**SUPREME COURT OF INDIA**

State of U.P.

Versus

Rasid and Ors.

5.3.2003

(N. Santosh Hegde and B.P. Singh, JJ. )

Criminal Appeal No. 142 of 1996.

**JUDGMENT**

**N. Santosh Hegde, J.** - The respondents herein and two others charged for offences punishable under Sections 148, 452, 302 read with 149 and 307 IPC for having committed the murder of one Nasir Ahmad son of Mohd. Siddiq, his wife Chheddan and his two years old son Ishtiyak in the house of Mohd. Siddiq (PW-2) and for causing grievous and other injuries to PW-2 Mohd. Siddiq, PW-3 Mukhtar Ahmad, Nasir Ahmad PW-11 and another by name Masroor. Learned Sessions Judge, Sitapur, Uttar Pradesh in Sessions Trial No. 371/1982 acquitted accused No. 6 Sadaqat and A-7 Liyaqat giving them the benefit of doubt and convicted other 15 persons for various offences punishable under Sections 302 read with Sections 149, 452, 307 read with 149 IPC. He sentenced the said accused for the principal offence punishable under Section 302 read with Section 149 IPC to imprisonment for life and awarded varying sentences in regard to other offences. In appeal, the High Court of Judicature at Allahabad in Crl. Appeal No. 804 of 1983 allowed the same and set aside the conviction and sentence imposed on the appellants therein, consequently the State of U.P. is in appeal before us.

2. The prosecution case, in brief, is : these respondents along with 2 other acquitted accused persons formed themselves into an unlawful assembly armed with deadly weapons like rifles, country made pistols, Gandasas and lathis went to the house of PW-2 on 20.2.1982 at about 9.30 a.m. with an intention of causing the death of deceased Nisar Ahmed, and with the said intention while A-1 to A-8 entered the house of PW-2, other accused persons some of whom were also armed, surrounded the house, and out of those accused who entered the house, A-1 Yousuf, shot the deceased Nisar Ahmad which injured him on his knee and he fell down. At that time, A-3 Rasid fired two shots which hit deceased Chheddan and Ishtiyaq who fell down, thereafter, A-1 again fired simultaneously with A-5 Abdul Khaliq which hit PWs. 2, 3 and 11. It is the further case of the prosecution that thereafter A-4, A-7 and A-8 hit deceased Nasir with lathis and pinned him down while A-2 cut Nasir's head with a Gandasa and took it with him while the other accused also left the house of PW-2. In this incident, Nasir and Chheddan succumbed to their injuries while Ishtiyaq. PWs. 2, 3, 4 and 11 got injured. The prosecution alleges that some other villagers also had seen the incident in question. The further case of the prosecution is that after the accused persons left, PW-2 left the place of the incident with a view of the lodge a Police complaint and on the way while passing through the colony of Hargaon he met one Liyaqat (not examined) and told him about the incident and requested him to write down a complaint which was done by said Liyaqat on which PW-2 put his thumb impression. He then

took the report and went to the Police Station at Hargaon and handed over the same to the Officer-in-Charge of the Police Station who after registering a case sent PW-2 with a Constable to Hargaon Hospital where he was medically examined. The further case of the prosecution is that when PW-2 was being treated in the said hospital, the other wounded persons like PWs. 3 and 11 along with child Ishtiyaq were brought to the hospital by another Constable and were examined by the doctor. At that time the child Ishtiyaq was still alive and was advised by the doctors to be taken to Sitapur hospital, and on the way, he died and his dead body was taken to the Police Station where an inquest was held on the said dead body. In the meantime, the Police had already reached the place of incident and the I.O. found the headless body of Nasir in the Angan of the house of PW-2 and he held an inquest on the said body. He then sent the dead bodies of Nasir and Chheddan with necessary instructions to the Medical Officer to conduct the post mortem. He then directed his subordinates to search for the accused persons and he himself recorded the statement of PW-12 Rustam, PW-4 Masoom Ali and three others who have not been examined in the case. He also inspected the place of occurrence and found a partially woven durry, 4 broken teeth, blood stained empties of the cartridges, pellets etc. which he took his possession after making a Panchnama in regard to the same. He also collected blood stained and plain earth in separate containers from near the body of Nasir. Thereafter he made search for the decapitated head of deceased Nasir Ahmad but could not trace the same. It is the case of prosecution that the post mortem of the dead bodies was done on 21.2.1982 by Dr. V.S. Bajpai PW-7 from 12 noon to 1.45 p.m. and the said post mortem reports are marked as Ex.Ka-16A to 18. The prosecution then states that during the course of investigation, the accused persons were arrested, and based on the material gathered during the said investigation, the respondents were charged before the learned Sessions Judge as aforesaid.

3. Before the Sessions Court the prosecution has examined PWs. 2, 3, 4, 11 and 12 as eye-witnesses to the occurrence. PW-6 the doctor was examined to give evidence as to the injuries suffered by the deceased Ishtiyaq, and other injured witnesses - PWs. 2, 3, 11 and two other non-examined witnesses at the Primary Health Center, Hargaon on 20.2.1982. PW-7 the doctor who conducted the post mortem was examined in regard to his observations on the dead bodies of the deceased.

4. Learned Sessions Judge on consideration of the material on record came to the conclusion that so far as the motive for the accused persons to commit the crime in question was concerned, it was practically undisputed. The learned Judge also came to the conclusion that the place of the incident was also not disputed. He notice that the main contention of the defence was in regard to the actual time of the occurrence and involvement of the accused persons in the crime. He noticed that the defence was contending that the incident in question must have occurred before the day break and there being no occasion to identify the assailants the accused persons were falsely implicated because of prior enmity.

5. While dealing with the question of the time of the incident learned Sessions Judge held that the prosecution had relied upon the oral evidence of the eye witnesses coupled with the time of registering the complaint and the treatment given to the injured persons as also the opinion of the doctor who conducted the post mortem, and came to the conclusion that the incident in question must have occurred as stated by the prosecution i.e. at 9.30 a.m. It accepted the evidence of the prosecution witnesses in this regard. Learned Judge also relied upon the evidence of PW-6 Dr. Mohan Georage Din who had examined the injured witnesses as also the deceased Ishtiyaq which was between 1 p.m. and 2 p.m. on the date of the incident i.e. on 20.2.1982. The learned Judge noticed that he doctor in his evidence stated that the injuries in question suffered by the persons examined by him must have occurred a quarter day before, which according to the learned Judge takes the time of attack to about 9.30 a.m. Learned Sessions Judge while discussing the evidence of

PW-7 Dr. V.S. Bajpai, who conducted the autopsy on the dead body, noticed that the said witness had opined that death of Nasir could have taken place at about 9.30 a.m. Learned Judge also noticed that the said witness had agreed with the defence that the time of death could also be between 5 and 6 a.m. on 20.2.1982. He also noticed that the doctor in his report as well as in his oral evidence had stated that there was semi digested food in the stomach of the deceased and the same was found in the rectal area of the intestine and the bladders of the victims were full but he rejected the argument on behalf of the defence that from the above contents of the stomach the indication is that the attack on the deceased must have been earlier in the morning. While so rejecting the argument of the defence in regard to the timing of death based on the stomach contents, apart from the ocular evidence, he relied on Samson Writ's Applied Physiology (12th Edition) at page 416. On the basis of this opinion found in the text-book, learned Judge came to the conclusion that the presence of partly digested food in the stomach can furnish no basis about the time of last meal. Thereupon relying upon the evidence of PW-7 as to the setting in of rigor mortis as also the opinion recorded in The Medical Jurisprudence, 3rd Edition, page 149 by Dr. R.M. Jhala and B.B. Raju he came to the conclusion that the death of Nasir must have occurred 22 hours before the post mortem examination which when calculated would take the time of death to 9.30 a.m. on 20.2.1982. On the said basis the learned Sessions Judge came to the conclusion that the time of attack was as stated by the prosecution.

6. In regard to the ocular evidence as to the incident in question, learned Judge held while evidence of PW-4 Masoom Ali in regard to identification of the accused cannot be believed because he was not familiar with any of the accused and he had contradicted himself in the course of his examination, the court came to the conclusion that the conclusion that the evidence of Mohd. Siddiq PW-2, Mukhtar Ahmad PW-3, Rustam PW-12 can be safely relied upon to base a conviction of those accused persons who have been consistently named by these witnesses. He however found the evidence led by the prosecution in regard to A-6 Sadaqat and A-7 Liyaqat was confusing hence he gave them the benefit of doubt by acquitting them. In regard to the other accused persons, the court came to the conclusion that a conviction could be safely based on the evidence of prosecution witnesses especially that of PW-2 with the aid of Section 149 IPC.

7. In appeal the High Court primarily proceeded to examine the prosecution case in regard to time of occurrence and in this process, it held that the incident in question could not have occurred at 9.30 a.m. as contended by prosecution. The High Court in this process noticed that the distance from the village to the Police Station was about 3-1/2 miles and PW-2 being 50 years of age, and having received a gunshot injury on his thigh could not have covered that distance in one hour so as to file a complaint by 11 a.m. in the Police Station. The High Court was of the opinion that considering the condition in which Mohd. Siddiq was he would have taken at least one hour and 20 minutes for walking a distance of 3-1/2 miles to which it added an approximate time that might have been taken by PW-2 to get the complaint scribed by Liyaqat. Then the High Court observed that it would have taken at least one hour for the Head Moharrir to write one foolscap page of the form of the chik report and two pages of the other report, in addition to a page and half of General Diary. It also took into account the time taken for getting copies of the report made for the purpose of case diary and special report. Thus, calculating the approximate time required for registering a complaint, it came to the conclusion that in the normal course this procedure would have taken at least 5-1/2 hours before a complaint could be lodged. Thus calculating backwards, the time required to be taken (in its opinion), the High Court held that if the complaint was filed by 11 a.m., the incident must have occurred at least 5-1/2 hours earlier which will be before the day-break and not as stated by the prosecution. In this process, it also held that if the injured witnesses were examined by the doctor by 1 p.m. on that day, the incident must have occurred much earlier than 9.30 a.m.

which, according to the High Court, fits in with the suggestion made by the defence. In this regard the High Court also relied on the evidence of PW-7 Dr. Bajpai as to the contents of the stomach of the deceased persons to further come to the conclusion that since semi digested food was still in the stomach of the deceased, the incident in question must have occurred prior to these deceased persons having an opportunity to answer the call of nature which must have been much prior to the sunrise. In this view of the matter, the High Court disagreed with the learned Sessions Judge and held that the incident in question must have occurred before the day-break and that there was no opportunity for anyone to witness the incident and identify the assailants and because of the prior enmity the respondents must have been implicated. In regard to the actual incident, the High Court reviewed the evidence produced by the prosecution and came to the conclusion that the evidence of PW-2 cannot be accepted because he has made a contradictory statement in regard to the acquitted accused 6 and 7 and also made inconsistent statement about the time of death of Chheddan. It also did not believe PW-2's evidence in regard to his identification of all the accused. The High Court did not believe the evidence of Nasir PW-11 even though he was one of the injured witnesses. It also rejected the evidence of PW-3 even though admittedly he is one of the residence of the house where the incident had taken place being the son of PW-2. The evidence of Rustam PW-12 was rejected by the High Court since he had in the course of examination admitted that he was outside the house at the time of the incident. It however also rejected the suggestion made by the defence that the incident in question must have occurred because of dacoity in the house in the night intervening 19th and 20th February, 1982 but then it observed that this would not in any manner improve the prosecution case because the burden was on the prosecution to establish its case.

8. In conclusion the High Court held that in view of its finding that the incident could not have taken place at 9.30 a.m. and must have happened much earlier, and it held that it appeared that the prosecution case was built up after deliberations, therefore, it drew a strong presumption against the prosecution. It thus held that though there is a strong suspicion against the accused yet the same is not sufficient to base a conviction and the investigating agency for reasons best known to it has made changes in the time of the offence, the benefit of which it thought should be given to the accused. On this finding, the High Court allowed the appeal and set aside the conviction and sentence imposed on the respondents.

9. Mr. Prashant Choudhary, learned counsel for the State of U.P. contended that while the trial Court justly accepted the prosecution evidence both in regard to the time of the incident as also the manner in which the incident had taken place, the High Court erroneously rejected the finding of the learned Sessions Judge basing its findings not on material on record but on inferences drawn not on facts established or available on record. Learned counsel contended that the time taken for drafting and registering the complaint or for that matter, the time investigating agency would take to prepare its records were matters not really in issue still the High Court drew an inference not on proved facts in the case but based on the ipse dixit of the Judges of the High Court. Learned counsel submitted that the time PW-2 could have taken from his house to the Police Station could have been best elicited from his own evidence and there being no such material which supported the view taken by the High Court, the High Court could not have applied its own yardstick to gauge the time that may be taken to prepare the Police records or to get the injured examined. Learned counsel took us through the evidence of eye witnesses and doctors and contended that there has been consistency in the evidence of the eye witnesses as to the time of the incident and the doctors' evidence also supported the case of prosecution as also the text relied upon by the learned Sessions Judge to come to the conclusion as to the time of the incident in question, therefore, the High Court ought not to have rejected the findings of the learned Sessions Judge by merely substituting its subjective views. It was further argued on behalf of the appellant that the High Court erred in rejecting the evidence

produced by the prosecution on very flimsy grounds without really noticing any inconsistency in the said evidence as to the actual incident which took place.

10. Mr. Sushil Kumar learned senior counsel appearing for the respondents however supported the finding of the High Court in regard to the time of the incident. He submitted that from the medical evidence it is quite clear that the victims had not answered the call of nature therefore the incident in question could not have occurred as late as 9.30 a.m. therefore it should be presumed that the incident must have occurred before they had an opportunity to answer the call of nature which normally is very early in the morning. He contended that it is clear from the material on record that the complaint was drafted after due deliberations and after the Police arrived in the village based on suspicion and proved enmity which is clear from the fact that a large number of innocent members of the accused's family were roped in as accused in the case, even though some of them were not the residents of the village.

11. From the judgments of the courts below we notice that while the Sessions Court accepted the prosecution evidence that the incident in question had occurred at 9.30 a.m. on 20.2.1982, the High Court did not accept this evidence as to the time of occurrence and accepted the defence suggestion that the incident in question must have occurred sometime prior to the day-break. For this reason the High Court primarily relied upon its own assessment of the time that might have been taken by PW-2 in covering a distance of 3-1/2 miles to reach the Police Station, having to stop for some time at Hargaon for getting the complaint written down by Liyaqat as also the time that the Constable at the Police Station would have taken to register the complaint. The High Court in this process also placed reliance on that piece of medical evidence which showed that the incident in question, must have occurred very early in the morning. From the tenor of discussion on this point by the High Court we notice that the High Court has proceeded more on probabilities than on the evidence on record. In this process it as completely ignored the evidence of PWs 2, 3, 4, 11 and 12 therefore we have with the assistance of learned counsel gone through the evidence of the abovenoted witnesses. PW-2 in his evidence in unequivocal terms has stated at about 9.30 a.m. on the date of the incident he was sitting on a cot near the door and talking to Masoom Ali, PW-4 and Nasir Ahmad, PW-11. He also stated that at that time Mukhtar Ahmad PW-3 and Masroor Ali (not examined) were weaving the carpet around that place, and his deceased son Nasir and his wife Chheddan were sitting inside the house with their son Ishityaq when 17 accused persons came, some of whom stayed outside the house and others whom he had named, entered the house and assaulted the deceased an others. He also stated that after the assault the assailants left the house around 10 a.m. While going to the Police Station he stated that he met Liyaqat and got the complaint scribed form said Liyaqat which he cared to the Police Station where the Muharrir registered the said complaint. He further stated that the I.O. sent him with a Constable to Hargaon hospital and while he was being examined there, PWs. -11, 3 and deceased child Ishtiyaq were also brought to the hospital by another Constable and they were all examined by the doctor at the hospital from about 1 p.m. Though this witness has been cross-examined at length, except in regard to the factum of Chheddan's death, nothing contradicting his evidence in examination in chief has been elicited by the defence. It is to be noted here that this witness was also injured in the incident in question, therefore, his presence at the time of the incident cannot be disputed. Mukhtar Ahmad, PW-3, who is son of PW-2 and also an injured witness in his evidence has stated that at 9.30 a.m. while he was weaving durry in the Barotha of his house along with Masroor (not examined) his father PW-2 was talking with PWs 11 and 4 near the door of the house sitting on a cot. At that time the assailants entered the house and attacked the deceased and other witnesses including himself. He stated that his father left for the Police Station after half an hour and the Police came to the house at about 12 p.m. after which he along with other injured persons was taken to the hospital by a Police

Constable. His presence in the house also cannot be disputed and the factum that he was weaving durry at the time of the incident is further corroborated by the evidence of PW-14, I.O. who had noticed half-finished durry at the Barotha of the house when he visited the place. Though searching cross-examination was made of this witness, nothing which could create any doubt in his evidence has been brought out by the defence. In the cross-examination also he reiterated the incident in question had occurred around 9.30 a.m. and the suggestion put to him that the incident had taken place around 6.30 a.m. when he had gone outside his house, was denied by this witness.

12. PW-4 Masoom Ali is a resident of Magrava who was visiting Richhin where the incident took place, because of the health condition of his Phufa Dim Mohd. After visiting Dim Mohd. he states that he came to the house of PW-2 at about 9 a.m. and was sitting on the cot at the door talking to PW-2. He states that at that point of time PW-11 also dropped in. He further states that he had seen PW-3 and Masroor (not examined) weaving a durry at that time in the house of PW-2. He further states at about 9.30 a.m., 17 persons came from the East and attacked. He further states that after the accused persons left the house of PW-2, the Police came to the village at about 12 p.m. and when the Police came PW-2 had already gone to the Police Station. He also states that his statement was recorded by the I.O. at about 4 p.m. In cross examination, he has stated that he had come from Sitapur to Richhin that morning. The defence has not been able to elicit anything which would cast any doubt in his evidence in regard to the time of the incident during his cross examination.

13. PW-11 Nasir Ahmad is another eye witness who was also injured in the incident. He is resident of Lakhimpur and his in-laws live in Richhin the village in which the incident had occurred. He states that about 2 years prior to the date of the incident he came to Richhin and was to return back to his place of residence on the date of the incident. He came to PW-2 to pay a courtesy call and states that at about 9 or 9.30 a.m. while he was sitting with PW-2, PW-4 was also sitting with them. He states that deceased Nasir was inside the house with his wife and children and PW-3 and Masroor (not examined) were weaving durry at that point of time when 10 to 15 people came from the Eastern side of the house who attacked the deceased and the injured which included himself. He claims that he had seen the incident which took place inside the house form the place where he was standing. This witness who is not a relative of PW-2 and who cannot be termed as an interested witness has established his presence in the house of PW-2 which is further corroborated by the fact that he was also injured in the incident. Like the other witnesses the defence has not been able to elicit anything worthwhile during the course of his cross examination. On the contrary he reiterated whatever he has stated in his examination in chief as to the time of the incident.

14. Rustam PW-12 is a neighbour of PW-2. He in his evidence states that his house is about 100 paces away from that of PW-12 and on the day of the incident, he heard the voice of PW-4 hence reached the place of incident and he found about 10 people surrounding the house of PW-2 at about 9.30 a.m. Though this witness has not witnessed the incident inside the house, his evidence that when he came near the house of PW-2 at 9.30 a.m. some incident had taken place also establishes the fact that the prosecution's claim that the incident had occurred at that time of the day is proved.

15. The trial court in regard to the time of the incident relying on the oral evidence of PWs, 2, 3, 4, 11 and 12 held that it was possible to conclude that the incident in question had occurred at about 9.30 a.m. in the morning in which these witnesses were also injured. In this process, it accepted the prosecution's ocular evidence as to the incident. Of course, it also found corroboration from the medical evidence as also from certain circumstantial evidence adduced by the prosecution.

16. The High Court, however, proceeded on the basis of probabilities of the case rather than the

evidence of eye-witnesses to come to the conclusion that the incident in question could not have taken place at 9.30 a.m. Having perused the material on record and heard the arguments of the learned counsel, we are of the opinion that when there is acceptable oral evidence of eye witnesses who were present at the time of incident to speak about the time of incident, the High Court erred in entering into the exercise of calculation based on probabilities which has no foundation in evidence. However exact a calculation of this nature could be, the same cannot be a substitute for the evidence of acceptable eye witnesses, such exercise of calculating the time of incident based on probabilities can only be resorted to in the absence of acceptable oral evidence. From the judgment of the High Court, we are unable to find that the High Court has in the first instance, really tried to anaylse the evidence of the eye witnesses to come to a definite conclusion as to the acceptability or otherwise of the said evidence. Therefore, we will now examine whether the prosecution from the oral evidence has been able to establish the time of incident or not. PW-2 is the father of PW-3 and both of them reside in the same house and admittedly the incident has occurred in the house of PW-2. Therefore, as to the presence of these witnesses at the time of the incident there cannot be any doubt more so in the background of the fact that both these eye-witnesses have also suffered injuries. The defence, as noted above, has not challenged the place of incident. Both PWs. 2 and 3 have specifically stated that the incident in question took place at about 9.30 a.m. in the morning. We have also noticed that there has been no successful challenge to this evidence of PWs2 and 3 in the cross-examination. Be that as it may, we will still have to be cautions as to the acceptance of the evidence of these two witnesses because they are admittedly interested witnesses and have some motive to depose against the accused. If in this background, we analyse the evidence of other eye witnesses then we find from the evidence of PWs 4, 11 and 12 that the prosecution has conclusively established that the incident in question has occurred at 9.30 in the morning. These three witnesses who are not related to PW-2 are outsiders who were visiting the village and happened to be in the house of PW-2 at the time of incident though they are chance witnesses, their presence stands established by other evidence. They have no reason to implicate the accused persons falsely. On the question of time of incident these 3 witnesses and PWs 2 and 3 have spoken consistently and vouching for the presence of each other. It is to be noted that PW-11 is also a witness who suffered injuries in the incident in question and PW-12 is a neighbour whose presence also cannot be doubted at the time of the incident because at the time of incident of this magnitude, it is but natural if nothing else curiosity brings people to place of incident. From the perusal of the cross-examination, of these witnesses, we are not able to find anything which creates doubt in our mind as to the credibility of evidence of these witnesses. Thus from the oral evidence of PWs 2, 3, 4, 11 and 12, the prosecution has established that the incident in question has occurred at 9.30 in the morning which the trial Court has rightly accepted. As noted above, the High Court did not discuss this evidence in the proper perspective but relied upon certain other probabilities which according to us ought not to have been done in the face of the divest evidence available on record. Herein we must notice that the High Court has also relied upon the medical evidence to show that the dead bodies of Nasir and Chheddan contained semi-digested food when the post mortem was conducted, therefore, the High Court inferred that the incident in question must have occurred much before these two deceased had an opportunity to answer the call of nature. THis is a probability which can be utilised for the purpose of determining the time of incident provided there is no other acceptable evidence. Then again we must notice before the court decides to determine the time of death based on the stomach contents of the deceased, the court should first find out whether there is material to show on record as to the possibility of deceased having or not having an opportunity to go to answer the call of nature before his/her death. It is not as if every human being without exception goes to case himself first thing on the day break, there may be innumerable reasons not to do so, therefore, presence of semi digested food in the stomach of the deceased is not an absolute proof of the fact that deceased must have died before day break.

While we do agree that this can be a factor to be taken into consideration it cannot be such a prima factor as to overruled the acceptable oral evidence which is available on record. We also have to notice that the medical evidence tendered by PW-7 does not in fact support either of the sides because the doctor has said specifically from the appearance of rigor mortis that the death could have occurred at 9.30 a.m. on 20th February, 1982. In the cross examination, he accepted the suggestion that the same coudl have occurred even earlier basing his opinion on the stomach contents, therefore, in the present case the medical evidence does not help the court to come to positive conclusion as to the time of death. Therefore, on reappraisal of the evidence on record, we are of the opinion that the prosecution in this case has established by oral evidence that the incident has actually occurred at about 9.30 a.m. and we find no reason why we should disbelieve the oral evidence in this regard especially because of the evident of the independent injured witness like PW-11 and other two independent witnesses PWs 4 and 12 in regard to the timing of the incident. The learned Sessions Judge rightly accepted this evidence and the High Court, in our opinion, erred in rejecting this evidence based on probability which had no foundation in evidence.

17. This leaves us to examine the merit of the prosecution case as to the involvement of accused persons in the incident. It is the case of prosecution that out of the 17 accused persons 9 of them remained outside the house of PW-2, while A-1 to A-8 entered the house carrying various weapons and were responsible for death of the three persons as also injuries to the 4 witnesses. So far as the identity of the 9 accused persons who stayed outside is concerned, we notice considerable discrepancy in the prosecution evidence. As a matter of fact it has come in evidence that those witnesses who were inside the house coudl not even have seen these accused who were outside the house, therefore, in our opinion, it is not safe to accept this evidence to base a conviction of those accused who were standing outside the house. The only person who could have possibly noticed all these accused who were outside the house is PW-12 but from his evidence alone, we think it is not safe to hold these accused persons guilty of the offence alleged against them. At this stage itself, we notice that so far as accused A-6 and A-7 are concerned, the learned Sessions Judge himself found some difficulty in accepting the evidence of PW-2 because of some confusion in his evidence. That findings has since become final, therefore, we will accept the said finding of the learned Sessions Judge in regard to A-6 and A-7. In view of this discussion of ours, so far as the accused persons A-6 to A-15 are concerned, we must hold the prosecution has not established its case of the involvement of these accused in the alleged crime, therefore, they are entitled to the benefit of doubt and to that extent, the State appeals should fail.

So far as A-2 is concerned from the prosecution evidence, it is clear that he actually cut the head of Nasir. Therefore, he is guilty of the offence charged against him but it has come on record that he has since died, therefore, the appeal against him has abated.

18. So far as accused Nos. 1, 3 to 5 and 8 are concerned, in our opinion there is sufficient material on record to hold them guilty of the charge levelled against them.

PW-2 in the course of his evidence has stated when these accused persons entered the house of A-1 Yusuf exhorted others to kill consequent to which he himself shot at Nasir which hit deceased Nasir on his right elbow and he fell down. As per this witness, A-1 against fired simultaneously with A-5 which his him (PW-2), PW-3 and PW-11 as also deceased child Ishtiyaq. This evidence of PW-2 is supported by the evidence of PW-3 who in his evidence stated that at the time of incident A-1 was carrying a single barrel gun and he exhorted others to kill and fired from his gun which hit Nasir who fell down. PW-3 also states that A-1 again fired simultaneously with Khaliq A-5 which hit PW-2, himself PW-11 and deceased Ishtiyaq. PW-11, the other injured witness in his evidence has stated

that the identified A-1 in the ground of people who entered the house and that he exhorted others to kill A-1. He also supports PWs 2 and 3 in regard to overt act of A-1. Thus from the evidence of these witnesses, it is clear that A-1 had entered the house carrying a fire-arm and he exhorted the other accused persons inside the house to kill the people there and he himself fired twice causing injuries to the deceased Nasir and Ishatiyaq as also causing injuries to witnesses PWs 2, 3 and 11, therefore, his involvement in the incident in question stands established.

19. Similar is the evidence in regard to A-3, 4, 5 and 8 wherein PW-2 has stated that Rasid A-3 fired twice which hit Chheddan and Ishtiyaq. This evidence of PW-2 in regard to overt act of Rasid finds corroboration from the evidence of PW-3 who has stated that A-3 Rasid who was carrying a single barrel gun had fired at deceased Chheddan and Ishtiyaq. PW-11 in his evidence states though he has not named A-3 by name in his previous statement but he had seen A-3 fire with a gun at the wife of Nasir which hit her and she fell down which, in our opinion, is sufficient to corroborate the evidence of PWs. 2 and 3.

20. In regard to A-4 Qayum, PW-2 says he assaulted Nasir with lathi and assisted A-2 in cutting his head by pinning the deceased down. The lathi assault on Nasir is corroborated by the corresponding contusions found in the chest of the deceased and evidence of PW-2 in this regard is corroborated by PW-3 who says that he knows the accused and had seen him assaulting Nasir on the date of incident in the house of PW-2.

21. In regard to A-5 Khaliq, PW-2 says this accused fired twice from his gun which hit Nasir and Ishtiyaq and the same is supported by PW-3 Mukhtar. The evidence of this injured witness PW-3 also supports PW-2 in regard to the act of this accused firing two shots. PW-11 also supports the evidence of PW-2 an 3 in regard to overt act of A-5, therefore, we have no hesitation in coming to the conclusion that this accused also took part in the incident in question.

22. In regard to A-8 Barqat, PWs. 2 and 3 have stated that this accused was carrying a lathi and dealt blows along with A-4 Qayum on deceased Nasir which as stated above is supported by the medical evidence which shows deceased Nasir had as many as 4 contusions on his chest and other parts of the body. Therefore, we hold this accused also guilty of the offence charged against him.

23. Learned counsel for the respondents strenuously contended the prosecution has roped in a large number of family members of the accused who are otherwise innocent which is established by the fact that the prosecution has not been able to prove the case against those accused persons who had not entered the house. The learned counsel, therefore, argues that this itself shows that the prosecution has foisted a false case. In this process he further contends that A-5 is not a resident of village Richhin but he is a resident of another village nearly 25 kms. away from the said place and his presence at the time of the incident is highly improbable. He contends that this accused was obviously included in the array of accused persons falsely because he belonged to the family of the accused. Similarly the learned counsel contended that A-4 and A-8 could not have been present at the time of the incident and the contusions found on the body of deceased Nisar could have been caused even from fall or other injuries suffered by him during the melee when the incident took place.

24. We are not able to accept this argument which is based purely on surmise. It is true that the prosecution has in the instant case not been able to prove its case as against many of the accused persons beyond reasonable doubt, it is only on that basis they have been given the benefit of doubt and have been acquitted of the charges levelled against them by us. But that does not mean that the

other accused against whom there is sufficient material to establish the prosecution case should also be given such benefit of doubt. The prosecution witnesses who were present at the time of incident have very clearly and consistently spoken about the overt acts of A-4, A-5 and A-8 along with A-1, A-2 and A-3 which is supported by medical evidence also, therefore, we accept the prosecution case in regard to accused A-1, A-3 to A-5 and A-8, that along with deceased A-2 had entered the house of PW-2 and were responsible for the death of Nasir, Chheddan and Ishtiyaq. They were also responsible for causing injuries to PWs. 2, 3 and 11 therefore, we are in agreement with the finding of learned Sessions Judge in regard to these accused persons.

25. In the said view of the matter, the appeal of the State succeeds in regard to (i) respondent No. 1 Rasid, s/o Abdul Majid; (ii) respondent No. 2 Qayum s/o Nazir, (iii) respondent No. 4 Barkat s/o Hamid, (iv) respondent No. 5 Yusuf s/o Rahim and (v) respondent No. 13 Khaliq s/o Abbas.

26. We set aside the judgment of the High Court in regard to these respondents and confirm the conviction and sentence imposed by the learned Sessions Judge on these respondents. The appeal of the State in regard to other respondents stands dismissed. The bailbonds of the convicted accused persons shall stand cancelled and they shall serve out the remainder of the sentence imposed on them by the learned Sessions Judge.

27. The appeal is allowed in part.