

## In the High Court of Judicature, Orissa

## CRIMINAL APPELLATE SIDE

1959.

SESSIONS DIVISION OF \_\_\_\_\_

DISTRICT \_\_\_\_\_

Part

ORISSA HIGH COURT  
RECORD ROOM  
Removed on 26/3/73

( This file must be preserved for ever )

~~410~~Gort. Appeal under Section ~~417~~ of the Code of Criminal Procedure~~476B~~

G.A. No. 11/69.

The state.

} APPELLANTS

Offence :— Unlawfully Assembly.

Sections :— { 143, 147 S.P.C.

Sentences :— { Acquittal.

Date of trial \_\_\_\_\_ 16. 12. 1958.

Received \_\_\_\_\_ 10. 11. 4. 1959.

Date of decision of High Court \_\_\_\_\_ 16. 2. 1959.

Magistrate :—No dated 195 . Cr. Intimates that the of 195 , has been fixed for the hearing of the appeal and requests him to give notice thereof the appellants.

To Sessions Judge :—No. dated 195 . Cr. A Copy for information with the request that he will forward the record on or before the 195 .

To Advocate General :— No. dated 195 . Cr. B Copy for information

From Sessions Judge :—No. dated 195 . "

From Magistrate :—No. dated 195 . "

Lay before the Criminal Bench  
Place first before Hon'ble Mr. Justice  
in Chamber.

Deputy Registrar

# IN THE HIGH COURT OF ORISSA

## CRIMINAL JURISDICTION

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*[Signature]*  
Signature of Officer of Court

Compared and found correct

Date

*2. 3. 23.*

*[Signature]*  
Record-keeper

*26/3/23*



S.C.A. 25/73.

M/s. H. Kanungo + R.N. Mohanty

(Rs. 12, 31, 32, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44)

In The High Court of Orissa

Mr. R.K. Mohapatra  
(Rs. 12, 31, 32, 35, 36)

## ORDER-SHEET

Court. Appeal No. 11 of 1969

Appellant

The State

Versus

Bhikari Charan Nain &amp; 43 others

Respondent S.

Serial No. of Order	Date of Order	Order with signature	Office note as to action (if any) taken on Order
1.	11.4.69.	Presented in Court. D.O. <u>Nain</u>	For stamp upon whose. 14/4/69. L.V. Moh 15/4
2	25 <sup>4</sup> / <sub>69</sub>	Time till to-morrow is allowed to remove the defect <sup>No. 2</sup> as pointed out in the stamp report, failing which place before the Bench for orders. <u>Regn</u>	Defects as per stamp upon to be removed. 15/4/69. Defects as per stamp upon removed. (includes limitation matter). 24/4/69 Order no. 2 of 25.4.69. Defect no. 2 as per stamp upon removed. For orders (D.B.) 28/4/69.



2. A. 11/69

Serial No. of Order	Date of Order	Order with signature	Office note as to action (if any) taken on Order
3	30.4.69	As requested, three day's time is allowed to remove the defect No. 2 as per stamp report.	A memo showing the addresses of the respondents filed. Defect No. 2 removed.
4.	16.5/69.	Admit. Issue available warrant of arrest up to 427 v.p.c to the satisfaction of the trial court.	For Admission and issue of warrant of arrest against the respondents with limitation (D.B.). 6/5/69.
		S. Banerjee Patel	Warrants are prepared and put up for favour of approval by the Hon'ble C.J. & Hon'ble Patel J.
			44 Warrants with a copy of order of 16.5.69 forwarded to the Sen. Judge, Puri.
			Order No. 4 Communicated to the A.D. (C.J.), Puri.
			28/5/69 23/5



G.A. No 11 of 1969.

Serial Order	Date of Order	ORDER WITH SIGNATURE	Office note as to action (if any taken on Order)
5.	26.6.70	<p>Issue appeal notice afresh on Rs. 27 and 43. Necessary copies of appeal memo be filed within three days, failing which place before the Bench as per rules amended.</p> <p><i>Y. K. Regu</i></p>	<p>45 copies of Appeal memo filed. Notice issued for 7.8.69.</p> <p><i>On 18/7/69</i> <i>D.R.</i></p> <p>S.Rs of notices issued to the respondents received and service thereof is sufficient on all the <del>O.Ps</del> ex respondents except Responds 2, 17, 27 and 43.</p> <p>Respondents Nos. 12, 13, 31, and 32, 35 and 36 appeared through Mr. R.K. Mahapatra and respondents Nos. 1, 3, 10, 11, 13 to 16, 18 to 20, 22 to 26, 28 to 30, 34, 37 to 42 and 44 appeared through M/s. H. Kanungo + R.N. Mahanty.</p> <p><i>On 27/4/8</i></p> <p>The Sessions Judge, Puri in his letter No 1105 Cr. dated 23.6.69 reports that the 44 accused respondents <sup>made their appearance</sup> were present before his Court and enlarged on bail. Further the Sessions Judge reports that all the respondents do not want legal assistance from the State Govt.</p> <p><i>On 27/4/8</i></p> <p>M/s H. Kanungo, R.N. Mahanty + H.N. Kanungo appear for Rs 2, 17, 21 and 33.</p> <p>S.Rs of notices issued to the respondent received and service thereof is sufficient on all the respondents except Rs 2, 17, 27 and 43 who were absent from their respective places, Rs. 2 and 17 since appeared through</p> <p>Steps for fresh service on Rs 27 and 43 not yet taken. For Orders.</p> <p><i>On 26/5</i> <i>Regu.</i></p>



G. A. Doll 7 1969.

Serial No. of Order	Date of Order	ORDER WITH SIGNATURE	Office note as to action (if any) taken on Order
6.	6.7.70.	<p>Copies in question is said to have been filed. Office to verify and accept.</p> <p>W. Br</p>	<p><u>Order 105.</u> Two copies of appeal memo not yet filed for issue of fresh notice to the Rs. 27 and 43. For Orders. <u>D.B.</u></p> <p><u>Am</u> 3/17</p> <p>Two copies of Petn. filed. Notice issued to Rs. 27 and 43 in appeal matter fixing 5.8.70 as in D.F.A. <u>D.B.</u></p> <p><u>Am</u> 10/17.</p> <p><u>Am</u> 10/17/70</p> <p>S. Rang notice received and the service is personal on Rs 27 and 43. <u>Am</u> 5/18/70</p> <p>Records in S.T. No 12/68, and G.R. Case No 336/67 together with Connected Police Case Diary received, checked and found correct. <u>Am</u> Record being bulky kept 5/23/12 separately.</p> <p>Copy supplied to the Govt. Advocate. The case is ready &amp; shown in the weekly cause list dated 2.10.72. <u>Am</u> 30/9/12</p>



Govt. A. no. 11 of 1969.

[O. C.-98]

Serial No. of Order	Date of Order	ORDER WITH SIGNATURE	Office note as to action (if any) taken on Order
7	1 $\frac{12}{72}$	Heard in part. B2 KBN	
8	1 $\frac{1}{73}$	Further hearing assumed. Heard further in part. B2 Misra	
9	5 $\frac{1}{73}$	Further hearing assumed. Heard further in part. B2 Misra	
10	9 $\frac{1}{73}$	Further hearing assumed. Heard further in part. B2 Misra	



Govt. A. no. 11/69.

Serial No. of Order	Date of Order	ORDER WITH SIGNATURE	Office note as to action taken on Order
11	18 $\frac{1}{73}$	Further hearing resumed. Heard further in part.  B.D. <u>Misra</u>	
12	22.1 73	Hearing concluded. It is reserved.  B.O. Lak-	
13	16.2.73	Judgment delivered. The appeal is allowed in part vide It in separate sheets B.O. Lak	<p>A copy of Court's judgment along with L.C.R. are sent to the Sess. Judge, Puri.</p> <p>Recd 19/2/73</p> <p>19/2/73</p> <p>A letter received from Sess. Judge, Puri in which the Sess. Judge requests for date of disposal of G.A. 11/69.</p> <p>Letter issued. 18.2.73</p>



From an order dated 16.12.1968 passed by Sri B. Misra, Sessions Judge, Puri, in S.T. No. 12 of 1968 (P).

versus

For appellant -- Mr. A. Mohanty for  
Govt. Advocate

For respondents -- M/s S. Mohanty,  
R. K. Mohapatra and  
H. N. Kanungo

**Present:**

THE HONOURABLE MR. JUSTICE B. K. PATRA  
AND  
THE HONOURABLE MR. JUSTICE K. B. PANDA

PANDA, J. This is an appeal under S. 417, Cr.P.C. filed by the State against an order of acquittal passed by Sri B. Misra, Sessions Judge, Puri, in S.T. No.12 of 1968(P) wherein the 44 respondents were facing trial under various section of the Indian Penal Code, such as, 143, 147, 323/149, 351/149, 427/149, 435/149, 440/149 and 307/149, on the allegations of having formed an unlawful assembly with the common object of assaulting P.W.3 (Harekrushna Mangaraj, Block Development Officer, Pipili), and P.W.2 (Iswar Behera, B.D.O.'s jeep-driver), storming Chandanapur Outpost and setting fire to the office jeep.

2). The scene of occurrence is spread over two villages - Damodarpur and Chandanapur - separated by Bhargavi river over which there is a pucca bridge, 500 ft. long and 12 ft. broad, that can allow only one vehicular traffic at a time. On Chandanapur side there is a police outpost at a distance of 60 ft. from the end of the bridge. The total distance from Chandanapur Outpost to/shop of



P.W.13 (Bihari Mohapatra) on Damodarpur side is 238 yards to which the different phases of the incident are confined. 3).

On 2.4.67 at about 10 a.m. P.W.3 was proceeding in his office jeep driven by P.W.2 towards Puri. At village Damodarpur the jeep is said to have knocked down a boy but did not stop. The previous night there had been some such accident there caused by a truck-driver who speeded up and escaped detection. So this alleged accident of 2.4.67 roused the anger of the locality and some persons of Damodarpur chased the jeep evidently with the purpose of stopping the vehicle and taking the driver and probably the occupants also to task. A mob of 30 to 40 ran after it shouting to stop the vehicle that had caused an accident.

Ordinarily, in the busy hours of the day, a traffic constable is placed at Chandanpur side of the bridge to see that two vehicles from opposite directions do not make an attempt to cross the bridge at a time. At that time P.W.1 (Jagannath Sahu), constable, was on signal duty at the said bridge. He had already given pass to a truck from Chandanapur side. When this truck had entered the bridge a few yards, the jeep from the opposite direction rushed upon the bridge followed by a shouting angry mob. The truck driver attempted to reverse his vehicle; and in the process the jeep could not proceed ahead. Consequently it was overtaken by the angry mob from Damodarpur side. Some persons of Chandanapur side also joined the said mob. They first assaulted the truck-driver, then turned to the jeep-driver (P.W.2) who, for safety of his life, was running towards the police aiming at the outpost. However, the traffic police (P.W.1) came to his rescue and passed him over to another constable Satyabadi Naik (P.W.26) who



took charge of him and kept him locked within the outpost for his safety.

Then the angry mob turned towards the B.D.O. (P.W.3) and pulled him out of the jeep. He was trying to pacify the mob but to no effect. Some accused him of driving the jeep and some others accused him for not directing the driver to stop the jeep. However, no body listened to him and he was manhandled. His hands were twisted and he was pulled and pushed towards Damodarpur side. Some blows were also delivered on the way. On the intervention of some saner elements, he was put in the shop house of P.W.13 and chained from outside. The angry mob was even threatening to set the shop-house on fire. P.W.1 came over there from Chandanapur side to look to the safety of P.W.3; but on his intervention he was assaulted and trampled over.

Sometime after the Grama Rakshi Udayanath Das (P.W.15) appeared and rescued P.W.1 and took him to Chandanapur Outpost. In the meantime a mob of about 50/60 were demanding the release of the jeep-driver from the outpost against the protests of the constables in charge of the outpost. At last the mob broke open the outpost door, got into the outpost, ransacked it, damaged the records and belaboured P.W.2. Thereafter some of them set fire to the jeep which was on the bridge itself.

While the raid on the outpost was going on, some one telephoned to Police Headquarters at Puri regarding the riot. By 12.30 p.m. police force with Addl. S.P. and a ~~Surgant~~ Sergeant arrived at the spot. Seeing them the mob melted away. The jeep was found ablaze on the bridge stopping vehicular traffic from either side.



P.W.1 lodged first information report (Ex.1) about the incident. The injured (P.Ws. 1, 2, 3, 15 and 26) were examined by Dr. Rabindranath Raut (P.W.20) (Exs. 2, 3, 4, 5 and 6). Some of the suspects were found absconding and <sup>the</sup> so/rest put on identification parade and finally chargesheet was submitted against 44 accused (the present respondents) under various sections with the result aforesaid.

4). The defence was substantially a bare denial.

5). There were 31 witness for the prosecution and none for the defence. Most of the local witnesses turned hostile. The learned Sessions Judge acquitted the accused persons on the reasonings that what happened on Damodarpur side after the B.D.O. was taken there was simultaneous with the storming of Chandanpur Outpost, ~~and the members of the unlawful assembly associated with the events on Damodarpur side could not possibly be the members of the unlawful assembly storming Chandanapur Outpost, and, therefore, the evidence against such accused persons was not acceptable; that there was no evidence as to who was a mere silent spectator and who was a member of the unlawful assembly having the common guilty object; and that the F.I.R. (Ex.1) is inadmissible in evidence being hit by S. 162, Cr.P.C. So/as the evidence of <sup>far</sup> ~~the~~ assaulted B.D.O. (P.W.3) or the injured jeep-driver (P.W.2) is concerned, the learned Sessions Judge discarded it on the ground that in that confused state of mind there was scope for mistaken identity and, therefore, their evidence, though otherwise credible, has become unacceptable in the circumstances.~~







5). It was contended on behalf of the State that the learned Sessions Judge should not have rejected Ex.1, the F.I.R. as being hit by S.162, Cr.P.C. since the telephonic message received by Jagannath Das, S.I. of Police (P.W.28) was a cryptic anonymous information in that the outpost had been gharoed by a mob consequent upon a jeep accident; that the learned Judge was not justified in brushing aside the evidence of the eye-witnesses, such as, the constable, the jeepdriver and the B.D.O. and P.Ws. 11, 13, 17, 18, 19, 24, 25 and 26  $\angle$  P.Ws. 19, 24, 25 and 26 are constables attached to the said Outpost and the rest were local people of Chandanpur or Damodarpur<sup>7</sup>; that there was no basis for the reasoning that the incidents at Damodarpur and Chandanpur were simultaneous so as to improbabilise the presence of an accused at both the places; that the learned Judge instead of scanning the evidence more minutely in the light of the broad probabilities of the case, has taken the path of least resistance by discarding their evidence on a fanciful ground that a person cannot be present at two places simultaneously; that the total distance the occurrence covered being about a furlong and it being daytime and the incident being spread over for a period of two hours, there was nothing improbable in some persons taken part in the incidents at Damodarpur side in assaulting the B.D.O. as also the incident at Chandanpur side in ransacking the outpost and that at least it was not such an impossible task for which positive evidence in the case has to be jettisoned.



is ~~proved~~ which is not weakened by the order of acquittal. In the instant case we are very much alive to the fact that in the two busy localities like Damodarpur and Chandanpur, when anything abnormal happens, there would be a lot of sightseers. We are also alive to the fact that there might be an attempt, in over-enthusiasm, to rope in as many persons as possible. But let not those considerations blur our vision to the tell-tale facts of the case.

8). All the phases of the occurrence, namely, pursuing the jeep and overtaking it on the bridge; rescue of the jeep-driver by P.W.1 and putting him in the outpost; assaulting the B.D.O., dragging him to Damodarpur and putting him inside the shop house of P.W.13; storming the outpost and ravaging the records therein and manhandling the jeep-driver and lastly burning of the jeep - are all uncontroverted facts accomplished in the broad daylight by certain people belonging to these two localities.

It is beyond doubt that there was an unlawful assembly to take the jeep driver and its occupant to task and in that process there was an escalation. The narrow question, therefore, for determination is if any of the real culprits had been identified and there is unmistakable proof of his complicity in the crime.

The occurrence as already indicated was spread over a distance of one furlong and a space of two hours in the broad daylight and the theory propounded by the learned Sessions Judge and advanced as well on behalf of the respondents that the incidents at Chandanapur and Damodarpur were simultaneous, does not appeal to us. The result is - the finding that an accused cannot be present at both the places is fallacious and cannot be accepted.



That apart, the learned Judge has neither scanned the evidence of the independent witnesses nor weighed the broad probabilities as a trying court should. His reasoning that even P.Ws. 2 and 3 were so perplexed that they could not have identified a single individual out of the entire mob appears puerile. His further finding that (Ex.1) the F.I.R. was hit by S.162, Cr.P.C. is equally unsustainable. On these broad points, at least, we cannot but hold that the order of acquittal is very vulnerable.

9). Next we will address ourselves to the propriety of rejecting the F.I.R. (Ex.1) as hit by S.162, Cr.P.C. It was contended on behalf of the respondents that the prosecution purposefully suppressed it lest it might go against the prosecution. According to the respondents, the message that reached Puri, on the basis of which additional force arrived, is the information first in point of time which is the real First Information Report, but not produced. What happened subsequent to the arrival of the police force from Puri was in course of investigation of the information conveyed over phone and, therefore, the examination of P.W.1 or the statement given by him was during investigation, and so on no account can be the first information report in the case.

The prosecution contended that it was just a vague message without any details, seeking reinforcement to save the situation. While dealing with this aspect of the case, the learned Judge observes thus: :

On 2.4.67 the A.S.I. in-charge of the Out-post had been out, and the incident took place at about 10 or 10.30 A.M. P.W.28 Jagannath Das a Subinspector of Police attached to Sadar P.S. gives evidence that he received a Phone message from one attendant of Electrical Sub-Division at Charinala to the effect that there was a Jeep accident at Damodarpur



Bazar and local people being enraged assaulted the Jeep Driver and gheraoed the Police Out-post. This information he says was not treated as F.I.R. because it was vague. Whether any culprits were named or not in the said information is not there. It is, however, clear that an offence was reported, namely, assault on the Driver and storming of the Out-post. Therefore, the subsequent statement taken from P.W.1 as F.I.R. can reasonably be treated as a statement made during investigation. Moreover, P.W.31 - the Officer in-charge of Sadar P.S. who subsequently took charge of the investigation at ~~Chandanpur~~ ~~Chandanpur~~ has disclosed that Constable Sudersan Patnaik had intimated the disturbance at Chandanpur Out-post over Phone. The witness has mentioned this fact ~~in~~ in his forwarding report (Ex.B) submitted to the Magistrate of 5.4.67. Sudersan Patnaik Constable who has been examined as P.W.24 does not speak of it and his evidence is to the effect that he was in the Out-post throughout the incident. In view of Ex.B and the statement of P.W.31, it is clear that the Sadar P.S. had information from Constable Sudersan Patnaik (p.w.24). Therefore, Ex.1 the F.I.R. is clearly a statement made by a witness during investigation and so not admissible.

The view taken by the learned Judge is hardly sustainable. Chandanpur Outpost has no phone connection. It was urged that P.W.24 ran to the Electrival Sub-station at Bhagabanpur to communicate the information to Sadar P.S., Puri, over phone. But P.W.24 does not state anything about it in his chief nor is there any cross-examination on this point. True, in Ex.B the officer-in-charge, Sadar P.S. on 15.4.67 (mistakenly mentioned in the judgment as 5.4.67) submitted to the S.D.O., Puri, had mentioned that constable no.148 Sudersan Patnaik during the incident had used the telephone at Electric Sub-station, Bhagabanpur and communicated the information to Sadar P.S.. Whether it was P.W.24 who did it or somebody from the Electric Sub-station at Bhagabanpur is not clearly established. The evidence of P.W.24 is that he was all through at the outpost and so does not seem to take that credit. The evidence of P.W.28 who actually heard the message supports him.

There is a catena of citations on the point that vague and indefinite reports do not come under S. 154, Cr.P.C. Besides, whether a statement to police falls



under S. 162 or S. 154, Cr.P.C. is a question of fact to be judged in the circumstances of each case (See Kamrul Hussain v. King Emperor 43 Cr.L.J. 115). It has been held that where information which is first given to the police is of such a vague and indefinite character that it cannot be treated as coming under S. 154 so as to make it incumbent on the Officer-in-charge of the police station to start investigation and he may reasonably require more information before doing so, further information given to him in such circumstances may fall within S.154, Cr.P.C.

In the case of Tapinder Singh v. State of Punjab 1970 Cr.L.J. 1415, their Lordships of the Supreme Court have stated commenting on an F.I.R. based on Dying Declaration thus:

He started with an attack on the F.I.R. based on dying declaration. According to the counsel, the information in regard to the offence had already been conveyed to the police by means of telephone message and the police had actually started investigation on the basis of that information. This argument was, however, not seriously persisted and was countered by respondent on the authority of the decision in Sarup Singh v. State of Punjab AIR 1964 Punj.508. The telephone message was received by Hari Singh A.S.I., police station City Kotwali at 5.30 p.m. of September 8, 1969. The person conveying the information did not disclose his identity, nor did he give any other particulars and all that is said to have been conveyed was that firing had taken place at the taxi stand, Ludhiana. That was, of course, recorded in the daily diary of the police station by the police officer responding to the telephone call. But prima facie this sryptic and anonymous oral message which did not in terms clearly specify a cognizable offence cannot be treated as F.I.R. The mere fact that this information was the first in point of time does not by itself clothe it with the character of F.I.R. The question whether or not a particular document constitutes a First information report has, broadly speaking, to be determined on the relevant facts and circumstances of each case. The appellants' submission is that since the police authorities had actually proceeded to the spot pursuant to this information, however exiguous



it may appear to the court, the dying declaration is hit by S. 162, Cr.P.C. This submission is unacceptable. . . . .

This view has been accepted, without exception, and this Court has reiterated the same in the case of State v. Narasingh Khuntia reported in 1971 (1) C.W.R. 711 and in the case of Banamali Mohanty v. State of Orissa (XXV C.L.T. 433).

In the facts and circumstances of the instant case, therefore, we are not persuaded to hold that any indefinite earlier phone message was the real F.I.R. and Ex.1 so treated is hit by S. 162, Cr.P.C.

10). The next point for consideration is if the charge and the evidence are at such variance that the learned Judge could not but acquit the accused persons. It was contended on behalf of the respondents that the unlawful assembly was one and their object was also one, namely, to take the jeep-driver and its occupants to task. But in the present case, the common object is not confined to that alone but includes the storming of Chandanapur Outpost and burning up of the jeep. So the first comment was that the prosecution has not put up a case that there were three distinct unlawful assemblies animated by three common different/objects in view. The second comment was that there is no charge of any specific offence done by any of the named accused persons so that others would become constructively liable for their acts of commission or omission. For appreciation of this two-pronged attacks, some of the charges need be extracted:

" CHARGE WITH EIGHT HEADS  
I, Sri B.Misra, Asst. Sessions Judge, Puri, do hereby charge you (Nos. 1 to 44 names of the accused persons mentioned) as follows:-



FIRSTLY That you on or about 2nd day of April 1967 at Chandanapur and Damodarpur Bazar between 10 A.M. to 1 P.M. were members of an unlawful assembly, the common object of which was to cause hurt to Harekrishna Mangaraj, the B.D.O., Iswar Behera, the driver and burn the jeep and thereby committed an offence u/s 143, IPC . . . . .

SECONDLY That you or or about the 2nd day of April 1967 at Chandanapur and Damodarpur Bazar between 10 A.M. to 1 P.M. were members of an unlawful assembly, and in prosecution of the common object of such assembly viz., to cause hurt to Harekrishna Mangaraj and Iswar Behera and to burn the jeep committed the offence of rioting punishable u/s 147, IPC . . . . .

THIRDLY That you on or about the 2nd day of April 1967 at Chandanapur and Damodarpur Bazar between 10 A.M. to 1 P.M. were members of an unlawful assembly in prosecution of the common object of which some of the members caused hurt to Harekrishna Mangaraj, B.D.O., Iswar Chandra Behera, the driver and constable Jagannath Sahu, Satyabadi Naik and Sarat Chandra Mohanty and thereby committed an offence punishable u/s 323/149 IPC . . . . .

FOURTHLY That you on or about the 2nd day of April 1967 at Chandanapur and Damodarpur Bazar between 10 A.M. to 1 P.M. were members of the unlawful assembly in prosecution of the common object of which committed house trespass by entering into the police out-post at Chandanapur used as human dwelling and for custody of property in order to commit mischief and hurt and that you thereby committed offence punishable u/s 451/149 IPC . . . . .

(Other charges need not be quoted as they are identical as the Third Charge with a change in the sections only, as 427/149, 435/149 and 307/149, with the expressions "some of the members" without naming any particular accused person or persons.)

As would be seen from the charges, ~~as~~ no body has been charged under S. 323, 307, ~~427~~ or 451; and thus no body can be held liable for having committed any substantive offence under any of those sections in the absence of a specific charge therefor. This type of case is not covered under S. 237 or S.238, Cr.P.C.

Next coming to the charges under Ss. 323/149, 451/149, 427/149, 435/149, 440/149 and 307/149, I.P.C., there being no mention in the charge as to which



particular accused committed the offence complained of, it remains vague and indefinite which is likely to prejudice the accused. As such, there cannot be any conviction thereunder also. We accept the defence contention so far. 11).

The other two charges that remain for consideration are under Ss. 143 and 147, IPC. - the former merging in the latter. The question is if the criticism that the unlawful assembly that first formed to take the driver or the B.D.O. to task is not the same unlawful assembly that stormed the Chandanapur Outpost. In the <sup>a</sup>charge the common object of the unlawful assembly has been mentioned as to assault the B.D.O., the jeep-driver and to burn the jeep. The storming of the outpost with burning of its records has been split up into three different charges like, 451/149, 427/149 and 435/149, I.P.C. So it cannot be said that the accused persons had no notice of this also being the common object as the same had not been incorporated in the two charges now under consideration. At least there is no scope for prejudice on that score.

The essence of the offence is the common object of the persons forming the assembly. Whether the object was in their minds when they initially came together, or whether it occurred to them afterwards, is not material. What is necessary is that the object should be common to persons who composed the assembly, that is, that they should all be aware of it and concur in it. Here comes in the difference between object and intention, for, though the object of the assembly is common, the intention of the several members may differ and indeed may be similar only in the respect that it is unlawful. A common object is different from a common intention in that it does not



require prior consent and a prior meeting of minds before the attack is launched and an unlawful object may develop after the people get together. In case of common object, as in this case, there need not be a prior meeting of minds. It is enough that each shared the same object and that their number was five or more and that they acted in unison to achieve that object. Members of an unlawful assembly may have a community of object only upto a 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 will vary, not only according to the information at his command, but also according to the extent to which he shares the community of object.

Common object of the unlawful assembly can be collected also from the nature of the assembly, arms used by it and the behaviour of the assembly at or before the scene of occurrence. The common object is an inference of fact to be deduced from the facts and circumstances of each case. Commission of overt act is certainly an evidence of fact that the accused was a member of an unlawful assembly; but the converse is not always true. In other words, it cannot be contended that if there is no proof of commission of certain overt act by the accused, he is presumed to be not a member of the unlawful assembly. Law is also clear that as different persons may subsequently join an unlawful assembly and thus the original group (unlawful assembly) may swell in number, similarly the initial object of an unlawful assembly may also vary and become manifold; but in neither case the members of the



unlawful assembly can claim exoneration from all liability on that score alone.

There is no hard and fast rule that there must be one and one common object for any unlawful assembly. In the instant case, therefore, the defence contention that the original unlawful assembly that chased the jeep was not the unlawful assembly that stormed the outpost or burnt the jeep, is not tenable. As already indicated, though to form an unlawful assembly, overt act is not essential but sharing of the common object<sup>is</sup> yet in the circumstances of the case, namely, Damodarpur and Chandanpur being busy localities and there being the possibility of many ~~innocent~~ innocent onlookers who might be gazing at what was happening out of sheer curiosity, we would like to scrutinise the evidence to arrive at a finding as to which of the accused-respondents has been proved to have committed some overt act so as to be liable for rioting.

12). Out of the 44 respondents facing trial, there is absolutely no evidence of any overt act committed by some of them and the evidence as against some others is doubtful. Accordingly, we would divide them into three categories. Again out of these 44, only 28 have been named in the first information report. Further all the 44 were not put in the test identification parade but a few, the reason being that the rest were absconding. The respondents who were not in the T.I. Parade are -

(1) Jagannath Subudhi	(Accd. respdt.-7)
(2) Biswanath Naik	-do- 10
(3) Nakula Naik	-do- 15
(4) Bharat Naik	-do- 19
(5) Banshidhar Sahu	-do- 23
(6) Bauribandhi Naik	-do- 24
(7) Bhagaban Naik	-do- 25
(8) Budhi Sahu	-do- 26
(9) Baidhar Naik	-do- 27
(10) Dandapani Subudhi	-do- 28



(11)	Khetrabasi Naik	(Accd-respdt-29)
(12)	Pitabas Mohapatra	-do- 30
(13)	Basu Parida	-do- 31
(14)	Muliram Mohapatra	-do- 32
(15)	Dinabandhu Sahu	-do- 33
(16)	Naba Parida	-do- 34
(17)	Natabar Senapati	-do- 35
(18)	Satura lias Satrughna Jena	-do- 36
(19)	Jagannath Sahu	-do- 37
(20)	Banshidhar Naik	-do- 38
(21)	Kelu Naik	-do- 39
(22)	Dukha Naik	-do- 40
(23)	Abakash Sahu	-do- 41
(24)	Lakhana Naik	-do- 42
(25)	Ananda Parida	-do- 43
and	(26) Agadhu Sahu	-do- 44

The accused-respondents who are not mentioned in the first information report are :-

(1)	Hadibandhu Adik	(Accd-respdt- 6)
(2)	Maheswar Naik	-do- 17
(3)	Chandrasekhar alias Jati Dey	-do- 18
(4)	Bharat Naik	-do- 19
(5)	Rama Das	-do- 20
(6)	Purna Chandra Naik	-do- 21
(7)	Dinabandhu Sahu	-do- 33
(8)	Kelu Naik	-do- 39
(9)	Abakash Sahu	-do- 41
(10)	Lakhana Naik	-do- 42
and	(11) Ananda Parida	-do- 43

( as per notes supplied by the State in both the cases).

In the first information itself the total number of the accused is 28. Thus  $28 + 11 = 39$  and the rest 5 remain surplus. The learned Sessions Judge in his judgment ~~(para-15)~~ (para- 15) has specifically dealt with the case of 31 accused persons leaving aside 13 others. Out of the 31 he dealt with, 2 are not in the first information report, namely, accd-respdt-33 Dinabandhu Sahu and accd-respdt-6 Hadibandhu Adik. There is also some misdescription in names, viz., in the first information report there is one PANCHU NAIK who does not find place in the accused list nor in the respondents' list, unless he be PURNA CHANDRA NAIK (accd-respdt-21) who is aged 10 only; so too DASARATHI PANDA (accused-3) unless he is DASARATHI PARIDA (respdt-3).



On a close analysis of the evidence and as conceded by the learned counsel for the State, we find that there is absolutely no evidence of any overt act done by the following accused-respondents, namely, nos. 3, 4, 5, 6, 7, 9, 10, 11, 15, 16, and 18 to 24, and as such, their acquittal is proper.

The evidence as against accused-respondents 1, 13, 14, 17, 25 to 27, 29, 30, 32, 33 and 37 to 44 is rather shaky. In the circumstances of the case, without clear and corroborative evidence of any overt act done by them, it would be unsafe to convict them, and, as such, they ought to be given benefit of doubt. The learned counsel for the State also could not urge for their conviction in view of weak nature of evidence as against them.

13). Thus left for consideration is the case of the rest, namely, accused-respondents 2, 8, 12, 28, 31, 34, 35 and 36.

Dinabandhu Naik (accused-respondent-2) - He was put in the T.I.Parade and identified by P.Ws. 1, 2, 19, 22, 24, 25 and 26. The allegation against him mentioned in the F.I.R. is that he assaulted the jeep-driver and the B.D.O. and was a member of the unlawful assembly. The witnesses, who deposed against him in court, are P.Ws. 1, 2, 3, 6, 11, 19, 24, 24 and 26. His defence was that he saw the disturbance by the hooligans from his shop at Chandanpur. Sometime after he proceeded to Damodarpur and found there the mob creating disturbance near the shop of Bihari Mohapatra (P.W.13). The mob was trying to enter within the shop and get hold of some body in the shop while others were stopping them. He somehow got near the shop and locked the room to save the man. Later he learnt that he had saved



the B.D.O., Pipili who was inside the room. The evidence of his assault on P.W.2- the jeep-driver- was denied. Regarding the evidence of P.Ws. 11, 19, 24, 25 and 26 that he was demanding release of the driver and creating trouble by entering into the outpost, his explanation was that he had not seen the driver; all the evidence against him is false; and he only passed by the outpost while going to Bihari Mahapatra's shop and at that time there was none in the outpost. His specific case is that some police people are against him as he refused to give subscription collected by them for Puja and that on his refusal to pay goods on credit, they bore grudge against him. The learned Judge observed in his case that the evidence against him "is meagre" and he "cannot be a culprit as he kept the B.D.O. in the shop of Bihari (P.W.13)". Besides "he being at Damodarpur cannot be one of the culprits storming the O.P."

From his explanation it is clear that he was watching the hooligans from his shop; he passed by the outpost where <sup>there</sup> was none and then went to Damodarpur where, according to him, he rescued the B.D.O. from further assault. At least this is clear from his statement that he was present at both the places at the relevant time. This gives a go-by to the theory advanced by the defence and accepted by the learned Judge that the incidents were simultaneous at both the places viz., Chandanpur and Damodarpur.

P.W.1 is the traffic constable who rescued the jeep-driver. His evidence is that this accused-2 Dinabandhu at the moment emerged from the mob and wanted the truck to stop, assaulted the truck-driver and took away the switch key. Thereafter accused-32 from Chandanpur side joined



accused-2. Accused nos. 9 and 29 joined them and all of them assaulted the jeep-driver (P.W.2). Accused-34 tore away the shirt pocket of P.W.2 and snatched away some money threfrom. He (P.W.1) rescued P.W.2 and made him over to constable Satyabadi Naik (P.W.26) who was just coming out of the outpost. Thereafter this witness hearing hullah and not seeing the B.D.O. went towards Damodarpur. There he found accused-~~28~~ 23, 28 and 29 holding the B.D.O. and assaulting him. The witness put the B.D.O. inside the room, closed the door and held it firmly. At that time accused-28 climbed over his shoulders and attempted to open the door. Accused-23 threw away his Pugree and pushed him as a result of which he fell down. P.W.15 Udenath Das, the Grama Rakshi (Home Guard) came to his rescue when he was assaulted by accused nos. 9, 27, 28 and 29 with fist blows and kicks as a result of which he received injuries on left eye, right cheek, right eye and right ~~knee~~ knee. The Home Guard (P.W.15) took him to the outpost and <sup>kept</sup> him in the barracks. He later learnt about the damages to the outpost and the burning of the jeep. This witness had been posted at Chandanpur 6/7 months prior to the occurrence and, therefore, the criticism that he was only guessing the accused persons does not seem correct. Nothing inherently incredible is pointed out in his evidence so as to discredit his entire evidence. The only comment was that he has exaggerated facts just to take the credit of having played a great role by rescuing the jeep-driver and the B.D.O. endangering his own life and thus claim a reward from the department. The injuries on his person were 3 bruises situate on the right side of the lower lip, left eye-lid and on the right upper eye-lid; 2 abrasions



on the outer aspect of left hand and left calf below the knee-joint (Ex.3). He was examined on 3.4.67 and there is nothing to doubt that he received these injuries during the incident. Himself being there for 6/7 months prior to the occurrence and having been greatly involved in the incident, there is no reason why he would fail to identify or name some of the accused persons who had taken leading part in the riot. It may be that persons who are quite close and whom he found in the mob, he mentioned their names to have taken part in the rioting; but that is no reason why the specific evidence against any of the accused persons, as deposed to by him and corroborated also, should be discarded. It only serves as a caution to eliminate chances of mistaken identity, embellishment or exaggeration. Keeping that in view, we hold that the evidence of this witness regarding the overt act done by Dinabandhu Naik (accused-respondent-2), Dandapani Subudhi (accused-respondent-28), Basu Parida (accused-respondent-31) and Naba Parida (accused-respondent-34) should be believed. His evidence regarding accused nos. 9, 23, 27 and 29, in the absence of independent corroboration, is not taken into consideration.

P.W.2, Iswar Behera, the jeep-driver's statement is that as he stopped the jeep, some people of Chandanapur side came and caught hold of him. Their number is 7/8 and out of them he could identify one or two and in the court he identified accused-respondents 2 and 34. His specific evidence is that accused-2 held him by the neck and others tore his shirt and took away the money he had. Some one also snatched away his wrist-watch and all of them assaulted him. He was a new man to the locality and,



therefore, it was just possible that he could not identify all of them. But the criticism that he could not have identified any as he got puzzled, does not appeal to us. We, therefore, accept his evidence as against accused-respondents 2 and 34 whom P.W.1 also implicates. P.W.2 has identified accused-2 in the T.I.Parade. Accused-34 was not in the T.I.Parade.

P.W.3, the B.D.O., Pipili, stated that he was blamed for not stopping the jeep. While he was trying to pacify the mob, after 5/7 minutes some body held his left hand and twisted it and wanted him to follow to Damodarpur. Another person held his right hand and he was taken to Damodarpur. Many persons surrounded him and some gave fist blows on his back; some were shouting to kill him and some saying that he should execute a bond. Some gave him push and blows from back side and he fell down. One Panchanan Sahu, whom he knew before, wanted the mob to stop causing hurt to him. At the time constable P.W.1 came and practically carried him to a grocery shop at Damodarpur. He said how the constable (P.W.1), Panchanan Sahu and Nanda Mohapatra put him inside the shop room for his safety and closed the door and blocked the door by a cot. He stated that he could identify some who held the driver and surrounded him and created trouble. He pointed out accused 2 and 34- the latter catching hold of the driver and the former standing close to the latter. Accused-28 was one who gave fist blows on his back. He pointed out accused 22, 25 and 36 as the members of the mob while he was being dragged towards Damodarpur. He specifically stated that accused-12 was in the mob near the grocery shop and was threatening to hurt him. He was saying



BATA CHHADI DIA MU DEKHINEBI (meaning, Give me way, I shall see him). Thus his evidence is specific as against accused-respondents 2, 12, 28, 34 and 36. There is no reason why the B.D.O. cannot identify any of these people. His evidence is that while he was kept confined in the room, he was peeping through door-chinks how the mob was shouting to set fire to the house so that he would be burnt. True, he must have got panicky; but to go to the length of assuming that he was so terror stricken that he could<sup>not</sup> even identify anybody in that broad daylight and in course of the whole incident is something hard to believe. The reasoning given by the learned Session Judge in discarding his evidence is that in that puzzled state he could not have identified anybody, does not commend itself to us. In cross-examination while accused-28 was shown to him, he (the B.D.O.) described the part played by him as twisting his hand.

14). Jayamohan Sahu (accused-respondent-8)- He has been named in the F.I.R. His plea was that he was a newspaper vendor and the police has falsely implicated him due to grudge. He has been identified by P.Ws. 1, 8, 19, 24, 25 and 26 in the T.I. Parade. P.W.8 is man of Chandanpur having a shop close to the outpost. His statement is that while in the morning he was coming to his shop in front of the outpost he found accused-20 and accused-8 were in the mob who were shouting. P.W.8 was declared hostile.

P.W.17 has a betel shop at Chandanapur close to the outpost. He stated to have identified some of these people who had gathered near the outpost and were demanding release of the driver. He says that accused-8 and 9 were arguing with the constables as to why they had kept the driver inside.



P.W.19, a constable posted there for 2 years, stated that accused- 8, 34 and 36 were among the persons who were shouting to break open the lock and assault the driver. Accused-36 gave him (P.W.19) a push; accused-34 chased him holding a stick. Accused-8 gave him a push as well as to P.W.26 and that they (P.Ws. 19 and 26) were assaulted on the verandah of the outpost.

P.W.24, another constable attached to Chandanpur outpost, stated that about 90 persons rushed towards the outpost; some came over the verandah and demanded to release the driver so that he would be assaulted. Out of them he identified accused 24, 31 and 33. Accused-31 broke open the lock and some of the culprits entered the outpost. Accused- 8, 33 and 34 were amongst the culprits who entered the outpost. Accused-36 assaulted P.W.26. Accused-35 left his timber godown and passed by the outpost muttering something. Being further questioned he said that accused-35 went towards Chandanapur side by the side of the outpost shouting something. About the names of the accused persons known to him he stated to have known accused- 2, 8, 34 and 35 and identified all. In cross-examination he stated that accused-31 is the only person who attempted to break open the lock and subsequently broke it.

P.W.25, a constable, stated that accused-12, 31 and 34 and others whose named he does not know but can identify, were chasing the driver. He identified accused-2, 4, 8, 36 and some others. He specifically stated that accused-31 and 34 were demanding to leave the driver saying that they would assault him. As they did not agree, accused-8 abused them. Thereafter accused- 31 and 32 pulled the lock and the former brought a stone and broke it.



Thereafter about 8 persons including accused -8, 31, 34 and 36 entered the room and tore away the records. They also assaulted the driver. Thereafter they left saying "let us go and burn the jeep". He found accused 12, 31 and 34 going near the jeep. Accused-12 opened the cap of the petrol tank and accused-34 set fire to it striking a match stick. He stated that he followed the ~~jeep~~ mob till the jeep but after it was burnt he came back to the outpost. His evidence was attacked on the ground that he was blackmailing and extorting money from the accused persons even on the day of trial. But the question does not appear to have been pursued and it might ~~xxx~~ cut both ways as it is.

P.W.26, another constable, implicated the accused persons who had raided the outpost to be accused<sup>2</sup>, 23, 31, 34 and 36. Besides them there were others also but he did not know them. The witness pointed out accused- 1, 8, 11, 12, 13, 17, 30, 35 and 44 to have been in the mob. He stated that at that time P.Ws. 24 and 25 were also on the verandah of the outpost. On their refusal to leave the driver, accused-8 gave him a push and accused 36 pulled the lock to open it.

15). Ganeswar Mohapatra (accused-respondent-12)- He has been named in the F.I.R. to be a member of the unlawful assembly. His plea was that the police was hostile to him as he had ~~xxxxxxx~~ filed some complaints against them. ~~xxx~~ He was put in the T.I.Parade and was identified by P.Ws. 19, 25 and 26. While discussing the evidence against accused 2 and 8 and dealing with the evidence of P.Ws. 19, 25 and 26 it has been already noted how this accused has been implicated directly in the occurrence at the outpost.



The specific overt act attributed to him is, besides raiding the outpost, opening of the cap of the petrol tank of the jeep whereafter accused-34 burnt it with match stick. He has been acquitted by the learned Judge on the simple ground that he has been involved in the incidents at both the places which is impossible.

16). Dandapani Subudhi (accused-respondent-28)- He has been named in the F.I.R. but not put in the T.I.Parade as he was absconding. He has been deposed to ~~have been~~ as doing some overt act in the ~~lawful~~ unlawful assembly by P.Ws. 1, 11 and 15. His plea was one of alibi.

P.W.11, a tailor of the locality, has stated that with the co-operation of constable P.W.1 and the Home Guard (P.W.15) he made a barricade and obstructed the mob from causing hurt to the B.D.O. The mob was violent. Accused nos. 24 and 28 were in that mob.

P.W.15, the Home Guard has implicated this accused as one assaulting the B.D.O. with fist blows. He also stated that accused-28 laid P.W.1 on the floor and tried to crush him with a bench. That is the evidence of P.W.1 also. His case has not been specifically dealt with by the learned Sessions Judge.

17). Basu Parida (accused-respondent-31)- He has been named in the F.I.R. but could not be put in the T.I.Parade as he was absconding. His plea was that P.Ws. 1 and 15 had taken rice on credit but did not pay and on his demand they have falsely implicated him. The witnesses who implicate him to have taken part in the overt act are P.Ws. 1, 19, 24, ~~and~~ 25 and 26 whose evidence has already been discussed above while dealing with the case of accused-8. It is this accused who is proved to have actually broken the lock of the



outpost with a stone after demanding release of the driver. While discussing the evidence against this accused, the learned Judge has said "although the evidence against this accused is somewhat strong, he is entitled to benefit of doubt".

18). Naba Parida (accused-respondent-34)- He has been named in the F.I.R. His plea was that the local police were hostile to him and so he has been roped in. He could not be put in the T.I.Parade as he was absconding. He has been referred to by witnesses 1, 2, 3, 12, 19, 24, 25 and 26 as dealt with earlier while dealing with the evidence against accused-3. He was also one who demanded the release of the driver and helped accused-31 in breaking the lock of the outpost and burning the jeep by striking a match-stick. The learned Judge has given him benefit of doubt.

19). Natabar Senapati (accused-respondent-35)- He has been named in the F.I.R. as a member of the unlawful assembly. His plea was that out of enmity the witnesses were deposing against him. He could not be put in the T.I.Parade as he was absconding. He has been implicated directly in doing overt act in the unlawful assembly by P.Ws. 10, 12, 24 and 26. P.W.10 says that this accused was standing at his bamboo godown near the outpost and shouting to the mob to drag out the driver and he was prepared to spend whatever amount <sup>would be</sup> ~~was~~/necessary for the purpose. He was also accusing the police as not doing their work properly. P.W.10's evidence is corroborated by the evidence of P.W.12 who is a garment dealer and his statement <sup>is</sup> that accused-35 was inciting the mob saying that he would spend Rs.5000/- for the defence. As the mob ran into the <sup>shop</sup> ~~xxx~~ outpost, out of fear that his ~~xxx~~ might be looted,



he (P.W.12) closed it and watched what the mob was doing. After half an hour he found the jeep in flame on the bridge. This witness was declared hostile by the prosecution.

P.W.24 implicated accused-35 as referred to above while discussing the evidence against accused-8. He has been acquitted by the learned Judge on the ground of discrepancy in the evidence of the witnesses against him.

20). Satura alias Satrughna Jena (accd-respdt-36)- He has been named in the F.I.R. as a member of the unlawful assembly. His plea was that P.W.4, out of business rivalry, has engineered the case against him. He could not be put in the T.I.Parade as he was alleged to be absconding. He has been implicated in doing some overt acts as a member of the unlawful assembly, as deposed to by P.Ws. 3, 4, 19, 24, 25 and 26. The evidence of these witnesses has been dealt with while dealing with accused-8 and so need not be repeated. The specific allegation against him is that he took part in storming the outpost. He has been acquitted by the learned Judge on the ground that the witnesses have deposed to his presence both at Damodarpur and Chandanapur.

21). From the above discussion it would follow that there is unimpeachable corroborative evidence about accused nos. 2, 8, 12, 28, 31, 34, 35 and 36 having done some overt acts in course of the incident being members of the unlawful assembly either by assaulting the B.D.O., some of the prosecution witnesses, the jeep-driver or pulling and breaking open the lock of the outpost, damaging what was inside it and then accused 12 and 31 actually burning the jeep.

The doctor (P.W.20) examined P.Ws. 1,2,3,15 and 26 regarding the injuries on them. P.W.15 is a fisherman and the party and he states Grama Rakshi unconnected with any that while P.W.1 was taking



the B.D.O. to the shop of P.W.13, accused-28 was assaulting the B.D.O. with fist blows. In spite of that P.Ws. 1, 4 and 13 kept the B.D.O. in the shop and locked the room. So accused-28 assaulted P.W.1. When he proceeded he was heavily beaten as a result of which he became unconscious. Accused-28 laid P.W.1 on the floor and tried to crush him with a bench. He put the bench on him and tried to crush it. Therefore, he and Hadu Mallik pulled out the constable. There is nothing why his evidence should not be accepted and more so when he received injuries while rescuing P.W.1 and that also fits in with the broad probabilities of the case.

22).

From the above discussions it would follow that as against accused nos. 2, 8, 12, 28, 31, 34, 35 and 36 the charge of rioting has been well established beyond possibility of doubt. The learned Judge's order of acquittal, so far as these accused persons are concerned, is set aside and they are convicted under Ss. 143 and 147, I.P.C. and sentenced to rigorous imprisonment for nine months each and to pay a fine of Rs.300/- each, in default, to undergo R.I. for three months more under S. 147, I.P.C. No separate sentence is passed under S. 143. The appeal of the State as against the above accused-respondents succeeds and as against the rest of the respondents fails. The convicted accused persons, namely, respondents nos. 2, 8, 12, 28, 31, 34, 35 and 36 are to surrender to undergo the sentence. Appeal succeeds in part.

.....  
*K.B. Panda*  
 16.2.73.

PATRA, J.

I agree.

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*B. S. B.*