

(2014) 05 PAT CK 0049

In the Patna High Court

Case No : Criminal Appeal (DB) No. 1227 of 2007

Mahendra Tanti

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 13-05-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313(1)(b)

Evidence Act, 1872 — Section 145

Penal Code, 1860 (IPC) — Section 141, 147, 148, 149, 302

Citation : (2014) 3 PLJR 468

Hon'ble Judges : S.P. Singh, J;I.A. Ansari, J

Bench : Division Bench

Advocate : Onkar Nath, Advocate for the Appellant; Ashwini Kumar Sinha and Mr. Shiwesh Chandra Mishra, A.P.Ps, Advocate for the Respondent

Final Decision : Partly Allowed

Judgement

I.A. Ansari, J.—Under challenge, in the present appeals, are the judgment of conviction, dated 28.07.2007, in Sessions Trial No. 91 of 1992, by the learned Additional Sessions Judge, Fast Track Court No. II, Khagaria, and the order, dated 30.07.2007, whereby various sentences have been passed against the accused-appellants.

2. By the impugned judgment, learned trial Court has convicted all the accused-appellants, under Sections 342, 323 and 307 read with 34 of the Indian Penal Code and Section 302 read with Section 149 of the Indian Penal Code. The learned trial Court has also convicted the accused-appellants, namely, Mahendra Tanti and Ram Sharesh Tanti, under Sections 302 and 148 of the Indian Penal Code. The learned trial Court has further convicted the accused-appellants, namely, Bhadaï Tanti, Chandra Deo Tanti and Bhujangi Tanti, u/s 149 of the Indian Penal Code. The trial Court has also convicted the accused-appellant, namely, Mahendra Tanti, u/s 148 of the Indian Penal Code. For their conviction u/s 302 read with Section 149 of the Indian Penal Code, all the accused-appellants

have been sentenced to undergo imprisonment for life. For their conviction u/s 342 read with Section 34 of the Indian Penal Code, all the accused-appellants have been sentenced to undergo simple imprisonment for a period of one year. For their conviction u/s 323 read with Section 34 of the Indian Penal Code, all the accused-appellants have been sentenced to undergo simple imprisonment for a period of one year. For their conviction u/s 307 read with Section 34 of the Indian Penal Code, all the accused-appellants have been sentenced to undergo imprisonment for life. For their conviction u/s 302 of the Indian Penal Code, the accused-appellants, namely, Mahendra Tanti and Ram Sharesh Tanti, have been sentenced to undergo imprisonment for life. For their conviction u/s 148 of the Indian Penal Code, the accused-appellants, namely, Mahendra Tanti and Ram Sharesh Tanti, have been sentenced to undergo simple imprisonment for a period of three years. For their conviction u/s 149 of the Indian Penal Code, the accused-appellants, namely, Bhadai Tanti, Chandra Deo Tanti and Bhujangi Tanti, have been sentenced to undergo imprisonment for life. For his conviction u/s 337 of the Indian Penal Code, the accused-appellant, namely, Mahendra Tanti, has been sentenced to undergo simple imprisonment for a period of six months. All the sentences having been directed to run concurrently.

3. The case of the prosecution, as unfolded at the trial, may, in brief, be set out as under:

(i) Deceased Kedar Paswan was the brother of the informant, Mahesh Paswan (PW 3). On 11.04.1992, at about 09:30 PM, the informant (PW 3), along with his younger brother, Kedar Paswan (since deceased), went to Mahavir Temple, in village Kamalpur, to offer "prasad", many other villagers were also performing their "puja" (i.e., worship), at the said temple, while the "puja" was so performed, the informant (PW 3), accompanied by his younger brother, Kedar Paswan (since deceased), reached the said temple. Accused persons, namely, Mahendra Tanti, Ram Sharesh Tanti, Dilo Tanti, all armed with farsa, were present, in a group, at Mahavir Asthan, along with Tanuk Tanti, Bhadai Tanti, Chandra Deo Tanti, who had bricks in their hands except accused Madan Tanti, who was carrying a lathi, they all being residents of village Kamalpur. On seeing the informant (PW 3) and his younger brother, Kedar Paswan (since deceased), accused Mahendra Tanti told PW 3 and the said deceased that he (Mahendra Tanti) would not allow any dusadh (name of a caste falling in the category of schedule castes) to offer "prasad" at the temple and if any one dared to do so, he (accused Mahendra Tanti) would finish him.

(ii) Not being deterred, the said deceased was insistent on offering "prasad", whereupon the informant (PW 3) proposed that as it was already 09:30 PM, the issue would be decided on the following morning in the meeting of the Society. Accused Mahendra Tanti, disagreeing with the proposal, instigated others to kill Kedar Paswan (since deceased) and also hurled abuses on the said deceased. Accused Mahendra Tanti, then, assaulted the said deceased by means of a farsa on his head with intention to kill him. The blow, given by accused Mahendra

Tanti, hit the said deceased on his left temporal region. Consequent to the injury caused, the said deceased fell on the ground and, then, accused Ram Sharesh Tanti, Dilo Tanti and Tanuk Tanti assaulted him by bricks and lathies. Bhadai Tanti and Mandan Tanti threw bricks on the head and body of the said deceased. They also caught Chamru Paswan and Muneshwar Paswan and injured them by means of bricks.

(iii) The occurrence was witnessed by Baleshwar Paswan (PW 1), Prakash Paswan (not examined) and Gango Paswan (not examined). A lot of people assembled, at the place of occurrence, on hearing the hulla. In the meantime, the accused persons made good their escape. The informant's brother, Kedar Paswan, died on the spot.

(iv) On receiving the information about the occurrence, police arrived at the Sadar Hospital, on 11.04.1992, at about 11:00 PM, and recorded, in the form of fardbayan, the information given by Mahesh Paswan (PW 3) about the occurrence.

(v) Treating the said fardbayan as First Information Report, Khagaria Police Station Case No. 143 of 1992 was registered, under Sections 147/148/149/337/323/324/307/302 of the Indian Penal Code, against all the six accused persons, namely, (i) Mahendra Tanti, (ii) Chandra Deo Tanti, (iii) Ram Sharesh Tanti, (iv) Bhadai Tanti, (v) Dilo Tanti, (vi) Bhujangi Tanti and (vii) Tanuk Tanti.

(vi) During investigation, inquest was held over the said dead body, which was also subjected to post mortem examination, and, on completion of investigation, charge sheet was laid against accused persons, namely, (i) Mahendra Tanti, (ii) Chandra Deo Tanti, (iii) Ram Sharesh Tanti, (iv) Bhadai Tanti, (v) Dilo Tanti (vi) Bhujangi Tanti and (vii) Tanuk Tanti, under Sections 147/148/149/337/323/324/307/302 of the Indian Penal Code.

4. At the trial, when charges, u/s 302 read with Section 149, Section 307 read with Section 34, Sections 323 and 342 of the Indian Penal Code, were framed, all the accused pleaded not guilty to their respective charges. When charges, under Sections 302 and 337 of the Indian Penal Code, were framed against accused Mahendra Tanti, he pleaded not guilty. When charges, u/s 147 and 149 of the Indian Penal Code, were framed against the accused persons, namely, Tanuk Tanti, Madan Tanti, Bhadai Tanti, Chandra Deo Tanti and Bhujangi Tanti, they pleaded not guilty thereto. In addition thereto, when a charge, u/s 148 of the Indian Penal Code, was framed against accused persons, namely, Mahendra Tanti, Ram Sharesh Tanti and Dilo Tanti, they, too, pleaded not guilty to the charge so framed.

5. In support of their case, prosecution examined altogether 9 (nine) witnesses. The accused persons were, then, examined u/s 313(1)(b) of the Code of Criminal Procedure and, in their examinations aforementioned, the accused persons denied that they had committed the offences, which were alleged to have been

committed by them, the case of the defence being that of denial. No evidence was adduced by the defence.

6. Having, however, reached the finding that the accused persons were guilty of the offences as indicated above, learned trial Court has convicted them accordingly and, consequent thereupon, sentences have been passed against all the appellants as have been mentioned above. However, the learned trial Court has acquitted accused Tanuk Tanti of the charges framed against him. Aggrieved by their conviction and the sentences, which have been passed against them, the accused, as convicted persons, have preferred these appeals.

7. These two appeals, having arisen out of the impugned judgment of conviction, dated 28.07.2007, and the impugned order of sentence, dated 30.07.2007, have been heard together and are being disposed of by this common judgment and order.

8. We have heard Mr. Onkar Nath, learned Counsel appearing on behalf of the appellants. We have also heard Mr. Ashwini Kumar Sinha, and Mr. S.C. Mishra, learned Additional Public Prosecutor, for the State.

9. The moot point, for consideration, is: whether the prosecution has been able to prove, beyond all reasonable doubt, the offences, which the accused-appellants stand convicted of. Out of the 9 (nine) witnesses examined by the prosecution, PW 1, PW 2, PW 3, PW 4 and PW 5 have been examined as eye-witnesses to the occurrence. However, out of them, PW 1 and PW 4 have been declared hostile.

10. Hence, the prosecution's case rests on the evidence of PW 2 (Nageshwar Paswan), PW 3 (Mahesh Paswan, informant) and PW 5 (Muneshwar Paswan, one of the injured). Besides this, prosecution has also placed reliance on the inquest report, post mortem report and the evidence of doctor (PW 8), who conducted post mortem examination on the said dead body, and PW 7 (Babu Lal Choudhary), who is the Investigating Officer of this case.

11. We may point out, at the very outset, the prosecution's case that Kedar Paswan was murdered, in the night of 11.04.1992, in village Kamalpur, is not in dispute.

12. It is also not in dispute that PW 8 was the doctor, who had conducted post mortem examination on the dead body of Kedar Paswan, on 12.04.1992, at 12:45 PM. According to the evidence of the doctor (PW 8), his findings are as follows:

- (i) Incised wound 6 cm x 1/2 cm x 1/2 cm on the left side of skull;
- (ii) Bruise size 5 cm x 3 cm on the back of the neck;
- (iii) Several bruises of different sizes and shapes were present on the whole body.

13. It is also in the evidence of the doctor (PW 8) that a part of temporal bone

was also cut and there was haematoma below the left temporal bone.

14. The doctor has opined that the above injuries were ante mortem in nature and caused by both, sharp and blunt weapon, inasmuch as some of the injuries were caused by blunt substance. The doctor has further opined that the time, elapsed since death, was between 12 and 24 hours.

15. Though it was suggested to the doctor (PW 8) that post mortem examination had not been conducted correctly, the fact remains that nothing has been elicited from the cross-examination of the doctor (PW 8) to show that his findings were incorrect. Even his opinion, with regard to the cause of death and the time, which had elapsed since death, could not be shaken by the defence. We, too, do not notice anything inherently incorrect or improbable in the evidence of the doctor. We, therefore, see no reason to disbelieve his evidence or not to place reliance on his findings with regard to the cause of death and the weapons used.

16. Since the defence has not disputed the factum of murder, we, now, proceed to examine whether the time of the occurrence, the place of the occurrence and the manner of the occurrence, as alleged by the prosecution, have been proved beyond all reasonable doubt.

17. While considering the above aspects of the present appeal, we may point out that the informant (PW 3) has deposed that on 11.4.1992, at 9.30 P.M., he, along with his brother, Kedar Paswan and Ratan Paswan, went to Mahavir Temple to offer "prasad" and just near the temple, the accused intercepted them and accused Mahendra Tanti declared that he would not allow "dusadh" (name of a caste falling in the category of schedule castes) to offer "prasad". To the declaration so made, the informant's brother, Kedar Paswan, objected and insisted on offering "prasad". As the informant's brother was adamant to offer "prasad", accused Mahendra Tanti, while exhorting others, struck farsa blow on the left temple of Kedar Paswan and other accused, too, assaulted him by means of lathis and bricks, and as a result of these assaults, Kedar Paswan died at the place of occurrence itself.

18. Broadly in tune with the evidence of PW 1, PW 2 has deposed that at about 9.30 P.M., on 11.04.1992, he had gone to Mahavir temple to offer "prasad", the temple being situated in Paswan Tola in Village Kamalpur, and that Mahesh Paswan and Kedar Paswan also arrived at the temple just after him and the appellants, along with Tanuk Tanti and Madan Tanti, were already there at the temple. It is in the evidence of PW 2 that Mahendra Tanti said that he would not allow Kedar Paswan to offer "prasad" at the temple. As Kedar Paswan refused to abide by what accused Mahendra Tanti had said, accused Mahendra Tanti assaulted Kedar Paswan by means of farsa on the head of Kedar Paswan and, thereafter, accused Mahendra Tanti dragged Kedar Paswan to Kali Asthan, whereas other accused, namely, Bhadai Tanti, Ram Sharesh Tanti, Madan Tanti, Dilo Tanti and Tanuk Tanti assaulted Kedar Paswan by means of lathis resulting into his death. By that time, he (PW 2), too, tried to escape, but accused Madan

Tanti assaulted him by means of bricks on his head and consequent thereto, he (PW 2), too, fell down on the ground.

19. Close on the heels of the evidence of PW 1 and PW 2, PW 5 (Muneshwar Paswan) has deposed that on 11.04.1992, at 9.30 P.M., he was present, at Hanuman temple, in village Kamalpur, Nageshwar Paswan and Maheshwar Paswan were also there with him and that he, too, proceeded forward to offer "prasad", but accused Mahendra Sharma (Mahendra Tanti) forbade Kedar Paswan from offering "prasad". On being so forbidden Kedar Paswan replied by saying that he would offer "prasad" and that the matter be deferred till next day for decision. At this juncture, accused Mahendra Tanti assaulted Kedar by means of farsa on his head and dragged him to Kali Asthan, where other accused persons assaulted him by means of lathis and bricks. In his cross-examination, this witness has clarified that it was a dark night and there was no source of light in the village and no body was present in Mahavir temple.

20. So far as the Investigating Officer (PW 7) is concerned, his evidence is that at the relevant point of time, he was posted as Sub Inspector of Police at Khagaria Police Station. PW 7 has deposed that, on 11.04.1992, at about 10:00 PM, he received information, on telephone, that an altercation had taken place between two parties in village Kamalpur and after making station diary entry in this regard, he proceeded to the place of occurrence along with Narayan Singh, Officer-in-Charge, Block Development Officer and armed personnel and, on arriving at the village, he learnt that Kedar Paswan had been taken to the hospital, along with other injured persons, for treatment, whereupon the police team also reached the hospital, where fardbayan of Mahesh Paswan (PW 3) was recorded. The fardbayan has been proved and marked as Exhibit-2. It is in the evidence of Investigating Officer (PW 7) that he prepared inquest report at the hospital itself, on 12.04.1992, at 07:30 AM. This inquest report has been proved and marked as Exhibit-4.

21. It is also in the evidence of PW 7 that the place of occurrence, where scuffle took place, is the lane by the side of the house of Janaki Paswan, which is situated towards north of Mahavir Asthan. He has further stated that there is big pipal tree near Kali Asthan and that the scuffle, first, took place near Mahavir Asthan and, thereafter, the accused persons took Kedar Paswan to Kali Asthan, where he was further assaulted. He has stated that the distance between Kali Asthan and Mahavir Asthan is about 200 yards, there is an open field towards the east of Kali Asthan and also a big pipal tree. There is a big well on the adjacent north of the pipal tree and that there is house of Rajo Paswan. The Investigating Officer (PW 7) has deposed that pieces of bricks and stone chips were found, in large quantity, inside the premises of Mahavir temple.

22. We find that the evidence of PW 2, PW 3, and PW 5 is consistent with each other and their evidence is to the effect that on 11.04.1992, at 9.30 P.M., they had gone to Mahavir temple to offer "prasad". Kedar Paswan had also gone there along with his brother, Mahesh Paswan (PW 3), to offer "prasad". The appellants,

too, were present at Mahavir Asthan, but they were armed with farsa, lathis and bricks.

23. It has clearly emerged from the evidence on record that accused Mahendra Tanti forbade Kedar Paswan from offering "prasad". However, undeterred by the attitude of accused Mahendra Tanti, Kedar Paswan insisted on offering "prasad", whereupon accused Mahendra Tanti instigated others and inflicted farsa blow on the left temporal region of Kedar Paswan and, on being so assaulted, Kedar Paswan fell down on the ground, and when Kedar Paswan fell on the ground, other accused-appellants assaulted him by means of lathies and bricks. It has further emerged from the evidence on record that Kedar Paswan succumbed to his injuries instantly at the very place of occurrence.

24. The defence has challenged the prosecution's case on the ground that as per the evidence of PW 2, PW 5 and PW 7, the place of occurrence is spread over from Mahavir Asthan to Kali Asthan, which is 200 yards apart.

25. The appellants argue that as per the informant, Kedar Paswan was assaulted near Mahavir temple, whereas PW 2 and PW 5 stated that Kedar Paswan was dragged also to Kali Asthan, where he was assaulted by other accused as well. On this basis, the appellants submit that the informant had not seen the occurrence and his version of the occurrence is a concocted one. We do not find that in the face of the evidence on record, there is any major contradiction inasmuch as the informant as well as other witnesses have been consistent in their evidence that Kedar Paswan was assaulted by accused Mahendra Tanti at Mahavir Asthan.

26. Learned Counsel for the appellants has also submitted that the informant has stated, in the fardbayan, that Ram Sharesh Tanti and Dilo Tanti were also armed with farsa, but in his evidence, he has stated that rest of the accused persons assaulted the said deceased by lathis and bricks.

27. It is true that the informant (PW 3), in his fardbayan, had stated that Mahendra Tanti, Ram Sharesh Tanti and Dilo Tanti were armed with farsa, but in his evidence, he did not specifically state that both the letters persons were armed with farsa.

28. We have minutely scrutinized the cross-examination of the informant (PW 3) at the hands of the defence. We do not find that the attention of PW 3 was drawn to the contents of the fardbayan, which was nothing, but previous statement of the informant (PW 3) and, in terms of the provisions of Section 145 of the Evidence Act, 1872, his attention ought to have been drawn to his statement made in the fardbayan. As the defence has not done so, it is not open to the appellants to submit, how, in the appeals, that there is inconsistency between what has been stated in the fardbayan and the evidence given in Court. This apart, the discrepancy, indicated hereinbefore, is not so vital as would make the prosecution's case unreliable inasmuch as the witnesses have consistently stated that Mahendra Tanti and other appellants came to Mahavir Asthan fully armed

with farsa, lathis and bricks, Mahendra Tanti forbade Kedar Paswan to offer "prasad", at the temple, on the ground that Kedar Paswan belonged to a caste, which is regarded as Schedule Caste, but as Kedar Paswan did not relent, Mahendra Tanti, while instigating others, struck a blow, on the head, by means of farsa, the other appellants followed the suit and assaulted Kedar Prasad by lathis and bricks.

29. The defence has pointed out that according to PW 2 and PW 5, the said deceased was dragged as soon as he fell down after being struck by farsa on his head and brought near Kali Asthan, which is 200 yards away from Mahavir temple.

30. We find that it has been mentioned, in the inquest report (Exhibit-4), that blood was oozing from the head of Kedar Paswan and both sides of his chest were swollen. The Investigating Officer (PW 7), too, found blood at the place of occurrence. The doctor (PW 8) has also mentioned, in his post mortem report, that the deceased had sustained incised wound on left side of scalp and there were several bruises present all over his body. The medical evidence on record, thus, completely corroborates the eyewitness's account of the occurrence and the evidence given by Investigating Officer (PW 7).

31. It would appear from the evidence of the Investigating Officer (PW 7) that there is open field between Mahavir Asthan and Kali Asthan and the learned trial Court has observed that since both, Mahavir Asthan and Kali Asthan, fall in the same area, the entire area may be referred to as Mahavir Asthan. We do not find any flaw in the inference so drawn by the learned trial Court.

32. Further-more, the defence has exhibited First Information Report, lodged by accused Bhujangi Tanti, on 12.04.1992, leading to the registration of a case, under sections 147 and 324 of the Indian Penal Code against Nageshwar Paswan, Baleshwar Paswan and Nago Paswan with respect to an incident of the previous night i.e., 11.04.1992, which is the night of the occurrence in the present case, too. The First Information Report of Bhujangi Tanti, in a way, confirms his presence, at the relevant point of time, at the place of occurrence. Nothing has been elicited from the cross-examination of prosecution witnesses, which could make their evidence unbelievable. There is no material contradiction in the evidence of the witnesses.

33. Situated thus, we find that the accused-appellants formed an unlawful assembly with the common object of not permitting Kedar Paswan to offer "prasad" at the temple and restrain him as he was dusadh (i.e., he belonged to a caste, which falls within the category of Scheduled Castes). In the unlawful assembly, which was so formed, all were armed with weapons including deadly weapon, such as, farsa. It necessarily follows that every member of this unlawful assembly knew that if resisted by Kedar Paswan, farsa was likely to be used to assault him so that he would not be able to offer "prasad" at the said temple. We also find that in prosecution of the common object with which the assembly was

so formed, the appellants, led by accused-appellant, Mahendra Tanti, assaulted Kedar Paswan on his left temporal region. Not only accused-appellant, Mahendra Tanti, but the remaining accused-appellants, too, assaulted Kedar Paswan by lathis and also by bricks, even after Kedar Paswan had fallen on the ground, leading to his death at the spot itself.

34. In the facts and attending circumstances of the present case, which have emerged from the evidence on record, can it be concluded that the appellants were guilty of offences u/s 302 read with Section 149 of the Indian Penal Code and ought to have been convicted and have rightly been convicted accordingly?

35. Our quest for an answer to the question posed above, brings us to Section 149 of the Indian Penal Code, which reads as follows:

Every member of unlawful assembly guilty of offence committed in prosecution of common object.-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.

36. From a bare reading of Section 149 of the Indian Penal Code, it becomes abundantly clear that even if an offence committed is not directly in prosecution of the common object of an unlawful assembly, it may still fall under second part of Section 149 of the Indian Penal Code if it can be held that the offence was such as the members knew was likely to be committed. The expression "knew" 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, variously armed with deadly weapons, go to take forcible possession of a land, it would be correct to infer that someone is likely to be killed and all the members of the unlawful assembly must be aware thereof and would be guilty under the second part of Section 149 of the Indian Penal Code.

37. The observations, made by the Supreme Court, in Charan Singh and Others Vs. State of Uttar Pradesh, , are, in this regard, worth reading and, therefore, quoted below:

"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 *eo instanti*. Hence, the common object of the unlawful assembly in question depends firstly on whether such object can be classified as one of those described in Section 141 of the IPC. Secondly, such common object need not be the product of prior concert but, as per established law, may form on the spur of the moment. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under second part of Section 149 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.

(Emphasis is supplied)

38. In *Allauddin Mian and Others and Sharif Mian and Another Vs. State of Bihar*, , explaining the import of Section 149 of the Indian Penal Code, the Supreme Court has observed that this Section (149 IPC) creates constructive liability and makes every member of the unlawful assembly liable for the offence or offences committed in the course of the occurrence provided that the same was/were committed in prosecution of the common object or was/were such as the members of that assembly knew to be likely to be committed. Since Section 149 of the Indian Penal Code imposes a constructive penal liability, it must be strictly construed inasmuch as it seeks to punish members of an unlawful assembly for the offence or offences committed by their associate or associates in carrying out the common object of the assembly. What is important, in each case, is to find out if the offence was committed. There must be a nexus between the common object and the offence committed and if it is found that the same was committed to accomplish the common object, every member of the assembly will become liable for the same.

39. Any offence, therefore, committed by a member of an unlawful assembly in prosecution of anyone or more of the five objects, mentioned in Section 141 of the Indian Penal Code, will render his companions, constituting the unlawful assembly, liable for that offence with the aid of Section 149 of the Indian Penal Code. It is not the intention of the legislature, in enacting Section 149 of the Indian Penal Code, to render every member of an unlawful assembly liable to

punishment for every offence committed by one or more of its members.

40. In order to invoke Section 149 of the Indian Penal Code, it must be shown that the incriminating act was done to accomplish the common object of the unlawful assembly. Even if an act, incidental to the common object, is committed to accomplish the common object of an unlawful assembly, the doing of the act must be treated to have been within the knowledge of the other members as the act likely to be committed in prosecution of the common object. If the members of the assembly knew or were aware of the likelihood of a particular offence being committed in prosecution of the common object, they all would be liable for the commission of the offence u/s 149 of the Indian Penal Code.

41. However, once it is established that the unlawful assembly had common object, it is not necessary that all persons, forming the unlawful assembly, must be shown to have committed some overt act. For the purpose of incurring the vicarious liability under the provisions of Section 149 of the Indian Penal Code, the liability of the other members of the unlawful assembly for the offence committed, during the continuance of the occurrence, rests upon the fact whether the other members knew before hand that the offence actually committed was likely to be committed in prosecution of the common object.

42. The relevant observations, appearing in *Alauddin Mian* (supra), read as under:-

...This section creates a specific offence and makes every member of the unlawful assembly liable for the offence or offences committed in the course of the occurrence provided the same was/were committed in prosecution of the common object or was/were such as the members of that assembly knew to be likely to be committed. Since this section imposes a constructive penal liability, it must be safely construed as it seeks to punish members of an unlawful assembly for the offence or offences committed by their associate or associates in carrying out the common object of the assembly. What is important in each case is to find out if the offence was committed. There must be a nexus between the common object and the offence committed and if it is found that the same was committed to accomplish the common object every member of the assembly will become liable for the same. Therefore, any offence committed by a member of an unlawful assembly in prosecution of anyone or more of the five objects mentioned in Section 141 will render his companions constituting the unlawful assembly liable for that offence with the aid of Section 149, it is not the intention of the legislature in enacting Section 149 to render every member of an unlawful assembly liable to punishment for every offence committed by one or more of its members. In order to invoke Section 149 it must be shown that the incriminating act was done to accomplish the common object of the unlawful assembly. Even if an act incidental to the common object is committed to accomplish the common object of the unlawful assembly, it must be within the knowledge of other members as one likely to be committed in prosecution of the common object: If the members of the assembly knew or were aware of the likelihood of a

particular offence being committed in prosecution of the common object, they would be liable for the same u/s 149." However, once it is established that the unlawful assembly had common object, it is not necessary that all persons forming the unlawful assembly must be shown to have committed some overt act. For the purpose of incurring the vicarious liability under the provision, the liability of other members of the unlawful assembly for the offence committed during the continuance of the occurrence, rests upon the fact whether the other members knew before hand that the offence actually committed was likely to be committed in prosecution of the common object.

(Emphasis is added)

Constructive Liability--Who Can Be Fastened With:-

43. Section 149 of the Indian Penal Code creates a constructive or vicarious liability on the members of the unlawful assembly for the unlawful acts committed pursuant to the common object by any other member of that assembly. The basis of the constructive guilt, u/s 149 of the Indian Penal Code, is mere membership of the unlawful assembly with the requisite common object. While overt act and active participation may indicate common object of the person perpetrating the crime, the mere presence, in the unlawful assembly, may fasten vicariously criminal liability u/s 149 of the Indian Penal Code.

44. There are two essential ingredients of Section 149, viz., (1) commission of an offence by any member of an unlawful assembly and (2) 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. Once the court finds that these two ingredients are fulfilled, every person, who, at the time of committing an offence, was a member of the assembly, has to be held guilty of that offence.

45. After such a finding, as the one indicated above, it would not be open to the Court to see as to who actually did the offensive act nor it would be open to the Court to require the prosecution to prove which of the members did which of the offensive acts. Whenever a Court convicts any person of an offence with the aid of Section 149 of the Indian Penal Code, a clear finding, regarding the common object of the assembly, must be given and the evidence discussed must show not only the nature of the common object, but that in pursuance of such common object, the offence was committed. There is no manner of doubt that before recording conviction u/s 149 of the Indian Penal Code, the essential ingredients of Section 149 of the Indian Penal Code must be established. (See *Daya Kishan Vs. State of Haryana*,).

46. What logically follows from the above discussion is that once membership of an unlawful assembly is established, it is not incumbent, on the prosecution, to establish whether any specific overt act has been assigned to any accused or not. Mere membership of the unlawful assembly is sufficient and every member of an unlawful assembly is vicariously liable for the acts done by others either in

prosecution of common object or an offence, which a member of the assembly knew was likely to be committed.

47. In *Masalti Vs. State of U.P.*, , it was held by the Supreme Court that the crucial question for determination, in a case being prosecuted with aid of Section 149 of the Indian Penal Code, is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects specified by Section 141 of the Indian Penal Code. While determining this question, it becomes relevant to consider whether the assembly consisted of some persons, who were merely passive witnesses and/or had joined the assembly as a matter of idle curiosity without intending to entertain the common object of the assembly.

48. Again, in *K.M. Ravi & Ors. v. State of Karnataka*, [(2009) 16 SC 337], the Supreme Court has clarified that mere presence or association with other members alone does not per se be sufficient to hold every one of them criminally liable for the offences committed by the others unless there is sufficient evidence on record to show that each intended to commit the offending act or knew the likelihood of commission of such an offending act.

49. Further, in *Amerika Rai and Others Vs. State of Bihar*, , the Supreme Court has opined that in order to make a member of an unlawful assembly, having common object, liable, what is to be determined is as to whether there was any active participation and the presence of all the accused persons was with an active mind in furtherance of their common object. The law of vicarious liability, u/s 149 of the Indian Penal Code, is crystal clear that even the presence, in an unlawful assembly, of a person with an active mind to achieve the common object, makes such a person vicariously liable for the acts of the unlawful assembly.

50. In the present case, in the light of the evidence on record, there can be no escape from the conclusion that the appellants, variously armed, including farsa, came to the said temple with the common object, restraining, by applying force, Kedar Paswan, from offering "prasad" at the said temple, on the ground that Kedar Paswan was a dusadh (i.e., he belonged to a caste, which falls within the category of Scheduled Castes). Thus, an unlawful assembly came into existence with the common object of using force, if required, by resorting to deadly weapons, such as, farsa, in order to restrain Kedar Paswan from offering "prasad", at the said temple, only because of Kedar Paswan's caste. As this unlawful assembly was armed with weapons, such as, farsa, and everyone in this unlawful assembly knew that if resisted by Kedar Paswan, farsa was likely to be used to assault him so that he would not be able to offer "prasad" at the said temple. We also find that in prosecution of the common object with which the assembly was so formed, the appellants, led by accused-appellant, Mahendra Tanti, assaulted Kedar Paswan on his left temporal region. Not only accused-appellant, Mahendra Tanti, but the remaining accused-appellants, too, assaulted Kedar Paswan by lathis and also by bricks, even after Kedar Paswan had fallen on

the ground, leading to his death at the spot itself.

51. Situated thus, it becomes crystal clear that in prosecution of the common object of the unlawful assembly, which was so formed, Kedar Paswan was killed and every member of the said assembly was liable to be convicted for the offence of murder u/s 302 read with Section 149 of the Indian Penal Code. There could not have been, we may also hasten to add, conviction of any of the accused-appellants u/s 149 of the Indian Penal Code simpliciter inasmuch as Section 149 of the Indian Penal Code, as already discussed above, creates constructive liability and does not prescribe any punishment.

52. Considering the fact that in prosecution of common object of the said unlawful assembly, the accused-appellants had also assaulted PW 2 and had restrained Kedar Paswan from offering "prasad", they were liable to be convicted u/s 323 and 342 read with Section 149 of the Indian Penal Code.

53. What crystallizes from the above discussion is that the conviction of the appellants, u/s 302 read with Section 149 of the Indian Penal Code, cannot be disturbed. The conviction of the appellants under Sections 342 and 323 read with Section 149 of the Indian Penal Code can also not be disturbed. As Kedar Paswan already died and no case of attempt to murder against the appellants could be proved, they are all held not guilty of the offence u/s 307 of the Indian Penal Code.

54. We, therefore, maintain the conviction of the appellants under Sections 302, 342 and 323 read with Section 149 of the Indian Penal Code and we affirm their conviction accordingly. So far as the conviction of the appellants u/s 307 read with Section 149 of the Indian Penal Code and the consequential of the sentence, are concerned, the same hereby stand set aside.

55. With the above modifications in the impugned judgment and order, these two appeals stand partly allowed.

56. The bail bonds of the appellants, namely, (i) Chandra Deo Tanti, (ii) Ram Sharesh Tanti, (iii) Bhadai Tanti, (iv) Dilo Tanti, (v) Bhujangi Tanti are hereby cancelled and they are hereby directed to surrender, in the learned trial Court, in order to serve out the sentences of imprisonment passed against them. On the failure of the appellants to surrender in the Court, as has been directed hereinbefore, the learned trial Court may take such step/steps as may become necessary in order to secure their presence so that they can serve the remaining period of their sentences.

57. Registry is directed to send, forthwith, a copy of this judgment and order along with the Lower Courts Record.

S.P. Singh, J.

I agree