

(2013) 04 SC CK 0112

In the Supreme Court Of India

Case No : Criminal Appeal No. 88 of 2007

Subal Ghorai and Others

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 02-04-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 313
Penal Code, 1860 (IPC) — Section 141, 142, 143, 147, 148

Citation : (2013) 4 AD 635 : (2013) AIRSCW 3627 : (2013) 2 ALT(Cri) 197 :
(2013) CriLJ 3626 : (2013) 2 Crimes 137 : (2013) 4 JT 527 : (2013) 5 SCALE
275 : (2013) 4 SCC 607 : (2013) 2 Supreme 597 : (2013) 2 UC 1055

Hon'ble Judges : Ranjana Prakash Desai, J;Aftab Alam, J

Bench : Division Bench

Advocate : Pradip Ghosh, S.B. Sanyal, Tara Chandra Sharma, Neelam Sharma, Rauf Rahim, Ajay Sharma and Rupesh Kumar, for the Appellant; Chanchal Kr. Ganguli, Avijit Bhattacharjee, Bikas Kar Gupta, Soumi Kundu and Anasuya De Biswas, for the Respondent

Final Decision : Disposed Of

Judgement

Ranjana Prakash Desai, J.—The Appellants viz. A1-Subal Ghorai, A2-Bishnupada Ghorai, A3-Ranjit Samanta (since deceased), A4-Sunil Senapati, A5 Pulin Sat @ Samanta, A6-Sudarshan Ghorai, A7-Nemai Ghorai, A8-Biswanath Ghorai, A9-Joydeb Ghorai @ Bhatu, A10-Tarapada Samanta, A11-Bistu Samanta, A12-Bhanu Samanta, A13-Uttam Samanta @ Bhalu, A14-Sambhu Jana, A15-Dipu Samanta @ Dipak, A16-Subal Samanta (since deceased), A17-Dulal Samanta (since deceased), A18-Nentu Dhara (since deceased), A19-Rakhal Dhara, A20-Batul Dhara, A21-Kengal Senapati, A22-Nikhil Senapati, A23-Sibu Pramanik, A24-Dhiren Shee @ Singh (since deceased), A26-Niranjana Das, A28-Sambhu Samanta, A29-Probodh Jana, A35-Satrughna Patra and A36-Duryadhan Patra ("Appellants accused") along with 7 other accused viz. A25-Subal Shee @ Singh, A27-Tapan Pramanik, A30-Padmaloachan Das, A31-Dima Pramanik, A32-Manick Pramanik, A33-Sankar Das and A34-Bhakti Bhusan Maity were tried by the 4th

Court of the Additional Sessions Judge, Midnapore in Sessions Trial Case No. XXIII of May, 1989, for offences punishable under Sections 147, 148, 302 read with Section 149, Section 324 read with Section 149 and Section 436 read with Section 149 of the Indian Penal Code ("the Indian Penal Code").

2. It must be mentioned here that the charge-sheet mentioned the names of 39 persons but learned Additional Sessions Judge commenced the session's trial in respect of 36 persons because out of 39 persons, 3 persons were held to be juveniles. Their trial was separated from that of the remaining 36 persons. For the sake of convenience, we shall refer to the accused as per the numbers assigned to them by the trial court.

3. The prosecution case shall be stated more in detail, a little later. Suffice it to state, at this stage, that the case of the prosecution in short was that on 14/5/1986, the goat of deceased-Hemanta damaged the paddy of A1-Subal. Juvenile delinquent-Gopal and his mother beat the said goat. Juvenile delinquent-Gopal was detained by deceased-Hemanta and, after sometime, he was released. This infuriated the accused. They came to the bund armed with weapons and attacked deceased-Hemanta, deceased-Manik and deceased-Gour, who succumbed to the injuries sustained by them. They also assaulted PW-2 Lakshmi, PW-5 Ananta, PW-12 Jamini and PW-13 Mandakini. PW-1 Promila, the wife of Mohanta Dhara, who witnessed the incident, lodged the FIR. The accused were then arrested and tried as aforesaid. The prosecution in support of its case examined 20 witnesses. In defence, the accused examined 8 witnesses. They denied the prosecution case. A1-Subal Ghorai, A24-Dhiren Shee and A34-Bhakti Bhushan pleaded defence of alibi.

4. After considering the evidence, by judgment and order dated 7/9/1994, learned Additional Sessions Judge convicted the Appellants-accused and A25-Subal, A27-Tapan, A30-Padmaloachan, A31-Dima, A32-Manick, A33-Sankar and A34-Bhakti Maity for the offences punishable u/s 302 read with Section 149 of the Indian Penal Code and sentenced them to undergo imprisonment for life and to pay a fine of Rs. 5,000/-. In default of payment of fine, they were directed to undergo two years rigorous imprisonment. They were also convicted u/s 436 read with Section 149 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for five years and to pay a fine of Rs. 5,000/-. In default of payment of fine, they were directed to undergo rigorous imprisonment for two years. Appellants-A1-Subal, A2-Bistu, A18-Nentu and A21-Kengal were also convicted for the offence punishable u/s 148 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for two years and to pay a fine of Rs. 1,000/-. In default of payment of fine, they were directed to undergo rigorous imprisonment for one year. Appellants A3-Ranjit, A4-Sunil, A5-Pulin, A6-Sudarshan, A7-Nemai, A8-Biswanath, A9-Joydeb, A10-Tarapada, A11-Bistu, A12-Bhanu, A13-Uttam, A14-Sambu, A15-Dipu and A16-Subal Samanta, A18-Nentu, A19-Rakhal, A20-Batul, A21-Kengal, A22-Nikhil, A23-Sibu, A24-Dhiren, A25-Subal Shee, A26-Niranjan and A27-Tapan and 7 others were also convicted for

offence punishable u/s 147 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for two years. Appellants A2-Bistu and A21-Kengal were also convicted for offence punishable u/s 324 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for 2 years and to pay a fine of Rs. 1,000/-. In default of payment of fine, they were directed to undergo rigorous imprisonment for one year. The substantive sentences were ordered to run concurrently.

5. Being aggrieved by the judgment of conviction, an appeal was preferred by the accused. During the pendency of the appeal before the High Court, A3-Ranjit Samanta and A24-Dhiren Shee died. Hence, the High Court recorded that the appeal so far as it related to them had abated. The High Court confirmed conviction and sentence of the Appellants-accused. However, the High Court acquitted A25-Subal Shee, A27-Tapan Pramanik, A30-Padmalochohan Das, A31-Dima Pramanik, A32-Manick Pramanik, A33-Sankar Das and A34-Bhakti Bhusan Maity of all the charges leveled against them. Being aggrieved by the said judgment and order, the Appellants-accused have approached this Court. During the pendency of the instant appeal, A16-Subal Samanta, A17-Dulal Samanta and A18-Nentu Dhara have died. Hence, the appeal has abated as against them.

6. We have heard learned Counsel for the parties and carefully perused the written submissions tendered by them. Mr. Pradip Kumar Ghosh, senior advocate appearing for A1-Subal, A2-Bistu, A4-Sunil, A5-Pulin, A6-Sudarshan, A7-Nemai, A8-Biswanath, A9-Joydeb, A10-Tarapada, A11-Bistu Samanta, A12-Bhanu, A13-Uttam, A14-Sambhu, A15-Dipu, A18-Nentu, A19-Rakhal, A20-Batul, A21-Kengal, A22-Nikhil, A23-Sibu, A24-Dhiren, A25-Subal, A26-Niranjana and A27-Tapan submitted that the prosecution story that because the goat of deceased-Hemanta damaged the paddy of A1-Subal, 200/250 persons gathered at the scene of offence and killed the three Dharas is absurd. It is sought to be substantiated only by the evidence of interested witnesses, the independent witnesses having turned hostile. The prosecution case therefore does not inspire confidence. A1-Subal's defence of alibi was wrongly rejected though credible witnesses were examined by the defence in its support. Counsel submitted that assuming the prosecution case against A1-Subal, A2-Bishnu and A3-Ranjit, A18-Nantu and A21-Kengal who were stated to be carrying weapons and against whom specific overt acts are alleged is proved, even then the case against the remaining accused persons will have to be rejected because they were not armed with weapons. Counsel submitted that PW-2 Lakshmi has improved her statement in the court. She stated that A22-Nikhil assaulted her, but A22-Nikhil was not armed. A22-Nikhil was not even questioned about this in his statement recorded u/s 313 of the Code of Criminal Procedure, 1973 ("the Code"). PW-3 Nilima and PW-4 Sarathi made mistakes in identifying the accused. PW-12 Jamini and PW-13 Mandakini made general allegations. Counsel drew our attention to the evidence of the investigating officer PW-19 P.I. Samrendra Ghosh to point out that PW-2 Lakshmi, PW-3 Nilima, PW-4 Sarathi, PW-7 Pratap Majhi and PW-12 Jamini have made improvements in their statements made in the court. Counsel pointed out

that PW-1 Promila stated that she knows the father's name of only some of the accused and she does not know the addresses of the accused persons but the FIR contains all these details. Counsel pointed out that PW-1 Promila stated in her cross-examination that her statement was read over to her but it was not intelligible to her. It was intelligible to the elder brother of her husband who told her that it was correctly recorded by the police. Counsel submitted that it is clear from all these admissions that the FIR is not a spontaneous document but it is the result of deliberations and afterthought. It is likely that the names of certain onlookers who did not share the common object of those against whom overt acts have been alleged, have been purposely included in the FIR. Counsel pointed out that this Court has held in a series of decisions that in a case in which large number of accused persons are involved and they are sought to be roped in with the aid of Section 149 of the Indian Penal Code on the basis of constructive joint liability, the rule of prudence must be applied. The court has to consider whether it is safe to convict all the accused on the basis of omnibus evidence and if the court does not have before it some materials to lend assurance to the general allegations, then benefit of doubt must be given to the accused. In support of his submissions, counsel relied on the judgments of this Court in *Sherey and others Vs. State of U.P.*, *Akbar Sheikh and Others Vs. State of West Bengal*, *Pandurang Chandrakant Mhatre and Others Vs. State of Maharashtra*, and *Debashis Daw and Others Vs. State of West Bengal*, Counsel submitted that judgments of this Court in *State of A.P. Vs. Thakkidiram Reddy and Others*, and *Lalji and Others Vs. State of U.P.*, cited by the Respondents are not applicable to the present case. They can be distinguished on facts. Counsel pointed out that the trial court has disbelieved the story that the accused poured acid in the mouth of the deceased. This indicates that the prosecution witnesses have exaggerated the case. It would be, therefore, risky to convict the accused persons on the basis of such evidence. Counsel submitted that the prosecution has not successfully established the motive. The prosecution is relying on the alleged identification of the accused by the witnesses in the court which does not inspire confidence. Counsel submitted that in any case, all the Appellants-accused have completed more than 7 years of imprisonment. This fact may be taken into consideration while dealing with the case.

7. Mr. S.B. Sanyal, learned senior advocate appearing for A35-Satrughna Patra, A36-Duryadhan Patra, A28-Sambhu Samanta, A13-Uttam Samanta, A16-Subal Samanta, A15-Dipu Samanta and A19-Rakhal Dhara endorsed the submissions of Mr. Pradip Kumar Ghosh and pointed out that A35-Satrughna, A36-Duryadhan and A28-Sambhu are not named in the FIR and in the statement made u/s 161 of the Code but their names are found in the evidence given before the court. The names of accused A19-Rakhal, A16-Subal Samanta and A15-Dipu have been mentioned in the FIR, but their names have not been mentioned by the eye-witnesses in their statements before the police. Therefore, their evidence cannot be acted upon. PW-7 Pratap Majhi does not mention the names of A3-Ranjit, A2-Bishnu, A6-Sudarsan, A5-Pulin, A14-Sambhu Jana, A4-Sunil as the accused

persons who had assaulted deceased-Hemanta, deceased-Gour and PW-13 Mandakini. Counsel pointed out the omissions in the evidence of PW-2 Lakshmi, PW-3 Nilima, PW-4 Sarathi, PW-5 Ananta, PW-7 Pratap, PW-12 Jamini and PW-13 Mandakini, which have been brought on record by PW-19 P.I. Ghosh. Counsel submitted that when evidence of eye-witnesses PW-2-Lakshmi, PW-3 Nilima, PW-4 Sarathi, PW-5 Ananta, PW-12 Jamini and PW-13 Mandakini is in substantial variance with their statements made u/s 161 of the Code before the investigating officer, their evidence cannot be acted upon. In support of this submission, counsel relied on State represented by Inspector of Police, Tamil Nadu Vs. Sait @ Krishnakumar, Dr. Sunil Kumar Sambhudayal Gupta and Others Vs. State of Maharashtra, and Subhash v. State of Haryana (2011) 2 SCC 715. Counsel submitted that according to the prosecution, 200/250 persons had assembled and the assembly was unlawful. When several persons who had allegedly assembled were unarmed; they did not exhort others and did not co-operate with the named accused, it cannot be said that they shared common object to commit murder. In support of this submission, counsel relied on Dhanna, etc. Vs. State of Madhya Pradesh, , Kuldeep Yadav and Others Vs. State of Bihar, and Waman and Others Vs. State of Maharashtra, Counsel pointed out that there is no clear finding of the High Court that the common object of the assembly was to murder or that the assembly of the persons at all was aware of the object of the three assailants which is a must to convict the accused u/s 149 of the Indian Penal Code. Counsel submitted that in the circumstances, the conviction and sentence deserve to be set aside.

8. Mr. Chanchal K. Ganguli, learned advocate appearing for the Respondent-State submitted that the prosecution has, by leading cogent evidence of eye-witnesses some of whom are injured eye-witnesses, successfully proved that the murder of deceased-Hemanta, deceased-Gour and deceased-Manik was committed by the accused. Counsel submitted that the evidence of PW-15 Dr. Subimal and PW-16 Dr. Tapan corroborates the eye-witness account. The defence could not prove the alibi set up by A1-Subal and A34 Bhakti Bhusan Maity. Counsel submitted that it is true that the eye-witnesses are related to the deceased, but, their evidence cannot be discarded on that count. The evidence of the interested witnesses can be relied upon if it inspires confidence. In this connection, he relied on the judgments of this Court in Brathi alias Sukhdev Singh Vs. State of Punjab, and Shyamal Ghosh Vs. State of West Bengal, . Counsel submitted that the argument that some of the accused to whom overt act is not attributed deserve to be acquitted, must be rejected. Mere presence of a person in the unlawful assembly may fasten vicarious liability on him u/s 149 of the Indian Penal Code. The prosecution is not obliged to prove the specific overt act of each accused. In this connection, he relied on Lalji and Thakkidiram Reddy. Counsel submitted that the identification of the accused in the court is held by this Court in several judgments to be worthy of credence and, therefore, it cannot be discarded. In this connection, reliance was placed on Malkhansingh and Others Vs. State of Madhya Pradesh, and Sheo Shankar Singh Vs. State of Jharkhand and Another,

Counsel further submitted that in a case of this type where several witnesses have been examined, there are bound to be minor discrepancies in their evidence. Such discrepancies are natural. The prosecution story cannot be rejected on that ground. In this connection, counsel relied on *Leela Ram (Dead) Through Duli Chand Vs. State of Haryana and Another, Rammi @ Rameshwar etc. Vs. State of Madhya Pradesh*, and *Shyamal Ghosh Vs. State of West Bengal*, Relying on *Tika Ram v. State of Madhya Pradesh* (2007) 15 SCC 760, counsel submitted that merely because the name of the accused is not mentioned in the FIR, it cannot be concluded that he is falsely involved in the case. There may be other cogent evidence on record to prove his involvement as in this case. Therefore, absence of the names of some of the accused in the FIR must not lead to their acquittal. Counsel submitted that since the prosecution has adduced evidence of eyewitnesses which inspires confidence, alleged absence of motive does not adversely affect its case. In this connection, counsel relied on *Bipin Kumar Mondal Vs. State of West Bengal*, Counsel submitted that it is true that some of the witnesses have turned hostile but it is well settled that the evidence of hostile witnesses need not be discarded as a whole and relevant parts thereof, which are admissible in law, can be used by the prosecution. In this connection, counsel relied on the judgments of this Court in *Sheikh Zakir Vs. State of Bihar*, , *C. Muniappan and Others Vs. State of Tamil Nadu*, *Bhagwan Dass Vs. State (NCT) of Delhi*, *Mrinal Das and Others Vs. The State of Tripura*, and *Bhajju @ Karan Singh Vs. State of M.P.*, Counsel submitted that it is possible that there are some minor instances of defective investigation in this case. But, those defects do not dislodge the substratum of the prosecution story, which is proved by cogent evidence. In this connection, counsel relied on the judgments of this Court in *Visveswaran Vs. State Rep. by S.D.M., . Muniappan and Shyamal Gosh*. Counsel submitted that there is overwhelming credible and clinching evidence against the accused. The prosecution has proved its case beyond reasonable doubt and, therefore, the appeal be dismissed.

9. PW-15 Dr. Paramanick has reproduced the injuries suffered by deceased-Hemanta, deceased-Manik and deceased-Gour. They indicate that they were attacked in a most gruesome manner. The fact that their death was homicidal cannot be and is not disputed. It must also be noted at the outset that the prosecution story that the accused poured acid in the mouth of all the deceased has not been believed by the trial court. Keeping this in mind, we shall proceed to deal with the case.

10. PW-12 Jamini Dhara is the widow of one Ramani Dhara. The couple had five sons viz. Mohanta Dhara, PW-5 Ananta Dhara, Netai Dhara, deceased-Gour Dhara, deceased-Manik Dhara and deceased-Hemanta Dhara. PW-1 Promila Dhara is the wife of Mohanta Dhara. PW-4 Sarathi Dhara is the wife of PW-5 Ananta Dhara, PW-13 Mandakini Dhara is the wife of deceased-Gour Dhara. PW-2 Lakshmirani is the wife of deceased Hemanta Dhara and PW-3 Nilu Dhara @ Nilima Burman is their daughter.

11. The Dharas reside in village Brajaballavpur. The murders took place in the said village on 14/5/1986. The prosecution story is disclosed from the evidence of the complainant PW-1 Promila. According to PW-1 Promila, on the day of incident at about 9/10 a.m., the goat of deceased-Hemanta damaged the paddy of A1-Subal; juvenile delinquent-Gopal and his mother, whose house is in front of the paddy field, beat the goat; PW-3 Nila, daughter of deceased-Hemanta protested; thereupon juvenile delinquent-Gopal slapped her; there was exchange of abusive words; juvenile delinquent-Gopal slapped PW-2 Lakshmi; deceased-Hemanta came there and slapped juvenile delinquent-Gopal, took him to the bund and detained him for sometime and, thereafter, released him. Thereafter, A3-Ranjit roamed the villages Brajaballavpur, Bijaynagar and Ramchandrapur on his motor cycle. According to PW-1 Promila, she heard a sound of conch-shell. Around 200/250 people assembled on the bund equipped with lathis, ballams, tara, iron rod and pipe. They attacked the houses of the Dharas. Deceased-Hemanta, deceased-Manik and deceased-Gour inquired as to what was the matter. A3-Ranjit, A1-Subal, A2-Bistu gave a call to kill them and burn their houses. A1-Subal assaulted deceased-Gour with iron rod, A2-Bistu assaulted deceased-Hemanta with a bamboo tara and A3-Ranjit assaulted deceased-Manik with iron pipe. Deceased-Hemanta, deceased-Manik and deceased-Gour fell down on the ground. PW-1 Promila and Ors. requested A3-Ranjeet, A1-Subal and A2-Bistu not to assault them, but they paid no heed to their request and 10/15 of them started assaulting the deceased and killed them. PW-1 Promila identified A1-Subal, A2-Bistu, A3-Ranjit, A4-Sunil, A8-Biswanath, A19-Rakhal, A20-Batul, A18-Nentu, A21-Kengal, A22-Nikhil, A35-Satrughna, A36-Duryadhan, A9-Joydeb, A7-Nemai in the court. She also identified A34-Bhakti, A30-Padmaloachan, A33-Sankar, A26-Niranjan, A27-Tapan, A31-Dima, A32-Manick, A23-Sibu, A24-Dhiren, A25-Subal Shee, A16-Subal Samanta, A17-Dulal, A12-Bhanu, A28-Sambhu Samanta, A14-Sambhu Jana, A10-Tarapada, A15-Dipu, A5-Pulin and two juvenile delinquents and stated that they co-operated with the other accused in commission of offence. She stated that the hands, legs and chest of all the deceased were fractured to pieces. The accused dragged the deceased to the land of one Ravat Jana and A4-Sunil and A18-Nentu poured some acid like substance in the mouth of the deceased. She stated that A3-Ranjit asked the crowd to burn their houses. The houses of deceased-Hamanta, deceased-Gour, PW-5 Ananta, Mohanta, Netai, Kishori Bera and Prafulla Bera were set on fire by A1-Subal, A5-Pulin, A4-Sunil and others. She stated that their neighbours tried to extinguish the fire with the help of water, but their houses were burnt to ashes. She stated that the police came before dusk, saw the dead bodies; visited the burnt houses and recorded her statement. She stated that after recording her statement, the same was read over to her; her left hand thumb impression was taken on it. She identified the dead bodies and the police took away the dead bodies. It may be stated here that the FIR (Ex-8) was recorded on the basis of her statement.

12. PW-1 Promila's evidence has come under heavy criticism. It is true that she

stated in her evidence that her complaint was read over to her but it was not intelligible to her. It was intelligible to the elder brother of her husband PW-5 Ananta who told her that it was correctly recorded by the police. It is argued that therefore the FIR is not, in fact, lodged by PW-1 Promila but is the creation of PW-5 Ananta and others. It is not possible to accept this submission. We find PW-1 Promila to be a natural and trustworthy witness. She appears to be a courageous lady who has, even after witnessing three gruesome murders, promptly lodged the FIR. She frankly stated that she is illiterate. In our opinion, PW-1 Promila being a rustic and illiterate woman, some allowance must be made for the minor discrepancies in her evidence. Her case that she found it difficult to understand what was being read over to her and, to find out whether her statement was correctly recorded, she took the help of PW-5 Ananta, the brother of her husband has a ring of truth. We find nothing wrong in this exercise. It is also true that she stated that she did not know the father's name of some of the accused and she did not know the addresses of the accused but the FIR contains those details. This again does not make PW-1 Promila an untrustworthy witness. In fact, because of this frank admission, she comes across as a very honest witness. It must be remembered that several persons were involved in this gruesome attack. In a case of this type and magnitude, it would be difficult for any person, more so for a rustic woman like PW-1 Promila, to give all particulars about the accused as required by the investigating officer. It is clear from her statement that she knew the first name of all the accused. She gave the first name of the accused. There is, therefore, no manipulation of names. The trial court has rightly observed that she appears to have collected the addresses and father's name of some of the accused while her statement was being recorded. It is pertinent to note that she has correctly identified most of the accused in the court. We find it difficult to accept the submission of counsel for the Appellant-accused that PW-1 Promila's evidence must be discarded on this count. In our opinion, the evidence of PW-1 Promila inspires confidence and reliance can be placed on it. There are no major discrepancies in her evidence. She has stood the test of cross-examination very well.

13. It would be appropriate now to refer to the two injured eye-witnesses, whose presence at the scene of the offence at the time of incident cannot be disputed. PW-12 is Jamini, the mother of the deceased. She stated that on the date of occurrence, the goat of deceased-Hemanta damaged the paddy of A1-Subal whereupon juvenile delinquent-Gopal and his mother beat the said goat. PW-3 Nila daughter of deceased-Hemanta protested. Thereafter, there was exchange of abuses between the two sides. Juvenile delinquent-Gopal slapped PW-3 Nila. Thereafter, PW-2 Lakshmi came there. Juvenile delinquent-Gopal slapped her. Deceased-Hemanta slapped juvenile delinquent-Gopal and took him to the bund. Thereafter, Gopal was released. About 20 minutes after this incident, there was a sound of blowing of conch-shell. A3-Ranjit was roaming around on his motorcycle in different villages. According to PW-12 Jamini, around 200/230 persons encircled the houses of her sons. They were having tara, lathi, rod, iron pipe,

katari, ballam, etc. She could recognize A2-Bistu, A1-Subal, A6-Sudarshan, A7-Nemai, A8-Bishu, A9-Joydeb, A17-Dulal, A16-Subal Sat, A11-Bistu Sat, A5-Pulin, A12-Bhanu, A29-Probod, A18-Nentu, A19-Rakhal, A20-Batul, A21-Kengal, A22-Nikhil, A4-Sunil, A36-Dhuryadhan and A35-Satrugna. She honestly stated that she could not recollect the names of other accused. She then added that Shiba Paramanik, Bhakta Maity and Raghu Das were also there. In the court, however, she committed mistakes in identifying A26-Niranjan, A30-Padmaloachan and A34-Bhakta Maity. She could not identify A9-Bhatu. She stated that when the deceased enquired why so many persons had encircled their house, A2-Bistu assaulted deceased-Hemanta with a tara on his leg and A1-Subal assaulted deceased-Gour with an iron rod on his head and A3-Ranjit assaulted deceased-Manik with an iron pipe on his head. She further stated that she caught hold of the hands and feet of the accused and requested them not to assault whereupon A1-Bistu assaulted PW-13 Mandakini with a katari on her head and A21-Kengal assaulted her with a katari on her right hand. She stated that her three sons, who were half-dead, were dragged by the accused by pulling their legs to a paddy field of Pravat Jana. They broke the hands, legs and chests of the deceased. The deceased were shouting for water but the accused did not allow her to give them water. She stated that several houses of Dharas were burnt by the accused. She has been extensively cross-examined. It is contended that her evidence should be rejected because she could not identify some of the accused correctly in the court. This argument does not appeal to us. It must be remembered that when she gave her evidence, she was 65 years of age. She was deposing about the incident of 14/5/1986 on 10/12/1990 i.e. almost four years after the incident. She had lost her three sons in the incident and must be terribly emotionally disturbed while giving evidence. Her evidence will have to be evaluated keeping this in mind. Errors committed by her in identifying some of the accused cannot be taken against her. She is an injured eye-witness. Her presence at the scene of offence cannot be doubted. We are pained to note that the trial court permitted the defence to subject her to a very lengthy rambling cross-examination. She has, however, come across as a credible witness. We, therefore, hold that PW-12 Jamini is a reliable witness.

14. PW-13 Mandakini is the wife of deceased-Gour. She stated that on the day of incident, goat of deceased-Hemanta damaged the paddy of A1-Subal. Juvenile delinquent-Gopal and his mother beat that goat. PW-3 Nila protested whereupon, juvenile delinquent-Gopal slapped her. Juvenile delinquent-Gopal also slapped PW-2 Lakshmi, mother of PW-3 Nila. Deceased-Hemanta separated them, slapped juvenile delinquent-Gopal, took him to the bund and made him sit there. After sometime, he was allowed to go. Thereafter, the sound of conch-shell was heard. A3-Ranjit was found roaming on his motorcycle in different directions in Ramchandrapur, Brajaballavpur and Kumarchak villages. About 250/300 people came there from all directions. They were equipped with lathis, axes, iron pipes, iron rods, etc. They attacked Dharas' houses. She stated that, she could recognize A3-Ranjit, juvenile delinquent-Gopal, A1-Subal, A2-Bistu, A11-Bistu

Samanta, A19, Rakhal, A18-Nentu, A20-Batul, A21-Kengal, A22-Nikhil and A4-Sunil. She identified the said accused in the court. She stated that deceased-Hemanta, deceased-Gour and deceased-Manik came out of their houses and enquired with those who had assembled there as to why they had come and encircled their houses whereupon A2-Bistu assaulted deceased-Hemanta with a bamboo tara on his leg, A1-Subal assaulted deceased-Gour with an iron rod on his head and A3-Ranjit assaulted deceased-Manik with an iron rod on his head. They fell down. She stated that they caught hold of the feet of the accused and requested them not to assault the deceased. Then A2-Bistu assaulted her with a katari on her head. She fell down and became unconscious. She was then shifted to Moyna hospital. After she became conscious, she gave statement to the police. According to her, she was in hospital for two days. After she returned from hospital, she found that her house was burnt. Nothing has been elicited in her cross-examination, which can suggest that she is not a reliable witness. She has honestly stated that she had seen the assault on her husband and brothers-in-law. She became unconscious after she was assaulted and did not see what happened thereafter.

15. PW-2 Lakshmi is the wife of deceased-Hemanta. She stated that when the goat of her husband was beaten by juvenile delinquent-Gopal, her daughter PW-3 Nila protested. Juvenile delinquent-Gopal and his mother abused her in filthy language. Then juvenile delinquent-Gopal slapped PW-3 Nila whereupon PW-3 Nila began to weep. She abused juvenile delinquent-Gopal and his mother. PW-2 Lakshmi further stated that juvenile delinquent-Gopal and his mother also assaulted her. Thereafter, her husband deceased-Hemanta came there. He slapped juvenile delinquent-Gopal and detained him near the bund. After sometime, he allowed him to go. Thereafter, A3-Ranjit roamed around nearby villages on his motorcycle. After sometime, she heard the sound of conch-shell. About 200/250 people assembled there. They attacked the houses of Dharas. They were equipped with lathis, iron rods, iron pipes, chowkis, tangis, kataris, etc. She could recognize A1-Subal, A2-Bistu, A3-Ranjit, A10-Tarapada, A18-Nantu, A21-Kental, A22-Nikhil, A4-Sunil, A20-Batul, A19-Rakhal, A36-Dhuryadhan, A35-Satrugna, juvenile delinquent-Gopal, A8-Bishwanath, A7-Nemai, A9-Bhatu, A5-Pulin, A12-Bholu, A6-Sudarshan, juvenile delinquent-Nirmal and others. She stated that she can identify all of them. She stated that juvenile delinquent-Gopal was also there. She identified the accused and juvenile delinquents named by her, in the court. She further stated that her husband deceased-Hemanta and deceased-Manik enquired with the accused as to what was the matter. Then A1-Subal assaulted deceased-Gour with an iron rod on his hand, A2-Bistu assaulted deceased-Gour with a bamboo tara on his leg and A3-Ranjit assaulted deceased-Manik with an iron pipe on his head. She further stated that they requested the accused not to assault them. The accused told them that they would release them once for all. She stated that she, PW-12 Jamini, PW-1 Promila and Ors. dropped on their feet and requested them not to beat the victims. But, A22-Nikhil assaulted her. A21-Kengal assaulted PW-12

Jamini and A2-Bistu assaulted PW-13 Mandamini. Thereafter, the accused assaulted PW-5 Ananta by hurling brick-bats. A18-Nentu assaulted deceased-Hemanta with a tangi on his head. She stated that 10/15 persons continued to assault deceased-Hemanta, deceased-Manik and deceased-Gour till they succumbed to their injuries. She stated that A1-Subal, A2-Bistu, A3-Ranjit, A8-Biswanath, A7-Nemai, juvenile delinquent-Nirmal, A21-Kengal, A4-Sunil, A22-Nikhil, A19-Rakhal, A20-Batul, A18-Nentu, A12-Bholu, A29-Prabodh are the accused, who assaulted the deceased and caused their death. Then the accused dragged the deceased to the land by the side of a tank. A3-Ranjit told the accused to set their houses on fire and drive them away. Accordingly, A3-Ranjit, A4-Sunil, A5-Pulin and some other persons set the houses of Dharas on fire. Thereafter, the accused fled away. Though she has been extensively cross-examined, the defence has not been able to make any dent in her evidence.

16. PW-3 Nila daughter of deceased-Hemanta also stated that on the date of incident, their goat damaged crop of A1-Subal. Therefore, the wife and son of A1-Subal started beating the goat. She went there and protested whereupon juvenile delinquent-Gopal assaulted her and his mother abused her. Thereafter, her mother PW-2 Lakshmi came and asked juvenile delinquent-Gopal why he assaulted PW-3 Nila whereupon he assaulted PW-2 Lakshmi and also abused her. She further stated that her father deceased-Hemanta came and slapped juvenile delinquent-Gopal and took him near the bund and then released him. Thereafter, A3-Ranjit was moving around in nearby villages on his motorcycle. She heard the sound of a conch-shell. About 200/250 people assembled there and attacked their houses. They were equipped with iron pipes, iron rods, kataris, axes, tangis, bamboo-taras, kanchas, chowkis. She recognized A1-Subal, A2-Bistu and A3-Ranjit, A5-Pulin, juvenile delinquent-Nirmal, A6-Sudarshan, A9-Bhatu, A7-Nemai, A8-Biswanth, A17-Dulal, A15-Dipu, A12-Bholu, A4-Sunil, A22-Nikhil, A21-Kengal, A18-Nentu, A20-Batul, juvenile delinquent-Gopal, A28-Sambhu, A14-Sambhu, juvenile delinquent-Gopal Jana, A12-Bhanu and one Sibhu Maity. She frankly stated that she could not recollect the names of other accused. She made some mistakes while identifying A5-Pulin, A6-Sudarshan, A2-Bistupada and A32-Shibu Parmanik. She further stated that deceased-Hemanta, deceased-Manik and deceased-Gour enquired with the accused as to what was the matter. A1-Subal, A2-Bishnupada and A3-Ranjit told them to wait and see the consequences. Thereafter, A1-Subal assaulted deceased-Gour with an iron rod on his head, A2-Bistu assaulted deceased-Hemanta with a bamboo-tara on his thigh and A3-Ranjit assaulted Manik with an iron pipe on his head. The three fell down on the ground whereupon her mother PW-2 Lakshmi, PW-13 Mandakini, PW-12 Jamini, PW-4 Sarathi and PW-5 Ananta came and dropped down on the feet of the assailants and told them not to assault. PW-12 Jamini was assaulted with a katari on her right palm by A21-Kengal. When PW-13 Mandakini tried to resist the assault upon her husband deceased-Gour, she was assaulted with a katari on her head. She further stated that the said assailants continued to assault deceased-Gour, deceased-Hemanta and deceased-Manik and threw away their bodies on a

land by the side of a tank. Thereafter, A4-Sunil and A5-Pulin set the houses of the Dharas on fire. The defence has not been able to make any dent in the prosecution story through the cross-examination of this witness. It is true, however, that while identifying some of the accused, she had made mistakes but then, she was also deposing in the court almost four years after the incident and, therefore, there are bound to be some discrepancies in her evidence. On vital parts of the prosecution story, she is consistent. We find no reason to disbelieve her.

17. PW-4 Sarathi and PW-5 Ananta have corroborated PW-1 Promila, PW-2 Lakshmi, PW-3 Nila, PW-12 Jamini and PW-13 Mandakini on the vital aspects of the prosecution story. Their evidence particularly about the assault on deceased-Hemanta, deceased-Gaur and deceased-Manik is consistent with the evidence of above-stated witnesses. PW-4 Sarathi and PW-5 Ananta have also corroborated the evidence of other witnesses as regards the assault on PW-13 Mandakini with a katari on her head by A2-Bistu and assault on PW-12 Jamini with a katari on her palm by A21-Kengal. PW-4 Sarathi also referred to setting on fire of the houses of Dharas. PW-4 Sarathi made some mistakes in identifying some of the accused but as we have already noted, evidence of witnesses was recorded about four years after the incident. Some mistakes would, therefore, not affect their evidence adversely.

18. In the cross-examination of PW-19 PI Ghosh - the investigating officer, certain omissions in the evidence of prosecution witnesses have been brought on record. Surprisingly, his attention was not drawn to the evidence of PW-1 Promila at all. The evidence of PW-19 PI Ghosh has not been happily recorded. In any case, the omissions are minor omissions pertaining to non-mentioning of weapons carried by the accused or not referring to the parts of the bodies of the deceased on which the assault was made. Some of the witnesses have omitted to mention the names of some of the accused. But, in our opinion, on the substratum of the prosecution story, there are no omissions or contradictions. While analyzing the evidence, we have kept in mind the manner in which several accused persons armed with weapons attacked the deceased. In an attack of this type, in the nature of things, there are bound to be some omissions or discrepancies in the evidence of witnesses. Experience shows that witnesses do exaggerate and this Court has taken note of such exaggeration made by the witnesses and held that on account of embellishments, evidence of witnesses need not be discarded if it is corroborated on material aspects by the other evidence on record. Therefore, the fact that some witnesses have not referred to certain accused in their police statements but have attributed role to them in the court, does not lead us to conclude, in the peculiar facts of this case, that the said witnesses are not credible witnesses. In this connection, we may usefully refer to Leela Ram on which reliance is placed by learned Counsel for the State. The following observations of this Court are material.

12. It is indeed necessary to note that one hardly comes across a witness whose

evidence does not contain some exaggeration or embellishment - sometimes there could even be a deliberate attempt to offer embellishment and sometimes in their over anxiety they may give a slightly exaggerated account. The court can sift the chaff from the grain and find out the truth from the testimony of the witnesses. Total repulsion of the evidence is unnecessary. The evidence is to be considered from the point of view of trustworthiness. If this element is satisfied, it ought to inspire confidence in the mind of the court to accept the stated evidence though not however in the absence of the same.

19. It is true that the prosecution has relied on the evidence of interested witnesses but, interested witness is not necessarily a bad witness. In fact, if the witness is related to the deceased, there is less chance of his leaving aside the real assailants. The evidence of interested witness has to be analyzed with care. But, once the court comes to the conclusion that it is truthful and in accord with the relevant circumstances on record, the court should not hesitate to accept it and record conviction on the basis thereof. In this case, all the eye-witnesses are consistent about the prosecution case as regards assault on the deceased and setting on fire of the houses of Dharas. We are, therefore, not inclined to reject their evidence on the ground that they are related to the deceased. As already noted, two of the eye-witnesses i.e. PW-12 Jamini and PW-13 Mandakini are injured witnesses, whose presence at the scene of offence cannot be doubted. They completely bear out the prosecution case.

20. Counsel for the Appellant submitted that the identification of the accused in the court should not be relied upon. We have no hesitation in rejecting this submission. The attack was dastardly. It is difficult to forget such heinous episode. The injuries suffered by the deceased show how brutally they were attacked. The eye-witnesses had seen the accused from close quarters. There is, therefore, nothing unusual if the eye-witnesses identified some of the accused in the court. This Court has accepted the evidence of identification in the court in several cases (see Malkhansingh.) This submission must, therefore, be rejected. It is pertinent to note that some witnesses have honestly stated that they could not identify some of the accused. That shows that they were not tutored. It was argued that the prosecution has not been able to establish motive. The incident appears to have taken place because juvenile delinquent-Gopal was detained by deceased-Hemanta. Assuming, however, that this is a case of weak motive or that the prosecution has not established motive, that will not have adverse impact on its case because when there is credible evidence of eye-witnesses on record, the motive pales into insignificance.

21. It is necessary also to state that the defence of alibi taken by A1-Subal has been carefully examined by the trial court as well as the High Court. The witnesses examined by A1-Subal have rightly been disbelieved. We concur with the trial court and the High Court that A1-Subal has failed to prove the defence of alibi.

22. We must now deal with the submission that all the accused cannot be

convicted for murder with the aid of Section 149 of the Indian Penal Code because the prosecution story that all the accused were armed with weapons and they attacked the deceased is based on omnibus statements of the eyewitnesses. In order to deal with this submission, we have reproduced the material portions of the evidence of the eyewitnesses. It is now necessary to refer to the judgments of this Court which have been relied upon by the counsel on this point so that the evidence of the witnesses can be examined in their light.

23. In Lalji, this Court observed that Section 149 of the Indian Penal Code makes every person who is the member of an unlawful assembly at the time of committing of the offence guilty of that offence. It creates 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 this 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, because everyone must be taken to have intended the probable and natural results of the combination of the acts in which he joined and it is not necessary that all the persons forming an unlawful assembly must do some overt act. It was further observed that once the court holds that certain accused persons formed an unlawful assembly and an offence is committed by any member of the 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 offence was a member of the same assembly is to be held guilty of that offence. This Court further observed that 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. On the facts of the case before it, this Court held that after having held that the Appellants formed an unlawful assembly carrying dangerous weapons with the common object of resorting to violence, it was not open to the High Court to acquit some of the members on the ground that they themselves did not perform any violent act, or that there was no corroboration of their participation. In other words, having held that they formed an unlawful assembly and committed an offence punishable with the aid of Section 149 of the Indian Penal Code, the High Court erred in examining which of the members only actively participated and in acquitting those who, according to the court, did not so participate. Doing so would amount to forgetting the very nature and essence of the offence created by Section 149 of the Indian Penal Code.

24. In Sherey, 25 Appellants were tried for offences punishable under Sections 147, 148, 302, 307, 323 and 325 all read with Section 149 of the Indian Penal Code in respect of an incident of rioting. The rioting occurred because of the

dispute over a grove between Hindus and Muslims. Twenty five Muslims attacked Hindus. Three Hindus died. Six eye witnesses deposed about the incident. PW-1 complainant gave a detailed version and attributed overt acts to nine accused. In deposition, he named five more persons who also attacked the deceased. Regarding the others, he mentioned in an omnibus way that they were armed with lathis. He did not attribute any overt act to any one of them. This Court observed that in the circumstances, it was difficult to accept the prosecution case that the other Appellants were members of the unlawful assembly with the object of committing the offences with which they were charged. This Court expressed that it was highly unsafe to apply Section 149 of the Indian Penal Code and make everyone of them constructively liable. This Court further observed that when there is a general allegation against a large number of persons the Court naturally hesitates to convict all of them on such vague evidence. Some reasonable circumstance must be found out to lend assurance. It was further observed that from that point of view it was safe only to convict the nine accused whose presence was not only consistently mentioned from the stage of FIR but also to whom overt acts were attributed. This Court concluded that the fact that they were armed with weapons and attacked the victims shows that they were members of an unlawful assembly with the common object of committing murder and other offences with which they were charged.

25. In Thakkidiram Reddy, the case of the prosecution was that the 21 accused in the dead of night formed themselves into an unlawful assembly armed with weapons and went to the house of the deceased. They attacked the inmates of the house of one Gankidi Reddy in which Gankidi Reddy lost his life. The accused, thereafter, left the place. The trial court acquitted 10 of them and convicted A1 to A11, inter alia, u/s 148 and Section 302 read with Section 149 of the Indian Penal Code. In the appeal, the High Court set aside the convictions of A2 to A11 under Sections 148 and 302 read with Section 149 of the Indian Penal Code and maintained all other convictions. The State carried an appeal to this Court. This Court referred to its previous judgments in Masalti Vs. State of U.P., and Lalji and observed that from these judgments, it is evident that to ascertain whether a particular person shared the common object of the unlawful assembly, it is not essential to prove that he committed some illegal overt act or had been guilty of some illegal omission in pursuance of the common object. Once it is demonstrated from all the facts and circumstances of a given case that he shared the common object of the unlawful assembly in furtherance of which some offence was committed - or he knew was likely to be committed - by any other person, he would be guilty of that offence. This Court further observed that undoubtedly, commission of an overt act by such a person would be one of the tests to prove that he shared the common object, but it is not the sole test. This Court rejected the submission that some of the accused had caused simple injuries and, hence, they did not share common object to murder and observed that the manner in which the incident took place clearly proved that even if this Court were to assume that those accused did not share the common object of

committing the murder, they, being members of the unlawful assembly certainly knew that the murder was likely to be committed by A1 in prosecution of the common object so as to make them liable u/s 302 read with the second part of Section 149 of the Indian Penal Code. In the circumstances, order of acquittal of A2 to A5 and A9 of the charges under Sections 148 and 302 read with Section 149 of the Indian Penal Code recorded by the High Court was set aside and the order of the trial court convicting them for the said offences was restored.

26. In Akbar Sheikh, in the dead of night, the accused attacked the house of PW-9 Ashraful, the son of the complainant. The complainant was informed about it. He came out of his house and saw that about 100 persons armed with deadly weapons had gathered there. They attacked Samsul. The house of Akramul was set on fire. They attacked Akramul, the son of PW-9 Ashraful and the wife of Akramul. Akramul was kidnapped and killed near the pond. The prosecution story rested in the evidence of the complainant and PW-9 Ashraful. The complainant had not named Asgar Sheikh, Kuddus Sheikh and Kudrat Sheikh but they had been named by PW-9 Ashraful. The complainant and PW-9 Ashraful had named Kanku Sheikh as a miscreant. The question which arose for consideration was as to whether some of the Appellants who had not committed any overt act must be held to be part of the unlawful act or whether they shared common object of the main accused. Several decisions of this Court on the scope of Section 149 of the Indian Penal Code were noticed by this Court and it was observed that the earlier view favouring strict application of constructive liability was not, later on, strictly adhered to and in some of the decisions, this Court proceeded to determine the issue on the factual matrix obtained therein. Reflecting on the facts before it, this Court observed that in such cases, the rule of prudence should be applied. Something more than their being cited as an accused in a witness box would be necessary. This Court further observed that the court must have before it some materials to form an opinion that the accused had shared a common object. Referring to the two accused, who had been named by both the witnesses, this Court observed that even against them, no overt act had been attributed and, therefore, doubt arises as regards their presence and or sharing of common object. This Court adverted to the gruesome nature of the crime and held that even then it cannot lose sight of the fact that a person should not suffer rigorous imprisonment for life although he might have just been a bystander without anything more. Observing that there was no clinching evidence against those accused, this Court acquitted them.

27. In Pandurang Chandrakant Mhatre, after adverting to relevant judgments, this Court observed that for determination of common object of unlawful assembly, the conduct of each of the members of the unlawful assembly, before and at the time of attack is of relevant consideration. At a particular stage of incident, what is the object of the unlawful assembly is a question of fact and that has to be determined keeping in view the nature of the assembly, the arms carried by the members and the behaviour of the members at or near the scene of the incident.

28. In Waman, this Court held that whenever the court convicts any persons of any offence with the aid of Section 149 of the Indian Penal Code, a clear finding regarding the common object of the assembly must be given and the evidence disclosed must show not only the nature of the common object but also that the object was unlawful. In order to attract Section 149 of the Indian Penal Code, it must be shown that the incriminating act was done to accomplish the common object of unlawful assembly. In that case, there was no recovery of weapon from A12 therein, but weapons were recovered from other accused and prosecution witnesses asserted that A12 therein dealt a blow of iron pipe on the deceased. This Court held that this was sufficient to attract Section 149 of the Indian Penal Code.

29. The above judgments outline the scope of Section 149 of the Indian Penal Code. We need to sum-up the principles so as to examine the present case in their light. Section 141 of Indian Penal Code defines unlawful assembly to be an assembly of five or more persons. They must have common object to commit an offence. Section 142 of the Indian Penal Code postulates that whoever being aware of facts which render any assembly an unlawful one intentionally joins the same would be a member thereof. Section 143 of the Indian Penal Code provides for punishment for being a member of unlawful assembly. Section 149 of the Indian Penal Code provides for constructive liability of every person of an unlawful assembly if an offence is committed by any member thereof in prosecution of the common object of that assembly or such of the members of that assembly who knew to be likely to be committed in prosecution of that object. The most important ingredient of unlawful assembly is common object. Common object of the persons composing that assembly is to do any act or acts stated in clauses 'First', 'Second', 'Third', 'Fourth' and 'Fifth' of that section. Common object can be formed on the spur of the moment. Course of conduct adopted by the members of common assembly is a relevant factor. At what point of time common object of unlawful assembly was formed would depend upon the facts and circumstances of each case. Once the case of the person falls within the ingredients of Section 149 of the Indian Penal Code, the question that he did nothing with his own hands would be immaterial. If an offence is committed by a member of the unlawful assembly in prosecution of the common object, any member of the unlawful assembly who was present at the time of commission of offence and who shared the common object of that assembly would be liable for the commission of that offence even if no overt act was committed by him. If a large crowd of persons armed with weapons assaults intended victims, all may not take part in the actual assault. If weapons carried by some members were not used, that would not absolve them of liability for the offence with the aid of Section 149 of the Indian Penal Code if they shared common object of the unlawful assembly.

30. But this concept of constructive liability must not be so stretched as to lead to false implication of innocent bystanders. Quite often, people gather at the scene of offence out of curiosity. They do not share common object of the

unlawful assembly. If a general allegation is made against large number of people, Court has to be cautious. It must guard against the possibility of convicting mere passive onlookers who did not share the common object of the unlawful assembly. Unless reasonable direct or indirect circumstances lend assurance to the prosecution case that they shared common object of the unlawful assembly, they cannot be convicted with the aid of Section 149 of the Indian Penal Code. 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 stages. The court must have before it some materials to form an opinion that the accused shared common object. What the common object of the unlawful assembly is at a particular stage has to be determined keeping in view the course of conduct of the members of the unlawful assembly before and at the time of attack, their behaviour at or near the scene of offence, the motive for the crime, the arms carried by them and such other relevant considerations. The criminal court has to conduct this difficult and meticulous exercise of assessing evidence to avoid roping innocent people in the crime. These principles laid down by this Court do not dilute the concept of constructive liability. They embody a rule of caution.

31. We shall now state the conclusions drawn by us after applying the above principles. The attack has been meticulously and consistently described by the eyewitnesses. It is true that the weapons carried by some of the accused are specifically named by the witnesses but the weapons carried by some accused have not been named by some. However, all the witnesses have stated that all the accused were carrying weapons. The evidence discloses that several persons pounced on the deceased and attacked them mercilessly with weapons. The attack was so heinous and scary that the witnesses may not have noted the type of weapons carried by each accused. At the cost of repetition, we must mention that the evidence was given by witnesses after about four years. In the facts of this case, it is not possible for us to dismiss this evidence as omnibus evidence. Having carefully perused the evidence, we have no hesitation in recording that this is not a case where any innocent bystanders are roped in the crime with the aid of Section 149 of the Indian Penal Code. All the accused came after the conch-shell was blown. They gave clarion calls. They exhorted others to kill the Dharas. They burnt the houses of Dharas. They killed the Dharas even though the witnesses came and requested not to attack them. Two of the accused attacked two ladies with katari. After the murder was committed, they picked up the dead-bodies and threw them on the land near the bund and then they fled away. Their conduct before the attack, at the time of the attack, after the attack and near the scene of offence clearly indicates that they were members of the unlawful assembly, the common object of which was to murder the Dharas and set fire to their houses. In our opinion, there are sufficient direct and indirect circumstances on record which lend assurance to the prosecution story that all the accused except A26-Niranjan, A28-Sambhu, A29-Probodh, A35-Satrughnan and A36-Duryadhan whose case stands on a different footing, had common

object of the unlawful assembly and in prosecution of the common object of the unlawful assembly, they killed the three Dharas, injured some witnesses and burnt the houses of Dharas. In the facts of this case, those to whom, overt act is not attributed or those who might not have used the weapons would also be liable to be convicted for murder and other offences with the aid of Section 149 of the Indian Penal Code because they were members of the unlawful assembly at all crucial stages and shared common object of the assembly at all stages. The prosecution has therefore successfully proved its case against all Appellant-accused except A26-Niranjan, A28-Sambhu, A29-Probodh, A35-Satrughnan and A36-Duryadhan whose case stand on a different footing for the reasons we shall now state.

32. So far as A26-Niranjan, A28-Sambhu, A29-Probodh, A35-Satrughnan and A36-Duryadhan are concerned, their names are not mentioned in the FIR by PW-1 Promila. As already noted, FIR was read out to PW-1 Promila by the investigating officer. As she could not understand it, she took the help of PW-5 Ananta, who was present there. He told her that it was correctly recorded. We have also noted that PW-1 Promila gave the first name of all the accused, therefore, there is no manipulation of names. She did not however know the father's name of some of the accused and addresses of the accused. The trial court has stated that she must have collected these particulars while her FIR was being recorded. We have concurred with the trial court on this aspect and found nothing wrong with this exercise considering the fact that all the names of the accused were stated by her and only certain particulars required by the investigating officer were gathered by her from others. But one thing is certain from this evidence that recording of FIR must have taken sometime. It was read over to her and because it was not understood by her, it was explained to her by PW-5 Ananta. In such meticulous exercise, if PW-1 Promila missed the names of A26-Niranjan, A28-Sambhu, A29-Probodh, A35-Satrughnan and A36-Duryadhan it is of some significance. It is true that in the evidence, she has referred to them. Some other witnesses have also referred to them. Some of them have attributed role to them. It is true that absence of the name of an accused in the FIR is not always indicative of his innocence because there may be some other clinching evidence on record to establish his complicity. But, in the aforementioned peculiar facts of this case, because of the absence of the names of these accused in the FIR, a doubt is created in the mind as to whether they could be really involved in the offence. This does not however, make the evidence of PW-1 Promila and other witnesses unreliable. We have already noted that witnesses are prone to exaggeration and the court has to sift the chaff from the grain and find out the truth from the testimony of the witnesses (See Leela Ram). While we are sure about the involvement of all other Appellants-accused in the crime in question and we are of the confirmed opinion that their conviction with the aid of Section 149 of the Indian Penal Code is perfectly justified, we feel that so far as A26-Niranjan, A28-Sambhu, A29-Probodh, A35-Satrughnan and A36-Duryadhan are concerned, evidence on record gives rise to suspicion about

their involvement. But it is well settled that suspicion, however strong, is not enough to convict a person. Absence of their names in the FIR in the abovementioned facts, lead us to give them benefit of doubt.

33. In the circumstances, the appeal is partly allowed. A26-Niranjana Das, A28-Sambhu Samanta, A29-Probodh Jana, A35-Satrughnan Patra and A36-Duryadhan Patra are given benefit of doubt and acquitted of all the offences with which they were charged. They shall be forthwith released from custody unless otherwise required in any other case. Their bail bonds shall stand discharged.

34. Conviction and sentence of A1-Subal Ghorai, A2-Bishnupada Ghorai, A4-Sunil Senapati, A5 Pulin Sat @ Samanta, A6-Sudarshan Ghorai, A7-Nemai Ghorai, A8-Biswanath Ghorai, A9-Joydeb Ghorai @ Bhatu, A10-Tarapada Samanta, A11-Bistu Samanta, A12-Bhanu Samanta, A13-Uttam Samanta @ Bhalu, A14-Sambhu Jana, A15-Dipu Samanta @ Dipak, A19-Rakhal Dhara, A20-Batul Dhara, A21-Kengal Senapati, A22-Nikhil Senapati and A23-Sibu Pramanik is confirmed.

35. The appeal is disposed of in the aforesaid terms.

36. Before parting, we must express that the investigation of this case is far from satisfactory and recording of evidence is done in a casual manner. Justice is done only because of the inherent strength of the prosecution case and credible evidence of the honest rustic witnesses. Sessions cases involve the rights of the victims and rights of the accused. Even the society has a great stake in the proper conduct of sessions cases because they have relevance to the maintenance of law and order. Investigation of criminal cases must, therefore, be done very carefully and trials must be conducted with a sense of responsibility.