

A AMERIKA RAI & ORS.  
v.  
STATE OF BIHAR  
(Criminal Appeal No. 1516-1517 of 2004)

B FEBRUARY 23, 2011

[V.S. SIRPURKAR AND ANIL R. DAVE, JJ.]

*Penal Code, 1860 – s.302 r/w s.149 and s.307 – Murder and attempt to murder – Unlawful assembly – Common object – Vicarious liability – Allegation that a day after an altercation, at the time of marriage of PW-7's brother, and assault on A-5, the accused persons slapped and fisted PW-6, the brother-in-law of the bride of PW-7's brother and when PW-7's brother resisted such action, the accused persons indiscriminately fired at PW-7 and his brother causing grievous injuries to the former and death of the latter – Conviction by Courts below of the six accused persons – Further appeal of A-3 dismissed by Supreme Court – Appeals by the other five accused – Held: There was a definite background to the attack – The accused persons had carried a grudge and seeing PW-6, they slapped and fisted him and when PW-7's brother resisted the same he was done to death – Presence of the 5 eye-witnesses was most natural – All of them unanimously stated that A-1 had ordered to bring the guns; that A-4 fired 3-4 rounds with his gun and caused injury to PW-7, and that A-5 and A-6 fired with pistols in their hand – Therefore, at least insofar as these persons are concerned, their presence and their active participation made them guilty under s.149 IPC, though the author of the injury to the deceased was A-3 whose appeal has already been dismissed – However, that cannot be said about A-2 – The evidence of the eye-witnesses that he was instigating the other accused persons to fire, appears to be an exaggeration – He would not have kept on standing holding a lathi had he shared the intention and the common*

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*object of committing murder of the deceased – Therefore, benefit of doubt granted to A-2 and he is acquitted – Arms Act – s.27.*

**According to the prosecution, a day after an altercation, at the time of marriage of PW7's brother, and assault on A-5, the accused persons slapped and fisted PW-6, the brother-in-law of the bride of PW7's brother and when PW7's brother resisted such action, the six accused persons formed themselves into an unlawful assembly and as a common object of that unlawful assembly indiscriminately fired at PW7 and his brother causing grievous injuries to the former and death of the latter.**

**All the accused persons were convicted under Section 302 read with Section 149 of the IPC, while A-3 was convicted for substantive offence punishable under Section 302 and for offence punishable under Section 27 of the Arms Act. A-4 was also convicted for the offence punishable under Section 307 IPC in addition to the offences punishable under Section 27 of the Arms Act and Section 302 read with Section 149 IPC. He was booked for that offence on the allegation that he had fired at and injured PW-7. The appeals of all the accused persons were dismissed by High Court. The further appeal of A-3 was dismissed by the Supreme Court.**

**The instant appeals were filed by the other five accused persons, A-1, A-2, A-4, A-5 and A-6.**

**Dismissing the appeals of all the accused-appellants except A-2, the Court**

**HELD:1. PW7's brother died a homicidal death. As many as 5 eye-witnesses whose presence was most natural on the spot, have supported the prosecution version regarding the deadly attack on PW7's brother, as**

A also the firing at PW-7. The evidence of the two doctors  
PW-8 and PW-10, who conducted the autopsy, is  
sufficient to hold that PW7's brother died an almost  
instantaneous death because of indiscriminate firing at  
him by A-3. PW7's brother had suffered as many as 8  
B injuries, all attributable to the gun shot injuries, so also  
the injuries suffered by PW-7 were found to be dangerous  
to his life, though he ultimately survived. [Para 6] [184-F-  
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C 2. The presence of the accused persons on the spot  
was well established by the five eye-witnesses. All the five  
eye-witnesses who supported the prosecution in one  
voice deposed to the presence of all these accused  
persons and the acts performed by them. PW-7, PW-1,  
PW-4, PW-6, PW-2 and PW-3 are unanimous on the  
D question that A-1 had ordered to bring the guns. As many  
as 4 witnesses being PW-7, PW-1, PW-4 and PW-6 spoke  
about A-2 standing holding a stick. All these 4 witnesses  
also suggested that he was instigating. Insofar as A-4 is  
concerned, all the witnesses are unanimous that he fired  
E 3-4 rounds with his gun and caused injury to PW-7, so  
also all the witnesses are absolutely unanimous in  
respect of A-5 and A-6 to the effect that they were firing  
with the pistols in their hand. PW-2 and PW-3 also went  
to the extent of saying that these two accused persons  
F fired 2-3 rounds of shots though no injury was caused  
by those gun shots. Therefore, there can be no doubt  
that all these accused persons, who were staying in the  
nearby house of the deceased, had attacked the  
deceased and his brother PW-7. There was a definite  
G background to this attack which related to the altercation  
in between the bride's party and bridegroom's party at  
the time of marriage and A-5 having been beaten. It has  
come in the evidence of the witnesses like PW-7 and PW-  
6 that there was an unpleasant incident of altercation in  
H between the bride's party and bridegroom's party at the

time of Dwarpuja. It has also come in the evidence that A-5, when he was returning back from bridegroom's place on cycle, was beaten. Therefore, it appears that the accused persons had carried a grudge and seeing PW-6, the brother-in-law of the deceased's bride, there was an instantaneous reaction on their part. It has come in the evidence that PW-6 was slapped and fisted when he had finished his meals and was going for rest. The presence of PW-6 acted as a flash point; perhaps it reminded the accused persons and more particularly, A-5, of the insult meted out to them and then the idea of taking revenge emerged. What happened is that deceased seeing that his wife's relation was being slapped and fisted by the accused persons, had resisted the attempt on the part of the accused persons and that ultimately proved to be a *raison d'etre* of his death. Therefore, there is no doubt that this was undoubtedly done with a common object of teaching lesson to the deceased who had taken – as was expected– side of PW-6, the brother-in-law of his bride. [Para 7] [185-B-H; 186-A-D]

3. The law of vicarious liability under Section 149 IPC is crystal clear that even the presence in the unlawful assembly, but with an active mind, to achieve the common object makes such a person vicariously liable for the acts of the unlawful assembly. In that light, when the evidence is examined, it is obvious that A-1 who was the elder in the family and father of A-2, A-4 and A-3, instead of acting in a responsible manner and preventing any unpleasant incident, exhorted the accused persons to bring the gun. The exhortation to bring the gun definitely speaks about the guilty mind of A-1, so also the use of guns by A-4, A-5 and A-6 is very clear that they also had guilty mind. A-4 went to the extent of injuring PW-7. Therefore, even their presence and part played by them was obviously pointing towards the common object of committing murder of PW7's brother, who, became the

A victim of the circumstances. The accused persons had nothing to do with the deceased. Their main ire was directed at PW-6. But, perhaps because the deceased took side of PW-6, he became the victim of circumstances and had to pay with his own life. Therefore, at least insofar as these persons are concerned, their presence and their active participation would make them guilty under Section 149 IPC, though the author of the injury to the deceased was A-3 whose appeal has already been dismissed. [Para 7] [186-F-H; 187-A-C]

C 4. However, that cannot be said about A-2. He had been given the role of standing in the door of his house with a lathi. The evidence of the eye-witnesses that he was instigating the other accused persons to fire, appears to be an exaggeration. He would not have kept on standing there holding a lathi had he shared the intention and the common object of committing murder of the deceased. The role of A-2, as attributed to by the eye-witnesses, should not make him vicariously liable. Therefore, benefit of doubt is granted to A-2 and he is acquitted. [Para 8] [187-D-E]

F 5. There is evidence that when PW-6 was going for rest after the meals, he was actually fisted and slapped by A-1, A-2, A-3, A-4, A-5 and A-6. When this was informed to the deceased he came and made enquiry from A-3 and then when there was exchange of abuses, the brick batting started between the parties. In short, there can be no dispute about the formation of unlawful assembly and its common object. All the accused persons are, therefore, held guilty and their appeals are dismissed excepting that of A-2 who is granted the benefit of doubt and is acquitted. [Paras 9, 10] [188-A-B-C]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1516-1517 of 2004.

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From the Judgment and Order dated 20.05.2004 of the High Court of Judicature at Patna in Criminal Appeal No. 311 and 372 of 1999. A

Rajesh Prasad Singh, Abhilesh Kumar Pandey, Sudhanshu Saran, Abhay Kumar, Ashutosh Pandey abd Chandan Kumar (for Gopal Singh) for the appearing parties. B

The Judgment of the Court was delivered by

**V.S. SIRPURKAR, J. 1.** This judgment will dispose of Criminal Appeal Nos. 1516 and 1517 of 2004. Five accused persons have filed these appeals, they being Amerika Rai (original accused No. 1), Darbesh Rai (original accused No. 2), Mithilesh Rai (original accused No. 4), Sanjay Rai (original accused No. 5) and Sipahi Rai (original accused No. 6). The appeal of Chulhan Rai (original accused No. 3) is already dismissed. Six accused persons came to be tried for having formed themselves into an unlawful assembly and as a common object of that unlawful assembly, having committed murder of one Shankar Rai. Some of the accused persons were also charged with the offences under the Arms Act. All the accused persons were convicted for the offence punishable under Section 302 read with Section 149 of the Indian Penal Code (IPC), while Chulhan Rai (A-3) was convicted for substantive offence punishable under Section 302 and for offence punishable under Section 27 of the Arms Act. Again, Mithilesh Rai (A-4) was also convicted for the offence punishable under Section 307 IPC in addition to the offences punishable under Section 27 of the Arms Act and Section 302 read with Section 149 IPC. He was booked for that offence on the allegation that he had fired at and injured one Dineshwar Rai (PW-7). The appeals of all the accused persons were dismissed by Patna High Court and that is how the accused persons are before us in the present appeals. C  
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2. The prosecution story is in the short conspectus. This is a cruel murder of a young bridegroom Shankar Rai who was H

A married only a day before. He was put to death virtually without any reason. As per the prosecution story, his marriage was held at village Ishupur, Police Station Lalganj, District Vaishali. All the accused persons appear to be either relations or neighbours of deceased Shankar Rai. They all had joined the bridegroom party and were present at the time of marriage. It is alleged that at the time of function of "Dwarpuja", there was some altercation in between the members of bride party on one side and bridegroom's on the other. It is alleged that the brother of the informant Dineshwar Rai was assaulted by the members of the bride party and in retaliation, the informant also attacked some members of the bride side. Further, when one of the accused persons Sanjay Rai (A-5) was going back to Janmasa (the place where the bridegroom's party stays during the marriage), he was assaulted by some boys of the village. However, the marriage was solemnized. The party of the bridegroom returned to their village alongwith bride, and alongwith them, the brother-in-law of the bride accompanied as per the custom. On the next day, at about 11'o clock in the morning, when the said brother-in-law, namely, Ram Babu (PW-6) was going for rest after taking meals, the accused persons, namely, Amerika Rai (A-1), Darbesh Rai (A-2), Chulhan Rai (A-3), Mithilesh Rai (A-4), Sanjay Rai (A-5) and Sipahi Rai (A-6) assaulted him with fists and slaps. When this was objected to, a quarrel ensued. At that very time, Amerika Rai (A-1) exhorted and as a result, Chulhan Rai (A-3) brought a licensed gun and fired 6/7 rounds at Shankar Rai. He fell down injured. In the meantime, Mithilesh Rai (A-4) fired 3/4 rounds from his gun causing injury to Dineshwar Rai (PW-7) who was none else but the brother of Shankar Rai (deceased). He suffered injuries to his hand, abdomen and thigh. At this time, Sanjay Rai (A-5) and Sipahi Rai (A-6) also opened fire from their pistols. Darbesh Rai (A-2) was present with a lathi. Injured Shankar Rai was removed to the State dispensary, Parsa, where he died during his treatment. Dineshwar Rai (PW-7) was also treated. The incident, having taken place in the broad day light, was

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witnessed by number of persons including the villagers. Dineshwar Rai (PW-7) reported the matter on 26.6.1995 at 4.15 pm to the Officer-in-charge of Dariyapur Police Station. This was done in the State dispensary. FIR was drawn up by Dariyapur Police Station vide case No. 76/95 and the offences were registered under Sections 302, 307, 324 read with Section 34 IPC and Section 27 of the Arms Act. The chargesheet was filed and the matter was committed to sessions. All the accused abjured their guilt.

3. In support of the prosecution, as many as 12 witnesses were examined including the eye-witnesses, the police witnesses and the doctors.

4. Some of the witnesses like Dineshwar Rai (PW-7) who was an injured witness, Ram Babu (PW-6), Dhaneshwar Rai (PW-1), Sheo Nath Rai (PW-2), Ramesh Rai (PW-3) and Ram Bhawan Rai (PW-4) supported the prosecution version. However, some other witnesses like Wakil Rai, Virendra Rai and Dina Pandit did not support the prosecution. Relying on their evidence, the trial Court firstly came to the conclusion that the accused persons formed themselves into an unlawful assembly and indiscriminately fired at Shankar Rai (deceased) and Dineshwar Rai (PW-7) and caused murder of Shankar Rai and attempted to murder Dineshwar Rai (PW-7). However, it is only Mithilesh Rai (A-4) who is booked for the offence punishable under Section 307 IPC on the ground that he was the only person who fired at Dineshwar Rai (PW-7) and injured him seriously. The trial Court has also discussed the whole medical evidence as well as the evidence of the eye-witnesses and convicted all the accused persons. The appeals of the accused persons before the High Court failed and that is how the matter is before us.

5. The learned counsel appearing on behalf of the accused persons firstly urged that the role of Amerika Rai (A-1) and Darbesh Rai (A-2), as attributed to them by the

A prosecution witness, itself suggests that these two accused persons did not use any fire arms. The learned counsel further urged that Amerika Rai (A-1) was merely standing and at the most, it could be said that he exhorted for bringing the guns; however, even that could not be said in respect of Darbesh Rai (A-2) who was merely standing in the door with a lathi. The learned counsel were at pains to point out, by reference to evidence, that Darbesh Rai (A-2) did not in any manner either assault the deceased or take part in the whole affair. The learned counsel, therefore, urged that at least insofar as Amerika Rai (A-1) and Darbesh Rai (A-2) are concerned, they could not be said to be the members of the unlawful assembly. The learned counsel appearing on behalf of Sanjay Rai (A-5) and Sipahi Rai (A-6) pointed out that though it was suggested that these two accused persons fired with their pistols, those pistols are nowhere to be found in the whole investigation, as nothing was recovered from these two accused persons. The learned counsel, therefore, urged that it will be difficult to say that these two persons either shared the common intention or had the common object. It was pointed out that Sanjay Rai (A-5) and Sipahi Rai (A-6) were not even related to Amerika Rai (A-1) and his family or deceased Shankar Rai and his family.

6. There can be no dispute that Shankar Rai died a homicidal death. As many as 5 eye-witnesses whose presence was most natural on the spot, have supported the prosecution version regarding the deadly attack on Shankar Rai, as also the firing at his brother Dineshwar Rai (PW-7). The evidence of the two doctors being Dr. Shradha Nand (PW-8) and Dr. Amarnath Jha (PW-10), who conducted the autopsy is sufficient to hold that Shankar Rai died an almost instantaneous death because of indiscriminate firing at him by Chulhan Rai (A-3). It has already been stated earlier that appeal of Chulhan Rai (A-3) is already dismissed. Deceased Shankar Rai had suffered as many as 8 injuries, all attributable to the gun shot injuries, so also the injuries suffered by Dineshwar Rai (PW-7) were found to be dangerous to his life, though he ultimately survived.

The question, however, is whether all the accused persons could be booked with the aid of Section 149 IPC on the ground that they were the members of the unlawful assembly having the common object. A

7. There can be no dispute that the presence of the accused persons on the spot was well established by the five eye-witnesses named above. All the five eye-witnesses who supported the prosecution have in one voice deposed to the presence of all these accused persons and the acts performed by them. Dineshwar Rai (PW-7), Dhaneshwar Rai (PW-1), Ram Bhawan Rai (PW-4), Ram Babu (PW-6), Sheo Nath Rai (PW-2) and Ramesh Rai (PW-3) are unanimous on the question that Amerika Rai (A-1) had ordered to bring the guns. As many as 4 witnesses being Dineshwar Rai (PW-7), Dhaneshwar Rai (PW-1), Ram Bhawan Rai (PW-4) and Ram Babu (PW-6) spoke about Darbesh Rai (A-2) standing holding a stick. All these 4 witnesses also suggested that he was instigating. Insofar as Mithilesh Rai (A-4) is concerned, all the witnesses are unanimous that he fired 3-4 rounds with his gun and caused injury to Dineshwar Rai (PW-7), so also all the witnesses are absolutely unanimous in respect of Sanjay Rai (A-5) and Sipahi Rai (A-6) to the effect that they were firing with the pistols in their hand. Sheo Nath Rai (PW-2) and Ramesh Rai (PW-3) also went to the extent of saying that these two accused persons fired 2-3 rounds of shots though no injury was caused by those gun shots. Therefore, there can be no doubt that all these accused persons, who were staying in the nearby house of the deceased, had attacked the deceased and his brother Dineshwar Rai (PW-7). There was a definite background to this attack which related to the altercation in between the bride's party and bridegroom's party at the time of marriage and accused Sanjay Rai having been beaten. It has come in the evidence of the witnesses like Dineshwar Rai (PW-7) and Ram Babu (PW-7) that there was an unpleasant incident of altercation in between the bride's party and bridegroom's party at the time of Dwarpuja. It has also come in the evidence that B  
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A Sanjay Rai (A-5), when he was returning back from bridegroom's place on cycle, was beaten. Therefore, it appears that the accused persons had carried a grudge and seeing Ram Babu (PW-6), the brother-in-law of Shankar Rai's bride, there was an instantaneous reaction on their part. It has come in the  
B evidence that Ram Babu (PW-6) was slapped and fisted when he had finished his meals and was going for rest. The presence of Ram Babu (PW-6) acted as a flash point; perhaps it reminded the accused persons and more particularly, Sanjay Rai (A-5), of the insult meted out to them and then the idea of  
C taking revenge emerged. What happened is that deceased Shankar Rai seeing that his wife's relation was being slapped and fisted by the accused persons, had resisted the attempt on the part of the accused persons and that ultimately proved to be a *raison d'etre* of his death. Therefore, there is no doubt  
D in our mind that this was undoubtedly done with a common object of teaching lesson to deceased Shankar Rai who had taken – as was expected– side of Ram Babu (PW-6), the brother-in-law of his bride. What is liable to be seen is as to  
E 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 under Section 149 IPC is crystal clear that even the presence  
F in the unlawful assembly, but with an active mind, to achieve the common object makes such a person vicariously liable for the acts of the unlawful assembly. In that light, when the evidence  
G is examined, it is obvious that Amerika Rai (A-1) who was the elder in the family and father of Darbesh Rai (A-2), Mithilesh Rai (A-4) and Chulhan Rai (A-3), instead of acting in a responsible manner and preventing any unpleasant incident, exhorted the accused persons to bring the gun. The guns are  
H normally not brought for making a show. The exhortation to bring the gun definitely speaks about the guilty mind of Amerika Rai (A-1), so also the use of guns by Mithilesh Rai (A-4), Sanjay Rai (A-5) and Sipahi Rai (A-6) is very clear that they also had guilty mind. Mithilesh Rai (A-4) went to the extent of injuring Dineshwar Rai (PW-7). Therefore, even their presence and part;

played by them was obviously pointing towards the common object of committing murder of Shankar Rai. Unfortunately, Shankar Rai became the victim of the circumstances. The accused persons had nothing to do with Shankar Rai. Their main ire was directed at Ram Babu (PW-6). But, perhaps because Shankar Rai took side of Ram Babu (PW-6), he became the victim of circumstances and had to pay with his own life. Therefore, at least insofar as these persons are concerned, their presence and their active participation would make them guilty under Section 149 IPC, though the author of the injury to Shankar Rai was Chulhan Rai (A-3) whose appeal has already been dismissed.

8. However, that cannot be said about Darbesh Rai (A-2). He had been given the role of standing in the door of his house with a lathi. We feel that the evidence of the eye-witnesses that he was instigating the other accused persons to fire, appears to be an exaggeration. He would not have kept on standing there holding a lathi had he shared the intention and the common object of committing murder of Shankar Rai. In our opinion, the role of Darbesh Rai (A-2), as attributed to by the eye-witnesses, should not make him vicariously liable. We, therefore, grant benefit of doubt to Darbesh Rai (A-2) and acquit him.

9. It was tried to be suggested, relying on the defence witnesses, namely, Ajit Kumar Singh (DW-1) and Ram Dhani Chaudhary (DW-2), that Chulhan Rai (A-3) did not have any gun, as his gun was deposited in Singh Gun House. This argument is already rejected by trial and appellate Courts and we also endorse the finding. Insofar as Ram Dhani Chaudhary (DW-2) is concerned, he stated that there was a distance of 250 feet in between the house of Chulhan Rai (A-3) and deceased Shankar Rai and there was a pond in between their houses. He also found brick bats in front of the house of the deceased and Chulhan Rai (A-3). Thereby it was suggested that there was exchange of brick bats between the parties. That

- A may be so. However, there is evidence that when Ram Babu (PW-6) was going for rest after the meals, he was actually fisted and slapped by Amerika Rai (A-1), Darbesh Rai (A-2), Chulhan Rai (A-3), Mithilesh Rai (A-4), Sanjay Rai (A-5) and Sipahi Rai (A-6). When this was informed to Shankar Rai, Shankar Rai
- B came and made enquiry from Chulhan Rai (A-3) and then when there was exchange of abuses, the brick batting started between the parties. The evidence of Ram Dhani Chaudhary (DW-2), S.D.P.O., does not in any manner shake the prosecution case. It was not as if the defence came up with a
- C plea of right of private defence of person and property and indeed they could not have done so as they were the aggressor party using guns. We have considered the defence evidence also at the instance of both the learned counsel appearing on behalf of the defence and we do not find that this evidence
- D would in any manner help the prosecution.

10. In short, there can be no dispute about the formation of unlawful assembly and its common object. We, therefore, dismiss all the appeals excepting that of Darbesh Rai (A-2) who has been granted the benefit of doubt. He shall be acquitted.
- E All the accused persons are, therefore, held guilty and their appeals are dismissed excepting that of Darbesh Rai (A-2) whose appeal is accepted and who is directed to be released forthwith unless required in any other matter. His bail bonds are discharged. It is reported that accused No.1, Amerika Rai is
- F on bail. He shall be taken into custody immediately for serving out rest of the sentence. His bail bonds are cancelled.

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Appeals disposed of.