

(1996) 06 GAU CK 0057

In the Gauhati High Court

Case No : Criminal Appeal No's. 9 of 1984 and 15 of 1985

Amir Hossain alias Ali and Others

APPELLANT

Vs

State of Tripura

RESPONDENT

Date of Decision : 24-06-1996

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313

Evidence Act, 1872 — Section 103

Penal Code, 1860 (IPC) — Section 141, 142, 144, 145, 146

Citation : (1998) CriLJ 4315

Hon'ble Judges : N.G. Das, J

Bench : Single Bench

Advocate : B. Daas and B.N. Majumder, for the Appellant; S. Das, Public Prosecutor, for the Respondent

Judgement

N.G. Das, J.—These two appeals (Criminal Appeal No. 9/84 and Criminal Appeal No. 15/1984) by six of the accused are directed against the judgment of the learned Addl. District and Sessions Judge, West Tripura, Agartala dated 19-4-1984 passed in Sessions Trial No. 67 (W.T/S) 1983 whereby the learned Additional Sessions Judge convicted the appellants under different Sections and passed sentences. There were 16 accused in the case, of whom 6 appellants were convicted and the remaining 10 were acquitted. I shall now refer which of the accused was convicted under which Section.

2. All the appellants of these two appeals were convicted u/s 148 of IPC and they were sentenced thereunder to undergo R.I. for 2 years and to pay a fine of Rs. 500/- each in default to suffer a further period of 3 months. Appellant Amir Hossen was also convicted u/s 304, Part-II of IPC and sentenced thereunder to suffer R.I. for 7 years and also to pay a fine of Rs. 500/- in default of which he is to suffer a further period of 3 months. Appellant Birendra Debnath was also convicted u/s 326 of IPC and sentenced thereunder to suffer R.I. for 4 years and to pay a fine of Rs. 500/- in default of payment of fine he is to suffer R.I. for a further period of 3 months. Appellant Abdul Rahim was also convicted u/s 324 of

IPC and sentenced thereunder to suffer R.I. for a period of 2 years and also to pay a fine of Rs. 500/- in default of which to suffer a further period of R.I. for 3 months.

3. The facts of the case which may succinctly be summarised are that the victims and the accused-appellants are residents of the same village viz. Kamrangatali and they are known to one another. There was a Club named Netaji Club near the house of the informant Rakhal Chandra Deb (P.W.I) and the accused-appellants were members of that Club. It was alleged that in the morning of the date of occurrence viz. 30-1-1982 one of the accused, namely, Narayan Sukladas along with a few others came to the house of informant Rakhal Chandra Deb (P.W. 1) and demanded subscription of Rs. 101/- in connection with Saraswati Puja of their Club. The informant expressed his inability to pay such an amount. But this refusal infuriated them to such extent that they threatened them with the dire consequences in case he would not pay the sum by 7 a.m. They also told him that last night he received a sum of Rs. 900/- by selling rice at Agartala and hence why he should not pay the subscription of Rs. 101/-. Saying this Narayan Sukladas and his companions left the house of the informant.

4. But at about 7.30 a.m. when informant Rakhal Chandra Deb was having tea with his mother Biraja Sundari Deb in front of their hut, he noticed accused-appellant Muklesh Rahman was talking with his elder brother Ganesh Deb in front of their house. But while they were talking suddenly appellant Muklesh started assaulting Ganesh Deb (P.W.I 1) with a lathi. As a result of this beating Ganesh fell down on the ground when their mother Biraja Sundari rushed for the rescue of Ganesh Deb. But at that time the accused-appellants along with others numbering 20/25 in all armed with deadly weapons like dao, lathi etc. attacked them. It was alleged that appellant Birendra Debnath attempted to strike a blow on the person of the informant by means of a lathi. But as the informant Rakhal stepped aside immediately the lathi blow fell on the head of his mother Biraja Sundari and almost simultaneously appellant Amir Ali struck a blow on the head of Biraja Sundari by means of a dao and as a result of this violent beating Biraja Sundari Deb at once fell down on the ground. Appellant Abdul Rahman who was near the other assailants also attempted to strike a blow on the person of the informant by means of a dao but the informant at once caught hold of the dao and saved himself. But in the process he sustained bleeding cut injury on his left palm and as a result of this beating he was fainted. It was further alleged that appellant Muklesh and Akhil Debnath also struck lathi blows on the persons of Biraja Sundari saying that she should be finished. The other house inmates and some neighbours also came out at that time and the assailants left the house.

5. A few villagers came to the house of the informant on hearing the cries and soon after their arrival the brother of the informant, namely, Nepal and Bhupal also came to the house on getting the information. The villagers took Biraja Sundari to Molaghar hospital. The informant and his brother Ganesh also followed them but on his way to hospital informant Rakhal Ch. Deb along with

Monoranjan Deb and Narendra Deb went to Melaghar Police Out Post and lodged an ejahar with A.S.I. Asit Gupta (P.W.20).

6. A.S.I. Shri Asit Gupta (P.W.20) recorded the ejahar (Ext. P-I/1), entered the gist of the information in the G.D. book of thana under entry No. 558 dated 30-1-1982 and thereafter seized one dao which was produced by informant under a seizure list and after doing these preliminary works A S.I. Shri Gupta rushed to Melaghar hospital along with informant and while going there he also took the ejahar with him. On going over there he got S.I. Shri Dharendra Ch. Paul (P.W.23) of Sonamura P.S. and handed over the ejahar to him.

7. After handing over the ejahar to S.I. Dharendra Ch. Paul (P.W.23) A.S.I. Shri Asit Gupta (P.W.20) prepared the inquest report of Biraja Sundari Deb as by that time she expired and forwarded the dead body of Biraja Sundari Deb to Melaghar hospital under a dead body challan for post mortem examination.

8. On receipt of the written ejahar S.I. Shri Dharendra Ch. Paul (P. W.23) handed over it to O/C, Sonamura P.S. by making an endorsement (Ext. P-I/2). During his investigation Shri Paul examined informant Rakhal Ch. Deo but he did not record his statement afresh as he corroborated the statement in his ejahar. However, he went to the place of occurrence, prepared hand sketch map and recorded the statements of a few witnesses. But he could not complete the investigation as O/C, Sonamura P.S. Shri Ajit Choudhury (P.W.2.4) took up the investigation of the case and after completing investigation he charge-sheeted the appellants and 10 others numbering 16 in all for their prosecution under Sections 148/149/448/324/323/302 of IPC.

9. The case being exclusively triable by the Court of Session it was committed to the Court, of learned Sessions Judge and by transfer the case come to the file of learned Addl. Sessions Judge, West Tripura. The accused-persons who were on bail appeared before the learned Addl. Sessions Judge who after perusal of the materials on record and hearing the learned counsel for the parties framed a charge u/s 148. IPC and a charge u/s 302/324/323 read with Section 149 of IPC against all the accused-appellants and 10 others. He also framed the following charges, namely, (1) a charge u/s 323 of IPC against accused Muklesh Rahman, (2) a charge u/s 324 of IPC against appellant Abdul Rahman. All the charges were read over and explained in Bengali to the accused and the appellants who denied the charges claimed to be tried.

10. In order to bring home the charges the prosecution examined 24 witnesses in all and also exhibited the documents, namely, ejahar, seizure list, inquest report, post mortem examination report etc. The appellants also examined 2 witnesses in support of their defence and their defence so far as it can be ascertained from the cross-examination, the statements of the accused-appellants recorded during examination u/s 313 of Cr.P.C. and the evidence of D.Ws. is that they are quite innocent and they have been falsely implicated in this case. It was also stated that at the time of occurrence appellant Amir

Hussain was in his house and appellant Muklesh was in the house of Gaon Pradhan. The further defence case of accused appellants is that informant and his brothers used to quarrel with one another off and on over the share of their properties and at the time of such quarrel they would take dao. Lathi etc. and villagers also had to intervene on many occasions to pacify them. It was further stated that on the date of occurrence informant Ramal entered into a fight with his brother with dao and lathi and in course of the fighting he received injuries on his person and that when their mother intervened to separate them she sustained injuries on her person.

11. Learned Addl. Sessions Judge however, after appreciation of the evidence on record found the appellants guilty for commission of the offence and awarded sentences as already stated. Learned Additional Sessions Judge placed reliance upon the eye-witnesses namely, P.W.s. 1,9, 11, 13 and the circumstantial evidence for recording the order of convictions. After discussing the evidence of the P.Ws. the learned Addl. Sessions Judge recorded his finding to the effect that:-

From the evidence as adduced by the prosecution it is established that a group of miscreants numbering more than 20 persons including the accused Birendra Debnath, Amir Hossain, Rahim Miah, Muklesh Rahman, Swapan Paul and Akhil Debnath entered into the house of the informant Rakhal Deb with intent to assault him, his brother Ganesh Deb and their mother Biraja Sundari Deb and in their such pursuit-(i) Birendra Debnath gave a lathi blow to Rakhal and Rakhal having stepped back to save him, the blow fell on the head of Biraja Sundari; (ii) accused Amir Hussain gave a dao blow on the head of Biraja Sundari; (iii) Rahim Miah gave a dao blow on the informant, but the informant in his attempt to save him sustained bleeding injury in his left palm (iv) Akhil Debnath, Swapan Paul and Muklesh Rahaman being armed with lathis were present in the house being members of such lawful assembly.

12. The above findings of the learned Additional Sessions Judge are sufficient to prove beyond any doubt that the appellants were members of an unlawful assembly, the common object of which was to give a severe beating to the deceased Biraja Sundari and her sons.

13. But Mr. B. Das, the learned senior counsel assisted by Mr. B.N. Majumder, the learned counsel appearing on behalf of the appellants has at the very outset submitted that no reliance can be placed on the evidence of those eyewitnesses as they belonged to the same family. In this context it has also been argued by Mr. Das that a perusal of the evidence of those witnesses will show that there were some independent witnesses namely, Ranjit, Dhananjay, Prallad Dey and Nakul Singh at the time of occurrence, but the Investigating Officer did not examine any of them and hence no reliance can be placed on the testimony of the eye-witnesses which has been well counter-acted and balanced by the D.Ws.

14. It is true that P.W. 1 Rakhal Ch. Deb who lodged the ejahar with A.S.I. Asit

Gupta (P.W.20) of Melaghar Police out Post is the son of Biraja Sundari. But one undisputed fact that has emerged out from the evidence on record is that on the date and time as mentioned in the charge there was an occurrence in the house of P.W. 1 Rakhal Ch. Deb. The defence case has also stated that Biraja Sundari sustained injuries on her person as when Rakhal Ch. Deb (P.W.I) engaged himself in fighting with his brothers with lethal weapons, she in order to separate them intervened and while she was making attempt to separate Rakhal from the other borhters some blows of lathal weapons fell upon her person and as a consequence thereof she sustained severe injuries and ultimately succumbed to those injuries while she was being taken to Melaghar hospital.

15. The evidence of the independent witnesses, who rushed to the house of P.W. 1 on hearing the cries also shows that an occurrence took place in the house of P.W.I on the date and time as mentioned in the charge and in course of that occurrence Biraja Sundari Deb, P.W. 1 and P.W. 11 Ganesh Ch. Deb sustained injuries on their persons.

16. Now as regards the contention of Mr. Das that the eye-witnesses being close relations their evidence ought to have been rejected by the learned Addl. Sessions Judge, it may be stated that the Supreme Court in the case of Rana Partap and Others Vs. State of Haryana,

In a murdertrial by describing the independent witnesses as "chance witnesses" it cannot be implied thereby that their evidence is suspicious and their presence at the scene doubtful. Murders are not committed with previous notice to witnesses, soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a brothel, prostitutes and paramours are natural witnesses. If murder is committed in a street, only passers by will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mre "chance witnesses

17. In the same judgment the Supreme Court also made the following observations about the reaction of the witnesses who witnessed the occurrence. The observation reads :-

Every person who witnesses a murder reacts in his own way. Some are stunned, become speechless and stand rooted to the spot. Some become hysteric and start wailing. Some start shouting for help. Others run away to keep themselves as far removed from the spot as possible. Yet others rush to the rescue of the victim, even going to the extent of counterattacking the assailants. Every one reacts in his own special way. There is no set rule of natural reaction. To discard the evidence of witnesses on the ground that he did not react in any particular manner is to appreciate evidence in a wholly unrealistic and unimaginative way.

18. Keeping the above dictum in view I now proceed to examine the evidence of the eye-witnesses of this case.

19. As already stated the prosecution case is that the appellants along with others formed themselves into an unlawful assembly with the common object of beating P.W. 1 Rakhal Ch. Deb and his brothers and with that common object in view they entered into the house of P.W. 1 and thereafter they not only assaulted P.W. 1 and his brother Ganesh Ch. Deb (P.W. 11) but they also gave a violent beating to Smt. Biraja Sundari Deb, the mother of P.W. 1 and P.W. 11 and as a consequence of that violent beating Biraja Sundari sustained grievous injuries on her person and while she was being taken to Melaghar hospital she passed away. Dr. Radha Kanta Dhar (P.W.6) the Medical Officer of Melaghar Hospital performed the autopsy on the dead body of Biraja Sundari Deb in the afternoon of 30-1-1982. Since the fact that Biraja Sundari Deb died a homicidal death is not in dispute, I need not set out the findings recorded by P.W.6 in his post mortem report. The finding of the doctor is that all the injuries he found on the dead body were ante mortem in nature and Biraja Sundari Deb died due to the head injury causing fracture. The prosecution case is also that in course of the occurrence P.W. 1 and P.W. 11 sustained injuries on their bodies.

20. Learned Additional Sessions Judge after appreciation of the evidence on record arrived at the conclusion that all the appellants along with others formed themselves into an unlawful assembly with the common object of assaulting Rakhal Deb, his brother Ganesh Ch. Deb and their mother Biraja Sundari Deb and in prosecution of that common object appellant Birendra Debnath attempted to strike a blow on the person of Rakhal by means of a lathi but Rakhal having stepped back the blow fell on the head of Biraja Sundari; appellant Amir Hussain struck a blow on the head of Biraja Sundari by means of a dao; appellant Rahim struck a blow on the person of Rakhal by means of a dao and Akhil Debnath, Swapan Paul and Muklesh were members of that unlawful assembly with lathis in their hands.

21. It has, therefore, to be ascertained whether the appellants have been rightly convicted u/s 148 of IPC. Section 141, IPC defines an unlawful assembly as an assembly of 5 or more persons whose common object is to commit any one of the 5 acts enumerated therein. The explanation to that Section makes it clear that an assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly. Section 142 states 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. Section 143 sets out the punishment for being a member of unlawful assembly. Section 144 prescribes the punishment for joining an unlawful assembly armed with deadly weapons. Section 145 prescribes the punishment for joining or continuing in an unlawful assembly which has been commanded to disperse. Section 146 defines rioting, it says that whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting. Section 147 prescribes the punishment for rioting. Section 148 prescribes the punishment for rioting by members of an unlawful assembly

armed with deadly weapons.

22. Section 148 reads :-

148. Rioting, armed with deadly weapon.- Whoever is guilty of rioting, being armed with deadly weapon or with anything which. used as a weapon of offence, is likely to cause death, shall be punished with imprisonment of either description for a term which may extend to 3 years or with fine, or with both.

This Section creates a specific offence, i.e., the offence of rioting with deadly weapon and it is a separate and distinct offence inasmuch as a person can be found guilty under this Section if he actually has a dangerous weapon in hand. The essential question is whether there was an unlawful assembly, as defined in Section 141, of 5 or more than 5 persons. If it is found that an unlawful assembly was actually formed and each member had a deadly weapon in his hand then no matter who actually struck the blow. If any of that unlawful assembly causes simple or grievous hurt then every member of that assembly makes himself liable u/s 148.

23. In the present case, the common object of the unlawful assembly as alleged in the charge was to assault Rakhal Ch. Deb and Ganesh Ch. Deb and also to kill Biraja Sundari Deb. To accomplish that objectives the appellants along with others armed with dao and lathi entered into the residential house of P.W.I Rakhal Ch. Deb and started beating them.

24. P.W.I Rakhal Ch. Deb who lodged the ejahar narrated the occurrence in details. He deposed that on 30-1-1982 at about 6 a.m. accused Narayan Sukladas along with a few others came to his house and demanded Rs. 101/- as subscription in connection with Saraswati Puja of their Club named Netaji Club which is situate at a distance of about 15/20 cubits away from his house, he deposed that as he refused to give the subscription accused Narayan threatened him with dire consequences and left the house. But at about 7/7.30 a.m. when he was having his morning tea with his mother in the courtyard of the house he noticed accused Muklesh Rahman and accused Swapen Paul scolding his elder brother Ganesh Deb at the entrance of their courtyard. According to him at that time suddenly he heard the cries of his elder brother Ganesh Deb saying "I am done with". He further stated that on being beaten by the accused. Ganesh rushed to the house and fell near the eastern viti room. So, he and his mother rushed to save him when 30/35 persons of the Netaji club rushed to their house with lethal weapons in their hands and one of them namely, accused appellant Birendra Debnath attempted to strike a blow on him by means of a lathi. That blow however, did not fall on him as he stepped backward, but the blow fell on the head of his mother causing profuse bleeding. According to him then and there Amir Hussain gave a blow with a ram-dao on the head of his mother and simultaneously Muklesh and Akhil Debnath also struck blows on the person of his mother saying that she should be finished.

25. His further version is that at that time accused Rahim Mia struck a blow on

him with a dao and as he raised his left hand to save himself, the dao blow fell on the palm of his left hand causing severe bleeding injury. So, to save himself he entered the eastern viti room and went under a cot. He also stated that he could recognise Bidhu Bhusan Paul and others who were armed with deadly weapons. This witness has been cross-examined and during cross-examination he again stated that the miscreants were 30/35 in number and all of them were armed with deadly weapons. It has, however, been suggested to him that he implicated the accused persons as he had a civil case against accused Birendra Debnath, Swapan Paul and Bidhu Paul. During cross-examination it has also been suggested to the witness that he used to quarrel with his brother Ganesh with deadly weapon like dao in respect of his share of the landed property and on the date of occurrence when he engaged himself in a fight with Ganesh his mother intervened to separate him and in that process she sustained injuries on her person. Learned Additional Sessions Judge rejected this story being a gratuitous one and on perusal of the evidence on record I also find that he has rightly rejected that story as in support of this suggestion the defence did not adduce any reliable evidence.

26. So, what emerges out from the evidence of this witness is that the appellants along with others numbering 30/35 entered into their house on the date and time as mentioned in the charge with the common object of assaulting them. The witness has specifically stated that while appellant Amir Hussain and Abdul Rahim were armed with does appellant Birendra, Muklesh Akhil and Swapan Paul were armed with lathis.

27. This P.W. 1 also deposed that soon after the occurrence he went to the Melaghar hospital and on his way to Melaghar hospital he at first went to Melaghar Police Out post and lodged the ejabar with the In-charge officer of the Police Out Post. P.W. 20 A.S.I. Asit Gupta deposed that on that date he was attached with the Melaghar Out Post and P.W. 1 Rakhel Ch. Deb came to the Police Out Post and lodged an ejahar which he recorded. Ext. P-1/1 is the saidejahar. According to him after recording the ejahar Ext. P-1/1 he entered the ejahar in the G.O. book of the thana under entry No. 558 dated 30-1-82. This G.D. book of Melaghar Police Out Post has been marked as Ext. P-II and G.O. entry No. 558 dated 30-1-82 has been marked as Ext. P-11/1. G.D. entry 556 of 30-1-82 shows that on that day at 9-50 a.m. P.W. 1 Rakhel Ch. Deb came to the Melaghar Police out post and lodged the ejahar. The ejahar has been entered under entry No. 558 of that day. This ejahar shows that P.W. 1 made specific allegation against the appellants and 10 others numbering 16 in all. The fact of entry in G.D. book shows that ejahar was lodged without any practicable loss of time.

28. The next eye-witness is P.W. 9 Smti Chaya Rani Deb wife of P.W. 1 Rakhel Ch. Deb. She deposed that on the date of occurrence at about 7 a.m. after serving tea to her husband and mother-in-law she went to the kitchen, but soon after her reaching there she heard hue and cry of about 20/25 persons. On hearing the

cries she came out of the Kitchen and found 20/25 persons armed with daos and lathis entering into their house uttering filthy words. According to her version at that time she found her brother-in-law Ganesh Deb lying near the eastern viti hut and accused Swapan Paul, Muklesh and Akhil beating him. Her further version is that as her mother-in-law and her husband went there to ascertain what had happened accused Birendra struck a blow on the head of her mother-in-law and as a consequence thereof her mother-in-law fell on the ground. But as soon as she fell on the ground accused Amir Ali struck a blow on her head with a dao and that accused Rahim Mia also aimed to strike a blow with a dao on the head of her husband but as her husband stepped back raising his hands the blow fell on his hand causing bleeding injury and on getting this blow her husband ran inside the room. She also stated that on hearing the cries raised by them the neighbours came and at that time the accused-appellants left their house but at the time of their departure they left one dao in the courtyard.

29. During cross-examination it has been brought that they have a civil case against accused Birendra Debnath. But apart from that no reason has been assigned as to why this lady should depose against the accused-appellants.

30. P.W. 10 is Smt. Chaya Deb, wife of Ganesh Deb. She saw part of the occurrence. Their house is situated at a short distance of the house of Rakhal Ch. Deb. She deposed that on hearing the cries she rushed to the house of Rakhal Ch. Deb and on reaching there she found some persons numbering 30/35 armed with daos, lathis etc. in the courtyard of the house of Rakhal Ch. Deb, she categorically stated that she found lathis in the hands of accused Birendra Debnath, Swapan Paul, Muklesh and Akhil and daos in the hands of Rahim Mia and Amir Ali. She also stated that as she came in the courtyard of the house of Rakhal she found her mother-in-law lying in the court-yard with bleeding injuries on her person and at that time she also found her husband near the eastern viti room and her brother-in-law Rakhal Ch. Deb with bleeding injury near his room. This witness thus corroborated the version of P.W. 1 in all material particulars. The witness has been cross-examined but nothing material could be elicited from her to discredit her version.

31. P.W. 11 is Ganesh Ch. Deb who sustained some injury on his person during the course of occurrence. He deposed that on the date of occurrence at about 7/7-30 a.m. he came to the house of his brother Rakhal Ch. Deb and at that time he found accused Swapan Paul, Muklesh and Akhil in front of the house of Rakhal Ch. Deb. He further deposed that as he came there accused Swapan wanted a match to light his bidi and he also gave him a match box. According to him on getting the match box Swapan lighted his bidi and thereafter he threw the burnt match stick on the ground. He then rebuked Swapan and proceeded towards the house of Rakhal Ch. Deb. But as he proceeded accused Rahim asked his associates not to leave him. His further version is that then and there 30/35 persons came out of the Club house with daos, lathis etc. in their hands and entered into the house of Rakhal Ch. Deb, chased him and then accused

Muklesh, Akhil and Swapan assaulted him near the eastern viti hut. He also stated that he found accused Birendra striking lathi blow on the head of his mother and almost simultaneously Amir Hussain struck a blow on the head of his mother by means of a dao and on seeing this incident he became unconscious. This witness thus supports the prosecution story on all salient points. The witness has been cross-examined but nothing material could be brought out to discredit his version.

32. Now on an analysis of the evidence of these four witnesses, as discussed above, it would be quite apparent that the assailants assaulted P.W. 1, P.W. 11 and their mother Biraja Sundari Deb. It is also apparent from their evidence that while Biraja Sundari was being taken to the hospital she expired.

33. P.W. 6 Dr. Radha Kanta Dhar, who conducted autopsy on the dead body of Biraja Sundari Deb in the afternoon of 30-1-1982 found the following injuries on her person :

1. An incised wound measuring 10.5 cm. x 2 cm. x bone deep situate on the left side of the vertex close to mid-line under antero posteriority in the parietal region;
2. A contusion measuring 6V2 cm. x 6 cm. in the forehead (frontal region); and
3. A contusion measuring 8 1/2 cm x 8 cm on the scalp situated on the right temporal region just above the pinna of right ear extending downwards in front of the ear upto tragus.

The doctor stated that the dissection showed extravasation of blood in the tissues and also clotted blood under-neath the external injuries and there were fractures on the frontal right and left parietal bones. According to doctor all the injuries he found on the person of the deceased were ante-mortem and the death was caused due to the head injury.

34. This P.W. 6 also examined Ganesh Ch. Deb on that day and found the following injuries :-

- (1) An abrasion measuring 1/2" x 1/2" on the right side of the fore-head;
- (2) A lacerated wound measuring 1" x 1" x 1/3" on the left just below the elbow joint; and
- (3) An abrasion measuring 1/2" x 1/3" just below the right eye lower lid; and
- (4) Defused tenderness over the back of neck.

The doctor opined that all the injuries on the person of Ganesh Ch. Deb were simple in nature. The doctor further deposed that on that day he also examined Rakhal Ch. Deb and found one incised wound measuring 3 1/2." x 1/2" x muscle deep in the space between thumb and index linger. According to doctor these injuries were caused by sharp cutting weapon and another injury, namely, a contusion measuring 2" x 1" on the right wrist back. This injury according to

doctor was simple in nature. The evidence of the doctor thus fully corroborates the version of the eye-witnesses about the injuries they stated.

35. P.W. 2 Prahlad Deb and P.W. 3 Narendra Krishna Deb deposed that on that very date when they came to police station soon after the occurrence they found injuries on the person of Rakhal Chandra Deb. These two witnesses are also witnesses of the seizure list by means of which P.W. 20 seized one dao. It is found from the evidence of P.W. 9 that the assailants at the time of their departure from the house left one dao and her husband deposed that dao in the police station. P.W. 20, however, deposed that dao was actually produced by P.W. 1 Rakhal Ch. Deb and he seized that dao in presence of the witnesses under a seizure list marked as Ext. P-2/2. This seizure list shows that the dao was seized in presence of P. Ws. 2 and 3. Their evidence also affirms that P.W. 1 received injury on his person on that day sometime before their arrival in thana.

36. P.W. 12 Bipul Deb is the younger brother of P.W. 1. He deposed that on getting the information he along with his other brother Nepal Deb (P.W. 14) rushed to the house of P.W. 1 and as they came in front of the house they found all the accused-appellants standing on the road in front of the house. They also deposed that they found injuries on the bodies of their mother and their brothers. So, from their evidence also it is sound that they saw the accused-appellants in front of their house. Their evidence also affirms that Biraja Sundari. P.W. 1 and P.W. 11 sustained injuries.

37. P.W. 13 Smt. Sikha Deb is the daughter of Rakhal Ch. Deb. She deposed that at the time of occurrence she was a student of Class-IX and she had been prosecuting her studies in High Secondary School at Kakraban. She deposed that on that day at about 6-30 a.m. she came to the Senior Basic School which is adjacent to their house. But after about an hour on hearing the cries she rushed to their house when she found 30/35 persons with daos, lathis etc. entering into their house. She further deposed that those assailants assaulted her uncle Ganesh Deb and as her grandmother came to intervene accused Birendra struck a blow on her head with a lathi. She deposed that on seeing this incident she did not enter into the house out of fear and at once she rushed to the house of her uncle Nepal Deb and Bhupal Deb to pass the information. Her further version is that after informing Bhupal Deb of the occurrence she came back hurriedly and found 30/35 persons armed with daos, lathis etc. standing in front of their house. According to her she found injuries on her grandmother, father and uncle. She thus supports the version of eyewitnesses as discussed above. No cogent reason has been assigned as to why she should be disbelieved.

38. P.W. 15 is Priyalal Sharma. He is the Gaon Pradhan of village Kamrangatali. From his version also it appears that he came to know that some incident had taken place in the house of Rakhal Ch. Deb and on getting the information when he was coming to the house of Rakhal Ch. Deb he found the mother of Rakhal Ch. Deb being carried to the hospital in a wooden plank and at that time he also noticed injuries on the bodies of Ganesh Deb and Rakhal Ch. Deb.

39. P.W. 17 Amar Krishna Sutradhar is the Sarpanch. He deposed that on hearing the hue and cry he came to the house of P.W. 1 and as he came there he found the mother of P.W. 1 lying on the ground with bleeding injuries and at that time he also found injuries on the bodies of Ganesh and Rakhal. His evidence thus lends support that an occurrence took place on that day in the house of P.W. 1 and in course of the occurrence P.Ws. 1,11 and their mother sustained injuries.

40. Now on analysis of the evidence discussed above it is found that on the date of occurrence at about 7-30 a.m. a group of assailants numbering 25/30 entered into the house of P.W. 1 with daos, lathis etc. in their hands to assault Rakhal and Ganesh and while accused Birendra Debnath aimed to strike a blow on the head of Rakhal by means of a lathi that blow fell on the head of Biraja Sundari as she came there to intervene. It is also found that, at that time Amir Hussain also struck a blow on the head of Biraja Sundari Deb with a ram-dao and simultaneously Muklesh and Akhil also struck blows on her person with lathis. It is also found that accused Rahim struck a blow on the person of P.W. 1 Rakhal causing injuries on his left palm. The evidence as discussed above also shows that accused Muklesh, Akhil and Swapan assaulted Ganesh by means of lathis. The doctor also deposed that the injuries he found on the person of Ganesh were caused by a blunt weapon.

41. Now, learned Additional Sessions Judge while making the finding of conviction u/s 148 of IPC he discussed the defence evidence elaborately. The plea of alibi was taken by accused Amir Hussain, Abdul Rahim and Muklesh. Learned Additional Sessions Judge discussed the defence evidence and with sufficient reasons rejected their plea. Here it may be mentioned that when an accused pleads alibi the burden is on him to prove it u/s 103 of the Evidence Act which provides :-

103. The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Illustrations: (a) A prosecutes B for theft and wishes the Court to believe that B admitted the theft to C. A must prove the admission.

B wishes the Court to believe that, at the time in question, he was elsewhere. He must prove it.

In this case, the defence evidence which was adduced to prove the alibi was found to be contradictory and not at all supported by any cogent reason. I have perused the evidence and on perusal of the evidence I find that learned Additional Sessions Judge rejected the plea quite rightly. The evidence of D.W. 1 rather shows that on hearing the cries he rushed to the house of Rakhal Ch. Deb and found Rakhal and Ganesh shouting when his mother was lying in the courtyard with injuries, D.W. 2 also deposed that on the date of occurrence some incident took place in the house of Rakhal Ch. Deb in the morning.

42. The learned counsel for the appellants has not been able to satisfy that the evidence of the eye-witnesses is unreliable or that the assessment made by, the learned Additional Sessions Judge was incorrect. On scrutinising the evidence afresh as discussed above I am of the view that the assessment made by the learned Additional Sessions Judge is reasonable and acceptable.

43. It is argued by the learned counsel for the appellants that the evidence on record will show that there is some civil litigation between the accused Birendra Debnath and P.W. 1 Rakhal Ch. Deb. It is true that defence during cross-examination of the witnesses elicited the fact that there was some civil litigation between P.W. 1 Rakhal Ch. Deb and accused Birendra Deb Nath. But that fact alone is not sufficient to brush aside the evidence of the eye-witnesses lightly. What is necessary is to scrutinise their evidence closely. I have discussed the evidence and shown that the FIR was lodged without any loss of time and that the FIR has been well corroborated by the evidence of the eye-witnesses whose statements were also recorded within a very short time. There may be some minor discrepancies but those discrepancies, in my opinion, may not stand in the way of accepting the ocular version as we cannot overlook what a chaos and confusion might take place in such an occurrence where 25/30 persons armed with lethal weapons entered into the house and some of the inmates were mercilessly beaten. At such moment of utter chaos and confusion it is not unlikely that a particular act of a particular accused might escape or may not be noticed. The appellants have been well identified and it is also found from the evidence discussed above that all of them were armed with either lathis or daos and they actively took part in the commission of the offence. I, therefore, find that learned Additional Sessions Judge rightly held them guilty u/s 148 of IPC.

44. Now as regards the charges u/s 302 read with Section 149 or charges Under Sections 325/324/323 it is found from the judgment of the learned trial Court that learned trial Court did not deal with this charge u/s 302/149 elaborately. On the other hand, after discussing the medical evidence learned Addl. Sessions Judge jumped to the conclusion that accused Amir Hussain who struck dao blow on the head of Biraja Sundari causing bleeding injury committed the offence of culpable homicide not amounting to murder. With this finding he held Amir Hussain guilty for commission of the offence u/s 304, Part 2 of IPC. As regards accused Birendra Debnath learned Additional Sessions Judge held that Birendra aimed to strike a blow on the person of Rakhal Deb with a lathi but that blow fell on the head of Biraja Sundari Deb causing injury Nos. 2 and 3 and with this finding learned Additional Sessions Judge held accused Birendra Debnath guilty for commission of the offence u/s 326 of IPC. For commission of an offence u/s 326 of IPC, the essential ingredient is that the grievous hurt must be caused by means of an instrument of cutting, stabbing, shooting etc. But in the instant case learned Additional Sessions Judge made a specific finding that accused Birendra struck blow with lathi. Lathi is a blunt weapon. I also find that he has made a correct finding. So, the conviction of accused Birendra Debnath u/s 326 of IPC is bad in law and cannot be maintained. It is, however, found that accused Birendra

struck blow on the head of Biraja Sundari by means of a lathi causing grievous injury and hence he committed the offence u/s 325 of IPC. The learned Addl. Sessions Judge found accused Rahim Mia guilty for commission of the offence u/s 324 of IPC as it was found that he struck blow on the palm of Rakhal Ch. Deb by means of a dao and thereby caused severe injury. This is a correct finding.

45. But even though learned Addl. Sessions Judge made the finding that all the appellants were guilty for commission of the offence u/s 148, IPC it is not clear why learned Addl. Sessions Judge did not apply Section 149 of IPC which reads:-

149. Every member of unlawful assembly guilty of offence committed in prosecution of common object.- 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.

46. It will appear from the provision quoted above that u/s 149 of IPC every person of an unlawful assembly renders himself liable for the criminal act or acts of any other member or members of that assembly provided the same is/are done in prosecution of the common object or is/are such as every member of that assembly knew to be likely to be committed. This Section creates a specific offence and makes every member of the unlawful assembly liable for the offence or offences committed in the course of the occurrence provided the same was/were committed in prosecution of the common object or was/were such as the members of that assembly knew to be likely to be committed.

47. In other words, what can be said that a member of an unlawful assembly can be convicted of an offence if it is proved that he was a member of that unlawful assembly and that the act was done by some members of the assembly in prosecution of the common object or which the members knew was likely to be committed in prosecution of that object. Failure to prove the presence of the other accused who were charged among the members of unlawful assembly will not affect the criminality of those who are proved to be members of the assembly if the other conditions of the applicability of Section 149 of IPC is established *Ramu Gope and Others Vs. State of Bihar*,

48. If an unlawful assembly is formed with the common object of committing an offence and if that offence is committed in prosecution of the object by any member of the unlawful assembly, all the members of the unlawful assembly will be vicariously liable for that offence even if one or more but not all committed the offence.

49. In the instant case, common object of the unlawful assembly as alleged in the charge was to kill Biraja Sundari Deb and to assault Rakhal Ch. Deb and Ganesh Deb. To accomplish that object the accused-appellants along with others entered into the house of P.W. 1 Rakhal Ch. Deb with lethal weapons in their hands and thereafter started beating them with lethal weapons. It is, however,

true that Birendra Debnath aimed to strike the blow with a lathi on the person of Rakhal Ch. Deb but as Rakhal Ch. Deb stepped back the lathi blow fell on the head of Biraja Sundari Deb. But the evidence on record as discussed above also establishes that at that moment accused Amir Hussain struck a blow on the head of Biraja Sundari by means of a dao and thereby caused grievous injury. It is also found from the evidence of P.W. 9 that at the time of his departure accused Muklesh said that Biraja Sundari had not expired and on saying this he and accused Akhil assaulted her. The cumulative effect of all the facts and circumstances as discussed above leads to the only inference that all the members of the unlawful assembly were aware of the common object or that they knew that it was likely to be committed in prosecution of that object.

50. But this finding cannot dispose of another controversy which is involved in this case and it is that whether in view of the facts and circumstances it can be held that the offence u/s 304, Part 2 of IPC has been committed. It would be apparent from the discussion of the evidence made above that accused Birendra aimed to strike blow on the person of Rakhal Ch. Deb. But as Rakhal Ch. Deb stepped back the blow fell on the head of Biraja Sundari Deb. It cannot, therefore, be said that accused Birendra Debnath had the intention to assault Biraja Sundari as the evidence on record does not indicate that he made a second attempt to strike a blow on the person of Biraja Sundari. It has, however, been proved that accused Amir Hussain struck a blow on the head of Biraja Sundari by means of a dao causing grievous bleeding injury. Amir Hussain, however, did not make a second attempt to strike a blow on the person of Biraja Sundari. Apart from that the evidence of Doctor (P.W. 6) does not indicate that the injuries were sufficient in the ordinary course of nature to cause the death.

51. So, considering all the facts and circumstances as discussed above I find that the accused-appellants committed offence u/s 326 read with Section 149 of IPC and they have also committed the offence u/s 325 and 324/323 read with Section 149 of IPC. But no sentence can be passed upon the accused-appellants Muklesh-Rahman, Swapan Paul and Akhil Debnath as learned Additional Sessions Judge found them guilty only u/s 148 of IPC and the State has not preferred any appeal for their acquittal of the other charges. The occurrence took place as far back as on 30-1-1982 i.e. more than 14 years back. Therefore, after lapse of such a long period which the appellants passed with agony I do not like to issue fresh notice to enhance the punishment.

52. In the result, appeals of Amir Hussain and Birendra Debnath are partly allowed. The conviction and sentence passed upon Amir Hussain u/s 304, Part 2, IPC is set aside and similarly the conviction and sentence passed upon accused-appellant Birendra Debnath u/s 326 of IPC is set aside.

53. Instead, although I find all the accused-appellants guilty for commission of the offence u/s 326 read with Section 149, IPC since no notice was issued to the appellants Muklesh Rahman. Akhil Debnath and Swapan Paul for enhancement of sentence. I convict only accused Amir Hussain, Birendra Debnath and Abdul

Rahim u/s 326 read with Section 149, IPC and sentence them thereunder to suffer rigorous imprisonment for two years and to pay a fine of Rs. 500/- each. In default of payment of fine they are to suffer rigorous imprisonment for a further period of 3 months. The conviction and sentence passed upon all the appellants u/s 148, IPC are affirmed. The sentences passed upon accused-appellants viz. Amir Hussain, Birendra Debnath and Abdul Rahim will, however, run consecutively. Fine money, if realised, be paid to P.W. 1 Rakhal Ch. Deb and P.W. 11 Ganesh Ch. Deb in equal share. The appellants are to surrender before the Court of learned Sessions Judge, West Tripura, Agartala to suffer the term of imprisonment. In case the appellants do not surrender before the Court of learned Sessions Judge within the prescribed time then learned Sessions Judge will take steps according to law to secure their attendance to suffer the term of imprisonment.

54. Both the appeals are accordingly disposed of. Send down the records to the Court of learned Sessions Judge, West Tripura, immediately.