Gangadhar Behera And Ors vs State Of Orissa on 10 October, 2002

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Bench: Arijit Pasayat, S.B. Sinha

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           CASE NO.:
Appeal (crl.)  1282 of 2001

PETITIONER:
Gangadhar Behera and Ors.

RESPONDENT:
State of Orissa

DATE OF JUDGMENT: 10/10/2002

BENCH:
ARIJIT PASAYAT & S.B. SINHA.

JUDGMENT:
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J U D G M E N T ARIJIT PASAYAT, J.

This is the second journey of the accused-appellants to this Court questioning their conviction on being found guilty of offences punishable under Section 302 read with Section 149 and Section 148 of the Indian Penal Code, 1860 (in short the 'IPC').

On the first occasion apart from the conviction for the aforesaid offences, the appellants were also convicted under Section 307 read with Section 149 IPC. However, in the second instance, the said conviction has been altered to one under Section 324 read with Section 149 IPC.

Filtering out unnecessary details, the prosecution version as unfolded during trial is as follows:

On 31.12.1988, there was an altercation between Jairam Das and Sadananda (hereinafter referred to as the deceased) on one hand and Jagabandhu Samal (D.W.1) on the other near Motto Hat in connection with occupation/construction of a shed in a market area. When Jagabandhu suddenly got up his head struck against a bamboo protruding into the thatch and he sustained some injury. Subsequently, when Jairam Das (PW-1), Gagan Das (PW-5) and the deceased proceeded towards their village near Balabhadrapur Sasan, they found that the accused persons armed with lathi, tentas etc. were coming. Being afraid, the deceased and his companions ran towards to the village. Gagan Das (P.W. 5) went inside the house of Sikhar Bal whereas the other three concealed themselves inside the house of Nilakantha Rath (P.W. 8). The house was surrounded by the accused persons who dealt blows on the door and walls of the house and some of them entered inside the house. Accused Panchanan (appellant 10 in the present appeal) and Subash Samal (appellant 7 in the present appeal) dragged the three persons and assaulted them. At that time, one of the accused persons shouted that police personnel were coming and subsequently all the accused persons fled away. PW-5 who saw the incident through an opening in the door leaf of the house of Sikhar Bal lodged the report before the Police which was treated as the First Information Report. Apart from PW-1 who was injured in the incident and PW-5, the informant, the occurrence was seen by some other persons including PWs. 2, 3, 4, 7 and 8. The last two witnesses are the owners of the house wherein the deceased and his companions had taken refuge and also spoke about the occurrence but except a few they were not able to name the other accused persons. Investigation was undertaken and on completion thereof, charge sheet was placed.

The accused persons gave a different version of the incident. According to them, the allegation that the accused persons being armed followed the deceased and his companions to Balabhadrapur Sasan is incorrect. In fact, some incident took place in the Motto Hat itself where DW-1 was assaulted and in order to save himself, he had brandished a 'Bahunga'. As a result, the deceased, PW-1 and Sanatan were injured. To substantiate their plea, they examined DW-1 and nine others. It was indicated that the appellant-Subash Samal is the son of DW-1. It was claimed by them that since they belonged to Communist Party and the deceased belonged to Congress Party, they were falsely implicated.

Originally, there were 21 accused persons. The Additional Session Judge, Bhadrak acquitted six of them and convicted the other 15 under Section 302 read with Section 149 IPC and Section 148, IPC as well as under Section 307 read with Section 149 IPC and sentenced them to suffer imprisonment for life for the conviction and sentence under Section 302 read with Section 149 IPC, and three years rigorous imprisonment on each count i.e. for offences punishable under Section 148 and under Section 307 read with Section 149 IPC. The sentences were directed to run concurrently.

The 15 accused persons who had been convicted preferred an appeal before the Orissa High Court. A Division Bench by its judgment dated 18.4.1995 dismissed the appeal i.e. Criminal Appeal

No.133/90. The said judgment of the High Court was assailed before this Court in appeal arising out of Special Leave Petition No.4170/1995.This Court noticed that the High Court had disposed of the appeal in a very casual manner without even analyzing the evidence and there was no proper application of mind. The matter was, therefore, remitted back to the High Court. That is how the High Court heard the appeal again and by the impugned judgment has upheld the conviction of 10 and acquitted the rest of the accused. It is to be noted that in respect of Krishna Mohanty (accused No.17) the High Court noticed that there was no finding recorded by the Trial Court either finding him guilty or otherwise, and, therefore, it was observed that it must be deemed that the said Krishna Mohanty had been acquitted by the Trial Court. The High Court by its impugned judgment specifically directed acquittal of four of the accused persons i.e. appellants 1, 2, 3 and 15 before it. The judgment of the High Court dated 16.7.1999 is the subject matter of challenge in this appeal.

At the Special Leave Petition stage because of non-surrender of accused appellant No.7, Subash Samal, the petition was dismissed by order dated 18.7.2000, so far as he is concerned.

In support of the appeal, Mr. S. Misra, learned counsel has submitted that though by its previous judgment this Court had required the High Court to analyse the evidence vis--vis every accused, it has not been done. In fact, as was done previously, the High Court has proceeded on generalized basis. The main eye witnesses PWs. 1 and 5 are relatives of the deceased and the other eye-witnesses are members of the same political party to which the deceased and PWs. 1 and 5 belonged. The witnesses have not specifically attributed any definite role to the accused persons. In fact they have in an omnibus manner stated that accused persons had assaulted. It is improbable that PW-5 could have seen the occurrence, through a small hole as claimed by him. The four accused persons who have been acquitted by the Trial Court stood on similar footing and the logic for their acquittal is equally applicable to the present appellants. Sikhar Bal in whose house PW 5 claimed to have taken shelter, has not been examined and PWs. 7 and 8 who are the independent witnesses have also not identified all the accused persons and only identified few of them. Sanatan who, the prosecution claimed, was injured has also not been examined. Overt act, if the prosecution version is to be accepted, has been attributed to accused Katia, Subash Samal, Hemant Nayak and Panchanan Bal (appellants 4, 7, 8 and 10 respectively). There is no reason as to why the others should have been convicted. The ingredients of Section 149 are not present because the witnesses have not said about the specific roles, if any, played by the accused and mere omnibus statement is not sufficient to bring in application of Section 149. The defence version is more probable and should have been accepted. There was a discrepancy between the evidence of the so-called eye-witnesses and the medical evidence on record. With reference to Bolineedi Venkataramaiah and Ors. v. State of Andhra Pradesh (AIR 1994 SC

76) it has been stated that before the application of Section 149 the evidence of interested witnesses has to be carefully analysed and according to learned counsel the said has not been done in the present case. With reference to Kamaksha Rai and Ors. v. State of U.P. (AIR 2000 SC 53) it has been submitted that omnibus statements are not sufficient to bring in application of Section 149. It was also submitted that since some of the accused persons have been acquitted either by the Trial Court and the High Court and discarding of evidence of the so-called eye witnesses, a different yardstick should not have been applied so far as the appellants are concerned.

In response, Mr. J.R. Das, learned counsel for the State submitted that the evidence of the eye-witnesses is clear, cogent and credible. Merely because they belonged to a particular political party there is no reason as to why they would falsely implicate the accused persons. No foundation for falsely implicating them has been established. All the accused persons have been named. It has been clearly brought on evidence that they were armed while chasing deceased and the injured witnesses and were shouting to bring them out when they had taken shelter in the house of Sikhar Bal. Merely because Sikhar Bal has not been examined, that does not in any way dilute the evidence of eye witnesses. Further, much has been made out of the non-examination of Sanatan. It has been clearly brought on record that his whereabouts are not known and, therefore, he could not be examined. Further, PW 7 has not stated that except two accused persons whom he had named and identified, others were not present. He has never stated that the others were not there, and only stated that he knew the name of two persons. The common intention has been clearly established. Merely because some of the accused persons have been acquitted, that does not render the evidence of the eye-witnesses suspect. Two Courts have categorically found that the accused persons were armed while chasing the deceased and the others, entered into the house where they were taking shelter and brought them out, and one of the witnesses had sustained injuries in the occurrence, while deceased lost his life. These findings of fact are conclusive in nature and there is no scope for any interference.

We shall first deal with the contention regarding interestedness of the witnesses for furthering prosecution version. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent ad credible.

In Dalip Singh and Ors. v. The State of Punjab (AIR 1953 SC

364) it has been laid down as under:-

> "A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

The above decision has since been followed in Guli Chand and Ors. v. State of Rajasthan (1974 (3) SCC 698) in which Vadivelu Thevar v. State of Madras (AIR 1957 SC 614) was also relied upon.

We may also observe that the ground that the witness being a close relative and consequently being a partisan witness, should not be relied upon, has no substance. This theory was repelled by this Court as early as in Dalip Singh's case (supra) in which surprise was expressed over the impression which prevailed in the minds of the Members of the Bar that relatives were not independent witnesses. Speaking through Vivian Bose, J. it was observed:

> "We are unable to agree with the learned Judges of the High Court that the testimony of the two eyewitnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in 'Rameshwar v. State of Rajasthan' (AIR 1952 SC 54 at p.59). We find, however, that it unfortunately still persists, if not in the judgments of the Courts, at any rate in the arguments of counsel."

Again in Masalti and Ors. v. State of U.P. (AIR 1965 SC

202) this Court observed: (p, 209-210 para 14):

> "But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses.....The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct."

To the same effect is the decision in State of Punjab v. Jagir Singh (AIR 1973 SC 2407) and Lehna v. State of Haryana (2002 (3) SCC 76). Stress was laid by the accused-appellants on the non-acceptance of evidence tendered by some witnesses to contend about desirability to throw out entire prosecution case. In essence prayer is to apply the principle of "falsus in uno falsus in omnibus" (false in one thing, false in everything). This plea is clearly untenable. Even if major portion of evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, notwithstanding acquittal of number of other co-accused persons, his conviction can be maintained. It is the duty of Court to separate grain from chaff. Where chaff can be separated from grain, it would be open to the Court to convict an accused notwithstanding the fact that evidence has been found to be deficient to prove guilt of other accused persons. Falsity of particular material witness or material particular would not ruin it from the beginning to end. The maxim "falsus in uno falsus in omnibus" has no application in India and the witnesses cannot be branded as liar. The maxim "falsus in uno falsus in omnibus" has not received general acceptance nor has this maxim come to occupy the status of rule of law. It is merely a rule of caution. All that it amounts to, is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a Court may apply in a given set of circumstances,

but it is not what may be called 'a mandatory rule of evidence'. (See Nisar Alli v. The State of Uttar Pradesh (AIR 1957 SC

366). Merely because some of the accused persons have been acquitted, though evidence against all of them, so far as direct testimony went, was the same does not lead as a necessary corollary that those who have been convicted must also be acquitted. It is always open to a Court to differentiate accused who had been acquitted from those who were convicted. (See Gurucharan Singh and Anr. v. State of Punjab (AIR 1956 SC 460). The doctrine is a dangerous one specially in India for if a whole body of the testimony were to be rejected, because witness was evidently speaking an untruth in some aspect, it is to be feared that administration of criminal justice would come to a dead-stop. Witnesses just cannot help in giving embroidery to a story, however, true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some respects the Court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well. The evidence has to be shifted with care. The aforesaid dictum is not a sound rule for the reason that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishment. (See Sohrab s/o Beli Nayata and Anr. v. The State of Madhya Pradesh 1972 3 SCC 751) and Ugar Ahir and Ors. v. The State of Bihar (AIR 1965 SC 277). An attempt has to be made to, as noted above, in terms of felicitous metaphor, separate grain from the chaff, truth from falsehood. Where it is not feasible to separate truth from falsehood, because grain and chaff are inextricably mixed up, and in the process of separation an absolutely new case has to be reconstructed by divorcing essential details presented by the prosecution completely from the context and the background against which they are made, the only available course to be made is to discard the evidence in toto. (See Zwinglee Ariel v. State of Madhya Pradesh (AIR 1954 SC 15) and Balaka Singh and Ors. v. The State of Punjab. (AIR 1975 SC 1962). As observed by this Court in State of Rajasthan v. Smt. Kalki and Anr. (AIR 1981 SC 1390), normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal, and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so. These aspects were highlighted recently in Krishna Mochi and Ors. v. State of Bihar etc. (JT 2002 (4) SC 186). Accusations have been clearly established against accused-appellants in the case at hand. The Courts below have categorically indicated the distinguishing features in evidence so far as acquitted and convicted accused are concerned.

It is submitted that benefit of doubt should be given on account of co-accused's acquittal. It was submitted that the evidence is inadequate to fasten guilt, and therefore prosecution cannot be said to have established its case beyond doubt.

Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicion and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let hundred guilty escape than punish an innocent. Letting guilty escape is not doing justice

according to law. [See: Gurbachan Singh v. Satpal Singh and Others [AIR 1990 SC 209]. Prosecution is not required to meet any and every hypothesis put forward by the accused. [See State of U.P. v. Ashok Kumar Srivastava [AIR 1992 SC 840]. A reasonable doubt is not an imaginary, trivial or merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case. If a case is proved perfectly, it is argued that it is artificial; if a case has some flaws inevitable because human beings are prone to err, it is argued that it is too imperfect. One wonders whether in the meticulous hypersensitivity to eliminate a rare innocent from being punished, many guilty persons must be allowed to escape. Proof beyond reasonable doubt is a guideline, not a fetish. [See Inder Singh and Anr. v. State (Delhi Admn.) (AIR 1978 SC 1091)]. Vague hunches cannot take place of judicial evaluation. "A judge does not preside over a criminal trial, merely to see that no innocent man is punished. A judge also presides to see that a guilty man does not escape. Both are public duties." (Per Viscount Simon in Stirland v. Director of Public Prosecution (1944 AC (PC) 315) quoted in State of U.P. v. Anil Singh (AIR 1988 SC 1998). Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth.

In matters such as this, it is appropriate to recall the observations of this Court in Shivaji Sahebrao Bobade v. State of Maharashtra [1974 (1) SCR 489 (492-493)] :

> ".....The dangers of exaggerated devotion to the rule of benefit of doubt at the expense of social defence and to the soothing sentiment that all acquittals are always good regardless of justice to the victim and the community, demand especial emphasis in the contemporary context of excalating crime and escape. The judicial instrument has a public accountability. The cherished principles or golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt....."
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> ".....The evil of acquitting a guilty person light- heartedly as a learned author Glanville Williams in 'Proof of Guilt' has sapiently observed, goes much beyond the simple fact that, just one guilty person has gone unpunished. If unmerited acquittals become general, they tend to lead to a cynical disregard of the law, and this in turn leads to a public demand for harsher legal presumptions against indicted 'persons' and more severe punishment of those who are found guilty. Thus too frequent acquittals of the guilty may lead to a ferocious penal law, eventually eroding the judicial protection of the guiltness....."
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> ".....a miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent....."

The position was again illuminatingly highlighted in State of U.P. v. Krishna Gopal (AIR 1988 SC 2154).

At this juncture, it would be appropriate to deal with the plea that ocular evidence and medical evidence are at variance. It would be erroneous to accord undue primacy to the hypothetical answers

of medical witnesses to exclude the eye-witnesses' account which had to be tested independently and not treated as the "variable" keeping the medical evidence as the "constant".

In Krishna Gopal's case (supra), the position has been succinctly stated as follows:

> "It is trite that where the eye-witnesses' account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive. Witnesses, as Bantham said, are the eyes and ears of justice. Hence the importance and primacy of the quality of the trial process. Eye witnesses' account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be credit-worthy; consistency with the undisputed facts the 'credit' of the witnesses; their performance in the witness-box; their power of observation etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation.
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> A person has, no doubt, a profound right not to be convicted of an offence which is not established by the evidential standard of proof beyond reasonable doubt. Though this standard is a higher standard, there is, however, no absolute standard. What degree of probability amounts to 'proof' is an exercise particularly to each case. Referring to of probability amounts to 'proof' is an exercise the inter-dependence of evidence and the confirmation of one piece of evidence by another a learned author says: (See "The Mathematics of Proof II" : Glanville Williams: Criminal Law Review, 1979 by Sweet and Maxwell, p. 340 (342).
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> "The simple multiplication rule does not apply if the separate pieces of evidence are dependent. Two events are dependent when they tend to occur together, and the evidence of such events may also be said to be dependent. In a criminal case, different pieces of evidence directed to establishing that the defendant did the prohibited act with the specified state of mind are generally dependent. A juror may feel doubt whether to credit an alleged confession, and doubt whether to infer guilt from the fact that the defendant fled from justice. But since it is generally guilty rather than innocent people who make confessions, and guilty rather than innocent people who run away, the two doubts are not to be multiplied together. The one piece of evidence may confirm the other."

Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth. To constitute reasonable doubt, it must be free from an over emotional response. Doubts must be actual and substantial doubts as to the guilt of the accused person arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt; but a fair doubt based upon reason and commonsense. It must grow out of the evidence in the case.

The concepts of probability, and the degrees of it, cannot obviously be expressed in terms of units to be mathematically enumerated as to how many of such units constitute proof beyond reasonable doubt. There is an unmistakable subjective element in the evaluation of the degrees of probability and the quantum of proof. Forensic probability must, in the last analysis, rest on a robust common sense and, ultimately on the trained intuitions of the judge. While the protection given by the criminal process to the accused persons is not to be eroded, at the same time, uninformed legitimization of trivialities would make a mockery of administration of criminal justice."

Another plea which was emphasized relates to the question whether Section 149, IPC has any application for fastening the constructive liability which is the sine qua non for its operation. The emphasis is on the common object and not on common intention. Mere presence in an unlawful assembly cannot render a person liable unless there was a common object and he was actuated by that common object and that object is one of those set out in Section 141. Where common object of an unlawful assembly is not proved, the accused persons cannot be convicted with the help of Section 149. 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. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. The expression 'in prosecution of common object' as appearing in Section 149 have to be strictly construed as equivalent to 'in order to attain the common object'. It must be immediately connected with the common object by virtue of the nature of the object. There must be community of object and the object may exist only up to a particular stage, and not thereafter. Members of an unlawful assembly may have community of object up to certain point beyond which they may differ in their objects and the knowledge, possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence of this the effect of Section 149, IPC may be different on different members of the same assembly.

'Common object' is different from a '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. 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.

Section 149, IPC consists of two parts. The first part of the section means that the offence to be committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. In order that the offence may fall within the first part, the offence must be connected immediately with the common object of the unlawful assembly of which the accused was member. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 141, if it can be held that the offence was such as the members knew was likely to be committed and this is what is required in the second part of the section. The purpose for which the members of the assembly set out or desired to achieve is the object. If the object desired by all the members is the same, the knowledge that is the object which is being pursued is shared by all the members and they are in general agreement as to how it is to be achieved and that is now the common object of the assembly. An object is entertained in the human mind, and it being merely a mental attitude, no direct evidence can be available and, like intention, has generally to be gathered from the act which the person commits and the result therefrom. Though no hard and fast rule can be laid down under the circumstances from which the common object can be called out, it may reasonably be collected from the nature of the assembly, arms it carries and behaviour at or before or after the scene of incident. The word 'knew' used in the second branch of the section implies something more than a possibility and it cannot be made to bear the sense of 'might have been known'. Positive knowledge is necessary. When an offence is committed in prosecution of the common object, it would generally be an offence which the members of the unlawful assembly knew was likely to be committed in prosecution of the common object. That, however, does not make the converse proposition true; there may be cases which would come within the second part but not within the first part. The distinction betweens the two parts of Section 149 cannot be ignored or obliterated. In every case is would be an issue to be determined, whether the offence committed falls within the first part or it was an offence such as the members of the assembly knew to be likely to be committed in prosecution of the common object and falls within the second part. However, there may be cases which would be within first offences committed in prosecution of the common object would be generally, if not always, with the second, namely, offences which the parties knew to be likely committed in the prosecution of the common object. (See Chikkarange Gowda and others v. State of Mysore : AIR 1956 SC

731.) The other plea that definite roles have not been ascribed to the accused and therefore Section 149 is not applicable, is untenable. A 4-Judge Bench of this Court in Masalti's case (supra) observed 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."

To similar effect is the observation in Lalji v. State of U.P. (1989 (1) SCC 437). It was observed that :

> "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 the scene of occurrence. It is an inference to be deduced from the facts and circumstances of each case."

In State of U.P. v. Dan Singh and Ors. (1997 (3) SCC 747) it was observed that it is not necessary for the prosecution to prove which of the members of the unlawful assembly did which or what act. Reference was made to Lalji's case (supra) where it was observed that "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".

Above being the position, we find no substance in the plea that evidence of eye witnesses is not sufficient to fasten guilt by application of Section 149. So far as the observations made in Kamaksha Rai's case (supra), it is to be noted that the decision in the said case was rendered in a different factual scenario altogether. There is always peril in treating the words of a judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases (See Padamasundara Rao (dead) and Ors. v. State of Tamil Nadu & Ors. [JT 2002 (3) SC 1]. It is more so in a case where conclusions relate to appreciation of evidence in a criminal trial, as was observed in Krishna Mochi's case (supra) The inevitable result of this appeal is dismissal which we direct.