

IN THE HIGH COURT OF JUDICATURE AT PATNA

CRIMINAL APPEAL (DB) No. 393 of 1995

1. Kamakhya Singh

2. Binod Singh

Sons of late Haridyar Singh

Both residents of village – Barni, Police Station – Charpokhari, District -
Bhojpur

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Anant Kumar Bhaskar, Advocate
Mr. Ravi Shankar Roy, Advocate
Mr. Binod Kumar Singh, Advocate
For the Respondent/s : Mr. Abhimanyu Sharma, APP

CORAM: HONOURABLE MR. JUSTICE BIBEK CHAUDHURI

and

HONOURABLE MR. JUSTICE DR. ANSHUMAN

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE BIBEK CHAUDHURI)

Date : 11-09-2025

1. The instant appeal is directed against the
judgement and order of conviction and sentence passed by
the learned 2nd Additional Sessions Judge, Bhojpur at Ara on
27th of November, 1995 in Sessions Trial No. 271 of 1991,



whereby and whereunder, the appellants were held guilty and convicted of the charges under Section 302 of the Indian Penal Code and also under Sections 149/302 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for life on the above two heads of charge.

2. Accused Binod Singh was further sentenced to undergo rigorous imprisonment for 8 years for the offence punishable under Section 307 of the Indian Penal Code. Both the appellants were further sentenced to undergo rigorous imprisonment for three years for the offence punishable under Section 148 of the I.P.C. and Section 27 of the Arms Act, 1959. It was directed by the Trial Court that substantive sentences of rigorous imprisonment shall run concurrently.

3. Sworn of unnecessary details, the facts, leading to the present appeal is as follows: -

4. One Baban Prasad, son of Jagannath Prasad, since deceased, made a statement before the Officer Incharge of Charphokhari Police Station on 28th of August, 1990 at about 09.00 P.M. that on the self-same date at around 08.00 P.M., while he was sitting in the inner courtyard of his house



and the entrance door of the house was open, he suddenly heard sounds of two gun-shots from outside. Thereafter, continuous firing started. Out of fear, the brother of the informant Hareshwar Prasad and the informant hid themselves behind the southern door of their house. From there, they saw Kamakhya Singh, Binod Singh and Kamlesh Bhat, all residents of village-Balwan, being armed with a rifle, a pistol and a double barrel gun respectively, and one unknown person with a rifle in his hand, entered into their house. Accused Kamakhya Singh fired with rifle at his younger brother, Baleshwar Prasad, who was sitting at the door way of the western room in the inner courtyard. On being hit, he received gun-shot injury on his arm. Accused Kamlesh Bhat fired at the younger brother of the informant Umesh Prasad and his nephew Dharmendra Prasad with the help of his double barrel gun and both of them sustained gun-shot injury on their legs.

5. After this, all four persons went on firing inside the house and while making their exist from the northern side of the house, they also opened fire at the father of the



informant, namely, Jagannath Kahar, who died at the spot, receiving bullet injury. The informant found the dead-body of his father lying on the ground in pool of blood. When he came out of the house, he saw his grand father Banwari Kahar lying dead in pool of blood by the side of a hand pump in front of their house. After causing massacre as aforesaid, the appellants fled away towards eastern side while firing. It was also stated by the informant that there were, in all, 8 miscreants, armed with rifle, guns and other fire arms. Except the accused persons named in the F.I.R., he could not identify any other person.

6. The informant also stated that the houses of accused Kamakhya Singh and Binod Singh are situated 150-200 away from their house on the north eastern direction. About 10 days before the incident, Kamakhya Singh ate some sweets from the shop of the brother of the informant Hareshwar Prasad, but did not pay the money for the said sweets. Over the said incident, an altercation took place between Hareshwar Prasad and Kamakhya Singh and during such altercation, accused Kamakhya Singh threatened him to



wipe out all the family members of the informant.

7. On the basis of the said complaint, police registered Charphokhari P. S. Case No. 75 of 1990, dated 28th of August, 1990 against the F.I.R. named and five unknown accused persons under Sections 147/148/149/452/302/307 of the Indian Penal Code and Section 27 of the Arms Act, 1959 and took up the case for investigation. During investigation, the police visited the place of occurrence, recorded statement of the witnesses, seized some articles under a seizure list, dated 28th of August, 1990, viz., five empty cartridges fired, on which 30.06 is marked at their bottom; fired empty cartridges, on which Indian Ordinance FOC FORY K.F special is marked; and WAD of fired bullet of 12 bored-gun; and also collected injury report of the injured persons and post-mortem report of the deceased Jagannath Kahar and Banwari Kahar and finally submitted charge-sheet under Sections 147/148/149/452/302/307 of the Indian Penal Code and Section 27 of the Arms Act, 1959.

8. After the case was committed to the Court of Sessions, the learned Sessions Judge, Bhojpur at Ara



transferred the case records to the 2nd Court of the learned Additional Sessions Judge, Ara for trial and disposal. The learned Additional Sessions Judge, vide order, dated 26th of August, 1991 framed the charge separately against accused persons, namely, Kamakhya Singh, who faced trial under the charge of offence punishable under Sections 302/149 of the IPC and Section 148 of the IPC. The appellant Binod Singh was charged for the offence punishable under Sections 307, 302/149 of the IPC. Accused Birendra Singh was charged under Sections 302/149 and 148 of the IPC. Accused Kamlesh Bhat faced trial under the charge of Sections 307, 302/34 of the IPC. All the accused persons also faced trial under the charge of Section 27 of the Arms Act.

9. In order to bring home the charge against the accused persons, prosecution examined 9 witnesses. Amongst the said witnesses, P.W. 1 to P.W. 5 are the close relatives of the deceased persons. P.W. 5 is the informant. P.W. 6, Dr. Kumar Ganga Nand is the Medical Officer, who medically treated and prepared injury reports of the persons injured in the alleged incident. P.W. 7 Srikant Upadhyaya is the



Investigating Officer of the case. P.W. 8 Dr. Madan Mohan Verma is the autopsy surgeon who held post-mortem examination over the dead body of Banwari Kahar. P.W. 9 Murat Ram proved the post-mortem report of Jagannath Kahar.

10. During trial, the original FIR, seizure list, injury reports, post-mortem reports and the formal FIR were marked exhibits which we propose to refer subsequently.

11. At the outset, we have narrated the incident, as reported by the informant (P.W. 5) to the police on 28th of August, 1990 at about 09:00 P.M. It appears from the materials on record as well as the FIR that the incident took place at about 08:00 P.M. and the statement of the informant was recorded within one hour of the incident.

12. Learned Advocate for the appellants assailed the impugned judgement on the following grounds:

(i) There are material contradictions between the FIR and the statement of the witnesses made before the Investigating Officer under Section 161 of the Cr.P.C. as well as before the Court. In view of such material contradictions,



evidence of the witnesses ought not to have been believed by the Trial Court as gospel truth;

(ii) Secondly, all the witnesses on behalf of the prosecution are members of the same family. If the prosecution case is believed, then it is found that a group of eight miscreants armed with lethal weapons, raided the house of the informant, committed murder of his father and grandfather by gun-shot injury, opened fire at his brother and brother's son and while going away, they were firing indiscriminately to create terror. However, not a single villager came forward to support the prosecution case. Prosecution Witnesses No. 1 to 5 are close relatives of the deceased. Three of them are injured and they are highly interested persons. Therefore, the trial Court committed a gross error in holding the appellants guilty for committing offence under Section 302 of the IPC read with Section 149 of the IPC and other penal provisions only on the basis of the evidence of interested witnesses.

(iii) Thirdly, it was submitted by the learned Advocate for the appellants that indisputably a quarrel broke



out between one Hareshwar Prasad and accused Kamakhya Singh and Kamlesh Bhat over non-payment of price of sweets which they ate from the shop of P.W. 1. Therefore, there was previous enmity between the parties, so the accused persons might be falsely implicated in the case.

(iv) Lastly, the learned Advocate for the appellants urged that the incident took place at about 08:00 P.M. at night on 28th of August, 1990. In the FIR, the informant did not state that lanterns were burning on the date and time of occurrence inside the house and specially near the place of occurrence. However, in course of evidence, the witnesses developed their version saying that they could identify the appellants by the light of lanterns. The Investigating Officer did not even seize any lantern from the place of occurrence. Therefore, prosecution failed to prove hopelessly regarding the source and light by virtue of which the witnesses allegedly identified the appellants.

13. It is also submitted by the learned Advocate for the appellants that the prosecution failed to establish the charge under Sections 148 and 149 of the IPC. There is



absolutely no evidence that the accused persons were five or more in number and they found unlawful assembly in prosecution of their common object to murder Jagannath Kahar and Banwari Kahar and gun-shot injury to Baleshwar Prased, Umesh Prasad and Dharmendra Prasad.

14. The learned Advocate on behalf of the prosecution, on the other hand, has supported the impugned judgement and submits that witnesses on behalf of the prosecution were able to bring home charge against the appellants beyond any shadow of reasonable doubts and they were rightly convicted and sentenced by the learned Trial Court.

15. We have duly considered the arguments advanced by the learned counsels for the appellants and the respondent.

16. At the outset, we propose to discuss as to whether the statement of P.W. 5 Baban Prasad, which was treated as F.I.R. suffers from any infirmity or material contradictions with his evidence or not.

17. It is needless to say that the learned Advocate



for the appellants in course of his argument refers to the statements of almost all the witnesses on behalf of the prosecution, who deposed about the incident, in order to show contradictions with the F.I.R. However, it is absolutely settled that the F.I.R. is not a substantive piece of evidence and the contents of the FIR can be contradicted with the subsequent statement of the F.I.R. maker only.

18. Therefore, we are under obligation to examine the FIR in the light of the evidence of P.W. 5 Baban Prasad.

19. In his evidence, P.W. 5 has stated that on the date of occurrence at about 08:00 p.m. he was present at the Southern Courtyard of his house. The main gate of the house was open, suddenly he heard sound of firing from outside and rushed towards northern courtyard. When he reached near the door of the courtyard, he saw five persons, of whom he identified the appellants and one Kamlesh Bhat entering into their house being armed with rifle, country made pistol and double barrel gun. He saw Kamakhya Singh opening fire with the help of his rifle on his father, who was at that point of time taking food. Appellant-Binod Singh fired from his pistol,



causing bullet injury on the right arm of his younger brother-Baleshwar Prasad. Then Kamlesh Bhat fired at his younger brother-Umesh Prasad and nephew-Dharmendra, both of whom sustained gun shot injury on his legs. After causing death of Jagannath Kahar and injuring others, the miscreants fled away while shooting. After the said miscreants departed, the informant and other members of the family came out of the house and they saw their grandfather Banwari Kahar lying dead near the hand-pump situated outside the house receiving gun shot injury.

20. It is submitted by the learned Advocate for the appellants that in the FIR, PW-5 did not state that accused-Kamakhya Singh committed murder of his father. On the contrary, he said that Kamakhya fired with the help of his rifle at his younger brother Baleshwar Prasad, who was sitting at the door way of the western room in the inner courtyard.

21. Thus, there is material contradictions in the statement made by PW-5 in his F.I.R. and the subsequent statement made on oath at the time of Trial. PW-5 developed the prosecution case by describing himself as the eye witness



of the death of his father-Jagannath Kahar.

22. In view of such circumstances, evidence of PW-5 ought not to have been taken into consideration.

23. The learned Advocate on behalf of the appellants wanted to draw the contradictions between the statement recorded as FIR and the evidence of PW-1 to PW-4.

24. This is not at all permissible under the law of evidence. It is already recorded that an FIR is not a substantive piece of evidence and can only be used to corroborate the statement of the FIR maker under Section 157 of the Evidence Act or to contradict it under Section 145 of the Evidence Act. It cannot be used as evidence against the maker at the trial, nor to corroborate or to contradict the evidence of other witnesses. The learned Advocate for the appellants is absolutely misconceived when he wanted to show from the evidence of PW-1 that there is a contradiction between the FIR and the evidence of PW-1 on the point as to his place of stay in the house at the time of incident.

25. First Information Report is the report at the first



instance after the occurrence to set criminal administration of justice into motion.

26. In the instant case, statement made by PW-5 before the police is required to be considered under the prevailing facts and circumstances, viz. the residents of the house of Jagannath Kahar were sitting at different places, some of them were taking their food at about 08:00 p.m., when the miscreants being armed with lethal weapons raided the house and committed murder of two persons and caused gun shot injury to three other inmates of the house. Hearing the sound of firing, the women inmates of the house started to raise alarm. Obviously, they tried to take shelter in different parts of the house to save themselves. At this stage, it is very obvious that the inmates saw different parts of incident differently and they stated the said fact. It is not omitted in the FIR that Banwari Kahar and Jagannath Kahar were not murdered by the appellants. It is also not stated that Baleshwar Prasad, Umesh Prasad and Dharmendra Prasad were not injured by firing.

27. Under such circumstances, it is not expected



that the informant would make a statement of the incident in mathematical precision stating what had happened in seriatim.

28. For the reasons stated above, we are not in a position to hold that the FIR suffers from concoction, exaggeration and infirmity. Moreover, contradictions in the evidence of PW-5 referred to by the learned Advocate for the appellants cannot also be treated as material contradiction.

29. In ***Shyamal Ghosh Vs. State of West Bengal***, reported in ***(2012) 7 SCC 646***, the name of the accused was not stated in the F.I.R. He was not identified in police custody. He was also not named by PW-8 in his statement. The Hon'ble Supreme Court relied on the statement of PW-8 with regard to the role of the accused, on the basis of his identification in Court.

30. The Hon'ble Supreme Court in ***Tika Ram Vs. State of Madhya Pradesh***, reported in ***(2007) 15 SCC 760***, while rejecting the argument that name of the accused is not mentioned in the F.I.R. held that this would not by itself be sufficient to reject the prosecution case as against the



accused. The Court further held that where the prosecution is able to establish its case, such omission by itself would not be sufficient to give benefit of doubt to the accused.

31. In the instant case, appellant-Kamakhya Singh is not entitled to get benefit of doubt on the same logic laid down by the Apex Court in the above-mentioned decision on the ground that in the F.I.R. his name was not mentioned as the assailant of Jagannath Kahar.

32. We are in agreement with the learned Advocate for the appellants that PW-1 to PW-5 are close relatives of the deceased, three of them are injured and they are highly interested in the outcome of the case.

33. In ***Paresh Kalyandas Bhavsar Vs. Sadiq Yakubbbhai Jamadar & Ors.,*** reported in ***AIR 1993 SC 1544***, it is held by the Hon'ble Supreme Court that mere interestedness is not a ground to reject the evidence of the eye witnesses, particularly those who were injured. Firstly, their presence during the occurrence cannot be doubted. Secondly, the injured witnesses would be the last persons to leave out the real culprits and implicate others falsely.



However, it becomes necessary to scrutinize their evidence with great care and caution. Normally, in a case of this nature, the evidence of such witnesses is scrutinized in the light of medical evidence, their previous statements, the earliest version put forward and other circumstances like the investigation being defective and also the effect of omission or discrepancy, if any.

34. In the instant case, amongst first five witnesses, three were injured. Dharmendra, Umesh and Baleshwar sustained gun shot injury on the date and time of occurrence. Is it believable at this stage to hold that the sons of the deceased and the injured eye witnesses would implicate innocent persons leaving aside the real culprits. The irresistible reply would be in the negative.

35. In ***Rajju @ Prakash Vs. State of Madhya Pradesh***, reported in ***1993 Supp (4) SCC 667***, almost similar is the incident like the case in hand. The occurrence took place at about 08:00 in the evening and the First Information Report was lodged by PW-1, who happened to be the brother of the deceased at 08:50 p.m., the same evening,



i.e., within an hour of occurrence. In the First Information Report only, the appellant was named and it was said that he along with three other accused persons had assaulted the deceased. The Hon'ble Supreme Court held that if PW-1, the informant, had any motive to falsely implicate their enemies or persons against whom they had any grudge, then they would have named three other persons as well but they admitted that only the appellant was identified and others were not known to them.

36. In the instant case also the FIR maker stated that eight persons being armed with fire arms assembled in front of their house. Four of them entered into the house and caused the massacre. The informant stated only three names, he even could not say the name of the fourth assailant, who entered into the house and the names of those who were standing outside. Had the informant any motive to implicate falsely innocent persons, he could have stated the names of other persons. Thus, we hold that only because PW-1 to PW-5 were close relatives and interested witnesses, their evidence cannot be treated as false and concocted, and thereby



discarded.

37. It is found from Lower Court Record itself that appellants were charged under Section 302 of the IPC with the aid of Section 149 IPC. Practically, appellant-Binod Singh was convicted under Section 302 of the IPC taking into consideration his vicarious liability of being a member of unlawful assembly, the common object of such assembly was to commit murder and cause injury of the above-named persons.

38. It is submitted by the learned Advocate for the appellants that the prosecution hopelessly failed to prove the charge under Sections 148 and 149 of the I.P.C. A question was raised by him, whether section 149 IPC has any manner of application for fastening the constructive liability, which is a *sine qua non* for its operation. It is submitted by him that according to the prosecution, eight persons came to the house of the informant. Out of the said eight persons, only four persons entered into the house. The witnesses did not state the specific role of remaining accused persons, who were allegedly outside the house of the deceased.



39. It is needless to say that mere presence in an unlawful assembly cannot render a person liable unless there was a common object and the members of unlawful assembly were actuated by that common object and that object is one of those set out in section 141 and where common object of an unlawful assembly is not proved the accused cannot be convicted with the help of Section 149 of IPC. The crucial question is as to whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects, as specified in Section 141 of the IPC.

40. In the instant case, the prosecution witnesses were absolutely silent about the role of the persons, who were standing outside the house. The Investigating Officer also failed to identify and arrest those persons to ascertain as to whether the said persons also shared common object with the appellants. A common object may be formed by express agreement after mutual consideration, but that is by no means necessary. It may be formed at any stage by all or few members of the assembly and the other members may just



join and adopt. Once formed, it need not continue to be the same. It may be modified or altered or abandoned at any stage. The expression “in prosecution of common object” as appearing in Section 149 have to be strictly construed as equivalent to “in order to attain the common object”. It must be immediately connected with the common object by virtue of the nature of the object. There must be community of object and the object may exist only upto a particular stage and not thereafter.

41. Section 149 of IPC consists of two parts, the first part of 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 other 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 a 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 IPC 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.

42. In support of our discussion, we may refer to the decision of the Hon'ble Supreme Court in ***Gangadhar Behera & Ors. Vs. State of Orissa***, reported in ***(2002) 8 SCC 381***.

43. Similar view was taken by the Hon'ble Supreme Court in a subsequent decision in the case of ***Chanakya Dhibar (dead) Vs. State of West Bengal & Ors.***, reported in ***(2004) 12 SCC 398*** and ***Dani Singh & Ors. Vs. State of Bihar***, reported in ***2005 SCC (Crl) 127***.

44. In ***Ramachandran & Ors. Vs. State of Kerala***, reported in ***(2011) 9 SCC 257***, it was held by the Hon'ble Supreme Court that Section 149 IPC has essential two ingredients, viz. (i) offence committed by any member of an unlawful assembly consisting of five or more members, and (ii) such offence must be committed in prosecution of the common object (under Section 141 of IPC) of that assembly or such as the members of that assembly knew to be likely to be committed in prosecution of the common object. In order that the case may fall under the first part of Section 149 of



IPC, the offence must be connected immediately with the common object of the unlawful assembly, of which the accused were members. Even if, the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under the second part of Section 149 of IPC, if it can be held that the offence was such as the members knew was likely to be committed. The expression “know” does not mean a mere possibility, such as might or might not happen. For instance, it is a matter of common knowledge that if a body of persons go armed to take forcible possession of the land, it would be right to say that someone is likely to be killed and all the members of the unlawful assembly must be aware of that likelihood and would be guilty under the second part of Section 149 IPC. There may be cases which would come within the second part, but not within the first. The distinction between two parts of section 149 IPC cannot be ignored or obliterated.

45. In ***Taijuddin Vs. State of Assam & Ors.***, reported in ***(2022) 1 SCC 395***, the Hon’ble Supreme Court considering the scope and object of Sections 141 to 149 of



the IPC held that a person, who only pointed out where the victim was hiding, cannot be said to be the member of unlawful assembly and cannot be convicted with the aid of section 149 of IPC.

46. In the instant case too, the appellants cannot roped with the aid of vicarious liability described in section 149 of IPC on the ground that four suspected persons were standing outside the house of victim. There is absolutely no evidence that the said suspected persons had common object to commit the offence of murder and causing gun shot injury of the deceased and the eye witnesses. Therefore, we are of the view that appellant-Binod Singh cannot be convicted under Section 302 of IPC with the aid of Section 149 of the IPC.

47. Similarly, the Trial Court committed an error in convicting appellant-Kamakhya Singh under Sections 148 and 149 of the IPC.

48. In ***Pulen Phukan & Ors. Vs. State of Assam***, reported in ***(2023) 13 SCC 41***, the Hon'ble Supreme Court disbelieved the story of common object and



commission of offence by some members of unlawful assembly in prosecution of common object under the facts and circumstances of the case.

49. In the instant case also, the facts and circumstances does not inspire us to hold that the appellants formed unlawful assembly within the meaning of section 141 of IPC and in prosecution of the common object of the assembly, the appellants committed murder of father and grandfather of the informant and injury to the brothers and nephew of the informant and the witnesses.

50. The decision of the Hon'ble Supreme Court in ***Naresh @ Nehru v. State of Haryana***, reported in ***(2023) 10 SCC 134*** may also relied on in support of our observation.

51. Oral evidence of the witnesses on record is absolutely silent as to the formation of unlawful assembly by the appellants and other unknown persons except an omnibus statement that four unknown persons were standing with arms outside the house of the informant. The evidence of the inmates of the house where the incident took place suggests



that four persons entered into the house. They were these two appellants and one Kamlesh Bhat and another unknown person. Therefore, the number of accused persons, who entered into the house and caused massacre also was not five or more persons. Thus, the prosecution evidence is not only scanty but also does not support the charge under Section 148 or 149 of the I.P.C.

52. Conviction of the appellants cannot sustain with the aid of section 149 of the I.P.C. or that the appellant Binod Singh cannot be held guilty for committing offence of murder with the aid of Section 149 of the I.P.C.

53. The learned Advocate on behalf of the respondent, on the other hand, submits that all the witnesses are the members of the family of the deceased and injured persons. Three of them are injured witnesses. Therefore, their presence at the scene of occurrence on the date and time of incident cannot be held to be doubtful. The evidence of the witnesses corroborated with each other on material points. It is true that there may be some minor contradictions and omissions between the statements of the witnesses but



these contradictions and omissions ought to be treated as minor contradictions, not touching upon the merit of the prosecution case.

54. It is also submitted by the learned Advocate appearing on behalf of the respondent that from the evidence of the witnesses no. 1 to 5, motive of the accused persons was proved. It is found from the evidence on record that about 10 days before the occurrence, appellant Kamakhya Singh ate some sweets from the shop of one of the witnesses situated at Charpokhari market but did not pay the price of the same. Over the said issue, a quarrel broke out between P.W. 2 and Kamakhya Singh. At that time, Kamakhya Singh threatened P.W. 2 that he would finish all the members of his family. P.W. 3 and P.W. 4 also corroborated the said incident. It was stated on oath by P.W. 3 that many people of Charpokhari market knew about the incidence of quarrel on account of non-payment of money of sweets between P.W. 2 and accused Kamakhya Singh. But nobody would depose out of fear from the accused persons. The said incident of quarrel was not strongly challenged by the defence during cross-



examination of the witnesses except a solitary suggestion to them that no such quarrel broke out between them, which the witnesses sternly denied.

55. The learned Advocate appearing on behalf of the respondent also submits that the appellants are residents of the same locality. They are known to the witnesses. Therefore, identification of the accused persons cannot be questioned by the appellants. Thus, it is submitted by the learned Advocate appearing on behalf of the respondent that if the presence of the appellants along with others on the date and time of occurrence is proved, coupled with the overt act they committed, they could be convicted under Section 302 read with Section 149 of the Indian Penal Code.

56. In support of his contention, the learned Advocate appearing on behalf of the respondent refers to a recent decision of the Hon'ble Supreme Court in **Parshuram v. State of M.P.**, reported in **2023 INSC 973**. Paragraph 13 of the said decision is very relevant and quoted below: -

“13. The law with regard to conviction under Section 302 read with Section 149 of IPC has been succinctly



discussed by a Constitution Bench of this Court in the locus classicus of Masalti v. State of U.P.2, wherein this Court observed thus:

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 whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly. 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. It is in that context that the observations made by this Court in the case of Baladin [AIR 1956 SC 181] assume significance; otherwise, in law, it would not be correct to say that before a person is held to be a member of an unlawful assembly, it must be shown that he had committed some illegal overt act or had been guilty of some illegal omission in pursuance of the common object of the assembly. In fact, Section 149 makes it clear that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence; and that emphatically brings out the principle that the punishment



prescribed by Section 149 is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly.....”

57. Relying on the said decision, it is submitted by the learned Advocate appearing on behalf of the respondent that from the evidence of P.W. 1 to P.W. 5, it is clear that the appellants along with five other unknown persons were members of unlawful assembly. Four of them, being armed with fire arms, entered into the house of the informant and the witnesses. Remaining four accused persons were standing at the entrance door of the informant.

58. No doubt, there is no specific role attributed to all the members of unlawful assembly in causing the death of Banwari Kahar and Jagannath Kahar and bullet injury of three witnesses, however, since appellants were members of the unlawful assembly, in view of the law laid down in Parshuram (supra), relying on earlier decision in the case of Masalti v. State of U.P., it is not necessary that such a person, for being convicted, must have actually assaulted the deceased.

59. We have already discussed the provisions



relating to formation of an unlawful assembly, common object of such assembly, mainly in relation to the provisions contained in Section 148 and 149 of the I.P.C. The witnesses on behalf of the prosecution did not state anything with regard to formation of unlawful assembly by the appellants and other persons, who did not take any part in any overt act. At the risk of repetition, we may record that the witnesses saw four other persons standing outside the house at the time of occurrence with fire arms in their hand. There is no evidence as to whether the said four persons were in the group of appellants or if they committed some act in prosecution of common object of the assembly or the said persons knew about the common object of the assembly to cause death of the family members of P.W. 1, P.W. 2 and P.W. 3. Therefore, the ratio laid down in Parshuram (supra) relying upon the decision in Masalti v. State of U.P., reported in (1964) 8 SCR 133, is not applicable under the facts and circumstances of this case.

60. The learned Advocate appearing on behalf of the appellants vehemently argues that P.W. 1 to P.W. 5 are



close relatives. They had previous enmity with the appellants. The Investigating Officer failed to examine any witness of the neighbourhood of the place of occurrence. Therefore, prosecution version of the incident ought to be regarded with a pinch of salt. As a matter of fact, the Investigating Officer failed to examine any person of the neighbourhood of the place of occurrence. The villagers, who accompanied the deceased to the hospital were also not examined. On examination of the lower court records and the case-diary for a limited purpose, we are astonished to note that even the sketch map of the place of occurrence was not drawn by the Investigating Officer.

61. In our view, the investigation of the case was conducted in a very perfunctory manner. At this stage, question that arises for consideration is as to whether a wrong and perfunctory investigation would go in favour of the appellants when the evidence on record sufficiently proves the role of each of the appellants, precisely and without any shadow of doubt. It is needless to say that we are not in a position to discard the evidence of the injured witnesses.



62. In Naresh @ Nehru (supra), the Hon'ble Supreme Court in paragraph 16 of the judgement quoted paragraph 22 of the judgement in ***Rai Sandeep v. State (NCT of Delhi)***, reported in ***(2012) 8 SCC 21***. In Rai Sandeep v. State (NCT of Delhi), the Hon'ble Supreme Court was pleased to state, who would be treated as a sterling witnesses in a criminal trial. The relevant paragraph is quoted below.

“22 In our considered opinion, the “sterling witness” should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court.



It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that such a witness



can be called as a “sterling witness” whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged.”

63. In the instant case, let us now briefly discuss the evidence of witnesses on behalf of the prosecution to come to a finding as to whether their evidence is sterling in nature or not.

64. We have discussed the relationship of the witnesses no. P.W. 1 to P.W. 5 with the deceased and the injured persons.

65. From the evidence of P.W. 1, Dharmendra Kumar, it is ascertained that he recognized the appellants, Birendra Singh and Kamlesh Bhat, who entered into their



house with fire arms. P.W. 1 and other witnesses stated that Birendra Singh was carrying a rifle, Kamlesh Bhat was holding a double barrel gun, Binod Singh had a pistol and Kamakhya Singh was armed with a rifle. Kamlesh fired at P.W. 1 Dharmendra Kumar and he sustained bullet injury on his right leg. He fell down on the ground and became unconscious. When he regained consciousness, he saw that his grandfather Jagannath Kahar and great grandfather Banwari Kahar had already died. Baleshwar Prasad and Umesh Prasad sustained injury. It is also found from his evidence that at the time of occurrence, his uncle, Baban Prasad was present in the courtyard. Other two witnesses, namely, Umesh Prasad and Baleshwar Prasad were in women's courtyard along with his father Hareshwar Prasad. His grand father was in the courtyard in front of the cattle shed and while his great grandfather was washing his hands and fists at the hand pump (Chapa Kal).

66. P.W. 2 is Baleshwar Prasad. He deposed that on the date of occurrence at about 08.00 P.M., he heard the sound of firing. Hearing the sound of two shots, he went to



the northern courtyard where his father was eating. He saw five man standing there. Amongst them, he could recognize Kamakhya Singh with a rifle in his hand, Binod Singh, holding a pistol, Kamlesh Bhat with a double barrel gun and Birendra Singh with a single barrel gun. As soon as he reached there, Binod Singh fired at him with a pistol and he was struck by bullet on his right arm. Since receiving bullet injury, he was handicapped by his right hand. Thereafter, Kamakhya Singh fired with the rifle at his father. On being hit, his father fell down and died while writhing in pain. Then, Kamlesh Bhat fired with the help of his double barrel gun, causing injury to Umesh and Dharmendra on their left leg and right leg, respectively.

67. P.W. 3 is Hareshwar Prasad. He also gave the same account of story in his deposition. He claimed himself to be the eye-witness of the murder of his father Jagannath Kahar and also the grand father Banwari Kahar. P.W. 3 stated that about ten days before the occurrence, he had a quarrel with Kamakhya Singh over payment of price of sweets, which he ate from the shop of the witness.



68. P.W. 4 Umesh Prasad is another son of the deceased Jagannath Kahar. According to his account, on the date and time of occurrence, he was sitting in the southern courtyard of their house. While his father was in the northern courtyard, eating food, sitting on a cot. At that time, he heard the sound of firing from outside the house. Immediately, he rushed to the gate of southern courtyard. Along with him, Baleshwar, Baban, Hareshwar and Dharmendra also came there. They all saw Kamakhya Singh firing at Jagannath Kahar, causing instant death. They also saw the accused persons causing death by gun shot injury of Banwari Kahar. P.W. 4 also stated that Dharmendra, Baleshwar and Umesh received gun shot injury by Kamlesh Bhat and Binod Singh.

69. P.W. 5 is the informant, who made statement to the SHO of Charpokhari Police Station, which was treated as F.I.R.

70. Thus, all the witnesses in same tune, narrated the prosecution version of the incident and unequivocally stated the role of Kamakhya Singh and Binod Singh in causing death of Jagannath Kahar, gun shot injury to Dharmendra,



Umesh and Baleshwar. They withstood the test of cross-examination. Their evidence was not shaken during cross-examination. Therefore, we have no hesitation to accept and rely upon the evidence of the above-named witnesses.

71. P.W. 6 is the Medical Officer of Charpokhari State Dispensary who medically examined the injured persons and corroborated the fact of receiving gun shot injury by Umesh, Dharmendra and Baleshwar.

72. P.W. 8 Madan Mohan Verma, proved the post-mortem report of the deceased Banwari Kahar. There were following injuries as per the post-mortem report in the body of the deceased:

“Rigor Mortis was present

External Injuries:- i) Lacerated wound 3/4" X 1/2" in the chest cavity deep with inverted margin on the back of the chest just below the inferior angle of left scapula.

ii) Lacerated wound 3/4" x chest cavity deep with everted margin on the right lateral side of chest in the fifth intercostal space. Injury no. 1 communicating to injury no. 2.

iii) Lacerated wound of measuring



3/4" x 3/4" with inverted margin on the medial side of right arm. Injury no. 3 is just opposite to injury no. 2.

iv) Lacerated wound measuring 1" x 1" on the lateral side of right arm with everted margin. Injury no. 3 communicating to injury no. 4."

73. P.W. 9 Murat Ram proved the post-mortem of Jagannath Kahar, which is marked as Exhibit-11 during trial of the case.

74. It is important to note that the Medical Officer, who hold post-mortem examination over the body of Jagannath Kahar could not be examined by the prosecution. However, no case on behalf of the defence was made out that Jagannath Kahar was not murdered by gun shot injury.

75. At this stage, we may take help of Exhibit-8, being the inquest report prepared by P.W. 7, upon the dead-body of the deceased. The dead-body was found on the open space (Sehan Jamin) in front of the house of Baban Kahar. Inquest was done on the date of occurrence at about 09.30 P.M. The Police Officer found bullet injury on the lower jaw of the deceased causing destruction of teeth of lower mandible



with presence of blood. There were laceration on the left shoulder of the deceased. The Officer found that Jagannath Kahar died of gun shot injury. The inquest report corroborates the evidence of the witnesses. Therefore, non-examination of the Medical Officer who conducted autopsy over the dead-body of the deceased is found to be no material which may affect the ultimate decision of this Court.

76. A question was raised on behalf of the appellants that the prosecution failed to prove how the appellants were identified by the witnesses. All the witnesses stated that lanterns were burning in the house and they could identify the appellants with the help of light of lanterns. An objection was raised by the learned counsel for the appellants that the Investigating Officer did not seize any lantern from the place of occurrence.

77. We have already stated that the appellants would not get any advantage due to perfunctory and lackadaisical investigation of the Investigating Officer. It is obvious that in a village house, source of light is by lantern and naturally lanterns were burning at about 08.00 P.M. on



the date of occurrence in the house of the victims. Moreover, the appellants are residents of the same village and they are known to the witness from before. Therefore, no suspicion can be raised over identification of the appellants.

78. For the reasons stated above, we are of the view that the Trial Court rightly convicted and sentenced appellant Kamakhya Singh for the offence punishable under Section 302 of the Indian Penal Code to the imprisonment for life and also to pay fine of Rs. 50,000/-, in default, simple imprisonment to six (6) months.

79. However, for the reasons, recorded hereinabove, we are of the view that the prosecution failed to prove the charge of offence under Section 302/149 of the I.P.C. against the accused Binod Singh on the ground of vicarious liability in prosecution of common object. Specific act alleged against Binod Singh is causing gun shot injury to Baleshwar Prasad on his right hand.

80. Therefore, while setting aside the order of conviction and sentence against appellant Binod Singh under Section 302 read with Section 149 of the I.P.C., this Court



holds that appellant Binod Singh is liable to be punished for the offence under Section 307 of the I.P.C.

81. Thus, this Court holds that appellant no. 2 Binod Singh be sentenced to suffer rigorous imprisonment for seven years with fine of Rs. 10,000/-, in default, to suffer further simple imprisonment for six months for the offence punishable under Section 307 of the I.P.C.

82. In case of appellant Binod Singh, the period of incarceration which he had undergone during investigation, trial of the case, after passing of the sentence by the Trial Court till the grant of bail to him, shall be set up against the actual period of punishment.

83. The appellants are directed to surrender before the Trial Court within a period of two weeks from the date of this order, failing which the Trial Court is at liberty to issue warrant of arrest against them.

84. A plain copy of the judgement be handed over to the appellant free of cost.

85. With the aforesaid observation/direction, this appeal stands disposed of.



(Bibek Chaudhuri, J)

Dr. Anshuman, J : - I agree.

(Dr. Anshuman, J)

skm/-

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