

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 1049 of 2013**

1. Gayaram S/o Kheduram Sahu Aged About 35 Years R/o Dindori, PS Lalpur, Rev. Distt. Mungeli, Civil Distt. Bilaspur C.G.
2. Dayaram S/o Kheduram Sahu Aged About 30 Years R/o Dindori, PS Lalpur, Rev. Distt. Mungeli, Civil Distt. Bilaspur C.G.

---- Appellants**Versus**

- State Of C.G. Through PS Lalpur, Rev. Distt. Mungeli, Civil Distt. Bilaspur C.G.

---- Respondent**CRA No. 1094 of 2013**

1. Bali Ram Sahu And Anr. S/o Nut Ram Sahu Aged About 70 Years R/o Village Dindori, Ps Lalpur, Distt. Bilaspur, Present Distt. Mungeli C.G. , Chhattisgarh
2. Bhupesh S/o Bali Ram Sahu Aged About 37 Years R/o Village Dindori, Ps Lalpur, Distt. Bilaspur, Present Distt. Mungeli C.G.

---- Appellants**Versus**

- State Of Chhattisgarh Through Ps Lalpur, Distt. Bilaspur, Present Distt. Mungeli C.G.

---- Respondent

For Appellants	: Shri Ashutosh Trivedi in Cr.A. No. 1049/13 and Shri Vinay Dubey and Shri Sunil Pillai, counsel for the appellants.
For Respondent/State	: Shri Anand Verma, Dy.GA

Hon'ble Shri Justice Hon'ble Manindra Mohan Shrivastava
Hon'ble Smt. Justice Rajani Dubey

Judgment On Board By Manindra Mohan Shrivastava,J.

02/05/2019

These two connected appeals arise out of judgment of conviction and order of sentence dated 19th August 2011 passed by Sessions Judge, Mungeli district Bilaspur in S.T. No. 49/2011 whereby and whereunder the appellants have been held guilty for commission of offence and sentenced as below :

Conviction	Sentence
Under Section 302/149 IPC	Imprisonment for life and fine of Rs. 1,000/- with default stipulation
Under Section 307/149 IPC	Imprisonment for life and fine of Rs. 1,000/- with default stipulation
Under Section 148 IPC	RI for three years and fine of Rs. 500/- with default stipulation.

2. Prosecution story, as is unfolded from the records of the case and impugned judgment is that upon receipt of information regarding assault by the appellants on one Devendra and Goverdhan, police reached at the spot in village Dindori on 17.07.2011 and Puna Ram (PW-2) who is said to have been present at the spot, informed regarding the incident and having found the dead body, which led to recording of merg intimation at the instance of PW-2 Puna Ram as also *dehati nalishi* (spot FIR). In the merg and spot FIR, it was recorded that there existed

dispute relating to property between Bali ram and Sant Ram. Sant Ram, son of Goverdhan, had sown soya bean in the field. It was further recorded therein that there was a hue and cry that Bali Ram and his family members have opened fire and Bali Ram, his sons Rajesh, Bhupesh and Mahesh were seen dragging a person on the ground whereafter, Puna Ram came to his house and then went to the house of Gautam where Goverdhan was found lying in injured condition who stated that Bali Ram, Bhupesh, Rajesh and Mahesh have fired gun shot on him and his brother Devendra. On the similar lines, spot FIR and merg, unnumbered FIR and merg were recorded at the police station. Dead body of Devendra was sent for postmortem. Dr. R.S.Ayam PW-7 conducted post mortem examination and prepared report in Ex.P-23. Goverdhan was also examined by Dr. Vibha Sindur PW-6. Post mortem of Devendra revealed certain injuries and according to the opinion of the doctor, he died of gun shot injury on his neck because of excessive bleeding. Goverdhan was also reported having sustained gun shot injury. Investigation was carried out and charge sheet was filed against Bali Ram, Rajesh, Bhupesh, Mahesh, Gaya ram and Daya Ram. Prosecution case was that because of the property dispute at the spot, appellants and other accused opened fire and shot Goverdhan and Devendra in which incident, though Goverdhan survived, Devendra died homicidal death. Upon framing of charges, appellants abjured guilt and they were put to trial. It is relevant to note at this stage that two accused namely, Rajesh and Mahesh remained absconding and the present appellants were tried.

3. In order to prove its case, prosecution came out with the eyewitness account of Goverdhan PW-3 and Komal Sahu PW-11. The appellants examined one defence witness also. In their 313 Cr.P.C. statement, appellants denied having committed the offence and pleaded their innocence and false implication in the case.

4. Learned trial court, however, relied upon eyewitness account of Goverdhan and Komal Sahu, medical evidence with regard to gun shot injury found on the body of deceased Devendra and injured Goverdhan. Learned trial court also held appellant Bali Ram guilty of commission of offence under Section 27 of the Arms Act also. The appellants were convicted under Section 302 IPC with the aid of Section 149 IPC.

5. Assailing legality and validity of the impugned judgment of conviction and order of sentence, learned counsel for the appellant would argue that the prosecution case is extremely doubtful and is a case of false implication. It is argued that from the evidence of the prosecution itself, it is borne out that there existed a property dispute between Bali Ram and Sant Ram, father of Goverdhan. He would argue that somebody had assaulted and killed Devendra and on suspicion, a false case was prepared against the appellants. It is argued that the evidence of PW-3 Goverdhan is not reliable because his evidence that after having sustained head injury by bullet, he got up, ran away and went to inform the matter to others, is highly improbable. His statement otherwise suffers from material contradictions and omissions with regard to the manner in which the incident happened. As far as the other so

called eyewitness Komal Sahu PW-11 is concerned, it is contended that the conduct of this witness renders highly doubtful and that he had seen the incident because according to him, after having seen the incident of firing, he ran away, called his brother Ravi Kant and went to Hardi. He neither reported the matter in the police station nor did he inform even the family members of the deceased Devendra and injured Goverdhan, with whom he was employed.

6. Next submission of counsel for the appellants is that the evidence of Dr. Vibha Sindur PW-06 with regard to injury sustained by Goverdhan is highly doubtful because there is neither any proper examination nor the nature and extent of injury is probable because according to Goverdhan, even after sustaining injury, he ran away from the spot, informed others and took other steps including getting his dying declaration recorded by the executive magistrate which was not possible and in the light of injury as stated by the doctor, both with regard to nature and extent of injury and the conduct of Goverdhan, prosecution evidence becomes highly doubtful. As far as the nature and extent of injury and cause of death of Devendra is concerned, it is argued that the evidence of Dr. R.S.Ayam PW-7 who conducted postmortem is not conclusive with regard to the nature and cause of death. It is argued that there is no basis on which the doctor concluded that the injury was gun shot injury because no pellets were found either on the body of the deceased nor at the spot and mere recovery of empty cartridges from the spot would not conclusively prove that

Devendra was shot by a gun and died of gun shot injury. It is next submitted that though a gun is said to have been recovered from the possession of Bali Ram, there is no report that it was capable of being fired or that it was actually fired at and around the time of incident. On the contrary, defence has examined witness and led evidence with regard to improbability of the use of gun and the injury on Goverdhan by that gun. Thus, the very basis of the entire prosecution case that Bali Ram fired a gun shot on Goverdhan is not made out. Learned counsel for the appellants further argued that in the present case, the involvement of Gaya Ram and Day Ram is complete afterthought because neither in the so called dying declaration Ex.P-10 given by Goverdhan, immediately after the incident, nor in the merge or FIR, Gaya Ram and Daya Ram have been named. It is only at a later stage of investigation that their names have been subsequently involved. Further submission is that the conviction of Bali Ram and Bhupesh for murder of Devendra with the aid of Section 149 IPC is not sustainable because, even according to the evidence of the eyewitnesses, the incident happened at the spot and that deceased and Goverdhan arrived at the field and engaged in measurement. According to the prosecution witness, Bali Ram fired gun shot on Goverdhan therefore, for the act of Bali Ram, other accused cannot be held vicariously liable as there is no specific evidence of formation of unlawful assembly with a common object that all of them had come with intention of killing Goverdhan. Learned counsel for the appellants would also argue that the allegation of firing at Devendra is by Rajesh, who is absconding. As far as the present

appellants are concerned, the present appellants cannot be held liable vicariously for the alleged act of Rajesh in firing and killing Devendra. In absence of there being clinching evidence of formation of unlawful assembly and common object, a person would be liable only for his individual criminal overt act. Therefore, for the alleged murder of Devendra, Bali Ram, his son Bhupesh or other two appellants Gaya Ram and Daya Ram could not be held liable with the aid of Section 149 IPC. Learned counsel for the appellant would further argue that the nature and extent of injury found on the body of Goverdhan is regarding giving one single gun shot by Bali Ram. Goverdhan remained in hospital for about 3 days and there is no basis to hold that he sustained grievous injuries. Report of the doctor (PW-6) with regard to the nature and extent of injury does not inspire confidence that there was any entry and then exist wound to say that any bullet pierced through. These were only impressions of the doctor and for that reason, according to the doctor PW-6, it is only said to be possible and not conclusive. Goverdhan was admitted in Apollo hospital and his wound certificate Ex. P-1 does not prove that he has sustained any such injury. It is argued that had there been that the bullet pierced into the head and the same going through the brain matter, injury would have been much more grievous but no such report has come in the wound certificate given by the doctor to Goverdhan at Apollo Hospital. Therefore, taking into consideration all these aspects, sentencing life imprisonment for the offence under Section 307 IPC is disproportionate to the gravity and as he had already undergone for about more than 7 ½ years of sentence

and his age being around 75 years, the conviction under Section 307 IPC may be reduced to the period already undergone by him.

7. On the other hand, learned State counsel supporting the impugned judgment of conviction and order of sentence would argue that the assault on Goverdhan by Bali Ram and assault on Devendra by Rajesh are proved from the eyewitness account of injured witness Goverdhan himself and Komal Sahu PW-11, their servant who was present at the spot. There may be some minor discrepancy in the nature and extent of injury sustained by Goverdhan but, that by itself, would not render his testimony improbable because the doctor has found gun shot injury on his head. According to the case of prosecution, from Bali Ram's possession, a 12 bore gun was seized. The doctor who treated Goverdhan had given impression that the bullet pierced through the head but Goverdhan has categorically stated that despite injury, he was in a possession to run away. The 12 bore gun fired small pellets and not big bullets, therefore, only on this discrepancy in the examination of Goverdhan by the doctor, evidence of Goverdhan of he running away subsequent to the incident of firing at him and Devendra, could not be doubted. It is submitted that Goverdhan was injured witness and, therefore, there is no reason to disbelieve his testimony. It is next submitted that as far as Komal Sahu PW-11 is concerned, his presence at the spot is proved from his emphatic evidence. He corroborates the testimony of Goverdhan PW-2 also. Merely because, frightened with the incident, he ran away from the spot and did not

return to the village of the deceased, it cannot be inferred that he was telling lie in the court. Further submission is that in the present case, FIR and merg intimation was taken by the police officer who reached the spot promptly and PW-2 Puna Ram, has clearly stated that when he had gone to the house of Gautam, he found Goverdhan in injured condition and there, Goverdhan had disclosed the names of the appellants as the assailants which fact was immediately disclosed by him to the police authorities at the spot. It is further argued that slight discrepancy in the medical evidence would not discredit the testimony of PW-2, 3 and 11 because though, there may be some discrepancy with regard to the extent of injury but the doctors have clearly stated regarding gun shot injury and even the wound certificate issued in respect of treatment of Goverdhan also proves that it was a case of gun shot injury. Police seized various articles from the spot, a gun was also seized from the possession of Bali Ram. The opinion of the doctor who conducted postmortem of Devendra, regarding nature and extent of injury found on his body is unimpeachable, both with regard to the nature and also the extent of injury, clearly proves that Devendra had sustained multiple pellet injuries on his neck which could be fired by a 12 bore gun whose empty cartridges were found on the spot and seized in the presence of seizure witness PW-2 Puna Ram who has fully supported the prosecution case in this regard. State counsel would further argue that even though initially, name of Gaya Ram and Daya Ram was not mentioned, prosecution witnesses who had witnessed the incident namely, Goverdhan PW-3 and Komal Sahu PW-11 both have

categorically stated regarding presence of Daya Ram and Gaya Ram along with Bali Ram who has three sons Rajesh, Bhupesh and Mahesh. State counsel would further argue that the arrival of the appellants along with other accused at the spot, one of which, Bali Ram, armed with a gun, clearly proves that the appellants formed unlawful assembly with a common object of killing Devendra and Goverdhan where after, at first, Goverdhan was shot by Bali Ram and, thereafter, Rajesh, taking gun from the hands of his father Bali Ram, fired at Devendra in which incident, Devendra died and Goverdhan sustained grievous injury on his head.

8. We have heard counsel for the parties and perused the records.

9. The evidence of the Investigating Officer PW-12 is that he recorded *dehati nalishi* Ex.P-2 (spot FIR) on the report given by Puna Ram and his report of merg intimation in Ex.P-4 was also recorded by him. Puna Ram PW-2 has deposed that on 17.7.2011, when he returned home, he heard of firing and when he went ahead he was informed by some of the children that Bali Ram had fired gun shot and he saw Bali Ram, his son Rajesh, Bhupesh and Mahesh dragging one person on the ground whereafter, he came to his house and then went to the house of Gautam where he saw Goverdhan who was bleeding. Upon being enquired, Goverdhan informed that Bali Ram and his sons Rajesh, Bhupesh, Mahesh fired at him and they have also shot at Devendra. He requested him to inform his wife and father

whereafter, Goverdhan's wife Anita and Sant Ram arrived at the spot, Tokhan brought the jeep and then Goverdhan was taken to hospital at Mungeli. This witness further deposed that thereafter, he went towards the spot where he found that dead body of Devendra was lying near the field of Bali Ram and then police personnel arrived at the spot and he got merg intimation in Ex.P-4 and *dehati nalishi* in Ex.P-2 recorded at the spot. In the merg intimation Ex.P-4 and *dehati nalishi* Ex.P-2, it has been recorded that he heard of Bali Ram and his family members having fired and Bali Ram and his three sons dragging a person on the field, whereafter, he went to the house of Gautam and met with Goverdhan and then Goverdhan informed that Bali Ram, his sons fired at him and Devendra due to which he had sustained injury and Devendra died. Similar is the content of *dehati nalishi*. On the basis of spot merg, unnumbered FIR and merg were recorded in the police station. It is however, found that in the merg intimation and the spot FIR or even in the unnumbered merg and FIR, name of Gaya Ram and Daya Ram had not been mentioned. PW-2 Puna Ram has not said in his evidence that Goverdhan, while disclosing the name of the appellants had also named Daya Ram and Gaya Ram.

10. Prosecution case mainly rests on the eyewitness account given by PW-3 and PW-11. PW-3 Goverdhan is the brother of deceased Devendra and he himself is a injured witness. He has deposed that on 17.7.2011, he had come to the village along with his brother Devendra from Raipur and had reached Padta field at

about 1.30 in the afternoon along with brother Devendra, Punit Nishad and Komal Sahu. When they started measuring the field, at that time at about 2.00 p.m. Bali Ram, his sons Bhupesh, Rajesh and Mahesh as also Gaya Ram and Daya Ram arrived at the spot and started abusing and asked them to stand up thereafter Bali Ram fired gun shot on him due to which, he sustained head injury on his head and fell down and, thereafter, he was assaulted with the help of *lathi* by Bhupesh, Mahesh, Dya Ram and Gaya Ram due to which, he sustained injury. Thereafter, Rajesh took the gun from the hands of Bali Ram and shot at Devendra, due to which, Devendra fell down and thereafter, appellants assaulted his brother with the help of axe and club. When he attempted to run away, Rajesh chased him up to the main road, thereafter, Rajesh fired at him but he narrowly escaped. He then went to the house of Gautam Sahu informed regarding the incident and at that time, Poona Sahu also arrived and he was also informed about the incident. He was taken to the hospital at Mungeli and from there he was referred to CIMS, Bilaspur and then to Apollo hospital at Bilaspur. He has stated that he remained admitted in the hospital for about 6 days and then when he was admitted in the hospital, his dying declaration Ex.P-10 was registered by the Executive Magistrate. He says that there exist an old property dispute between the appellants and his father and it is out of this property dispute that the appellants assaulted. He has been subjected to detailed cross-examination and it has been elicited that the field where they were carrying on measurements is not recorded in their name but according to him, one Nana Ram and Danuram had

sold the agricultural land to his grand father. He states that he is not possessed of any sale deed. He has deposed that three gun shots were suffered by him. He further admits that on the report of the appellants, a criminal case was also initiated against his father and family members. He also admits that Rajesh has contested panchayat election against his wife in which, he lost. The suggestion that the appellants had surrounded Bali Ram and Bali Ram had to open fire in exercise of his right to private defence, has been denied.

11. Goverdhan is injured witness and the doctor PW-6, who conducted medical examination, had deposed regarding injuries sustained by Goverdhan. She was the doctor posted in the Primary Health Centre, Mungeli and after examining, she stated that Goverdhan has sustained gun shot and as many as 5 injuries were found according to her. There were entry and exit wounds found on the head of Goverdhan caused by gun shot and in addition to that, three scratches were also found in the left forearm, right foot and left ear, likely to be caused by hard and blunt object, which were simple in nature. She has admitted in her cross-examination that at the time of examination, Goverdhan 's statement was taken and she has admitted that the confirmation regarding gun shot can be given only after CT scan and x-ray. She has also admitted the suggestion that Goverdhan was shot from a short distance therefore, the bullet pierced through and in such a condition, the injured could not run even for a distance of 15-20 feet and in all probability, such injury would cause a person likely

to fall unconscious and die. Taking a clue from this evidence of the doctor, the veracity of the evidence of Goverdhan PW-3, has been seriously doubted. It has been argued that in such type of injury, it was impossible for Goverdhan to get up from the place and run away, go to the house of Gautam and, thereafter, take other activities. Though at first blush, in the light of evidence of the doctor who conducted MLC of Goverdhan, one would gather an impression that a bullet had pierced through the head of Goverdhan, with an entry and exit wound, however, on a closure scrutiny of evidence and the doctor's opinion as also the wound certificate, it is quite doubtful. According to the prosecution, Goverdhan was fired with the help of a gun, which was later on, seized from the possession of Baliram. It is a twelve bore gun, which is only capable of firing small pellets. It is improbable that on such gun shot injury, small pellets would pierce through thick skull bone in the head and also exit from the other side. The examination of Goverdhan by Dr.Vibha Sindur, PW-6 shows that it was only a superficial examination in a Community Health Centre, which was not followed by any CT scan, X-ray or other confirmative test. It is quite apparent that the injuries which were noticed by the doctor appear like gun shot injury merely because on the frontal and back part of the head small holes were seen, the doctor might have gathered an impression of bullet piecing through the head entering from frontal side and creating an exit wound on the back. Even the evidence of doctor PW-6 shows that it was a probability and not confirmative. Had there been a bullet injury causing entry and exit wound, it could have definitely injured brain

matter, indeed a very serious injury. However, in the present case, no such injury has actually been found. We find that Goverdhan was admitted in the Apollo hospital, where he remained admitted for a couple of days and then discharged along with the wound certificate Ex.P-1. This also does not contain any such report. Therefore, the only inference that can be drawn on the basis of oral and medical evidence is that there were small pellets fired by twelve bore gun at Goverdhan which hit his head not only on the frontal but also on the back part which is explained from the statement of Goverdhan himself who states that initially he could not see as to who fired at him and when he started running away fire continued on him. Certainly, pellet injury would be found both on frontal and back part.

12. The evidence of the other eyewitness namely, Komal Sahu , PW-11 is also reliable. He is a natural witness, being the servant of the injured Goverdhan. He has clearly deposed regarding he having seen the incident of gun shot fired both at Devendra and Goverdhan. According to him, having seen the incident, he was frightened and therefore, he ran away from the spot. He has stated regarding having called his brother over telephone and then went to another village and, thereafter, coming back on the next day. By that time, report was already lodged in the police station. Aforesaid conduct of this witness, which has been relied upon by the defence to doubt the testimony, does not appear to be so doubtful as to altogether reject his testimony. Persons may react in different manner when faced with a given situation. Having seen the

frightening incident of gun shot fired at Devendra and Goverdhan, the reaction of this witness in running away from the spot is quite natural as he was their servant and therefore, was frightened that he could also be attacked and merely, because he ran away from the spot and immediately did not come back to the village to inform others, his testimony cannot be doubted.

13. We, however, find that as far as Daya Ram and Gaya Ram are concerned, their involvement in the alleged incident appears to be doubtful. This is because in the spot FIR, which was recorded at the spot at the instance of Puna Ram, soon after the incident and according to Puna Ram, he was informed by Goverdhan, there is no mention of the names of Gaya Ram and Daya Ram as assailants having arrived at the spot along with Bali Ram and his sons and giving assault. Merg intimation Ex.P-4 does not contain the names of Daya Ram and Gaya Ram.

14. Goverdhan PW-3 has deposed that when he sustained bullet injury, his dying declaration was also recorded. This was recorded on the date of incident itself at about 4.00 p.m. in the evening. As Goverdhan survived, his so called dying declaration Ex.P-10 could, at best, be treated as former statement with regard to incident stated before Tahsildar Mungeli. Dr. Vibha Sindur (PW-6) has also stated that dying declaration of Goverdhan was recorded on 17.7.2011 at about 4.30 p.m. in her presence. Goverdhan has also stated regarding having given the said dying declaration. It being a prosecution document could be used to impeach the credibility of the prosecution case. Contents

of the dying declaration Ex.P-10 do not involve Gaya Ram and Daya Ram anywhere. Goverdhan is not only injured witness but a witness to assault on Devendra. His statement was recorded soon after the incident. Non mention of Daya Ram and Gayaram at that stage of first instance also raise serious doubt with regard to involvement of Daya Ram and Gaya Ram. The numbered FIR Ex. P-7 also does not contain his name. Therefore, the evidence of PW-3 Goverdhan and PW-11 Komal Sahu with regard to involvement of Daya Ram and Gaya Ram are not free from doubt and there is great force in the contention of learned counsel for the appellant, that they have been falsely implicated as an after thought long after the incident.

15. 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. In the case of ***Subal Ghorai Vs. State of West Bengal, (2013) 4 SCC 607***, the Apex Court has observed thus:

49. Reflecting on the facts before it, this Court observed that in such cases, the rule of prudence should be applied. Something more than their being cited as an accused in a witness box would be necessary. This Court further observed that the court must have before it some materials to form an opinion that the accused had shared a common object. Referring to the two accused, who had been named by both the witnesses, this Court observed that even against them, no overt act had been attributed and, therefore, doubt arises as regards their presence and or sharing of common object. This Court adverted to the gruesome nature

of the crime and held that even then it cannot lose sight of the fact that a person should not suffer rigorous imprisonment for life although he might have just been a bystander without anything more. Observing that there was no clinching evidence against those accused, this Court acquitted them.

50. In *Pandurang Chandrakant Mhatre* (2009) 10 SCC 773 : (2010) 1 SCC (Cri.) 413, after adverting to relevant judgments, this Court observed that for determination of common object of 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 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.

52. The above judgments outline the scope of [Section 149](#) of the IPC. We need to sum-up the principles so as to examine the present case in their light. [Section 141](#) of IPC defines unlawful assembly to be an assembly of five or more persons. They must have common object to commit an offence. [Section 142](#) of the 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](#) of the IPC provides for punishment for being a member of unlawful assembly. [Section 149](#) of the 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](#) of the 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](#) of the 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, 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](#) of the 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.

Komal Sahu PW-11, what is discernible is that when Goverdhan and Devendra were engaged with certain measurements in the agricultural fields, a dispute had arisen when Bali Ram and his three sons arrived at the spot. A quarrel had taken place probably because of the pre-existing dispute with regard to the proprietary rights over the agricultural lands of which measurements were taken by Devendra in the presence of Goverdhan. It is said that at that stage, Bali Ram, who was holding the gun, fired at Goverdhan, due to which, Goverdhan ran away from the spot. According to the eyewitnesses, when quarrel was going on, one of the absconding accused Rajesh, is said to have snatched gun from the hands of Bali Ram and then fired at Devendra which proved to be fatal, leading to death of Devendra. This evidence of the prosecution shows that the genesis of dispute at the spot was all of a sudden because Devendra and Goverdhan started taking measurement claiming property as their own whereas the appellants had an existing dispute with Sant Ram - father of Devendra and Goverdhan. In these circumstances, if all of a sudden, Rajesh snatched gun from the hands of Bali Ram and shot at Devendra, Bali Ram could not be held vicariously liable with the aid of Section 149 IPC, for the criminal overt act of Rajesh, who is absconding. At best, liability of Bali Ram would be to the extent of his criminal overt act of injuring Goverdhan and not causing death of Devendra. As has been disclosed herienabove, the nature and extent of injury on Devendra and use of gun certainly proves intention on the part of Bali Ram that those gun shots were fired with the intention of causing death, taking into

consideration that the pellet injuries did not require long hospitalization and it was only for a few days and further that it has not resulted in any permanent damage to any parts of the body and further taking into consideration the age of Bali Ram, in our opinion, even if his conviction under Section 307 IPC for assaulting Goverdhan is affirmed, sentence of 7 years would be commensurate to the gravity of offence. He is stated to have undergone more than 7 years of RI by now.

17. We, accordingly, conclude that involvement of Gaya Ram and Dayaram in the alleged incident is not free from doubt and therefore, they are entitled to be given benefit of doubt. Their conviction, therefore, is set aside and they be set at liberty.

18. As far as Bali Ram Sahu is concerned, his conviction under Section 302 with the aid of Section 149 IPC is set aside. However, his conviction under Section 307 and 148 IPC as also under the Arms Act is upheld, though, sentence for commission of offence under Section 307 and 148 IPC is reduced for the period already undergone by him and he be also set at liberty.

19. Involvement of Bhupesh in the incident is founded on his mere presence and in the absence of any criminal overt act committed by him, his conviction under Section 302 with the aid of Section 149 IPC and under Section 307/149 IPC is legally unsustainable and set aside.

20. As far as his conviction under Section 148 IPC is concerned, we find that in the entire case of prosecution there is no specific

criminal overt act attributed to him. In view of the above finding that the dispute at the spot arose all of a sudden and Goverdhan was shot at by Bali Ram and thereafter Rajesh snatched gun from his hand and fired gun shot at Devendra, in our considered opinion, the criminal liability of appellant Bhupesh does not crystallize under Section 148 IPC.

21. Accordingly, appeals of Gayaram, Dayaram and Bhupesh are allowed and their conviction is set aside. Appeal of Bali Ram is partly allowed.

Sd/-

(Manindra Mohan Shrivastava)
Judge

Sd/-

(Rajani Dubey)
Judge