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HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No. 827 of 2016

1. Kamleshwar Painkra S/o Shri Kripashankar Painkra, Aged about 35 years.
2. Kripashankar Painkra S/o Shri Laluram Painkra, Aged about 57 years.
3. Jagendra Kumar S/o Shri Laluram Painkra, Aged about 45 years.
4. Shivlal Gond, S/o Shri Bokha Gond, Aged about 35 years.
5. Baldev S/o Shri Devsai Kodaku, Aged about 45 years.
6. Dhanushdhari S/o Shri Birjanram, Aged about 50 years.

All R/o Village Gotgawan, Police Station Pratappur, Distt. Surajpur, Chhattisgarh.

---Appellants

Versus

State of Chhattisgarh through Station House Officer, Police Station Pratappur, Distt. Surajpur, Chhattisgarh.

---Respondent

For Appellants :- Mr. R.S. Marhas, Advocate

For State :- Ms. Ruchi Nagar, Dy. G.A.

Criminal Appeal No. 1133 of 2016

1. Shyam Painkra S/o Thururam Paikra, Aged about 45 years.
2. Ramkumar Painkra S/o Ramprasad Painkra, Aged about 32 years.



Both R/o Village Goatganwa, Police Station Pratappur,
Distt. Surajpur, Chhattisgarh.

---Appellants

Versus

State of Chhattisgarh through District Magistrate, Surajpur,
District (Revenue and Civil) – Surajpur, Chhattisgarh.

---Respondent

For Appellants :- Mr. A.N. Pandey, Advocate
For State :- Ms. Ruchi Nagar, Dy. G.A.

Hon'ble Shri Justice Sanjay K. Agrawal
Hon'ble Shri Justice Deepak Kumar Tiwari
Judgment on Board
02/11/2022

Sanjay K. Agrawal, J.

1. Since both of these criminal appeals have arisen out of impugned judgment dated 27/05/2016 passed by learned Additional Sessions Judge Pratappur, Distt. Surajpur in Sessions Trial No. 27/2015, therefore, they have been clubbed together, heard together and are being decided by this common judgment.
2. The six appellants in Criminal Appeal No. 827/2016 namely Kamleshwar Painkra (A-1), Kripashankar Painkra (A-2), Jagendra Kumar (A-3), Shivilal Gond (A-4), Baldev (A-7) and Dhanushdhari (A-8) as well as the two appellants in Criminal Appeal No. 1133/2016 namely Shyam Painkra (A-



5) and Ramkumar Painkra (A-6); all have preferred these appeals under Section 374(2) of CrPC calling in question the validity, legality and correctness of the judgment impugned whereby each one of them have been convicted and sentenced as under :-

Conviction	Sentence
U/s 148 of IPC	1 year R.I. with fine of Rs. 500/- in default of payment of fine, additional R.I. for 6 months.
U/s 353 of IPC	6 months R.I. with fine of Rs. 1000/- in default of payment of fine, additional R.I. for 6 months.
U/s 302/149 of IPC	Imprisonment for life with fine of Rs. 5000/- in default of payment of fine, additional R.I. for 6 months.

Prosecution case :-

3. Case of the prosecution, in brief, is that on 11/06/2015 in between 11PM-12AM, the eight appellants herein along with two other co-accused persons namely Smt. Shanti and Smt. Abha Painkra constituted an unlawful assembly in the forest range of Chitkabahra at Village Gotgaon with the intention of obstructing Forester Motilal Kushwaha (deceased), Forester Hemlal Sahu (P.W.-7), Beat Guard Sohan (P.W.-10) and Forest Guard Jaikaran (P.W.-11) from performing governmental work and assaulted them with deadly and dangerous weapons and in furtherance of their common intention, caused the death of Motilal Kushwaha



and injured Hemlal Sahu (P.W.-7), Sohan (P.W.-10) and Jaikaran (P.W.-11) and thereby, committed the aforesaid offences.

4. Further case of the prosecution is that on 11/06/2015 at about 10 PM, deceased Motilal Kushwaha made a call to Hemlal Sahu (P.W.-7) and informed him that he had received the information that wood was being stolen at forest range Chitkabahra and directed him to go to the place of the incident along with barrier guard Jaikaran (P.W.-11). As directed, when Hemlal Sahu (P.W.-7) and barrier guard Jaikaran (P.W.-11) went to the Chitkabahra forest range, they heard the sound of wood being unloaded from the tractor and they immediately informed about this to Circle Incharge deceased Motilal Kushwaha. After being informed, deceased Motilal Kushwaha reached the spot along with beat guard Sohan (P.W.-10) and when all of them went near the courtyard of Kamleshwar Painkra (A-1), they found that Kamleshwar Painkra (A-1), Kripashankar Painkra (A-2) and Jagendra (A-3) were unloading wood from a tractor bearing registration No. CG 15-AI/4322. Upon this, deceased Motilal Kushwaha asked them to again reload the tractor with illegal wood and send it to the Range Office but Kamleshwar Painkra (A-1) replied that he also worked in Forest Department and he would see who takes the wood to Range Office. Thereafter, deceased Motilal Kushwaha informed about the incident to the Ranger and after telling them that





action will be taken against them in the morning, he started going back but at that time, Kamleshwar Painkra (A-2) and Jagendra (A-3) came back with 8-10 people along with them and while abusing and obstructing deceased Motilal Kushwaha from performing their governmental duties, with the intention of causing death, assaulted him with clubs and murdered him. The accused persons also assaulted Sohan (P.W.-10) and Jaikaran (P.W.-11) with clubs and injured them.

5. The said incident was reported at Pratappur Police Station wherein a case was registered at the instance of Hemlal Sahu (P.W.-7) vide Ex. P/27 and first information report (Ex. P/26) was lodged against Kamleshwar Painkra (A-1), Kripashankar Painkra (A-2), Jagendra (A-3) and 8-10 persons for offences punishable under Sections 147, 148, 149, 186, 353, 332, 307 and 302 of IPC pursuant to which the wheels of investigation started running. Nazri naksha was prepared vide Ex. P/40 and summons were issued to the witnesses vide Ex. P/21. Inquest was conducted vide Ex. P/22 and the dead body of deceased Motilal Kushwaha was subjected to postmortem which was conducted by Dr. Rajesh Shresth (P.W.-19) and as per the postmortem report (Ex. P/46), the cause of death is said to be cardiorespiratory arrest due to subarachnoid hemorrhage and the nature of death is said to be homicidal.



6. Pursuant thereof, all the ten accused persons were taken into custody and after recording their memorandum statements, following seizure was made from them :-

Appellant/Accused	Memorandum	Seizure
Kamleshwar Painkra (A-1)	Ex. P/1	Tangi (Ex. P/2)
Kripashankar Painkra (A-2)	Ex. P/3	Lathi (Ex. P/4)
Jagendra (A-3)	Ex. P/5	Tangi, blood stained banyan (Ex. P/6)
Shivlal (A-4)	Ex. P/7	Wooden Stick (Ex. P/8)
Shyam Painkra (A-5)	Ex. P/9	Bamboo Stick (Ex. P/10)
Ram Kumar Painkra (A-6)	Ex. P/11	Bamboo Stick (Ex. P/12)
Baldev (A-7)	Ex. P/13	Bamboo Stick (Ex. P/14)
Dhanushdhari (A-8)	Ex. P/15	Wooden Stick, blood stained shirt (Ex. P/16)
Smt. Shanti (A-9)	Ex. P/17	Wooden Stick (Ex. P/18)
Smt. Abha (A-10)	Ex. P/19	Wooden Stick (Ex. P/20)

7. The aforesaid seized articles were sent for chemical examination and as per the FSL report (Ex. P/81), blood was found on soil (Article B), banyan seized from Jagendra (Article D), shirt seized from Dhanushdhari (Article E) and dress worn by the deceased Motilal Kushwaha (Article F) and as per the Serological report (Ex. P/83), human blood of 'A' blood group was found on soil (Article B) as well as in the banyan seized from Jagendra (A-3) (Article D) whereas the



blood spots found on shirt seized from Dhanushdhari (A-8) (Article E) and the dress worn by the deceased (Article F) were found to be disintegrated and therefore, the origin of blood found on these two articles could not be ascertained.

8. After due investigation, the ten appellants/accused persons were charge-sheeted for offences punishable under Sections 148, 302, 307, 353, 332/149 of IPC which was committed to the Court of Sessions for hearing and disposal in accordance with law. The appellants/accused persons abjured their guilt and entered into defence.

9. In order to bring home the offence, prosecution examined as many as 19 witnesses and exhibited 83 documents on record. The statements of the accused persons were recorded wherein they denied guilt and examined 2 witnesses and exhibited 13 documents in their defence.

10. Learned trial Court, after appreciating the oral and documentary evidence on record, though acquitted two accused persons namely Smt. Shanti (A-9) and Smt. Abha Painkra (A-10) from the charges levelled against them, but convicted the eight present appellants/accused persons for offences punishable under Sections 148, 353 and 302/149 of IPC and sentenced as aforesaid against which these two appeals have been preferred by them.



Submissions on behalf of the parties :-

11. Mr. R.S. Marhas, learned counsel for the appellants/accused persons in Criminal Appeal No. 827/2016 would make the following submissions :-

i) that the testimonies of injured witnesses Hemlal Sahu (P.W.-7), Sohan (P.W.-10) and Jaikaran (P.W.-11), who are said to be eye-witnesses, cannot be relied upon as the incident took place in dense forest in between 11PM-12AM and in the dark night, there was no source of light available therein. Sohan (P.W.-10) has stated before the Court that he had seen the incident with the help of torch light, however, he did not make any such statement in his statement under Section 161 of CrPC. As such, in absence of sufficient light in the place of offence, the injured eye-witnesses Hemlal Sahu (P.W.-7), Sohan (P.W.-10) and Jaikaran (P.W.-11) could not have identified the persons involved in the crime in question.

ii) that, prosecution has miserably failed to prove the presence of Shivlal Gond (A-4), Shyam Painkra (A-5), Ramkumar Painkra (A-6), Baldev (A-7) and Dhanushdhari (A-8) at the date and time of the incident on the place of offence beyond reasonable doubt, as such, the trial Court has legally erred in convicting these accused persons for the aforesaid offences with the aid of Section 149 of IPC stating



that they were members of unlawful assembly as even in the first information report (Ex. P/26) lodged by Hemlal Sahu (P.W.-7), he has not named these five accused persons (A-4 to A-8) as assailants. As such, with regard to the identity of these accused persons who were neither named in the merg intimation (Ex. P/27) nor in the first information report (Ex. P/26), no credible evidence is on record to prove their presence especially in absence of any test identification parade conducted at the instance of the prosecution.

iii) that, the trial Court has gravely erred in convicting Kamleshwar Painkra (A-1), Kripashankar Painkra (A-2) and Jagendra (A-3) for offence punishable under Section 302/149 of IPC as pursuant to their memorandum statements, tangi has been recovered from Kamleshwar Painkra (A-1), lathi has been recovered from Kripashankar Painkra (A-2) and tangi has been recovered from Jagendra (A-3) whereas as per the medical opinion of Dr. Rajesh Shreshtha (P.W.-19) and as per the postmortem report (Ex. P/46), no incised wound has been inflicted on the deceased and only single injury has been inflicted on him which could have been caused by a hard and blunt object.

He would further submit that at the most, the appellants/accused persons namely Kamleshwar Painkra (A-1) and Kripashankar Painkra (A-2) could have been convicted for offence punishable under Section 304 part I or



Part II of IPC as their act is covered with Exception 4 to Section 300 of IPC and since they are in jail since 12/06/2015 i.e. for more than 7 years, they be sentenced for the period already undergone.

12. Mr. A.N. Pandey, learned counsel for the appellants/accused persons in CRA/1133/2016, would adopt the submission made by Mr. R.S. Marhas and submit that the presence of Shyam Painkra (A-5) and Ramkumar Painkra (A-6) has not been established and their names have neither been mentioned in the merg intimation (Ex. P/27) nor in the first information report (Ex. P/26), therefore, it cannot be said that they had constituted an unlawful assembly along with the other appellants/accused persons and learned trial Court has erred in convicting them for offence punishable under Section 302 with the aid of Section 149 of IPC.

13. Ms. Ruchi Nagar, learned State counsel, would support the impugned judgment and submit that prosecution has been able to prove that appellants/accused persons had constituted an unlawful assembly and in furtherance of their common intention, they have murdered Motilal Kushwaha as Kamleshwar Painkra (A-1), Kripashankar Painkra (A-2) and Jagendra (A-3) are key perpetrators of the crime in question and they were unloading stolen wood when deceased along with three injured eye-witnesses namely Hemlal Sahu (P.W.-7), Sohan (P.W.-10) and



Jaikaran (P.W.-11) had gone to enquire the matter, they did not co-operate and called 8-10 more persons and assaulted them due to which Motilal Kushwaha died on the spot and the other three witnesses got injured. She would further submit that pursuant to the memorandum statements of the appellants/accused persons, tangi has been seized from Kamleshwar Painkra (A-1), laathi has been seized from Kripashankar Painkra (A-2) and tangi and banyan has been seized from Jagendra (A-3) and as per the FSL report (Ex. P/86) and Serological report (Ex. P/87), human blood has been found on the banyan seized from Jagendra (A-3). Moreover, human blood of 'A' blood group has also been found on the clothes seized from Dhanushdhari (A-8) vide Ex. P/15, as such, his presence on the spot has also been established and therefore, the trial Court has rightly convicted the appellants/accused for offence punishable under Section 302 with the aid of Section 149 of IPC and the instant appeals deserve to be dismissed.

14. We have heard learned counsel for the parties, considered their rival submissions made herein-above and went through the records with utmost circumspection.
15. The first question for consideration is whether the death of deceased Motilal Kushwaha was homicidal in nature, which has been answered in affirmative by the trial Court relying upon the expert medical opinion of Dr. Rajesh Shrestha (P.W.-19) as well as the postmortem report (Ex. P/46) in



which cause of death is said to be cardiorespiratory arrest due to subarachnoid hemorrhage and the nature of death is said to be homicidal. As such, relying upon the postmortem report (Ex. P/46) as well as the statement of Dr. Rajesh Shreshtha (P.W.-19), it can safely be inferred that the death of deceased was indeed homicidal in nature, more so, when it has also not been refuted by learned counsel for the appellants. In that view of the matter, we are of the considered opinion that learned trial Court has rightly held that death of deceased Motilal Kashyap was homicidal in nature.

16. The next question that arises for consideration is whether the appellants/accused persons (A-1 to A-8) constituted unlawful assembly in terms of Section 141 of IPC and in furtherance of their common intention, they assaulted the deceased with dangerous and deadly weapons and murdered him ?

17. In order to answer this question, it would be relevant to notice Section 141 of IPC, which defines “unlawful assembly” as under :-

“141. Unlawful assembly.—An assembly of five or more persons is designated an “unlawful assembly”, if the common object of the persons composing that assembly is-

(First)— xxxx;

(Second)— xxx;

(Third)— To commit any mischief or criminal trespass, or other offence; or

(Fourth)— xxx;

(Fifth)— xxxx.”



18. Section 141 of IPC states that an “unlawful assembly” is an assembly of five or more persons, if their common object is to commit mischief, criminal trespass or any other offence. The Constitution Bench of the Supreme Court in the matter of **Mohan Singh and another vs. State of Punjab**¹ held 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 one of the essential condition of an unlawful assembly that its membership must be five or more. The assembly must consist of five or more persons having one of the five specified objects as their “common object”. Further, their Lordships while dealing with as to the applicability of Section 149 of IPC in such case held that 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 those charge against all of them it is very clear that Section 149 IPC can be invoked.

19. Since all the convicted accused persons/appellants herein (A-1 to A-8) have been convicted for offence punishable under Section 302 with the aid of Section 149 of IPC, it is relevant to notice Section 149 of IPC here, which reads as

¹AIR 1963 SC 174



under:

“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.”

20. A careful perusal of the aforesaid provision would show that following ingredients are required to be established in order to convict an accused person for offence under Section 149 of IPC: (i) there must be an unlawful assembly; (ii) Commission of an offence by any member of an unlawful assembly and (iii) Such offence must have been committed in prosecution of the common object of the assembly; or must be such as the members of the assembly knew to be likely to be committed.

21. Section 149 is applicable only in case of members of unlawful assembly i.e. assembly of 05 or more persons the common object of whom is any of the objects specified in Section 141 of IPC. In case of such an assembly every person who is member of the assembly, is guilty of every offence committed by any member of the assembly (1) if such offence is committed in prosecution of the common object of such assembly or (2) if the offence is such as the members knew likely to be committed in prosecution of the common object, provided the person was a member of such



assembly when that offence was committed. Thus, the liability under this provision attaches to every member of the assembly even when such member had nothing to do with the actual commission of the offence, and even a knowledge about the likelihood of the offence being committed in prosecution of the common object of the assembly is sufficient to impose the liability for the offence when committed by any member of the assembly.

22. The first part of Section 149 of IPC speaks of the commission of an offence in prosecution of the common object of the assembly, whereas the second part takes within its fold knowledge of likelihood of the commission of the offence in prosecution of the common object. The knowledge contemplated by the second part does not mean knowledge of mere possibility of the commission of the offence. The commission of offence must be reasonably likely. Such knowledge may be collected from the nature of the assembly, its common object, the kind of arms which its members bear and their behaviour at or before the actual conflict (**See: State of Assam vs. Darga Dewani²**).

23. The Supreme Court in the matter of **Rajendra Shantaram Todankar vs. State of Maharashtra**³ explained the scope of Section 149 and held in Para-14 as under:

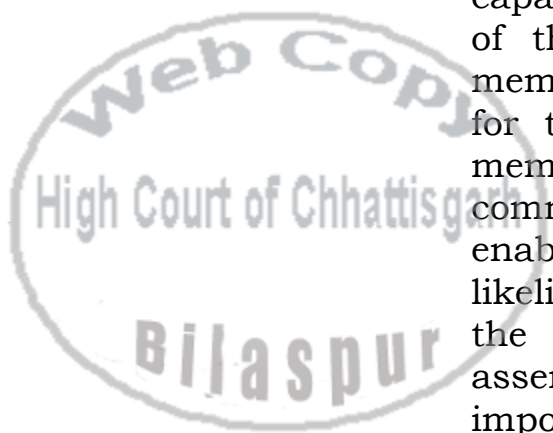
“**14.** Section 149 of the Indian Penal Code provides that if an offence is committed by any member of an unlawful assembly in prosecution of the common

² 1970 (3) SCC 236 [Para-8]

³ (2003) 2 SCC 257



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. The two clauses of Section 149 vary in degree of certainty. The first clause contemplates the commission of an offence by any member of an unlawful assembly which can be held to have been committed in prosecution of the common object of the assembly. The second clause embraces within its fold the commission of an act which may not necessarily be the common object of the assembly nevertheless the members of the assembly had knowledge of likelihood of the commission of that offence in prosecution of the common object. The common object may be commission of one offence while there may be likelihood of the commission of yet another offence the knowledge whereof is capable of being safely attributable to the members of the unlawful assembly. In either case every member of the assembly would be vicariously liable for the offence actually committed by any other member of the assembly. A mere possibility of the commission of the offence would not necessarily enable the Court to draw an inference that the likelihood of commission of such offence was within the knowledge of every member of the unlawful assembly. It is difficult indeed, though not impossible, to collect direct evidence of such knowledge. An inference may be drawn from circumstances such as the background of the incident, the motive, the nature of the assembly, the nature of the arms carried by the members of the assembly, their common object and the behaviour of the members soon before, at or after the actual commission of the crime. Unless the applicability of Section 149 either clause is attracted and the Court is convinced, on facts and in law both, of liability capable of being fastened vicariously by reference to either clause of Section 149 of IPC merely because a criminal act was committed by a member of the assembly every other member thereof would not necessarily become liable for such criminal act. The inference as to likelihood of the commission of the given criminal act must be capable of being held to be within the knowledge of another member of the assembly who is sought to be held vicariously liable for the said criminal act.”





24. Similarly, in the matter of **Joseph v. State, represented by Inspector of Police**⁴ their Lordships of Supreme Court defined the scope of Section 149 of IPC in two parts in Para-11.1 & 11.2, which reads as under:

“**11.1** The first part of the section means that there exists common object and that the offence has been committed in prosecution of the common object. In order that the offence may fall within the first part, the offence must be connected immediately with the common object of the unlawful assembly of which the accused was member.

11.2 The second part of the section means that 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 shown that the offence was such as the members knew was likely to be committed.”

25. Section 149 of IPC declares the principle of vicarious criminal liability. Upon an offence being committed by any member of an unlawful assembly in prosecution of the common object, every person, who at the time of the offence being committed is a member of such assembly is guilty of such offence. Equally, in the second part of Section 149, the law-makers have provided that upon an offence being committed by any member of the unlawful assembly which was such that members of that assembly (unlawful assembly), knew to be likely to be committed in prosecution of that object, every member of the assembly, though he may not have committed the offence, is rendered guilty of the offence (**See: Somasundaram @ Somu vs. State**

4 (2018) 12 SCC 283



represented by the Deputy Commissioner of Police⁵).

26. It is well settled that since Section 149 IPC imposes a constructive penal liability, it must be strictly construed as it seeks to punish members of an unlawful assembly for the offence or offences committed by their associate or associates in carrying out the common object of the assembly and there must be a nexus between the common object and the offence committed. The Supreme Court in the matter of **Allauddin Mian vs. State of Bihar**⁶ has held in Para-08 as under:

“8. Therefore, in order to fasten vicarious responsibility on any member of an unlawful assembly the prosecution must prove that the act constituting an offence was done in prosecution of the common object of that assembly or the act done is such as the members of that assembly knew to be likely to be committed in prosecution of the common object of that assembly. Under this section, therefore, every member of an unlawful assembly renders himself liable for the criminal act or acts of any other member or members of that assembly provided the same is/are done in prosecution of the common object or is/are such as every member of that assembly knew to be likely to be committed. This section creates a specific offence and makes every member of the unlawful assembly liable for the offence or offences committed in the course of the occurrence provided the same was/were committed in prosecution of the common object or was/were such as the members of that assembly knew to be likely to be committed. Since this section imposes a constructive penal liability, it must be strictly construed as it seeks to punish members of an unlawful assembly for the offence or offences committed by their associate or associates in carrying out the common object of the assembly. What is important in each case is to find out if the offence was committed to accomplish the common object of the assembly or was one which the

5 (2020) 7 SCC 722

6 (1981) 2 SCC 755



members knew to be likely to be committed. There must be a nexus between the common object and the offence committed and if it is found that the same was committed to accomplish the common object every member of the assembly will become liable for the same. Therefore, any offence committed by a member of an unlawful assembly in prosecution of anyone or more of the five objects mentioned in [Section 141](#) will render his companies constituting the unlawful assembly liable for that offence with the aid of [Section 149, I.P.C.](#)”

27. The aforesaid principle of law laid down by their Lordships of Supreme Court in the matter of **Allauddin Mian v. State of Bihar**⁷ has been followed in the matter of **Kuldip Yadav and others v. State of Bihar**⁸.

28. In the matter of **Vijay Pandurang Thakre and others v. State of Maharashtra**⁹ the Supreme Court has reiterated the expression “in prosecution of the common object” occurring in Section 149 IPC, postulates that it must be one which has been done with a view to accomplish the common object attributed to the members of the unlawful assembly. Their Lordships of Supreme Court further held that this expression is to be strictly construed as equivalent to in order to attain common object. It must be immediately connected with common object by virtue of nature of object and held in Para-17 as under:

“**17.** In the facts of the present case, we find that common object of the assembly, even if it is presumed that there was an unlawful assembly, has not been proved. The expression 'in prosecution of the common object' occurring in this Section

7 (1981) 2 SCC 755

8 (2011) 5 SCC 324

9 (2017) 4 SCC 377



postulates that the act must be one which have been done with a view to accomplish the common object attributed to the members of the unlawful assembly. This expression is to be strictly construed as equivalent to in order to attain common object. It must be immediately connected with common object by virtue of nature of object. In the instant case, even the evidence is not laid on this aspect. As pointed out above, the courts below were influenced by the fact that one of the injuries on the person of Ashok was on his head which became the cause of death and from this, common object is inferred.”

29. Apart from the above, Section 149 creates a specific offence.

So, there should be a clear finding as to what was the object of the unlawful assembly and if so whether the object was unlawful, that is, to commit murder, grievous hurt or simple hurt (**See: Bhudeo Mandal vs. State of Bihar¹⁰**). It is now well settled law that whenever a Court convicts any person for an offence with the aid of section 149 of IPC, a clear finding regarding a common object of the unlawful 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. (**See: Irengbam Labej Singh vs. State of Manipur¹¹**).

30. The aforesaid principle laid down has been followed by the Supreme Court in the matter of **Kuldip Yadav (supra)** in following words:

“**36.** The above provision makes it clear that before convicting accused with the aid of Section 149 IPC, 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

¹⁰ (1981) 2 SCC 755

¹¹ 1993 Suppl. (3) SCC 653



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](#) IPC, essential ingredients of [Section 141](#) IPC must be established. The above principles have been reiterated in [Bhudeo Mandal and Others vs. State of Bihar](#) (1981) 2 SCC 755.

39. 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](#) IPC.”

31. The Supreme Court in the matter of **Sikhar Behera and other vs. State of Orissa**¹² while deciding the question of common object, their Lordships have held that the nature of participation, the weapon used and the injuries caused would be relevant to infer the nature of common object.
32. Reverting to the facts of the present case in light of the aforesaid principles of law laid down by their Lordships of the Supreme Court, it is quite vivid that in order to invoke Section 149 of IPC, it is required to consider whether the

¹² 1994 Supp (1) SCC 493



appellants/accused persons (A-1 to A-8) had constituted unlawful assembly in terms of Section 141 of IPC and they had the common object of causing hurt to the deceased and the act of the appellants/accused persons (A-1 to A-8) was done to accomplish the said common object of the unlawful assembly and it was within their knowledge that the offence is likely to be committed in prosecution of their said common object and in furtherance thereof, they committed the murder of deceased Motilal Kushwaha and injured Hemlal Sahu (P.W.-7), Sohan (P.W.-10) and Jaikaran (P.W.-11). Admittedly, charges were framed by the trial Court against the appellants/accused persons for offences punishable under Sections 148, 302, 307, 353, 332/149 of IPC and the trial Court, after appreciating the oral and documentary evidence on record, recorded an affirmative finding with regard to the constitution of unlawful assembly by the appellants/accused persons (A-1 to A-8) and thereby committing the murder of the deceased in furtherance of their common object and convicted them for offence punishable under Section 302 of IPC with the aid of Section 149 of IPC.

33. The first and foremost argument raised by learned counsel for the appellants is that prosecution has not been able to prove the presence of appellants/accused persons namely Shivlal Gond (A-4), Shyam Painkra (A-5), Ramkumar Painkra (A-6), Baldev (A-7) and Dhanushdhari (A-8) on the



place of incident on the date and time of the offence as they have neither been named in the first information report (Ex. P/26) lodged by Hemlal Sahu (P.W.-7) nor in the merger intimation (Ex. P/27) and as such, the fact of constitution of unlawful assembly in terms of Section 141 of IPC has also not been proved beyond reasonable doubt. Both the first information report as well as merger intimation have been registered against Kamleshwar Painkra (A-1), Kripashankar Painkra (A-2), Jagendra (A-3) and 8-10 other persons. Moreover, the three injured eye-witnesses namely Hemlal Sahu (P.W.-7), Sohan (P.W.-10) and Jaikaran (P.W.-11) have not named the appellants/accused persons (A-4 to A-8) in their statements under Section 161 of CrPC and they have only stated that after enquiry, they came to know about the involvement of appellants/accused persons (A-4 to A-8) in the offence.

34. In order to run forth their plea, the first ground taken by learned counsel for the appellants is that the incident happened in the Chitkabahra forest range in between 11PM to 12 AM and there was neither any natural light nor any source of electricity available in the forest, as such, Hemlal Sahu (P.W.-7), Sohan (P.W.-10) and Jaikaran (P.W.-11) could not have identified the appellants/accused persons in darkness. At this stage, it would be relevant to notice the statements of these three injured eye-witnesses one-by-one.

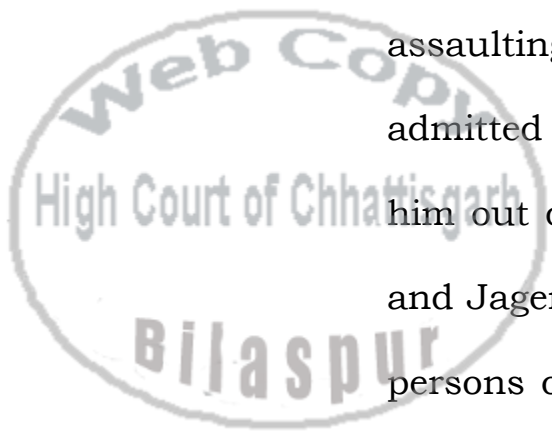


35. Hemlal Sahu (P.W.-7) is one of the witnesses who is said to have seen the incident and who has lodged first information report (Ex. P/26) as well as registered merg intimation (Ex. P/27) at the Police Station. In his statement before the Court, Hemlal Sahu (P.W.-7) has admitted that on account of darkness, he could not see the registration number of the tractor from which wood was unloaded by the appellants/accused persons. In his statement under Section 161 of CrPC (Ex. D/3), he has stated that at the time of lodging first information report, he did not know about the identity of the other accused persons and when the dead body of Motilal Kushwaha could not be found, he again went in the forest and thereafter, he came to know that appellants/accused persons (A-4 to A-8) were also involved in the commission of offence along with appellants/accused persons (A-1 to A-3) and that is the reason why, he did not name the appellants/accused persons (A-4 to A-8) in the first information report (Ex. P/26) or in the merg intimation (Ex. P/27).
36. Similarly, Sohan (P.W.-10), the next eye-witness, in his statement under Section 161 of CrPC (Ex. D/8), has nowhere stated about the source of light in the place of the incident but thereafter, in his statement before the Court, he has stated that he along with Hemlal Sahu (P.W.-7), Jaikaran (P.W.-11) and deceased Motilal Kushwaha reached the spot after seeing the light coming from the headlights of



the tractor and he has further stated that they were in possession of torch but he has failed to explain why he omitted the said fact in his statement under Section 161 of CrPC.

37. The third and last eye-witness Jaikaran (P.W.-11) has also not stated anything about the source of light available in the spot either by the headlights of the tractor or by the torch. In paragraph 3 of his statement, he has clearly admitted that when 10-12 came along with Kamleshwar Painkra (A-1) armed with clubs and when they started assaulting the deceased, he ran away. Thereafter, he has admitted that 3 -4 people came towards him and assaulted him out of which he could only identify Shivilal Gond (A-3) and Jagendra (A-4) and he could not identify the rest of the persons on account of darkness. In his cross-examination, in paragraph 5, he has clearly admitted that when he along with Hemlal Sahu (P.W.-7), Sohan (P.W.-10) and deceased Motilal Kushwaha reached the spot, it was late night and dark all around. He has also stated that at that time, it was also raining lightly and the house of Kamleshwar Painkra (A-1) was near about 200 meters away from the spot and he has further admitted that it would be difficult to identify any person from a distance of 200 meters in late night darkness. He has then stated that when he noticed 10-15 people coming in a group, he absconded from the spot and reached the place where his motorcycle was parked which is





also near about 200 meters away from the spot and thereafter, he does not know as to what happened on the spot of the incident.

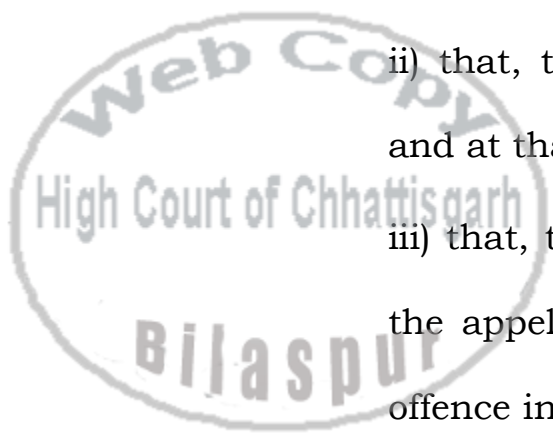
38. As such, from the testimonies of the aforesaid three injured eye-witnesses namely Hemlal Sahu (P.W.-7), Sohan (P.W.-10) and Jaikaran (P.W.-11), following facts have been established :-

i) that, the place of offence is courtyard of Kamleshwar Painkra (A-1) which is near about 200 meters away from his house and that too, in the forest range Chitkabahra.

ii) that, the incident took place between 11 PM to 12 AM and at that time, it was raining.

iii) that, the three eye-witnesses have claimed to have seen the appellants/accused persons (A-4 to A-8) committing the offence in question, however, they have not stated about the source of light in the spot rather they have clearly mentioned that it was late night and there was darkness.

iv) that, in the first information report (Ex. P/26) lodged by Hemlal Sahu (P.W.-7) he had only named Kamleshwar Painkra (A-1), Kripashankar Painkra (A-2) and Jagendra (A-3) as the assailants and thereafter, in his statement under Section 161 of CrPC (Ex. D/3), he has admitted that he could not identify other persons at that time and later on after enquiry, he got to know that appellants/accused persons (A-4 to A-8) were also involved in the crime in question.





39. Moreover, it is also relevant to notice that the spot map prepared by the Investigating Officer vide Ex. P/28 as well as the nazri naksha prepared by the Patwari vide Ex. P/40 do not indicate anything about the source of light present in the spot at the time of the incident and the first information report (Ex. P/26) is also particularly silent in this regard. As such, considering the aforesaid evidence available on record, it is established that there was insufficient light on the spot at the time of the offence.

40. It is well-settled law that identification in insufficient light is also possible if the culprit was known to the witness beforehand. It is also well-settled that even if there is insufficient light, a witness can identify a person, with whom he is fairly acquainted or is in intimate terms, from his voice, gait, features, etc. (see: paragraph 11 of **Dalbir Singh v. State of Haryana**¹³)

41. In the matter of **Hindu Singh v. State**¹⁴, it has been held by the Rajasthan High Court that where the dacoity takes place at night and there is no sufficient light in which the accused can be identified and the accused is alleged to have been moving to and fro and not standing at any fixed place near the identifying witness it is very possible that the witness might make a mistake about the identity of the accused. It has further been held that it would be very risky to base conviction only on the evidence of identification in

13 (2008) 11 SCC 425

14 1952 Raj LW 130



such a case.

42. Dealing with torch light, the Allahabad High Court in the matter of **Salik Ram v. State of U.P.**¹⁵ has held that it must not be probable for a witness to see the accused from a distance of 50 paces particularly when they were in a moving state.
43. Reverting to the facts of the present case in light of the aforesaid legal position, particularly, the principle of law laid down by their Lordships of the Supreme Court in **Dalbir Singh** (supra), it is quite vivid from a careful perusal of the entire evidence available on record that the incident took place in the dense forest of Chitkabahra forest range in between 11PM to 12 AM and there was darkness all around and it was also raining and no particular source of light which was available at that time has been established either in the first information report (Ex. P/26) or in the statements of eye-witnesses Hemlal Sahu (P.W.-7), Sohan (P.W.-10) and Jaikaran (P.W.-11) or in the spot map prepared by the Investigating Officer (Ex. P/28) or in the nazri naksha (Ex. P/40) prepared by the Patwari. In the first information report (Ex. P/26), which has been lodged by Hemlal Sahu (P.W.-7), he has only named appellants/accused persons (A-1 to A-3) and not named the appellants/accused persons (A-4 to A-8) and explaining

15 1976 ACJ (All) 72



about the same, in his statement under Section 161 of CrPC (Ex. D/3), he has stated that at the time, he could not identify the other accused persons apart from A-1 to A-3 and later on, after enquiry, he came to know that appellants/accused persons (A-4 to A-8) were also involved in the commission of the offence. As such, we are of the considered opinion that the three eye-witnesses Hemlal Sahu (P.W.-7), Sohan (P.W.-10) and Jaikaran (P.W.-11) have failed to identify the appellants/accused persons (A-4 to A-8) on account of darkness in the spot of the incident and moreover, it is also not the case of the prosecution that even though there was insufficient light on the spot, the said three witnesses were already acquainted with the voices, gaits and features of appellants/accused persons (A-4 to A-8) so as to identify them without a doubt/mistake.

44. In such a circumstance, where the said three eye-witnesses were unable to identify the rest of the accused persons apart from appellants/accused persons (A-1 to A-3), prosecution was obliged to conduct test identification parade which is admissible in evidence under Section 9 of the Indian Evidence Act, 1872, which provides as under :-

“9. Facts necessary to explain or introduce relevant facts. - Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of any thing or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted,



are relevant in so far as they are necessary for that purpose.”

45. The Supreme Court in the matter of **Jadunath Singh and another v. The State of U.P.**¹⁶ has held that failure to hold test identification of accused is not fatal in all cases and if the accused is well known to prosecution witnesses it would be waste of time to put him up for identification. If, however, there is any doubt in the matter the prosecution should hold identification parade. Paragraphs 17, 18 and 21 of the report state as under :-

“17. In Kanta Prasad v. Delhi Administration, 1958 SCR 1218 at p. 1221 : (AIR 1958 SC 350 at p. 351), a point was made regarding non-holding of test identification parade by the police and this Court observed :

“As for the test identification parade, it is true that no test identification parade was held. The appellants were known to the police officials who had deposed against the appellants and the only persons who did not know them before were the persons who gave evidence of association, to which the High Court did not attach much importance. It would no doubt have been prudent to hold a test identification parade with respect to witnesses who did not know the accused before the occurrence, but failure to hold such a parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification would be a matter for the courts of fact and it is not for this court to reassess the evidence unless exceptional grounds were established necessitating such a course.”

18. It seems to us that it has been clearly laid down by this Court in Criminal Appeal No. 92 of 1956, D/-15-1-1957 (SC) that the absence of test identification in all cases is not fatal and if the accused person is well known by sight it would be waste of time to put him up for identification. Of

16 AIR 1971 SC 363



course if the prosecution fails to hold an identification on the plea that the witnesses already knew the accused well and it transpires in the course of the trial that the witnesses did not know the accused previously, the prosecution would run the risk of losing its case. It seems to us that if there is any doubt in the matter the prosecution should hold an identification parade specially if an accused says that the alleged eye-witnesses did not know him previously. It may be that there is no express provision in the Code of Criminal Procedure enabling an accused to insist on an identification parade but if the accused does make an application and that application is turned down and it transpires during the course of the trial that the witnesses did not know the accused previously, as pointed out above the prosecution will, unless there is some other evidence, run the risk of losing the case on this point.

21. It is stated in Phipson on the Law of Evidence, 9th Ed., p. 415, as follows:

“In criminal cases it is improper to identify the accused only when in the dock; the police should place him, beforehand, with others, and ask the witness to pick him out. Nor should the witness be guided in any way, nor asked “ Is that the man?””

46. Likewise, in the matter of **Dana Yadav alias Dahu and others v. State of Bihar**¹⁷, their Lordships of the Supreme Court considered the issue threadbare and laid down the law in this regard in paragraph 38 as under :-

“38. In view of the law analysed above, we conclude thus:

(a) If an accused is well known to the prosecution witnesses from before, no test identification parade is called for and it would be meaningless and sheer waste of public time to hold the same.

(b) In cases where according to the prosecution the accused is known to the prosecution witnesses from before, but the said fact is denied by him and he challenges his identity by the prosecution witnesses by filing a petition for holding test identification parade, a court while dealing with such a prayer,

17 (2002) 7 SCC 295

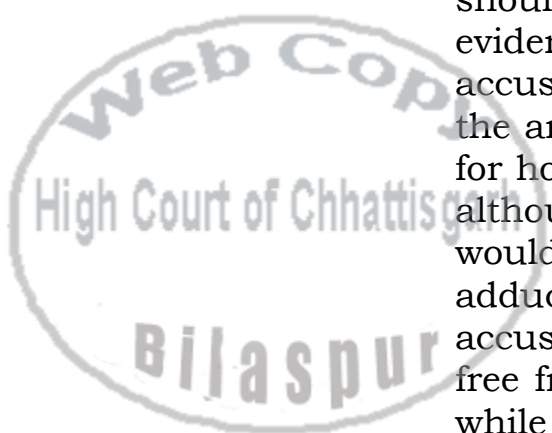


should consider without holding a mini-inquiry as to whether the denial is bona fide or a mere pretence an/or made with an ulterior motive to delay the investigation, question for grant of such a prayer would not arise. Unjustified grant or refusal of such a prayer would not necessarily ensure to the benefit of either party nor the same would be detrimental to their interest. In case prayer is granted and test identification parade is held in which a witness fails to identify the accused, his so-called claim that the accused was known to him from before and the evidence of identification in court should not be accepted. But in case either prayer is not granted or granted but no test identification held, the same ipso facto cannot be a ground for throwing out evidence of identification of an accused in court when evidence of the witness, on the question of identity of the accused from before, is found to be credible. The main thrust should be on answer to the question as to whether evidence of a witness in court to the identity of the accused from before is trustworthy or not. In case the answer is in the affirmative, the fact that prayer for holding test identification parade was rejected or although granted, but no such parade was held, would not in any manner affect the evidence adduced in court in relation to identity of the accused. But if, however, such an evidence is not free from doubt, the same may be relevant material while appreciating the evidence of identification adduced in court.

(c) Evidence of identification of an accused in court by a witness is substantive evidence whereas that of identification in test identification parade is, though a primary evidence but not substantive one, and the same can be used only to corroborate identification of the accused by a witness in court.

(d) Identification parades are held during the course of investigation ordinarily at the instance of investigating agencies and should be held with reasonable dispatch for the purpose of enabling the witnesses to identify either the properties which are the subject-matter of alleged offence or the accused persons involved in the offence so as to provide it with materials to assure itself if the investigation is proceeding on right lines and the persons whom it suspects to have committed the offence were the real culprits.

(e) Failure to hold test identification parade does not make the evidence of identification in court inadmissible, rather the same is very much





admissible in law, but ordinarily identification of an accused by a witness for the first time in court should not form the basis of conviction, the same being from its very nature inherently of a weak character unless it is corroborated by his previous identification in the test identification parade or any other evidence. The previous identification in the test identification parade is a check value to the evidence of identification in court of an accused by a witness and the same is a rule of prudence and not law.

(f) In exceptional circumstances only, as discussed above, evidence of identification for the first time in court, without the same being corroborated by previous identification in the test identification parade or any other evidence, can form the basis of conviction.

(g) Ordinarily, if an accused is not named in the first information report, his identification by witnesses in court, should not be relied upon, especially when they did not disclose name of the accused before the police, but to this general rule there may be exceptions as enumerated above.”

47. Highlighting the object of test identification parade, their

Lordships of the Supreme Court in the matter of **Mulla and another v. State of Uttar Pradesh**¹⁸ have held as under :-

“55. The identification parades are not primarily meant for the court. They are meant for investigation purposes. The object of conducting a test identification parade is twofold. *First* is to enable the witnesses to satisfy themselves that the accused whom they suspect is really the one who was seen by them in connection with the commission of the crime. *Second* is to satisfy the investigating authorities that the suspect is the real person whom the witnesses had seen in connection with the said occurrence. Therefore, the following principles regarding identification parade emerge:

- (1) an identification parade ideally must be conducted as soon as possible to avoid any mistake on the part of witnesses;
- (2) this condition can be revoked if proper explanation justifying the delay is provided; and
- (3) the authorities must make sure that the delay

¹⁸ (2010) 3 SCC 508



does not result in exposure of the accused which may lead to mistakes on the part of the witnesses.”

48. Applying the principles of law laid down by their Lordships of the Supreme Court in **Jadunath Singh** (supra), **Dana Yadav** (supra) and **Mulla** (supra) to the facts of the present case, it is quite vivid that as we have already held that the three eye-witnesses namely Hemlal Sahu (P.W.-7), Sohan (P.W.-10) and Jaikaran (P.W.-11) could not see and identify the appellants/accused persons (A-4 to A-8) on the spot as they were not even known to these prosecution witnesses and there is serious doubt about the involvement of appellants/accused persons (A-4 to A-8) in the commission of the crime in question, the prosecution should have held test identification parade as laid down by the Supreme Court in the aforesaid cases (supra). In absence of test identification parade, merely on the basis of suspicion, it would be really unsafe to convict the appellants/accused persons (A-4 to A-8) for a serious offence under Section 302 of IPC with the aid of Section 149 of IPC.

Case of appellants/accused persons namely Shivlal Gond (A-4), Shyam Painkra (A-5), Ramkumar Painkra (A-6), Baldev (A-7) :-

49. After going through the entire evidence available on record with utmost circumspection and after a thorough legal analysis as stated herein-above, we are of the considered opinion that the trial Court has legally erred in convicting



the appellants/accused persons namely Shivlal Gond (A-4), Shyam Painkra (A-5), Ramkumar Painkra (A-6), Baldev (A-7) and Dhanushdhari (A-8) for the offence punishable under Section 302/149 of IPC particularly when the prosecution has failed to conduct test identification parade and prove the involvement of these appellants/accused persons in the crime in question beyond reasonable doubt. As such, we hereby set aside the conviction recorded and sentence awarded to these appellants/accused persons (A-4 to A-8) for offence punishable under Section 302/149 of IPC.

Case of appellant/accused Dhanushdhari (A-8) :-

50. So far as the case of appellant/accused Dhanushdhari (A-8) is concerned, though the eye-witnesses Hemlal Sahu (P.W.-7), Sohan (P.W.-10) and Jaikaran (P.W.-11) have failed to identify him, but since pursuant to his memorandum statement (Ex. P/15), wooden stick as well as blood stained shirt has been seized from him vide Ex. P/16 and as per the FSL report (Ex. P/80), human blood has been found on it, it has been contended by learned State counsel that he has rightly been implicated for offence punishable under Section 302 with the aid of Section 149 of IPC.

51. It is appropriate to mention here that in cases of circumstantial evidence, the five golden principles for proving a case based on circumstantial evidence must be proved by the prosecution and since the appellant/accused Dhanushdhari (A-8) could not be identified by the eye-



witnesses, therefore, merely on the basis of only one of the circumstances found proved against him, he cannot be implicated for offence punishable under Section 302 read with Section 149 of IPC. Accordingly, his conviction and sentence for offence punishable under Section 302/149 of IPC is also set aside.

52. Since we have already held that prosecution has failed to prove that appellants/accused persons constituted an unlawful assembly and in furtherance of their common intention, they committed the murder of deceased Motilal Kushwaha and since we have already acquitted the appellants/accused persons for offence punishable under Section 302 read with Section 149 of IPC, as such, rest of the three appellants/accused persons namely Kamleshwar Painkra (A-1), Kripashankar Painkra (A-2) and Jagendra (A-3) cannot be convicted with the aid of Section 149 of IPC. However, they can be convicted with the aid of Section 34 of IPC or for offence punishable under Section 302 of IPC simpliciter. Considering the facts of the case, we will first consider the case of Jagendra (A-3).

Case of Jagendra (A-3) :-

53. Pursuant to the memorandum statement of Jagendra (A-3) vide Ex. P/5, tangi and blood stained banyan was seized from his possession vide Ex.P/6. The said seized articles were sent for chemical examination and as per the FSL report (Ex. P/80), there was no blood found on tangi (Article



C) whereas blood was found in the banyan (Article D) and as per the Serological report (Ex. P/83), human blood of A blood group was found on the said banyan.

54. A careful perusal of the statement of Dr. Rajesh Shreshth (P.W.-19) as well as the postmortem report (Ex. P/46) would show that there was a single injury on the body of the deceased and he had suffered comminuted fracture on his upper temporal bone near right temple due to which he had suffered subarachnoid hemorrhage and succumbed to death. As stated by Dr. Rajesh Shreshth (P.W.-19) in his statement before the Court, the said injury could have been caused by a hard and blunt object. Thus, as noticed herein, no incised wound has been found on the body of the deceased that could have been caused by the seized tangi and moreover, there is no such evidence available on record that appellant/accused Jagendra (A-3) inflicted the injury upon the deceased by the hard and blunt side of the tangi as no blood has either been found on it as per the FSL report. In that view of the matter, we extend the benefit of doubt to the appellant/accused Jagendra (A-3) and hereby set aside his conviction for offence punishable under Section 302/149 of IPC.

Cases of Kamleshwar Painkra (A-1) and Kripashankar Painkra (A-2) :-

55. Admittedly, pursuant to the memorandum statement of Kamleshwar Painkra (A-1) vide Ex. P/1, recovery of tangi



has been made from him vide Ex. P/2 and on the basis of the memorandum statement of Kripashankar Painkra (A-2) vide Ex. P/3, laathi has been seized from him vide Ex. P/4 but, for the reasons best known to the prosecution, both of these seized articles were not sent for chemical examination even though other articles were sent for the same and FSL report is available on record. However, considering the testimonies of eye-witnesses Hemlal Sahu (P.W.-7), Sohan (P.W.-10) and Jaikaran (P.W.-11) and particularly considering that both of these appellants/accused persons have been clearly named in the first information report (Ex. P/26) and furthermore considering that motive of offence has also been proved by the prosecution beyond reasonable doubt as the both of these appellants/accused persons were unloading stolen wood from the forest and when the deceased as well as the eye-witnesses tried to stop them, the appellants/accused persons assaulted them due to which deceased Motilal Kushwaha died on the spot and the three eye-witnesses got injured, we are of the considered opinion that appellants/accused persons Kamleshwar Painkra (A-1) and Kripashankar Painkra (A-2) are the perpetrators of the crime in question.

56. The question that arises herein is whether the trial Court is justified in convicting these two appellants/accused persons namely Kamleshwar Painkra (A-1) and Kripashankar Painkra (A-2) for offence punishable under Section 302 of



IPC or their case would fall within Exception 4 to Section 300 of IPC and as such, their conviction ought to be altered to Section 304 Part II of IPC, as contended by learned counsel for the appellants ?

57. At this stage, it would be relevant to notice Exception 4 to Section 300 of IPC, which provides as under :-

“Exception 4. - Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.”

58. Thus, to invoke Exception 4 to Section 300 of IPC, the following four ingredients must be fulfilled :-

- a) that, it was a sudden fight;
- (b) that, there was no premeditation on the part of the assailant;
- (c) that, the act was done in a heat of passion; and
- (d) that, the assailant did not take any undue advantage or did not act in a cruel or unusual manner.

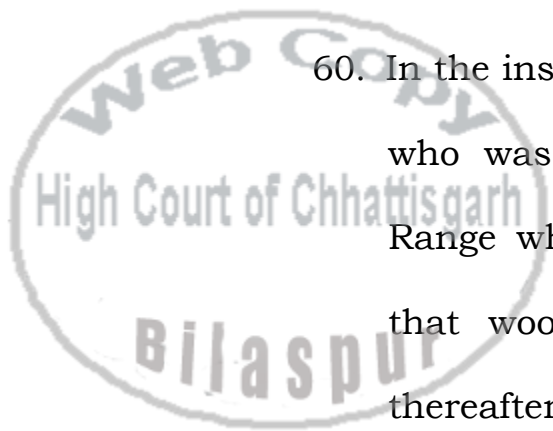
59. In order to consider whether the case of the appellants/accused persons namely Kamleshwar Painkra (A-1) and Kripashankar Painkra (A-2) is covered with Exception 4 to Section 300 of IPC, it would be appropriate to notice the decision rendered by the Supreme Court in the matter of **Sukhbir Singh v. State of Haryana**¹⁹ wherein it has been observed as under :-

¹⁹ (2002) 3 SCC 327



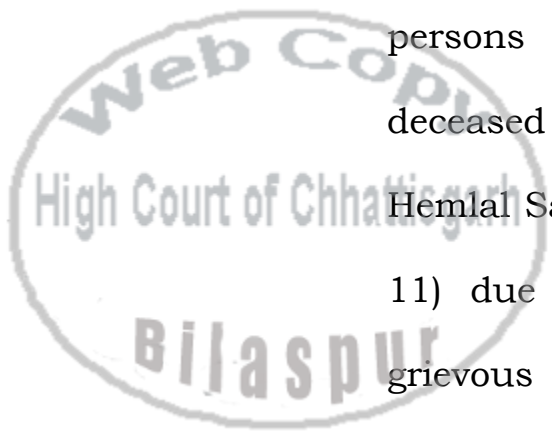
“21. Keeping in view the facts and circumstances of the case, we are of the opinion that in the absence of the existence of common object Sukhir Singh is proved to have committed the offence of culpable homicide without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and did not act in a cruel or unusual manner and his case is covered by Exception 4 of Section 300 IPC which is punishable under Section 304 (Part I) IPC. The finding of the courts below holding the aforesaid appellant guilty of offence of murder punishable under Section 302 IPC is set aside and he is held guilty for the commission of offence of culpable homicide not amounting to murder punishable under Section 304 (Part I) IPC and sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of Rs. 5000. In default of payment of fine, he shall undergo further rigorous imprisonment for one year.”

60. In the instant case, admittedly, deceased Motilal Kushwaha, who was the Circle Incharge of the Chitkabahra Forest Range where the incident took place, got the information that wood was being stolen from the said forest and thereafter, he informed about the same to Hemlal Sahu and asked him to go to the place of the incident with Barrier Guard Jaikaran (P.W.-11). Hemlal Sahu (P.W.-7) and Jaikaran (P.W.-11) heard the sound of wood being unloaded from the tractor and immediately informed the deceased about the same pursuant to which deceased Motilal Kushwaha also reached the spot along with Beat Guard Sohan (P.W.-10) and when they all reached the spot which was near about 200 meters away from the house of appellant/accused Kamleshwar Painkra (A-1), they found that he along with appellant/accused Kripashankar Painkra (A-2) was unloading wood from the tractor. Thereafter, when





deceased Motilal Kushwaha asked the appellants/accused persons to reload the illegal wood on the tractor and send it to the Range Office, Kamleshwar Painkra (A-1) said that he also works in the Forest Department and he would see who takes the wood to the Range Office. Thereafter, deceased informed about this to the Ranger and started coming back saying that action will be taken against the appellants/accused persons on the next morning. At that time, the appellants/accused persons Kamleshwar Painkra (A-1) and Kripashankar Painkra (A-2) along with 8-10 other persons (who have not been identified) assaulted the deceased and the three injured eye-witnesses namely Hemlal Sahu (P.W.-7), Sohan (P.W.-10) and Jaikaran (P.W.-11) due to which deceased Motilal Kushwaha suffered grievous injuries and died on the spot whereas the other three witnesses got injured and absconded from the spot. Thus, after taking account the facts and circumstances of the case and after going through the entire evidence available on record, it is quite vivid that all the four ingredients of Exception 4 to Section 300 of IPC are fulfilled in the instant case as there was no premeditation on the part of the appellants/accused persons to assault the deceased and cause his death and in sudden quarrel that took place between the appellants and the deceased with regard to stolen wood from the forest, out of sudden anger and in heat of passion, the appellants/accused persons





assaulted the deceased and inflicted injury on his head due to which he succumbed to death. Moreover, as per the postmortem report (Ex. P/26), it is evident that the deceased suffered a single injury on his head i.e. comminuted fracture on his upper temporal bone near right temple due to which he had suffered subarachnoid hemorrhage and succumbed to death which could have been caused by a hard and blunt object as opined by Dr. Rajesh Shreshth (P.W.-19) which goes to show that the appellants/accused persons did not take any undue advantage and did not act in cruel manner.

61. Now, what has to be considered is, whether the appellants/accused persons namely Kamleshwar Painkra (A-1) and Kripashankar Painkra (A-2) would be convicted for Section 304 Part I or Part II of IPC, as their case is covered with Exception 4 to Section 300 of IPC ?

62. In the matter of **Gurmukh Singh v. State of Haryana**²⁰, Their Lordships of the Supreme Court have laid down certain factors which are to be taken into consideration before awarding appropriate sentence to the accused which state as under :-

“23. These are some factors which are required to be taken into consideration before awarding appropriate sentence to the accused. These factors are only illustrative in character and not exhaustive. Each case has to be seen for its special perspective. The relevant factors are as under :

(a) Motive or previous enmity;

20 (2009) 15 SCC 635



- (b) Whether the incident had taken place on the spur of the moment;
- (c) The intention/knowledge of the accused while inflicting the blow or injury;
- (d) Whether the death ensued instantaneously or the victim died after several days;
- (e) The gravity, dimension and nature of injury;
- (f) The age and general health condition of the accused;
- (g) Whether the injury was caused with premeditation in a sudden fight;
- (h) The nature and size of weapon used for inflicting the injury and the force with which the blow was inflicted;
- (i) The criminal background and adverse history of the accused;
- (j) Whether the injury inflicted was not sufficient in the ordinary course of nature death but the death was because of shock;
- (k) Number of other criminal cases pending against the accused;
- (l) Incident occurred within the family members or close relations;
- (m) The conduct and behaviour of the accused after the incident.

Whether the accused had taken the injured/the deceased to the hospital immediately to ensure that he/she gets proper medical treatment ?

These are some of the factors which can be taken into consideration while granting an appropriate sentence to the accused.

24. The list of circumstances enumerated above is only illustrative and not exhaustive. In our considered view, proper and appropriate sentence to the accused is the bounded obligation and duty of the court. The endeavour of the court must be to ensure that the accused receives appropriate sentence, in other words, sentence should be according to the gravity of the offence. These are some of the relevant factors which are required to be kept in view while convicting and sentencing the accused.”



63. Likewise, in the matter of **State v. Sanjeev Nanda**²¹, their Lordships of the Supreme Court have held that once knowledge that it is likely to cause death is established but without any intention to cause death, then jail sentence may be for a term which may extend to 10 years or with fine or with both. It is further been held that to make out an offence punishable under Section 304 Part II of the IPC, the prosecution has to prove the death of the person in question and such death was caused by the act of the accused and that he knew that such act of his is likely to cause death.

64. Further, the Supreme Court in the matter of **Arjun v. State of Chhattisgarh**²² has elaborately dealt with the issue and observed in paragraphs 20 and 21, which reads as under :-

“20. To invoke this Exception 4, the requirements that are to be fulfilled have been laid down by this Court in Surinder Kumar v. UT, Chandigarh [(1989) 2 SCC 217 : 1989 SCC (Cri) 348], it has been explained as under :(SCC p. 220, para 7)

“7. To invoke this exception four requirements must be satisfied, namely, (i) it was a sudden fight; (ii) there was no premeditation; (iii) the act was done in a heat of passion; and (iv) the assailant had not taken any undue advantage or acted in a cruel manner. The cause of the quarrel is not relevant nor its I relevant who offered the provocation or started the assault. The number of wounds caused during the occurrence is not a decisive factor but what is important is that the occurrence must have been sudden and unpremeditated and the offender must have acted in a fit of anger. Of course, the offender must not have taken any undue advantage or acted in a cruel manner. Where, on a sudden quarrel, a person in the heat of the moment picks up a weapon which is handy and causes injuries, one of which proves fatal, he would be entitled to

21 (2012) 8 SCC 450

22 (2017) 3 SCC 247



the benefit of this exception provided he has not acted cruelly.”

21. Further in *Arumugam v. State* [(2008) 15 SCC 590 : (2009) 3 SCC (Cri) 1130], in support of the proposition of law that under what circumstances Exception 4 to Section 300 IPC can be invoked if death is caused, it has been explained as under : (SCC p. 596, para 9)

“9. '18. The help of exception 4 can be invoked if death is caused (a) without premeditation; (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the “fight” occurring in Exception 4 to Section 300 IPC is not defined in the Penal Code, 1860. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties had worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two or more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression “undue advantage” as used in the provisions means “unfair advantage”.

65. In the matter of **Arjun** (supra), the Supreme Court has held that when and if there is intent and knowledge, the same would be case of Section 304 Part-I IPC and if it is only a case of knowledge and not the intention to cause murder and bodily injury, then same would be a case of Section 304 Part-II IPC.



66. Reverting to the facts of the present case in light of the aforesaid principle of law laid down by their Lordships of the Supreme Court in the matter of **Arjun** (supra), it is quite vivid that as is evident from the entire evidence available on record, the appellants/accused persons did not have any intention to cause the death of the deceased and they assaulted him in sudden fight and in heat of passion, however, looking to the injury inflicted by them on the head of the deceased, which is a vital part of the body, they must have had the knowledge that their act would likely cause the death of the deceased. As such, the conviction of both the appellants/accused persons namely Kamleshwar Painkra (A-1) and Kripashankar Painkra (A-2) for offence punishable under Section 302/149 of IPC and the sentence awarded accordingly is hereby set aside and they are rather convicted for offence punishable under Section 304 Part II of IPC with the aid of Section 34 of IPC and since they are in jail since 12/06/2015 i.e. more than 7 years, they are sentenced to the period already undergone by them.

Conclusion :-

67. The conviction recorded and sentence awarded by the impugned judgment against all the appellants/accused persons for offences punishable under Sections 148 and 302/149 of IPC is hereby set aside. However, their conviction for offence punishable under Section 353 of IPC is well-merited and it is hereby maintained.



Appellants/accused persons namely Kamleshwar Painkra (A-1) and Kripashankar Painkra (A-2) are convicted for offence punishable under Section 304 Part II read with Section 34 of IPC and are sentenced for the period already undergone as stated above. However, their fine sentence shall remain intact. All the appellants/accused persons be released forthwith, if their detention is not required in any other case.

68. Accordingly, both of these criminal appeals are allowed to the extent indicated herein-above.

Sd/-

(Sanjay K. Agrawal)

Judge

Sd/-

(Deepak Kumar Tiwari)

Judge

Harnett