

(2001) 08 AHC CK 0028

In the Allahabad High Court

Case No : Govt. Appeal No. 1874 of 1976 and Cri. Appeal No's. 966 and 1228 of 1976

State of U.P.

APPELLANT

Vs

Ram Bharat and Others etc.

RESPONDENT

Date of Decision : 02-08-2001

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Juvenile Justice Act, 1986 — Section 3, 32, 8
Penal Code, 1860 (IPC) — Section 141, 147, 148, 149, 201
Uttar Pradesh Children Act, 1951 — Section 2(4), 27

Citation : (2002) CriLJ 1529

Hon'ble Judges : Onkareshwar Bhatt, J;O.P. Garg, J

Bench : Division Bench

Advocate : Amar Jeet Singh, A.G.A. and Pradeep Pandey, for the Appellant; G.S. Chaturvedi and Samit Gopal, for the Respondent

Final Decision : Dismissed

Judgement

1. It is a case in which hair raising gruesome crime was executed in a most dastardly and horrendous manner. As many as nine persons lost their lives on account of homicidal act and seven persons (four from the side of the prosecution and three on the side of defence) received injuries from the formidable weapons of assault.

2. The incident had taken place on 19th June, 1973 at about 10 a.m. in Village Dangipur Tola Bharpur of district Gorakhpur. In all 53 persons were prosecuted for the offence punishable under Sections 147 148 302 307 324 201 with the aid of Sections 149 and 395, I.P.C. Out of them two died during the trial, surviving 51 accused persons were put up for trial. 25 accused persons who are covered by appeal Nos. 996 of 1976 and 1228 of 1997 have been convicted on various counts and sentenced to varying prison terms. The remaining 26 accused have been acquitted. Against the order of acquittal the State has preferred an Appeal No. 1874 of 1976. Out of the convicted accused appellants Suraj Bali son of

Nabalak and Ram Kishun son of Baldeo died during the pendency of these appeals. Therefore, there are only 23 surviving convicted appellants.

3. Some of the accused persons at the time of the incident were armed with firearms, Pharsas and spears. They are alleged to have resorted to indiscriminate use of their respective weapons.

4. The genesis of the crime is to be found in the deep seated enmity between the strife torn two factions in the village. There were two dominating groups of Kewats and Ahirs in the village. Prior to the incident there was an election to the post of Sabhapati, Bishunpur Buzurg, Murari Lal was a candidate of the Kewat community while he was opposed by Sant Gulab, a leader of Ahirs. They were face to face and had the solid backing of the members of their respective communities. Ultimately, the result of the election went in favour of Murari Lal who was declared elected as Sabhapati. There arose a wide gulf in the already existing acrimonious relations between the two communities. As a matter of fact, sharp embitterment resulted in a wrangle giving rise to cross-cases. In course of time election to the post of Block Pramukh was notified. Murari Lal who was elected as Sabhapati of Bishunpur Buzurg was one of the contesting candidates for the post of Block Pramukh. He was opposed by Kamleshwar Dhar Dubey. With a view to settle the score and to avenge the defeat. Sant Gulab, a leader of Ahirs fell in the fold of Kamleshwar Dhar Dubey and extended him full support. The victory of Murari Lal as Block Pramukh added fuel to the fire. The Ahir community which was beaten twice could not digest the success of Kewat community. Murari Lal leader of Kewat community and who had come to occupy the twin posts of Sabhapati and Block Pramukh was murdered in May, 1973. Sukh Nath, Shaukat, Hari, who are injured witnesses in the present case and some others were prosecuted for the murder of Murari Lal. Three days prior the date of the present incident, the above named accused involved in the murder of Murari Lal were released on bail. The members of Kewat community felt incensed and enraged on account of the release on bail of the alleged murderers of Murari Lal. After the murder of Murari Lal, his brother Chhotey Lal, one of the convicted appellants, assaulted the leadership of the members of Kewat community.

5. On the fateful day i.e. 19th June, 1973, which was Tuesday on which weekly market is held in village Dangipur, Bhagwan Dhar Dubey, brother of Kamleshwar Dhar Dubey and his friends joined Sukhi Nath P.W. 1 and others for the specific purpose of playing cards. It was noticed that certain members of the Kewat community were assembling at the house of Chhotey Lal which is towards the north of the house of Sukhi Nath. After some time a body of 20-25 persons armed with guns and other weapons, reached the house of Sukhi Nath. They hurled abuses. Sukhi Nath asked Chhotey Lal to cool down and not to pick up unnecessary quarrel. Chhotey Lal aimed his gun at Sukhi Nath. Imbued with a feeling of self preservation Sukhi Nath went out of his house and ran for safety. He was followed by his brother Suraj Nath and Bhagwan Dhar Dubey, Ganeshi, Shaukat, Hira and five other companions of Bhagwan Dhar. They were pursued

by Chhotey Lal and his party men, shouting that time has come to avenge the murder of Murari Lal. Sukhi Nath and others who were joined by Hari PW 3 entered into the house of one Sajjan Lal in village Bhaironpur, a helmet of village Dongipar. They closed the doors of the house of Sajjan Lal from inside. Sukhi Nath, Suraj Nath, Hari and Shaukat climbed on the top of the house of Sajjan while others went in hiding inside the house. Later on the house of Sajjan came to be surrounded by a band of about 100-125 persons. They were armed with guns, country made pistols, Pharsas, Ballam and most of them are carrying lathis. A few persons out of the mob climbed upon the roof of the house of Hira Harijan, near the house of Sajjan Lal and started pelting brick-bats and throwing Khapras, Sukhi Nath and others retaliated in the same manner. Lal Dhar and Nanda (since deceased) armed with guns also reached at the top of the roof of the house of Hira Harijan. They opened fire aiming at Sukhi Nath and others. Sukhi Nath was injured, Sukhi Nath and others jumped down in the courtyard of Sajjan Lal and joined Bhagwan Dhar Dubey and others who were already in the hiding. Thereafter some of the accused persons climbed up the roof of the house of Sajjan Lal. Finding that Sukhi Nath and others were hiding in the kachcha portion of the house of Sajjan Lal, the accused persons removed the Khapras of the kachcha roof and opened fire from the hole made by removing the Khapras. It so happened that Bhagwan Dhar Dubey made entreaties and requested Chhotey Lal to spare his life. Chhotey Lal accused permitted Bhagwan Dhar Dubey to leave the house along with his companion. They along with Suraj Nath, Hari, Ganeshi and several others came out of the house. On the exhortation of Lal Dhar, the abovenamed persons, who were leaving the house of Sajjan Lal fell prey of the mob fury and were killed, Sukhi Nath, Shaukat and Hari injured reached the grove in Hakkabad where Mewa Lal, nephew of Hari informed him that the mob has ransacked and looted the house of Sajjan Lal and that it has also dragged the dead bodies towards the house of Chhotey Lal. They were also informed that mob was out to damage the house of Chhotey Lal. This fact raised the suspicious in the mind of Sukhi Lal that some false case is going to be concocted against them. Sukhi Lal accompanied by Shaukat, Hari and Mewa Lal went straight to the Police Station Khorabar and Lald a written report at 2 p.m. naming 55 persons as accused. The investigation of the case ensued. Out of 55 named accused persons in the first information report, charge sheet was submitted against 53 of them.

6. All the 53 accused persons were charged of the offence punishable under Sections 302 149 395 307/149 324/149 and 201/149, I.P.C. At the trial 3 injured witnesses namely Sukhi Nath, PW 1, Shaukat Ali, PW 2 and Hari PW 3 were examined besides a host of other eye-witnesses namely Ram Nawal, PW 4 Ram Sajjan, PW 5, Sajjan Lal PW 6 and Yogendra Prasad PW 7. The other witnesses who have either identified the dead bodies or in any other manner assisted during the course of investigation are Ram Awadh PW 21, Ganga Prasad PW 24, Sunder PW 27 Autar PW 32 and Mewa Lal PW 33. One of them, Avtar PW 32 turned hostile and did not support the prosecution case. He was, therefore,

subjected to cross-examination.

7. The formal witnesses in the case are Dr. Brijendra Kumar, Medical Officer, PW 8 who conducted autopsy on dead body of Suraj Nath, Vashistha.Singh A.S.I. PW 9 was initially associated during the course of investigation. PW 10 Shiv Dhar Dwivedi is the person who took the photographs of the dead bodies. The injured Sukhi Nath, Shaukat and Hari were medically examined on 19-9-1973 by Dr. V.P. Gupta PW 11, Dr. K.C. Kapoor, PW 18 the then Dy. C.M.O. District Hospital Gorakhpur conducted post mortem of the dead body brought by constable Param Hans Singh. S.P. Misra, PW 16 is the Balistic Expert C.I.D. Lucknow. The remaining prosecution witnesses are police officials who were in one way or the other associated with the investigation of the case and proved the steps taken by them. Mukeshwar Prasad Singh, Inspector C.I.D. PW 35 was the second Investigating Officer from whom the thread of investigation was picked by Ram Bhuwan Singh PW 38 and ultimately the investigation was concluded by Mohammad Khan, Inspector C.I.D. PW 40. He submitted charge sheet against 53 accused persons.

8. In defence 4 witnesses namely Jagjeet Singh DW 1 who proved the entries in the G.D., Dr. S.C. Tripathi, DW 2 Radiologist in the District Hospital Gorakhpur, Dr. M.S. Hussain DW 3 who medically examined accused Achhe Lal, Parohi and Ram Prit and Dr. A.K. Gupta DW 4 who x-rayed Achhe Lal and Parohi, were examined.

9. Two of the accused persons, namely, Lal Dhar and Nanda died during the course of trial. The learned Sessions Judge convicted 25 accused persons who are appellants before this Court in Appeals Nos. 966 and 1228 of 1976 and acquitted 26 accused persons who are respondents in Government Appeal No. 1874 of 1976.

10. All the 25 accused persons have been convicted u/s 302 read with Section 149, I.P.C. All of them have been sentenced for the prison term of life. They have also been convicted u/s 395, I.P.C. for having committed dacoity in the house of Sajjan Lal and each one of them has been sentenced to undergo seven years, rigorous imprisonment.

11. Besides global sentence of life imprisonment for the offence punishable u/s 302 read with Section 149, I.P.C. and 7 years rigorous imprisonment for the offence punishable u/s 395, I.P.C, the convicted accused persons have further been convicted and sentenced under Sections 307 324 and 201 read with Section 149, I.P.C. for varying prison terms of 4 years, 1 year and 4, years respectively on the basis of individual role. All the sentences are to run concurrently.

12. For the convicted appellants, Sri Gopal Chaturvedi, Senior Advocate, assisted by Sri Samit Gopal and for the acquitted appellants Sri Amar Jeet Singh learned A.G.A. assisted by Sri Pradeep Pandey have been heard at considerable length. In our quest to reach the truth we have thoroughly waded the voluminous record of the case.

13. It is an indubitable fact that nine persons namely Chikori, Prabhu, Suhagi, Mohan Lal, Ganeshi, Suraj Nath, Tota, Hira and Bhagwan Dhar Dubey lost their lives in the incident aforesaid. The dead body of Hira was thrown in river Mailoni Bandh and could not be recovered. Besides the deceased, four persons, Sukhi Nath, Shaukat Ali, Hari and Smt. Prabhawati received injuries. Sukhi Nath and Shaukat sustained fire arm injuries while Hari had an incised wound, a scabbed abrasion, a contusion and swelling. Smt. Prabhawati had two injuries in the form of traumatic swelling and a scabbed abraded contusion. Three accused persons viz. Achhe Lal, Ram Prit and Parohi received injuries. All these three persons besides others also received fire arm injuries. A very satisfactory and plausible explanation has been offered by the prosecution which has been accepted by the learned Sessions Judge that the accused persons received injuries on account of the confusion and melee from the arms which were being used by the other co-accused persons. The prosecution witnesses were not carrying any weapon or fire arm. They were taken aback and had, as a matter of fact, took to their heels to find out the place of safety when they saw that the accused persons have come prepared to avenge the murder of Murari Lal. In these circumstances there is no escape from the conclusion that the 3 accused persons received injuries from the weapon or fire arm of the co-accused persons who had resorted to indiscriminate firing and assault.

14. The learned Sessions Judge by a very detailed, reasoned and well discussed judgment has concluded that the accused persons had the see through motive to commit the crime. It was virtually a caste war since Murari Lal belonging to Kewat community who had been elected initially as Sabhapati and lateron as Block Pramukh, was murdered by members of Ahir community, the accused persons with a view to wreck vengeance took the extreme step resulting in the annihilation of 9 human lives and seriously injuring 4 persons.

15. The learned Sessions Judge who tried 51 persons has adopted two broad parameters in finding the accused persons guilty or otherwise. The first guiding principle adopted by him is that it would be safe to convict only those accused persons against whom some overt act is proved and secondly there are at least 3 eye witnesses to establish the participation or overt act of each one of the accused persons. Both the sets of the learned counsel for the convicted and the acquitted appellants criticized the standard of proof adopted by the learned Sessions Judge. He urged that it does not find support from any provisions of law or precedence. The learned A.G.A. on behalf of the State urged that if the yard stick adopted by the learned Sessions Judge is accepted in that event no accused, however grave crime may be, could be punished if there are less than 3 eye witnesses. Sri Amar Jeet Singh learned A.G.A. painstakingly argued that even the testimony of lone witness, if otherwise inspires confidence, is sufficient to base the finding of conviction. According to him there are as many as five eye-witnesses out of whom 3 are injured and if any one of them or more have supported the prosecution version, the order of conviction should have been the normal result.

16. We have given thoughtful consideration to this matter. It is true that there is no law which restricts or limits the corroboration of a particular fact by at least three eyewitnesses. If the evidence of witnesses is of such quality that implicit reliance can be placed upon it, his sole testimony may plausibly and rightfully be made the foundation for conviction. In the instant case the circumstances are inordinate and the rule of thumb cannot be applied. It was a body of about 100-125 persons out of which the names of accused persons were culled out. The house of Sajjan Lal in which some of the victims had taken shelter was surrounded by a mob. In the case of mob fury it is very difficult to ascertain the role of assailants and to recognize them. It was for this reason that out of 100-125 persons only 55 could be named in the first information report. All those persons who were nominated as accused cannot be equated with those persons who have not actually taken the part in the commission of the crime. Therefore, a very cautious/circumspect approach had to be adopted by the trial Court.

17. In the backdrop of the hostility between the parties and over zealousness to falsely rope in certain persons of the warring community, it was necessary to deviate from the normal rule of appreciation of evidence i.e. it is the quality of evidence and not the number of witnesses which should weigh. The principle of appreciation of evidence adopted by the learned Sessions Judge has to be commended rather than condemned. Those persons who had not exhibited any overt act and were not possessed of any weapon and fire arm, necessity, had to receive a separate treatment. Their cases could not be equated with the accused persons who had come armed with an avowed object of committing the aggression.

18. There were 25 accused persons who were found guilty by the trial Court. All of them have appealed. During the pendency of the appeal, as said above, two convicted accused persons Suraj Bali and Ram Kishun died. There are only 23 convicted accused persons whose case we have to consider with reference to the evidence led at the trial.

19. Out of 23 convicted appellants, 13 of them were variously armed as has been stated by 3 or more witnesses. They were (1) Chhoey Lal (Gun) 2. Om Prakash (Pharsa) 3. Chandra Bhan (Country made pistol) 4. Ram Naresh (Country made pistol) 5. Ram Briksh (Country made pistol) 6. Bhagelu (Pharsa) 7. Bans Raj (Pharsa) 8. Achche Lal (Spear) 9. Parohi son of Khaderu (Country made pistol) 10. Prohi son of Santu (Spear) 11. Prem Sagar alias Prem (Spear) 12. Ram Prit Kurmi (Spear) and 13. Tribhwan (Spear). The remaining 10 convicted appellants were either carrying lathis or were un-armed. They are (1) Ram Surat, (2) Sri Bhagat, (3) Shiv Poojan alias Poojan, (4) Bharosa, (5) Ramman alias Bipat, (6) Pradeshi (7) Ram Pat, (8) Ram Babu alias Ram Dayal, (9) Ram Dayal and (10) Ram Hit alias Chirkut. Some of the convicted appellants appeared at the house of Sukhi Nath right "in the beginning while some of them joined them later on and took part one way or the other in the commission of the crime. Some of them climbed up the roof of Hira Harijan, whose house is in the vicinity of the house of

Sajjan Lal where Sukhi Nath injured and others took shelter. Some of the accused persons climbed over the roof of the house of Sajjan Lal and removed Khapras with a view to jump down and to use their fire arms. They had also went down the house of Sajjan and ransacked and looted his belongings. The learned Sessions Judge has specified the role of each of the convicted appellants with reference to the witnesses who have spoken about their overt acts. We have appraised the evidence on record and scanned the findings of the trial Court and are satisfied that the order of conviction of each one of the appellants cannot be said to be based on flimsy ground. The Learned Sessions Judge has rightly come to the conclusion that all the 23 surviving appellants were members of the unlawful assembly and were out to prosecute the common object of the assembly.

20. Samit Gopal learned counsel for the convicted appellants urged that the witnesses examined by the prosecution cannot be said to be independent and impartial and obviously had an axe to grind in the matter, inasmuch as all of them belong to the adversely group. In substance the argument was that no independent witness has been examined. This submission does not go too far. Obviously the deep seated enmity between the two groups of communities germinated the commission of the crime. No person other than that of Ahir community could be a prosecution witness as all the accused persons belong to Kewat community. Even though all the prosecution witnesses are of the same community and in one way or the other related to each other, the fact remains that their testimony cannot be rejected merely on the ground of partiality. At best the Court has to be cautious in appraising the evidence of such witnesses and if presence of a witness at the time of the incident is beyond doubt, his testimony has to be given due weight and consideration. In the instant case, as said above, there are at least three injured witnesses namely Sukhi Nath, Shaukat Ali and Hari. Their presence at the time of the incident, therefore, is well established. They have proved the presence of Ram Nawal, PW 4 and Ram Sajan PW 5 at the time of incident besides other witnesses. The testimony of Ram Nawal and Ram Sajan whose presence has been fully established cannot be discarded. All these witnesses have clearly stated that the incident had taken place in their full view and that at the time of the incident it was brilliant light of the day and therefore, there was hardly any possibility of mistaking identity of all the accused persons out of whom 23 survive, have been assigned specific roles. These accused persons who were armed with gun, country made pistol, pharsas and spear have been recognised by three or more witnesses. There is ample corroboration and believable evidence of the witnesses who have spoken about the specific role played by each one of the 23 convicted accused persons. We have read and re-read the evidence of the three injured witnesses namely Sukhi Nath, Shaukat Ali and Hari as well as that of Ram Nawal and Ram Sajan and find that their testimony has a ring of truth. Whatever they have stated is within the realm of reality. They have established that the occurrence had taken place in the manner as it has been put up by the prosecution. The first information report and the medical evidence lend adequate assurance to their testimony.

21. On behalf of the convicted appellants it was urged that at least those accused who were not carrying any weapon or say were un-armed should have been given the benefit of doubt as it cannot be positively be said that they were the members of the unlawful assembly as defined u/s 141, I.P.C. with the remaining accused persons who were carrying the fire arms and other formidable weapons of assault. At the first flush, this submission appeared to be quite attractive but on deeper consideration and scrutiny, we find that all those convicted accused persons who were not carrying any arms such as, Ram Surat, Sri Bhagat, Shiv Poojan alias Poojan, Bharosa, Ramman alias Bipat, Pradeshi, Ram Pat, Ram Babu alias Babu Ram, Ram Dayal and Ram Hit alias Chirkut have been assigned the specific overt acts. Even though these persons were not armed with any lethal weapon they have taken active part in the commission of the crime along with other co-accused persons. Some of them climbed over the Khaprail of Sajjan Lal Sahu and removed the khaprail pieces. A few of them pelted brickbats while the remaining ones surrounded the house of Sajjan Lal and were moving about with the other co-accused persons who were armed with weapons and had hand in looting the belongings of Sajjan Lal and others. In respect of those persons who had the com-mon object and were members of unlawful assembly, no further evidence of actual overt act on their part is required as with the aid of Section 149, I.P.C. they are liable to be convicted for the appropriate offence.

22. Sri Gopal Chaturvedi learned Senior Advocate, pointed out that the convicted accused Ramman alias Bipat, Pradeshi, Ram Pat, Babu Ram alias Ram Babu, Ram Dayal Ram Hit alias Chirkut who were completely unarmed cannot be said to be members of the unlawful assembly and therefore, they should have earned acquittal. As regards these six convicted persons about whom specific argument was advanced, we have shifted the evidence. Having done so, we find that the convicted accused Ramman alias Bipat and Pardeshi have been specifically assigned the role of climbing over the roof of Hira Harijan. They had also entered the house of Sajjan Lal and looted it. As against the convicted accused Ram Pat, Ram Babu alias Babu Ram and Ram Dayal, specific overt act has been assigned to them, inasmuch as they were found dragging the dead bodies of the persons who have been murdered to take them to the house of Chhotey Lal, accused who had taken the leading role in the whole incident. As regards Ram Hit alias Chirkut it has been said that he was taking part in the committing assault. Therefore, the above named six persons, in one way or the other, have taken active part in the commission of the crime. They cannot be said to be idle spectators having nothing to do with the unlawful assembly. On the other hand the learned Sessions Judge has rightly come to the conclusion that the accused persons who were not armed were the member of the unlawful assembly and have further taken part in the commission of the crime in one way or the other. When once a finding is recorded that they were members of the unlawful assembly, it was immaterial whether they have indulged in any overt act or not.

23. The other limb of the argument of the learned counsel for the convicted appellants is that there are at least three convicted accused persons namely Om

Prakash, Babu Lal alias Babu Ram and Prern Sagar alias Prem who were minors at the time of the incident and, therefore, they were entitled to the benefit under the provisions of the U.P. Children Act, 1951. This submission is founded on the basis of the fact that these three persons had described their age in their statements recorded u/s 313, Cr.P.C. as follows :

-----	S.L.	Name of the
Age stated by him in Observation of the Age at Convicted his statement under	learned Sessions the time Accused Section 313, Cr. P.C./Judge of incident Date	of
Statement	i.e.	19-6-73

-----	1. Om Prakash 15	
years/6-2-1976	Appeared to be 14 years	17 to 18 years
2. Babu Lal 18		
years/6-2-1976	Appeared to be 15 years	18 years
3. Prem Sagar 17		
years/3-2-1976	Appears to be 15 years	@ Prem 18 to 20 years

----- 24. Sri Samit Gopal urged that that each, of one of the three accused persons named above was below 16 years of age at the time of the occurrence. Therefore, they were entitled to get the benefit of the provisions of the U.P. Children Act, 1951. In substance the assertion was that each one of three accused persons was a "child" within the meaning of Section 2(4) of the Act and in view of the Section 27 of the said Act he could not be sentenced for imprisonment along with other co-accused persons. In support of his contention Sri Samit Gopal placed reliance on the decisions in Jayendra and another Vs. State of Uttar Pradesh, ; Bhoop Ram v. State of U.P. 1989 (26) All Cri C 285 : 1990 ALJ 65 (SC); Jagveer Singh v. State of U.P. 1992 (29) All Cri C 658; Bhola Bhagat v. State of Bihar 1997 (35) All Cri C 835 : AIR 1998 SC 236 which have been discussed and considered in a Division Bench recent decision of this Court in Babu Khan v. State of U.P. 2000 (41) All Cri C 244.

25. Sri Amar Jeet Singh learned A.G.A. placed reliance on the decision of the Apex Court in the case of Arnit Das Vs. State of Bihar, and urged that from a composite reading of the provisions of Sections 3 8 and 32 of the Juvenile Justice Act, 1986 it would be apparent that the juvenility of an accused is to be determined with reference to the date which he was brought to the Court or the Competent Authority. We have closely studied the said decision and find that in the same decision it has been specifically held that an enquiry for determining the age of an accused has to be with reference to the date on which the offence was committed. There are catena of decisions of the Apex Court as well as other High Courts, (which is not necessary to recount, as it would unnecessarily burden this judgment) by which it is well established that juvenility of an accused or his age has to be determined with reference to the date of the offence. The incident in the present case had taken place on 19th June, 1973. The age of the accused persons who claimed the benefit of the U.P. Children Act, has to be reckoned with reference to the aforesaid date of occurrence.

26. It may be made clear that no evidence worth the name either documentary

or oral was led at any stage of the trial (except at the time of statement of the accused persons u/s 313, Cr. P. C.) to indicate that the accused Om Prakash, Babu Lal alias Babu Ram and Prem Sagar alias Prem were below 16 years of age on the date of the incident. Therefore, the age is to be determined with reference to the age as disclosed by them in their statements u/s 313, Cr. P. C. Sri Samit Gopal urged that the undisputed age or the estimated age as per the observation of the learned Sessions Judge incorporated in the statement u/s 313, Cr. P. C. has to be taken as correct in the absence of any evidence to the contrary and if one goes back to the date of the occurrence, the above-named three accused persons would obviously be found to be less than 16 years of age. As an example Sri Samit Gopal urged that the case of Babu Lal alias Babu Ram may be considered. He has disclosed his age as 18 years in his statement u/s 313, Cr. P.C. made on 6-2-1976. The learned Sessions Judge has made an observation that the age stated by Babu Lal alias Babu Ram was correct. In this manner the age of Babu Lal alias Babu Ram on the date of incident i.e. 19th June, 1973 would come to 15 years i.e. in any case less than 16 years. Sri Amar Jeet Singh, learned A.G.A. has some reservation on this issue primarily on the ground that no plea of juvenility was taken by the three accused persons at any stage of the trial and, therefore, the belated attempt of these accused persons in their statements u/s 313, Cr. P.C. should not be accepted. This submission of Sri Amar Jeet Singh, learned A.G.A. is clearly in opposition to the law laid down by this Court in the case of Babu Khan (2000 (41) All Cri C 244 (supra) Paragraph 15 of the said decision may profitably be quoted to allay the doubts.

15. A Full Bench of the Patna High Court in the case Krishna Bhagwan Vs. State of Bihar, considered the question relating to the determination of the age of accused and the belated raising of that plea. The Full Bench opined that a plea that accused in question was a "child" within the meaning of the Act can be entertained at the appellate stage also and should not be overlooked on the technical grounds. It further opined that taking into consideration the aim and intention of the Act benefit should not be denied to an offender where by the time the trial commenced or concluded the accused had ceased to be juvenile, although when the offence was committed he was a juvenile within the meaning of the Act. The ratio laid down in the case of State of Haryana v. Balwant Singh (1993) (1) SCC 409 was that if the plea that accused was child has not been raised before the committal Court as well as before the trial Court, the High Court could not merely on the basis of the age recorded in the statement u/s 313, Cr. P.C. conclude that the accused was a "child" within the definition of the expression under the Act on the date of the occurrence, in the absence of any other material to support that conclusion. In the case of Bhola Bhagat (supra) the Apex Court, while distinguishing the decision of Balwant's case, however, observed that the earlier judgment of the Apex Court in Gopinath Ghosh Vs. The State of West Bengal, : and Bhoop Ram v. State of U.P. (XXVI) (1989) ACC 285 (SC), were not noticed or considered in Balwant Singh's case (supra) and the views expressed in Gopi Nath's case and Bhoop Ram's case 1990 AIR 65

received support from the three-Judges Bench decision in the case of Pradeep Kumar, Krishan Kant and Jagdish Vs. State of U.P., wherein it has been held that an accused cannot be denied the benefit of the provisions of the Act on the basis of Balwant Singh's case. In the case of Bhola Bhagat AIR 1998 SC 236 the correctness of the estimate of the age as given by the trial Court was neither doubted nor questioned by the State either in the High Court or in the Supreme Court and the parties accepted the correctness of the estimate of the age of appellants as given by the trial Court and it was held that the three appellants should not be denied the benefit of the provisions of a socially progressive statute.

27. In view of the above well embedded legal position we have to determine whether the three accused persons namely Om Praksh, Babu Lal alias Babu Ram and Prem Sagar alias Prem fall within the ambit of the expression "child" as defined u/s 2(4) of the U.P. Children Act i.e. with reference to the date of occurrence. All the above three accused persons, as said above, disclosed their age in the statements recorded u/s 313, Cr. P.C. Om Prakash accused gave out his age to be 15 years on 6-2-1976. The learned Sessions Judge has made an observation, that he appeared to be 17-18 years of age. If the age of Om Prakash as observed by the learned Sessions Judge is taken to be 17 years, his age on the date of occurrence would be around 14 years. The age of Babu Lal alias Babu Ram accused, as discussed above, was around 15 years, Prem Sagar alias Prem disclosed his age as 16 years on 3-2-1976. The observation of the learned Sessions Judge is that he was aged between 18-20 years. If the age of Prem Sagar alias Prem is taken to be 18 years, his age on the date of the occurrence would be 15 years. In this manner all the above-named three accused were less than 16 years of age on the date of the incident i.e. 19th June, 1973 and consequently, they fall within the ambit of expression "Child" as defined in Section 2(4) of the U.P. Children Act. Section 27 of the said Act prohibits sentence and imprisonment for any term to an accused who was a "child" as determined on the date of occurrence. Each one of the three accused persons who was undoubtedly a "Child" within the meaning of Section 2(4) of the U.P. Children Act is now more than 40 years of age. He cannot be sent to any approved school or Children's Home under the provisions of the said Act for being detained there. Therefore, they cannot now be committed to jail to serve out the various terms as awarded by the learned Sessions Judge. In view of the various decisions of the Apex Court and this Court referred to above, the sentence of imprisonment imposed upon these three accused persons has to be quashed. It appears that this aspect of the matter was not canvassed before the learned Sessions Judge otherwise he would not have committed these persons to various prison terms.

28. In view of the above discussion the finding of conviction of the appellants in Criminal Appeal Nos. 966 of 1976 and 1288 of 12976 cannot be interfered with. The learned Sessions Judge has rightly appraised the evidence to record the order of conviction. Therefore, the order of conviction and sentence passed by

the learned Sessions Judge has to be maintained. However, the order of sentence in respect of the three convicted appellants, namely Om Prakash son of Ram Daur, Babu Lal alias Babu Ram s/o Bedhan and Prem Sagar alias Prem s/o Sukhdeo, who have been adjudged as juveniles on the date of occurrence cannot be committed to jail to serve out the sentence passed against them. The order of sentences in respect of these three convicted appellants has to be quashed.

29. Now it is the time to deal with the Government Appeal No. 1874/1976 against the order of acquittal passed by the learned Sessions Judge in favour of the 26 accused persons, namely, Barat s/o Bechan, Ganga Kewat s/o Tirath, Mewa s/o Raghubir, Raja s/o Ram Kewat s/o Ramdhari, Sheo Nath Bania alias Surya Nath, Kodai Kewat s/o Ballia, Darshan s/o Petu, Sita Ram s/o Parmeshwar, Ram Ratan s/o Baldeo Ram, Prit Kewat s/o Ram Kishun, Ramdeo Bania s/o Gunun, Tilak Kewat s/o Dode, Santraj Kewat s/o Ram Dhan, Khaderu s/o Lochan, Sudhlu Kewat s/o Nageshar, Dina Nath s/o Ram Subhag, Swami Nath s/o Ram Subhag, Ram Daras Harijan s/o BuLal Harijan, Santu Kewat s/o Kishnu, Koil alias Razi Ahmad s/o Gafur, Rajendra Kurmi s/o Ramdeo, Kamla Kewat s/o Badri, Tilak Kewat s/o Bukhu, Mathar s/o Khilalwan, Mahabir s/o Gukul KoLal s/o Surya Bali. Sri Amarjeet Singh, learned A.G.A. took pains in asserting that the learned Sessions Judge has committed a grave error in not convicting these persons by applying a self-made mechanical test of corroboration of ocular account by at least three witnesses (this submission has been dealt with above) and acquitting those accused persons to whom no overt act has been assigned. The submission of the learned A.G.A. proceeds on the assumption that since the acquitted persons were members of the unlawful assembly, they were required to be convicted even though no overt act was assigned to ? them. It was urged that Section 149 of the Indian Penal Code provides for the guilt of every member of an unlawful assembly, if in prosecution of a common object, an offence is committed or which the members know would be likely to be committed in prosecution of that object. It is well established legal position that to convict an accused with the aid of Section 149 Indian Penal Code, his being a member of an unlawful assembly within the meaning of Section 41, Indian Penal Code is sufficient. In this connection, a reference may be made to the following observations of the Apex Court in Lalji and Others Vs. State of U.P.,

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 hand 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 assembly 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.

Another decision of the Apex Court in *State of A.P. Vs. Thakkidiram Reddy and Others*, is worth mentioning. Although each case is to be decided on its own facts, the Apex Court invoked the provisions of Section 149, Indian Penal Code to maintain the conviction of the accused persons in *State of Haryana Vs. Tek Singh and Others*, by observing as follows (at Pp. 1745-46 of AIR):

They came all of a sudden armed with the deadly weapons and attacked the victim, who rushed to take shelter in the house. In such a fact-situation, some contradictions as to who assaulted whom, with what weapon and whether it was by the sharp edge or blunt side of the gandasa are bound to be there, particularly when the blows are given in quick succession, it would be against the ground reality to expect the witness to depose exactly on which part of the body the blow landed. In these circumstances, even if there is some exaggeration with regard to the infliction of blows, it would hardly be a ground for rejecting their testimony. It may be futile to expect an exact description of the details of the attack on the victims by each accused from the widow of one of the deceased who witnessed the dastardly act or from eye-witnesses. The accused were known to the widow and the witnesses. Their names were disclosed immediately. Hence, the presence of the accused at the scene of offence was established. They all were armed with deadly weapons and came together. In such a situation, when the presence of the accused who were armed with deadly weapons is established beyond doubt, Sections 148 and 149, I.P.C. would come into operation and they would be liable for the offence.

Similar view was taken by the Apex Court in a recent decision in *Jaswant Singh v. State of Haryana* 2000 SCC 991 : AIR 2000 SC 1833. There can be no quarrel with the firm legal position as adumbrated in the decisions aforesaid that if five or more persons have formed an unlawful assembly, each one of the members is responsible for the acts of another even though he himself has not committed any overt act. Membership of an unlawful assembly is sine qua non for inflicting the punishment.

30. In the present case, however, the things are altogether different. It was not a case where entire body of 100-125 persons has come together armed with weapons. Initially, there were only about 20-25 accused persons who had appeared at the house of Sukhi Nath, the first informant. Sukhi Nath and others fled from there and ultimately took shelter in the house of Sajjan Lal in Bhaironpur another hamlet. The entire crowd collected to the north of the house of Sajjan Lal, as stated by Sukhi Nath, P.W. 1. He has made it clear that the

accused persons and certain other spectators were standing to the north of the house of Sajjan Lal. All of them were standing at some distance and only few of them mustered the courage of coming closer to the house of Sajjan Lal. Learned Sessions Judge has recorded a finding that the possibility of the innocent and idle spectators having been named in the First Information Report as accused cannot be ruled out. Learned Sessions Judge has been cautious enough and has sifted the case of each one of the accused persons on the basis of the parameters adopted by him which cannot be said to be mechanical or unreasonable. When grain is to be segregated from the chaff and the body of the accused persons is quite large, some sort of parameters or say sifter has to be applied.

31. The acquitted accused persons, though they were named in the First Information Report, were standing at a distance from the house of Sajjan Lal, mixed up with the other accused persons, they were not carrying any weapons or committed any overt act. Their position was merely that of silent or idle spectators. The crucial question to be determined in such a case is whether the assembly consisted of 5 or more persons and whether the said persons entertained one or more of the common objects specified in Section 141. While determining this question, it becomes relevant to consider whether the assembly consisted of some persons who were merely positive witnesses and had joined the assembly intending to entertain the common object of the assembly. By no stretch of imagination, in the absence of evidence the acquitted respondents in Government Appeal, can be termed to be the members of unlawful assembly within the meaning of Section 141 of the Indian Penal Code and, therefore, the learned Sessions Judge was right in acquitting them.

32. It is well settled principle of law to be followed by the appellate Courts considering an appeal against an order of acquittal to interfere only when there are "compelling and substantial reasons" for doing so. If the order is clearly unreasonable, it is a compelling reason for interference. The principle of law was elucidated by the Apex Court in *Ramesh Babulal Doshi Vs. State of Gujarat*, . In paragraph 7, the following observations were made :

While sitting in judgment over an acquittal the appellate Court is first required to seek an answer to the question whether the findings of the trial Court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate Court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate Court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities, it can then and then only - reappraise the evidence to arrive at its own conclusions.

A reference was also made to other decisions of the Apex Court, namely, *Shivaji Sahabrao Bobade and Another Vs. State of Maharashtra*, ; *George and Others Vs. State of Kerala and Another*, and *Jaswant Singh v. State of Haryana* AIR 2000 SC 1833 (supra).

33. We have thoroughly scanned the findings of the trial Court and the reasonings adopted by it and find that no demonstrable perversity is capable of being culled out. The findings which impelled the trial Court to acquit 26 respondents in Government Appeal No. 1874 of 1976 are based on cogent reasons. It cannot be concluded that they are the outcome of any perversity or misreading of the evidence. We do not find any compelling reason to interfere with the order of acquittal passed against the 26 persons by the learned Sessions Judge. We approve his conclusions in acquitting the accused persons who are respondents in the said appeal. In conclusion the Government Appeal turns out to be devoid of any merit and substance.

34. For the reasons stated above, the Government Appeal is accordingly dismissed.

35. The order of conviction in respect of all the convicted accused persons who are-appellants in Appeal No. 966 of 1976 and 1288 of 1976 is maintained. The order of sentence passed against them except the three appellants viz. Om Prakash, Babu Lal alias Babu Ram and Prem Sagar alias Prem, is upheld. Since Om Prakash son of Ram Daur, Babu Lal alias Babu Ram s/o Bedhan and Prem Sagar alias Prem s/o Sukhdeo have been adjudged to be juveniles on the date of occurrence, the order of sentence passed against them has to be quashed and to this extent only their appeal shall stand allowed.

36. The bail bonds of all the convicted appellants except Om Prakash, Babu Lal alias Babu Ram and Prem Sagar alias Prem are hereby cancelled. They shall be taken in custody forthwith to serve out the sentences passed against them. The office shall send a copy of this order to the trial Court for ensuring that the appellants against whom order of conviction and sentence has been maintained, are committed to jail to serve out their respective sentences.

37. The bail bonds of Om Prakash, Babu Lal alias Babu Ram and Prem Sagar alias Prem shall stand discharged. They need not surrender.