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**Suresh vs State of Kerala**

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**Court** : Kerala

**Decided On :** Jun-28-2019

**Judge** : Honourable Mr.Justice a.M.Shaffique,Honourable Mr. Justice Ashok Menon

**Appeal No.** : CRL.A/1229/2016

**Appellant** : Suresh

**Respondent** : State of Kerala

**Judgement** :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE & THE HONOURABLE MR. JUSTICE ASHOK MENON FRIDAY, THE 28TH DAY OF JUNE 2019 / 7TH ASHADHA, 1941 CRL.A.No.1140 of 2014 AGAINST THE JUDGMENT IN SC 829/2007 of I ADDITIONAL SESSIONS COURT PALAKKAD DATED 15-10-2014 AGAINST CP 15/2007 of JUDICIAL MAGISTRATE OF FIRST CLASS -III,PALAKKAD CRIME NO.16/2005 OF Hemambika Nagar Police Station , Palakkad APPELLANTS/ACCUSED 2 TO 4: 1 PRAMOD AGED 32 YEARS S/O.CHITHAMBARAN, ANAPPARA, NUCHUPPULLY, PALAKKAD DISTRICT.

2 KRISHNANKUTTY AGED 37 YEARS S/O.VELAYUDHAN, PUTHANTHODI VEEDU, ANAPPARA, NUCHUPPULLY, PALAKKAD DISTRICT. 3 HARIDAS @ MADHU AGED 36 YEARS S/O.MALLU, ANAPPARA, NUCHUPPULLY, PALAKKAD DISTRICT. BY ADVS. SRI.P.VIJAYA BHANU (SR.) SRI.S.RAJEEV SMT.POOJA PANKAJ SRI.AJEESH K.SASI SRI.K.K.DHEERENDRAKRISHNAN SRI.M.REVIKRISHNAN SRI.P.M.RAFIQ SRI.THOMAS J.ANAKKALLUNKAL SRI.V.C.SARATH SRI.VIPIN NARAYAN SRUTHY N. BHAT RESPONDENT/COMPLAINANT/STATE: STATE OF KERALA REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.682031 (CRIME NO.16/2005 OF HEMAMBIKA NAGAR POLICE STATION, PALAKKAD DISTRICT). SR.P.P. SRI.ALEX M.THOMBRA THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 7.3.2019, ALONG WITH CRL.A.1229/2016, THE COURT ON 28.06.2019 DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE & THE HONOURABLE MR. JUSTICE ASHOK MENON FRIDAY, THE 28TH DAY OF JUNE 2019 / 7TH ASHADHA, 1941 CRL.A.No.1229 of 2016 AGAINST THE JUDGMENT IN SC 829/2007 of I ADDITIONAL SESSIONS COURT PALAKKAD DATED 15-10-2014 AGAINST CP 15/2007 of JUDICIAL MAGISTRATE OF FIRST CLASS -III,PALAKKAD CRIME NO.16/2005 OF Hemambika Nagar Police Station , Palakkad APPELLANT/1ST ACCUSED: SURESH AGED 46 YEARS, S/O. RAMAKRISHNAN, AANAPPARA, NOCHUPPULLY. BY ADV. SRI.NIREESH MATHEW RESPONDENT/COMPLAINANT-STATE:

STATE OF KERALA REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM, KOCHI - 682 013. THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 7.3.2019, ALONG WITH CRL.A.1140/2014, THE COURT ON 28.06.2019 DELIVERED THE FOLLOWING:

**JUDGMENT**

SHAFFIQUE, J Both these appeals had been preferred by accused who were convicted by the Ist Additional Sessions Judge, Palakkad in S.C.No. month each for the offence under Section 143 of the Indian Penal Code, 1860 (for short 'IPC'), 2 months each for the offence under Section147 of the IPC, 6 months for the offence under Section 148 of the IPC, 1 year each for the offence under Section 324 of the IPC, 3 years each and a fine of Rs.10,000/-(Rupees ten thousand only) each for the offence under Section 326 of the IPC and 2 years each for the offence under Section 308 of the IPC and imprisonment for life and a fine of Rs.75,000/-(Rupees seventy five thousand only) each for the offence under Section 302 of the IPC and also for the offence under Section 302 read with Section 149 of the IPC. Default sentence for non payment of fine also has been imposed.

2. Altogether there were 12 accused in the case. 10 th accused

died during the pendency of the trial and the charge against him stood abated. The Court below acquitted accused Nos. 5 to 9, 11 and 12. Hence appeal is filed by accused Nos.1 to 4. Crl.A.No.1229/2016 is filed by the 1st accused and Crl.A.No.1140/2014 is filed by accused 2 to 4.

3. The prosecution alleged that the accused formed

themselves into an unlawful assembly with a common object of committing murder of Sahadevan and Narayanan. They carried swords, iron pipes and bamboo sticks. While Sahadevan and Narayanan were walking through the road, accused came in 3 autorickshaws and they were attacked with the weapons. They sustained severe injuries. Both of them were taken to hospital. Sahadevan succumbed to the injuries while being treated in Thrissur Medical College Hospital on 20.01.2005. The incident happened on 18.01.2005 at 10.30 am. The First Information Statement was given by PW3. Ext.P1 is the FI statement. It was recorded by PW27 Sub Inspector of Police, Hemambika Nagar Police Station. On the basis of the said FI statement, PW19 registered Crime No. 16/2005 and prepared Ext.P26 FIR. Investigation was initially conducted by PW18, the Circle Inspector of Police. It was continued by PW26 and final report was submitted by PW24.

4. In order to prove the case, prosecution had examined PW1 to PW27 and placed reliance on Exts.P1 to P54 and MO1 to MO11. The defence marked Exts.D1 to D3, portions of CD statement of PW1, PW2 and PW11.

5. Though there were 4 eyewitnesses examined by the

prosecution, other than PW1 who was the injured eyewitness, PW2, PW3 and PW4 turned hostile to the prosecution. Court below however placed reliance on the oral testimony of PW1 and since he was able to identify accused Nos.1 to 4, convicted the said accused and others were acquitted.

6. PW25 was working as Civil Surgeon, District Hospital,

Palakkad. On 18.01.2005 at 11.00 A.M., he examined one Sahadevan who was brought with the history that Suresh and others inflicted cut injuries on him. On examination, PW25 found compound fracture on the left forearm and multiple incised wounds on both legs. Since the condition of the patient was very serious, he was referred to Medical College Hospital, Thrissur. Ext.P32 is the wound certificate issued by him. PW25 deposed that on the same day he examined Narayanan who was brought with the same history and he noticed the following injuries: (1) Compound fracture on both legs below knee, (2)Lacerated wound 10x10cm on the scalp (3) Lacerated wound 10cmx5cm on the right forearm and (4) incised wound 10cmx1cm on the left palm. According to him the condition of the patient was serious and he was also referred to Medical College Hospital, Thrissur. Ext.P33 is the wound certificate issued in respect of Narayanan.

7. PW14 deposed that he was Assistant Professor of

Orthopedics, Medical College Hospital, Thrissur and on 16.02.2005 he issued discharge certificate in respect of the patient by name Narayanan and the X-ray showed the following injuries: (1) Fracture of left tibia - lower third, (2) Fracture of left fibula segmental, (3) Fracture of right ulna and (4) Fracture on both bones of right leg. The other injuries noted on the body of Narayanan are as follows:

(1) Lacerated wound 7x2cm over the lateral aspect of left leg junction of middle and lower third, muscle bulging out, bone fragments also seen.

(2) Incised wound left thigh lower third lateral aspect 1x0.5cm.

(3) Incised wound - 4 in number -vertical over the lateral aspect of left ankle.

(4) Incised wound over the ulnar aspect of right forearm junction of middle and lower third 3x1cm.

(5) Lacerated wound 0.5cmx0.5cm over the right leg middle third.

(6) Multiple lacerated wounds 1x0.5cm, 2x0.5cm, 1x0.5cm and 1x0.5cm over the anterior aspect of left leg muscle bulging out.

(7) Incised wound 8x0.5cm horizontal over the base of left palm skin and subcutaneous deep.

(8) Incised wound 8x1cm and 5x1cm over the scalp. Ext.P20 is the certificate issued by him which bears his signature.

8. PW15 deposed that he was working as Casualty Medical

Officer, Jubilee Mission Hospital, Thrissur and on 18.02.2005 he issued discharge certificate in respect of the patient Narayanan who was admitted in the Hospital on 22.01.2005 and discharged on 17.02.2005 and Ext.P22 is the certificate and he noted the injuries, fracture on right tibia, fracture on left tibia and fibula and fracture on right ulna.

9. PW14 further deposed that Sahadevan was admitted on

18.01.2005 and expired on 20.01.2005 and Ext.P21 is the certificate which bears his signature. He deposed that the X-ray showed (1) Fracture of ulna comminuted on the left side, (2) Cortical break right radius and (3) Fracture on second metacarpal right. He also noted the following injuries on the body of Sahadevan:

1. Incised wound 12x8cm over the dorsomedial aspect

of left forearm oblique bone deep muscle bellies protruding out bone fragments visible in the wound. Extension of left wrist and fingers limited active bleeding and contamination and radial pulse palpable.

2. Incised wound 8x4cm oblique on the dorsomedial

aspect and dorsum of junction of middle and lower third of right forearm, muscle bellies protruding out, extension of wrist and fingers of right side limited. Radial pulse palpable.

3. Incised wound 8x1cm on the lateral aspect of right head active bleeding present.

4. Lacerated wound 1x0.5cm over the lateral aspect of left knee active bleeding present.

5. Incised wound 2x0.5cm over the right scapular region.

6. Incised wound 2x1cm over the middle third of left leg anteriorly.

7. Incised wound 2x0.5cm over the middle third of right leg.

10. PW16 conducted autopsy on the deceased Sahadevan. He deposed that on 20.01.2005, he was working as Lecturer in Forensic Medicine, Medical College Hospital, Thrissur. He noted the following ante-mortem injuries:

1. Incised wound 15x3.5x5cm on the back and inner

> aspect of left forearm, lower end 8 cm above wrist and upper end 14 cm below elbow, sutured with 15 black sutures. On removal of sutures the edges were found cleanly cut. Underneath muscles were found sutured. Injury was bone deep. Ulna was found cut for its full width, there was cut on the radius, 0.5x0.2x0.2cm; the muscular blood vessels were found cut.

2. Incised wound 11x2x2cm on back of right forearm,

lower end 3cm above wrist and upper and 16cm below elbow, sutured with 10 black sutures, on removal of sutures edges were found cleanly cut. Underneath muscles and muscular blood vessels were found cleanly cut and was sutured.

3. Two lacerated wounds 2x0.5x0.5cm and 1.5x0.5x0.5cm, oblique, 0.5cm apart on front of right leg, with former 20cm below knee, sutured with black sutures each.

4. Lacerated wound 1.5x0.5cm oblique on front aspect of right leg, 4cm below injury No.3.

5. Abrasion 1.5x0.5cm on top of right foot, 10cm below ankle.

6. Incised wound 7x1x3.5cm on sole and outer aspect of right foot, upper end 3cm below lateral malleolus, sutured with 7 black sutures.

7. Abrasion 1x0.5cm on outer aspect of right little toe.

8. Incised wound 2x0.5x1cm on front aspect of left leg, 11 cm above ankle, sutured with 2 black sutures.

9. Abrasion 1.5x1cm on front of left leg. 7.5cm above injury No.8.

10. Lacerated wound 1.5x0.5x0.8cm on front of left leg, 1.5cm above injury No.9, sutured with two black sutures.

11. Incised wound 2x1x1cm oblique on outer aspect of left knee, sutured with two black sutures with an abrasion 7.5x0.2cm vertical, extending to lift thigh on from top end to incised wound.

12. Incised wound 2x0.5x1cm vertical on back of right shoulder with upper end 9cm below top of shoulder and 12 cm outer to midline, sutured with 2 black sutures.

13. Linear abrasions 5x0.1cm, vertical on left side of back of shoulder, upper end 5cm below shoulder and 5cm outer to midline.

14. Fracture of second right metacarpal at base, with

swelling of hand. PW16 opined that the deceased died due to combined effects of Fat Embolism and adult respiratory distress syndrome following the injury sustained to left upper limb i.e., injury No.1. He also deposed that the injury No.1

is sufficient in the ordinary course of nature to cause death. Ext.P23 is the certificate issued by him. He also deposed that Ext.P24, the pathological report is consistent with the findings in his certificate, and that injury Nos. 3, 4, 10 and 14 could be produced by MO5 to MO7 shown to him, injury Nos. 5, 6, 9 and 13 could be caused by beating with the said sticks and the other incised wounds could be caused by MO1 to MO4 weapons shown to him.

11. In the light of the medical evidence adduced in the case,

there cannot be any dispute that Sahadevan died on account of the injuries sustained by him and it was a homicide and that PW1 sustained grievous injuries by use of deadly weapons.

12. In so far as Court below had placed reliance upon PW1's

oral testimony and the recovery of MO1 to MO4 weapons, it would suffice to have a detailed consideration of the said evidence while considering whether the accused 1 to 4 are guilty of the offences for which they were convicted.

13. PW1 admittedly is an injured eyewitness. The injuries

sustained by him which we had already extracted above would indicate that he had suffered very serious injuries and it is in evidence that Sahadevan as well as Narayanan were examined by PW25 the Civil Surgeon of the District Hospital Palakkad on 18.01.2005 at 11.00 am. Exts.P32 and P33 are the wound certificates. In Ext.P32, the cause of injury is shown as " " which means that the cause of injury was on account of injuries inflicted by Suresh and others. Suresh has been identified as the 1 st accused in the case. The cause of injury shown in Ext.P33 with respect to PW1 is also the same. Therefore it is rather clear that Sahadevan as well as Narayanan were brought to the District Hospital immediately after the incident and that they had informed the Doctor that they were assaulted by Suresh and others. Though PW3 had given FI statement, he turned hostile to the prosecution. Other eyewitnesses also turned hostile. We have therefore before us the oral testimony of the injured eyewitness.

14. It is settled law that the injured eyewitness stands in a

better position than any other occurrence witnesses, since the presence of the said witness can never be doubted. PW1 is the brother of Sahadevan. He deposed that he suffered injuries during the said incident on 18.1.2005 morning at 10.30 am. He deposed that he along with his brother Sahadevan and Kannan were going to the police station for signing the conditional bail. When they reached near a pathway which leads to house of Vasu, a person by name Krishnan came opposite them. Krishnan informed them that some strangers were waiting there and they should be careful. They thought that since it was their own place, there may not be any problem. They proceeded further. At that time an autorickshaw came from the road leading from Vasu's house. It stopped near them. Suresh(A1), Krishnankutty(A3), Pramod(A2) and Haridas(A4) came out from the autorickshaw with swords. Haridasan attacked Sahadevan and Suresh attacked PW1 with sword. Krishnankutty and Pramod repeatedly inflicted injuries on both of them. Krishnakumar and 5 other persons whom they knew had inflicted cut injuries on them and had beaten them with iron rod and stick. Both PW1 and Sahadevan fell down. They cried aloud. They were taken to the hospital. The assailants came in two autorickshaws. He does not know the numbers. Sahadevan died at Thrissur Medical College.

15. While being treated at Jubilee Mission Hospital, Thrissur,

PW1 gave the statement to the police. He identified A1 Suresh, A2 Pramod, A3 Krishnankutty, A4 Haridas, A6 Pardeesh and A8 Krishnakumar. He does not remember the name of others. He knew them. He also stated that he knew the persons he had named, from his childhood days itself. He also stated that he could identify the weapons used by accused. He identified MO1 to MO4 swords, MO5 to MO7 iron pipes, MO8 series were identified as the chappals PW1 wore and MO9 series were identified as the chappals Sahadevan wore. According to him, the attack was on account of political vengeance. The accused were BJP members and PW1 and his brother were CPM members. Ext.D1 is a contradiction which had been marked with reference to previous statement. He denied having stated to police that he saw the autorickshaw of Suresh and another autorickshaw with a few persons by the road side leading to Vasu's mill. During cross examination, he stated that he informed the police that they came in two autorickshaws. He does

not know why it was not recorded. Ext.D1(a) is another contradiction. He denied having given a statement that after inflicting injuries with sword, a few other persons came and had beaten them with bamboo sticks and pipes. He said he has not given such a statement to the police which is marked as Ext.D1(a). He further deposed that Pramod and Krishnankutty had repeatedly inflicted injuries on Sahadevan and he had stated the same to the police. But he does not know why the same has not been recorded by the police. He also stated that Suresh had inflicted cut injury on his leg and the said fact was informed to the police but he does not know why the police has not recorded the same. He further stated that all the four accused had inflicted injuries on himself and his brother. But he cannot say which all injuries were inflicted by which all persons.

16. The material objects were recovered based on the

confession statement of Suresh. He stated that four swords were concealed in a dry water channel near the house of Rajesh and that he would show the place and swords. On the basis of the aforesaid confession statement, the swords were recovered as per Ext.P17 mahazar. PW11 is a witness to the recovery of swords. PW11 saw the swords being recovered at the instance of 1 st accused. He identified MO1 to MO4 and admitted signature in Ext.P17. Presently he is a Police Constable.

17. Exts.P30 and 31 are the chemical analysis reports which

were proved through PW24. In Ext.P31, item Nos. 2 to 5 were the swords sent for chemical analysis. Blood was found in swords, but origin was not ascertained for want of sufficient quantity. The blood group of Sahadevan as evident from Ext.P30 is A group.

18. This was a group attack and even according to PW1, the cut

injuries were inflicted by A1 to A4 by using swords. The trial Court had given benefit of doubt to accused Nos.5 to 9, 11 and 12. From the aforesaid materials placed on record it is rather clear that A1 to A4 were involved in the commission of crime by which Sahadevan died and PW1 sustained serious injuries. There is

some contradiction in the evidence of PW1, which we do not think as material. He had suffered several cut injuries which had resulted in the incised wounds. A gang of people were attacking him and his brother. It may not be possible for them to say which accused has caused a particular injury. They may say about the initial attack and thereafter they cannot say as to who committed the particular overt act. Once we imagine such a scene, after initial attack by 'A' or 'B', it may not be possible for all to recapitulate as to which accused caused a particular injury. Therefore contradictions pointed out are not serious in nature to discard the evidence of PW1. Further all the material objects were recovered based on the confession statement of the 1st accused.

19. One of the arguments raised by the counsel for the

appellants was regrading the conviction for offence under Section 143, 147, 148 and 302 r/w Section 149 of the IPC. It is argued that there is no evidence before the Court to prove that five or more persons entertained a common object to commit the alleged criminal act, as evidence in the case only indicate the involvement of only four. Originally there were 12 accused in the case. One of them died and accused 5 to 9, 11 and 12 were acquitted. The acquittal of accused 5 to 9, 11 and 12 was on account of the fact that there is no clarity in the identification of the accused except accused Nos.1 to 4. The position of law in this regard had been well settled.

20. In Vinubhai Ranchhodbhai Patel v. Rajivbhai

Dudabhai Patel and Others [(2018) 7 SCC 743] the Apex Court had occasion to consider the question regarding vicarious liability of persons involved in unlawful assembly. Paragraph 33 is relevant which reads as under:

> 33. The common object of assembly is normally to be gathered from the circumstances of each case such as the time and place of the gathering of the assembly, the conduct of the gathering as distinguished from the conduct of the individual members are indicative of the common object of the gathering. Assessing the common object of an assembly only on the

basis of the overt acts committed by such individual members of the assembly, in our opinion is impermissible. For example, if more than five people gather together and attack another person with deadly weapons eventually resulting in the death of the victim, it is wrong to conclude that one or some of the members of such assembly did not share the common object with those who had inflicted the fatal injuries (as proved by medical evidence); merely on the ground that

the injuries inflicted by such members are relatively less serious and non fatal.

21. It is also worthwhile to note the Constitution bench

**judgment in Mohan Singh and Another v. State of Punjab (AIR**

1963 SC 174). Paragraphs 8 to 11 are relevant which reads as under:

8. The true legal position in regard to the essential

ingredients of an offence specified by S. 149 are not in doubt. Section 149 prescribes for vicarious or constructive criminal liability for all members of an unlawful assembly where an offence is committed by any, member of such an unlawful assembly in prosecution of the common object of that assembly or such as the members of that assemblies knew to be likely to be committed in prosecution of that object. It would thus be noticed that one of the essential ingredients of section 149 is that the offence must have been committed by any member of an unlawful assembly, and S. 141 makes it clear that it is only where five or more persons constituted an assembly that an unlawful assembly is born, provided, of course, the other requirements of the said section as to the common object of the persons composing that assembly are satisfied. In other words it is an essential condition of an unlawful assembly that its membership must be five or more. The argument, therefore, is that as soon as the two Piara Singhs were acquitted, the membership of the assembly was reduced from five to three and that made S. 141 inapplicable which inevitably leads to the

result that S. 149 cannot be invoked against the appellants. In our opinion, on the facts of this case, this argument has to be upheld. We have already observed that the point raised by the appellants has to be dealt with on the assumption that only five persons were named in the charge as persons composing the unlawful assembly and evidence led in the course of the trial is

confined only to the said five persons. If that be so, as soon as two of the five named persons are acquitted the assembly must be deemed to have been composed of only three persons and that clearly cannot be regarded as an unlawful assembly.

9. In dealing with the question as to the applicability of S. 149

in such cases, it is necessary to bear in mind the several categories of cases which come before the Criminal Courts for their decision. If five or more persons are named in the charge as composing an unlawful assembly and evidence adduced by the prosecution proves that charge against all of them, that is a very clear case where S. 149 can be invoked. It is, however, not necessary that five or more persons must be convicted before a charge under S. 149 can be successfully brought home to any members of the unlawful assembly. It may be that less than five persons may be charged and convicted under S along with others named constituted an unlawful assembly; the other persons so named may not be available for trial along with their companions for the reason, for instance, that they have absconded. In such a case, the fact that less than five persons are before the Court does not make Section 149 inapplicable for the simple reason that both the charge and the evidence seek to prove that the persons before the Court and others number more than five in all and as such, they together constitute an unlawful assembly. Therefore, in order to bring home a charge under S. 149 it is not necessary that five or more persons must necessarily be brought before the Court and convicted. Similarly, less than five persons may be charged under S. 149 if the prosecution case is that the persons before

the Court and others numbering in all more than five composed an unlawful assembly, these others being persons not identified and so not named. In such a case, if evidence shows that the persons before the Court along with unidentified an un-named assailants or members composed an unlawful assembly, those

before the Court can be convicted under Section 149 though the un-named and un-identified persons are not traced and charged. Cases may also arise where in the charge, the prosecution names five or more persons and alleges that they constituted an unlawful assembly. In such cases, if both the charge and the evidence are confined to the persons named in the charge and out of the persons so named two or more are acquitted leaving before the court less than five persons to be tried then S. 149 cannot be invoked. Even in such cases; it is possible that though the charge names five or more persons as composing an unlawful assembly, evidence may nevertheless show that the unlawful assembly consisted of some other persons as well who were not identified and so not named. In such cases, either the trial court or even the High Court in appeal may be able to come to the conclusion that the acquittal of some of the persons named in the charge and tried will not necessarily displace the charge under Section 149 because along with the two or three persons convicted were others who composed the unlawful assembly but who have not been identified and so have not been named. In such cases, the acquittal of one or more persons named in the charge does not affect the validity of the charge under Section 149 because on

**the evidence the court of facts is able to reach the conclusion**

that the persons composing the unlawful assembly nevertheless were five or more than five. It is true that in the last category of cases, the court will have to be very careful in reaching the said conclusion. But there is no legal bar which prevents the court from reaching such a conclusion. The failure to refer in the charge to other members of the

unlawful assembly un- named and un-identified may conceivably raise the point as to whether prejudice would be caused to the persons before the court by reason of the fact that the charge did not indicate that un-named persons also were members of the unlawful assembly. But apart from the question of such prejudice which

may have to be carefully considered, there is no legal bar preventing the court of facts from holding that though the charge specified only five or more persons, the unlawful assembly in fact consisted of other persons who were not named and identified. That appears to be the true legal position in respect of the several categories of cases which may fall to be tried when a charge under Section 149 is framed.

10. In this connection, we may refer to three representative

decision of this Court. IQ Dalip Singh v. State of Punjab, 1954 SCR 145: (AIR 1953 SC 364), this Court has held that before Section 149 can be applied, the Court must be satisfied that there were at least five persons sharing the common object. It has also been held that this does not mean that five persons must always be convicted before S. 149 can be applied. If the Judge concludes that five persons were unquestionably present and shared the common object, though the identity of some of them is in doubt, the conviction of the rest would be good. In that case, this Court took the view that the evidence adduced by the prosecution did not satisfactorily prove the fact that the un-lawful assembly was composed of five or more persons, and

**so, S. 149 was held to be inapplicable. In other words, on facts**

relevant for the purpose of applying S. 149 this case is similar to the case with which we are concerned in the present appeal.

11. In Bharwad Mepa Dana v. State of Bombay, 1960-2 SCR

172: (AIR 1960 SC 289), this Court was dealing with a case where twelve named persons were charged with having formed an unlawful assembly with the common object of committing the murder of three persons. At the trial before the Sessions Judge, seven of the named persons were acquitted and five were convicted under S. 302/149 and S. 302/34. On appeal the High Court acquitted one of the convicted persons but maintained the conviction and sentence passed on the rest. The validity of the said order of conviction and sentence was challenged before this Court on several grounds, one of which

was that S. 149 became inapplicable as soon as eight out of the twelve persons named as members of the unlawful assembly were acquitted. In rejecting this argument, this Court referred to the finding. recorded by the High Court that the unlawful assembly in question consisted of ten to thirteen persons out of whom only four were identified and not the rest; and held that it was open to the High Court to come to such a finding. The argument which was urged against the validity of such finding was put alternatively in two forms. It was first contended that the prosecution case must be confined to the charge framed against the accused persons and the charge in the Sessions Court referred to twelve named persons as composing the unlawful assembly, and so, as soon as eight of them were acquitted, S. 149 became inapplicable. It was also urged that in coming to the conclusion that the unlawful assembly consisted of ten to thirteen persons, the High Court was making out a case of a new unlawful assembly and that was not permissible in a criminal trial. Both these arguments were repelled by this Court and it was held that there was no legal bar which prevented the High Court from coming to the conclusion that apart from the persons who were acquitted and excluding them, evidence adduced by the prosecution showed the presence of more than five persons who composed the unlawful assembly. The assembly about the existence of which the High Court has made a finding is not a new assembly but the same assembly as alleged by the

prosecution. The only difference is that according to the charge, all the members of the assembly were alleged to be known, whereas on the evidence the High Court has reached the conclusion that the identity of all the members of the assembly has not been established, though the number of the members composing the assembly is definitely found to be five or more. It is on this reasoning that this Court confirmed the conviction of the appellants under S. 302/149. Thus, this decision illustrates how S. 149 can be applied even if

two or more of the persons actually charged are acquitted.

22. In so far as the proposition is well settled by the Apex Court

in Mohan Singh (supra) wherein it is clearly held that the acquittal of one or more persons named in the charge does not affect the validity of charge under Section 149. In instances where, if the Court is able to conclude that 5 persons were unquestionably present and shared the common object, though the identity of some of them is in doubt, the conviction of the rest is justified. The principles laid in IQ Dalip Singh v. State of Punjab (AIR 1953 SC 364) was upheld by the Apex Court in Mohan Singh (supra). Therefore in the present case also the Court below had acquitted the other accused since there was no clarity in the identification. But the Court was sure about the fact that more than 5 persons had attacked Sahadevan and Narayanan, the accused being members of unlawful assembly having common object to commit the criminal act.

23. However, we find that the accused had been convicted

under Sections 147 and 148 of the IPC. Section 147 of the IPC is punishment for rioting and Section 148 is rioting, armed with deadly weapon. Rioting is defined under Section 146 of the IPC which reads as under: 146. Rioting:- Whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the

common object of such assembly, every member of such assembly is guilty of the offence of rioting. The statute classifies punishment for rioting into two; under

Section 147 with imprisonment which may extend to two years, or with fine, or with both and under Section 148 with imprisonment of 3 years or with fine or with both. Sections 147 and 148 reads as under:

147.Punishment for rioting:- Whoever is guilty of rioting, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both. 148. Rioting, armed with deadly weapon:- Whoever is guilty of rioting, being armed with a deadly weapon or with anything which, used as a weapon of offence, is likely to cause death, shall be punished with imprisonment of either description of a term which may extend to three years, or with fine, or with both.

Whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is punishable under Section 147 of the IPC. But rioting armed with deadly weapon is punishable under Section 148 of the IPC. This is a case in which accused Nos.1 to 4 were armed with deadly weapons. Under such circumstances, they shall be punishable under Section 148 of the IPC and not under Section 147 of the IPC. As far as this case is concerned, in so far as the conviction is directed to be suffered concurrently it may not make much difference. However, it has to be borne in mind that punishment for rioting under Section 147 of IPC will arise in the event when force is used by unlawful assembly without deadly weapons or anything which could be used as weapon and likely to cause death. Rioting under Section 147 of the IPC is a lesser offence and therefore when Section 148 of the IPC is charged there is no reason for charging offence under Section 147 of the IPC.

24. Having regard to the aforesaid discussion it is rather clear

that accused Nos.1 to 4 along with certain others were responsible for having committed murder of the deceased and also for having caused grievous hurt to PW1 and he suffered severe injuries. The punishment is commensurate to the nature of crime. We therefore sustain the conviction and sentence of accused under Sections 143, 148, 324, 326, 308 and 302 r/w Section 149 of the I.P.C., while setting aside the conviction and sentence under 147 of the IPC. The appeals

are partly allowed as above. Sd/- A.M.SHAFFIQUE JUDGE Sd/- ASHOK MENON True copy JUDGE kp P.A. To Judge

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