

(1999) 01 PAT CK 0028

In the Patna High Court

Case No : Criminal Appeal No's. 109 and 120 of 1996

Shiva Shankar Pandey and Others, etc.

APPELLANT

Vs

State of Bihar

RESPONDENT

Date of Decision : 03-01-1999

Acts Referred:

Arms Act, 1959 — Section 27

Penal Code, 1860 (IPC) — Section 147, 148, 149, 302, 34

Citation : (2000) CriLJ 435

Hon'ble Judges : Sudhir Kumar Katriar, J; Manohar Lal Visa, J

Bench : Division Bench

Advocate : P.N. Pandey, Indu Singh and Vikram Deo Singh, for the Appellant;
K.P. Gupta, for the Respondent

Final Decision : Dismissed

Judgement

Manohar Lal Visa, J.—Both these appeals have been heard together and are being disposed of by this common judgment as they both arise out of the same judgment dated 5-2-1996 and order dated 12-2-1996 convicting and sentencing Sri Niwas Pandey and Dinesh Pandey who are appellants in Cr. Appeal No. 120 of 1996, and Shiva Shankar Pandey, Ram Pravesh Pandey, Vijoy Shankar Pandey, Mithilesh Pandey alias Lalli, Ram Keshwar Pandey and Awadhesh Pandey, who are appellants in Cr. Appeal No. 109 of 1996. Appellant Dinesh Pandey has been convicted under Sections 302 and Section 341 of the Indian Penal Code (in short "IPC") and 27 of the Arms Act and has been sentenced to undergo life imprisonment u/s 302, IPC. The remaining seven appellants have been convicted u/s 302 read with Sections 149 and 341, IPC and have been sentenced to undergo life imprisonment u/s 302 read with Section 149, IPC. No separate sentence has been passed under Sections 341, I.P.C and 27 of the Arms Act.

2. The prosecution case, in short, is that on 18-10-93 at about 5.45 a.m. Manglanand Pandey, father of informant Ram Bachan Pandey (P.W. 10) and Rangnath Pandey (P.W. 2), uncle of informant were constructing a "Machan" (a

platform abridging some trees with bamboos for holding vegetable creepers) in their Sahan (open land) situate adjacent west to their "dalan". The dalan and cow-shed of appellant Ram Pravesh Pandey are adjacent to that land where the "Machan" was being erected. All the eight appellants at that time came there and started abusing the father and uncle of informant. The informant who at that time was in his Goshala (cow-shed) and Ram Lakhan Pandey, grandfather of informant, who was in his dalan, went to the place and they asked the appellants not to quarrel. All the appellants ran to assault them. The informant along with his father, uncle and grandfather came running to his house and they closed the doors of the house. The appellants came to the "darwaja" of the house of the informant and continued abusing them and they were also saying that they would not leave any one of them alive. The informant and his companions out of fear went to the roof of the house and started making "hulla". All the appellants except appellants Mithilesh Pandey and Ram Keshwar Pandey who remained in a lane and continued abusing the informant's party, went on the roof of their house and from there they started pelting brickbats on the informant's party. Informant and his companions again asked the appellants not to do so. In the meantime, appellant Sri Niwas Pandey brought a licensee rifle from his house and gave it to Dinesh Pandey who fired at the father of informant causing injury on the upper portion of his left arm. The father of informant after receiving injury came down running with the informant and others. Thereafter the informant (PW 10) along with Rangnath Pandey (PW 2), Satyendra Narayan Pandey (PW 9) and Rangnath Tiwary (not examined) proceeded for the treatment of his father after putting him on a cot. At about 7.15 when the informant and his companions reached near the dalan of Ram Narayan Pandey (PW. 7), appellants Ram Pravesh Pandey, Vijoy Shankar Pandey, Ram Keshwar Pandey and Awadhesh Pandey all armed with lathis, appellants Mithilesh Pandey and Sri Niwas Pandey armed with garasa, appellant Shiva Shankar Pandey armed with a country made rifle and appellant Dinesh Pandey armed with a licensee rifle reached there running and they all gave out for killing the informant's party. The cot on which the father of informant was being carried was kept near the dalan by the party of informant and informant ran inside a room of the "dalan" of Ram Narayan Pandey and by hiding near a window he started watching the appellants through the window. His uncle Rangnath Pandey (PW 2) fled towards the village. Rang Nath Tiwary and Satyendra Pandey (PW 9) remained there. Thereafter appellant Dinesh Pandey fired from his rifle on the father of informant who was lying unconscious on the cot. Appellants Ram Pravesh Pandey and Sri Niwas Pandey asked appellant Dinesh Pandey to fire again saying that father of informant was still alive and then appellant Dinesh Pandey fired 2-3 more shots causing the death of father of informant at the spot. Thereafter all the appellants fled away towards their house. S. I. Narendra Mohan Sinha (PW. 11) who at that time was posted as Officer Incharge of Sajhauri Police Station on hearing rumours about the commission of murder reached the place on 18-10-93 at about 9.30 a.m. and recorded the fardbeyan (Ext. 3) of informant. About the motive, the informant in the fardbeyan stated that a murder case was pending between informant's party

and the appellants and for that reason the appellants after hatching a plan committed the murder of his father. Shri Narendra Mohan Sinha (PW 11) took up the investigation of the case, inspected the two places of occurrence, seized blood stained earth and brickbats from the "osara" of the house of the informant and prepared a seizure list (Ext. 4) and also seized blood stained earth, fired cartridge, remains of cartridges, blood stained cot and bed from the second place of occurrence and also prepared seizure lists (Exts. 4/a and 4/b). He also prepared inquest report (Ext. 5) of the dead body of the father of informant and sent it for post mortem examination, recorded the statements of witnesses", sent the blood stained earth to Forensic Science Laboratory and thereafter he, on his transfer, made over the charge of investigation of this case to SI Kanhaiya Prasad Singh (PW 12), who submitted chargesheet under Sections 147 148 149 341 302, IPC and 27 of the Arms Act against the appellants.

3. Cognizance of the case was taken and the case was committed to the Court of Session where charges under Sections 341 and 302/149, IPC were framed against all the eight appellants. Besides this, additional charge u/s 302, IPC and Section 27 of the Arms Act against appellant Dinesh Pandey and charge u/s 27 of the Arms Act against appellant Shiva Shankar Pandey were also framed. The appellants denied the charges. The case of the appellants as it appears from the trend of cross-examination of prosecution witnesses is that the deceased himself was a veteran criminal and he was murdered by some unknown persons and they have been falsely implicated in this case owing to their enmity with the informant. After trial the appellants were found guilty and they have been convicted and sentenced as indicated above.

4. The prosecution in order to bring home the charges against the appellants has examined 12 witnesses in this case. Ram Bachan Pandey (PW 10) is the informant. Madhusudan Pandey (PW 1), Rangnath Pandey (PW 2) and Girija Devi (PW 3) are said to be the eye witnesses to the occurrence. Shree Bhagwan Singh (PW 4) is the doctor who had conducted autopsy on the dead body of the deceased Manglanand Pandey, father of informant. Megh Baran Pandey (PW 5), Ram Ashish Pandey (PW 6) and Ram Narayan Pandey (PW 7) have been declared hostile by the prosecution. Hare Ram Pandey (PW 8) and Satyendra Narayan Pandey (PW 9) have been tendered. Narendra Mohan Sinha (PW 11) is the I.O. who had conducted the investigation of the case and Kanhaiya Prasad Singh (PW 12) is the Police Officer to whom Narendra Mohan Sinha (PW 11) on his transfer had given the charge of investigation who simply submitted the charge sheet.

5. Dr. Shree Bhagwan Singh (PW 4) in his evidence has stated that on 18-10-93 he was posted as Medical Officer in Sadar Hospital, Sasaram and at about 4.30 p.m. he conducted the post mortem examination on the dead body of deceased Manglanand Pandey and found following ante mortem injuries:

(i) Circular wound lacerated 1/2" x 1/2" margin inverted, surrounding area blackened on upper left upper arm, lateral side of clavicle just below the level of clavicle.

(ii) Lacerated wound 4" x 1/2" on posterior lateral aspect of left upper arm, neck of left humerus fractured in pieces, margin everted, scapula of upper part also fractured.

both the wounds were communicating to each other.

(iii) Circular wound 1/2" x 1/2" surrounding area blackened -- over the manubrium sterna in lower part in the level of second inter costal space middle line x thoracic cavity deep, surrounding area blacken, margin inverted.

(iv) Lacerated wound circular 2" x 1/2" x cavity deep, margin everted over the right side of 8th inter costal space posteriorly.

6th, 7th and 8th rib posteriorly fractured. Manubrium sterna fractured.

Both the above wounds were communicating to each other.

(v) Lacerated wound 4" x 2" x bone deep on upper arm right side, middle part of humerus fractured into pieces, surrounding area blackened.

(vi) Lacerated wound 5" x 3" on left leg mid part both tibia and fibula fractured, surrounding/area blackened. A metallic body taken out from the upper part of left leg just above the wound.

According to him, cause of death was due to shock and haemorrhage produced by above injuries which were caused by fire arm which may be rifle and time since injuries sustained was within 6 to 24 hours. He has proved the post mortem examination report which is marked Ext. 1. The evidence of this witness proves that the death of deceased was homicide and the time of death corresponds to the time as given by the prosecution. Now it was to be seen what evidence has been led by the prosecution against the appellants for making them responsible for causing the aforesaid injuries to the deceased which resulted into his death.

6. Ram Bachan Pandey (PW 10), the informant, in his evidence has stated that on 18-10-93 at about 5.45 a.m. his father and his uncle Rangnath Pandey (PW 2) were constructing a "Machan" in the Sahan situate adjacent west to his "dalan" when all the appellants came there and started abusing his father and uncle. He went there from his Ghoshala and asked the appellants not to quarrel. His grandfather also went there from "dalan" and he also asked the appellants not to abuse. All the appellants thereafter ran to assault them and therefore they all came running in their house and closed the door of the house from inside. The appellants came to the "darwaja" of his house and again started abusing them and they were also saying that they will not leave any one alive. Out of fear he and his father went on the roof of the house and thereafter his mother and his grandmother Munka Devi also came on the roof. He and his family members raised alarm. The appellants Mithilesh Pandey and Ram Keshwar Pandey continued abusing the informant and his family members while remaining in a lane whereas the other appellants climbed on the roof of the house of appellant

Shri Niwas: Pandey and started pelting brick bats from there. Thereafter appellant Sri Niwas Pandey brought a licensee gun running from his house and handed over the gun to appellant Dinesh Pandey who fired at his father causing injuries on his right scapula. The father of informant after holding the wounds came down from the roof along with informant and others and in the meantime villagers came to the "darwaja" of the informant and then the door of the house was opened. The informant after putting his injured father on a cot along with Rangnath Pandey (PW 2) Satyendra Narayan Pandey (PW 9) and Rangnath Tiwary proceeded for treatment of his father. Mother of informant also followed them. At about 7.15 a.m. when the informant's party reached near the "dalan" of Ram Narayan Pandey it heard the sound of "Maro Maro" from behind and when the informant turned back he found all the appellants chasing them. Appellants, Vijoy Shankar Pandey, Ram Keshwar Pandey, Awadhesh Pandey and Ram Pravesh Pandey were armed with lathis, appellants Sri Niwas Pandey and Mithilesh Pandey were armed with grasa, appellant Shiva Shankar Pandey was armed with a country made rifle and appellant Dinesh Pandey was armed with a licensee rifle. All the appellants came near the informant and his party and gave out for killing them. The informant out of fear put the cot carrying his father at the place north western side of "dalan" of Ram Narayan Pandey and he went inside a room situate in the "dalan" of Ram Narayan Pandey and started watching from the window. His uncle Ram Narayan Pandey ran towards the village. Rangnath Tiwary and Satyendra Pandey remained at that place. Thereafter appellant Dinesh Pandey fired a shot from his rifle on the father of the informant which hit him. Appellants Ram Pravesh Pandey and Satyendra Narayan Pandey by saying that deceased was still alive exhorted Dinesh Pandey to fire again. Appellant Dinesh Pandey then fired 2-3 more shots on the father of the informant who died instantaneously there. Appellant Shiva Shankar Pandey was also pointing his rifle. Thereafter all the appellants fled towards their house.

7. Rangnath Pandey (PW 2), the uncle of informant, has stated that on the day of occurrence at about 5.45 a.m. he was in his vegetable field and the deceased was constructing a "Machan" who called him for his help and when he and deceased both were constructing the "Machan" all the appellants came there and started abusing them. In the meantime, informant Ram Bachan Pandey and Ram Lakhan Pandey also came there. He and his companions asked the appellants not to abuse them on which all the appellants picked up brickbats and ran to assault them. Thereafter he went inside his house. Ram Lakhan Pandey also went into his dalan. The deceased entered his house. While he was in his house, he heard the appellants" abusing in a lane. He then went to the roof of his house and from there he saw the deceased, the informant, Girija Devi (PW 3) and his mother Munka Devi on the roof of the house of the deceased and he also saw appellants Ram Pravesh Pandey, Dinesh Pandey and Shiva Shankar Pandey on the roof of the house of Sri Niwas Pandey who were throwing brick bats on the roof of the house of the deceased whereas other appellants were in a lane from where they were abusing. When the deceased asked the appellants not to abuse him,

appellant Sri Niwas Pandey brought a rifle and gave it to appellant Dinesh Pandey who fired at the deceased causing injury on his left arm. The deceased after holding his wound came down in the verandah and he also came down from the roof in his house. Thereafter he went to the house of deceased and saw bleeding in the wound of his arm. In the meantime, villagers including Satyendra Narayan Pandey (PW 9), Megh Baran Pandey (PW 5) and Rangnath Tiwary (not examined) came there. The deceased was then put on a cot and he along with others proceeded for treatment of the deceased and when they reached near the "dalan" of Ram Narayan Pandey, they heard hulla of "Maro Maro" coming from behind and thereafter they put the cot carrying the deceased at the corner of west north of the dalan of Ram Narayan Pandey and he went towards village but the informant went into the dalan of Ram Narayan Pandey. He after reaching the mill of Ram Anuj Pandey stopped there and from there he started watching. He found that appellants Ram Pravesh Pandey and Sri Niwas Pandey exhorted appellant Dinesh Pandey who from his licensee rifle again fired one shot on the deceased but he could not see whether the shot hit the deceased or not. Thereafter Ram Pravesh Pandey again exhorted the appellant Dinesh Pandey saying that the deceased was still alive and asked them to fire again and then appellant Dinesh Pandey fired 2-3 shots on the deceased. At that time all the appellants were there and appellants Ram Pravesh Pandey, Awadhesh Pandey, Vijoy Shankar Pandey and Ram Keshwar Pandey were armed with lathis, appellant Dinesh Pandey was armed with licensee rifle and appellant Shiva Shankar Pandey was armed with a country made rifle. All the appellants-thereafter fled towards their house. Thereafter he went near the "dalan" of Ram Narayan Pandey where he found that the deceased had died and Girija Dev (PW 3), Munka Devi (not examined), Ram Bachan Pandey (PW 10), the informant, Madhusudan Pandey (PW 1), Satyendra Narayan Pandey (PW 9), Megh Baran Pandey (PW 5), Ram Narayan Pandey (PW 7) and Rangnath Tiwary (not examined) were standing there.

8. Madhusudan Pandey (PW 1) has stated that at the time of occurrence he had gone in a field situate towards east of his village to ease out and he then heard sound of firing from rifle and the sound had come from the side of village. He did not have any suspicion on hearing the sound of firing. After moving in the field he proceeded to his house and when he reached near the dalan of Ram Narayan Pandey he found a man lying on a cot and the cot was kept in the west northern corner of dalan of Ram Narayan Pandey. He also saw appellant Dinesh Pandey firing from his country made rifle on the man who was lying on the cot. Appellant Shiva Shankar Pandey was armed with a country made rifle. He also saw appellants Sri Niwas Pandey and Mithilesh Pandey armed with grasa, appellants Ram Pravesh Pandey, Awadhesh Pandey and Vijoy Shankar Pandey armed with lathis there. Thereafter at the instigation of appellants Ram Pravesh Pandey and Sri Niwas Pandey, appellant Dinesh Pandey fired one more shot and he then went to the Goshala of Ram Narayan Pandey and there also he heard sound of 2-3 firing and after 2-3 minutes when he came out of the Goshala he found all the

eight appellants running towards their house. When he went near the cot he found that the deceased had died and there were marks of fire arm injuries on his body. The informant came there who told him that appellant Dinesh Pandey had fired from his licensee rifle from the roof of appellant Sri Niwas Pandey on the deceased causing injuries on his left scapula when the deceased was standing on the roof of his house.

9. Girija Devi (PW 3), wife of deceased, in her evidence has stated that on the day of occurrence she was at her darwaja and was talking with her mother-in-law Munka Devi when her husband and her son, the informant, came running in the house from Goshala and they closed the door and when she asked why they were closing the door, her husband, the deceased, told her that appellant Ram Praveen Pandey and his family members were coming to assault him. In the meantime, the appellants came to her darwaja and started knocking the door and abusing. Her husband and son both went on the roof of the house and she and Munka Devi also followed them. Thereafter she found appellants Ram Pravesh Pandey, Dinesh Pandey, Shiva Shankar Pandey, Vijoy Shankar Pandey, Awadhesh Pandey and Sri Niwas Pandey on the roof of the house of the appellant Sri Niwas Pandey. According to her, the alias name of Sri Niwas Pandey is Bhuwar Pandey. All the aforesaid appellants started pelting brickbats on her husband and son (informant) and from the lane appellant Mithilesh Pandey and Murkut Pandey (which according to the evidence of informant is alias name of appellant Ram Keshwar Pandey) continued abusing the deceased. Thereafter Bhuwar Pandey brought a rifle from the house of appellant Ram Pravesh Pandey and gave it to appellant Dinesh Pandey who fired at her husband causing injury on his left shoulder. At that time appellants Ram Pravesh Pandey and Bhuwar Pandey were exhorting. Dinesh Pandey for firing. After receiving injuries her husband came down followed by her, informant and Munka Devi. In the meantime, villagers including Satyendra Pandey, Rangnath Tiwary and others came there and they all put her husband on a cot and proceeded for treatment. She followed them with a "lota" containing water and when they all reached near the dalan of Ram Narayan Pandey, they found that appellants were chasing them. Appellants Dinesh Pandey and Shiva Shankar Pandey were armed with rifles whereas remaining appellants were armed with grasa and lathis. Appellants Ram Pravesh Pandey and Bhuwar Pandey exhorted appellant Dinesh Pandey who fired at her husband and he was again exhorted by the same appellants, namely, Ram Pravesh Pandey and Bhuwar Pandey and he then again fired 2-3 shots at her husband. Appellant Shiva Shankar Pandey at that time was pointing out rifle. She has stated that the cot on which her husband was being carried was kept at the west northern corner of the dalan of Ram Narayan Pandey because appellants were chasing and her husband was fired at while he was lying on the cot and at that time her son Ram Bachan Pandey, the informant was hiding in the house of Ram Narayan Pandey. In her cross-examination she has stated that she was going along with the persons carrying the cot on which her husband was lying and when the cot reached near dalan of Ram Narayan Pandey she herself was at

a "puliya" (a culvert) 10 steps west from the dalan and at that time she heard the voice of appellants and she then hid while the appellants reached near the cot passing ahead of her. She again stated that she did not go near her husband when he was being assaulted and when the appellants left the place of occurrence she went there and found her husband dead.

10. Narendra Mohan Sinha (PW 11), who is the I. O. of the case, has said that on 18-10-92 he was posted as Officer-in-charge of Sanjhauli Police Station and on that day at about 7.45 a.m. he got information by rumours that a murder had been committed in the village Jigni and he then entered that information in Station Diary as Entry No. 360 dated 18-10-92 and along with A.S.I. Kanhaiya Prasad Singh and police force proceeded for Jigni and after reaching there recorded the fardbeyan (Ext. 3) of informant. After recording the further statements of informant he leaving behind the dead body of deceased in the watch of ASI Kanhaiya Prasad Singh proceeded to the place of first occurrence and found in between the land of informant situate adjacent to the house of informant situate adjacent to the house of information on which vegetables were grown and land of appellant Ram Pravesh Pandey adjacent west to this land, some trees on which a "Machan" was tied up and he found blood stains on the stairs coming down from the roof of the house of the informant to his "osara" and found some brickbats on the roof of the house of the informant. He also found blood stains in abundant quantity in the "osara" of the house of the informant from where he seized blood stained soil and also seized brickbats in presence of Megh Baran Pandey (P.W. 5) and Ram Ashish Pandey (P.W. 6) and prepared seizure list (Ext. 4). He has said that the roof of the house of appellant Sri Niwas Pandey is situate about 3 1/2 cubits from the house of informant. About the second place of occurrence he has stated that it is a place situate west northern corner of the dalan of Ram Narayan Pandey and he found the dead body of deceased smeared with blood on a cot kept there with gun shot injury. He also found a room in the western side of the dalan, the window of which was found open. He seized blood stained earth and blood stained cot with bed and prepared seizure lists (marked Ext. 4/a and 4/b). He proved in the Court the fired cartridge (Material) Ext. 1), cot (Material Ext. II) and bed (Material Ext. III). According to him he sent the blood stained earth to Forensic Science Laboratory for examination. He also prepared inquest report (Ext. 5) of the dead body of the deceased.

11. The defence has drawn the attention of the prosecution witnesses towards the contradictions in their earlier statements and their evidence in Court subsequently got corroborated by the evidence of I.O. According to the defence, the attention of PW 1 was drawn on the fact whether he had stated in his earlier statements that when he had gone to ease out in a field he heard the sound of firing and thereafter he found a man lying on a cot kept near the dalan of Ram Narayan Pandey and he saw appellant Dinesh Pandey firing at that man by a country made rifle and he had seen the appellants running away towards their house in west and had also stated that informant and Rangnath Pandey (PW 2)

had told that appellant Dinesh Pandey had inflicted injury on the shoulder of the deceased by firing from his rifle from the roof of appellant Shri Niwas Pandey which this witness had denied but then the I.O. has stated that this witness has not stated the aforesaid facts before him. It is true that the I.O. has stated that this witness had not stated before him that when he had gone to ease out he heard the sound of firing and he had seen a man lying a cot kept near the dalan of Ram Narayan Pandey and appellant Dinesh Pandey had fired at that man but then the I.O. has stated that this witness had stated before him that appellant Dinesh Pandey had fired from his rifle and appellants Sri Niwas Pandey, Mithilesh, Vijoy Shankar, Awadhesh and Ram Pravesh were armed with lathi and grasa and he had stated before him that after the appellants fled away when he came out from his Goshala he found the deceased on a cot. About Rangnath Pandey (PW 2) his attention was drawn on the fact that he had not stated before the I.O. that the deceased had called him for help when the deceased was constructing a "Machan" when all the appellants came there, where informant and Ram Lakhan Pandey also came and thereafter he climbed to the roof of his house from where he saw the occurrence, he had also not stated before the I. O. that informant ran in the dalan of one Ram Narayan Pandey and had not stated the exact place where the cot was kept, he had also not stated before the I. O. that he saw the occurrence from the Mill of Ramanuj Pandey. It is true that the I.O. has said that this witness had not stated the aforesaid facts before him. But then the I.O. in his evidence has stated that this witness had stated before him that appellants started pelting brickbats on the informant and deceased and he had also stated that when the appellants came to the dalan of Ram Narayan Pandey and fired he fled away. He had further stated before him that appellant Dinesh Pandey fired one shot and on exhortation again he fired 2-3 shots and had also stated that other appellants were armed with lathi, rifle and grasa. The Court below has not found the evidence of this witness trustworthy because of the reason that some of the facts which he has stated in evidence had not been stated by him earlier before the I.O. So far as the question of assault to the deceased is concerned we find that there is no contradiction in the evidence and his earlier statements made before the I. O. Similarly about Girija Devi (PW 3) her attention was drawn that she had not stated earlier that on which shoulder her husband had received injuries and she had not stated before the I.O. that the villagers had come and had knocked the door of the house when the door was opened and when her husband was being carried on a cot she also followed him by carrying water in a "lota" and the appellants chased the informant's party at the dalan of Ram Narayan Pandey and on the exhortation of Ram Pravesh Pandey and Bhuwar, appellant Dinesh Pandey fired at her husband. No doubt the I.O in his evidence has stated that this witness (PW 3) had not stated before him that she also followed her husband by carrying water in a "lota" when her husband was being carried on a cot and appellants chased the informant's party near the dalan of Ram Narayan Pandey and appellant Dinesh Pandey on exhortation of Ram Pravesh Pandey and Bhuwar Pandey fired at her husband. She had also not stated before him that the cot was kept near the dalan of Ram Narayan Pandey

because of the fact that appellants had chased the informant's party. Learned lawyer appearing on behalf of the appellants submitted that this witness is not named in the FIR. The Court below because of the contradiction in her evidence and her earlier statements has not accepted her presence at the time of second part of occurrence but it has accepted her presence at the time of first part of occurrence. For the informant the defence has drawn his attention towards some contradiction in his evidence and in his earlier statements. The informant was asked whether in his earlier statements he had stated that his father after receiving injury on his shoulder came down from the roof by holding the injury and when villagers came he then opened the door of his house and his father was being carried on a cot, cot was kept at the north western corner of the dalan, the room in which he hid is situate towards north west of dalan, appellant Shiva Shankar Pandey was also pointing his rifle and the occurrence was seen by Madhusudan Pandey (PW 1), Girija Devi (PW 3) and Rangnath Pandey (PW 2) and other witnesses . The I. O. no doubt in his evidence has stated that the informant had not stated before him the aforesaid facts but he has stated that this witness had stated that his mother and grandmother Munka Devi were on the roof of the house. The aforesaid contradictions are trivial in nature and these contradictions are not of such importance to discredit the entire evidence of informant. On the point of forming an unlawful assembly by the appellants and committing the murder of deceased by appellant Dinesh Pandey by opening fire from his rifle we find that there is no major contradiction in the evidence and in the earlier statements of informant. About the evidence of PW 2 also, we find that his evidence on the point of assault to the deceased does not suffer from any infirmity as there is no contradiction in his evidence and in his earlier statements. On the first part of occurrence the evidence of PW. 3, the mother of informant, is also consistent and supports the case of the prosecution. There is no contradiction in the evidence and in the earlier statements of PW 1 on the point that appellant Dinesh Pandey fired at the deceased and appellant Sri Niwas Pandey, Mithilesh Pandey, Vijoy Shankar Pandey, Awadhesh Pandey and Ram Pravesh Pandey were armed with lathi and grasa. Similarly the evidence of I. O. further shows that there is no contradiction in the evidence and earlier statements of Rangnath Pandey (PW 2) on the point of throwing brickbats by the appellants and thereafter firing by appellant Dinesh Pandey at the deceased and presence of other appellants who, according to him, were armed with lathi, rifle and grasa.

12. Learned counsel appearing on behalf of the appellants has submitted that the I.O. in his evidence has clearly stated that he did not find any blood stains at the roof of the house of the informant which falsifies the case of the prosecution that when father of informant was standing on the roof he was fired at by appellant Dinesh Pandey causing injury on his left shoulder. It is true that the I.O. in his evidence has stated like this but then it is the evidence of prosecution witnesses that after receiving injury father of informant put his hands on the wound and holding the wound came down from stairs to "Osara". The I.O. in his evidence

has said that he found blood at the stairs as well as in the "Osara". In this situation if the blood was not found on the roof the house of informant it does not adversely affect the case of the prosecution. It has further been argued on behalf of the appellants that Bhagwan Singh (PW 4), the doctor, who held autopsy on the dead body of the deceased, in his evidence, has stated that surrounding area of the wound which was found on the upper portion of left arm was blackened which falsifies the case of the prosecution that appellant Dinesh Pandey by standing on the roof of the house of Sri Niwas Pandey fired at the deceased because the evidence of the doctor shows that the firing must have been made from a close range otherwise the surrounding area of this wound would not have been found blackened. In view of the objective evidence of the I.O. that he found the roof of the house of appellant Sri Niwas Pandey situate at a distance of about 3 1/2 cubits from the house of informant we are unable to accept this argument. The distance between the roof of the house of the informant and the roof of the house of appellant is very short and if the doctor found the surrounding area of the injury caused on the upper arm of the deceased blackened it does not create any doubt on the case of the prosecution.

13. Lastly, learned counsel appearing on behalf of the appellants has submitted that allegation of firing at the deceased is against the appellant Dinesh Pandey only and so far other appellants are concerned no specific overtact has been attributed to them and therefore they cannot be held guilty u/s 302/149, IPC. In support of his argument he has relied upon a decision of this Court in the case of Pitambar Thakur (since deceased) and Others Vs. The State of Bihar, . In this case there is reference of findings of this Court in Cr. Appeal No. 17 of 1985 in which after relying upon decisions of the Supreme Court in Dukhmochan Pandey and Others Vs. State of Bihar, and Rambilas Singh and Others Vs. State of Bihar, it was held that the mere presence of the accused was not enough to hold that they shared the common unlawful object of the assembly. Before they could be held vicariously liable u/s 34 of the Indian Penal Code or Section 149 of the Indian Penal Code there must be material to show that overt act or overt acts of one or more was or were done in furtherance of common intention of all the accused or in prosecution of the common object of the members of unlawful assembly." It appears that this Court while deciding Cr. Appeal No. 17 of 1985 for coming to a finding as to common object of an unlawful assembly along with other facts such as the trial Court did not find that part of the prosecution case established in which two appellants who were armed with bhalas were specifically assigned the role of committing murder, trial Court disbelieved the use of bombs although some of the appellants were alleged to be armed with bombs, also took note of the fact that no other specific role was assigned to aforesaid appellants and no overt act was alleged against the remaining appellants. Considering the aforesaid facts it was held that the appellants did not share any common object to commit murder of any one. Even in the case of Dukhmochan Pandey v. State of Bihar and Rambilas Singh v. State of Bihar which were relied upon in Cr. Appeal No. 17 of 1985 of this Court, the respective facts of case were considered

for deciding the existence of common intention or common object. It is not that by these decisions it has been laid down that a member of an unlawful assembly in absence of proof of committing any overt act by him will not be liable for an offence committed by any other member or members of such assembly in prosecution of common object of such assembly. To attract the provisions of Section 149,1.P.C overtact by each and every member of the unlawful assembly is not necessary which is clear from the bare reading of Section 149, IPC which runs as follows:--

149. Every member of unlawful assembly guilty of offence committed in prosecution of common object.-- If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence."

From the aforesaid provisions it is clear that every member of an unlawful assembly, is guilty of an offence committed by any member of such assembly in prosecution of the common object of such assembly or such as the members of that assembly knew to be likely to be committed in prosecution of the common object of such assembly. A member of an unlawful assembly cannot take the defence that no overt act was committed by him if it is established that an offence has been committed in prosecution of the common object which he shared with other members of such assembly by any other member of such assembly. So in the given type of case it is the question of sharing of common object and commission of an offence in prosecution of the common object which is to be decided after considering the facts and circumstances of the case. In this case, first, all the appellants abused the deceased and thereafter barring two, remaining appellants went on the roof of the house of appellant Sri Niwas Pandey from where they pelted brickbats on the deceased. Till that time the conduct of appellants does not show that they had any common object to commit murder of the deceased. Thereafter the appellant Sri Niwas Pandey brought a rifle from his house and he handed over it to appellant Dinesh Pandey who fired at the deceased. Even up to this stage, we can say that only appellants Sri Niwas Pandey and Dinesh Pandey shared common intention to commit murder of the deceased and other appellants did not share any such thing with them, although the Court below in its judgment has held that the moment appellant Sri Niwas Pandey brought a rifle from his house and gave it to appellant Dinesh Pandey the intention of killing the deceased crept in the mind of all the appellants. It is the second part of the occurrence which clearly suggests that all the appellants had common object to commit murder of the deceased because when after receiving injury inflicted on the left shoulder of the deceased by appellant Dinesh Pandey he was being carried on a cot for treatment, all the appellants variously armed with rifle, garasa and lathi chased him and compelled the informant and his companions to leave the cot carrying his father near the dalan of Ram Narayan Pandey and to run away from that place and thereafter appellant Dinesh

Pandey fired one shot from his rifle at the deceased. Appellants Sri Niwas Pandey and Ram Pravesh Pandey then said to the appellant Dinesh Pandey that the deceased was still alive on which appellant Dinesh Pandey again fired two-three shots on the deceased causing his death and thereafter all the appellants fled away. This subsequent conduct of the appellants in chasing the informant party when the deceased was being carried on cot for treatment variously armed with rifle, garasa and lathi and thereafter (commission of murder of deceased by appellant Dinesh Pandey by firing from his rifle, causing death of deceased, clearly suggests that all the appellants had common object to commit the murder of the deceased.

14. We therefore find that prosecution by adducing ocular evidence which has been supported by the medical evidence has proved beyond all reasonable doubts that appellant Dinesh Pandey fired at the deceased causing his death and this firing was in prosecution of common object of all the appellants to commit murder of the deceased and appellants have been rightly found guilty and convicted and sentenced by the Court below.

15. In the result, both the appeals are dismissed. The judgment and order of the Court below convicting and sentencing the appellants is hereby confirmed. The bail bonds of the appellants, namely, Shiva Shankar Pandey, Ram Pravesh Pandey, Vijoy Shankar Pandey, Mithilesh Pandey alias Lalli, Ram Keshwar Pandey and Awadhesh Pandey (of Cr. Appeal No. 109 of 1996) and Sri Niwas Pandey (of Cr. Appeal No. 120 of 1996), who are on bail, are hereby cancelled and they are directed to surrender before the Court below to serve out the remainder of sentences passed against them.

S.K. Katriar, J.

16. I agree.