

## Baladin And Ors. vs State Of Uttar Pradesh on 18 October, 1955

**Equivalent citations: AIR1956SC181, 1956CRILJ345, AIR 1956 SUPREME COURT 181**

### JUDGMENT

Sinha, J.

1. These two appeals arise out of the same judgment and order of a Division Bench of the Allahabad High Court, on leave granted by it at the same time that the judgment was delivered. Something will have to be said in the course of this judgment about the legality or regularity of the leave so granted. There are 16 appellants in Criminal Appeal No. 118 of 1954 and only one appellant in 119 of 1954.

Both the appeals relate to the occurrence which took place on the morning of the 7th February 1952 at village Goran, police station Ait, in the district of Jalaun of the State of Uttar Pradesh. 57 persons were, placed on trial before the learned Sessions Judge of Orai on charges under Sections 120B and 148, Indian Penal Code, as also under Sections 201, 302, 325 and; 452, all read with Section 149, Indian Penal Code.

The learned trial Judge acquitted all the accused in respect of the charge under Section 120B, Indian Penal Code. He convicted 36 of them under Sections 148, 201/ 149 and 302/149, Indian Penal Code, of whom nine were sentenced to death and the others to transportation for life under Section 302/149, to two years rigorous imprisonment under Section 148, Indian Penal Code and to seven years rigorous imprisonment under Section 201/149 in respect of four of them, and to three years imprisonment in respect of the rest.

No more need be said about the convictions and sentences under Section 325/149, Indian Penal Code, because those have not been maintained by the High Court on appeal. Some of them had also been convicted under Section 452 and sentenced to rigorous imprisonment for three years. One more accused named Kamoda Chamar was convicted under Section 325/149, Indian Penal Code and sentenced to three years rigorous imprisonment. Thus in all 37 out of the 57 accused were convicted and sentenced by the trial court, partly in agreement and partly in disagreement with the assessors.

2. On appeal, the High Court dismissed the appeal of Baladin Lodhi, who is the first appellant before us, and affirmed his convictions and sentences under Sections 148, 452, 302/149 and 201/149, Indian Penal Code and accepted the reference, by confirming the sentence of death passed against him in respect of the charge under Section 302/149.

In respect of the other appellants who had been sentenced to death, the High Court allowed the appeal of four of them and acquitted them and in respect of the others allowed their appeal on the

question of sentence under Section 302/149 by giving them the lesser sentence of transportation for life. The High Court allowed the appeal of twenty of the appellants before it and acquitted them of all charges. In the result, the High Court confirmed the convictions and sentences in respect of the remaining 17 appellants before it with the modification on the question of sentence as aforesaid.

Hence 16 of them figure as the appellants in Criminal Appeal No. 118 of 1954 and Jangi is the sole appellant in Criminal Appeal No. 119 of 1954. Both these appeals have been heard together and will be disposed of by this judgment.

3. Before setting out the case against the accused it is necessary briefly to notice the background of the events leading up to the ghastly occurrence. Twelve or thirteen refugee families' from the West Punjab were rehabilitated in village Goran which is about 10 miles from Orai town by the direct 'kachha' route and about 25 miles by the road proper.

The State Government provided those displaced families with lands for cultivation and sites in the village 'abadi' for residential purposes, as also loans for helping them to settle in their new homes. But unfortunately the new-comers were not welcome to the old residents of the village because they were looked upon as competitors for house sites and culturable lands of the village. The result was a great deal of tension between the old residents on the one side and the new settlers on the other.

Mutual recriminations followed and some incidents of a minor nature, like cattle grazing disputes and simple assaults, took place. All the four years that the new displaced families had come to stay in the village there were allegations of harassment on both sides and complaints to the public authorities. The gulf between the two factions widened until the climax was reached on the 4th February 1952, that is to say, three days before the occurrence which was the subject matter of the charges against the accused persons.

On that date Vir Singh 'alias Vir Lodhi' was alleged to have secured the services of one Shambhu Lodhi, resident of district Hamirpur, who is alleged to be a notorious character. It is admitted by both parties that an incident took place between Diwan Singh and Mangal Singh, two of the displaced persons on the one side, and Vir Singh Lodhi and Shambhu Lodhi on the other, in which grievous hurt was said to have been caused to Shambhu Lodhi and simple injuries to the displaced persons, leading to the lodging of counter informations at the police station.

Both sides had some injuries, though not equally serious but it appears, as found by the courts below, that the incident was very lightly treated by the police and not at all as the precursor of more serious events which actually took place three days later. As the refugees found the attitude of the local police hostile to them, 13 male members of the refugee families including Mool Singh, Mela Singh, Sant Singh and Ravel Singh, four of the six persons who were cruelly done to death in cold blood in the occurrence of the 7th February, came to Orai on the morning of the 5th February 1952 to report the matter to the district authorities and to the Refugee Officer.

They succeeded only in making an application to the Refugee Officer and could not get the district authorities to lend them a hearing. Disappointed at this attitude of the district authorities, they

decided to file a regular complaint in court against Shambhu aforesaid and others. They spent the 6th February in making further attempts to contact the public authorities to ventilate their grievances and in preparing a complaint to be filed in court.

4. Things were happening in the other camp also at village Goran. The villagers are said to have assembled at the house of Parichhat Lodhi, adjacent to the house of Mangal Singh, one of the refugees, after having come to know that most of the male members of the refugee families had gone to the district headquarters to take steps against them. The villagers are said to have resolved to kill all the male members of the refugee families so as to put an end to what they thought was the recurring trouble.

When Ravel Singh and Kartar Singh, two of the 13 refugees who had gone to Orai, came back to their village, were informed by their womenfolk of the conspiracy said to have been hatched by the villagers that very evening. Naturally therefore, they came post-haste that same night, that is to say, the night between the 6th and 7th February to Orai and informed their other male members about the resolution.

Such an alarming news caused a great deal of commotion amongst the refugees and they forthwith got their applications prepared for presentation to the District Magistrate, the Superintendent of Police and the Refugee Officer informing them about the aforesaid resolution of the old residents of the village and their apprehensions about the safety of their persons and imploring the authorities to give them and their families protection against the threatened attack.

They also made it clear to those authorities that the situation was so grave that they had decided to go to the village Goran under the cover of the night to rescue their families and to bring them back to safety. It was decided that six of the refugees, namely, Mool Singh, Mela Singh, Ravel Singh son of Mangal Singh, Sant Singh, Kastura Singh and Harbans Singh should go back to the village to rescue their families. Those were the six unfortunate victims of the occurrence which took place the next morning.

5. As soon as those six ill-fated persons reached the village on the morning of the 7th February 1952 at about sunrise, they found their womenfolk in a state of alarm and collected at the house of Mangal Singh aforesaid. They were apprised of the desperate situation in which the womenfolk found themselves in the absence of the male members. After talking over the situation at both ends and exchanging information, three of them, namely, Mela Singh, Ravel Singh and Mool Singh were taken upstairs for having their breakfast after their night's journey.

Thus when three of the six male members who had arrived from Orai were upstairs and the other three, Kastura Singh, Harbans Singh and Sant Singh, were on the groundfloor of the house, suddenly a crowd of 80 to 100 persons surrounded the said Mangal Singh's house armed with axes, spears, daggers, guns, etc. Narain Das Lodhi and Baladin Lodhi along with 15 to 20 other Lodhis appeared on the first floor of Mangal Singh's house with guns and shot down those three persons.

The other Lodhis were also said to have attacked those three unfortunate male members and belaboured them with their lethal weapons. As soon as Mela Singh received two gunshot wounds and rolled down in his attempt to run downstairs, he was picked up by Smt. Bhagwanti (one of the four eyewitnesses examined in the case) and was hidden in the grain room of Mangal Singh's house. The Lodhis who were on the first floor of the house threw the dead bodies of Mool Singh and Ravel Singh from the roof of Mangal Singh's house towards the cattle shed of Mahabir, one of the appellants.

The three other male members of the refugee families who were on the ground floor were prevented from escaping, by the large mob assembled in front of Mangal Singh's house. Some of the members of the mob who had guns with them (Prabhu Dayal and Shobha Lal not before the court) fired a number of shots at those three persons and killed them. The other members of the mob are said to have belaboured those unfortunate victims with their spears, axes and daggers.

Mela Singh who had been concealed as aforesaid in the grain room of Mangal Singh's house was said to have been dragged out by Raja Ram and Mahabir, two of the appellants and others. When taken out of the room, he was said to have been assaulted by Jangi Lodhi, the sole appellant in Criminal Appeal No. 119 of 1954 and by other persons not before the court, with axes, and by Uma Charan, another appellant, with a sword, and thus some of the members of the unlawful assembly finished him off also.

The dead bodies of all those six helpless victims were then dragged to the front of Manna Teli's house. Two bullock carts, one belonging to and driven by Manna Teli, and the other belonging to and driven by Vira Lodhi, two of the appellants, were loaded each with three of the dead bodies and carried to the tank in the village. A tin of kerosene oil was sprinkled on the dead bodies and Vira Lodhi and others are said to have set fire to the joint pyre of those six dead bodies which were thus burnt to ashes.

Such was the ghastly tragedy which is said to have been witnessed by four of the female inmates in the house at that time, namely, Mst. Paiyyan Devi (P.W. 18), Mst. Shanti Devi (P.W. 21), and Mst. Parvati (P. W. 22), who were the widows respectively of Mela Singh, Mool Singh and Sant Singh, three of the six victims and the fourth Mst. Bhagwanti (P.W. 20), wife of Mangal Singh and mother of the fourth victim Ravel Singh.

6. While the aforesaid six male members had thus met their unnatural death, the remaining male refugees who had stayed back at Orai were trying to get into touch; with the public authorities on the 7th February, without any success. In the meantime, at about 2 p.m., when they were waiting at the residence of the Superintendent of Police for an interview, two of the members brought the sad news from the market where they had gone for their meals that there was a rumour that those six refugees who had left for the village had been murdered.

They naturally all began to weep and bemoan their lot and then the Superintendent of Police on coming to know of the sad news granted them an interview. He directed the Circle Inspector, Kabir Ahmad (P.W. 27) at about 4-30 p.m. to proceed to the village on a truck with an armed guard and

the refugees. After sunset, on the way he met Raj Bahadur Singh, Sub-Inspector of Police in charge Ait police station coming towards Orai by a passenger bus, apparently completely ignorant of what had happened at the village Goran.

This ignorance may have been due to the fact that at about 5 p.m. the same day the village chowkidar Ramola, one of the appellants, had lodged an information at the police station that all was quiet in the village. As will presently appear, it was the quiet of a deserted village after the holocaust and the burning of the dead bodies by the members of the mob.

The Circle Inspector with Sub-Inspector Raj Bahadur Singh went to the police station, strengthened their force and then reached the village at about midnight between the 7th and 8th February. At that time the village presented a deserted appearance with no lights in any house and no whispers from any direction. The original residents of the village, as also the refugees, it appears, had for the time being completely abandoned the village.

Mangal Singh and Diwan Singh, refugees, took the police truck to village Kotra, about two and a half miles away from village Goran in search of their womenfolk and children. On the way, in the jungle they picked up some of their womenfolk and children and brought them back to the village. In the morning of the 8th February, the Deputy Superintendent of Police also arrived with some of the refugee ladies, namely, Mst. Paiyyan Devi and Smt. Bhagwanti Devi, two of the four eye-witnesses aforesaid to the unfortunate occurrence.

These two ladies had trudged until midnight from the village to Orai and informed the Superintendent of Police about the occurrence to which they were eye-witnesses. It was then that the Superintendent of Police deputed the Deputy Superintendent of Police to look into the matter. Until he reached that village next morning no progress had been made in the investigation of the case as he found the Sub-Inspector asleep.

7. A remarkable feature of the case, as pointed out by the courts below, is the unsatisfactory manner in which the police investigation took place. It appears that the local police from the village chowkidar upwards were not only apathetic but definitely hostile to the refugees. Instead of taking recourse to preventive action in view of the rising tension between the two parties in the village, things were allowed to drift until the unfortunate occurrence, as described above, took place.

Even then the Sub-Inspector of Police, Raj Bahadur Singh (P.W. 30), did not take prompt measures to apprehend the culprits. Not only that; as pointed out by the courts below, from the very start of his investigation he gave such a twist to the prosecution case, by the entries in his diary, as to make it appear that the occurrence had taken place not in broad daylight, as really was the prosecution case, but in the darkness of the night so that identification of the culprits would be difficult, if not impossible.

Naturally, there was a complaint to the superior officers against him and that very day the investigation was taken out of his hands and Circle Inspector Kabir Ahmad (P.W. 27) was placed in charge of the police investigation. But he also does not appear to have been immune from the local

police bias in favour of the accused, with the result that on further complaints being made he was also relieved of the investigation on the 21st February 1952.

The then Deputy Superintendent of Police, C.B. Singh (P.W. 28) did not start the investigation in right earnest until the 30th May, 1952, though he is said to have taken charge of the investigation from Inspector Kabir Ahmad on the 22nd or 23rd February 1952. All he did up till then was to raid the houses of several of the accused persons in that village to effect their arrest, to serve warrants of attachment and proclamation under Sections 87 and 88, Criminal Procedure Code and to record the statements of some persons on the 11th and 13th March 1952.

The bulk of the investigation by him was made after the 30th May 1952 and even then the record of statements of witnesses made to him does not do credit to a senior police officer, inasmuch as he failed to record the statements with particular reference to the individual part said to have been played by the accused persons, though he admitted that the witnesses examined by him had assigned particular acts to various accused persons.

It is manifest that the police officers concerned with the investigation of the case did not fully realize the gravity of the situation and did not take prompt steps to collect evidence of an occurrence which on the face of it was rather of an unusual character in so far as it had been the result of a preconcerted plan to annihilate the male members of the refugee families which were being treated by the residents of the village as so many usurpers of their culturable lands and house sites.

Even if the police had realized the seriousness of the situation, they did not prove equal to the occasion. Either they were incompetent or were unwilling to take all necessary steps to vindicate justice and to inspire confidence in the minds of the aggrieved party. As will presently appear, this remissness on the part of the police officers has had a very adverse effect on the prosecution case and has added to the difficulties of the court in finding out who the real culprits were.

Though the prosecution did not rely upon the investigation made or purported to have been made by the Sub-Inspector and the Circle Inspector aforesaid, they have been examined as prosecution witnesses in order to enable the parties to elicit such information as they thought necessary and proper.

8. The defence was a complete denial of all knowledge of the occurrence and the alleged death of all the six male refugees who had travelled on the night between the 6th and 7th February from Orai to the village. The accused persons ascribed their implication in the occurrence to various kinds of enmity between them and the refugee families.

It was alleged on behalf of the accused that the refugee families had rendered themselves so obnoxious to the original inhabitants of the village that the villagers, blacksmiths, potters, shoe-makers and other professional persons in the village, including money-lenders and shop-keepers had refused to render them any services because they would not pay for those services. On the main occurrence the suggestion on behalf of the accused persons appears to have been that even if the six refugees had been put to death, the occurrence might have taken place in the darkness

of the night in which unknown persons had taken part; and that the admitted enmity between the two parties was the reason for false implication.

It is thus clear that it is common ground between the prosecution and the defence that serious enmities existed between the original inhabitants of the village on one side and the refugee families on the other. It is not, as usually happens, a case of animosities between particular individuals on the one side and named individuals on the other.

9. As a result of police investigation, such as it was, and committal proceedings the accused persons placed at the trial were charged,' firstly, under Section 120B, Indian Penal Code with conspiracy to do illegal acts, namely, to murder and to cause grievous hurt to the refugees in general and to six named refugees as aforesaid in particular; secondly, under Section 148, Indian Penal Code with being members of an unlawful assembly armed with deadly weapons like guns, spears, swords, pharsas, axes and lathis with the common object to cause death and grievous hurt to refugees in general and the six named refugees in particular; thirdly, under Section 452, Indian Penal Code with house trespass by entering into the building belonging to Mangal Singh and used as a human dwelling,, after having made preparations for causing death and hurt; fourthly, under Section 302 read with Section 149, Indian Penal Code with having committed the murder of those six persons in pursuance of the common object of the unlawful assembly and in furtherance of the aforesaid criminal conspiracy; and lastly, under Section 201 read with Section 149, Indian Penal Code for causing the evidence of the aforesaid offences to disappear by burning the dead bodies of those six persons and by throwing the bones and ashes into the village tank.

Reference to the charge under Section 325 read with Section 149, Indian Penal Code is no more necessary at this stage.

10. The learned Sessions Judge, partly agreeing and partly disagreeing with the opinion of the three assessors who aided him at the trial, for reasons which may not bear scrutiny acquitted all the accused of the charge of conspiracy under Section 120B, although he believed the prosecution case that there was a meeting on the evening of the 6th February at the house of Parichhat Lodhi at which it was resolved that the male members of the refugee families should be killed, as alleged by the prosecution.

In respect of the other charges he convicted and sentenced 37 of the accused persons, as stated above. In the course of his judgment the learned trial Judge found that the four women witnesses who figured as the only eye-witnesses of the occurrence were on the whole truthful witnesses who corroborate one another on all material questions; that their statements as recorded by the sub-Inspector, Raj Bahadur Singh, was not a faithful record; that the Circle Inspector of Police did not make any independent record of his own and that the prosecution version, of the occurrence and not the defence suggestions was true.

He also observed that the so-called contradictions in the statements of those eyewitnesses as compared with the statements recorded by the investigating Sub-Inspector should not be allowed to affect the credibility of those witnesses because there were clear indications that he did not faithfully

record the statements of those witnesses and distorted their versions with a view to favouring the accused persons.

The learned Judge also took the precaution of closely scrutinising the evidence of those four eye-witnesses, though he held them to be competent and truthful witnesses, in view of the general tendency in rioting cases of witnesses to rope in also those who may not have been actuated by the common object of the unlawful assembly and may have been present there as mere spectators. He therefore examined the evidence against each individual accused bearing in mind the dictum that mere spectators had to be distinguished from members of the unlawful assembly.

11. On appeal by the convicted persons, the Division Bench of the High Court wrote a very painstaking judgment which runs into 83 printed pages. The judgment tends to be discursive and could have been more concise without affecting its quality. The High Court went into meticulous details but, as will presently appear, fell into a grievous error as a result of which it acquitted 20 of the appellants, a number of whom had been ascribed leading parts in the occurrence which was the subject matter of the charge against them.

The High Court held that the Sub-Inspector, the Circle Inspector and the Deputy Superintendent of Police who were successively in charge of the police investigation, to put it mildly, were not very circumspect in conducting the investigation. The investigation suffered from lack of thoroughness and quickness, with the result that statements of witnesses were recorded by them in the "most haphazard manner" and many matters of importance and significance to the case were omitted. It also observed that "Sub-Inspector Raj Bahadur Singh for oblique motives distorted their statements, ..... that his attempt was to introduce such variations in the statements and to leave such loopholes as to damage the ultimate result of the case to as large a measure as possible".

The High Court in the main relied upon the testimony of the four eye-witnesses, the ladies belonging to the family of the victims, but with reference to the testimony of Paiyyan Devi and Shanti Devi further observed that their evidence should be scrutinized and relied upon only when corroborated by other evidence on the record. Hence in respect of those two witnesses, the learned Judges were not as sure as in respect of the others.

Having held that the four eye-witnesses were on the whole reliable and that the record of their statements made by the investigating Sub-Inspector was not honest and faithful, the High Court fell into the error of acquitting all those accused persons, appellants before it, whose names did not find a place in the record made by that police officer. In other words it rejected reliable testimony with reference to that very record which it had condemned as unreliable.

Thus the police officer was allowed by the High Court to succeed in his effort to favour the accused. Ordinarily accused persons are entitled to challenge the testimony of witnesses examined in court with reference to the statements said to have been made by them before the investigating police officer. Statements made by prosecution witnesses before the investigating police officer being the earliest statements made by them with reference to the facts of the occurrence are valuable material for testing the veracity of the witnesses examined in court, with particular reference to those



statements which happen to be at variance with their earlier statements; but the statements made during police investigation are not substantive evidence.

Hence the record made by a police investigating officer has to be considered by the court only with a view to weighing the evidence actually adduced in court. If the police record becomes suspect or unreliable, as in the present case, on the ground that it was deliberately perfunctory or dishonest, it loses much of its value and the court in judging the case of a particular accused has to weigh the evidence given against him in court keeping in view the fact that the earlier statements of witnesses as recorded by the police is tainted record and has not as great a value as it otherwise would have in weighing all the material on the record as against each individual accused.

In so far as the High Court misled itself into relying upon the record made by the Sub-Inspector of Police to discard the evidence given in the court it fell into a serious error.

12. On appeal the High Court, as indicated above, acquitted those persons in respect of whom the evidence of the four eye-witnesses was not consistent with their statements as recorded by the investigating Sub-Inspector, though some of them had been assigned leading parts in the occurrence of shooting. After examining in great detail the evidence against each individual accused the High Court delivered its judgment on the 10th September 1954 and presumably at the request of counsel for the 17 persons against whom the High Court maintained the order of conviction, recorded the following order which is the last line and is a part of the judgment of the court:--

"Leave to appeal to Supreme Court is granted".

At the outset the learned counsel for the State of Uttar Pradesh (the respondent) raised a preliminary objection to the hearing of the appeal on the ground that the certificate granted in the terms quoted above is not in full compliance with the provisions of Article 134(1)(c) of the Constitution. It was contended that the High Court should have granted the certificate after examining the case of each individual accused, that is to say, that the High Court should have exercised its judicial discretion after satisfying itself that the certificate prayed for should be granted in respect of each and every accused convicted by it.

It was argued on behalf of the appellants that the High Court granted the certificate in exercise of its powers contained in Rule 28 of Chapter 23 of the Rules of the Allahabad High Court which required that the counsel for the appellant should pray for the leave at the time the judgment of the High Court is delivered. The leave having been granted in pursuance of that practice, it should be, it was further contended, assumed that the High Court had directed its attention to the case of each individual accused.

13. The respondent on the other hand contended that the question is concluded by the decision of this Court in 'Nar Singh V. State of U.P.', . We have now to determine whether that is so. That case lays down three propositions:--

(1) that the mere grant of a certificate does not prevent this Court from determining whether it was rightly granted and whether the conditions pre-requisite to the grant are satisfied;

(2) that the only condition is the exercise or a judicial discretion by the High Court;

(3) that being a judicial discretion, it must be exercised along well established lines governing an exercise of judicial discretion; and (4) if the discretion is properly exercised on well established and proper lines, then, as in all cases where an exercise of discretion is involved, there would be no interference except on very strong grounds. We have now to apply these principles to the present case.

14. Article 134(1)(a) and (b) lay down two conditions which confer a right of appeal to this Court. That in itself indicates that normally there is no right of appeal in any other type of case. The only exception is (c) where a right is conferred ("an appeal 'shall' lie") if the High Court "certifies" that the case is a fit one for appeal. Now the word "certifies" is a strong word.

It indicates that the High Court must bring its mind to bear on the question and, as in all cases of judicial orders and certificates, the reasons for the order must be apparent on the face of the order itself. The Supreme Court must be in a position to know first that the High Court has applied its mind to the matter and not acted mechanically and, secondly, exactly what the High Court's difficulty is and exactly what question of outstanding difficulty or importance the High Court feels this Court ought to settle.

It is not enough to say "leave to appeal is given" and no more because an appeal is not allowed in the ordinary way when conditions (a) and (b) are not satisfied. Accordingly merely to say that leave is given and no more is tantamount to saying that the High Court will usurp the functions of the Constitution-makers and allow the whole case to be opened up despite the fact that the Constitution has specifically limited the normal right of appeal to Sub-articles (a), and (b) and has left (c) to meet extraordinary cases.

15. Now, in the present case, where the High Court has merely said "Leave to appeal to the Supreme Court is granted". It is impossible for us to gather what induced the High Court to grant this leave or what points of outstanding importance that require to be settled are, in the opinion of the High Court, involved. The learned Judges have not even certified that this is a fit case for appeal.

Had some reasons been given and the I point or points that it was felt we ought to settle been indicated that might have been treated as a curable irregularity in its procedure. But, as it is, we can only regard this omission as indicative of the fact that the High Court did not realise the responsibility that is cast upon it by Article 134(1) (c) and did not realise that its discretion has to be 'judicially' and not mechanically exercised.

Accordingly, following our previous decision, we are unable to regard this appeal as properly certified and so decline to accept it as an appeal under Sub-article (c).

16. In fairness to the learned Judges we have been at pains to see whether there are matters which would have afforded them justification for granting a certificate under Sub-article (c). Four grounds were put forward before us on behalf of the appellants three of which are pure grounds of fact. Now it is clear that a certificate cannot be granted under Sub-article (c) if the High Court is in doubt about 'the facts. If there is doubt in the minds of the learned Judges about the facts, their duty is to acquit. They cannot convict and then issue a certificate because they cannot make up their minds about the facts.

17. The fourth ground taken before us involves a question of law but it is clear that that was not present to the minds of the learned Judges because they do not even discuss it or advert to it. We are therefore constrained to hold that the appeal does not lie under Sub-article (c). But that still leaves us a discretion to examine whether this is a fit case for us to exercise our special powers under Article 136(1), and that we now proceed to do.

18. The learned counsel for the appellants raised four questions before us, namely, (1) that the courts below were in error in relying upon the evidence of the four eye-witnesses aforesaid when their statements in court were at variance with their statements as recorded by the investigating Sub-Inspector; (2) that the courts below were in error in convicting and sentencing the appellants on the testimony of those four eye-witnesses when their evidence had not been acted upon in respect of the other accused who had been acquitted by the courts below; (3) that the evidence of those four eye-witnesses having been disbelieved by the lower appellate court, particularly in respect of some of those accused persons to whom they had attributed specific parts, should, not have been accepted in respect of those accused to whom no such parts had been assigned; and (4) that the courts below had erred in law in convicting those accused persons against whom no specific parts had been deposed to and whose mere presence, in the assembly had been penalized.

(19) It is manifest that the first three grounds do not make out a case for special leave but we think that the fourth ground does. It is well settled that mere presence in an assembly does not make such a person a member of an unlawful assembly unless it is shown that he had done something or omitted to do something which would make him a member of an unlawful assembly, or unless the case falls under Section 142, Indian Penal Code.

In this case there is no doubt that the original inhabitants of the village were all inimically disposed towards the new-comers. From the site plan (Ex. P-18) of the houses of the refugees, it is clear that the houses of the accused persons and of the refugees are situated close to one another. The house of Mangal Singh which was the scene of the occurrence was surrounded by the houses of the original inhabitants of the village including some of the accused persons.

According to the prosecution case, one party of the members of the unlawful assembly entered the first floor of the house of Mangal Singh through the roof of the house of Parichhat Lodhi, adjacent to the south-east and attacked the three persons who were there. The other party of the miscreants collected at the front door of Mangal Singh's house facing west. In front of Mangal Singh's house is the house of Mahabir, appellant, and on the other three sides of that house are the houses of Baladin Lodhi, Parichhat Lodhi and Ajodhia Lodhi, appellants.

It would thus appear that the place of occurrence is surrounded on all sides by the houses of the appellants. If members of the family of the appellants and other residents of the village assembled, all such persons could not be condemned 'ipso facto' as being members of that unlawful assembly. It was necessary, therefore, for the prosecution to lead evidence pointing to the conclusion that all the appellants before us had done or been committing some overt act in prosecution of the common object of the unlawful assembly.

The evidence as recorded is in general terms to the effect that all these persons and many more were the miscreants and were armed with deadly weapons, like guns, spears, pharsas, axes, lathis, etc. This kind of omnibus evidence naturally has to be very closely scrutinised in order to eliminate all chances of false or mistaken implication. That feelings were running high on both sides is beyond question.

That the six male members who were done to death that morning found themselves trapped in the house of Mangal Singh has been found by the courts below on good evidence. We have, therefore, to examine the case of each individual accused to satisfy ourselves that mere spectators who had not joined the assembly and who were unaware of its motive had not been branded as members of the unlawful assembly which committed the dastardly crimes that morning.

It has been found that the common object of the unlawful assembly was not only to kill the male members of the refugee families but also to destroy all evidence of those crimes. Thus even those who did something in connection with the carrying of the dead bodies or disposal of them by burning them as aforesaid must be taken to have been actuated by the common objective.

20. There cannot be the least doubt that those who had trespassed into the first floor of the house of Mangal Singh and killed those three refugees who had gone upstairs to have their breakfast were certainly up to their neck in the conspiracy and were thus very active members of the unlawful assembly. In that category are Baladin Lodhi, Parichhat, son of Lallu Lodhi, Ajodhia Lodhi and Parichhat, son of Sadhoo. They have therefore been rightly convicted and sentenced by the court below.

21. The appellant Raja Ram is a close neighbour of Mangal Singh. He has been assigned a distinct part in the occurrence that morning. He is said to have dragged Mela Singh out of the grain room of Mangal Singh on the first floor. He is also said to have given an axe blow to Mela Singh because he had not died till then as a result of the firing at him.

This man has a history of hostility against the refugees. He had litigation with some of the refugee families and was one of those who had falsely and maliciously reported that the two daughters-in-law of Mangal Singh were Muslim girls abducted from West Pakistan. Though the High Court had some doubts as to these specific parts against him because the police records did not show that those parts had been assigned to him and on that account that court reduced the sentence of death to transportation for life under Section 302/149, his conviction under Sections 148, 201/149 and 452 Indian Penal Code has also been upheld.

He was apparently very much in the lime-light on that morning. In view of his leading activities against the refugee families, it is not improbable that he took a leading part in the occurrence. His conviction and sentence must therefore be upheld.

22. The appellant Uma Charan had also been named by all the four eye-witnesses as having taken a leading part in the occurrence. He was said not only to have hit Mela Singh on the head with a sword but was also one of those who took part in the burning of the dead bodies. The episode of the burning of the dead bodies was an essential part of the common object of the unlawful assembly and his presence therefore in that assembly is beyond all doubt.

In view of the fact that the use of sword against Mela Singh had been spoken to by only one of the eye-witnesses consistently throughout, though the other eye-witnesses' statement in court on that incident did not find a place in the police diary, the High Court gave him the lesser sentence under Section 302/149, Indian Penal Code, though the trial court had given him the extreme penalty of death under that Section.

His conviction under Sections 148, 201/149 has also been upheld. It must therefore be held that he was not a mere spectator in the assembly. His appeal must therefore-also stand dismissed.

23. Appellant Mahabir Pershad has his cattle shed adjacent to the north of Mangal Singh's house and his residential house is just in front of that house. The two dead bodies of the victims on the first floor of Mangal Singh's house had been thrown into his cattle shed and had been dragged out from there and taken to the open space between the houses of Mannu Teli and Raja Ram, also appellants.

He is also said to have dragged out Mela Singh from the place where he had been concealed. That part, according to the High Court, had not been "conclusively proved". Hence his sentence under section 302/149 was reduced by the High Court from death to transportation for life. It has been found that he was also present at the time of the disposal of the dead bodies.

His convictions under Sections 148, 302/149, 201/149 and 452, Indian Penal Code were also upheld. Apparently he had been there from beginning to end. His appeal must therefore also stand dismissed.

24. Appellant Narain Das was the Mukhia of the village and is a close neighbour of the refugees and lives opposite to the houses of Sant Singh and Mela Singh, two of the victims. He has been assigned the specific part of inciting the mob from near the 'chhabutra' of Mahabir. Hence the evidence of the four eye-witnesses directly implicating him in the crime and assigning him the part of inciting the mob clearly negatives the theory of his having been a mere sightseer.

The fact that he is a close neighbour of some of the victims of the occurrence and, therefore, must have been very well known to the witnesses who deposed against him exclude the possibility of a mistake. The courts below were therefore fully justified in believing the testimony of the four eyewitnesses that he took part in the unlawful assembly. His appeal must also stand dismissed.

25. Appellant Ramola is the village chowkidar. Instead of keeping' the police informed of the developments in the village he went as late as 5 p.m. to the police station to lodge the report that all was well in the village, apparently concealing all that had happened since the early morning that day. The courts below were therefore justified in thinking that his false report at the police station was only meant to shield himself and the other miscreants.

He did not move out of the village until all was finished, so that the higher police authorities could not move in the matter until all traces of the crime had been destroyed. This serious dereliction of duty on his part was therefore not a mere act of negligence but intended to throw a veil round the whole occurrence. The courts below were therefore justified in convicting him under Sections 148, 302/149 and 201/149. His appeal must also stand dismissed.

26. Appellant Vir Singh 'alias' Vira Lodhi had, according to the prosecution case, set the ball rolling by importing into the village the notorious Shambhu Lodhi a few days before the occurrence on 4th February 1952. He is further alleged to have taken three of the dead bodies in his cart to the cremation ground near the pond and the police later on recovered the cart in front of the house with stains of human blood on it. One of the four eye-witnesses also deposed to having seen him on the roof of Mangal Singh's house.

Hence it cannot be said that he was a mere sightseer in that assembly. His appeal was also rightly dismissed by the High Court.

27. Appellant Mannu Teli also is assigned the specific part of carrying three of the dead bodies on his cart and to have placed them on the funeral pyre. The wheels of his cart which were said to have been thrown into the tank were also recovered by the police. His appeal was also rightly dismissed by the High Court.

28. It remains to consider the cases of Thakur Das, Ishwari Prasad, Mulloo and Jagdish. These four appellants had not been assigned any particular part in the occurrence nor any overt act has been attributed to them. Of these, Thakur Das is a resident of another village in another police station, though he has cultivation in village Goran. They might possibly have been spectators who got mixed up in the crowd. They will, therefore, be given the benefit of the doubt and acquitted.

29. It remains to consider the case of the only appellant Jangi in Criminal Appeal No. 119 of 1954. Besides being named and picked out by the four eye-witnesses, he was also alleged to have struck Mela Singh, one of the victims, with an axe. The High Court has thought fit to reduce his sentence from death to that of transportation for life in view of the fact that the statements of the four eye-witnesses as to the part played by him were not supported by the police record.

But in view of the fact that even the Deputy Superintendent of Police did not admittedly take note of the individual part played by the accused persons, it is not surprising that the police records do not corroborate the witnesses in court, but there is no contradiction of their statements with reference to their previous statements during the investigation stage. Hence it cannot be said that he was a mere sightseer, when the learned Sessions Judge has found that he was one of the ring-leaders.

30. In the result, the appeal of Thakur Das, Ishwari Prasad, Mulloo and Jagdish is allowed. Their convictions and sentences are set aside and they will be released forth with. The convictions and sentences in respect of the other appellants are maintained and their appeals dismissed.