

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 622 OF 2012

1. Krishnarao Gangrao Maske
Age 75 years, Occ. Agricultural
 2. Kondbarao Krushnarao Maske
Age 29 years, Occ. Agricultural
 3. Baban @ Uttam Keshavrao Maske
Age 27 years, Occ. Agricultural
- ...Appellants
(Ori. Accused Nos. 1, 4 & 9)
- All R/o. Parda, Tq. and District Hingoli

versus

The State of Maharashtra

...Respondent

.....
Mr. Joydeep Chatterji, Advocate for the appellants
Mr. S.W. Munde, A.P.P. for respondent-State
.....

WITH
CRIMINAL APPEAL NO. 625 OF 2012

1. Goprao s/o Marotrao Maske
Age 36 years, Occ. Agricultural
R/o. Hingoli, Tq. And Dist. Hingoli
 2. Marotrao s/o Kanbarao Maske
Age 74 years, Occ. Agricultural
R/o. Parda, Tq. Hingoli,
District Hingoli
 3. Waman s/o Madhavrao Maske
Age 44 years, Occ. Agricultural
R/o. Parda, Tq. Hingoli,
District Hingoli
- ...Appellants
(Ori. Accused Nos. 8, 10 & 11)

versus

The State of Maharashtra
Through Police Inspector Basamba
Tq. and District Hingoli

...Respondent

.....

Mr. Akshay Kulkarni h/f Mr. R.S. Deshmukh, Advocate for the appellants
Mr. S.W. Munde, A.P.P. for respondent-State

.....

WITH
CRIMINAL APPLICATION NO. 5160 OF 2013
IN
CRIMINAL APPEAL NO. 625 OF 2012

Goprao Marotrao Maske
Age 40 years, Occ. Agriculture
R/o. Parda, Tq. Hingoli,
District Hingoli

...Applicant
(Ori. Accused No.8)

versus

The State of Maharashtra
(Copy to be served on P.P.
High Court of Bombay, Bench
at Aurangabad)

...Respondent

.....

Mr. Akshay Kulkarni h/f Mr. R.S. Deshmukh, Advocate for applicants
Mr. S.W. Munde, A.P.P. for respondent-State

.....

WITH
CRIMINAL APPEAL NO. 633 OF 2012

1. Santosh s/o Laxman Bangar
Age 24 years, Occ. Agriculture
R/o. Hingoli, Tq. and Dist. Hingoli

2. Shriram s/o Laxman Bangar
Age 26 years, Occ. Agriculture
R/o. Hingoli, Tq. and Dist. Hingoli
(at present are in jail)

...Appellants
(Ori. Accused Nos. 6 and 7)

versus

The State of Maharashtra
(Copy to be served on P.P.
High Court of Bombay, Bench
at Aurangabad)

...Respondent

.....
Mr. N. S. Ghanekar, Advocate for the appellants
Mr. S.W. Munde, A.P.P. for respondent-State
.....

WITH
CRIMINAL APPEAL NO. 179 OF 2014

The State of Maharashtra
Through Police Station, Basamba
Tq. Hingoli, Dist. Hingoli

...Appellant
(Ori. complainant)

versus

1. Keshavrao Dattarao Maske
Age 60 years, Occ. Agricultural
R/o. Parda, Tq. Hingoli
District Hingoli

2. Santosh Nanarao Maske
Age 22 years, Occ. Agriculture
R/o. Parda, Tq. Hingoli
District Hingoli

...Respondents
(Ori., Accused Nos. 2 & 5)

.....
Mr. S.W. Munde, A.P.P. for appellant-State
.....

CORAM : V. K. JADHAV, J.

**Date of Reserving
the Judgment : 01.07.2019**

**Date of pronouncing
the Judgment : 22.01.2020**

JUDGMENT :-

1. All these appeals arise from the judgment and order dated 15.10.2012 passed by the learned Additional Sessions Judge, Hingoli, in Sessions Case No. 15 of 2008. In Sessions Case No. 15 of 2008 there were 11 accused persons and out of them accused

Nos. 1, 4, 6, 7, 8, 9, 10 and 11 (total 8 accused) were convicted and accused nos. 2, 3 and 5 came to be acquitted. The State of Maharashtra has filed criminal appeal No. 179 of 2014 against the acquittal of accused Nos. 2 and 5.

2. The Division Bench of this court (Coram: A.V. Nirgude and A.I.S. Cheema, JJ.) heard the appeals. However, they were divided in opinion. The Hon'ble the Chief Justice in exercise of the powers under Section 392 of Cr.P.C. r.w. Rule 7 of Chapter I of Bombay High Court, Appellate Side Rules, 1960 has referred the matter to me as a third Judge.

3. Brief facts giving rise to the prosecution case are as follows:-

a) Deceased Vithalappa Tukaramappa Torkad had purchased agricultural land admeasuring 4 Acres 38 Gunthas situated at village Parda, Tq. and district Hingoli from one Ratnabai and Kanbarao about more than 10 years earlier to the incident. However, the accused persons had raised dispute from Dasara of 2006. According to accused persons, 20 gunthas of the land of their share had been illegally shown as part of land purchased by deceased Vithalappa and as such they were demanding the said portion of land of 20 Gunthas of their share. Deceased Vithalappa told them that they should measure the land and if it is revealed during the measurement that 20 gunthas excess of land belonging to the share of accused, he

would return it to them. In the backdrop of this dispute, the incident had taken place on 23.2.2007 at about 11.00 a.m. in the field of deceased Vithalappa, situated near the bus stand. At that time, there was standing crop of turmeric and it was almost ready for harvesting. On the day of incident, at about 10.00 a.m. to 11.00 a.m. deceased Vithalappa was present alongwith his brothers Gangadharappa, Babanappa, Gajanan, Santosh and Kundalik and 7 - 8 other persons in the field. At that time, accused No.1 Krishnarao, accused No.2 Keshavrao, accused No.8 Goprao, accused No.9 Baban @ Uttam and accused No.10 Marotrao came there. All of them started telling to Vithalappa that they would take away the crop of turmeric. They also gave threats that if deceased Vithalappa would take the crop, they would kill him. Deceased Vithalappa had tried to convince them. Thereafter, those accused persons went to their house. P.W.3- Gangadharappa with others had gone to police station immediately for lodging the complaint.

b) It is further case of the prosecution that accused No.8 Goprao, accused No.11 Waman, Accused No.1 Krishnarao, accused No.2 Keshavrao, accused No.9 Baban, accused No.10 Marotrao and accused No.4 Kondbarao came there armed with axe and sticks. On arrival, they started giving abuses to deceased Vithalappa. It is the prosecution case that the accused No.8 Goprao gave three blows of axe on the head of deceased Vithalappa. The accused No.9 Baban had also given a blow with sticks on the back of deceased

Vithalappa. The other accused persons, as referred above, started beating the others. Deceased Vithalappa fell down on receiving those axe blows. Thereafter, the police jeep reached there. The accused persons fled away from the spot leaving the axe and sticks on the spot itself. P.W.2 Suresh and other persons took injured to the Civil Hospital at Hingoli in a private jeep. Deceased Vithalappa was declared dead on arrival. On the basis of complaint lodged by P.W.2 Suresh, crime No. 11 of 2007 came to be registered with Basamba police station for the offences punishable under Sections 147, 148, 149, 302 and 447 of I.P.C.

c) P.W.16 Police Inspector Ramkrishna Chate has carried out the investigation of the crime. He had visited the spot, seized the weapons under panchnama, recorded the statements of the witnesses, obtained the postmortem examination notes and finally submitted charge sheet against 11 accused persons. Learned Additional Sessions Judge, Hingoli in Sessions Case No. 15 of 2008 framed charges against the accused persons for the offences punishable under sections 147, 148, 149, 302 r.w. 149, 447 of the I.P.C. and under Section 135 of Bombay Police Act. All the accused persons pleaded not guilty and claimed to be tried. The prosecution has examined in all 16 witnesses to substantiate the charges levelled against the accused persons. The defence of the accused is of total denial and false implication. After completion of prosecution evidence, the statements of the accused persons came to be

recorded under section 313 of Cr.P.C. After hearing both sides, the learned Additional Sessions Judge, Hingoli by judgment and order dated 15.10.2012 convicted the accused persons as follows:-

(A) Accused No. 1-Krishnarao Gangrao Maske, accused No.4 Kondabrao Krushnarao Maske, accused No.6- Santosh Laxman Bangar, accused No.7-Shriram Laxman Bangar, Accused No.8-Goprao Marotrao Maske, accused No.9-Baban @ Uttam Keshavrao Maske, accused No.10 Marotrao Kanbarao Maske and accused No.11- Waman Madhavrao Maske under Section 302 r.w. 149 of I.P.C., Section 447 r.w. 149 of I.P.C. individually and independently for the offence punishable under Section 147, 148 and 149 of I.P.C. respectively.

(B) The accused Nos. 1 and 4 and 6 to 11 were accordingly sentenced to suffer imprisonment for life and to pay fine of Rs.5000/- each i/d to suffer R.I. for six months under Section 302 r.w. 149 of I.P.C..

(C) The accused Nos. 1 and 4 and 6 to 11 were also convicted for the offence punishable under Section 447 r.w. 147 of I.P.C. and sentenced to suffer R.I. for six months and to pay fine of Rs.1000/- each i/d to suffer R.I. for one month.

(D) The accused Nos. 1 and 4 and 6 to 11 were also convicted for the offence punishable under section 147 of I.P.C. and sentenced to suffer R.I. for three months and to pay fine of Rs.500/- each i/d to suffer R.I. for one month.

(E) The accused Nos. 1 and 4 and 6 to 11 also convicted for the offence punishable under Sections 148 of I.P.C. and sentenced to suffer R.I. for three months and to pay fine of Rs.500/- each i/d to suffer R.I. for one month.

(F) The accused Nos. 1 and 4 and 6 to 11 also convicted for the offence punishable under Sections 149 of I.P.C. and sentenced to suffer R.I. for three months and to pay fine of Rs.500/- each i/d to suffer R.I. for one month.

d) The accused No.2 Keshavrao Dattarao Maske, accused No.3 Nanarao Gangrao Maske and accused No.5 Santosh Nanarao Maske came to be acquitted for the offences punishable under Section 302 r.w. 149, 447, 149 and independently for the offences punishable under Sections 147, 148 and 149 of I.P.C. and under section 37(1) (3) of Bombay Police Act.

e) The learned Additional Sessions Judge has also directed that the substantive part of sentence passed against the accused persons under all heads shall run concurrently.

4) Criminal appeal No. 622 of 2012 is filed by accused No.1 Krishnarao Gangrao Maske, accused No.4 Kondbarao Krushnarao Maske and accused No.9 Baban @ Uttam Keshavrao Maske. Criminal appeal No. 625 of 2012 is filed by accused No.8 Goprao Marotrao Maske, accused No.10 Marotrao Kanbarao Maske and accused No.11 Waman Madhavrao Maske. Criminal appeal No. 633 of 2012 is filed by accused No.6 Santosh Laxman Bangar and accused No.7 Shriram Laxman Bangar. The State of Maharashtra has filed criminal appeal No. 179 of 2014 against the acquittal of accused Nos. 2 and 5. The accused No.8 Goprao has filed criminal application No. 5160 of 2013 praying therein that he may be permitted to place on record the copy of F.I.R. No. 12 of 20017 filed by Santosh Laxman Bangar alongwith other documents and it was necessary to exhibit those documents, as the said documents were not brought on record and the trial court should have brought on record the relevant documents. The accused No.8 accordingly prayed that said documents be allowed to be brought on record before the trial court and the matter may be remanded to the trial court.

5) P.W.2 Suresh Torkad nephew of deceased Vithalappa had lodged complaint and P.W.2-Suresh, 4-Annapurnabai, 5-Gajanan, 13-Santosh Gangadharappa Torkad, 14-Santosh Kishanappa Torkad and 15-Raju Torkad are the eye witnesses to the incident.

6) There were 11 accused persons before the trial court. Eye witnesses, as stated above, have named only accused Nos. 1, 2, 4, 8, 9, 10 and 11 being the assailants and they have not named the accused persons 3, 5, 6 and 7. Even the learned A.P.P. before the trial court has declared them hostile to that extent and subjected to cross examination on their failure to name accused persons 3, 5, 6 and 7 as assailants.

7) So far as the conviction of accused No.8 Goprao Marotrao under Section 302, 149 of I.P.C. and other offences, as detailed in foregoing paras i.e. appellant No.1 in criminal appeal No. 625 of 2012 is concerned, there is no difference of opinion between the Judges of the Division Bench about his conviction and sentence.

8. Mr. Chatterji, learned counsel for the appellants in criminal appeal No. 622 of 2012 has restricted his submissions to the extent of role played by the appellants therein i.e. original accused Nos. 1, 4 and 9. Learned counsel submits that members of an unlawful assembly may have a community of object upto 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 of the Indian Penal Code may be

different on different members of the same unlawful assembly. Learned counsel submits that in the instant case, the common object of assembly was to take away the turmeric crop in assertion of their right pertains to 20 gunthas of land having been wrongly included in the area of land purchased by deceased Vithalappa. Learned counsel submits that initially accused persons went in the field of deceased Vithalappa and gave him threats and after some time, again entered in the field of deceased Vithalappa armed with weapons. Accused No.8 Goprao was armed with weapon axe, however, the other accused persons, including the appellants in criminal appeal No. 622 of 2012 were armed with sticks. Though there is consistency in the evidence of eyewitnesses that accused No.8 Goprao given blows of axe on the head of deceased Vithalappa. So far as accused No.9 (appellant No.3 in criminal appeal No. 622 of 2012) is concerned, he has given blow of stick on the back of deceased Vithalappa causing simple injury. It is no doubt that accused No.8 Goprao caused fatal injury to deceased Vithalappa and caused his death. However, it is difficult to infer that the other members of the unlawful assembly knew that accused No.8 Goprao likely to cause death of deceased Vithalappa by giving fatal blow on his head. Learned counsel submits that had there been any common object to commit murder of deceased Vithalappa, the other members of the assembly would have entered in the field of deceased Vithalappa armed with weapons like axe, as per accused No.8 Goprao and they would have assaulted deceased Vithalappa

alongwith accused No.8 Goprao. Learned counsel submits that as against accused Nos. 1, 4 and 9 the appellants in criminal appeal No. 622 of 2012 at the most the offence of rioting and causing simple injury can be said to have been proved by the prosecution.

Learned counsel for the appellant in criminal appeal No. 622 of 2012, in order to substantiate his submissions, placed reliance on the following judgments:-

- i) Chikkarange Gowda and others vs. State of Mysore, reported in AIR 1956 SC 731;
- ii) Sita Ram and others vs. State of U.P., reported in 1993 SC 350;
- iii) Gangadhar Behera and others vs. State of Orissa, reported in AIR 2002 SC 3633;
- iv) Shambhu Nath Singh and Ors. vs. State of Bihar, reported in AIR 1960 SC 725;
- v) State of Karnataka vs. Mallu Kallappa and others, reported in AIR 1994 SC 784;
- vi) Tanviben Pankajkumar Divetia vs. State of Gujarat, reported in AIR 1997 SC 2193
- vii) Rambilas Singh and others vs. State of Bihar, reported in (1989) 3 SCC 605

9. Mr. Kulkarni h/f Mr. R.S. Deshmukh, learned counsel for the appellants in criminal appeal No. 625 of 2012 has adopted the submissions made on behalf of the appellants in criminal appeal No. 622 of 2012 so far as the appellant Nos. 2 and 3 i.e. original accused Nos. 10 and 11 are concerned. In so far as the appellant No.1-accused No. 8 Goprao Marotrao Maske is concerned, who has given fatal blows on the head of deceased Vithalappa, learned counsel submits that as per medical evidence, accused No.8 Goprao seems to have given only one blow of axe from its sharp side on the head of deceased Vithalappa and as such, he should not have been held guilty by the trial court for the offence punishable under section 302 of I.P.C.

10. Mr. N. S. Ghanekar, learned counsel for the appellants original accused Nos. 6 and 7 in criminal appeal No. 633 of 2012 has adopted the submissions made on behalf of the appellants in criminal appeal No. 622 of 2012.

11. Learned A.P.P. for the State submits that all the members of unlawful assembly are constructively liable for the acts committed by each other, in prosecution and execution of the common object. The learned A.P.P. submits that it is not necessary to show overt act by all the accused persons. Learned A.P.P. submits that mere presence in the unlawful assembly may fasten vicariously criminal liability under Section 149 of I.P.C. The basis of the constructive guilt under

Section 149 of I.P.C. is mere membership of the unlawful assembly, with requisite common object or knowledge. Learned A.P.P. submits that accused persons assembled armed with axe and sticks and entered in the field of deceased Vithalappa. Learned A.P.P. submits that their second time entry in the field of deceased Vithalappa clearly demonstrate their common unlawful object to commit murder.

12. Learned A.P.P. submits that the prosecution has examined six eye witnesses and out of them some of the eye witnesses are injured witnesses. Learned A.P.P. submits that the incident is divided into two parts. Firstly, the accused entered in the field of Vithalappa and at that time, gave threats to him. In consequence of which, P.W.3 Gangadharappa alongwith others went to police station for lodging the complaint. However, in the meanwhile, the accused persons returned with determination armed with weapons. It is clear from the prosecution evidence that the common object of unlawful assembly formed by the accused persons was to commit murder, if they were obstructed from taking away the turmeric crop from the portion of land on which they assert their right. The learned A.P.P. submits that it was not necessary to prove the overt act on the part of each of the accused persons. Learned A.P.P. submits that the trial court has correctly recorded the conviction against the appellants in criminal appeal Nos. 622 of 2012, 625 of 2012 and 633 of 2012. So far as the original accused Nos. 2 and 5 i.e. respondent Nos. 1 and 2 in criminal appeal No. 179 of 2014 is concerned, learned A.P.P.

submits that they were also members of unlawful assembly having common object and as such, they cannot escape from the liability and thus their case cannot be distinguished from the case of other accused persons. Though the witnesses have not supported the incident and involvement of accused persons from Bangar group, however, the trial court has rightly convicted the appellants-accused and their conviction needs to be maintained while acquitted accused Nos. 2 and 5 also deserve to be convicted. Learned A.P.P. submits that therefore, the appeal preferred against the accused Nos. 2 and 5 deserves to be allowed by setting aside their acquittal and they are also liable to be convicted under section 302 r.w. 149 of I.P.C. and also other offences alongwith the appellants in criminal appeal Nos. 622 of 2012, 625 of 2012 and 633 of 2012.

Learned A.P.P. in order to substantiate his submissions placed reliance on the following judgments:-

- i) Anup Lal Yadav and Another vs. State of Bihar, reported in (2014) 10 SCC 275
- ii) Om Prakash vs. State of Haryana, reported in (2014) 5 SCC 753.

13. P.W. 2 Suresh Torkad, who happened to be nephew of deceased Vithalappa is the complainant. He has deposed that deceased Vithalappa had purchased the agricultural land

admeasuring 4 Acres 38 Gunthas some 10 years back of the incident. However, dispute started in this respect since Dasara 2006 to the extent of 20 gunthas of land. The accused No.1 and others were claiming their right over the 20 Gunthas of land, which according to them encroached upon by deceased Vithalappa. They were demanding the part of the said area of 20 gunthas of land. On the day of incident, at about 10.00 to 11.00 a.m. deceased Vithalappa alongwith his brothers P.W. 3 Gangadharappa, Babanapam, Gajanan, Santosh Kishanappa, Kundlik Balajiappa and other 7 to 8 persons were present in his field. There was standing crop of turmeric, which was ready for harvesting. As deposed by P.W.2 Suresh and other eye witnesses, accused Nos.1, 2, 8, 9, 10 and 11 came there. They had started telling deceased Vithalappa that they would forcibly take away the turmeric crop and further if they were stopped, they would kill deceased Vithalappa. After this, they left the field and went to their house. P.W. 3 Gnagadhar alongwith others went to police station for lodging the complaint in respect of the said incident.

14. Thereafter, the main incident had taken place. As deposed by the prosecution witnesses and their evidence is consistent about re-entry of the accused persons in the field armed with weapons. Accused No.8 Goprao was armed with weapon axe. The other accused persons were armed with sticks. P.W.2, 4, 5, 13, 14 and 15, who are the eye witnesses, have consistently deposed that accused

No.8 Goprao assaulted Vithalappa and delivered 2 to 3 blows of axe on Vithalappa's head. Accused No.9 Baban gave stick blows on the back of Vithalappa. P.W.13 Santosh Gangadharappa Torkad was assaulted by accused No.11 Waman with stick and P.W. 13 Santosh sustained injury on left leg and left hand. P.W.14 Santosh Kishanappa Torkad was assaulted with stick by accused No.1 Krishnarao and he had sustained injury on his right knee. P.W.15 Raju Torkad was assaulted by accused No.4 Kondabrao with stick and he had sustained injury on his little finger of his left hand.

15. The evidence of prosecution witnesses is also consistent on the point of first entry of the accused persons in the field of deceased Vithalappa and about threats given by them to deceased Vithalappa and others. The medical evidence also fully corroborates the prosecution story. The prosecution has examined P.W.7 Dr. Vitthal Karpe, who has carried out the postmortem examination and noted 5 external injuries on the person of deceased Vithalappa. The said injuries are as follows:-

- i. Incised wound on head, having dimension 12 cm x 2 cms x deep to brain matter, on temporal bone, behind left ear, just above mastoid process, left side. Fracture of temporal bone present;
- ii. Contusion of head, on parietal bone, right side 12 cms x 10 cms x deep to brain matter near to sagittal suture medially, at

posterior end causing depressed fracture of parietal bone forming hole to skull oval in shape, bone fragment emerged in brain matter;

- iii. Contusion on head, on parietal bone posteriorly near sagittal sutured on left side 12 cms x 10 cms x deep to brain;
- iv. Contusion on back, left lateral side 12 cms x 10 cms;
- v. Abrasion over left shoulder at deltoid region two in number, 1- having 2ms x 1 cm x deep to skin; 2-having 0.5 cm x 0.5 cm x deep to skin.

16. Dr. Karpe has also noted the fracture of temporal bone, left side was present, fracture of parietal bone, right side present. On internal examination he has also noted injuries on the scalp, as detailed in the postmortem note Exh.91. In his expert opinion, injury Nos. 1 to 3 shown in column No.17 and the corresponding injury No.1 in column No.19 i.e. incised wound on head are possible by muddemal article No.6 axe and the injury No 4 and 5 are possible with wooden handles as per article 2(2/1 to 2/11). He has further explained that external injury as shown in column No.17 alongwith corresponding injury in column No.19 are sufficient to cause death in the ordinary course of nature. In his opinion the cause of death is due to hemorrhagic shock, due to multiple fractures on skull, due to severe head injuries.

In the light of evidence of P.W.7 Dr. Vitthal Karpe, it is clear

that due to three blows given by P.W.8 Goprao on the head of deceased Vithalappa with the help of axe, the homicidal death of Vithalappa occurred. So far as the injury 4 and 5 are concerned, those injuries are possible by the blow given by accused No.9 Baban.

So far as the injuries on the persons of P.W.13 to 15 are concerned, the prosecution has examined P.W. 8 Dr. Ramesh Kute who has deposed that P.W.13 to 15 have sustained injuries on their persons in the form of abrasions, contusions and those injuries are simple in nature.

17. In my considered opinion, the prosecution has proved that on 23.2.2007 at about 10.00 a.m. to 11.00 a.m. in the field of deceased Vithalappa the incident of rioting had taken place. The prosecution has also proved that Vithalappa was present in his field and turmeric crop was standing in the field ready for harvesting. Accused Nos. 1, 2, 8, 9, 10 and 11 had gone to the field of deceased Vithalappa and threatened him the consequences if the turmeric crop would be harvested by deceased Vithalappa. They had asserted their right to the extent of 20 Gunthas of land alongwith the turmeric crop standing thereon. The prosecution has also proved that after giving threats, those accused persons went to their house and came back within a short time, armed with weapons. Accused No.8 Goprao had assaulted deceased Vithalappa first and inflicted injuries on his head by giving 2/3 blows of axe on Vithalappa's head. The appellants

accused persons have thus, formed unlawful assembly.

18. It further appears from the prosecution evidence that the common object of unlawful assembly was to take away the standing turmeric crop and to deal with the obstruction if made by deceased Vithalappa and others in carrying out the said crop. It has also come in the evidence of prosecution witnesses, including the eye witnesses that only appellant-original accused No.8 Goprao was armed with weapon axe. However, other appellants-accused were armed with sticks. It is also a fact that accused No.8 Goprao and accused No.9 Baban had only assaulted deceased Vithalappa. The appellants-accused persons re-entered in the field armed with weapons but except accused No.8 Goprao, the other accused persons re-entered in the field armed with weapon sticks and not with any sharp weapon. P.W.2 Suresh, P.W.4 Annapurnabai, who happened to be wife of deceased Vithalappa and P.W.5 Gajanan Torkad, though present on the spot and eye witnesses to the incident, surprisingly they were not assaulted by anybody nor they sustained injuries on their person. P.W. 13 to P.W.15 sustained the injuries on their person with following description:-

(A) P.W.14 Santosh Kishanappa Torkad had sustained abrasion, size 2 cms x 1 cm on right knee. The nature of injury was simple as per the medico legal certificate Exh.97.

(B) P.W.13 Santosh Gangadhar Torkad had sustained one abrasion $\frac{1}{2}$ cm x $\frac{1}{2}$ cm on left hand, dorsal aspect. It was simple in nature. Contusion 3 cms x 3 cms on left thigh, medial third anteriorly, simple in nature, as per medico legal certificate Exh.98.

(C) P.W.15 Raju Torkad had sustained injury i.e. CLW size 1 cm x $\frac{1}{4}$ th cm x $\frac{1}{4}$ th cm on terminal phalanx of left little finger, on dorsal aspect and it was simple in nature.

19. In the backdrop of this evidence can it be said that other members of unlawful assembly i.e. other accused persons except accused No. 8 Goprao and accused No.9 Baban knew that the murder of deceased Vithalappa was likely to be committed in prosecution of common object? So far as the selection of weapon by other accused persons while re-entering in the field of deceased Vithalappa, causing injuries on the persons of eye witnesses P.W.13 to 15, which are minor and simple injuries and also the fact that only accused No.8 Goprao and accused No.9 Baban assaulted deceased Vithalappa with weapons axe and sticks, respectively, I hesitate to conclude that there was community of common object by each of the accused persons joining assembly to commit murder of deceased Vithalappa. There is no evidence about positive knowledge on the part of other accused persons (except accused No.9 Baban) so far as the injuries caused by accused No.8 Goprao on the person of deceased Vithalappa by giving fatal blows on his head with the help

of axe.

20. In the case of ***Gangadhar Behera and others vs. State of Orissa, reported in AIR 2002 SC 3633*** (supra) wherein in paras 23 and 24, the Supreme Court has made the following observations:-

“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 at the spot co-instanti.

24. Section 149, IPC consists of two parts. The first part of the section means that the offence to be committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. In order that the offence may fall within the first part, the offence must be connected immediately with the common object of the unlawful assembly of which the accused was member. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 141, if it can be held that the offence was such as the members knew was likely to be committed and this is what is required in the second part of the section. The purpose for which the members of the assembly set out or desired to achieve is the object. If the object desired by all the members is the same, the knowledge that is the object which is being pursued is shared by all the members and they are in general agreement as to how it is to be achieved and that is now the common object of the assembly. An object is entertained in the human mind, and it being merely a mental attitude, no direct evidence can be available and, like intention, has generally to be gathered from the act which the person commits and the result therefrom. Though no hard and fast rule can be laid down under the circumstances from which the common object can be called out, it may reasonably be collected from the nature of the assembly, arms it carries and behaviour at or before or after the scene of incident. The word 'knew' used in the second branch of the section implies something more than a possibility and it cannot be made to bear the sense of 'might have been known'. Positive knowledge is necessary. When an offence is committed in prosecution of the common object, it would generally be an offence which the members of the unlawful assembly knew was likely to be committed in prosecution of the common object. That, however, does not make the converse proposition true; there may be cases which would come within the second part but not within the first part.

The distinction between the two parts of Section 149 cannot be ignored or obliterated. In every case it would be an issue to be determined, whether the offence committed falls within the first part or it was an offence such as the members of the assembly knew to be likely to be committed in prosecution of the common object and falls within the second part. However, there may be cases which would be within first offences committed in prosecution of the common object would be generally, if not always, with the second, namely, offences which the parties knew to be likely committed in the prosecution of the common object. (See Chikkarange Gowda and others v. State of Mysore : AIR 1956 SC 731.)"

21. The Supreme Court has observed that 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. The Supreme Court has also considered that Section 149 of IPC consists of two parts. In order that the offence may fall within the first part, the offence must be connected immediately with the common object of the unlawful

assembly of which the accused was member. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 141, if it can be held that the offence was such as the members knew was likely to be committed and this is what is required in the second part of the section. The word 'knew' used in the second branch of the section implies something more than a possibility and it cannot be made to bear the sense of 'might have been known'. Positive knowledge is necessary. When an offence is committed in prosecution of the common object, it would generally be an offence, which the members of the unlawful assembly knew was likely to be committed in prosecution of the common object. That, however, does not make the converse proposition true; there may be cases, which would come within the second part but not within the first part. The distinction between the two parts of Section 149 cannot be ignored or obliterated. In every case, it would be an issue to be determined, whether the offence committed falls within the first part or it was an offence such as the members of the assembly knew to be likely to be committed in prosecution of the common object and falls within the second part.

22. The facts of the instant case squarely fall within the second part of Section 149 of I.P.C. It has discussed in the foregoing para in detail about acts and languages of the members composed it, surrounding circumstances, conduct adopted by other appellants-

accused persons, arms carried by other accused persons and their behavior at or near the scene of incident, including the injuries inflicted on the persons of injured witnesses P.W. 13 to 15 respectively.

23. In the case of ***Shambhu Nath Singh vs. State of Bihar, reported in AIR 1960 SC 725 (supra)***, in para 6, the Supreme court has made the following observations;-

"6. Section 149 of the Indian Penal Code is declaratory of the vicarious liability of the members of an unlawful assembly for acts done in prosecution of the common object of that assembly or for such offences as the members of the unlawful assembly knew to be likely to be committed in prosecution of that object. If an unlawful assembly is formed with the common object of committing an offence, and if that offence is committed in prosecution of the object by any member of the unlawful assembly, all the members of the assembly will be vicariously liable for that offence even if one or more, but not all committed the offence. Again, if an offence is committed by a member of an unlawful assembly and that offence is one which the members of the unlawful assembly knew to be likely to be committed in prosecution of the common object, every member who had that knowledge will be guilty of the offence so committed. But "members of an unlawful assembly may have a community of object upto 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 of the Indian Penal Code may be different on different members of the same unlawful assembly.” (Jahiruddin vs. Empress, ILR 22 Cal 306.)”

24. The Supreme Court has observed that members of an unlawful assembly may have a community of object upto 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 of the Indian Penal Code may be different on different members of the same unlawful assembly.

25. In the case of ***Omprakash vs. State of Haryana, reported in (2014) 5 SCC 753*** (supra) relied upon by learned A.P.P. in para 16 of the judgment, the Supreme Court has made the following observations:-

“16. Common object of an unlawful assembly can also be gathered from the nature of the assembly, the weapons used by its members and the behavior of the assembly at or before the scene of occurrence. It cannot be stated as a general proposition of law that unless an overt act is proven against the person who is alleged to be a member of the unlawful assembly, it cannot be held that he is a member of

the assembly. What is really required to be seen is that the member of the unlawful assembly 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 IPC. The core of the offence is the word "object" which means the purpose or design and in order to make it common, it should be shared by all. Needless to say, the burden is on the prosecution. It is required to establish whether the accused persons were present and whether they shared the common object. It is also an accepted principle that number and nature of injuries is a relevant fact to deduce that the common object has developed at the time of incident. (See Lalji v. State of U.P., Bhargavan and others v. State of Kerala, Debashis Daw and others v. State of West Bengal, and Ramachandran and others v. State of Kerala)."

26. Learned A.P.P. has also relied upon the judgment of the Supreme court in the case of **Anup Lal Yadav and another vs. State of Bihar, reported in (2014) 10 SCC 275 (supra)** wherein the Supreme court while referring the earlier judgment in the case of **Lalji vs. State of U.P. (1989 (1) SCC 437)** dealt with the provisions of section 149 of I.P.C. and held that section 149 of I.P.C. creates a constructive or vicarious liability of the members of the unlawful assembly for the unlawful acts committed pursuant to the common object by any other member of that assembly. However, the Supreme Court has by quoting para 9 of **Lalji's case** (supra) also made it clear that the vicarious liability of the members of 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. In the facts of the said case, the Supreme Court has further observed that once the case of a person falls within the ingredients of the section 149 of I.P.C. the question that he did nothing with his own hands would be immaterial. 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. In the case of ***Gangadhar Behera and others vs. State of Orissa (supra)***, the reference has been made to the Lalji's case.

27. The 'common object' of an unlawful assembly is to be ascertained from the acts and language of the members composing it, conduct adopted by the members of the assembly, surrounding circumstances, weapons used and the nature of injuries sustained by the injured persons. In the facts of the instant case, considering the role played by accused No.8 Goprao and accused No.9 Baban, directly assaulting deceased Vithalappa with the weapons axe and stick respectively, I find them guilty under Section 302 r.w. section 149 of I.P.C. However, rest of the appellants accused cannot be held to be guilty under section 302 of I.P.C. in causing death of deceased Vithalappa. It appears that, except accused No.8 Goprao assisted by accused No.9 Baban, the other members of the unlawful assembly are not responsible for the death of deceased Vitthalappa.

28. So far as the criminal application No. 5160 of 2013 filed by accused No.8 Goprao is concerned, learned counsel for the applicant has not made any submission with regard to the said application. Furthermore, I do not find anything in the said application to remand the matter to the trial court on its basis alone. Criminal application thus deserves any consideration.

29. So far as accused Nos. 6 and 7 are concerned, none of the prosecution witnesses, including eye witnesses deposed against them and even they are convicted by the trial court. The prosecution witnesses have turned hostile as regards to the involvement of accused Nos. 6 and 7. Even the learned A.P.P. has subjected to prosecution witnesses, including eye witnesses to cross examination at length, particularly about role played by accused Nos. 6 and 7 and their presence on the spot. In the impugned judgment, the trial court in para 24, 25 and 37 has relied upon the material in counter-case, being Sessions Trial No. 9 of 2008 and convicted the accused Nos. 6 and 7. However, on the basis of evidence recorded in the counter case when their presence is not established in this case, the trial court's order convicting the accused Nos. 6 and 7 is not sustainable.

30. Similarly, I find no evidence against accused No.5 Santosh Nanarao Maske. None of the prosecution witness has deposed about his presence on the spot at the time of commission of offence. All eye witnesses have given reference to seven accused persons

entered in the field armed with weapons including accused No.2 Keshavrao. The trial court has just ignored the presence accused No.2 Keshavrao at the time of alleged incident and acquitted him. The State Appeal is required to be partly allowed to the extent of involvement of accused No.2 Keshavrao in the incident.

31. In view of discussion above, seven accused persons have formed themselves into unlawful assembly and had committed rioting. The common object of unlawful assembly was to take away turmeric crop forcibly and in that process prepared to deal with the obstruction if made by the victim and his associates. They were armed with weapons. I have already discussed that the accused No.8 Goprao and accused No.9 Baban are guilty for murder of deceased Vithalappa and as such, no interference is required so far as their conviction recorded by the trial court is concerned. So far as the other accused persons are concerned, they are members of unlawful assembly must have known that the grievous hurt would likely to be caused in prosecution of their common object. In the instant case, even though no grievous hurt has been caused to the prosecution witnesses, however, considering the common object to the extent as discussed above, I am inclined to convict the appellant accused No.1 Krishnarao, accused No. 4 Kondabrao, accused No. 10 Marotrao, accused No.11 Waman and respondent/accused No.2 Keshavrao under Section 326 r.w. 149 of I.P.C. instead of Section 302 r.w. 149 of I.P.C.. Hence, I proceed to pass the following order:-

O R D E R

I. Criminal appeal No. 622 of 2012 is hereby partly allowed.

(a) The conviction and sentence of accused No. 1 Krishnarao Gangarao Maske and accused No.4 Kondbarao Krushnarao Maske for the offence punishable under section 302 r.w. 149 of I.P.C. is hereby quashed and set aside.

AND INSTEAD OF THAT

The accused No. 1 Krishnarao Gangarao Maske and accused No.4 Kondbarao Krushnarao Maske are hereby convicted for the offence punishable under Section 326 r.w. Section 149 of I.P.C. and sentenced to suffer R.I. for six years with fine of Rs.5000/- each i/d to suffer R.I. for six months.

(b) Rest of the conviction and sentence dated 15.10.2012 passed by the learned Additional Sessions Judge, Hingoli in Sessions Case No. 15 of 2008 stands confirmed as against the original accused No. 1 Krishnarao Gangarao Maske and accused No.4 Kondbarao Krushnarao Maske.

(c) Criminal appeal No. 622 of 2012 filed by accused No.9 Baban @ Uttam Keshavrao Maske is hereby dismissed to his extent and the judgment and order of conviction and sentence dated 15.10.2012 passed by the learned Additional Sessions Judge, Hingoli in Sessions Case No. 15 of 2008 stands confirmed inclusive the order of set off under Section 428 of Cr.P.C.

(d) All the substantive sentences shall run concurrently.

(e) The accused Nos. 1 and 4 would be entitled to set off under Section 428 of the Code of Criminal Procedure.

II. Criminal appeal No. 625 of 2012 is partly allowed.

(a) The conviction and sentence of accused No. 10 Marotrao Kanbarao Maske and accused No.11 Waman Madhavrao Maske for the offence punishable under section 302 r.w. 149 of I.P.C. is hereby quashed and set aside.

AND INSTEAD OF THAT

The accused No. 10 Marotrao Kanbarao Maske and accused No.11 Waman Madhavrao Maske are

hereby convicted for the offence punishable under Section 326 r.w. Section 149 of I.P.C. and sentenced to suffer R.I. for six years with fine of Rs.5000/- each i/d to suffer R.I. for six months.

(b) Rest of the conviction and sentence dated 15.10.2012 passed by the learned Additional Sessions Judge, Hingoli in Sessions Case No. 15 of 2008 stands confirmed as against the original accused No. 10 Marotrao Kanbarao Maske and accused No.11 Waman Madhavrao Maske.

(c) Criminal appeal No. 625 of 2012 filed by accused No.8 Goprao s/o Marotrao Maske is hereby dismissed to his extent and the judgment and order of conviction and sentence dated 15.10.2012 passed by the learned Additional Sessions Judge, Hingoli in Sessions Case No. 15 of 2008 stands confirmed, inclusive the order of set off under Section 428 of Cr.P.C.

(d) All the substantive sentences shall run concurrently.

(e) The accused Nos. 10 and 11 would be entitled to set off under Section 428 of the Code of Criminal

Procedure.

III. Criminal appeal No. 633 of 2012 is allowed.

(a) The judgment and order of conviction and sentence dated 15.10.2012 passed by the learned Additional Sessions Judge, Hingoli in Sessions Case No. 15 of 2008 as against the appellants-accused Nos. 6 Santosh s/o Laxman Bangar and the accused No. 7 Shriram s/o Laxman Bangar is hereby quashed and set aside and they are acquitted of the offence of which they were charged. Their bail bonds stand cancelled.

IV. Criminal Appeal No. 179 of 2014 preferred by the State against original accused Nos. 2 and 5 is partly allowed.

(a) The judgment and order of acquittal dated 15.10.2012 passed by the learned Additional Sessions Judge, Hingoli in Sessions Case No. 15 of 2008 as against the accused No.2 Keshavrao Dattarao Maske is quashed and set aside.

(b) The accused No.2 Keshavrao Dattarao Maske is hereby convicted for the offence punishable under Section 326 r.w. Section 149 of I.P.C. and sentenced to

suffer R.I. for six years with fine of Rs.5000/- i/d to suffer R.I. for six months.

(c) The accused No.2 Keshavrao Dattarao Maske is hereby convicted for the offence punishable under Section 447 r.w. Section 149 of I.P.C. and sentenced to suffer R.I. for six months and to pay fine of Rs.1000/- i/d to suffer R.I. for one month.

(d) The accused No.2 Keshavrao Dattarao Maske is hereby convicted for the offence punishable under Section 148 of I.P.C. and sentenced to suffer R.I. for three months and to pay fine of Rs.500/- i/d to suffer R.I. for one month.

(e) All the substantive sentences shall run concurrently.

(f) The accused No. 2 Keshavrao Dattarao Maske would be entitled to set off under Section 428 of the Code of Criminal Procedure.

(g) The State appeal is dismissed as against original accused No.5 Santosh Nanarao Maske.

V. The criminal application No. 5160 of 2013 is rejected.

(V. K. JADHAV, J.)

rlj/

CORAM: T.V. NALAWADE &
M.G. SEWLIKAR, JJ.

DATE: 22nd JANUARY, 2020

ORDER

The judgment, opinion of the learned 3rd Judge is received,
which is also the judgment of this court.

(M.G. SEWLIKAR, J.)

(T.V. NALAWADE, J.)