

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 198 of 2004

Chandra Sekhar Das & Ors.

-Vs-

The State of West Bengal

For the Appellants : Mr. Ashraf Ali
Mr. Manoranjan Jana
Mr. Indrajit Chatterjee

For the State : Mr. Avishek Sinha

Heard on : 18.12.2023, 19.01.2024, 27.02.2024,
15.03.2024, 20.06.2024

Judgment on : 19.09.2024

Ananya Bandyopadhyay, J.:-

1. This appeal is preferred against the judgment and order dated 18.03.2024 and 19.03.2024 passed by the Learned Additional Sessions Judge, Fast Track 1st Court, Purba Medinipore in Sessions Trial Case No. XXVI/September/2000, convicting thereby the appellants for commission of offences punishable under Sections 143/435/427 of the Indian Penal Code and sentencing them to suffer rigorous imprisonment for 3 months each and to pay a fine of Rs.500/- each, in default, to suffer rigorous imprisonment for a further period of 1 month each for the offence punishable under Section

143 of the Indian Penal Code, rigorous imprisonment for 7 years each and pay a fine of Rs.5,000/- each, in default, to suffer rigorous imprisonment for a further period of 1 ½ years each for the offence punishable under Section 435 of the Indian Penal Code and to suffer rigorous imprisonment for 2 years each and to pay a fine of Rs.5,000/- each, in default, to suffer rigorous imprisonment for a further period of 6 months each under Section 427 of the Indian Penal Code. All the sentences were directed to be run concurrently.

2. The appellants were placed on trial before the Court of the Learned Additional Sessions Judge, Fast Track 1st Court, Contai, Purba Medinipore to answer a charge under Sections 143/148/427/436 of the Indian Penal Code in connection with Sessions Trial Case No. XXVI/September/2000.
3. The prosecution case precisely stated that on 29.08.1990 at about 10.00 a.m., the appellants, forming an unlawful assembly bearing with lathi, vali, katan, tangi etc., trespassed into the house of the two nephews of the de facto complainant Trailokya Maity and caused damage to betel groves, banana plants and coconut trees and set fire to the house. The appellant nos. 2 to 13 took away coconuts, bananas, personal effects. The accused Subal Das (appellant no.14), Padmalochan Das (appellant no.15) and Chandra Sekhar Das (appellant no.1) directed the appellant no.2 to sprinkle kerosene oil over the thatch shed of Nalini Maity. After that the appellant no.3 set fire to the thatch shed of the complainant's nephews. Subsequently the appellants fled away. Many persons witnessed the alleged incident. Two nephews of the de facto complainant sustained financial loss amounting to Rs. 25,000/- to Rs. 30,000/-.

4. On the basis of the aforesaid complaint, Ramnagar Police Station Case No.43 of 1990 dated 30.08.1990 under Sections 143/448/427/436 of the Indian Penal Code was registered for investigation. On completion of investigation charge-sheet was filed.
5. Charges under Sections 143/448/427/436 of the Indian Penal Code were framed and to which the appellants pleaded not guilty and claimed to be tried.
6. In order to prove its case, the prosecution examined 7 witnesses and exhibited certain documents.
7. Learned Advocate for the appellants submitted that:-
 - i. The evidence adduced by the prosecution did not prove the charges under Sections 143/435/427 of the Indian Penal Code and in such circumstances, the impugned judgment and order of conviction and sentence was liable to be set aside.
 - ii. There were contradictions in the evidences of the prosecution witnesses.
 - iii. The contents of the letter of complaint, which had been treated as First information Report, could not be made an exhibit without examining the maker thereof, i.e., the defacto complainant. The defacto complainant in the instant case having expired, the Learned Judge could not have had marked the First Information Report as an exhibit or read the contents thereof in evidence. The Learned Judge by doing so and by convicting the appellants by relying upon the contents of the letter of complaint, which had been treated as

First Information Report, had committed grave error in law thereby rendering his impugned judgment and order bad in law and liable to be set aside.

- iv. The police in course of investigation seized burnt bamboos, wooden poles and ash. However, from the evidence of the prosecution witnesses, it was apparent that there was a burnt wooden chair as also burnt doors and windows. Non-seizure of such articles as stated by the other prosecution witnesses clearly cast doubt upon the veracity of the prosecution story itself.
- v. The prosecution witness no.1, in course of her evidence, had admitted that prior to the date of initiation of the present case, the appellants had initiated a police case against the brother-in-law of prosecution witness No.1 for assault committed by Nalini Maity and his associates on the appellants and thereafter the present proceedings had been initiated as a counter-blast.
- vi. Though the prosecution witness No.1 claimed herself to be an eye witness to the alleged occurrence, her evidence was vague and indistinct.
- vii. Articles allegedly looted by the appellants, were not recovered from any of the appellants by the Investigating Agency. The prosecution revolved around the fact that the appellants allegedly cut off trees and took the logs away. The Investigating Agency did not recover such logs/tree.

- viii. The prosecution witnesses had not only embellished their case, as disclosed by them at the earlier point of time before the Investigating Officer and recorded under Section 161 of the Code of Criminal Procedure but they had also contradicted their own statements recorded under Section 161 of the Code of Criminal Procedure.
- ix. The Investigating Officer had miserably failed to prepare a sketch map therein showing the place of occurrence. The preparation of the sketch map was essentially in order to pin-point the place of occurrence.

8. Learned Advocate for the appellants further submitted that:-

- i. As per the prosecution case there was an allegation of setting fire on the house with kerosene oil, but during investigation and examination of the witnesses it had been apparent from the deposition of witnesses that no one saw any of the accused persons who were carry the kerosene jar.
- ii. No household article or incriminating article was seized.
- iii. Though there was an allegation that the accused persons armed with deadly weapons attacked the house as well as the family members of the defacto complainant, however no casualties were reported.

9. The Learned Advocate for the State referred to the evidence adduced by PW-1 wherein she had categorically stated appellant Santosh Das to have set fire to the house of her brother-in-law. PW-1 further stated appellant Gunasindhu Jana to have been directed by Chandrasekhar Das to pour

kerosene oil and subsequently the appellant ignited fire to the house as aforesaid and escaped accomplishing rivalry removing the betel leaves worth Rs.10,000/-. PW-2 too specified the individual role enacted by the appellants in committing the offence as aforesaid. The seizure list delineated the articles of seizure which were cited as alamats and were exhibited in the Trial Court. However, with utmost fairness, the Learned Advocate for the State submitted that the theft of utensils was not established by the prosecution through proper recovery by the Investigating Officer and the manner of investigation was shoddy and unacceptable.

10. A circumspection of evidence of prosecution witnesses revealed as follows:-

- i. PW-1 deposed the appellants namely Santosh Das, Gunasindhu Jana, Chandra Sekhar Das, Madhusudan Das, Parameswar Das, Jagadish Das, Sagar Singh, Srimanta Tola, Jhantu Tola, Mintu Jana, Padmalochan Das, Subal Das, Manoranjan Sahoo, Mahitosh Das and Himangshu Das came to her house on 12th Bhadra, 1397 B.S., Wednesday at about 10:00 a.m in the morning being armed with lathi, tangi, axe etc. The accused persons cut the trees and took away coconuts, bananas, betel leaves along with utensils and other articles. The appellants Santosh Das also set fire to the house of her brother-in-law Nalini Maity. Appellant Gunasindhu Jana poured kerosene oil under the direction of Chandrasekhar Das. The appellants after setting fire to the said dwelling house went away and escaped. The witnesses namely Bikash Jana, Lakshmikanta Jana and many others saw the incident. Being supporters of rival

political party, the appellants committed the offence grudgingly subsequent to an altercation over the pathway. The value of the betel leaves which were taken away by the accused persons would be about Rs.10,000/-. The P.S. was informed of the occurrence. Police came to their house for investigation and seized burnt bamboo, wooden poles, ashes. Police prepared a seizure list.

- ii. During cross-examination, PW-1 stated that Mat. Exhibit showed burning articles of the dwelling house. The Mat. Exbts were burnt ash and bamboo of the case dwelling house. Those exhibited materials were seized at the place of occurrence. She could not say as to what was written in the seizure list. She had two betel leaves grove. There were utensils inside the place of occurrence house including 'sil' and 'nora'. There were $\frac{1}{2}$ aluminium made utensils but other household articles including the utensils were taken away by the accused persons on the day of occurrence. Stolen articles of the place of occurrence house were not recovered by the I.O during investigation. Windows and doors were half burnt condition. Those were not taken away by the I.O. Police had not seized stone made 'nora' and other household articles barring the seized alamat. She could not recap on whether I.O. had seized iron made nails. The appellants had filed a police case against her brother-in-law on the ground of assault taken place on the preceding day of the incident of the case. Her husband had been implicated as an accused. Accused Subal Das and Padmalochan Das had entered into different

betel leave groves. She could not recap as to who entered in which betel leave groves. She could not state as to who had plucked coconut from the concerned coconut trees. The accused persons had stolen away the coconut trees. She could not state as to whether I.O. had seized coconut trees from the accused persons. On the following day of incident she was examined by I.O. P.O belonged to her husband and brother-in-law but she could not state their share. The de facto complainant was Trailokya Maitya but he died.

- iii. PW-2 reiterated the evidence of PW-1 claiming himself to be an eyewitness. Accused Santosh Das and Chandrasekhar Das ordered other accused persons to set on fire at the house of Nalini Maity and Pulin Maity. Accused Gunasindhu Jana spread kerosene oil from her house. Santosh Das put light on the kerosene oil causing burn of the entire house. They had protested against such misdeeds but the appellants did not pay heed to their words. Lakshmikanta Jana, Pulin Sahoo and others had seen the occurrence.
- iv. During cross-examination, PW-2 deposed that his homestead plot bearing no.1526 under Mouza Paschim Karanji he did not know the plot number of the place of occurrence. Place of occurrence was intervened by 5/6 houses away from his house. He was examined by the Investigating Officer. He had stated to the Investigating Officer that accused Chandrasekhar, Santosh and Gunasindhu Jana leaded unlawful assembly comprising the rest accused persons or

they were armed with 'katari', 'lathi', axe or that they came to the house of P.O. or that they had cut away the trees of Nalini Maity and Pulin Maity or that accused persons looted away betel leaves from betel leaves groves amounting to Rs.8,000/9,000/- or that they took away all the household articles including ghati, bowls, brass made bucket and other household articles or that Chandrasekhar and Santosh ordered to set on fire at the house of Nalini or that accused Gunasindhu spread all over the house of Nalini or that Santosh put light on the kerosene oil place or that Nalini used to live with her family in the case house. Nalini Maity was alive and could walk. It had been further stated that due to resistance put forward to him, he could not proceed towards the house of Nalini Maity. On that day, he was coming from his father-in-law's house. He got down from the bus at Paniparul crossing. Accused Sagar Singh was carrying with axe. All the accused persons were carrying lathis. Accused persons had cut down ground nut trees, neem tree, banana plant, mango tree but could not say as to who cut down what trees. The trees were aged about 4/5 years.

- v. PW-3 and PW-4 substantially reiterated the evidence of PW-1 and PW-2 stating the role of the appellants to have cut the trees and departed with the logs and utensils setting fire to the thatch roof house of the brother-in-law of PW-1.
- vi. PW-5 was declared hostile by the prosecution.
- vii. PW-6 was tendered for cross-examination.

viii. PW-7, the Investigating Officer, in his deposition, inter alia, stated as follows:-

“I have not submitted charge sheet u/S. 379 I.P.C. I cannot say as to who has written the complaint. Also it is not possible for me to say as to where the complaint was written. On 30.08.90 at 1:35 p.m. I have received the complaint. Ramnagar P.S. is about 2 kms. away from Paniparul More bus stand. P.O. is situated by the side of Paniparul More. I did not raid house of the accused persons for recovery of stolen articles. I did not feel necessity of searching of the accused persons for recovery of stolen articles. I did not get half burnt door leaves and window leaves at P.O. and as such the same could not be seized. I did not find any reddish wooden door leaves or window leaves caused by burning. I did not get silnora, burnt utensils and iron nails, iron made bangles remained fitted with the door. I did not find any burnt wrapper or rag or pillow. Seized straw ashes are same in nature with the burnt ashes. Anyone can prepare such burnt ashes of straw like seized burnt ashes. The material ext. shows burnt bamboo pole along with its ashes. I have not examined other neighbours baring the cited witness of seized alamat. I have not prepared sketch map of the P.O. I did not seize stem of the cut tree. I have not seized any leaves covering the betel leaves groves. I did not seize betel plant from which betel leaves were plucked away. I did not seize any portion of the structure of betel leave groves. I have not

seized any record of right relating to land upon which betel leave grove situated. The accused of the instant sessions case Madhusudan Das has lodged a complaint against the witnesses Pulin Behari Maity, Nalini Maity, Susila Maity and others on 30.8.90. I cannot say as to whether the defacto complainant raised objection against mode of investigation made by me before the authority.

It has been stated by witness P.W.1 Kalpana Maity that in the morning 10 to 12 persons forming an unlawful assembly entered into my house and threatened to destroy palaghar or that the palaghar was found to have been burning. It has not been stated P.W.1 Kalpana Maity that under direction of accused Chandrasekhar Jana, accused Gunasindhu Jana sprinkled k. oil over palaghar.

It has not been stated by P.W.2 Bikas Jana that under the leadership Chandrasekhar Das, Santosh Das and Gunasindhu Jana they led the unlawful assembly for causing mischief or that they were armed with axe, kuthar, lathi or that they have taken away logs of Nalini and Pulin or that they have looted away betel leaves amounting to Rs.8,000/9,000/- or that they have looted away household articles including ghati, bowels, bucket and other household articles or that Santosh put light on the palaghar and thereby caused burning. It has been stated by Bikash Jana that he has got down from her in-law's house at Paniparul bus stand

at 9:00 a.m. or that he proceeded towards house for 45 minutes or that while approaching towards village he found fumes from a house.

It has been stated by P.W.4 Lakshmikanta Jana that he saw fume evolving from palaghar made of bamboo poles having thatch shed. But, it was not stated by Lakshmikanta Jana over theft of household articles by accused persons. It was not stated by Lakshmikanta Jana that under direction of accused Chandrasekhar accused Santosh Das sprinkled k. oil from a jar. It was stated by P.W.5 Pulin Sahoo that he found fume from palaghar situated by the side of betel leave groves. Further he could not say as to who has caused such burning of palaghar.”

11. The provisions of the Indian Penal Code are replicated as follows:-

“Section 143 of I.P.C.- Punishment.—Whoever is a member of an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

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Section 427 of I.P.C.- Mischief causing damage to the amount of fifty rupees.—Whoever commits mischief and thereby causes loss or damage to the amount of fifty rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

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Section 435 of I.P.C.- Mischief by fire or explosive substance with intent to cause damage to amount of one hundred or (in case of agricultural produce) ten rupees.—Whoever commits mischief by fire or any explosive substance intending to cause, or

knowing it to be likely that he will thereby cause, damage to any property to the amount of one hundred rupees or upwards ⁴¹⁷[or (where the property is agricultural produce) ten rupees or upwards], shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

12. In **Krishna Gopal Singh v. State of U.P.**¹, the Hon'ble Supreme Court held the following:-

“5. Similarly, the offence under Section 147 also cannot be pressed into service as none of the appellants is alleged to have committed any act “with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person”. The offence of mischief as defined in Section 425 can be established only with the strength of the allegations covering the ingredients enumerated in the said section. Learned counsel for the State has fairly conceded that the allegations in the charge are lacking in those ingredients. If so, the appellants cannot be convicted of the offence under Section 427 either.”

13. The following was held in **Bihar State Electricity Board v. Nand Kishore Tamakhuwala**² by the Hon'ble Supreme Court:-

“7. Section 427 of the Penal Code, 1860 provides:

“Whoever commits mischief and thereby causes loss or damage to the amount of fifty rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.”

This provision contemplates commission of mischief and mischief has been defined in Section 425 which reads thus:

“Whoever, with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property, or any such change in any property or in

¹1999 SCC OnLine SC 133

²(1986) 2 SCC 414

the situation thereof as destroys or diminishes its value or utility, or affects it injuriously, commits ‘mischief’.”

In order to make out an offence of mischief, it has to be alleged that the person caused the destruction of any property or any such change in the property or in the situation thereof. From a perusal of the complaint it is clear that no acts are alleged against any one of the accused persons which could bring any of their actions within the mischief of the definition of mischief. Apparently therefore the offence under this section also is not even prima facie alleged. Section 50 of the Act provides for the persons who could launch a prosecution for any offence under this Act. Section 50 reads as under:

“Institution of prosecutions.—No prosecution shall be instituted against any person for any offence against this Act or any rule, licence or order thereunder, except at the instance of the government or an Electrical Inspector, or of a person aggrieved by the same.”

Although the complainant claims to be the son of one of the partners of the firm owning the flour mill but it is not shown any existing interest that he has in the flour mill but as on the facts stated, no offence prima facie appears to have been committed, we do not think it proper to go into this question”.

14. In **Vinubhai Ranchhodbhai Patel v. Rajivbhai Dudabhai Patel**³ the

Hon’ble Supreme Court held the following:-

“25. Section 141 IPC declares an assembly of five or more persons to be an “unlawful assembly” if the common object of such assembly is to achieve any one of the five objects enumerated in the said section. [See *Yeshwant v. State of Maharashtra*, (1972) 3 SCC 639 : 1972 SCC (Cri) 684] One of the enumerated objects is to commit any offence. [**40. “Offence”**.—Except in the Chapters and sections mentioned in clauses 2 and 3 of this section, the word “offence”

³(2018) 7 SCC 743

denotes a thing made punishable by this Code.”] “The words falling under Section 141, clause third “or other offence” cannot be restricted to mean only minor offences of trespass or mischief. These words cover all offences falling under any of the provisions of the Penal Code or any other law.” [Manga v. State of Uttarakhand, (2013) 7 SCC 629 : (2013) 3 SCC (Cri) 621] The mere assembly of 5 or more persons with such legally impermissible object itself constitutes the offence of unlawful assembly punishable under Section 143 IPC. It is not necessary that any overt act is required to be committed by such an assembly to be punished under Section 143. [See Dalip Singh v. State of Punjab, (1953) 2 SCC 36 : AIR 1953 SC 364 : 1953 Cri LJ 1465]

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30. *It can be seen from the above, Sections 141, 146 and 148 create distinct offences. Section 149 only creates a vicarious liability. However, Sections 146, 148 and 149 contain certain legislative declarations based on the doctrine of vicarious liability. The doctrine is well known in civil law especially in the branch of torts, but is applied very sparingly in criminal law only when there is a clear legislative command. To be liable for punishment under any one of the provisions, the fundamental requirement is the existence of an unlawful assembly as defined under Section 141 made punishable under Section 143 IPC.*

31. *The concept of an unlawful assembly as can be seen from Section 141 has two elements:*

- (i) The assembly should consist of at least five persons; and*
- (ii) They should have a common object to commit an offence or achieve any one of the objects enumerated therein.*

32. *For recording a conclusion, that a person is (i) guilty of any one of the offences under Sections 143, 146 or 148 or (ii) vicariously liable under Section 149 for some other offence, it must first be proved that such person is a member of an “unlawful assembly”*

consisting of not less than five persons irrespective of the fact whether the identity of each one of the 5 persons is proved or not. If that fact is proved, the next step of inquiry is whether the common object of the unlawful assembly is one of the 5 enumerated objects specified under Section 141 IPC.”

15. In **Raju v. State of Rajasthan**⁴ the following was observed by the Hon’ble Supreme Court:-

“14. Insofar as the acquittal of the four accused, which is the subject-matter of challenge in Criminal Appeal No. 1897 of 2008 is concerned, the first question that has to be determined is whether the aforesaid four accused along with the two convicted accused had formed an unlawful assembly within the meaning of Section 141 of the Penal Code so as to render them vicariously liable for the offence(s), if any, committed by the members of the unlawful assembly either in furtherance of the common object of the assembly or if the offence committed was or could have been known to be likely to be committed in pursuance of such common object of the unlawful assembly.

15. From the evidence of PW 2 Avtar Singh (son of the deceased) as well as PW 4 Ram Niwas (declared hostile) it transpires that the deceased and the party of the accused had a dispute over land and, in fact, some of the accused had made attempts to encroach upon land belonging to the deceased. All the three eyewitnesses, namely, PW 1, PW 13 and PW 19, as already noticed, had unequivocally and categorically stated in the court that the six accused persons had come together to the field of deceased Mukhtyar Singh armed with dangerous weapons including firearms. If this is the manner in which the accused persons had come to the spot it cannot be said that the accused had not formed an unlawful assembly within the

⁴(2013) 2 SCC 233

meaning of the said expression as appearing in Section 141 of the Penal Code. While membership of an unlawful assembly itself is an offence under Section 143 IPC, use of force by members of the unlawful assembly gives rise to the offence of rioting which is punishable either under Section 147 or Section 148 IPC. Membership of the four accused in the unlawful assembly and use of force with dangerous weapons is borne out by the evidence on record. The said facts would make the acquitted accused liable for the offence under Section 148 of the Penal Code. However, their liability under any other provision of the Penal Code would depend on what can reasonably be understood to be the common object of the assembly in the present case.”

16. The Hon’ble Supreme Court observed the following in the case of **Akbar Sheikh v. State of W.B.**⁵ :-

“19. Chapter VIII of the Penal Code, 1860 provides for the offences against the public tranquillity. Section 141 defines “unlawful assembly” to be an assembly of five or more persons. They must have a common object *inter alia* to commit any mischief or criminal trespass or other offence. Section 142 of the Penal Code postulates that whoever, being aware of facts which render any assembly an unlawful one, intentionally joins the same would be a member thereof.

20. Section 143 of the Penal Code provides for punishment of being a member of unlawful assembly. Section 149 provides for constructive liability on 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 knew to be likely to be committed in prosecution of that object.

⁵(2009) 7 SCC 415

21. *Whether an assembly is unlawful one or not, thus, would depend on various factors, the principal amongst them being a common object formed by the members thereof to commit an offence specified in one or the other clauses contained in Section 141 of the Penal Code. Constructive liability on a person on the ground of being a member of unlawful assembly can be fastened for an act of offence created (sic committed) by one or more members of that assembly if they had formed a common object. The distinction between a common object and common intention is well known.*

22. *In Munna Chanda v. State of Assam [(2006) 3 SCC 752 : (2006) 2 SCC (Cri) 43] this Court held as under: (SCC pp. 756-57, paras 10-13)*

“10. The concept of common object, it is well known, is different from common intention. It is true that so far as common object is concerned no prior concert is required. Common object can be formed on the spur of the moment. Course of conduct adopted by the members of the assembly, however, is a relevant factor. At what point of time the common object of the unlawful assembly was formed would depend upon the facts and circumstances of each case.

11. Section 149 IPC creates a specific and distinct offence. There are two essential ingredients thereof:

(i) commission of an offence by any member of an unlawful assembly, and

(ii) 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.

12. It is, thus, essential to prove that the person sought to be charged with an offence with the aid of Section 149 was a member of the unlawful assembly at the time the offence was committed.

13. The appellants herein were not armed with weapons. They except Bhuttu were not parties to all the three stages of the dispute.

At the third stage of the quarrel, they wanted to teach the deceased and others a lesson. For picking up quarrel with Bhuttu, they might have become agitated and asked for apologies from Moti. Admittedly, it was so done at the instance of Nirmal, Moti was assaulted by Bhuttu at the instance of Ratan. However, it cannot be said that they had common object of intentional killing of the deceased. Moti, however, while being assaulted could free himself from the grip of the appellants and fled from the scene. The deceased was being chased not only by the appellants herein but by many others. He was found dead the next morning. There is, however, nothing to show as to what role the appellants either conjointly or separately played. It is also not known as to whether if one or all of the appellants were present, when the last blow was given. Who are those who had assaulted the deceased is also not known. At whose hands he received injuries is again a mystery. Neither Section 34 nor Section 149 of the Penal Code is, therefore, attracted. (See Dharam Pal v. State of Haryana [(1978) 4 SCC 440 : 1979 SCC (Cri) 61] and Shambhu Kuer v. State of Bihar [(1982) 1 SCC 486 : 1982 SCC (Cri) 264] .)”

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25. *The aforementioned observation in Baladin case [AIR 1956 SC 181] was, however, not accepted later by this Court as an absolute proposition of law and was held to be limited to the peculiar facts of the case in Masalti v. State of U.P. [AIR 1965 SC 202 : (1964) 8 SCR 133] in the following terms: (Masalti case [AIR 1965 SC 202 : (1964) 8 SCR 133] , AIR pp. 210-11, para 17)*

“17. ... 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 objects 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.”

17. The evidence of the Investigating Officer, i.e. PW-7, discerningly amplified the lapses on his part in failing to have identified the place of occurrence through a proper sketch map. The betel leaf plants were not seized. Burnt ashes of straw necessarily would not relate to the burnt thatched hut. The evidence of PW-1 claiming to be eye witness had been inconsistent deviating from her earlier statements along with omissions. Similar stance had been adopted by PW-2 in contradicting his early statements as well as introducing new facts before the Court with certain omissions. PW-7 deposed that he did not find half burnt door leaves and window leaves at the place of occurrence. He did not find any reddish wooden door or window to have been burnt or ignited.
18. The delay in filing the complaint after such an allegedly serious incident was not explained which otherwise should have been instantaneously reported to the police authorities.

19. The prosecution failed to prove its case beyond reasonable doubt. In the context of the occurrence of the incident the specific role played by the individual appellants based on the ambivalent evidence of partisan witnesses.
20. In view of the above discussions, the appellants are acquitted from the conviction under Sections 143/435/427 of the Indian Penal Code and the instant criminal appeal being CRA 198 of 2004 is allowed.
21. There is no order as to costs.
22. Trial Court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.
23. Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

(AnanyaBandyopadhyay, J.)