an unlawful assembly in the execution of the common object of which four persons were killed; they have been sentenced, fourteen of them, namely, those numbered 3, 6, 7, 8, 16, 17, 28 to 35 to the extreme penalty subject to confirmation by this Court, and the remaining 21 to imprisonment for life. In addition they have been convicted, numbers 1 to 33 and 35 under Section 325 read with 149 Indian Penal Code and sentenced to live years rigorous imprisonment each and under Section 323 read with 149 with sentences of rigorous imprisonment for one year each and all under Section 147 Indian Penal Code with a sentence of two years rigorous imprisonment all sentences to run concurrently.

2. In regard to another 25 who had been arrested and discharged by the police, the learned Sessions Judge has recorded his opinion that the discharge was on insufficient grounds, and should be looked into by the District Magistrate. If this implies that there are proceedings pending further inquiry into the cases against these 25, whatever is said in this judgment will not be counted against them if and when they are brought to trial.

3. The special problems of this case are, on law, whether on the prosecution witnesses' own allegations there was only one transaction and an attack by one unlawful assembly acting at different locations or whether there were two unlawful assemblies as indicated on the two separate challans, or three or four unlawful assemblies each going to each of the separate fields of the Cha-mars. In the latter event the question would be, whether there could have been a joint single trial or whether if separate trials were indicated there has been miscarriage of justice by the joinder.

Another very unusual question in this case is regarding the circumstances in which the Public Prosecutor can on his personal opinion that they may not tell the truth, give up without any adverse inference being drawn against his side, witnesses who are essential and have been listed and summoned in fact, the Chowkidar and the village patel or headman, the former giving the first information report and the latter visiting the scene of the happening either when it was in progress or immediately after.

Other questions are primarily in regard to the assessment of oral evidence; but here again the peculiarity of the present case is that for one thing, all the material witnesses are the alleged victims of the attack and no features observed on the site or sites are proved to support or to belie the possibility that an incident of the kind described, did happen there. The final question of very great consequence is when, on the Additional Sessions Judge's own finding the parts played by all the accused are practically the same, and the individual parts are not deposed to and not as-certainable, how he could select a certain number for the capital punishment while awarding the others the lesser sentence.

4. This case arises out of a serious incident or a few similar incidents of an equally serious nature, in that village sometime about midday of the 4th September, 1962, in course of which a number of chamars were attacked by a larger number, obviously of non-Chamars, with the result that some fifteen of them were beaten with lathis more or less severely. Four of them died each of them having among other injuries one lathi mark and one only on the head under which either the skull had got fractured or the brain lacerated even without a damage to the skull bone; they being Mangya Chamar, Bhavrya Chamar, Gordhan Charaar and Bhima Chamar.

In addition, five other Chamars, namely, Baissu Chamar, Baijnath Chamar, Bheru Chamar, Chena Chamar and Devia Chamar received among other injuries one or more each of bone fractures at the extremities which are described as grievous. Besides these nine, twelve Chamars men, women or children were found to have some marks each, mostly superficial, of beating with lathis or friction with some blunt substances. Some of the injuries were quite insignificant and such as might not at all mean that they were attacked in the manner or at the time they described. Five or six of them, however, as will be set out in time, had undoubtedly been hit with lathis though mildly, at about the time of the more serious attack on others.

On the other hand, if any members among the assailants of the Chamars had received injuries, they were either not conspicuous enough or the injured persons have concealed them. The sixty persons who were arrested within a few days after

the 4th September, 1962, and at all events the thirty-five that were put on trial did not have any conspicuous marks indicating that they had been beaten at about the time of the incident. Thus it can be safely assumed as a starting point that whatever the genesis of the quarrel and wherever it took place, the Chamars, let us say, about fifteen of them, men and women, were overpowered by a large number and were beaten though only with lathis with varying degrees of severity and had not succeeded in their turn in making any impression on their assailants. Either the chamars were attacked singly or in twos or threes by groups of five or six assailants each, or were set upon in a mass by twice or thrice their number so that they got really no chance of retaliating. The prosecution account, it may be stated even here, is the first alternative.

5. Neither has the prosecution led any evidence worth the name about the genesis or the events and movements immediately before mid-day of the 4th September, nor have the investigating authorities cared to record and prove in Court the features at the site of the alleged attack such as trampling, damage to the crop, blood marks or the like. Even the village choudidar who gave the first information report and the village patel who along with the choudidar or even before him moved about on the scene of the attack have not been examined as witnesses. It is therefore convenient to begin with to indicate what the learned Addl. Sessions Judge from some police papers of the previous years 1960 and 1961 describes as the 'back-ground' of the incident; we have at the same time to eliminate the controversial and unproved allegations he has noted under that heading,

6. That village has about 150 families out of whom nearly two-thirds or about 100 are Dangis, cultivators by profession having a status (in, the old village society) of caste Hindus, on the one hand not so high as Brahmins or Rajputs, nor on the other so low by village standards as the Chamars. Next in number come the Chamars who are about 10 or 12 families strong closely inter-related as usual in small groups, and including those injured or killed in this incident. There are other castes also but only a few families each, among whom, however, the Lohars and Barbers are worth mentioning. Thirty two of the thirty five appellants and all the fourteen condemned persons are Dangis while two of the rest are Barbers and one a Lohar.

In 1960 and 1961 a larger part of the wide stretch of the cultivable waste numbered Survey Plot 935 and described as grazing land in the map was parcelled out for cultivation purposes among the villagers, the Chamars getting quite a number of slices but others also getting allotments. There were about twenty five allotments each round about five acres or so (7 bighas) out of which fifteen went to Chamars, several of whom were among the casualties in this incident. The point to note is that the allotment of lands was not on the basis of Chamars against others, but presumably on the basis of poverty or landless-ness.

This is worth remembering because it is said that the allotment of land 'infuriated' the non-chamars especially the Dangis, though there is no evidence that any of them especially, any of the present appellants had either expressed or shown signs of resentment against this allotment. The area of grazing land available for the village animals was of course reduced; but for one thing, still a good part out of the original Plot No. 935, was left, and for another, the shortage, if any., and the consequent increased possibility of cattle nuisance affected all villagers alike as the lands of the Chamars and the non-Chamars are indiscriminately mixed in that locality. All the same, sometime in 1961 the police reported for action under Section 107 Criminal Procedure Code against several villagers Chamars and non-Chamars alike; but the proceedings were dropped and no action taken, apparently no notices even issued for cause.

7. About a year later sometime in May or June 1962 (in Jeth) there was held in this village what is called in the judgment a symposium on the abolition of untouchability conveyed by leaders of social reform and presided over by the Tehsildar and probably attended by the officers of the police. Two incidents are specially referred to, they being the ceremonial opening of the village temple to the Harijans, (that is, the Chamars in this village) by two Chamar girls carrying pots of water into the temple and pouring it on the idol. The other was the shaving of some Chamars on the instructions of the Tehsildar by two of the barbers who would formerly have refused to shave any but the caste Hindus.

There is nothing extra-ordinary in these incidents. But they have been repeatedly referred to in the evidence and in the judgment with the further comments that this

made the Dangis very angry, though one goes through the evidence in vain to find a particle of evidence about any resentment shown by any Dangi or other caste Hindus in the village at this incident and none whatsoever by any of the appellants. In fact, the two barbers on trial were not the barbers of that day who have been named in the evidence.

8. On the 24th August, 1962, that is, about ten or eleven days before this incident, & petition was filed by ten Chamars before the police alleging that some unknown people had been throwing stones on the tiles of their houses at night and they thought that it may be the Dangis who were angry at their social uplift. On the next day a memorial was filed before the District Officer signed by some Dangis among whom we find the names of two and two alone of the present appellants, possibly the same or others (as the parentage is not given there). This memorial is extremely apologetic in tone and only complaints of the Chamars who were making false allegations and were dirtying grazing grounds and spoiling wells and the like, and were getting aggressive because of the general feeling that the authorities would support them whatever they did. As for the allegation that some people were throwing stones, it was suggested in the memorial that the Chamars themselves might have broken a few tiles in the hope that they could now ask government to give them corrugated sheets for their roofing.

Neither petition is evidence and the only specific allegation of the Chamars that some people had thrown stones and broken their tiles was never verified; even the investigating authorities in this case do not tell us that they saw tiles broken on the Chamars' houses, and that the breaking of tiles was such as could have been the result of stone throwing. But these have to be referred to, as the prosecution has persuaded the learned Sessions Judge to assume from these that the Dangis had 'started harassing the Chamars destroying and cutting their crops and the like'. There being no evidence whatsoever about this, the proper approach is to disabuse our minds of such notions.

9. There is one more incident or a possible incident of which there are clear indications. There must have been something embittering the feeling between the Chamars on the one hand and quite a number of non-Chamars on the other,

immediately before the incident, say, on the previous night or on that very morning. There is one incident touched upon in the evidence, but scrupulously (or rather unscrupulously) kept back by the prosecution.

It seems to be the practice in this village and possibly in that area, for the residents to release rams dedicated to a goddess; their ears are clipped, so that they could be recognised by all and sundry -- possibly smaller editions of the better-known village bulls--licensed nuisances, which the villagers do not care to hurt or harm and would not usually summon courage to kill, out of respect for the superstitious or the religious sentiments of the vast majority. It does appear that one such ram in this village was killed and the carcass found in the field of Baijnath Chamar allotment 935/9 sometime on the morning of the 4th September, 1962, soon after which the Chamars were faced by the angry villagers near that place. The beating was undoubtedly a sequel to this; but the exact course of events has not come before us because for one thing, the Chamars themselves except one girl witness deny the existence of the carcass and do not refer to any immediate incident leading to the attack on them. The extra-ordinary feature of this case is, everybody concerned, the Chamars who were undoubtedly the victims of an attack by some non-Chamars, the police officers Investigating the case, and even the special Public Prosecutor literally run away from the carcass of the ram almost as if it was a living tiger. This will be discussed at some length in course of the judgment.

10. It is against what can be called this background that the present incident took place. The prosecution evidence on the happening itself comes only from the Chamars without, as already noted, anything direct about what happened immediately before or was observed on the alleged site or sites immediately after. The story or the stories are separate and somewhat complicated. In view of the problem concerning the propriety or otherwise of joint trial it would be proper to set out the evidence with reference to each individual incident.

11. Broadly speaking there are two or two sets of events, one happening over the stretch of land about 600 to 700 yards wide from sub-plot 935/5 in the west allotted to Bhavrya (deceased), through sub-plot 935/6 allotted to Moti (injured), Sub-plot 935/7 allotted to Gordhan (killed but on prosecution allegation not at this place),

sub-plot 935/8 allotted to Baksu (grievously injured), subplot 935/9 allotted to Baijnath (grievously injured) skirting sub-plot 935/10 allotted to Bhima (killed but according to the prosecution not at this place) and passing on to sub-plot 935/15 (across a nala and another allotment) belonging to Chena and his son Bheru (both grievously injured). I may note even here that the distances are essential to the appreciation of the evidence and have been measured down with an approximation to less than 5 per cent from the 1"=100 yards map Ex. P/1. The dead person Mangya is alleged to have been with Moti--his brother at sub-plot 935 / 6 though he has managed to get a separate allotment farther east No. 935/16. Towards the eastern side of this stretch but about 200 to 250 yards to the west of Chena and Bheru's plot there is a stretch of water (called nala by the witnesses) which actually adjoins on the east the allotments of Baksu, Baijnath and Bhima.

The other battle-field as it may be called -- is alleged to be round about plot 611 at the extreme south-west of the village bordering on the contiguous village Amola. This place is about three-quarters of a mile from the centre of the first location and about half-a-mile to the south of the abadi of the village. Though Gordhan and Bhima have allotments in the new lands as already mentioned, the story is that they were actually working on that date at Gordhan's field in plot No. 611. Sometime (may be, about 15 to 20 minutes) after the incident at the Balda or the new lands. some villagers are said to have set upon Gordhan and Bhima and beaten them to death. They are further said to have injured three other persons -- Deviya 'grievously' by fracturing a metacarpal bone, his wife and Sewa simply, the last with a stone causing a bluish patch on his shoulder of about the size of an old one-pice coin. Strictly speaking, the injuries to these last three were not caused at plot No. 611, but according to the prosecution witnesses concerned, at some distance to the south in the village Amoda how far and where, evidence has not been led.

A later and a third happening at this place, that is, plot No. 611 is deposed to by one witness an old woman, mother of Bhima. According to her, the two injured lay there, not quite dead but in a serious condition in the last gasp, as it were. A number of villagers had come there whose names will be set out later, and shouted that they should make sure that these two were really dead, and gave

more lathi blows finishing them then and there. Thus we have two main incidents or 'Acts', each with several separate scenes.

12. to 16. (After discussing the prosecution evidence on one of the happenings, their Lordships proceeded:) All the witnesses in this case speak in similar general terms. Subject to other considerations the best way of assessing the value of these statements is to see if they had any motive to implicate wrong men among their own assailants, and really identified in a manner that would carry conviction, persons known beforehand at a distance of a few hundred yards, especially during a commotion in which they themselves had been injured. It can be stated even here that the witness Daryao has altogether no notion of the identity of those she was implicating because when asked to point out four out of those she had named, she indicated three wrong men; possibly the fourth was pointed out correctly, but for ought we know, it may be coincidence. So, on identification her evidence has to be rejected.

17. to 24. (After assessing the evidence their Lordships proceeded:) The foregoing account is a fairly detailed summary of the material evidence against the accused persons, all coming from the victims who are themselves closely inter-related, belong to one caste, and are rightly or wrongly deposing to an alleged outrage on account of caste. All this will be examined in time; but the bare narration shows that it is a much involved story leading to a certain amount of possible confusion unless it is guarded against.

25. There is no defence evidence. But the suggestions and statements on behalf of the appellants are that none of them was present during the incidents in which the Chamars were attacked, injured and killed. Possibly there was a happening at or near Baijnath Chamar's field, where the Chamars killed the sacred ram, and some villagers but none of the appellants went to protest and call for an explanation. The Chamars were acting in an offensive manner in killing the animal because they were led to believe from the well-intentioned sympathy of the authorities in their welfare, that they might do whatever they liked and get away with it. They (accused) also alleged prejudice because of wrong joinder of accused, the confusion in the matter of common object, the exaggerations and

additions by the witnesses, the suppression of material evidence by the prosecution, and the Addl. Sessions Judge's accepting generalisations as specific evidence.

26. Taking up the question of the propriety or otherwise of a joint trial of all these persons, the essential requirement is that all the offences should have been committed in course of a single transaction. In that event a joint trial is justified. If the quantity of material and the number of accused persons are such as can be overwhelming, it will be proper for the sake of clarity to try the accused in different groups with reference to the parts of the transaction in which they were concerned. On the other hand, if these are not parts of the same transaction and the happening resolves itself into two, three or more separate ones, then separate trials are mandatory and not merely a matter of convenience.

Broadly speaking, the picture is of two main sets of events, the more elaborately described ones in the balda or the new fields round about Baijnath's allotment. This itself can be sub-divided into two different happenings, the first one to the west of the nala all over the stretch from Bhavrya's field (935/5) and Baijnath's (935/7) and the second at Chena Chamar's field, about 200 yards to the east of the nala. Quite separate from it in time and place are the second set of happenings at the mal or old fields, where Gordhan Chamar and Bhima Chamar are said to have been killed. This again includes yet another separate transaction, the later events described by Motiya P.W. 12. All these can become one transaction only when we have a continuity of purpose either patent on the face of events themselves or emerging from an earlier conspiracy or scheme.

27. It is in this connection that the evidence of a previous plan or scheme has to be scrutinized. The original official account of the prosecution was that on the previous day the non-Chamars had all collected at the temple and had resolved that they should put an end to the Chamars who were getting uppish and out of hand, the words used by the learned Sessions Judge being 'annihilate the Chamars'. It would appear that at one stage a witness was thought of who was to come and depose that he was present at the meeting; but actually, the witness called for this purpose was not able to say anything to that effect and was

accordingly declared hostile.

In fact, the learned Sessions Judge took account of the fact that the story of earlier conspiracy was dropped by the prosecution. Surprisingly enough, he refers to the same later on in course of the judgment; but the fact remains that there is no evidence whatsoever of any such conspiracy. Another possible basis of continuity of purpose can be a common feeling of bitterness on the part of the appellants with the course of events and what has been called 'the social uplift of the Chamars'. The charge itself seems to have been framed on that basis, though as set out in so many words by the learned Sessions Judge it makes no real sense. The Magistrate's wording is vague:-

'..... the common object of such assembly, namely, to the vengeance on the Harijan Cha-mars of your village by causing them severe in-juries, committed the offence of rioting

'..... the common object of such assembly to avenge the acts of social uplift undertaken by the Chamar community, committed the offence of rioting

We are not immediately concerned with the factual position, though, as already indicated there is not a particle of acceptable evidence of any of these accused persons having given expression by word or gesture to any resentment at 'the acts of social improvement' effected by or for the Cha-mars. The real question here is whether the phrase 'avenge the acts of social uplift' conveys any clear meaning to the accused. Usually, people avenge something done against their interest or feelings. But the vengeance itself takes the shape of some act of oppression or violence; for example, of mischief or hurt or grievous hurt or murder. Accordingly, to say that the common object was to avenge something may indicate the motive generally, but does not give any clue to what form the vengeance was to take.

In the instant case, presumably the learned Addl. Sessions Judge understood that the vengeance was to take the form of causing hurt, grievous hurt or murder. Apart from the vagueness, the wording is so general that by itself it cannot bind together all the different acts committed by the accused into one continuous transaction.

28. We do not have any evidence that before arriving at the scenes of the attack, that is, the new fields on the one side and Gordhan's old field on the other, the accused had collected at one place or had come in response or to the call of one or more persons and had marched together. It is one thing to say that the whole lot of them came together and then fanned out in different directions to attack the Chamars in different fields, and another thing for each victim of the beating to say that while he was at his field, he saw 5, 10 or 12 of the assailants come on him, other similar batches simultaneously coming for other Chamars similarly working at their respective fields at varying distances. In the first instance, the commonness of purpose can be inferred. In the other, the most we can infer is that there were as many groups as there were separate fields and all of them were actuated by similar objects which need not necessarily be a common object. As between the members of the smaller groups, the object would be common. But as between these groups themselves the mere fact of the similarity, of the objects will not make it common, unless we have some other evidence of the kind indicated during the foregoing discussion.

Thus we have a case in which the common objects, if any, were similar, and were those of the smaller groups which went to attack the Chamars at each of the different fields in which they were working. What that common object was should certainly be examined; but there was no object common to one and all the non-Chamars estimated at anything between 50 and 75 who went in small batches to the different fields both in the west and on the eastern side of the village. Looked at that way, the joint trial of all these persons was not justified under Section 239 (d) Criminal Procedure Code. Besides, it might have been more convenient to have had separate trials at least in two batches in regard to the occurrences in the two parts of the village; but that is a matter of prudence and not of law.

29. As against it, the case for joint trial is based on the initial allegation that there was a conspiracy hatched on the previous day at a meeting in the temple that the chamars should be taught a lesson or 'should be annihilated'. As it turned out, the allegation of conspiracy was dropped even as the case began. Still, it can be contended that to examine the propriety of a joint trial one has to be guided by the shape the case originally had. Another justification would be-that the very fact that

there was close similarity between the happenings at the different fields might show that there was something like a common plan.

30. The problem is not without some difficulty, in a case of this nature; but fortunately, no definite answer is necessary for our instant purposes. A very similar question arose in State v. Lachhman, Death Reference No. 3 of 1963, D/-15-4-1963 (Indore Bench) (Madh Pra) in which there was a difference of opinion in the approach to this problem; but as it did not in any manner affect the decision, it has been allowed to rest.

Here also the practical question is whether the trial having been joint, there is any justification at this stage on the ground of prejudice or breach of a mandatory provision to order retrial separately in two or more batches. That of course is not necessary. In view of the considerable quantity of the material and the number of accused, it might have been more convenient to have held separate trials; but the record shows that as far as possible, the allegations against each of the accused (which is nothing more than that of presence in this or that crowd) have been kept separate and put to him separately in the questioning under Section 342 Criminal Procedure Code. It cannot therefore be said that in effect there was any embarrassment.

31. The real practical question is whether in the assessment of the liability under Section 149, which is the crucial problem in this case, any of the accused (or appellants) will be prejudiced by the joint trial. It is clear that every one of the accused would at all events be answerable under Section 149 for the unlawful common object which is apparent at the happening at any one of the several scenes. Clearly this is the causing of hurt and grievous hurt, at all but two of the scenes whether at these two where there were the killings (or the infliction of head injuries on each of the four victims that led to their death), it was anything more, will have to be examined in time.

But if there is only one assembly, and if the unlawful common object of the entire assembly is the killing of one or the other of the Chamars and if in prosecution of it four of them have been killed every member would obviously be answerable for it, whether or not he was really at one of these two scenes. On the other hand; if in

spite of the killings, the unlawful common object of every one of the groups is only the causing of the grievous hurt, and further if on account of the awareness of the possibility of death no member of any of the groups is liable for a charge under Section 302 it would be of very little practical effect whether we treat the whole crowd as members of one unlawful assembly or two or several.

The great significance of this proposition will appear in connection with the finding on the unlawful common object of the assembly in general or in all the separate batches. For these reasons it is unnecessary to enlarge on the question of the propriety of the joint trial except to note that looked at in any way, it has not caused prejudice in this case. The difference which has already been referred to need not be resolved here, but can wait till it comes up again in a case where it is vital for the decision.

32. It would in any view of the matter be proper to keep separate, against that particular group, the allegations made against it in so far as it attacked any particular team of the Chamars, and see whether inter se the members of each of the groups had a common object, and if so, what it was, and further if they were aware that in the prosecution of the common object more serious offences than were part of the original object were likely to be committed. If indeed the whole thing was one transaction by one unlawful assembly, then liability of every one of the accused under Section 149 IPC for each of the four killings will have to be examined. The difference between the two approaches will become purely academic ii we found that the liability under Section 149 IPC is not for murder in any case; on the contrary, if it is, then on the former view it will be attracted, so far as these killings go, only to the sub-groups that immediately chased and attacked Mangya and Bhavrya at the new fields, and as alleged by the prosecution witnesses, Gordhan and Bhima at the old fields.

33. In all cases of this nature it is usual for the prosecution to adduce evidence, most often of a non-controversial nature and therefore reliable, about what immediately preceded the actual attack and also what immediately followed, such as the presence of the corpses or the injured persons at particular sites, marks on the ground or on the crops and so on.

Surprisingly enough, we have in this case in spite of its seriousness and the number of persons injured, literally a blank both before and after. Part of it and as can be guessed -- a good part of it -- could have been removed if the prosecution had cared to examine the village Choukidar Bhima Dangi as also Badrilal the patel or headman of that village. They discharge functions of public servants though in a humble capacity, and are entrusted with the duty of observing and reporting to the police any unusual happening or movements among the villagers as are likely to lead to clashes. No doubt the evidence as adduced has to be assessed; but in this case the Public Prosecutor gave up these two witnesses, that is, the choukidar and the patel who had been listed and were actually in attendance before the Sessions Court. The learned Additional Sessions Judge himself did not care to examine them as Court-witnesses; the result was that the best witnesses on this have been kept back and we are left to make out what we can from the statements of the injured persons only.

The learned Government Advocate has seriously urged with what he considers to be reported case law supporting a thesis that even if a witness is essential for the unfolding of the prosecution story, the Public Prosecutor can give him up, if he forms the judgment that the witness may not tell the truth, and further in that event no adverse inference should be drawn. This argument has to be examined at some length both on account of its far reaching nature and its considerable effect on the controversy in this case.

34. Before doing this it would be convenient to summarize the course of events that brought the investigating officer to the scene of the happening only next morning; in other words, about 18 hours after the incident even though two policemen were there within about 6 hours, that is, the same evening. It is stated, though we are not in a position to verify it as the choukidar and patel are not before us, that the authorities at the thana did not have any inkling of the possibility of such an incident till about midnight, that is, 12 hours after the event.

It is to be remembered that the Police station is about 6 miles away, may be, 8 miles by a round about route because that distance is also given at one place in the evidence; either way, on foot within about 3 hours reach. Exactly at 4'O Clock

that evening two constables Nandansingh and Ramzankhan leave the thana for Kachotiya and arrive there within about 2 or 3 hours, that is, at about 6 or 7 p.m. The impression one gets from this is that some news has reached the thana, may be, of the happening itself, or may be, of the preparations of the villagers or of the general feeling of uneasiness in that locality, so that the station officer is sending two constables to find what it is all about, and to keep a watch that factions do not come to blows. But this is exactly what we are not told.

It is urged that the timing was a mere coincidence and the constables were deputed to ask the villagers to be ready and collect at some common place to meet the Tehsildar who was to visit the village on the next day in connection with the allegation made to him 10 or 12 days before. In itself it is not improbable though one would be inclined to feel that some news did reach the thana at about that time, that is, by the afternoon of the 4th September. It would have been better to have examined the officer for whose visit the constables were going to arrange.

35. The story further is that at the outskirts of the village the constables met Bhima Choukidar just on his way to the thana to report what he had known or gathered of this incident. If this is true, the Choukidar is starting about 6 hours after this most serious happening; but we do not know because the choukidar is not before us. For aught we know, the Choukidar might have left earlier or might have sent an earlier report and the story that he was starting at about 6 or 7 is itself false.

Anyway, the Choukidar is supposed to reach at about, midnight, covering in six hours the same distance which the constables had covered in about 2 hours, a record of slow speed, equalled only by that of the station officer who is also supposed to leave after midnight and reach in the morning. The first information report given by the choukidar at about midnight, is properly speaking not evidence in the circumstances except for the limited purpose, on the one hand, of introducing what the police officers did, and on the other, of showing the possible real motive behind the suppression of his evidence by the prosecution, it runs thus:-

'appears at the thana and reports orally 'At about 1-0 P.M. today I was at my house when I heard the Chamar women running along shouting 'Run-up. There

has been a fight and they are beating our men'. Hearing it I ran towards the Khodra of the village where I passed Badrilal patel who stated that there had been a fight with tie Gwalas. (Badrilal not being examined this reference to a fight among the Gwalas is in no event of evidentiary value). At that stage: Nathulal also arrived there. Thereupon all of us started in the direction from which the noises were coming and happened to pass the goyara of the village where Bhima and Gordhan were lying dead with bleeding injuries on their person. Their women were also at that place. They said, 'Two more are lying dead at the baldi', whereupon we went there and saw Bhavrya Chamar and Mangya Chamar lying dead at a short distance from each other and Motiya Chamar lying injured. Nearby there was the carcass of a ram lying on the field. At that place there were chamar women, but no others. They said that more Chamars had been injured and had gone home. I went to their houses and noted that Baksia, Baijnath, Chena, Bapu and Bheria Chamar had injuries. I learnt that the Chamars were weeding at the new lands which they had ploughed up and there had a fight with the Dangis of the Village who had killed Bhavrva, Gordhan, Bhima and Mangya and caused injuries to Motia, Baksia, Baijnath, Chena, Bheria and Bapu. They did not know what had happened to Deviya Chamar.'

'Having gathered all this I started for the thana at about the lighting time; but I met on the way constables Nandansingh and Ramzan and told them all that I knew and asked Nandansingh to go to the village and watch the corpses. Ramzankhan has accompanied me. This is my report'. '

36. Though the choukidar is not an eye-witness he claims to have arrived immediately after the happening and seen the corpses as well as several injured persons including those who could not have easily walked to their own houses. He further speaks of seeing the carcass of a ram, the killing of which by the Chamars, was according to the defence the starting point of the trouble. Incidentally, the officer states that on the strength of this information he searched on the next morning for the carcass but did not find it, a perfectly understandable thing as the carcass might have been taken away by jackals or other wild animals or might have been removed by the Chamars themselves, one and all of whom deny that there was any such carcass lying on the field. Whatever, that might be, it is after

this, information that the investigation starts. On the face of it, there is delay and it was for the prosecution to put the choukidar in the witness box and elicit from him that as a fact he arrived at midnight, and as far as he is, concerned, he did not give or send any report earlier on that day, because of which the constable might have been deputed.

37. The patel Badrilal, it would appear, was on the scene either during or immediately after the fight. Anyway, he, as well as the choukidar, were listed as witnesses and were summoned in the Court of Session. Nathulal is another man referred to; but he is not a public servant and we need not attach any significance to his non-examination. When the turn of these witnesses came, the Public Prosecutor filed a petition that he was giving them up, the justification being that they were Dangis, that is, caste fellows of most of the accused and were not therefore expected to give truthful evidence.

It is difficult to understand why the Public Prosecutor took it upon himself and did not leave it to the Court to decide whether these two witnesses discharging functions of public servants had really betrayed their trust and let themselves to be won over by the accused persons. There was no point in saying that the choukidar's late arrival at the thana is itself indication of his having been won over, because even that has to be ascertained after his examination and his explanation if any, about the real hour of his arrival and the causes, if any, of his being detained either at the village or on the way.

38. This looks almost obvious. But the learned Government advocate has very elaborately argued justifying the course adopted in regard to these witnesses. Broadly speaking, the principle is that the prosecution has some discretion in the examination of witnesses, but should not without giving very good reasons refuse to examine witnesses essential for what is called the 'unfolding of the prosecution story'. On the other hand, if the same set of incidents is deposed to by a number of witnesses, the Public Prosecutor need not waste public time and burden the record by getting witness after witness to repeat the same story. Again, it is a common happening specially in our country that quite a number of persons who actually see a serious happening do not care to come and give evidence. If the

witness is unwilling and shows patent indications of unwillingness there is no point in compelling him unless he is likely to bring material that is absolutely necessary, and is such that it cannot be obtained by the examination of any other witness. There might also be a third type of witness whose evidence is not of a direct and immediate bearing on the controversy before the Court, but which is otherwise important in connection with a counter case or alternative, version; naturally, there can be no inference from his non-examination. All this is obvious from the decisions of the Privy Council and the Supreme Court. But where the witness, is essential for the unfolding of, the prosecution story and where he is a public servant (such as a village choudidar and a police patel) and has in fact given the first information report and is further willing and ready to give evidence having been listed and summoned, the prosecution can have no justification in giving him up.

39. The theory propounded by the learned Government Advocate is that the moment the Public Prosecutor forms a judgment presumably by a preliminary private examination of the witness that he has been won over and is not likely to speak truth, he can give up and no inference should be drawn. This he seeks to support from the ruling in *Girishchandra v. Emperor*, AIR 1932 Cal 118.

'The only witnesses whom the prosecution need call are those who know the facts and are able and willing to give truthful evidence which is relevant to the charge.'

For one thing, this ruling is earlier than those of the Privy Council and the Supreme Court which have made the position-quite clear; for another, what the Calcutta High Court really means by 'willingness' and 'ability to give truthful evidence' is that prima facie it should appear that the witness was in a position to see and understand what was happening before him with a degree of clarity as would justify an expectation that he will give a true story. In this sense it is not much different from the reliability of the witness mentioned in the Privy Council ruling reported in *Stephen Seneviratne v. The King*, AIR 1936 PC 289. That appeal arose out of a jury trial in Ceylon; but we are concerned with the general principle which is applicable here also:

'It is wrong idea that the prosecution must call witnesses irrespective of considerations of number and reliability or that it should discharge the functions both of prosecution and defence. , If it does so, confusion is very apt to result, more specially so when the prosecution calls witnesses and proceeds automatically to discredit them by cross-examination. Witnesses essential to the unfolding of the narrative, on which the prosecution is based, must, of course, be called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution.'

This passage summarizes the general principles that should guide the prosecution in this regard and has with substantial approval been quoted by the Supreme Court in *Narain v. State of Punjab*, AIR 1959 SC 484:

'The test whether a witness is material for the present purpose is not whether he would have given evidence in support of the defence. The test is whether he is a witness essential to the unfolding of the narrative on which the prosecution is based. Whether a witness is so essential or not would depend on whether he could speak to any part of the prosecution case or whether the evidence led disclosed that he was so situated that he would have been able to give evidence of the facts on which the prosecution relied.'

'It is not that the prosecution is bound to call all witnesses who may have seen the occurrence and so duplicate the evidence. But apart from this, the prosecution should call all material witnesses and if a material witness has been deliberately or unfairly kept back, then a serious reflection is cast on the propriety of the trial itself and the validity of the conviction resulting, from it may be open to challenge.'

40. As already noted, the prosecution is not bound to duplicate evidence by calling a number of witnesses on the same point; nor should any adverse inference be drawn because it finds itself unable to call certain witnesses on account of their unwillingness. The witness called should also be 'reliable' which does not at all mean reliable in the personal judgment of the investigating officer or the Public Prosecutor, but reliable in the objective circumstances, that is to say, so situated as to be able to see and hear and form a reasonably clear impression. As for the prosecution discharging the duties of defence, the rule is of the golden mean. On

the one hand, no Court would compel by threat of an inference the prosecution to call a witness who is essentially one unfolding the defence version of the happening; on the other hand, no Court should allow the prosecution to pick and choose its witnesses so as to support a preconceived theory and drop or give up all evidence which is otherwise necessary for the unfolding of the story but which the Public Prosecutor believes would not fit in with his theory. A prosecution at the instance of Government is really not a proceeding aimed at necessarily punishing the person sent up by the police, but one for a fair inquiry to find out the real course of events whether or not it is going to damn or exonerate the persons on trial. In *Adel Muhammad v. Attorney General of Palestine*, AIR 1945 PC 42 which was a case from Palestine but which still contains some very sound principles, it was held that:-

'There is no obligation on the prosecution to tender witnesses, whose names were upon the information but who were not called to give evidence by the prosecution, for cross-examination by the defence. The prosecutor has a discretion as to what witnesses should be called for the prosecution and the Court will not interfere with the exercise of that discretion, unless it can be shown that the prosecutor has been influenced by some oblique motive.'

41. In the instant case, any Court would obviously be anxious to know how exactly the trouble started, and what was the appearance of the field during or immediately after the even. It is stated clearly that one public servant came immediately afterwards and another was already there. Yet both of them are given up because the Public Prosecutor has formed his own notions of their impartiality and veracity. It can be stated without exaggeration that this is probably the only case in our experience where the first informant is given tip while in attendance, and especially where the public servants entrusted with the keeping of the peace in the village are described ex parte as having been won over by the accused, and the Additional Sessions Judge allows the Public Prosecutor to get away with it. There is certainly the oblique purpose of eliminating everything which does not support the preconceived theory which may or may not be a sound one. The proper course for the Public Prosecutor would have been to call the witnesses and put questions and after hearing the answers move the Court if there was

justification for declaring them hostile and seek leave to cross-examine them.

42. It is of almost comic interest to note that the learned Government Advocate has in course of his argument in reply to the appellants' argument suggested that if this Court considered it proper, it might as well get these witnesses examined. It is indeed surprising that such a suggestion should be made at this stage and in this manner. One could take it for what it is worth if it had been made at the commencement of the hearing or even at the beginning of the Government Advocate's reply. At this stage it is hardly worth considering.

The result of the whole procedure of the Public Prosecutor has been that we do not know how the trouble started at all. Obviously, there was some immediate provocation to the non-Chamar villagers before they attacked the Chamars. There is no indication whatsoever that they really resented the Chamars getting lands, or going to the temple or getting themselves shaved by the barbers, all of which was, as it were, ancient history. If, on the other hand, something did happen, the Chamars have kept it back and the Police themselves and the Public Prosecutor have prevented it from coming on the record. The only indication is the killing of the ram. It is certainly not suggested that simply because some Chamars killed a ram supposed to be a sacred animal in the eyes of most of the villagers, they were in the least justified in rushing at them and beating them: up in the manner they do seem to have done. But had the full truth come before us, we would at least have been in a position to get the full picture how many came, and with what preparations and what exactly was the language or gesture on the part of the chamars that triggered the other side to acts of violence.

43 Another defect in the evidence is that there is no observation made and deposed to by the investigating officer on the fields. If the prosecution evidence is correct, there should have been a tremendous amount of trampling on the scenes of the fight. If one adds up the number of the alleged assailants at the different scenes especially the main scene at the Bhavrya, Moti, Baksu, Baijnath fields, it would come to 50 or 60. There would be a dozen at Chena's field and not many less at Gordhan's old field, the later going twice over. The ground is damp if not slushy in September with a crop about a foot high; the trampling would be

unmistakable for several days.

But we do not have any observation on this. Nor do we have any observation supporting the statement of the witnesses that they were weeding the fields. The modus operandi has been described already and they had been at it for sometime may be, an hour or two before this incident. If so, the patches over which the weeds had been removed or the implements dragged would be showing out clearly as against the patches where the operations had not been done. At the top of it, every one of the witnesses has asserted that after the beating the newcomers drove herds of cattle over the field. If a herd of cattle or even if a few are let to graze on a crop which has come up a foot or two, the signs of trampling and eating would be unmistakable.

Even that we do not have. The question is not only whether the incidents took place at this or that location but also what the parties were doing before the trouble started. It would be one thing if the Chamars were working at their fields quietly and the non-Chamars came and began to beat them without provocation; it would be another thing if the Chamars were celebrating the killing of the ram held sacred by the vast majority of superstitious villagers and on the latter coming to protest they are insulted or provoked by the Chamars by language, samples of which have come in the evidence. As the matter has come before us, we are unable to decide which of the two alternatives is nearer the truth.

44. As the things stand, therefore, we can only see if the beating was done at the different places mentioned by the Chamars' witnesses whether or not they were really at work at that time, and scrutinize the identification evidence bearing in mind the previous knowledge and acquaintance, the distance from which each witness claims to have seen the different members of the assembly or assemblies, and their immediate reaction. The nature of the common object and the awareness imputable to the members of the possibility of murder or grievous hurt in the prosecution of the common object have also to be ascertained. That the assembly or assemblies each of which included more than five, had the common object of causing hurt or grievous hurt to the Chamars whom they attacked, is obvious. If more than five people come with lathis in a body and some of them beat a person

working at the field and the others stand by and look on there is undoubtedly a common object. The position would be different if the person who stands by gives an account of his presence unconnected with the assembly. For example, the incident might happen on a road and he might be passing by innocently or it might be in front of his house and he comes out on hearing noises. If the incident took place at a field where the accused has really no business, these considerations do not arise. When lathis are carried one can be certain that the common object is at least to cause hurt and in addition, the members are aware of the possibility at least of grievous hurt. Whether they would be aware also of the possibility of killing in the prosecution of the common object would depend upon various circumstances, in particular, the numbers in the assembly, the nature of the weapons, and the number of injuries caused to the persons who are actually killed.

One point very much in favour of the accused persons is that though we are told possibly with reason that in all the groups put together there were 50 to 75 persons, not one of them even according to their victims had brought any weapon that could be called deadly. Even the lathis which they said to have carried were comparatively thin if one can decide from the width of the ecchymoses on the bodies of the victims; there was nothing like a farsi or bhala or similar village weapons with sharp edges; not even lathis reinforced with bands and the like. A lathi can do a certain amount of harm; but the fact that the assailants whoever they were had brought only thin lathis shows that killing could not have been a common object. These lathis are of the kind that villagers carry while going to their fields.

45. One circumstance very much to the point is that even the four who were killed whether at this or that field, did not have injuries in such number or of such seriousness as would indicate anything like a grim determination on the part of their assailants to endanger the victims' lives.

(After describing the injuries caused to the deceased persons, their Lordships proceeded:)

46. Thus, the post-mortem reports show that while each of the four men was attacked by a number of assailants with lathis, there was apparently no common

object of killing or of causing such injuries as would in normal course of events result in death. Had it been possible to identify the assailants on the head of each of these four persons, we could have considered whether independently of the common object and the operation of Section 149 Indian Penal Code, and the possible awareness of death following, that particular assailant would be guilty under Section 302 Indian Penal Code. But a special feature of this case is that we do not have any evidence whether from any of the victims who are still alive, or from the on-lookers that any particular injury or injury in any particular part of the body had been inflicted by a particular accused person. The statements are general which by itself is quite understandable, because in a crowd it might be difficult to get, any clear impression of individual assailants with reference to the particular injuries. Thus as, far as the injuries are concerned, we have necessarily to fall back upon the common object on the one hand, and the awareness of the possibility of fatal injuries on the other.

The analysis of the evidence shows that killing could not have been a possible object, and as for the awareness there is nothing in the context to indicate that any of the members of the assembly could be deemed to have known that death was likely to be caused in the prosecution of the common object.

47. While at the common object, it is of interest to note that the wording of the charge is altogether unhelpful in this regard. Merely to state that the assailants were out 'to avenge the social uplift', which the Chamars had made both 'by their efforts and of their well-wishers is at best to give a motive for the attack. The object of the attack, that is, to say, what exactly did the members of the assembly want to do to their victims is not set out. Nor is it said in the charge, or in the questioning, that whatever the object proper, the members had every reason to know that in its prosecution death was likely to be caused.

For all these reasons it would be safe to hold that the common object of the assembly or the assemblies if we treat each of the separate groups as an independent assembly was to cause grievous hurt with lathis and not to cause death. It is unlikely that the members had in this context any reason to apprehend that in course of the incident some of them might exceed the common object and

kill one or the other of the Chamars on the opposite side. In the absence of evidence in individual parts also it would be proper to treat the case as one under Section 325 read with 149 Indian Penal Code besides under Section 323 read with 149 and Section 147 Indian Penal Code.

48. The injuries on the others both on the five who were grievously hurt and on the few more who received ordinary blows have been summarized earlier. They would fit in with a charge under Section 325 read with Section 149, Indian Penal Code. Thus, whether there was one unlawful assembly including each and every one of the non-Chamars who beat the Chamars somewhere in the village on that day, or two assemblies one on the eastern side at and near the fields of Moti, Baksu and Baijnath Chamars and the other at plot No. 611, or a number of assemblies one at each of the fields, six in number at which small groups each exceeding five no doubt set upon the Chamars the practical consequence is the same. The common object proper of all these assemblies or the one or the two composite assemblies was to cause grievous hurt.

There is nothing in this context to indicate that either the entire assembly or the groups of some members, of which chased Mangya and Bhavrya on the one side and attacked Gordhan and Bhima on the other had reason to know that the common object was likely to be exceeded and death itself caused. Therefore, Section 149 will apply with reference to the common object of causing grievous hurt in which event it makes no difference whether we are dealing with one assembly or several because the common objects of the several are quite similar.

49. It is now necessary to examine critically in respect of the presence of the individual appellants the evidence that has been summarised earlier. It is all about presence and attack generally without any special act attributed to any individual. That something very serious did actually take place in the balda at all events is beyond doubt; but one cannot be equally sure that something did take place at plot No. 611. Even, if it did, the evidence of the three witnesses who speak of it is not at all convincing. In fact it is doubtful if Sewa was in that incident. Even if Kanchan saw things before she started running away, her ability to recognize the five persons she named is not proved. As for Motia the shortsighted old woman, her

identification is in any event unsafe on single witness evidence; her story itself is highly improbable.

50. As with other aspects of circumstantial evidence here also we find no indication, on the site that there was any such incident. No doubt it is stated that the grass was found pressed at two points on or near plot No. 611 and those places were where probably the two corpses had been kept. This does not appeal to me. With the commotion described by the witnesses, in fact with a repetition, the signs must have been altogether different.

(On assessing the oral evidence of some of the prosecution witnesses on identification, their Lordships proceeded:)

51. It is quite in order for the police authorities to arrange for test identification parades when a witness does not know the accused by name. But when a witness names them it is not usual to arrange for such parades. The whole thing is obscure and the witness's own account does not convince one that she really recognized these five in the assembly that came to her husband's field; all this even assuming something did happen at Gordhan's field in the mal. On any view of the matter, therefore, about an incident at that place even if it happened, the evidence of the two witnesses Kanchan (P.W. 14) and Sewa (P.W. 15) is altogether unconvincing.

52-60. (On further assessing the evidence of other witnesses, their Lordships proceeded:)

The result is, the convictions and sentences of all the appellants under Section 302 read with 149 Indian Penal Code are set aside. Instead, the following 23 are convicted under Section 147, Indian Penal Code and also under Section 325 read with 149 Indian Penal Code:

1. Kalu s/o Ratta Dangi, 2. Amarsingh s/o Gangaram Dangi, 3. Daula s/o Gangaram Dangi, 4. Mangiya s/o Daula Luhar 5. Gangaram s/o Bhanwarsingh Dangi 6. Dhanna s/o Uda Dangi, 7. Uda s/o Raghunath Dangi, 8. Laxman s/o Pyara Dangi, 9. Mangilal s/o Gangaram Dangi, 10. Chaina s/o Bhona Dangi, 11.

Ramlal s/o Moti Dangi, 12. Dhuliya s/o Kalu Dangi, 13. Devisingh s/o Hira Dangi, 14. Kishan s/o Bhanwarji Dangi, 15. Mangilal s/o Laxman Dangi, 16. Ratan s/o Pyara Dangi, 17. Hira s/o Bhagga Dangi, 18. Gangaram s/o Chhita Nai, 19. Bheru s/o Nyada Dangi, 20. Mohanlal s/o Bhanwarsingh Dangi, 21. Nathu s/o Chunnilal Dangi, 22. Prahlad s/o Chhita Dangi, 23. Mangilal s/o Moti Dangi.

The convictions and the sentences of the following 12 persons under all sections are set aside and their appeals completely allowed. They should be released forthwith unless wanted in any other case:

1. Ghisa s/o Mehtab Dangi, 2. Jagannath s/o Kalu Dangi, 3. Harlal s/o Bhanwar Singh Dangi, 4. Bhagirath s/o Bhawarji Dangi, 5. Bhawariya s/o Kalu Dangi, 6. Prabu s/o Uda Dangi, 7. Devilal s/o Chhita Nai, 8. Devisingh s/o Kalu Dangi, 9. Jagannath s/o Nathu Dangi, 10. Mukund s/o Bhawarji Dangi, 11, Nathu s/o Pura Dangi, 12. Amarsingh s/o Chena.

61. Coming to the sentences, offences with a caste or communal complex should be severely dealt with especially in our country where such complexes are endemic. The Sessions Court has awarded sentences that can be called really staggering; but the principle behind it is unexceptionable though in the instant case the conviction recorded by that Court under the more severe section cannot be supported in appeal. Assuming that the incident had something to do with the killing by the Chamars of a ram considered sacred by most of the villagers, there was altogether no justification or excuse for them to attack the Chamars en masse and inflict the injuries they did. If any religious feelings had been outraged they could have got the offenders prosecuted and punished under the law.

Therefore, under Section 325 read with 149 Indian Penal Code each of these 23 persons is sentenced to rigorous imprisonment for seven years and a fine of Rs. 250/- (two hundred and fifty) with further rigorous imprisonment in default for six months. Under Section 147 Indian Penal Code again each of them is sentenced to rigorous imprisonment for two years which sentence shall run concurrently with that under Section 325 read with 149 Indian Penal Code. For reasons already noted it is unnecessary to record any conviction under Section 323 read with Section 149 Indian Penal Code. The appeal in respect of these 23 is partly allowed

in this manner, while that in respect of the 12 is fully allowed. The Death Reference No. 1 of 1963 is rejected.

Sen, J.

62. I have very little to add to the elaborate and meticulous judgment of my learned brother. I agree with the conclusions he has reached but I am constrained to write a few lines as it appears from the judgment of my learned brother that he is inclined to ignore the impropriety of joint trial as it has not caused prejudice. Though my learned brother did not actually want to resolve our differences on this question, yet there are observations to the effect that unless there is a prejudice impropriety of joint trial will not vitiate the trial.

63. In Death Reference No. 3 of 1963, D/-15-4-1963 (Indore Bench) (Madh Pra) we have already given our respective views on this question. In the instant case, I do not think that joint trial cannot be had on the facts. Originally there was a charge of conspiracy against all the appellants. Though the story of conspiracy was given up the charge remained under Section 149 with a common unlawful object.

64. Section 239 (d), Criminal Procedure Code allows joint trial of persons who are accused of different offences committed in the course of the same transaction. If there was a conspiracy, it cannot be disputed that the offences were committed in pursuance to that conspiracy and the transaction will be the same. Similarly the offences with which the appellants were ultimately charged were under Section 149, Indian Penal Code. In fact when there is an offence under Section 149, all the accused charged under it have to be tried jointly. Not only that there was a charge under Section 149, the learned Sessions Judge held the charge to be good.

65. While considering whether the joint trial was bad or otherwise, the criterion is not the result; it is the accusation. The charge levelled against the appellants may fail for want of reliable evidence but that does not matter. The trial would be good. It will be expecting from prosecuting department the duty of a Judge if it has to decide finally whether the witnesses are telling the truth or whether the particular circumstances of the case unmistakably show that the offences were not

committed in the course of the same transaction. I need not repeat my reasons I had given in my Judgment in Death Ref. No. 3 of 1963, D/- 15-4-1963, (Indore Bench) (Madh Pra). As according to me in the instant case joint trial was quite proper, there is no question of considering Section 537-(a) for curing the irregularity.

66. As I agree with my learned brother on all other questions of fact and law, I have nothing else to add.

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