

(2008) 02 GAU CK 0018

In the Gauhati High Court

Case No : Criminal Appeal No. 21 (J) of 2006

Dayaljoy Tripura and Another

APPELLANT

Vs

State of Tripura

RESPONDENT

Date of Decision : 28-02-2008

Acts Referred:

Arms Act, 1959 — Section 25(1), 27, 27(1), 27(3)
Criminal Procedure Code, 1973 (CrPC) — Section 161
Penal Code, 1860 (IPC) — Section 141, 147, 148, 149, 302
Unlawful Activities (Prevention) Act, 1967 — Section 10, 13

Citation : (2010) 3 GLR 275 : (2008) GLT 558 Supp

Hon'ble Judges : R.B. Misra, J;H. Barua, J

Bench : Division Bench

Advocate : Arun Chandra Bhowmik, D.C. Roy and M.K. Roy, for the Appellant;
Abhijit Ghosh, for the Respondent

Judgement

H. Barua, J.—Appellants Dayaljoy Tripura and Bagirai Reang were tried by the learned Additional Sessions Judge, Kamalpur, North Tripura along with three other accused, namely, Buddhijoy Tripura, Barnajoy Reang and Garamjoy Reang u/s 148, 302 read with Section 149, IPC and under Sections 25(1)(a)/27(3) of the Arms Act. Learned Additional Sessions Judge, Kamalpur, North Tripura at the conclusion of the trial convicted both the appellants Dayaljoy Tripura and Bagirai Reang under Sections 148, 302 read with Section 149 of the IPC, and u/s 27(1) of the Arms Act and sentenced both the appellants for life u/s 302, IPC with fine of Rs. 2,000 each, in default of payment of fine both the appellants to suffer simple imprisonment for one year. Appellants were also convicted and sentenced to suffer three years imprisonment u/s 27(1) of the Arms Act. It is ordered that both the sentences will run concurrently and period of detention in custody during trial shall be set off from the period of sentence.

2. Dissatisfied with the impugned judgment and order of conviction and sentence, both the appellants filed this present appeal challenging its legality and correctness.

3. Before entering into the merit of this present appeal, it would perhaps be appropriate for this Court to project the case of the prosecution in a nutshell for better appreciation and understanding. Deceased, Ananda Mohan Roaja, who was a sitting MLA of Gandacherra constituency and chairman of the Block Advisory Committee, Damburnagar as well. The occurrence took place on the 18th day of October 1998 at about 20.30 hrs. On the relevant time of the fateful night, the deceased along with his wife Smt. Daya Rani Roaja (PW1) were enjoying Radio sitting at their bedroom after dinner and at that time a boy from outside called the deceased in "kakbarak" language and requested him to open the door. Deceased asked the boy from inside to come on the following morning but the boy insisted that he had some urgent business with him. As soon as the deceased opened the door, all on a sudden, a group of persons numbering 10/12 being armed with fire arms caught hold of the deceased and forcibly dragged him towards the gate and gunned him down there at. The wife (PW1) cried for help. Neighbouring people including their son (PW16) and the daughter-in-law (PW2) assembled. The son, Gaganjoy Tripura (PW16) lodged the FIR (exhibit-9) with the Station House Officer (S.H.O), of Gandacherra Police Station, which had been registered as Gandacherra P.S. Case No. 20/1998 under Sections 148/149/302, IPC and 27 of the Arms Act read with Section 10/13 of the Unlawful Activities (Prevention) Act. Police commenced the investigation accordingly. Police visited the place of occurrence and conducted inquest on the dead body of the deceased and prepared an inquest report (exhibit-7) and sent the dead body for post mortem examination. During visit Police also seized two Nos. of empty cartridges of A.K., series rifle from the vicinity of the place of occurrence vide, (exhibit-2), seizure memo; two numbers of empty cartridges from the place of occurrence and one 9 mm bullet (live) vide (exhibit-3). The Investigating Officer also examined the witnesses under the provisions "of Section 161 of the Cr.PC and prepared the sketch map (exhibit-8) of the place of occurrence with index. On 2.11.1998, appellant Dayaljoy Tripura was arrested from his residence while appellant Bagirai Reang was arrested on 28.11.1998. Having received an information on 7.11.1999 that accused Buddbijoy Tripura was also involved in the killing, he was shown as arrested. After completion of the investigation, the Investigating Agency laid the charge sheet on 23.1.2000 against Bagirai Reang and Dayaljoy Tripura, both the appellants along with Barnajoy Reang, Buddhijoy Tripura, Atharababu Halam, Garamjoy Reang, Daharam Reang, Goshiram Reang and Doshiram Reang showing as absconders. After lodgment of the charge sheet accused Garamjoy Reang was arrested.

4. The case having been committed to the court of Sessions and made over the case to the court of learned Sessions Judge, North Tripura, Kamalpur, for disposal, having found sufficient materials to frame charge by the learned Additional Sessions Judge, charge under Sections 148, 302 by 149 IPC, 25(1) (a)/27(3) of the Arms Act were framed against the present two appellants along with Buddhijoy Tripura, Barnajoy Reang and Garamjoy Reang. All of them pleaded not guilty to each charge so framed and claimed to be tried.

5. Trial commenced. All together 16 witnesses were examined including two official witnesses, namely, Dr. Madan Mohan Debnath (PW13) and Sub-Inspector of Police, Sri Buddha Deb Barma, (PW14). Nine documents were proved (exhibit 1-9). At the conclusion of the trial, learned trial Judge found both the appellants guilty under Sections 148, 302, IPC and u/s 27(1) of the Arms Act and accordingly convicted and punished as above. The learned trial court, however, did not record a finding of guilt against the other three accused persons under any of the charges and accordingly all were acquitted.

6. We have heard Mr. A.C. Bhowmik, learned Counsel for and on behalf of the appellants, assisted by Mr. D.C. Roy and Mr. M.K. Roy, Advocates. Also heard Mr. Abhijit Ghosh, learned Additional Public Prosecutor for and on behalf of the State respondent.

7. The crucial issue involved in this present appeal is whether the conviction and sentence awarded by the learned trial court can be sustained in view of the evidence on record more particularly the evidence of PW1, PW2 and PW16, who are the wife, daughter-in-law and son respectively.

8. Mr. A.C. Bhowmik, learned Counsel for the appellants, at the very outset of his argument submitted that the learned trial court committed grave error and illegality in accepting the evidence of those three witnesses in particular when their evidence do not transpire any confidence in the mind of the court. It was argued by him that the learned trial court failed to scan their evidence in proper perspective in the context of involvement and recognition of the appellants and, thus, arrived at erroneous finding. Had their evidence been carefully marshaled by the learned trial Judge, it was argued, no conviction could have been warranted.

9. Before entering into the merit of the issue involved herein, let us consider other aspects of the case which would be relevant for the purpose.

10. Let us first consider whether the death of the deceased was accidental or homicidal. In this context, evidence of doctor, (PW13) and the Investigating Officer, (PW14), who conducted the inquest on the dead body of the deceased, would be more relevant.

11. The evidence of Dr. Madan Mohan Debnath, (PW13) goes to show that on 19.10.1998, he was serving as SDMO at Gandacherra Hospital. On that day at about 10.15 a.m. he conducted post mortem examination on the dead body of Anand Mohan Roaja in connection with Gandacherra P.S. Case No. 20/1998 who had been identified by Sub-Inspector of Police, Sri Buddha Deb Barma and Constable No. 7029, Rabindra Malakar. On examination he found the following:

On external examination I found the dead body was stout. Rigor mortis present, cyanosis was also present. Bullet injury over the right side of abdomen and lacerated wound over the right elbow joint. No other injury was present. Skull and batribrah was healthy, membranes were healthy, spinal cord was healthy,

injuries over thorax:

(i) Walls, ribs and cartilages healthy, pleurae healthy, larynx and trachea healthy, right lung healthy, left lung healthy, pericardium healthy, heart healthy, right sided dark blood, left side was healthy.

(ii) Abdomen - walls exit wound of bullet injury in the anterior aspect of right side of abdominal wall.

(iii) Peritoneum - Injured over the side of bullet injury.

(iv) Mouth, pharynx and oesophagus were healthy.

(v) Stomach and its contents - stomach was healthy, its contents undigested food particles.

(vi) Small intestine and its contents - small intestine was healthy, its contents ashes only.

(vii) Large intestine and its contents - transverse: was perforated by bullet injuries and it contains gashes and stools faeces.

(viii) Liver - liver healthy.

(ix) Spleen - Spleen was healthy.

(x) Kidneys - Left kidney was healthy.

On the outer surface of the right kidney one bullet injury was there, half inch deep.

(xi) Bladder - Bladder was healthy and empty.

(xii) Organs of generation external and internal were healthy. No ejection of semen seen.

(xiii) Muscles, bones and joints - (i) injury nil, (ii) disease or deformity nil, (iii) fracture nil, (iv) dislocation - nil.

More detail description of deceased.

(i) One entry wound of bullet injury about 1" in circumference, margin charred were situated over the right side of back below the costal region about 4" away from midline.

(ii) Exit wound 1" in circumference situated about 6" away from midline below the level of ribs margin in the right side of anterior aspect of abdominal wall.

(iii) Outer space of right kidney was injured and transverse colon at its right corner was perforated by a bullet injury. Kidney injury was half inch deep.

(iv) One irregular shape at lacerated wound about 2" square size was situated over the dorsal aspect of right elbow joint. Deceased died about 14 hours before post mortem examination.

12. After scrutiny of the above findings, he opined that death was due to cardio respiratory failure following massive haemorrhage from bullet injury, which was homicidal in nature. He also opined that the lacerated injury found on the dorsal aspect of right elbow joint could happen if a person fell on the ground or was dragged by anybody. According to the testimony of this particular witness, the cause of death was due to cardio respiratory failure following massive haemorrhage from bullet injury on his person which caused injuries in the abdomen, peritoneum and large intestine.

13. PW14, is Sub-Inspector of Police, Sri Buddha Deb Barma. He was the Investigating Officer of this case. From his evidence, it appears that when he visited the place of occurrence, being entrusted with the investigation, he conducted the inquest on the dead body of Ananda Mohan Roaja, in presence of the witnesses and prepared the inquest report (exhibit-7). In exhibit-7, the inquest report, PW14, Sri Buddha Deb Barma noticed three numbers of bullet marks on the right side of the back of the deceased. PW13, the doctor, who conducted the post mortem examination on the dead body, found one entry wound of bullet injury about half inch in circumference, margin charred situated over the right side of the back below the costal region about 4" (inch) away from midline. He also noticed one exit wound 1" (inch) in circumference situated about 6" (inch) away from midline below the level of the ribs margin in the right side of the anterior aspect of the abdominal wall. Further, PW13 also found the outer surface of the right kidney injured and the transverse column at its right corner perforated by a bullet injury together with injury in the kidney. So from the evidence of both the witnesses it is found that the evidence are consistent in regard to sustention of the bullet injury by the deceased. The opinion part of the PW13 specifically goes to show that the bullet injury was homicidal in nature. PW13 was not cross-examined by the defence. Therefore, we are of the view that the death resulting receipt of bullet is not denied by the defence. It is nowhere found from the evidence on record that, the injuries which were discovered on the dead body of the deceased were all self inflicted or accidental. When there is no rebuttal from the side of the defence in regard to the cause of death, we do not per se see any reason to discard the evidence of PW13. However, PW13 failed to give an opinion about whether the injuries so found were ante mortem or post mortem. From close scrutiny of the evidence of both the witnesses, we are of the view that the injuries so discovered on the dead body of the deceased were all ante mortem in nature.

14. Therefore, the issue involved in regard to the death of the deceased can be answered in the affirmative that death of the deceased was due to cardio respiratory failure following massive hemorrhage from bullet injury which was ante mortem and homicidal in nature.

15. The next issue involved is who caused the death of the deceased on the relevant day and time. To answer this issue we are to make a survey of the evidence of PW1, PW2, and PW16. From a close look of the evidence on record

we have found that there was only one eye witness to the occurrence. She is PW1, who is the wife of the deceased. Her evidence is that on the relevant night, at about 8/8.30 p.m. after dinner she and her husband (deceased) were enjoying radio. At that time a boy from outside the door called her deceased husband in "Kakbarak" language and requested him to open the door. Her deceased husband requested the boy to come in the following morning but he insisted on saying that he had some urgent business with him. Being, thus, insisted her deceased husband opened the door and immediately thereafter a group of persons numbering 10/12 being armed with fire arms caught hold of her deceased husband and forcibly dragged him unto the gate where he was gunned down. She cried for help. Neighbouring people came out to their house. After sometime her son Ganganjoy Tripura, (PW16), who at that time was residing in a separate residence, also came to the place of occurrence. She has further stated that she had a scuffling with the miscreants who also beaten her. Out of those miscreants she could identify the appellant Dayaljoy Tripura since previously he resided in their locality. Her further testimony is that she could recognise Bagirai Reang, the other appellant since while calling outside her deceased husband he identified himself as Bagirai Reang. All the miscreants came wearing fauzi coloured dresses. Her deceased husband, according to her was a sitting MLA of the Gandacherra constituency and prior to his death he received a demand notice to pay ransom from the extremists about one month back.

16. From the perusal of the evidence of this particular witness it is found that among the group of persons she could identify appellant Dayaljoy Tripura by her own eyes. Since the appellant Bagirai Reang introduced himself as such to her deceased husband while calling from outside. This witness of PW1 implicated Bagirai Reang as one of the members of the said group. Except these two appellants, she is silent in the context of recognition/identification of the other assailants. In the context of recognition of both the appellants apparently we do not have any rebuttal evidence on record. Only two questions were put to this witness suggesting that she did not have the opportunity to recognise appellant. Dayaljoy and Bagirai did not introduce himself as Bagirai from outside. There is no evidence appearing in the cross-examination sufficient to unsettle the evidence of PW1 in the context of recognition of Dayaljoy Tripura and Bagirai Reang.

17. It was argued during the course of argument by the counsel of the either party that the conviction of both the appellants can be sustained if the court believes in the statement of PW1. Before answering this particular question let us discuss whether both the appellants were members of Unlawful Assembly. "Unlawful Assembly" is defined in Section 141 of the IPC which can be reproduced as under:

141. An assembly of five or more persons is designated an "unlawful assembly", if the common object of the persons composing that assembly is-

First: To, overawe by criminal force, or show of criminal force, the Central or any

State Government or Parliament or the Legislature of any State, or any public servant in the exercise of the lawful power of such public servants; or

Second: To resist the execution of any law, or of any legal process; or

Third: To commit any mischief or criminal trespass, or other offence; or

Fourth: By means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or

Fifth: By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

18. So in order to brand a group of persons as "unlawful assembly", the group must be consisted of five or more persons with a common object as defined in Section 141 of the IPC. Here in the instant case we have found as per testimony of PW1 that a group of persons numbering 10/ 12 came who dragged her deceased husband unto the gate and gunned down. There is no specific evidence appearing in the face of the record specifying the member of the assembly who did cause the death of the deceased with the help of firearm. It is in the evidence of PW1 that though there was light in the residence but the outside was covered with darkness. Even inspite of that PW1 could recognise Dayarjoy Tripura, one of the appellants amongst the group of assailants since he was residing in their locality. Bagirai Reang the other appellant since introduced himself as such she disclosed his name as one of the members of the said assembly also.

19. Common object emanates from concerted mind and if any one of the members of the unlawful assembly does some overt act in prosecution of the common object each of the member of the assembly can be brought to book under the charge framed. The group consisted of (as per PW1) 10/12 persons. They were armed with fire arms. When all came together and acted in a concerted manner, the approach of the group makes the position clear that the group had a pre-concerted mind and evolved a common object. The acts resorted to by the said group of persons unmistakably goes to show that such member of the group was a member of the "unlawful assembly" as defined u/s 141 of the IPC.

20. If any of the members of the said unlawful assembly in prosecution of the common object of that assembly resorted to an overt act each of the member of the said assembly can be roped under the charge with the aid of Section 149 of the IPC. Now the question which paused and required to be answered is whether the conviction of some of the members of the said assembly can be sustained when some members get acquittal. Law is very much clear on this point. This issue has been answered by the hon''ble Supreme Court and our present High

Court in affirmative. In the case between Bharwad Mepa Dana and Anr. v. The State of Bombay 1960 SC 289, their Lordships in para 13 and 18 laid as under:

13. That does not, however, conclude the matter. Nothing in law prevented the High Court from finding that the unlawful assembly consisted of the four convicted persons and some unidentified persons, who together numbered more than five. We have advisedly said, "Nothing in law etc."; for, whether such a finding can be given or not must depend on the facts of each case and on the evidence led. It is really a question of fact to be determined in each case on the evidence given therein. Learned Counsel for the appellants has argued before us, as though it is a matter of law, which it was not open to the High Court to come to the finding to which it came, because the prosecution case was that thirteen named persons constituted the unlawful assembly. We are unable to accept this argument as correct. We do not like that there was any such legal bar as is suggested by learned Counsel, though there may be cases where on the facts proved it will be impossible to reach a finding that the convicted persons, less than five in number constituted an unlawful assembly with certain other unspecified persons not mentioned in the charge. That consideration apart, any mere error, omission or irregularity in the charge will not invalidate the finding in this case as a matter of law. So far as the finding can be said to have traveled beyond the letters of the charge, the appellants have not proved any prejudice, and in the absence of prejudice no complaint can now be made of any defect in the charge.

18. There are two other decisions, one of the federal Court and the other of this Court. In Kapildeo Sing v. The King 1949 FCR 834 : AIR 1950 FC 80, the prosecution case was that 60 or 70 men constituted the unlawful assembly, but the appellant in that case was charged with thirteen others with having committed certain offences in furtherance of the common object of the unlawful assembly. The appellant was found guilty, but the thirteen others who were charged along with the appellant were acquitted as they were not properly identified. One of the contentions raised in the Federal Court was that in all fourteen persons having been charged with rioting and thirteen of them having been acquitted, it could not be held that there was any unlawful assembly of five or more persons whose common object was to commit an offence. With regard to this contention, it was observed at pp.837-838 (of FCR): (at p.81 of AIR):

The essential question in a case u/s 147 is whether there was an unlawful assembly as defined in Section 141, IPC, of five or more than five persons. The identity of the persons comprising the assembly is a matter relating to the determination of the guilt of the individual accused, and even when it is possible to convict less than five persons only, Section 147 still applies, if upon the evidence in the case the court is able to hold that the person or persons who have been found guilty were members of an assembly of five or more persons, known or unknown, identified or unidentified. In the present case, there is such a finding and that concludes the matter.

We consider that these observations apply with equal force in the present case, and we do not think that the distinction sought to be made by teamed counsel for the appellants on the basis that in Kapildeo's case the prosecution allegation was that there were 60 or 70 men in the unlawful assembly, makes any difference in the legal position. The same view was expressed again by this Court in Dalip Singh and Others Vs. State of Punjab,

Before Section 149 can be called in aid the court must find with certainty that there were at least five persons sharing the common object. A finding that three of them "may or may not have been there" betrays uncertainty on this vital point and it consequently becomes impossible to allow the conviction to rest on this uncertain foundation.

This is not to say that five persons must always be convicted before Section 149 can be applied. There are cases and cases. It is possible in some cases for judges to conclude that though five were unquestionably there the identity of one or more is in doubt. In that case, a conviction of the rest with the aid of Section 149 would be good. But if that is the conclusion it behoves a court, particularly in a murder case where sentences of transportation in no less than four cases have been enhanced to death, to say so with unerring certainty.

The same view was reiterated in Nar Singh and Another Vs. The State of Uttar Pradesh, We have stated earlier what the finding in the present case is: it is a clear finding - a finding with certainty - that the number of persons who constituted the unlawful assembly was more than five, though the identity of four only has been established; and the killing was done in prosecution of the common object of the entire unlawful assembly. Therefore, we see no serious difficulty in applying Section 149, Indian Penal Code in the present case.

21. In the case between Kallu alias Masih and Ors. v. The State of Madhya Pradesh AIR 2006 SCW 177, their lordships of the Supreme Court in para 17 and 19 held as under:

17. The contention that when only four persons are found guilty, there cannot be conviction u/s 149, IPC, has no merit. Section 149 provides that if an offence is committed by any member of any 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. Section 141 requires a minimum of five persons for being designated as an "unlawful assembly."

19 The accused before the trial court were 27 in number. PW4 specifically named 22 persons and further named the four out of them who landed him the blows. PW3 named 12 persons who came as a group. Other eye witnesses also clearly stated that the appellants with other accused who were present in court had come to attack sadruddin. As noticed above, the trial court shoes to acquit all the 27 accused. In the appeal filed by the State, leave was granted by the High

Court only in regard to five of the accused, as they were specifically named as the persons wielding weapons and causing injuries to sadruddin and others and as the names of others were mentioned only as being members of the assembly without any specific act being attributed to them. The High Court gave benefit of doubt to one of the five (Anwar) though his presence as a member of the group was accepted. This resulted in conviction of only four. This does not mean that there is no finding that there was an unlawful assembly. When the evidence clearly shows that more than five persons armed with swords, spears etc. had come to the house of Sadruddin with the common object of causing injury, and injured him. The mere fact that several accused were acquitted and only four are convicted, does not enable the four who are found guilty to contend that Section 149 is inapplicable. We may also in this context refer to the following observation in Masalti Vs. State of U.P., reiterated in Triloki Nath and Others Vs. State of U.P.,

In fact, Section 149 makes it clear that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence; and that emphatically brings out the principles that the punishment prescribed by Section 149 is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly.

22. This hon'ble High Court in the case between Bogatola and Another Vs. The State, their Lordships in paras 10, 11 and 12 held as under:

10. We are now to see what offence if any, is committed by Bogatola.

Shri B.C. Barua, learned Counsel for the appellants, submits that the six out of the eight accused persons who were charged for forming an unlawful assembly having been acquitted, the two appellants cannot be convicted u/s 14.8 or under the other two sections read with Section 14.9. He submits that in the charge the Sessions Judge has mentioned only eight definite names and has not mentioned that there were unknown and unnamed persons in the unlawful assembly. That being the position when six of them are acquitted, the number of members of the assembly falls below five and the assembly ceases to be an unlawful assembly.

The law is well settled that if 5 or more persons commit (constitute?) an unlawful assembly and if after acquittal of some of the accused, the number of persons convicted is reduced to less than 5, the conviction will not be illegal, if there be evidence to show that in the assembly there were 5 or more persons named or unnamed. The Supreme Court, in the case of Bharwad Mepa Dana v. The State of Bombay Bharwad Mepa Dana and Another Vs. The State of Bombay, approving the decision of the Federal Court in this regard reported in AIR 1950 FC 80 : 51 Cri LJ 1057, has held:

In *Kapildeo Sing v. The King* 1949 FCR 834 : AIR 1950 FC 80 : 51 Cri LJ 1057, the prosecution case was that 60 or 70 men constituted the unlawful assembly, but the appellant in that case was charged with thirteen others with having committed certain offences in furtherance of the common object of the unlawful assembly. The appellant was found guilty, but the thirteen others who were charged along with the appellant were acquitted as they were not properly identified. One of the contentions raised in the Federal Court was that in all fourteen persons having been charged with rioting and thirteen of them having been acquitted, it could not be held that there was any unlawful assembly of five or more persons whose common object was to commit an offence. With regard to this contention, it was observed at pages 837-838 (of FCR): (at p. 81 of AIR):

The essential question in a case u/s 147 is whether there was an unlawful assembly as defined in Section 141, Indian Penal Code of five or more than five persons. The identity of the persons comprising the assembly is a matter relating to the determination of the guilt of the individual accused, and even when it is possible to convict less than five persons only. Section 147 still applies, if upon the evidence of the case the court is able to hold that the person or persons who have been found guilty were members of an assembly of five or more persons known or unknown, identified or unidentified.

11. This decision of the Supreme Court clinches the point. In the instant case P Ws 2, 3, 5, 6, 8 and 9 have stated that appellant Bogatola along with 20/22 others armed with lathis and daos attacked Devakanta. There is, therefore, no doubt that an unlawful assembly was formed by about 20/22 persons and appellant Bogatola was a member of that unlawful assembly; and that the common object of the assembly was to assault devakanta and the members of his family.

The learned Sessions Judge also has found, and in our opinion, correctly; "I find that more than five persons in number came in a body and was waiting outside the house when five persons came inside to see as to where the members of the household were and by a trick lured out Debakanta, who being the eldest son in the family came out on a false call, and assaulted him causing his death and when other members of the family came out were also assaulted by the assailants. The object of the assembly, therefore, is clear that they came armed with deadly weapons with the object of assaulting the members of the family for their keeping the cow belonging to accused Bogatola during the day for the damage caused to their crops. The object of the assembly was certainly to assault the members, which was unlawful and when there were more than five persons in that assembly every person who was present and shared the common object must be held guilty of the offence of rioting."

12. Another argument of Shri Barua is that the common object mentioned in the charge is "assaulting the members of the family of Ramakanta Bora", and as Debakanta is alleged to have been killed before the other members of the family were assaulted, it cannot be said that the murder was committed in prosecution

of the said common object. This argument has no substance. Deceased Debakanta himself is a member of the implementation or execution of the common object starts the moment Debakanta is assaulted and continues till Ramakanta and Jogeswar were assaulted.

There is, therefore, no doubt that the common object of the assembly was to assault the members of the family of Ramakanta, that the common object, and as such the assembly, was unlawful, and that in prosecution of that common object, Debakanta was killed. In our opinion, therefore, appellant Bogatola has been rightly convicted u/s 148 and 302/149, Penal Code.

23. Therefore, law is much clear in regard to the application of Section 149 of the IPC. When a group of assailants who were members of an unlawful assembly proceeds to commit a crime in pursuance of the common object of the assembly it is always not possible on the part of the witnesses to describe the actual part played by each of the members and when the members of the assembly armed with weapons assault the intended victim. All of them may not take part in the actual assault. Therefore, it is not necessary for the prosecution to establish the specific overt act done by each of the member, of the assembly. Here in our present case also we have come across the same situation since the PW1 failed to specify the specific overt act resorted to by each of the members of the assembly but facts remain that one of the members of the said assembly must have fired at the deceased resulting his death. It is said by PW1, amongst the members of the said assembly, she could identify appellant Dayaljoy Tripura but she did not state that she witnessed the actual firing by this particular appellant on her deceased husband. In the same way she also did specify the specific part played by appellant Bagirai Reang. Identity of Bagirai Reang, the appellant has been discussed herein before.

24. The learned trial court accepting the evidence of PW1, in particular, convicted both the appellants under the charge viz; 148, 302 and 27(1) of the Arms Act and acquitted the other three. The learned Additional Public Prosecutor relying on the decisions (supra) submitted that no error or illegality has been committed by the learned trial court convicting Dayaljoy Tripura and Bagirai Reang under the charges. He, further, argued that a claim for acquittal of the convicted accused would not sustain in view of acquittal of some of the accused persons, who were members of unlawful assembly as defined u/s 141 of the IPC. The hon''ble Supreme Court and the High Court have laid down the ratio in the context of application of Section 149, IPC, and therefore, no deviation therefrom is entertainable, he argued.

25. Let us look back to the crucial issue whether on the basis of the evidence of PW1, PW2 and PW16, conviction of both the appellants can be sustained. Mr. A.C. Bhowmik, learned Counsel for the appellants citing the ratio laid down by the Apex Court, in the case in between Gopal Deb and Ors. v. State of Tripura, (unreported) submitted that the conviction of the appellants in any of the charges cannot be sustained inasmuch as the evidence of PW1, PW2 and PW16

are not found inconsistent and there is a total suppression of material facts. It is submitted by him that though PW1 claimed to have identified both the appellants, she never disclosed the fact of identity/recognition at any point of time either to PW2 or PW16 or any other witnesses, whose evidence find place on the record. PW2 is the daughter-in-law of PW1, while PW16 is the son, who lodged the FIR with the Police. PW1 did not divulge about the fact of recognition of both the appellants either to PW2 or PW16. Sri A.C. Bhowmik referring to the evidence of PW2 argued that her mother-in-law told her that on Bagirai Reang called her father-in-law and requested him to open the door. PW16 also in his evidence-in-chief stated that on the night of occurrence he enquired about the occurrence to his mother and she informed that appellant Bagirai Reang called his father from outside on the plea that his wife was ill and required to be admitted in the hospital and he solicited his help. He also stated that his mother told him that she could identify Dayaljoy Tripura and Bagirai Reang. This witnesses in cross-examination specifically stated that he enquired with his brother, sister-in-law and mother regarding the incident and thereafter rushed to the Police Station. So from the composite reading of the evidence of PW1, PW2 and PW16, it has become apparent that there was a discussion in between the three regarding the occurrence where identity of both the appellants cropped up. But interestingly, the FIR (exhibit-9) lodged by PW16, the son, the names of the appellants do not find place. In it, it is specifically stated that a group of miscreants of six to seven persons dressed in army uniform with weapons dragged his father unto the gate while he opened the door after calling and shot him dead. The miscreants are unknown. Sri A.C. Bhowmik, learned Counsel for the appellants submitted that the identity/recognition of the appellants as alleged by PW1 in her evidence is shrouded with doubt since the FIR does not disclose their names. Admittedly, FIR was lodged on 18.10.1998, the day of occurrence at about 21.15 hrs, while occurrence took place at about 20.30 hrs. Apparently there was a discussion between these three witnesses regarding involvement/recognition of the appellants. When PW2 and PW16 specifically stated that PW1 told them about the recognition of both the appellants, non-incorporation of their names in the FIR creates a reasonable doubt regarding their involvement. Therefore, no implicit reliance can be put on the evidence of PW1 and conviction can be based on her evidence. We find sufficient force in the argument so advanced by Mr. A.C. Bhowmik, learned Counsel for the appellants.

26. Having considered the facts and circumstances and the evidence on record, we are of the view that a reasonable doubt creeps in regard to the involvement of both the appellants in the commission of the crime.

27. The learned trial court also convicted both the appellants u/s 27(1) of the Arms Act. The conviction under the section also cannot, however, be sustained in view of the perfunctory investigation and the doubt which creeps in.

28. For the foregoing reasons, we feel that the appellants are entitled to benefit of reasonable doubt. We, therefore, allow this appeal and set aside the conviction

and sentence awarded by the learned trial court. Both the appellants are accordingly acquitted and set at liberty.

29. Send down the LCRs with a copy of the Judgment.