

(2008) 05 CAL CK 0010
In the Calcutta High Court
Case No : C.R.A. No. 132 of 2002

Kazem Sk. alias Kamruzzaman alias Kazeman

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 16-05-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 290, 464
Evidence Act, 1872 — Section 145
Explosives Act, 1884 — Section 6(3)
Juvenile Justice (Care and Protection of Children) Act, 2000 — Section 7A
Penal Code, 1860 (IPC) — Section 141, 142, 147, 148, 149

Citation : (2008) 3 CALLT 393 : (2008) CriLJ 4474

Hon'ble Judges : Kishore Kumar Prasad, J; Girish Chandra Gupta, J

Bench : Division Bench

Advocate : Sekhar Basu, Rajdeep Majumdar and Sreyashee Biswas, in CRA 147-148/02 and P.S. Bhattacharyya and Souvik Mitter, in CRA 132/02, for the Appellant; Subhasish Panchal and Pushpa Satpati, for the Respondent

Judgement

Girish Chandra Gupta, J.—These three appeals are directed against a judgment dated 18th April 2002 passed by the learned sessions Judge, Suri, Birbhum, in sessions Trial No. 3/May 1992 arising out of Sessions Case No. 47 of 1984 convicting the appellants under Sections 148, 302, 436, 326 read with Section 149 of the Indian Penal Code and an order passed on the same day by which the accused Buddik Sheikh, Sadek Sheikh, Ruli Sheikh and Kabir Sheikh were convicted and sentenced to suffer further imprisonment for a year and the rest of the appellants were convicted and sentenced to suffer imprisonment for life as also to pay a fine of Rs. 5000/- in default to suffer imprisonment for one year for the offence punishable u/s 302 read with Section 149 of the IPC. The accused Maddin Seikh was convicted and sentenced to suffer 10 years imprisonment as also to pay a fine of Rs. 1000/-, in default to suffer further imprisonment for three months for the offences punishable u/s 436 simpliciter. The rest of the appellants were however convicted and sentenced to suffer identical punishment for the offence punishable u/s 436 read with Section 149 IPC. The accused Sadek

Seikh alias Sadek All was convicted and sentenced to suffer three years rigorous imprisonment as also to pay a fine of Rs. 3000/- in default to suffer imprisonment for further six months for the offence punishable u/s 326 simpliciter. Rest of the appellants were handed down similar punishment u/s 326 read with Section 149 of the IPC. All the substantive sentences were directed to run concurrently.

2. Briefly slated the facts of the case are as follows:

In the night of 15th/16th May 1982 at 02.00 hrs., thirty (30) named accused persons along with others are alleged to have raided the house of Sezidur Rahaman. Samsul, son of Sezidur Rahaman who was sleeping in the courtyard was mercilessly murdered. The inmates of the house helplessly were watching the incident. They were chased whereupon they entered into the room and bolted from inside. Bombs were then exploded. House of the de facto complainant was partly thatched by corrugated tin and party by straw. The house was put on fire. Akramul, another son of the de facto complainant Sezidur Rahaman was sleeping with his wife in one of the rooms. In order to save his life he came out of his room along with his wife. Both of them were severely assaulted. The other inmates of the house also came out of the burning house. Latifa, the wife of the de facto complainant Sezidur, intervened and tried to save her son Akramul whereupon she was also assaulted. Akramul was taken away from the house of the de facto complainant and his dead body was found near a pond in the morning. The wife of the de facto complainant received grievous injury.

So did the wife of the victim Akramul. It is not in dispute that Nadira, wife of the victim Akramul, is a sister of the accused Kazem. She had fallen in love with Ashadul. They were married. The accused Kazem was against this marriage. The mamage sparked dispute between the families. Ashadul committed suicide more or less within two months after the marriage. The de facto complainant had to leave the village. He remained outside of the village for more than ten months. He returned to the village about twenty days before the date of the incident. About ten days prior to the date of incident he solemnised the marriage of the said Nadira with his son Akramul against the wishes of Kazem. After the fateful incident on 15th/16th May 1982 Nadira has patched up with her brother Kazem and has been married somewhere else. The de facto complainant and the rest of his family has moved out from the village.

3. Charge sheet was filed by the police against the thirty accused persons. Charge was framed against 29 of them. The trial remained pending for 20 years. For the first time charges were framed on 3rd September 1984. For the second time charges were framed on 16th January 1991. It appears from the Lower Court records that on 13th July 1992 on behalf of the accused Rahul a letter of a learned Advocate was produced signifying that the hearing of the case had been stayed by the High Court. No copy of the order granting stay was however produced. On 1st August 2000 it was submitted on behalf of the accused that

nothing was pending in the High Court. The trial was thus stalled for 8 years for no reason whatsoever. Prayers were even thereafter made on behalf of the defence to adjourn the hearing of the case on various "grounds which were granted by the learned Trial Court from time to time but this time the learned Trial Judge insisted upon production of the copy of the order, staying hearing of the case, which the accused persons failed to produce and ultimately the Trial was concluded on 15th March 2002. The delay of 20 years naturally took its toll. 9 of the accused persons died in the meantime. P.W.6, wife of the de facto complainant became senile. The learned Trial Judge who is now one of us while taking her evidence recorded the following observation u/s 290 of the Code of Criminal Procedure:

The witness started weeping and it was found that she is not in a position to remember everything.

4. It appears that the accused Kazem Seikh has filed an independent appeal which has been registered as CRA 132 of 2002. Asgar Seikh and 14 others have together filed an appeal which has been registered as CRA 147 of 2002. Ruli Seikh and three others have filed an independent appeal which has been registered as CRA 148 of 2002. A5, A6, A8, A12 and A13 in CRA No. 147 of 2002 were released on bail by an order dated 5th September 2002. Rest of the appellants in CRA No. 147 of 2002 were granted bail on 8th April 2003. All the four appellants in CRA No. 149 of 2002 were released on bail by an order dated 18th September 2003. Thus except for the appellant Kazem Seikh s/o All Newaj, all others are now on bail.

5. P.W. 1 Sezidur Rahaman the de facto complainant is an eyewitness to the incident. P.W.2, a neighbour, deposed as to the correctness of the incident but as regards the identity of the miscreants, refused to divulge anything. He was declared hostile. P.W.3 Azizul Haq similarly deposed that such an incident did, in fact, take place but he did not divulge anything as regards the identity of the miscreants. He was also declared hostile. P.W.4, another neighbour, deposed in the same way. He was also declared hostile. P.W. 5 Kalu who at the material time was in the house of the de facto complainant himself supported the incident but refused to divulge as regards the miscreants. He was also declared hostile. P.W.6 Latifa, wife of the de facto complainant, is an eyewitness. She deposed as regards the incident involving the accused persons but due to old age she was unable to remember everything as recorded by the learned Trial Judge himself. P.W. 7 Ahmada, daughter of the de facto complainant, watched the incident from outside. She informed the police over telephone after waking up the postmaster. She has deposed about the identity of the miscreants on the basis of what she heard from the P.W.1, her father. P.W.9 is also an eyewitness. He has deposed as regards the incident.

6. Mr. Basu, learned Advocate, appearing in support of the appeals made the following submissions:

a) There are two inquest reports concerning the dead bodies of Samsul and Akramul. Both of them contained the case No. which was registered subsequent to holding the inquest. Therefore, the case number must have been inserted later on.

b) The case narrated in the written complaint is vastly different from the one narrated from the witness box.

c) The evidence of P.W.6 is not corroborated by the evidence of the P.W.I. According to him, the P.W.6 did not talk about any unlawful assembly. He added that she spoke about abduction but there was no charge of abduction.

d) With regard to the evidence of the P.W. 7 Ahmada he submitted that she has disclosed in her evidence more names than her father the P.W.I did.

e) As regards the evidence of P.W.9 he submitted that if his evidence were to be believed, the Injury on the person of Samsul would have been much more than were actually found by the Autopsy Surgeon. He added that the P.W.9 did not ascribe individual overt act of the accused persons. His evidence, according to Mr. Basu, was also contradicted by the Investigating Officer.

f) The learned Trial Judge did not disclose any reason why some of the accused persons were convicted simpliciter u/s 326, 436 and 302 and some of them were convicted under the same sections with the aid of Section 149 IPC.

g) P.W. 15 the doctor examined both the Injured women. As regards the injury suffered by Nadira, the doctor has not expressed any opinion. As regards the injury suffered by P.W.6 Latifa he deposed that one of the injuries was grievous,

h) Lastly Mr. Basu contended that even with the aid of Section 149 IPC all persons present at the place of occurrence cannot be convicted. According to him only those persons who are proved to have actually participated in the crime can be convicted. In support of his submission he relied on some judgments of the Apex Court which we shall consider.

7. Mr. Panchal, learned Advocate appearing for the State disputed the submissions of Mr. Basu. He submitted that prosecution is not required to prove individual overt acts of the accused persons after proving an unlawful assembly. He also relied on the judgments of the Supreme Court which we shall consider.

8. From the submissions made by the learned Counsel appearing for the appellant we are of the view that the following questions arise for determination:

I) Was there any unlawful assembly, if so, who were the members thereof?

II) What individual overt acts, if any, have been proved by the prosecution?

III) Is the prosecution liable to prove individual overt acts as a precondition for conviction of the accused persons with the aid of Section 149 IPC?

9. The first two questions are questions of fact and the last question is a question

of law. We shall take up the first and the second question together. In order to answer these two questions we shall, scrutinise the evidence on record.

P.W.7 Ahmada, daughter of the de facto complainant, deposed as follows:

P.W. 1 is my father. I was given in marriage with Abu Bakkar of our village, and I reside there after my marriage. My father's house is about 100/150 cubits away from my husband's house intervened by one pond.

On 31st Baisakh, about 20 yrs. back I was in the house of my husband during night. I woke up on hearing cries and sound of bursting of crackers. It was about 1/1.30 -A.M. in the midnight. I came out from my house and noticed that the house of my father was burning and heard hue and cry from the said place. I found assembly of many persons with the help of light of fire. I cried out for help but none appeared. The miscreants left the P.O. and thereafter I went to the house of my father. I found dead body of Samsul lying there and my mother, with injuries. Being asked by me my father told me that these accused persons namely Kajem, Ruli, Kuddus, Sadek, Kudrat, Kobir, Akbar, Asgar, Sajahan, Most, Chosi, Habal, Monir, Moddin, Bhutun, Ajijul, Goda, Kaku, Motahar committed the crime. My father also told me that Samsul was assaulted first by Saifuddin. Saifuddin. Saifur, Gostal, Kamrej, Samsul, Arefin, Ohed are absent today. Kajem is my cousin brother. I went to the Post Office to inform the P.S. woke up the Post Master and told him the incident. The P.S. was informed over phone and police came in the early morning. Police seized one torch with battery and one hurricane from our house under a seizure list and this is my signature on it marked Ext. 1/1.

10. There is no significant cross-examination of this witness. There is none whatsoever as regards the names of the miscreants which she ascertained from her father. She was however suggested that due to long-standing enmity with the accused persons, they were falsely implicated. The evidence of the P.W.7 as regards the information given to the police on the night of the incident itself has been corroborated by the P.W.8 Nirmal Chatterjee, the Post Master who deposed that after taking appropriate charges he had informed the police about the incident during the dead part of the night.

11. The police arrived at the place of occurrence at 5.30 hrs. on 16th May 1982. The evidence of P.W. 13 Shri D.N. Ghosh, the then Officer-in-Charge of Nalhati P.S. is as follows:

On 16.5.821 was posted at Nalhati P.S. as O/C.

On that date at about 4.15 A.M. I got one telephonic information from Kurumgram Post Office to the effect that there was one murder and arson in a house at village Bujung. I diarised the same vide G.D.E No. 302 dt. 16.5.82. This is the Diary written and signed by me marked Ext.3. Myself along with S.I. Gopesh Ch. Mitra and force went to the village Bujung. I recorded the statement of Sajidar Rahaman which was reduced into writing by me after reaching the

village. This is that statement duly recorded by me with my signature marked Ext.4. the said complaint was sent to P.S. through driver Abdus Selim with direction to start case under Sections 147, 148, 149, 324, 326, 436, 364, 304 I.P.C. and 6(3) of Indian Explosives Act. I endorsed this case to S.I. G.C. Mitra for investigation. During my stay, I arranged for sending the injured persons namely Nadira Begum, w/o Akramul Sk. and Latifa Bibi, w/o complainant Sejidur Rahaman for medical treatment. I held inquest over the dead body of Akramul Sk. in presence of witness and this is the inquest report marked ext.5. The said inquest was held for helping the I.O. The remaining portion of the investigation was held by the I.O. S.I. G.C. Mitra. So long G.C. Mitra was at the P.O. on that date, I was present there.

In his cross-examination the P.W. 13 deposed, inter alia, as follows:

The details of the incident was not disclosed in the telephonic information. I reached the village Bujung at about 5.30 A.M. The statement was reduced into writing as per verbal statement of the complainant immediately after my arrival at the village. There is endorsement in the complaint that it was read over and explained to the complaint who put his L.T.I. after admitting the same.

12. P.W. 13 in his re-examination proved the formal F.I.R. which was recorded by S.I. Sukumar Mukherjee and the same was marked Ext.6. Further cross-examination was declined on behalf of the accused persons. From the inquest report concerning the dead body of Akramul prepared at 6.30 A.M. on 16th May 1982, it appears that the dead body was found at a distance of 500 yards approximately near a canal.

13. Wearing apparel of the victim Samsul, controlled and bloodstained seized earth, a burnt piece of bamboo, burnt pieces of straws, exploded bomb material and a crowbar were seized from the house of the defacto complainant at 6.30 hrs on 16th May 1982 vide a seizure list which has been marked Ext.7. The treatment sheet of Nadira, wife of Akaramul, was prepared at 7.50 hrs on 16th May 1982 which has been marked Ext.8. The treatment sheet of Latifa Begum (P.W.6) was prepared at 8 hrs. on 16th May 1982 which has been marked Ext.9. There are further treatment sheets of both the injured women which have collectively been marked Ext. 10.

14. P.W. 18 Dr. P.K. Das conducted the postmortem on the dead bodies of both the deceased Akramul and Samsul. The injuries found on the dead body of the Akramul including the opinion of the Autopsy Surgeon are as follows:

1. One incised wound 4" x 1" muscle deep extending from the chin across the right side of the neck below and angle of mandible bisecting thyroid cartilage, vessels, muscles.
2. One incised wound 8" x 1" over the abdomen extending from Xiphoid process of stumum, to umbilicus through all the layers of abdomen with protrusion of inter abdomen contents intestines and omentum.

3. One incised wound 1" x 1/2" x scalp deep over left side of frontal region.
4. One incised wound 1/2" x 1/4" x skin deep over middle of forehead.
5. One incised wound 1/2" x 1/4" x 1/4" over the right side on the back of the chest wall.

On dissection I did not find any abnormality with respect to vital organs of the deceased.

Death, in my opinion, was due to the effect of the shock and haemorrhage from the injuries mentioned above which were ante mortem and homicidal in nature. This is the P.M. Report (carbon copy) prepared in the same process by me with my signature (Identifies Ext. 11).

The injuries found on the dead body of Samsul including the opinion of the Autopsy Surgeon are as follows:

On the same date I also held P.M. Examination over the dead body of one Samsul Haque, M.H. aged about 17 years in connection with the above mentioned case. The said dead body was also identified by the same constable.

On examination I found the following injuries:

1. Traumatic amputation of the neck at the level C3 to 34 bisecting vertebrae muscles, vessels, spinal cord, trachea, oesophagus etc. only a tag of skin is intact in that the neck caused by heavy sharp cutting weapon.
2. One lacerated wound 1" x 1/2" x muscle deep over left shoulder joint.
3. One lacerated wound 1" x 1/2" muscle deep over the back of right elbow joint.
4. One lacerated wound 3" x 1" x bone deep over left partial region.

In my opinion, death was caused due to shock and haemorrhage out of the injuries as stated by me which were ante mortem and homicidal in nature. The injuries were sufficient to cause death in ordinary course of nature.

This is the carbon copy of the postmortem report prepared by me with my signature identifies Ext. 12.

The incised injuries can be caused by heavy sharp cutting weapon and the lacerated injuries can be caused by blunt and hard substance like lathi etc.

15. The written complaint marked Ext.5 contains, inter alia, the following statements of the P.W. 1:

At about 2 p.m. at night my son Ashraful and nephew Kalu coming to me made me awaken and told that many persons have surrounded my house. Hearing that I woke up and found that about 100 people with lathi, tangi, heso and bomb are present at my courtyard at a beating manner and Suifuddin, a resident of my village, s/o Nasir Sk. assaulted on the back of neck of my son Samsul with a goat

cutting chopper by falling him on the courtyard and Asgar Sk. s/o Lt. Denar Sk, Kamaruzzamal, s/o Lt. Nestan Sk., Ruli Sk, s/o Lt. Rajemen, Kuddus s/o Lt. Tajeman, Sadek s/o Late Tajeman Sadek, Akbar Sk. s/o Late Alihad, Badal s/o Nazir Sk. the persons of my village caught my son Samsul and began to beat him with sticks and murdered Samsul on the courtyard. I and my son Saidui, my wife Latifa Bibi, nephew Kalu could recognise those persons with the help of the light of the burning lantern. Out of fear we could not go to those persons. Then those accused persons and so many villagers like Kudrat Sk. s/o Lt. Tazeman sk. Kabir Sk. s/o Late Tazeman Sk., Kazem Sk. s/o All Newaz, Samsul Aretin, S/o Kamarauzzaman, Aktarul Alam s/o Karnaruzzarnan, Jahangir Sk., s/o Kamaruzzaman Sk. s/o Late Nestan Sk, Taz Sk. s/o Janbarish Sk., Buddique Sk. s/o Lt. Mokid Sk, Buddique Sk. s/o Arshad Sk., Gastur Sk., s/o Late Salamat Sk., Monir sk. s/o Gastur Sk., Moddin Sk. s/o Gastur sk., Azizul Sk., s/o Maizel Sk., Bhutun s/o Kowser Sk., Ohed Sk. s/o All Newaz Sk., Moshi sk. s/o Nazu Sk., Chosi Sk. s/o Nazu Sk, Sajahan s/o Nazu sk., Sajahn s/o Nazu Sk., Janbaz sk. s/o Nazu Sk. and Saifur Sk. s/o Nazar sk. coming on the varandah of my house charged some bombs. Then we shut out the door of the house. The accused persons began to break the door of the house by axe and as a result some portion of the door was broken. My son Ashraful poke a person with a sword through the hole of the door. For that reason the accused person became injured and the accused person set fire to my east facing house. As per direction of the accused Kazem Ali, Maddin Sk. set fire to my east facing house the roof of which is covered by straw and Ohed Sk. set fire to the roof of the room at ground floor which is under my tin thatched room. Flame of the fire began seriously. At that time when my son Akramul and my wife came out of our house to save their life from fire. Then the accused Sadek sk., Kabir, Ruli. Buddique and others caught hold and take away my son Akramul as per direction of the accused Samsul Arefin. At that time my son Akramul began to shout saying "save me, save me" but we could not go to them as we were small in number. We could recognise all the accused persons in the light of torch, lantern and fire of the straw. Accused persons assaulted with blood shed injury in the different portions of bodies of my wife and son's wife Nadira Begum, as because Nadira and my wife was trying to save my son Akramul. Both the accused persons Knzetrn All and Kamaruzzaman told that "we shall take him to the house of Aretin and there we shall murder him". Then after taking my son Akramul to the house of Arefin the accused persons murdered my son and left the dead body to the canal (Daha) towards the south of our village. In the morning we found that the dead body of Akramul in the canal (Daha). A mark of deep injury is found on his throat and the portion from chest to abdomen is open, intestine has come out, there is a mark of injury with bleeding on the back.

16. The de facto complainant (P.W.I) on 18th May 1992 deposed, inter alia, as follows:

At about 1 A.M. of that night, my son Asraful and nephew Kalu roused me and my wife from sleep and informed me that many persons attacked my house

being armed with deadly weapons. A hurricane was hanging in the verandah. I came out with my torch and with the flash of the torch, I found 100 persons in my house. They started assaulting Samsul with lathi and ballam. Accused Kazem ordered that he should be beheaded. At this, accused Saifuddin cut his neck with one stroke by a saw used by a butcher for slaughtering the goat. Samsul was assaulted by Buddique with knife (son of Mokid Sheikh), Samsul Arefin assaulted with lathi and Kamrujjoman assaulted with ballam. Sadek assaulted with tangi. Accused Buddik, Arefin, Kazetn, Saifuddin, Kamrujjoman are on the dock (identifies).

Then the accused persons chased us as we were standing on the verandah. Out of fear, we entered into the door and bolted door from inside. They exploded 2/3 bombs on the verandah. They tried to break open the door with axe. A gap was created in the process. My son Asraf took a sword from the room and pushed it through the gap towards the accused persons standing outside. At the direction of Kazem, accused Wahed set fire on the chala of the south-facing room. (Accused Wahed is represented by the learned lawyer), Wahed is my brother's son. Kazem also asked Moddin to set fire. Accordingly accused Moddin set fire in the Ghar of another house of straw thatch, Moddin is in the dock (identities). For fear of being burnt by fire, we took shelter in the vacant space outside the house through the rear door of the Ghar on the north and stood near the vacant space of another house on the west. Akramul and his wife also came out of the Ghar which was set on fire. When Akramul was coming out, accused Buddik (son of Mokid) assaulted him on his back by axe. My wife intervened and requested them not to kill my son Akramul. Then accused Sadek assaulted my wife on her forearm of right hand with shaval. Accused Budik, Ruli, Sadek, Kabir forcibly took away Akramul to the house of accused Arefin at the order of accused Kazem. All the miscreants dispersed with them.

At dawn. I got information that Akramul was murdered and his dead body has been left near a pond (ditch). I went to the spot and found my son Akramul lying dead with his neck chopped and long cut injury over the breast upto abdomen. His stomach came Out.

17. He also deposed that Nadira was at the time of his deposition in the Court was under the control of the accused Kazem. She had married again at the instance of Kazem and that Kalu was also under the control of the accused Kazem. Besides the persons already named by him the P.W. 1 also recognised the following miscreants:

I also recognised some other miscreants who were present in the assembly. They are Manir Sheikh, Kako, Gado, Sheikh, Akbar, Badal, Sajahan, Mast, Chasi, Buddik (son of Arsad). I do not remember the names of others. These accused persons are on the dock (identifies).

All the accused persons whom I named above taking active participation in the murder of my sons and assault on my wife and those who only were present all

on the dock (identifies the accused persons). I recognised the accused persons with the flash of torch as also with the light of the hurricane lantern.

Cross-examination of the P.W. 1 was declined on behalf of the accused Kazem. Samsul Aretin, Jahangir, Kamruzzaman, Saifuddin, Akhtarul Alam and Rahul Amin. Rest of the accused persons through lawyer cross-examined the P.W. 1. Nothing significant was elicited. After 18th May 1992 the P.W. 1 was further cross-examined on 19th May 2001. His cross-examination was concluded on 22nd March 2001. He was suggested that due to long standing enmity the accused persons had falsely been implicated which he denied. Both in his chief and cross-examination he deposed that he saw the entire incident in the light of hurricane and torch. Both the hurricane and the torch were seized by the police at 6.45 hrs. on 16th May 1982 which is evidenced by a seizure list which has been marked Ext. 1.

18. Concerning the evidence of the P.W. 1 Mr. Basu submitted that his evidence in Court suggests that Kazem instigated the accused persons to Basu is not correct in his submission because in the written complaint it is in fact stated "as per direction of the accused Kazem All, Maddin Sk. act fire to my east acing house...". In his evidence the P.W.1 has deposed that Maddin Sk. set fire to one house and Wahid Sk. set fire to another house. It is not in dispute that there are two houses in one compound which also appear from the sketch map exhibited during trial. Mr. Basu further submitted that the instigation attributed to Kazem in his evidence in Court by the P.W. 1 that the deceased Akramul should be taken to the house of Samsul Arefin for the purpose of killing is not there in the written complaint which again is not correct. In the written complaint it was stated "both the accused persons Kazem All and Kamruzzaman told that "we shall take him to the house of Arefin and there we shall murder him"." Mr. Basu submitted that the persons, who took away Akramul forcibly, deposed in Court are also different from those stated in the written complaint. This again is an incorrect submission. In the written complaint Sadek, Kabir, Ruly and Buddik have been stated to have taken away the victim Akramul. In his evidence in Court he deposed "accused Buddik, Ruly, Sadek and Kabir forcibly took away Akramul to the house of the accused Arefin". We therefore, find no substance in the submission of Mr. Basu that the evidence of the P.W. 1 in Court is different from that appearing from his earliest statement which is Ext.5. No other infirmity in the evidence of the P.W. 1 was pointed out by Mr. Basu.

19. The evidence of Latifa Bibi (P.W.6) is as follows:

P.W.1 is my husband. I am aged 72 yrs. I am suffering from various ailments. At present, I cannot do any work with my right hand.

One night in the month of Baisakh, 20 years ago I was in my house. On that night these accused persons some of whom are my relatives came to our house. Accused Kazem ordered to murder my sons Samsul and Akramul. Saifuddin assaulted my son Samsul. I tried to save my son and I was assaulted.

20. In her cross-examination she has admitted that there was long-standing enmity between the accused persons. She has further deposed that after the incident they have left the village.

21. Mr. Basu submitted that the P.W.6 did not talk about any unlawful assembly which obviously is incorrect." P.W.6 did depose that on the fateful night the accused persons came to her house and murdered her sons. In her cross-examination she deposed that 100/150 persons had entered their house and she was assaulted simultaneously with Samsul. Mr. Basu added that the P.W.6 talked about abduction but there is no charge in support thereof. We are of the view that absence of charge is not material in the absence of any prejudice caused to the accused persons. Reference in this regard may be made to Section 464 Cr PC. Mr. Basu did not point out any prejudice having been suffered by the accused persons. Reference in this regard may also be made to the judgment in the case of Willie (William) Slaney Vs. The State of Madhya Pradesh, . The dead body of the deceased Akramul was found in a nearby canal within hours after he was forcibly taken away from his home. The accused persons have been charged u/s 302 IPC. The fact that the accused persons had taken away the deceased Akramul from his house is there in the written complaint. Therefore, all the facts were known to the accused persons and there is no substance in the submission that there is no charge for abduction for the purpose of killing. No other criticism as regards the evidence of the P.W.6 was advanced by Mr. Basu.

22. P.W.9 Asraful deposed as follows:

About 20 years back on the last part of Baisakh the incident took place in our house at about 2.00 A.M. in the night. At the relevant time I was aged about 15 years. Myself along with cousin brother Kalu Sk. alias Ali Mahammad were sleeping In the first floor of east facing room. I woke up on hearing the barking of dogs and I came down. I noticed that our entire house was surrounded by some persons. I noticed 25/28 persons inside out courtyard. They were armed with lathi, tangi, spear. Saifuddin had a big dagger (ramda) in his hand. They were Kajem, Saifuddin, Ruli, Kuddus, Sadeque, Arefin, Asgar, Sajahan, Buddik s/o Mokid, Buddik s/o Pama Arsad, Moddin, Gustal, Monir, Kudrat, Akbar s/o Oli Ahad, Gadakaku, Motahar and others. The accd. persons namely Gostul, Saifuddin, Buddik s/o Arshad are absent today. The other accd. persons were amongst the miscreants who entered into our courtyard (identified on dock). Samsul was sleeping in the courtyard. Kajem asked Saifuddin to cut the throat of Samsul. Saifuddin cut down the neck of Samsul with the said Ramda. The other accused persons assaulted Samsul with lathi etc. I was in the courtyard and after murdering Samsul, the miscreants chased us, for which we took shelter inside the house where my parents were staying. We bolted the door from inside. They broke open the door with the help of axe but the door could not be opened, fully. I used a big sword from inside the cut portion of the door to save ourselves. When they failed to get inside our house, they put fire over the thatched portion and also to the east facing room of our house. We took shelter on the bank of a

tank after getting out from our house. They assaulted Akramul on the back side, and accused Buddik s/o Mokid and accused Sadeque were the persons who assaulted him with axe. Kajem told them that Akramul should be murdered in the house of Arefin, and as such, he was kidnapped by the miscreants. The dead body of Akramul was brought by police in our house on the following morning. They assaulted my mother who sustained fracture on her hand. The miscreants did not do anything more during their stay.

Volunteers, due to lapse of time I have forgotten the details of everything.

23. Mr. Basu submitted that according to the P.W.9 the accused persons assaulted Samsul with a lathi etc. Considering the number of accused persons Mr. Basu submitted that if 30 persons were to assault Samsul the injuries found on his body by the Autopsy Surgeon should have been much more. We do not think that anything really turns on it. In the first place it may not be possible for 30 persons simultaneously to strike one person. If all the accused persons shared the common object that would make them individually liable. We shall separately give our reasons whether they shared the common object. Mr. Basu further submitted that the evidence of P.W.9 is that "they set the house on fire" without naming any person in particular. It has to be kept in mind that before the house was set on fire the P.Ws. 1,6, and 9 had been chased. In order to save their lives they had to bolt themselves inside a room. The miscreants tried to break open the door of the room by striking at the door by an axe. A hole was created on the door but the door did not open. Through this hole in the door the witnesses may have seen the miscreants putting the house on fire or they may not have seen anyone setting the house on fire but the fact that the house was set on fire is not in dispute. Therefore, the evidence of the P.W.9 that the accused persons put the house on fire cannot in our view be said to be incorrect or false. It is nobody's case that besides the accused persons anyone else had set the house on fire. Lastly Mr. Basu contended that the evidence of the P.W.9 was contradicted by the I.O.(P.W.16). The I.O. as regards the examination of the P.W.9 deposed as follows:

I recorded the statement of Asratul Sk. He did not state before me that as per order of Kajem, Saifuddin cut down the neck of Samsul with a big Ramda. He did not state before me that from that place he noticed Buddik, son of Mokid assaulting his brother Akramul with axe on his back and that Kajem told them not to murder him there, but to murder him in the house of Arefin. Besides the named persons other persons were with them, but I did not ascertain whether they were from the same village or were outsiders.

During his cross-examination the I.O. also deposed as follows:

I examined P.W.9 Asraful Sk. He did not state before me that he identified the miscreants with the help of flashing of torch which was with his father and with the help of burning lantern. He stated before me that out of fear they failed to protest.

24. We do not think that any of these omissions deposed to by the I.O. during his cross-examination amounts to a contradiction. Only that omission is a contradiction which is inconsistent with what was stated during the examination u/s 161 Cr PC. If what was not stated during the examination u/s 161 Cr PC can co-exist with what was stated, it cannot be said that such omission would amount to a contradiction. Reference in the regard may be made to the judgment in the case of Tahsildar Singh and Another Vs. The State of Uttar Pradesh, wherein the following view was expressed.

If the provisions of the section are construed in the aforesaid background, much of the difficulty raised disappears. Looking at the express words used in the section, two sets of words stand out prominently which afford the key to the intention of the legislature. They are: "statement in writing", and "to contradict". "Statement" in its dictionary meaning is the act of stating or reciting. "Prima facie" a statement cannot take in an omission. A statement cannot include that which is not stated. But very often to make a statement sensible or self-consistent, it becomes necessary to imply words are not actually in the statement. Though something is not expressly stated, it is necessarily implied from what is directly or expressly stated. To illustrate: "A" made a statement previously that he saw "B" stabbing "C" to death; but before the Court he deposed that he saw "B" and "D" stabbing "C" to death; the Court can imply the word "only" after "B" in the statement before the police. Sometimes a positive statement may have a negative aspect and a negative one a positive aspect. Take an extreme example: if a witness states that a man is dark, it also means that he is not fair. Though the statement made describes positively the colour of a skin, it is implicit in that statement itself that it is not of any other colour. Further, there are occasions when we come across two statements made by the same person at different times and both of them cannot stand or co-exist. There is an inherent repugnancy between the two and, therefore, if one is true the other must be false. On one occasion a person says that when he entered the room, he saw "A" shooting "B" dead with a gun; on another occasion the same person says that when he entered the room he saw "C" stabbing "B" dead: both the statements obviously cannot stand together for if the first statement is true, the second is false and "vice versa". The doctrine of recital by necessary implication, the concept of the negative or the positive aspect of the same recital, and the principle of inherent repugnancy, may in one sense rest on omissions, but, by construction, the said omissions must be deemed to be part of the statement in writing. Such omissions are not really omissions strictly so called and the statement must be deemed to contain them by implication. A statement, therefore, in our view, not only includes what is expressly stated therein, but also what is necessarily implied therefrom.

"Contradict" according to the Oxford Dictionary means to affirm to the contrary. Section 145 of the Evidence Act indicates the manner in which contradiction is brought out. The cross examining counsel shall put the part or parts of the statement which affirms the contrary to what is stated in evidence. This indicates

that there is something in writing which can be set against another statement made in evidence. If the statement before the police officer-in the sense we have indicated-and the statement in the evidence before the Court are so inconsistent or irreconcilable with each other that both of them cannot co-exist, it may be said that one contradicts the other.

25. It was next contended by Mr. Basu that in appreciating the evidence of the witnesses Court should, as a matter of course, look for corroboration. He relied on a judgment in the case of Baddi Venkata Narasayya and Others Vs. State of A.P., wherein Their Lordships quoted the following views expressed earlier and applied the same:

We too are of the opinion that on the facts and evidence in this case on account of the large number of assailments and victims involved in the case it would be a prudent exercise to follow the ratio evolved by this Court in Masalti Vs. State of U.P., which was reiterated by this Court in later decisions including the recent one [Binay Kumar Singh and others Vs. State of Bihar,]. We extract below the said ratio:

Where a criminal Court has to deal with evidence pertaining to the commission of an offence involving a large number of offenders and a large number of victims, it is usual to adopt the test that the conviction could be sustained only if it is supported by two or three or more witness who give a consistent account of the incident.

26. From the evidence led by the prosecution the following chain of events transpire:

i) The accused persons armed with lethal weapons between 1 and 2 A.M. in the night of 15th/16th May 1982 entered into the house of the de facto complainant.

ii) The victim Samsul was sleeping in the courtyard. He was severely beaten up and his head was almost beheaded. The de facto complainant, his wife and the P.W.9 watched the incident helplessly.

iii) Bombs were exploded in the house of the de facto complainant by the accused persons.

iv) The P.W. 1 the de facto complainant, his wife P.W.6, P.W.9 and others including small children were chased. In order to save their lives they, entered into a room and bolted from inside.

v) The accused persons tried to break open the gate with the strikes of an axe. The gate however could not be opened. P.W.9, from inside the room, passed through the hole, made by the axe, on the gate, a sword seeking to injure the assailants.

vi) The house which was partly thatched by corrugated tin and partly by straw was set on fire. Akramul and his wife then were sleeping in a different room. They came out from the room and both of them were severely beaten.

vii) The de facto complainant, P.W.6, P.W.9 and the other inmates also came out of the room since it was on fire.

viii) Latifa (P.W.6) the wife of the de facto complainant tried to save her son Akramul. She was severely beaten up. Akramul was taken away from the place of occurrence for the purpose of killing in the house of Samsul Arefin.

ix) From the house of Samsul Arefin, police seized controlled and bloodstained earth which has been reflected by the seizure list marked Ext.2.

x) At the dawn dead body of Akramul was found lying near the pond at a distance of 500 yards from the place of occurrence.

An unlawful assembly is defined by Section 141 of the IPC which insofar as the same is material for our purpose is set out herein:

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

First- ...

Second - ...

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

...

Section 142 of IPC provides as to how is membership of an unlawful assembly acquired. Section 142 reads as follows:

Being a member of unlawful assembly. - Whoever, being aware of facts which render any assembly an unlawful assembly intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly.

27. A commentary on these two sections as regards proof that a person was a member of an unlawful assembly is to be found in the case of Masalti Vs. State of U.P., Their Lordships of the Apex Court observed as follows:

What has to be proved against a person who is alleged to be a member of an unlawful assembly is that he was one of the persons constituting the assembly and he entertained along with the other members of the assembly the common object as defined by Section 141, IPC. Section 142 provides that however, being aware of facts which render any assembly, intentionally joins that assembly, or continues in it, is said to be member of an unlawful assembly. In other words, an assembly of five or more persons actuated by, and entertaining one or more of the common objects specified by the five clauses of Section 141, is an unlawful assembly. The crucial question to determine in such a case is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects as specified by Section 141. While determining this question, it becomes relevant to consider whether the

assembly consisted of some persons who were merely passive witnesses and had joined the assembly, as a matter of idle curiosity without intending to entertain the common object of the assembly.

28. In the present case more than five persons were there who had raided the house of the defacto complainant during night when everyone was fast asleep. No one who does not entertain any Improper motive would stealthily enter somebody's house during late night when everyone is sleeping. Therefore the persons who had entered the house of the defacto complainant cannot be expected to have done so as a matter of idle curiosity or as passive onlookers. The fact that they were all armed with lethal weapons demonstrates their object. The object is a mental condition which can rarely be proved by direct evidence. The object has to be inferred. We have evidence to show that the accused persons armed with lethal weapons entered the house of the defacto complainant between 1 A.M. and 2 A.M. when everyone was in, deep slumber. The first thing that they did after entering the house of the P.W. 1 was to attack the deceased Samsul who was sleeping in the courtyard. He was merciless killed. He was practically beheaded. He was also beaten with lathi, ballam etc. The next step was bombing; the third was arson, the fourth was beating Akramul, his wife Nadira and his mother Latifa and lastly the deceased Akramul was taken away whereafter only his dead body was found in the morning. Who did actually kill Akramul is not evidenced by any direct evidence. But the fact that the accused persons had assembled in the house of P.W. 1 with the common object of exterminating the sons of P.W. 1 could not have been clearer. They may not have shared a common object of causing hurt or grievous hurt to Nadira and Latifa. They may have been caught and beaten up when they interfered.

29. For the aforesaid reasons the first question is answered in the affirmative. All the accused persons according to us were the members of the unlawful assembly.

30. Before we proceed to answer the question No. 2 we would like to notice the difficulty judicially accepted by the highest Court of the land in case of Masalti (supra) wherein Their Lordships observed as follows:

Where a crowd of assailants who are members of an unlawful assembly proceeds to commit an offence of murder in pursuance of the common object of the unlawful assembly, it is often not possible for witnesses to describe accurately the part played by each one of the assailants. Besides, if a large crowd of persons armed with weapons assaults the intended victims, it may not be necessary that all of them have to take part in the actual assault. In the present case, for instance, several weapons were carried by different members of the unlawful assembly, but it appears that the guns were used and that was enough to kill 5 persons. In such a case, it would be unreasonable to contend that because the other weapons carried by the members of the unlawful assembly were not used, the story in regard to the said weapons itself should be rejected. Appreciation of evidence in such a complex case is no doubt a difficult task; but criminal Courts have to do their best in dealing with such cases and it is their

duty to sift the evidence carefully and decide which part of it is true and which is not.

31. The view quoted above applies to all fours of this case. The incident with which we are concerned contains a number of episodes. There are episodes which were enacted by all the members of the unlawful assembly. Those episodes are a) raiding the house of the P.W. 1 during dead part of the night; b) chasing the complaint party after Samsul was killed, c) exploding bombs, d) seeking to break open the doors of the room where the P.Ws. 1, 6 and 9 had escaped in order to save themselves. Besides the active role played by the accused persons they also served a passive role. Because they were so many in number the complainant party did not dare to face them in defence.

32. The individual role appearing from the evidence may now be summarised. According to P.Ws. 1, 6 and 9 Kazem ordered to kill Samsul. Samsul was dealt a deadly blow by Saifuddin according to P.Ws. 1, 6 and 9. Buddique, Samsul Arefin, Kamrujamman, Sedek also assaulted the deceased Samsul according to P.W. 1. The said Buddique, Sadek. Ruli and Kabir took away Akramul after assaulting him according to P.W. 1. Wahed and Moddin set fire to the two parts of the house of the P.W. 1 according to his evidence. The theory that the Court should insist upon evidence of at least two witnesses, as a matter of prudence, reiterated in the case of Saadi Ventaka Narayan (*supra*) cited by Mr. Basu would result in denial of justice, if pressed into service in this case, because the defence is to blame for the inordinate delay in the trial as already indicated. They cannot be allowed to take the advantage of senility of P.W.6 and the fact that P.W.9 deposed that because of lapse of time he was unable to recollect the details. The second question is accordingly answered.

33. We shall now take up the third question for consideration.

34. Mr. Basu relied on a Judgment in the case of Bhagga and Ors. v. M.P. reported in J.T. 2007 (11) SC 623. This Judgment in our view has no manner of application because in this case Their Lordships opined as follows:

We are inclined to hold that the common object of all the accused to kill Babulal has not been established by the prosecution and Bhagga, Shankara and Bahadura, who are the appellants Nos. 2,4 and 10 before us are entitled to be given the benefit of doubt.

35. Mr. Basu then relied on a judgment in the case of Haramant Laxmappa Kukyadi and Others Vs. State of Karnataka, . The question which fell for decision in that case was whether the accused persons could be convicted u/s 302 IPC read with Section 149 thereof. Considering that the prosecution itself had laid evidence that the child was killed accidentally, Their Lordships in that case reduced the conviction and the sentence from one under Sections 302/149 to 326/149. Therefore this judgment has no manner of application.

36. The next judgment cited by Mr. Basu is in the case of Musakhan and Others

Vs. State of Maharashtra, . This judgment is distinguishable on facts. In the case before Their Lordship there were four several places of occurrence and there was no evidence that each of the accused persons was present at all the four places of occurrence. It is in that view of the matter that Their Lordships observed as follows:

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.

37. The next judgment cited by Mr. Basu was in the case of Manoj @ Bhau and Others Vs. State of Maharashtra, . In that case Their Lordships held that necessary ingredients to attract Section 149 IPC were totally absent. Therefore this judgment has no manner of application.

38. Mr. Basu upon being pointed out by us that there is an earlier larger bench judgment drew our attention to the judgment delivered by a four Judge Bench in the case of Masalti Vs. State of U.P., but he added that this Judgment has been explained in the subsequent judgments to which our attention was not drawn. In this judgment the following view was expressed:

The observation of which Mr. Sawhney relies, *prima facie*, does seem to support his contention; but with respect, we ought to add that the said observation cannot be read as laying down a general proposition of law that unless an overt act is proved against a person who is alleged to be a member of an unlawful assembly, it cannot be said that he is a member of such an unlawful assembly. In appreciating the effect of the relevant observation on which Mr. Sawhney has built his argument, we must bear in mind the facts which were found in that case. It appears that in the case of Baladin and Others Vs. State of Uttar Pradesh, the members of the family of the appellants and other residents of the village had assembled together some of them shared the common object of the unlawful assembly, while others were merely passive witness. Dealing with such an assembly, this Court observed that the presence of a person in an assembly of that kind would not necessarily show that he was a member of an unlawful assembly. What has to be proved against a person who is alleged to be a member of an unlawful assembly is that he was one of the persons constituting the assembly and he entertained along with the other members of the assembly the common object as defined by Section 141 IPC. Section 142 provides that however, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly. In other words, an assembly of five or more persons actuated

by, and entertaining one or more of the common objects specified by the five clauses of Section 141, is an unlawful assembly. The crucial question to determine in such a case is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects as specified by Section 141. While determining this question, it becomes relevant to consider whether the assembly consisted of some persons who were merely passive witnesses and had joined the assembly as a matter of idle curiosity without intending to entertain the common object of the assembly. It is in that context that the observations made by this Court in the case of *Baladin and Others Vs. State of Uttar Pradesh*, assume significance; otherwise, in law, it would not be correct to say that before a person is held to be a member of an unlawful assembly, it must be shown that he had committed some illegal overt act or had been guilty of some illegal omission in pursuance of the common object of the assembly. In fact 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 principle 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.

39. Mr. Panchal, learned Advocate appearing for State disputed the submission of Mr. Basu that individual overt acts have to be proved in order to fasten liability with the aid of Section 149 IPC. He relied on the judgment in the case of *Lalji and Others Vs. State of U.P.*, wherein the following views were expressed:

Section 149 makes every member of an unlawful assembly at the time of committing of the offence guilty of that offence. Thus this section created a specific and distinct offence. In other words, it created a constructive or vicarious liability of the members of the unlawful assembly for the unlawful acts committed pursuant to the common object by any other member of that assembly. However, the vicarious liability of the members of the unlawful assembly extends only to the acts done in pursuance of the common object of the unlawful assembly, or to such offences as the members of the unlawful assembly knew to be likely to be committed in prosecution of that object. Once the case of a person falls within the ingredients of the section the question that he did nothing with his own hands would be immaterial. He cannot put forward the defence that he did not with his own hands commit the offence committed in prosecution of the common object of the unlawful assembly or such as the members of the assembly knew to be likely to be committed in prosecution of that object. Everyone must be taken to have intended the probable and natural results of the combination of the acts in which he joined. It is not necessary that all the persons forming an unlawful must do some overt act. When the accused persons assembled together, armed with lathis and were parties to the assault on the complainant party, the

prosecution is not obliged to prove which specific overt act was done by which of the accused. This section makes a member of the unlawful assembly responsible as a principal for the acts of each, and all, merely because he is a member of an unlawful assembly. While overt act and active participation may indicate common intention of the person perpetrating the crime, the mere presence in the unlawful assembly may fasten vicariously criminal liability u/s 149. It must be noted that the basis of the constructive guilt u/s 149 is mere membership of the unlawful assembly, with the requisite common object or knowledge.

Thus once the Court holds that certain accused persons formed an unlawful assembly and an offence is committed by any member of that assembly in prosecution of the common object of that assembly, or such as the members of the assembly knew to be likely to be committed in prosecution of that object, every person who at the time of committing of that offence was a member of the same assembly is to be held guilty, of that offence. After such a finding it would not be open to the Court to see as to who actually did the offensive act or require the prosecution to prove which of the members did which of the offensive acts. The prosecution would have no obligation to prove it.

40. It may be pointed out that in the case of Ranbir Yadav Vs. State of Bihar, the views expressed in the case of Masalti as also in the case of Lalji were applied wherein Their Lordships held as follows:

In view of the above interpretation given to Section 149 IPC we need not delve into or decide the contention raised by Mr. Jethmalini that the evidence regarding the specific overt acts ascribed to each of the three appellants herein is not reliable, for the evidence of the host of eyewitness- which both the Courts below considered and accepted-conclusively prove that all the three appellants shared the common object of the unlawful assembly to commit the offences of loot, arson and murder and causing the disappearance of the evidence of murder and that in furtherance of those common objects some members of that unlawful assembly committed those offences for which the appellants are also liable to be " convicted u/s 149 IPC.

41. For the aforesaid reasons the third question is answered in the negative.

42. After the hearing of the appeal was concluded, an application was made claiming and contending that the appellants Jahangir Sk., Motahar Sk. Mosi Sk. Chosi Sk. and Habal Sk. were minors on the date of commission of offence i.e., 16.5.1982. Prayer was made for determination of their age u/s 7A of the Juvenile Justice (Care and Protection of Children) Act, 2000.

43. Considering the views expressed above, the conviction of the appellants under Sections 148, 302 and 436 IPC both with and without the aid of Section 149 IPC is upheld. The conviction u/s 326 of IPC of the appellant Sadek Sheika alias Sadek Ali is also upheld. The conviction of the rest of the appellants u/s 326 read with Section 149 is however set aside. Except for Moshiwar Rahaman alias

Mosi Sk. no one else filed any age proof even to show prima facie that on the date of the incident he was a minor. Even as regards the age proof filed by Mosi Sk. we have some doubt because no dependable evidence is there to show that Mosi Sk. is also known as Moshiwar Rahaman. However this will be gone into by the learned Trial Court.

44. Considering that an application has been made for determination of the age of the appellants Jahangir Sheikh, Motahar Sheikh, Mosi Sheikh, Chosi Sheikh and Habal Sheikh, the appeal concerning them in relation to sentences is kept pending. The learned Trial Court is directed to take evidence in accordance with law and to determine the following question:

Whether the appellant Jahangir Sheikh, Motahar Sheikh, Mosi Sheikh, Chosi Sheikh and Habal Sheikh were juveniles on the date of incident that is on 16.5.1982?

It appears from the record that the aforesaid five appellants were granted bail by a Division Bench of this Court. They are permitted to continue on the same bail bond until further order passed by this Court. They are directed to appear before the learned Lower Court within seven days for the purpose of determination of their age by the learned Lower Court. The remaining appellants enlarged on bail are directed to surrender forthwith before the learned Trial Court to serve out the remainder part of their sentences. Their bail bonds are accordingly cancelled. The appellant Kazem Sheikh, alias Kamaruzzaman alias Kazeman, son of All Newaz, is now in jail. He is directed to serve out the rest of the sentences.

45. The fate of the appeal as regards the sentences against the appellants namely Jahangir Sheikh, Motahar Sheikh, Mosi Sheikh, Chosi Sheikh and Habal Sheikh respectively shall be considered after the question as formulated above is decided by the learned Trial Court upon taking evidence in accordance with law. The learned Trial Court is directed to decide the question as early as possible preferably within a period of three months from the date of receipt of the lower Court records.

46. The learned Trial Court will take necessary step for the purpose of adducing evidence in support of their claim that they were juveniles on the date of incident that on 16.5.1982. If necessary, the learned Trial Court may refer the aforesaid five appellants to the medical board or the Civil Surgeon as the case may be for obtaining credit-worthy evidence about their age.

Before we part with the judgment, we must observe that in the recent past, in this Court, contention about the age of the convicts and prayers claiming benefit under the relevant provisions of the Juvenile Justice (Care and Protection of Children Act) 2000, which came into force on 1st April 2001, have repeatedly been raised for the first time in this Court. Ordinarily this Court would be reluctant to entertain a connection based on factual averments raised for the first time before it. However, this Court is equally reluctant to ignore, overlook or nullify the beneficial provisions of the statute. We are therefore of the opinion

that whenever a case is brought before Magistrate and/or Trial Court and the accused appears to be juvenile, the age of the accused on the date of occurrence, should be ascertained before proceeding with the trial. This procedure, if properly followed, would avoid a journey up to this Court and return journey to the grass-root Court. If necessary and found expedient, this Court may on its administrative side issue necessary instructions to cope with the situation herein indicated.

47. Lower Court Records with a copy of this judgment be sent down forthwith to the learned Trial Court for information and necessary action. The Lower Court records along with the finding about the age of the appellants namely Jahangir Sheikh, Motahar Sheikh, Most Sheikh, Chosi Sheikh and Habal Sheikh on the basis of evidence adduced on behalf of the parties should be sent back in order to dispose of the appeal concerning the aforesaid appellants.

The Criminal section of this Court is directed to put up the file of this appeal before this Court immediately after receipt of the Lower Court records along with the finding of the learned Lower Court regarding the age.

Urgent xerox copy of this judgment, if applied for, be delivered to the learned Advocates for the parties, upon compliance of all formalities.

Kishore Kumar Prasad, J.

48. I agree.