Reportable

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS.1709-1710 OF 2019
(Arising out of Special Leave Petition (Crl.)Nos.2497-2498 of 2019)

STATE OF MADHYA PRADESH …Appellant

VERSUS

KILLU @ KAILASH AND ORS. …Respondents

**J U D G M E N T**

**Uday Umesh Lalit, J.**

1. Leave granted.

2. These Appeals question the judgment and order dated 29.06.2018 passed by the High Court of Madhya Pradesh at Jabalpur in Criminal Appeal Nos.2676 of 2008 and 158 of 2009.

3. The basic facts as stated in the judgment under appeal are as under:-

> "3. Prosecution story, in brief is that, accused/appellant No.4 Khushiram in Cr. Appeal No.2678 of 2008, who is uncle [mousia] of the son of the deceased, had some enmity with Balaprasad Pathak [since deceased]. He along with other accused persons entered in the house of Balaprasad Pathak in the mid night [2 O' clock] of 23.05.2005. Deceased was sleeping with his family members. Accused/appellants [in Cr.Appeal No.2678/2008] namely; Khushiram and Himmu @ Hemchand were armed with axe, appellant Devendra was armed with Ballam and other two accused namely Killu @ Kailash and Kailash Nayak were armed with lathi. Two accused persons namely; Khushiram and Himmu @ Hemchand [appellants No.2 and 4 in Cr. Appeal No.2676/2008] inflicted injuries by axe on the person of deceased. Allegation against other accused persons is of exhortation. Deceased died on the spot. Report of the incident was lodged by (PW-5) Rameshwar Pathak. Police conducted investigation and filed charge-sheet. During trial, appellants abjured their guilt and pleaded innocence. …"

4. In support of its case, the prosecution relied upon the testimony of PW3-Prabha Rani, wife of the deceased, PW4-Devendra Kumar, son of the deceased and PW5-Rameshwar Pathak, a relative of the deceased, who had lodged the First Information Report ('the FIR', for short). It was narrated in the FIR that after having received information about the assault, the informant had gone to the house of the deceased where PW3 narrated the incident to him, based on which the reporting was made by the informant. The medical evidence was unfolded through the testimony of PW2-Dr.

R.K. Bhardwaj, who had conducted the post-mortem. He had found following injuries on the person of the deceased:-

> "(i) Incised wound over left anterior part of scalp 4"x1/2" underlaying bone and brain matter cut inhacranial cavily pilled with blood.
>
> (ii) Incised wound 5" x 1" x 2 1/2" uppermost part of chest and adjoining anterior part of neck slightly left side obliquely placed undergone and blood vessels cut."

According to him, the injuries were ante-mortem and the deceased had died as a result of those injuries.

5. In due course, five accused were tried in connection with the murder of said Balaprasad Pathak for the offence punishable under Section 302 read with Section 149 IPC in Sessions Trial No.173 of 2005 before the First Additional Sessions Judge, Damoh, Madhya Pradesh. After considering the evidence on record, the Trial Court concluded that all the five accused were members of an unlawful assembly and had entered the house of the deceased on the fateful night with the common object of causing death of the deceased and as such, they were guilty of the offence punishable under Section 302 read with Section 149 IPC. Holding them guilty of the aforesaid offence, by its judgment dated 19.12.2001, the Trial Court sentenced them to suffer life imprisonment and to pay fine in the sum

of Rs.500/- each, in default whereof, each of the convicts was to undergo further rigorous imprisonment of three months. The view so taken by the Trial Court was challenged by way of Criminal Appeal No.2676 of 2008 by four accused while Criminal Appeal No.158 of 2009 was filed by accused Kailash Nayak.

6. Insofar as accused Himmu @ Hemchand and Khushiram, who were armed with sharp cutting weapons, the High Court found as under:-

> "16. Appellants No.2 and 4 namely Himmu @ Hemchand and Khushiram were armed with axe, i.e. deadly weapons. They inflicted blows on the vital part of deceased as a result of which, deceased died on the spot. Evidence of causing injury by axe is against the appellants Himmu @ Hemchand and Khushiram. Hence, in our opinion, the Trial Court has rightly held the appellants guilty for commission of offence of murder. Other three accused persons namely; Killy @ Kailash and Devendra (appellants No. 1 and 3 in Cr. A No. 2676/2008) and appellant Kailash Nayak (appellant in Cr.A.No. 158/2009) have been convicted with the aid of Section 149 of IPC. Allegation against them is that they entered in the house and they were armed with lathis and Ballam. From the evidence, this fact has also been proved that deceased was facing trial of Section 302 of IPC because he had killed one Rammilan Pathak."

7. The High Court further found that the other three accused were stated to be armed with lathis and Ballam but there were no injuries which could be associated with lathis and Ballam. The High Court, therefore, gave benefit to said three accused as under:-

"21. From the aforesaid quoted judgment, the principle of law is that "the member of unlawful assembly may have committed for the offence caused by another accused, if he has knowledge about the act committed by the main accused". In the present case, evidence is that the accused entered the house of deceased and thereafter, two accused had inflicted blow by axe. The other accused persons did not give any blow on the deceased. It is alleged that they were present on the spot. There was previous enmity between the accused persons and the deceased, he was also facing criminal trial. Hence, it cannot be ruled out that other three persons, who had not inflicted any injury may have been named along with the other accused persons.

22. Looking to the evidence on record, in our opinion, the conviction of three appellants namely; Killu @ Kailash, Devendra and Kailash Nayak, who were armed with lathis and Ballam and did not inflict any blow with the aid of Section 149 of IPC, is not proper. There is lack of sufficient evidence to prove them guilty for commission of offence under Section 149 of IPC beyond reasonable doubt. Hence, the appeal filed by appellant Kailash Nayak (Cr. Appeal No. 158/2009) is hereby allowed.

23. Cr. Appeal No.2676/2008, filed by four accused/ appellants is partly allowed. Appeal filed by appellants No. 2 and 4 namely; Himmu @ Hemchand and Khushiram is hereby dismissed. They are convicted for commission of offence punishable under Section 302 of IPC and awarded a sentence of life. Appellant No.2 Himmu @ Hemchand is on bail. His bail bonds are hereby cancelled. He is directed to surrender before the Trial Court for facing remaining jail sentence.

24. Appeal filed by the appellants No.1 and 3 namely; Killu @ Kailash and Devendra [Cr.Appeal No.2676/2008] is hereby allowed. They are acquitted from the charge of Section 302/149 of IPC. The

> judgment passed by the trial Court in regard to appellants No.1 and 3 namely; Killu @ Kailash and Devendra, is hereby set aside. Appellants Killu @ Kailash, Devendra and Kailash Nayak, are on bail, their bail bonds are hereby discharged."

8. The State, being aggrieved by the order of acquittal of accused Killu @ Kailash, Devendra and Kailash Nayak, has preferred the instant appeals. We heard Mr. Varun K. Chopra, Deputy Advocate General (Madhya Pradesh), in support of the Appeal and Mr. S.K. Shrivastava and Mr. R.R. Rajesh, learned Advocates who appeared for three acquitted accused.

9. Since the instant case depends upon the extent and application of the principle of vicarious liability under Section 149 of the IPC, at the outset, we may consider the leading case of ***Masalti vs. State of U.P.***[1] The submission of the appellants therein was that mere presence in an assembly would not make a person member of an unlawful assembly unless it was shown that he had done something or omitted to do something which would make him a member of unlawful assembly. Reliance was placed by said appellants on the earlier judgment of this Court in ***Baladin vs. State of Uttar Pradesh***[2] . The issue was dealt with as under:-

> "… … The observation of which Mr. Sawhney relies, prima facie, does seem to support his contention; but,

1 (1964)8 SCR 133
2 AIR 1956 SC 181

with respect, we ought to add that the said observation cannot be read as laying down a general proposition of law that unless an overt act is proved against a person who is alleged to be a member of an unlawful assembly, it cannot be said that he is a member of such an unlawful assembly. In appreciating the effect of the relevant observation on which Mr. Sawhney has built his argument, we must bear in mind the facts which were found in that case. It appears that in the case of *Baladin*[2], the members of the family of the appellants and other residents of the village had assembled together; some of them shared the common object of the unlawful assembly, while others were merely passive witnesses. Dealing with such an assembly, this Court observed that the presence of a person in an assembly of that kind would not necessarily show that he was a member of an unlawful assembly. What has to be proved against a person who is alleged to be a member of an unlawful assembly is that he was one of the persons constituting the assembly ,and he entertained along with the other members of the assembly the common object as defined by s.141, I.P.C. Section 142 provides that 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. In other words, an assembly of five or more persons actuated by, and entertaining one or more of the common objects specified by the five clauses of s. 141, is an unlawful assembly. 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 s.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 the case of *Baladin*[2] 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, s.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 s.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. Therefore, we are satisfied that the observations made in the case of *Baladin*[2] must be read in the context of the special facts of that case and cannot be treated as laying down an unqualified proposition of law such as Mr. Sawhney suggests."
>
> (underlined by us)

10. After considering the cases on the point including ***Masalti***[1], the order of acquittal passed by the High Court was set aside by this Court in ***State of Maharashtra vs. Ramlal Devappa Rathod and others***[3]. Relevant paragraphs of the decision are:-

> **"22.** We may at this stage consider the law of vicarious liability as stipulated in Section 149 IPC. The key expressions in Section 149 IPC are:
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> (*a*) if an offence is committed by any member of an unlawful assembly;

3 (2015) 15 SCC 77

> (*b*) in prosecution of common object of that assembly;
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> (*c*) which the members of that assembly knew to be likely to be committed in prosecution of that object;
>
> (*d*) every person who is a member of the same assembly is guilty of the offence.

This section makes both the categories of persons, those who committed the offence as also those who were members of the same assembly liable for the offences under Section 149 IPC, if other requirements of the section are satisfied. That is to say, if an offence is committed by *any person* of an unlawful assembly, which the members of that assembly knew to be likely to be committed, *every member* of that assembly is guilty of the offence. The law is clear that *membership* of unlawful assembly is sufficient to hold such members vicariously liable.

**23.** It would be useful to refer to certain decisions of this Court. In *State of U.P.* v. *Kishanpal*[4] it was observed: (SCC p. 93, para 47)

> "*47*. … It is well settled that once a membership of an unlawful assembly is established it is not incumbent on the prosecution to establish whether any specific overt act has been assigned to any accused. In other words, mere membership of the unlawful assembly is sufficient and every member of an unlawful assembly is vicariously liable for the acts done by others either in the prosecution of the common object of the unlawful assembly or such which the members of the unlawful assembly knew were likely to be committed."

Further, in *Amerika Rai* v. *State of Bihar*[5] it was observed as under: (SCC p. 682, para 13)

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4 (2008) 16 SCC 73
5 (2011) 4 SCC 677

> "*13*. The law of vicarious liability under Section 149 IPC is crystal clear that even the presence in the unlawful assembly, but with an active mind, to achieve the common object makes such a person vicariously liable for the acts of the unlawful assembly."
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> **24.** The liability of those members of the unlawful assembly who actually committed the offence would depend upon the nature and acceptability of the evidence on record. The difficulty may however arise, while considering the liability and extent of culpability of those who may not have actually committed the offence but were members of that assembly. What binds them and makes them vicariously liable is the common object in prosecution of which the offence was committed by other members of the unlawful assembly. Existence of common object can be ascertained from the attending facts and circumstances. For example, if more than five persons storm into the house of the victim where only few of them are armed while the others are not and the armed persons open an assault, even unarmed persons are vicariously liable for the acts committed by those armed persons. In such a situation it may not be difficult to ascertain the existence of common object as all the persons had stormed into the house of the victim and it could be assessed with certainty that all were guided by the common object, making every one of them liable. Thus when the persons forming the assembly are shown to be having same interest in pursuance of which some of them come armed, while others may not be so armed, such unarmed persons if they share the same common object, are liable for the acts committed by the armed persons."

11. If we now consider the facts in the present matter, the case lies in a short compass. The case of the prosecution that five accused had entered

the house of the deceased on the fateful night is accepted. It is also found that each one of them was separately armed and two of them were armed with sharp cutting weapons. As far as other three accused i.e. the present respondents were concerned, the first one had a Ballam while the other two were having lathis. It is true that the deceased had only two injuries on the person which were the cause of death. To the extent that the persons who were armed with sharp cutting weapons were found responsible for causing the death is also not disputed or challenged. The evidence on record fully establishes that the present respondents had also accompanied those two accused persons who were found responsible for the crime and all of them had entered the house of the deceased around midnight. It is crucial to note that the incident did not happen in any public place where the presence of a non-participating accused could, at times, be labelled as that of an innocent bystander. The role played by each one of them was clear and specific. They had stormed into the house in the dead of the night.

12. On the strength of the principles accepted and laid down in the cases as aforementioned, their liability is fully established. Merely because the other three accused persons i.e. the present respondents had not used their weapons does not absolve them of the responsibility and vicarious liability on which the very idea of charge under Section 149 IPC is

founded. For the application of the principle of *vicarious liability* under Section 149 IPC what is material to establish is that the persons concerned were members of an unlawful assembly, the common object of which was to commit a particular crime. The fact that five persons were separately armed and had entered the house of the deceased during night time is clearly indicative that each one of them was a member of that unlawful assembly, the object of which was to commit the crime with which they came to be charged in question. The High Court was not justified in granting benefit to those three accused.

13. The presence of the respondents in the house of the deceased; the fact that they were armed; the fact that all of them had entered the house around midnight and further fact that two out of those five accused used their deadly weapons to cause the death of the deceased was sufficient to attract the principles of *vicarious liability* under Section 149 IPC.

14. The High Court was not justified in entertaining a doubt that it could not be ruled out that the respondents were merely named along with the other accused persons. There was absolutely no room for such doubt. The testimony of the eye witnesses namely the wife and the son, who were occupants of the same house, was quite clear and cogent.

15. We have, therefore, no hesitation in allowing these Appeals. We, thus, set aside the view taken by the High Court insofar as the present respondents namely Killu @ Kailash, Devendra and Kailash Nayak are concerned. We set aside their acquittal as recorded by the High Court and restore the judgment and order of conviction passed by the Trial Court in Sessions Trial No. 173 of 2005 against said respondents.

16. The respondents shall surrender within three weeks, failing which the concerned police shall immediately arrest them and send them to custody to undergo the sentence imposed upon them. A copy of this Judgment shall be sent to the concerned Chief Judicial Magistrate and the Police Station for immediate compliance.

……J.
[Uday Umesh Lalit]

……J.
[Indu Malhotra]

New Delhi;
November 19, 2019.