

Kuldip Yadav & Ors vs State Of Bihar on 11 April, 2011

Equivalent citations: AIR 2011 SUPREME COURT 1736, 2011 (5) SCC 324, 2011 AIR SCW 2404, AIR 2011 SC (CRIMINAL) 1039, 2011 (2) AIR JHAR R 743, 2011 (3) AIR KANT HCR 215, (2011) 3 CHANDCRIC 7, (2011) 3 JCR 116 (SC), (2011) 3 MH LJ (CRI) 590, (2011) 101 ALLINDCAS 9 (SC), (2011) 2 RECCRIR 820, 2011 (2) CALCRILR 553, 2011 (4) SCALE 543, 2011 (2) SCC(CRI) 632, 2011 (3) KCCR 309 SN, (2011) 2 CURCRIR 185, (2011) 4 SCALE 543, (2011) 2 DLT(CRL) 211, (2011) 2 MADLW(CRI) 1, (2011) 4 MAD LJ(CRI) 129, (2011) 73 ALLCRIC 712, (2011) 2 ALLCRILR 369, 2011 (2) ALD(CRL) 112

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Bench: H.L. Gokhale, P. Sathasivam

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 531 OF 2005

Kuldip Yadav & Ors.

.... Appellant(s)

Versus

State of Bihar

.... Respondent(s)

WITH

CRIMINAL APPEAL NO. 532 OF 2005

AND

CRIMINAL APPEAL NO. 534 OF 2005

J U D G M E N T

P.Sathasivam,J.

1) These appeals are directed against the common judgment and final order dated 26.09.2003 passed by the Division Bench of the High Court of Patna in Criminal Appeal Nos. 293, 307, 311 and 371 of 2000 whereby the High Court upheld the judgment and order dated 26/27.06.2000 passed by the Ist Addl. District & Sessions Judge, Nawadah in Sessions Trial No. 333/97/40/97 convicting the appellants herein for the offence punishable under Section 302 of the Indian Penal Code (in short the "IPC") read with Section 27 of the Arms Act, 1959, Section 302 read with Section 149 of the IPC and Section 324 read with Section 149 of the IPC and maintained the sentences imposed upon them.

2) Brief facts:

(a) The present group of appeals arises out of FIR No. 11 of 1997 registered at Police Station Govindpur, at the instance of one Naresh Yadav (PW-9) leading to Session Trial No. 333/97/40/97 at the Court of Ist Addl. District & Sessions Judge, Nawadah.

(b) There was a cross FIR No. 12 of 1997 registered at the same Police Station at the instance of one Sunil Yadav (accused No.9 in FIR No. 11 of 1997) which was lodged at the instance of the accused in FIR No. 11 of 1997.

(c) According to Naresh Yadav (PW-9)-the informant in FIR No. 11 of 1997, on 28.04.1997, at 9:00 a.m., all of a sudden, Brahamdeo Yadav, Darogi Mahto, Maho Yadav, Paro Mahto, Kuldeep Yadav, Sudhir Yadav, Sunil Yadav s/o Bale Yadav, Bale Yadav, Shiv Nandan Yadav, Sunil Yadav s/o Musafir Yadav and Suraj Yadav armed with Saif, Bhala, lathis and gun came in a mob where Suresh Yadav- informant's elder brother, since deceased, was getting his diesel machine repaired through a mechanic Mohan Yadav. It was alleged that accused Brahamdeo Yadav @ Bhonu Yadav shot a fire at Suresh Yadav in the abdomen and when he went to help him, Sunil Yadav gave a saif blow causing injury on his lips. It was also alleged that on hearing alarm Munshi Yadav, Ganuari Yadav and Bindeshwar Yadav had come and they were also subjected to assault by the accused persons. He also told that the victim Suresh Yadav died on the way while being taken to the hospital.

(d) On the basis of the farde bayan of Naresh Yadav-the informant, FIR No. 11/97 was registered with Govindpur Police Station under Sections 147, 148, 149, 323, 324, 307 and 302 IPC against Brahamdeo Yadav, Sunil Yadav s/o Bale Yadav, Darogi Mahto, Maho Yadav, Paro Mahto, Kuldeep Yadav, Sudhir Yadav, Bale Yadav, Shiv Nandan Yadav and Suraj Yadav. Sunil Yadav s/o Musafir Yadav was instituted.

On 29.04.1997, S.I. Anil Kumar Gupta recorded the statement of Sunil Yadav s/o Musafir Yadav at Nawadah Sadar Hospital and on the basis of his statement FIR No. 12/97 was registered with Govindpur Police Station under Sections 147, 148, 149, 323, 324, 307 and 447 IPC against (i) Upendra Yadav (ii) Rambalak Yadav (iii) Basudev Yadav (iv) Anil Yadav

(v) Ganuari Yadav (vi) Damodar Yadav (vii) Suresh Yadav (viii) Umesh Yadav (ix) Muni Yadav (x) Naresh Yadav and (xi) Manager Yadav. The investigations in both the FIRs were taken by S.I. Mohd. Shibli, Officer-in-charge of Govindpur Police Station.

(e) After investigation, charge sheet No. 12/97 was submitted in FIR No. 11/97 and charge sheet bearing No. 36/97 was submitted in FIR No. 12/97 against the accused persons and thereafter the case was committed to the Court of Sessions Judge and registered as Sessions Trial No. 333/97/40/97.

(f) The prosecution examined ten witnesses in support of its claim, namely, Dr. Bipul Kumar, PW-1, Dr. R.K. Bibhuti, PW-

2, Ganuari Yadav, PW-3, Bindeshwar Prasad @ Manager Yadav, PW-4, Basudeo Yadav, PW-5, Kesho Yadav, PW-6, Munshi Yadav, PW-7, Minta Devi, PW-8, Naresh Yadav, PW-9 and Md. Shibli, Officer-in-Charge, Nawadh PS. PW-10.

(g) After completion of the trial, learned Sessions Judge convicted all the accused for the offences punishable under Sections 302, 324 read with 149 IPC and sentenced them to undergo rigorous imprisonment for life and further imprisonment of two years.

(h) Aggrieved by the order passed by the trial Judge, the accused preferred different sets of appeals, namely, Criminal Appeal Nos. 293, 307, 311 and 371 of 2000 before the High Court of Patna. By the impugned judgment and order, after accepting the prosecution case, the Division Bench of the High Court upheld the judgment of the Sessions Judge and dismissed all the appeals.

(i) Aggrieved by the decision of the High Court, Paro Mahto (A5), Kuldip Yadav (A6), Sudhir Yadav (A7) filed Criminal Appeal No. 531 of 2005, Brahamdeo Yadav (A1) filed Criminal Appeal No. 532 of 2005 and Darogi Mahto (A2), Bale Yadav (A8) and Suraj Yadav (A11) filed Criminal Appeal No. 534 of 2005 before this Court.

3) Heard Mr. Rajan K. Chourasia learned counsel for the appellants in Criminal Appeal Nos. 531 & 534 of 2005, Mr. J.P.N Gupta, learned amicus curiae for the appellant in Criminal Appeal No. 532/2005 and Mr. Manish Kumar, learned counsel for the respondent-State.

4) On the basis of the farde bayan of the informant Naresh Yadav, F.I.R. No. 11/97 was registered with Govindpur P.S. under Sections 147, 148, 149, 323, 324, 307 and 302 IPC against Brahmdeo Yadav, Sunil Yadav, Darogi Mahto, Maho Yadav, Paro Mahto, Kuldeep Yadav, Sudhir Yadav, Bale Yadav, Shiva Nandan Yadav and Suraj Yadav. Sunil Yadav was instituted.

5) On 29.04.1997, about 5:30 a.m., at Nawada Sadar Hospital, SI Anil Kumar Gupta recorded the statement of Sunil Yadav s/o Musafir Yadav and on the basis of his statement FIR No 12/97 was registered with Govindpur P.S under Sections 147, 148, 149, 323, 324, 307, 447 IPC against Upendra Yadav, Rambalak Yadav, Basudev Yadav, Anil Yadav, Manager Yadav, Ganuari Yadav, Damodar Yadav, Suresh Yadav, Umesh Yadav, Muni Yadav and Naresh Yadav.

6) The investigation in both FIRs was taken by SI Md.

Shivli, Officer-in-charge, Govindpur Police Station. The charge-sheet bearing no. 12/97 was submitted in FIR No. 11/97 P.S. Govindpur, on 30.06.1997 against Brahamdeo Yadav, Sunil Yadav, Darogi Mahto, Maho Yadav, Paro Mahto, Kuldeep Yadav, Sudhir Yadav, Bale Yadav, Shivan Yadav and Suraj Yadav and Sunil Yadav who was later instituted.

7) The charge sheet bearing no. 36/97 was also submitted in FIR No. 12/97 P.S. Govindpur, on 17.12.1997 against Upendra Yadav, Rambalak Yadav, Basudev Yadav, Anil Yadav, Manager Yadav, Ganuari Yadav, Damodar Yadav, Umesh Yadav, Muni Yadav and Naresh Yadav except Suresh Yadav s/o Kesho Yadav as he had died. The cognizance was taken by the Court and charge was framed under Section 307 and 149 IPC.

8) It was highlighted that the prosecution witnesses are not certain about the place of death of the deceased Suresh Yadav.

At least three eye-witnesses stated, either in their statement under Section 164 of the Code of Criminal Procedure, 1973 (in short the "Code") or during their examination under Section 313 that the deceased died at the spot which is contrary to the statement of Naresh Yadav (PW-9) eye-witness who stated that he died on the way to hospital and which is consistent with the statement of Sunil Yadav informant in FIR No 12/97.

Sunil Yadav stated in his farde bayan that during altercation Suresh Yadav received fire-arm injury which was shot by Upendra Yadav and died. A perusal of the documents and cross examination on behalf of the accused persons probabalize the version of the accused as set up in FIR No. 12/97 which culminated into charge sheet No. 36/97 against the informant/prosecution party.

Procedure in respect of cross cases

9) In order to understand the above issue, it is useful to refer Section 223 (d) of the Code which reads as under:

"223. What persons may be charged jointly.--The following persons may be charged and tried together, namely:--

(a) xx

(b) xx

(c) xx

(d) persons accused of different offences committed in the course of the same transaction;

(e) xx

(f) xx

(g) xx"

10) The above provision has been interpreted by this Court in the following decisions. In Harjinder Singh vs. State of Punjab and Ors. (1985) 1 SCC 422, the question before the Court was whether under Section 223 of the Code it is permissible for the Court to club and consolidate the case on a police challan and the case on a complaint where the prosecution versions in the police challan case and the complaint case are materially different, contradictory and mutually exclusive. The question was whether the Court should in the facts and circumstances of the case direct that the two cases should be tried together but not consolidated i.e. the evidence be recorded separately in both cases and they may be disposed of simultaneously except to the extent that the witnesses for the prosecution which are common to both may be examined in one case and their evidence be read as evidence in the other. After analyzing the factual details, this Court has concluded:-

"8. In the facts and circumstances of this particular case we feel that the proper course to adopt is to direct that the two cases should be tried together by the learned Additional Sessions Judge but not consolidated i.e. the evidence should be recorded separately in both the cases one after the other except to the extent that the witnesses for the prosecution who are common to both the cases be examined in one case and their evidence be read as evidence in the other. The learned Additional Sessions Judge should after recording the evidence of the prosecution witnesses in one case, withhold his judgment and then proceed to record the evidence of the prosecution in the other case. Thereafter he shall proceed to simultaneously dispose of the cases by two separate judgments taking care that the judgment in one case is not based on the evidence recorded in the other case....."

(underlining supplied)

11) In *Balbir vs. State of Haryana & Anr.* (2000) 1 SCC 285, this Court considered clauses (a) and (d) of Section 223 of the Code and held that the primary condition is that persons should have been accused either of the same offence or of different offences "committed in the course of the same transaction". The expression advisedly used is "in the course of the same transaction". That expression is not akin to saying "in respect of the same subject-matter". For several offences to be part of the same transaction, the test which has to be applied is whether they are so related to one another in point of purpose or of cause and effect, or as principal and subsidiary, so as to result in one continuous action. Thus, where there is a commonality of purpose or design, where there is a continuity of action, then all those persons involved can be accused of the same or different offences "committed in the course of the same transaction".

12) In *Lalu Prasad vs. State thr. CBI* (2003) 11 SCC 786, this Court held that amalgamation of cases under Section 223 is discretionary on the part of trial Magistrate and he has to be satisfied that persons would not be prejudicially affected and that it is expedient to amalgamate cases.

13) Regarding the argument based on Section 210(2) of the Code, it is useful to refer the decision of this Court reported in *Pal @ Palla vs. State of U.P.* (2010) 10 SCC 123 which reads as under:-

"27. Sub-section (2) of Section 210 provides that if a report is made by the investigating officer under Section 173 and on such report cognizance of any offence is taken by the Magistrate against any person, who is an accused in a complaint case, the Magistrate shall inquire into or try the two cases together, as if both the cases had been instituted on a police report. Sub-section (3) provides that if the police report does not relate to any accused in the complaint case, or if the Magistrate does not take cognizance of any offence on a police report, he shall proceed with the inquiry or trial which was stayed by him, in accordance with the provisions of the Code.

28. Although it will appear from the above that under Section 210 CrPC, the Magistrate may try the two cases arising out of a police report and a private complaint together, the same, in our view, contemplates a situation where having taken cognizance of an offence in respect of an accused in a complaint case, in a separate police investigation such a person is again made an accused, then the Magistrate may inquire into or try together the complaint case and the case arising out of the police report as if both the cases were instituted on a police report. That, however, is not the fact situation in the instant case, since the accused are different in the two separate proceedings and the situation has, in fact, arisen where prejudice in all possibility is likely to be caused in a single trial where a person is both an accused and a witness in view of the two separate proceedings out of which the trial arises.

30.As was observed in *Harjinder Singh* case¹ clubbing and consolidating the two cases, one on a police challan and the other on a complaint, if the prosecution versions in the two cases are materially different, contradictory and mutually exclusive, should not be consolidated but should be tried together with the evidence in the two cases being recorded separately, so that both the cases could be disposed of

simultaneously."

14) In the case on hand, we have already noted that the investigation was conducted by the same I.O. in respect of the incident that took place on 28.04.1997 at Khalihan. Though in the cross-case, that is, FIR No. 12/97, a complaint was made on the next day i.e. on 29.04.1997 at about 5:30 A.M., from the materials available, both the cases relate to the incident that took place at 9 A.M. on 28.04.1997 which is also clear from the following information.

FIR No. 11/97 P.S. GOVINDPUR FIR No. 12/97 P.S. GOVINDPUR Informant-Naresh Yadav (PW-9) Informant-Sunil Yadav (A9 in FIR 11/97) Chargesheet submitted on 30.06.1997 Chargesheet submitted on Charge was framed on 19.03.1999 17.12.1997 Date of Judgment of Trial Court: 27.06.2000 Date of Judgment of Trial Court: 18.11.2009 Accused Persons Accused Persons

1. Brahamdeo Yadav @ Bhonu Yadav (Gun) 1. Upendra Yadav (Pistol)
 2. Darogi Mahto (Gun) 2. Rambalak Yadav (Gun)
 3. Maho Yadav (Gun) 3. Basudev Yadav
 4. Sunil Yadav s/o Bale Yadav (Gun) (Gandassa)
 5. Paro Mahto (Lathi) 4. Anil Yadav (Gandassa)
 6. Kuldip Yadav (Gandassa) 5. Bindeshwar Yadav @
 7. Sudhir Yadav (Bhala) Manager Yadav
 8. Balle Yadav (Gandassa) (Gandassa)
 9. Sunil Yadav s/o Musafir Yadav (Saif) 6. Ganori Yadav (Informant in FIR No. 12/97) (Gandassa)
 10. Shivan Yadav (Gandassa) 7. Damodar Yadav (Stick)
 11. Suraj Yadav (Bhala) 8. Suresh Yadav (Stick)
 9. Umesh Yadav (Stick)
 10. Muni Yadav (Gandassa)
 11. Naresh Yadav (Gandassa) Injury to deceased Suresh Injured Person
1. An oral lacerated wound of =" diameter 1. Brahamdeo Yadav @ With inverted and charred margin, =" Bhonu Yadav (A1 in right to umbilicus of uncertain depth i.e. FIR 11/97) wound of entry
2. Sunil Yadav (A9 in FIR

2. Multiple bruises of size 3" x 2" to 1" x = " 11/97) four 3. Musafir Yadav in number over back right lower chest and abdomen Injured Persons

1. PW-3 Ganauri Yadav (A6 in FIR 12/97)

2. PW-4 Bindeshwar Yadav @ Manager Yadav (A5 in FIR 12/97)

3. PW-7 Munshi Yadav (A10 in FIR 12/97)

4. PW-9 Naresh Yadav (A11 in FIR 12/97)

15) In view of the above factual details coupled with the statements made by prosecution witnesses and in the light of the principles enunciated by this Court, the Investigating Officer ought to have brought to the notice of the trial Judge about the two FIRs arising out of the same incident to avoid gross injustice to the parties concerned.

Discrepancies in the prosecution witnesses

16) Among various witnesses examined by the prosecution, it heavily relied on the evidence of Naresh Yadav (PW-9), Ganauri Yadav (PW-3), Bindeshwar Yadav (PW-4), Kesho Yadav (PW-6), Munshi Yadav (PW-7), Minta Yadav (PW-8) and Dr. R.K. Bibhuti (PW-2).

17) First, let us discuss the evidence of Naresh Yadav (PW-9).

He is the informant and Suresh Yadav- the deceased was his brother. According to him, on Monday, i.e. on 28.04.1997, he along with Suresh, Ganauri Yadav and Bindeshwar Yadav were busy in getting the diesel machine repaired. Brahmdeo Yadav, Darogi Mahto, Sunil S/o Bale Yadav, Maho Yadav, Kuldeep Yadav, Bale Yadav, Suraj Yadav, Shiv Nandan Yadav, Sunil Yadav S/o Musafir Yadav, Sudhir Yadav and Paro Mahto, total 11 persons forming a group came there and surrounded them. Brahmdeo Yadav, Sunil Yadav, Darogi Mahto and Maho Yadav were armed with rifle. Bale Yadav, Kuldeep Yadav, Shiv Nandan Yadav and Suraj Yadav were armed with Gandassa. Sunil Yadav S/o Musafir Yadav was having saif in his hand. Sudhir Yadav was having spear with him and Paro Mahto was having lathi in his hand. The abovesaid persons surrounded them whereupon they started running when Brahmdeo Yadav fired shot from rifle hitting the abdomen of Suresh Yadav. He further deposed that when he went to help Suresh to get up, Sunil Yadav (A-4) using his saif hit him on his upper lip. Bale Yadav (A-8) gave a Gandassa blow on the neck of Ganauri Yadav and while stopping the blow with his right hand, he sustained injury on his palm.

Kuldeep Yadav also gave him a Gandassa blow on the right hand. Shiv Nandan and Suraj Yadav too gave Gandassa blows to Ganauri Yadav. Sudhir Yadav using Gandassa hit on the forehead of Bindeshwar Yadav. Kuldeep Yadav gave gandassa blow to Munshi Yadav. Paro Mahto also beat Ganauri Yadav with lathi. While they were taking Suresh to Govindpur Hospital, just after some distance, he died on the way. When they reached Govindpur Hospital, S.I. recorded his statement.

In his statement under Section 164 of the Code, he has not mentioned all the above details. According to him, Suresh was alive at the spot but he died on the way to Govindpur Hospital.

Even, in respect of use of weapons by the accused, he was not consistent with his earlier statement made under Section 164 of the Code. He also admitted that S.I. seized blood stained earth in his presence. He also stated that even though S.I. saw the clothes having blood spots but he did not seize them.

He also asserted that at the relevant time, he was repairing diesel engine and Mohan-Mechanic was present at that time.

In cross-examination, he also admitted that there is another counter case against the very same incident and he informed the court that on that day he did not see any injury on the person of Brahmdeo (A-1), Sunil Yadav (A-9) and Musafir Yadav. He also answered that when Suresh was running ahead of all of them, he was hit by a bullet on his abdomen. It is not the case of any one that Suresh was running towards the accused. On the other hand, it is their definite case that the accused persons were chasing and Suresh and others were running to escape from them. In such circumstances, there is no plausible explanation how the bullet hit Suresh Yadav - the deceased, on his abdomen. From his evidence, it is clear that though diesel mechanic-Mohan was present, he denied his relationship with him in the statements made later on. It was put to him that incident did not actually take place as stated and all accused were not present. It is also clear from his evidence that injury on the accused was not seen by him.

18) The next witness heavily relied on by the prosecution is Munshi Yadav (PW-7). According to him, accused persons were armed and Brahmdeo Yadav (A1) fired a shot from gun which hit Suresh Yadav on his abdomen and he fell on the ground and when Ganauri Yadav (PW-3) went for his rescue, five accused persons, namely, Bale Yadav (A8), Kuldeep Yadav (A6), Sunil Yadav (A4), Suraj Yadav (A11) and Shiv Nandan Yadav (A10), all armed with deadly weapons, started beating him. Suresh Yadav died on the way to hospital. His evidence also makes it clear that he did not deny the presence of mechanic-Mohan at the place of occurrence. According to him, the incident started when diesel engine was about to start. A specific suggestion was put to him that Suresh Yadav died from the bullet fired by Upendra Yadav. It is relevant to note the conduct of (PW-7). He admitted in his evidence that after the incident, he went to take the cow for grazing. It is unnatural that after having seen the incident, without associating with his fellow villagers about the crime, he coolly went for grazing his cow which is unbelievable.

19) Another witness relied on by the prosecution is Bindeshwar Prasad @ Manager Yadav (PW-4). In his evidence, he mentioned 17 persons as accused who were present at the place of occurrence and, according to him, on seeing them, he got afraid of his life but did not run away and remained standing. He said, when bullet hit Suresh, they started running. He further deposed that except Suresh Yadav, no other fell down due to beating, all continued running and some of them reached their homes and some remained there.

He has not only added more names as accused persons but also asserted that the bomb was exploded after firing of shots.

He also mentioned that Suresh Yadav died on the way to hospital. A specific suggestion was also given to this witness that Suresh Yadav died from the bullet fired by Upendra Yadav. Here again, by drawing our attention to his statement under Section 164 of the Code, it was pointed out that there were lot of contradictions and inconsistencies in respect of vital aspects.

20) The next witness relied on by the prosecution is Ganauri Yadav (PW-3). Like Bindeshwar Yadav (PW-4), he also named 17 persons as accused who came at the place of occurrence and (A1) fired from gun hitting the abdomen of Suresh Yadav and other accused persons started beating. He said when he fell down, he was not hit on neck with gandassa. He asserted that Suresh Yadav died on the spot. He received one blow of spear and two blows of gandassa. He explained that the said blow of spear was given by poking it into his body and not like hitting with a lathi. He further deposed that the attack with spear caused a hole in the vest also. As stated earlier, he asserted that Suresh Yadav died at the place of occurrence itself, which is not in tune with the statement of other prosecution witnesses. He said that blood did not fall on diesel engine, however, it fell at the spot. He also informed the Court that the blood oozed out from the wounds of all the injured and its stains were present up to Govindpur hospital.

He admitted that he did not see any injury on the persons of accused. He admitted that he was not in full sense when he made the statement to S.I. under Section 164 of the Code. He also referred to the use of bomb which was kept in a bag, though, he did not say the same before the court.

21) Another witness relied on by the prosecution is Kesho Yadav (PW-6)-father of the deceased. He admitted that he had diesel engine in the field towards north of village. His sons, namely, Suresh Yadav and Naresh Yadav were repairing the said engine for irrigation purposes. At that time, all the accused Brahmdeo Yadav (A1), Darogi Mahto (A2), Maho Yadav (A3), Sunil Yadav (A4) armed with guns in their hands, accused Kuldip Yadav, Shiv Nandan Yadav, Baleshwar, Suraj with gandassas, Sunil Yadav with saif, Sudhir yadav with spear and Paro Mahto with lathi came there. He further explained that immediately on coming there, the accused persons surrounded them and when they started running, they were caught in the field of Aziz Mian. Accused Brahmdeo Yadav (A1) fired from gun and the bullet hit the abdomen of Suresh Yadav and he fell down. Naresh Yadav went to lift Suresh from the ground when Sunil Yadav hit him with saif causing injury to his lips. When Ganauri Yadav went to pick him up, Kuldeep Yadav hit on his neck using gandassa. He also asserted that his son Suresh Yadav died at the spot itself.

He further informed the court that the bullet made a hole in the vest of his son and the cloth got cut edges and that was handed over to the police.

22) Another witness examined on the side of the prosecution is Dr. Basudeo Yadav (PW-5). He attested the seizure memo which was prepared by SI before him. He also admitted that Naresh Yadav affixed his thumb impression before him and he was present there. He did not say anything about the occurrence. Minta Devi (PW-8)-wife of the deceased, also did not elaborate anything

about the incident.

23) Dr. R.K. Bibhuti, who treated injured Naresh Yadav (PW-

9) and other injured witnesses was examined as (PW-2). He examined Naresh Yadav, Munshi Yadav, Ganauri Yadav, Bindeshwar Yadav and after treatment issued a certificate about the same. Dr. Bipul Kumar, who conducted the autopsy on the body of the deceased was examined as PW-1 and found the following ante-mortem injuries:-

"(1) An oval lacerated wound of 1/2" diameter with inverted and charred margin, half inch right to illeg. of uncertain depth, i.e. wound of entry.

(2) Multiple bruises of size 3"x2" to 1"x1/2", in four in number over back, right lower chest and abdomen.

On dissection abdominal cavity filled with blood and blood clot, multiple perforations four in number of small intestine locum and transverse colon, linear ruptured, a metallic foreign body like bullet of 1 =" length and 1/6"

in diameter was lodged at L/1 spine after piercing the abdominal aorta. Rest viscera were intact and pale, stomach contains fluids about 100 ml. Bladder empty, heart all chambers empty.

Cause of death - hemorrhage and shock produced by above noted injuries. Injury No. 1 caused by firearm such as gun. Injury No. 2 caused by hard and blunt object such as lathi."

24) The analysis of the evidence of R.K. Bibhuti (PW-2) and the evidence of injured persons about the nature of injury contradict each other. The analysis of witnesses examined on the side of the prosecution clearly show that they were not able to identify the actual place of occurrence, namely, whether the incident happened near the diesel engine or in the field of Aziz Mian. They all had a different version about the nature of injuries and they are not consistent whether the deceased died at the spot or on the way to hospital or in the hospital. All these contradictions, uncertainties cannot be ignored lightly when some of the accused also suffered bullet injuries in the same incident, which is a cross case, namely, FIR No. 12/97.

Conviction under Section 149 IPC

25) Apart from conviction under Section 302, all the accused were also convicted under Section 149 IPC. Learned counsel appearing for the appellants demonstrated that, first of all, there was no common object, even if, it is admitted that there was a common object, the same was not known to anybody, in such circumstances, punishment under Section 149 IPC is not warranted. On the other hand, learned counsel appearing for the State submitted that when the charge is under Section 149 IPC, the presence of the accused as part of unlawful assembly is sufficient for conviction, even if, no

overt act is imputed to them. In other words, according to him, mere presence of the accused as part of unlawful assembly is sufficient for conviction. In order to understand the rival claim, it is useful to refer Section 149 which reads as follows:-

"149. Every member of unlawful assembly guilty of offence committed in prosecution of common object.--If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence."

26) The above provision makes it clear that before convicting accused with the aid of Section 149 IPC, the Court must give clear finding regarding nature of common object and that the object was unlawful. In the absence of such finding as also any overt act on the part of the accused persons, mere fact that they were armed would not be sufficient to prove common object. Section 149 creates a specific offence and deals with punishment of that offence. Whenever the court convicts any person or persons of an offence with the aid of Section 149, a clear finding regarding the common object of the assembly must be given and the evidence discussed must show not only the nature of the common object but also that the object was unlawful. Before recording a conviction under Section 149 IPC, essential ingredients of Section 141 IPC must be established. The above principles have been reiterated in Bhudeo Mandal and Others vs. State of Bihar (1981) 2 SCC

755.

27) In Ranbir Yadav vs. State of Bihar (1995) 4 SCC 392, this Court highlighted that where there are party factions, there is a tendency to include the innocent with the guilty and it is extremely difficult for the court to guard against such a danger. It was pointed out that the only real safeguard against the risk of condemning the innocent with the guilty lies in insisting on acceptable evidence which in some measure implicates such accused and satisfies the conscience of the court.

28) In Allauddin Mian and others Sharif Mian and another vs. State of Bihar (1989) 3 SCC 5, this Court held:-

"...Therefore, in order to fasten vicarious responsibility on any member of an unlawful assembly the prosecution must prove that the act constituting an offence was done in prosecution of the common object of that assembly or the act done is such as the members of that assembly knew to be likely to be committed in prosecution of the common object of that assembly. Under this section, therefore, every member of an unlawful assembly renders himself liable for the criminal act or acts of any other member or members of that assembly provided the same is/are done in prosecution of the common object or is/are such as every member of that assembly knew to be likely to be committed. This section creates a specific offence and makes every member of the unlawful assembly liable for the offence or offences committed in the course of the occurrence provided the same was/were committed in

prosecution of the common object or was/were such as the members of that assembly knew to be likely to be committed. Since this section imposes a constructive penal liability, it must be strictly construed as it seeks to punish members of an unlawful assembly for the offence or offences committed by their associate or associates in carrying out the common object of the assembly. What is important in each case is to find out if the offence was committed to accomplish the common object of the assembly or was one which the members knew to be likely to be committed. There must be a nexus between the common object and the offence committed and if it is found that the same was committed to accomplish the common object every member of the assembly will become liable for the same. Therefore, any offence committed by a member of an unlawful assembly in prosecution of any one or more of the five objects mentioned in Section 141 will render his companions constituting the unlawful assembly liable for that offence with the aid of Section 149, IPC...."

29) It is not the intention of the legislature in enacting Section 149 to render every member of unlawful assembly liable to punishment for every offence committed by one or more of its members. In order to attract Section 149, it must be shown that the incriminating act was done to accomplish the common object of unlawful assembly and it must be within the knowledge of other members as one likely to be committed in prosecution of the common object. If the members of the assembly knew or were aware of the likelihood of a particular offence being committed in prosecution of the common object, they would be liable for the same under Section 149 IPC.

30) In *Rajendra Shantaram Todankar vs. State of Maharashtra and others* (2003) 2 SCC 257=2003 SCC (Crl.) 506, this Court has once again explained Section 149 and held as under:

"14. Section 149 of the Indian Penal Code provides that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who at the time of the committing of that offence, is a member of the same assembly is guilty of that offence. The two clauses of Section 149 vary in degree of certainty. The first clause contemplates the commission of an offence by any member of an unlawful assembly which can be held to have been committed in prosecution of the common object of the assembly. The second clause embraces within its fold the commission of an act which may not necessarily be the common object of the assembly, nevertheless, the members of the assembly had knowledge of likelihood of the commission of that offence in prosecution of the common object. The common object may be commission of one offence while there may be likelihood of the commission of yet another offence, the knowledge whereof is capable of being safely attributable to the members of the unlawful assembly. In either case, every member of the assembly would be vicariously liable for the offence actually committed by any other member of the assembly. A mere possibility of the commission of the offence would not necessarily enable the court to draw an inference that the likelihood of commission of such offence was within the knowledge of every member of the unlawful assembly. It is difficult indeed, though not

impossible, to collect direct evidence of such knowledge. An inference may be drawn from circumstances such as the background of the incident, the motive, the nature of the assembly, the nature of the arms carried by the members of the assembly, their common object and the behaviour of the members soon before, at or after the actual commission of the crime. Unless the applicability of Section 149 -- either clause -- is attracted and the court is convinced, on facts and in law, both, of liability capable of being fastened vicariously by reference to either clause of Section 149 IPC, merely because a criminal act was committed by a member of the assembly every other member thereof would not necessarily become liable for such criminal act. The inference as to likelihood of the commission of the given criminal act must be capable of being held to be within the knowledge of another member of the assembly who is sought to be held vicariously liable for the said criminal act...."

The same principles have been reiterated in State of Punjab vs. Sanjiv Kumar alias Sanju and others (2007) 9 SCC 791.

Summarization of the principles attracting S.149

31) In the earlier part of our order, we have analysed the evidence led in by the prosecution and also pointed out several infirmities therein. In our view, no overt act had been attributed to any other accused persons except Brahmdeo Yadav (A1) towards the murder of Suresh Yadav. Had the other accused persons intended or shared the common object to kill Suresh Yadav, they must have used the weapons allegedly carried by them to facilitate the alleged common object of committing murder. The Sessions Judge, on analysis, held that no case under Section 307/149 against all the 11 accused persons be made out for causing murderous assault and hurt to Naresh Yadav, Munshi Yadav, Bindeshwar Yadav and Ganauri Yadav. The learned Judge further observed that it appears that at least 4 of the accused persons were armed with gun but no gun shot injury was inflicted against any of the aforesaid injured prosecution witnesses.

Had the accused persons intended to kill the witnesses, they must have used the surest weapon of committing murder i.e. gun against any of the aforesaid witnesses. In view of the fact that common object was not known to anybody and in the light of the principles enunciated over application of Section 149 IPC and with the available material on the side of the prosecution, we hold that it is not safe to convict the accused persons under Section 149 IPC.

32) Summary of all the issues:

a) Though both the FIRs (11/97 and 12/97) were investigated by the very same IO, he had not acted in good discipline and not drawn the attention of the trial Judge about the cross cases arising out of the same incident.

b) By reading the statement of prosecution witnesses under Section 164 of the Code and their evidence before the Court clearly show their improvements with due deliberation and consultation and in the absence of credible explanation, conviction

based on their testimony cannot be sustained.

c) The prosecution is not sure, especially about the actual place of occurrence since some witnesses demonstrated that it occurred near diesel engine and some said the occurrence had taken place in the field of Aziz Mian. We have already noted down the contradictions among the prosecution witnesses on material facts and it is not safe to convict all the accused based on the same.

d) Even, on description of injuries alleged to have been sustained, the details furnished by the prosecution witnesses and the medical evidence vary on material aspects.

e) Non-examination of diesel mechanic-Mohan Yadav is fatal to the prosecution case. Though, his presence at the scene of occurrence was mentioned by the prosecution witnesses under Section 164, it is not clear why the prosecution did not examine him.

f) Likewise, though the IO collected blood stained clothes and other objects including earth from the site, there is no information whether the same were examined by the forensic science laboratory and the outcome of the same.

g) There is no material to show that all the accused shared in common object, the object itself not being proved and their participation in it is not made out by credible evidence.

Without a clear finding regarding common object and participation therein by each one of the accused members, there can be no conviction with the aid of Section 149 IPC.

h) The place of occurrence has been shifted by informant and the investigating officer has admitted not making any site plan of the place of occurrence and casually acted on the basis of the statement of the informant without carrying its own investigation to ascertain the actual place of occurrence.

i) As it was morning time, at least some villagers in their routine work must have been present in neighbouring field who could have deposed regarding the occurrence and manner in which it did take place, if they were examined.

j) The injuries on the accused, particularly, fire arm injury on Brahmdeo Yadav has not been explained by the prosecution despite the fact that the informant parties were chargesheeted for causing those injuries on the person of Brahmdeo Yadav, Darogi Mahto, Musafir Yadav and Sunil Yadav.

k) The weapons alleged to be used in the offence were not seized and no effort was made to recover them. Hence, there is nothing on record to link the accused persons to the crime.

l) The blood stained clothes, blood stained earth of the place of occurrence were not sent to forensic laboratory for chemical examination.

m) The bullet found by the doctor who conducted the post-

mortem of the deceased was not seized and preserved for court's observation.

n) The version given by eye-witnesses who were also interested witnesses on account of their relationship with the deceased and being inimically deposed against the accused persons is highly exaggerated, contrary to each other and not fully corroborated with medical evidence and there are discrepancies about the number of accused persons, weapons and ammunitions carried by them and they are not in tune with what (PW-9) informant has stated in his deposition. In other words, the prosecution has not presented true version on most of the material parts and therefore the witnesses and material placed on their side does not inspire confidence and cannot be accepted on its face value.

o) The findings of the High Court and ultimate conclusion dismissing the appeals are perverse and resulted in failure of justice.

33) Under these circumstances, the impugned judgment of the High Court dated 26.09.2003 in Criminal Appeal Nos. 293, 307, 311 and 371 of 2000 and the judgment and order dated 26/27.06.2000 passed by the Ist Addl. District & Sessions Judge, in Sessions Trial No. 333/97/40/97 are set aside. All the accused are directed to be released forthwith unless their presence is required in some other case. Appeals are allowed.

.....J. (P. SATHASIVAM)J. (H.L. GOKHALE)
NEW DELHI;

APRIL 11, 2011.