

Sunil Kumar Ghosh and ors. Vs. State of West Bengal

Sunil Kumar Ghosh and ors. Vs. State of West Bengal

SooperKanoon Citation : sooperkanoon.com/874429

Court : Kolkata

Decided On : Apr-18-2008

Reported in : (2008)3CALLT16(HC)

Judge : Girish Chandra Gupta and ;Kishore Kumar Prasad, JJ.

Acts : Evidence Act - Sections 11, 17 to 39, 45, 58, 60 and 114; ;[Indian Penal Code \(IPC\), 1860](#) - Sections 141, 142, 148, 149, 201, 302, 304 and 436; ;[Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 154, 161, 162, 294, 294(1), 294(3) and 428

Appeal No. : C.R.A. No. 325 of 2005

Appellant : Sunil Kumar Ghosh and ors.

Respondent : State of West Bengal

Advocate for Def. : Asimes Goswami, ;S. Ganguly and ;P.R. Bhattacharyya, Advs.

Advocate for Pet/Ap. : Sekhar Basu, ;Milan Mukherjee, ;Shiladitya Sanyal, ;Rajdeep Mazumdar, ;A. Mitra and ;Mangaljit Mukherjee, Advs.

Judgement :

Girish Chandra Gupta, J.

1. This appeal is directed against a judgment and order dated 30th March 2005 and 31st March 2005 passed by the learned additional sessions Judge, 3rd Court, Suri. Birbhum, in Sessions Trial No. 9 of August 2002 arising out of sessions case No. 26 of 1995 by which all the 26 appellants were convicted under Section 148 of the Indian Penal Code and were sentenced to suffer rigorous imprisonment for a period of three years. The appellants No. 1 to 13 were also convicted under Section 302 read with Section 149 of the IPC; under Section 436 read with Section 149 of the IPC and under Section 201 read with Section 149 of the IPC. They were sentenced to rigorous for life as also fine of Rs. 8000/- each, in default to suffer further rigorous imprisonment for two years for the offence punishable under Section 302 read with Section 149 of the IPC. They were also sentenced to suffer rigorous imprisonment for 10 years as also to pay a fine of Rs. 8000/- each, in default to suffer rigorous imprisonment for two years for the offence punishable under Section 436 read with Section 149 of the IPC. They were also sentenced to suffer rigorous imprisonment for 5 years as also to pay a fine of Rs. 2.000/-, in default to suffer further rigorous imprisonment for six months for the offence punishable under Section 201 read with Section 149 of the IPC. All the sentences were directed to run concurrently. 50% of the amount of fine was directed to be paid to Shrimati Adari Pal, mother of the victims/deceased Niranjana Pal and Lalu Pal by way of compensation.

2. The facts and circumstances of the case briefly stated are as follows:

On 26th November 1990 in the morning at about 7 A.M. the accused persons armed with lathi, tangi etc. raided the house of the defacto complainant, Sri Manick Chandra Pal. Their object was to compel Pals, the complainant party to accept Supriti @ Buri, daughter of Premnath Ghosh, as the wife of Bijoy Pal, a younger brother of Manik Chandra Pal, who had allegedly developed an emotional relationship with the said Supriti @ Buri. The complainant party resisted the attempt of the accused persons who had tried to push the said Supriti in their house. A scuffle ensued between the parties. According to the complainant party (hereinafter referred to as the 'Pals') they entered into their house and closed the main gate. According to the case of the accused persons during the scuffle the Pals started assaulting the people who had assembled the people to secure a respectable

rehabilitation of the said Supriti. According to Sanjay Pal assaulted Shantiram with a tangi, Bharat Pal assaulted Banamali with a lathi, the deceased Lalu assaulted Haradhan Mondal with a bhojali and the said Lalu and Niranjarn both assaulted Nanichora and Sujit with lathi. Shantiram, according to of the accused, was so severely assaulted that he died on the way to Khayrasole P.S. According to the case of the accused persons this had enraged the villagers. They became furious and rushed to the house of the Pals. According to the Pals after they had entered into their house and closed the main gate, their house was surrounded and set on fire by the accused persons. The inmates of the house of the Pals dispersed in order to save their lives, the deceased Lalu and the deceased Niranjan were dragged by some of the accused persons and thereafter all the accused persons jointly killed them by beating. The case of the accused persons however is that they were neither connected with the killing of the deceased Lalu or Niranjan nor were they in any way connected with setting the house of the Pals on fire. Case and a counter case were filed. A written complaint filed by the accused Biswanath Ghosh at 7.45 A.M. on 26th November 1990 provided the basis of G.R. Case No. 716 of 1990 which ultimately was tried in sessions case No. 34 of 1999. A written complaint made by Manik Chandra Pal recorded by the Sub-Inspector of Police at 11.30 A.M. on 26th November 1990 formed the basis of the G.R. Case No. 721 of 1990 which culminated in sessions case No. 26 of 1995. Both the cases were tried by the same learned Judge one after the other. In sessions case No. 34 of 1992 we are told that the persons figured as accused have been acquitted and a revision is pending in this Court whereas the sessions case No. 26 of 1995 resulted in conviction of 26 out of 33 accused persons who faced trial which we already indicated.

3. For a proper appreciation of the facts and circumstances of the case it would in our view be appropriate to notice in extenso the written compliant lodged by the P.W. 1 Manik Chandra Pal on the date of the incident at 11.30 A.M. which is ext.1/3. The written complaint, ext.1/3, was recorded in Bengali. A translated version thereof included in the paper book is wholly unsatisfactory and is also incomplete. In that view of the matter we have corrected the english version of the written complaint retaining the original translation as far as possible which read as follows:

Statement of Manik Pal, S/o Bharat Pal of Mamudpur, P.S.-Khairasole, recorded under Section 154 Cr PC.

My name is Manik Pal, s/o Bharat Pal of village-Mamudpur under P.S. Khairasole. Today i.e., on 26.11.90 at 11-30 A.M., knowing you as the Officer-in-Charge of Police Station, I am to inform you that since a pretty long period all of the villagers of our village forming a group were spreading a rumour that there was love affairs in between my brother-Bijoy Pal and Buri, the daughter Prem Nath Ghosh of the village. On the basis of such love affairs, many of the villagers were creating pressure upon us, since a pretty long period that Bijoy has to marry her.

Today i.e. on 26.11.90 at about 7.00 A.M., in the morning a number of persons namely-1) Prem Nath Ghosh, s/o Unknown;

2) Sunil Ghosh, s/o Bhaktipada Ghosh;

3) Haradhan Mondal, s/o Umapada Mondal;

4) Haradhan Laha, s/o Jaladhar Laha;

5) Naba Gopal Ghosh, s/o Unknown;

6) Bhagyadhar Mondal, s/o Bhutnath Mondal;

7) Nanda Ghosh, s/o Bhola Nath Ghosh;

8) Rabilal Ghosh,

9) Shib Shankar Ghosh, s/o Nanda Ghosh;

10) Purna Chandra Ghosh, s/o Shyama Pada Ghosh;

11) Duryodhan Mondal, s/o Umapada Mondal;

12) Biswanath Ghosh, s/o Rampada Ghosh;

13) Nabadwip Ghosh, s/o Nitai;

14) Nitya Bouri, s/o Sahadeb Bouri;

15) Dharam Bouri, s/o Madhu Bouri

16) Gadadhar Bouri, s/o Sakul Bouri;

17) Senapati Bouri, s/o Basudeb Bouri;

18) Ranti,

19) Mantri Bouri, s/o Kalipada Bouri;

20) Faring Bouri, s/o Sajan Bouri;

21) Uday Bouri, s/o Nabani Bouri;

22) Nonichora Pal, s/o Harendra Pal;

23) In torn condition;

24) Dipankar Mondal, s/o Haradhan Mondal;

25) Krishno Bouri, s/o Mohan Bouri;

26) Sahan Bouri, s/o unknown and 12/14 persons more all of village-Mamudpur, being armed with lathis, tangis etc, had come to our house and created pressure upon us to accept Suprit Ghosh, daughter of Prem Nath Ghosh, as the wife of Bijoy Pal and they had made Supriti Ghosh enter into our house. At this we tried to resist them and then and there they all tried to assault us. Thereafter we had hidden ourselves in the house and they had surrounded our and set the same on fire. In order to save ourselves my brother Sanjay and myself took refuge in the gola. At that time Fatick @ Lalu Pal and Niranja Pal were hiding near the gola. The accused persons entered into our house and within our view took away Lalu and Niranjan beating them and they were beaten to death. I have witnessed this incident from behind the boundary wall of our house. All our family members including the female members witnessed the incident. After killing my two brothers the accused persons ran away expressing joy and satisfaction. When I was hiding in the house I have noticed my brother Fatick Pal and Niranjan Pal being dragged out by Sunil Ghosh, Nawadwip Ghosh, Rabilal Ghosh, Haradhan Laha and Dipak

Mondal. Thereafter all the accused persons started beating them. The accused persons fled away after beating my aforesaid brothers to death. Coming out of the house all of us noticed that paddy stack, the cart, the water pump set etc. had been destroyed involving damage estimated at a sum of Rs. 50000/-. We came to know that the accused persons after murdering our two brothers had thrown their dead bodies in a well situated on the north-eastern side and had covered the same with straw and branches of trees.

This is my statement. This was read over to me. This has been recorded according to my statement and accordingly I put my signature.

Sd-Manik Pal

4. It would appear that the salient features of the written complaint are that-

(a) On 26th November 1990 at about 7 A.M. in the morning 26 named accused persons accompanied by 12/14 unknown persons raided the house of the Pals armed with lathi, tangi etc.

(b) The accused persons mounted pressure upon the Pals to accept Supriti @ Buri, daughter of Premnath Ghosh, as the wife of Bijoy Pal. They also made her enter into the house of the Pals.

(c) The Pals resisted. As a result the accused persons tried to assault the Pals.

(d) The Pals took refuge in their house.

(e) The accused persons surrounded the house of the Pals and set the same on fire.

(f) In order to save themselves, the de facto complainant Manik Pal and his brother Sanjay Pal took refuge in the gola (granary).

(g) At that time the deceased Fatick @ Lalu Pal and Niranjana Pal were hiding somewhere near the gola.

(h) The accused Sunil Ghosh, Nabadwip Ghosh, Rabilal Ghosh, Haradhan Laha and Dipak Mondal dragged out Fatick @ Lalu Pal and Nirnajan Pal.

(i) Thereafter, all the accused persons started beating them and continued to do so until they died on the spot.

(j) All the family members including the female members had witnessed the incident.

(k) After the event was over, the de facto complainant found that extensive damage had been caused by fire which was estimated at a sum of Rs. 50000/-.

(l) The Pals thereafter came to know that the dead bodies of Fatick @ Lalu Pal and Niranjain Pal had been thrown into the adjacent well and covered with straw and branches of trees.

5. The fact that the house of the Pals was set on fire has been proved beyond any reasonable doubt. P.W. 13 Shyamapada Roy, a member of crew of Fire Brigade, which was pressed into service for the purpose of extinguishing the fire, deposed that on their way to Mamudpur for the purpose of putting off the fire they encountered a mob consisting of male and female persons who forcibly detained the vehicle of the Fire Brigade and restrained them from entering into the village. They thereafter, went to Khairosole P.S. Police accompanied them to the place of occurrence. It is thereafter that they could start operation to put off the fire in the house of the Pals. Remnants of the burnt pieces of the household articles were seized by the police. The seizure lists have been marked exts.4/1, 7, 8 and 9. P.W. 12 Sunil Ghosh deposed in this regard as follows:

I saw that the residential house of Bharat Pal was burnt and also I saw the family members of Bharat Pal to cry in the house of Narayan Pal. I also saw the employees of Fire Brigade to put off the fire in the house of Bharat Pal.

The fact that the house of Pals was burnt has not been disputed.

6. The fact that Fatick @ Laiu Pal and Niranjan Pal were beaten to death has also been satisfactorily established. The postmortem report goes to show that Fatick @

Lalu died due to 'the effect of injuries which were ante-mortem and homicidal in nature.' The postmortem report has been marked ext. 11 which goes to show the following injuries suffered by the deceased Lalu:

- (1) Multiple slight abrasions on his person.
- (2) One incise injury on the Rt. lat aspect of scalp-3' 2 ' 2'.
- (3) Fracture (#) 5th & 6th Ribs (Rt.)
- (4) Rt. lung ruptured at thiapex
- (5) Fracture (#) Rt lat aspect of frontal bone.

7. The postmortem report of the deceased Niranjana Pal marked ext. 12 goes to show that he died due to the effect of injuries which were ante-mortem and homicidal in nature. The injuries described in the postmortem report are as follows:

- (1) Multiple slight abrasions on his person.
- (2) One incised injury on LL lat aspect of forehead 2' 1 2'.
- (3) One incise injure on Rt. lat aspect of scalp 3' 2' 2 .
- (4) Fracture (#) Rt lat aspect of frontal bone.

8. The fact that the dead bodies of Fatick @ Lalu and Niranjana were thrown into the adjoining well is proved by the evidence of the P.W. 13 Shyamapada Roy, a member of the crew of the Fire Brigade who deposed that they had taken out the dead bodies abandoned well. The bodies were found unconscious. P.W. 12 has deposed that he saw the dead bodies being taken out from the well. This fact also not been disputed. P.W. 17 has admitted that Shantiram Bouri died on 26th November 1990. 33 persons, it appears, were chargesheeted. 7 of them have been acquitted. 26 out of 33 accused persons have been convicted particulars whereof we already have indicated. Certified copy of the written complaint lodged by the accused Biswanath Ghosh at 7.45 A.M. in the morning of 26th November 1990 has been tendered in evidence on behalf of the defence and has been

marked ext. 'C'. From the written complaint made by the accused Biswanath Ghosh which is ext. 'C' it appears that Bijoy Pal had allegedly impregnated the said Supriti. He is allegedly to have promised marry Supriti provided the pregnancy was aborted. Biloy Pal allegedly absconded after the abortion. Complaints made to Bharat Pal, father of the said Bijoy Pal, did not yield any result. The villagers then resorted to socially boycott the Pals which did not yield any result either. On 25th November 1990 in the evening a meeting was held when it was decided that on 26th November 1990 in the morning Supriti would be pushed into the house of Bharat Pal and she would be married to Bijoy as and when he would return. At 6 A.M. in the morning on 26th November 1990 the parents of Supriti accompanied by their daughter went to the house of Bharat Pal. Bharat Pal and his wife and his sons assaulted Supriti and her mother by fists and blows. As a result Supriti could not enter the house of the Pals. Villagers thereafter, assembled there. Sons of Bharat Pal armed with tangee, chora, Bhojali, pipegun etc. came out. Bharat Pal was armed with lathi and his wife Adari Pal was armed with hot water. Sanjay Pal assaulted Shantiram Bouri with a tangee, Nonichora Pal, Haradhan Mondal, Banamali Laha and Sujit Bouri were also severely injured. Biswanath Ghosh the complainant, Sunil Ghosh, Dhiren Ghosh, Mahadev Bouri, Bipin Ghosh, Shantiram Pal, Haradhan Laha, Bhagyodhar Mondal, Nityagopal Bouri, Ganadev Bouri were present at that spot. Shantiram Bouri died on the way to Khairosole P.S. It would thus appear that the fact that the house of the Pals was raided is not in dispute. From Ext. 'C' it is also established that the appellants No. 1, 2, 3, 8, 10, 11, 15, 21, 22 and 23 amongst others were present at the place of occurrence. Based on the complaint and the counter complaint two several cases were commenced which were ultimately committed to the sessions Court and were registered as sessions case No. 34 of 1992 and 26 of 1995. They were heard by the same learned sessions Judge and disposed on the same day.

9. Law declared by the Apex Court in the case of Nathi Lal and Ors. v. State of U.P. and Anr. reported in 1990 (supp) SCC 145 as regards procedure to be followed where there are cross cases is as follows:

We think that the fair procedure to adopt in a matter like the present where there cross cases, is to direct that the same learned Judge must try both the cross cases one after the other. After the recording of evidence in one case is completed, he must hear the arguments but he must reserve the judgment. Thereafter he must proceed to hear the cross case and after recording all the evidence he must hear the arguments but reserve the judgment in that case. The same learned Judge must thereafter dispose of the matters by two separate judgments. In deciding each of the cases, he can rely only on the evidence recorded in that particular case. The evidence recorded in the cross case cannot be looked into. Nor can the judge be influenced by whatever is argued in the cross case. Each case must be decided on the basis of the evidence which has been placed on record in that particular case without being influenced in any matter by the evidence or arguments urged In the cross case. But both the judgments must be pronounced by the same learned Judge one after the other.

10. We shall now try to scan the evidence adduced in this case.

The de facto complaint P.W. 1 in his evidence deposed as follows:

The walls of our residential house are made of bricks but said house is thatched by straw. On the adjoining east of our residential compound the residential house of our uncle is standing. There is a gap on our eastern boundary wall for ingress and egress to and from the house of our uncle.

On 26.11.90 in the morning at about 6/7 a.m. while we four brothers namely myself, Niranjana Pal, Sanjoy Pal and Lalu Pal, my parents Bharat Pal and Adara Pal and my sister Sarbani were in our said residential house, said Prem Ghosh along with her daughter Supriti and some villagers, namely, Biswanath Ghosh, Sunil Ghosh, Nanichora Pal, Haradhan Mondal, Dipak Mondal, Durjodhan Mondal, Haradhan Laha, Nabadwip Ghosh, Rabilal Ghosh, Purna Ch. Ghosh, Sibsankar Ghosh, Dharendra Nath Ghosh, Nanda Ghosh, Bipin Ghosh, Swadhin Mondal, Banamali Laha, Nitya Bauri, Dharam Bauri, Purna Ch. Bauri, Ranti Bauri, Mantri Bauri, Krishna Bauri, Gadadhar Bauri, Gaya Bauri, Sujit Bauri and Basudeb Bauri and also Naba Kr. Ghosh came to our southern gate and they asked us to keep Supriti in our house as the wife of my brother Bijoy Pal. All those villagers were

armed with tangi, lathi, ballam, chora, Bhojali, etc. All those villagers who participated in said incident are found present in the accused box. (identified)

In said occasion Premnath Ghosh and others stated to us that there was a love affairs in between Supriti and Bijoy Pal. We did not agree with the proposal of Premnath Ghosh and other villagers and also we did not permit Supriti to enter into our house. Seeing said villagers and also seeing the activities of these accused persons we being afraid closed our main gate and kept ourselves inside our house. Thereafter accused Biswanath Ghosh and Sunil Ghosh ordered the others to set fire in our house. Being ordered these accused persons set fire in our house. Accordingly to save ourselves we left our house and took shelter in the house of my uncle Narayan Ch. Pal. Thereafter accused Sunil Ghosh, Dipak Mondal, Durjodhan Mondal & Nabadwip Ghosh entered into the house of my uncle and therefrom pulled out my brother Niranjan Pal from house. Then says said four persons took our Niranjan Pal and Lalu Pal from my uncle's house beating them and they assaulted them on the road with tangi, lathi, bhojali and iron rod haphazardly. Being assaulted by these accused persons in said road they died on the spot. Thereafter these accused persons left said place and returned their house.

11. No major omission or contradiction in the evidence of the P.W. 1 was obtained from P.W. 18, the investigating officer except for the fact that the P.W. 1 had not told him that the accused persons had assembled with bhojali, chora and iron rod. P.W. 1 in his evidence stated that the accused persons were armed with 'tangee, lathi, ballam, chora, bhqjali etc.' In his written complaint he has mentioned that they were armed with lathi, tangee etc. Therefore, the fact that the accused persons were armed with lethal weapons has been corroborated by the written complaint. Only other omission obtained from the P.W. 18, during cross-examination by the defence, was that he did not tell the investigating officer during his examination under Section 161 that his married sister Sarmoni was on the date of the occurrence in their house. This omission is of no consequence for the simple reason that Sarmoni is an accused in the counter case which would appear from the ext. 'C'. Therefore presence of Sarmoni at the place of occurrence cannot be doubted.

12. Mr. Basu, learned Advocate appearing in support of the appeal, submitted that the P.W. 1 in his evidence deposed that Biswanath Ghosh and Sunil Ghosh exhorted the other accused persons to set the house of Pals on fire which is not there in the written complaint. In our view this is a matter of detail and the written complaint is not supposed to contain every minute detail. Mr. Basu then contended that the P.W. 1 in his evidence deposed that the members of the Pal family left their house and took shelter in the house of their uncle namely Chandra Pal. This fact, according to him, is also not there in the written complaint. There is evidence to show that the house of Narayan Chandra Pal is adjacent to that of the P.W. 1. It is also there in the evidence that there is an opening in the boundary wall to have access to the house of Narayan Chandra Pal. Narayan Chandra Pal is the brother of Bharat Pal. Bharat Pal is the father of P.W. 1. At the time when the incident took place both Bharat Pal and Narayan Chandra Pal were alive. There is evidence to show that at that point of time there was cordiality between the two families which over the time has been impaired. Therefore it is not unlikely that when the P.W. 1, in his written complaint, referred to their house he might have included the house of his uncle Narayan Chandra Pal regard being had to the fact that this family, according to Ext.C, had been ex-communicated by the rest of the villagers. Significantly the discrepancy which Mr. Basu highlighted during his argument was not put to the P.W. 1 during his cross-examination. Moreover there was no other place where the Pals could have taken refuge. Their house was on fire. Outside the house the assailants were there armed with lethal weapons. Therefore the only place where they could have resorted to was the house of the uncle Narayan Chandra Pal. We are therefore, unable to find any contradiction in the evidence of the P.W. 1.

13. Mr. Basu also drew our attention to that part of the evidence of the P.W. 1 where he deposed that Sunil Ghosh Dipak Mondal, Durjodhan Mondal and Nabadwip Ghosh took away the victims. Mr. Basu tried to find contradiction on this aspect of the matter also. We find that in the written complaint the P.W. 1 had stated that Sunil Ghosh, Nabadwip Ghosh, Rabioplal Ghosh, Haradhan Laha and Dipak Mondal had dragged out the deceased Fatik Pal and Niranjana Pal. It is that in the written complaint Durjodhan Mondal was not alleged to be one of those who had dragged away the victims. In the written complaint it was alleged that the

accused persons had beaten the victims to death. In his deposition the defacto complainant has stuck to the same. The variation brought to our notice by Mr. Basu is a minor one and cannot affect the story in the main. We are unable to accept the submission of Mr. Basu that the story to be found in the FIR underwent a change. We are unable to accept this approach. In appreciating the evidence of rural people we shall do well to remember the following caution administered in the case Shivaji Sahabrao v. State of Maharashtra reported in : 1973 CriLJ1783 .

The scene of murder is rural, the witnesses to the case are rustic and so their behavioural pattern and perceptive habits have to be judged as such. The too sophisticated approaches familiar in Courts based on unreal assumptions about human conduct cannot obviously be applied to those given to the lethargic ways of our villages. When scanning the evidence of the various witnesses we have to inform ourselves that variances on the fringes discrepancies in details, contradictions in narrations and embellishments in inessential parts cannot militate against the veracity of the core of the testimony provided there is the impress of truth and conformity to probability in the substantial fabric of testimony delivered.

14. Mr. Basu also commented that the explanation sought to be given by the P.W. 1 for examining the members of the family of Narayan Chandra Pal are not convincing. P.W. 1 was not suggested during his cross-examination that his explanation was intended to get rid of the rigour of the Section 114(g) of the Evidence Act. Moreover, a daughter-in-law of Narayan Chandra Pal was, in fact, examined. We, therefore are not in a position to accept this. submission of Mr. Basu.

15. Mr. Basu also submitted that the relationship between Bijoy Pal and Supriti had been admitted by the P.W. 1. P.W. 1 deposed that he had heard about a love affair between his younger brother Bijoy and Supriti. Whether this amounts to an admission of relationship is doubtful. In any event this does not affect the merits of this matter.

16. Next submission of Mr. Basu was that the P.W. 1 did not depose that his mother had followed the victims when they were being taken away by the assailants. This is neither a contradiction nor an omission within the meaning of

the explanation appended to Section 162 of the Code of Criminal Procedure.

P.W. 2 Sanjay Pal deposed as follows:

On 26.11.90 in morning at about 6/7 a.m. while I myself Sanjoy Pal, Niranjana Pal, Lalu Pal, Manik Pal, our parents, the wife of Manik Pal and his children we all were present in our residence at village Mamudpur, about 35/36 villagers along with Supriti Ghosh, d/o Premnath Ghosh came to our southern gate being armed with tangi, lathi etc. and they took attempt to push Supriti into our house stating that Supriti Ghosh was the wife of my brother Bijoy Pal. We protested and resisted them. As a result an altercation in between those villagers in one side and Lalu and Niranjana in another side was started. During the course of said altercation said villagers took attempt to assault us. Accordingly, we four brothers closed our main gate. As a result, they failed to enter into our house. Then villagers namely, Haradhan Mondal, Sunil Ghosh, Biswanath Ghosh, Nanichora Pal and Rabilal Ghosh ordered the other villagers to set fire in our house. To save our life we all the family members took shelter in the house of our uncle Narayan Pal. The house of Narayan Pal was standing adjoining east of our residential house. Thereafter said villagers entered into the house of my uncle to trace out us and they were able to trace out my brothers Niranjana Pal and Lalu Pal and they pulled out them from said house and took them into the place in front of our southern gate and also in front of the southern gate of my uncle, after beating. There is a village road adjoining south of our said southern gate. There Haradhan Mondal, Durjodhan Mondal, Dipak Mondal, Sunil Ghosh, Biswanath Ghosh, Nabadwip Ghosh, Purnachandra Ghosh, Nanichora Pal, Haradhan Laha, Rabilal Ghosh, Dhiren Ghosh, Sibsankar Ghosh, and Nandalal Ghosh of our village assaulted them (my said two brothers) with tangi, lathi etc. Being assaulted by said persons, my said two brothers Lalu and Niranjana died on the spot. We saw said incidents keeping ourselves inside the compound of my uncle surrounded by walls by peeping.

I saw those persons to take out the dead bodies of my said two brothers from that place and to throw the same into an well situated by the side of our residential house and they also kept the branches and other washed materials over said dead bodies. Thereafter those persons left said place and returned to their houses.

For setting fire by said persons our residential house was burnt. All those persons/villagers are found present in the accused box (identification).

17. In the evidence of P.W.2 omissions were highlighted by the P.W. 18, the investigating officer, during his cross-examination. He deposed that the P.W.2 did not tell him that at the time of the incident the wife and children of the P.W. 1 Manik Pal were also present and they saw the incident. We already have noticed the written complaint which contains a statement that all the members of family including female members had witnessed incident. Second omission pointed out by the P.W. 18 is that P.W.2 did not tell him that he had witnessed the incident by peeping. That in our view is a matter of detail. The omission does not derogate from the fact that he witnessed the incident. The third omission pointed out by the P.W. 18 during his cross-examination is that the P.W. 2 did not tell him that some of the villagers had taken away his two brothers 'forcibly' from the house of his uncle Narayan Chandra Pal. It is significant that the P.W.2 in his evidence never used the expression forcibly. His evidence is that his brothers Niranjana and Lalu were pulled out by the persons named by him. Therefore, this omission does not in our view materially affect the value of the evidence of the P.W.2. The only other omission pointed out by the P.W. 18 during his cross examination is that the P.W.2 did not tell him that they had taken shelter in the house of their uncle to save themselves. We have noticed from the evidence of the P.W. 1 that the house of the uncle is situate on the adjoining east of the residential house of the defacto complainant. There is also an opening in the eastern boundary wall of the house of the defacto complainant for ingress and egress to and from the house of the uncle. When there is an opening in the boundary wall for the purpose of access to the house of the uncle of the defacto complainant and the uncle is the brother of Bharat Pal who is the father of the defacto complainant, it is quite likely that the house of the uncle was treated by the defacto complainant and the members of his family as a part of their house. Moreover, the P.W. 1 in his evidence has also deposed that they had taken shelter in the house of the uncle. P.W. 18 during cross-examination has not pointed out any omission or contradiction on this part of the evidence of the P.W. 1. Therefore, the fact that the P.W.2 also deposed the same thing, which the P.W.1 had done, cannot be viewed with any amount of suspicion. Sight also cannot be lost of the fact that the house of the complainant

party was on fire. The mob was there outside the house with lethal weapons. The house was set on fire by them. If the Pals had crossed the boundary of their house that would have meant greater danger to them. Therefore, the only place where they could have resorted to, was the house of the uncle Narayan Chandra Pal.

18. Mr. Basu submitted that according to the P.W.2 Haradhan Mondal, Sunil Ghosh, Biswanath Ghosh, Nonichora Pal and Rabilal Ghosh had ordered the villagers to set the house on fire. He submitted that the evidence of the P.Ws. 1 and 2 on the same point is irreconcilable and cannot be believed. He further submitted that according to the P.W.2. Six persons had exhorted the villagers to set the house on fire and 7/8 persons acting on such exhortation had actually set the house on fire whereas the evidence of the P.W. 1 is that all the accused persons had set the house on fire being exhorted by Biswanath Ghosh and Sunil Ghosh. We are unable to accept the submission that the evidence of P.Ws. 1 and 2 are irreconcilable. Both P.Ws. 1 and 2 deposed that (a) there was instigation to put the house on fire; (b) Sunil and Biswanath have been implicated as the instigators by both P.Ws. 1 and 2. The difference is confined to actual number of instigators and the actual number of persons who had set the house on fire. The effect of this difference may not be material because it is a case based on Section 149 of the Indian Penal Code. An unlawful assembly resorted to these illegal activities. In such a case it is not necessary to prove overt acts of all the individual members. We may also point out that observation of all the witnesses cannot be the same particularly when their mind is overpowered with the imminent danger of death. Even in normal circumstances if an incident happens, all the persons present at the place of occurrence would seldom be able to reproduce the whole thing uniformly. The reason is that attention of all the witnesses cannot be concentrated all the time on all aspects of the matter and therefore discrepancies in the account of witnesses is bound to be there.

19. Next submission advanced by Mr. Basu concerning the evidence of P.W.2 is that according to this witness 'only we four brothers took shelter in the house of my uncle'. On the basis of this evidence of the P.W.2 Mr. Basu submitted that the mother and the sister were not in the house of the uncle. Whether the mother and the sister of the P.W.2 were there in the house of the uncle is a question which

was not put to the witness. If the defence wanted to prove that the mother and the sister of the P.W.2 were not present in the house of Narayan Chandra Pal then a specific question to that effect should have been asked. The fact that a specific question was not asked goes to show that the defence knew that a favourable answer was not likely to come forth. Moreover, we already have demonstrated that except for the house of uncle they had no other place to go. We therefore are unable to accept this submission of Mr. Basu.

20. Mr. Basu further pointed out that the P.W.2 has admitted that on 26th November 1990 Shantiram Bauri, Nonichora Pal, Haradhan Mondal, Banamali Laha and Sujit Bouri received injuries on their persons. P.W.2 has added that he did not know as to when were such injuries suffered by them. Moreover, the injuries suffered by those five persons or any of them is a subject-matter of a different litigation and we cannot record any finding with regard thereto in this appeal.

21. P.W.3 Sabita Pal, daughter-in-law of the uncle Narayan Chandra Pal deposed as follows:

From my house I heard that a quarrel in between the sons of Bharat Pal and said persons was going on and subsequently the sons of Bharat Pal entered into their house after closing their main gate. Within a short time I saw the fire on the house of Bharat Pal and as such to save themselves the sons of Bharat Pal and also the other members of their family came to our house. Thereafter about ten persons out of said 30/40 persons entered into our house and out of them four persons forcibly took out Niranjana Pal and Lalu Pal after beating them from our house. And those persons assaulted them on the village road outside our southern gate and for said assault said Niranjana Pal and Lalu Pal died on spot. For setting fire in the house of Bharat Pal, the entire house including household articles were burnt and damaged. On the same date subsequently the dead bodies of Niranjana and Lalu were recovered from a well. On the same date the fire brigade came to our village and put out the fire of the house of Bharat Pal.

Haradhan Mondal, Sunil Ghosh, Nanichora Pal and Biswanath Ghosh took out said Niranjana and Lalu Pal from our house after beating them. I know said

persons. They are present in the Court room. (identified)

Most of the said 30/40 persons who being armed were assembled in the southern gate of the house of Bharat Pal were not known to me as only about 2/3 months ago I became married and started to live in my father-in-law's house.

22. P.W. 18 in his cross-examination did not at all point out any omission or contradiction in her evidence.

23. Criticising the evidence of P.W.3 Mr. Basu submitted that at the highest only the P.Ws. 1 and 2 and two deceased brothers had taken shelter in the house of the uncle Narayan Chandra Pal. This submission, in our view, is contrary to the evidence of P.W.3. P.W.3 deposed that 'to save themselves the sons of Bharat Pal and also the other members of their family came to our house'. Mr. Basu drew our attention to the following part of the evidence of P.W.3 'we did not try to come out from said room upto the time of arrival of police'. Mr. Basu submitted that this goes to show that no one budged from the room in which they had taken shelter. He submitted that even if it is assumed that the mother and the sister of the P.Ws. 1 and 2 had taken shelter in the house of Narayan Chandra Pal they did not come out of the house. The learned cross-examining counsel did not pursue the line of cross examination by asking the P.W.3 as to who did she mean by the expression 'WE'.

24. Lastly Mr. Basu drew our attention to the following suggestion given to the P.W.3:

It is true that on the date of incident at about 7 a.m. some villagers of our village except these accused persons and many people of the neighbouring villages attacked the house of Bharat Pal.

24.1. Mr. Basu submitted that the P.W.3 has admitted in her evidence that the accused persons were not there at the place of occurrence. We are unable to accept this submission. What the witness meant was excepting the accused persons there were other villagers also who had attacked the house of Bharat Pal. In other words what she meant was that in addition to the accused persons there

were others. The evidence given in Bengali was translated into English by the learned Trial Judge. He appears to have made literal translation. We cannot apply sophisticated standard of English language which is not our mother tongue.

25. P.W.4 Shrimati Adari Pal, mother of the deceased persons, deposed, inter alia, as follows:

At that time about 40 villagers who are found present in this Court room came to our house with the daughter of Premnath Ghosh with an intention to keep the daughter of Prem Ghosh into our house my sons protested. Said persons were armed with lathi, tangi etc. Thereafter my sons being afraid of entered into our house and closed the gate. Thereafter said persons set fire in our house with an intention to kill us. As such we took shelter in the house of Narayan Pal standing by the side of our house. Thereafter some of the villagers, namely, Nanichora Pal, Biswanath Ghosh, Nabadwip Ghosh, Purna Ghosh, Haru Laha, Nanda Ghosh, Dhiren Ghosh, Sunil ghosh, Siblu Ghosh, Rabi Ghosh, Haru Mondal, Dipak Mondal, Durjodhon Mondal etc. entered into the house of Narayan Pal and took out my two sons, namely, Niranjana Pal and Lalu Pal from the house of Narayana Pal forcibly. I followed them and requested them not to assault my sons and they assaulted my said two sons and they also killed them and thereafter they took out the dead bodies of my said two sons into a well.

26. Only omission pointed out by the P.W. 18 during his cross examination in respect of the evidence of P.W.4 is that she had not told the investigating officer during her examination under Section 161 Cr PC that she had requested the assailants not to assault her sons after coming out from the house. This at the highest goes to show that she requested the assailants not to assault her sons but she did not come out of the house. This would not, in our view, take away her character of an eyewitness.

27. Mr. Basu drew our attention to this part of the evidence of P.W.4 'I followed them and requested them not to assault my sons and they assaulted my said two sons and they also killed them'. Mr. Basu submitted that the P.W.4 did not tell the I.O. during her examination under Section 161 Cr PC that she had come out of the house of Narayan Chandra Pal and had requested the assailants not to assault

her two sons. This according to him renders the evidence of P.W.4 unbelievable. We are unable to accept this submission for the reason already indicated. Moreover, we also requested Mr. Basu to produce the record containing the statements of the P.W.4 during her examination under Section 161 Cr PC which he promised to produce but did not do so ultimately on the ground that it was not available with him. Mr. Basu added that P.W.3 deposed in her evidence that no one went out of the house of Narayan Chandra Pal until arrival of the police. According to him how can the P.W.4 be believed to have followed the assailants. It is possible for a mother to follow the assailants of her sons. It is not unnatural that a mother will risk her life and try to save her sons. The evidence of P.W.3 that no one budged from the house of Narayan Chandra Pal was not put to the P.W.4. Therefore she did not get an opportunity to clarify the position.

28. Mr. Basu lastly submitted that the P.W.2 deposed that only 4 brothers had taken shelter in the house of the uncle Narayan Chandra Pal. Even this was not put to the P.W.4 and P.W.3 deposed, we already have noticed, that all the members of the complainant party had taken shelter in their house. We already have indicated that the Pals had no other place to go. Their own house was on fire and outside the house were the assailant armed with lethal weapons. We therefore, do not find any reason to disbelieve the evidence of the P.W.4.

29. P.W.6 Sarmoni Ghosh, sister of the two deceased persons, deposed, inter alia, as follows:

On the above date and time about 30/40 villagers led by Biswanath Ghosh of our village along with Premnath Ghosh and his daughter Buri alias Supriti came in front of the main gate of our parents' house being armed with tangi, lathi etc. with an intention to push said Buri alias Supriti into our house claiming that she was the wife of my elder brother Bijoy Pal. My father and my brothers except Bijoy made protest against said intention of the villagers as a result a scuffling in between said villagers and my said brothers was started. During the course of said scuffling my brothers and my father entered into the house being afraid to be killed and closed the main gate from inside. They tried to break down the main gate but failed and then accd. Biswanath Ghosh, Nanichora Pal, Sunil Ghosh and Haradhan Mondal

asked the rest villagers to set fire in our house to kill us with fire. As such they set fire in our house. Being afraid we all left our said house and entered into the house of our uncle Narayan Pal. In between our house and the house of Narayan Pal there was a small passage for ingress and egress. In between our house and the house of Narayan Pal only one boundary wall was standing and in said boundary wall the passage as stated above was existing. Our main gate and the main gate of uncle Narayan Pal were on the south of our respective houses. Thereafter accused Biswanath Ghosh, Nabadwip Ghosh, Purna Ghosh, Nanda Ghosh, Rabilal Ghosh, Sibul Ghosh, Dhiren Ghosh, Nanichora Pal, Haradhan Laha, Sunil Ghosh, Durjodhan Mondal, Haradhan Mondal and Dipak Mondal who are found present in the accused box (identified) entered into the house of my said uncle and they forcibly took out my elder brother Niranjana Pal and younger brother Fatik alias Lalu from said house by assaulting them and came on the village road in front of the main gate of the house of my uncle Narayan Pal and said persons as stated above assaulted them causing grievous injuries and as a result both of my brothers died on the spot. The rest villagers who are found present in the accused box also (identified) saw the incident surrounding them. They assaulted them with tangi, lathi etc. I saw the incident standing on the spot. When said accused persons were taking out my said two brothers from the house of my uncle I myself and my mother also came out from the house of my uncle and we requested them not to assault my said two brothers.

30. P.W. 18 in his cross-examination pointed out that she did not tell him that at the relevant point of time she was in her father's house. This does not, in our view, render her evidence unbelievable for the simple reason that the presence of the P.W. 6 in the house of the defacto complainant at the time when the incident took place is more than proved by ext. 'C' which is a complaint filed earlier in order of time in which P.W.6 is an accused. However, some omissions were indeed deposed to by the P.W. 18 during his cross examination pertaining to the evidence of P.W.6. It would appear that the evidence of P.W.6. It would appear that the evidence of P.W.6 insofar as the same related to - (a) location of the uncle's house, (b) the house of Pals set on fire by the accused persons at the exhortation of Biswanath Ghosh, Nanichora Pal, Sunil Ghosh and Haradhan Mondal was not contradicted.

31. Mr. Basu drew our attention to the following sentences elicited from the P.W.6 during her cross-examination:

Since before the incident in question a litigation in between the family members of Biswanath Ghosh over the issue of a land is pending. I cannot say whether said land subsequently came into the ownership of my brothers.

32. He submitted that there was previous enmity between the parties which could be a reason for falsely implicating them in the case. This could also be a reason which motivated Biswanath Ghosh and his family members to commit this crime. Reference in this regard may be made to the judgment in the case of Ram Sewak v. State of U.P. reported in 2005(12) SCC 143 wherein Their Lordships held as follows:

It was then pointed out that P.W.2 Virendra Singh was inimical towards the accused and, therefore, he was implicated. The alleged enmity is said to be on account of oral report given by P.W.2 in connection with the theft committed by the accused in the house of the deceased. Far from creating a doubt on the reliability of the evidence of P.W.2, this fact stated by P.W.2 would throw light on the possible motive for attacking the deceased.

33. Mr. Basu added that this witness cannot be believed because she feigned ignorance as regards the fact that she was an accused in the counter case. There is nothing before us to show that by the time she came to give evidence she had been arrested or that she was enlarged on bail or that she was at that point of time regularly attending the proceedings from the dock. Therefore it can not be said that she deliberately feigned ignorance. She may or may not have feigned ignorance. In any event this is not a factor on the basis of which credibility of her evidence in this case may be corroded.

34. Evidence of P.W.7 Namita Pal, wife of the de facto complainant, we agree with Mr. Basu, has been largely contradicted and we would not like to take her evidence into consideration.

35. P.W.8 Kalpana, daughter of the P.W.1, who at the relevant point of time was only 12 years old, deposed, inter alia, as follows:

Then accused Biswanath Ghosh, Sunil Ghosh, Haradhan and Nanichora Pal ordered the rest villagers to set fire in our house. Then the villagers Rabi Ghosh, Nabadwip Ghosh, Purna Ghosh, Dhiren Ghosh, Nanda Ghosh, Haradhan Laha, Dipak Mondal, Durjodhan Mondal and others set fire in all side of our residence. All the abovenamed accused persons are found present in the accused box. (identified) At this stage I am unable to identify the rest villagers who on the date of incident came to our gate with the abovenamed accused persons. For setting fire said accused persons our residential house was burnt.

When our residential house was burning accused Biswanath Ghosh, Purna Ghosh, Nabadwip Ghosh, Dhiren Ghosh, Nanda Ghosh, Rabi Ghosh, Sibnath Ghosh, Nanichora Pal, Haradhan Laha, Sunil Ghosh, Haradhan Mondal, Dipak Mondal, Durjodhan Mondal entered into the house of said Narayan Pal through the main gate. And within a short time they forcibly took out my uncle Niranjan Pal and Lalu Pal beating them from the house of said Narayan Pal and taking them on said village road in front of said gate assaulted them with lathi, tangi etc. and for said assault my said two uncles Niranjan Pal and Lalu Pal died on the spot. I myself saw the above incident. I also saw said accused persons to take their dead bodies of my two uncles into the vacant land of Sukumar Pal and threw the same into the well of said Sumukar Pal. Thereafter they put straw and branches of tree on said well to cover said dead bodies. Thereafter they left said place.

36. P.W. 18 in his cross-examination deposed that P.W. 8 had not told him during her examination under Section 161 that the accused Rabi Ghosh, Dhiren Ghosh, Nanda Ghosh, Haradhan Laha, Dipak Mondal and Durjodhan Mondal had set house on fire. P.W. 18 in his cross-examination went on to add that the P.W. 8 in her examination under Section 161 Cr PC had indeed implicated Biswanath Ghosh, Rabi Ghosh, Dhiren Ghosh, Swadhin Mondal, Subodh Pal, Habol Pal, Ranjit Bauri, Mantri Bouri, Purna Bouri, Faring Bouri, Nanichora Pal, Haradhan Mondal and some others. Therefore, there is no serious infirmity in her evidence.

37. The evidence of the P.W.9, we agree with Mr. Basu, was largely contradicted by the P.W.18 the I.O. and we would not like to take into consideration his evidence.

38. Mr. Basu submitted that according to the evidence of P.W. 19 'it could be said about 1 hr. time is required to go to P.S. from Mamudpur on foot'. He also drew our attention to the following evidence of P.W. 19 S.I. Kabir Khan:

I perused the contents of written compliant and being satisfied I started said P.S. Case No. 68/90 by filling up formal FIR. Said written compliant was received by me at 7.45 hrs. from Biswanath Ghosh. After receiving said written complaint but before filling up the formal FIR of P.S. Case No. 68/90 I saw the dead body of a person and also I saw the injured persons.

39. Mr. Basu contended that the four injured persons namely Banamali, Haradhan Mondal, Nanichora Pal and Sujit and the dead body of Shatiram Bouri had already reached the police station at 7.45 a.m. on 26th November 1990. He added that considering the fact that from the the place of occurrence, in the village Mamudpur, the distance of Khairasole P.S. is a journey of 1 hr. on foot, the presence of Banamali, Haradhan Mondal, Nani Chora Pal and Sujit at the place of occurrence is highly improbable because the incident, according to the prosecution witnesses, took place at around 7 a.m. He therefore submitted that the prosecution case is a cooked up story and should be rejected in limine.

40. We are unable to accept this submission. There is nothing to show that the four injured persons traversed the distance on foot. As a matter fact, injured persons walking an hour to reach the P.S. is all the more difficult to believe. On the top of that the dead body of Shantiram was also there with them. It is therefore not possible to hold that the four accused persons walked to the police station. On the top of that the evidence of P.W.19 is that after receiving the written complaint at 7.45 a.m. and before filling up the formal FIR he had seen the injured persons. How long after receiving the written complaint did the P.W. 19 take up the work of filling up the formal FIR has not been spelt out by him. P.W. 19 after receiving the written complaint must have taken some time to follow the matter. How long did he, in fact, not been disclosed by anyone. It is, therefore, not possible to hold that

the aforesaid four injured persons could not have been present at the place of occurrence. It may not also be correct to say that the time of occurrence was 7 a.m. Both the P.Ws.1 and 2 deposed that incident took place at about 6/7 a.m. The ext. 'C' tendered by the defence depicts the incident to have taken place at 6 A.M.

41. Mr. Basu submitted that the villagers had assembled to see that the girl Supriti is respectably rehabilitated in life. The intention of the villagers was not to assault and far less to kill any of the members of the Pal family. It is only when the members of the Pal family turned violent by resorting to assault on the villagers that the villagers retaliated and there was casualty on either side. According to him the prosecution has not been able to substantiate any of the charges levelled against the appellants. The charge under Section 201 according to him has not been proved at all. The charges under Section 436 and under Section 302 of the IPC would depend upon the proof of the necessary ingredients of Section 149 of IPC which according to him has not been done. Individual overt acts according to him have to be proved in order to take assistance of Section 149 IPC.

42. Mr. Basu relied on judgment in the case of Musakhan and Ors. v. State of Maharashtra reported in : 1976 CriLJ1987 . He relied on paragraph 5.

It is well settled that a mere innocent presence in an assembly of persons, as for example a bystander, does not make the accused a member of an unlawful assembly, unless it is shown by direct or circumstantial evidence that the accused shared the common object of the assembly. Thus a Court is not entitled to presume that any and every person who is proved to have been present near a riotous mob at any time or to have joined or left it at any stage during its activities is in law guilty of every act committed by it from the beginning to the end, or that each member of such a crowd must from the beginning have anticipated and contemplated the nature of the illegal activities in which the assembly would subsequently indulge. In other words, it must be proved in each case that the person concerned was not only a member of the unlawful assembly at some stage, but at all the crucial stages and shared the common object of the assembly at all these stages. Such an evidence is wholly lacking in this case where the

evidence merely shows that some of the accused were members of the unlawful assembly at one particular stage but not at another. In these circumstances, therefore, the accused who were not present or who did not share the common object of the unlawful assembly at other stages cannot be convicted for the activities of the assembly at those stages. In view of this error committed by the High Court it has become necessary for us to examine the evidence on the limited question as to which of the accused had actually participated in the incident at the Engineering College, Bharat Lodge and the chawl of Jogendra Singh where acts of incendiarism had taken place. It is also common ground that the occurrence had taken place at night and the evidence of the witnesses identifying the accused had to be examined with great caution.

43. Secondly Mr. Basu relied on a judgment in the case of Manoj alias Bhau and Ors. v. State of Maharashtra reported in AIR SC 1620. He relied on paragraph 5.

As has been stated earlier so far as role ascribed to accused 2 and 3 are concerned the witness has not given any definite overt acts excepting making the general version that all accused surrounded and assaulted. In this view of the matter though the evidence of this witness does not assist the prosecution in bringing home the charge against accused Nos. 2 and 3 but so far as accused No. 1 is concerned the prosecution case can be said to have been proved beyond reasonable doubt on the basis of the evidence of P.W.1.

44. Thirdly he relied on the judgment in the case of Chikkarange Gowda and Ors. v. State of Mysore reported in 1956 SC 731 wherein the essential ingredients of Section 149 were summarised as follows:

The first essential element of Section 149 is the commission of an offence by any member of an unlawful assembly; the second essential part is that the offence must be committed in prosecution of the common object of the unlawful assembly, or must be such as the members of that assembly knew to be likely to be committed in prosecution of the common object.

45. Commenting upon the FIR he submitted it is silent on very important aspects of the matter like who instigated the accused persons to set the house on fire. This

infirmity according to him has seriously impaired the veracity of the prosecution case. In support of his submission he relied on the judgment in the case of Ram Kumar Pandey v. State of M.P. reported in : 1975 CriLJ870 wherein the following view was expressed:

No doubt, an FIR is a previous statement which can, strictly speaking, be only used to corroborate or contradict the maker of it. But, in this case, it had been made by the father of the murdered boy to whom all the important facts of the occurrence, so far as they were known up to 9.15 p.m. on March 23, 1970, were bound to have been communicated. If his daughters had seen the appellant inflicting a blow on Harbinder Singh, the father would certainly have mentioned it in the FIR. We think that omissions of such important facts, affecting the probabilities of the case, are relevant under Section 11 of the Evidence Act in judging the veracity of the prosecution case.

46. Commenting on absence of autopsy surgeon Mr. Basu submitted that the contents of the postmortem report cannot be said to have been proved in this case because the Autopsy Surgeon was not examined. In support of his submission he relied on a Division Bench judgment of this Court in the case of June @ Arjun Mandi v. The State reported in 1986 C Cr LR(Cal) 138. In the aforesaid judgment following view was expressed:

The moot question in this appeal is thus whether, in the aforesaid facts and circumstances, the conviction of the appellant under Section 302, IPC is to be affirmed or not. Mr. Jaiswal has contended that the Court below erred in relying on a Full Bench decision of the Allahabad High Court in the case of Saddiq v. State 1981 Cr LJ 379 to the effect that a postmortem report may be read as substantive evidence when the genuineness of the postmortem report is not disputed by an accused, even though the doctor who held the postmortem examination was not examined. Mr. Jaiswal has, in this connection, referred us to a Division Bench decision of this Court in the case Gafur Sheik v. State 1984 Cr LJ 559 to the effect that the postmortem report cannot be used as substantive evidence in the absence of examination of the doctor who submitted the report. Mr. Ghosh, learned Advocate for the State, has tried to distinguish this Division Bench

decision of this Court in the case of Gafur Sheik there was no explanation as to why the doctor was not examined, explanation has been given by the prosecution in the present case for the non-examination of the doctor. Mr. Ghosh has, in this connection, drawn our attention to Order No. 8 dated 25.6.83 passed by the learned Sessions Judge, the relevant portion of which reads as follows: Learned Panel Pleader files a petition stating that the attendance of Medical Officer, who held postmortem examination 'could not be secured and he prays for making the postmortem report as exhibit. Copy of the petition served upon the learned Advocate for the accused. Heard both sides. Sri Nalini Mazumdar, learned Advocate for the accused is called upon to admit or deny the genuineness of the postmortem report, which is sought to be exhibited by the prosecution. The learned Advocate does not dispute the genuineness of the document, namely, the postmortem report and has no objection to the document being admitted in evidence. Hence the postmortem report is received in evidence and it is marked ext. No. 4 under Section 294, Cr PC....

Mr. Ghosh has submitted that when sufficient explanation is given in the Court's order dated 25.6.83 for non-examination of the doctor, the postmortem report, Ext. 4, should be treated as substantive evidence on the basis of the decision in the case of Saddiq (supra). It appears that in the course of the trial in the Court below there was a petition by the prosecution on 24.6.83 for an adjournment on the ground that Dr. B.K. Khastagir, the Sub-Divisional Medical Officer, Jhargram, did not attend Court on that day, though he was till then posted at Jhargram. By an order passed on 24.6.83 the learned Sessions Judge fixed the case on 25.6.83 for further hearing, after considering this petition filed for the prosecution. Thereafter, on 25.6.83 another petition was filed for the prosecution in the Court below wherein it was stated that: Dr. B.K. Khastagir, who was on medical leave, was to join on 27.6.83 and could extend his leave on medical ground. A prayer was made in that petition filed on 25.6.83 for treating the postmortem report as evidence under Section 294, Cr PC on alleging that the whereabouts of Dr. B.K. Khastagir were not yet intimated to the prosecution. The learned Sessions Judge allowed this prayer made in the petition dated 25.6.83 and passed the aforesaid order. After considering the petitions filed for the prosecution on 24.6.83 and 25.6.83, we are unable to accept the contention of Mr. Ghosh that prosecution has given

sufficient explanation in this case for non-examination of the doctor. When the doctor was to join his duties on 27.6.83, prosecution could well have prayed for adjournment for some more days for examination of the doctor instead of straight way filing a petition for treating the postmortem report as evidence under Section 294, Cr PC. The provisions of Section 294, Cr PC relate to formal proof of certain documents. The marginal note to that Section is, 'no formal proof of certain documents.' This marginal note suggests that Section 294, Cr PC is intended to avoid wastage of time for proof of certain documents, formal proof of which can be dispensed with in the circumstances mentioned in Section 294(1), Cr PC. These circumstances are filing of a list of documents by either the prosecution or the accused and calling upon either the prosecution or the accused to admit or deny the genuineness of each such document mentioned in this list of documents. There is nothing in the record of the Court below to show that any such list of documents was filed for the prosecution in the Court below or that, prior to 25.6.83, the learned Advocate for the appellant in the Court below was called upon by the prosecution to admit or deny the genuineness of the postmortem report. We are accordingly, of the opinion that the provisions of Section 294(1), Cr PC have not been properly complied with in this case. Even assuming that the provisions of Section 294(1), Cr PC have been complied with in this case, in view of the aforesaid order No. 8 dated 25.6.83 passed by the learned Sessions Judge, opinion evidence like a postmortem report cannot but be hearsay evidence *Rahim Khan v. Khurshid Ahmed* : [1975]1SCR643 . Section 60 of the Evidence Act is to the effect that oral evidence must, in all cases whatever, be direct and if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds. There is proviso to this provision regarding reception of opinion evidence alike the provision in Section 32 of the Evidence Act. Though the term 'hearsay' means statements, oral or written, reported to have been made by persons not called as witnesses. Such statements are not admissible in evidence subject to certain exceptions mentioned in Sections 17 to 39 of the Evidence Act. These Sections 17 to 39 find place in Chapter II of the Evidence Act. In the case of *Gafur Shiek* 1984 Cr LJ 559, it was observed that no evidence was led to show that the postmortem report was being tendered in evidence under any of the provisions in Chapter II of the Evidence Act

and hence the postmortem report could be used as substantive evidence. What Their Lordships presumably meant by referring to Chapter II of the Evidence Act were the provisions of Sections 17 to 39 of the Evidence Act, which were exceptions to the hearsay rule. The postmortem report cannot fall within any such exceptions in Sections 17 to 39 of the Evidence Act. Mr. Ghosh wanted to rely of the provisions of Section 58 of the Evidence Act and contended that when learned advocate for the accused in the Court below did not object to postmortem report being admitted in the evidence, the postmortem report would go as admission. This contention cannot be accepted. A distinction is always maintained by the Courts between judicial admission and evidentiary admission. Section 58 of the Evidence Act is confined to judicial admission such as admission, by the pleadings. The expression 'read In evidence' in Section 294(3), Cr PC cannot be judicial admission within the meaning of Section 58 of the Evidence Act. With due respect to Their Lordships, we are unable to accept the view expressed in the case of Saddiq 1981 Cr LJ 379 that this expression 'read in evidence' in Section 294(3), Cr PC means 'read as substantive evidence'. The expression 'read in evidence' in Section 294(3) Cr PC cannot mean 'read as substantive evidence' in view of the bar under the aforesaid Section 60 of the Evidence Act under which if a document refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on these grounds. This provision in Section 60 of the Evidence Act, if considered with the provisions in Section 45 of the Evidence Act, go to show that the opinion given by the doctor, who held the postmortem examination, can never be substantive evidence in the absence of examination of the doctor who held that opinion. We are of the opinion that in a case covered by Section 294(1), Cr PC the matters which could be 'read in evidence' under Section 294(3) Cr PC are factum of holding of the postmortem examination of the dead body by the doctor on the date mentioned in the postmortem report, the identification of the dead body before the doctor by the person claiming to have identified the dead body before the doctor as well as the existence of the injuries found by the doctor on an examination of that dead body and that the opinion given by the doctor in the postmortem report about the cause of the injuries or the effect of the injuries of the dimension of the injuries found by him cannot be substantive evidence in view of the bar under Section 60 of the

Evidence Act. It is to be stated in this connection that a distinction is also drawn by the Courts between the factum of a statement and the truth of a statement. The aforesaid matters, viz., holding of postmortem examination on a certain date by a doctor, identification of dead body by a person before a doctor and the existence of the injuries in the person of the dead body found by the doctor are matters of fact as contrasted with the truth of the other statements made in a postmortem report, such as giving opinion about the cause of the injuries or dimension of the injuries or the result of the injuries. We are, accordingly, of the opinion that the postmortem report, Ext.4, may be read as evidence about the factum of holding of postmortem examination by the doctor, identification of the dead body of Hiramoni before the doctor and the existence of the injuries without their dimensions, mentioned in the postmortem report and in the judgment of the learned Judge, when no objection was raised in the Court below about the reception of the report as exhibit.

47. Thus from a conspectus authorities relied on by Mr. Basu he submitted that this is a case for outright acquittal because the prosecution has not been able to prove beyond reasonable doubt the case against the appellants. As an alternative argument he submitted that at the highest the appellants No. 1 to 13 can be held guilty under Section 304 Part II.

48. The questions, in our opinion, that fall for a decision are whether there was an unlawful assembly? If so, who were the members thereof? and lastly whether the evidence adduced in this case brings home the charges, beyond any reasonable doubt, levelled against the appellants? The first document namely the written complaint, Ext.1, noticed above, goes to show that 26 named accused persons along with 12/14 other villagers of Mamudpur, armed with lathi, tangi etc. had come to the house of the Pals and created pressure upon them to accept Supriti @ Buri Ghosh as the wife of Bijoy Pal. Based on the evidence of P.Ws. 1, 2, 4 and 6, discussed above, we can safely conclude that this part of the case to be found in the written complaint has been well established. Section 141 of the IPC defines an unlawful assembly. Section 141 insofar as the same is material for our purpose provides as follows:

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

First....

Second....

Third....

Fourth....

Fifth - By means of criminal force, or show of criminal force compel any person to do what is not legally bound to do, or to omit to do what he is legally entitled to do.

Explanation.- An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly.

49. The accused persons armed with lethal weapons had assembled to compel the members of the Pal family to accept Supriti as the wife of Bijoy Pal which they were not legally obliged to do. Exhibit 'C' goes to show that on 25th November 1990 a meeting was convened by the villagers in which it was resolved that the following morning the Pals would be compelled to accept Supriti as their daughter-in-law. Therefore the persons who had assembled knew pretty well that the object was illegal and they had no right to take law into their own hands. The number of the members of the assembly was far in excess of the statutory minimum five. They may not at that point of time have the object of indulging into the acts of arson and murder but they were prepared for that eventuality which is proved by the fact that they were armed with lethal weapons. This later object was formed after the Pals refused to accept Supriti as the wife of Bijoy Pal and shut themselves in their house after closing the main gate. It is well settled that an object may be formed at any stage by a few members of an unlawful assembly and the others may just Join and adopt it. Reference in this regard may be made to the judgment in the case of *State of Maharashtra v. Kashirao and Ors.* reported in : 2003 CriLJ4464 .

The crucial question to determine is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects, as specified in Section 141. It cannot be laid down as a general proposition of law that unless an overt act is proved against a person, who is alleged to be a member of unlawful assembly, it cannot be said that he is a member of an assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of Section 141. The word 'object' means the purpose or design and, in order to make it 'common', it must be shared by all. In other words, the object should be common to the persons, who compose the assembly, that is to say, they should all be aware of it and concur in it. A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it.

Section 149 of the IPC provides as follows:

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

50. In deciding as to who the members of the unlawful assembly were the Court has to be cautious so that mere passive witnesses who may have joined the assembly as a matter of idle curiosity without intending to entertain common object of the assembly are not included therein. It is at the same time well settled that in order to hold a person a member of the unlawful assembly an individual overt act is not necessary. His presence is enough. Reference in this regard may be made to a very instructive passage in the judgment in the case of *Ranabir Yadav v. State of Bihar* reported in : 1995 CriLJ2665 .

If the above-quoted proposition of law had still operated in the field it might have been necessary for us to closely scrutinise the evidence of the eyewitnesses so far

as it sought to prove the overt act allegedly committed by each of the appellants to ascertain whether the learned Courts below were justified in accepting the same. But the above interpretation given to Sections 141 and 149 IPC in Baladin case was explained by a four-Judge Bench of this Court in Masalti v. State of U.P. as under:

It appears that in the case of Baladin, the members of the family of the appellants and other residents of the village had assembled together; some of them shared the common object of the unlawful assembly, while others were merely passive witnesses. Dealing with such an assembly, this Court observed that the presence of a person in an assembly of that kind would not necessarily show that he was a member of an unlawful assembly. What has to be proved against a person who is alleged to be a member of an unlawful assembly is that he was one of the persons constituting the assembly and he entertained along with the other members of the assembly the common object as defined by Section 141, IPC. Section 142 provides that however, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continue in it, is said to be a member of an unlawful assembly. In other words, an assembly of five or more persons actuated by, and entertaining one or more of the common objects specified by the five clauses of Section 141, is an unlawful assembly. The crucial question to determine in such a case is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects as specified by Section 141. While determining this question, it becomes relevant to consider whether the assembly consisted of some persons who were merely passive witnesses and had joined the assembly as a matter of idle curiosity without intending to entertain the common object of the assembly. It is in that context that the observations made by this Court in the case of Baladin, assume significance; otherwise, in law, it would not be correct to say that before a person is held to be a member of an unlawful assembly, it must be shown that he had committed some illegal overt act or had been guilty of some illegal omission in pursuance of the common object of the assembly. In fact, Section 149 makes it clear that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object,

every person who, at the time of committing of that offence, is a member of the same assembly, is guilty of that offence, and that emphatically brings out the principle that the punishment prescribed by Section 149 is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly. Therefore, we are satisfied that the observations made in the case of Baladin must be read in the context of the special facts of that case and cannot be treated as laying down an unqualified proposition of law such as Mr. Sawhney suggests.

The above-quoted principle was reiterated by this Court in *Lalji v. State of U.P.* with the following words: (SCC pp. 441-42 paras 8 and 9).

The two essentials of the Section are the commission of an offence by any member of an unlawful assembly and that such offence must have been committed in prosecution of the common object of that assembly or must be such as the members of that assembly knew to be likely to be committed. Not every person is necessarily guilty but only those who share in the common object. The common object of the assembly must be one of the five objects mentioned in Section 141 IPC. Common object of the unlawful assembly can be gathered from the nature of the assembly, arms used by them and the behaviour of the assembly at or before scene of occurrence. It is an inference to be deduced from the facts and circumstances of each case.

Section 149 makes every member of an unlawful assembly at the time of committing of the offence guilty of that offence. Thus this Section created a specific and distinct offence. In other words, it is created a constructive or vicarious liability of the members of the unlawful assembly for the unlawful acts committed pursuant to the common object by any other member of that assembly. However, the vicarious liability of the members of the unlawful assembly extends only to the acts done in pursuance of the common objects of the unlawful assembly, or to such offences as the members of the unlawful assembly knew to be likely to be committed in prosecution of that object. Once the case of a person falls within the ingredients of the Section the question that he did nothing with his own hands would be immaterial. He cannot put forward the defence that he did not

with his own 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 under Section 149. It must be noted that the basis of the constructive guilt under Section 149 is mere membership of the unlawful assembly, with the requisite common object or knowledge.

The Court thereafter considered the facts of the case before it and observed that after having held that the appellant 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 did not perform any violent act or that there was no corroboration of their participation.

51. The written complaint goes to show that Sunil, Nabadwip, Rabilal, Haradhan Laha and Dipak Mondal had taken away the deceased brothers beating from the house and thereafter, the accused persons had beaten them to death. P.W.1 the de facto complainant in his evidence deposed that Sunil Ghosh, Nabadwip, Dipak Mondal and Durjodhan Mondal had taken away the deceased brothers from the house and thereafter the accused persons had beaten them to death. Therefore the evidence of P.W. 1 insofar as Sunil Ghosh, Nabadwip Ghosh and Dipak Mondal are concerned has been corroborated by the written complaint as to the persons who had taken away the deceased brothers. His evidence in Court is that all the accused persons had beaten them to death whereas P.W.2 deposed that Sunil, Nabadwip, Rabilal, Haradhan Laha, Dipak Mondal, Durjodhan Mondal,

Haradhan Mondal, Biswanath Ghosh, Pujna Chandra, Dharendra Nath Ghosh, Nanichora Pal, Sibshankar Ghosh and Nandalal Ghosh assaulted the deceased brothers with lathi and tangi until they died. Evidence of P.W.2 has been fully corroborated by the P.Ws.4 and 6. P.W.3, daughter-in-law of Narayan Chandra Pal, deposed that she at the relevant point of time had newly entered the family soon after her marriage and did not know all the villagers, Accordingly she could name only Sunil Ghosh, Biswanath Ghosh, Haradhan Mondal and Nanichora Pal. We are therefore of the opinion that the fact these 13 persons who had actually participated in beating the deceased persons to death had entertained a common object of the unlawful assembly is well established.

52. We already have set out the relevant portions of the evidence of the P.Ws.1, 2, 3, 4 and 6. We already have discussed submissions advanced on behalf of the appellants as regards their evidences. P.W. 1 deposed that Biswanath Ghosh and Sunil Ghosh exhorted the accused persons to set the house on fire and the accused persons set the house on fire. P.W.2 deposed that Biswanath Ghosh, Sunil Ghosh, Haradhan Mondal, Nanichora Pal and Rabilal Ghosh exhorted the villagers to set the house on fire. P.W.6 corroborated the evidence of P.W.2 insofar as the accused Biswanath Ghosh, Nanichora Pal, Sunil Ghosh and Haradhan Mondal are concerned. Whether two person exhorted the other accused persons to set the house of the Pals on fire or more persons did the act of instigation is not of much significance. When the rest of the accused persons joined in putting the house on fire there became a community of object. Thereafter only relevant enquiry is whether five persons in all had joined in the act of setting the house on fire. An answer to this question is undoubtedly in the affirmative. Reference in this regard may be made to the judgment in the case of Sukha v. State of Rajasthan reported in : 1956 CriLJ923 wherein the following view was expressed.

But the commonsenses of purposes is an inference of fact which Courts of fact would be entitled to make. It does not matter whether the others Joined in because of an initial instigation or whether, seeing the assault in progress, they joined in on their own account, because so long as each had the object of beating up Parsia and Chhotiya and those who came to their assistance, that would make their

object common.

53. The question still remains as to who the members of the unlawful assembly were. Taking into consideration the evidence discussed above we hold that they were Sunil, Nabadwip, Rabilal, Haradhan Laha, Dipak Mondal, Durjodhan Mondal, Dharendra Nath Ghosh, Haradhan Mondal, Biswanath Ghosh, Purna Chandra, Nanichora Pal, Sibshankar Ghosh and Nandalal Ghosh.

From the FIR it appears that after the event was over when the de facto complainant assuredly came out of his house he came to know that the dead bodies of his brothers have been thrown into the adjoining well. Therefore, who actually had thrown the dead bodies into the well was not known to the complainant party. There is no evidence apart from that of the Pals to show as to who had actually thrown the dead bodies into the well. We would therefore acquit all the appellants of the charge under Section 201 read with Section 149 IPC.

54. It may be pointed out that the postmortem report was tendered in the present case without any objection. Moreover, the fact that the deceased were beaten to death on the spot is well proved. Not only that they were beaten to death their dead bodies were thrown into the adjoining well which were recovered from the well by the members of the fire brigade. The Division Bench in the case of Arjun Mandi on the basis of the other evidence dismissed the appeal from conviction. The same course may be followed in the present case and therefore this judgment of the Division Bench has no manner of application. We however hasten to add that the judgment is clearly against the mandate of Section 294(3) Cr PC.

55. Insofar as the judgment in the case of Ram Kr. Pandey reported in 1975 (3) SCC 815 is concerned it cannot be pointed out that there is in our view no serious infirmity in the FIR and therefore that Judgment has no manner of application to the case in hand.

56. In the result the conviction of the appellants No. 1 to 13 namely Sunil, Nabadwip, Rabilal, Haradhan Laha, Dipak Mondal, Durjodhan Mondal, Haradhan Mondal, Biswanath Ghosh, Purna Chandra, Dharendra Nath Ghosh, Nanichora Pal, Sibshankar Ghosh and Nandalal Ghosh under Sections 148, 436 and 302

read with Section 149 IPC including the sentences are upheld. The conviction of the appellants No. 14 to 26 under Section 148 IPC is set aside. All the appellants are acquitted of the charge under Section 201 read with Section 149 IPC. It appears that all the appellants were enlarged on bail by an order dated 21st June 2005. The bail bonds in respect of the appellants No. 1 to 13 stand cancelled. Through their Counsel, they are directed to forthwith surrender before the learned Trial Court to serve out the rest of the sentences. They shall get the benefit of set-off in terms of Section 428 of the Cr PC out of the period of imprisonment already undergone. All the substantive sentences as awarded by the learned Trial Court for the offences punishable under Section 148 of IPC, under Section 302 read with Section 149 of IPC and under Section 436 read with Section 149 of IPC shall run concurrently.

57. On failure to comply with the direction as aforesaid, the learned Trial Court shall take appropriate legal action against the aforesaid appellants No. 1 to 13 to secure their remand to jail for serving out the remainder part of their sentences as awarded. 50% of the amount of fine be paid to Srimati Adari Pal, mother of the victim deceased Niranjan Pal and Lalu Pal by way of compensation.

58. The learned Trial Court is directed to issue necessary revised jail warrant as required by the Rules in respect of appellants No. 1 to 13.

The appellants No. 14 to 26 are discharged of their bail-bonds.

The appeal is thus partly allowed.

Lower Court records with a copy of this judgment be sent forthwith to the learned trial Court for compliance. Compliance report be submitted within one month.

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

Kishore Kumar Prasad, J.

59. I agree.

