Supreme Court of India
Masalti vs State Of U. P on 4 May, 1964
Equivalent citations: 1965 AIR 202, 1964 SCR (8) 133
Author: P Gajendragadkar
Bench: Gajendragadkar, P.B. (Cj)

PETITIONER:
MASALTI

Vs.

RESPONDENT:
STATE OF U. P.

DATE OF JUDGMENT:
04/05/1964

BENCH:
GAJENDRAGADKAR, P.B. (CJ)
BENCH:
GAJENDRAGADKAR, P.B. (CJ)
WANCHOO, K.N.
GUPTA, K.C. DAS
DAYAL, RAGHUBAR

CITATION:
1965 AIR 202 1964 SCR (8) 133
CITATOR INFO :

F	1968	SC1438	(4)
RF	1971	SC2381	(4)
RF	1972	SC1309	(3)
RF	1973	SC 1	(6)
R	1973	SC 863	(13)
R	1974	SC 902	(38)
R	1976	SC1449	(15)
R	1977	SC 472	(24)
RF	1978	SC1647	(6)
MV	1982	SC1325	(69)
RF	1983	SC 305	(5)
RF	1992	SC1751	(2)

ACT:
Criminal Appeal-Appeal by special leave-Scope-Murders committed by village faction constituting unlawful assembly-Sentence of death, if and when can be passed-Appreciation of evidence-Test -Validity Prosecution-It must examine an witnesses cited.

HEADNOTE:
Forty persons belonging to a village faction and

constituting an unlawful assembly were put up on trial before the Additional Sessions Judge under s. 302 read with s. 149 of the Indian Penal Code and other sections thereof for murdering 5 persons of the other faction with guns. The trial Judge found 35 of them guilty and sentenced 10 of them, who carried fire arms, to death and the rest to imprisonment for life. Three appeals were preferred by the convicted persons to the High Court and the sentences of death came up for confirmation under s. 374 of the

(1) L.R. 59 I.A. 2o6.

134

Code of Criminal Procedure. The High Court acquitted 7 of the appellants and, concurring with the findings of the trial court, dismissed the appeals of the rest. It confirmed the sentences of death passed on the 10 accused persons. The appeals to this Court were preferred by those 10 and 6 others by special leave.

HELD:-(i) In criminal appeals under Art. 136 of the Constitution involving sentences of death it would be improper to refuse to consider relevant pleas of fact or law on the ground that they had not been taken before the High Court. when any such point had actually been urged and not considered by the High Court, the party urging it was entitled as a matter of right to obtain a decision from this Court. Even otherwise no hard and fast rule can be laid down prohibiting such pleas being raised in such appeals.

(ii).It -would be unsound to lay down as a general rule that every witness cited by the prosecution must be examined by it even though his evidence was not very material or he was known to have been won over or terrorised.

(iii).....Evidence of a witness could not be discarded only on the ground that he was a partisan or interested witness, particularly in cases of murder committed by a village faction, such mechanical rejection would invariably lead to failure of justice.

(iv).It was not improper for a criminal court having a large number of offenders and victims to deal with to adopt the test that the conviction of any particular accused could be sustained only if a particular number of witnesses gave a consistent account against him. Such a test, even though mechanical, was not unreasonable.

(v)..Punishment prescribed by s. 149 of the Indian Penal Code was in a sense vicarious and that section does not necessarily require that the offence must have been actually committed by every member of the unlawful assembly. The observations of this Court in Baladin v. State of U.P. had to be read in the context of that case and could not be treated as laying down an unqualified proposition of law. Baladin v. State of Uttar Pradesh , A.I.R. 1958 S.C. 181, explained.

(vi) It was....not correct to say that if a person was found guilty of

murder under s......302/149 of the Indian Penal Code and it

was not shown
that he himself.....had committed the murder, no sentence of death could
be inflicted on him.
Dalip Singh v. State of Punjab , [19541 S.C.R. 145, distinguished.
(vii).....There was no error in the exercise of their discretion by the courts below in the present case in making a distinction between the ten persons who carried fire arms and were sentenced to death and the others, who did not carry fire and were sentenced to imprisonment for life, under a common charge under ss. 302/149.
I35
(viii)....Regard being had to the circumstances of the present case, the ends of justice would be properly served if the sentences of death passed on the three accused persons aged 18, 23 and 24, who had joined the unlawful assembly under pressure of their elders were modified to life sentences.

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeals Nos. 30-34 of 1964.

Appeals by special leave from the judgment and order dated October 22, 1963 of the Allahabad High Court in Criminal Appeals Nos. 77 and 78 of 1963.

M....S. K. Sastri, for the appellant (in Cr. A. No. 30 of 1964).

I. ..M. Lall and Ganpat Rai, for the appellants (in Cr. A. No. 31 of 1964).

V....'Y. Sawhney, for the appellants (in Cr. A. Nos. 32--34/64).

0....P. Rana, Atiqur Pehman and C. P. Lal, for the res- pondents-

May, 4. 1964. The Judgment of the Court delivered by GAJENDRAGADKAR, C. J. - Forty person were charged with having committed several offences the principal one of which was under section 302 read with S. 149 of the Indian Penal Code. The case against these persons was tried by the first Additional Sessions judge at Jhansi. The other charges framed against them were under s. 307 / 149, 201/ 149 & SI 1, 395, 396, 149 & 449, 1. P. C. The learned trial Judge held that none of the char-es had been proved against five of the accused persons. '.He -also found that the charges under sections 395 & 396 were not proved against any of them. In regard to the remaining charges. he found that 35 out of 40 accused persons were guilty. For the major offence charged under s. 302/149, he sentenced 10 accused persons to death and 25 others to imprisonment for life. He also directed that the said accused persons should undergo different terms of imprisonment for the remaining offences; but for the purpose of the present appeals, it is unnecessary to refer to them.

After the learned trial Judge pronounced his judgment on the 31st December 1962, the 35 accused persons who had been convicted by him preferred three appeals between them before the Allababad High Court, whereas the sentences of death imposed on 10 accused persons by the learned trial Judge were submitted to the said High Court for confirmation. The High Court has held that 7 out of the 35 appellants before it were not proved to have committed any of the offences, and so, they were ordered to be acquitted. In regard to the remaining 28 appellants, the High Court has confirmed the orders of conviction and sentence imposed on them by the trial Court. In the result, the reference made to the High Court for confirmation of the sentences of death imposed on the 10 accused persons by the trial Court was allowed. It is against this decision of the High Court that the present five appeals have been brought to this Court by special leave, and the number of accused persons who have brought these appeals before us is 16.

Before dealing with the points raised in these appeals, it is necessary to set out very briefly the relevant facts on which the prosecution case against the appellants and their co-accused substantially rests. The incident which has given rise to the present criminal proceedings took place on the 29th November, 1961 in village Bilati Khet in the district of Jhansi at about 8 a.m. It is clear that this village is cursed with keen rivalry and enmity between two factionsOne group was led by Gayadin who and four other members of his family were murdered on the said date. All these murders were committed, according to the prosecution, by the members of the rival faction amongst whom are included the present appellants before us. Criminal proceedings have continued between the parties for several years almost without interruption. The rival group was led by Laxmi Prasad alias Laxmi Narain who is one of the appellants in this Court. In the last election of the village Panchayat Laxmi Prasad succeeded as Pradhan of the village and defeated the candidate set up by Gayadin. On the 28th November, 1961, a boundary dispute led to an incident between the members of the two groups. This dispute related to two fields one of which belonged to Gayadin and the other to Laxmi Prasad. Attempts were made to settle this dispute by arbitration, but they failed. It appears that Laxmi Prasad and the members of his group did not agree to submit to any arbitration and they left the meeting called for the purpose threatening that they would see that the matter in dispute between them was settled the next day. It is on this grim note that the incident of the 28th November ended.

On the 29th November in the early morning, Bahoran, one of the sons of Gayadin, had gone out to ease himself. He was then carrying a pharsa. In the field he met Laxmi Prasad who attacked him with a lathi. Bahoran retaliated this attack with his own pharsa and in the scuffle the nose of Laxmi Prasad was injured and it began to bleed; in fact, a part of the nose was actually cut. Infuriated by this injury, Laxmi Prasad went to his house and collected the whole crowd belonging to his faction. Bahoran eased himself and returned to his house. Soon there after he washed his hands and went to the north where his father, brothers and other relations were warming themselves by fire. At that stage, Ram Prasad and Dayaram rushed to the scene and informed them that Laxmi Prasad and his companions were all armed with guns, spears, swords, gandasas and lathis and were proceeding to the house of Gayadin determined to kill all the members of Gayadin's family. On receiving this alarming information, Gavadin and his friends and relatives thought of proceeding towards the house of Gayadin. About that time, Laxmi Prasad and his companions reached near the house of Gayadin whereon Laxmi Prasad fired a gun. Bhagwati was carrying a large quantity of cartridges in

the folds of his dhoti and was instigating Laxmi Prasad to fire at everyone sitting near the fire to the north of the house and to exterminate the family of Gayadin. On hearing this, everyone of the group sitting near the fire rushed into the house and closed the doors. The assailants then broke open the doors of the house and entered the sehan of Gayadin. Inside the house the assailants pursued Gayadin on the upper storey and killed him there. Brindaban, Radha Saran and Dayaram were hiding in different rooms of the house; the doors of these rooms were broken open and all the three of them were shot dead. Bahoran and Shiroman Singh, both sons of Gayadin, escaped through the tiled roof into the cattleshed of Harbans which is situated towards the south-east of Gayadin's house. Shiroman concealed himself in the godown while Bahoran concealed himself in the room in the upper storey where chaff had been stored. After killing Gayadin, Brindaban, Radha Saran and Dayaram, the assailants mercilessly dragged the bodies of the victims out of the house of Gayadin and began their search for Bahoran and other male inmates of the house. When the dead bodies were thus being dragged, Gori Dulaiya wife of Gayadin rushed after the assailants and implored them not to take the dead bodies away. One of the assailants, however, struck her with a stick and she was forced to retrace her steps. The dead bodies were then dragged towards the east of the house. On reaching the cattleshed of Harbans, the assailants broke open the outer door of the house and entered into it. They then injured Harbans and managed to discover Shiroman Singh who was promptly killed. The five dead bodies were then taken into the field of Bhagwati. In the field two big piles of cowdung cakes were prepared. On one of the piles the bodies of Gayadin, Brindaban, Radha Saran and Davaram were placed and on the other Shiroman Singh's body was put. Kerosene oil was sprinkled on the bodies and fire was set to them. That, in brief, is the story of the gruesome murders which have given rise to the present proceedings. When the assailants had left the house of Gayadin dragging the dead bodies with them. Rahoran came out of hi,, hiding place and rushed to the Police Station Krichh and lodged the First Information Report at about 11 o'clock. In this report,.....he gave all the material details in regard to the commission.of the offence and named the 35 persons as the assailants. ....In fact, the first committal order passed on the 31st March,.....1962 in the present proceedings referred to 35 assailants. Later. five more persons were added to the list of assailants by the committal order made on the 14th May, 1962. On receiving the first information report, the police party rushed to the scene of occurrence on cycles and they put off the burning fire and took out the half burnt bodies of the five murdered persons. These bodies were identified aid were sent for post mortem examination. The injured persons Harbans, Ram Prasad, Mansa Ram and Smt. Gori Dulaiya were sent for medical examination. Post-mortem examination was then held on the dead bodies and statements of witnesses were recorded in the course of investigation. That led to the several charges framed against 40 persons and ultimately their trial in the Court of the First Additional Sessions Judge at Jhansi.

The case for the prosecution is sought to be established by the testimony of 12 eye-witnesses. All the accused persons denied that they had anything to do with the offences charged. Their main contention was that a false case had been made against them and it was attempted to be supported by evidence of witnesses who were hostile to them and who had no regard for cruth. The trial Judge, in substance. rejected the defence plea and accepted the prosecution evi- dence. except in the case of five accused persons. In appeal, several contentions were raised on behalf of the appellants, but they were rejected and in the result, the findings of the trial Court against the appellants were confirmed. The High Court, however, reversed the conclusion of the trial Court in respect of 7 accused persons

with whose cases we are not concerned in the present appeals. The 12 persons who gave direct evidence against the appellants and their co-accused persons are: Bahoran P.W. 1; Basanti Lal P.W.2; Rameshwar Dayal P.W.3; Prabhu Dayal P.W.5; Pancham P.W.6: Swarup Singh P.W.14; Kasturi P.W.15; Thakur Das P.W.16. Shyamlal P.W.17; Harbans P.W.18; Dropadi P.W.19; and Kishori Lal P.W.20. The High Court has critically examined the evidence given by these witnesses and has held that the evidence of Bahoran and Prabhu Dayal may be left out of account as it appeared to the High Court that the said evidence suffered from material infirmities. The evidence given by the remaining 10 witnesses has, however, been accepted by the High Court as substantially true and correct.

Jr. dealing with this oral evidence, the High Court took into account the fact that most of these witnesses belonged to the faction of Gayadin and must, therefore, be regarded as partisan. It also considered another feature which characterised the evidence of all the witnesses and that was that they gave their account of the incident substantially in similar terms and did not assign particular parts in respect of overt acts to any of the assailants except Laxmi Prasad accused No. 1. The approach adopted by the High Court shows that it decided to confirm the conviction of the accused persons against whom four or more witnesses gave a consistent account, and it is by the application of this test that 7 accused persons have been acquitted. As to the sentence, the High Court realised that 10 persons had been ordered to be hanged and that it could not be said about all of them, except Laxmi Prasad, that they had actually fired a gun and caused the death of any of the five victims. Even so, the High Court held that since they all formed members of the unlawful assembly the common object of which was to exterminate the male members of the family of Gayadin, they were all equally guilty of murder under s.302,/149, I.P.C. and it would not, therefore, be unreasonable to impose the penalty of death on such of the assailants is were shown to have carried guns in their hands on that occasion. That is how the High Court upheld the orders of conviction passed against 28 persons who had brought their cases before it in appeal and confirmed the sentences of death imposed on I 0 of them.

In these appeals, Mr. Sawhney who has addressed the principal argument before us on behalf of the appellants, has urged that the High Court has failed in discharging its duty properly when it dealt with the appeals brought before it by the appellants and decided to confirm the sentences of death imposed on 10 of the accused persons. In support of this argument, Mr. Sawhney has relied upon the decision of this Court in the case of Jumman & Ors. v. The State of Punjab. (1) In that case, this Court has emphasised the fact that the mandatory requirement prescribed by s.374 of the Code of Criminal Procedure shows that in dealing with reference for confirmation of death sentence imposed by the Sessions Judge, the High Court has to consider the entire case for itself before deciding whether the sentence of death (1) A.T.R. I957 S.C. 469-

should be confirmed or not. Section 374 provides that the sentence of death shall not be executed unless it is confirmed by the High Court. In other words, the sentence of death imposed by the Court of Sessions is not effective until and unless it is confirmed by the High Court. It is only when the High Court confirms the sentence of death that it is capable of execution. That is why this Court emphasised the solemnity of the Proceedings brought before the High Court under s.374, and it pointed out that under s.375, the High Court is given the power to admit additional evidence if it

thinks necessary to do so. Proceedings brought before the High Court for confirmation of a death sentence give a right to the condemned prisoner to be heard on the merits and to require the High Court to consider the matter for itself without being influenced by the conclusions recorded by the Court of Sessions. The conclusions of the High Court on the merits in such proceedings must be independent,. and so, the High Court inevitably has to go into the whole of the evidence. consider all the pros and cons of the case and satisfy itself that the offence charged under s. 302, I.P.C. is established beyond reasonable doubt and the sentence of death submitted to it for its confirmation is fully justified. Mr. Sawhney contends that this essential requirement of s.374 has not been complied with by the High Court when it dealt with the appeals brought before it in the present proceedings. He also adds that since 10 persons have been ordered to be hanged, that itself is a reason why this Court should examine the evidence for itself and not hold that the appellants are concluded by concurrent findings of fact recorded by the Court below. We are not impressed by this argument. It is perfectly true that, in a murder trial when an accused person stands charged with the commission of an offence punishable under s.302, he stands the risk of being subjected to the highest penalty prescribed by the Indian Penal Code; and naturally judicial approach in dealing with such cases has to be cautious, circumspect and careful. In dealing with such appeals or reference proceedings where the question of con- firming a death sentence is involved, the High Court has also to deal with the matter carefully and to examine all relevant and material circumstances before upholding the conviction and confirming the sentence of death. All arguments urged by the appellants and all material infirmities pressed before the High Court on their behalf must be scrupulously examined and considered be- fore a final decision is reached. The fact that 10...persons had been ordered to be hanged by the trial Judge necessarily imposed a more serious and onerous res- ponsibility on the High Court in dealing with the present appeals. We have carefully considered the judgment delivered by the High Court in these appeals and we are satisfied that the criticism made by Mr. Sawhney that the High Court did not bestow due care and attention on the points involved in the case, cannot be regarded as well- founded, The judgment shows that the arguments which were urged on behalf of the appellants, have been carefully examined, the evidence given by the respective witnesses has been accurately summarised and the infirmities in the said evidence closely scrutinised. The relevance of the argument of the admitted enmity between the two factions of the village has been taken into account and the common features of the evidence tendered by the witnesses have not been overlooked. After taking into account all the points which were urged before the High Court the High Court adopted what it thought to be a safe test before acting on direct evidence. It has held that unless at least four witnesses are shown to have given a consistent account against any of the appellants. the case against them cannot be said to have been proved beyond reasonable doubt. Having regard to the manner in which the High Court has dealt with the appeals brought before it, we are not prepared to hold that the general criticism made by Mr. Sawhney against the judgment of the High Court can be accepted.

In this connection, Mr. Sawhney strongly relied on the fact that the High Court has not considered one important point in favour of the defence, and that is in to the failure of the prosecution to tender three material witnesses whose names had been shown in the witness-list in the calendar sent by the committing Magistrate to the trial Judge. These witnesses are: Ram Prasad, Mansa Ram and Rani Dulhan. It appears that this contention was raised by the defence before the Trial Court and had been rejected by it. The Government counsel appearing for the prosecution had made an application

to the trial Court expressing his inability to examine the three witnesses for the reason that Ram Prasad and Mansa Ram had been won over by the defence and Rani Dulhan, the widow of one of the victims, was suffering from such mental shock that she was unable to depose coherently. After this application was made and granted, the learned trial Judge did not insist upon the prosecution examining the three said witnesses. Then followed three other applications by the defence (Nos. 247B, 248B and 249B) in which it was urged that the said three witnesses should be examined under s.540, Cr. P.C. The learned trial Judge rejected these applications, and so, the case concluded without the said three witnesses giving evidence before the trial Court. In rejecting the applica- tions made by the defence, the learned Judge has carefully examined the validity of the defence contention that the evidence given by the said witnesses before the Committing Magistrate showed that they were material witnesses and the plea raised by them that the absence of their evidence would cause prejudice to the defence, and has held that the evidence which the said three witnesses may give was not essential for a just decision of the case and that it was unreasonable to suggest that the prosecution had an oblique moive in supressing their evidence. This part of the judg- ment clearly shows that all relevant aspects of the matter were examined by the trial Judge before he refused to exercise his powers under s.540, Cr. P.C. It is obvious that this contention was not urged before the High Court, and so, we find no discussion of the point in the judgment of the High Court.

We are not prepared to accept Mr. Sawhney's argument that even if this point was not raised by the appellants before the High Court, they are entitled to ask us to consider that point having regard to the fact that 10 persons have been ordered to be hanged. It may be conceded that if a point of fact which plainly arises on the record, or a point of law which is relevant and material and can be argued with-

out any further evidence being taken, was urged before the trial Court and after it was rejected by it was not repeated before the High Court, it may, in a proper case, be permis- sible to the appellants to ask this Court to consider that point in an appeal under Art. 136 of the Constitution; afterall in criminal proceedings of this character where sentences of death are imposed on the appellants, it may not be appropriate to refuse to consider relevant and material pleas of fact and law only on the ground that they were not urged before the High Court. If it is shown that the pleas were actually urged before the High Court and had not been considered by it, then, of course, the party is entitled as a matter of right to obtain a decision on those pleas from this Court. But even otherwise no hard and fast rule can be laid down prohibiting such pleas being raised in appeals under Art. 136.

In the present case, however, we are satisfied that there is no substance in the contention which Mr. Sawhney seeks to raise before us. It is not unknown that where serious offences like the present are committed and a large number of accused persons are tried, attempts are made either to terrorise or win over prosecution witnesses, and if the prosecutor honestly and bonafide believes that some of his witnesses have been won over, it would be unreasonable to insist that he must tender such witnesses before the Court. It is undoubtedly the duty of the prosecution to lay before the Court all material evidence available to it which is necessary for unfolding its case; but it would be unsound to lay down is a general rule that every witness must be exa- mined even though his evidence may not be very material or even if it is known that he has been won over or terrorised. In such a case, it is always open to the defence to examine such witnesses is their witnesses and the Court can also call

such witnesses in the box in the interest of justice under s.540, Cr. P.C. As we have already seen, the defence did not examine these witnesses and the Court, after due deliberation, refused to exercise its power under s.540, Cr. P.C. That is one aspect of the matter which we have to take into account.

The other aspect of the matter is that the trial Court has found that the evidence which these witnesses would have given was not essential for a just decision of the case. What these witnesses might have said in the Sessions Court was judged by the trial Court in the light of their previous statements already recorded, and that is a finding which is purely one of fact. If this finding was not challenged by the appellants before the High Court, we do not see how they can claim to argue before us now that the said finding is erroneous. Besides, so far as Rani Dulhan is concerned, it seems to us utterly unreasonable to insist that before per- mitting the prosecutor not to examine her, evidence should have been led to show that she was suffering from such mental shock that she was unable to give a coherent account of the tragic events that happened on that fateful morning. One has merely to recall the fact that five male members of her family were butchered to death by the assailants to realise that the prosecutor's statement that she was mentally unbalanced must be true. Then, as to Ram Prasad and Mansa Ram having been won over by the defence, that again is a matter on which the trial Court appears to have been satisfied; otherwise it would have readily acceded to the request of the defence to exercise its powers under s.

540. Cr. P.C. We are inclined to think that it is because this part of the defence contention was felt to be inarguable that the Advocate for the appellants did not raise this point before the Court. Therefore, we are not prepared to allow Mr. Sawhney to take us through the evidence in the case on the ground that one important contention raised by the defence has not been examined by the High Court.

Mr. Sawhney has then argued that where witnesses giving evidence in a murder trial like the present are shown to belong to the faction of victims, their evidence should not be accepted, because they are prone to involve falsely mem- bers of the rival faction out of enmity and partisan feeling. There is no doubt that when a criminal Court has to appreciate evidence given by witnesses who are partisan or interested, it has to be very careful in weighing such evidence. 51 S.C.-IO Whether or not there are discrepancies in the evidence; whether or not the evidence strikes the Court as genuine; whether or not the story disclosed by the evidence is prob- able, are all matters which must be taken into account. But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. Often enough, where factions prevail in villages and murders are committed as a result of enmity between such factions, criminal Courts have to deal with evidence of a partisan type. The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct.

Then it is urged that the evidence given by the witnesses conforms to the same uniform pattern and since no specific part is assigned to all the assailants, that evidence should not have been accepted. This criticism again is not well- founded. Where a crowd of assailants who are members of an

unlawful assembly proceeds to commit an offence of murder in pursuance of the common object of the unlawful assembly, it is often not possible for witnesses to describe accurately the part played by each one of the assailants. Besides, if 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 the present case, for instance, several weapons were carried by different members of the unlawful assembly, but it appears that the guns were used and that was enough to kill 5 per- sons. In such a case, it would be unreasonable to contend that because the other weapons carried by the members of the unlawful assembly were not used, the story in regard to the said weapons itself should be rejected. Appreciation of evidence in such a complex case is no doubt a difficult task: but criminal courts have to do their best in dealing with such cases and it is their duty to sift the evidence carefully and decide which part of it is true and which is not. In the present case, the High Court has in fact refused to act upon the, evidence of Bahoran and Prabhu Dayal, because it appeared to the High Court that the evidence of these two witnesses suffered from serious infirmities. 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.

Mr. Sawhney then attempted to argue that the High Court failed to give effect to the principles enunciated by this Court in the case of Baladin v. State of Uttar Pradesh('). In that case, it was observed by Sinha, J., who spoke for the Court, that it is well-settled that mere presence in an assembly does not make a person, who is present, a number 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 s.142, I.P.C. The argument is (1) A.I.R. 1956 S.C. 181 that evidence adduced by the prosecution in the present case does not assign any specific part to most of the accused persons in relation to any overt act, and so, the High Court was in error in holding that the appellants were members of an unlawful assembly. The observation of which Mr. Sawhney relies, prima facie, does seem to support his contention; but, with respect, we ought to add that the said observation cannot be read as laying down a general proposition of law that unless an overt act is proved against a person who is alleged to be a member of an unlawful assembly, it cannot be said that he is a member of such an unlawful assembly. In appreciating the effect of the relevant observation on which Mr. Sawhney has built his argument, we must bear in mind the facts which were found in that case. It appears that in the case of Baladin(1), the members of the family of

the appellants and other residents of the village had assembled together; some of them shared the common object of the unlawful assembly, while others were merely passive wit- nesses. Dealing with such an assembly, this Court observed that the presence of a person in an assembly of that kind would not necessarily show that he was a member of an un- lawful assembly. What has to be proved against a person who is alleged to be a member of an unlawful assembly is that he was one of the persons constituting the assembly ,and he entertained along with the other members of the assembly the common object as defined by s.141, I.P.C. Section 142 provides that whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly. In other words, an assembly of five or more persons actuated by, and entertaining one or more of the common objects specified by the five clauses of s. 141, is an unlawful assembly. The crucial question to determine in such a case is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects as specified by s.....141. While determining this question, it becomes relevant....to consider whether the assembly consisted of some persons.....who were merely passive witnesses and had (1) A.I.R. 1956 S.C. 181 I49 joined the assembly as a matter of idle curiosity without intending to entertain the common object of the assembly. It is in that context that the observations made by this Court in the case of Baladin(1) assume significance; otherwise, in law, it would not be correct to say that before a person is held to be a member of an unlawful assembly, it must be shown that he had committed some illegal overt act or had been guilty of some illegal omission in pursuance of the common object of the assembly. In fact, s.149 makes it 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; and that emphatically brings out the principle that the punishment prescribed by s.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. Therefore, we are satisfied that the observations made in the case of Baladin(l) must be read in the context of the special facts of that case and cannot be treated as laying down an unqualified proposition of law such as Mr. Sawhney suggests.

In this case, the High Court has carefully examined the evidence and has made a finding that the whole group of persons who constituted the assembly were members of the faction of Laxmi Prasad and they assembled together, armed with several weapons, because they entertained a common object in pursuance of which the five murders were committed on that day. Therefore, there is no substance in the argument that the conclusion of the High Court that the appellants are guilty of the offences charged is not sup- ported by the principles of law enunciated by this Court in the case of Baladin(1).

It is thus clear that the general grounds of attack urged before us by Mr. Sawhney in challenging the validity of the conclusions recorded by the High Court fail, and so, there (1) A.I.R. I956 S.C. 181 would be no occasion or justification for this Court to con- sider the evidence for itself.

That leaves one question still to be considered and that has relation to the sentence of death imposed on 10 persons. Mr. Sawhney argues that in confirming the sentences of death imposed by

the trial Court on 10 accused persons in this case, the High Court has adopted a mechanical rule. The High Court has held that the 10 persons who carried fire- arms should be ordered to be hanged, whereas others who have also been convicted under s. 302/149, should be sentenced to imprisonment for life. It is true that except for Laxmi Prasad, the charge under s. 302/149 rests against the other accused persons on the ground that five murders have been committed by some members of the unlawfui assembly of which they were members, and the argument is that unless it is shown that a particular accused person has himself committed the murder of one or the other of the victims, the sentence of death should not be imposed on him. In other words, the contention is that if a person is found guilty of murder under s. 302/149 and it is not shown that he himself committed the murder in question, he is not liable to be sentenced to death. In support of this argument, Mr. Sawhney has relied on certain observations made by Bose J. who spoke for the Court in Dalip Singh v. State of Punjab('). In that case, what this Court observed was that the power to...enhance a sentence from transportation to death should very...rarely be exercised and only for the stron-

gest reasons; and...it was added that it is not enough for the appellate court to..say or think that if left to itself it would have awarded the....greater penalty because the discretion does ,not belong to the..appellate court but to the trial Judge, and the only ground on which the appellate court can interfere is that the discretion has been improperly exercised. These observations have no relevance in the present case, because we are not dealing With a case where the High Court has enhanced the sentence imposed by the trial Judge at all. In fact, both the trial Court and the High Court are agreed that the sentences of death imposed on 10 persons are justi- fied by the circumstances of the case and by the requirements (1) (1954] S.C.R. 145 of justice. As a mere proposition of law, it should be difficult to accept the argument that the sentence of death can be legitimately imposed only where an accused person is found to have committed the murder himself. Whether or not sentences of death should be imposed on persons who are found to be guilty not because they themselves committed the murder, but because they were members of an unlawful assembly and the offence of murder was committed by one or more of the members of such an assembly in pursuance of the common object of that assembly, is a matter which had to be decided on the facts and circumstances of each case. In the present case, it is clear that the whole group of persons belonged to Laxmi Prasad's faction, joined together armed with deadly weapons and they were inspired by the common object of exterminating the male members in the family of Gayadin, 10 of these persons were armed with fire-arms and the others with several other deadly weapons, and evidence shows that five murders by shooting were committed by the members of this unlawful assesmbly. The conduct of the members of the unlawful assembly both before and after the commission of the offence has been considered by the courts below and it has been held that in order to suppress such fantastic criminal conduct on the part of villagers it is necessary to impose the sentences of death on 10 members of the unlawful assembly who were armed with firearms. It cannot be said that discretion in the matter has been improperly exercised either by the trial Court or by the High Court. Therefore we see no reason to accept the argument urged by Mr. Sawhney that the test adopted by the High Court in dealing with the question of sentence is mechanical and unreasonable.

There are, however, three cases in which we think we ought to interfere. These are the, case of accused No. 9 Ram Saran who is aged 18; accused No. II Asha Ram who is aged 23 and accused No.

16 Deo prasad who is aged 24, Ram Saran and Asha Ram are the sons of Bhagwati who is accused No. 2. Both of them have been sentenced to death. Similarly, Deo prasad has also been sentenced to death. Having regard to the circumstances under which the unlawful assembly came to be formed, we are satisfied that these young men must have joined the unlawful assembly under pressure and influence of the elders of their respective families. The list of accused persons shows that the unlawful assembly was constituted by members of different families and having regard to the manner in which these factions ordinarily conduct themselves in villages, it would not be unreasonable to hold that these three young men must have been compelled to join the unlawful assembly that morning by their elders, and so, we think that the ends of justice would be met if the sentences of death imposed on them are modified into sentences of life imprisonment. Accordingly, we confirm the orders of conviction and sentence passed against all the appellants except accused Nos. 9, 11 and 16 in whose cases the sentences are altered to those of imprisonment for life. In the result, the appeals are dismissed, subject to the said modification. Appeals dismissed.