

Rooplal and ors Vs. State

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Court : Rajasthan Jodhpur

Decided On : Jan-21-2014

Appellant : Rooplal and ors

Respondent : State

Judgement :

1 D.B.Civil Writ Petition No.446/2005 IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR <><><> :

JUDGMENT

: Roop Lal & ORS.versus The State of Raj.

"D.B.Criminal Appeal No.446 of 2005 under Section 374 Cr.P.C.

against the judgment dated 07.05.2005 passed by the learned Additional District & Sessions Judge (Fast Track).No.3, Udaipur Camp at Salumber in Sessions Case No.93/2004.

Date of Judgment ::: 21st January 2014 Present Hon'ble Mr.Justice Govind Mathur Hon'ble Mr.Justice Banwari Lal Sharma Mr.Mahesh Bora, Sr.Advocate with Mr.Nishant Bora, for the appellants.

Mr.K.R.Bishnoi, Public Prosecutor.

Mr.Mohammed Aslam for Mr.V.N.Kalla, for the complainant.

By the Court:[per Hon'ble Sharma,J.].The accused-appellants have preferred this criminal appeal against the judgment of conviction and order of sentence dated 07.05.2005 passed by the learned Additional Sessions Judge (Fast Track).No.3, Udaipur camp at Salumber in Sessions Case No.93/2004, whereby they have been convicted for the offences punishable under Sections 148 and 302/149 Indian Penal Code and each sentenced as under:- 148 IPC Two yearRs.simple imprisonment with fine of Rs.500/- and to further undergo one month's simple imprisonment in event of default in payment of fine.

2 D.B.Civil Writ Petition No.446/2005 302/149 IPC Imprisonment for life term along with fine of Rs.2000/- and to further undergo three months' simple imprisonment in event of default in payment of fine.

The brief facts of the case are that Kantilal (PW-2) submitted a written report that on 11.08.2003, at about 5.00 pm, he, his father Khaturam, Sanjay, Banshi, Prakash and Bahadur returned home after agriculture work from Pulawala agricultural field, from where his father Khatuji was returning to his house, he crossed about 50 yards distance, on hearing cry of accused persons, he (Kantilal).Prakash, Sanjay, Banshi and Bahadur all came outside and saw that Rooplal, Ashok, Rama, Jeeva and Babu were having swords in their hands, Valji was having Bhala in his hand, Nana and Bharat were having axes in their hands, Kanna was having Lath (stick) in his hand along with 5-6 persons surrounded his father.

Accused Roopa inflicted sword blow on the neck of his father, Ashok inflicted sword blow on the leg, Valji assaulted on the back from Bhala and other accused persons Rama, Jeeva, Babu from swords, Nana from axe and Kanna from lath (stick).inflicted blows on his father.

When they tried to intervene, the accused persons also tried to beat them on which they ran away.

When the accused persons ran away from the place of incident, his father was taken to the Hospital at Kherwada and then to Doongarpur General Hospital where he was declared dead.

On basis of the above report, FIR No.120/2003 under 3 D.B.Civil Writ Petition No.446/2005 Sections 147, 148, 302, 149 Indian Penal Code was registered at Police Station Pahada and investigation commenced.

After completion of investigation, charge-sheet was filed against the appellants-accused in the court of learned Additional Chief Judicial Magistrate, Kherwada from where it was committed to the court of Sessions Judge, Udaipur.

Thereafter, the case was transferred to the court of Additional Sessions Judge, No.2, Udaipur from where the case was again transferred to the court of learned Additional Sessions Judge (Fast Track).No.3, Udaipur Camp Salumber (hereinafter referred to as the learned trial court.).The learned trial court, after hearing on the charge, framed charges against the appellants-accused for the offences punishable under Sections 148 and 302/149 Indian Penal Code to which they denied and claimed for trial.

To prove its case, the prosecution examined as many as 21 witnesses and exhibited various documents.

The accused persons availed opportunity to explain the circumstances adverse to them in prosecution evidence.

In defence testimonies of Jeeva Lal (DW-1).Dashrath (DW-2) and Laxman (DW-3) was taken and certain documents were exhibited.

The learned trial court, after hearing the learned Additional Public Prosecutor and the learned counsel for the accused, convicted and sentenced them as aforesaid vide impugned judgment of conviction and order of sentence dated 07.05.2005.

Being aggrieved by the aforesaid judgment of conviction and 4 D.B.Civil Writ Petition No.446/2005 order of sentence, the appellants-accused preferred this appeal, which was admitted for hearing by this court vide order dated 02.06.2005 and record of the trial court was called for.

Learned Senior Advocate Sr.Mahesh Bora on behalf of appellants has submitted that there are only six injuries on the body of deceased, out of which injury No.1 is

said to be sufficient to cause death and injury No.2 is grievous in nature.

The other four injuries are simple in nature and nine persons have been convicted and only six injuries are there, therefore, all the accused persons have not participated in the beatings and the possibility of false implications cannot be ruled out.

He further submitted that once the Court comes to conclusion that the prosecution has not come with truthful version of incident then benefit of doubt should be given to the accused appellants.

He further submitted that not a single witness stated correctly the manner in which the injuries were inflicted, there is no injury on those parts of body where the witnesses assigned the injury, therefore, infact the witnesses are not the eye-witnesses.

One set of witnesses whose statements were recorded after twenty days of incident cannot be relied upon.

He further submitted that specific allegations of beating are against accused Rupa Lal, Ashok, Valji and there is no injury on the neck which was assigned to Roopa.

There is also no injury on leg caused by sharp edged weapon which was assigned to Ashok and there is no injury on back.

Meaning thereby even these three accused were not the persons who inflicted the injuries.

The eye- 5 D.B.Civil Writ Petition No.446/2005 witnesses are not getting any support from the medical evidence also.

He further submitted that looking to the nature of the injuries it cannot be said that the accused had any intention or common object to commit murder of deceased Khatu Ram.

The learned trial court has wrongly convicted the accused persons.

Witnesses improved their statements in the Court.

The name of eye-witness PW12Shanti Lal, PW8Mani Lal, PW6Sakara, PW7Kalu Ram and PW21Lala @ Lal Shanker are not in the FIR.

All eye- witnesses are from one family and inimical to accused persons that's why the names of the accused persons were falsely mentioned in the FIR.

He further submitted that the swords were recovered at the instance of Rooplal, Rama and Ashok and lathis were recovered at the instance of Babu, Kanahaiya Lal and axes were recovered at the instance of Bharat and Nana and there was no recovery from Nana and Valji.

The eye-witnesses mentioned some different weapons which the accused were carrying on the contrary the recoveries were made.

The articles which were produced before the Court were not even sealed, hence, all these recoveries are doubtful and no conviction can be placed on basis of these recoveries.

Lastly he submitted that the appeal may be allowed and the appellants may be acquitted.

Per contra, learned Public Prosecutor Sr.Kalyan Ram Bishnoi, and Mr.Mohd.

Aslam on behalf of Mr.V.N.Kalla learned counsel for the complainant has supported the impugned judgment and stated that all the eye-witnesses named the accused persons and 6 D.B.Civil Writ Petition No.446/2005 there were common object of the accused persons for murdering Khatu Ram, therefore, the appeal may be dismissed.

We have considered the submissions made by the learned counsels.

The death of Khatu Ram was considerably homicidal in nature.

As per postmortem report (Ex.P-1).following antimortem injuries were found on dead body:- (1) Incised wound on left temporal frontal region with cutting of frontal

and temporal bone with brain lobes 10X1X1 cm with clotted blood.

(2) Incised wound on left elbow post transversely placed with cutting of left ulna transversely 4X1X2 cm with clotted blood.

(3) Incised wound on right leg M/3rd anteriorly vertically 5X2X1/3 cm with clotted blood.

(4) Incised wound on right leg 1/3rd anteriorly 1X1/3X1/3 cm with clotted blood vertically.

(5) Deep abrasion right mid scapular region to left ISR obliquely 16X1/3 cm.

(6) Abrasion linear transversely 3 cm long.

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In the opinion of Dr.

B.P.Verma (PW-1).the cause of death was due to cardiac respiratory arrest caused by Neurogenic shock sustaining injury No.1 in left fronto temporal region.

By internal examination, he noticed that below injury No.1, there was cutting of bone and there was wound of size 6X0.5X1 cm in the brain due to which neuorogenic shock occurred.

As per Dr.

B.P.Verma (PW-1) injury No.1 was sufficient to cause death and there was again cutting bone in injury No.2.

Therefore, injury No.2 was grievous.

Injuries Nos.3 and 4 were though by sharp edged weapon but these 7 D.B.Civil Writ Petition No.446/2005 were simple in nature.

Injuries No.5 and 6 were also simple in nature and by blunt weapon.

The Investigating Agency made the arrest of accused persons and certain recoveries were made at their instances on the basis of disclosure made by accused Rooplal, Ashok swords articles 1 and 2 were recovered at their instances as per recovery memo Ex.

P-26 and Ex.

P-25, those articles were sent for serological examination to the Forensic Science Laboratory.

As per FSL Report Ex.

P-7 no human blood was found on the swords articles 1 and 2.

A sword was also recovered in pursuance of the disclosure statement Ex.

P- 19 of accused Rama vide recovery memo Ex.

P-27 which was also sent for serological examination to the Forensic Science Laboratory and no human blood was found on it as per FSL Report Ex.

P-7.

An Axe was recovered at the instance of accused Bharat under the recovery memo Ex.

P-28 and the same was sent for serological examination to the Forensic Science Laboratory but no human blood was found.

The lathis were recovered at the instances of accused Babu, Jeeva and Kanna vide recovery memos Exs.

P-29, Ex.P-30 and Ex.

P-31 and these articles were not sent for its examination to the Forensic Science Laboratory.

The investigating Agency seized the 'Baniyan' worn by the 8 D.B.Civil Writ Petition No.446/2005 deceased at the time of incident and this was subjected to serological test as per FSL report Ex.

P-7, the human blood was found on the 'Baniyan' but the blood group of the stain on the 'Baniyan' could not be determined and the result remained inconclusive.

The conviction of the accused persons for offence punishable under Sections 148, 302/149 Indian Penal Code is mainly based upon the testimonies of Kanti Lal (PW2).Sanjay (PW3).Bansi Lal (PW-5).Sakara (PW-6).Kalu Ram (PW-7).Mani Lal (PW-8).Bahadur (PW-14).Prakash (PW-20) and Lala @ Lal Shanker (PW-21).PW2Kanti Lal is the son of deceased Khatu Ram.

As per this witness on 11th August 2003 at 5:00 p.m.he was there in the agricultural field Pulawala.

alongwith his father Khatu Ram (deceased).Sanjay, Banshi, Prakash and Bahadur.

After completing the agricultural work his father came to his house thereafter his father went to big house, he, Sanjay, Prakash and Bahadur were putting plows in their house, suddenly they heard voice from the back side of the house that Khaturam ko Marna hain.

they rushed outside the house and saw that nine accused persons Roopa S/o Nanji, Ashok S/o Nanji, Rama S/o Dhula, Jiva S/o Kava, Babu S/o Valji, Nana S/o Vaisa, Bharat S/o Nana, Valji S/o Vaisa, Kanna S/o Kava etc.surrounded his father about 50 yards away from the house.

Roopa, Ashok, Rama and Dhula were having swords in their hands and there were axes in the hands of 9 D.B.Civil Writ Petition No.446/2005 Bharat and Nana and Kana was armed with stick and Valji was armed with 'Bhala' all these accused came there to murder his father.

Roopa inflicted sword blow on the neck of his father.

Ashok inflicted sword blow on the leg, Valaji inflicted Bhala blow on the body of the deceased, Rama Jeeva, Bharat, Babu, Nana and Kanna inflicted lathi blows on the body of his father.

His father fell down after inflicting injury by Roopa.

After treating him dead the accused persons ran away.

He further stated that they were about 10 fts.

away from them, therefore, they could not save him.

Thereafter the injured was taken to Kherwada, then to Doongarpur where he was declared dead.

The information was submitted to Police Station Pahada by wireless and in the morning Station House Officer, Police Station Pahada reached at Doongarpur Hospital where he submitted a written report to him.

Sanjay (PW-3).is a cousin of Kanti Lal (PW-2) has stated that he along with Kanti Lal, Bahadur, Banshi and Prakash were putting plows etc.in the house, a noise came, Khaturam Ko Marna Hain.

On hearing this noise, they came out and saw that Rupa, Ashok, Rama, Jiva and Babu were having swords, Valji was having Bhala, Nana and Bharat were having axes and Kanna was having Lath (stick).They surrendered Kharuram who was about 50 yards away from the house.

Roopa inflicted sword blow on the back side of head, Ashok inflicted sword blow on the leg, Valji inflicted Bhala blow on the back and Rama, Jiva and Babu also assaulted by swords, Nana and Bharat assaulted by axes, Kanna inflicted Lathi 10 D.B.Civil Writ Petition No.446/2005 (stick) blow.

All were giving beatings blindly.

He (Khaturam) fell down, he was taken to Kherwada for treatment, then to Dungarpur where Doctor declared him dead.

Banshi Lal (PW-5) has also stated that Rupa inflicted injury by sword on head towards neck, Ashok inflicted injury by sword on right leg of Khaturam.

Valji inflicted injury by Bhala on the back.

Jiva, Kanna, Rama, Nana and Bahadur were having swords.

Nana, Vaisa and Bharat were having Kulhari (axes) and Kanna was having Lath (stick) and they all committed murder of Khaturam.

Shakra (PW-6) has also stated that Rupa, Ashok, Rama, Jiva and Babu were having swords.

Valji was having Bhala, Nana and Bharat were having axes and Kanna was having Lath (stick) and they all were giving beatings to Khaturam on various places of his body.

Roopa inflicted sword blow on the head of Khaturam, Ashok inflicted sword blow on leg and Valji inflicted Bhala blow on the back.

Kalu Ram (PW-7) has stated that Rooplal, Ashok, Rama, Jiva, Babu, Valji, Bharat, Nana and Pania committed murder of Khaturam by swords, Bhala, axes and lathi (sticks). He further stated that there was land dispute, due to it he was murdered.

Manilal (PW-8) has stated that Rooplal, Ashok, Jiva, Rama, Babu, Valji, Bharat, Nana and Kanna were giving beatings to Khaturam by swords, axes and Lath (sticks). Rupa inflicted injury by sword on the back side of the head, Valji inflicted injury by 11 D.B. Civil Writ Petition No.446/2005 Bhala and Rama inflicted sword injury on the leg.

Bahadur (PW-14) has stated that Rooplal, Ashok, Rama, Babu, Jiva, Bharat, Nana, Valji, Kanna were having swords, Bhala, axes and Lath (stick) surrounded Khaturam with intention to cause death, Rooplal inflicted sword blow on the head near neck, Ashok inflicted sword blow on the leg, Valji inflicted Bhala blow on the

back, Jiva and Babu inflicted sword blows, Nana and Bharat assaulted by axes and Kanna assaulted by Lath (stick) and inflicted injury on various parts of his body.

Prakash PW-20 has stated that Roopa, Ashok, Rama, Babu, Jiva, Valji, Nana, Bharat, Kanna all 9 accused persons surrounded his Baba Khaturam with intention to cause death of Khaturam, Roopa inflicted sword blow on his neck, Ashok inflicted sword blow on his leg, Valji inflicted Bhala blow on his back, Rama, Babu and Jiva assaulted by swords, Nana and Bharat assaulted by axes and Kanna assaulted by Lath (stick).Lala @ Lal Shankar (PW-21) has stated that Roopa, Ashok, Rama, Jiva, Babu, Valji, Nana and Bharat were giving beatings to Khaturam.

Roopa, Ashok, Rama and Babu were having swords, Valji was having Bhala, Bharat and Nana were having axes and Kanna was having Lath (stick) and when Khatu fell down they ran away.

The arguments of learned counsel for the accused-appellants 12 D.B.Civil Writ Petition No.446/2005 is that all the witnesses have given different versions about accused, arms and participation of the individuals.

We have examined the case of each and every appellant-accused in light of the evidence available on record.

So far as accused-appellant No.1 Rooplal @ Roopa is concerned, all the eye witnesses during the couRs.of investigation, stated that he was remained with sword and gave a sword blow on the backside of the head/neck of Khaturam and on his disclosure a sword article-1 was also recovered vide recovery memo Ex.

P-26.

Although no human blood was found on it and serological examination remained inconclusive for which PW-9 Bahadur Singh, Investigating Officer stated that due to rain water blood could not be detected and as per Dr.

B.P.Verma (PW-1) this injury was sufficient to cause death of Khaturam in ordinary couRs.of nature, as such, participation of this accused in the assembly that attacked the victim is established and participation of act of causing injury to deceased has also been established.

So far as accused-appellant No.2 Ashok is concerned, all the eye witnesses except Kaluram (PW-7).Manilal (PW-8).specifically stated that he was armed with sword and inflicted sword blow on the leg of deceased Kahturam and sword article-2 was also recovered at the instance of this accused vide recovery memo Ex.

P-25.

Lala @ Lal Shankar (PW-21).Kaluram (PW-7) and Mani Lal (PW-8) though not specified the injury caused by Ashok.

As per Dr.

13 D.B.Civil Writ Petition No.446/2005 B.P.Verma (PW-1) there were two cut wounds on the right leg of deceased, as such, the version of the eye-witnesses also corroborates with the medical evidence.

Both the injuries of right leg were found simple in nature as such, participation of this accused in the assembly and alleged act of causing simple injuries on right leg by sword to deceased have been established.

So far as accused-appellant No.3 Rama Bhagora is concerned, Kantilal (PW-2).Sanjay (PW-3).Banshi Lal (PW-5).Shakra (PW-6).Bahadur (PW-14).Prakash (PW-20) and Lala @ Lal Shankar (PW-21) have stated that he was having sword and the same was recovered on his disclosure vide recovery memo Ex.

P-27 but no specific overt act was assigned to him, as such, presence of this accused in the assembly that attacked the victim is established, but the alleged act of causing injury has not been established.

So far as accused-appellant No.4 Jiva Bhagora is concerned, Kanti Lal (PW-2).Sanjay (PW-3).Banshi Lal (PW-5).Shankar (PW- 6).Bahadur (PW-14).Prakash

(PW-20).Lala @ Lal Shankar (PW-21) has stated about him that he was having sword, but no overt act was assigned to him while on his disclosure a Lath (stick) was recovered vide recovery memo Ex.

P-31 wherever none of the eye- witnesses has stated that he was having Lath (stick) and no recovery of sword was made on the instance of this accused as such, presence of this accused in the assembly that attacked the 14 D.B.Civil Writ Petition No.446/2005 victim is established, but his alleged act of causing injury or having remained with sword or Lath has not been established.

So far as accused-appellant No.5 Babu Bhagora is concerned, Kanti Lal (PW-2).Kalu, Roopa (PW-7).Manilal (PW-8) did not assigned any participation to this accused but Sanjay (PW- 3).Banshilal (PW-5).Shankar (PW-6).Bahadur (PW-14).Prakash (PW-20).Lala @ Lal Shankar (PW-21) have stated that he was having sword, but none of witnesses has assigned any overt act to him.

Further no sword was recovered on his instance as per PW-9 Bahadur Singh, Investigation Officer a Lath (stick) was recovered at his instance vide recovery memo Ex.

P-29.

While none of the eye- witnesses has stated that he was having Lath (stick) at the time of incident, as such, presence of this accused in the assembly that attacked the victim is established, but it has not been established that he was having sword or Lath (stick) and alleged act of causing injury has also not been established.

So far as accused-appellant No.6 Valji Bhagora is concerned, Kantilal (PW-2).Sanjay (PW-3).Banshilal (PW-5).Shankar (PW-6).Bahadur (PW-14).Prakash (PW-20) and Lala @ Lal Shankar (PW-21) all have stated that he was having Bhala and except Kalu Ram (PW- 7).Mani Lal (PW-8) and Lala @ Lal Shankar all have stated that he inflicted injury on the back by 'Bhala' but as per statement of Dr.

B.P.Verma (PW-1) no sharp edged injury was found on the back of the victim.

Abrasion was found on middle of both the shoulders 15 D.B.Civil Writ Petition No.446/2005 and no Bhala was recovered from him, as such, presence of this accused in the assembly that attacked the victim is established, but his alleged act of causing injury and having Bhala have not been established.

So far as accused-appellant No.7 Nana Bhagora is concerned, except Kaluram (PW-7) and Manilal (PW-8).all witnesses have stated that he was having Kulhari (axe) but no overt act was assigned to him and no axe was recovered from him, as such, presence of this accused in the assembly that attacked the victim is established, but his alleged act of causing injury has not been established.

Now coming to the accused-appellant No.8 Bharat, except Kaluram (PW-7) and Manilal (PW-8).all witnesses have stated that he was having 'Kulhari ' (axe) but no overt act was assigned to him, but an axe was recovered on his disclosure statement (Ex.

P-21) vide recovery memo Ex.

P-28.

as such, presence of this accused in the assembly that attacked the victim is established, but his alleged act of causing injury has not been established.

So far accused-appellant No.9 Kanna is concerned, except Kaluram (PW-7) and Manilal (PW-8).all witnesses have stated that he was having Lath (stick).but no specific overt act was assigned to him.

On his disclosure statement (Ex.

P-23) a Lath (stick) was recovered vide recovery memo (Ex.

P-30).as such, the presence of 16 D.B.Civil Writ Petition No.446/2005 this accused in the mob that attacked the victim is established, but his specific role of giving any assault or causing injury to the deceased person has not been established.

With factual findings arrived aforesaid, this case is further required to be examined about alleged formation of the mob that attacked the victim in commission of the offences alleged, as the conviction is given with the aid of Section 149 Indian Penal Code.

Now coming to the issue relating to applicability of Section 149 Indian Penal Code.

At the fiRs.instance, we deem it appropriate to understand the amplitude and scope of the provision aforesaid.

Hon'ble Supreme Court in Sikandar Singh & Ors.v.State of Bihar, reported in AIR 2010 SC3580 in detail discussed the ambit of Section 149 Indian Penal Code and that is highly useful in the instant matter, therefore, the same is quoted below:-
"13.

Section 149 IPC reads as follows: "149.

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

1.

The provision has essentially two ingredients viz.

(i) the commission of an offence by any member of an unlawful assembly and (ii) such offence must be committed in prosecution of the common object of the assembly or must be such as the members of that assembly knew to be likely to be committed in prosecution of the common object.

Once it is established that the unlawful assembly had 17 D.B.Civil Writ Petition No.446/2005 common object, it is not necessary that all persons forming the unlawful assembly must be shown to have committed some overt act.

For the purpose of incurring the vicarious liability for the offence committed by a member of such unlawful assembly under the provision, the liability of other members of the unlawful assembly for the offence committed during the continuance of the occurrence, rests upon the fact whether the other members knew before hand that the offence actually committed was likely to be committed in prosecution of the common object.

2.

In *Mizaji and Anr.v.State of U.P.*, explaining the scope of Section 149 IPC, this Court had observed thus: "This section has been the subject matter of interpretation in the various High Courts of India, but every case has to be decided on its own facts.

The *fiRs*.part of the section means that the offence committed in prosecution of the common object must be one which is committed with a view to accomplish the common object.

It is not necessary that there should be a preconcert in the sense of a meeting of the members of the unlawful assembly as to the common object; it is enough if it is adopted by all the members and is shared by all of them.

In order that the case may fall under the *fiRs*.part the offence committed must be connected immediately with the common object of the unlawful assembly of which the accused were membeRs.Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 149 if it can be held that the offence was such as the members knew was likely to be committed.

The expression 'know' does not mean a mere possibility, such as might or might not happen.

For instance, it is a matter of common knowledge that when in a village a body of heavily armed men set out to take a woman by force, someone is likely to be killed and all the members of the unlawful assembly must be aware of that likelihood and would be guilty under the second part of Section 149.

Similarly, if a body of persons go armed to take forcible possession of the land, it would be equally right to say that they 18 D.B.Civil Writ Petition No.446/2005 have the knowledge that murder is likely to be committed if the circumstances as to the weapons carried and other conduct of the members of the unlawful assembly clearly point to such knowledge on the part of them all.

There is a great deal to be said for the opinion of Couch, C.J., in Sabed Ali's case 20 Suth WR Cr 5 (supra) that 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.

The distinction between the two parts of Section 149, Indian Penal Code cannot be ignored or obliterated.

In every case it would be an issue to be determined whether the offence committed falls within the first part of Section 149 as explained above 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."

3.

A 'common object' does not require a prior concert and a common meeting of minds before the attack.

It is enough if each member of the unlawful assembly 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 couRs.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 19 D.B.Civil Writ Petition No.446/2005 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.

17.

In Masalti v.

State of U.P., a Constitution Bench of this Court had observed that Section 149 makes it clear that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence; and that emphatically brings out the principle that the punishment prescribed by Section 149 is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly.

18.

In Pandurang Chandrakant Mhatre and Ors.v.State of Maharashtra, of which one of us (R.M.Lodha, J.) was the author had, however, relying on Masalti (supra) and a few other decisions of this Court, cautioned that where a large number of persons are alleged to have participated in the crime and they are sought to be

brought to book with the aid of Section 149 IPC, only those accused, whose presence was clearly established and an overt act by any one of them was proved, should be convicted by taking into consideration a particular fact situation."

The Hon'ble Apex Court in Shaji & Ors.v.State of Kerala, reported in AIR 2011 SC1825 while examining the provisions of Section 149 Indian Penal Code, held as under:- 11.

While considering the applicability of necessary ingredients of Section 149 Indian Penal Code, we had an occasion to consider the same in Kuldip Yadav and Ors.v.State of Bihar : JT2011(4) SC436 After analyzing the conditions therein, it was held in paragraph 26 of the judgment as under: 20 D.B.Civil Writ Petition No.446/2005 "26) The above provision makes it clear that before convicting accused with the aid of Section 149 Indian Penal Code, the Court must give clear finding regarding nature of common object and that the object was unlawful.

In the absence of such finding as also any overt act on the part of the accused persons, mere fact that they were armed would not be sufficient to prove common object.

Section 149 creates a specific offence and deals with punishment of that offence.

Whenever the court convicts any person or persons of an offence with the aid of Section 149, a clear finding regarding the common object of the assembly must be given and the evidence discussed must show not only the nature of the common object but also that the object was unlawful.

Before recording a conviction under Section 149 Indian Penal Code , essential ingredients of Section 141 Indian Penal Code must be established...."

The above principles have been reiterated in Bhudeo Mandal and Ors.v.State of Bihar : (1981) 2 SCC755 Ranbir Yadav v.

State of Bihar : (1995) 4 SCC392 Allauddin Mian and ORS.Sharif Mian and Anr.v.State of Bihar : (1989) 3 SCC5 Rajendra Shantaram Todankar v.

State of Maharashtra and ORS.: (2003) 2 SCC257and State of Punjab v.

Sanjiv Kumar @ Sanju and ORS.: (2007) 9 SCC791 12.

The following conclusion in *KuldipYadav* (supra) is also relevant which reads as under: "It is not the intention of the legislature in enacting Section 149 to render every member of unlawful assembly liable to punishment for every offence committed by one or more of its members. In order to attract Section 149, it must be shown that the incriminating act was done to accomplish the common object of unlawful assembly and it must be within the knowledge of other members as one likely to be committed in prosecution of the common object.

If the members of the assembly knew or were aware of the likelihood of a particular offence being committed in prosecution of the common object, they would be liable for the same under Section 149 Indian Penal Code."

21 D.B.Civil Writ Petition No.446/2005 13.

Though as per the decision of the Constitution Bench, the prosecution is well within its jurisdiction to establish the charge under Section 149 Indian Penal Code even after the acquittal of two members of the unlawful assembly, however, in order to attract Section 2149 Indian Penal Code , it must be shown that the incriminating act was done to accomplish the common object of unlawful assembly and it must be within the knowledge of other members as one likely to be committed in prosecution of the common object."

In view of the judgments referred above a Division Bench of this Court in *D.B.Criminal Appeal No.1194/2003 Abdul Karim @ Jamil Master & ORS.versus State of Rajasthan & ORS.* decided on 21st June 2012 is summarized the factors to establish commission of an offence with the aid of Section 149 Indian Penal Code, which are:- (1) There must be an unlawful assembly; (2) Accused must be a member of such assembly; (3) Such unlawful assembly should have been joined by the accused intentionally or should have continued with that knowingly; (4) Accused was acquainted with the common object of the unlawful assembly; (5) As a member of unlawful assembly, the accused must be knowing that an offence is likely to be committed; and (6) It must be shown that the incriminating act was done to accomplish the common object of unlawful assembly.

In the case in hand conviction of the accused-appellants is based on testimony of 9 eye-witnesses with the aid of Section 149 Indian Penal Code, thus, their involvement is required to be 22 D.B.Civil Writ Petition No.446/2005 examined by keeping in mind the factors noticed above.

However, before going to the merits pertaining to the act of each and every appellant, it shall be appropriate to mention that as per Section 141 Indian Penal Code the 'unlawful assembly' means an assembly of 5 or more persons is designated 'unlawful assembly' if the common object of the persons comprising that assembly is- First.- To overawe by criminal force, or show of criminal force, the Central or any State Government or Parliament or the Legislature of any State, or any public servant in the exercise of the lawful power of such public servant; or Second.- To resist the execution of any law, or of any legal process; or Third.- To commit any mischief or criminal trespass, or other offence; or Fourth.- By means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right or way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or Fifth.- By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

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

23 D.B.Civil Writ Petition No.446/2005 As per Section 142 Indian Penal Code whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continuous it, is said to be a member of an unlawful assembly.

The punishment for members of such unlawful assembly shall be imprisonment of either description for a term which may extend to six months, or with fine, or with both.

From examination of the evidence available on record and as discussed in preceding paras it is apparent that an assembly of five or more persons was there

and some persons of the assembly were carrying arms too, but merely on that count it cannot be inferred that every member of the assembly was intending to commit mischief or any offence.

In absence of such intention the assembly cannot be termed as unlawful. Suffice to mention that the appellants were resident of the nearby place of incident and their collective gathering is not unusual.

Once the assembly has not been found unlawful., the conviction with the aid of Section 149 Indian Penal Code is not sustainable, thus, individual acts of the appellants required significance.

We have examined the case of accused-appellants Rama, Jiva, Babu, Valji, Nana, Bharat, Kanna in the light of the evidence available on record.

True it is that they were present on the spot, but no evidence is available on record to establish that they were having any knowledge about likely commission of any offence punishable under Section 148, 302/149 Indian Penal Code by any other member of the assembly.

No overt act is proved on part of 24 D.B.Civil Writ Petition No.446/2005 these accused persons also.

As such, their conviction under Section 148 and 302/149 Indian Penal Code is not proper.

So far accused-appellant No.1 Roopa is concerned, as per eye-witnesses, he was carrying sword and inflicted injury No.1 mentioned in Postmortem Report Ex.

P-1 which was on vital part and sufficient to cause death in ordinary couRs.of nature which proved fatal, as such, he is certainly guilty for committing murder of Khaturam.

Now the question arises that when a special charge framed for the Section 302/149 IPC and prosecution failed to establish unlawful assembly in that case, whether accused- appellant Rooplal @ Roopa can be convicted for the offence punishable under Section 302 Indian Penal Code simplicitor.

Since the punishment for the offence punishable under Section 302/149 Indian Penal Code and under Section 302 Indian Penal Code simplicitor is the same and learned trial court also reached on the conclusion that fatal blow was inflicted by accused Rooplal @ Roopa.

Hence, it cannot be said that accused Rooplal @ Roopa can not be convicted for the offence punishable under Section 302 Indian Penal Code simplicitor in place of offence under Section 302/149 Indian Penal Code.

In the matter of Haradhan Das versus State of West Bengal (2013) 2 SCC1975 persons constituted unlawful assembly and 25 D.B.Civil Writ Petition No.446/2005 charge were framed for the offence punishable under Section 302/149 Indian Penal Code but court acquitted some of them on prosecution failure to prove their identification, role and object.

In such circumstances Hon'ble Supreme Court held that remaining accused even though less than 5 in number against whom prosecution is able to prove its case beyond reasonable doubt, can still be convicted and punish them if ingredients of Section 302 Indian Penal Code are established, either under Section 302 simplicitor or even under Section 302/149.

If there are other persons, who might not have been identified or convicted, were party to the crime and together constituted the statutory number, as such, our view fortified by this judgment and accused-appellant No.1 Rooplal @ Roopa is convicted for the offence punishable under Section 302 Indian Penal Code simplicitor in place of Section 302 Indian Penal Code.

So far as accused-appellant No.2 Ashok is concerned, he gave two simple injuries to deceased on his right leg by sword and simple cut wounds were found on the right leg of deceased Khaturam, therefore, he is guilty for the offence punishable under Section 324 Indian Penal Code.

The conviction of accused Roopa @ Rooplal, Ashok, Rama, Jiva, Babu, Valji, Nana, Bharat and Kanna for the offence punishable under Section 148 Indian Penal Code in our opinion is not well founded as prosecution failed to prove their

unlawful 26 D.B.Civil Writ Petition No.446/2005 assembly armed with deadly weapons and conviction of accused Jiva, Babu, Valji, Nana, Bharat and Kanna for the offence punishable under Section 302/149 Indian Penal Code in our opinion is also not well founded.

In view of the discussion made above, this appeal deserves acceptance in part.

The conviction of accused persons for the offence punishable under Section 148 Indian Penal Code is set aside and they are acquitted for the offence punishable under Section 148 Indian Penal Code.

The conviction of the accused- appellants for the offence punishable under Section 302/149 Indian Penal Code is set aside and the sentence awarded is also set aside.

Accused appellant Ashok Bhagora is convicted for the offence punishable under Section 324 IPC.

He remained in custody for about 2 years 2 days.

Therefore in the interest of justice he is sentenced for the period already undergone by him for the offence punishable under Section 324 Indian Penal Code.

He is on bail.

His bail bonds are discharged.

The accused-appellant No.1 Roopa @ Rooplal is convicted for the offence punishable under Section 302 Indian Penal Code instead of 302/149 Indian Penal Code.

He is sentenced to undergo life term imprisonment for the offence punishable under Section 302 Indian Penal Code with fine of Rs.2000/- and to further undergo 3 months simple imprisonment in the event of default in payment of fine.

27 D.B.Civil Writ Petition No.446/2005 The appellants-accused Rama, Jiva, Babu, Valji, Nana, Bharat and Kanna are availing suspension of sentence, as such, their bail bonds and surety bonds are discharged.

(BANWARI LAL SHARMA).J.

(GOVIND MATHUR).J.

Ramesh/-

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