

Nitya Nand
v.
State of U.P. & Anr.
(Criminal Appeal No. 1348 of 2014)
04 September 2024
[Abhay S. Oka and Ujjal Bhuyan,* JJ.]

Issue for Consideration

Whether the prosecution could prove the charges against the appellant under Sections 148 and 302/149 IPC beyond reasonable doubt. Whether the appellant was a part of the unlawful assembly and if he actually took part in the crime or not.

Headnotes[†]

Penal Code, 1860 – ss.149, 148 – Appellant alongwith others was convicted for the murder of his Uncle – Whether the appellant was a part of the unlawful assembly – Plea of the appellant that both the courts below erred in convicting him as the allegation against him was that he was carrying a country- made pistol, however, neither were there any firearm injuries nor recovery of any country-made pistol or empty cartridge:

Held: Appellant was roped in by virtue of ss.148 and 149 – PW-1 and PW-2 (sons of the deceased) were eyewitnesses – Appellant was carrying a country-made pistol in his hand – Neither PW-1 nor PW-2 stated that the appellant had fired at them or at the deceased – The role attributed to the appellant was helping the other accused persons and himself flee from the crime scene by frightening the people including PW-1 and PW-2 when they were about to reach the crime scene, by firing from his country-made pistol into the air – Factum of causing injury or not causing injury would not be relevant when an accused is roped in with the aid of s.149 – Further, though, neither any country-made pistol nor any cartridge, empty or otherwise, was recovered however, as the appellant was roped in with the aid of s.149 IPC, no overt act is required to be imputed to a particular person when the charge is u/s.149; the presence of the accused as part of the

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unlawful assembly is sufficient for conviction – Appellant was a part of the unlawful assembly which had the common object of eliminating the deceased by criminal force – Therefore, being a member of the unlawful assembly, he was also guilty of the murder committed in prosecution of the common object – Charges against the appellant u/ss.148 and 302/149 proved beyond reasonable doubt. [Paras 22, 24, 25, 30.1, 32]

Penal Code, 1860 – s.149 – Liability under – Discussed.

Case Law Cited

Krishnappa v. State of Karnataka [\[2012\] 6 SCR 1068](#) : (2012) 11 SCC 237; *Vinubhai Ranchhodhbhai Patel v. Rajivbhai Dudabhai Patel* [\[2018\] 6 SCR 1050](#) : (2018) 7 SCC 743; *Yunis alias Kariya Vs. State of M.P.* (2003) 1 SCC 425 – relied on.

List of Acts

Penal Code, 1860.

List of Keywords

Unlawful assembly; Part of the unlawful assembly; Member of the unlawful assembly; Common object; In prosecution of the common object; Murder; Charges proved beyond reasonable doubt; Firearm injuries; Country-made pistol; Cartridge, Empty cartridge; Lacunae in the prosecution; Scribe not examined; Non-recovery of country-made pistol; Overt act; Property dispute; Old enmity.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 1348 of 2014

From the Judgment and Order dated 27.09.2012 of the High Court of Judicature at Allahabad in CRLA No. 340 of 1997

Appearances for Parties

P. K. Jain, Saurabh Jain, S.P. Singh Rathore, P.K. Goswami, Jagannath Jha, Arunansh Bharti Goswami, Advs. for the Appellant.

Goutham Shivhankar, Ms. Ruchira Goel, Adit Jayeshbhai Shah, Sharanya Sinha, Ms. Manju Jetley, Advs. for the Respondents.

Nitya Nand v. State of U.P. & Anr.**Judgment / Order of the Supreme Court****Judgment****Ujjal Bhuyan, J.**

This appeal is directed against the judgment and order dated 27.09.2012 passed by the Allahabad High Court upholding the conviction of the appellant alongwith others under Sections 148 and 302/149 of the Indian Penal Code, 1860 (IPC).

2. It may be mentioned that learned Sessions Judge, Etah *vide* the judgment and order dated 20.01.1997 passed in Sessions Trial No. 17 of 1993 convicted the appellant alongwith three others under Sections 148 and 302/149 IPC and sentenced each of them to undergo rigorous imprisonment (RI) for two years and to pay fine of Rs. 2,000.00 for the conviction under Section 148 IPC with a default stipulation and further sentenced to undergo imprisonment for life under Section 302/149 IPC. Another accused Shree Dev was convicted for the offences punishable under Sections 147 and 302/149 IPC. He was sentenced to undergo RI for two years and to pay fine of Rs. 2,000.00 with a default stipulation for the offence committed under Section 147 IPC and to suffer imprisonment for life under Section 302/149 IPC.
3. Being aggrieved by the aforesaid conviction and sentence, all the five accused persons including the appellant herein preferred criminal appeal under Section 374 of the Code of Criminal Procedure, 1973 (Cr.P.C.) before the Allahabad High Court (High Court) which was registered as Criminal Appeal No. 340 of 1997. By the judgment and order dated 27.09.2012, a division bench of the High Court affirmed the conviction and sentence of all the accused persons including that of the appellant and dismissed the criminal appeal.
4. The appellant then preferred petition for special leave to appeal before this Court being SLP(Criminal) No. 750/2013. This Court *vide* the order dated 04.02.2013 had issued notice on the special leave petition as well as on the application for bail. On 30.06.2014, this Court granted leave but rejected the prayer for bail. It was thereafter that Criminal Appeal No. 1348 of 2014 came to be registered.
5. We have heard learned counsel for the parties.

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6. Prosecution case in brief is that informant Sarwan Kumar, son of late Satya Narain, had lodged a written report (First Information Report) i.e. FIR before Police Station Soron, District Etah on 08.09.1992 at 05:10 PM. He stated that on 08.09.1992 at about 04:30 PM, he and his father Satya Narain as well as his uncle Laxmi Narain as per their daily routine, came to Ganga ghat near Ambhagarh Akhada, after easing themselves, for taking bath. At around the same time, from the side of Dhimaro Ka Mohalla, Bhola Shankar and Kuldeep Kumar Tiwari came. He and his uncle proceeded ahead while talking with Bhola Shankar and Kuldeep Kumar Tiwari. This way they had reached the temple of Govardhan Nath Ji. In the meantime, from the southern side of Tulsi Park, Shree Dev and his four sons, viz., Munna Lal, Raju, Nitya Nand and Uchchav @ Pappu, resident of Mohalla Tiraha, Chodah Pore, P.S. Soron, armed with kanta, knives and country-made pistol confronted his father Satya Narain. All the accused persons caught hold of his father and started assaulting him with kanta and knives. On hearing the cries of his father, informant Sarwan Kumar and others dashed towards Satya Narain to save him. It was then that appellant Nitya Nand fired from his country-made pistol whereafter all the accused persons made good their escape from the south-western side. When the informant and others reached the spot, his father Satya Narain had already succumbed to the multiple injuries which he had suffered on his body.
 - 6.1. A written report of the incident scribed by Kuldeep Kumar Tiwari i.e., the FIR was submitted by Sarwan Kumar at 05:10 PM on the same day at P.S. Soron.
 - 6.2. It was mentioned that Shree Dev, deceased Satya Narain, and Laxmi Narain were the three brothers. Laxmi Narain, who was the youngest of the three, had no issue; so he had executed a will in favour of Satya Narain's sons. Shree Dev and his sons including the appellant Nitya Nand were enraged by this disposition of property by Laxmi Narain. This led to filing of several cases between them. Due to such litigation, there was an old enmity and for that reason, the accused persons had fatally assaulted Satya Narain on that fateful day.
7. On the basis of the FIR, Crime No. 237/1992 was registered at P.S. Soron under Sections 147, 148, 149 and 302 IPC. The investigating officer had carried out investigation of the case. The post-mortem

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report indicated multiple *ante-mortem* injuries on the person of the deceased. On completion of the investigation, charges under Sections 148 and 302/149 IPC were framed against the accused Munna, Raju, Uchchav @ Pappu and Nitya Nand. Similarly, charges under Sections 147 and 302/149 IPC were framed against the accused Shree Dev.

8. The accused persons denied the charges and claimed to be tried.
9. To prove its case, the prosecution examined a total of five witnesses. After closure of the prosecution evidence, statements of the accused persons were recorded under Section 313 Cr.P.C.
10. The trial court on an appreciation of the evidence adduced and considering the materials on record, convicted the accused Shree Dev under Sections 147 and 302/149 IPC and also convicted the appellant and the other sons of Shree Dev i.e. Munna Lal, Raju and Uchchav @ Pappu under Sections 148 and 302/149 IPC. All the accused were thereafter sentenced as indicated above.
11. In appeal, the High Court observed that the eyewitness account of the incident stood fully corroborated by the medical evidence. Prosecution had proved its case beyond all reasonable doubt against each of the accused. Therefore, while upholding the conviction and sentence, the High Court dismissed the appeal.
12. Learned counsel for the appellant submits that both the trial court and the High Court committed a manifest error in convicting the appellant under Sections 148 and 302/149 IPC. He submits that allegation against the appellant was that he was carrying a country-made pistol. As the informant and others tried to rush towards Satya Narain on hearing his cries as he was being assaulted by the other accused persons, appellant Nitya Nand fired from his country-made pistol thereby threatening the informant and the others who tried to rescue Satya Narain. As the appellant fired from his country-made pistol, all the accused persons made good their escape from the crime scene. However, neither were there any firearm injuries on the person of the deceased nor on anyone else. That apart, there was no recovery of any country-made pistol or empty cartridge from the crime scene or from anywhere else. In the absence thereof, both the courts below were not justified in so convicting the appellant.
 - 12.1. Learned counsel for the appellant further submits that Laxmi Narain, who was with the deceased and who had walked ahead

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along with the informant while talking with Bhola Shankar and Kuldeep Kumar Tiwari, was not examined by the prosecution as a witness. This is a crucial omission as because only due to gifting of the property by Laxmi Narain to the sons of the deceased Satya Narain which led to such bad blood between the brothers leading to the fatal incident. Learned counsel also emphasized that another crucial omission on the part of the prosecution is that Kuldeep Kumar Tiwari was not examined as a witness. Such glaring omission has cast uncertain shadows over the prosecution case. Omission to examine Kuldeep Kumar Tiwari as a prosecution witness has completely punctured the prosecution case because it was he who had written the FIR lodged by the informant besides being an eyewitness.

- 12.2. Learned counsel for the appellant finally submits that appellant has been convicted solely on the basis of suspicion. In a criminal trial, the conviction must be based on hard evidence and not on mere suspicion. Even if there is an iota of doubt as to the culpability of an accused, as in the present case, he has to be given the benefit of the doubt. That being the position, the impugned conviction and sentence of the appellant should be interfered with by this Court.
13. Learned counsel for respondent No. 1, State of U.P., has vehemently argued that conviction and sentence of the appellant is fully justified. There is no reason to interfere with the same.
 - 13.1. He submits that there was a clear motive for the accused persons, including the appellant, to have caused the murder of Satya Narain. According to him, the accused Shree Dev, deceased Satya Narain, and Laxmi Narain were the three brothers, Laxmi Narain being the youngest of the three. Since Laxmi Narayan had no issue, he executed a will in favour of the sons of Satya Narain. Shree Dev and his sons, including the appellant, were unable to come to terms with this development. They were highly agitated which led to filing of several cases by and between them. This was the real intention behind the plot to kill Satya Narain.
 - 13.2. Learned counsel for respondent No. 1 submits that the appellant was very much a part of the unlawful assembly as one of the persons at the place of occurrence which was mentioned in

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the FIR itself. That apart, in their evidence, PW-1 and PW-2, categorically stated that appellant was carrying a country-made pistol from which he fired in the air with the intent to frighten the informant and others who tried to come to the rescue of the deceased. Taking advantage of the situation, the accused persons escaped from the crime scene.

- 13.3. The evidence of PW-1 and PW-2 in this regard is unflinching. Therefore, non-recovery of the country-made pistol or any cartridge fired therefrom cannot be fatal to the prosecution case.
- 13.4. The very act of the appellant in firing from his country-made pistol to enable the accused persons to escape is clearly an overt act whereby he became part of the unlawful assembly with a common object to cause the death of the deceased. The evidence on record clearly provides that appellant was part of the unlawful assembly having the common object to kill the deceased.
- 13.5. Learned counsel for respondent No. 1 State submits that it is a case of direct evidence which clearly establish the involvement of the appellant in the killing of Satya Narain. The ocular evidence is fully supported by the medical evidence. That apart, the post incident conduct of the appellant is also a significant factor. Laxmi Narain, who could have been an important eyewitness, was killed on 25.10.1993. In that case, appellant herein along with others were named as accused. Therefore, it was not possible for the prosecution to present Laxmi Narain as a prosecution witness.
- 13.6. He, therefore, submits that there is no merit in the criminal appeal which should be dismissed.
14. Submissions made by learned counsel for the parties have received the due consideration of the Court.
15. Question for consideration is whether the prosecution could establish the culpability of the appellant in the murder of Satya Narain beyond any reasonable doubt? In other words, whether the prosecution could prove the charges against the appellant under Sections 148 and 302/149 IPC beyond any reasonable doubt?
16. To answer the aforesaid question it is necessary to briefly analyse the evidence on record. PW-1 is Shri Sarwan Kumar S/o Late Satya

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Narain. He is the informant in the case. In his examination in chief, PW-1 stated that his father Late Satya Narain was one of the three brothers, Shree Dev being the eldest and Laxmi Narain alias Daroga being the younger. Shree Dev had four sons viz. Munna Lal, Raju, Nitya Nand (appellant) and Uchchav alias Pappu. His uncle Laxmi Narain was issueless and was residing with Satya Narain. Laxmi Narain gifted all his property to the informant and his brothers i.e. to the sons of Satya Narain. This was not to the liking of the accused persons which resulted in litigation and enmity.

- 16.1. He further stated that on the fateful day at about 04:30 PM his father Satya Narain, uncle Laxmi Narain and himself after easing themselves at about 04:30 PM, had reached Ambhagarh Akhada, Har Ki Pauri. At the same time from the side of Dhimaro Ka Mohalla, Shri Kuldeep S/o Ram Prakash and Bhola Shankar S/o Siaram came. Informant and his uncle Laxmi Narain started a conversation with the above two persons and while talking with the two persons went ahead and reached the temple of Goverdhan Nath Ji. Father of PW-1 Satya Narain had got down from the stairs for bathing in the Ganga at Har Ki Pauri. In the meanwhile, from the southern side of Tulsi Park, the accused persons came. While Shree Dev was armed with a danda, Munna Lal was armed with kanta. Raju and Uchchav were armed with knives. Appellant Nitya Nand was carrying a country-made pistol in his hand. As they confronted Satya Narain, Shree Dev exhorted the other accused persons to kill him. Thereafter, the accused persons caught hold of his father and started assaulting him with knives and kanta. As Satya Narain cried for help, Bhola Shankar, Kuldeep, Laxmi Narain and PW-1 rushed to help him. They had reached the Bharoji temple when appellant Nitya Nand fired a shot in the air from his country-made pistol to frighten PW-1 and the others. Taking advantage of the situation, the accused persons made good their escape from the crime scene through the south-western side.
- 16.2. As PW-1 went near his father, he found that his father had received multiple injuries inflicted by knives and kanta on his head, cheek, neck, back and ribs. His father Satya Narain had died on the spot with half of his body inside the water. While blood was splattered on the spot, sandal of his father

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was lying on the stairs with stick in the water. PW-1 stated that he had dictated a report of the incident on the spot to Kuldeep Kumar Tiwari S/o Ram Prakash who had scribed the same. After he had completed writing down what was dictated, scribe Kuldeep Kumar Tiwari read over the same to PW-1 and thereafter took his signature. PW-1 stated that he along with his uncle Laxmi Narain went to the police station in a tricycle (rickshaw) and handed over the report to the incharge of the police station who registered a case and handed over a copy of the same to PW-1.

17. In his cross-examination PW-1 stated that after hearing the cries of his father, he had rushed back to the spot. About five-six nearby people had also gathered there but he could not remember their names. Regarding Bhola Shankar, PW-1 stated that he came after the incident.
 - 17.1. When PW-1 tried to go near his father, appellant Nitya Nand had fired in the air to stop him and thereafter he ran away. No fire was shot for causing injury either to PW-1 or to the deceased. People did not find any cartridge or empty cartridge on the spot.
 - 17.2. He admitted that because of his uncle Laxmi Narain gifting all his property to the sons of Satya Narain including himself there was enmity between the two sides.
 - 17.3. Regarding the deceased, PW-1 stated that he had taken his last meal between 02.00 to 02.30 PM when he had taken dal and roti. His father's daily routine was to go to Har ki Pauri for taking a bath in the Ganga. On the fateful day, his father went to ease himself first and then went for bathing.
 - 17.4. PW-1 stated that his uncle Shree Dev had exhorted the other accused persons to kill his father. This fact however is not mentioned in the FIR.
 - 17.5. PW-1 stated that he was at the crime scene for about half an hour. During this period, about 100-200 people had gathered. After intimation was sent to home about the incident, people from home had also arrived. After getting the report written, PW-1 proceeded to the police station in a rickshaw and submitted the same.

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- 17.6. PW-1 denied the suggestion that the incident as reported in the FIR had not happened at the time mentioned therein and that the accused persons were falsely implicated due to previous enmity. He also denied the suggestion that the FIR (Ex.1) was not written in the handwriting of Kuldeep.
18. Bhola Shankar, son of Satya Narain, deposed as PW-2. While reiterating what was stated by PW-1 leading to the incident, he further stated that Satya Narain had cried out for help to save him when he was being assaulted by the accused persons. He stated that he alongwith other people rushed to the spot when appellant Nitya Nand fired from his country-made pistol. He asserted that he alongwith the other people had seen the accused assaulting Satya Narain. After the accused persons escaped towards the south-western side, they came to the spot where Satya Narain was lying. By that time, he was already dead with half of his body inside the water.
 - 18.1. In his cross-examination, PW-2 stated that he had seen the incident with his own eyes. FIR was written by Kuldeep Kumar and his statement was also recorded by the police. He further stated that he had seen Satya Narain falling down the stairs and crying for help. At that time, PW-1 was also near him and he had also witnessed the assault.
 - 18.2. He denied the suggestion that he was not present at the time of the incident and that he was not witness to the writing and lodging of the FIR. He further denied the suggestion that he was deposing falsely due to his friendship with the informant.
19. Dr. Satya Mitra, who was serving in the District Hospital, Etah, deposed as PW-3. He had carried out the post-mortem examination on the dead body of Satya Narain on 09.09.1992, following which he found the following *ante-mortem* injuries on the body of the deceased:
 1. Incised wound 10 cm x 1 cm x brain matter deep over right side and back of head at left of back of upper and of right external ear. Skin muscle (scalp) bone meninges and brain cut.
 2. Multiple incised wound in an area 10 cm x 7 cm on the right side cheek and upper part of neck measuring

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1 cm x 0.3 cm muscle deep to 3 cm x 0.7 cm x bone deep. Mandible on right side fractured.

3. Stab wound 3 cm x 1 cm x thoracic cavity deep over right side lateral side of chest 8 cm below axillary crease. On discussion subcostal muscle underlying rib, pleura right side, lung right side, cut direction right to left transverse.
 4. Stab wound 3.5 cm x 1 cm x thoracic cavity deep on left side chest 6 cm below left nipple. Skin, muscle underlying the 8th rib, left pleura, left lung and pericardium part are cut. Direction left to right and slightly upwards.
 5. Multiple incised wound in an area 10 cm x 5 cm on the left side chest above nipple measuring 2 cm x 0.3 cm x skin deep to 3 cm x 0.5 cm x muscle and rib deep.
 6. Multiple incised wound over back of chest in an area 20 cm x 20 from base of neck above measuring 2 cm x 0.2 cm. Muscle deep to 3 cm x 0.5 cm x thoracic cavity deep. Right scapula cut. Right pleura and right lung cut at places.
 7. Multiple incise wound in an area 10 cm x 6 cm over front and external aspect of left upper arm 3 cm below the left shoulder joint.
- 19.1. He opined that death was possibly caused due to shock and haemorrhage as a result of the injuries. The injuries were caused by sharp-edged weapons like kanta, knives etc.
- 19.2. PW-3 proved the post-mortem report which was in his handwriting as well as his signature thereon.
20. At the relevant point of time, Ramesh Chandra Sharma served as Inspector at Soron Police Station. He deposed as PW-4. He has stated that investigation of the case was started by Shri Devi Dayal Prajapati from whom he had taken over the investigation on 23.09.1992. On completion of investigation, he had submitted the chargesheet on 13.10.1992.
 - 20.1. In his cross-examination, he has stated that he did not record the statement of any of the witnesses. On the basis of the

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statements recorded by his predecessor Shri Devi Dayal Prajapati, and after perusal of other documents, the chargesheet was submitted against the accused persons.

21. Shri Devi Dayal Prajapati deposed as PW-5. He has stated that on the date of receipt of the first information, he had recorded the statements of Laxmi Narain, Bhola Shankar, Kuldeep Kumar and the witnesses of the panchnama. Despite search, the accused persons were not found and, therefore, they could not be arrested. Thereafter, investigation was taken over by PW-4.
 - 21.1. In his cross-examination, he admitted that though he had taken blood sample from the stairs where the dead body of Satya Narain was found, he did not send the sampled blood for chemical examination. Though he had recorded the statement of the informant, the latter did not mention in his statement that his uncle Shree Dev had exhorted the other accused persons to kill his father and that he should not be spared as he had grabbed the property of his younger brother. Again, he did not mention in the case diary that Bhola Shankar was present on the spot. That apart, Bhola Shankar did not mention the names of any assailant.
22. From the evidence tendered on behalf of the prosecution, it is clear that PW-1 and PW-2 are the eyewitnesses. When PW-1 Satya Narain and Laxmi Narain had reached Har Ki Pauri at Ambhagarh Akhada, they were joined by Kuldeep and Bhola Shankar (PW-2). PW-1 and Laxmi Narain went ahead talking with Kuldeep and PW-2. Satya Narain was walking down the steps for a dip in the river. At that time, the accused persons arrived at the scene from the southern side of Tulsi Park. Both PW-1 and PW-2 were categorical in their evidence that Shree Dev was armed with a danda, Munna Lal was armed with kanta and Raju and Uchchav were armed with knives. Appellant Nitya Nand was carrying a country-made pistol in his hand. Though the appellant did not assault Satya Narain, the other accused persons actively participated in the assault. Hearing the cries of Satya Narain, PW-1, PW-2, Kuldeep and Laxmi Narain rushed back. When they had reached near the crime scene, appellant Nitya Nand fired a shot in the air from his country-made pistol to frighten PW-1 and the others. As the appellant fired in the air, all the accused persons escaped from the crime scene.

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23. At this stage, we may mention that PW-2 was categorical in his cross-examination that he had seen the incident with his own eyes and that PW-1 was also with him then.
24. Neither PW-1 nor PW-2 has stated that appellant had fired at them nor he had fired at the deceased. The role attributed to the appellant was helping the other accused persons and himself flee from the scene of crime by frightening the people including PW-1 and PW-2 when they were about to reach the crime scene by firing from his country-made pistol into the air. The fact that the death of Satya Narain was homicidal has been fully established by the post-mortem report as well as by the evidence of PW-3 i.e. the doctor. The ocular evidence supported by the medical evidence clearly establish that it was a case of murder of the deceased by the other accused persons under Section 302 IPC.
25. Appellant has been roped in by virtue of Sections 148 and 149 IPC. Appellant was a part of the unlawful assembly which had the common object of eliminating Satya Narain by means of criminal force and, therefore, being a member of the unlawful assembly, he was also guilty of the offence committed in prosecution of the common object i.e. the offence under Section 302 IPC.
26. At this juncture, we may briefly survey the relevant legal provisions.
27. Section 141 IPC defines unlawful assembly. It says an assembly of five or more persons is designated as unlawful assembly if the common object of the persons composing that assembly is to commit an illegal act by means of criminal force.
28. As per Section 148 IPC which deals with rioting armed with deadly weapon, whoever is guilty of rioting, being armed with a deadly weapon or with anything which, used as weapon of offence, is likely to cause death, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both. Rioting is defined in Section 146 IPC. As per the said definition, whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting.
29. This brings us to the pivotal section which is Section 149 IPC. Section 149 IPC says that every member of an unlawful assembly shall be guilty of the offence committed in prosecution of the common object. Section 149 IPC is quite categorical. It says that if an offence is

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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 committing of that offence, is a member of the said assembly; is guilty of that offence. Thus, if it is a case of murder under Section 302 IPC, each member of the unlawful assembly would be guilty of committing the offence under Section 302 IPC.

30. In *Krishnappa Vs. State of Karnataka*,¹ this Court while examining Section 149 IPC held as follows:-

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.

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.

- 30.1. Thus, this Court held that 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

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by any other member of that assembly. By application of this principle, every member of an unlawful assembly is roped in to be held guilty of the offence committed by any member of that assembly in prosecution of the common object of that assembly. The factum of causing injury or not causing injury would not be relevant when an accused is roped in with the aid of Section 149 IPC. The question which is relevant and which is required to be answered by the court is whether the accused was a member of an unlawful assembly and not whether he actually took part in the crime or not.

31. As a matter of fact, this Court in *Vinubhai Ranchhodhai Patel Vs. Rajivbhai Dudabhai Patel*² has reiterated the position that Section 149 IPC does not create a separate offence but only declares vicarious liability of all members of the unlawful assembly for acts done in common object. This Court has held:

20. In cases where a large number of accused constituting an “unlawful assembly” are alleged to have attacked and killed one or more persons, it is not necessary that each of the accused should inflict fatal injuries or any injury at all. Invocation of Section 149 is essential in such cases for punishing the members of such unlawful assemblies on the ground of vicarious liability even though they are not accused of having inflicted fatal injuries in appropriate cases if the evidence on record justifies. The mere presence of an accused in such an “unlawful assembly” is sufficient to render him vicariously liable under Section 149 IPC for causing the death of the victim of the attack provided that the accused are told that they have to face a charge rendering them vicariously liable under Section 149 IPC for the offence punishable under Section 302 IPC. Failure to appropriately invoke and apply Section 149 enables large number of offenders to get away with the crime.

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22. When a large number of people gather together (assemble) and commit an offence, it is possible that only some of the members of the assembly commit the

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crucial act which renders the transaction an offence and the remaining members do not take part in that “crucial act” — for example in a case of murder, the infliction of the fatal injury. It is in those situations, the legislature thought it fit as a matter of legislative policy to press into service the concept of vicarious liability for the crime. Section 149 IPC is one such provision. It is a provision conceived in the larger public interest to maintain the tranquility of the society and prevent wrongdoers (who actively collaborate or assist the commission of offences) claiming impunity on the ground that their activity as members of the unlawful assembly is limited.

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- 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.
32. It is true that there are certain lacunae in the prosecution. The scribe Kuldeep was not examined. Similarly, the younger brother Laxmi Narain was not examined though it has come on record that Laxmi Narain was killed in the year 1993 and in that case one of the accused is the appellant himself. It is also true that neither any country-made pistol was recovered nor any cartridge, empty or otherwise, recovered. However, the appellant has been roped in with the aid of Section 149 IPC. Therefore, as held by this Court in *Yunis alias Kariya Vs. State of M.P.*,³ no overt act is required to be imputed to a particular person when the charge is under Section 149 IPC; the presence of the accused as part of the unlawful assembly

³ (2003) 1 SCC 425

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is sufficient for conviction. It is clear from the evidence of PW-1 and PW-2 that the appellant was part of the unlawful assembly which committed the murder. Though they were extensively cross-examined, their testimony in this regard could not be shaken.

33. In view of what we have discussed above, we have no doubt in our mind that the trial court had rightly convicted the appellant under Section 148 IPC read with Section 302/149 IPC and that the High Court was justified in confirming the same. The question framed in paragraph 15 above is therefore answered in the affirmative.
34. Thus, we see no merit in the appeal which is accordingly dismissed.

Result of the case: Appeal dismissed.

[†]Headnotes prepared by: Divya Pandey