PETITIONER:
KARTAR SINGH

Vs.

RESPONDENT:
STATE OF PUNJAB

DATE OF JUDGMENT:
26/04/1961

BENCH:
DAYAL, RAGHUBAR
BENCH:
DAYAL, RAGHUBAR
SUBBARAO, K.
MUDHOLKAR, J.R.

CITATION:
1961 AIR 1787 1962 SCR (2) 395
CITATOR INFO :
E 1963 SC 174 (12)
F 1974 SC 323 (7,9)
RF 1975 SC1917 (14)
R 1976 SC1084 (12)
R 1976 SC2207 (51)

ACT:
Unlawful Assembly-Conviction of three of thirteen alleged assailants-Acquittal of the rest-Legality of conviction-Indian Penal Code, 1860 (Act XLV of 1860), ss. 149, 302, 307, 34.

HEADNOTE:
The appellant was tried along with two others under ss. 302 and 307 read with s. 149 of the Indian Penal Code. The prosecution case against them was that they along with ten others had taken part in a free fight resulting in the death of one belonging to the other side. The Sessions judge held that the accused were accompanied by nine or ten others but that it was not proved who they were. He, therefore, gave them the benefit of the doubt and acquitted them. The High Court on appeal affirmed that decision. It was urged on behalf of the appellant in this Court that (1) the offence of unlawful assembly had not been made out and (2) that in a free fight each participant is liable for his own act and the conviction of the appellant, who had caused no injury to the deceased, was untenable under ss. 302 and 307 of the Indian Penal Code.
Held, that the contentions must fail.
It is only when the number of the alleged assailants is definite and all of them are named and the number of persons proved to have taken part in the incident is less than five that it can be said that there was no unlawful assembly. The acquittal of the remaining named persons must mean that they were not in the incident. The fact that they were named, excludes the possibility of other persons to be in the appellant's party and especially when there can be no occasion to think that the witnesses naming all the accused could have committed mistakes in recognising them.
Since this was not the position in the instant case, it could not be said that the courts below were wrong in

holding that there was unlawful assembly.
Dalip Singh v. State of Punjab, [1954] S.C.R. 145, referred to.
It is not correct to say that in a premeditated free fight each is liable for his individual act. Where the accused party prepare for a free fight and can, therefore, have no right of private defence, their intention to fight and cause injuries to the other party amounts to a common object so as to constitute unlawful assembly.
Gore Lal v. State of U. P., Cr. A. No. 129 of 1959 dated 15-12-1960, referred to.
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Even assuming that in the instant case the finding that there were more than five persons in the appeLlant's party was wrong, the conviction of the appellant would be maintainable under s. 302 and s. 307 read with S. 34 of the Indian Penal Code.

JUDGMENT:
CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 146 of 1959.
Appeal by special leave from the judgment and order dated January 5, 1959, of the Punjab High Court in Criminal Appeal No. 238 of 1958.
J. N. Kaushal and Naunit Lal, for the appellant.
B. K. Khanna, R. H. Dhebar and D. Gupta, for respondent.
1961. April 26. The Judgment of the Court was delivered by RAGHUBAR DAYAL, J. -This appeal, by special leave, is against the judgment of the Punjab High Court dismissing the appellant's appeal and confirming his conviction under s. 302 and s. 307 read with s. 149, Indian Penal Code.
The case for the prosecution was that the appellant and twelve other persons who were tried with him, had, on account of a dispute about the possession of a plot of land, assaulted Darshan, deceased, and his companions, when they were returning from their fields and that Darshan Singh and his companions also struck the appellant's party in self-defence. In the incident, Darshan and Nand Lal received injuries on the one side while Daya Ram, Hamela and Kartar Singh the appellant, received injuries on the appellant's side. Darshan Singh died on account of the injuries received.
Daya Ram stated that when be, Kartar Singh, Hamela and a few other persons were going near about their field, Darshan, Nand Lal and others, who happened to be sitting on a well, challenged them and Nand Lal remarked that he would not let him (Daya Ram) escape. At this fight ensued between both the parties in which injuries were inflicted on each, other. Daya Ram said that he did not know who speared Darshan, deceased.
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Kartar Singh stated that a member of Nand Lal's party caused a spear blow in his abdomen and that he then ran away. He states that he did not cause any injury to anybody.
Hamela stated that Darshan and others assaulted his party when they were going to plough the land in dispute and that they caused them, injuries in selfdefence.
The learned Sessions Judge, after noting the allegations of the parties and the admitted facts about the dispute with respect to the plot of land, said:

> "It is also not denied that the parties in this case instead of taking resort to law wanted to force the issue by the force of arms

> and for that purpose both the parties collected number of persons from Seel and other villages who were armed with deadly weapons such as spears, gandasis and sticks and in order to decide the issue had a pitched fight which was pre-concerted. The Public Prosecutor therefore maintained that under these circumstances the question of right of self-defence to any party does not arise."
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> The learned Sessions Judge also said:
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> "This proposition of law has not been challenged by the defence. As observed above, in this case, both the parties, in order to assert their rights, had a free fight which was pre-concerted with the set purpose of forcing the issue mentioned above."
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> He further said:
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> "The only point therefore which requires determination in this case is whether all or only some of the accused did participate in this assault,"

and came to the conclusion that three accused, viz., Daya Ram, Hamela and Kartar Singh, who had admitted their presence in the incident and had received injuries, were proved to have taken part in that free fight, and that the participation of the other ten accused in the case was not established beyond doubt. He, however, said:

"Although I feel that Daya Ram, Hamela and Kartara accused were accompanied by at least 9 or

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10 persons, but it is difficult to say who those 9 or 10 persons were."

He therefore acquitted those ten persons giving them the benefit of doubt.

The three convicted persons preferred an appeal to the High Court.

Two questions were urged at the hearing. One was that when there was no evidence that there were more than five persons in the fight on the side of the appellants, the learned Sessions Judge could not, in law, record a conviction under s. 302 read with s. 149, he having acquitted the other ten persons specifically named by the P. Ws., as being the companions of the appellants. The other point was that the other party was the aggressor.

The High Court, on the first point, said.:

> "The circumstances of this case leave no manner of doubt in our mind that there were a large number of persons on the side of the appellants and this number must have exceeded five, and was more or less near the number of persons who were actually accused in the case."
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> On the second point, it said:
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> "We have no manner of doubt in our mind that there is no question of right of private defence and it is a clear case of a free fight between both the parties. It would not therefore be of any importance as to who gave the first lalkara and who started the fight."

It further held that the appellant's party formed an unlawful assembly and its common object was to cause injuries to the opposite side which could result in the ordinary course of nature in death and, consequently, the conviction of the three appellants, whose participation

could not be doubted, under ss. 302 and 307 read with s. 149, Indian Penal Code, was well-based and must be upheld.
Two points have been urged in this Court: (i) When ten out of the thirteen persons charged with the offence have been acquitted, the remaining three persons cannot constitute an unlawful assembly; (ii) in a case of free fight, each participant is liable for his own
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individual act and as the appellant is not proved to have actually caused any injury to Darshan or Nand Lal, he could not be convicted of the offences under ss. 302 and 307.
If the Courts below could legally find that the actual number of members in the appellant's party were more than five, the appellant's party will constitute an unlawful assembly even when only three persons have been convicted. It is only when the number of the alleged assailants is definite and all of them are named, and the number of persons found to be proved to have taken part in the incident is less than five, that it cannot be held that the assailants' party must have consisted of five or more persons. The acquittal of the remaining named persons must mean that they were not in the incident. The fact that they were named, excludes the possibility of other persons to be in the appellant's party and especially when there be no occasion to think that the witnesses naming all the accused could have committed mistakes in recognizing them. This is clear from the observations in Dalip Singh v. State of Punjab (1) of this
Court:

> "Now mistaken identity has never been suggested. The accused are ail men of the same village and the eye-witnesses know them by name. The murder took place in daylight and within a few feet of the two eye-witnesses."

The same cannot be said in this case. The witnesses are from village Seel. A good number of the accused are from other villages.
Only Nand Lal and Chetan Singh, P. Ws. 22 and 23, named all the thirteen accused. The other prosecution witnesses, viz., Prem Singh, P.W. 15, Puran, P. W. 16, Jethu, P. W. 17 and Norata, P. W. 18, did not name all the thirteen accused. None of them named more than seven accused and all of them said that there were thirteen persons in the appellant's party. In this state of evidence, it is not possible to say that the Courts below could not have come to the conclusion that there were more than five persons in the appellant's party.
(1) [1954].C.R. 145,150.
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It follows therefore that the finding of the Courts below that the appellant's party formed an unlawful assembly and that the appellant is constructively liable for the offences under s. 302 and s. 307, Indian Penal Code, in view of s. 149, is correct.
The second contention that in a free fight each is liable for an individual act cannot be accepted in view of the decision of this Court in Gore Lal v. State of U. P. (1). This Court said in that case-

> "In any event, on the finding of the Court of first instance and of the High Court that both the parties had prepared themselves for a free fight and had armed themselves for that purpose, the question as to who attacks and who defends is wholly immaterial,"

and confirmed the conviction under s. 307 read with s. 149,

Indian Penal Code. It may, however, be noted that it does not appear to have been urged in that case that each appellant could be convicted for the individual act committed by him. When it is held that the appellant's party was prepared for a fight and to have had no right of private defence, it must follow that their intention to fight and cause injuries to the other party amounted to their having a common object to commit an offence and therefore constituted them into an unlawful assembly. The injuries they caused to the other party are caused in furtherance of their common object. There is then no good reason why they be not held liable, constructively, for the acts of the other persons of the unlawful assembly in circumstances which makes s. 149, Indian Penal Code, applicable to them.

Even if the finding that there were more than five persons in the appellant's party be wrong, we are of opinion that the facts found that the appellant and his companions who were convicted had gone from the village armed and determined to fight, amply justified the conclusion that they had the common intention to attack the other party and to cause such injuries which may result in death. Darshan had two incised wounds and one punctured wound. Nand Lal

(1) Criminal Appeal No. 29 of 1950, decided on December 15, 1960.

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had two incised wounds and one punctured wound and two abrasions. The mere fact that Kartar Singh was not connected with the dispute about the plot of land is not sufficient to hold that he could not have formed a common intention with the others, when he went with them armed. The conviction under s. 302 and s. 307 read with s. 149 can be converted into one under s. 302 and s. 307 read with s. 34, Indian Penal Code.

We therefore see no force in this appeal and accordingly dismiss it.

Appeal dismissed.