State Vs. Kishori and Others

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Court : Delhi

Decided On : Oct-16-1998

Reported in : 76(1998)DLT209; 1999(48)DRJ825

Judge : Devinder Gupta and; N.G. Nandi, JJ.

Acts : Code of Criminal Procedure (CrPC), 1973 - Sections 149, 161, 228, 302, 319 and 366; Indian Penal Code (IPC), 1860 - Sections 149 and 302

Appeal No. : Murder Reference No. 6/97 Cr.A. No. 421/97, 455/97 & 313/98

Appellant : State ;mohammad Abbas ;budh Prakash Kashyap (Dr.) ;kishori

Respondent : Kishori and Others; State; State; State

Advocate for Def. : Mr. R.K. Bali, Adv. for ;Mohd. Abbas

Advocate for Pet/Ap. : Mr. M.S. Butalia, Adv.,; Mr. S.K. Sharma, amices curiae for;

Judgement :
ORDER

N.G. Nandi, J.

1. Capital punishment inflicted on Kishori son of Hoshiar Singh, Abbas son of Munsif Ali and Budh Prakash Kashyap alias Dr. Lamboo by the learned Additional

Sessions Judge, Karkardooma Courts, Delhi in F.I.R. No.426/84, P.S. Kalyan Puri, Delhi for the offences under Section 302 read with Section 149 IPC has given rise to the criminal reference under Section 366 of the Code of Criminal procedure (hereinafter referred to as 'the Code') for the confirmation of the death sentence imposed by the Additional Sessions Judge and these three criminal appeals challenging the conviction and sentences imposed for the offences under Section 148/188/397 read with Section 149 and Section 302 read with Section 149 IPC by the appellants/convicts.

2. The prosecution case is that the assassination of late Prime Minister Smt.Indira Gandhi led to the breaking out of the riots on 1.11.1984 and thereafter in Trilok Puri area; that during these days of riots in the area of Block Nos. 30,32 and 34, Trilok Puri, thousands of Sikhs were done to death, law and order machinery having completely broken down; that during anti-sikh riots besides other persons Darshan Singh aged 24 years, Amar Singh aged 22 years and Nirmal Singh aged 18 years, three sons and one Kirpal Singh brother of one Mansa Singh were brutally killed by the violent mob of rioters, who were on rampage; that the surviving members of the family were removed to relief camps; that on the basis of the statement of one Rijju Singh to the effect that riots have taken place in the area of Block Nos. 30,32 and 34 of Trilok Puri and that many houses have been burnt, persons of sikh community killed and burnt alive, F.I.R. No.426/84, P.S. Kalyan Puri came to be registered; that the riots went on unabated for about 3 days; that on 17.11.1984 the statement of Mansa Singh was recorded in the relief camp, naming the victims and rioters whereupon a separate challan in respect of particular incident was directed to be filed by the Court wherein charge-sheet pertaining to F.I.R. No.426/84 was filed; that the police submitted the split challan without registering a separate case with practically no investigation to ascertain whether there were other eye witnesses to the occurrence or not; that the investigation was an empty formality; that the split challan was numbered as Sessions Case No.53/95 and charges were framed under Section 183, 148, 302 read with Section 149 IPC and 397 read with Section 149 IPC against the accused persons, namely Kishori, Ram Pal Saroj and Shabnam.

3. The prosecution examined Mansa Singh on 1.2.1996. In that statement he disclosed the names of two more persons as the members of the unlawful assembly involved in the incident in question so vide order dated 1.2.1996 Budh Prakash and Mohd. Abbas were joined under Section 319(1) of the Code and were summoned through bailable warrants to stand trial for similar offences in the case and similar charges were framed against Budh Prakash and Mohd. Abbas on 21.3.1996. Thereafter, according to the prosecution trial commenced afresh, examination-in-chief of P.W. 3 recorded again and thereafter the cross-examination of P.W. 3 by all the accused and evidence of the other prosecution witnesses was recorded. The statements of the accused persons under Section 313 of the code were recorded besides the defense evidence. The Additional Sessions Judge, on appreciation of the evidence found Kishori, Dr.Budh Prakash and Mohd. Abbas guilty of the offences charged and convicted each of them and sentenced each of them under Section 148 IPC to under go Rigorous Imprisonment (R.I.) for two years, under Section 188 IPC sentenced to under go R.I. for six months, under Section 397 read with Section 149 IPC to under go R.I. for 10 years and a fine of Rs. 20,000/- each, in default to under go further R.I. for two years, under Section 302 read with Section 149 IPC sentenced to death and a fine of Rs. 30,000/-, in default R.I. for two years. All the three convicts/ appellants are ordered to be hanged by neck till they are dead. All the substantive sentences are made to run concurrently. It is this finding of guilt and the sentences imposed, which have also been assailed by each of the appellant/convict.

4. One of the arguments advanced by Mr. S.K. Sharma, learned counsel for the appellants is that Section 319(1) of the Code could not have been invoked for summoning appellants Dr. Budh Prakash and Mohd. Abbas for the reason that only on the basis of the evidence in examination-in-chief of P.W. 3 no order under sub-Section (1) of Section 319 of the Code could have been passed because examination-in-chief is only an incomplete evidence and can not be regarded as evidence in law and that sub-Section (1) of Section 319 of the Code could have been invoked only after P.W. 3 was cross-examined by the defense. Another limb of argument assailing the legality of the conviction of these appellants is that sub-Section (4) of Section 319 of the Code requires a fresh trial after a person is summoned to join the trial and that after the framing of the charge against these

appellants, the examination-in-chief of P.W.3 was not recorded afresh by giving oath to P.W. 3 on 19.8.1996 for the purpose and only the evidence recorded before the passing of order under sub-Section (1) has been again typed out on 19.8.1996 since the order sheet dated 19.8.1996 does not suggest giving of oath to P.W.3 for the purpose of recording his examination-in-chief afresh and on this score the trial qua the persons summoned under sub-Section (1) is vitiated.

5. As far as the order under sub-Section (1) of Section 319 of the Code passed on 1.2.1996 is concerned, it may be appreciated that the evidence - examination-in-chief - of P.W. 3 Mansa Singh son of Chandan Singh began on 1.2.1996. The witness deposed that in the mob of rioters which had attacked his house on 1.11.1984 apart from Kishori, other persons who were present in the mob and whom he can identify were Ram Pal Saroj, Shabnam, Dr. Lamboo and Abbas; that Abbas, about whom he has been talking is living in House No. 32 and doing the work of Chappals-Joota.

The Court thereafter passed order under sub-Section (1) directing a separate challan to be filed for the incident of 1.11.1984 and also issued bailable warrants of Rs.3000/- of Abbas Chappalwala and Budh Prakash on the basis of the statement made by P.W.3 in the examination-in-chief recorded on 1.2.1996. It may be appreciated that the legality of the order dated 1.2.1996 under sub-Section (1) summoning appellants Dr.Budh Prakash alias Dr. Lamboo and Abbas was not challenged and carried to the High Court under sub-Section (1) of Section 397 of the Code seeking revision of the same but the same has been made a ground in the appeal memo by the appellants Dr.Budh Prakash Kashyap.

6. We are conscious that the settled position of law is that powers under sub-Section (1) of Section 319 of the Code should be exercised very sparingly, as held in the case of Delhi Municipality Vs . Ram Kishan : 1983 CriLJ159 . The examination-in-chief of P.W.3, as per the order dated 1.2.1996 under sub-Section (1) suggests the involvement of Budh Prakash alias Dr.Lamboo and Mohd. Abbas. Relying on the decision in the case of Amarjit Singh alias Amba v. The State of Punjab and another 1983 85 P L R 324; Gulam Mondal v. Nazam Hossain and others 1987 Crl.L.J. 729 (Calcutta High Court); Sannarevanappa Bharamajappa

Kalal @ Kuncharkar and others v. State of Karnataka 1991 Crl.L.J. 21; R.J. Lakhia v. State of Gujarat 1982 Crl.L.J. 1687, it has been contended by Mr.Sharma that the evidence of a witness recorded up to examination-in-chief disclosing complicity of other persons in the offence being incomplete evidence can not justify the order of summoning the other persons to stand trial under sub-Section (1).

Sub-Section (1) provides that where in the course of any inquiry into, or trial of an offence it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

It may be appreciated that the examination-in-chief of P.W.3 recorded on 1.2.1996 is a statement on oath by a witness in the judicial proceedings i.e. in course of a trial of an offence under Sections 148/149/302 IPC. In the submission of Mr.Sharma, examination-in-chief of P.W.3 in absence of any cross-examination is incomplete and thereforee, no evidence in the eye of law that could be relied upon for the purpose of sub-Section (1) of Section 319 of the Code. It may be appreciated that at that stage the evidence of P.W. 3 was an evidence as between the parties on record i.e. the prosecution (P.W. 3) and the accused, namely Kishori Lal, Shabnam and Ram Pal, to be more precise at least not between P.W. 3 and Budh Prakash @ Dr.Lamboo and Mohd. Abbas. The question of cross-examining P.W. 3 by Budh Prakash and/or Mohd. Abbas would arise only after they are joined as accused persons to stand trial pursuant to order under sub-Section (1) of Section 319 of the Code. Till 1.2.1996 Budh Prakash and/or Mohd. Abbas will have no right to cross-examine P.W. 3. Then the only person who could have till/before passing of the order under sub-Section (1) cross-examined P.W. 3 would be the accused on record i.e. the persons against whom charge-sheet had been filed and charge framed under Section 228 of the Code. If we are to accept the submission of Mr. Sharma, then it would tantamount to creating a stage for the cross-examination of a prosecution witness by those persons who are contemplated to be summoned under sub-Section (1) before actually summoning the person required to join trial consequent upon the passing of the order under sub-Section (1) which stage is not envisaged or contemplated under the law. It has

not been contended by the learned counsel that any prejudice has been caused to Dr. Budh Prakash and/or Mohd. Abbas by not permitting them to cross-examine P.W. 3 before passing order under sub-Section (1), summoning them to stand trial along with the accused persons. It may also be appreciated that if Budh Prakash and/or Mohd. Abbas first cross-examine P.W. 3 for the purpose of Order under sub-Section (1) and then order under sub-Section (1) is passed and they are summoned to stand trial and thereafter the cross-examination of P.W.3 by Budh Prakash and Mohd. Abbas would be nothing but duplication/repetition for the simple reason that after the order under sub-Section (1) Budh Prakash and Mohd. Abbas would be summoned to stand the trial. Thereafter the framing of charge under Section 228 of the Code against them which has been done in the instant case by the trial Court, as suggested from the record and thereafter as required under sub-Section (4) of Section 319 of the Code the proceedings in respect of Budh Prakash and Mohd. Abbas have to commence afresh and the witnesses reheard.

In the case of H.K.L. Bhagat Vs . State : 61(1996)DLT391 it has been held by the learned Single Judge of this Court that 'sub-Section (1) of Section 319 of the Code does not relate to evidence as between parties on record having the right to cross-examine the witnesses. It relates to a person who is not yet an accused and thus has no right to cross-examine the witnesses. He is a stranger to the proceedings and thus unconcerned with the question as to whether the witness in the proceeding has been cross-examined or not by the already arraigned accused. He would come into the picture only when process is issued. Even at the stage when the Court is considering the question as to whether he should be summoned or not, he remains a stranger because that is a question which concerns the Court and perhaps the complainant only. Looked at from that angle, one may think of provisions relating to complaints (Chapter XV of the Code) whereunder the statements are only in the form of examination-in-chief and are not tested on the anvil of cross-examination. The Court under Section 319(1) acts likewise and thus may form its prima facie view on the basis of the examination-in-chief itself.'

In the case of Kishun Singh and Others Vs . State of Bihar : 1993 CriLJ1700 , while considering 'the evidence' occurring in sub-Section (1) thereof, 'the evidence'

has been construed by the Supreme Court as 'from the material available on record' which would, in our opinion, suggest that the word 'evidence' occurring in sub-Section (1) is to be used in a comprehensive/broad sense and not to be construed narrowly. For these reasons, we are of the view that the view taken by the single Judges of the Punjab & Haryana High Court, Calcutta High Court, Gujarat High Court and Karnataka High Court can not be regarded as laying down the correct law on the subject.

7. Coming to the other bone of contention, namely compliance with sub-Section (4) of Section 319 of the Code requiring commencement of the trial afresh after a person has been summoned to stand trial under sub-Section (1) reliance has been placed on the case of Amanat Sk. & Others v. State of West Bengal 1988 (2) Crim 323 wherein it is held that 'the evidence, which is led by the prosecution after the person newly summoned appeared is to be treated as substantive evidence during the trial and the evidence during the trial and the evidence earlier given by the prosecution witness can be used as only 'previous statement' and that the proceedings in respect of persons summoned under sub-Section (1) shall be commenced afresh under sub-Section (4)(a) and that all the witnesses be it of the prosecution or the defense should be reheard, evidence led afresh.'

It may be appreciated that vide order dated 1.2.1996 under sub-Section (1) bailable warrants of Rs.3000/- of Abbas Chappalwala and Budh Prakash were issued for 8.2.1996 and the other accused persons were required to appear on 27.2.1996. The order sheet of 27.2.1996 suggests that Dr.Budh Prakash Kashyap and Abbas along with other persons already charged were present before the Court. Copies were given to Budh Prakash and Abbas. The order sheet of 21.3.1996 suggests that the charges against Dr.Budh Prakash alias Lamboo Doctor and Abbas were framed on the same day. Four witnesses including P.W.3 were present. Counsel for the accused requested for time. The record suggests that the examination-in-chief of P.W.3 on 'SOLEMN AFFIRMATION' was recorded on 19.8.1996 and the cross-examination was deferred at the request of Mr.S.K.Ahluwalia, Advocate for the accused persons. The cross-examination of P.W.3 for Mohd. Abbas and Budh Prakash was conducted by the counsel representing them. It may be appreciated that no objection was raised by Mohd.

Abbas and/or Budh Prakash before the trial Court that P.W.3 Mansa Singh has not entered the witness box and was not administered the oath and his examination-in-chief not recorded on solemn affirmation. Even in the cross-examination of P.W.3 it has not been suggested by the defense counsel that the witness did not depose afresh in examination-in-chief on solemn affirmation and that he was only offered for the cross-examination. It is pertinent to note that even ground (D) of Appeal Memo only contends about the illegality of the order passed under sub-Section (1) of Section 319 of the Code inasmuch as the same having the basis of incomplete statement of P.W.3 and the trial being illegal as no speaking order passed by the Trial Court. It is not the ground in the Appeal Memo that the trial against Budh Prakash and/or Mohd. Abbas is vitiated as sub-Section (4) was not complied with inasmuch as there was no recording of examination-in-chief of P.W. 3 afresh on solemn affirmation as sought to be contended before us. Simply because in the order sheet of 19.8.1996 it is not specifically stated that P.W.3 was afresh examined in chief on solemn affirmation, it can not vitiate the trial qua Mohd. Abbas and/or Budh Prakash. The omission to state that P.W.3 was examined afresh in chief on solemn affirmation in the order sheet could be at the most an irregularity in maintaining the order sheet which in no way suggests even irregularity in the conduct of trial against the persons summoned under sub-Section (1) of Section 319 of the Code, especially in absence of any prejudice caused to such persons.

8. One of the arguments advanced by Mr. S.K. Sharma is that why Mansa Singh did not file affidavit before any of the authorities till he deposed in Court on 1.2.1996 about the presence of Budh Prakash and Mohd. Abbas as the members of the unlawful assembly, if police did not record the names of assailants as named by him; that the principle of two witnesses suggesting the complicity of the accused in the crime means two independent/unrelated witnesses and not the members of the family of the victim; that why none other than the members of the family of the victims has been joined as witness.

In the case of Masalti Vs . State of Uttar Pradesh : [1964]8SCR133 followed in the later decision in the case of Baddi Venkata Narasayya & Ors. Vs . State of Andhra Pradesh : (1998)2SCC329 it is observed that 'under the Evidence Act, trustworthy

evidence given by a single witness would be enough to convict an accused person, whereas evidence given by half a dozen witnesses which is not trustworthy would not be enough to sustain the conviction. But where a criminal court has to deal with evidence pertaining to the commission of an offence involving a large number of victims, it is usual to adopt the test that the conviction could be sustained only if it is supported by two or three or more witnesses who give a consistent account of the incident. In a sense, the test may be described as mechanical, but it cannot be treated as irrational or unreasonable. It is, no doubt, the quality of the evidence that matters and not the number of witnesses who give evidence. But sometimes, it is useful to adopt a mechanical test.' It is argued that following the principle of two witnesses the prosecution has not been able to establish the complicity of any of the appellants, since there are no two independent witnesses implicating any of the appellants.

It is true that P.W. 3 and 7 are the parents of the victims who were done to death in the incident by the violent mob of rioters but it need hardly be said that there is no rule of evidence legally prohibiting/for-bidding the basing of finding of guilt on the strength of testimony of the related witnesses or even a single witness without corroboration. It may be appreciated that the relations of the deceased would obviously be interest-ed in securing the conviction of the wrong doers. Related witnesses would not be interested in falsely implicating innocent persons but they would always be interested in seeing that the real culprit does not go scot free. All what the law requires as far as the appreciation of evidence of such witness is concerned, is that the testimony of such witness shall be scrutinized with utmost care and caution by the Court. If the testimony of a single such witness is found to be reliable and trustworthy, then no corroboration would be necessary and the finding of guilt could be solely based thereon.

9. The undisputed facts revealed are that on 1.11.1984 and thereafter anti-sikh riots had broken out in Trilok Puri area, Delhi following the assassination of late Prime Minister Smt. Indira Gandhi. Houses were ran-sacked, looted and set ablaze. Hundreds of innocent persons, young and old, lost their lives at the hands of the rioters. Many persons had to abandon their dwellings and take shelter in relief camps. Families shattered/scattered and the after-effects of the incident of

1.11.1984 and there-around left many families in the state of misery.

In the present case the incident resulting into the death of Amar Singh, Nirmal Singh and Darshan Singh,sons of P.W.3 Mansa Singh and P.W.7 Devi Kaur took place at about 10 A.M. in block No.32, Trilok Puri. The incident of 2.11.1984 also account for the liquidation of Kirpal Singh, brother of P.W.3 Mansa Singh by the unlawful assembly. As pointed out above, a common FIR No.426/84, P.S. Kalyan Puri on the strength of the statement Ex. PW-2/A of Rijju Singh came to be registered without naming any assailants or victims. As disclosed from the evidence, the statement of P.W.3 Mansa Singh under Section 161 of the Code was recorded on 17.11.1984 Ex. PW-3/DA.

10. It is submitted by Mr. Bali, learned counsel for appellant Mohd. Abbas (Crl.A.421/97) that P.W. 3 was confronted with his previous statement under Section 161 of the Code to suggest that appellant Mohd. Abbas has not been named by him therein; that P.W. 7 does not depose about appellant Mohd. Abbas; that on 14.11.1996 Mohd. Abbas was not present in the court as he was exempted from personal appearance in the Court; that P.W. 4 has only named Mukri @ Shabnam in her testimony; that there is no corroboration to the say of P.W. 7 as regards the presence of Mohd. Abbas in the mob; that even the presence of P.W. 3 at the place of incident is not free from reasonable doubt.

11. One of the arguments advanced by Mr. S.K. Sharma is that the presence of P.W.3 can not be said to be established beyond all reasonable doubts inasmuch as P.W.3 has not been hiding anywhere and that is not the case of the prosecution. If P.W.3 was present at the occurrence he would at least receive some injury; that the presence of P.W. 3 is rendered doubtful on probabilities. In the case of State of Rajasthan Vs . Mahaveer & Others : 1998 CriLJ2275 , it has been observed by the Supreme Court that the two witnesses hiding themselves in a gap between Kothi and southern wall of room and behind a cot near eastern wall of that room, respectively not stating to police that due to fear they were residing in the house of another prosecution witness who is stated to have been shot, but he was in fields and no likelihood of his being spared if he had been seen by the accused near the house where he claimed to be watching incident as he was

leader of rival group. In view of this, it has been held that 'the version of the prosecution witness was improbable. Their presence is also doubtful and in view of improbabilities and infirmities the view of the High Court in acquitting the convicts was not unreasonable'. The facts themselves suggest the non-applicability of the above principle to the present case.

In the instant case it has not been even suggested to P.W. 3 in the cross-examination that up to the evening of 1.11.1984 he did not hide him-self here and there and on the evening of 1.11.1984 he ran towards the jungle and did not keep himself shifting here and there.

The evidence of P.W. 3 suggests that Kishori was one of the members of the unlawful assembly which pulled out Darshan Singh, Nirmal Singh and Amar Singh from House No.32/7, Trilok Puri on 1.11.1984 around 10 A.M. It is clearly stated that the members of this unlawful assembly killed aforesaid three sons of P.W. 3. A categorical statement has been made by P.W. 3 that Kishori present in court was having a big pig cutting knife and was one of the members of the mob and that he cut the sons of P.W. 3. It is pertinent to note that there is no cross-examination challenging the statement of P.W. 3 to the effect that Kishori was living in block No.31 and was having shop near Gurudwara on the main road of block No. 32. On the contrary, the suggestion denied by the witness is that he used to play cards at the shop of Kishori. It has been categorically stated that witness knew Kishori 2/3 years before the riots and had opened a meat shop opposite Gurudwara in Khokha. This would suggest that Kishori was known to the witness much prior to the incident and was having a meat shop opposite Gurudwara. Even in the statement dated 17.11.1984 under Section 161 of the Code the witness has attributed a specific over tact of killing his sons with big knife by Kishori as one of the members of the unlawful assembly. Thus, Kishori has been attributed the act of killing sons of P.W.3 with big knife as the member of unlawful assembly. There is no omission or contradiction proved on record as regards the role of Kishori in the incident. As far as P.W.3 is concerned his statement u/s.161 of the code, first in point of time was recorded on 17.11.1984 wherein Kishori has been not only specifically named but an over tact, as pointed out above, has been attributed to him as the member of the unlawful assembly.

12. P.W.3 has in categorical terms stated that when the incident took place he was in his house No.32/7, Trilok Puri along with his family members and that the mob of rioters pulled out his sons Darshan Singh, Amar Singh and Nirmal Singh from the house and killed them. The incident of killing the sons of P.W.3 by Kishori has taken place after the deceased were pulled out from the house by the mob. In our opinion the principle laid down in the case of State of Rajasthan v. Mahaveer Singh & Others (supra) will not be applicable to the present case, in view of the specific overt act on the part of Kishori, though no specific overt act would be necessary when Section 149 IPC is taken aid of.

13. Thus, it will be seen that Kishori has been named as one of the members of the unlawful assembly carrying big knife and is stated to have cut the sons of the witness; that Kishori is identified as he was having a meat shop in the area and known to the witness much prior to the occurrence whereas Budh Prakash and Mohd. Abbas known to P.W.3 since 1976, are implicated in the crime as the members of the unlawful assembly, identified by the witness only during his testimony and not earlier.

14. P.W.4 Sugnibai deposed in her evidence that on 1.11.1984 the riots took place in the Trilok Puri area; that the sons of Mansa Singh (P.W.3) were killed sometime in the evening at about 4 p.m. This witness does not name anyone except Mukri, whom she could identify. This witness does not refer to Kishori at all.

15. P.W.7 Devi Kaur wife of Mansa Singh stated that on 1.11.1984 rioters had come to the area around 10 A.M. and among the mob of rioters the accused present in Court were there; that Kishori was holding a Chhura; that her son Nirmal Singh was hit with Khanjar by Kishori; that Kishori also gave Khanjar blow to her sons Darshan Singh and Amar Singh when they fell down after being hit with lathis by the rioters. In the cross-examination, it has been stated that from amongst the crowd, she knew Kishori besides other persons; that Kishori was having a meat shop near Gurudwara; that Kishori was known to her 2/3 years before the incident. It is denied that Kishori was not amongst the rioters. Thus, according to this witness Kishori was holding Khanjar (Chhura) in his hand and he dealt Khanjar blow first to Nirmal Singh and thereafter to Darshan Singh and Amar

Singh.

It is pertinent to note that in the cross-examination, the witness stated that her statement under Section 161 of the code was not recorded by the Police. A.P.P. In-charge of the trial also made a statement that no statement under Section 161 of the Code of the witness was recorded. Thus, the only statement made by P.W.7 implicating Kishori is her testimony before the court during trial.

16. P.W.9 Atra Kaur wife of Kirpal Singh stated in her testimony that the riots started on 1.11.1984 around 10 A.M. in Trilok Puri area; that the houses were looted and set ablaze by the rioters including her house; that her nephew Nirmal Singh @ Timmu Singh, Amar Singh and Darshan Singh were killed by the rioters outside the house but she did not know the rioters who killed them; that Nirmal Singh @ Timmu Singh was killed in her presence. This witness does not name any of the assailants including the appellants.

17. Thus, P.Ws. 3 and 7 named Kishori as one of the members of the unlawful assembly specifically attributing the over tact. As pointed out above, as far as P.W.7 is concerned, her statement under Section 161 of the Code was not recorded. Neither P.W.3 nor P.W.7 have filed affidavit implicating any of the assailants as the members of the unlawful assembly in the incident of 1.11.1984. In our opinion, P.W.7 having only revealed the name of Kishori as one of the members of the unlawful assembly in her testimony before the court for the first time and in absence of her statement under Section 161 of the code at all and not filing any affidavit or application before any authority so as to name any person as the member of the unlawful assembly, her evidence naming Kishori as one of the members of the unlawful assembly after more than 12 years of the occurrence can not be regarded as trust-worthy and reliable and it would not be safe to attach any credence to her evidence.

18. Coming to the complicity of Dr.Budh Prakash @ Dr. Lamboo and Mohd. Abbas, as pointed out above, P.W.3 has disclosed the names of these appellants as the members of the unlawful assembly for the first time in his testimony recorded on 1.2.1996. In the cross-examination, it has been stated that he was knowing Abbas Chappalwala from 1976. He was living in the same line in which

the witness was living and having shop adjoining to the shop of the witness; that he had told his name also being amongst the rioters but police did not record his name.

P.W.4 states in her evidence that son of Chappalwala was there. The name of the son of Chappalwala who is stated to be there in the mob is not specified. It is also not suggested from the evidence that who (name) that chappalwala is whose son was present in the mob. Thus neither the name of the son nor the home of the father is suggested from the evidence of P.W.4. As far as evidence of P.W.4 with regard to identity of the son of Chappal-wala who is stated to be present in the mob is concerned, the same is absolutely vague and the evidence of P.W.4 does not lead any where and for that reason deserves no credence. Likewise the evidence of P.W.9 Smt.Atra Kaur does not name either Abbas or Budh Prakash @ Dr.Lamboo. This witness has not named any person as the member of the unlawful assembly.

P.W.7 has stated that she did not file any affidavit anywhere naming any person as the member of the unlawful assembly nor her statement under Section 161 of the code recorded by the police. She has stated in her evidence that in the mob of rioters on 1.11.1984, Dr. Lamboo was having iron rod in his hand; that her son Nirmal was hit by iron rod by Dr.Lamboo; that the accused persons present in Court were there in the mob. In the cross-examination it is stated that she does not remember whether accused Abbas was present in Court on 14.11.1996 when she named him as an accused during cross-examination, she again said that accused Abbas was present in Court on 14.11.1996 when she named him as one of the assailants. Perusal of the order sheet dated 14.11.1996 suggests that on the said date Abbas prayed for exemption from personal appearance and the same was granted by the Trial Court meaning thereby that on 14.11.1996 accused Mohd. Abbas was personally not present in the Court. It is pertinent to note that in the examination-in-chief she has not referred to Mohd. Abbas specifically but in reply to the question put by the Court, the witness has stated that she can identify accused Abbas who had first set her shop on fire and then came along with mob, looted her house. It is also suggested from the said reply that while identifying accused Abbas she first named him as Shabnam and then as Abbas which would

suggest that even in answer to the question put by the Court, she identified accused Abbas first as Shabnam and then as Abbas. It is pertinent to note that in the examination-in-chief the witness has only named Dr.Lamboo and Kishori as the members of the unlawful assembly by referring to their names specifically. In the cross-examination for accused Kishori, the witness had named Ram Pal Saroj, Lamboo Doctor, Kishori, Abbas and Shabnam Mukri whom she knew out of the crowd. Even then a question was put by the learned trial Judge with regard to the identity of the culprits, who had attacked and killed her sons. It is not suggested as to what was the ambiguity in the answer given by her as regards the identity of the culprits involved in the incident, which required the trial Court to seek clarification with regard to the identity of the culprits involved. If at all any clarification was required the same could have been attempted by the A.P.P. In-charge of the trial but the trial Judge, without waiting for the A.P.P. to attempt re-examination, if at all required, puts the questions so as to bring the information on record with regard to identity of the persons involved despite what has been deposed by the witness, as pointed out above. The learned trial judge ought not to have undertaken the task of establishing the identity of the culprits in the manner in which it is done. It need hardly be said that the court should neither assume the role of prosecutor nor the defense. If there is any ambiguity in the answer given by the witness, it would be the duty of the court to get the same clarified by putting necessary question and the exercise by the court has to be in the direction of finding out the truth for imparting justice objectively. As far as the testimony of P.W.7 is concerned, all that could be said is that after more than 12 years of incident, in examination-in-chief in the Court she has named Dr.Lamboo and not Mohd. Abbas. As pointed out above, her statement under Section 161 of the Code has not been record-ed at any point of time nor she has filed any affidavit/application before any authority naming any of the appellants as members of the unlawful assembly.

19. One of the arguments advanced by Mr.M.S. Butalia, learned counsel for the respondent-State is that the previous statement should be viewed in background of the situation prevalent at the time of riots when the mobs were indulging in ransacking, looting, setting ablaze the houses and the killing of the persons of one particular community with law and order situation having completely broken down and police absolutely inactive.

It is suggested from the record that with regard to the incident of 1.11.1984 and 2.11.1984, a common FIR No.426/84 P.S. Kalyan Puri was filed. Various Commissions of Inquiries were constituted by the Government which obliged the police to undertake some investigation. In this regard, reliance has been placed on the decision in the case of Duli Chand & Anr. Etc. v. State 1998 Crl.L.J. 988 by the Division Bench of this Court wherein it has been observed that 'the absence of mention of the name of the accused in the F.I.R. or that of even victims on the facts and circumstances of the case is not fatal. The accused can not be permitted to take benefit of tardy investigation'.

In the instant case the FIR No.426/84 P.S. kalyan Puri was registered on the basis of the statement of one Rijju Singh dated 2.11.1984 which is absolutely general, not naming the assailants or the victims. We are in agreement with the principle enunciated in the case of Duli Chand & Another Etc. v. State (supra).

It is pertinent to note that in examination-in-chief it is not the say of P.W.3 that he had named all the accused in his statement dated 17.11.1984 recorded under Section 161 of the Code but the police did not record the statement as dictated by him or that the police did not record the correct statement and only few lines were recorded. The Explanationn with regard to non mentioning of the names of Dr.Budh Prakash @ Dr.Lamboo and Mohd. Abbas is to be found only in the cross-examination of P.W.3 by the defense. Even assuming what P.W.3 states in this regard in his cross-examination to be true, then the question would be that if P.W.3 could name Kishori, Shabnam and Ram Pal Saroj then why the names of Dr. Budh Prakash @ Dr.Lamboo and Mohd. Abbas do not find place in his statement dated 17.11.1984. This Explanationn, in our opinion, does not deserve any weight to be attached and for that reason not attaching any importance to the fact of nonmentioning of the names of Dr.Budh Prakash @ Dr.Lamboo and Mohd. Abbas in statement under Section 161 of the Code cannot be accepted. Though it is otherwise true that law and order machinery had totally broken down, police was absolutely inactive and not making any investigation whatsoever in the incidents of looting, arsoning and murder on 1.11.1984 and 2.11.1984 in the Trilok Puri area. After 17.11.1984, the witness does not appear to have named these persons before any authority by way of application/affidavit. We would not think it safe to

accept the say of P.W.3 as regards the complicity of Dr. Budh Prakash @ Dr. Lamboo and Mohd. Abbas in the incident, especially for the reason that he had all the opportunity to name these two appellants in his statement under Section 161 of the Code recorded on 17.11.1984 and even subsequent thereto by filing any application or affidavit to that effect before any authority. Though police apathy may be there, law and order machinery may have completely broken down, general FIR No.426/84 recorded on the basis of the statement of Rijju Singh and there may be tardy investigation by the police in the incident which occurred on 1.11.1984 and 2.11.1984, nevertheless the prosecution can not take advantage of the situation prevalent on 1.11.1984, 2.11.1984 and thereafter, especially, in view of the fact that in the present case, P.W.3 availed of the opportunity available to him of naming the assaillants in his statement under Section 161 of the Code on 17.11.1984 by specifically implicating three persons, namely Kishori, Shabnam and Ram Pal Saroj and when it is not shown as to what prevented P.W.3 from naming other persons who were the members of the unlawful assembly and known and identified by the witness in the occurrence.

It is a settled principle of law that prosecution has to prove the case against the accused in the manner stated by it and that any act or omission on the part of the prosecution giving rise to any reasonable doubt, would go in favor of the accused. In the present case, there is no question of any acts or omissions by the investigating agency which could be taken in favor of the accused, which would tantamount to giving premium for the wrongs of the prosecution committed in favor of the appellants since P.W.3, as pointed out above, had all the opportunity to name all the persons seen and identified as the members of the unlawful assembly and having chosen to name only some persons except Budh Prakash and Mohd. Abbas, as pointed out above.

20. The above discussion would reveal that there is no satisfactory and evidence worthy of credence to establish the complicity of Dr. Budh Prakash @ Dr. Lamboo and Mohd. Abbas since they are named after more than 12 years of the occurrence even when P.W.3 had the opportunity to name them in his statement under Section 161 of the Code recorded on 17.11.1984 if they were really the members of the unlawful assembly and identified by P.W.3 in the incident. The

evidence of P.W.7 can not lend any support to the say of P.W.3 in this regard since her statement under Section 161 of the Code was not recorded at all nor has she filed any affidavit or application before any authority naming Dr. Budh Prakash @ Dr. Lamboo and Mohd. Abbas. P.W. 7 names these two appellants only after her husband P.W. 3 named them on 1.2.1996 in his examination-in-chief, as pointed out above. P.W. 7 having not named any of these appellants on earlier occasion and only naming them after 12 years of occurrence we do not regard her evidence to be trustworthy or reliable so as to lend any assurance to the say of P.W. 3. Thus, the effect is that there is no cogent, satisfactory and trustworthy evidence so as to establish the complicity of Dr. Budh Prakash @ Dr. Lamboo and Mohd. Abbas and the evidence against these two appellants do not satisfactorily suggest their complicity in the crime beyond reasonable doubt and both these appellants would be entitled to benefit of doubt. thereforee, the finding of guilt could not have been conclusively recorded by the trial Judge on the basis of the state of evidence as pointed out above.

As far as the complicity of Kishori is concerned, even in the statement under Section 161 of the Code recorded on 17.11.1984 he has been clearly named by P.W.3 with specific over tact, as one of the members of the unlawful assembly which had the common object of looting, setting on fire and killing of persons of one particular community, namely sikh community. It is with this common object that Kishori continued to be the member of the unlawful assembly. Nothing substantial has been brought out from the cross-examination so as to discredit P.W. 3 as regards the complicity of Kishori in the crime. It is suggested from the evidence of P.W.3 that Kishori was known to him much prior to the incident and that he has been identified in the mob as one of the members of the unlawful assembly with over tact attributed to him though not necessary when Section 149 IPC has been taken aid of by the prosecution. In our considered view, the conviction recorded against appellant Kishori deserves to be confirmed. 21. As seen above, during the early days of November 1984, the Delhi witnessed worst of the carnage, following the assassination of Mrs. Indira Gandhi, preceded by large scale riots which had broken out, then resulting into the killings of innocent persons irrespective of their age, middle aged or teenager of a particular community. The acts can not be regarded but barbarism. For no fault of theirs

innocent persons were done to death in a most cruel manner. This can not be regarded as an ordinary routine case of murder, looting or burning. Members of one particular community were targeted, their properties looted and burnt and people done to death. The law and order machinery had completely broken down. Unprecedented lawlessness prevailed during those days and the miscreants had absolute free hand for indulging in criminal acts. The situation created by the anti-communal forces can not be viewed lightly and needs to be dealt with sternly. The after effects of the incidents would be felt by the people left behind for years. Though the time is the best healer certain situation can not be retrieved or healed when P.W. 3 and P.W. 7 in their middle age loose their three grown up sons. Let's think of the agony and the suffer-ings of the old parents who are left behind. The mob caused nothing short of havoc. There can be no place for leniency, mercy or sympathy in such cases.

22. In the case of Dhanajoy Chatterjee alias Dhana Vs . State of West Bengal : [1994]1SCR37 it has been observed that 'shockingly large number of criminals go unpunished thereby encouraging the criminals and in the ultimate making justice suffer by weakening the system's credibility. The imposition of appropriate punishment is the manner in which the Court respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence for the heinous crime committed by the accused. The courts must not only keep in view the rights of the criminal but also the rights of the victims of the crime and the society at large while considering imposition of appropriate punishment.'

In the case of Jashubha Bharatsinh Gohil and others Vs . State of Gujarat : [1994]3SCR471 it has been held that 'in the matter of death sentence the courts are required to answer new challenges and mould the sentencing system to meet these challenges. The object should be to protect the society and to deter the criminals in achieving avowed object of law by imposing appropriate sentence. It is expected that the courts would operate the sentencing system as to impose such sentence which reflects the conscious of the society and the sentencing process has to be stern where it should be.'

In the case of Ravji @ Ram Chandra Vs . State of Rajasthan : AIR 1996 SC787 it has been held that 'it is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should respond to the society's cry for justice against the criminal. If for extremely heinous crime of murder perpetrated in a very brutal manner without any provocation most deterrent punishment is not given the deterrent punishment will loose its relevance.'

23. The crime in the present case qua appellant Kishori falls in the category of rarest of rare cases and the sentence has to be commensurate with the degree/gravity of the offence so that a required message is sent.

In the above view of the matter, having regard to the evidence as above, in our view the conviction and death sentence imposed by the Trial Court on Kishori son of Hoshiar Singh (appellant in Crl.A.313/98) deserves to be confirmed under Section 366 of the Code whereas the conviction and sentence of appellants Dr. Budh Prakash Kashyap @ Dr. Lamboo son of Jyanti Prashad (appellant in Crl. A. 455/97) and Mohammed Abbas son of Munsif Ali (appellant in Crl.A.421/97) deserves to be set aside.

24. In the result, Criminal Appeal No.313/98 being devoid of merits is dismissed. The murder reference No. 6/97 under Section 366 of the Code is partly accepted to the extent that the death sentence imposed on Kishori son of Hoshiar Singh only is confirmed. Criminal Appeals No. 421/97 and 455/97 are allowed. The conviction and sentences imposed on appellants Dr. Budh Prakash Kashyap @ Dr. Lamboo son of Jyanti Prashad and Mohammed Abbas son of Munsif Ali are set aside.

Dr. Budh Prakash Kashyap @ Dr. Lamboo and Mohammed Abbas be set at liberty forthwith, if not required in any other case.