HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

D.B. Criminal Appeal No. 434/1984
CNR: RJHC020000091984 | URN: CRLA / 368U / 1984

1. Bhura s/o Jagannath, (Since deceased)
2. Bhanwarlal s/o Gokul,
3. Uda son of Bhura,
4. Chatra son of Dhana, (Since deceased)
5. Purshotam s/o Jagdish, (Since deceased)

Through his legal representative:

5.1. Rakesh Kumar Parashar son of Late Shri Purshotam,

6. Mohan son of Devi Lal,
7. Gokul son of Mala, (Since deceased)
8. Mohd. Hussain s/o Allauddin, (Since deceased)
9. Deva Lal son of Gokul, (Since deceased)
10. Mohan son of Sarvan, (Since deceased)
11. Balu son of Chunna, (Since deceased)
12. Polu son of Madho,
13. Madia @ Modu s/o Surja, (Since deceased)
14. Abdul Salaam s/o Chhote Khan,
15. Gheesa Lal s/o Narain, (since deceased)

Through his legal heir:

15.1 Smt. Harku Devi wife of Late Shri Gheesa Lal, Resident of Village Rajmahal, Police Station Dooni, District Tonk.

16. Nathu son of Mangi Lal, (Since deceased)
17. Sheoji son of Gokul, (Since deceased)
18. Abdul Gaffar s/o Allanoor,
19. Sukhdeva s/o Sunder Lal,
20. Nanda @ Kalya s/o Gangaram, (Since deceased)

All residents of Village Rajmahal, P.S. Duni, District Tonk

----Accused-Appellants

Versus

State of Rajasthan

----Respondent

For Appellant(s)	:	Mr. Vivek Raj Bajwa, Sr. Adv. with Mr. Amar Kumar Ms. Savita Nathawat
For Respondent(s)	:	Mr. Amit Kumar Punia, PP

HON'BLE MR. JUSTICE MAHENDAR KUMAR GOYAL
HON'BLE MR. JUSTICE PRAMIL KUMAR MATHUR

Judgment

Date of Conclusion of Arguments : 19.08.2026
Date on which judgement is reserved : 19.08.2026

Whether the full judgment or only the

operative part is pronounced : Full Judgement

Date of pronouncement : 03.09.2026

PER HON'BLE MAHENDAR KUMAR GOYAL, J.

Under challenge in this criminal appeal are the judgement of conviction and order of sentence dated 17.09.1984 passed by the learned Sessions Judge, Tonk (for brevity, 'learned trial Court') in Sessions Case No.40/82 whereby, the accused-appellants (for brevity, 'appellants') have been convicted and sentenced as under:-

Section 302 IPC or in the alternative, Section 302/149 IPC:- Life imprisonment and fine of Rs.200/- each; in default whereof, two months' rigorous imprisonment each.

Section 448 IPC:- One year's rigorous imprisonment each.

Section 436/149 IPC:- Five years' rigorous imprisonment and fine of Rs. 100/- each; in default whereof, one month's rigorous imprisonment each.

Section 323/149 IPC:- Six months' rigorous imprisonment each.

All the sentences to run concurrently.

The brief facts, in a nutshell, are that based on the parcha bayan (Ex. P66) of Shri Tarachand (PW4) recorded on 03.06.1982 at about 10:30 am at Gram Panchayat Bhawan, Rajmahal, an FIR No.28/82 dated 03.06.1982 came to be registered at Police Station Duni, District Tonk for the offences under Sections 302, 147, 148, 149, 436, 325, 323 and 379 IPC. It was averred therein that he is a resident of Kanjar Basti, Rajmahal and for last few days, the villagers of Village Rajmahal have boycotted the residents of the Kanjar Basti and were not permitting them to visit the village. It was alleged that on the fateful day of 03.06.1982, at about 5:00 am, 4-5 villagers had come to their basti and asked for the culprits who have allegedly stolen two fodder bundles from their fields and upon their denial, they asked him and his father-Hawalia to accompany them to the village panchayat which they refused. It was further alleged that about 7:00 am, a large number of villagers, out of which some were named, came armed with *lathis* and attacked their basti. It was claimed that his father and Kanhaiya were beaten to death and some of them were injured including himself. It was also alleged that their houses and household goods were torched to fire and some articles were also stolen. After investigation, 33 accused were charge-sheeted for the offences under various provisions of IPC including Section 302 IPC. Charges under various provisions of IPC were framed against all the charge-sheeted accused persons who were put to trial. However, during the trial, accused-Surajmal expired and the proceeding was dropped against him. After trial, while, 12 accused

persons were acquitted of the charges framed against them, 20 accused appellants were convicted and sentenced, as supra.

This appeal was preferred by all the twenty accused persons convicted by the learned trial Court, however, during its pendency, the appellants barring the appellants namely Bhanwarlal Gurjar, Uda Gurjar, Mohan, Polu Raigar, Abdul Salaam, Abdul Gaffar and Sukhdeva, expired. The legal representatives of two of the deceased appellants namely Puroshottam and Gheesa Lal were taken on record under Section 394 of the Cr.P.C. Therefore, this appeal survives qua the aforesaid 9 appellants.

Assailing the impugned judgment of conviction and order of sentence, learned Senior counsel Shri Vivek Raj Bajwa for the appellants contended that the findings of the learned trial Court are based on conjectures and surmises and, as a matter of fact, there is no legally admissible evidence available on record to connect them with the alleged crime. Inviting attention of this Court towards the testimony of injured eye witnesses namely, Tarachand (PW4), Kangresia (PW5), Seeta (PW7), Nakhima (PW9), Bhag Chand (PW11) and Kamla (PW10) as also that of other eye witnesses viz; Geeta Kumari (PW6), Sohni (PW8) and Vakilya (PW12), he contended that the same is full of contradictions and improvements on material aspects of the case rendering the same totally unreliable and it was not safe for the learned trial Court to have recorded their conviction based on such sketchy evidence. Relying upon a Constitution Bench judgement in the case of **Masalti Vs. State of UP: AIR 1965 Supreme Court 202: MANU/Supreme Court/0074/1964**, learned Senior Counsel canvassed that when, there is a large number of

offenders as also a large number of victims, it is a safe practice to be adopted by the Court that conviction should be based only if it is supported by at least two, or three or more witnesses who give a consistent account of incident. He submitted that in the instant case, testimony of neither of the two witnesses is consistent as to either their presence at the scene of crime or, the role attributed to the appellants.

Shri Bajwa argued that except the ocular testimony, which is not otherwise reliable, the prosecution has not come up with any other corroborative piece of evidence, such as recovery of the weapon(s) of offence or of any other incriminating evidence including their bloodstained clothes or the blood smeared soil collected from the place of alleged crime, to warrant their conviction.

Learned Senior Counsel asserted that although, their conviction has been recorded under Section 436/149 IPC but, without recording any such finding that they had committed mischief by fire to destroy any building used by the victims as residence or the place of worship or as the human dwelling or the place for custody of the property, in absence whereof, their conviction is not sustainable.

In the aforesaid background, he prayed that the appeal be allowed, the impugned judgement of conviction and the order of sentence be quashed and set aside and the appellants may be acquitted of the charges framed against them.

Per contra, learned Public Prosecutor-Shri Amit Kumar Punia, opposing the submissions, contended that the learned trial Court has recorded the finding of guilt of the appellants based on cogent

material on record and the prosecution was able to establish its case beyond a reasonable doubt from the evidence led by it which warrants no interference by this Court under its appellate jurisdiction. Shri Punia asserted that from the testimony of the injured eye witnesses and other eye witnesses, which was wholly reliable, it was proved that the appellants, acting individually or in concert with other members of an unlawful assembly, in furtherance of their common object, committed murder of Hawalia and Kanhaiya, inflicted injuries to many members of the complainant party and also torched their houses and household belongings. He, therefore, prayed for dismissal of the appeal.

Heard. Considered.

The instant case involves death of Hawalia son of Sua as also of Kanhaiya son of Katya and injuries to twelve persons.

As per the Postmortem Report (Ex. P1) of the body of the deceased-Hawalia, he had received a large number of injuries comprising two lacerated wounds on head with no corresponding internal injury, one injury on left hand resulting into fracture of the bone of upper arm and five to ten contusions on left side of the chest with corresponding tearing of the membrane of left lung and fracture of fifth, sixth, seventh and eighth ribs with their broken ends puncturing the lung. Upon examination of the left lung, wounds were found below the broken ribs while, the right lung was found to be healthy. All the injuries were found to be ante-mortem in nature with blunt weapon. As per medical opinion, the cause of death was multiple injuries and shock on account of internal hemorrhage and injury to left lung which were sufficient in the ordinary course of nature to cause death.

As per Ex. P2-the Autopsy Report of deceased-Kanhaiya, there were injuries in the shape of lacerated wound and contusions on face and head, an injury each on the right leg and right arm with a number of contusions on the right chest. No fracture of skull bone was found. However, fracture of lower part of tibia was found with fracture of fifth to tenth ribs with their end penetrating the membrane of right lung and crushing it. All the injuries were ante-mortem in nature with blunt weapon and were found to be sufficient in the ordinary course of nature to cause death which was on account of multiple injuries and shock due to internal hemorrhage and crushing of right lung.

As per the injury reports of Kangresia (Ex. P3), Sobadariya (Ex. P4), Kumari Gyantara (Ex. P47), Kumari Vimlesh (Ex. P48), Smt. Batani (Ex. P49), Smt. Seeta (Ex. P50), Smt. Nakhima (Ex. P51), Smt. Kamla (Ex. P52), Kumari Chandrakala (Ex. P53), Kumari Manti (Ex. P54), Bhagchand (Ex. P59) injuries to them were found to be simple in nature whereas, out of 18 injuries received by Tarachand (Ex. P46), two injuries were found to be grievous being fracture in right and left hand respectively.

Neither the Autopsy Reports nor, the Injury Reports were questioned by the defence during the course of cross-examination of Dr. S.D. Sharma (PW1) and Dr. Vimal Kumar Jain (PW15) who have prepared the same rather, were admitted. On that premise, it is found to be an established case of culpable homicide of deceased-Hawalia and Kanhaiya and of injuries to as many as twelve members of the complainant-party.

From the prosecution case as also from the defence evidence, an admitted position which emerges is that there was

animosity in between the complainant and the accused-party. While, it was allegation of the accused-party that the members of the complainant-party used to tease their women folk and used to steal their cattle and/or other articles, grievance of the complainant-party was that the accused-party had boycotted them, did not permit them to visit the village nor, used to engage in any business with them. In this factual backdrop, the prosecution case is that on the fateful day of 03.06.1982, at about 5:00 am, some of the villagers visited the basti of the complainant with a request to handover the culprits to them who had allegedly stolen their two bundles of hay and upon their refusal, they insisted the complainant-Tarachand (PW4) and his father to accompany them to the village panchayat which was declined. Thereafter, by beating of drum, the villagers were gathered and about 200-250 villagers, armed with *lathis*, attacked the complainant's basti, beaten Hawalia and Kanhaiya to death and also injured as many as 12 persons, as stated hereinabove. Although, none of the prosecution witnesses has stated that they came armed to commit murder of Hawalia and Kanhaiya or for that matter, any other member of the complainant side but, from the aforesaid circumstances, it can safely be gathered that the villagers, who came in a very large number armed with *lathis* and had attacked the members of the complainant-party, constituted an unlawful assembly and in furtherance of their common object, committed murder of Hawalia and Kanhaiya and also injured a large number of members of the complainant-party. Their common object to commit murder can also be assessed from the large number of injuries on the vital parts of the body of the

deceased including the head and chest which were, as per the unchallenged medical opinion, sufficient in ordinary course of the nature to cause death.

In the case of **Sitaram Kuchhbedia Vs. Vimal Rana and Others: Criminal Appeal No(s).1837-38 of 2011** and another connected matter, it was held by the Hon'ble Supreme Court that determination of intention, being a state of mind, is seldom susceptible to a rigid or mechanical formula and it must necessarily be gathered from the cumulative effect of the circumstances proved on record including the nature of weapon used, the part of body targeted, the manner of assault, the number of injuries and the circumstances surrounding the occurrence. While holding the respondents guilty of the offence under Section 302 read with Section 149 IPC, it was further held that the deceased was subjected to a concerted assault by the accused respondents who were armed with *lathis* with nothing on record to suggest that the same were picked up casually at the spot rather, the accused were lying in wait prepared to launch the assault on the unsuspecting victims. In view of the fact that there was deliberate obstruction of the road by the respondents by placing tube-well pipes, their prior presence in the form of an unlawful assembly armed with *lathis* and the repeated blows inflicted upon the deceased including multiple injuries in head region and so also to the other injured persons, was sufficient to cumulatively demonstrate that the assault was neither sudden nor an isolated act aimed at chastisement, but was rather a concerted intentional attack. The Hon'ble Supreme Court further held that when repeated blows are inflicted on the parietal and temporal

regions with *lathis* resulting in bone-deep lacerations causing fractures and brain damage and culminating in coma, it cannot be said that the assailants lacked the intention to inflict such bodily injury as was sufficient in the ordinary course of nature to cause death. In the conspectus of aforesaid evidence, Their Lordships were pleased to hold that the accused-respondents had formed an unlawful assembly and acted in prosecution of the common object of such assembly, i.e., to assault the victims.

In the instant case, however, from the prosecution evidence, as would be discussed later on at the appropriate place, it is also revealed that not all the villagers who had come, were members of unlawful assembly but, some of them were, on the contrary, trying to dissuade the assailants from attacking the residents of the Kanjar Basti. Therefore, it could not be presumed that all the villagers numbering about 200-250, who had visited the Kanjar Basti, were members of the unlawful assembly; rather, cases of the appellants are required to be examined individually in the light of the prosecution evidence available against them.

In the aforesaid factual and legal context, now, the question arises as to whether the prosecution was able to establish, beyond reasonable doubt, that the appellants, acting individually or in concert with the other members of the unlawful assembly, committed murder of Hawalia and Kanhaiya inasmuch as the learned trial Court has recorded their conviction under Section 302 or in the alternative, under Section 302/149 IPC.

A perusal of the material on record reflects that out of the present appellants, charge under Section 302 IPC simplicitor was framed only against the appellants-Bhanwarlal and Uda and

against rest of the appellants, charge was framed under Section 302 read with Section 149 IPC. However, all the appellants, including the appellants who have expired during pendency of the appeal, were convicted under Section 302 or in the alternative, under Section 302/149 IPC which is found to be violative of the provisions of Section 354(2) CrPC which mandate that when the conviction is under the IPC and it is doubtful under which of the two Sections, or under which of two parts of the same Section of that Code the offence falls, the Court can distinctly express the same and pass judgement in the alternative. Thus, the condition precedent for recording conviction in the alternative Sections is that the Court must distinctly express its doubt, under which of the two Sections the offence falls. However, a perusal of the judgement impugned would reflect that while recording conviction in the alternative, no such finding was recorded. As a matter of fact, the judgement is bereft of any reason as to why the conviction was recorded under Section 302 or in the alternative, under Section 302/149 IPC. Further, it is not reflected from the impugned judgement as to why conviction of the appellants was recorded under Section 302 IPC simplicitor inasmuch as there is no finding that death of Hawalia or for that matter Kanhaiya was on account of injuries attributable only to each appellant individually. It is also not reflected from their postmortem reports that any particular injury was cause of their death rather, it was on account of cumulative effect of the injuries sustained by them.

Be that as it may, before we propose to consider its effect on the validity of the impugned judgement and the findings of conviction, if so required, first, we propose to analyze the

evidence to adjudge as to whether the prosecution was able to establish participation of the appellants in murder of Hawalia and Kanhaiya either individually or in furtherance of the common object of the unlawful assembly.

In the present case, there was a large number of assailants as also victims. For appreciating the evidence in such cases involving unlawful assembly, in the case of **Ranvir Singh and Others Vs. State of Madhya Pradesh: (2023) 14 Supreme Court Cases 41,** the Hon'ble Supreme Court of India succinctly held that where presence of a large group of person belonging to the accused side is established involving the applicability of Section 149 IPC, a little more scrutiny is required on the part of the Court as there may be a tendency to falsely implicate the person along with the actual accused and the Courts will have to be very circumspect while sifting through the evidence in such cases. Another judgement of the Hon'ble Supreme Court in the case of **Arvind Kumar Vs. State of Rajasthan: (2022) 16 SCC 732** was referred to and relied upon wherein, it was held that the Court will have to be more circumspect and cautious while dealing with the case of an accused charged under Section 149 IPC as it involves a deeming fiction. Therefore, a higher degree of onus is required to be put on the prosecution to prove that a person charged with the offence is liable to be punished for the offence committed by the others under Section 149 CrPC. Another judgement in the case of **Baladin Vs. State of UP: AIR 1956 Supreme Court 181** was also relied upon wherein, it was held that mere presence in an assembly does not make a person a member of the unlawful assembly unless it is shown that he had

done or omitted to do something which would show that he was a member of such unlawful assembly or unless the case fell under Section 142 IPC. It was also held that if all the members of a family and other residents of the village assembled at the place of occurrence, all such persons could not be condemned ipso facto as members of the unlawful assembly. The prosecution in all such cases shall have to lead evidence to show that a particular accused had done some overt act to establish that he was a member of the unlawful assembly and it would require the case of each individual to be examined so that mere spectators who had just joined the assembly and were unaware of its motive, may not be branded as the members of the unlawful assembly.

In the case of **Ranjit Singh Vs. State of Punjab: (2013) 16 SCC 752**, it was held as under:-

> "**39.** That in a faction-ridden village community, there is a tendency to implicate innocents also along with the guilty, especially when a large number of assailants are involved in the commission of an offence is a matter of common knowledge. Evidence in such cases is bound to be partisan, but while the courts cannot take an easy route to rejecting out of hand such evidence only on that ground, what ought to be done is to approach the depositions carefully and scrutinise the evidence more closely to avoid any miscarriage of justice." (Emphasis in original)

If the prosecution evidence is examined on the touchstone of the principles of law laid down in the aforesaid cases, we notice that to drive home the aforesaid charge, the prosecution has

relied upon the testimony of injured eye witnesses namely Tarachand (PW4), Kangresia (PW5), Seeta (PW7), Nakhima (PW9), Bhag Chand (PW11) and Kamla (PW10) and other eye witnesses namely Geeta Kumari (PW6), Sohni (PW8) and Vakilya (PW12). Since, there are a large number of accused-appellants as also a large number of injured persons including deceased, for the sake of convenience, we would like to examine case of each appellant individually and separately.

Bhanwarlal son of Gokul by caste Gurjar:- We are consciously referring the complete name of the appellant including his surname inasmuch as another accused sharing the same name, i.e., Bhanwarlal but, son of Asharam by caste Raigar was also put to trial but, was acquitted by the learned trial Court vide judgement impugned. For convenience, we would refer the appellant as Bhanwarlal Gurjar hereinafter.

The injured eye witness-Tarachand (PW4) has stated, in his examination-in-chief, that Bhanwarlal and Hussain inflicted *lathi* blow to his father-Hawalia and other persons were also beating whose name he was not acquainted with. However, he has not specified as to which Bhanwarlal was the assailant, i.e., whether the appellant-Bhanwarlal Gurjar or the co-accused-Bhanwarlal Raigar. During his cross-examination, he has alleged Bhanwarlal to have beaten his father and has stated that he had identified him and had also memorized his name but, feigned ignorance as to why his name did not figure in the written report (Ex.P66) lodged by him immediately after the incident. It may be pertinent to observe here that the law postulates the genuineness and truthfulness of the contents of the FIR, if lodged immediately after

the incident without any delay as it rules out probability of any manipulation. He has further stated that he has mentioned name of the appellant-Bhanwarlal as the accused who had set fire but, he was unaware why it was not so mentioned in the written report or in his police statement (Ex. D1). Taking a contrary stand to his examination-in-chief, he has further stated that his father was surrounded only by Bhanwarlal and Mohd. Hussain.

Thus, from the aforesaid testimony, it is apparent that he has not specified as to which Bhanwarlal inflicted injuries to his father and despite identifying him and memorizing his name, his name did not figure in the written report (Ex. P66) lodged by this witness. Thus, it raises a doubt as to which Bhanwarlal, out of the two accused sharing same name, attacked his father and further, absence of his name in the written report submitted by PW4 himself immediately after the incident despite categorically admitting, during his cross-examination, that he had not only identified him but, also memorized his name, raise a serious doubt as to reliability of his deposition against the appellant-Bhanwarlal Gurjar.

Another injured eye witness namely Kangresia (PW5), has, in his examination-in-chief, levelled specific allegation against the appellant-Bhanwarlal Gurjar and Hussain to have beaten his father with *lathi*s but, during his cross-examination, he has stated that in his police statement (Ex. D2), he has wrongly stated that in addition to Bhanwarlal and Hussain, Devilal also inflicted *lathi* blows to his father. He has further stated that his father was surrounded by about 40-50 person. Geeta Kumari (PW6), another injured eye witness has stated, in her examination-in-chief, that

Bhanwarlal, Devilal and Hussain had beaten his grandfather, i.e., Hawalia and Bhanwarlal was carrying a *farsi* (a sharp edged curved weapon). Further, taking a contrary stand to that of the PW4 and the PW5, who have stated that their father was beaten in open, she has stated that her grandfather was beaten inside the house. Further, from her testimony, it is not reflected as to which Bhanwarlal had beaten her grandfather. Moreover, she was stated him to have carried a *farsi* and not *lathi* as alleged by other prosecution witnesses.

Another prosecution witness namely Seeta (PW7) has alleged that Hussain and Bhanwarlal had inflicted *lathi* blow on head of her father-in-law without specifying as to exactly which Bhanwarlal. In her cross-examination, she has stated that she was acquainted with the accused-Bhanwarlal present in Court. However, her statement was recorded on 22.02.1983 and from the order-sheet of the learned trial Court for that day, we find that except the accused-Ramkaran, all the other accused were present in the Court meaning thereby both the Bhanwarlal were present and there is nothing on record to suggest whether she had identified the present appellant, i.e., Bhanwarlal Gurjar or the other one.

The other prosecution witnesses namely Sohni (PW8), Nakhima (PW9) and Kamla (PW10) have not named the appellant during their deposition.

Bhagchand (PW11) has alleged that Mohan, Uda, Bhanwarlal, Hussain and Devlal had beaten Hawalia but, again, he did not identify which Bhanwarlal.

The remaining prosecution witness namely Vakilya (PW12), though, has alleged in his examination-in-chief that the appellant-Bhanwarlal Gurjar inflicted injuries to Hawalia but, in his cross-examination, he has categorically stated that a large number of villagers were shouting not to assault, not to quarrel and he had identified Bhanwarlal as one of them who was requesting not to assault. Thus, his cross-examination demolishes the allegation levelled by him against the appellant in his examination-in-chief.

Thus, from the aforesaid prosecution testimony, we find that only PW5-Kangresia and PW12-Vakilya have levelled specific allegation against the appellant-Bhanwarlal Gurjar of inflicting injuries to deceased but, the PW12 has admitted during his cross-examination that Bhanwarlal was one of the villagers who was requesting the other villagers not to assault rendering his allegation not to be reliable. In view thereof, we are left with the sole testimony of Kangresia. However, as already observed, in his cross-examination, the PW5 has admitted that although, his father was attacked by only two person, he was unaware as to why name of Deva came to be mentioned in his police statement (Ex. D2). He has further admitted that 'c' to 'd' part of his police statement wherein, he has levelled allegation against as many as 32 persons of attacking them, was wrong and he did not mention these names. Most importantly, the rigour of his allegation also gets diluted in view of the deposition of the PW12. In the conspectus of aforesaid analysis, we find that even the testimony of Kangresia (PW5) is not of sterling worth if we go by the doctrine that testimony of a single witness is sufficient to warrant conviction if it is trustworthy, wholly reliable and free from any suspicion.

Further, a Constitution Bench has, in the case of **Masalti** (supra) wherein, the High Court has adopted a mechanism of recording the conviction of only those accused against whom four or more prosecution witnesses have deposed consistently, held as under:-

> **"16.** Mr. Sawhney also urged that the test applied by the High Court in convicting the appellants is mechanical. He argues that under the Indian Evidence Act, trustworthy evidence given by a single witness would be enough to convict an accused person, whereas evidence given by half a dozen witnesses which is not trustworthy would not be enough to sustain the conviction. **That, no doubt is true; but where a criminal court has to deal with evidence pertaining to the commission of an offence involving a large number of offenders and a large number of victims, it is usual to adopt the test that the conviction could be sustained only if it is supported by two or three or more witnesses who give a consistent account of the incident. In a sense, the test may be described as mechanical; but it is difficult to see how it can be treated as irrational or unreasonable.** Therefore, we do not think that any grievance can be made by the appellants against the adoption of this test. If at all the prosecution may be entitled to say that the seven accused persons were acquitted because their cases did not satisfy the mechanical test of four witnesses, and if the said test had not been applied, they might as well have been convicted. It is, no doubt, the quality of the evidence that matters and not the number of witnesses who give such evidence. But, sometimes it is useful to adopt a test like the one which the High Court has

adopted in dealing with the present case.” (Emphasis supplied)

The aforesaid judgement was followed by Their Lordships in the case of **Binay Kumar Singh Vs. State of Bihar: (1997) 1 SCC 283** wherein, it was observed as under:-

“**31.** …There is no rule of evidence that no conviction can be based unless a certain minimum number of witnesses have identified a particular accused as a member of the unlawful assembly. It is axiomatic that evidence is not to be counted but only weighed and it is not the quantity of evidence but the quality that matters. Even the testimony of one single witness, if wholly reliable, is sufficient to establish the identification of an accused as a member of an unlawful assembly. **All the same, when the size of the unlawful assembly is quite large (as in this case) and many persons would have witnessed the incident, it would be a prudent exercise to insist on at least two reliable witnesses to vouchsafe the identification of an accused as a participant in the rioting.**" (Emphasis supplied)

Facts in the instant case are identical with the aforesaid cases inasmuch as, there was a very large number of assailants, i.e., 200-250 and a large number of injured as also two deceased. Further, applying this very test, i.e, only one or two witnesses have deposed against them, as many as 12 co-accused person were acquitted by the learned trial Court itself. Here, we find it to be profitable to quote the relevant part of the impugned judgement:-

"इस प्रकार अभियोजन पक्ष की समस्त साक्ष्य को पूरी तरह पढने से प्रथमतः सोहनलाल व अलीमुद्दीन के विरूद्ध कोई साक्ष्य नहीं है। अभियुक्त रामकरण के विरूद्ध केवल सीता एवं वकील्या के कथन हैं जो अधिक विश्वसनीय नहीं कहे जा सकते हैं क्योंकि उनके कथनों का समर्थन अन्य साक्षीयों ने नहीं किया है। नारायण दास के लिये केवल गीताकुमारी व सीता का ही वक्तव्य है जिसका समर्थन भी अन्य साक्षीयों द्वारा नहीं किया गया है। सत्यनारायण के लिये केवल कांग्रेसीया और गीताकुमारी का ही कथन है। कांग्रेसीया के लिये हमारे पूर्वाधिकारी द्वारा यह नोट दिया गया है कि यह साक्षी रूक रूक कर बोल रहा है। जबकि सीता किसी प्रकार सत्यनारायण को जानती थी यह स्पष्ट नहीं है। तत्पश्चात् भूरा पुत्र जगन्नाथ लोधा का नाम केवल गीताकुमारी ने ही लिया है और अन्य साक्षीगण इसका समर्थन नहीं करते हैं। चुन्ना के लिये केवल गीताकुमार व नकीमा ने ही बयान दिया है किन्तु अब्दुल गफ्फार के लिये गीता व ताराचन्द का कथन है। ताराचन्द हमारी सम्मति में विश्वसनीय साक्षी है। सुखदेव के लिये भी ताराचन्द व गीताकुमारी वक्तव्य है। मोतीराम के लिये केवल एक साक्षी है। बजरंगदास खटीक के लिये भी एक ही साक्षी गीता कुमारी है जिसका किसी ने समर्थन नहीं किया है। बजरंगलाल ब्राहमण के लिये केवल ताराचन्द का कथन है जिसका किसी अन्य ने समर्थन नहीं किया है। भंवर रेगर के लिये भी एक ही साक्षी है जो पी0डब्यू0 5 कांग्रेसीया है, जिसके कथन का समर्थन नहीं है। कूरा के लिये एक साक्षी सीता पी0डब्ल्यू0 7 बताती है किन्तु उसके कथन का समर्थन नहीं है।"

Thus, we find that the learned trial Court has acquitted the co-accused-Ramkaran inasmuch as testimony against him by Seeta and Vakilya was not corroborated by other witnesses. Similarly, Satyanarain was acquitted as deposition against him was only by Kangresia and Geeta Kumari and for Kangresia, it was observed in the judgement that the earlier Presiding Officer has noted his demeanour in terms that 'he was speaking haltingly'. It may be pertinent to observe here that acquittal of the aforesaid

accused persons including the other accused has attained finality inasmuch as it was not assailed.

On that premise, we do not find it to be prudent to sustain the conviction of the appellant Bhanwarlal Gurjar relying on the sole testimony of Kangresia (PW5) which, otherwise also, we have not found to be wholly reliable and trustworthy.

Uda Gurjar:- So far as Uda Gurjar is concerned, Tarachand (PW4) did not mention his name in the examination-in-chief. In his cross-examination, he admitted that the appellant's name was neither mentioned in the written report (Ex.P66) nor, in his statement recorded under Section 161 CrPC (Ex.D1). Another prosecution witness Kangresia (PW5) has named him as one of the assailants and has stated that Uda inflicted blow to deceased-Kanhaiya. Geeta Kumari (PW6) has though identified him but, without levelling any allegation. Seeta (PW7), Nakhima (PW9) and Kamla (PW10) neither named him in their examination-in-chief nor, in their cross-examination. Sohni (PW8) has levelled allegation against Uda of beating her husband-Kanhaiya. Taking a contrary stand, Bhagchand (PW11) has alleged that he had beaten Hawalia and as per Vakilya (PW12), Uda was carrying a *lathi.*

Thus, while, four of the witnesses did not even mention his name in their deposition, one has only identified him without any allegation, two have stated him to have caused injury to Kanhaiya and one to Hawalia. Thus, we do not find any consistency in the testimony of the witnesses as to whether he inflicted injuries to the deceased-Kanhaiya or to the deceased-Hawalia. In the conspectus of aforesaid analysis and in the backdrop of law laid down in the case of **Masalti** (supra), we find that it was not safe

for the learned trial Court to have held him guilty of the offence under Section 302 or in the alternative, under Section 302/149 IPC.

Purshotam:- Tarachand (PW4), though, has dock identified him but, during the course of his cross-examination, he has stated that he did not see him at the scene of crime. PW5, PW9 and PW11 did not name him. Geeta Kumari (PW6) though, claimed to have identified him in her examination-in-chief but, during the course of her cross-examination, she has stated that she has wrongly levelled allegation against him of inflicting injuries. Seeta (PW7) has stated that he was amongst the person who were requesting others not to cause any assault. However, upon a Court question, she has admitted that the matter has been compromised with the masters but, in our considered view, the learned trial Court erred in rejecting her entire testimony on the count of it being a non-compoundable offence as, her position could not have been worse than that of a hostile witness and her entire testimony could not have been rejected on this count inasmuch as Vakilya (PW12) has also stated specifically, in his cross-examination, that this appellant was one of the villagers who were requesting others not to attack any person. Thus, her testimony stood corroborated from the deposition of the PW12.

Their Lordships have, in the case of **Dadu @ Ankush and Another Vs. State of Madhya Pradesh and Another: SLP (Criminal) No.10759/2024**, while dealing with an identical issue, held as under:-

> "**19.** It is also important to note the deposition of PW-4. Though related to the victim and PW-2, he

deposed that the pandal of Ganesh Puja was overcrowded and peoples' feet were touching each other due to which PW-2 felt that A-1 and A-2 had stepped on PW-2's feet. This resulted in a scuffle breaking out between A-1 and A-2 on the one hand and PW-2 on the other. Though PW-4 was declared hostile after he made the above statement, he was subjected to cross-examination by the Public Prosecutor. Notably, it is in his evidence that it was wrong to suggest that PW-2 was assaulted by A-1 and A-2. The High Court did not refer to the evidence of PW-4 simply on the ground that he had turned hostile, in ignorance of the law relating to appreciation of the evidence of a witness who has been declared hostile. A profitable reference may be made to the decision of this Court in **State of U.P. v. Ramesh Prasad Misra**: **(1996) 10 SCC 360** wherein it was held that **it is settled law that the evidence of a hostile witness would not be totally rejected if spoken in favour of either the prosecution or the accused. It would rather have to be subjected to closer scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence may be accepted.** The mere rejection of the evidence of PW4 in the manner aforesaid is contrary to the law laid down by this Court." (Emphasis supplied)

Thus, in the backdrop of aforesaid precedential law, in our considered view, the learned trial Court erred in rejecting her testimony in its entirety.

Sohni (PW8) has alleged Purshotam to have attacked her husband and to have set the household articles to fire but, admitted in her cross-examination that these allegations were absent in her police statement (Ex.D4). Thus, the allegations

levelled by her amount to improvement rendering her testimony to be unreliable. Similarly, Kamla (PW10) has identified the appellant-Purshotam as the assailant who had hit her on eye but, in her cross-examination, she admitted that the allegation did not exist in her police statement (Ex.D6) rendering her unreliable. PW12 has stated in his cross-examination, that in his police statement (Ex.D7), he did not mention Purshotam's name and it was recorded by the Investigating Agency on its own. Further, he has specifically named him as one of the villagers who were trying to save them.

From the conspectus of aforesaid analysis, we do not find evidence of any of the two witnesses to be consistent to show his involvement as one of the assailants rather, as per the PW7 and the PW12, he was amongst the villagers who were trying to save them. In view thereof, we are of the considered view that findings of the learned trial Court qua him are not sustainable in the eyes of law.

Gheesa Lal:- Tarachand, in his cross-examination, has stated not to have seen Gheesa Lal at the scene of crime. He was not named by the PW5, PW8, PW9, PW10 and PW11 at all. Only Geeta Kumari (PW6) has identified him. Seeta (PW7) and Vakilya (PW12) have stated him to be one of the saviours and upon Court question, the PW7 has stated to have entered into compromise only with the masters and indisputably, Gheesa Lal was not one of them. Therefore, we have no reason to doubt her testimony. On that premise, we do not find it prudent to uphold his conviction

based on the sole testimony of PW6 wherein also, she has only identified him without any allegation.

Polu:- So far as Polu is concerned, although, Tarachand (PW4) has alleged, in his cross-examination, that he was one of the assailants to cause injuries to him with *lathi* but, admitted that his name did not figure either in the written report lodged by him (Ex.P66) or in his police statement (Ex.D1). Kangresia (PW5) has alleged him to be one of the assailants with a *lathi*. Geeta Kumari (PW6) has levelled allegation against Polu of hitting her grandfather-Hawalia with *lathi* but, in her cross-examination, she also admitted that his name did not figure in her Section 161 CrPC statement (Ex.P67) and therefore, her allegation amounts to improvement. Similarly, Seeta (PW7) has alleged that Polu had hit her husband and has also set fire to the rice but, admitted, during her cross-examination, that these allegations were absent in her police statement (Ex.D3). PW8, PW9, PW10 and PW12 have levelled no allegation against Polu. Bhagchand (PW11) has alleged that Polu hit him. However, as per his injury report-Ex.P59, which was proved by Dr. Vimal Kumar Jain (PW15), there was no apparent injury on his body except complaint of pain on his right hand. Therefore, his testimony is not found to be reliable.

Thus, we notice that while, PW4, PW6 and PW7 has levelled allegation against him of inflicting injuries with a *lathi* but, they all have admitted, in their cross-examination, that this allegation was absent in their police statement. Thus, we find the same to be the material improvement. In view thereof, we are left with testimony only of Kangresia (PW5). Applying the test approved by the

Constitution Bench in the case of **Masalti** (supra), we do not find it to be safe to uphold the findings of his conviction based on his testimony alone. Even otherwise, there has been no recovery of any *lathi* from him.

Abdul Gaffar:- Although, Tarachand has identified him in his examination-in-chief but, in his cross-examination, he has claimed not to have seen him at the scene of crime. Further, he has claimed that name of the accused mentioned in his written report (Ex.P66) from 'क' to 'ट' including Abdul Gaffar's name were mentioned wrongly. PW5, PW7, PW9, PW10 and PW11 have not named him. Vakilya (PW12) has not levelled any allegation against him in his examination-in-chief and, in his cross-examination, he has claimed him to be one of the villagers who were dissuading the other villagers not to harm them. Thus, we are left with testimony of Geeta Kumari (PW6) who has claimed to have identified him but, without any allegation and of Sohni (PW8), who has levelled no allegation against him of subjecting the household goods to fire in her police statement (Ex.D4). In the backdrop of aforesaid evidence, we are not able to persuade ourselves to concur with the finding of the learned trial Court of his conviction.

Abdul Salaam:- Tarachand, again, during his cross-examination as PW4, has claimed not to have seen the appellant-Abdul Salaam at the scene of crime. PW5 as well as PW6 have claimed his presence as one of the assailants. However, PW12, during his cross-examination, has claimed him to be one of the villagers who were requesting other villagers not to attack them. Rest of the prosecution witnesses namely Seeta, Sohni, Nakhima,

Kamla and Bhagchand have not named him. In view thereof, while, two prosecution witnesses, i.e., the PW5 and the PW6 have claimed him to be one of the assailants, one witness (PW4) has denied his presence at the scene of crime and the remaining prosecution witness, i.e., PW12 has stated specifically him to be one of the saviours. In view of the aforesaid contradictory testimony, we do not find it to be prudent to uphold the findings of his conviction based on the testimony PW5 and PW6 which stands shattered in view of the testimony of one of the injured eye witnesses namely Tarachand and the eye witness namely Vakilya.

Mohan Mali:- Tarachand as also Sohni and Kamla did not name him during the course of their deposition.

Kangresia (PW5) has alleged him to be one of the assailants. Although, Geeta Kumari has identified Mohan as one of the accused but, without specifying as to which Mohan, i.e., Mohan Mali or Mohan Raigar. It may be worthy to mention here that two Mohan were put to trial, i.e., Mohan Mali and Mohan Raigar. Seeta (PW7) has levelled allegation against both Mohan of inflicting injuries to her but, during the course of her cross-examination, she admitted that she was ignorant as to why their name did not figure in her police statement (Ex.D3) rendering her testimony to be unreliable. PW9, though, has levelled allegation against Mohan but, in her cross-examination, she admitted that his name did not figure in her police statement (Ex.D5). Bhagchand (PW11) has levelled allegation against Mohan without specifying which Mohan. PW12 has levelled allegation against Mohan Raigar in his examination-in-chief; however, stating specifically, during his

cross-examination, that he did not name the present appellant-Mohan Mali as one of the assailants.

Thus, while, three prosecution witnesses did not name him in their deposition, PW6, PW9 and PW11 have levelled allegation against 'Mohan' without specifying as to whether he was the present appellant-Mohan Mali or the co-accused Mohan Raigar who has expired during pendency of the appeal. The remaining prosecution witnesses, i.e., PW5 and PW7, though, have levelled allegation against the appellant-Mohan Mali as one of the assailants but, the PW7 has admitted, during her cross-examination, that his name did not figure in her Section 161 CrPC statement (Ex.D3). Therefore, we are left with the sole testimony of the PW5. However, applying the test adopted in the case of **Masalti** (supra), we do not find it to be safe to sustain the findings of conviction of Mohan Mali relying upon the sole testimony of the PW5. Further, there was no recovery of the weapon of offence, i.e., *lathi* from him.

Sukhdeva:- Although, Tarachand has claimed him to have come to his house at about 5:00 am on the fateful day but, during his cross-examination, he has categorically stated him not to have seen at the scene of crime. PW8, PW9, PW10, PW11 and PW12 did not name him. Kangresia (PW5) has alleged him to have come only at 5:00 am with absence of allegation against him of coming with other villagers at 7:00 am. PW6 has identified him but, with no allegation. The remaining prosecution witness Seeta (PW7), has claimed him to be one of the saviours rather than being one of the members of the unlawful assembly. Thus, we find absence of

any allegation against him to be one of the assailants rather, PW7 has claimed him to be one of the villagers who were preventing others from assaulting them. On that premise, we are left with the sole testimony of PW6, who has only identified him with no allegation. Further, no recovery of any weapon of offence was effected from him. In view thereof, we are not able to persuade ourselves to uphold the finding of the learned trial Court against him.

In view of the aforesaid analysis, we are not convinced that the prosecution was able to establish, beyond a reasonable doubt, that the appellants were guilty of the offence either under Section 302 or under Section 302 read with Section 149 IPC and they are entitled for the benefit of doubt. Further, on that premise, we do not find it necessary and expedient to dwell on the issue as to whether conviction by the learned trial Court in alternative section without complying with the condition precedent as provided under Section 354(2) CrPC is sustainable or not.

The reasonings assigned by this Court while setting aside the conviction of the appellants under Section 302 or in the alternative, under Section 302/149 IPC, apply with full force equally so far as their conviction under Sections 448, 436/149 and 323/149 IPC is concerned and the same is also liable to be set aside. Insofar as their conviction under Section 436/149 is concerned, there is one more reason for not concurring with the conclusion of the learned trial Court. While recording their conviction under these provisions, the learned trial Court has not recorded a whisper of finding that they were guilty of causing

mischief by setting fire to destroy any building used by the victims as residents or the place of worship or the human dwelling or for custody of the property in absence whereof, the conviction is not found to be sustainable.

The upshot of the aforesaid discussion is that the appeal deserves to be allowed and is hereby allowed. The judgement impugned dated 17.09.1984 passed by the learned Sessions Judge, Tonk in Sessions Case No.40/82 is quashed and set aside. The appellants are acquitted of the charges framed against them. Since, all the appellants are already on bail, their bail bond stands discharged. The appellants are set at liberty forthwith if not required to be detained in any other case.

In view of the provisions of Section 437-A CrPC (Section 481 Bharatiya Nagarik Suraksha Sanhita, 2023), the appellants namely **1. Bhanwarlal Gurjar, 2. Uda Gurjar, 3. Mohan, 4. Polu Raigar, 5. Abdul Salaam, 6. Abdul Gaffar and 7. Sukhdeva** are directed to furnish a personal bond in the sum of Rs.25,000/- each and a surety in the like amount within four weeks before the Registrar (Judl.) of this Court which shall be effective for a period of six months with the stipulation that in the event of Special Leave Petition being filed against the judgement or on grant of leave, the appellants aforesaid, on receipt of notice thereof, shall appear before the Hon’ble Supreme Court.

(PRAMIL KUMAR MATHUR),J (MAHENDAR KUMAR GOYAL),J

1/PRAGATI