IN THE HIGH COURT OF JHARKHAND AT RANCHI

Cr. Appeal (DB) No.11 of 1997(R)

[Against the judgment of conviction and order of sentence dated 28.11.1996 passed by the learned 1st Additional Judicial Commissioner, Khunti in Sessions Trial No.645/1994**]**

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1. Soma Bas Mahali @ Soma Bans Mahali Son of Shri Dago Bans Mahali
2. Durga Bas Mahali @ Durga Bans Mahali Son of Shri Dago Bans Mahali
3. Gondro Bas Mahali @ Gondro Bans Mahali Son of Shri Dago Bans Mahali
4. Marki Bas Mahali @ Marki Bans Mahali Son of Shri Bul Bans Mahali

All residents of village Chatam Sal P.S. Tamar, District Ranchi

…. …. Appellants

Versus

The State of Bihar (Now Jharkhand)

…. …. Respondent

P R E S E N T

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE ARUN KUMAR RAI

…..

For the Appellant : Mr. Ashok Kumar Pandey, Advocate

For the State : Mr. Saket Kumar, A.P.P.

…..

C.A.V. on 23/07/2024 ***Pronounced on 28/08/2024***

Per Sujit Narayan Prasad, A.C.J.

1. The instant appeal filed under Section 374 (2) of the Code of Criminal Procedure, is directed against the judgment of conviction and order of sentence dated 28.11.1996 passed by the learned 1st Additional Judicial Commissioner, Khunti in Sessions Trial No.645/1994, whereby and whereunder, the

appellants have been convicted for the offence punishable under Sections 302 and 149 of the Indian Penal Code and Appellant namely, Marki Bas Mahali @ Marki Bans Mahali, further convicted under Section 323 of the Indian Penal Code and all the appellants have been sentenced to undergo R.I. for life for the offence punishable under Sections 302 /149 of the Indian Penal Code and appellant, namely Marki Bas Mahali @ Marki Bans Mahali, have further been sentenced to undergo R.I. for three months for the offence under Section 323 of the Indian Penal Code.

Prosecution case

2. This Court, before proceeding to examine the legality and propriety of the judgment of conviction and order of sentence, deems it fit and proper to refer the background of prosecution case, as per the *fardbayan* of Jeetan Kumari (informant and daughter of the deceased), which reads as under:

3. ***(i)*** The prosecution case as unfolded in the fardbayan of the Informant Jeetan Kumari (P.W.2), wherein, she has stated that about one month prior to the occurrence, accused Soma Bas Mahali had told against the informant's character in the village and for that reason, quarrel had taken place in between accused Soma Bas Mahali and the deceased. Thereafter, Soma Bas Mahali had quarreled with the deceased on 17.05.1994 in the evening and at about 7:30 p.m., while the deceased was taking his meal outside his house, all the accused persons had arrived there, armed with *farsa, tangi* and *lathi* and started

assaulting the deceased (informant's father). The deceased had sustained injuries in his stomach, arm and other places of the body due to which he died on the spot.

(ii) It is further alleged that the other members of the family, namely, Pus Bas Mahali, Jagarnath Bas Mahali and wife of the deceased, namely, Sunia Devi had tried to save the deceased and in course thereof, they had also sustained injuries as the accused persons had assaulted them also.

(iii) It has also been mentioned in the FIR that the Gondro Bas Mahali was armed with *Tangi* (Axe), Guruwa Bas Mahali was armed with *Lathi* and other accused persons were armed with *farsa* .

(iv) It has been further alleged that the accused persons had killed the informant's father and had injured the other family members of the informant.

4. On the basis of fardbeyan of the informant, Police registered Tamar P.S Case No. 43 of 1994 dated 18.05.1994 under Sections 302/149/323 of the I.P.C. During investigation, the Police got the post-mortem report of dead body of the deceased and got the report of injured persons who were examined by the doctor.

5. On conclusion of the investigation, Police submitted charge-sheet vide charge-sheet no.51 of 1994 dated 31.07.1994 against the accused persons.

6. Accordingly, learned A.C.J.M., Khunti took cognizance of the offence against the accused persons. The case was

committed to the Court of Sessions for trial and disposal. After framing of charges the accused persons pleaded not guilty and claimed to be tried.

7. In order to prove its case, prosecution altogether examined altogether 9 witnesses, i.e., P.W.1-Sunia Bas Mahali (Widow of the deceased), P.W.2-Jeetan Kumari (daughter of the deceased and Informant), P.W.3-Dr. Sunil Oraon, P.W.4-Bal Ram Singh Munda, P.W.5-Dr. Tulsi Mahto, P.W.6-Tangru Bas Mahali, P.W.7-Maheshwar Jha (Investigating Officer), P.W.8-Narayan Bas Mahali (brother of the deceased) and P.W.9-Md. Sakil Azam.

8. The trial Court, after concluding the evidence of prosecution, recorded the statement of the accused persons under Section 313 of the Criminal Procedure Code, in which, accused persons had denied the prosecution evidence and claimed to be innocent.

9. The learned trial court, after perusal of record found the charge levelled against the accused/appellants proved. Accordingly, the accused/appellants have been found guilty, as such, convicted and sentenced vide impugned judgment of conviction and order of sentence dated 28.11.1996, which is the subject matter of instant appeal.

Arguments of the appellants

10. Mr. Ashok Kumar Pandey, learned counsel for the appellants has taken the following grounds by assailing the impugned judgment of conviction and order of sentence: -

(i) Nothing is on the record to show the motive of the occurrence and therefore, it cannot be said that the accused persons had assaulted the deceased with any common object.

(ii) The learned trial court has miserably failed in not appreciating the fact that the P.W.1, 2 and 8 who had claimed themselves as an eye-witness to the alleged occurrence are the interested and related witnesses and as such, their testimonies cannot be relied upon to curtail the liberty of the appellants.

(iii) Learned counsel for the appellants has taken this court extensively to the evidences of witnesses and has tried to point out contradictions in their evidences, in particular, the contradictions in the evidences of informant (P.W.2).

(iv) To substantiate this argument, he has pointed out the *fardbayan of* the informant, wherein, she has stated that her father (deceased) had died on spot due to injuries inflicted to him by the accused/appellants. But as per the testimony of Investigating Officer (P.W.7), the body of deceased has been recovered in the field of Marki Bans Mahali which was located 25 yards away from the alleged place of occurrence.

(v) To buttress this limb of argument, the learned counsel has put his reliance upon the judgments rendered by the Hon'ble Apex Court in the case of ***Bannareddy and Ors. Vs. State of Karnataka and Ors.,*** reported in ***(2018) 5***

SCC 790 and in the case of ***Pratap Singh and Anr. Vs. State of Madhya Pradesh,*** reported in ***(2018) 5 SCC 790.***

(vi) Further, there is complete absence of evidence in the regard that accused/appellants having shares common object of unlawful assembly, as such, criminal liability against the appellants under section 149 of the Indian Penal Code cannot be made out.

(vii) There is no specific allegation against the appellants, rather, the allegations are general and omnibus, as such, the prosecution has also miserably failed to establish the charges said to have been proved beyond all reasonable doubts.

11. Learned counsel for the appellants, on the aforesaid premise, has submitted that the impugned judgment of conviction/sentence suffers from patent illegality and hence, it is not sustainable in the eye of law.

Arguments of the respondent-State

12. *Per Contra,* Mr. Saket Kumar, learned A.P.P. appearing for the respondent-State has vehemently opposed the aforesaid grounds by defending the impugned judgment by taking the following grounds: -

(I) The conviction is based upon the eye witnesses, i.e., P.W.1, P.W.2 and P.W.8, who had witnessed the entire commission of crime and their evidences with respect to alleged occurrence is consistent and there is no confusion regarding the same. Further, it is settled law that contradiction minor in nature

cannot vitiate the trial or erode the credibility of the witnesses. The learned counsel in this regard relied upon the Judgment as rendered by the Hon'ble Apex Court in the cases of ***Leella Ram Vs. State of Haryana,*** reported in ***(1999) 9 SCC 525*** and ***State of Uttar Pradesh Vs. Naresh,*** reported in ***(2011) 4 SCC 324***.

(II) The Investigating Officer has also corroborated the prosecution version by gathering the material in course of investigation which is fully substantiated by the post-mortem report of deceased.

(III) The totality of the circumstances must be taken into consideration in order to arrive at a truthful conclusion that the appellants had a common object to commit the offence, under which, they were convicted. The appellants were armed with deadly weapon like *Tangi* and *Farsa* and in the present case, the way the occurrence took place, it can be stated that the appellants were having common object to kill the deceased. Thus, in these circumstances, it can be said that the appellants have acted in furtherance of common object to attract vicarious liability under Section 149 of the Indian Penal Code, 1860.

(IV) All the witnesses have supported the prosecution version, basis upon which, the judgment of conviction has been passed, which cannot be said to suffer from an error.

13. In the aforesaid backdrop, the learned A.P.P. for the state has submitted that the prosecution has successfully established

the charges against the present appellants, hence, the instant appeal requires no interference by this Court.

Analysis

14. We have heard the learned counsel for the parties, considered the finding recorded by the learned trial court in the impugned judgment, gone across the testimony of the prosecution witnesses as well as the other documents available in the lower court records.

15. Now, the question which falls for determination before this Court is:

> *"as to whether the prosecution has been able to bring home the charges levelled against the appellants beyond all reasonable doubts and whether the impugned judgment is sustainable in eye of law or on facts?"*

16. This Court, before going into the legality and propriety of the impugned judgment of conviction/sentence, deems it fit and proper to refer the testimonies of prosecution witnesses.

17. **Sunia Bas Mahali** has been examined as **P.W.1 (widow of the deceased)**, who has deposed in her examination-in-chief that the occurrence had taken place one year ago on Tuesday evening. At the time of occurrence, she, along with her daughter (Jeetan Kumari, i.e., informant) was sitting and her husband (deceased), brother-in-law and father-in-law were taking dinner. She has further stated that accused Soma and Durga armed with Kapi (farsa), Gondro armed with Hake (Tangi), Bodo and Lautha

armed with Hake and Budhram and Gurwa armed with lathi had arrived there.

18. Further, she has deposed that Soma had assaulted her husband with *farsa* on his waist and Durga had assaulted her husband on his chest and due to which, her husband sustained injury, thereafter, he died. At para-4 of her deposition, she has deposed that accused Bodo and Lautha had given axe blow on head. At para-7 of her deposition, she has deposed that none had complained about the bad character of her daughter (Jeetan Kumari).

19. She has denied that she had said to the Police that Budhram had told to the people in village about the bad character of her daughter. She has further deposed that accused Soma, Durga and Godra are own brothers and her brothers-in-law. At para-8, she has deposed that all the accused persons are neighbours.

20. In her testimony, she has denied that she had not seen the occurrence and falsely implicated the accused persons because they had made allegation of bad character against her daughter.

21. **Jeetan Kumari**, has been examined as **P.W.2**, (informant and daughter of the deceased). She has deposed in his examination-in-chief that at the time of occurrence, she was sitting along with her mother, father and Uncle Narayan, who were taking meal.

22. In the meantime, accused Soma and Durga armed with farsa, Gondro armed with axe, Lautha armed with tono, Bodo

and Marki armed with axe and Gurya & Budhram armed with lathi had arrived there.

23. She has further stated in her examination-in-chief that all the accused persons after arriving there had assaulted her father. Soma had assaulted her father on the lung portion and stomach, thereafter, her father had started fleeing but suddenly had fallen down in the court-yard and died at the spot.

24. She has further testified that Durga had also assaulted her father. When her father was being assaulted by the accused persons, Narayan Bas Mahali (P.W.8) and Jagarnath had tried to save him but they were also assaulted by the accused persons.

25. This witness has further deposed that accused Lautha, Bodo and Marki had assaulted Push, Narayan and Jagarnath and after killing her father, all the accused persons fled away from there. As it was night, she could not go anywhere to report the matter but on the next morning, she went to village Markidih to call her maternal uncle and her maternal uncle had come to her house and thus, they had sent the people to call the Chowkidar and on arrival of the Chowkidar, she along with her maternal uncle and the Chowkidar had gone to Tamar police station to report the matter and at the police station, she had narrated the occurrence and her statement was recorded by the Daroga and the same was read over and explained to her, upon which, she put her LTI (left thumb impression).

26. Further, she has stated that she had given her statement to the police in Mundari language and the same was interpreted by

the Chowkidar in Hindi and the Chowkidar had interpreted her statement to her in Mundari and thereafter, she had put her thumb impression over that.

27. At para-4 of her deposition, this witness has stated that the Daroga had come to her village and had seen the dead-body of her father and thereafter, also the Daroga had asked her about the occurrence. At para-5, she has stated that prior to the occurrence also, a quarrel in between her father and the accused persons had taken place but she does not know the reason about that.

28. At para-7 of her cross-examination, she has stated that when the accused persons had cut her father, he had started fleeing away and then he had fallen down in the court yard and had succumbed to injuries. At para-9 of her cross-examination, she has denied that she was the cause of dispute in between her father and the accused persons.

29. **Dr. Sunil Oraon** has been examined as P.W.3, who has deposed that he had examined Sunia Bas Mahali (P.W.1) and Narayan Bas Mahali (P.W.8) and had also examined Jagarnath Bas Mahali (father-in-law of P.W.1) on 19.05.1994.

30. He has deposed that the injury report of Sunia Bas Mahali (P.W.1) shows that there was lacerated wound on the head of P.W.1 and there was also lacerated would over her right supra orbital region and both the injuries were simple and caused by hard and blunt substance.

31. He has further deposed that on the body of P.W.8 (Narayan Bas Mahali), there was one abrasion over front of head and one bruise over left supra orbital region and both were simple in nature caused by hard and blunt substance.

32. He has also deposed about the injury report of Jagarnath Bas Mahali, the grand-father of the informant. He has stated that he had one lacerated would on front of the head, one abrasion on right shoulder and one swelling on dorsal of left palm and all the injuries were simple in nature caused by hard and blunt substance.

33. **Dr. Tulsi Mahto** has been examined as **P.W.5**, who has deposed that on 20.05.1994, he had conducted the post mortem examination on the dead body of Shyambans Mahli and found the following injuries over the body of the deceased:-

External-

a) Abrasions-

(i) 15 cm x 7 ½ cm over the right chest front.

(ii) 11 cm x 1 ½ cm over the left chest front.

(iii) 17 cm x 2 cm over the front part of chest situated transversely.

b) Lacerated wound-

(i) 5 cm x 1 ½ cm x soft tissue deep over the left elbow lateral side.

C) Incised wounds-

(i) 11” x 2” x soft tissue deep on the inter scapular region.

(ii) 13'' x 3'' x bone deep over the left arm medial side situated above down words cutting the soft tissue, blood vessels and left humors bone.

Internal-

1. All the organs are normal but decomposing. The stomach contained undigested rice particle 125 gm the urinary bladder is empty.

Opinion

1. All the injuries are ante-mortem.

2. Incised wounds are caused by heavy sharp cutting weapon may be Tangi & Bhala and right by hard and blunt weapon may be lathi. Death was caused due to hemorrhage and shock. Time since death within 3 to 5 days from the time of post-mortem examination.

34. P.W.-6 Tangru Banshmahli in his examination-in-chief has stated that informant is his niece. He further stated that about 1 ½ years ago, on Wednesday morning, Jitan came to his house and said that her father was killed by Soma, Gurua and Budhu by assaulting him with *farsa*, *tangi* and *lathi* at the door of her house.

35. He has further stated that Jitan had given her statement at the police station, which was written down by the Daroga ji of Tamar Police Station and same was read over to her, then after finding it correct, Jitan put her thumb impression and he put his signature on the same and he identified his signature on the F.I.R., which was marked as Ext.2/1.

36. He also deposed that Daroga ji went to village Chatmasal and there was blood near the body of his brother-in-law, namely, Shyam Bans Mahali. Daroga ji had seized the blood in his presence and had made seizure list. Daroga ji had also taken his signature and thumb impression of the Sanatan on the seizure list, which was marked as Ext.2/2.

37. In cross-examination, this witness testified that he went to the police station with Jeetan. He further stated that Daroga ji had prepared seizure list of blood-stained soil at the place of occurrence itself. At that time, many people of the village had gathered there. He also stated that when Jeetan had told him about the incident, his uncle's son, namely, Sanatan was also there. At around 10 o' clock of day time, Jeetan came to his house and talked about the occurrence.

38. In cross-examination, he stated that he had not seen the occurrence and his niece came to his house and told him everything. He denied the suggestion that Jeetan had not told him anything. He also denied the suggestion that the Daroga ji had not seized the blood-stained soil.

39. P.W.-7 Maheshar Jha (the Investigating Officer of the case) has stated that on 18th May, 1994, Jeetan Kumari (the P.W.-2) had come to the police station and had given her statement to him, which was written on his order by the Munshi of the Police Station. He further stated that the place of occurrence was near the mud house of the deceased and his house was consisting of only one room. He also stated that there

was a hut also and he had found blood stain and had seized the same in presence of witnesses, namely, Sanatan and Tangru.

40. He had deposed that the dead body of the deceased was found at a distance of 25 yards in the field of Marki Bans Mahali and he had found blood stains at the first place of occurrence and from the first place of occurrence up to the place where the dead body was lying.

41. He had also stated that the inquest report is in his handwriting which bears his signature. He prepared the inquest report in presence of witnesses, Balram Singh Munda and Tangru Mahli and took their signatures on the same which was marked Ext.6. He further stated that the dead body was lying with its head facing west and both legs were bent. There were wounds on the dead body which he had mentioned in the inquest report and sent the body for *postmortem*.

42. He further testified that he found Narayan Bansmahali, Jagarnath Bansmahali, Suniya Devi and Sobaram Bansmahali injured and their injury reports were marked as Exts.7 to 7/3. He further stated that he recorded the statements of the witnesses and upon his transfer, the investigation of this case was handed over to Sakil Ajam, the then Officer-in-Charge of Tamar Police Station on 17th June, 1994.

43. In cross-examination, this witness had stated that Tangru Bansmahali had come to Police Station but his statement was not recorded and his statement was taken on 19th May, 1994 in village Chatmasal. The place of occurrence is in a hamlet of 8 to

10 houses and he had not written it in the diary but the house of deceased and accused is there. He further stated that Sania Devi (P.W.1) had said that Godro had a tangi in his hand and Gurua had lathi and the rest had an axe in their hands. He also stated that he did not find the weapons used in the occurrence. This witness on recall has stated that Narayan had not specifically stated in his statement that he hit Jagarnath with madki lathi, Jagarnath with bodo lathi and Sunia with Gandoro @ Gurua lathi. He had also not specifically said that Soma Bansmahali with tabla and Durga with axe have killed his brother.

44. P.W.-8 Narayan Bansmahali who claimed himself to be an eyewitness of the occurrence has stated in his examination-in-chief that the occurrence is of about one year and it was Tuesday evening. They were eating rice in their courtyard. He, his elder brother Shyambansh Mahali and sister-in-law were eating rice when Soma, Durga, Lautha, Gondaro, Madki and Bodo came there. Soma had a tabla in his hand, Durga had tangi in his and, Lauta had tono in his hand, Gonddaro had laathi in his hand, Madki and Bodhi had also lathi in their hands. Soma came there first and assaulted his brother Shyam Bansmahali on his chest with tabla. Durga had assaulted on his back with axe and others had assaulted with lathi. He further stated that his brother was running and while running, he went to the Bari of Lauta and died there.

45. He had also stated that they had tried to save his brother and they had also sustained injury. This witness has further stated that he had also sustained injury on his head with Madaki's lathi. His father was assaulted by Bodo with lathi which hit his right palm. He further stated that Gondoro had assaulted his sister-in-law on her head with lathi.

46. In cross-examination, this witness had stated that police had recorded his statement. He further stated that it is not true that he had not told to the police that Madaki had assaulted him with lathi. He had also stated that his father was assaulted by Bodo with lathi and Gondoro @ Gandhwa had assaulted Suniya with lathi. Accused Soma, Durga and Bodo are his cousin brothers.

47. He further deposed that accused Budhram and Gurua are his own brothers. He also stated that all accused came together to fight. He further stated that Soma had used tabla once and daroga ji had not seized any weapons from the house of the accused. This witness also stated that his daughter had quarrel with Soma's mother but he had not seen the quarrel. It is not true that he was not assaulted.

48. P.W.-9 Md. Shali Azam in his examination-in-chief has stated that he took the charge of investigation of this case on 17th June, 1994 and after getting the order from the senior officer, he filed the charge-sheet in the Court.

49. In cross-examination, this witness had stated that the investigation of this case had already been done by the then Officer-in-Charge of Tamar police station.

50. Now, this Court is required to answer the following issues:-

(i) *Whether the judgment passed by the learned trial court convicting the appellants can be said to be justified?*

(ii) *Whether on the basis of the testimony of the witnesses can it be said to be a case based on common object or if it is based upon the common object whether there is any evidences in this regard or it is rightly appreciated by the learned trial court in order to convict the appellants by taking aid of Section 149 of the IPC?*

51. Both the issues, since are interlinked, as such, are being considered together and answered hereinafter.

52. But, before considering the aforesaid issues, this Court thinks fit to discuss the foremost argument of Learned Counsel for the appellants that it is not a case of common object and there is complete absence of evidence in the regard that accused/appellants having shares common object of unlawful assembly, as such, criminal liability against the appellants under Section 149 of the Indian Penal Code cannot be made out.

53. In the aforesaid context, it is necessary, therefore, to examine the provisions of Section 149 of the Indian Penal Code. Section 149 of the Indian Penal Code is to be found in Chapter VIII of that Code which reads as under:-

"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."

54. Thus, this section postulates that an offence is committed by a member of an unlawful assembly in prosecution of the common object of that assembly or such as a member of the assembly knew to be likely to be committed in prosecution of that object and declares that in such circumstances every person, who was a member of the same assembly at the time of the commission of the offence, was guilty of that offence. Without the provisions of this section a member of an unlawful assembly could not have been made liable for the offence committed not by him but by another member of that assembly. Therefore, when the accused are acquitted of riot and the charge for being members of an unlawful assembly fails, there can be no conviction of any one of them for an offence which he had not himself committed.

55. Further, a plain reading of the above would show that the provision is in two parts. The first part deals with cases in which an offence is committed by any member of the assembly "in prosecution of the common object" of that assembly. The second part deals with cases where the commission of a given offence is not by itself the common object of the unlawful assembly but

members of such assembly “knew that the same is likely to be committed in prosecution of the common object of the assembly”.

56. The Hon’ble Apex Court has exclusively dealt with application of ingredients of Section 149 in the case of ***Ramachandran vs. State of Kerala,*** reported in ***(2011) 9 SCC 257*** and has observed at Paragraph Nos.17 to 27 as under:-

> ***“17.*** *Section 149 IPC has essentially two ingredients viz. (i) offence committed by any member of an unlawful assembly consisting of five or more members, and (ii) such offence must be committed in prosecution of the common object (under Section 141 IPC) of the assembly or members of that assembly knew to be likely to be committed in prosecution of the common object.*
>
> ***18.*** *For “common object”, it is not necessary that there should be a prior concert in the sense of a meeting of the members of the unlawful assembly, the common object may form on the spur of the moment; it is enough if it is adopted by all the members and is shared by all of them.*
>
> ***19.*** *In order that the case may fall under the first part, the offence committed must be connected immediately with the common object of the unlawful assembly of which the accused were members. (Vide Bhanwar Singh v. State of M.P.) Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under the second part of Section 149 IPC if it can be held that the offence was such as the members knew was likely to be committed. The expression “know” does not mean a mere possibility, such as might or might not happen. For instance, it is a matter of common knowledge that if a body of persons go armed to take forcible possession of the land, it would be right to say that someone is likely to be killed and all the members of the unlawful assembly must be aware of that likelihood and would be guilty under the second part of Section 149 IPC. There may be cases which would come within the second part, but not within the first. The distinction between the two parts of Section 149 IPC cannot be ignored or obliterated.*

20. *However, once it is established that the unlawful assembly had common object, it is not necessary that all persons forming the unlawful assembly must be shown to have committed some overt act. For the purpose of incurring the vicarious liability under the provision, the liability of other members of the unlawful assembly for the offence committed during the continuance of the occurrence, rests upon the fact whether the other members knew beforehand that the offence actually committed was likely to be committed in prosecution of the common object.*

21. *The crucial question for determination 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 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.*

22. *In K.M. Ravi v. State of Karnataka this Court observed that mere presence or association with other members alone does not per se become sufficient to hold every one of them criminally liable for the offences committed by the others unless there is sufficient evidence on record to show that each intended to or knew the likelihood of commission of such an offending act.*

23. *Similarly, in State of U.P. v. Kishanpal this Court held 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. 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 prosecution of the common object or such as the members of the assembly knew were likely to be committed.*

24. *In Amerika Rai v. State of Bihar this Court opined that for a member of an unlawful assembly having common object what is liable to be seen is as to whether there was any active participation and the presence of all the accused persons was*

with an active mind in furtherance of their common object. The law of vicarious liability under Section 149 IPC is crystal clear that even the mere 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.

25. *Regarding the application of Section 149, the following observations from Charan Singh v. State of U.P. are very relevant: (SCC pp. 209-10, para 13)*

"13. … The crucial question to determine 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 in Section 141. … The word 'object' means the purpose or design and, in order to make it 'common', it must be shared by all. In other words, the object should be common to the persons, who compose the assembly, that is to say, they should all be aware of it and concur in it. A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. The expression 'in prosecution of common object' as appearing in Section 149 has to be strictly construed as equivalent to 'in order to attain the common object'. It must be immediately connected with the common object by virtue of the nature of the object. There must be community of object and the object may exist only up to a particular stage, and not thereafter."

26. *In Bhanwar Singh v. State of M.P. this Court held: (SCC p. 674, para 44)*

"44. Hence, the common object of the unlawful assembly in question depends firstly on whether such object can be classified as one of those described in Section 141 IPC. Secondly, such common object need not be the product of prior concert but, as per established law, may form on the spur of the moment (see also Sukha v. State of Rajasthan). Finally, the nature of this common object is a question of fact to be determined by considering nature of arms, nature of the assembly, behaviour of the members, etc.

> ***27.*** *Thus, this Court has been very cautious in a catena of judgments that where general allegations are made against a large number of persons the court would categorically scrutinise the evidence and hesitate to convict the large number of persons if the evidence available on record is vague. It is obligatory on the part of the court to examine that if the offence committed is not in direct prosecution of the common object, it yet may fall under the second part of Section 149 IPC, if the offence was such as the members knew was likely to be committed. Further inference has to be drawn as to what was the number of persons; how many of them were merely passive witnesses; what were their arms and weapons. The number and nature of injuries is also relevant to be considered. "Common object" may also be developed at the time of incident.*

57. In the case of ***Subal Ghorai Vs. State of W.B.,*** reported in ***(2013) 4 SCC 607*****,** the Hon'ble Supreme Court at Paragraph Nos. 42 to 47 and 50 to 53 has observed as under:-

> ***42.*** *We must now deal with the submission that all the accused cannot be convicted for murder with the aid of Section 149 IPC because the prosecution story that all the accused were armed with weapons and they attacked the deceased is based on omnibus statements of the eyewitnesses. In order to deal with this submission, we have reproduced the material portions of the evidence of the eyewitnesses. It is now necessary to refer to the judgments of this Court which have been relied upon by the counsel on this point so that the evidence of the witnesses can be examined in their light.*
>
> ***43.*** *In Lalji this Court observed that Section 149 IPC makes every person who is the member of an unlawful assembly at the time of committing of the offence guilty of that offence. It 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 this assembly. However, the vicarious liability of the members of the unlawful assembly extends only to the acts done in pursuance of the common object of the unlawful assembly, or to such offences as the members of the unlawful assembly knew to be likely to be committed in prosecution of that object. Once the case of a*

person falls within the ingredients of the section, the question that he did nothing with his own hands, would be immaterial, because everyone must be taken to have intended the probable and natural results of the combination of the acts in which he joined and it is not necessary that all the persons forming an unlawful assembly must do some overt act.

44. *It was further observed in Lalji case that: (SCC p. 442, para 10)*

"10. … once the court holds that certain accused persons formed an unlawful assembly and an offence is committed by any member of that assembly in prosecution of the common object of that assembly, or such as the members of the assembly knew to be likely to be committed in prosecution of that object, every person who at the time of committing of that offence was a member of the same assembly is to be held guilty of that offence."

This Court further observed that: (Lalji case, SCC p. 442, para 10)

"10. … After such a finding it would not be open to the court to see as to who actually did the offensive act or require the prosecution to prove which of the members did which of the offensive acts. The prosecution would have no obligation to prove it."

45. *On the facts of the case before it, this Court held that after having held that: (Lalji case, SCC p. 442, para 11)*

"11. … the appellants formed an unlawful assembly carrying dangerous weapons with the common object of resorting to violence … it was not open to the High Court to acquit some of the members on the ground that they themselves did not perform any violent act, or that there was no corroboration of their participation. In other words, having held that they formed an unlawful assembly and committed an offence punishable with the aid of Section 149 IPC, the High Court erred in examining which of the members only did actively participate and in acquitting those who, according to the court, did not so participate. Doing so would amount to forgetting the very nature and essence of the offence created by Section 149 IPC."

46. *In Sherey 25 appellants were tried for offences punishable under Sections 147, 148, 302, 307, 323 and 325 all read with*

Section 149 IPC in respect of an incident of rioting. The rioting occurred because of the dispute over a grove between Hindus and Muslims. Twenty-five Muslims attacked Hindus. Three Hindus died. Six eyewitnesses deposed about the incident. PW 1 complainant gave a detailed version and attributed overt acts to nine accused. In deposition, he named five more persons who also attacked the deceased. Regarding the others, he mentioned in an omnibus way that they were armed with lathis. He did not attribute any overt act to any one of them. This Court observed that in the circumstances, it was difficult to accept the prosecution case that the other appellants were members of the unlawful assembly with the object of committing the offences with which they were charged. This Court expressed that it was highly unsafe to apply Section 149 IPC and make everyone of them constructively liable. This Court further observed that when there is a general allegation against a large number of persons the Court naturally hesitates to convict all of them on such vague evidence. Some reasonable circumstance must be found out to lend assurance. It was further observed that from that point of view it was safe only to convict the nine accused whose presence was not only consistently mentioned from the stage of FIR but also to whom overt acts were attributed. This Court concluded that the fact that they were armed with weapons and attacked the victims shows that they were members of an unlawful assembly with the common object of committing murder and other offences with which they were charged.

47. *In Thakkidiram Reddy the case of the prosecution was that the 21 accused in the dead of night formed themselves into an unlawful assembly armed with weapons and went to the house of the deceased. They attacked the inmates of the house of one Gankidi Reddy in which Gankidi Reddy lost his life. The accused, thereafter, left the place. The trial court acquitted 10 of them and convicted A-1 to A-11, inter alia, under Section 148 and Section 302 read with Section 149 IPC. In the appeal, the High Court set aside the convictions of A-2 to A-11 under Sections 148 and 302 read with Section 149 IPC and maintained all other convictions. The State carried an appeal to this Court. This Court referred to its previous judgments in*

Masalti v. State of U.P. and Lalji and observed (Thakkidiram Reddy case, SCC p. 562, para 17) that from these judgments,

"it is evident that to ascertain whether a particular person shared the common object of the unlawful assembly, it is not essential to prove that he committed some illegal overt act or had been guilty of some illegal omission in pursuance of the common object. Once it is demonstrated from all the facts and circumstances of a given case that he shared the common object of the unlawful assembly in furtherance of which some offence was committed—or he knew was likely to be committed—by any other person, he would be guilty of that offence".

This Court further observed that undoubtedly, commission of an overt act by such a person would be one of the tests to prove that he shared the common object, but it is not the sole test. This Court rejected the submission that some of the accused had caused simple injuries and, hence, they did not share common object to murder and observed that the manner in which the incident took place clearly proved that even if this Court were to assume that those accused did not share the common object of committing the murder, they, being members of the unlawful assembly certainly knew that the murder was likely to be committed by A-1 in prosecution of the common object so as to make them liable under Section 302 read with the second part of Section 149 IPC. In the circumstances, order of acquittal of A-2 to A-5 and A-9 of the charges under Sections 148 and 302 read with Section 149 IPC recorded by the High Court was set aside and the order of the trial court convicting them for the said offences was restored.

50. *In Pandurang Chandrakant Mhatre, after adverting to relevant judgments, this Court observed: (SCC p. 797, para 72)*

"72. … that for determination of common object of the unlawful assembly, the conduct of each of the members of the unlawful assembly, before and at the time of attack is of relevant consideration. At a particular stage of the incident, what is the object of the unlawful assembly is a question of fact and that has to be determined keeping in view the nature of the assembly, the arms carried by the members and the behaviour of the members at or near the scene of the incident."

51. *In Waman this Court held that: (SCC p. 307, para 40)*

"40. … whenever the court convicts any person or persons of any offence with the aid of Section 149 IPC, a clear finding regarding the common object of the assembly must be given and the evidence disclosed must show not only the nature of the common object but also that the object was unlawful. In order to attract Section 149 IPC it must be shown that the incriminating act was done to accomplish the common object of unlawful assembly."

In that case, there was no recovery of weapon from A-12 therein, but weapons were recovered from other accused and prosecution witnesses asserted that A-12 therein dealt a blow of iron pipe on the deceased. This Court held that this was sufficient to attract Section 149 IPC.

52. *The above judgments outline the scope of Section 149 IPC. We need to sum up the principles so as to examine the present case in their light. Section 141 IPC defines unlawful assembly to be an assembly of five or more persons. They must have common object to commit an offence. Section 142 IPC postulates that whoever being aware of facts which render any assembly an unlawful one intentionally joins the same would be a member thereof. Section 143 IPC provides for punishment for being a member of unlawful assembly. Section 149 IPC provides for constructive liability of every person of an unlawful assembly if an offence is committed by any member thereof in prosecution of the common object of that assembly or such of the members of that assembly who knew to be likely to be committed in prosecution of that object. The most important ingredient of unlawful assembly is common object. Common object of the persons composing that assembly is to do any act or acts stated in clauses "First", "Second", "Third", "Fourth" and "Fifth" of that section. Common object can be formed on the spur of the moment. Course of conduct adopted by the members of common assembly is a relevant factor. At what point of time common object of unlawful assembly was formed would depend upon the facts and circumstances of each case. Once the case of the person falls within the ingredients of Section 149 IPC, the question that he did nothing with his own hands would be immaterial. If an offence is committed by a*

member of the unlawful assembly in prosecution of the common object, any member of the unlawful assembly who was present at the time of commission of offence and who shared the common object of that assembly would be liable for the commission of that offence even if no overt act was committed by him. If a large crowd of persons armed with weapons assaults intended victims, all may not take part in the actual assault. If weapons carried by some members were not used, that would not absolve them of liability for the offence with the aid of Section 149 IPC if they shared common object of the unlawful assembly.

53. *But this concept of constructive liability must not be so stretched as to lead to false implication of innocent bystanders. Quite often, people gather at the scene of offence out of curiosity. They do not share common object of the unlawful assembly. If a general allegation is made against large number of people, the court has to be cautious. It must guard against the possibility of convicting mere passive onlookers who did not share the common object of the unlawful assembly. Unless reasonable direct or indirect circumstances lend assurance to the prosecution case that they shared common object of the unlawful assembly, they cannot be convicted with the aid of Section 149 IPC. It must be proved in each case that the person concerned was not only a member of the unlawful assembly at some stage, but at all the crucial stages and shared the common object of the assembly at all stages. The court must have before it some materials to form an opinion that the accused shared common object. What the common object of the unlawful assembly is at a particular stage has to be determined keeping in view the course of conduct of the members of the unlawful assembly before and at the time of attack, their behaviour at or near the scene of offence, the motive for the crime, the arms carried by them and such other relevant considerations. The criminal court has to conduct this difficult and meticulous exercise of assessing evidence to avoid roping innocent people in the crime. These principles laid down by this Court do not dilute the concept of constructive liability. They embody a rule of caution."*

58. In the light of aforesaid settled proposition of law, it can be safely inferred that Common object of the unlawful assembly can be gathered from the nature of the assembly, and the behaviour of the assembly at or before scene of occurrence. It is an inference to be deduced from the facts and circumstances of each case.

59. In the background of the aforesaid settled legal proposition of law, this Court is now adverting to the facts of the case to decide the aforesaid issues.

60. In the instant case, it is admitted fact that the motive behind the alleged occurrence has not been established by the prosecution. However, this Court is conscious with the settled position of law that motive is not pre-requisite for commission of crime but in the instant case, since, the common object has been alleged, hence, it requires to establish motive behind the alleged occurrence in order to establish the common object.

61. It is evident from the testimonies of the eyewitnesses, i.e. P.W.1, P.W.2 and P.W.8, who proclaimed themselves as the witness of the alleged occurrence that even these witnesses were not sure about the motive behind the alleged crime.

62. P.W.1, widow of the deceased at para-4 of her examination-in-chief had categorically stated that perhaps, the accused persons had killed her husband to take Rs.1500/- which was with them, at that time. In the same paragraph, she had further stated that she had no idea as to why the accused persons had killed her

husband. For ready reference the paragraph-4 of her testimony is being quoted as under:

> *"**4.** मुझे बोदो और लौठा हाके से सरपर मारे थे। हमलोगों के पास 1500 रुपया शायद वही लेने के लिए मुदालय मेरे पति को मारे होंगे। पुनः मेरे पति को ये लोग आकर क्यों मार दिए तथा मुझे भी क्यों मारे नहीं जानती।"*

63. Thus, it is evident from her testimony that even she was not sure about the motive behind the alleged occurrence.

64. P.W.2, daughter of the deceased and informant was also not sure about the motive of the alleged occurrence, which is evident from para-5 of the examination-in-chief, wherein, she had stated that prior to the alleged occurrence, also a quarrel in between her father and the accused persons had taken place but she does not know reason of that. Further, in cross-examination at para-9, she had denied that she was cause of the dispute in between her father and the accused persons. For ready reference, paragraph nos.5 and 9 of her testimony are being quoted as under:

> *"5. मेरे पिता से मुदालयों का पहले भी झगड़ा हुआ था पर क्यों यह मैं नहीं जानती। गुरुआ और बुधराम को छोड़कर सभी मुदालय कटघरे में हैं। गुरुआ और बुधराम गांव में है।*
>
> *9. मुझको लेकर मुदालयों का मेरे पिता से कोई झगड़ा नहीं हुआ था। यह बात नहीं है कि सही बात छुपाकर मैंने झूठी गवाही दी है। यह बात नहीं है कि मैंने घटना नहीं देखा था।"*

65. P.W.8 had also not stated any thing about the motive behind the alleged occurrence. In para-4 of his cross-examination, he had only stated that a quarrel in between, Jeetan (P.W.2) and mother of accused Soma (appellant no.1 herein) had taken place

but not in his presence. For ready reference, the Para-4 of the cross-examination is being quoted as under:

> *"4. मेरी बेटी जीतन का सोमा की माँ से झगड़ा हुआ था पर झगड़ा होते मैं नहीं देखा था। यह बात नहीं है कि मुझे कोई मारपीट नहीं हुई थी। यह बात नहीं है कि मुदालयों को झुठा फंसाया हूँ।"*

66. Thus, from the aforesaid testimonies of the eyewitnesses, it is evident that motive behind the alleged occurrence has not been established by the prosecution.

67. From the perusal of the *Fardbayan* which was given by the P.W.2 at Police Station, wherein, she has stated that accused Soma Bas Mahali had told against the informant's character in the village and for that reason, quarrel had taken place in between accused Soma Bas Mahali and the deceased. But this part of statement has been denied by the P.W.1 in her testimony at para-7, wherein, she had stated that none had complained to them about the bad character of her daughter (P.W.2). Further, she has denied that she had said to the Police that Budhram had told to the people about the bad character of her daughter. For ready reference, Para-7 of her testimony is being quoted as under:

> ***5.*** *मेरे पति या मुझसे किसी ने कभी नहीं शिकायत किया कि मेरी बेटी जीतन का चरित्र खराब था। पुलिस में नहीं कही थी कि बुधराम बासमहली गांव में लोगों से मेरी पुत्री के चाल-चलन की शिकायत किए थे। सोमा दुर्गा और गोदरो तीनो आपस में भाई है तथा मेरा देवर लगते हैं।*

लौटा मेरे भाई ससुर का लड़का, मारकी भाई ससुर का लड़का है। नारायण मेरा देवर तथा टंगरू भाई है। जगरनाथ ससुर हैं।

68. Thus, from aforesaid discussion, it is evident that nothing is on record to show the motive of the alleged occurrence and as such, it cannot be said that accused/appellants had assaulted the deceased with their common object. The Hon'ble Apex Court in the case of ***Hawa Singh v. State of Haryana*, 1993 Supp (2) SCC 527** has categorically observed that in absence of motive there can be no common object on the part of the appellants to commit the crime.

> ***"6.*** *The motive is almost non-existent. Ram Kumar appellant had some altercation with one Sunder two days earlier. Sat Narain was also present there and he tried to pacify them. The alleged motive is that Ram Kumar did not like it and he left the place while giving threats to Sat Narain. It is difficult to believe that such a minor incident can be the motive for committing the double murder two days later. We are of the view that the prosecution has not been able to show the existence of any motive for the appellants to commit the crime. The absence of motive lends further support to the contention of the learned counsel for the appellants that there was no common object on the part of the appellants to commit the crime."*

69. From perusal of record, it is also evident that there is no ingredient of Section 149 of the Indian Penal Code said to have been collected in course of investigation by the prosecution that

the appellant was having common object to commit the murder of the deceased.

70. It is settled connotation of law that it is for the prosecution to prove the factors such as the existence of the assembly with a requisite number, the common object for everyone, the object being unlawful, and an offence committed by one such member. The courts will have to be more circumspect and cautious while dealing with a case of the accused charged under Section 149IPC, as it involves a deeming fiction. Therefore, a higher degree of onus is required to be put on the prosecution to prove that a person charged with an offence is liable to be punished for the offence committed by the others under Section 149IPC. The principle governing the aforesaid aspect is taken note of by the Hon'ble Apex Court in ***Ranjit Singh v. State of Punjab*** reported in ***(2013) 16 SCC 752.***

71. Same view is also reiterated by the Hon'ble Apex Court in the case of ***Arvind Kumar vs. State of Rajasthan*****,** reported in **(2022) 16 SCC 732.** For ready reference, the relevant paragraph of the aforesaid judgment is being quoted as under**:**

> ***"52.*** *Section 149 of the Code deals with a common object. To attract this provision there must be evidence of an assembly with the common object becoming an unlawful one. The concept of constructive or vicarious liability is brought into this provision by making the offence committed by one member of the unlawful assembly to the others having the common object. It is the sharing of the common object which attracts the offence committed by one to the other members.*

Therefore, the mere presence in an assembly per se would not constitute an offence, it does become one when the assembly is unlawful. It is the common object to commit an offence which results in the said offence being committed. Therefore, though it is committed by one, a deeming fiction is created by making it applicable to the others as well due to the commonality in their objective to commit an offence. Thus, it is for the prosecution to prove the factors such as the existence of the assembly with a requisite number, the common object for everyone, the object being unlawful, and an offence committed by one such member. The courts will have to be more circumspect and cautious while dealing with a case of the accused charged under Section 149IPC, as it involves a deeming fiction. Therefore, a higher degree of onus is required to be put on the prosecution to prove that a person charged with an offence is liable to be punished for the offence committed by the others under Section 149IPC. The principle governing the aforesaid aspect is taken note of by this Court in Ranjit Singh v. State of Punjab [Ranjit Singh v. State of Punjab, (2013) 16 SCC 752---"

72. As already noticed hereinabove that prosecution has attempted to drive home the guilt of the accused/appellants based on accused persons/appellants having shared a common object, by pressing into service of Section 149 of IPC. As discussed hereinabove, this provision does not create a separate offence but only declares vicarious liability of all members of unlawful assembly for acts done in common object.

73. Thus, in order to attract Section 149 of the Code, it must be shown by the prosecution that it must be within the knowledge of the other members as one likely to be committed in furtherance of the common object. In the instant case the prosecution had failed to prove that the appellants herein had shared a common object with other members of the alleged unlawful assembly. To convict a person under Section 149 IPC prosecution has to establish with the help of evidence that firstly, appellants shared a common object and were part of unlawful assembly and secondly, it had to prove that they were aware of the offences likely to be committed is to achieve the said common object. Both these ingredients are conspicuously absent.

74. Further, it is settled position of law that when the prosecution is not able to prove its case beyond reasonable doubt, it cannot take advantage of the fact that the accused have not been able to probabilise their defence.

75. It is well settled that the prosecution must stand or fall on its own feet. Reference in this regard may be made to the Judgment rendered by the Hon'ble Apex Court in the case of ***Sunil Kundu*** **Vrs.** ***State of Jharkhand,*** reported in **(2013) 4 SCC 422 ,** wherein, at paragraph-28 it has been observed as under:-

> *"28. … When the prosecution is not able to prove its case beyond reasonable doubt it cannot take advantage of the fact that the accused have not been able to probabilise their defence. It is well settled that the prosecution must stand or fall on its own feet. It cannot draw*

support from the weakness of the case of the accused, if it has not proved its case beyond reasonable doubt."

76. It is important to bear in mind that members of an assembly may have a community of an object only up to a certain point, beyond which they may differ in their objects; and the knowledge possessed by each member of what is likely to be committed in prosecution of the common object will vary not only according to the information at his command but also according to the extent to which he shares the community of objects. If knowledge of the likelihood of the particular offence cannot be reasonably attributed to the other members, then their liability does not arise.

77. Further, it is pertinent to mention here that that in order to sustain a conviction under Section 149 I.P.C., it was important that the accused should be sharing a common object to murder as it had to be proved that the accused have come to the place of occurrence with a premeditated plan. To sustain a conviction under Section 302, that even if the murder was proved, those persons who are not involved in the actual assault and were not responsible for the injuries caused to the deceased, unless and until it was conclusively proved that they had come at place of occurrence with premeditated plan.

78. It is further settled proposition of law that in absence of evidence of any common object being established, accused are liable for their individual acts only.

79. In the backdrop the aforesaid discussion and the judicial pronouncements, the evidence of prosecution witnesses as also taken into consideration the facts and circumstances of the instant case, this Court is of the view that the attack was not a premeditated one nor there was prior concert. Further, the prosecution has completely failed in establishing that the appellants have common object to commit the alleged offence.

80. The totality of the circumstances must be taken into consideration in order to arrive at a truthful conclusion that the appellants had a common object to commit the offence under which they were convicted. Thus, in aforesaid circumstances, it cannot be said that the appellants have acted in furtherance of common object to attract constructive liability under Section 149 of the Penal Code, 1860.

81. At this juncture, this Court is now going to revisit the evidences available on record in order to find that in absence of evidence of any common object being established, what are the liability of the accused persons in their individual capacity.

82. P.W.1 (widow of the deceased), has deposed in her testimony that Soma had assaulted her husband with *farsa* on his waist and Durga had assaulted her husband on his chest and due to which, her husband sustained injury, thereafter, he died. For ready reference ,the relevant paragraph of her testimony is being quoted as under:

"3. सोमा आकर कापी से मेरे पति को काट दिया। वह मेरे पति के कमर में, दुर्गा, उनके छाती में काटा। मेरे पति जख्मी होकर मर गए।"

83. P.W.2, **(informant and daughter of the deceased)** has deposed in his examination-in-chief that Soma had assaulted her father on the lung portion and stomach, thereafter, her father had started fleeing but suddenly had fallen down in the court-yard and died at the spot. She has further testified that Durga had also assaulted her father. For ready reference, the relevant paragraph of her testimony is being quoted as under:

"1. ___ये सभी आकर मेरे पिता को काटे। पहले मेरे पिता को सोमा पंजरा के पास और पेट में अपने हाथ में लिए हथियार से मारा। मेरे बाप भागने लगा तब आंगन में गिर गया और मर गया। मेरे बाप को दुर्गा भी मारा।"

84. P.W.-8 Narayan Bansmahali (brother of the deceased) who claimed himself to be an eyewitness of the occurrence has stated in his examination-in-chief that Soma came there first and assaulted his brother Shyam Bans Mahali (deceased) on his chest with *tabla.* Durga had assaulted on his back with axe and others had assaulted with lathi. For ready reference, the relevant paragraph of his testimony is being quoted as under:

"3.करीब सालभर हुआ। मंगल दिन के शाम की बात है हमलोग अपने आंगन में भात खा रहे थे। मैं, मेरे बड़े भाई श्यामबांस महली भाभी वहां भात खा रहे थे कि इसी बीच वहां सोमा, दुर्गा, लौठा, गोन्चरो गाडकी बोदो आए। सोमा के हाथ में तबला दुर्गा के हाथ में टांगी, लौटा तोनो लिए, गोन्दरो लाठी, माडकी लाठी तथा बोदो भी लाठी लिए आए थे। सोमा वहां आकर पहले तबला से मेरे भाई

श्याम बांस महली के छाती पर मारा, दुर्गा टांगा से उसके पीठ में मारा तथा और लोग उसे लाठी से मारे। मेरा भाई भाग रहा था। भागते भागते वह लौटा की बारी में चला गया और वहीं गिरगर मर गया

85. Thus, it is evident from the testimonies of aforesaid eyewitnesses that there is specific allegation of deadly assault against the Soma and Durga. It has also come in evidences that they were armed with sharp cutting weapon. The aforesaid versions of the witnesses have also been substantiated by the testimony of P.W.5, the doctor who conducted post-mortem on the deceased body and has found the two incised wound injuries and opined that injuries may be caused by sharp-cutting weapon. The relevant part of his testimony is being quoted as under:

"C) Incised wounds-

(i) 11" x 2" x soft tissue deep on the inter scapular region.

(ii) 13'' x 3'' x bone deep over the left arm medial side situated above down words cutting the soft tissue, blood vessels and left humors bone.

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3. *All the injuries are ante-mortem.*

Incised wounds are caused by heavy sharp cutting weapon may be Tangi & Bhala and right by hard and blunt weapon may be lathi."

86. Learned counsel for the appellants has contended that there is *inter-se* contradiction among the testimonies of the witnesses on the point of arms carried by the appellants and further, it is

contended that all the self-proclaimed eyewitness are close relatives of the deceased.

87. In this aforesaid context, it requires to refer herein that it is settled legal proposition that not every discrepancy or contradiction matters for assessing the reliability and credibility of a witnesses, unless the discrepancies and contradictions are so material that it destroys the substratum of the prosecution case. It is natural for a witness to make minor improvements in the testimony in relation to the occurrence, therefore, such improvements cannot be said to be of material importance for disbelieving the testimony of the witnesses.

88. It is settled proposition of law that merely because there is some contradiction and discrepancies in the testimonies, the same cannot be alone to vitiate the prosecution story, as has been held by the Hon'ble Apex Court in the case of ***Mukesh Kumar v. State (NCT of Delhi)***, reported in ***(2015) 17 SCC 694*****,** wherein, at paragraph-8, it has been held as under: —

> *"8. While the slight difference in the initial version of the prosecution and the FIR version has been reasonably explained by the cross-examination of PW 6, it is our considered view that minor discrepancies, embellishments and contradictions in the evidence of the eyewitnesses do not destroy the essential fabric of the prosecution case, the core of which remains unaffected.* ***Even if we have to assume that there are certain unnatural features in the evidence of the***

<u>eyewitnesses the same can be reasonably explained on an accepted proposition of law that different persons would react to the same situation in different manner and there can be no uniform or accepted code of conduct to judge the correctness of the conduct of the prosecution witnesses</u> *i.e. PWs 1 and 2. The relation between PWs 5 and 6 and PWs 1 and 2 and the deceased, in our considered view, by itself, would not discredit the testimony of the said witnesses. There is nothing in the evidence of PWs 1 and 2 which makes their version unworthy of acceptance and their testimony remains unshaken in the elaborate cross-examination undertaken."*

89. Likewise, the Hon'ble Apex Court in the case of ***Shyamal Ghosh* Vs. *State of West Bengal***, reported in ***(2012) 7 SCC 646***, wherein, at paragraphs-46 & 49, it has been held as under: —

"46. Then, it was argued that there are certain discrepancies and contradictions in the statement of the prosecution witnesses inasmuch as these witnesses have given different timing as to when they had seen the scuffling and strangulation of the deceased by the accused. It is true that there is some variation in the timing given by PW 8, PW 17 and PW 19. Similarly, there is some variation in the statement of PW 7, PW 9 and PW 11. Certain variations are also pointed out in the statements of PW 2, PW 4 and PW 6 as to the motive of the accused for commission of the

crime. ***Undoubtedly, some minor discrepancies or variations are traceable in the statements of these witnesses. But what the Court has to see is whether these variations are material and affect the case of the prosecution substantially****. Every variation may not be enough to adversely affect the case of the prosecution.*

49. It is a settled principle of law that the court should examine the statement of a witness in its entirety and read the said statement along with the statement of other witnesses in order to arrive at a rational conclusion. No statement of a witness can be read in part and/or in isolation. We are unable to see any material or serious contradiction in the statement of these witnesses which may give any advantage to the accused."

90. Indeed, in the instant case, there is some contradiction in the evidence of inter-se eyewitnesses' evidences, which according to the considered view that aforesaid contradiction cannot be termed as major contradiction in the view of the judgment as quoted hereinabove. Further, at the moment, when such type of incident happened in front of any person then at that time his mindset is not in normal stage and when he give testimony in the court, he just memorizing the incident and stated in front of trial court and as such, in that situation, the court cannot expect that such witnesses will testify graphic detail of the incident.

91. However, it is settled position of law that where a testimony is duly explained and inspires confidence, the Court is not expected to reject the testimony of an interested witness. However, when the testimony is full of contradictions and fails to match evenly with the supporting evidence, the Court is bound to sift and weigh the evidence to test its true weight and credibility. Reference in this regard may be made to the Judgment rendered by the Hon'ble Apex Court in the *case* ***Mallappa Vs. State of Karnataka, AIR 2024 SC 1252*****.**

92. Further, this Court is conscious with the fact that all the said eyewitnesses are injured eyewitnesses as such their testimonies cannot be brushed aside lightly. It is settled position of law that the evidence of an injured witness is considered to be on a higher pedestal than that of a witness simpliciter. Reference in this regard may be made to the Judgment rendered by the Hon'ble Apex Court in the case of ***Periyasamy Vs. State, AIR 2024 SC 1667*****.**

93. In the instant case, all the eye-witnesses (P.W.1, 2 and 8) categorically stated that Soma and Durga had made an assault upon the deceased by the sharp edged weapon like axe or *farsa.* However, admittedly there is contradiction regarding the weapon used by both of the appellants but that contradiction has not much importance that eroded the credibility of the said eyewitnesses.

94. Since, this Court has already observed that the conviction of the appellants by taking the aid of Section 149 of IPC is not

justified and as such, the same cannot be sustained, therefore, in the absence of common object, the appellants are liable for their individual act as such, conviction of Soma Bas Mahali and Durga Bas Mahali @ Durga Bans Mahali, appellant nos.1 and 2 respectively, on the basis of discussion made hereinabove, under Section 302 Penal Code, 1860 is maintained and accordingly, they are sentenced to undergo imprisonment for life and to pay fine of Rs.1000/- each and in case of default of payment of fine, they are further directed to undergo rigorous imprisonment for one year.

95. Since, the appellant nos.1 & 2, namely, Soma Bas Mahali and Durga Bas Mahali @ Durga Bans Mahali respectively have been granted bail by this Court, as such, their bail bonds are cancelled and court concerned, is hereby directed to do the needful.

96. So far as the appellant nos.3 & 6, namely, Gondro Bas Mahali @ Gondro Bans Mahali and Marki Bas Mahali @ Marki Bans Mahali respectively are concerned, the allegations against them are general and omnibus and no specific allegations are alleged against them. Further, from the testimony of PW.3, the doctor who has examined the injured witnesses P.W.1 P.W.8 has found the injuries upon the said witnesses are simple in nature.

97. Accordingly, the appellant nos.3 & 6, namely, Gondro Bas Mahali @ Gondro Bans Mahali and Marki Bas Mahali @ Marki Bans Mahali respectively, are hereby convicted under section 323

IPC for the offence voluntarily causing hurt and accordingly, they are sentenced to period already undergone by them.

98. Since the aforesaid appellant nos.3 & 6 are on bail, accordingly, they are discharged from liability of bail bond.

99. With the aforesaid observations/directions, the instant appeal stands dismissed.

100. Let this order/judgment be communicated forthwith to the Court concerned along with the Lower Court Records.

I Agree **(Sujit Narayan Prasad, A.C.J.)**

(Arun Kumar Rai, J.) **(Arun Kumar Rai, J.)**

High Court of Jharkhand, Ranchi
Dated: 28th August, 2024.
Rohit/-**A.F.R.**