Madhya Pradesh High Court
Bhaggo Bai vs The State Of Madhya Pradesh on 13 May, 2022
Author: Gurpal Singh Ahluwalia

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IN THE HIGH COURT OF MADHYA PRADESH
AT GWALIOR

BEFORE
HON'BLE SHRI JUSTICE GURPAL SINGH AHLUWALIA
&
HON'BLE SHRI JUSTICE RAJEEV KUMAR SHRIVASTAVA
ON THE 13th OF MAY, 2022

CRIMINAL APPEAL NO.1116 OF 2014

Between:-

BHAGGO BAI, W/O CHHAVIRAM,
AGED 45 YEARS, R/O RAMGARH,
DABRA, DISTRICT GWALIOR
(MADHYA PRADESH)

.....APPELLANT

(BY SHRI SHAILENDRA SINGH SENGAR - ADVOCATE)

AND

STATE OF MADHYA PRADESH
THROUGH POLICE STATION -
DABRA, DISTRICT- GWALIOR
(MADHYA PRADESH)

.....RESPONDENT

(BY SHRI C.P. SINGH - ADVOCATE)

Reserved on : 09th of May, 2022
Delivered on : 13th of May, 2022

This appeal coming on for final hearing this day, Hon'ble Shri Justice G.S. Ahluwalia, passed the following:

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JUDGMENT

This Criminal Appeal under Section 374 of Cr.P.C. has been filed against the judgment and sentence dated 10/10/2014 passed by First Additional Sessions Judge, Dabra, District Gwalior in ST No.87/2010, by which the appellant has been convicted and sentenced for the following offences:-

Conviction U/s	Sentence	Fine	Default (in lieu of fine)
148 of IPC	1 year's RI	Rs.1,000/-	3 months RI

302/149 of IPC (on LI two counts)		Rs.5,000/-	2 years RI
324/149 of IPC	1 year's RI	Rs.1,000/-	3 months RI

2. It is not out of place to mention here that total ten persons were made accused, out of which, six persons namely, Chhaviram, Sodam alias Kunjbihari, Chunge alias Ramgopal, Hemant, Thakurdas and Janki alias Ramdas were tried in ST No.87/2010 and have been convicted by judgment and sentence dated 7/9/2011 passed by Third Additional Sessions Judge (Fast Track Court) Dabra, District Gwalior. Two accused persons were juvenile and accordingly, they were tried by Juvenile Justice Board. The present appellant and co-accused Tillu were absconding. The appellant was arrested at a later stage and a separate trial was conducted and by the impugned judgment and sentence, She has been convicted for the above-mentioned offences. Six co-accused persons have also filed Criminal Appeal No.873/2011 and Criminal Appeal No.977/2011 and in the light of the judgment passed by the Supreme Court in the case of A.T. Mydeen Vs. The Asstt. Commissioner, Customs Department, decided on 31/10/2021 passed in Cr.A.No.1306 of 2021, the evidence led in the case of present appellant cannot be read for six co-accused persons and vice versa. However, the appeals filed by the appellant as well as co-accused persons have been heard simultaneously, but they are being decided by separate judgments.

3. The prosecution story in short is that on 15-9-2009 at 08:10 A.M., the complainant Narayan lodged an FIR on the allegations that on 14-9- 2009, a dispute had taken place between him and Hemant Kushwaha on the issue of fetching water from the water tanker sent by Municipal Council. Today, at about 7:45 A.M., his father was sitting on a platform constructed in front of his house. On the issue of water, Thakurdas, with sword, Hemant with sword, Sodam with sword and brother-in-law of Hemant with sword, Chhaviram with baka(Chopper), Janaki with iron rod, Chunge with Lathi and Bhaggo bai empty handed came on the spot and started abusing him filthily. When his father objected to it, then Hemant and Thakurdas, with an intention to kill his father assaulted by sword as a result his father sustained injuries on his head and forehead, as well as on teeth and blood started oozing out. When his brother Amar Singh tried to intervene, then Sodam Singh assaulted him by sword whereas Janaki assaulted him by iron rod. At that time, Bhaggo bai, wife of Chhaviram exhorted that all should be killed so that the daily dispute may come to an end. When his wife Asha and the complainant Narayan tried to intervene in the matter, the Appellant Chhaviram assaulted his wife by Baka, as a result she sustained injury on her right forearm. Chunge, and brother-in-law of Hemant also caused injuries to his father and brother. After hearing his alarm, his brother Premnarayan, Ashok and brother-in-law Ashok also came on the spot. The assailants ran away.

Thereafter, he took his brother and father to the hospital in an injured condition, where his father was declared dead by the Doctors. The complainant also stated that he has come to the Police Station after leaving the injured and other witnesses in the hospital.

4. Accordingly, the police registered FIR in Crime No. 650 of 2009 for offence under Sections 302,307,147,148,149 of IPC. Amar Singh died during his treatment. The dead bodies were sent for post-mortem. The statements of witnesses were recorded. Eight accused out of 10 accused were arrested. The seized articles were sent for forensic examination. The police after completing

investigation, filed charge sheet for offence under Sections 147,148,149,302, 307, 324 of IPC. Since, the appellant was absconding therefore, charge sheet under Section 299 of Cr.P.C. was filed against the Appellant and Tillu (absconding). The appellant was arrested at a later stage.

5. The Trial Court by order dated 29/11/2010 framed charges under Sections 148, 302 read with Section 149 (on two counts) and under Section 324/149 of IPC.

6. The appellant abjured her guilt and pleaded not guilty.

7. The prosecution in order to prove its case, examined Dr. R.K. Arora (PW-1), Narayan (PW-2), Ashok (PW-3), Smt. Asha (PW-4), R.B. Kurele (PW-5), Dr. Ajay Gupta (PW-6), Rakesh Singh Jadon (PW-7), Ramesh Chandra Gour (PW-8) and R.P. Tiwari (PW-9).

8. The appellant did not examine any witness in her defence.

9. The Trial Court by the impugned judgment has convicted the appellant for the offences mentioned above.

10. Challenging the judgment and sentence passed by the Court below, it is submitted by the counsel for the appellant that the only allegation against the appellant is that of exhorting the co-accused persons. There is a material variance in the evidence of the witnesses. According to Narayan (PW-2), the exhortation was made only after the assault was already made, whereas according to Ashok (PW-3)exhortation was made while the assault was being made, whereas Asha (PW-4) has stated that exhortation was made prior to initiation of the assault. The Appellant has not caused any injury, therefore, She cannot be said to be a member of Unlawful Assembly or sharing common object.

11. Per contra, the counsel for the State has supported the prosecution case as well as the findings recorded by the Trial Court.

12. Heard the learned counsel for the parties.

13. Before adverting to the submissions made by the counsel for the appellant, this Court would like to consider "as to whether the death of Gangaram and Amar Singh is homicidal or not ?"

14. The deceased Amar Singh was medically examined and one lacerated wound of nearly 10 cm extending from right eye brow to upper forehead and a lacerated wound above left eyebrow of 5 cm in size were found. All wounds were stitched. The MLC is Ex. P1C. However, on 21- 9-2009 at 11:30 A.M., Amar Singh expired during treatment. Dr. R.K. Arora (P.W. 1) who had medically examined the injured Amar Singh has stated that two injuries were found i.e., 1 lacerated wound of 5 cm x 1 cm x bone deep bleeding present on right side of forehead and one lacerated wound of 4 cm x 1 cm x bone deep bleeding present at mid line of (Illegible) region of head posterior aspect. He was cross-examined and he stated that the injuries could not have been caused in a vehicular accident and were caused by assault only. From naked eye, fracture of bone was not visible. He denied that he has prepared the MLC, Ex. P.1C, without examining the injured.

15. Dr. Ajay Gupta (P.W.6) has conducted post-mortem of deceased Amar Singh and found the following injuries :

> Dead body of an average built male, aged 22 years, lying on post-mortem table in supine position. With following clothings (1) Underwear (2) Banyan. Red thread around right wrist bandage all around head.
>
> Eyes closed cornea hazy mouth closed Rigormortis present all over the body and post-mortem staining evidence over back of the body :
>
> Ante-mortem injuries evident over the body are as follows :
>
> (i) Stitched wound 1.5 cm long directed upwards from medial end of right eye brow 2 stitches present.
>
> (ii) Stitched wound 7 cm long 8 stitches present directed upwards from mid of right eye brow.
>
> (iii) Stitched wound 3.5 cm long directed upwards from lateral end of left eye brow and stitches present
>
> (iv) Stitched wound 3.5 cm long directed upward from medial end of left eye brow 4 stitches present
>
> (v) Stitched wound transversely placed and stitches present over occipital area 4 cm long
>
> (vi) Stitched wound over posterior parietal area anterio- transversly 4 stitches present 4 cm long
>
> (vii) Both forearm and hand swollen diffusely
>
> (viii) Abrasion with scab over upper lip 3 x 1 cm size
>
> (ix) Abrasion with scab right shoulder posterio-(illegible) 5 x 4 cm
>
> (x) Abrasion with scab over back right scapula inferior angle 7 x 1 cm size
>
> (xi) Abrasion with scab over back left scapula inferior angle 4 x 1 cm size
>
> (xii) Abrasion with scab left buttock laterally 3 x 1 cm size
>
> (xiii) Abrasion with scab left buttock laterally 3 x 1 cm size

(xiv) Abrasion with scab lower end left leg posteriory 3 x 2 cm size

(xv) Abrasion with scab right ankle medially 1 x 4 cm Internal Examination Contusion lower jaw 3 x 2 cm sized, caused fracture of mandible in to two pieces (illegible) ecchymosed diffusely.

Underneath and corresponding to external injuries depressed fracture of right side, forehead 5.9 x5 cm size into two pieces. Thin extradural hemorrhage present all over the brain. All injuries are ante-mortem 05 to 07 days old. Possible in circumstances given by police. Head injury is sufficient to cause death in ordinary course of nature.

The post-mortem report is Ex. P. 10.

16. Ajay Gupta (PW-6) was cross-examined and in cross-examination, he stated that he has not mentioned in his post-mortem report that the injuries sustained by the deceased could have been caused in the fight . He further stated that the deceased Amar Singh could have sustained injuries in case of any vehicular accident. He admitted that the deceased Amar Singh had not sustained any injury which could have been caused by the defence wound. He further stated that the deceased Amar Singh had no defence wound on his body. He further admitted that none of the family members of the deceased had informed him about the incident. He denied that he had prepared postmortem report without conducting postmortem.

17. Thus, it is clear that the death of the deceased Amar Singh was homicidal in nature.

18. Dr. R.B. Kurele (P.W. 5) had conducted post-mortem of deceased Gangaram and found following injuries :

A 55 year old male lying supine, overlying clothes Baniyan, Langoth, towel stained with blood, head rupture, brain matter seen through fracture skull bone, two incised wound over head.

(i) Over right eye size 9 cm x 4 cm bone deep.

(ii) Incised wound over forehead size 19 inch x 2 inch bone deep Underlying skull bone fracture at multiple places, brain matter protruded through wound, rigormortis absent, bleeding from right ear present. On dissection Heard left chamber empty, right contain few blood, organs lung, liver, kidney and spleen are pale, stomach contain fluid.

Cause of death : Deceased died due to head injury within 6 hours of Examination.

Mode of death would depend on circumstantial evidence. The post-mortem report is Ex. P.9.

19. Dr. R.B. Kurele (PW-5) was cross-examined by the appellant. In cross-examination, he admitted that the deceased Gangaram had sustained only two injuries and he has not mentioned in his postmortem report Ex. P/9 that both the injuries were antemortem in nature. He also stated that the deceased could have sustained injury on account of vehicular accident. He denied that he had prepared false postmortem report. Thus, it is clear that defence had not given any suggestion to any of the witness with regard to vehicular accident. The deceased Gangaram had sustained two incised wounds on his parietal region and even the brain matter had protruded from the fractured wound.

20. Thus, it is clear that the death of the deceased Gangaram was also homicidal in nature.

21. The next question for consideration is whether the appellant is an author of the offence or not ?

22. Narayan (PW-2) has stated that the deceased Gangaram was his father, whereas deceased Amar Singh was his younger brother. On 14/09/2009 at about 09:30 PM, this witness had a dispute with the accused Hemant and appellant Chhaviram on the question of fetching water from the water tanker. Accordingly, he had lodged a report Ex. P/2.

On the next day, i.e., 15/09/2009 at about 07:30 AM, his father Gangaram was sitting on the platform constructed in front of his house. On the question of dispute which arose in the previous night, the accused Chhaviram, Hemant, Sodam, Thakurdas, Chunge, Janki, Tillu (absconding) and appellant came there. Chhaviram was having Baka, whereas Hemant, Sodam, Thakurdas and Tillu were having sword and Janki was having iron rod. Chunge was having lathi and appellant was empty handed. All the accused persons started abusing his father filthily. When Gangaram objected to it, then Hemant and Thakurdas assaulted him by sword causing injury on his face and jaw. At that time, his younger brother Amar Singh tried to intervene in the matter, then Sodam by axe, Chunge by lathi and Janki by Saria, assaulted him on his head and back of neck and forehead. The appellant exhorted them to kill them so that the daily dispute may come to an end (rHkh HkXxks ckbZ us dgk fd bUgsa tku ls gh ekj nks] jkst&jkst dk >a>V [kRe gks tk,xk). He and his wife Asha tried to intervene, then the appellant Chhaviram gave a Baka blow on left hand of his wife Asha (PW-4). On hearing shots, his younger brother Ashok and Sughar Singh also came on the spot. It was alleged that the accused persons under an impression that his father and brother have died, ran away. Thereafter, this witness took his father and brother to the government hospital, where his father was declared dead and his brother Amar Singh and his wife Asha were sent to Gwalior for treatment, thereafter, he lodged the FIR Ex. P/3. The police prepared the spot map Ex. P/4. Thereafter, he took his wife and brother to Gwalior hospital. He got his brother admitted in Neurology Department. On 21.09.2009 at about 11:30 AM, his brother Amar Singh expired. Thereafter, Safina form Ex. P/5 was issued. Lash Panchayatnama was prepared. Dead body of Amar Singh was handed over to him after postmortem for cremation purposes and the acknowledgment receipt is Ex. P/6. This witness was cross-examined and in cross-examination, he stated that after sending his brother and wife to Gwalior, he immediately went to lodge the FIR. Amar Singh and Asha were sent by Private Ambulance. He denied that he did not go along with them. He denied that after lodging the FIR, he went to the spot and, therefore, he did not go along with Amar Singh and Asha. He on his own clarified that after lodging the FIR, he went to the spot and thereafter he took his wife and brother to Gwalior. He had reached on the spot at about 09:00 AM. He stayed back on the spot for 10-15

minutes. He went to Dabra Hospital and thereafter he went to Gwalior. He reached Gwalior at about 10:30 AM. Treatment of his brother had started from 10:35 AM. He denied that appellant Bhaggo Bai had not cooperated the accused persons in the incident. He denied that Chhaviram had not caused any injury to Asha by Baka. He denied that no injury was caused to Amar Singh by any of the accused. He had raised an alarm even prior to causing of injury to Asha. He denied that he and his family members were not present on the spot. He denied that Bhaggo Bai had not stated that they should be killed so that daily dispute may come to an end.

23. Ashok (PW-3) has also supported the prosecution case. He stated that on the issue of fetching water from water tanker which took place on 14/09/2009, all the accused persons came on the spot. Hemant and Thakurdas assaulted his father Gangaram by sword, as a result, he sustained injuries on his eyes and forehead, whereas the appellant was exhorting that all should be killed. Thereafter, his brother Amar Singh also tried to intervene, then he too was assaulted by Sodam, Janki and Tillu by sword and iron rod. His Bhabhi and his brother Narayan, who were also standing there and tried to intervene. Chhaviram gave a Baka blow to his Bhabhi, which landed on her hand. Tillu assaulted his Bhabhi by sword, which landed on her back. At that time, Premnarayan and Sughar Singh also came there and all the accused persons ran away. In cross-examination, he stated that at the time of incident, he was in his house and after hearing the shouts, he came on the spot, but he denied that before he could come on the spot, the deceased Amar Singh and Gangaram had already sustained injury. He claimed that Asha sustained injuries only after his arrival on the spot. He admitted that he did not try to save his father and brother because the accused were assaulting them, however, he claimed that he had raised an alarm. He denied that Bhaggo Bai had not exhorted any of the accused. He denied that Bhaggo Bai was not present on the spot. He denied that he is making statement on the instructions of his counsel that Bhaggo Bai was exhorting all the accused persons. He further claimed that she had also stated that no one should be spared, however, could not explain as to why the factum of killing all the persons is not mentioned in her police statement Ex. D/1. He claimed that he had disclosed to the police that Bhaggo Bai had exhorted that all should be killed, but could not explain as to why the said fact is not mentioned in the police statement Ex. D/1 (This Court has gone through the police statement of this witness and it is mentioned that Bhaggo Bai had exhorted that today these persons should be killed so that daily dispute may come to an end).

24. Asha (PW-4) also supported the prosecution case. She has stated that one day prior to the incident, dispute had taken place on the issue of fetching water from water tanker and, accordingly, her husband Narayan (PW-2) had lodged the report in Police Station Dabra. On the next day, at about 07:30 - 07:45 AM, his father-in-law Gangaram was sitting on the platform constructed outside his house. All the accused persons came there and they were abusing. When her father-in-law objected to it, then the appellant exhorted that he should be killed and should not be spared and, thereafter, assault was made by the accused persons. She has also stated that Chhaviram had assaulted her by Baka which landed on her right wrist.

25. This witness was cross-examined and she claimed that there was no enmity between the family of the deceased Gangaram and appellant Chhaviram. She also denied that both the families were on talking terms, but clarified that although there was no enmity, but they were not on talking terms.

She further claimed that on earlier occasion also, a dispute had taken place and in that, Chhaviram had left some part of platform in favour of her father-in-law. She claimed that she was not on the spot at the time when abuses were hurled, but after hearing abuses, she came to the spot. She further claimed that except on the question of platform, no dispute had taken place with the accused party.

26. It is submitted by the counsel for the appellant that Narayan (PW-

2), Ashok (PW-3) and Asha (PW-4) are closed relatives of the deceased. Narayan (PW-2) and Ashok (PW-3) are sons of the deceased, whereas Asha (PW-4) is the wife of Narayan (PW-2). Asha (PW-4) has admitted that the house of neighborers are closely situated, but no independent witness has been examined. The appellant has been falsely implicated being the wife of the co-accused Chhaviram and the prosecution has failed to prove that the appellant was the member of unlawful assembly and was sharing common object.

Whether Narayan (P.W.2), Asha (P.W.4) and Ashok (P.W. 3) are reliable witnesses?

27. It is submitted by the Counsel for the Appellants that Narayan (P.W.2), Asha (P.W.4) and Ashok (P.W.3) are related witnesses and therefore, their evidence is not reliable.

28. Narayan (P.W.2) and Ashok (P.W.3) are sons of the deceased Gangaram and Asha (P.W.4) is the wife of Narayan (P.W.2). The incident took place at 7:45 A.M. in front of the house of the witnesses. Therefore, their presence on the spot is natural and they cannot be said to planted or chance witnesses.

29. It is well established principle of law that the evidence of a "related witness" cannot be discarded only on the ground of relationship. The Supreme Court in the case of Rupinder Singh Sandhu v. State of Punjab, reported in (2018) 16 SCC 475 has held as under :

> 50. The fact that PWs 3 and 4 are related to the deceased Gurnam Singh is not in dispute. The existence of such relationship by itself does not render the evidence of PWs 3 and 4 untrustworthy. This Court has repeatedly held so and also held that the related witnesses are less likely to implicate innocent persons exonerating the real culprits.

30. The Supreme Court in the case of Shamim Vs. State (NCT of Delhi) reported in (2018) 10 SCC 509 has held as under :

> 9. In a criminal trial, normally the evidence of the wife, husband, son or daughter of the deceased, is given great weightage on the principle that there is no reason for them not to speak the truth and shield the real culprit.....

31. The Supreme Court in the case of Rizan v. State of Chhattisgarh, reported in (2003) 2 SCC 661 has held as under :

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

7. In Dalip Singh v. State of Punjab it has been laid down as under: (AIR p. 366, para 26) "26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

8. The above decision has since been followed in Guli Chand v. State of Rajasthan in which Vadivelu Thevar v. State of Madras was also relied upon.

9. We may also observe that the ground that the witness being a close relative and consequently being a partisan witness, should not be relied upon, has no substance. This theory was repelled by this Court as early as in Dalip Singh case in which surprise was expressed over the impression which prevailed in the minds of the Members of the Bar that relatives were not independent witnesses. Speaking through Vivian Bose, J. it was observed: (AIR p. 366, para 25) "25. We are unable to agree with the learned Judges of the High Court that the testimony of the two eyewitnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in

-- 'Rameshwar v. State of Rajasthan' (AIR at p. 59). We find, however, that it unfortunately still persists, if not in the judgments of the courts, at any rate in the arguments of counsel."

10. Again in Masalti v. State of U.P. this Court observed: (AIR pp. 209-10, para 14) "But it would, we think, be unreasonable to contend that evidence given by witnesses

> should be discarded only on the ground that it is evidence of partisan or interested witnesses. ... The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hardand-fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct."
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> 11. To the same effect is the decision in State of Punjab v. Jagir Singh and Lehna v. State of Haryana.

32. Why a "related witness" would spare the real culprit in order to falsely implicate some innocent person? There is a difference between "related witness" and "interested witness". "Interested witness" is a witness who is vitally interested in conviction of a person due to previous enmity. The "Interested witness" has been defined by the Supreme Court in the case of Mohd. Rojali Ali v. State of Assam, reported in (2019) 19 SCC 567 as under :

> 13. As regards the contention that all the eyewitnesses are close relatives of the deceased, it is by now well-settled that a related witness cannot be said to be an "interested" witness merely by virtue of being a relative of the victim. This Court has elucidated the difference between "interested" and "related" witnesses in a plethora of cases, stating that a witness may be called interested only when he or she derives some benefit from the result of a litigation, which in the context of a criminal case would mean that the witness has a direct or indirect interest in seeing the accused punished due to prior enmity or other reasons, and thus has a motive to falsely implicate the accused (for instance, see State of Rajasthan v. Kalki; Amit v. State of U.P.; and Gangabhavani v. Rayapati Venkat Reddy). Recently, this difference was reiterated in Ganapathi v. State of T.N., in the following terms, by referring to the three-Judge Bench decision in State of Rajasthan v. Kalki: (Ganapathi case, SCC p. 555, para 14) "14. "Related" is not equivalent to "interested". A witness may be called "interested" only when he or she derives some benefit from the result of a litigation; in the decree in a civil case, or in seeing an accused person punished. A witness who is a natural one and is the only possible eyewitness in the circumstances of a case cannot be said to be "interested"."
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> 14. In criminal cases, it is often the case that the offence is witnessed by a close relative of the victim, whose presence on the scene of the offence would be natural. The evidence of such a witness cannot automatically be discarded by labelling the witness as interested. Indeed, one of the earliest statements with respect to interested witnesses in criminal cases was made by this Court in Dalip Singh v. State of Punjab, wherein this Court observed: (AIR p. 366, para 26) "26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relative would be the last to screen the real culprit and falsely implicate an innocent person."

> 15. In case of a related witness, the Court may not treat his or her testimony as inherently tainted, and needs to ensure only that the evidence is inherently reliable, probable, cogent and consistent. We may refer to the observations of this Court in Jayabalan v. State (UT of Pondicherry): (SCC p. 213, para 23) "23. We are of the considered view that in cases where the court is called upon to deal with the evidence of the interested witnesses, the approach of the court, while appreciating the evidence of such witnesses must not be pedantic. The court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the court must not be suspicious of such evidence. The primary endeavour of the court must be to look for consistency. The evidence of a witness cannot be ignored or thrown out solely because it comes from the mouth of a person who is closely related to the victim."

33. Thus, the mechanical rejection of testimony of witnesses who are related to the deceased, is not permissible. However, the evidence of such witnesses should be examined minutely.

34. It is submitted by the Counsel for the Appellants that the witnesses have admitted on their own, that there was an enmity between the parties, therefore, it is clear that not only the witnesses are Related but they are Interested and Inimical Witnesses also.

35. Enmity is a double-edged weapon. On one hand, if enmity provides motive for false implication of the accused persons, then on the other hand, it also provides motive for committing offence. The Supreme Court in the case of Sushil Vs. State of U.P. Reported in 1995 Supp (1) SCC 363 has held as under :

> 8.....It goes without saying that enmity is a double-edged weapon which cuts both ways. It may constitute a motive for the commission of the crime and at the same time it may also provide a motive for false implication.....

36. The Supreme Court in the case of Matibar Singh v. State of U.P., reported in (2015) 16 SCC 168 has held as under :

> 14.....The fact that there was previous enmity between the complainant's party and the rival group of which the accused happen to be members or sympathisers is a factor that need to be taken as adverse to the prosecution. Enmity is a double- edged weapon. It was because of the said enmity that the victim was assaulted while he was on his way to attend the function. The existence of such enmity lends support to the prosecution case rather than demolish the same.....

Non-Examination of Independent Witnesses

37. It is submitted by the Counsel for the Appellants that it is clear from the spot map,Ex. P.4, that the houses of independent witnesses were situated at nearby places, but inspite of that, none of independent witness was examined.

38. The Supreme Court in the case of Mahesh v. State of Maharashtra, reported in (2008) 13 SCC 271 has held as under :

> 54. This Court in Salim Sahab v. State of M.P. held that: (SCC pp. 701 & 703, paras 11 & 14-15) "11. ... [mere relationship] is not a factor to affect the credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible.
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> 14. ... in Masalti v. State of U.P. this Court observed: (AIR pp.

209-10, para 14) 'But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. ... The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard-and-fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct.'

15. To the same effect are the decisions in State of Punjab v. Jagir Singh, Lehna v. State of Haryana and Gangadhar Behera v. State of Orissa."

55. As regards non-examination of the independent witnesses who probably witnessed the occurrence on the roadside, suffice it to say that testimony of PW Sanjay, an eyewitness, who received injuries in the occurrence, if found to be trustworthy of belief, cannot be discarded merely for non- examination of the independent witnesses. The High Court has held in its judgment and, in our view, rightly that the reasons given by the learned trial Judge for discarding and disbelieving the testimony of PWs 4, 5, 6 and 8 were wholly unreasonable, untenable and perverse. The occurrence of the incident, as noticed earlier, is not in serious dispute. PW Prakash Deshkar has also admitted that he had lodged complaint to the police about the incident on the basis of which FIR came to be registered and this witness has supported in his deposition the contents of the complaint to some extent. It is well settled that in such cases many a times, independent witnesses do not come forward to depose in favour of the prosecution. There are many reasons that persons sometimes are not inclined to become witnesses in the case for a variety of reasons. It is well settled that merely because the witnesses examined by the prosecution are relatives of the victim, that fact by itself will not be sufficient to discard and discredit the evidence of the relative witnesses, if otherwise they are found to be truthful witnesses and rule of caution is that the evidence of the relative witnesses has to be reliable evidence which has to be accepted after deep and thorough scrutiny.

39. The Supreme Court in the case of Nagarjit Ahir Vs. State of Bihar reported in (2005) 10 SCC 369 has held as under :

> 12. It was then submitted that in spite of the fact that a large number of persons had assembled at the bank of the river at the time of occurrence, the witnesses examined are only those who are members of the family of the deceased or in some manner connected with him. We cannot lose sight of the fact that four of such witnesses are injured witnesses and, therefore, in the absence of strong reasons, we cannot discard their testimony. The fact that they are related to the deceased is the reason why they were attacked by the appellants. Moreover, in such situations though many people may have seen the occurrence, it may not be possible for the prosecution to examine each one of them. In fact, there is evidence on record to suggest that when the occurrence took place, people started running helter-skelter. In such a situation it would be indeed difficult to find out the other persons who had witnessed the occuence. In any event, we have the evidence of as many as 7 witnesses, 4 of them injured, whose evidence has been found to be reliable by the courts below, and we find no reason to take a different view.

40. The Supreme Court in the case of Sadhu Saran Singh v. State of U.P., reported in (2016) 4 SCC 357 has held as under :

> 29. As far as the non-examination of any other independent witness is concerned, there is no doubt that the prosecution has not been able to produce any independent witness. But, the prosecution case cannot be doubted on this ground alone. In these days, civilised people are generally insensitive to come forward to give any statement in respect of any criminal offence. Unless it is inevitable, people normally keep away from the court as they find it distressing and stressful. Though this kind of human behaviour is indeed unfortunate, but it is a normal phenomena. We cannot ignore this handicap of the investigating agency in discharging their duty. We cannot derail the entire case on the mere ground of absence of independent witness as long as the evidence of the eyewitness, though interested, is trustworthy.

41. Thus, the evidence of Narayan (P.W.2), Asha (P.W.4) and Ashok (P.W.3) cannot be discarded merely on the ground that independent witnesses were not examined by the prosecution.

Prosecution witnesses did not try to intervene

42. It is submitted that Narayan (P.W.2) and Ashok (P.W.3) are the sons of the deceased Gangaram and brother of deceased Amar Singh. They did not try to intervene in the matter. Similarly Asha (P.W.4) was medically examined at 17:20 whereas the incident took place at 7:45 A.M., therefore, it is clear that She is not an injured eye witness.

43. The Supreme Court in the case of Suresh Yadav @ Guddu Vs. State of Chhatisgarh passed on 25-2-2022 in Cr.A. No.1349 of 2013 has held as under :

> Even otherwise, we do not find the present one to be a case of manifest illegality so as to call for interference. The evidence of PW-1, being the eye-witness to the incident,

> remains unimpeachable and has been believed by the two Courts. His evidence cannot be discarded only for the reason that he allegedly did not raise any alarm or did not try to intervene when the deceased was being ferociously assaulted and stabbed. Excessive number of injuries do not ipso facto lead to an inference about involvement of more than one person; rather the nature of injuries and similarity of their size/dimension would only lead to the inference that she was mercilessly and repeatedly stabbed by the same weapon and by the same person.
>
> (Underline Supplied)

44. In the present case, Ganga Ram had sustained two incised wounds on his head and even his brain matter had protruded. Amar Singh had sustained as many as 15 injuries. Thus, it is clear that number of accused persons were involved. Further when a father and son are being mercilessly beaten by the assailants, then the evidence of an eye-witness cannot be discarded merely on the ground that he had not intervened in the attack.

45. It is submitted that Asha (P.W.4) did not sustain any injury in the incident. Further She was medically examined at 17:20, Ex. P. 8.

46. So far as the delayed medical examination of Asha (P.W.4) is concerned, it is suffice to mention that two persons were brought to the hospital in an injured condition. Gangaram was declared dead on his arrival to the hospital. Amar Singh was seriously injured and he was referred. The family members were busy in police investigation as well as in assuring the medical treatment for Amar Singh. Asha (P.W.4) had not sustained any grievous injury. Therefore, if She was medically examined at 17:20, then her delayed medical examination would not make her evidence unreliable.

47. Thus, it is clear that it is incorrect to say that none of the eye- witness tried to save the deceased persons.

Whether Ocular Evidence is contrary to Medical Evidence.

48. This Court has already come to a conclusion that Asha (P.W.4) had sustained injuries in the incident.

49. According to Narayan (P.W.2), Hemant (dead) and Thakurdas had assaulted Gangaram by sword. In post-mortem report of Gangaram, Ex. P. 10, two incised wounds were found on the face of the deceased Ganga Ram. It is true that it was also alleged that other co-accused persons also assaulted Ganga Ram by lathi but no such injury was found.

50. It is true that lacerated wounds were found on the head of Amar Singh and according to prosecution case, Sodam had assaulted by sword whereas Janki had assaulted by iron rod, Chunge had assaulted Amar Singh by lathi. No incised wound was found. Thus the question is that whether Sodam had assaulted the deceased by Sword or not?

51. The Supreme Court in the case of Putchalapalli Naresh Reddy v. State of A.P., reported in (2014) 12 SCC 457 has held as under :

> 14.....The doctor has opined that this injury could have been caused by a blunt object. According to the learned counsel the witness did not say that the accused reversed the axe while hitting the deceased on the head as the injury shows, and therefore he is lying or was not present.
>
> 15. In the first place, we find that other witnesses have given the same deposition. It is possible that the statement of the witness [PW 3] is slightly inaccurate or the witness did not see properly which side of the axe was used. It is equally possible that the sharp edge of the axe is actually very blunt or it was reversed just before hitting the head. It is not possible to say what is the reason. That is however no reason for discarding the statement of the witness that A-1 Puchalapalli Parandhami Reddy hit the deceased with a battleaxe, as is obvious from the injury. Moreover, it is not possible to doubt the presence of this witness, who has himself been injured. Dr M.C. Narasimhulu, PW 13, Medical Officer, has stated in his evidence that on 25- 11-1996 at about 3.30 p.m., he examined this witness PW 3 P. Murali Reddy and found the following injuries: "(1) Diffused swelling with tenderness over middle ?rd and back of left forearm.
>
> (2) A lacerated injury skin-deep of about ½? over the back of head. Bleeding present with tenderness and swelling around."
>
> (Underline Supplied)

52. Further more, unless and until the medical evidence completely makes the ocular evidence improbable, the ocular evidence will have primacy over the medical evidence. The Supreme Court in the case of Bhajan Singh Vs. State of Haryana reported in (2011) 7 SCC 421 has held as under :

> 37. In State of U.P. v. Hari Chand this Court reiterated the aforementioned position of law: (SCC p. 545, para 13) "13. ... In any event unless the oral evidence is totally irreconcilable with the medical evidence, it has primacy."
>
> 38. Thus, the position of law in such a case of contradiction between medical and ocular evidence can be crystallised to the effect that though the ocular testimony of a witness has greater evidentiary value vis-à-vis medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. However, where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved. (Vide Abdul Sayeed.)

53. The Supreme Court in the case of Ramanand Yadav v. Prabhu Nath Jha, reported in (2003) 12 SCC 606 has held as under :

> 17. So far as the alleged variance between medical evidence and ocular evidence is concerned, it is trite law that oral evidence has to get primacy and medical evidence is basically opinionative. It is only when the medical evidence specifically rules out the injury as is claimed to have been inflicted as per the oral testimony, then only in a given case the court has to draw adverse inference.

54. The Supreme Court in the case of Shamsher Singh Vs. State of Haryana reported in (2002) 7 SCC 536 has held as under :

> 8. The authorities cited by the learned counsel for the appellant, on the point that when there is conflict between the medical evidence and the ocular evidence, the prosecution case should not be accepted, are of no help to him in this case. On deeper scrutiny of the evidence as a whole, it is not possible to throw out the prosecution case as either false or unreliable on the mere statement of the doctor that injuries found on the deceased could not be caused by a sharp-edged weapon. This statement cannot be taken in isolation and without reference to the other statement of the doctor that the injuries could be caused by Ext. P-9 axe to disbelieve the evidence of the eyewitnesses. From the evidence available in this case the possibility of the blunt head of the axe or the stick portion coming in contact with the head of the deceased cannot be ruled out. These decisions cited by the learned counsel for the appellant are related to those cases where the medical evidence and the version of the eyewitnesses could not be reconciled or that the account given by the eyewitnesses as to the incident was highly or patently improbable and totally inconsistent with the medical evidence having regard to the facts of those cases and as such their evidence could not be believed.

55. Thus, merely because Lacerated wounds were found on the skull of deceased Amar Singh, it cannot be said that there was material variance in the ocular and medical evidence, thereby completely ruling out the ocular evidence. Either the blade of the sword must have become blunt or the blunt part of the sword must have come in contact at the time of assault, therefore, the ocular evidence has to be given preference over the medical evidence. Thus, it is held that the evidence of witnesses cannot be discarded merely on the ground that although it was alleged that the Appellant Sodam had used a sword, but lacerated wound was found.

Whether there are material improvements in the evidence of Narayan (P.W.2), Asha (P.W.4) and Ashok (P.W.3).

56. It is submitted by the Counsel for the parties, that the witnesses have tried to improve their version, therefore, their testimony should be discarded. Narayan (P.W.2) has stated that the Appellant exhorted after the assault was made, whereas Ashok (P.W.3) has stated that She had exhorted while assault was going on and Asha (P.W.4) has stated that She exhorted at the beginning of the assault.

57. Considered the submissions made by the Counsel for the Appellants.

58. When an incident is witnessed by more than one witness, then there are bound to be some variances in their evidence. Furthermore, there is a tendency to embellish. Some times variance takes place due to different approach of looking at the things. Parrot like evidence clearly indicates that the witnesses may be tutored. If the witnesses are natural witnesses, then there is bound to be some variance in the evidence of the witnesses. Unless and until the variance is of such a nature, which makes it difficult to reconcile, minor variances in the evidence can not be given importance in order to dislodge the prosecution story. The entire incident took place in a quick succession. The witnesses were in their house. Asha (P.W.4) was on the roof of the house and She came down after hearing the abuses. A minor variance would not make the evidence of witnesses untrustworthy.

59. The Supreme Court in the case of Dharmendrasinh v. State of Gujarat, reported in (2002) 4 SCC 679 has held as under :

> 14. In our view the High Court taking into account the observations made in the decision referred to above came to the conclusion that otherwise reliable statement of the witness PW 3 Ashaben could not be discarded or discredited and even though there had been any fault or negligence in conducting the investigation, that too by itself, is not sufficient to dislodge the prosecution case as a whole. The chances of making some embellishment here and there in the statement are not ruled out even in cases of otherwise truthful and reliable witnesses. The concept of falsus in uno and falsus in omnibus has been discarded long ago. Therefore in such circumstances the court may have to scrutinize the matter a bit more closely and carefully to find out as to how far and to what extent the prosecution story as a whole is demolished or it is rendered unreliable. For this purpose the statement of the witnesses will have to be considered along with other corroborating evidence and independent circumstances so as to come to a conclusion that the contradiction in the statement of a witness could be considered as an embellishment by the witness under one or the other belief or notion or it is of a nature that the whole statement of the witness becomes untrustworthy affecting the prosecution case as a whole. The same principle will apply to a faulty or tainted investigation. Other relevant facts and circumstances cannot be totally ignored altogether. While appreciating the matter, one of the relevant considerations would be that chances of false implication are totally eliminated and the prosecution story as a whole rings true and inspires confidence. In such circumstances, despite the contradictions of the defective or tainted investigation, a conviction can safely be recorded.

60. The Supreme Court in the case of State of M.P. v. Dal Singh, reported in (2013) 14 SCC 159 has held as under :

> So far as the discrepancies, embellishments and improvements are concerned, in every criminal case the same are bound to occur for the reason that witnesses, owing to common errors in observation i.e. errors of memory due to lapse of time, or errors owing to mental disposition, such as feelings of shock or horror that existed at the time of occurrence. The court must form its opinion about the credibility of a witness,

> and record a finding with respect to whether his deposition inspires confidence. "Exaggeration per se does not render the evidence brittle. But it can be one of the factors against which the credibility of the prosecution story can be tested, when the entire evidence is put in a crucible to test the same on the touchstone of credibility." Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements, as the same may be elaborations of a statement made by the witness at an earlier stage. "Irrelevant details which do not in any way corrode the credibility of a witness cannot be labelled as omissions or contradictions." The omissions which amount to contradictions in material particulars i.e. which materially affect the trial, or the core of the case of the prosecution, render the testimony of the witness as liable to be discredited. Where such omission(s) amount to contradiction(s), raising serious doubts about the truthfulness of a witness, and other witnesses also make material improvements before the court in order to make their evidence acceptable, it cannot be said that it is safe to rely upon such evidence. (Vide A. Shankar v. State of Karnataka.)

61. The Supreme Court in the case of Bhagwan Jagannath Markad v. State of Maharashtra, reported in (2016) 10 SCC 537 has held as under :

> While appreciating the evidence of a witness, the court has to assess whether read as a whole, it is truthful. In doing so, the court has to keep in mind the deficiencies, drawbacks and infirmities to find out whether such discrepancies shake the truthfulness. Some discrepancies not touching the core of the case are not enough to reject the evidence as a whole. No true witness can escape from giving some discrepant details. Only when discrepancies are so incompatible as to affect the credibility of the version of a witness, the court may reject the evidence. Section 155 of the Evidence Act enables the doubt to impeach the credibility of the witness by proof of former inconsistent statement. Section 145 of the Evidence Act lays down the procedure for contradicting a witness by drawing his attention to the part of the previous statement which is to be used for contradiction. The former statement should have the effect of discrediting the present statement but merely because the latter statement is at variance to the former to some extent, it is not enough to be treated as a contradiction. It is not every discrepancy which affects the creditworthiness and the trustworthiness of a witness. There may at times be exaggeration or embellishment not affecting the credibility. The court has to sift the chaff from the grain and find out the truth. A statement may be partly rejected or partly accepted. Want of independent witnesses or unusual behaviour of witnesses of a crime is not enough to reject evidence. A witness being a close relative is not enough to reject his testimony if it is otherwise credible. A relation may not conceal the actual culprit. The evidence may be closely scrutinised to assess whether an innocent person is falsely implicated. Mechanical rejection of evidence even of a "partisan" or "interested" witness may lead to failure of justice. It is well known that principle "falsus in uno, falsus in omnibus" has no general acceptability. On the same evidence, some accused persons may be acquitted while others may be convicted,

> depending upon the nature of the offence. The court can differentiate the accused who is acquitted from those who are convicted. A witness may be untruthful in some aspects but the other part of the evidence may be worthy of acceptance. Discrepancies may arise due to error of observations, loss of memory due to lapse of time, mental disposition such as shock at the time of occurrence and as such the normal discrepancy does not affect the credibility of a witness.

Unlawful Assembly

62. It is submitted by the Counsel for the Appellants that the prosecution has failed to prove that the Appellant was the member of Unlawful Assembly or was sharing common object. There is no allegation of assault by the Appellant. She was allegedly exhorting the other co-accused persons which would not make her member of Unlawful Assembly.

63. Considered the submissions made by the Counsel for the Appellant.

64. According to the prosecution case, there was a dispute between the parties on the question of platform and ultimately, in a compromise, the co-accused Chhaviram had given a part of platform to the deceased. Thus, it is clear that the co-accused Chhaviram had encroached upon the platform. Further more, on the previous evening, a dispute arose between Narayan (P.W.2) and the Appellants and accordingly, a police report was also lodged by Narayan (P.W.2). On the next day, all the co-accused persons including the Appellant came together and forcibly took Gangaram to the road and assaulted Gangaram. It is submitted that according to the prosecution case, the deceased Gangaram was forcibly dragged from his house to the place of incident, and no dragging marks or blood trails were found upto the place of incident. But, if the evidence of the witnesses is considered, then it is clear that Gangaram was forcibly taken to the place of incident, which is only 15 ft.s from the house of the deceased. The deceased was sitting on the platform constructed in front of his house. Although the prosecution has not clarified the distance between platform and the place of incident, but looking to the fact that the distance between the house and the place of incident was only 15 ft.s therefore, the distance between the platform and the place of incident has to be less than that. Dragging a person and taking a person forcibly are two different things. Further, the incident took place just in front of the house of the deceased persons. Therefore, it is clear that all the accused persons came to the house of the deceased and were armed with sword, iron rod and lathi. The co-accused assaulted the deceased Gangaram and Amar Singh. The Appellant Bhaggo bai exhorted to kill the deceased persons and to finish the dispute for once and all. Thus, it is clear that all the Appellant and co-accused persons were the members of Unlawful Assembly and in furtherance of Unlawful Object, they assaulted the deceased persons. Further more, in order to find out as to whether a person was member of Unlawful Assembly or he was sharing common object or not, causing of injury is not sine qua non.

65. The Supreme Court in the case of Krishnappa v. State of Karnataka, reported in (2012) 11 SCC 237 has held as under :

> 20. It is now well-settled law that the provisions of Section 149 IPC will be attracted whenever any offence committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or when the members of that assembly knew that offence is likely to be committed in prosecution of that object, so that every person, who, at the time of committing of that offence is a member, will be also vicariously held liable and guilty of that offence. Section 149 IPC creates a constructive or vicarious liability of the members of the unlawful assembly for the unlawful acts committed pursuant to the common object by any other member of that assembly. This principle ropes in every member of the assembly to be guilty of an offence where that offence is committed by any member of that assembly in prosecution of common object of that assembly, or such members or assembly knew that offence is likely to be committed in prosecution of that object. (Lalji v. State of U.P., Allauddin Mian v. State of Bihar, Ranbir Yadav v. State of Bihar.)
>
> 21. The factum of causing injury or not causing injury would not be relevant, where the accused is sought to be roped in with the aid of Section 149 IPC. The relevant question to be examined by the court is whether the accused was a member of an unlawful assembly and not whether he actually took active part in the crime or not. (State of U.P. v. Kishan Chand7 and Deo Narain v. State of U.P.)

66. The Supreme Court in the case of Daya Kishan v. State of Haryana, reported in (2010) 5 SCC 81 has held as under :

> 27. There are two essential ingredients of Section 149 viz. (1) commission of an offence by any member of an unlawful assembly, and (2) such offence must have been committed in prosecution of the common object of that assembly or must be such as the members of that assembly knew to be likely to be committed. Once the court finds that these two ingredients are fulfilled, every person, who at the time of committing that offence was a member of the assembly has to be held guilty of that offence. After such a finding, it would not be open to the court to see as to who actually did the offensive act nor would it be open to the court to require the prosecution to prove which of the members did which of the offensive acts. Whenever a court convicts any person 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 that in pursuance of such common object the offence was committed. There is no manner of doubt that before recording the conviction under Section 149 IPC, the essential ingredients of Section 149 IPC must be established.

67. The Supreme Court in the case of Vinubhai Ranchhodbhai Patel v. Rajivbhai Dudabhai Patel, reported in (2018) 7 SCC 743 has held as under :

> 24. To understand the true scope and amplitude of Section 149 IPC it is necessary to examine the scheme of Chapter VIII (Sections 141 to 160) IPC which is titled "Of the

offences against the public tranquility". Sections 141 to 158 deal with offences committed collectively by a group of 5 or more individuals.

25. Section 141 IPC declares an assembly of five or more persons to be an "unlawful assembly" if the common object of such assembly is to achieve any one of the five objects enumerated in the said section. One of the enumerated objects is to commit any offence. "The words falling under Section 141, clause third "or other offence" cannot be restricted to mean only minor offences of trespass or mischief. These words cover all offences falling under any of the provisions of the Penal Code or any other law." The mere assembly of 5 or more persons with such legally impermissible object itself constitutes the offence of unlawful assembly punishable under Section 143 IPC. It is not necessary that any overt act is required to be committed by such an assembly to be punished under Section 143.

26. If force or violence is used by an unlawful assembly or any member thereof in prosecution of the common objective of such assembly, every member of such assembly is declared under Section 146 to be guilty of the offence of rioting punishable with two years' imprisonment under Section 147. To constitute the offence of rioting under Section 146, the use of force or violence need not necessarily result in the achievement of the common object. In other words, the employment of force or violence need not result in the commission of a crime or the achievement of any one of the five enumerated common objects under Section 141. Section 148 declares that rioting armed with deadly weapons is a distinct offence punishable with the longer period of imprisonment (three years). There is a distinction between the offences under Sections 146 and 148. To constitute an offence under Section 146, the members of the "unlawful assembly" need not carry weapons. But to constitute an offence under Section 148, a person must be a member of an unlawful assembly, such assembly is also guilty of the offence of rioting under Section 146 and the person charged with an offence under Section 148 must also be armed with a deadly weapon.

28. Section 149 propounds a vicarious liability in two contingencies by declaring that (i) if a member of an unlawful assembly commits an offence in prosecution of the common object of that assembly, then every member of such unlawful assembly is guilty of the offence committed by the other members of the unlawful assembly, and (ii) even in cases where all the members of the unlawful assembly do not share the same common object to commit a particular offence, if they had the knowledge of the fact that some of the other members of the assembly are likely to commit that particular offence in prosecution of the common object.

29. The scope of Section 149 IPC was enunciated by this Court in Masalti: (AIR p. 211, para 17) "17. ... The crucial question to determine in such a case is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects as specified by Section 141. While determining this question, it becomes relevant to consider whether the assembly consisted of some persons who were merely passive witnesses and had joined the assembly as a matter of idle curiosity without intending to entertain the common object of the assembly. It is in that context that the observations made by this Court in Baladin assume significance; otherwise, in law, it would not be correct to say that before a person is held to be a member of an unlawful

assembly, it must be shown that he had committed some illegal overt act or had been guilty of some illegal omission in pursuance of the common object of the assembly. In fact, Section 149 makes it clear that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence; and that emphatically brings out the principle that the punishment prescribed by Section 149 is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly."

30. It can be seen from the above, Sections 141, 146 and 148 create distinct offences. Section 149 only creates a vicarious liability. However, Sections 146, 148 and 149 contain certain legislative declarations based on the doctrine of vicarious liability. The doctrine is well known in civil law especially in the branch of torts, but is applied very sparingly in criminal law only when there is a clear legislative command. To be liable for punishment under any one of the provisions, the fundamental requirement is the existence of an unlawful assembly as defined under Section 141 made punishable under Section 143 IPC.

31. The concept of an unlawful assembly as can be seen from Section 141 has two elements:

(i) The assembly should consist of at least five persons; and

(ii) They should have a common object to commit an offence or achieve any one of the objects enumerated therein.

32. For recording a conclusion, that a person is (i) guilty of any one of the offences under Sections 143, 146 or 148 or (ii) vicariously liable under Section 149 for some other offence, it must first be proved that such person is a member of an "unlawful assembly" consisting of not less than five persons irrespective of the fact whether the identity of each one of the 5 persons is proved or not. If that fact is proved, the next step of inquiry is whether the common object of the unlawful assembly is one of the 5 enumerated objects specified under Section 141 IPC.

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.

34. For mulcting liability on the members of an unlawful assembly under Section 149, it is not necessary that every member of the unlawful assembly should commit the offence in prosecution of the common object of the assembly. Mere knowledge of the likelihood of commission of such an offence by the members of the assembly is sufficient. For example, if five or more members carrying AK 47 rifles collectively attack a victim and cause his death by gunshot injuries, the fact that one or two of the members of the assembly did not in fact fire their weapons does not mean that they did not have the knowledge of the fact that the offence of murder is likely to be committed.

35. The identification of the common object essentially requires an assessment of the state of mind of the members of the unlawful assembly. Proof of such mental condition is normally established by inferential logic. If a large number of people gather at a public place at the dead of night armed with deadly weapons like axes and firearms and attack another person or group of persons, any member of the attacking group would have to be a moron in intelligence if he did not know murder would be a likely consequence.

68. If the facts of the present case are considered, then it is clear that there was some dispute between the parties, and just one day prior to the date of incident, some dispute arose on the question of fetching water from the water tanker and a police complaint was also made by Narayan (P.W.2). The incident took place in front of the new house of the deceased. All the co-accused persons and Appellant are alleged to have participated in the incident. As many as 15 injuries were found on the dead body of Amar Singh, whereas two incised wounds were caused on the head of Gangaram. Further Section 142 of IPC makes the situation very clear. Section 142 of IPC reads as under :

> 142. Being member of unlawful assembly.--Whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly.

69. Hemant (dead) and Thakurdas are alleged to have assaulted on the head of Gangaram by Sword and thereafter, Amar Singh was assaulted by other Appellants. If the common object was not to kill the deceased persons, then the Appellant should have withdrawn herself after the assault was made on Gangaram. The participation of each and every co- accused including Appellant clearly indicates that not only She was the member of Unlawful Assembly but was also sharing common object.

70. No other argument is advanced by the Counsel for the parties.

71. In view of discussion, it is held that the prosecution has established the guilt of the Appellant beyond reasonable doubt. Accordingly, her conviction under Section 148, 302/149 (On two counts) and 324/149 of IPC is hereby upheld.

72. So far as the question of sentence is concerned, the minimum sentence for offence under Section 302 of IPC is Life Imprisonment. Therefore, the sentence awarded by the Trial Court doesnot call for any interference.

73. Ex-Consequenti, the judgment and sentence dated 10/10/2014 passed by First Additional Sessions Judge, Dabra, District Gwalior in ST No.87/2010 is hereby affirmed.

74. The Appellant is on bail. Her bail bonds are hereby cancelled. She is directed to immediately surrender before the Trial Court on or before 30th of May 2022 for undergoing the remaining jail sentence. In case if Appellant fails to surrender before the Trial Court, then the Trial Court shall be free to take coercive steps for ensuring her appearance.

75. Let a copy of this judgment be provided to the Appellant, free of cost.

76. The record of the Trial Court be sent back along with the copy of this judgment for necessary information and compliance.

77. The Appeal fails and is hereby Dismissed.

(G.S. AHLUWALIA)
JUDGE

(RAJEEV KUMAR SHRIVASTAVA)
JUDGE

Arun*

ARUN KUMAR MISHRA
2022.05.13 17:08:04 +05'30'