

**(2009) 05 AHC CK 0872**

**In the Allahabad High Court**

**Case No :** Criminal Appeal No's. 5099 and 6886 of 2008

Khursheed

APPELLANT

Vs

State of U.P.

RESPONDENT

**Date of Decision :** 19-05-2009

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 389  
Penal Code, 1860 (IPC) — Section 147, 148, 149, 302, 307

**Citation :** (2009) 2 ACR 2160

**Hon'ble Judges :** V.K. Dixit, J; Shiv Charan, J

**Bench :** Division Bench

**Advocate :** Munesh K. Sharma, Abhai Saxena and R.K. Verma, for the Appellant; A.G.A., for the Respondent

## Judgement

1. Sri Abhai Saxena, advocate has filed parcha-pairvi on behalf of Appellant Khursheed in Criminal Appeal No. 5099 of 2008 and on behalf of Appellant Mustazir in Criminal Appeal No. 6886 of 2008.

2. Let the parcha-pairvi of Sri Abhai Saxena be placed on record in both the above mentioned appeals. Objection filed by the learned A.G.A. against the prayer of bail of the Appellants be taken on record. Both the above mentioned criminal appeals have been instituted against the judgment passed by the Additional Sessions Judge, Court No. 4, Moradabad in S.T. No. 364 of 2006, Asrar Ahmad v. State, under Sections 147, 148, 149, 307, 302/34, 323/34 and 504, I.P.C., P. S. Asmauli, Moradabad.

3. We have also perused trial court record and relevant documents available on record.

4. Learned Counsel for the Appellants argued that as many as seven accused persons faced trial and all the accused persons were convicted for the offence under Sections 302/34 and 149, I.P.C. and were also convicted under Sections 147, 148 and 504, I.P.C. and they have been sentenced to undergo maximum

life imprisonment. Accused persons were also convicted and sentenced on other counts also.

5. Learned Counsel for the Appellants argued that co-accused Tajammul had already been granted bail vide order dated 23.9.2008 in Criminal Appeal No. 5931 of 2008 and other accused persons to whom other weapons were attributed had also been granted bail earlier. That Tajammul was armed with Tabal a sharp edged weapon, but the evidence was produced by the prosecution that Tabal was used from reverse side and in this connection learned Counsel also argued that as per the averments of the F.I.R. Khursheed was also armed with Boori a pointed heavy weapon and it is said that this Boori was used from reverse side as a blunt object. That Mustazir was also armed with a lathi, but recovery has been shown of a Bamboo (danda) on his pointing out.

6. Learned Counsel also argued that injury No. 1 was fatal. Hence, this injury was stitched wound. That it has not been alleged that by whom this injury No. 1 was caused. Learned Counsel also argued that the fact is that some incident took place during the process of polling and besides the deceased Zahid Husain, other persons also sustained injuries in the incident. That the trial court opined that in case Appellants might have taken this defence then the case might have ended in acquittal. That the Appellants were on bail during the trial and they had not misused the liberty of bail.

7. We have considered all the facts and circumstances of the case as well as submissions of the learned Counsel for the Appellants and also learned A.G.A. and considering the nature of evidence and considering the bail orders passed on the prayer of bail of other accused persons and without making any comment on the merits of the case, we are of the opinion that the Appellants Khursheed and Muntazir are entitled to be enlarged on bail.

8. Let the Appellants namely Khursheed and Muntazir be released on bail in the above case on their furnishing a personal bond with two sureties each in the like amount to the satisfaction of Court concerned.

9. However, realization of fine is not stayed.

10. Before parting with this order, we will like to comment regarding the legal acumen of the concerned Sessions Judge. It appears that the learned Sessions Judge is totally ignorant regarding the difference of Sections 34 and 149, I.P.C. In the present case the accused persons were convicted for the offence under Sections 147 and 148, I.P.C. It means all the accused persons formed an unlawful assembly and in prosecution of common object of the unlawful assembly the murder was committed. We could not justify the validity of this order to the effect that the learned Sessions Judge convicted the accused persons for the offence u/s 302, I.P.C. read with Sections 34 and 149, I.P.C. That either there was common intention of all the accused persons to commit the murder or there was a common object of the unlawful assembly to commit the murder, but both cannot be possible simultaneously. Section 34, I.P.C. is

applicable when the accused persons less than five in number with common intention of all commit an offence then the accused person will be jointly responsible with the aid and assistance of Section 34, I.P.C. irrespective of the individual act of an accused. But when an offence had been committed by an unlawful assembly of five or more than that then all such accused persons shall be punished and convicted with the aid and assistance of Section 149, I.P.C.

11. It also appears that the learned Sessions Judge is not aware that how and which of the accused is to be punished for the offence under Sections 147 and 148, I.P.C. and that what is the difference in Sections 147 and 148, I.P.C. But u/s 147, I.P.C. only such accused can be punished who were armed by blunt weapon or a member of unlawful assembly having no weapon. But u/s 148, I.P.C. only such accused shall be punished who were armed with lethal weapon. And accused persons irrespective of the fact that they are members of unlawful assembly cannot be punished simultaneously for the offence under Sections 147 and 148, I.P.C. only.

12. The Presiding Officer must have not convicted such of the accused persons who were also armed with lethal weapons u/s 147, I.P.C. and rest of the accused persons who were armed with lethal weapons must have been punished u/s 148, I.P.C. A person being member of unlawful assembly and who is not in possession of any weapon or not in possession of any deadly weapon cannot be punished u/s 148, I.P.C. alongwith the accused persons who are armed with lethal weapons.

13. We expect that the learned Sessions Judge should know about the correct positions of law and it is also expected from the learned Sessions Judge that while awarding punishment for an offence he must consult relevant provisions of law.

14. Let a copy of this order be sent to the concerned Sessions Judge for future guidance.