

(2014) 01 GAU CK 0045
In the Gauhati High Court
Case No : Crl. Appeal No. 92 of 2010

Haren Patgiri and Others

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 21-01-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 162, 313
Penal Code, 1860 (IPC) — Section 141, 143, 144, 145, 146

Citation : (2014) 1 GLD 448 : (2014) 1 GLT 477

Hon'ble Judges : Tinlianhang Vaiphei, J; Prasanta Kumar Saikia, J

Bench : Division Bench

Advocate : N. Dutta, Sr. Advocate, Advocate for the Appellant; D. Das, Addl. P.P, Advocate for the Respondent

Judgement

Prasanta Kumar Saikia, J.—This criminal appeal is directed against the judgment dated 21.05.2010 passed by learned Sessions Judge, Barpeta, in Sessions Case No. 34 of 2005 convicting appellant Shri. Haren Patgiri and Shri. Basudev Das of offence u/s 302/148 IPC and sentencing them to imprisonment for life and a fine of Rs. 5,000/- each i/d R.I. for another 6(six) months for offence u/s 302 IPC and sentencing them to R.I. for 6(six) months and a fine of Rs. 500/- each, i/d to undergo R.I. for another 1 (one) month for offence u/s 148 IPC. By the same judgment, learned trial court while acquitting accused Govinda Das and Gargeswar Das of offence u/s 148/302/149 IPC also convicted (i) Hemanta Das, (ii) Basanta Patgiri, (iii) Dharjya Das, (iv) Aswimi Das, (v) Harekanta Das and (vi) Mohan Das of offence u/s 148 IPC, and sentenced all those accused persons to R.I. for 6 (six) months and a fine of Rs. 500/- each, i/d to undergo R.I. for another 1 (one) month for offence u/s. 148 IPC.

2. Being aggrieved by and dissatisfied with aforesaid judgment, the accused-appellants had preferred this appeal citing several infirmities in the judgment under challenge in this appeal.

3. The brief facts which have emerged during trial and which are necessary for

disposal of the present proceeding are that on 05.05.2003, an FIR was lodged with in-Charge; Sarupeta Police Outpost by one Khagendra Nath Patgiri alleging that on 04.05.2003, at about 8:30/9:00 a.m.. while his brother Paban Patgiri was proceeding towards the paddy field, accused (i) Haren Patgiri, (ii) Basanta Patgiri, (iii) Hemanta Das, (iv) Dharjya Das, (v) Aswini Das, (vi) Harekanta Das, (vii) Mohan Das and (viii) Garge Das and (ix) Basudev Das attacked Paban Patgiri with lathi, spade etc hurting him grievously.

4. The injured was immediately shifted to Bhagmara Primary Health Centre (in short, PHC) wherefrom he was taken to Gauhati Medical College & Hospital, Guwahati (in short, GMCH) for treatment. However, while undergoing treatment at Gauhati Medical College & Hospital, Guwahati, the injured breathed his last on the night of 04.05.2003. Having received an FIR in that connection,, in-charge, Sarupeta Police Outpost made a GD Entry No. 66 dated 05.05.2003 and forwarded the FIR to the O.C., Patacharkuchi Police Station for registration of a case and for doing further needful in accordance with law.

5. On the receipt of the said FIR, O.C., Patacharkuchi Police Station, registered a case vide Patacharkuchi PS Case No. 80/2003 u/s 147/148/149/325 IPC and ordered investigation. Since the victim died after the lodging of the FIR, offence u/s 302 IPC was also added to the case, so initiated against accused persons. During the course of investigation, the police officer who was entrusted with the preliminary investigation of the aforesaid case, visited the place of occurrence and recorded the statements of witnesses,

6. The said Police officer also seized some articles allegedly used in the committing the crime under consideration from the place of occurrence, did other needful and on the completion of the preliminary investigation, he handed over the case diary to In-charge, Sarupeta Police Outpost. Thereafter, one Mr. Abdul Jalil Choudhury, the then I/C Sarupeta Police Outpost, completed the remaining part of investigation and submitted charge-sheet u/s 147/148/149/325/302 IPC against as many as 10 accused persons aforementioned and forwarded them to the Court to stand trial.

7. The Magistrate, before whom charge-sheet was so laid, committed the case to the court of Sessions at Barpeta since the offence u/s 302 IPC is exclusively triable by the Court of Sessions. On the commitment of the case and on hearing learned counsel for the parties, learned Sessions Judge, Barpeta framed charge u/s 148/149/302 IPC against the accused persons and charges, so framed, on being read over and explained to them, accused persons pleaded not guilty and claimed to be tried.

8. During trial, the prosecution examined as many as 15 witnesses including the informant, the Medical Officer and the Investigating Officers. The statements of accused persons u/s 313 Cr.P.C were recorded. The plea of the accused persons was of total denial. In support of their plea, accused persons also examined one defence witnesses who was cross-examined at length by prosecution. After

hearing the arguments, advanced by the parties, the learned Sessions Judge convicted all the accused persons of offence u/s 148 IPC and punished them as stated above.

9. While acquitting all the accused-persons except accused Haren Patgiri and Basudev Das of offence u/s 302 IPC, he convicted those two accused persons of offence u/s 302 IPC and sentenced them to suffer imprisonment for life and a fine of Rs. 5,000/- each i/d R.I. for another 6(six) months for offence u/s 302 IPC. It is that judgment which has been assailed by the appellants in the present appeal citing several infirmities therein.

10. Opening up argument on behalf of appellants, Mr. Nilaya Nanda Dutta, learned Sr. counsel has contended that the judgment of the trial Court is unsustainable in law since it was rendered in gross violation of law which holds the field in question. According to Mr. Dutta, the learned trial court placed enormous reliance on the evidence of PW-4, PW-6, PW-7 and PW-8 but it overlooked the fact that those witnesses are not at all reliable since they had made significant improvement to their testimonies by the time they tendered evidence before the Court.

11. It has also been contended that some very vital witnesses, such as, Damayanti and Khagen who were present at the place of occurrence when incident in question was in progress, were not examined and that too without assigning any reason whatsoever. This important infirmity in the prosecution case was not taken into account by the learned trial court and it again makes the judgment impugned in this appeal unsustainable.

12. Mr. Dutta, learned counsel for the appellant further contends that there was huge discrepancy in the evidence of PWs in so far seizure of weapons of offence is concerned. This is because of the fact that PW 3 deposes that the weapons of offence were seized from the house of Dhani and Khagen but the I.O. (PW-12) deposes that those article were recovered from the place of occurrence itself. Such discrepancy makes the prosecution case more and more doubtful.

13. Controverting the arguments, so advanced by the learned Sr. counsel for the appellants, learned Public Prosecutor Mr. D. Das has submitted that the learned trial court has properly marshaled the evidence on record and on doing so, he rightly came to the conclusion that accused Haren Patgiri and Basudev Das administered the fatal blows on the deceased on his vital parts which occasioned his death on the night of 04.05.2003. Thus, the conviction of those two accused persons u/s 302 IPC invites no interference from this court of appeal.

14. He further argues that there were no infirmities on the part of the trial court on holding all the accused persons guilty of offence u/s 148 IPC or sentencing them to punishment for such offence as well. He, therefore, urges this Court to dismiss this appeal by affirming the judgment of the trial Court. We have very carefully considered the arguments, advanced by the learned counsel for the parties having regard to the evidence on record as well as the judgment under

challenge.

15. However, before we proceed further, we find it necessary to have a brief review of the evidence on record and the evidence of the doctor is first taken up for consideration. The Medical Officer who conducted autopsy on the dead body was Dr. Hemanta Kr. Mahanta and he was examined as PW-9. According to him, on 5.5.2003 on police requisition he conducted the post mortem examination on the body of one Paban Patgiri and found the following:--

Injuries.,

a. One lacerated wound-4cm in length with 5 cm stitches, scalp deep present on left parietal area 2 cm from midline and 18 cm above the root of the nose.

b. Lacerated wound 3 cm long scalp deep with 3 stitches on occipit in middle.

c. Abrasion-6 cm x 1 cm on back of left forearm in the middle vertically placed. The whole left forearm was swollen. On cut section found haemorrhage within the layers of the muscles of the left forearm.

Cranium and spinal canal: Scalp lacerated injury (1) &. (2) skull:- Fissured fracture of the left parietal bone from underneath the injury No. (1) to the right parietal and frontal bone across the sagittal suture up to the right supra orbital ridge 18cm long.

Membrane:- Congested

Sub-dural haemorrhage present on both sides.

Brain:- Brain was congested. Contusion of the left parietal area 6x4 cm in size.

All other organ are healthy.

Stomach:- healthy and empty.

Opinion:- In his opinion the death of the deceased was due to coma resulting from head injury, all injuries were ante mortem and caused by blunt impact.

The PW-9 also stated that Ext. 4 is the P.M. report (carbon copy) with is carbon signature with original signature with original seal.

16. The evidence of the Doctor which was not seriously challenged reveals that ante mortem wounds caused by blunt object (s) occasioned the death of Paban Patgiri on the night of 04.05.2003. In other words, death of aforesaid person was homicidal in nature. Now, the question arises as to who occasioned the death of the person stated above. To find an answer of the above query, we have gone through the evidence on record.

17. A bare perusal of the evidence, tendered from the side of the prosecution, reveals that though as many as six witnesses claimed to have seen the incident under consideration, yet, on reading the evidence in between the lines, it is found that witnesses who reportedly saw the incident in question are PW-4

Uttara Patgiri, PW-6 Ratan Patgiri, PW-7 Hridoi Patgiri and PW-8 Bani Kanta Talukdar. So situated, we propose to put on scrutiny the evidence of those witnesses before scanning the evidence of other witnesses.

18. In her evidence, PW-4 disposes that on the fateful day, the incident in question occurred at about 8.30/9 am and at that time, she was going to the field by the village path. Her paternal uncle Paban Patgiri followed her. While she was proceeding towards her house, she heard hue and cry. On looking back, she found the accused Haren, Basudev, Hemanta, Dharjya, Harenkanta, Aswini, Garja and Govinda started assaulting him. She also saw that while Haren assaulting his paternal uncle with lathi, Basudeb assaulted him with a spear and other persons present there also assaulted him with various weapons which they yielded at that point of time, such as, lathi, spear etc.

19. On seeing such incident she rushed to the victim to save him from the onslaught of accused persons. However, accused Mohan and Basudev caught her by hand, laid her down on the ground and also torn her blouse. When she raised hue and cry, Phani Talukdar and Khagen came there and found Paban lying on the ground in an injured condition. His injured uncle was therefore immediately taken to Bagmara Civil Hospital where-from he was shifted to Gauhati Medical College & Hospital where he expired on that night itself.

20. It is also in her evidence that there was a quarrel between the parties over the allotment of contract for construction of village road. In her cross-examination, she denied the suggestion that she did not tell the police that Haren assaulted Paban on his head with a lathi while Basudev assaulted Paban with a spear. She also denied that she did not tell police that Paban and Basudev did not tear her blouse. She was not sure whether her clothes were seized by police or not.

21. PW-6 Sri Ratan Patgiri, cousin of the deceased, deposes that on the fateful day, he was removing rubbish from his homestead. He also saw Paban Patgiri going to the field. Little later, Haren Patgiri came there and administered a lathi blow on the head of Paban Patgiri for which Paban fell down on the ground. Boko (Basudev) and Hemanta Das gave blow with spade. But he did not notice if some other persons were with the accused persons at the P.O. at that point of time.

22. Seeing such incident, he started raising hulla which brought the nearby people to such place. The victim was taken to Bagmara Civil Hospital where from he was taken to GMCH, Guwahati. But he died on the same night. In his cross-examination, he denied that he did not tell the police that Haren assaulted the deceased with a lathi on his head while Basudeb and Hemanta assaulted Paban with a spade.

23. PW-7 Hridoi Patgiri, the nephew of the deceased, deposes that on the fateful day, he was near the village tube-well washing his face and legs. At that time, Paban Patgiri was proceeding towards the field. While Paban Patgiri was proceeding toward the field, accused Haren gave lathi blow on his head and soon

thereafter, the other accused persons started assaulting him with the weapons in their hands. In the meantime, Uttara Patgiri also came there to save Paban. One Phani Talukdar was also there when the incident was going on.

24. When he went to such place, accused persons threatened him too for which he left such place. Soon after the incident, the injured was taken to Bagmara Civil Hospital and then to GMCH where he expired on the same night. In his cross-examination, he denied the suggestion that he did not tell police that Haren Patgiri assaulted the deceased with lathi. He also denied the suggestion that he did not tell police that Basudev and Mohan torn the blouse of Uttara Patgiri.

25. PW-8 Banikanta Talukdar deposes that on the fateful day, at about 8/8.30 am, he went to the house of injured Paban Patgiri. While he returned from the house of the Paban Patgiri, the later too accompanied him and both of them was proceeding towards the field. While they reached the place of occurrence, the accused persons started assaulting Paban Patgiri with spade and bamboo. At that time, he was at a distance of hardly 6/8 cubits from such place. Though he knew the accused persons by face, he did not know them by their names.

26. He tried to protect Paban Patgiri but when he was threatened by the accused persons for which he retreated there-from. One Uttara also came there and tried to protect the victim from the assault of the accused persons but she was also assaulted and her clothes were torn by them. On seeing the victim, he became nervous and left such place. Meanwhile, village people came there and took the injured to hospital. Later on, he came to know that the victim expired at hospital same night.

27. So situated, let us consider the evidence of other witnesses who claimed to be in and around the P.O. during the time under consideration. They are PW-1, PW-2 and PW-3. According to PW-1 the incident in question took place in 2003 in the month of Bohag and it occurred at about 8.30 to 9 a.m.. near his house. On that day, he was doing some household work. His brother, Paban Patgiri, the deceased, was proceeding towards the field. When he reached the place of occurrence, the accused Haren, Hemanta, Basusdeb, Aswini, Mohan and Gagen assaulted Paban Patgiri on the road leading to the field.

28. The hue and cry raised at the place of occurrence alerted him for which he rushed to such place. As he arrived at the P.O. he saw the accused persons running away from such place leaving the dao spear and lathi at such place. On arriving at the P.O., he found his brother lying on the ground in an injured condition. He could not talk to the people who arrived at such place by that time. He was immediately taken to Bagmara Civil Hospital. However, on being referred by Bagmara Civil Hospital, he was taken to GMCH, Guwahati.

29. However, while undergoing treatment at GMHC, Guwahati, his brother breathed his last same day at about 12:00 p.m../1:00 a.m.. it is also in his evidence that on the way to GMCH, Guwahati, he went to Patacharjuchi Police

Station to lodge an FIR. However, the O.C., Patacharkuchi PS directed him to lodge the same with I/C Sarupeta outpost. So, he lodged the FIR with I/C Sarupeta outpost, next day in the morning. He proved the FIR as Ext. 1 with his signatures therein as Ext. 1(1).

30. In his cross-examination, he states that on arriving at the P.O. he found there Dyamanti and Vimala wife and mother of the deceased respectively. In his cross-examination, he further admitted that he himself did not witness the incident in question. PW-2 Sri Phanindra Patgiri also deposes in the same way. According to him on the fateful day, he was ploughing in the field at a distance of 200 meter from his house. While he was so ploughing, he heard the hue and cry for which he rushed to such pace and saw the accused running away there-from.

31. On arriving at the place of occurrence, he saw Paban lying on the ground in an injured condition. He was immediately taken to Bagmara Civil Hospital wherefrom he was taken to GMCH, Guwahati where he died same day at about 12:00 a.m.. Next day, in the morning, police came and held an inquest on the body of the deceased and prepared a report in that connection. He proved the inquest report as Ext. 2. In his cross-examination he admitted that he rushed to the P.O. on hearing the hue and cry there-from.

32. PW-3 Hemanta Talukdar also deposes that on the fateful day, he was doing work near the place of occurrence. Suddenly, he heard hue and cry coming from the place of occurrence and saw the accused persons assaulting Paban with lathi for which he sustained injuries on his head. He was taken to Bagmara Civil Hospital. Later on, he was taken to GMCH, Guwahati where he expired same night. Police came to the P.O. and seized lathi and spade on the strength of seizure list, Ext. 3. In his cross examination, he states that police seized lathi & spade from the house of Dhani and Khagen.

33. PW-5 Atul Choudhury is a seizure witness. According to him, police came to the place of occurrence next day in the morning and seized lathi and spade on the strength of seizure list, Ext. 3. Such seizure was made in his presence. According to him, there was a quarrel between the parties over the allotment of contract for the construction of village road. He was not cross-examined.

34. PW-10 Shri Charan Kalita and PW-11 Sri Dibakar Kalita are the persons in whose presence, police conducted an inquest on the dead body. According to them, police held inquest on the dead body at GMCH, Guwahati and prepared a report in that connection. On the other hand, PW-13 Shri. Angad Rajbanshi, ASI, deposes that he held inquest on the body of Paban Patgiri at GMCH, Guwahati on 05.03.2003 and prepared a report in that connection. PW-10, PW-11 and PW-13 proved the inquest report as Ext. 2.

35. PW-12 Basanta Kumar Barman, PW-14 Abdul Jalil Choudhury and PW-15 Abdul Kuddus are the police officers who participated in the investigation of the case under consideration. While PW-14 collected the post mortem report and submitted the charge-sheet u/s 147/148/149/325/302 IPC against Haren Patgiri,

Basanta Patgiri, Hamanta Das, Basudev Das, Dhoirjya Das, Aswini Das, Harkanta Das, Mohan Das, Gargeswar Das and Gobinda Das.

36. PW-16 deposes that on 05.05.2003, he was working as I/C Sarupeta police outpost. On that day, one Khagendra Nath Patgiri (P W1) submitted an FIR alleging that on 04.05.2003 accused person, namely, Haren Patgiri, Basanta Patgiri, Hamanta Das, Basudev Das, Dhoirjya Das, Aswini Das, Harkanta Das, Mohan Das, and Gargeswar Das assaulted his brother Paban Patgiri inflicting grievous wounds on his head for which he was taken to the Baghmara PHC where-from he was taken to GMCH, Guwahati.

37. On the receipt of the FIR, he made the GD entry and forwarded the FIR to O/C Patacharkuchi Police Station for registering me case for doing further needful. In the meantime, he entrusted PW-12 to make preliminary investigation of the case. Meanwhile, the injured died and section 302 IPC was added to the case.

38. On the completion of the preliminary investigation, PW-12 submitted the CD to him for doing further needful. However, before completing the investigation, he was transferred for which he handed over the CD to O/C Patacharkuchi Police Station.

39. PW-12 deposes that on 05.03.2003, he was posted at Sarupeta police out post. On that day, O/C received the FIR Ext. 1 from Khagendra Nath Patgiri. On the receipt of FIR, he registered a case and entrusted him to undertake preliminary investigation. Accordingly, he visited the place of occurrence, examined the witnesses, seized two spades, bamboo, lathi etc. from the place of occurrence on the strength of seizure list Ext.-3.

40. In his cross-examination, he stated that Smti. Uttara Patgiri (PW-4) and Sri Hridai Patgiri (PW-7) did not tell him that the accused Haren assaulted Paban Patgiri with lathi and Basudev assaulted Paban Patgiri with bamboo on his head. He also deposes that Ratan Patgiri (PW-6) did not tell him that Haren Patgiri assaulted deceased (Paban Patgiri) with lathi on his head whereas the accused Basudev and Hemanta Das assaulted him with spade.

41. He further states that the PW-7 also did not tell him that Haren assaulted Paban with lathi on his head. It is also in his evidence which he rendered in his cross-examination that PW-3 Hemanta Talukdar did not tell him that he came to the P.O. hearing hue and cry there from and saw accused persons assaulting Paban with lathi and spade.

42. Above being the evidence on the record, let us see how far such evidence makes out the allegations brought against the accused persons. We may note here that the learned counsel for the appellants had contended that some of the accused persons were juvenile in conflict with law and as such, this court needs to take action against them in accordance with the prescription of the Juvenile Justice Act, 2006 and the rules framed there-under. However, learned counsel for the appellants could not show anything to substantiate such a contention

requiring this court to take action in accordance with provisions of the Act aforementioned.

43. We have already found that there is no dispute over the fact that the deceased Paban died a homicidal death on the night of 04.05.2003 on sustaining wounds on his person caused by blunt object (s). The prosecution, as stated above, wants the court to believe that persons, arraigned as the accused persons in the case, under consideration, were the persons responsible for the gruesome and ghastly attack on Paban Patgiri on 4.5.2003 which afterward occasioned his death.

44. In order to ascertain such a plea on the part of the prosecution, we have very carefully perused the judgment under challenge having regard to the evidence on record. On making such an exercise, we have found that except PW-4, PW-6, PW-7 and PW-8, other non-official PWs did not throw any light as to the assailant/assailants who inflicted wounds on the victim on the fateful day. However, PW-4, PW-6, PW-7 and PW-8 claim that they were eye witnesses to the incident under consideration.

45. These PWs, we find, claim that they saw accused Haren and Basudev assaulting Paban Patgiri with various weapons in their hands. According to them, while the accused Haren used lathi to assault the person aforesaid, accused Basudev assaulted him with a spade. Some of them also depose that other accused persons too assaulted the victim on that eventful morning. A perusal of the judgment in question reveals that learned trial court believed such evidence and basically on the evidence of those witnesses, he convicted accused Haren and Basudev of offence u/s 302 IPC.

46. However, learned counsel for the appellants contends that the evidence on the basis of which learned trial court convicted those two accused persons of offence u/s 302 IPC is unreliable and untrustworthy since such evidence suffers from serious legal infirmities. Once such evidence is excluded from consideration, those two accused persons stand on the same footing as of other accused persons who are evidently acquitted by the trial court on holding that on the basis of materials on record, prosecution cannot be said to have proved the charge u/s 302 IPC against those accused persons.

47. Since accused Haren and Basudev stand on the same footing as of the other accused persons as far as charge u/s 302 IPC is concerned and since learned trial court already acquitted other persons of offence u/s 302 IPC due to paucity of evidence, having convicted the accused Haren and Basudev of offence u/s 302 IPC on similar evidence, the learned Sessions Judge committed huge error and as such, this court may be pleased to acquit those two accused persons of offence u/s 302 IPC on setting aside their conviction u/s 302 IPC and so also on setting aside the sentence imposed on them.

48. On considering the evidence of PW-4, PW-6, PW-7 and PW-8, we have found that in their evidence, these four PWs depose that accused Haren and Basudev

had assaulted Paban with weapons in their hands. They further depose that while accused Haren assaulted Paban with lathi, accused Basudev battered him with spade for which the victim sustained wounds on his person which occasioned his death same night. We have also considered such evidence of PWs aforesaid in the light of evidence rendered by I.O. (PW-12).

49. A conjoint reading of the evidence of PW-12 and evidence of those four witnesses unmistakably reveals that PW-4, PW-6, PW-7 and PW-8 did not tell the I.O. during the course of investigation that they saw accused Haren and Basudev assaulting Paban at the place of occurrence on 04.05.2003. In other words, they divulged such extremely vital information for the first time during trial only. Omission to state such very vital information to the I.O. during the investigation is undoubtedly an omission amounting to contradiction as contemplated in Section 162 Cr.P.C..

50. Unfortunately, such important contradictions on a very vital points make the evidence of those four PWs to the effect that they saw accused Haren and Basudev assaulting Paban with lathi and spade profoundly doubtful and therefore, such evidence cannot be accepted as credible one and as such, same needs to be discarded. Once the above evidence of PW-4, PW-6, PW-7 and PW-8 is discarded and kept beyond consideration, the roles played by accused Haren and Basudev become quite similar to those of other 8 (eight) accused persons whom the trial court had already acquitted of offence u/s 302 IPC due to paucity of evidence against them.

51. Thus, we have no hesitation in accepting the contention of the learned counsel for the appellants that as far as charge u/s 302 IPC is concerned, accused Haren and Basudev Das are situated similarly with that of other eight accused persons who were already acquitted by the trial Court, and quite rightly, for want of sufficient incrementing evidence. In spite of accused Haren and Basudev Das having been situated similarly with the other accused persons as far as offence u/s 302 IPC is concerned, learned trial court chose to convict accused Haren and Basudev of offence u/s 302 IPC.

52. This simply makes the judgment in question as far as conviction of accused Haren and Basudev of offence u/s 302 IPC is concerned unsustainable in law inasmuch as, learned trial court adopted two different yard sticks to measure the alleged crime, committed by two sets of persons although they stand situated similarly. Being so, the judgment under challenge as far as conviction of accused Haren and Basudev of offence u/s 302 IPC is concerned is liable to be set aside by this court in exercise of appellate authority conferred on it.

53. We have already found that learned trial court had convicted all the accused persons of offence u/s 148 IPC. Now, let us see whether on the fateful day, accused persons formed an unlawful assembly, and if so, what was the object of such an unlawful assembly. We may note here that in order to convict some persons of offence u/s 147 or u/s 148 or u/s 149 IPC, the prosecution needs to

prove first the existence of an unlawful assembly.

54. In this connection, we can peruse the decision rendered by Hon"ble Supreme Court in the case of Dani Singh and Others Vs. State of Bihar, . In Dani Singh (supra), Hon"ble Supreme Court held as follows:--

11.....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.....

12.....The "common object" of an assembly is to be ascertained from the acts and language of the members composing it, and from a consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms carried by the members, and the behavior of the members at or near the scene of the incident.....

13.....An object is entertained in the human mind, and it being merely a mental attitude, no direct evidence can be available and, like intention, has generally to be gathered from the act which the person commits and the result therefrom. Though no hard-and-fast rule can be laid down under the circumstances from which the common object can be culled out, it may reasonably be collected from the nature of the assembly, arms it carries and behavior at or before or after the scene of incident.

55. In a recent judgment, rendered by Hon"ble Supreme Court in the case of Bharat Soni etc. Vs. State of Chhatisgarh, , it is held as follows:--

14. An assembly of five or more persons having as its common object any of the five objects enumerated u/s 141 IPC is deemed to be an unlawful assembly. Membership of an unlawful assembly is itself an offence punishable u/s 143 to 145 IPC. Similarly, Sections 146 to 148 IPC deals with the offence of rioting which is defined to be used of force or violence by any member thereof. Section 149 makes every member of an unlawful assembly liable for offence that may be committed by any member of the unlawful assembly in prosecution of the common object of that assembly or for commission of any offence that the members of the assembly knew to be likely to be committed in prosecution of the common object of the assembly.

56. Situation being such, one may note that an unlawful assembly can be said to exist only when the prosecution proves the following:

An "unlawful assembly" is an assembly of five or more persons, if their common object is

1. to overawe by criminal force

- (a) the Central Government, or
- (b) the State Government, or
- (c) the Legislature, or
- (d) any public servant in the exercise of lawful power;
- 2. to resist the execution of law or legal process;
- 3. to commit mischief, criminal trespass, or any other offence;
- 4. by criminal force;
- (a) to take or obtain possession of any property, or
- (b) to deprive any person of any incorporeal right, or
- (c) to enforce any right or supposed right;
- 4. by criminal force to compel any person--
- (a) to do what he is not legally bound to do, or
- (b) to omit what he is legally entitled to do.

57. Now, let us see whether in our instant case there exists an unlawful assembly and if so, whether such an unlawful assembly committed the offence of rioting being armed with deadly weapons. On perusal of the record, we have found that there is evidence to show that at least eight persons, namely, Haren Patgiri, Basanta Patgiri, Hamanta Das, Basudev Das, Dhoirjya Das, Aswini Das, Harkanta Das and Mohan Das had assembled at the place of occurrence on the morning in question, all armed with various weapons.

58. On a careful reading of evidence on record in between the lines, one would also find that such assembly never wanted to cause the death of Paban Patgiri. Therefore, the conclusion of the trial court that the assembly in question never wanted to cause the death of Paban Patgiri in prosecution of common object cannot be faulted. But then, learned trial Court did not ascertain what the object of aforesaid assembly was. However, that does not prevent this Court of appeal from ascertaining the object of aforementioned assembly.

59. On reading the evidence more and more, we have also found that there is indisputable evidence to show that the object of assembly aforementioned was to cause grievous wounds to Paban Patgiri and they wanted to cause such injuries by means of blunt objects. The number of weapons, used by the members of the said assembly and the injuries on the deceased make such a conclusion inevitable. In the face of above revelations, it needs to be concluded that Haren Patgiri, Basanta Patgiri, Hamanta Das, Basudev Das, Dhoirjya Das, Aswini Das, Harkanta Das and Mohan Das committed the offences u/s 325 IPC and they committed such offence in prosecution of their common object.

60. Situation being such, learned trial court ought to have convicted all the accused persons of offence u/s 325/149 IPC. Unfortunately, learned trial Court convicted all the accused persons only of offence u/s 148 IPC while convicting accused Haren and Basudev of offence u/s 302 IPC as well. Situation being such, the conviction of all the accused persons u/s 148 IPC cannot be interfered with although the conviction of accused Haren and Basudev u/s 302 IPC is found unsustainable in law.

61. It may be noted here that learned counsel for the appellants has assailed the judgment also on the ground that there were some discrepancies in evidence over the seizure of weapons allegedly used in committing the crime in question. It has also been contended that the prosecution has not assigned any reason as to why it did not examine some neutral witnesses, such as Damayanti and Khagen. According to the learned counsel for the appellants, such infirmities on the part of the prosecution make the prosecution case extremely doubtful.

62. We have considered such submissions in the light of materials on record. It is found that some discrepancies did occur in evidence of PWs vis-?-vis seizure of weapons used in committing the crime in question. We have also noticed that some witnesses who were reportedly present at the place of occurrence when the incident under consideration was going on were not examined. But then, such infirmities/failures are too minor to make any dent to the prosecution case as far as their committing of offence u/s 148 IPC is concerned.

63. It may be noticed here that learned trial court ought to have convicted all the accused persons of offence u/s 325/149 IPC but it did not do so. We have also found that the incident in question occurred as back as 2003. On their conviction of offence u/s 302 IPC on 21.05.2010, accused Haren and Basudev were sentenced to undergo imprisonment for life and to pay fine as well and have been in custody ever since.

64. These apart, there is materials on record to show that when the incident in question occurred, some of the accused persons had just emerged from their teens. Since the accused persons have been facing the case under consideration for almost 11 years, and that too in different Courts and since some of the accused persons have already spent several years in custody, we refrain from remanding the case to the trial court for retrial.

65. On the conspectus of our forgoing discussions, while maintaining the conviction of all the accused persons u/s 148 IPC, we set aside the conviction/sentence imposed on accused Haren and Basudev allegedly for their having committed offence u/s 302 IPC.

66. Since all the accused/appellants have been adequately punished for their having committed offence u/s 148 IPC, we are not inclined to interfere with the quantum of sentence imposed on the accused persons for their committing of offence u/s 148 IPC.

67. In there suit, the judgment of the trial court stands modified as indicated above.

68. The accused/appellants who are on the bail are directed to surrender immediately before the trial Court to serve out the sentences imposed on them if in the mean time they have not served out the sentence imposed on them.

69. The accused/appellants who had served out the sentence in respect of offence u/s 148 IPC in the meantime be released forthwith. Let LCR be sent down forthwith.