

## **Jai Shree Yadav vs State Of U.P on 12 August, 2004**

**Equivalent citations: AIR 2004 SUPREME COURT 4443, 2005 (9) SCC 788, 2004 AIR SCW 4673, 2004 ALL. L. J. 3232, (2004) 6 JT 519 (SC), 2004 CRI(AP)PR(SC) 588, 2004 CRILR(SC&MP) 911, 2004 CRILR(SC MAH GUJ) 911, 2004 (6) JT 519, 2004 (5) SLT 82, (2004) 22 ALLINDCAS 470 (SC), 2004 (7) SRJ 506, 2006 (1) SCC (CRI) 160, (2004) 6 SCALE 587, (2004) 4 ALLCRILR 255, (2004) 2 CHANDCRIC 369, (2004) 3 ALLCRIR 2068, (2004) 3 CURCRIR 108, (2004) 29 OCR 176, (2004) 6 SUPREME 236, (2004) 3 BLJ 221, (2004) 3 CRIMES 286, (2004) 50 ALLCRIC 137, (2004) 21 INDLD 409, (2004) 2 ALD(CRL) 627**

**Bench: N. Santosh Hegde, S.B. Sinha, A.K. Mathur**

CASE NO.:

Appeal (crl.) 1072 of 2003

PETITIONER:

Jai Shree Yadav

RESPONDENT:

State of U.P.

DATE OF JUDGMENT: 12/08/2004

BENCH:

N. Santosh Hegde, S.B. Sinha & A.K. Mathur

JUDGMENT:

**J U D G M E N T** (With Crl. Appeal Nos. 1073 and 1074-1075 of 2003 ) SANTOSH HEGDE, J.

All these appeals arise out of a common judgment of the High Court of Judicature at Allahabad whereby the High Court while allowing the appeal of two of the accused persons, dismissed the appeal of 3 other accused persons all of whom were convicted by the III Additional Sessions Judge, Deoria (UP) of offences punishable under Sections 143, 148, 149, 504, 506, 307 and 302 IPC. Three of the accused whose appeals were dismissed by the High Court, have preferred Criminal Appeal Nos.1072-73 of 2003 and the State has preferred Criminal Appeal Nos.1074-75 of 2003 against the acquittal of two of the accused persons who were convicted by the trial court for the above mentioned offences.

We will first take up Criminal Appeal Nos.1072-73 of 2003 for consideration which, as stated above, are the appeals filed by the convicted accused.

The facts necessary for the disposal of these appeals, briefly stated, are as follows :

It is the prosecution case that there was enmity between one of the deceased Abid Ali and A-3 Jaishree Yadav, A-5 Daddan Yadav in regard to the auction and recovery of Tehbazari of the area between village Tatil Tola and Nawalpur crossing. A-6 Ram Pratap Yadav bore an enmity against the deceased Abid Ali on account of a pending litigation relating to a land in village Tatil Tola. A-1 Hafiz Khairul Bashr was on inimical terms with the said deceased in relation to the fixation of an electric pole on the chowk road. It is also the prosecution case that on account of these enmities, these accused persons were waiting for an opportunity to eliminate said deceased Abid Ali. It is the further case of the prosecution that on 23.9.1993 at about 5.50 p.m. deceased Abid Ali had come from Deoria, his place of residence, in his private jeep and was sitting on a Takhat in front of Pervez Book Stores, north of Nawalpur crossing. At that moment, Raju @ Noor Alam (PW-6) who had a shop selling sand and clay, came to deceased Abid Ali and complained that A-3 Jaishree Yadav was raising a dispute with him (PW-6) in regard to Tehbazari money. It is also the prosecution case that PW-1 who was working as a teacher in a School at Salempur of which the deceased Abid Ali was the Manager, was then passing through the said place where the said deceased was sitting and seeing him PW-1 came to talk to the said deceased. This was at about 4.15 p.m. Prosecution also states that PW-3 Arif Ali, son of deceased Abid Ali, who was a resident of that village, was also present there at that time. It is the further case of the prosecution that at that time 8 persons including A-1 Hafiz Khairul Bashr, A-2 Jaheed, A-3 Jaishree Yadav, A-4 Manish Yadav, A-5 Daddan Yadav, A-6 Ram Pratap yadav and two other unidentified persons came armed to that place. Amongst them, A-1 and A-2 and the unidentified persons were having country-made pistols (katta), A-3 and A-4 were carrying bombs and bags in their hands; A-5 and A-6 were carrying a knife and an iron 'Dav' respectively. Prosecution further alleges that A-3 Jaishree Yadav questioned PW-6 as to the propriety of his complaint to deceased Abid Ali. Other accused questioned the authority of deceased Abid Ali to meddle in a dispute between them and PW-6. It is stated the deceased Abid Ali warned them by asking them to have control over their language. At this stage the prosecution alleges A-1 exhorted the other accused to kill Abid Ali. Pursuant to the same, A-3 and A-4 hurled bombs at Abid Ali because of which Abid Ali received injuries and started running northwards to save himself. Prosecution then alleges that all the accused persons chased the deceased Abid Ali, hurling bombs and firing pistol shots at him and in this process when Abid Ali reached 'Palani', of one Idris, one Mahmood Shah (deceased No.2), a resident of the same village, tried to intervene, hence, the accused hurled bombs and fired pistol shots at Abid Ali and Mahmood Shah in front of the shop of one Ram Nakshatra consequent to which both Abid Ali and Mahmood Shah succumbed to their injuries on the spot. During the first attack on Abid Ali when he was sitting on the Takhat, PW-1 who was nearby also suffered an injury on his shoulder. Prosecution also alleges that there was a young boy who was also sitting on the Takhat with deceased Abid Ali who also suffered some injuries. PW-3 who was nearby ran after his father

but he was not attacked by the assailants. The assailants after causing fatal injuries to Abid Ali and Mahmood Shah ran away from the place of incident shouting at and threatening the witnesses. PW- 3 who is an eye-witness to the incident, then went to Salempur Police Station which is stated to be about 3-4 kms. away from the place of incident with a written complaint scribed by his brother-in-law and gave the same to PW-8 Ram Shiromani Pandey who was the officer-in-charge of the Police Station who registered a case at about 5.30 p.m. on 23.9.1993 and proceeded to the place of incident with his staff. There he recorded the statements of some witnesses and conducted the spot Panchnama, inquest Panchnama of the dead body and recovered certain empty cartridges, splinters of the bomb and one live bomb found at the place. It is relevant to note herein that before leaving for the place of the incident, PW-8 had sent a special report to the Jurisdictional Magistrate through a Constable in his Police Station to Deoria which is about 25-27 kms. from Salempur. During the course of his visit to the spot and preparation of the Panchnamas it is stated that senior officers on coming to know of the double murder case through radio transmitters, reached the spot. PW-8 after completing the inquest sent the dead bodies to Deoria along with Police Constable Durga Prasad PW-7 in a jeep around mid-night of 23/24.9.1993. It is stated that in view of the fact that on the way the said jeep developed mechanical problems and the same could be repaired only in the early hours of 24.9.1993, he handed over the bodies at about 10 a.m. to PW-4 Dr. V.D. Srivastava who conducted the post mortem on the dead bodies of Abid Ali and Mahmood Shah on 24.9.1993 at 10.30 a.m. and 12.15 p.m. respectively. He noticed 11 injuries on different parts of Abid Ali's body with corresponding internal injuries. In the opinion of PW-4 death of Abid Ali was due to shock and haemorrhage as a result of ante-mortem injuries.

On the body of Mahmood Shah, PW-4 noticed 3 external injuries which were multiple circular wounds and multiple circular lacerated wounds. On internal examination, he found corresponding injuries on various parts of the body. He also recovered a large number of pellets, totalling 89 from the body of Mahmood Shah and he opined that the death of Mahmood Shah was also due to shock and haemorrhage as a result of ante- mortem injuries.

Prosecution alleges that in spite of its best efforts, the accused persons could not be traced until they surrendered before the court. It is the case of PW-8 that PW-1 though named in the FIR as an eye-witness was not available for recording his statement and it is only after about 9-10 days when he came back to the village and his statement could be recorded; whereas PW-6's statement was recorded on 24.9.1993 at about 6 a.m. It is also the case of the prosecution that two of the unidentified persons were never traced, hence, they could not be sent up for trial while the six named accused persons were committed for trial by A.C.J.M., Deoria for offences under sections 147, 148, 149, 504, 506, 507, 302 and sections 4 and 5 of the Explosive Substances Act. But the trial court framed charges only for offences under sections 143, 148, 302 read with section 149, section 307 read with 149, 504 and 506 IPC.

In view of the fact that A-1 Hafiz Khairul Bashr was not in a medically fit condition to face trial, his trial was separated and the other 5 accused persons were tried by the III Additional Sessions Judge,

Deoria, for offences as stated above, in Sessions Trial No.36 of 1994. The trial court after considering the material produced by the prosecution, came to the conclusion that accused 2 to 6 were guilty of the offences charged against them hence convicted them under section 143 IPC to RI for 6 months, under section 148 IPC RI for 1 year and for an offence punishable under section 302 read with section 149 life imprisonment and for an offence under section 307 read with section 149, 7 years' RI and for an offence under section 504 IPC 6 months' RI and finally for an offence under section 506 IPC, 6 months' RI was awarded. The court also directed all the sentences to run concurrently.

It is against the said conviction and sentence of the trial court, the convicted accused preferred 4 appeals before the High Court of Judicature at Allahabad and the High Court by the impugned judgment, confirmed the conviction and sentence imposed on A-2 Jaheed, A-3 Jaishree Yadav, A-4 Manish Yadav, while it allowed the appeals of A-5 Daddan Yadav and A-6 Ram Pratap Yadav.

Out of the 3 convicted accused, A-2 Jaheed has not preferred any appeal hence his conviction and sentence has become final, while A-3 Jaishree Yadav and A-4 Manish Yadav have preferred the abovenoted criminal appeals. The State of U.P. being aggrieved by the acquittal of A-5 Daddan Yadav and A-6 Ram Pratap Yadav has preferred the connected criminal appeal noted hereinabove.

Shri Sushil Kumar, learned senior counsel appearing for the appellants contended that the prosecution case ought not to have been accepted by the courts below because of the serious infirmity found in the investigation as also possible doubt as to the presence of the eye-witnesses produced by the prosecution at the trial. He submitted that though the prosecution has alleged that the complaint of the incident in question was lodged at Salempur Police Station at 5.30 p.m., the same cannot be believed for more than one reason and according to him the FIR is a product of deliberation and is anti-timed. Elaborating this contention, he submitted that the special report in regard to the incident in question reached the Jurisdictional Magistrate at Deoria only on 24.9.1993 and the actual time of receipt of this special report has not been noted by the Jurisdictional Magistrate. It is his contention that if really the FIR had come into existence as stated by the prosecution and the complete details of the case and the facts as found in the complaint and in the inquest report would have been sent to the doctor who was to conduct post mortem but what in fact was sent along with the dead body and the requisition for post mortem was not really the true copy of the inquest report and the complaint. He further submitted the fact that the dead body was delivered to the doctor of Deoria at about 10 O'clock in the morning on 24.9.1993 which also indicates the fact that the incident in question must have come to the knowledge of the police very late in the evening of 23.9.1993, hence, a detailed FIR implicating the accused was prepared in deliberation with PW-3, the son of the deceased Abid Ali much later than 5.30 P.M.. He also pointed out that it has come on record that when radio transmission messages were sent to the superior officers, names of all accused were not mentioned obviously because same was not known to the Investigating Officer at that time. From the material on record, he pointed out that there were good reasons for PW-3 to implicate the appellants, hence, deceased being a prominent person the accused who were admittedly inimical towards him were falsely implicated.

Further, he contended that the evidence of PW-1 ought not to have been believed because he was closely connected with the deceased Abid Ali in his illegal activities in managing the school. It is also contended that it is highly improbable that a person who witnessed the murder of the Manager of his school and with whom he was closely connected would have disappeared from the place of incident and appeared only after 10 days to make his statement before the police. The further contention of the learned counsel in this regard was that the so called injury suffered by PW-1 is a make believe one and if at all such injury was there the same must have been a self-inflicted one to create evidence. In regard to PW- 3, the son of the deceased who is the complainant and also an eye-witness to the incident, learned counsel submitted that the contradictions, omissions and improvements proved by the defence in the cross-examination of this witness clearly established that this witness is one who cannot be believed. At any rate this witness is not a witness who could be termed as an absolutely reliable witness on whose sole evidence a conviction could be based without acceptable corroboration.

In regard to PW-6, the other eye-witness, learned counsel submitted that this witness was not present at the time when the police went to the spot of the incident nor was he present at the time of inquest proceedings. His statement was recorded only on the next day, hence, his evidence also could not have been believed.

Learned counsel also pointed out that the medical evidence is contradictory to the oral evidence led by the prosecution, hence, the appellants are entitled to acquittal.

He supported the findings of the High Court that from the prosecution case itself, it is clear that the accused Daddan Yadav and Ram Pratap Yadav have not taken part in the incident in question and they were implicated solely because there was some enmity between them and the deceased Abid Ali, hence, the High Court was justified in allowing their appeal.

The argument addressed by the learned counsel before us are similar to the ones that were addressed by his counter parts in the courts below. Both the courts below so far as the convicted appellant before us are concerned have concurrently come to the conclusion that these arguments cannot be accepted and have held that the prosecution has established its case to the hilt to prove the guilt of the convicted accused. It is in the backdrop of the concurrent findings of the two courts below that we will now examine the contentions advanced before us by the learned counsel appearing for the accused whose guilt have been upheld concurrently by two courts below.

It is the case of the prosecution that PW-3 Arif Ali who is a resident of village Nawalpur within the limits of Salempur Police Station came to the said police station on 23.9.1993 at 5.30 p.m. and gave a written report Ext.Ka-2 to PW-8 the Officer-in-Charge of the said police station. According to PW-8, he registered a crime based on the said complaint of PW-3 at 5.50 p.m. on the same day, which has been proved by the production of the general diary of the police station Ex.Ka-8. He also submitted that he sent a special report to the Jurisdiction Magistrate on 23.9.1993 at about 7 p.m. through Constable Dheeraj. He further stated that from the entry in the general diary, it is seen that Constable Dheeraj reported back to the police station at about 8 a.m. on 24.9.1993 . He has denied that the special report was not sent on 23.9.1993. A perusal of the entry made by the Chief Judicial

Magistrate, Deoria in the special report shows that the same was received by him on 24.9.1993 but the actual time of the report is not noted in the said entry, however it is clear that the said report was received by him at his residence. Based on this the learned counsel for the appellants had argued that it is possible that this report might have reached later in the day on 24.9.1993, but this argument is not supported by any material on record. On the contrary from the entry made in the general diary of the police station, it is clear that Constable Dheeraj who was entrusted with the job of delivering the special report to the Magistrate had returned back to duty at Salempur Police Station at 8 O'clock on 24.9.1993. Bearing in mind that the distance between Salempur Police Station and Deoria is about 28 to 29 kms. as seen from the records it is clear that the special report has reached the Jurisdiction Magistrate much earlier than 8 O'clock in the morning of 24.9.1993. Though it would have been more appropriate and less controversial if only the concerned Magistrate had noted the actual time of receipt of the special report, still on facts and circumstances of this case as stated above, we are of the opinion that the special report must have reached the Jurisdictional Magistrate much earlier than 8 a.m. Since by then the constable who carried the report had come back to Salempur on 24.9.1993 which fits in with the prosecution case that the same was sent from the police station in the evening of 23.9.1993 at about 7 p.m. So on this count, it cannot be said that the FIR is anti timed.

The next contention in this regard is that the requisition sent by PW-8 to PW-4, the doctor, to conduct post mortem did not accompany all the particulars found in the inquest report and the complaint like the particulars of the case, the weapon used and the names of the accused persons etc. which according to the learned counsel for the accused indicates that when the dead body was sent for post mortem the investigating agency did not know the full particulars of the case. We do not think that these omissions, if any, would lead to the conclusion that the FIR is anti-timed. It is a settled principle in law that though it is necessary to give the gist of the information collected during the course of inquest proceedings and from the material available in the FIR to the doctor conducting the post mortem, it is not necessary to give all the particulars as contained in either of the above said documents. This is clear from the judgment of this Court in the case of Mahendra Rai vs. Mithilesh Rai & Ors. (1997 10 SCC 605). Learned counsel had next contended that it has come on record that the incident in question was reported to the higher authorities through radio transmission and an application filed by the defence to produce the records pertaining to this transmission has been rejected by the trial court and according to the material available on record the said transmission had not given the names of all the accused concerned to the senior officers which also indicated the fact that the FIR in question has come into existence after the radio transmission was made. We are unable to accept this argument either. We think the trial court has given good reasons for not allowing the application for summoning the records pertaining to radio transmission of police communication, at any rate the accused having not challenged the said order, the same has become final. That apart it should be noted that the messages transmitted to higher authorities of an incident in question is only an information sent about a crime that has occurred which does not require all the particulars of the crime to be stated. In the instant case obviously because one of the deceased was a prominent person of the area concerned, the higher authorities were informed through radio transmission that his murder has taken place and in such communication, in our opinion, it is not necessary that the names of all the persons or other particulars as stated in complaint ought to have been mentioned or that non mentioning of such

particulars in such communication gives rise to an inference that at the time when the transmission was made the investigating agency was not in the know of the names of all the accused. Both the courts below have considered these aspects of the defence case as to anti-timing of the FIR and have rejected the same and we are in agreement with the findings of the courts below, hence, we reject this contention of the learned counsel for the appellants in regard to anti-timing of the FIR.

The next contention of the learned counsel for the appellant is that the evidence of PW-1 Ram Kripal Singh ought not to have been relied upon by the two courts below. It is argued that this witness was closely connected with deceased Abid Ali and was hand in glove with him in the mis- management of the School and it is because of this nexus that he has come forward to give evidence inspite of the fact that he was not present at the time of the incident. It was also submitted that the so called injury suffered by this witness was so superficial that it cannot be said to have been caused by the flying splinter of the bomb that exploded. Learned counsel also contended that the evidence of PW-5 Dr. A.K. Upadhyay who treated this witness is highly artificial and cannot be accepted primarily because of the fact that the injury suffered by the witness was not recorded in the medico-legal register of the dispensary. It is the further contention on behalf of the appellants in regard to PW1 that if really he was an eye witness to the incident he would not have disappeared for nearly 10 days in spite of his familiarity with deceased Abid Ali. It was also alleged that the explanation given by this witness as to his non-availability to the Police for almost 10 days is hard to believe.

There is no doubt that this witness was closely connected with the deceased Abid Ali in view of the fact that he was a teacher in the School of which said deceased was the Manager. By this it cannot be presumed that this witness has volunteered to be a false witness to the incident. It is a fact that the injury suffered by this witness is of minor nature but PW-5 who treated the said injury has stated that on 23.9.93 evening PW1 had come to him for treatment of an injury suffered by him. He has also stated that though the injury was simple in nature, he had treated the same and the said injury could have been caused by a flying splinter of a bomb. It is a fact that the doctor did not enter this injury in the medico-legal register but PW-5 the doctor has given an explanation that since the witness did not want to make a Police case out of the same he recorded this injury in the accident injury register.

It is also true that PW1 was not available to the Police for nearly 10 days after the incident but the explanation given by this witness is quite plausible that his family was afraid for his safety hence he went to his in-laws' place and remained there and it is only when things settled down he decided to come out and give a statement to the Police. The possibility of his fear of retaliation is supported by the evidence of PW-8 I.O. who stated that there was tension in the village and at the time of funeral of the deceased he had to make Police bandobust which indicates the possibility of PW-1's apprehension and his consequent non-availability to the investigating agency. There is one other aspect of this case which will have to be borne in mind while considering the evidence of PW-1. His name has been mentioned in the FIR as a person who was present at the time the incident took place. It is also stated in the FIR that in the said incident PW-1 was injured. We have already noticed that the prosecution has established that this complaint was filed in the Salempur Police Station at 5.30 p.m. If really this witness was not present at the time of incident in question we do not think PW-3 would have included his name without even knowing the whereabouts of this witness on that

day and by attributing an imaginary injury to him. In his examination in chief this witness has clearly narrated the incident involving the named accused persons as also the overt acts attributed to them. Of course in the cross examination the defence has brought out that this person is closely connected with deceased Abid Ali therefore a suggestion was made that he was deposing falsely. This suggestion has been denied by the appellant. In the cross examination defence has brought about certain omissions, contradictions and improvements in the evidence of this witness. These shortcomings in the evidence of this witness will have to be considered in the background of the fact that this witness was subjected to nearly 217 questions over a period of 14 months i.e. his cross examination starting on 14.8.1994 and ending on 28.11.1995. Both the courts below have taken judicial notice of this fact, not only in regard to this witness but in regard to other witnesses also and have come to the concurrent conclusion that when a witness is subjected to such lengthy arduous cross examination over a lengthy period of time there is always a possibility of the witnesses committing mistakes which can be termed as omissions, improvements and contradictions therefore those infirmities will have to be appreciated in the back ground of ground realities which makes the witness confused because of the filibustering tactics of the cross examining Counsel.

PW-3's evidence was challenged by the defence in the courts below as well as before this Court on the ground that he is a partisan and biased witness being the son of the deceased Abid Ali. This fact of course is not disputed by the witness because it is the case of the prosecution itself that the deceased Abid Ali was inimical to accused persons for various reasons mentioned hereinabove. PW1's presence at the place and time of the incident was challenged by learned counsel for the accused before us primarily on the ground that if really he was present at the time of incident he would have tried to protect his father and there was no material to show that any such thing was done by this witness. It was also pointed out from his evidence that though his father was profusely bleeding the clothes of this witness were not blood stained which indicated that he never even touched the body of his father which is an unnatural conduct on the part of a son present at the time of the murder of his father. This witness when cross examined in this regard, admitted that since his father had died already he did not carry the body of his father nor did he touch the body of his father. In our opinion different people react differently to a given situation and from the fact that this witness did not choose to fall on the body of his father or carry his dead body from where it was lying, by itself cannot be a ground to reject his evidence. We have already accepted the fact that the complaint in question was lodged by this witness soon after the incident in question and PW-8 in his evidence has spoken to the complaint being lodged by this witness and he being present throughout the investigation proceedings at the spot on that day. His presence at the place of incident also cannot be treated as a chance presence inasmuch as he is a resident of that village though his father stays in Deoria. Learned counsel for the appellant submitted that it is an admitted fact that this witness has stated that he is an educated person and according to this witness the complaint in question was not written down by him but by his brother-in-law which is also an unnatural conduct indicating that he might not have been present at the time of incident. We do not think this could also be a ground to suspect the presence of this witness at the time and place of incident. This witness in his evidence has stated that since his brother-in-law was available who was also a literate he dictated the complaint to him which was scribed by his brother-in-law and we do not find anything unnatural in this conduct either. Next ground of attack in regard to this evidence of this witness is that he has not stated all the motives stated in his evidence before the court in the



complaint. In other words the complaint did not contain details of the motives as spoken to by this witness in his evidence before the court. We do not think that this also could be a ground to reject the evidence of this witness. In the complaint this witness has specifically stated A-3 and A-4 had enmity with his father in regard to the auction of Tehbazari of Nawalpur chowk. He has further mentioned in the complaint that so far as accused Ram Pratap Yadav is concerned his father had a litigation pertaining to a particular land and so far as Hafiz Khairul Bashr is concerned his father had a dispute pertaining to the erection of an electric pole. He has also mentioned in the complaint about an altercation PW-6 had with A-3 and A-4 in regard to the payment of Tehbazari in regard to which PW-6 had made a complaint to his father on the fateful day. In this background we hardly find any force in the argument of learned counsel for the accused that this witness has made improvement in his evidence from what he had stated in his complaint. Of course during the course of his cross examination he has elaborated the nature of enmity that his father had with these accused persons but then that could hardly be a reason to contend that what is stated in the complaint is either different from what is stated in the evidence in regard to the motive or the witness has made improvement in regard to the motive of the accused to commit the crime. Apart from the above challenge to the evidence of this witness, learned counsel for the accused pointed out certain contradictions, omissions and improvements found in his cross examination but then this again will have to be considered as considered by the courts below, in the background of the fact that the cross examination of this witness was also spread over a period nearly 6 months and he was subjected to nearly 480 questions. In this background for the reasons already stated above, as held by the two courts below we do not think these contradictions, improvements and omissions would affect the credibility of this witness either.

The next witness cited by the prosecution as an eye- witness to the incident is PW-6 Raju alias Noor Alam. He is also a resident of Nawalpur who in his evidence stated that on 23.9.1993 he had an argument with A-5 Daddan Yadav and A-3 Jaishree Yadav in relation to the payment of Tehbazari for having sold some sand to them. He stated that he made a complaint to the deceased Abid Ali who had come to that village on that day and at that time the accused persons came armed with bombs, kattas and other sharp-edged weapons and attacked the deceased with the same and the deceased having suffered injuries, started running towards North and at a place near 'Palani' the accused persons shot at him as also at Mahmood Shah who came to the aid of the deceased Abid Ali consequent to which these victims died. The challenge to the evidence of this witness by the appellant is primarily based on the fact that he is a partisan witness and in his witness too a large number of contradictions, improvements and omissions were established during the cross-examination. We must notice that the name of this witness is also mentioned in the complaint and even the fact that there was an altercation between A-3 Jaishree Yadav and A-4 in payment of Tehbazari is also mentioned in the complaint which indicates that this witness was present at the time of the incident. In his examination in chief he has clearly stated the attack on the deceased by the accused persons and we are not prepared to reject this evidence on the ground that there have been some contradictions, omissions and improvements in his evidence. Even this witness was subjected to lengthy cross-examination over a long period of time and as held by the two courts below, in such type of cross-examination some improvements, contradictions and omissions are bound to occur which if not found fatal to the evidence given in the examination in chief would not in any manner affect the evidentiary value of the witness given in the examination in chief.

Another argument addressed on behalf of the appellants to be noticed is that there was considerable delay in sending the dead bodies for post mortem. According to the learned counsel, though a complaint in regard to the incident in question was lodged at about 5.30 p.m., the dead bodies reached the hospital at Deoria only at about 9.30 a.m. on 24.9.1993, therefore, this also indicates that the complaint in question had not been lodged, as alleged by the prosecution. It is true that the dead bodies reached the hospital at Deoria only at about 9.30 a.m. the next day but from the evidence of PW-8, the Investigating Officer, it is clear that he despatched the dead bodies to the hospital between 11 and 12 in the night of the incident through PW-7, Constable Durga Prasad, who took the dead bodies in jeeps but because of the fact that one of the jeeps broke down on the way at a distance of about 13-14 kms. from Salempur, hence, they were not able to proceed further that night until the jeeps were repaired in the morning. In this situation, the bodies reached the hospital only at about 9.30 a.m. In our opinion, the explanation given by PW-7 in regard to the delay in delivery of the dead bodies for post mortem cannot be rejected. Therefore, the contention that the delay in delivering the dead bodies indicates that the First Information Report was anti-timed, cannot be accepted.

It was also sought to be argued that there is contradiction between medical evidence and oral evidence. We having perused the same, find from the evidence of the post mortem report and the evidence of PW-4 Dr. V.D. Srivastava that the prosecution has established that both the deceased had died of shock and haemorrhage due to the injuries caused to them and those injuries are such injuries as could be caused by the explosion of a bomb, by the use of Kattas and sharp-edged weapons. We really do not find any reason whatsoever why this doctor should give false evidence to support the prosecution case. This witness was also subjected to nearly 170 questions over a period of a year i.e. between 18.5.1995 and 2.6.1996. In such circumstances we are in agreement with the findings of the two courts below that the prosecution has established its case beyond all reasonable doubt as against the accused persons held guilty by the trial court and the High Court.

This leaves us to consider the merit of Crl. Appeal Nos.1074-75 of 2003 preferred by the State against the acquittal of A-5 Daddan Yadav and A-6 Ram Pratap Yadav. In regard to these two accused persons the High Court has concurred with the finding of the trial court that they were present and were members of the party of the accused persons when the crime in question was committed. The trial court accepted the evidence that Ram Pratap Yadav abused deceased Abid Ali while others attacked the deceased. Similarly, the trial court also accepted the evidence that A-5 had carried a 'Dav' and attacked the deceased due to which a corresponding incised wound was found in the body of the deceased. The trial court also found as a matter of fact that all the accused persons before it including A-5 Daddan Yadav and A-6 Ram Pratap Yadav were members of an unlawful assembly with a common object of causing the death of deceased. Therefore, they were also convicted along with other accused persons for an offence punishable under section 302 read with section 149 among other offences. The High Court did not give a finding that these accused persons were not the members of an unlawful assembly and accepts the fact that they were present at the time of the incident but rather surprisingly proceeds to give a finding in the following terms :

" A perusal of the FIR shows that no role has been assigned to appellants Daddan and Ram Pratap. There is no allegation in it that they had used knife and 'Dav' in the

incident. From the post mortem report Ext.

Ka-3, also the use of Dav is excluded. Thus, the complicity of appellant Ram Pratap in the incident is ruled out. He had wrongly been convicted under Sections 143, 148, 302/149, 307, 504, 506 IPC. So far as appellant Daddan is concerned, he is said to have been armed with a knife. Neither in the FIR, nor in the ocular evidence, there is any mention that he used his knife on any of the deceased or to injure Ram Kripal. In these circumstances, his participation in the incident is also ruled out and his conviction cannot be justified."

We are unable to agree with the above finding of the High Court on facts and circumstances of the case. It is the prosecution case right from the stage of the complaint that these two accused persons had enmity with the deceased Abid Ali. They along with four other named accused and two other unnamed accused came together armed and remained members of the unlawful assembly till the attack on the deceased was over. This part of the prosecution case is accepted even by the High Court. If that be so, assuming for argument's sake that there is no material to show that these two accused persons took any part in the attack, that by itself would not take away the liability of these persons from being members of an unlawful assembly unless the High Court had given a specific finding either that they were not the members of the unlawful assembly at all or at any particular point of time they ceased to be the members of the said unlawful assembly. The High Court did not give any such finding. On the contrary, it proceeds as if the members of an unlawful assembly who do not commit any overt act are exonerated of the liability of being a member of an unlawful assembly. The trial court has held that the common object of the unlawful assembly was to attack and kill Abid Ali but in the process they also killed Mahmood Shah and convicted the accused on that basis. The High Court, as stated above, has nowhere held that these two accused persons, who are respondents in the State appeal before us, were not the members of the unlawful assembly or that they did not share the common object of that assembly. In our opinion on the facts of this case such a finding could not have been arrived at because evidence in this case shows these accused also had the motive, they were present throughout and escaped together. Once these facts are accepted it is difficult to exclude these accused from the liability under section 149 I.P.C.

The trial court even found that these two accused persons also carried deadly weapons and some of the injuries found on the dead body could be attributed to the weapons carried by them. Of course, the High Court differs with the trial court in this regard that there was no corresponding injury which could be attributed to the weapon carried by these appellants but that by itself, in our opinion, is not sufficient to extricate these two accused persons from the charge of being members of an unlawful assembly which attacked and killed Abid Ali and Mahmood Shah. It is trite law that a person who is a member of an unlawful assembly even if he does not commit any overt act but shares the common object of such an unlawful assembly, will be liable for the consequences of the same. We do not think that this principle in law requires any precedent to be relied upon but if need be, the same could be found in the judgment of this Court in the case of Yunis alias Kariya v. State of M.P. (2003 1 SCC 425) wherein this Court has held that "Even if no overt act is imputed to a particular person, when the charge is under Section 149 IPC, the presence of the accused as part of an unlawful assembly is sufficient for conviction. The fact that the accused was a member of the

unlawful assembly is sufficient to hold him guilty."

In view of the above principle in law, since the trial court has found these respondent-accused guilty of being members of an unlawful assembly with the common object of causing the murder of the deceased, and the High Court having not differed from the said finding, it erred in acquitting these respondent- accused solely on the ground that there is no evidence to show that they had taken part in the actual assault. In our opinion, assuming that the High Court was correct in coming to the conclusion that these respondent-accused have not taken part in the attack even then they having come together with the other accused armed, and having been members of the unlawful assembly and having shared the common object, they will be guilty of an offence punishable under section 302 read with section 149 IPC.

For the reasons stated above, we are not in agreement with the finding of the appellate court in regard to the reasons given by it as to the acquittal of Daddan Yadav, Ram Pratap Yadav, hence, the State appeal has to succeed.

For all these reasons, we dismiss Crl. Appeal Nos. 1072- 1073/2003 and allow Crl. Appeal Nos.1074-75/2003 of the State, set aside the judgment of the High Court and restore that of the trial court. The respondents in the said appeal, if on bail, shall surrender to their bail bonds and serve out the sentence awarded to them by the trial court.