

(2012) 12 GAU CK 0001

In the Gauhati High Court

Case No : Criminal Appeal No's. 24 and 53 of 2005

Chandan Tripura and Others

APPELLANT

Vs

State of Tripura

RESPONDENT

Date of Decision : 21-12-2012

Acts Referred:

Arms Act, 1959 — Section 27
Criminal Procedure Code, 1973 (CrPC) — Section 144, 161
Penal Code, 1860 (IPC) — Section 141, 146, 148, 149, 307

Citation : (2013) 4 GLT 56

Hon'ble Judges : Subhasis Talapatra, J

Bench : Single Bench

Advocate : A.K. Bhowmik and Mr. R. Datta, for the Appellant; A. Ghosh, Addl. PP and Mr. R.C. Debnath, Addl. PP, for the Respondent

Judgement

Subhasis Talapatra, J.—As the appeals emerged from the same judgment of conviction and order of sentence dated 05.04.2005 as passed by the Assistant Sessions Judge, South Tripura, Udaipur in case No. S.T.77(ST/S)/2004 those are tied up for disposal by a common judgment and order. By the impugned judgments and orders, the appellants namely, Rabidhan Tripura (in Crl. A. 53 of 2005)/Chandan Tripura and Manik Bhowmik (in Crl.A. 24 of 2005) are sentenced to suffer R.I. for two years for the offence punishable u/s 148 of the Indian Penal Code, the IPC in short. Further the appellants namely, Chandan Tripura and Manik Bhowmik have been sentenced to suffer R.I. for 8 (eight) years and to pay a fine of Rs. 5,000/-, in default of payment of fine each of the said appellants will have to suffer further R.I. for 5(five) months for the offence punishable u/s 333 of the IPC and to suffer R.I. for 8(eight) years and to pay a fine of Rs. 5,000/-, in default of payment of fine, to suffer R.I. for 5(five) months for the offence punishable u/s 307 of the IPC read with Section 34 of the IPC. It has been directed that the sentence against the appellants (except Rabidhan Tripura) shall run concurrently and the period which the appellants were in the custody be set off therefrom. For appreciating the challenge as directed against the impugned

judgment and order, the essential facts may briefly be noticed at the outset.

On 28.09.2002 at the instance of the Indian National Congress (the INC in short) and the Indigenous National Party of Twipra (the INPT in short) called a road blockade movement in different places of the State. As part of the said agitation at about 7 a.m. in the morning a mob of about 300 INPT/INC followers led by the appellants namely, Chandan Tripura and Manik Bhowmik proceeded towards the Block Office at Satchand and they were cordoned at the turning in front of the Tripura Gramin Bank. On that day, the prohibitory order u/s 144 of the Cr.P.C. was promulgated by the Sub-Divisional Magistrate (the SDM in short), Sabroom. The members of the said march blocked the road. The Officer-in-Charge of the Manubazar Police Station, the Sub- Divisional Police Officer, Sabroom and the Block Development Officer of Satchand Block with TSR and the Police personnel were there on duty to maintain the law and order. The police requested the leaders of the said gathering to clear the road and to surrender to the custody of the police but they declined to do so. At that time, the members of the said gathering were allegedly armed with lathi, bottles, brickbats and the fire arms. The said assembly attacked the police and the TSR personnel with lathi, bottles and brickbats and even tried to snatch away their arms. The unruly members of the said gathering started throwing brickbats causing serious injury to one Sub-Inspector namely, Niranjana Shome. Other Police and TSR personnel were also injured from the said assault. In that nick of time a sound of firing was heard from the side of the gathering aiming at the Police and the TSR personnel." For the security and safety of the public properties, the Police and the TSR personnel at the first instance opened blank fire to disperse the said unlawful assembly and when they did not succeed to clear off the gathering, the Police and the TSR personnel opened fire to the mob. Due to the said incident of firing several persons were injured and two persons in the said assembly succumbed to the bullet injuries. All the injured persons including the Police and the TSR personnel with two dead bodies were sent to Manubazar Rural Hospital by a Fire Service van. Then the Officer-in-Charge of Manubazar Police Station namely, Asish Kr. Deb lodged a suo motu complaint in the Manubazar Police Station narrating the incident on 28.09.2002 after returning to the Police Station at about 12.45 hours and he registered the Manubazar P.S. case No. 33 of 2002 dated 28.09.2002 under Sections 148 /149 /353 /333 /307 of the IPC and 27 of the Arms Act.

2. The investigation thereafter followed which after sometimes was taken over by the Superintendent of Police (Crime) and the case docket was handed over to the Inspector of Police, namely, Manoranjan Das. Subsequently the investigation was transferred to another Inspector of Police, namely, Dulal Chandra Dutta who completed the investigation and filed the Charge-sheet against the appellants and other 13 persons under Sections 148 /149 /353 /333 /307 of the IPC and 27 of the Arms Act.

3. The Sub-Divisional Judicial Magistrate, Sabroom, South Tripura on taking cognizance of the offence under Sections 148 /149 /353 /333 /307 of the I.P.C.

and Section 27 of the Arms Act committed the case to the Court of the Sessions Judge, South Tripura, Udaipur as the offence u/s 307 was exclusively triable by the Court of Sessions. The Sessions Judge, South Tripura, Udaipur transferred the said case for trial to the Court of the Assistant Sessions Judge, South Tripura, Udaipur who framed the charge against the appellants and 13 other persons under Sections 148 /333 /307 of the I.P.C. read with Section 149 of the IPC and u/s 27 of the Arms Act. The appellants and other accused persons pleaded not guilty and claimed to be tried.

4. The prosecution examined as many as 42(forty two) witnesses and exhibited 29 (twenty nine) documents (Exbt. 1 to Exbt. 29) whereas at the instance of the defence 2(two) other documents were exhibited (Exbt. A to Exbt. B).

5. After conclusion of the prosecution evidence, the Assistant Sessions Judge, South Tripura, Udaipur found that the charges as brought against the appellants namely Chandan Tripura and Manik Bhowmik under Sections 148 /333 /307, read with Section 34 of the I.P.C. have been proved by the prosecution beyond reasonable doubt. Against the appellant namely, Rabidhan Tripura the charge as brought u/s 333 /307 read with Section 149 of the I.P.C. and u/s 27 of the Arms Act could not be proved. The said appellant namely, Rabidhan Tripura was however convicted for commission of offence u/s 148 of the I.P.C. Thus, he was acquitted from the charges u/s 333 /307 of the I.P.C. read with Section 149 of the IPC and u/s 27 of the Arms Act The appellants challenged the finding of the conviction as returned by the Assistant Sessions Judge, South Tripura, Udaipur by these appeals.

6. From the written Ejahar filed by one Asish Kr. Deb (PW- 41) it would transpire that:

(i) On 28.09.2002 call for road blockade in different places of the State for 48 hours w.e.f. 28.09.2002 was given by the INC/LNPT. The Police and the T.S.R. personnel were detailed in the vicinity of Satchand Block Office, Sabroom as the law and order measure from the dawn.

(ii) The Police and the T.S.R. personnel took their positions in the U-turn of the road where the S.D.P.O., Sabroom was also present since 5.45.00 hours.

(iii) At 6.00 hours a group of about 100 supporters of the INPT/INC came there from different directions/places and created the road blockade at the U-turn on the road. All the picketers/supporters were arrested and sent to the detention camp at 06.30 hours.

(iv) Around 07.00 hours, a mob of 300 INPT/INC supporters, most of them armed with lathis etc. under the leadership of the appellants namely, Chandan Tripura and Manik Bhowmik came to that spot from different directions. The mob was found violent and was kept cordoned for sometimes. On certain point of time one Niranjana Shome, a Sub-Inspector of Police with 8(eight) T.S.R personnel arrived at the spot. The members of the said gathering were persuaded by the

police till 07.30 hours to surrender and to Court arrest but such approach was defied by the members of the gathering. It has been recorded that "their violent attitude appeared to be prejudicial to assault or kill the police personnel on duty there and to snatch away their arms."

(v) On such assumption the police and other forces used force to secure their arrest around 07.35 hours and when they proceeded to arrest, the members of that gathering demonstrated violent attitude and around the time they started assaulting Niranjana Shome, a Police Officer, with lathis causing serious bleeding injuries on his head. The other members as well started assaulting the other police personnel with lathis, attempting to kill them and to snatch away their arms. Thereafter, they started throwing brickbats and glass-bottles. At that time a brush fire from a sten-carbine like weapon was made from the mob. The person who fired could be identified as one Rabidhan Tripura (one of the appellants). It has been further stated that "simultaneously one person from the mob fired from a 9 mm pistol but the said person could not be identified". At that situation, the police had no other alternative but to open fire on self defence to disperse the mob. Initially they fired many rounds in the air with intent to scare away the mob but when it appeared absolutely ineffective, the police opened fire. After opening fire the mob dispersed within 8-10 minutes.

(vi) The police detected and recovered as many as 28 injured persons including the police personnel and they were shifted to Manubazar Rural hospital where the two injured persons were declared dead by the Medical Officer. Out of the 26 injured persons 16 were subsequently shifted to Udaipur hospital, of whom two were police personnel. The police fired 121 rounds from the SLR. The persons who died in the firing were the members of the said gathering namely, Jyotirmoy Tripura and Narayan Das.

(vii) On the basis of the said complaint, the Manubazar P.S. case No. 33 of 2002 was registered on 28.09.2002 under Sections 148 /149 /353 /333 /307 of the I.P.C. and u/s 27 of the Arms Act.

7. It would be beneficial if the finding of the trial Court is encapsulated:

(a) From the depositions on record it revealed that the members of the said assembly gathered in front of Satchand Block Office with an object to block the road and it also appears from the records that at the relevant time the SDM, Sabroom promulgated prohibitory order u/s 144 of the Cr.P.C. So the members of the said assembly were aware that the police would resist them in doing such illegal act of blocking the road and in such circumstances many incidents may let loose. So, the members of the said assembly gathered there having been prepared for the consequences.

(b) While the police tried to arrest the members of the said assembly in discharge of their duties, the members of the said assembly attacked on the police and the TSR personnel, causing grievous injury to one police personnel and simple injuries and trauma to some other TSR and police personnel. One

Niranjan Shome (PW-27) in his deposition specifically stated that being instigated by Chandan Tripura and Manik Bhowmik the members of the said assembly attacked on the police personnel and from the depositions of the PWs., it also reveals that before the incident of attack there was an unsuccessful dialogue between the Police and said Manik Bhowmik and Chandan Tripura. It transpired that there was a meeting of mind of Chandan Tripura and Manik Bhowmik prior to the incident of assault took place. So it appears that at the relevant time the common intention of Manik Bhowmik and Chandan Tripura was to deter the public servants in performing their duties and to cause grievous hurt or hurt to the police and the TSR personnel.

(c) While the police tried to arrest the members of the assembly then the common intention of Manik Bhowmik and Chandan Tripura to resist the public servants in performing their duties and cause grievous hurt to the police and the T.S.R. personnel surfaced and they instructed the members of the said assembly to attack the public servants namely, the police and the T.S.R. personnel. At that moment the members of the gathering also tried to snatch away their arms.

(d) It transpired that even though the prosecution failed to prove that the common object of the members of the said assembly was to obstruct the police and the TSR personnel from performing their duties beyond reasonable doubt but the accused persons namely, Chandan Tripura and Manik Bhowmik had common intention to deter the public servants in performing their duties and to cause grievous hurt or hurt to the public servant.

(e) Adhir Das (PW-10) in his deposition stated that Rabidhan Tripura was one of the members of the said group and he was armed with a gun. He entered into a jungle and then he ran away about 20 cubits from the place of occurrence. He saw the group of Chandan Tripura and Manik Bhowmik began to throw bricks and bottles and to missile marbles with the help of catapults. As a result, the police personnel received injuries. On that point of time, he heard sound of firings from the jungle situated near the bank of the lake aiming at the police personnel. The PW-10 also stated that he knew Chandan Tripura and Manik Bhowmik. However, in the cross-examination he stated that he was convicted in a dacoity case. But he never stated to the Police Officer that Rabidhan Tripura entered into the jungle situated near the bank of a lake.

(f) The PW-10 was corroborated by the PW-7 but the PW-7 in the cross examination stated that he came to know the name of Rabidhan Tripura from the public. As such he failed to disclose the name of the person from whom he came to know the name of Rabidhan Tripura. He also admitted that he did not know Rabidhan Tripura personally. Therefore, his statement was hit by the hearsay rule. But presence of Rabidhan Tripura was believed by the Court on the basis of the statement made by the PW-10.

(g) It has been further recorded in the impugned judgment and order that:

the witness No. 10 namely, Adhir Das may have witnessed Rabidhan Tripura in

the said assembly and other witnesses may not have witnessed him. Further PW-10 in his deposition stated that Rabidhan Tripura was personally known to him. So, it is quite probable that he might have seen Rabidhan Tripura in the procession and he identified him. But other witnesses may not have seen him as there was crowd of about 300 people. Further, it may be that Rabidhan Tripura was not known to other witnesses. So they failed to identify him in the said assembly.

(h) From the depositions of the PWs it reveals that the prosecution failed to adduce any direct evidence to show that Rabidhan Tripura had any prior meeting of mind with Chandan Tripura and Manik Bhowmik in regard to resisting public servants in performing their duty and to cause any hurt or grievous hurt to them. He gathered there as a member of the said assembly with object of blocking the road. But he had no common intention with Chandan Tripura and Manik Bhowmik to obstruct the public servants in performing their duty. So, it cannot be said that Rabidhan Tripura was equally liable for resistance of the public servants in performing their duties and for causing grievous hurt or hurt to the said public servants. Pradyut Kanti Debbarma (PW-36) and Damodar Debbarma (PW-37) both the Medical Officers examined the injured persons and prepared the injury reports. The PW-37 stated that he examined 14 injured persons at Manubazar Rural hospital in connection with Manubazar P.S. Case No. 33 of 202 on 28.09.2002. They found the injuries in their bodies and all the injuries were simple in nature caused by blunt weapons. The reports were identified and admitted in the evidence by them. They further stated that they also examined one Niranjana Shome who was admitted in the G.B. Hospital through the Emergency Block. On examination they found grievous injury in the skull of the said patient and there was intra cerebral hemorrhage and it was detected from the CT Scan report.

(i) The trial Court held that these statements established the charge substantively and those were corroborated by the statements of the PW-1, the PW-2, the PW-3, the PW-6, the PW-7, the PW-8, the PW-9, the PW-10, the PW-13, the PW-27, the PW-39 & the PW-41.

(j) The PW-27 stated that he tried to resist the members of the gathering. At that time the SDPO, Sabroom and the SDM, Sabroom called on Manik Bhowmik and Chandan Tripura and requested them to subside the hot temperament of the members of the said procession. But Manik Bhowmik and Chandan Tripura declined to do so. Rather they became more furious and directed the members of the said gathering to attack the police. Being instigated by Chandan Tripura and Manik Bhowmik the members of the said gathering attacked the police with bottles and brick-bats and assaulted him with lathi causing bleeding injury on his head.

(k) It has been further held that being instigated by Chandan Tripura and Manik Bhowmik the members of the gathering attacked the police with lathis and bottles and assaulted the PW-27 and later on he was shifted to Manubazar

hospital.

(I) The deposition of the PW-27 can safely be relied on and as such Chandan Tripura and Manik Bhowmik (the appellants) have been held liable to be convicted u/s 148 /307 of the I.P.C. read with Section 34 of the IPC.

8. It has been also held that the prosecution has proved beyond reasonable doubt that in furtherance of the common intention Chandan Tripura and Manik Bhowmik restrained the public servants in performing their duties and caused grievous hurt or hurt to the public servants. Thus they are held liable to be convicted u/s 333 of the IPC read with Section 34 of the IPC whereas Rabidhan Tripura is held liable to be convicted u/s 148 of the IPC.

9. Mr. A.K. Bhowmik, learned senior counsel appearing for the appellants seriously criticized the impugned judgment as returned by the Assistant Sessions Judge, South Tripura, Udaipur. He submitted that this judgment is an instance how a judgment of the conviction can be returned on assumption even not on presumption as can be drawn on certain foundation and on perverse reading of the evidence. The prosecution did not prove that Chandan Tripura and Manik Bhowmik hurt anyone or they have instigated anyone in the assembly either to resist the public servants or to assault them. Despite that such finding has been returned by the Assistant Sessions Judge. Apart that, when the participation of the Rabidhan Tripura has not at all been proved but by assumption and on reading the statement of the PW 10 the Court purposively and bereft of corroboration found that he was the member of the unlawful assembly. Mr. A.K. Bhowmik, learned senior counsel minced no words in criticizing the said judgment contending that justice has been buried by the Assistant Sessions Judge, South Tripura, Udaipur. The evidence has been superficially read into and the finding of conviction has been returned without foundation. Moreover, proposition of law as regards Sections 333 /307 /148 read with Section 34 of IPC has been given a go-bye.

10. Mr. A.K. Bhowmik, learned senior counsel appearing for the appellants had taken this Court to the relevant parts of the evidence which were relied by the Assistant Sessions Judge. He further submitted that there is no material at all against the appellants to hold the charge proved. Mr. A.K. Bhowmik, learned senior counsel further submitted that even though the complaint was lodged against the police for brutal assault on the peaceful participants of the movement and killing two of them, no investigation was taken up by the police. Mr. A.K. Bhowmik, learned senior counsel submitted that there is no evidence against the appellants that they had common intention for perpetrating any offence or any overt act brought on the evidence against them. Mere participation according to Mr. Bhowmik, learned senior counsel in an assembly is not sufficient and it has to be shown that the participation was with the common intention to perpetrate an offence as the conviction so returned is under the principal penal provisions, coupled with Section 34, I.P.C. as stated.

11. In support of his contention Mr. A.K. Bhowmik, learned counsel relied on a decision of the Apex Court in *Musakhan and Others Vs. State of Maharashtra*, where it has been held as under:

5. The appellants pleaded innocence and averred that they had been falsely implicated due to enmity and had not participated in the riot. Both the Courts below have accepted the main facts leading to the occurrence as also participation of the appellants in the rioting. The Additional Sessions Judge as also the High Court, however, do not appear to have made a correct approach in examining the individual cases of the accused, particularly with reference to their actual presence or participation in the incident in question. It is true that having regard to the background against which the events took place all the incidents starting from the National Hotel and ending with the chawl of Jogendra Singh were parts of the same transaction, nevertheless they were separate incidents in which different members of the mob had participated. In these circumstances, therefore, without there being any direct evidence about the actual participation of the appellants in all the incidents it could not be inferred as a matter of law that once the appellants were members of the mob at the National Hotel they must be deemed to have participated in all the other incidents at the Engineering College Hostel, Bharat Lodge and the chawl of Jogendra Singh. It is well settled that a mere innocent presence in an assembly of persons, as for example a bystander, does not make the accused a member of an unlawful assembly, unless it is shown by direct or circumstantial evidence that the accused shared the common object of the assembly. Thus a Court is not entitled to presume that any and every person who is proved to have been present near a riotous mob at any time or to have joined or left it at any stage during its activities is in law guilty of every act committed by it from the beginning to the end. or that each member of such a crowd must from the beginning have anticipated and contemplated the nature of the illegal activities in which the assembly would subsequently indulge. In other words, it must be proved in each case that the person concerned was not only a member of the unlawful assembly at some stage, but at all the crucial stages and shared the common object of the assembly at all these stages. Such an evidence is wholly lacking in this case where the evidence merely shows that some of the accused were members of the unlawful assembly at one particular stage but not at another. In these circumstances, therefore, the accused who were not present or who did not share the common object of the unlawful assembly at other stages cannot be convicted for the activities of the assembly at those stages. In view of this error committed by the High Court it has become necessary for us to examine the evidence on the limited question as to which of the accused had actually participated in the incidents at the Engineering College, Bharat Lodge and the chawl of Jogendra Singh where acts of incendiarism had taken place. It is also common ground that the occurrence had taken place at night and the evidence of the witnesses identifying the accused had to be examined with great caution.

[emphasis added].

12. Mr. A.K. Bhowmik, learned senior counsel further referred a decision of the Apex Court in Hari Kishan Vs. Sukhbir Singh and Others, and submitted that there is no evidence as regards the attempt to murder. In Hari Kishan (supra) the Supreme Court enunciated the law in no uncertain terms and held as under.

7. On the first question as to acquittal of the accused u/s 307 /149 IPC, some significant aspects may be borne in mind. u/s 307 IPC what the Court has to see is, whether the act irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in that section. The intention or knowledge of the accused must be such as is necessary to constitute murder. Without this ingredient being established, there can be no offence of "attempt to murder". u/s 307 the intention precedes the act attributed to accused. Therefore, the intention is to be gathered from all circumstances. and not merely from the consequences that ensue. The nature of the weapon used, manner in which it is used, motive for the crime, severity of the blow, the part of the body where the injury is inflicted are some of the factors that may be taken into consideration to determine the intention.

In this case, two parties in the course of a fight inflicted on each other injuries both serious and minor. The accused though armed with ballam never used the sharp edge of it. They used only the blunt side of it despite they being attacked by the other side. They suffered injuries but not provoked or tempted to use the cutting edge of the weapon. It is very significant. It seems to us that they had no intention to commit murder. They had no motive either. The fight as the High Court has observed, might have been a sudden flare up. Where the fight is accidental owing to a sudden quarrel, the conviction u/s 307 is generally not called for. We therefore, see no reason to disturb the acquittal of accused u/s 307 IPC.

[emphasis added]

13. While refuting the submission of Mr. A.K. Bhowmik, learned senior counsel appearing for the appellants both Mr. A. Ghosh, learned Additional Public Prosecutor and Mr. R.C. Debanth learned Additional Public Prosecutor for the State submitted that so far the evidence relating to promulgation of prohibition u/s 144 of the Cr.P.C. is concerned, it has been adduced through the PW-27 namely, Niranjana Shome and the PW-1, Ashish Kr. Deb. According to learned Additional Public Prosecutors appearing for the State, both the witnesses without any incoherence stated that despite prohibition u/s 144 of the Cr.P.C. the appellants had led the procession having the common object to attack the police personnel/the Government Officials as well as the Government properties. They further submitted that the overt acts of Chandan Tripura and Manik Bhowmik can adequately be gathered from the testimonies of the PW1 namely, Tarani Rudra Paul, the PW-4 namely, Mantu Ranjan Das, the PW-5 namely, Madhab Lal Das, the PW-6 namely, Kartik Oran, the PW-7 namely, Swapan Shil, the PW-10 namely, Adhir Das, the PW-12 namely, Brajabashi Das, the PW-27 namely, Niranjana Shome, the PW-28 namely, Bani Rani Biswas and the PW-41 namely,

Ashish Kr. Deb.

14. Apart that, learned Additional Public Prosecutors appearing for the State submitted that no question has been raised in the appeal relating to the seizure, the inquest and injuries. The said evidence having not been challenged has to be believed by this Court. Both Mr. A. Ghosh and Mr. R.C. Debnath, learned Additional Public Prosecutors for the State categorically submitted that the PW-10 and the PW-7 namely, Adhir Das and Swapan Shil categorically deposed of involvement of the appellant namely Rabidhan Tripura. They submitted that the material objects as brought in the evidence as Exbt. MO1, MO2 & MO3 also supported the prosecution case.

15. While responding to the legal objections as raised by Mr. A.K. Bhowmik, learned senior counsel appearing for the appellants as regards the filing of the suo moto complaint by the Investigating Officer himself and delayed recording of the statements of the witnesses, the learned Additional Public Prosecutors submitted that unless prejudice to due process is demonstrated, if the prosecution case is otherwise established, those are bound to lose their relevance.

16. In Salim Abdul Razak Baig Vs. State of Maharashtra where Bombay High Court held that:

It is for the necessity of such complaint was lodged suo moto by the Investigating Officer. It is well settled that unless the defence could demonstrate that for that reason they have suffered any prejudice, the adverse inference cannot be drawn against the prosecution. They further submitted that so far the delayed recording of the statements of the witnesses is concerned, unless those are in the cross examination, it has to be contended that the defence has waived that objection and subsequently they cannot resort to such objection further.

To buttress their contention they placed reliance on Salim Abdul Razak Baig Vs. State of Maharashtra as reported in 2011 CRI.L.J. (NOC) 445 (Bom) where the Bombay High Court held that:

The legal position which emerges is that once the right to cross examine a witness is foregone it is not open to a party to make any grievance about it. It is a rule of essential justice that whenever the defence has declined to avail himself of opportunity to put his case in cross-examination it must follow that the evidence tendered on that issue is not disputed.

17. They further submitted that for some irregularities or some steps which were required to be taken by the Investigating Officer, were not taken, for that reason the enter prosecution case cannot be wiped out unless it is demonstrated that the inherent improbabilities, the serious omission and infirmities, the interested or inimical nature of the evidence and other circumstances as might be pointed out are bound to lead to the opinion that the prosecution has wretchedly failed to prove the case, but in absence of those elements such inference can be drawn

against the prosecution inasmuch as the duty of the Court is fundamentally to sift grain from the chaf.

18. On placing reliance on *State of Karnataka, Paper Town Police Station Vs. Sheshadri Shetty and Others*, it has been contended that mere presence as the part of a mob that has committed the offence would be sufficient to fasten the liability of the offence. As observed in *Sheshadri Shetty (supra)*:

We are conscious of the fact that in cases of unlawful assembly and rioting there are instances when mere presence as part of a mob that has committed the criminal offence would be sufficient to fasten the liability of an accused.

Reliance has also been placed in reference to the delayed examination of witnesses on the *State of U.P. Vs. Satish*, where the Apex Court held as under:

18. As regards delayed examination of certain witnesses, this Court in several decisions has held that unless the Investigating Officer is categorically asked as to why there was delay in examination of the witnesses the defence cannot gain any advantage therefrom. It cannot be laid down as a rule of universal application that if there is any delay in examination of a particular witness the prosecution version becomes suspect. It would depend upon several factors. If the explanation offered for the delayed examination is plausible and acceptable and the Court accents the same as plausible, there is no reason to interfere with the conclusion [See *Ranbir and Others Vs. State of Punjab*, , *Bodh Raj @ Bodha and Others Vs. State of Jammu and Kashmir*, and *Banti @ Guddu Vs. State of Madhya Pradesh*, .

20. It is to be noted that the explanation when offered by IO on being Questioned on the aspect of delayed examination, by the accused has to be tested by the Court on the touchstone of credibility. If the explanation is plausible then no adverse inference can be drawn. On the other hand, if the explanation is found to be implausible, certainly the Court can consider it to be one of the factors to affect credibility of the witnesses who were examined belatedly. It may not have any effect on the credibility of prosecution's evidence tendered by the other witnesses.

[emphasis added]

19. Both Mr. A. Ghosh and Mr. R.C. Debanth learned Additional Public Prosecutors for the State fairly submitted that even beyond the community of object, another object may be formed in the subsequent phase. They relied on a decision of the Apex Court in *State of Maharashtra Vs. Kashirao and Others*, where it has been enunciated:

12. A plea which was emphasized by the respondents relates to the question whether Section 149, IPC has any application for fastening the constructive liability which is the sine qua non for its operation. The emphasis is on the common object and not on common intention. Mere presence in an unlawful assembly cannot render a person liable unless there was a common object and

he was actuated by that common object and that object is one of those set out in Section 141. Where common object of an unlawful assembly is not proved, the accused persons cannot be convicted with the help of Section 149. The crucial question to determine 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 in Section 141. It cannot be laid down as a general proposition of law that unless an overt act is proved against a person, who is alleged to be a member of unlawful assembly, it cannot be said that he is a member of an assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of Section 141. The word "object" means the purpose or design and, in order to make it "common" it must be shared by all. In other words, the object should be common to the persons, who compose the assembly, that is to say, they should all be aware of it and concur in it. A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. The expression "in prosecution of common object" as appearing in Section 149 have to be strictly construed as equivalent to "in order to attain the common object. It must be immediately connected with the common object by virtue of the nature of the object. There must be community of object and the object may exist only up to a particular stage, and not thereafter. Members of an unlawful assembly may have community of object up to certain point beyond which they may differ in their objects and the knowledge, possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object and as a consequence of this the effect of Section 149, IPC may be different on different members of the same assembly. [emphasis added]

20. On the basis of Kashirao (supra) learned Additional Public Prosecutors appearing for the State tried to impress this Court that in all the phases, the objects of the appellants were not alienating from the gathering. Learned Additional Public Prosecutors appearing for the State also relied a decision of this High Court in Brajalal Deb and Others Vs. State of Tripura and Others, where it has been held that:

Even if the irregularity in registering the F.I.R. cannot locate the other evidences are not automatically tainted. The Criminal Court is required to assess whether the prosecution case is proved beyond reasonable doubt on the basis of available evidence when the Court can reach the necessary conclusion, without even considering the F.I.R., would not be fatal and accused are not entitled to acquittal on that score.

Thus the learned Additional Public Prosecutors appearing for the State contended

that the impugned judgment and orders may not be faulted with as those judgments are founded on cogent reasons.

21. It is the admitted position that the PW-5, the PW-11, the PW-14, the PW-16, the PW-17, the PW-24, the PW-29, the PW-31, the PW-33 and the PW-35 were tendered by the prosecution and no cross-examination was carried out and the PW-14 and the PW-18 were declared hostile to the prosecution case and they were also not cross-examined to locate any inconsistency. Therefore, the PW-5, the PW-11, the PW-13, the PW-14, the PW-15, the PW-16, the PW-17, the PW-18, the PW-19, the PW-24, the PW-26, the PW-29, the PW-31, the PW-33 and the PW-35 are not required to be re-appreciated. The PW-22 and the PW-23 are merely the seizure witnesses and there was no dispute regarding the seizure of the material objects.

22. The PW-25 was the witness to the inquest report and there is no dispute regarding the inquest or the statement as available in the inquest report. Similarly the PW-33 who conducted the post mortem either his oral testimony or the documents including the post mortem report are not in question by the appellants. As such, the testimonies of those witnesses i.e. the PW-22, the PW-23, the PW-25, the PW-32, the PW-37 and the PW-38 may not be very relevant in determining the points of controversy. It is made clear that the PW-37 and the PW-38 are the Doctors who prepared the injury reports respectively at the IGM Hospital and Tripura Sundari Hospital.

23. Therefore, the witnesses being the PW-1, the PW-2, the PW-3, the PW-6, the PW-7, the PW-8, the PW-10, the PW-12, the PW-13, the PW-27, the PW-28, the PW-39 and the PW-41 are the witnesses of some relevance. The prosecution contended that promulgation of Section 144 of the Cr.P.C. has been proved by the PW-27 and the PW-41.

24. The PW-27 stated that:

at the relevant time SDM, Sabroom promulgated prohibition order u/s 144 of the Cr.P.C. and after arrest they took the arrested persons at Manubazar High School.

25. The PW-41 stated somehow differently as regards the promulgation of the prohibitory order u/s 144, Cr.P.C.

He stated that on 28.09.2002 he was posted as the OC Manubazar P.S. On that date the INPT-INC combined jointly called a "Rasta Roko Movement" and he along with other police personnel and TSR gathered at Satchand Block Office on duty. At about 6 a.m. one procession containing 100 agitators gathered in front of the Block Office and on National Highway under the leadership of Joy Kishore Tripura and the Mobile Officer namely, Niranjana Shome came to the spot. They persuaded and arrested them and the said Mobile Officer, namely, Niranjana Shome by his van shifted all the arrested persons in the detention camp. In the meantime, the SDPO and the BDO also came to the spot and about 7 a.m. another procession containing about 300 agitators proceeded towards the Block

Office and the said procession was led by Chandan Tripura and Manik Bhowmik. At that time, prohibition u/s 144, Cr.P.C. was proclaimed in this said area and the agitators were asked to Court arrest but the agitators did not given in to his custody and they reacted by attacking the police personnel with lathi, bhar (bamboo made shaft, used for carrying load), umbrella, piece of brick etc.

26. From that piece of evidence as referred by the learned Additional Public Prosecutors for the State it is not clear when the prohibition u/s 144, Cr.P.C. was promulgated in that area. From the deposition of the PW-41 it appears that after the agitators led by Chandan Tripura and Manik Bhowmik reached at the place of occurrence the prohibition u/s 144 of the Cr.P.C. was promulgated.

27. There is no definite proof and a copy of the order was also not placed in the evidence and as such it cannot be stated with certitude that the agitators led by the appellants namely, Chandan Tripura and Manik Bhowmik disobeyed a legal order promulgated in that area. The fall-out might be outcome of the unwarranted police action.

Now it is essential to examine the aspect of involvement of the appellants namely, Chandan Tripura and Manik Bhowmik in the charged offence.

28. The PW-1 namely, Tarani Rudra Paul simply stated that 300/350 people gathered at the place of occurrence under the leadership of Chandan Tripura and Manik Bhowmik and when they were obstructed they began to assault the PW-1 and the other police personnel with lathis but in the previous statement recorded by the Investigating Officer u/s 161 of the Cr.P.C. even the words "under the leadership of Chandan Tripura and Manik Bhowmik" were not found.

29. The PW-4 is a chance witness namely, Mantu Ranjan Das who stated that the agitators led by Chandan Tripura and Manik Bhowmik reached there and the police personnel obstructed them and there was a scuffle. But the PW-4 was declared hostile and his statement as recorded u/s 161 of the Cr.P.C. was accepted even though he categorically denied that he stated anything against the appellants but he admitted that he was the seizure witness of some materials.

30. The PW-7 was heavily relied by the prosecution against the all appellants who stated that he was posted at the place of occurrence as a constable and at about 7 a.m. in the morning on 28.09.2002 one procession came under the leadership Joykishore Tripura and the members of the said procession were arrested and another procession came under the leadership of Chandan Tripura and subsequently another procession came under the leadership of Manik Bhowmik. The Police requested them to Court arrest but they denied. Thereafter, he deposed that at that time the leaders of the said procession went behind the mob and they were found to some consultation. When Niranjana Shome appeared in the place of occurrence, one of the members of the gathering gave a blow with a lathi on the head of Niranjana Shome and thereafter there was a scuffle and ultimately the police opened fire. He also stated that the appellant Rabidhan Tripura also opened fire from the northern side. But later on, he resiled by saying

that he heard Rabidhan Tripura opened fire and in the cross examination he stated that he came to know subsequently from the public that Rabidhan Tripura opened fire.

31. The PW-10 namely, Adhir Das also stated that at that time the members of the procession led by Chandan Tripura and Manik Bhowmik gave blows with lathi on the head of the Police Officer whose title was "Shome" and due to the said assault the said Police Officer fell down on the ground. He stated that Rabidhan Tripura, the appellant herein, was armed with a gun and he entered into a jungle, 20 cubits away from the place of occurrence. He further stated that the group of Chandan Tripura and Manik Bhowmik began to throw brick-bats, bottles and the marbles by "Gultis" (catapults).

32. The PW-12, the another witness as relied by the prosecution stated that one procession was led by Manik Bhowmik and another procession was led by Chandan Tripura and they assembled together in front of the Block Office and there had been scuffling in between the police personnel and the members of the said procession. Then one Police Officer received a blow of lathi and he fell down on the ground. He stated nothing further.

33. The PW-27 namely, Niranjana Shome appears to be the most vital witness of the prosecution who stated that all the members of the said gathering were highly tempered and they tried to resist them. The SDPO, Sabroom, the SDM, Sabroom and the BDO, Satchand Block were also present there and at that time the SDPO and the SDM called on Manik Bhowmik and Chandan Tripura and requested to subside the hot temperament of the members of the said procession. But Chandan Tripura and Manik Bhowmik declined to do so. Rather they became furious and directed the members of the procession/gathering to attack upon the police. Then the members of the said procession being instigated by Chandan Tripura and Manik Bhowmik attacked the police with lathi, bottles and brick-bats and he also heard a sound of firing from the gun from the side of the said furious mob. The members of the said assembly assaulted him with a lathi causing bleeding injury on his head and he fell down. But in the cross-examination he admitted that "he did not state to Darogababu that the SDM and the S.D.P.O. called on Chandan Tripura and Manik Bhowmik and requested them to subside the hot temperament of the member of the gathering and Chandan Tripura and Manik Bhowmik declined to do so. rather they become more furious and directed the members of the said gathering to attack upon the police and then the members of the of the said procession being instigated by Chandan Tripura and Manik Bhowmik attacked upon the police with lathi, bottle. He further stated that he did not state the said fact to the Investigating Officer as it was known to him and he was present at the place of occurrence and witnessed the said incident.

Thus the version as stated in the examination-in-chief appeared to have been improved in the Court.

34. The PW-41 is the Police Officer who has been referred by the PW-27. Before appreciating the evidence of the PW-27 this Court is inclined to examine the oral testimony of the PW-28 and PW-39 who were relied by the prosecution for corroboration.

35. The PW-28 is a chance witness who stated that she found Chandan Tripura, Manik Bhowmik and one Badal and many other people about 300/350, were proceeding towards the Satchand Block Office and they were armed with lathi, bottles and brick-bats and the members of the said processions was very excited. The police personnel requested them not to obstruct the road and to clear the road, but they declined to do so. Then the members of the said procession began to throw brick-bats and bottles aiming at the police personnel, and the members of the said gathering also assaulted the police personnel causing injuries to them. Then the members of the said gathering opened fire and two civilian agitators received bullet injuries and succumbed within a short while. In the cross examination, she stated that she was an active member of the CPI(M) and the member of the Satchand Gaon Sabha. From 28.09.2002 to 21.02.2004 she had been residing in her house situated at Nabagram and she did not state anything to any person prior to 21st February, 2004 in regard to the said incident

This, witness appears to be a tutored witness as she exaggerated to say that for opening fire by the members of the gathering two members in the gathering died but the police case as surfaced is that when they opened fire two civilian agitators received bullet injuries and they died from the bullet injuries.

36. The PW-39, the another rifleman, namely, Anjan Das stated that later on, another procession of the supporters of "Rasta Roko Movement" containing about 100/150 members gathered in front of the Block office and they were hot tempered and aggressive. These processions were led by Manik Bhowmik and Chandan Tripura. Then the agitators attacked on the Sub-Inspector, Mr. Shome and gave a blow with a bottle on his head causing bleeding injury in his head and due to the said blow the Sub-Inspector (PW-27) fell down the ground.

In the cross examination he however, admitted that he did not state to the Investigating Officer that the members of the said procession gave a blow with a bottle on the head of the PW-27. Even no such statement was found in the statement recorded u/s 161 of the Cr.P.C. that the member of the said gathering tried to snatch away the arms of the PW-27.

37. The PW-40 even though was not referred and relied by the learned Additional Public Prosecutors for the State, he deposed that he was the Block Development Officer at the relevant point of time. He stated that when the gathering reached in the turning of Tripura Gramin Bank he along with the S.D.P.O. tried to convince the agitators to clear off the road. Then the S.D.P.O. told them that unless his order was complied, the agitators would be arrested. Then the agitators became furious and began to throw brick bats aiming to the police personnel. He categorically stated that he could not identify the accused persons under whose

leadership the said agitators gathered there. Consequently, the said witness was declared hostile and he was cross examined by the prosecution. To be noted that the S.D.P.O. was not examined as the witness.

38. The PW-41, one of the Investigating Officers stated that on 28.09.2002 he was posted as the Officer-in-Charge of Manubazar P.S. On that day there was a call for "Rasta Roko Movement". In the relevant point of time the SDPO and the BDO were also present in the spot. The agitators led by Chandan Tripura and Manik Bhowmik were requested to Court arrest but they denied and they started attacking the police personnel with lathi and bhar. He further stated that the agitators at one point of time tried to snatch away the arms of the police personnel and then they opened blank fire to scare and disperse the mob. As soon as the fire was opened, the agitators concealed themselves, behind the tress and no sooner the firing stopped than they came forward. He admitted that he registered a suo moto complaint and took up the investigation u/s 148 /149 /333 /307 of the IPC and u/s 27 of the Arms Act. He thereafter, narrated how he conducted the investigation for a substantial part and he admitted in the cross examination that" it is not a fact that in my FIR I nowhere mentioned that on the relevant date promulgation was made u/s 144". He also disclosed in the cross examination that he and the subsequent Investigating Officer proceeded with investigation and on culmination, the charge sheet was filed.

39. As stated that appellants namely, Chandan Tripura and Manik Bhowmik have been convicted under Sections 148 /333 read with Section 34 of the IPC and u/s 307 read with Section 34 of the IPC whereas the other appellant namely, Rabidhan Tripura was convicted u/s 148 of the IPC. There had been no conviction u/s 149 of the I.P.C. In absence of conviction u/s 149 of I.P.C., the element of constructive liability which is the sine qua non of the common object is absolutely weakened. Section 146 while defines that "rioting" 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.

40. As no conviction has been returned u/s 149 of the I.P.C. the element of the community of the object becomes irrelevant particularly on the face of not questioning such finding. On the other way round, a member of an unlawful assembly in prosecution of the common object is supposed committed in prosecution of that object. Every person at the time of the committing of the offence is a member of the same assembly and is guilty of that offence. Moreover, there is no evidence that the appellants had any overt act of participation in the rioting, as defined, with deadly weapon in terms of the finding.

41. So far the conviction as returned u/s 333 of the I.P.C. against the appellants namely Chandan Tripura and Manik Bhowmik for causing grievous hurt or hurt to deter the public servants from discharging their duty is not founded on evidence.

Unless there is any direct evidence that the appellants in any point of time attempted to deter any public servant by any overt act, the purport of Section 34 I.P.C. becomes inert. There is no doubt that convicting the appellants under Sections 333 and 307 of I.P.C. coupled with Section 34 I.P.C. cannot be held illegal for the reason as discussed.

42. In view of the decision of the Apex Court as rendered in Jivan Lal and Others Vs. State of M.P., the law becomes detenninative.

In no uncertain terms that the accused person charged with aid of Section 149 of I.P.C., they are convicted with aid of the Section is not illegal. No prejudice has been shown to have been caused to the appellants for not framing a distinct charge with the aid of Section 34 I.P.C. But Section 34 of IPC has provided certain burden to be discharged by the prosecution such as every such of individual act cumulatively resulted the criminal offence should have in furtherance of the common intention of persons.

[emphasis added].

In Nandu Rastogi @ Nandji Rastogi and Another Vs. State of Bihar, the Apex Court elaborated on some important aspects as visited while the provisions of Section 34, I.P.C. pressed into the circumstances.

it has to be shown that the accused person shared a common intention to commit the offence and in furtherance thereof each one played his assigned role by doing separate acts, similar or diverse.

43. In the case in hand, neither of the appellants namely Chandan Tripura and Manik Bhowmik has been attributed of any individual overt act As such it has to be held that the prosecution has failed to prove the charge against the said appellants. Apart that, Mr. A.K. Bhowmik, learned senior counsel has correctly contended that there is no material to show that either of the appellants physically assaulted the Police Officer (PW-27) who received the injuries. No such evidence is available in the evidence.

44. In view of this, both the appellants are entitled to acquittal on benefit of doubt. Apart that, what the learned Additional Public Prosecutors for the State have submitted is that the Police Officer who filed the suo moto FIR can also investigate the matter unless it is shown that investigation had caused prejudice to the accused persons. The element of prejudice has to be gathered from the attending circumstances in the touchstone of the legal evidence. In Megha Singh Vs. State of Haryana, where the Apex Court held as under.

We have also noted another disturbing feature in this case. PW-3, Siri Chand, head Constable arrested the accused and on search being conducted by him a pistol and the cartridges were recovered from the accused. It was on his complaint a formal first information report was lodged and the case was initiated. He being complainant should not have proceeded with the investigation of the case. But it, appears to us that he was not only the complainant in the case but

he carried on with the investigation and examined witnesses u/s 161, Cr.P.C. Such practice, to say the least should not be resorted to so that, there may not be any occasion to suspect fair and impartial investigation.

[emphasis added]

45. On cumulative assessment of the evidence so led by the prosecution interfaced by the legal precedents, this Court has no hesitation to hold that the prosecution has failed to substantiate the charges against the appellants beyond reasonable doubt. In the result, the appeals stand allowed. The impugned judgments and orders are interfered with and set aside. The appellants are set at liberty.

Send down the LCRs.