SUPREME COURT OF INDIA

Akbar Sheikh

Vs.

State of West Bengal

Crl.A.No.2040 of 2008

(S.B. Sinha and R.M. Lodha JJ.)

05.05.2009

JUDGMENT

S.B. SINHA, J:

1. Sajaedar Rahman (Complainant - PW-1) was a resident of a small village Bujung situated within the Police Station of Nalhati, in the district of Birbhum (West Bengal). He had a two-storeyed house made of mud with a tin shed. It had a verandah on the ground floor as also on the upper floor. It consisted of four rooms; two on the ground floor and two on the upper floor. There was another house in the same compound. It was thatched with straw. It was also a two-storeyed one.

2. The deceased Akramul Sheikh and Samsul Haque were his sons. Ashraful (PW-9) and Nasir were his two other sons. His wife is Latifa Bibi (PW-6) and Ahmuda Khatun (PW-7) is his daughter. Kazem (Accused No. 8) is his nephew. Ali Mohammed alias Kalu (PW-5) is his another brother.

3. On the fateful day, i.e., 16.05.1982 in the mid night, the complainant was sleeping inside his room. On the verandah thereof his wife, two sons Nasir and Saidul were sleeping. Ashraful and Kalu were sleeping in the first floor of another house. In the `Baithakkana' (living room) Akramul and his wife Nadira were sleeping. Samsul Haque was sleeping in the courtyard. At about 1 a.m. in the night, the complainant was woken up by his son Ashraful and his nephew Kalu. He was informed that a large number of people had attacked his house. They were armed with deadly weapons. A hurricane was hanging in the verandah. He also came out with a torch. He found that about 100 persons were there. They started assaulting Samsul with lathi and ballam. Kazem (Accused No. 8) directed that he should be beheaded whereupon Saifuddin cut his neck with one stroke by a big knife ordinarily used by a butcher for slaughtering goats. Samsul was also assaulted by Buddik (Accused No. 14) with a knife. Samsul Arefin assaulted him with lathi. Kamruzzaman assaulted him with a ballam whereas Sadek (Accused No. 4) assaulted him with tangi. He identified all of them. The accused chased the inmates of the house who were standing on the verandah. Out of fear, they entered into the room and bolted it from inside. Two-three bombs were hurled at the door. They exploded. An attempt was made to break open the door with an axe whereupon a gap was created. Ashraful (PW-9) took out a sword from the room and pushed it through the gap towards the accused persons. Then, Kazem asked Wahed to set fire on the chals of the south-facing room. He also asked Maddin to do the same thing. Fire was set in the house with thatched straw. They took shelter in the vacant space outside the house. Akramul and his wife also came out from the house which was set on fire. Buddik assaulted Akramul on his back with an axe. On resistance offered by his wife and an appeal to the assailants not to kill him, Sadek assaulted her on her

forearm of right hand with a shovel. Accused Buddik, Ruli, Sadek and Kabir forcibly kidnapped Akramul to the house of the accused Arefin as directed by Kazem. All the accused thereafter dispersed. The complainant received an information that Akramul was killed near the pond. He went to the spot and found him dead with his neck chopped and a long cut injury on his chest upto abdomen. D.N. Ghosh (PW-13), officer incharge of the Police Station received an information about the incident on telephone. They came to the village in the early hours of the morning. A First Information Report was lodged at about 6 a.m. In the said First Information Report, about thirty persons were named. Chargesheet was issued as against twenty-nine persons. The trial took a long time. Whereas the complainant was examined in 1992, his son Ashraful (PW-9) was examined in 2001. The learned Sessions Judge convicted 20 persons. Nine persons died during the pendency of the trial. Appeals were preferred thereagainst. By reason of the impugned judgment, the High Court, while affirming the judgment of conviction, remanded the case back to the learned Trial Judge for determining the age of five appellants who advanced a plea that they were `children' on the date of commission of the offence.

5. In Criminal Appeal No. 2040 of 2008, there are seven appellants. Criminal Appeal No. 2041 of 2008 was filed by Akhtar Alam alias Aktarul Sheikh. Criminal Appeal No. 2042 of 2008 was filed by Kabir Sheikh with three others. The Special Leave Petition of three petitioners was dismissed leaving Kabir Sheikh as the only appellant. Criminal Appeal No. 28 of 2009 has been preferred by Kazem Sheikh alias Kamuruzzaman.

5. Mr. Pradip K. Ghosh, learned senior counsel appearing on behalf of the appellants in Criminal Appeal Nos. 2040 and 2041 of 2008, would urge: (a) Most of the accused persons having not taken active part and some of them having not been named at all by the prosecution witnesses, the learned Sessions Judge as also the High Court committed a serious error in passing the impugned judgments. (b) Appellants had falsely been implicated due to long standing enmity as: (i) Even according to prosecution, Nadira, sister of Kazem, was married to the son of PW-1. He committed suicide. The said marriage took place without the consent of Kazem Sheikh. Allegedly, a rein of terror was unleashed. They have to leave the village. 20 days prior thereto, they came back and got Nadira married with the deceased Akramul. (ii) Asgar and Kuddus had depösted against the family of PW-1 in the matter of murder of one Dol Gobinda Acharya (ex- Pradhan). PW-9 accepted that he had committed his murder and was convicted in the criminal case and sentenced to life imprisonment. In that case Kuddus had deposed and, thus, all his brothers Sadek, Ruli, Kudrat and Kabir had been roped in. Similarly, as Asgar had deposed in the said case, his three nephews, viz., Habal, Hosi and Chosi, who were said to be minors at the time of alleged incident were also roped in. (iii) It has furthermore come in evidence that father of Monir and Maddin, i.e., Gastul had filed some criminal cases against PW-1. (iv) Five persons who were named in the First Information Report, being children in the age group of 12-15 years had not been spared. (v) Gado and Kaku being son of Jabrish Sheikh were roped in as Jabrish deposed against PW-1 in a criminal case wherein he was convicted for commission of murder of one Munsef Hazi. (c) The prosecution case must be held to have not been proved as all eye-witnesses are interested witnesses. Even Kalu (PW-5), nephew of PW-1 was declared hostile. Moreover, out of four eye- witnesses named in the First Information Report, only one had been examined and three were not even examined as witnesses for reasons best known to the State. Those villagers tendered as witnesses by prosecution being PWs 2, 3 and 4 were also declared hostile. Even PW-11, i.e., husband of PW-7 did not name anybody. Nasir Sheikh, son of PW-1, who is said to have identified the dead body of his brother Samsul at the time of inquest was also not examined. Nazrul, another son of PW-1, who was staying just outside the compound, was also not examined. (d) The First Information Report was ante-dated and ante-timed. According to PW-1, the inquest took place before the First Information Report was lodged. The

inquest report bears the police case number although by then the First Information Report was not lodged. (e) The First Information Report having been sent to the Magistrate after 24 hours, viz., on 17.05.1982, no reliance should be placed thereupon. (f) In any event, most of the appellants having not taken any active part, the rule of prudence would demand that in absence of any corroboration in material particulars benefit of doubt should be according to the appellants. 6. Mr. Rauf Rahim, learned counsel appearing on behalf of the appellant in Criminal Appeal No. 2042 of 2008 would urge that Kabir Sheikh (Accused No. 7) being a minor on the date of offence, also deserves the same treatment as accorded to other similarly situated, viz., remission of the case to the Trial Court for determination of his age. In support of the said contention, reliance has been placed on the statement of the said appellant before the Trial Court under Section 313 of the Code of Criminal Procedure as also a voters' list.

7. Mr. Seshadri Sekhar Ray, learned Amicus Curiae appearing on behalf of the appellant Kazem Sheikh in Criminal Appeal No. 28 of 2009 supplementing the submissions of Mr. Ghosh urged that the learned Sessions Judge as also the High Court failed to take into consideration the defence of the said accused viz. he at the relevant time was physically handicapped. There was no reason as to why the evidences of defence witnesses including the certificate of a doctor to that effect should not be believed.

8. Mr. Avijit Bhattacharjee, learned counsel appearing on behalf of the State, on the other hand, supported the impugned judgment contending that the fact that more than thirty persons had attacked the deceased and the prosecution witnesses with deadly weapons and they had not only murdered Samsul Haque but also took away Akramul Sheikh and murdered him near the pond clearly goes to show that each one of them had the requisite common object. It was furthermore contended that PW-1 having identified all the accused in the court, there is no reason as to why his evidence should not be relied upon.

9. Before adverting to the rival contentions raised before us by the learned counsel for the parties, we may notice the following salient features: PW-1 Sajedar Rahman is the informant/complainant. PW-9 Ashraful Sheikh is the son of PW-1. Like PW-1, he was also an eye-witness. PW-6 Latifa Bibi is the wife of PW-1 but as at the time of her deposition, she having been found to have become senile, neither the learned Trial Judge nor the High Court has placed any reliance on her evidence. PW-7 Ahmuda Khatun is the daughter of PW-1. On the date of incident, she had been residing in her matrimonial home and only upon receipt of the information, she came to her parents' place and came to know about the incident from her father. Her evidence is, therefore, a hearsay one and not considered by the High Court at all. Other witnesses, viz., PWs. 2 to 4 and PW-5 were declared hostile. We are, therefore, left with the evidences of PW-1 and PW-9 only. 10. Whereas according to PW-1, Akbar Sheikh (Accused No. 5) who had been named but had not taken any active part in the incident, PW-9 merely saw him as a member of the mob. Asgar Sheikh (Accused No. 1), Kuddus Sheikh (Accused No. 3) and Kudrat Sheikh (Accused No. 6) had not been named by PW-1 but they had been named by PW-9. Whereas Gado Sheikh (Accused No. 11) was named by PW-1 as a person who had not taken active part, he had not been named by PW-9. Kanku Sheikh (Accused No. 13) had been named both by PW-1 and PW-9, although, according to PW - 1, he also did not take any active part. Monir Sheikh (Accused No. 15) was named by PW-1 without taking any active part. PW-9 did not name him at all.

11. Akhtar (Accused No. 9) appellant in Criminal Appeal No. 2041 had not been named at all either by PW-1 or PW-9. 12. Allegation against Kabir Sheikh (Accused No.7) appellant in Criminal Appeal No. 2042 of 2008, is that he was one of the four accused who had

12 kidnapped Akramul and whose dead body was found at a distance of 500 yards from the house.

13. We have noticed hereinbefore that the role of Kazem Sheikh (Accused No. 8), according to PW-1, was positive. He not only ordered that Samsul Haque should be beheaded, pursuant whereto Saifuddin cut his neck with one stroke; he furthermore, at the second stage of the occurrence, directed Wahed and Maddin to set fire to the thatched house which was complied with. The overt act of kidnapping Akramul has been attributed to Buddik, Ruli, Sadek and Kabir. Buddik had also been attributed with the act of assault on Akramul on his back with the axe. Sadek injured Latifa (PW-6) on her forearm. The summary of the evidences of PW-1 and PW-9, therefore, demonstrates that whereas Akbar, Gado, Monir had been named by PW-1, they had not been named by PW-9. Only Kanku has been named as a miscreant person in the assembly by both PW-1 and PW-9. The core question which arises for consideration is as to whether some of the appellants who had not committed any overt act must be held to be a part of the unlawful assembly or shared the common object with the main accused. Chapter VIII of the Indian Penal Code provides for the offences against the public tranquility. Section 141 defines `Unlawful Assembly' to be an assembly of five or more persons. They must have a common object inter alia to commit any mischief or criminal trespass or other 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 of being a member of unlawful assembly. Section 149 provides for constructive liability on 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 knew to be likely to be committed in prosecution of that object.

14. Whether an assembly is unlawful one or not, thus, would depend on various factors, the principal amongst them being a common object formed by the members thereof to commit an offence specified in one or the other clauses contained in Section 141 of the Indian Penal Code. Constructive liability on a person on the ground of being a member of unlawful assembly can be fastened for an act of offence created by one or more members of that assembly if they had formed a common object. The distinction between a common object and common intention is well-known.

15. In Munna Chanda v. State of Assam [(2006) 3 SCC 752], this Court held as under:

"10. The concept of common object, it is well known, is different from common intention. It is true that so far as common object is concerned no prior concert is required. Common object can be formed on the spur of the moment. Course of conduct adopted by the members of the assembly, however, is a relevant factor. At what point of time the common object of the unlawful assembly was formed would depend upon the facts and circumstances of each case.

11. Section 149 IPC creates a specific and distinct offence. There are two essential ingredients thereof: (i) commission of an offence by any member of an unlawful assembly, and (ii) 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.

12. It is, thus, essential to prove that the person sought to be charged with an offence with the aid of Section 149 was a member of the unlawful assembly at the time the offence was committed.

13. The appellants herein were not armed with weapons. They except Bhuttu were not parties to all the three stages of the dispute. At the third stage of the quarrel, they wanted to teach the deceased

and others a lesson. For picking up quarrel with Bhuttu, they might have become agitated and asked for apologies from Moti. Admittedly, it was so done at the instance of Nirmal, Moti was assaulted by Bhuttu at the instance of Ratan. However, it cannot be said that they had common object of intentional killing of the deceased. Moti, however, while being assaulted could free himself from the grip of the appellants and fled from the scene. The deceased was being chased not only by the appellants herein but by many others. He was found dead the next morning. There is, however, nothing to show as to what role the appellants either conjointly or separately played. It is also not known as to whether if one or all of the appellants were present, when the last blow was given. Who are those who had assaulted the deceased is also not known. At whose hands he received injuries is again a mystery. Neither Section 34 nor Section 149 of the Penal Code is, therefore, attracted. (See Dharam Pal v. State of Haryana and Shambhu Kuer v. State of Bihar)"

16. The question came up for consideration before this Court in Baladin & Others v. State of Uttar Pradesh [AIR 1956 SC 181] wherein B.P. Sinha, J., as the learned Chief Justice then was, opined that with a view to invoke the provisions of Section 149 of the Indian Penal Code, "it was necessary therefore for the prosecution to lead evidence pointing to the conclusion that all the appellants before us had done or been committing some overt act in prosecution of the common object of the unlawful assembly". It was furthermore stated: "...The evidence as recorded is in general terms to the effect that all these persons and many more were the miscreants and were armed with deadly weapons, like guns, spears, pharsas, axes, lathis, etc. This kind of omnibus evidence naturally has to be very closely scrutinised in order to eliminate all chances of false or mistaken implication. That feelings were running high on both sides is beyond question. That the six male members who were done to death that morning found themselves trapped in the house of Mangal Singh has been found by the courts below on good evidence. We have therefore to examine the case of each individual accused to satisfy ourselves that mere spectators who had not joined the assembly and who were unaware of its motive had not been branded as members of the unlawful assembly which committed the dastardly crimes that morning. It has been found that the common object of the unlawful assembly was not only to kill the male members of the refugee families but also to destroy all evidence of those crimes. Thus even those who did something in connection with the carrying of the dead bodies or disposal of them by burning them as aforesaid must be taken to have been actuated by the common objective." The aforementioned observation was, however, not accepted later by this Court as an absolute proposition of law and was held to be limited to the peculiar fact of the case in Masalti v. State of U.P. [(1964) 8 SCR 133] in the following terms: "...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 long 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 object 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..."

17. We may, however, notice that whereas the principle of law laid down in Masalti (supra) is beyond any doubt or dispute, its application in the later cases has not been strictly adhered to. This Court, as would appear from the discussions made hereinafter, in some of its decisions had

proceeded to determine the issue in the factual matrix obtaining therein although some observations of general nature had been made.

18. In Sherey and Others v. State of U.P. [1991 Supp (2) SCC 437] involved a case where there was a dispute between Hindus and Muslims of a village regarding a grove. Whereas the Hindus were claiming that it was a grove, the Muslims were claiming it to be a graveyard. A large number of Muslims, about 25 in number, came out with lethal weapons and killed three persons and injured others. Before this Court an argument was advanced that the appellants against whom no overt act was attributed but were part of the unlawful assembly should be held to be not guilty was accepted, stating: "...Therefore, it is 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 are charged. We feel it is highly unsafe to apply Section 149 IPC and make everyone of them constructively liable. But so far as the above nine accused are concerned the prosecution version is consistent namely that they were armed with lethal weapons like swords and axes and attacked the deceased and others. This strong circumstance against them establishes their presence as well as their membership of the unlawful assembly. The learned counsel appearing for the State vehemently contended that the fact that the Muslims as a body came to the scene of occurrence would show that they were members of an unlawful assembly with the common object of committing various offences including that of murder. Therefore all of them should be made constructively liable. But 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. Therefore we have to find some reasonable circumstance which lends assurance. From that point of view it is safe only to convict the abovementioned nine accused whose presence is not only consistently mentioned from the stage of FIR but also to whom overt acts are attributed..."

19. Similarly, in Musa Khan and Others v. State of Maharashtra [(1977) 1 SCC 733], it was opined: "...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..." It was opined therein that as evidence was wholly lacking that all of them had taken part at all stages of the commission of offence, they were held to be not guilty of the charges levelled against them.

20. Yet again in Nagarjit Ahir v. State of Bihar [(2005) 10 SCC 369], it was opined: "...Moreover, in such situations though many people may have seen the occurrence, it may not be possible for the prosecution to examine each one of them. In fact, there is evidence on record to suggest that when the occurrence took place, people started running helter-skelter. In such a situation it would be indeed difficult to find out the other persons who had witnessed the occurrence..." It was furthermore observed: "...In such a case, it may be safe to convict only those persons against whom overt act is alleged with the aid of Section 149 IPC, lest some innocent spectators may get involved. This is only a rule of caution and not a rule of law..."

21. Almost a similar view has been taken in Hori Lal and Another v. State of U.P. [(2006) 13 SCC

79] wherein this Court noticed both Baladin (supra) and Masalti (supra) as also other decisions to opine: "

23. Common object would mean the purpose or design shared by all the members of such assembly. It may be formed at any stage.

24. Whether in a given case the accused persons shared common object or not, must be ascertained from the acts and conduct of the accused persons. The surrounding circumstances are also relevant and may be taken into consideration in arriving at a conclusion in this behalf.

25. It is in two parts. The first part would be attracted when the offence is committed in furtherance of the common object. The offence, even if is not committed in direct prosecution of the common object of the assembly, Section 149 IPC may still be attracted." What was, therefore, emphasized was that not only the acts but also the conduct and surrounding circumstances would be the guiding factors.

22. In Shankaraya Naik & Ors. v. State of Karnataka [2008 (12) SCALE 742], this Court held:

"5...It is clear from the record that the accused had come to the place of incident duly armed and had immediately proceeded with the attack on the opposite party and had caused serious injuries to the deceased and to as many as eight witnesses. It is also clear from the facts preceding the attack that there was great animosity between the parties and it must, therefore, be inferred that when the accused had come armed with lethal weapons, the chance that somebody might be killed was a real possibility."

23. In Maranadu and Anr. v. State By Inspector of Police, Tamil Nadu [2008 (12) SCALE 420], this Court stated the law, thus: "

17. `Common object' is different from `common intention' as it does not require a prior concert and a common meeting of minds before the attack. It is enough if each has the same object in view and their number is five or more and that they act as an assembly to achieve that object. The `common object' of an assembly is to be ascertained from the acts and language of the members composing it, and from a consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. For determination of the common object of the unlawful assembly, the conduct of each of the members of the unlawful assembly, before and at the time of attack and thereafter, the motive for the crime, are some of the relevant considerations. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact 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. It is not necessary under law that in all cases of unlawful assembly, with an unlawful common object, the same must be translated into action or be successful. Under the Explanation to Section 141, an assembly which was not unlawful when it was assembled, may subsequently become unlawful. It is not necessary that the intention or the purpose, which is necessary to render an assembly an unlawful one comes into existence at the outset. The time of forming an unlawful intent is not material. An assembly which, at its commencement or even for some time thereafter, is lawful, may subsequently become unlawful. In other words it can develop during the course of incident at the spot co instanti."

24. We may, however, notice that therein this Court had taken note of an earlier decision of this

Court in State of U.P. v. Dan Singh and Ors. [(1997) 3 SCC 747] wherein it was held:

"34. Mr Lalit is right in submitting that the witnesses would be revengeful as a large-scale violence had taken place where the party, to which the eyewitnesses belonged, had suffered and it is, therefore, necessary to fix the identity and participation of each accused with reasonable certainty. Dealing with a similar case of riot where a large number of assailants who were members of an unlawful assembly committed an offence of murder in pursuance of a common object, the manner in which the evidence should be appreciated was adverted to by this Court in Masalti case at p. 210 as follows: "Then it is urged that the evidence given by the witnesses conforms to the same uniform pattern and since no specific part is assigned to all the assailants, that evidence should not have been accepted. This criticism again is not well-founded. Where a crowd of assailants who are members of an unlawful assembly proceeds to commit an offence of murder in pursuance of the common object of the unlawful assembly, it is often not possible for witnesses to describe accurately the part played by each one of the assailants. Besides, if a large crowd of persons armed with weapons assaults the intended victims, it may not be necessary that all of them have to take part in the actual assault. In the present case, for instance, several weapons were carried by different members of the unlawful assembly, but it appears that the guns were used and that was enough to kill 5 persons. In such a case, it would be unreasonable to contend that because the other weapons carried by the members of the unlawful assembly were not used, the story in regard to the said weapons itself should be rejected. Appreciation of evidence in such a complex case is no doubt a difficult task; but criminal courts have to do their best in dealing with such cases and it is their duty to sift the evidence carefully and decide which part of it is true and which is not."

25. The decisions of this Court in Shankaraya Naik (supra) and Maranadu (supra), therefore, do not militate against the proposition of law in regard to appreciation of evidence, which we have to apply herein.

26. The prosecution in a case of this nature was required to establish (i) whether the appellants were present; and (ii) whether they shared a common object. The mob indisputably raided the house of the first informant. Most of the members thereof were armed with deadly weapons. They not only committed gruesome acts but also when their attempt to assault others was frustrated as the prosecution witnesses bolted themselves in a room, set the two portions of the house on fire, as a result whereof they had to come out. It had not been denied or disputed that they were inimically disposed of towards the family. We have been taken through the evidences of PWs 1 and 9 almost in their entirety. We did not find even a suggestion having been thrown at them that their story that the sister of the appellant Kazem was married twice to two sons of PW-1 as a result whereof Kazem bore a grudge against them is incorrect.

27. We also do not find any material on record to disbelieve that part of the evidences of PWs 1 and 9 that keeping in view the rein of terror unleashed by Kazem they had to leave the village and they came back only after 20 days prior to the occurrence. In the meanwhile, the sister of Kazem having come to their residence, she was married to Akramul.

28. Whereas this part of the prosecution story, in our considered opinion, has rightly been relied upon by the learned Sessions Judge as also the High Court in arriving at their conclusion, the defence side of the story should also not be ignored. While saying so, we are not oblivious of the dicta that enmity is a two-edged weapon. Whereas it is possible as was the case in Masalti (supra) that the accused had formed a common object, the chances of some of the accused having been falsely implicated for extraneous reasons also cannot be ruled out.

29. The discrepancies in the statements of PWs 1 and 9 with regard to the presence of some of the appellants have been noticed by us hereinbefore. Akhtar, appellant in Criminal Appeal No. 2041 of 2008 had not been named by any of those witnesses. On what basis, a judgment of conviction could be recorded against him is beyond our comprehension. Similarly, three others had not been named by PW-1 at all. In the court, PW-1 identified 19 persons. Three were absent. He, therefore, did not identify the others. According to him, he did not remember the names of other persons.

30. Mr. Bhattacharjee would contend that whereas PW-1 was examined ten years after the occurrence, PW-9 had been examined after twenty years after the occurrence. This may be so. It is unfortunate that for one reason or the other the trial was not completed for a period of twenty years. Pendency of a criminal case for a long time, as is evident from the fact noticed hereinbefore, is extremely hazardous. But, then omission on the part of a prosecution witness to name and identify an accused in the dock cannot be held to be wholly insignificant so as to record a judgment of conviction. Presence of an accused while the offence was committed is a sine qua non to find him guilty of being a member of unlawful assembly. If his presence is doubted, question of finding him guilty does not arise.

31. In a case of this nature, the rule of prudence should be applied. Something more than their being cited as an accused in a witness box would be necessary. The court must have before it some materials to form an opinion that they had shared a common object. It has not been denied or disputed that whereas five brothers were implicated as one brother had deposed against PW-9 and sons had also been implicated because a father had deposed against them. Whereas PW-1 in his deposition denied that the accused deposed in the case in which a son was found to be guilty of murder of Dol Gobinda Acharya (ex-Pradhan), PW-9 admitted that he committed the said murder in broad daylight. The defence that there were other reasons for their false implication cannot also be ruled out. In our opinion, there exists absence of any clinching evidence as against the seven appellants in Criminal Appeal No. 2040 of 2008, particularly when three of them had not been named at all by PW-1 and four of them had not been named by PW-9.

32. We are not unmindful that Akbar and Kanku have been named by both the witnesses but even against them no overt act has been attributed.

33. We, therefore, are of the opinion that doubts legitimately arise as regards their presence and/ or sharing of common object. While saying so, we are not oblivious of the fact that the incident had taken place at the dead of night. Enmity between two groups in the village is admitted. But, we cannot also 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.

34. Submission of Mr. Ghosh that the First Information Report is ante- timed cannot be accepted. It is possible that PW-1 because of lapse of time has made certain statements which go beyond the record, viz., holding of inquest before the FIR was recorded. The number of accused persons in the First Information Report might have also been put by the investigating officer at a later point of time. The fact that the post mortem examination had been held on 16.05.1982 itself goes a long way to establish the genesis of the occurrence. While saying so, we are not unmindful of the fact that the First Information Report was sent to the Magistrate after 24 hours. But then, in a case of this nature such a delay may not, by itself, be held to be fatal.

35. We are also unable to accept the submission of Mr. Rauf Rahim that Kabir was a juvenile on the date of occurrence. No such question had ever been raised. Even where a similar question was

raised by five other accused, viz., Jahangir, Motahar, Mosi, Chosi and Habal, no such plea was raised even before the High Court. Reliance inter alia has been placed on the statement of Kabir under Section 313 of the Code of Criminal Procedure wherein he stated his age to be 33 years in 2001. Such a statement, in our opinion, is not decisive. Reliance has also been placed on a voters' list. The said voters' list had been prepared long after the incident occurred. The same is again not decisive.

36. In the facts and circumstance of this case and particularly having regard to the specific role attributed to him, viz., he was one of the four persons who had taken away Akramul with Buddik, Ruli and Sadek and the said evidence brought on record by the prosecution having been relied upon by both the courts below, we do not see any reason to interfere therewith. Similarly, not only in the First Information Report but also the prosecution witnesses, viz., PWs 1 and 9, specifically attributed role of Kazem. Kazem took a specific defence of alibi. It was for him to prove the same.

37. The Trial Court noticed that the certificate issued by Dr. Dulal Chowdhury was issued by him in his private capacity as Medical Practitioner. The Trial Court noticed: "In cross-examination it transpires that he issued the certificate in the year 1991 but he cannot recollect the time and date when Kazem Ali was admitted at Suri Hospital and also cannot say also under what condition he was discharged from Suri Hospital without perusal of the records." The Trial Court held: "Ext. B and C are the certificates dated 7.5.91 and the discharge certificate issued by Dr. Dulal Chowdhury was issued on 7.5.91 and Ext. C was issued on 5.12.81. It is crystal clear from Ext. C that Kazem Ali was discharged on 5.12.81 and on the reverse side of this certificate it is also crystal clear that pt. can resume his usual duty. This shows that on and from 05.12.81 the pt. i.e. Kazem Ali was fit to resume his normal duty. That Kazem Ali was not fit on the date of incident i.e. on 16.05.82 does not arise at all. The defence lawyer has failed to establish the fact that Kazem was under the treatment of Dr. Chowdhury on the date of occurrence i.e. 16.05.82 does not stand at all. Therefore, the contention of the defence is that at the time of the said occurrence, accused Kazem was under the treatment of Dr. Dule Chowdhury has not been established."

38. The learned Trial Judge, in our opinion, has for good reasons disbelieved the certificate given by Dr. Dulal Chowdhury. If the appellant could not establish his plea of alibi, in our opinion, on the face of the records, no case has been made out to interfere with the judgment of Trial Court/ High Court.

39. In the result, Criminal Appeal Nos. 2040 and 2041 of 2008 are allowed and Criminal Appeal Nos. 2042 of 2008 and 28 of 2009 are dismissed.