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RAM DULAR RAI AND ORS.

v.

STATE OF BIHAR

NOVEMBER 27, 2003

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[DORAISWAMY RAJU AND ARIJIT PASAYAT, JJ.]

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*Penal Code, 1860—Sections 141, 148, 149, 302 and 307—Murder committed by unlawful assembly—Identification of only four persons of the unlawful assembly—Conviction under section 149 IPC for existence of common object—Correctness of—Held, non-identification of other persons involved does not affect conviction under section 149 IPC—Held, on facts, there was common object to commit the crime and hence, convictions upheld—Arms Act, 1959—Section 27.*

D

**PW6 – informant was sleeping outside his house along with his son and daughter and the other family members were sleeping inside the house. At about 12.30 a.m., the four appellants-accused came along with ten to eleven other persons armed with guns to the house of PW6 and fired at the son and daughter (PW2) of PW6. The son died due to injuries: The occurrence of the crime was witnessed by PW 1 and PW3 also. The defence witness DW1 stated that appellant nos. 1 and 4 were at their residence at the time of occurrence and hence could not have committed the offence. The trial court, relying on eyewitness reports of PW1, PW2, PW3 and informant PW6, found all the four appellants guilty. Appellant no. 1 was sentenced to life imprisonment for offence under section 302 IPC. Appellant nos. 2 to 4 were sentenced to life imprisonment for offences under section 302 read with section 149 IPC. Appellant no. 1 was further sentenced to 10 years imprisonment for offence under section 307 IPC and other appellants to 5 years imprisonment for offence under section 307 read with section 149 IPC.**

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**Besides, all the appellants were sentenced to 3 years imprisonment for offences under section 148 IPC and section 27 of the Arms Act, 1959. High Court dismissed the appeal of appellant no. 1. In respect of other appellants, the High Court set aside the conviction for offences relatable to section 307 read with section 149 IPC and upheld rest of the convictions.**

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In appeal, the appellants contended that the conviction under section 149 IPC is not applicable since the number of accused identified by the eyewitnesses does not exceed five; that unidentified persons were introduced by the prosecution for conviction under section 149 IPC: that there is no evidence of any participation or sharing of common object: and that the evidence of DW-1 rules out the presence of appellant nos. 1 and 4. A B

Dismissing the appeals, the Court

HELD : 1.1. Section 149 IPC does not require that all the five persons must be identified. What is required to be established is the presence of five persons with a common object of doing an act. If that is established, merely because other persons present are not identified, that does not in any way affect the applicability of section 149 IPC. C D

[269-A]

1.2 Under section 149 IPC, the emphasis is on the common object and not on common intention. Mere presence in an unlawful assembly cannot render a person liable unless there was a common object and he was actuated by that common object and that object is one of those set out in section 141 IPC. Where common object of an unlawful assembly is not proved, the accused persons cannot be convicted with the help of section 149 IPC. It cannot be laid down as a general proposition of law that unless an overt act is proved against a person, who is alleged to be a member of unlawful assembly, it cannot be said that he is a member of an assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of section 141. [269-B-D] E F

1.3 The word 'object, means purpose or design and in order to make it 'common', it must be shared by all. In other words, the object should be common to the persons, who compose the assembly. i.e. they should all be aware of it and concur in it. A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or a few H

- A** members of the assembly and other members may just join and adopt it. 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 IPC have to be strictly construed as equivalent to 'in order to attain the common object'. It
- B** 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 up to a particular stage and not thereafter. Members of an unlawful assembly may have community of object up to certain point beyond which they may differ in their objects and the
- C** knowledge possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the extent to which he shares the community of object and as a consequence of this the effect of section 149 IPC may be different on different members of the same assembly. [269-E-H; 270-A]
- D** 1.4. 'Common object' is different from a 'common intention' as it does not require a prior concert and 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
- E** 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
- F** 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
- G** assembly, with an unlawful common object, the same must be translated into action or be successful. It is not necessary that the object 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
- H** 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 *co instanti*. [270-B-F]

1.5. The evidence of the eyewitnesses which has been analysed in great detail by both the trial court and the High Court shows that though four appellants were specifically identified, other persons carrying weapons were present along with the appellants at the time and place of occurrence. That being so, section 149 IPC has been rightly applied. A

1.6. The evidence of DW-1 does not in any way improbabilises the presence of the appellants at the time of occurrence. He only has stated that on hearing his call, appellants 1 and 4 came near him. The place of occurrence and the place of residence of A 1 are in close proximity. The possibility, as has been highlighted by the trial court and the High Court of the aforesaid two accused appellants coming to their respective place of residence after committing the offence cannot be ruled out and is not physical impracticability or impossibility. When some persons came with guns and their actions preceding and succeeding the assault indicate the existence of a common object to do an act as stipulated in section 149, the liability under section 149 is clearly attracted. The eyewitnesses to the occurrence, as held by the trial court and the High Court, are natural witnesses and their presence at the spot of occurrence or nearby is quite normal. Nothing suspicious has been indicated as to why their evidence which stood firm in spite of incisive cross-examination is to be discarded on the hypothesis that they are inimical to the accused persons. [273-B-E] B

*Chikkarage Gowda & Ors. v. State of Mysore*, AIR (1956) SC 731; *Masalti & Ors. v. State of U.P.*, AIR (1965) SC 202; *Lalji v. State of U.P.*, [1989] 1 SCC 437 and *State of U.P. v. Dan Singh & Ors.*, [1997] 3 SCC 747, referred to. C

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 371-372 of 2003. D

From the Judgment and Order dated 30.7.2002 of the Patna High Court in CrI. A. (DB) Nos. 519 and 594 of 1996. E

P.S. Mishra, Vishnu Sharma, Ms. T. Swapna Reddy, A.C. Mishra and D.K. Jha for S. Chandra Shekhar for the Appellant. F

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A H.L. Aggarwal and Kumar Rajesh Singh for B.B. Singh for the Respondent.

The Judgment of the Court was delivered by

B **ARIJIT PASAYAT, J.** The appellant No.1 (Ram Dular Rai) faced trial for the commission of offences punishable under Sections 302 and 307 of the Indian Penal Code, 1860 (for short the 'IPC'). The other appellants were tried for offences relating to Section 302 read with Section 149 IPC and Section 307 read with Section 149 IPC. Each of the appellants was also tried for commission of offence punishable under Section 148 IPC and C Section 27 of the Arms Act, 1959 (in short the 'Arms Act'). They were found guilty and sentenced to undergo imprisonment for life for the offence relating to Section 302 or Section 302 read with Section 149 IPC, as the case may be. Appellant No.1 was further sentenced to undergo imprisonment for 10 years for the offence relating to Section 307 IPC and other three D appellants were sentenced to five years imprisonment for the offence relating to Section 307 read with Section 149 IPC. Each of them were sentenced to undergo imprisonment for three years for the offence relating to Section 148 IPC and Section 27 of the Arms Act. In appeal by the impugned judgment, appeal of the appellant Ram Dular Rai was dismissed. E In respect of other appellants, conviction for offences relating to Section 307 read with Section 149 IPC was set aside. The background facts leading to the trial is as follows:

F The informant Baleshwar Nath Singh (PW-6) in his fardbayan recorded on 17.3.1988 at about 1.05 a.m. stated that he was sleeping in the night on the Dalan of the house where a lantern and a dhibri were burning giving sufficient light in the Dalan. He was sleeping at the eastern extreme on a cot and near him his son Kamla Singh, daughter of Kamla Singh, Renu Devi (PW-2), were also sleeping. Other members of the family were sleeping inside the rooms. At about 12.30 a.m. the accused-appellants G each armed with double barrel gun came to the Dalan along with ten to eleven other persons and standing outside the Dalan, were also armed with guns. On being asked by the informant about their identity, appellant Lalu Rai scolded him and placed his gun on his chest. Accused-appellant Ram Dular Rai fired three times on his son Kamla Singh (hereinafter referred H to as the 'deceased') grievously injuring him, whereafter accused fired on

Renu Devi, injuring her. Thereafter all the assailants fled away. Other members of the family and co-villager Jai Narain Singh (PW-3) also had seen the occurrence. Kamla Singh died due to the injuries soon thereafter. According to the informant, the reason for the assaults was that they had been opposing one Madho Singh since the election of Mukhiya of their Panchayat, for which reason the assailants had committed the offence. A B

The accused persons denied their alleged role in the alleged occurrence claiming that they have been falsely implicated. Accused-appellant Lallan Rai in his examination under Section 313 of the Code of Criminal Procedure, 1973 (for short the 'Code') claimed that he was not even present, for which he placed reliance on medical certificate. One witness was also examined as DW-1. The said witness Narain Chaupal was a constable who was deputed for the security for accused-appellant Ram Dular Rai after a dacoity was allegedly committed in his house. The witness (DW-1) claimed that on hearing gunshots he had called appellant-Ram Dular Rai and his brother Lal Mohar Rai and at his call they came out from their house. In essence, the stand was that since they were at their residence at that time, they could not have committed the alleged offence. Prosecution examined 13 witnesses, out of whom Renu Devi (PW-2) is an injured witness and the informant was PW-6. There were two other eye-witnesses namely Ramji Singh and Jai Narain Singh (PWs 1 and 3 respectively). Placing reliance on their evidence, the trial Court convicted the appellants as noted supra. C D E

In appeal, as noted supra a Division Bench of the Patna High Court upheld the conviction of accused-appellant Ram Dular Rai while allowing the appeals of other three appellants before it. The conviction under Section 307/149 IPC was set aside and rest of the convictions were upheld. The High Court held that the accused persons, all armed with guns had come to Dalan. Ram Dular Rai fired at the deceased in furtherance of a common object and, therefore, the others were to be convicted under Section 302 read with Section 149 IPC. However, the assault on Renu Devi (PW-2) was a separate offence by Ram Dular Rai and there was no common object involved. F G

In support of the appeals, learned counsel for the accused-appellants submitted that in view of the admitted animosity the evidence does not H

A inspire confidence. There was nothing to bring in application of Section 149 IPC. Accused-appellants 2 to 4 did not make any attempt to enter into the house and did not commit any overt act. Only one witness (PW-6) has stated that all the persons came together. In view of the acquittal of appellants 2 to 4 in respect of accusations under Section 307 read with

B Section 149 IPC, Renu Devi (PW-2) ceased to be an injured witness and only evidence was that of the informant (PW-6). The so-called eyewitnesses could not have identified the persons as claimed. There was no scope for recognizing any of the accused. A person lying on a bed immobilized could not have made any recognition. As the other witnesses were beyond doors

C they could not have seen who was coming and who was going and, therefore, their evidence should be discarded. In any event, the number of accused persons does not exceed five and merely because some people were claimed to be unidentified persons they were only introduced to bring in application of Section 149 IPC. If Section 149 IPC is kept out then

D Section 34 IPC can be pressed into service and for that there must be a participation. There is no evidence of any participation or showing sharing of common object. The evidence of DW-1 has not been duly considered as his evidence clearly rules out the presence of accused appellants Ram Dular Rai and Lal Mohar Rai. Even if for the sake of arguments it is

E accepted that there was definite role attributed to accused appellants 1 and 4, that is not sufficient to rope in others. The presence of any dhibri or lantern as stated has not been established. The prosecution has introduced these two articles to make identification possible. The FIR was ante dated as has been clearly noted by the trial Court; but the reason given by the

F investigating officer has been accepted; which should not have been done.

In response, learned counsel for the State submitted that the evidence of DW-1 does not in any way rule out presence of the accused appellants 1 and 4. The High Court has analysed the evidence in detail as the evidence of eyewitnesses was categorized to be of partisan nature. The High Court

G has held that the witnesses were natural witnesses. The conviction and consequentially the sentences imposed are well merited and do not deserve any interference.

Coming to the question whether Section 149 has application when

H presence of more than five persons is established, but only four are

identified, Section 149 does not require that all the five persons must be identified. What is required to be established is the presence of five persons with a common object of doing an act. If that is established merely because the other persons present are not identified that does not in any way affect applicability of Section 149 IPC. A

Another plea which was emphasized relates to the question whether Section 149, IPC has any application for fastening the constructive liability which is the *sine qua non* for its operation. The emphasis is on the common object and not on common intention. Mere presence in an unlawful assembly cannot render a person liable unless there was a common object and he was actuated by that common object and that object is one of those set out in Section 141. Where common object of an unlawful assembly is not proved, the accused persons cannot be convicted with the help of Section 149. The crucial question to determine 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 in Section 141. It cannot be laid down as a general proposition of law that unless an overt act is proved against a person, who is alleged to be a member of unlawful assembly, it cannot be said that he is a member of an assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of Section 141. The word 'object' means the purpose or design and, in order to make it 'common', it must be shared by all. In other words, the object should be common to the persons, who compose the assembly, that is to say, they should all be aware of it and concur in it. A common object may be formed by express agreement after mutual consultation, but that is by no means necessary. It may be formed at any stage by all or a few members of the assembly and the other members may just join and adopt it. 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 up to a particular stage, and not thereafter. Members of an unlawful assembly may have community of object up to certain point beyond which they may differ in their objects and the knowledge, H

A possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence of this the effect of Section 149, IPC may be different on different members of the same assembly.

B '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 object 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 *co instanti*.

Section 149, IPC consists of two parts. The first part of the 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 order 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 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, 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. The purpose for which the members of the assembly set out or desired to achieve is the object. If the object desired by all the members is the same, the knowledge that is the object which is being pursued is shared by all the members and they are in general agreement as to how it is to be achieved and that is now the common object of the assembly. An object is entertained in the human mind, and it being merely a mental attitude, no direct evidence can be available and, like intention, has generally to be gathered from the act which the person commits and the result therefrom. Though no hard and fast rule can be laid down under the circumstances from which the common object can be called out, it may reasonably be collected from the nature of the assembly, arms it carries and behaviour at or before or after the scene of incident. The word 'knew' used in the second branch of the section implies something more than a possibility and it cannot be made to bear the sense of 'might have been known'. Positive knowledge is necessary. 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, however, does not make the converse proposition true; there may be cases which would come within the second part but not within the first part. The distinction between the two parts of Section 149 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 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. However, there may be cases which would be within first offences committed in prosecution of the common object, but would be generally, if not always, with the second, namely, offences which the parties knew to be likely committed in the prosecution of the common object. [See *Chikkarange Gowda and others v. State of Mysore*, AIR (1956) SC 731].

The other plea that definite roles have not been ascribed to the accused and, therefore, Section 149 is not applicable, is untenable. A 4-Judge Bench of this Court in *Masalti and Ors. v. State of U.P.*, AIR (1965) SC 202 observed as follows:

"Then it is urged that the evidence given by the witnesses conforms to the same uniform pattern and since no specific part

A is assigned to all the assailants, that evidence should not have been  
 accepted. This criticism again is not well founded. Where a crowd  
 of assailants who are members of an unlawful assembly proceeds  
 to commit an offence of murder in pursuance of the common  
 object of the unlawful assembly, it is often not possible for  
 B witnesses to describe accurately the part played by each one of  
 the assailants. Besides, if a large crowd of persons armed with  
 weapons assaults the intended victims, it may not be necessary  
 that all of them have to take part in the actual assault. In the  
 present case, for instance, several weapons were carried by  
 C different members of the unlawful assembly, but it appears that  
 the guns were used and that was enough to kill 5 persons. In such  
 a case, it would be unreasonable to contend that because the other  
 weapons carried by the members of the unlawful assembly were  
 not used, the story in regard to the said weapons itself should be  
 D rejected. Appreciation of evidence in such a complex case is no  
 doubt a difficult task; but criminal courts have to do their best in  
 dealing with such cases and it is their duty to sift the evidence  
 carefully and decide which part of it is true and which is not.”

To similar effect is the observation in *Lalji v. State of U.P.*, [1989]  
 E 1 SCC 437. It was observed that:

“Common object of the unlawful assembly can be gathered  
 from the nature of the assembly, arms used by them and the  
 behaviour of the assembly at or before the scene of occurrence.  
 F It is an inference to be deduced from the facts and circumstances  
 of each case.”

In *State of U.P. v. Dan Singh and Ors.*, [1997] 3 SCC 747 it was  
 observed that it is not necessary for the prosecution to prove which of the  
 members of the unlawful assembly did which or what act. Reference was  
 G made to *Lalji's* case (supra) where it was observed that “while overt act  
 and active participation may indicate common intention of the person  
 perpetrating the crime, the mere presence in the unlawful assembly may  
 fasten vicariously criminal liability under Section 149”.

H In the present case the evidence of eye-witnesses which has been

analysed in great detail by both the trial Court and the High Court shows that though four appellants were specifically identified, other persons carrying weapons were present along with the appellants at the time and place of occurrence. That being so, Section 149 has been rightly applied. A

One of the pleas raised with emphasis related to the evidence of DW-1. On a closer reading of his evidence it is clear that the same does not in any way improbabilises the presence of the appellants at the time of occurrence. He only has stated that on hearing his call, appellants 1 and 4 came near him. The place of occurrence and the place of residence of A-1 are in close proximity. The possibility, as has been highlighted by the trial Court and the High Court, of the aforesaid two accused appellants coming to their respective place of residence after committing the offence cannot be ruled out and is not physical impracticability or impossibility. C  
In respect of appellant Lallan Rai it is submitted that he did not fire the gun. Nothing has been shown about his object or to show that the deceased was the target. This plea is clearly untenable because when some persons came with guns and their actions preceding and succeeding the assault indicate the existence of a common object to do an act as stipulated in Section 149, the liability under Section 149 is clearly attracted. The eyewitnesses to the occurrence as held by the trial Court and the High Court are natural witnesses and their presence at the spot of occurrence or nearby is quite normal. Nothing suspicious has been indicated as to why their evidence which stood firm in spite of incisive cross-examination is to be discarded on the hypothesis that they are inimical to the accused persons. D  
Looked at from any angle the judgment of the High Court does not warrant any interference and the appeals fail and are dismissed. E

B.S.

Appeals dismissed. F