

\$~21

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CRL. A. 903/2015**

%

Date of Judgment: 21st April, 2017

NAVEEN @ SANJU

.... Appellant

Through : Mr.Manoj Singh, Adv.

versus

STATE (NCT OF DELHI)

.... Respondent

Through : Ms.Radhika Kolluru, APP for State.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE VINOD GOEL

G.S.SISTANI, J. (ORAL)

1. The present appeal has been filed under Section 374 read with Section 482 of the Code of Criminal Procedure, 1973 by the appellant impugning the judgment dated 05.11.2014 passed by the Additional Sessions Judge in Sessions Case No. 04/14 by which the appellant herein has been convicted of offences under Sections 147/148/149/302/34 of the Indian Penal Code, 1860 (in short 'IPC') and the order on the point of sentence dated 28.05.2015.
2. The case of the prosecution as set out by the Trial Court in the impugned judgment is as under:

“In nutshell, the case of the prosecution as unfolded in the rukka is that on 24/9/13 at about 10.00 pm, on receipt of DD 94B, SI P.R. Hudda alongwith one constable reached at the spot i.e. H. No. RZA 76, Gali No. 2, Sitapuri, Part-II. On reaching there, they found that injured has been shifted to DDU Hospital. SI P.R. Hudda reached DDU hospital where injured Chetan Sharma was declared brought dead. SI alongwith father of the deceased returned to place of

incident, where accused Deepak alongwith two associates (JCL) were apprehended at the spot. The statement of father of the deceased was recorded wherein he stated on 24/9/13 at about 10 pm, he heard noise and he come [sic: came] outside. He found that his son was beaten by accused and his daughter Priyanka requested accused persons to save her brother. Three accused persons out of which two found JCL were apprehended at the spot. The knife, with which the deceased was stabbed, handed over to IO. Physical clues were taken in possession from the spot. The postmortem was got conducted. The accused were arrested. The exhibits were sent to FSL, Rohini. During investigation, statements of witnesses were recorded and after completing necessary formalities, charge sheet was filed in court.”

3. On the basis of the foregoing allegations, the charge was framed. All the accused pleaded not guilty and claimed trial. The prosecution examined 20 witnesses to bring home the guilt of the accused. The statements of the accused were recorded under Section 313, where they claimed to have been falsely implicated. The appellant produced two witnesses in his defence.
4. During trial, three out of the five accused were found to be juveniles and thus, the trial proceeded against the remaining two accused namely, Deepak @ Barka and the appellant Naveen @ Sanju.
5. The Trial Court vide the impugned judgment dated 05.11.2015, came to the conclusion that the prosecution had been able to establish the guilt of the accused and holding both the accused guilty for the commission of the offences under Sections 147/148/149/302/34 IPC. By order dated 28.05.2015, the convicts were sentenced to undergo imprisonment for life and fine of Rs.5,000/-, in default of which to undergo further simple imprisonment for three months under Section 302 read with Section 149 IPC; rigorous imprisonment for one year

and to pay fine of Rs.2,000/-, in default of which simple imprisonment for one month under Section 147 IPC; and rigorous imprisonment for two years and fine of Rs.3,000/-, in default simple imprisonment for two months under Section 148 IPC.

6. This has led to the filing of the present appeal.
7. Mr.Singh, learned counsel for the appellant, submits that the Trial Court has erred in convicting the appellant and consequently, the impugned judgment and the order on the point of sentence deserve to be set-aside. It is contended that the prosecution had failed to prove its case beyond reasonable doubt and accordingly, the benefit of doubt should have been given to the appellant herein. It is submitted that none of the witnesses have alleged anything incriminating against the appellant herein and therefore, his conviction and sentence deserves to be set-aside. Even if the entire prosecution story is believed, no case is made out against the appellant herein. Mr.Singh contends that nothing has been shown to prove that the appellant herein shared a common object with the other accused in the matter.
8. Learned counsel submitted that the testimonies of the prosecution witnesses are full of contradictions and anomalies and do not support the case of the prosecution and consequently, the conviction based upon such depositions is bad in law and deserves to be set-aside. On the other hand, the defence witnesses have categorically stated that the appellant was present at his house at the time of the alleged offence.
9. It is next contended by Mr.Singh that the Trial Court has failed to appreciate that the role ascribed by the prosecution *qua* the appellant does not warrant a conviction under Section 302 r/w 149 IPC or under Sections 147/148 IPC. He submits that the main eye witness Priyanka

(PW-5) has not named the appellant herein and more so, she has not even alleged any role to the appellant. Nothing has been stated by this prosecution witness against the appellant. Further, the complainant (PW-2), father of the deceased had at the instance of the police only stated that the appellant was hitting the deceased with fists and leg blows. Apart from this there is no allegation against the appellant herein. Learned counsel submits that the Trial Court has erred in relying upon the testimony of Deepak (PW-7), Sh.Ganesh Sharma (PW-9), Sh.Dinesh Sharma (PW-11), SI P.R. Hudda (PW-17), and Inspector M.K. Mishra (PW-18) and basing its judgment broadly upon the statements of these witnesses.

10. *Per contra* it has been alleged by Ms.Kolluru, learned APP, that there is no infirmity in the impugned judgment and order which would warrant interference by this Court in appeal. The prosecution was able to prove its case beyond reasonable doubt. She submits that the appellant was not charged with Section 302 alone, but read with Section 149 as having been a part of an unlawful assembly sharing the common object. She submits that for being a part of an unlawful assembly, it is not necessary for any overt act being ascribed to the accused to establish the guilt of the accused. What is necessary is that the prosecution shows that the accused was a part of an unlawful assembly having a common object and that any member of the assembly commits an offence in furtherance of that object. In the present case, it has been established based upon the testimonies of the prosecution witnesses that the appellant was a member of the unlawful assembly and that the murder was committed in furtherance of the common object.

11. In response to the allegation that no overt role has been ascribed to the appellant herein, learned APP has relied upon the testimony of the complainant (PW-2) wherein he has specifically deposed that the appellant was hitting his son (the deceased) with fists and leg blows. Further, the other prosecution witnesses have specifically deposed that the appellant was a member of the unlawful assembly and thus, his being part of the assembly cannot be doubted.
12. We have heard the learned counsel for the parties and considered their rival contentions as well as gone through the impugned judgment and the trial court record.
13. Before we consider the rival submissions of the learned counsel for the parties, we deem it appropriate to analyse the testimony of the main prosecution witnesses, being the complaint (PW-2), Ms. Priyanka (PW-5), Sh. Deepak (PW-7), Sh. Ganesh Sharma (PW-9), Sh. Dinesh Sharma (PW-11), SI P.R. Hudda (PW-17), and Inspector M.K. Mishra (PW-18) with a view to examine the role of the appellant herein.
14. The complainant Mr. M.C. Sharma (PW-2) has deposed that on 24.09.2013 at about 9:45-10 PM, when he heard a noise outside his house and he came outside to hear his daughter Priyanka (PW-5) shouting "*Chor do chor do*" (leave him leave him). He saw five boys beating his son (deceased). He tried to intervene in the scuffle, but was pushed by Bhuttan [since declared juvenile ('JCL')]. At this point, one of the boys Faguwa (JCL) took out a knife and handed it over to Durga (JCL) and exhorted Durga (JCL) to stab the deceased. Thereafter, Durga (JCL) stabbed the deceased. He added that Deepak, Faguwa (JCL) and Durga (JCL) caught hold of the deceased and the appellant Naveen @ Sanju and Bhutan (JCL) gave him beating with

fist and leg blows. The PW-2 tried to lift his son and shouted, on which Sh.Deepak (PW-7), Sh.Ganesh Sharma (PW-9), and Sh.Dinesh Sharma (PW-11) came. Three boys, namely Deepak, Faguwa (JCL) and Durga (JCL) were caught while the other two, including the appellant, ran away. Later, the appellant was arrested from his house at the instance of the complainant (PW-2). In his cross-examination, the complainant (PW-2) stated that he did not know the accused prior to the incident and that when he had come out of his house, three boys had caught hold of his son while the others were giving him kicks and fist blows.

15. Ms.Priyanka (PW-5) (sister of the deceased), who is the star witness, testified that on 24.09.2013 at about 10 PM, she was sitting outside her house. Five boys came there and they started staring at her and passing comments. Chetan (deceased) objected to the act of the boys and asked the boys to leave. The boys started abusing the deceased. Thereafter, they assaulted him. Priyanka (PW-5) tried to save her brother, but was unable to do so and the boys continued to beat the deceased with leg and fist blows. Faguwa (JCL), Durga (JCL) and Bhuttan (JCL) were holding the deceased with his neck and Deepak was holding the hand of the deceased. At this point, Faguwa (JCL) took out a knife and gave it to Durga (JCL) and exhorted him. Durga (JCL) gave a knife blow in the stomach of the deceased. Her father (PW-2), Sh.Ganesh Sharma (PW-9), and Sh.Dinesh Sharma (PW-11) as well as the neighbours came out. Three boys were apprehended immediately. Sh.Ganesh (PW-9) took the knife out from the hand of Durga (JCL). We may note that no role was attributed to the appellant herein and she (PW-5) only recognised the appellant, who was present

in court at that time. In her cross-examination, she has stated that the boys were not known to her prior to the incident and that the names of the boys were told by the police.

16. The next witness Sh.Deepak (PW-7) (neighbour of the deceased) stated that on 24.09.2013 at about 9:50-10 PM, he came outside his house after hearing a noise and saw five boys had surrounded Chetan (deceased). He tried to intervene, but was pushed away. Faguwa (JCL) handed over a knife to Durga (JCL) upon his asking; and Durga (JCL) gave a knife blow to the deceased in his stomach. Other boys caught hold of Chetan (deceased). The appellant Naveen and Bhuttan (JCL) ran away from the spot. The witness knew the identity of the boys previously as they were residents of the same locality.
17. Sh.Ganesh Sharma (PW-9) (brother of the complainant PW-2) deposed that on 24.09.2013 at about 10 PM, he came out of his house hearing his brother Mahesh (PW-2). Upon coming outside, he saw that Durga (JCL) had stabbed the deceased. He stated that Durga (JCL) was with 4 other boys including the appellant Naveen. Durga (JCL), Deepak and Faguwa (JCL) were apprehended while the other two boys, including the appellant, ran away after pushing him. In his cross-examination, the witness stated that he did not know the name of the appellant prior to the incident, but recognised him by face.
18. The uncle of the deceased Sh.Dinesh Sharma (PW-11) has testified that on 24.09.2013 at about 9:30-10 PM, he heard the voice of his brother Mahesh (PW-2) and came out of his house. He saw five boys present and that the murder of the deceased had already been committed. Three boys had already been apprehended by Mahesh (PW-2) and Ganesh (PW-9). Durga (JCL) had a knife in his hand

which was taken by Ganesh (PW-9). The appellant Naveen and Bhuttan (JCL) were running from the spot. In his cross-examination, he stated that he does not know anyone with the name of Naveen nor the name of Naveen was disclosed to him.

19. We need not deal with the testimonies of SI P.R. Hudda (PW-17) and Inspector M.K. Mishra (PW-18) in great detail. Suffice to say that both the witnesses deposed that the appellant Naveen @ Sanju was arrested from his house on 26.09.2013.
20. We have also gone through the Post Mortem Report of the deceased Chetan Sharma (Ex. PW-6/A), which has been proved by Dr.Komal Singh (PW-6), wherein only one external injury being a clean incised wound was found on the body of the deceased. Further the cause of death was held to be haemorrhagic shock due to stab injury inflicted over the heart and that the clean incised wound was sufficient to cause death in ordinary course of nature. There was no evidence of any other external injury which would show that the deceased suffered fist and leg blows prior to his death.
21. Analysing the foregoing evidence, we are of the view that the appellant cannot be punished under Sections 302 r/w 149 or Sections 147/148 IPC. The incident as it unravels is that on 24.09.2013 at about 9:30-10 PM, Ms.Priyanka (PW-5) was sitting outside her house when five boys, being Deepak, appellant Naveen @ Sanju, Faguwa (JCL), Durga (JCL) and Bhuttan (JCL) came and started staring at her. They further passed comments, which was objected to by the brother (deceased) of Priyanka (PW-5). The boys then abused and assaulted the deceased. Priyanka (PW-5) initially tried to save her brother (deceased), but failing to do so raised an alarm. Hearing his daughter,

the complainant Mr. Mahesh Sharma (PW-2) came outside his house and saw five boys beating his son. PW-5 has deposed that the Faguwa (JCL), Durga (JCL), Bhuttan (JCL) had held the deceased with his neck while Deepak held the hand of the deceased. At this point Deepak (PW-7) also came out of his house to find that five boys had surrounded the deceased. Faguwa (JCL) took out a knife and handed it over to Durga (JCL) and exhorted him. Thereafter, Durga (JCL) stabbed the deceased in his stomach. Sh. Ganesh Sharma (PW-9) and Sh. Dinesh Sharma (PW-11) (uncles of the deceased) came out and saw that the deceased had already been stabbed. They were able to apprehend three boys [Durga (JCL), Deepak, and Faguwa (JCL)] while Bhuttan (JCL) and the appellant Naveen ran away. Thereafter, the deceased was taken to the hospital, where he was declared as brought dead.

22. The only role attributed to the appellant Naveen is in the testimony of the complainant (PW-2), wherein he deposed that while three boys caught hold of the deceased, the appellant Naveen @ Sanju and Bhuttan (JCL) “*were giving beatings to him with fist and leg blows.*” However, the factum of assault by the boys, let alone by the appellant herein, has not been borne out from the Post Mortem Report (Ex. PW-6/A) and infact in the testimony of PW-5, who is the star witness, the appellant has not even been named.
23. Even though no role was ascribed to the appellant herein, the Trial Court had proceeded to convict him as being a member of an unlawful assembly under Sections 147/148 IPC and Sections 302 r/w 149 IPC.
24. Section 147 gives the punishment for rioting; Section 148 stipulates the punishment for rioting armed with a deadly weapon or anything

capable of being used as such. The offence 'Rioting' has been defined in Section 146 IPC as the use of force or violence by an unlawful assembly or any of its members in prosecution of the common object. Thus, to establish the guilt under Section 147 or Section 148, it is a pre-requisite that the accused must be proved to be a member of a unlawful assembly. Similar is the case when any person is sought to be proved guilty for any offence read in conjecture with Section 149 IPC. The definition of the term 'unlawful assembly' and what amounts to being a member thereof have been given in Sections 141 and 142 respectively, which read as under:

“Section 141 - Unlawful assembly.— An assembly of five or more persons is designated an "unlawful assembly", if the common object of the persons composing that assembly is-

First.— To overawe by criminal force, or show of criminal force, the Central or any State Government or Parliament or the Legislature of any State, or any public servant in the exercise of the lawful power of such public servant; or

Second.— To resist the execution of any law, or of any legal process; or

Third.— To commit any mischief or criminal trespass, or other offence; or

Fourth.— By means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or

Fifth.— By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

Explanation.— An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly.

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

(Emphasis Supplied)

25. Thus, to bring home the guilt of the accused as being a member of an unlawful assembly, it must be proved that the accused was a member of an assembly of five or more persons and shared the common object with the assembly as explained in five clauses under Section 141. Further, the explanation clarifies that an assembly may not be unlawful at the time of its assemblage, but may become unlawful subsequently by the establishment of the common object.
26. Whether an overt act or specific role must be ascribed to each accused to find him a member of an unlawful assembly arose for the consideration of a Full Bench of the Supreme Court in ***Baladin & Ors. v. State of Uttar Pradesh, AIR 1956 SC 181***, wherein great tension between refugee families from West Punjab and the old residents of Village Goran led to an incident of murder of 6 members of the refugee families by large number of old residents. In this background, the Apex Court observed that all the accused could not be punished as *ipso facto* being a member of an unlawful assembly, but overt act must have been shown by the prosecution. The relevant portion of the judgment reads as under:

20. ...If members of the family of the appellants and other residents of the village assembled, all such persons could not be condemned ipso facto as being members of that

unlawful assembly. It was necessary therefore for the prosecution to lead evidence pointing to the conclusion that all the appellants before us had done or been committing some overt act in prosecution of the common object of the unlawful assembly. The evidence as recorded is in general terms to the effect that all these persons and many more were the miscreants and were armed with deadly weapons, like guns, spears, pharsas, axes, lathis, etc. This kind of omnibus evidence naturally has to be very closely scrutinised in order to eliminate all chances of false or mistaken implication. ...”

(Emphasis Supplied)

27. This judgment was considered by a Bench of four Judges of the Supreme Court in ***Masalti v. State of Uttar Pradesh***, AIR 1965 SC 202, wherein the offence was again caused by enmity between two rival factions: first lead by Gayadin and other headed by Laxmi Prasad. A small scuffle between one of the sons of Gayadin and Laxmi Prasad led to Laxmi Prasad collecting a large crowd to attack the family of Gayadin. This led to the merciless killing of numerous members of the family of Gayadin. The Trial Court had found 35 out of 40 accused to be guilty of Section 302/149 IPC. On appeal, the High Court had given relief to 7 of the convicts finding that they had not committed any of the offences. In appeal to the Apex Court, one of the contentions which was raised by the counsel for the appellants was that the High Court had failed to appreciate that no specific part had been ascribed to many accused. This did not find favour with the Supreme Court which read down ***Baladin (Supra)*** as being limited to its special facts and not laying any general principle of law. The relevant portion reads as under:

“17. ... The observation of which Mr Sawhney relies, prima facie, does seem to support his contention; but, with respect, we ought to add that the said observation cannot be read as laying down a general proposition of law that unless an overt act is proved against a person who is alleged to be a member of an unlawful assembly, it cannot be said that he is a member of such an unlawful assembly. In appreciating the effect of the relevant observation on which Mr Sawhney has built his argument, we must bear in mind the facts which were found in that case. It appears that in the case of Baladin the members of the family of the appellants and other residents of the village had assembled together; some of them shared the common object of the unlawful assembly, while others were merely passive witnesses. Dealing with such an assembly, this Court observed that the presence of a person in an assembly of that kind would not necessarily show that he was a member of an unlawful assembly. What has to be proved against a person who is alleged to be a member of an unlawful assembly is that he was one of the persons constituting the assembly and he entertained along with the other members of the assembly the common object as defined by Section 141 IPC. Section 142 provides that however, being aware of facts which render any assembly an unlawful assembly intentionally joins that assembly, or continue in it, is said to be a member of an unlawful assembly. In other words, an assembly of five or more persons actuated by, and entertaining one or more of the common object specified by the five clauses of Section 141, is an unlawful assembly. The crucial question to determine in such a case is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects as specified by Section 141. While determining this question, it becomes relevant to consider whether the assembly consisted of some persons who were merely passive witnesses and had joined the assembly as a matter of idle curiosity without intending to entertain the common object of the assembly. It is in that context that the observations made by this Court in the case of Baladin assume significance; otherwise, in law, it would not be correct to say that before a person is held to be a

member of an unlawful assembly, it must be shown that he had committed some illegal overt act or had been guilty of some illegal omission in pursuance of the common object of the assembly. In fact, Section 149 makes it clear that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence; and that emphatically brings out the principle that the punishment prescribed by Section 149 is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly. Therefore, we are satisfied that the observations made in the case of Baladin must be read in the context of the special facts of that case and cannot be treated as laying down an unqualified proposition or law such as Mr Sawhney suggests.”

(Emphasis Supplied)

28. Thus, what is required is that the evidence to show that the accused shared the common object of the unlawful assembly and not that he personally acted upon the common object. An overt act or specific role is not necessary though the same may be a good indicator of the sharing of the common object by the accused. We may not rely on numerous judicial precedents for the proposition to avoid prolixity, we may only note the following observations of the Apex Court in **Lalji v. State of U.P., (1989) 1 SCC 437:**

“9. Section 149 makes every member of an unlawful assembly at the time of committing of the offence guilty of that offence. Thus this section created a specific and distinct offence. In other words, it created 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. However, the

vicarious liability of the members of the unlawful assembly extends only to the acts done in pursuance of the common objects 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. He cannot put forward the defence that he did not with his own hand commit the offence committed in prosecution of the common object of the unlawful assembly or such as the members of the assembly knew to be likely to be committed in prosecution of that object. Everyone must be taken to have intended the probable and natural results of the combination of the acts in which he joined. It is not necessary that all the persons forming an unlawful assembly must do some overt act. When the accused persons assembled together, armed with lathis, and were parties to the assault on the complainant party, the prosecution is not obliged to prove which specific overt act was done by which of the accused. This section makes a member of the unlawful assembly responsible as a principal for the acts of each, and all, merely because he is a member of an unlawful assembly. While overt act and active participation may indicate common intention of the person perpetrating the crime, the mere presence in the unlawful assembly may fasten vicariously criminal liability under Section 149. It must be noted that the basis of the constructive guilt under Section 149 is mere membership of the unlawful assembly, with the requisite common object or knowledge.

(Emphasis Supplied)

[See also *Saddik v. State of Gujarat*, (2016) 10 SCC 663 (paragraph 18); and *Anil Rai v. State of Bihar*, (2001) 7 SCC 318 (paragraphs 30-32)].

29. What amounts to an common object and how the same may be ascertained was examined by the Apex Court. In *Allauddin Mian v. State of Bihar*, (1989) 3 SCC 5, the two members of an unlawful

assembly had failed to execute the common object had wielded their weapons on innocent girls, which had nothing to do with the common object. In this background, the Apex Court held that the killing of the girls was not a part of the common object and thus, the other members of the unlawful assembly could not be punished for the individual acts of the two members and observed as under:

8. ...Therefore, in order to fasten vicarious responsibility on any member of an unlawful assembly the prosecution must prove that the act constituting an offence was done in prosecution of the common object of that assembly or the act done is such as the members of that assembly knew to be likely to be committed in prosecution of the common object of that assembly. Under this section, therefore, every member of an unlawful assembly renders himself liable for the criminal act or acts of any other member or members of that assembly provided the same is/are done in prosecution of the common object or is/are such as every member of that assembly knew to be likely to be committed. This section creates a specific offence and makes every member of the unlawful assembly liable for the offence or offences committed in the course of the occurrence provided the same was/were committed in prosecution of the common object or was/were such as the members of that assembly knew to be likely to be committed. Since this section imposes a constructive penal liability, it must be strictly construed as it seeks to punish members of an unlawful assembly for the offence or offences committed by their associate or associates in carrying out the common object of the assembly. What is important in each case is to find out if the offence was committed to accomplish the common object of the assembly or was one which the members knew to be likely to be committed. There must be a nexus between the common object and the offence committed and if it is found that the same was committed to accomplish the common object every member of the assembly will become liable for the same. Therefore, any offence committed by a member of an unlawful assembly in prosecution of any one or more of

the five objects mentioned in Section 141 will render his companions constituting the unlawful assembly liable for that offence with the aid of Section 149, IPC. ...”

(Emphasis Supplied)

30. The Apex Court in ***Gangadhar Behera and Others v. State of Orissa***, (2002) 8 SCC 381 observed as under:

“22. Another plea which was emphasized relates to the question whether Section 149 IPC has any application for fastening the constructive liability which is the sine qua non for its operation. The emphasis is on the common object and not on common intention. Mere presence in an unlawful assembly cannot render a person liable unless there was a common object and he was actuated by that common object and that object is one of those set out in Section 141. Where common object of an unlawful assembly is not proved, the accused persons cannot be convicted with the help of Section 149. 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. It cannot be laid down as a general proposition of law that unless an overt act is proved against a person, who is alleged to be a member of an unlawful assembly, it cannot be said that he is a member of an assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of 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. Members of an unlawful assembly may have community of object 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 their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence of this the effect of Section 149 IPC may be different on different members of the same assembly.

23. “Common object” is different from a “common intention” as it does not require a prior concert and a common meeting of minds before the attack. It is enough if each has the same object in view and their number is five or more and that they act as an assembly to achieve that object. The “common object” of an assembly is to be ascertained from the acts and language of the members composing it, and from a consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact 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. It is not necessary under law that in all cases of unlawful assembly, with an unlawful common object, the same must be translated into action or be successful. Under the Explanation to Section 141, an assembly which was not unlawful when it was assembled, may subsequently become unlawful. It is not necessary that the intention or the purpose, which is necessary to render an assembly an unlawful one comes into existence at the outset. The time of forming an unlawful intent is not material. An assembly which, at its commencement or even for some time

thereafter, is lawful, may subsequently become unlawful. In other words it can develop during the course of incident on the spot eo instanti.”

(Emphasis Supplied)

[See also ***Madan Singh v. State of Bihar*, (2004) 4 SCC 622** (paragraphs 10 and 11)].

31. Applying the foregoing principles to the present case, we are of the view that the prosecution has been unable to show that the appellant Naveen @ Sanju shared a common object with the unlawful assembly. When the 5 boys assembled, the assembly was not unlawful. The boys started staring Ms. Priyanka (PW-5) and passed comments. When the deceased Chetan (brother of Priyanka) tried to intervene, the boys abused him. At this time, all boys, other than the appellant, held the deceased and Faguwa (JCL) took out a knife and handed it over to Durga (JCL). Faguwa (JCL) exhorted Durga (JCL), pursuant to which, Durga (JCL) stabbed the deceased causing his death. Nothing has been attributed/ascribed to the appellant herein. The testimony of the complainant (PW-2) that the appellant assaulted the deceased with fist and leg blows is neither borne out from the Post Mortem Report (Ex. PW-6/A) nor from the testimonies of other witnesses and thus, must be disbelieved. The only consistent fact coming from the testimonies of the prosecution witnesses is that the appellant ran away from the incident. It seems that the appellant withdrew from the assembly as soon as it became unlawful as not to partake in the common object of the assembly.
32. In this regard, we may only note two judgments. In ***Daya Kishan v. State of Haryana*, (2010) 5 SCC 81: 2010 [1] JCC 1727**, an

altercation between two persons namely Sanjay and Krishan led to Krishan threatening Sanjay. After a short time, Krishan along with four others came to the house of Sanjay. One accused (Pohla) was armed with a gun whereas the other persons were armed with *jelli* and *lathis*. On coming to the place of incident, Pohla immediately fired at Rajesh (cousin of Sanjay). The Trial Court *inter alia* found that the appellant therein shared the common object to cause death of Rajesh and convicted the appellant therein for Section 302 read with 149 IPC, which was upheld by the High Court. On appeal to the Apex Court, the conviction under Section 302/149 IPC was set-aside as the prosecution had failed to establish the sharing of the common object by other members of the assembly. The relevant paragraphs read as under:

“26. Section 149 IPC creates a constructive or vicarious liability on the members of the unlawful assembly for the unlawful acts committed pursuant to the common object by any other member of that assembly. The basis of the constructive guilt under Section 149 IPC is mere membership of the unlawful assembly with the requisite common object or knowledge. This section makes a member of the unlawful assembly responsible as a member for the acts of each and all, merely because he is a member of an unlawful assembly. While overt act and active participation may indicate common intention of the person perpetrating the crime, the mere presence in the unlawful assembly may fasten vicariously criminal liability under Section 149.

27. There are two essential ingredients of Section 149 viz. (1) commission of an offence by any member of an unlawful assembly, and (2) such offence must have been committed in prosecution of the common object of that assembly or must be such as the members of that assembly knew to be likely to be committed. Once the court finds that these two ingredients are fulfilled, every person, who at the time of

committing that offence was a member of the assembly has to be held guilty of that offence. After such a finding, it would not be open to the court to see as to who actually did the offensive act nor would it be open to the court to require the prosecution to prove which of the members did which of the offensive acts. Whenever a court convicts any person of an offence with the aid of Section 149, a clear finding regarding the common object of the assembly must be given and the evidence discussed must show not only the nature of the common object but that in pursuance of such common object the offence was committed. There is no manner of doubt that before recording the conviction under Section 149 IPC, the essential ingredients of Section 149 IPC must be established.

(Emphasis Supplied)

33. We may also note an old decision of the Allahabad High Court in **Rex v. Sadla, AIR 1950 All 418: MANU/UP/0159/1950** wherein four appellants, including one Sadla, had approached the High Court against their convictions by the Trial Court for rioting and committing the murder of one Lunja. The prosecution had showed that the appellants along with one more, owing to an old enmity, had attacked Lunja and Ajudhia. They prepared an ambush and Sadla attacked them first, but failed and received *lathi* blows from Lunja in return. Thereafter, on account of the injuries sustained Sadla was unable to take active part in the incident. Later, others attacked and killed Lunja. The High Court found that appellant Sadla owing to his injuries was unable to render any assistance in the assault or by incitement and thus, had disassociated with the common object of the assembly. The relevant portion reads as under:

“8. ... The question whether Sadla can be said to have been a member of the unlawful assembly after he had fallen down and been beaten depends on the determination of the fact

whether he, who formed a member of the unlawful assembly from the beginning, had withdrawn himself from the unlawful assembly and had thus dissociated himself with any further membership. It does not solely depend on the fact that he became incapable of taking part in the attack. His withdrawal from the unlawful assembly could be either actual and voluntary, which would be if he removed himself from the assembly and went away, clearly indicating that he was averse to taking any further part in the incident. If a member of an unlawful assembly is not able to walk away like this and has perforce to remain on the spot either because he is so injured that he cannot remove himself or because he is held up by others, he may still continue to be a member of the unlawful assembly if he shares the common object of the assembly subsequent to his being made helpless in assaulting the victim. He can, however, in such a position disavow his share in the common object by expressions, leaving no doubt that he did not share the object any more. If he is also unable to express himself in this respect, it would be fair to presume that he was incapable of both taking part and of sharing the objects of the unlawful assembly and that he had withdrawn himself from the unlawful assembly. ...”

(Emphasis Supplied)

34. It is clear that the prosecution must prove that the accused shared the common object of the unlawful assembly, of which he is alleged to be a member. Further, the common object may be modified or altered or abandoned at any stage. The accused may also disassociate himself from the common object of the assembly and then he cannot be found guilty of the actions of the assembly beyond that point.
35. In the present case, the prosecution has not been able to prove that the appellant herein shared the common object of the unlawful assembly. If anything, the evidence shows that the appellant ran away from the spot of the incident as soon as the deceased was stabbed, thereby

removing himself from the assembly and distancing himself from the common object. By no means can it be said that the appellant shared the common object of the assembly to either cause the death of the deceased or to riot. None of the witnesses have deposed that there was any previous enmity between the appellant and the deceased. The incident of stabbing seems to have occurred immediately when Faguwa (JCL) handed over the knife to Durga (JCL) and exhorted him to stab the deceased while other members immobilized the deceased, to which the appellant had no involvement in. No evidence could be adduced by the prosecution to establish that the common object of the assembly was to do away with the deceased Chetan. There is no evidence regarding the meeting of minds or sharing of common object even in the spur of the moment. Further, in such a background, the factum of no role having been ascribed to the appellant gains significance.

36. Thus, it can safely be concluded that the appellant Naveen @ Sanju did not share the common object of the assembly to either riot or cause the death of the deceased. Accordingly, the conviction of the appellant by the Trial Court is not well founded and is liable to be set-aside.
37. Accordingly, the present appeal is allowed. The impugned judgment dated 05.11.2014 and the consequent order on the point of sentence dated 28.05.2015 are set-aside. By previous order dated 19.04.2017, we had suspended the sentence of the appellant during the pendency of the appeal on furnishing a personal bond with one surety. Accordingly, the personal bond and the surety are discharged, if

already furnished; alternatively, the appellant shall be released forthwith unless wanted in any other case.

38. Appeal stands disposed of.

G. S. SISTANI, J.

APRIL 21, 2017

//

VINOD GOEL, J.

