(1987) 01 PAT CK 0001

Patna High Court

Case No: None

Ram Bali Thakur and Others		APPELLANT
	Vs	
State of Bihar		RESPONDENT

Date of Decision: Jan. 8, 1987

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 164
- Evidence Act, 1872 - Section 60
- Penal Code, 1860 (IPC) - Section 148, 201, 302, 34, 452

Citation: (1987) 01 PAT CK 0001

Hon'ble Judges: S.H.S. Abidi, J; P.S. Mishra, J

Bench: Division Bench

Judgement

1. In a pre-concerted attack in the morning of 4th March, 1975, it shall appear from the fact stated hereinafter, the appellants in a mob of 30-40 persons attacked Radheyshyam Thakur in the Courtyard of his house, who to save himself went into the house of his agnates which was contiguous to his house and concealed himself in the kitchen where P.W. 4 Imirti Devi was cooking food, but the members of the mob even entered into the said kitchen, dragged Radheyshyam, assaulted him in the Courtyard of Imirti Devi and also in the sahan with lathi, bhala and garasa. The appellants were, accordingly, charged under Sections 302/34 452 and 148 of the Indian Penal Code (for short "I.P.C."). In the eventual trial learned 2nd Additional District & Sessions Judge, Madhubani, has convicted the appellants under Sections 302/34 452 148 and 201 of the Indian Penal Code and suitably sentenced them for the said offences,

2. The police arrived at the house of Radheyshyam on information given to it by the Chaukidar (P.W. 11) who stated that in the night of the 3rd of March, 1975 there was some incident at the sradh of the sister-in-law of one Pragash Thakur (co-accused who is dead) about which he had also informed the police and in the morning of the 4th March,

1975 he had learnt that Ram Pragash and Ramsagar (both deceased) and appellant Ram Bali Thakur along with others were making preparation of committing arson etc. at the house of Radheyshyam. The police however, came but after the occurrence and recorded the fard-beyan of P.W. 7 Chandrika Devi the mother of Radheyshyam. Assistant Sub-Inspector Arjun Prasad (P.W. 10), who recorded the fard-beyan, also held local inspection and found blood at some places in the kitchen of Imirti Devi (P.W. 4), Courtyard and the darwaja and seized the same and prepared seizure list. He found some brick-bats, the roof of the kitchen broken at places and tiles removed and since the information revealed that the dead body of Radheyshyam had been taken to the burning ghat, he went in search thereof but found fresh signs of burning of dead body covered with fresh earth. He also found smell of kerosene oil in the ash and seized it. He also recovered from the river a bone which was cut from a certain body and sent it for examination to Darbhanga, Medical College Hospital, where it was medically examined by the Head of the Department of Forensic Science of the Darbhanga Medical College. P.W. 8 Dr. J. K. Lalla, who examined the said bone, found that it was that of a human male which was cut by a sharp cutting weapon. The Assistant Sub-Inspector of Police (P.W. 10) also prepared a sketch map of the place of occurrence, examined the witnesses and after completion thereof submitted charge-sheet. Pragash Thakur died before the trial and Ramsagar Thakur died during the trial. Initially appellant Rajeshwar Thakur had absconded and so declared by the Chief Judicial Magistrate, but subsequently he appeared and was also put on trial. In the eventual trial the appellants have been convicted as stated above.

3. P.W. 7 Chandrika Devi in her report stated that on the day of occurrence the deceased was washing his mouth in the Angan when the accused persons came. They included Ramsagar, Ram Pragrash (both dead) and appellants Ram Bali Thakur, Dharkan Thakur, Ram Rekha Thakur, Jugal Thakur, Jinis Thakur, Ramchandra Thakur alias Bauka and Baliram Thakur besides others. According to her report when the mob arrived Radheyshyam fled away in the Angan of Imirti Devi (P.W. 4) which was adjoining her house. She (P.W. 4) after a while went to the durukha and saw appellant Jinis Thakur with 3-4 persons dragging Radheyshyam out of Angan of (P.W. 4). They brought Radheshyam in the sahan of her darwaja. Appellant Ramchandra alias Bauka assaulted him with bhala at his chest. Appellant Ram Bali at Pakhura, and other persons assaulted him with lathi. In her deposition in the Court she has, however, said that appellant Rajeshwar assaulted Radheyshyam on his stomach and appellants Jeetan, Jinis, Jugal assaulted Radheyshyam with garsa and appellants Dharkan, Ramrekha, Baliram and Madan assaulted him with lathi. She has also said that Radheyshyam died on the spot and after his death the accused persons took his dead body towards east, that is to say towards river Kamala. P.W. 4 Imirti Devi has deposed that she was in her kitchen cooking food, when Radheyshyam came running inside the kitchen and bolted the door from within saying that a haseri was corning. Immediately following him the mob came and they pushed the door from outside. When the door, however, did not open, some members of the mob climbed on the roof, removed tiles etc. and from above appellant

Ramchandra alias Bauka gave a bhala blow on the chest of Radheyshyam, appellant Rambali gave a bhala blow on his pakhura, appellant Rajeshwar assaulted him with bhala on Punjara and appellant Kawal Kishore on stomach by bhala. They entered into the kitchen from the roof, broke open the doors and dragged Radheyshyam out of the kitchen and took him in the angan. Radheyshyam was assaulted in the angan and then taken to the sahan where too he was assaulted. P.W. 2 Sudama Devi, who has deposed that she was present in the Court-yard of Imirti Devi, has said that at the time of occurrence she saw Radheyshyam entering into the house of Imirti Devi followed by 30-40 persons constituting a mob. She then saw the mob dragging Radheyshyam and while assaulting him taking him to the sahan of the darwaja. P.W. 6, who is the son of Imirti Devi, has said that he was not in the house as he had gone to ease himself in the morning of the day in the fields but on hearing alarm he came and got himself concealed beneath a pillar standing northwest of the house of one Rajeshwar which was in front of his own house intervened by a road and from there he saw the members of the mob dragging out Radheyshyam from his Court-yard to the sahan and assaulting him. He has said that appellant Ramchandra alias Bauka, appellant Rambali, appellant Nawal Thakur and appellant Satyanarain assaulted Radheyshyam with bhala, appellants Jugal. Jinis and Jitan with garasa and appellants Dharkan and Ramrekha with lathi. He has further said that accused persons took the dead body towards the River Karoala. P.Ws. 1 and 5, who are brothers and first cousins of deceased Radheyshyam have also deposed as eye-witnesses. P.W. 1 a young ,lad aged about 16 years and P.W. 5 aged about 22 years have deposed supporting the prosecution case in material particular. P.W. 1 has said that he had been at his darwaja when the mob of 30-40 persons came armed with bhala, garasa and lathi and added that they thresy brickbats over the house of Radheyshyam who was washing his mouth in the Court-yard. Radheyshyam rushed through a galiari in the kitchen of the house of P.W. 4 Imirti Devi and concealed himself. About 15-20 persons out of the said mob entered first into the house of Radheyshyam and having not found him therein entered into the house of Imirti Devi (P.W. 4). Thereafter he saw Radheyshyam being dragged out of the angan of P.W. 4 at the darwaja where he was assaulted. He has also said that the accused persons dragged the dead body of Radheyshyam to the cremation ground and burnt it with wood and kerosene oil. When they could not succeed in completely burning the dead body, they cut the body into pieces and threw it in Kamla River. He has named appellant Ramchandra alias Bauka and appellant Ram Bali as the assailants by means of bhala on the chest and neck of Radheyshyam and appellants Jinis, Jugal and Jitan and appellant Ram Pravesh withgarasa on the back, stomach, Panjara and right hand respectively. He has also said that appellants Ram Rekha, Madan and Dharnkan assaulted Radheyshyam with lathi. P.W. 5 Shanker Thakur has said that he was inside the Courtyard when he heard the alarm of the mob. He along with the father of Radheyshyam came out and saw about 14 to 15 persons. Father of Radheyshyam implored with folded hands but appellant Ramrekha assaulted him with lathi and when he went to save him he was dragged. He has said that Radheyshyam was washing his mouth at that time in the Courtyard. To escape he entered into the house of P.W. 4 and concealed himself in the kitchen.

Appellants Ramchandra alias Bauka, Rajeshwar, Rambali and Kawal climbed on the roof of the kitchen, made holes by removing tiles etc. and assaulted Radheyshyam with bhala from above. Thereafter he saw that the victim was dragged out in an injured condition from the angan to the darwaja where appellants Jinis, Jeetan, Jugal dragged him and threw him down. He has also said that the mob took away the dead body of Radheyshyam towards Kamla River. According to his deposition he saw that appellant Baliram brought kerosene oil and with the help of wood and kerosene oil the accused persons set fire over the dead body but when they could not completely burn it, accused Shyamnandan, Pragas and Ramsagar cut the dead body into pieces with a Kulhari and threw the pieces into Kamla River.

4. It is a case obviously in which the dead body was disposed of and, but for an excuse of a bone cut from a dead body no part of the body of Radheyshyam was recovered by the police. P. W. 8 Dr. J. K. Lalla has said that he examined the said bone on 5-8-1975 and came to the conclusion that it was that of a stout adult male of the age of 40 to 45 years. In his cross-examination he has said that it was not possible to say whether it was post-mortem or ante mortem cut of the bone. The ocular evidence except the formal evidence of the witnesses of the search, seizure etc. which has given an account of the occurrence, however, shows that a mob of 30-40 persons came variously armed and attacked the house of Radheyshyam and when Radheyshyam took shelter into the kitchen of the house of P.W. 4 Imirti Devi some of the members of the mob forced their entry by scaling on the roof of Imirti Devi''s house and entering through the roof in the kitchen, assaulting Radheyshyam from the roof with bhala and after entering into the kitchen dragging him to the angan of the house of P.W. 4 assaulting him in the angan and thereafter dragging him to the darwaja and assaulted him in the sahan.

5. Learned Counsel for the appellants has not seriously questioned the factum of the murder of Radheyshyam. He could not do so on the face of the overwhelming evidence of the prosecution witnesses that a mob consisting of 30-40 persons came and attacked Radheyshyam as stated above. That Radheyshyam died and his dead body was taken away by the culprits is also fully demonstrated in the evidence of the prosecution witnesses and that his dead body was disposed of by the members of the mob is also not in doubt. Learned Counsel for the appellants has, however, contended that the occurrence took place in the morning at about 6 a.m. and when the notice arrived after hearing from the Chaukidar (P.W. 11) P.W. 7 Chandrika Devi recorded her fard-beyan at about 11 a.m. In the fard-beyan she made no mention of any of the accused persons going on the roof of the house of P.W. 4 or any assault from upon the roof with bhala on Radheyshyam. He has contended that when the fard-beyan was recorded, she could not but be aware with the names of the participants in the occurrence who had been identified by one or the other witnesses, but in the first information report she did not disclose the names of appellant No. 2 Madan Thakur, appellant No. 3 Satyanarain Rai, appellant Rajeshwar Thakur, appellant Kawal Thakur, appellant Rampravesh Thakur, appellant Nawal Kishore Thakur, appellant Indradeo Thakur and appellant Jeetan Thakur.

She has, however, in the Court named appellants Madan, Rajeshwar and Jeetan whom she had not named in the first information. She has thus, according to the learned Counsel, developed the case to include the names of these appellants evidently because later some witnesses were made to name them and those, who are not named by her in the first information report, were thus not the members of the mob although some witnesses have claimed to identify them. Learned Counsel has submitted that witnesses, who were not named in the first information report, namely, P.Ws. 2, 5 and 6, were examined as eye-witnesses by the prosecution, but no independent witnesses were examined by the prosecution, although it is suggested to the witnesses that several people had arrived and seen the occurrence.

6. To the submissions above, it has to be borne in mind that P.Ws. 2, 4 and 5 were also examined u/s 164, Cr.P.C. and P.W. 5 has said in his deposition that he had to do so because the police had not recorded the statement made by him correctly. True, the witnesses in a sense are partisan, that they belong to the family of the victim or his close relations, but there is no material on the record to show that at that morning hour of 6 a.m. any independent witness was available and he has not been examined. Witnesses, particularly, P.Ws. 2, 4 and 7, who are female agnates of the two houses in which one or the other part of the occurrence took place are the most natural and competent witnesses. Competency of P.Ws. 1, 5 and 6 also cannot be doubted, as they were most concerned with what happened with Radheyshyam. There is not even an iota of evidence or even a suggestion on the record that these witnesses in any manner were hostile to the appellants from before, except a suggestion available on the hearsay in the deposition of P.W. 11 about some incident taking place in the night of the 3rd of March, 1975 about which he had lodged a sanaha with the police. The said sanaha is on the record as Ext. 12. It discloses that there was some explosion made which had caused annoyance to the accused persons. The deposition and the sanaha recorded in the morning of the 4th March, 1975 show that before the attack was made on the victim the Chaukidar had come to learn about the preparation by the appellants and others to attack the house of Radheyshyam. He had, accordingly, informed the police, but the occurrence was over before the police arrived. P.W. 7, that is to say, the mother of the victim, who lodged information, narrated the occurrence to the extent she had seen and named those she saw in the mob and assaulting her son. If she failed to name one or the other appellants, it can be safely said, she failed because she did not know their names. A pardanashin illiterate woman is not expected to act with the same care and caution as a literate elderly person is expected to do. Omission of the names of some of the appellants in her fard-beyan could have been of some value had there been no examination of the witnesses by the police and the witnesses had not disclosed the names of those whom they identified before the police. In the instant case there is sufficient force in the statement of P.W. 5 that the investigating officer was negligent and was not taking the case seriously and not recording statements of the witnesses truthfully. The case, which was supervised by superior police officers, had in course of the investigation to go for recording the statement of the witnesses u/s 164, Cr.P.C., the omissions which are

natural in the fard-beyan by P.W. 7 are supplemented by the statements of the other prosecution witnesses and unless it is shown that their testimony independently is not trustworthy, it is not possible to agree with the contention of the learned Counsel for the appellants that those, who are not named in the first information report presumably, were not the members of the mob.

7. The next contention of the learned Counsel is based on variations in the details of the occurrence in the testimony of the prosecution witnesses. Starting from the fard-beyan in which there is no mention of any occurrence taking place on the roof of the house of P.W. 4, learned Counsel has taken us through the deposition of each prosecution witness to show that while P.W. 4 has talked about the assault upon Radheyshyam from the roof of the kitchen and breaking of the tiles etc., except P.W. 5 no other witnesses deposed about it. Evidence of a person is relevant in terms of Section 60 of the Evidence Act of the facts which could be seen, heard or perceived. A witness is not competent to speak about a fact which he had not seen, heard or perceived and if one hears from some other witness about a certain fact, his deposition as to the said fact will be hearsay and not admissible. Witnesses, therefore, if they have deposed truthfully have to confine to the facts seen, heard or perceived by them. If one or the other witness in this case has not stated about some part of the occurrence which was not seen by him, he has only deposed truthfully and in accordance with law. Omissions of such details in their evidence in respect of the facts, which are not seen, heard or perceived by them, cannot be either a development or concealment or a contradiction. We do not find any merit in the contention of the learned Counsel for the appellants as to the Contradictions in the evidence of the prosecution witnesses in so far as the omissions as to various details about which they were not competent to depose are concerned.

8. Learned Counsel for the appellants has, however, drawn out attention to the fact that in the Court the witnesses have said about a mob of 30-40 persons and in that they are consistent, but before the police they had said that it was a mob of 300-400 persons. Nothing seriously affecting the testimony of the witnesses who have said about the mob of 30-40 persons in the Court can be noticed in the statements made before the police as to the number of members of the mob being larger than what they have said in the Court. Estimation of number of people present and acting is alway a guess. A variation may be deliberate or may not be. In the instant case it is not possible to say that there could be any design in reducing the number of the members of the mob and if there is some variation in the number of the members of the mob in the deposition of the witnesses in the Court, in our view, it is of no consequence. Although number of decisions have been cited at the bar on behalf of the appellant, we have not been able to find any of relevance on the facts before us, but since learned Counsel for the appellants has relied upon them, we propose to say a few words about them. It is well settled that where independent corroboration is possible, the Court should seek such corroboration to the deposition of the partisan witnesses. But it is equally well settled that where there is no independent corroboration available, the evidence of the partisan witnesses should be examined with

caution and if reliable, accepted. A witness merely because he is a close agnatic relation or a member of the family of the victim is not infirm. He like any other witness is a competent and truthful witness until demonstrated otherwise. In the case of Masalti Vs. State of U.P., the same caution has been reiterated in the words "There is no doubt that when a criminal Court has to appreciate evidence given by the witnesses who are partisan or interested, it has to be very careful in weighing such evidence. Whether or not there are discrepancies in the evidence; whether or not evidence strikes the Court as genuine; whether or not the story disclosed by the evidence is probable, are all matters which must be taken into account. But it would be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses." In the same judgment a fact notoriously applicable to the villages in the State of Bihar, is stated in the following words : - "Often enough, where factions prevail in villagers and murders are committed as a result of enmity between such factions, criminal Courts have to deal with evidence of a partisan type. The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how such evidence should be appreciated, judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct." The salutary law stated by the Supreme Court is to us the fairest guide to appreciate the evidence in this case and we have no manner of doubt that in the instant case there is no material before us to imagine that there could be independent corroboration to the prosecution version of the case. We have approached the evidence keeping in view the law in this behalf and turned the pages of the brief only to find out whether there is anything to create doubt as to either the genesis or manner of occurrence. We have failed to find any and none has been pointed out to us.

9. In Juwarsingh and Others Vs. State of Madhya Pradesh, omission of the names of some of the accused persons in the first information report was taken as a circumstance to give to them benefit of doubt. The Court accepted the contentions of the learned Counsel appearing for the appellants before it that some explanation why the informant failed to mention names of some of the accused persons in the report should be available and if there is no such explanation such accused are entitled to benefit of doubt. Statement of law on the facts of the case before the Supreme Court in the judgment of Chinnappa Reddy, J. is a conclusion based on a very material fact that several witnesses claimed that they had deposed before the police and their statements were recorded immediately after the first information report. But, in fact, their statements were recorded much later and the informant was aware of the statements made by those witnesses and she had so said in the deposition in the Court but not stated in the report On such facts and in many other circumstances while appreciating the evidence a Court of law may doubt the veracity of the prosecution case either in respect of some accused persons who are not named in the first information report or in respect of the entire prosecution case and in respect of all the accused persons depending upon the facts of each case. In the instant case, as we have already taken notice of the fact that on the information of the

Chaukidar the police arrived when the occurrence was already over and it was only known to the informant that her son was killed and his dead body was taken away by the accused persons if she narrated what she had seen and confined her statement before the police only to that, we find no reason not to accept the prosecution evidence of other witnesses who have named the accused persons who were not named by the informant.

10. Before we enter into the consideration of a contention of law by the learned Counsel for the appellants, we propose to dispose of yet another contention that witnesses, who had not named some of the appellants before the police, have in the Court claimed to have identified them and said that they participated in the one or the other manner in the occurrence. Amongst them are P.Ws. 2, 4 and 5 also. It is in this context that it is of some importance to notice that these witnesses were required to make statements u/s 164, Cr.P.C. in which they have named some of these appellants, who according to the defence, were not named by them before the police. A number of omissions in the investigation by the investigating officer have been noticed by the learned Sessions Judge. We shall only burden ourselves by repeating them. But it may, at this stage, be pointed out that the investigating officer did not even care to maintain a record of the marks of violence about which the witnesses deposed before him and such violence was mentioned in the first information report also. Omission to name certain accused before the police, and naming such accused in the Court in a given circumstance may be a contradiction worth benefit of doubt to the accused, but if there are explanations to such omissions and explanations are plausible and acceptable the omission of a certain statement before the police cannot be of any consequence. We shall, therefore, test the veracity of these witnesses with reference to the individual accused persons only to satisfy ourselves whether omission to name them by one or the other witness before the police should be given any credit or not.

11. Learned Counsel for the appellants has, however, contended that on the facts of this case in the absence of any evidence of the principal accused, who committed the murder and charged for murder, case of riot and sharing the common intention cannot be made out. He has, in short, submitted that there has to be one committing the murder with the mens rea before another with him is charged u/s 34 I.P.C. The argument in one sense is quite attractive. In the case of Dharam Pal and Others Vs. State of Haryana, it has been pointed out that it may be that when some persons start with a pre-arranged plan to commit a minor offence, they may in the course of their committing the minor offence, come to an understanding to commit the major offence as well. Such an understanding may appear from the conduct of the persons sought to be made vicariously liable for the act of the principal culprit or from some other incriminatory evidence but the conduct or other evidence must be such as not to leave any room for doubt in that behalf. A Criminal Court fastening vicarious liability must satisfy itself as to the prior meeting of the minds of the principal culprit and his companions who are sought to be constructively made liable in respect of every act committed by the former. This law, which has been candidly stated, has to be applied with no exception, but one has to bear in mind that together with

several persons assaulting the victim and their individual acts going to show that they were not refraining themselves from committing a homicide, the meeting of minds in course of the occurrence is writ large in what they individually do. In the sense of one principal offender, there may not be any, but each may be charged for his individual act with the burden of the intention to kill, when they act in concert when the victim is killed their vicarious liability is proved. It is the settled law that one who commits the act knowing that it is so imminently dangerous that it must in all probability cause death or such bodily injury which is likely to cause death, if the death is caused, commits murder. If it can be shown that in their individual acts the appellants participated in the assault and acted as stated above, they in the event of death of the victim can individually be charged for murder even though there is no evidence who of them gave the fatal blow.

12. In the individual cases of the appellants, Rambali Thakur has been identified by P.Ws. 1, 2, 4, 5, 6 and 7. P.Ws. 4 and 5 had not named him before the police, but in their statement u/s 164 Cr. P.C. they named him as one of the participants who used a bhala and they have so deposed in the court. Appellant Madan Thakur is not named in the first information report, but he has been named in the court by P.Ws. 2, 5 and 7. Of them P.W. 5 had not named him before the police but in the statement u/s 164 Cr. P.C. did name him. P.W. 7, who omitted to name him in the first information report also omitted his name in her further statement. She has, however, chosen to identify him in the court. In this manner, therefore, one may doubt the identification of this appellant by P.W. 7, but his identification by P.Ws. 2 and 5 as a member of the mob who entered along with others with a lathi in the house of P.W. 6 and emerged out of it with others is proved beyond any doubt by the evidence of P.Ws. 2 and 5. Appellant No. 3 Satyanarain Rai has been identified by P.Ws. 5 and 6. P.W. 6 named him before the police as well as in the court and said that he was one of those who was carrying bhala and used the same as the weapon. P.W. 5, however, had not named him before the police but in his statement u/s 164 Cr. P.C. he named him as one of the culprits who was carrying a bhala. So participation of appellant No. 3 also cannot be doubted. Appellants Dharkan Thakur, Ramrekha Thakur, Jugal Thakur, Jinis Thakur, Ramchandra Thakur and Baliram Thakur are named in the first information report and are identified as one of the culprits by P.Ws.1, 6 and 7, 1, 5, 6 & 7, 1, 5, 6 & 7, 1, 2, 5, 6 and 7, 1, 2, 4, 5, & & 7 and 5 and 7 respectively. P.W. 5 had not named Ramrekha Thakur before the police, but in the statement u/s 164 Cr. P.C. he named him as one of the culprits, about which we have already mentioned earlier. Testimonies of these witnesses leave no manner of doubt that these appellants, who participated in the assault did assault with the intention to kill which assault ultimately resulted in the death of Radheyshyam. Appellant Rajeshwar Thakur, who was not named in the first information report, was also identified in the court by P.W. 7, but he has not been identified by her as one of the culprits who assaulted. P.Ws. 4 and 5 did not name him before the police but in their statement u/s 164 Cr. P.C. named him as one of the culprits who assaulted. Even if the evidence of P.W. 7 is not accepted for the reason of the omission by her in naming him in the fard-beyan as also before the police in the further statement by her, against him there is evidence of P.Ws. 4 and 5 to

prove his guilt. Appellant Rampravesh Thakur, who was not named in the first information report by the informant (P.W. 7) has been identified by P.Ws. 1, 5 and 6. P.Ws. 1 and 6 named him before the police as well as in the court. P.W. 5 protested when the police did not record his statement correctly and in. his statement u/s 164 Cr. P.C. named Rampravesh Thakur as one identified by him as a participant in the occurrence. Their evidence is reliable and there is no reason not to accept it. Same is the position of appellant Nawal Kishore Thakur who has been identified by P.Ws. 1, 4, 5 and 6. As usual with him, in the statement of P.Ws. 4 and 5 the investigating officer did not record the name of this appellant, but in their statement u/s 164 Cr. P.C. they have named him. Identification against him also, in our view, is clinching and proves his guilt. Appellant Indradeo Thakur and appellant Jeetan Thakur have been identified by P.Ws. 2, 5 and 6 & 5, 6 and 7 respectively. They were not named in the first information report. P.W. 7 thus may not be relied upon as the witness who had identified Jeetan Thakur as one of the culprits, but against him identification by P.Ws. 1, 5 and 6 is sufficient proof to establish his guilt. P.Ws. 1, 5 and 6 had named him before the Police and P.Ws. 5 and 6 in their statement u/s 164 Cr. P.C. also. Appellant Indradeo Thakur although not named in the first, information report since he has been identified by three witnesses, whose evidence is trustworthy, his participation is also proved. The only infirmity in the identification of this appellant by P.W. 5, that he had not identified this appellant before the police, is of no consequence because P.W. 5 named him in his statement u/s 164 Cr. P.C.

13. The case of the appellant Kewal Thakur, however, appears to be different. He is not named in the first information report He is also not named by any witness before the police until the statement u/s 164 Cr. P.C. of P.W. 5 He had been identified only by P.W. 5 who has said nothing about any overt act committed by this appellant. Appellant Kewal Thakur, in our view, may be entitled to benefit of doubt.

14. Having considered the case in all its aspects, we are of the view that the charge u/s 302/34 I.P.C. is proved against all the appellants except appellant No. 10 Kewal Thakur who is entitled to benefit of doubt. So far the charge u/s 452 I.P.C. is concerned, since the entry of the appellants into the house of the victim and that of P.W. 4 for unlawful purpose is proved and so far charge u/s 148 I.P.C. is concerned, the appellants were members of the unlawful assembly which committed the overt act of entering into the houses of the victim Radheyshyam and that of P.W. 4 and committed murder of Radheyshyam; the said charges are proved.

15. There are only two witnesses that is to say P.Ws. 1 and 5 who have stated about the cremation and disposal of the dead body of Radheyshyam by the members of the mob. Their evidence on this point appears to be in conflict with each other. Even though it is proved by their evidence that the dead body of Radheyshyam was disposed of by some members of the unlawful assembly and (Sic) it is not possible to hold that they found any of these appellants disposing of the dead body of Radheyshyam. On the evidence of P.Ws. 1 and 5 on this point we are satisfied, although it is proved beyond reasonable doubt that Radheyshaym''s dead body was disposed of by the members of the mob, that

the appellants are entitled to benefit of doubt.

16. As a result of our discussion above, the appeal on behalf of all the appellants except appellant No. 10 Kewal Thakur is dismissed subject to the modification that they are acquitted of the charge u/s 201 I.P.C. but their conviction under sections 302/34, 148 and 452 I.P.C. is affirmed. The appeal on behalf of appellant Kewal Thakur is allowed. He is acquitted of the charges levelled against him. The bail-bonds of the appellants except appellant No. 10 Kewal Thakur, are cancelled.