
(2007) 05 AHC CK 0371
In the Allahabad High Court

Shashi Kant and Others (In Jail)

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 01-05-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 107, 116, 117, 161
Penal Code, 1860 (IPC) — Section 119, 141, 142, 147, 148

Citation : (2007) 05 AHC CK 0371

Hon'ble Judges : Vinod Prasad, J;K.S. Rakhra, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Vinod Prasad, J.—The three surviving appellants Ram Kishan, Vishwanath and Chandrachud @ Lallu have Challenged their convictions u/s 302/149 IPC and sentence of life imprisonment and appellant Chandrachud has also challenged his conviction u/s 201/149 IPC with sentence of 5 years R.I. recorded by IIIrd Additional Sessions Judge Allahabad in Sessions Trial No. 2 A of 1975 , State v. Shashi Kant and Ors. & Sessions Trial No. 9Aof 1975, State v. Chandrachud vide his impugned judgment and order dated 7.9.1981. Both the sentences of appellant Chandrachud were directed to run concurrently. Rest of the four appellants in this appeal Shashi Kant, Muggan @ Rama Kant, Murli Dhar and Kanahiya Lal had died during the pendency of this appeal and hence their appeals have already been abated vide order dated 1 18.12.2003.

2. The prosecution allegations against the appellant, in birds eye view, are that Tulsi Ram Misra had six sons - Tej Dhar Misra, Shiv Bali Misra, Surya Bali Misra, Ram Bali Misra, Chandra Bali and Raj Dhar, Misra. Informant Bhol Nath is the son of Shiv Bali Misra. Chandra Bali Misra aforesaid , uncle of the informant Bhol Nath, was mured by accused Ramanand and Krishnanand with their Socio criminis accomplices and since then there was no love labour lost between the two sides. Two months prior to the present incident Suraj Bali Misra, another uncle of the informant Bhol Nath was got arrested by accused Ramanand who

was ordered to be released from Jail on 24.9.1974. The appellants and other co accused were under the impression that after his release from jail, Suraj Bali Misra will take revenge from them and consequently on 23.9.1974 at 6.30 A.M, when the informant and his uncle Ram Bali Misra, were present on the well, Tej Dhar Misra was chatting with Shyam Nagina Dubey and Bachchan Chamar at his door, Raj Dhar Misra was feeding the cattle and Manna Chamar the shepherd, was fixing the plough, a dozen plus one accused persons namely Shashi Kant, Kanhaiya Lal (armed with pistol). Ramanand (armed with rifle), Ram Krishna alias Kallo Pandey (armed with gun), Shiv Lochan alias Nibboo, Udit Narain alias Bachcha and Muggan (all armed with Gadasa), Murlidhar and Ram Krishna (Both armed with Ballam) along with 5 or 6 unknown persons raided the house of the informant Bhola Nath. Tej Dhar Misra was fired at by accused Rama Nanad (absconded) and Shashi kant with rifle and pistol respectively and Nibboo assaulted him by Gadasa. Shrieks of the informant and other witnesses attracted Dina Nath informant's brother with women folk and children of their houses and co villagers Ram Sajivan Tiwari, Jai Mangal Mallah. Kanahiya Lal Gond, and many others. At that time Shiv Bali father of the informant was returning from his field. Assailants chased Shiv Bali Misra, Ram Bali Misra and Tej Dhar Misra to annihilate them. Shiv Bali was shot at by Ram Nanad with rifle. Shiv Lochan @ Nibboo and Udit Narain @ Bachcha assaulted him with Gadasa, and Ram Krishna @ Kallu and Murli belaboured him with Ballam as a result of which he sustained injuries. It is further alleged that in the midst of the murderous assault accused Shashi kant along with some other persons proceeded towards Ghat (riverbank) to annihilated Bechan. Women and children followed them towards riverbank. This incident was witnessed by above named witnesses and co villagers. In this mayhem three-sibling brothers Tej Dhar Misra, Shiv Bali Misra and Ram Bali Misra along with Bechan lost their lives. In the middle of the assault informant Bhola Nath paddled a cycle to 6 miles to the police station Kotwali Dehat Mirzapur and lodged an oral FIR, Ext. Ka 1, the same day at about 8.45 a.m. as crime number 166 of 74 under Sections 147, 148, 149, 302 IPC. It transpires from the record that the Case diary and GD etc. of the crime were lost. S.O. Harnam Singh of P.S. Kotwali Dehat, Mirzapur started the investigation recorded the statements of the informant, Jai Nath, Raj Dhar Misra and then proceeded for the spot where he conducted the spot inspection and prepared the site plan, Ext Ka 17, collected blood stained earth from various places and prepared it's recovery memos Ext. Ka 18 to Ka 21, recovered empty cartridges and prepared it's recovery memo Ext. Ka 22 and Ka 23. He also made a report for chemical examination of the cloths of the deceased vide Ext. Ka 24 to Ka 26. He also collected blood stained earth from the places where the deceased persons were murdered and prepared it's recovery memos as Ext. Ka 6 to Ka 11. After conducting the usual investigation he submitted the charge sheet Ext. Ka 27 against the accused Shashi Kant, Ram kripal, Udit Narain, Ram Kishan, Krishna Nand , Vishambhar, Muggan @ Rama Kant, Murli Dhar Dubey, and Kanahiya Lal on 18.11.1974. He also charge sheeted Rama Nand, Ram Shiromani, Shiv Lochan. Chandrachud accused was charge sheeted on 27.2.75 vide Ext. Ka 28. It

is relevant to point out that out of 13 accused Ramanand, Ram Kripal and Shiv Lochan absconded and were never apprehended. Five other accused Shashi kant, Muggan @ Ramakant, Murli Dhar, Kanahiya Lal and Udit Narain died during the pendency of their appeals in this court and hence their appeals were, therefore abated on 18.12.2003. Hence we are left to decide appeal of only three appellants Ram Kishan , Vishambhar Nath and Chandrachud @ Lallu.

3. The post mortem on the dead bodies of the deceased Tej Dhar Misra and Shiv Bali Misra were conducted on 26.9.74 at 9.30 a.m. (Ext. Ka 30), and 12.10 PM (Ext. Ka 31). The autopsy on the dead body of Ram Bali Misra was conducted on 30.9.74 at 11.20 a.m. (Ext. Ka 29). So far as Bechan deceased is concerned his dead body was not found is according to the prosecution version his body was chopped off into pieces on a boat and both were submerged into the river. The genuineness of the post mortem reports have not been disputed by the accused who admitted it's correctness. How ever following injuries were found on the dead body of three deceased persons:

Injuries of Tej Dhar Misra:

- 1- Incised wound 5cm x 1 cm x bone deep over left side of neck obliquely and vertically over middle part of left lower few underneath and cut third cartilages.
- 2- Gun shot wound of entry margins triangular in shape as shown in diagram and margins with the wound No. 1 and just below it over left side of neck directed upwards 6cm x 4 cm x brain cavity deep with no tattooing , charring or blackening present around the wound. Margins of wound are blackened and there is lot of echymosis present all around and under the wound.
- 3- Gun shot wound of entry 2cm x 1.8cm x abdominal cavity deep with blackened margins but no blacking, charring or tattooing present around the wound directed from left to right and backwards situated over left side abdomen 11 cm from umbilicus and lot of echymosis was present over the wound.
- 4- Gun shot wound of exit 2.2.cm x 2 cm over black lumber region 3 cm to right of middle spine. One small metallic piece recovered from the tissue underneath.

Injuries of Shiv Bali Misra:

- 1- Incised wound 6 cm. x 0.6 cm. x tissues of neck and through the cartilage of left external ear lower part.
- 2- Three incised wounds parallel to each other 12 cm. x 12 cm. x tissues of neck over left side and posterior part lying obliquely and horizontal along the jaw border directed from left to right.
- 3- Punctured wound 1cm. x 0.8 cm. over back of left arm lower part directed forward and margins clean cut.
- 4- Two punctured wounds each 1m. x 0.8 m. x 1.2 m. over back of upper third left forearm directed forwards. Margins clean cut.

5- Two punctured wounds 1 cm. apart and each 1cm. x 0.8 cm. x 12 on over front of left elbow directed backwards and clean cut margins.

6- Four punctured wounds in an area of 15 cm. x 10 cm. over left side of abdomen each 1.5 cm. x 1.2 cm. x 1.8 cm. diverted from left to right with clean cut margins.

7- Six incised wounds 6 cm. x 1 cm. x scalp deep over various regions of head as shown in diagram.

8- Gun shot wound of entry 1.5 cm x 1.5 cm. x chest cavity deep directed from left to right over upper part of left axilla posteriorly.

9- Gun shot wound of exit 1.8 cm. x 1.6 cm. x chest cavity at same horizontal place and slightly towards situated over upper and front part of it axilla with in underneath pectoral region from where a metabolic place recovered.

Injuries of Ram Bali Misra:

1- Contused wound area around, front and back of right elbow.

2- Contused area over outer side and front of right shoulder extending up to base of neck about 15 cm. x 10 cm.

3- Contused area right frontal bone, region 6cm. x 6 cm.

4. After submission of the charge sheet, the case of the appellants accused was committed to the court of sessions for trial as Sessions Trial No. 2A of 1975. The case of Chandrachud appellant was separately committed to the court of sessions as S.T. No. 9A of 1975. Both the Sessions Trials were clubbed together and the IIIrd Additional District & Sessions Judge Allahabad tried all the accused persons. He acquitted accused Ram Siromani and Krishana Nand but convicted rest of the accused by his impugned judgment and order dated on 7.9.81 for offences under Sections 302/149. He also convicted appellant Chandrachud for offence u/s 201/149 IPC and sentenced each of them for life imprisonment on the first count and only to Chandrachud 5 years on the second count, which conviction and sentences has been question in the present appeal.

5. On the aforesaid fact we have heard Sri V.C. Tiwari, learned Senior Advocate assisted by Sri A.K. Awasthi in support of the appeal of three surviving the appellants Ram Krishna , Vishambhar Nath and Chandrachud, and Ms. Usha Kiran, learned AGA in opposition.

6. Sri V.C. Tiwari learned Senior Advocate vehemently harangued that the prosecution evidence in this case is contradictory in nature and is not reliable. He further submitted that three witnesses of fact Bhola Nath PW 1, Jai Nath PW 2 and Raj Dhar PW 3 all are interested, inimical and partisan witnesses and their testimony cannot be relied upon and no other independent witness was examined by the prosecution to support its version. The contention of learned senior counsel is that in the absence of any independent witness conviction

recorded by the trial court cannot be sustained in the crime of above magnitude. Learned senior counsel further contended that appellant Chandrachud was neither named in the first information report nor he has been named by Bhola Nath P.W. 1 informant in his deposition before the court. He submitted that Chandrachud is the brother-in-law of brother of Ramanand accused and was known to the prosecution witnesses. He contended that had Chandrachud been present on the spot there was no occasion for the first informant not to spell out his name while dictating the FIR at the PS. He further submitted that so far as Ram Krishna appellant is concerned, in the first information report, he is alleged to have been armed with a Ballam which he had wielded during the assault but in the trial, to make the prosecution case consistent with medical evidence, his weapon was changed to Gandasa and not only this it was evidenced before the court that Gandasa was wielded like blunt object by him from the handle side and not in the natural way of assault. Learned senior counsel submitted that such an evidence by the prosecution witnesses is wholly unnatural and cannot be acted upon to convict the accused persons. In respect of the third appellant, Vishambhar Nath learned senior counsel submitted that his implication is false. There is no cogent, reliable and acceptable evidence against him and his name is mention in the evidence in a cursory manner with out any specific role and since he was not present on the spot, therefore he deserves acquittal. Concludingly he pleaded that the appeal of the three appellants deserves to be allowed and they be acquitted.

7. Ms. Kiran, learned AGA, on the contrary contended that the evidence of three prosecution witnesses of fact coupled with medical evidence and the evidence of the investigating officer leaves no room for doubt that the prosecution has been able to establish the guilt of the appellants successfully and the prosecution evidences are reliable and consistent and therefore no fault can be find with the impugned judgment She further submitted that it is the case where four persons have lost their lives in day light incident with eye witnesses account which is cogent and consistent with prompt FIR and therefore there is no reason to allow this appeal. Learned AGA further contended that a there is no motive for false implication of the three appellants and this appeal in their respect deserves to be dismissed. She submitted that the medical report is cons stint with ocular testimony and this being a day light morning incident there was every chance of witnesses being present at the spot and therefore, the testimony of the three witnesses of fact cannot be discarded. She has contended that the appeal lacks merit and deserves dismissal.

8. We have cogitated over the rival contentions and have gone through the evidences and entire record of this appeal ourselves. In a case of above magnitude we propose to deal with the case of individual appellant to separate the grain from the chaff because the graver the offence he stricter be the scrutiny so that gravity offence may not eclipse independent analysis of evidence to find out the truth if at all we can and so we take up the appeal of Chadrachud appellant at the outset.

9. A perusal of the evidences of PW 1 to PW 3 indicates that two rival, factions were litigating with each other. One was represented by the informant and his family members and the other by the accused persons including the appellants. There has been an earlier murder in between them and both of them were in the look out to harm the other side. In this back ground when we examine the case of appellant Chadrachud we find that he is the brother-in-law of accused Ramanand's brother. PW 1 Bhola Nath in his deposition has said that he did not recognise him and had never met him but he knows his relationship with accused Ramanand. He denied having known the said appellant since last fifteen years. He has admitted that he had never gone to identify the said appellant nor had mentioned his name in the FIR and in his statement u/s 161 Cr.P.C. He also denied the fact that Chandrachud was accused in a case u/s 107/116 Cr.P.C. Jai Nath PW 2 brought out the complicity of appellant Chandrachud when he deposed that Chadrachud was also one of the accused who was chasing Ram Bali and Raj Dhar deceased rained with lathi. At that time Bechan deceased was proceeding towards his house because he had heard gunfire from that side. On seeing the assailants he ran back on which accused Ram Kripal with gun and Shashi Kant with Pistol shot at Bechan as a result of which he stumbled down on the ground in the field of Hari Har Dubey. All the accused then picked him up and threw him in a boat where appellant Chadrachud caught hold of Bechan's hand and accused Muggan chopped off his limbs one by one in the middle of the river Ganges and threw it in the river. First his upper limbs were cut and then lower limbs. He also deposed that both the limbs and the boat were sunk in the river by the assailants. He further deposed that assailants chased Ram Bali and Raj Bhar in another boat rowed by him on gunpoint pointed out by Chandrachud appellant. Shashi Kant accused exhorted other accused on which two malefactors caught hold of Ram Bali's hand and another gave blows on his head with the helm or rudder and rest accused assaulted him with Lathi and Ballam. Shashi Kant accused also fired at Raj Bhar. After this occurrence Jai Nath PW 2 along with Uma Boat man rowed the accused on the other side of Ganges river and then came back. He had denied the suggesuon that he had not witnessed any incident this witness was subjected to searching cross-examination by the defence but from his evidence we have not been able to fetch out any thing, which can discredit his testimony for the appellant Chadrachud who has been assigned the specific role of catching hold of deceased Bechan who was cut to pieces by already dead accused Muggan. Some minor contradictions and omissions in his statement does not make him un credit worthy witness. Further PW 2 is well supported in his deposition, so far as the presence and participation of appellant Chadrachud in the crime is concerned by Raj Dhar PW 3 who had also ran with Ram Bali to the river bank chased by accused persons and had also jumped into Ganges to save his life. He has admitted knowing Chadrachud from before the incident. The defence has not asked him that Chadrachud was not present on the spot. A general suggestion has been given to him that he had not seen the incident, which he had denied.

10. Thus from the above evidence we find ourselves unable to accept the contention of Sri Tiwari that the participation of appellant Chadrachud is doubtful and he has been falsely implicated in the case being a distant relative. From the evidence we find no reason for his false implication. The prosecution evidences in his respect are cogent, reliable and acceptable. It is the prosecution version itself that in the midst of the incident, the informant had dashed towards police station to lodge his FIR and therefore he had no occasion to witness the whole of the incident. The complicity of Chandrachud in the crime came to the fore front in the second part of the assault which occurred near the bank of the river and on the boat in the middle of the river through the evidence of Jai Nath PW 2 and Raj Dhar P.W. 3. In such a scenario the informant had no occasion to name Chandrachud as a culprit. This lends credibility to the statements of witnesses and indicate that they have not endeavoured to implicate him falsely other wise they would have named him in FIR and informant would have named him in his deposition in court. Thus we find Jai Nath PW 2 and Raj Dhar PW 3 reliable witnesses in his respect.

11. Coming to the case of another appellant Ram Krishna we find that testimony of three witnesses of fact are cogent, reliable and acceptable in his respect also. He is named in the FIR with specific role of assault with Ballam on the Sheo Bali deceased, the father of the informant. We don't find any reason for the informant to leave real assailant at bay and implicate innocent person in the murder of his own father. Sri V.C. Tiwari, learned Senior Advocate contended that weapon of Ram Krishan was changed from Ballam to Gandasa and a surreal conduct has been assigned to him to have assaulted the deceased from the blunt side of Gadasa. We are not impressed by the said argument for the simple reason that in this case four persons were lynched in the crime and from the prosecution side also there were quite a good number of persons more than a dozen. The incident occurred all of a sudden in the morning hours and informant without seeing the whole incident rushed towards the police station to lodge the FIR. On theses facts it is very difficult for any person to have a photogenic memory and some contradictions are bound to occur. Appellant Ram Krishna has been assigned specific role of assaulting deceased Shiv Bali and in this respect PW 1 is well supported by the evidence of PW 3. He had seen the assault on his father from quite a distance and in that molly he may get confused regarding the weapon wielded by the appellant Ram Kishan. Moreover neither PW 1 nor PW 3 were suggested that the weapon of appellant Ram Krishna was changed Jo falsely implicate him. We do not find any reason for giving benefit of the change of weapon to this appellant also because it is the case of the prosecution that Ballam and Gadasa both were wielded from the blunt handle side and not from the blade side and hence change of weapons do not make any significant difference. Further there seems to be a genuine mistake in mentioning Ballam instead of Gadasa in such huge number of accused and their weapons. We find no reason to overthrow other wise cogent and reliable testimony of prosecution witnesses on this petty contradiction. Tush we find that the participation of

appellant Ram Krishan in the incident is well established and proved by the prosecution. We are fortified in our view also because had the prosecution wanted to implicate the appellant Ram Krishna falsely P.W. 1 Bhola Nath, P.W. 2 Jai Nath and P.W. 3 Rajdhar would have narrated the same fact which were mentioned in the FIR in his respect. Thus the deviation which has been pointed out by Sri V.C. Tiwari, learned senior Advocate in the deposition of witnesses in fact leads to their credibility.

12. Lastly, coming to the case of the third appellant Vishambhar we are of the view that the prosecution evidence in his respect is not free from doubt. No tangible, cogent and reliable evidence has been led by the prosecution to cement his guilt with the aid of Section 149 IPC and his presence on the spot to us, seems to be doubtful. Scrutinising evidence of prosecution witnesses we find that Bhola Nath P.W. 1 in his deposit on has not assigned any role of assault to him on any body. His name was spelt out by him in a most casual manner. He is said to be armed with Gadasa which according to this witness he never used on any of the two deceased namely Tej Dhar Misra and Shiv Bali Misra and the role of causing their deaths have been assigned to other accused persons. Prosecution has not been able to lead any evidence to show that the appellant was present on the spot and participated in the murder of those two deceased persons. Role of exhortation has also not been assigned to him. At the worst what can be said from the evidence of PW 1 and P.W. 3 in his respect is that he was only a silent spectator without sharing any common object of murder of Tej Dhar and Shiv Bali. He was in no way connected with the murder of Chandra Bali and hence had no motive at all to participate in the incident PW 1 had not informed the investigating officer that Vishambhar had gone to the riverbank chasing Shiv Bali and Raj Dhar nor he had mentioned this fact in the FIR and therefore his this evidence before the court for that fact is an embellishment and improvement on which no reliance can be placed. Jai Nath P.W. 2 albeit mentioned about the presence of this appellant at the river bank and on the boat rowed by him but his this evidence is not reliable at all firstly because he assigned pistol to this appellant on the boat which was never the prosecution case and secondly because he also did not specify any role to him coupled with the fact that for assault on Bechan deceased Jai Nath PW 2 has not stated that Vishambhar had assaulted him which role has been specified to other accused persons. So far as injuries of Ram Bali are concerned they were not caused by Gadasa with which the appellant was armed. To make the prosecution case consistent with medical evidence this witness PW 2 had stated that Gadasa was wielded from the handle side and not from the blade side. This fact firstly, is an improvement amounting to contradiction as the same was stated in the court for the first time and therefore is a false statement of fact and secondly, if accepted this shows lack of common object to commit the murder of Ram Bali and hence takes the case of this appellant out of the purview of Section 149 IPC read with Section 302 IPC. More over Ram Bali received only three contusions, which is not commensurate with number of accused who are alleged to have assaulted him with Gadasa and

Ballam, who were eight or nine. All these facts indicate that Vishambhar was not present on the spot. Raj Dhar P.W.3 has categorically stated in his deposition that but for accused Shashi Kant and Muggan he did not recognize any other accused who had sailed in the boat while murdering Bechan and after that in chasing him and Ram Bali. He did not say that Vishambhar assaulted Bechan nor did he saw as to who were the accused who had caught hold of Ram Bali deceased and assaulted him with Gadasa and Ballam. He also did not see Ram Bali Deceased receiving any Gadasa injury. Prosecution has assigned specific role to each of the accused who have assaulted the four deceased but did not assign any role to appellant Vishambhar. None of the witnesses of fact gave any overt act to him. We find it difficult to apply the principle that those also serve who stand and wait in the acts of this case on the appellant Vishambhar as it will be hazardous seeing the number of assailants which is quite large and false implication of one person who has not participated in the assault can not be ruled out. In such a view looking to the nature of enemical character of witnesses and their record of criminal cases, which runs into dozens and also the fact that they all are enemical, partisan and related and there is no independent witness coming forward to support the prosecution case that we find it unsafe to hold that appellant Vishambhar was present on the spot at the time of the commission of offence. We refer here some of the criminal cases involving the prosecution witnesses and their side as has been admitted to PW 1. These cases include one case of decoity of village Rampur under PS Chilha District Mirzapur, another case u/s 399/402 IPC of PS Mirzamurad District Varanasi, one murder case of Excise Inspector in which Tulsi Ram, father of Tej Dhar Deceased was given death penalty and he was in fact executed as well and Tej Dhar deceased was sentenced to life and his sentence was remitted, another case u/s 107/117 Cr.P.C., a case u/s 307 IPC of PS Gopi Ganj etc. All theses cases are detailed in para 39 to 52 of the deposition of PW 1, Para 17 and 19 of the deposition of PW 2 and para 13 to para 31 of the deposition of PW 3. Thus on over all consideration of the evidences of three witnesses of fact in respect of Vishambhar appellant we find it unsafe to rely on them and are of the opinion that he was not present on the spot. Therefore for the quadruple murders of Tej Dhar Shiv Bali Bechan and Ram Bali he cannot be convicted u/s 302/149 IPC, and therefore afford him benefit of doubt. In taking this view we are supported by a few decisions of the apex court referred to below.

13. In Radha Mohan Singh @ Lal Saheb and Others Vs. State of U.P., it has been held by the Apex Court as under:

18. The question arises whether the conviction of the remaining accused u/s 302 read with Section 149, IPC is legally sustainable. The scope of Section 149 I.P.C. was explained in Mizaji and Another Vs. The State of U.P., , which decision has been followed in many later cases, in the following manner:

The first part of Section 149, IPC means that the offence committed in prosecution of the common object must be one which is committed with a view

to accomplish the common object. It is not necessary that there should be a pre-concert in the sense of a meeting of the members of the unlawful assembly as to the common object; it is enough if it is adopted by all the members and is shared by all of them. In order that the case may fall under the first part, the offence committed 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 u/s 149 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. Though it can be said that when an offence is committed in prosecution of the common object, it would generally be an offence which the members of the unlawful assembly knew was likely to be committed in prosecution of the common object that does not take the converse proposition true; there may be cases which would come, within the second part but not within the first. The distinction between the two parts of Section 149 Indian Penal Code cannot be ignored or obliterated. In every case it would be an issue to be determined whether the offence committed falls within the first part of Section 149 as explained above or it was an offence such as the members of the assembly knew to be likely to be committed in prosecution of the common object and falls within the second part.

19. In *Alauddin Mian v. State of Bihar* the import of Section 149 IPC was explained 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 to accomplish the common object of the assembly or was one which the members knew to be likely to be 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 119 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.

20. As mentioned earlier there was no such motive which could have impelled the accused persons to commit the murder of Hira Singh as In had merely declined to ask or persuade his younger brother PW 1 Ganesh Singh from giving evidence against A-1 and A-5 in the case relating to assault made upon Udai Narain. The statement of Ganesh Singh had already been recorded u/s 161 Cr.P.C. The deceased was not himself a witness in the said case. A-2, A-3 and A-5 did not cause any injury to the deceased. The incised wound on the body of deceased is of very small dimension and is only skin deep, which shows that A-4 did not wield the Pharsa with any intention or object to cause injury to deceased. In view of these features of the case, it cannot be held that the common object of the unlawful assembly was to commit the murder of the deceased or that the members of the unlawful assembly knew that murder is likely to be committed in prosecution of the common object of the assembly. However, as members of the unlawful assembly carried deadly weapons, the knowledge that grievous injury may be caused can certainly be attributed to them. We are, therefore, of the opinion that conviction of A-3, A-4 and A-5 u/s 302 read with Section 149 IPC deserves to be set aside and instead they are liable to be convicted u/s 326 read with Section 149 IPC for which a sentence of 7 years RI will meet the ends of justice.

14. In *Bunni Lal Chaudhari v. State of Bihar* AIR 2006 2531 it has been held by the apex court as follows:

No witness has proved that the accused persons had come on the scene of occurrence with an intention to commit the murder of Shambu Raut. None of them had given any blow to the deceased with the weapons they allegedly were carrying with them. We may say here that it is now the settled law that u/s 149 IPC, the liability of other members for the offence committed during the continuance of the occurrence rests upon the fact whether the other persons knew before hand that the offence actually committed was likely to be committed in prosecution of the common object. Such knowledge may reasonably be collected from the nature of the assembly, arms or behaviour on or before the scene of occurrence. If such knowledge may not reasonably be attributed to the other members of the assembly then their liability for the offence committed during occurrence does not arise. On scrutiny of the entire evidence on record, we are of the confirmed opinion that the conviction of the other accused persons is not sustainable and their appeal deserves to be allowed. We order, accordingly. Magister Chaudhary, Birendra Chaudhary, Maniraj Chaudhary Dashrath Chaudhary, Amarjit Chaudhary, Naresh Chaudhary and Rajdhari Chaudhary are acquitted of the offence u/s 302/149 IPC. They are on bail. Their bail bonds are discharged.

15. In the case of Masalti Vs. State of U.P., it has been held by the apex court as under:

...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....

16. Resultantly this appeal is partly allowed. While we dismiss the appeals of Ram Krishna and Chandrachud appellants in its entirety and confirm their conviction u/s 302/149 IPC and sentence of life imprisonment as has been recorded by the trial court through the impugned judgment, we allow the appeal of appellant Vishambhar Nath and acquit him of the charges under Sections 302/149 IPC, and 201/149 IPC. The appellant No. 3 Vishambhar Nath is on bail. He need not surrender. His surety and personal bonds are discharged.

17. So far as the appellant No. 2 Ram Krishna and appellant No. 7 Chandrachud are concerned, they are directed to surrender to their personal bonds and surety bonds forthwith. CJM Allahabad is directed to take immediate steps for their arrest and take them into custody and lodge them in jail to serve out the sentences awarded on them by the trial court through the impugned judgment. As soon as those two appellants surrender their personal and surety bonds shall be cancelled.

18. Let a copy of this judgment be certified to the trial court for its intimation forthwith.