SUPREME COURT OF INDIA

Vyas Ram @ Vyas Kahar

Vs.

State of Bihar

Crl.A.No.791 of 2009

(A.K. Patnaik and H.L. Gokhale JJ.)

20.09.2013

JUDGEMENT

H.L. GOKHALE J.

1. This Criminal Appeal No. 791/2009 filed by Vyas Kahar alias Vyas- jee, Naresh Paswan and Bugal Mochi alias Bugal Ravidas seeks to challenge the Death sentence awarded to them by the Sessions Judge-of the-Designated Court, Gaya, State of Bihar, by his judgment and order dated 11.02.2009 in C.R Case No.430 of 1992 arising out of Tekri PS Case No.19/1992. All of them have been convicted and sentenced to death under Section 3(1) of The Terrorists and Disruptive Activities (Prevention) Act, 1987 (hereafter referred to as TADA), and for life imprisonment on each count under Sections 302 read with 149, 364 r/w 149, 307 r/w 149 of Indian Penal Code (IPC in short), for rigorous imprisonment for 10 years under Section 436 r/w 149 IPC, and rigorous imprisonment for 1 year under Section 435 r/w 149 IPC. The Death Reference Case (R) No.2 of 2011 arises out of the award of death sentence made by the said learned Judge under Section 366 of the Code of Criminal Procedure, 1973 (Cr.P.C.) r/w Section 19 of TADA.

The initiation of prosecution

2. As per the First Information Report (FIR) dated 13.02.1992, there was a gruesome carnage in which 35 persons were killed, and 7 persons were injured. All of them belonged to the Bhumihar community of village Bara, police station Tekari, District Gaya, State of Bihar. The FIR was lodged on the basis of the fard-bayan of the informant Satendra Kumar Sharma who had stated that at 9:30 pm on

12.02.92, when the informant was preparing to go to bed, he heard sounds of explosions and firing. He saw the village ablaze. About 10-15 unknown people knocked at the door of his house violently, and told him that they had come to pick up one Dayanand and Haridwar Singh, as according to them they were hidden in one of the houses. When the informant opened the door, he was forcibly taken to the north-eastern side of the village, near a temple. He found many of his relatives sitting there, and their hands were tied at the back by the extremists. Soon thereafter 5-6 people including one of the appellants, viz. Bugal Mochi came there, and told the other extremists to bring all those people near the canal since their leader one Kirani Yadav had directed so. The ladies were sent home, and these people were taken near the canal. The informant claims that he had overheard the extremists saying that they did not intend to spare any person belonging to the Bhumihar caste. Some firing was heard from the west, and some of the extremists, including Bugal Mochi fearing the arrival of police started slitting the necks of people. The informant somehow managed to escape, though he lists some 37 persons whose dead bodies he claims to have seen. He also mentions the name of 8 injured people. The extremists retreated soon after the arrival of police, shouting slogans of "MCC (Maoist Communist Centre) zindabad". According to him there were about 500 extremists in all, out of whom some 300 were armed with firearms and explosives, and many were in police uniform. He named 34 people in the FIR including two of the appellants viz. Vyas Ram and Bugal Mochi, but the name of Naresh Paswan is not mentioned.

3. On the statement of the informant, the police registered the case under Sections 3, 4 and 5 of TADA, and under Sections 147, 148, 149, 302, 307, 326, 436, 452, 341 and 342 of IPC. During the investigation, many arrests were made, and the confessional statement of Bihari Manjhi was recorded. After further investigation the charge-sheet was submitted against as many as 119 persons, out of whom 13 were brought to trial, showing the remaining persons as absconders.

Proceeding of the trial at the earlier stage

4. The learned Designated Judge who conducted the trial of the Case C.R. No.430 of 1992, by his judgment and order dated 8.6.2001, acquitted four of these accused viz. Nanhey Yadav, Nanak Teli, Naresh Chamar and Ramashish Mahto. Four other accused viz. Krishna Mochi, Dharmendra Singh alias Dharu Singh, Nanhey Lal Mochi and Veer Kuer Paswan alias Veer Kuer Dusadh were sentenced to death under Section 3(1) of TADA, and for life imprisonment under Section 302 r/w 149 of IPC. Their death sentence was confirmed by a bench of three judges of this

Court by a majority of two versus one, on 15.04.2002 in Criminal Appeal No.761 of 2001 read with Death Reference No.1 of 2001 i.e. Krishna Mochi and Others v. State of Bihar reported in 2002 (6) SCC 81 (wherein the Senior Judge on the bench viz. Hon'ble Mr. Justice M.B. Shah, rendered a separate judgment acquitting Dharmendra Singh and commuting the death sentence of the other three to life imprisonment).

5. Another group of accused facing the said trial viz. Bihari Manjhi, Ramautar Dusadh alias Lakhan Dusadh, Rajendra Paswan and Wakil Yadav though convicted under Section 3(1) of TADA, were sentenced to rigorous imprisonment for life on each count. Bihari Manjhi, Ramautar Dusadh and Wakil Yadav filed one appeal, and Rajendra Paswan filed a separate one. Both these appeals were heard together and allowed. Their conviction and sentence was set aside by this Court in a unanimous judgment of the same bench of three judges rendered on the same day i.e. 15.04.2002 in Bihari Manjhi and Others v. State of Bihar and Rajendra Paswan v. State of Bihar, reported in 2002 (4) SCC 352.

Acquittal of three other accused in the present proceeding

6. Three other accused viz. Tyagi Manjhi alias Tyagi-jee, Vijay Yadav and Madhusudan Sharma, were tried along with the present appellants subsequently, as all of them were absconding at the time of the earlier mentioned proceeding. The charges were framed against them on 15.04.04. As reflected in the presently impugned judgment and order, all the accused pleaded to be not guilty, and took the defence of false implication. At the end of the trial, the above referred Tyagi Manjhi, Vijay Yadav and Madhusudan Sharma were acquitted for want of sufficient evidence. The three appellants herein were, however, held guilty and sentenced to death amongst other punishments as mentioned earlier.

7. The designated court observed that as far as the accused, Tyagi Manjhi and Vijay Yadav were concerned, both of them had been named in the confessional statement of Bihari Manjhi but that confession was not accepted to be reliable by the Supreme Court in Bihari Manjhi and Others v. State of Bihar (supra). The aforesaid confessional statement had not been produced before Chief Judicial Magistrate while producing the accused Bihari Manjhi before him, and the said statement was produced for the first time at the time of the trial i.e. after a lapse of five years from the date of its alleged recording. Thus it was hit by rule 15 of TADA (Prevention) Rules, 1987. In the absence of other evidence, these two accused were therefore acquitted, as it was held that the prosecution had not been

able to prove the charges against them. As far as Madhusudan was concerned, he was named in the FIR at serial no.5. The only prosecution witness, PW2, Birendra Singh who had named him as one of the accused who had slit throats of the deceased, had failed to identify him in the dock. There was no other evidence to throw light on his participation in this incident. Madhusudan was also accordingly acquitted.

Prosecution case against the present appellants

8. Appellant No.1 Vyas Ram who was named in the FIR at serial no.1 had been identified by PW-2, Birendra Singh. He had identified him in the dock also. He had also been identified by PW-16 Brajesh Kumar, and PW-17 Bunda Singh who had identified all the appellants in the dock. Appellant No.3 Bugal Mochi had been identified by PW-2, PW-3 Lawlesh Singh and PW-15 Ram Sagar Singh apart from PW-16 and PW-17. Appellant No.2 Naresh Paswan was also identified by all of these witnesses except PW-3.

9. The evidence of these prosecution witnesses was held to be sufficient to show their participation in the crime since they were held to be members of an unlawful assembly, and were sentenced to death under Section 3(1) of TADA, and for life imprisonment on each count under Sections 302 r/w 149, 364 r/w 149, 307 r/w 149 of I.P.C, and for rigorous imprisonment for 10 years under Section 436 r/w 149 IPC and rigorous imprisonment for 1 year under Section 435 r/w 149 IPC.

Submissions by the appellants

10. The main grounds raised by the learned counsel for the appellants Ms. Kamini Jaiswal to challenge the impugned order are the non application of TADA in the present case, the effect of the amended Section 20A of TADA, unreliable investigation especially in the light of the non examination of the informant, and the belated recording of the statement of the witnesses. The learned counsel for the appellants, has referred to the supplementing opinion of Katju J. in Vijay Kumar Baldev Sharma v. State of Maharashtra reported in 2007 (12) SCC 687, and submitted that after TADA came to an automatic end on 24.05.1995, and when there was no further extension of the period for which the act would remain in force, the continuation of the proceeding thereafter was clearly violative of the constitution.

11. It was further submitted that the prosecution had not been able to prove the notification of the notified area as required under Section 2(f) of TADA, and therefore, the constitution of the designated court for this area under Section 9(1) of the act was bad. Section 9(1) of the TADA lays down that "The Central Government or the State Government may by notification in the official Gazette constitute one or more designated courts, for such an area or areas or for such case or class or group of cases as may be specified in the Notification." It is, therefore, necessary to prove that the area/district where the occurrence took place is notified under Section 2(f) to invoke TADA.

12. The learned counsel for appellants also relied on the amended Section 20A which came into existence on 22-05-1993. According to Section 20A(1) no information in the form of FIR can be recorded by the police without prior written approval of the District Superintendent of the police. That is the condition precedent for recording of the FIR, and no cognizance of an offence can be taken without compliance of Section 20A(1). It was contended that in Hitendra Vishnu Thakur v. State of Maharashtra reported in AIR 1994 SC 2623, this Court has held that the amended Section 20A had retrospective effect.

13. However, most of these arguments have already been rejected by the relevant observations in the majority judgment of this Court in Death reference 1/2001, i.e. Krishna Mochi's case (supra) decided on 15.04.02. Besides as far as applicability of Section 20A is concerned, the submission on behalf of the appellant is not wholly correct. In fact at the end of paragraph 25 of Hitendra Thakur (supra), this court has held that the amendment of 1993 would apply to the cases which were pending investigation on 22.5.1993, and in which the challan had not been filed in Court till then. The present case was registered on 13.02.1992, the charge-sheet was submitted on 12.02.1993, and the cognizance was taken 6 days thereafter i.e. on 18.02.1993. Thus, all these steps were taken before coming into force of the amendment act. Therefore, the appellants cannot claim the benefit of the amendment, nor does the case cited by them come to their rescue.

14. Non-examination of the informant is once again stressed by the appellants in defence. The informant is, as claimed by the appellants, a member of Sawarna Liberation Front, and was the accused in the carnage known as Miyanpur Narsanghar. Non examination of S.I. Ram Japit Kumar also weakens the prosecution's case, because according to the counsel for appellants he was entrusted with the preliminary investigation, but neither the case diary was brought in, nor was he examined.

15. The learned senior counsel for the State Mr. Rai on the other hand submitted that the above submission is completely misconceived, and reiterated the findings of the Apex Court in para 35 of Krishna Mochi v. State (supra) viz. that an F.I.R is not a substantial piece of evidence, and non-examination of the informant would not entitle the appellants to an order of acquittal on this ground alone. The case should be examined on the basis of the evidence led by the prosecution. The carnage of Miyanpur had taken place after the carnage in the present case. The prosecution witnesses in the present case had supported the Fard-Bayan. As far as non- examination of Ram Japit Kumar is concerned, it was submitted that he was directed to investigate the case under the verbal orders of Suptd. of Police, Gaya. However, Ram Japit Kumar never made himself available for taking over the investigation of the case, and then the investigation was consequently entrusted to Suresh Chander Sharma, who had been examined as a prosecution witness (PW-21). This has also been observed in para 36 of the judgment in Krishna Mochi (supra).

16. Furthermore, the appellants have stressed upon the fact that no particular role was assigned to them, and in such a scenario there cannot be any conviction, leave aside the death sentence, for merely being present in the unlawful assembly at the place of incident. In Baladin v. State of U.P reported in AIR 1956 SC 181 a bench of three Judges held in paragraph 19 as follows:-

> "19. … It is well settled that mere presence in an assembly does not make such a person a member of an unlawful assembly unless it is shown that he had done something or omitted to do something which would make him a member of an unlawful assembly, or unless the case falls under section 142, Indian Penal Code."
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> The Court was concerned with a trial of some 57 persons for murder of 6 persons, out of whom 36 were convicted under Sections 148, 201/149 and 302/149 IPC, and 9 of whom were sentenced to death, and others were given different punishments for the roles assigned to them. This court examined the evidence, and upheld their sentences including death. Where some specific role was attributed to some of the accused like inciting the mob, the court held in paragraph 24 of the judgment that the theory of the person being a mere sight-seer will not help them. However, at the same time, where the court found that four of the appellants had not been assigned any particular part in the occurrence, nor any overt act had been attributed to

them, they were given benefit of doubt and acquitted. The court held in paragraph 28 that "they might possibly have been spectators who got mixed up in the crowd."

17. In Masalti v. State of U.P. reported in AIR 1965 SC 202, the accused had brutally killed one Gayadin and four members of his family, and then set the bodies on fire in the middle of the field. This had happened due to rivalry between two factions. F.I.R disclosed 35 persons as assailants and five more persons were added to the list by a subsequent committal order leading to the charges being framed against all 40 persons. A bench of four judges of this Court did not accept the defence that specific role had not been attributed to the accused, and that the mere presence of the accused in the unlawful assembly at the time of the incident does not justify the imposition of death sentence. However, as a rule of prudence, the court fixed the minimum number of witnesses needed to accept prosecution case to base a conviction on. It was emphasised by the court that it was unsafe to rely on the evidence of persons who spoke generally without specific reference to the identity of the individuals, and their overt acts that took place in the course of incident. This judgment laid down the principle of common liability viz., that where a crowd of assailants, who were the members of an unlawful assembly proceed to commit a crime, in pursuance of the common object of that assembly, it is often not possible for the witnesses to describe the actual part played by each one of them, and when a large crowd of persons armed with weapons assaults the intended victims, it may not be necessary that all of them have to take part in the actual assault. In that case several weapons were carried by different members of the unlawful assembly, and an accused who was the member of such an assembly and was carrying firearms was not permitted to take any advantage of the fact that he did not use those firearms, though other members of the assembly used their respective firearms.

18. Thus, the defining ingredient for the involvement of the accused would be the common intention. Section-149 of I.P.C makes it amply clear that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence is a member of the same assembly, is guilty of that offence. Masalti (supra) emphatically brings home the principle that the punishment prescribed by Section-149 is in a sense vicarious, and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly. At the same time we cannot ignore the law as

laid down in Baladin (supra) that if a person is a mere bystander, and no specific role is attributed to him, he may not come under the wide sweep of Section 149.

19. The submission of the appellants which does merit a close scrutiny and a thorough examination by the court is, however, concerning the allegedly faulty investigation, especially the failure of the prosecution to conduct a Test Identification Parade, and the delay in recording the statements of the witnesses which according to them rendered the entire alleged identification of the appellants doubtful. The appellants claim to be entitled to the benefit of doubt as it is dangerous to uphold the death sentence of the appellants on such shaky evidence. The appellants draw support from a judgment in the case of Jamuna Chaudhary v. State of Bihar reported in AIR 1974 SC 1822. In that case benefit of doubt was given to some of the accused in view of the unsatisfactory material on record. At the same time, we must also note that in that very matter where there was evidence of an injured witness, deposing against the accused, the same was accepted. The appellants have also drawn the attention of the court to the fact that a set of persons who were accused in the same case had been acquitted in the case of Bihari Manjhi and Others v. State (supra). However, here the bone of contention is with respect to their participation itself, in the light of the deficiency in the investigation. Those deficiencies also find a place in Hon'ble Mr. Justice Shah's observations in the Krishna Mochi case (supra).

Deficiencies in the prosecution:-

Non examination of Investigating Officer, Non submission of his case records

20. Suresh Chander Sharma (PW21) who had taken over the investigation after Ram Japit Kumar, had admitted in his cross examination that the entire investigation had been conducted by Ram Japit Kumar. PW 21 had not recorded the statements of many witnesses including the three chowkidaars who were the first to meet inspector Vijay Pratap Singh the then Station Incharge, and report the incident to him when he had come on patrolling, and heard the sounds of firing and explosion. The investigation conducted by Ram Japit had never been brought on record nor was his case diary submitted. PW21 had also admitted that the case diary was not with him, and that he had not seen the notification under TADA (para 61). It was also admitted that investigation has been done on the oral instructions of the Superintendent of Police without the necessary written orders from him or Director General of Police.

Statement of the SP

21. According to the statement of the Superintendent of Police Sunil Kumar, he received the information of Bihari Manjhi's arrest on 27.2.1992, and he went there to record the statement. He claims to have met Bihari Manjhi and told him to make his statement without fear or favour, and Bihari Manjhi did so. However, the same officer was not able to identify Bihari Manjhi in the Court. Moreover, the police personnel of P.S. Tekari were busy in making arrests, and a number of V.I.Ps were visiting. So the investigation had been entrusted to Suresh Chander Sharma, Inspector from Chandauti Police Station. Surprisingly, he does not remember whether written permission, to invoke TADA was taken or not, and whether under TADA the investigation had to be carried out only by an officer of rank of DSP or above.

Station in-charge of Police Station Bodh Gaya, Virendra Kumar Singh.

22. He admitted that he was an accused in the murder case of Vasuki Yadav, nephew of Vakil Yadav, (one of the accused in the present case), and had filed a petition before the Supreme Court for quashing the cognizance taken against him in that case.

23. Hon'ble Mr. Justice Shah had drawn support from the principle laid down in Masalti's case to emphasise the impossibility of basing the conviction on such shaky investigation. Such a view had been taken in a catena of other judgments, like Kamaksha Rai v. State of U.P., reported in 1999 (8) SCC 701. These principles were also followed in Binay Kumar Singh v. State of Bihar reported in 1997(1) SCC 283.

24. The delay in recording the statements of witnesses by the Investigating Officer and absence of the Test Identification Parade were also instrumental in demolishing the credibility of the investigation, and thus led to Hon'ble Mr. Justice Shah's dissenting opinion. Analysis of the evidence on record

25. In the present case, as per the statement of PW 21 Suresh Chander Sharma the investigation prior to him had been conducted by PW22, Vijay Pratap Singh who was the sub inspector and the officer incharge of Tekari Police station at the time of occurrence, as Ram Japit who had originally been entrusted with the investigation had fallen ill. He further adds that case diary from para 1- 222 had been recorded by PW22 and the rest, from 223 to 538, by himself. He does not

know whether S.P wrote any letter to the government for the invocation of TADA. PW 22 was the one who was the officer incharge of the Tekari P.S, and had gone for routine patrol at about 9 p.m. on 12.2.92, when he heard sounds of explosion. He heard from the Mukhia Sideshwar Yadav, whom he met on the way, that explosion was taking place in the north. On going there, he met three chowkidaars, Krishna Yadav, Bhola Paswan and Dafadar Ramparwesh Singh who told him that 'partywalas' had come, and set the village on fire, and were terrorising people by firing and exploding bombs. Interestingly, none of these people, through whom the police had come to know of the incident, were examined. Their fard bayan was not taken. PW 22 has stated in his deposition that he informed the SP of the gravity of the situation, and the SP came at the place of occurrence with his force and they all proceeded further. At this point of time, they were approached by one Sarwan Kumar, who had come running to them, after coming to know that they were police officers. His hands were tied at his back, he told them that extremists had come to the village, and had proceeded toward the east. Sarwan Kumar was also not examined. The reason given for this by PW22 is that Sarwan Kumar did not give the entire account of the happening, and because the entire village was on fire. The statements of none of the women who were weeping near the culvert were recorded either. Understandably, they were very upset, and possibly not in the position to give their statements. However, this does not explain as to why the statements of none of those people from whom the police had originally come to know of the incident, had been recorded, and why the F.I.R was recorded on the Fard bayan of the informant Satyendra Sharma later at 3 a.m. in the morning when the chowkidaars, the mukhiya and Sarwan Singh had much earlier informed the police about the incident. In fact statements of none of the women, and persons belonging to the communities of Brahmans, schedule castes or Yadavs were recorded by PW-22.

26. PW 22 claims to have taken over the investigation after Ram Japit Kumar was not available at the place of occurrence, but he did not have any written orders or approval for proceeding with the investigation. In para 28 of his deposition it is also revealed that none of the material exhibits of the case were submitted to the Court as the Malkhana had been attacked by the extremists in 1996, and all its articles were, consequently destroyed. In para 35 of his cross examination he had admitted that it had been recorded in para 23 of the police case diary that Ram Japit was busy with the investigation. In para 2 of the case diary it was mentioned that investigation of this case had been endorsed by the SP to Ram Japit Kumar who was at the place of occurrence. This contradicts his statement (para 26) that Ram Japit was not available at the place of occurrence.

27. In para 43, PW22 admits that no T.I.P was conducted of any suspect. PW22 investigated the case for only 8 days, and did not mention any time and place of the examination of any of the witnesses. There are also discrepancies in the depositions of PW21 and PW22 as far as the extent of case diary recorded by PW22 is concerned. PW 21 has stated it to be from para 1-222, while PW22 has stated it to be from 2-22 in para 27, and in para 40, he has stated it to be from 1-212. In addition to this, no seizure list was prepared. In the deposition of PW 20, it was found that informant was never seen after the recording of fard bayan and further statement. In para 12 he also states that there was no need for obtaining sanction from government for invoking TADA as there was provision to that effect. He did not specify the provision.

With evidence being in such a state, the question would be - who could be convicted ?

28. We cannot forget that in Krishna Mochi (supra) the accused were tried on the basis of same FIR, and two Judges in a bench of three upheld the conviction of Krishna Mochi, Dharmendra Singh, Nanhe Lal Mochi and Veer Kuer Paswan. Hon'ble Mr. Justice M.B. Shah, in paragraph 96 of his judgment, noted that the investigation was totally defective, the witnesses had exaggerated to a large extent, they had not assigned any specific role to the accused except their presence in the mob at the time of offence, they nowhere stated that the identified accused were having any weapon of offence, and the investigating officers had not recovered any weapon of offence or any incriminating article from their possession. In paragraph 96 (2) he referred to Dilavar Hussain v. State of Gujarat 1991 (1) SCC 253 and observed that when the accused are charged with heinous brutal murders punishable with highest penalty, the judicial approach in such cases has to be cautious, circumspect and careful. He acquitted Dharmendra Singh. As far as the other accused were concerned, although he upheld that conviction, presumably in view of the oral evidence on record, in view of the deficiencies noted by him, he altered their death sentence to life imprisonment.

29. In the present case, even if we decide to ignore the similar deficiencies in the prosecution, and look into the oral evidence which has come on record, the case of prosecution against appellant no: 2, Naresh Paswan is rather weak. His name was not mentioned in the FIR. PW-2 Birendra Singh who is an injured witness, though states in the dock that he had seen the appellants slitting the throats, he failed to identify Naresh Paswan in Court. None of the other witnesses including PW-3

Lawlesh Singh, who is another injured witness, have attributed any role to him. None of them said that he was a member of MCC. It is material to note that Madhusudan who was named at Sr. No.5 in the FIR also faced a similar allegation. It was PW-2 Birendra Singh who named Madhusudan as one of the accused who slit the throats of the deceased, but had failed to identify him in the dock. In the absence of other witnesses throwing any light on his participation in the occurrence, Madhusudan was acquitted by the learned designated Judge. In paragraph 39 of his judgment in Krishna Mochi (supra) Hon'ble Mr. Justice Aggarwal, rejected the theory of some of the accused being mere sight-seers. This was because, as the paragraph indicates, a specific role was attributed to them such as entering into the houses by breaking open the doors, and forcibly taking the inmates, tying their hands and taking them to the temple and thereafter near to the canal, where their legs were tied, and thereafter killing some of them. As far as Naresh Paswan is concerned, no such role is attributed to him by any of the witnesses. This being so, Naresh Paswan is entitled to have the same yardstick applied to him as was applied to Madhusudan. In the circumstances, in our view, Naresh Paswan deserves an acquittal.

30. As far as the other appellant no.3, Bugal Mochi is concerned, in addition to his name being mentioned in the FIR as one who was slitting the throats, he was identified by PW-2 injured witness Birendra Singh in Court. Bugal Mochi is attributed the role of slitting the throats by Birendra Singh in his oral deposition. Though other witnesses did not attribute any specific role to him, he was identified by them as a participant in the crime.

31. As far as appellant no.1, Vyas Ram is concerned, though his name was mentioned in the FIR, the heinous act of slitting the throats was not attributed to him in the FIR. PW-2, Birendra Singh has however stated in oral evidence that Vyas Ram was slitting the throats, and he identified him in the court as well, though no other witness has attributed any particular role to him. Birendra Singh being an injured witness, his testimony cannot be ignored. It is true that his testimony was not accepted in Krishna Mochi, but that was so with respect to other accused. In the present case, he has attributed a specific role to these two accused. There is no reason to discard his evidence. The conviction of these two accused under Section 302 of IPC and other charges will have to be upheld.

Question of sentence

32. Then comes the question of sentence to appellant nos.1 and 3 i.e. Vyas Ram and Bugal Mochi. It is true that in Krishna Mochi (supra), by a majority of two versus one, the crime in the instant case was held to be one which deserved the extreme penalty of death. This was apparently on the lines of the judgment of the Constitution Bench in Bachan Singh v. State of Punjab 1980 (2) SCC 684 as being one belonging to the rarest of the rare category. We have, however, to note that as far as the present trial is concerned, the occurrence of the crime is of February 1992 and the charges were framed in May 2004. More than nine years have gone thereafter also, and the appellants have been facing the trauma of the crime and the trial all this period. Besides, as noted earlier, the manner in which the investigation has proceeded was far from satisfactory. In all cases where death sentences are to be awarded, the circumstances of the accused are also required to be considered as laid down by the Constitution Bench in Bachan Singh (supra) and later by a bench of three Judges in Machi Singh v. State of Punjab 1983 (3) SCC 470. The leading judgment of conviction in Krishna Mochi (supra), was rendered by Hon'ble Aggarwal J., and he noted in para 33 of his judgment that in the present case there was more or less a caste war between the haves and the have nots. The appellants belonged to the latter category. The present incident was claimed to be a retaliatory attack by the members of MCC. They are essentially the persons belonging to the scheduled castes and backward classes, and economically weaker and exploited sections of society. The attack was supposed to be in retaliation to an earlier attack by the Bhumihar community, led by the Ranvir Sena. It must also be noted that none of the witnesses have attributed to these appellants that they belonged to the MCC. It is quite possible that due to their poverty and caste conflict in the villages they were drawn in the melee and participated in the crime. At the same time no harm was done to women and children. Appellant No.1 Vyas Ram worked with one Jamuna Singh. No harm was done to any member from his family either. This is not to say that such acts are to be condoned, but at the same time we have to consider as to whether after taking into account these circumstances of the accused, death sentence was warranted. We do not think so.

33. It was emphasised before us on behalf of the State that in Krishna Mochi (supra), the death sentence was upheld as against four accused, by a majority of two versus one, on the basis of an FIR which is common to the present case, and that this was so done by relying upon oral testimonies recorded in that case which are somewhat similar to those in the present case. In this connection we must state that though the FIR was common, the testimonies in the two cases are in fact different, and on the analysis thereof we have come to the conclusion that one of

the accused is not guilty, however, the other two are , but considering the circumstances in their case the death sentence is not warranted.

34. Even with respect to the death sentence awarded in Krishna Mochi(supra), having considered the dissenting opinion rendered by Hon'ble Shah J., we must note the approach adopted by this Court, subsequently, in a judgment of three judges in the case of Swamy Shraddananda @ Murali Manohar Mishra v. State of Karnataka reported in AIR 2008 SC 3040. A Sessions Court and the High Court had imposed death sentence on the appellant in that matter, and two judges of this court who heard the matter had differed on the issue of sentence. The matter was referred to three judges. The Court substituted the death sentence by imprisonment for life, though directed that the appellant shall not be released till the rest of his life. It was observed in paragraph 37 of the judgment as follows:-

> "37….. The absolute irrevocability of the death penalty renders it completely incompatible to the slightest hesitation on the part of the court….."
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> We may as well profitably refer to what was observed in para 149 of Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra reported in 2009 (6) SCC 498 which is to the following effect:-
>
> "149. Principle of prudence, enunciated by Bachan Singh is sound counsel on this count which shall stand us in good stead – whenever in the given circumstances, there is difference of opinion with respect to any sentencing prop (sic)/rationale, or subjectivity involved in the determining factors, or lack of thoroughness in complying with the sentencing procedure, it would be advisable to fall in favour of the "rule" of life imprisonment rather than invoking the "exception" of death punishment."

35. (i) In the circumstances, Crl. Appeal No.791 of 2009 is allowed in part. The judgment convicting appellant no.2, accused Naresh Paswan is set- aside, and he will stand acquitted. He is acquitted of the offences for which he was charged, and it is ordered that he be released forthwith if not required in any other case.

(ii) As far as appellant nos.1 and 3, accused Vyas Ram and Bugal Mochi are concerned, although their conviction under the offences for which they were charged is upheld, the death sentence awarded to them is commuted to imprisonment for life, which is to mean the rest of their natural life.

(iii) Consequently, the Death Reference Case (R) No.2 of 2011 filed by State of Bihar is hereby dismissed.