HARADHAN DAS

v.

STATE OF WEST BENGAL

(Criminal Appeal No. 148 of 2007)

DECEMBER 13, 2012

[SWATANTER KUMAR AND MADAN B. LOKUR, JJ.]

Penal Code, 1860 – ss. 302/149 – Murder – Five accused including the appellant-accused entering the house of the victims – Causing death of one and injuries to two – Eyewitnesses to the incident – Appellant-accused identified by the witnesses including injured witnesses – Three witnesses declared hostile – Accused charged u/ss. 148, 302/149, 326/149 and 460 IPC – One of the accused died during trial and hence the case against him abated – Trial court acquitted three accused and convicted the appellant-accused u/s. 302/149 – The order of trial court was confirmed by High Court – On appeal, held: Prosecution proved its case beyond reasonable doubt – Presence of eye-witnesses (two of them injured) at the place of occurrence is not doubtful – Their evidence is also corroborated by the three hostile witnesses – The evidence of injured witnesses were also corroborated by medical evidence and evidence of Investigating Officer – Other accused even if acquitted u/s. 302/149 on account of lack of evidence for having pre-determined mind and for not having been identified, appellant accused could be convicted u/s. 302 as there was direct evidence against him – Appellant-accused could also have been convicted with the aid of s. 149 – If five or more accused are charged u/s. 302 r/w s. 149 and if identification, role and object in participation against some accused not proved, still others against whom the case is proved, can be punished with the aid of s. 149 – s. 149 would include the acquitted persons – Conviction affirmed.

Witness – Hostile witness – Evidentiary value – Held:

A *Evidence of such witness, so far as it supports the prosecution case, is admissible.*

Administration of Criminal Justice – Criminal case – Investigation took 4 years and trial took 14 years – Advice to the State and the courts to gear up administrative machinery, so that at least trial of heinous offence gets concluded within reasonable period.

Five accused, including the appellant-accused, were prosecuted for house-breaking and causing death of one and causing injuries to two. Son of the deceased, who was an eye-witness lodged FIR. However, he could not be examined in the court as he died during trial. Two of the witnesses were injured. The appellant-accused was duly identified by the injured witnesses as well as the other witnesses present in the house at the time of the occurrence. The accused were charged u/ss. 148, 302/149, 326/149 and 460 IPC. Trail against one of the accused abated because of his death. Trial court acquitted three accused on the ground that they were not identified and there was no direct evidence implicating them. The appellant-accused was convicted by trial court u/s. 302/149 IPC. The order of trial court was confirmed by High Court.

In appeal, the appellant contended that as there was common evidence against all the accused, the courts below could not have convicted him having acquitted other accused; that no specific role was assigned to him; that he was entitled to benefit of doubt as PWs 1, 3 and 5 were declared hostile; and that conviction with the aid of s. 149 IPC was not permissible.

The State contended that even if a case is not made out against the accused u/s. 302/149 IPC, still he could be convicted u/s. 460 IPC for which he was charged and tried.

Dismissing the appeal, the Court A

HELD: Per Swantanter Kumar, J:

1. The statements of PWs 1, 3 and 5, though declared hostile, do provide support to the case of the prosecution. They suggest that an incident of dacoity had taken place at the house of the deceased who was badly injured and taken to the hospital. There was a bomb blast at the house and the presence of these witnesses at the stated places cannot be doubted. It is a settled principle of law that the statement of a witness who has been declared hostile by the prosecution is neither inadmissible nor is it of no value in its entirety. The statement, particularly the examination-in-chief, in so far as it supports the case of the prosecution, is admissible and can be relied upon by the Court. [Paras 13 and 14] [993-H; 994-A-C] B C D

Bhajju @ Karan v. State of Madhya Pradesh (2012) 4 SCC 327 – relied on.

2. PW8, PW9 and PW10, the eye-witnesses are the witnesses whose presence at the place of occurrence cannot be doubted as they were sleeping in their own house at such late hour of night. Out of these three witnesses, PW9 and PW10 were injured. These witnesses have categorically stated that a number of people had gathered there and had taken their injured parents to the hospital. These facts are duly corroborated even by the hostile witnesses PW1, PW3 and PW5. In face of this evidence, it cannot be said that these witnesses are not reliable or truthful. Their statement cannot be doubted merely by the virtue of their close relationship with the deceased. At such late hour of the night, their presence in their own house was normal. In fact, these witnesses lost their close relation and had suffered serious injuries E F G H

A themselves. Thus, there is no occasion for them to falsely implicate the accused persons. As per the statement of the doctor and the investigating officer, the chain of events, as stated by the prosecution stands proved beyond reasonable doubt. These facts to some B extent are even corroborated by the statement of hostile witnesses. [Paras 20 and 21] [999-B-G]

3. The evidence of the injured witnesses has to be examined in light of the statement of the doctors and the investigating officers. The doctor specifically stated that C the wounds on the person of the deceased were sufficient to cause death and that the injuries were caused by a sharp weapon. To complete the chain of events, the prosecution had examined the investigating officer who conducted the investigation after it was D marked to him for investigation. He had gone to the spot, prepared the site sketch map, sent the dead body for post mortem examination and seized ruminants of the crackers from the spot, blood-stained earth and other articles under the seizure list. He recorded the statement E of various witnesses who stated that they could identify the dacoits. The statement of these witnesses read together clearly show that the prosecution has been able to prove its case beyond reasonable doubt. [Paras 21 and 23] [999-G; 1000-E-G]

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4. The trial court acquitted the accused persons except the appellant, since there was no evidence of pre-determined mind of the accused persons to commit such an offence and except the appellant, other accused were G not even identified. Even if other accused were acquitted in the above circumstances for an offence under Section 302/149 IPC, still there was direct evidence involving the appellant in committing the offence and particularly for causing the vital injuries to the deceased. The appellant had duly been identified by PW9, wife of the deceased H

who was present in the room itself. There is no reason to disbelieve her statement. The injuries were caused with the intention to kill the deceased and they were caused on the vital parts of the body. From the medical evidence on record itself, it is clear that the ribs of the deceased were fractured, the abdominal wall was injured and on the head there was an injury which continued to bleed till death of the deceased. Due identification of role attributable to the appellant clearly establishes the ingredients of Section 302 IPC and thus, makes him liable to be punished for the said offence. [Para 25] [1001-D-H]

5. If five or more accused are charged with an offence under Section 302 read with Section 149 IPC and the Court finally finds that the person's identification, role and object in participation against some of those accused is not proved, still other persons forming the unlawful assembly and against whom the prosecution is able to prove its case beyond reasonable doubt can be punished for an offence under Sections 302/149 IPC. The statutory principle provided under the provision of Section 149 IPC will include the persons who were acquitted because that is the case of the prosecution. The conviction recorded by the trial court cannot be vitiated on that ground. [Para 26] [1002-A-C]

Khem Karan and Ors. v. The State of U.P. and Anr. AIR 1974 SC 1567: 1974 (3) SCR 863 – relied on.

6. The accused persons were charged for the offence u/s. 460 IPC and were tried for the same offence. The trial court has not returned any finding as to the guilt of the accused under Section 460 IPC and found the accused persons guilty of the offence under Section 302 read with Section 149 IPC. Even the High Court has not dwelled upon this discussion. The bare reading of s. 460 IPC shows that every person who is jointly concerned in

committing the offence of lurking house trespass by night or house breaking by night is to be punished with life imprisonment where death has been caused or with imprisonment which may extend to ten years where grievous hurt has been caused to any person. This joint liability is based upon the principle of constructive liability. Thus, the person who has actually committed the death or grievous hurt would be liable to be punished under the relevant provisions i.e. Section 302 or Section 326, as the case may be, while committing the offence of lurking house trespass by night. It is possible that common intention or object be not the foundation of an offence under Section 460 IPC. Thus, to establish an offence under Section 460, it may not be necessary for the prosecution to establish common intention or object. Suffice it will be to establish that they acted jointly and committed the offences stated in Section 460 IPC. The principle of constructive liability is applicable in distinction to contributory liability. Thus, the conviction of the accused under Section 302 IPC itself would be sustainable and the accused would be liable to be punished accordingly. [Paras 27, 28 and 29] [1003-A-B, F-H; 1004-A-B, D]

Abdul Aziz v. State of Rajasthan (2007) 10 SCC 283: 2007 (5) SCR 1166 – relied on.

Per Madan B. Lokur, J: (Supplementing)

In the present case, the investigation took almost four years to complete, despite eye-witnesses who knew the appellant. The trial concluded after another 14 years or about 18 years after the murder. This is a rather unhappy state of affairs. It is high time that the State and the Courts gear up their administrative machinery so that at least a trial for a heinous offence gets concluded within a reasonable period. [Para 2] [1004-G-H]

Case Law Reference:

(2012) 4 SCC 327	**Relied on**	**Para 14**
1974 (3) SCR 863	**Relied on**	**Para 26**
2007 (5) SCR 1166	**Relied on**	**Para 28**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 148 of 2007.

From the Judgment & Order dated 20.05.2005 of the High Court of Calcutta in Criminal Appeal No. 280 of 2001.

Rohit Minocha for the Appellant.

Kabir Shankar Bose, Abhijit Sengupta, Satish Vig for the Respondent.

The Judgments of the Court was delivered by

SWATANTER KUMAR, J. 1. The present appeal is directed against the concurrent judgment of conviction dated 29th June, 2001 and order of sentence dated 30th June, 2001 passed by the learned Additional Sessions Judge, Cooch Behar affirmed by judgment of the High Court dated 20th May, 2005.

2. The investigative machinery of the police was put into motion by one Shri Somnath Mukherjee son of Shri Barindra Nath Mukherjee, the deceased, by lodging a written complaint at about 8.00 a.m. on 9th October, 1983. According to the complainant at about 12.00 a.m. a dacoity took place in the house of Barindra Nath Mukherjee. It was further stated that 3-4 persons armed with weapons, criminally trespassed into the house, committed dacoity and also hurled bombs. First, they entered into the room of Barindra Nath Mukherjee and his wife Anuva Mukherjee, PW9, assaulted them and demanded the documents relating to their land-property. Thereafter, they entered into the room of the daughter of Barindra Nath

A Mukherjee and searched for their only son, Somnath Mukherjee. The miscreants then attacked the room of the brother of Barindra Nath Mukherjee, Jiten Mukherjee, PW10 and even threw a bomb causing injury to the said Jiten. Barindra Nath Mukherjee, his wife, Anuva and brother Jiten were taken B to the hospital the next morning. Due to the injuries inflicted by the miscreants upon Barindra Nath Mukherjee, he succumbed to his injuries in the hospital.

3. On the basis of the written complaint, the Police completed its investigation and submitted a charge sheet C against five accused persons, namely, Chandra Kumar Das, Ram Kumar Das Rabindra Nath Sil, Haradhan Das and Krishna Kumar Das under Sections 458, 459, 326, 302 and 120B of the Indian Penal Code, 1860 (for short 'IPC'). However, charge against the accused persons were framed D under Sections 148, 302/149, 326/149 and 460 of the IPC. The accused persons were committed to the Court of Sessions to face trial on these charges.

4. It may be noticed here that during the trial, one of the E accused, namely, Krishna Kumar Das, died. Thus, the case against him came to be closed as having been abated. The prosecution examined as many as 18 witnesses including the daughter, injured witnesses, investigating officer, etc. The accused persons did not lead any defence and took up the plea F of complete denial in their statement under Section 313 of the Code of Criminal Procedure, 1973 (for short 'CrPC'). The learned Trial Court, after discussing the ocular and the documentary evidence noticed that there was a long standing civil litigation between the parties and also found certain discrepancies in the case of the prosecution. It acquitted three G accused persons, namely, Chandra Kumar Das, Ram Kumar Das and Rabindra Nath Sil of all the charges and directed their discharge. However, the Trial Court convicted the accused Haradhan Das for an offence punishable under Section 302/ 149 IPC and sentenced him to life imprisonment and to pay a H

fine of Rs.10,000/- and in default to suffer imprisonment for one year under the said provision. A

5. At this stage, I may usefully refer to the discussion of the Court as under:

> "I think on the facts and evidence of the witnesses as discussed above coupled with the medical evidence that there were no serious discrepancies between the testimonies of P.Ws.8 to 10, 14 and 15 and the story of the F.I.R. regarding the time, place and manner of occurrence and the name of the assailants as disclosed by P.Ws.8 to 10, 14 and 15 and duly corroborated by P.Ws.2 and 4, the evidence as it was held in a reported decision that the evidence of an eye witness were held to be true and reliable and it was further held that some discrepancies, deviating and embellishment a minor. This part of argument of learned lawyer for the defence since rather hallow to me as because there are many occasions where Haradhan and the accused persons have chances to meet the family members of Barin Muherjee. Now, from the side of the defence the certified copy of the plaint of T.S. 23/62 (Ext.A), certified copy of judgment of decree of Title Appeal no.20/63 (Ext.B), certified copy of judgment and decree of T.S. 23/62 (Ext.C) and certified copy of Appeal (Ext.D) are filed but all these exhibits do not at all help the accused persons. These only show that there are long standing Civil litigation in between the accused persons and the family member of Barin Mukherjee but pendency of these civil litigation or result does not give any person right to commit murder. If the witnesses who are near relation to Barin Mukherjee have hatred for the accused persons then they promptly named or identified all the four accused persons facing trial in the instant case. But Anuva Mukherjee and her three daughters and Daor have only stated that they have been able to identify Haradhan Das among the other miscreants. The presence

B C D E F G H

A of Anuva Mukherjee at the spot cannot be doubted. After perusing the evidence of Anuva Mukherjee and her daughters there is no such confimrity (sic) which may call upon the testimony of these witnesses doubtful or untrustworthy. It was held in a Calcutta decision that when B there was no serious discrepancy between the testimony of eye witness and the story in the F.I.R. regarding the time, place and manner of the occurrence and the name of the assailants, the testimony of eye witness were also corroborated by medical evidence, the evidence of eye C witness was held to be true and reliable and it was further held that some discrepancies deviation and embellishment in minor details do not warrant rejection of the entire testimony. May be I pointed earlier that according to settled position of law the evidence of injured witnesses as in this case Anuva Mukherjee (P.W.9) cannot be easily D discarded and disbelieved because their presence at the time of occurrence remains doubted. Merely because their relation to each other, their evidence cannot be thrown overboard on that ground alone when there are convincing reason to accept them.

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Thus, it is established from the evidence adduced from the prosecution side as well as from the defence that the injury upon Barin Mukherjee is done by Haradhan Das. Thus, I have no hesitation to hold that Haradhan Das is F responsible for the murder of Barin Mukherjee but there is no sufficient evidence to show who assaulted Anuva Mukherjee (P.W.9) and Jiten Mukherjee (P.W.10) have not stated anything against other three accused persons and so they are entitled to get reasonable benefit of doubt. G Thus, the prosecution has been able to bring home the charge under Section 149/302 IPC against the accused Haradhan Das and the accused Chandra Kumar Das, Ram Kumar Das and Rabindra Nath Sil are entitled to get reasonable benefit of doubt in the instant case.

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In the premises, on consideration of the facts, circumstances and materials on record the prosecution, as I find, has been able to bring home the charge under Section 149/302 IPC against the accused Haradhan Das beyond all reasonable doubt. As such, the said accused Haradhan Das is found guilty under Section 149/302 I.P.C. and the accused Chandra Kumar Das, Ram Kumar Das and Rabindra Nath Sil are found not guilty of the charge labelled against them and as such they are acquitted from this case under Section 235(1) Cr.P.C. and be discharged from their respective bail bonds at once."

6. The High Court affirmed the judgment of the Trial Court. Aggrieved from the judgment of the High Court, Haradhan Das, the accused, has filed the present appeal before this Court.

7. The learned counsel appearing for the appellant has, with some vehemence, argued that :

(a) There was common evidence against all the accused persons and the learned Trial Court as well as the High Court having acquitted three other accused persons could not have returned a finding of conviction against the appellant. Conviction of the appellant was not even permissible with the aid of Section 149 IPC. The judgment under appeal, thus, suffers from a patent error of law and that of appreciation of evidence.

(b) No specific role was assigned to the appellant and, therefore, he could not be convicted for the offence.

(c) PW1, PW3 and PW5 had been declared hostile by the prosecution. This aspect seen in conjunction with the fact that no recoveries were made from the appellant, he was entitled to benefit of doubt and, thus, to an order of acquittal.

A 8. To the contra, the submission on behalf of the State is that the accused has rightly been convicted for an offence under Section 302/149 IPC. Even if, for the sake of argument, it is assumed that the said offence was not made out, still the appellant could be convicted for committing an offence under
B Section 460 IPC, the offence for which the accused was charged and tried.

9. From the above version of the prosecution, it is clear that the miscreants had come to the house of Barindra Nath Mukherjee on 9th October, 1983. They had committed dacoity,
C injured persons including Barindra Nath Mukherjee very seriously and had even asked for the papers of the land-property for which a civil dispute was pending between the parties.

D 10. First and foremost, I may deal with the effect of the hostile witnesses. PW1, Bhiguram Sealsarama in his examination-in-chief has stated that he was sleeping on the night of occurrence at his house and after hearing the hue and cry, two persons namely Dhurjadhan Sarkar and Aloke had
E come to his house and told him that the condition of Somnath's father was serious. He made his statement 13-14 years subsequent to the date of event. He stated that one Khagen had taken father of Somnath on rickshaw to the hospital while he had taken Somnath and his mother to the hospital. After
F reaching the house of Barindra Nath Mukherjee, at about 1.00 a.m. in the night he had heard that a dacoity had taken place in that house. He also heard that the dacoits had hurled bombs. However, he stated that he did not know who had committed the dacoity. Subsequently, he was declared hostile by the
G prosecution.

11. PW3, Khagen Das, stated that at about 1.00 a.m. in the night a dacoity was committed in the house of Barindra Nath Mukherjee. There was a *pucca* road between his house and the house of Barindra Nath Mukherjee. He also rushed to the
H house of Barindra Nath Mukherjee after hearing the hue and

cry from that house. He found Barindra Nath Mukherjee in blood-stained condition with head injury. His wife had also sustained serious injuries all over her body. Barindra Nath Mukhrejee's younger brother had also received injury by bomb. In his van he had taken Sima, Barindra Nath Mukherjee and Hiru to MJN Hospital, Cooch Behar. He had heard from members of the family of Barindra Nath Mukherjee that 6-7 persons had committed dacoity in their house. However, they did not tell him who had committed the dacoity at that stage. He was also declared hostile.

12. PW5, Bidhan Das stated that about 17 years ago, an incident had taken place at Barindra Nath Mukherjee's house. He was a member of the R.G. party who were patrolling from village to railway over bridge of the pucca road. A jeep was coming from Alipurduar side near the village and before they could reach near the jeep, it went away towards the southern direction. The jeep came back after 10-15 minutes when they were on the *pucca* road. They heard the sound of door breaking from a distance. There were sounds of hue and cry. Some people came to them and after crossing the bridge they heard the sound of a bomb blast. People started walking towards the house and on the way they saw that Barindra Nath Mukherjee was being taken to the hospital by the rickshaw van. They walked towards Barindra Nath Mukherjee's house. According to this witness, Barindra Nath Mukherjee had three daughters who were present in the house and the young daughter Latu was his student. At their request PW5 along with the members of his party stayed in the house of the deceased, Barindra Nath Mukherjee, till the next morning but they did not inform or disclose the identity of the miscreants. At this stage, this witness was declared hostile.

13. No doubt, these three witnesses were declared hostile by the prosecution but still one fact remains that the examination-in-chief and particularly the above recorded portions of their statements do provide support to the case of

A the prosecution. They suggest that an incident of dacoity had taken place at the house of Barindra Nath Mukherjee who was badly injured and taken to the hospital. There was a bomb blast at the house and the presence of these witnesses at the stated places cannot be doubted. One of them was staying opposite
B to the house of Barindra Nath Mukherjee while the other was at some distance and PW5 was on R.G. Duty.

14. It is a settled principle of law that the statement of a witness who has been declared hostile by the prosecution is
C neither inadmissible nor is it of no value in its entirety. The statement, particularly the examination-in-chief, in so far as it supports the case of the prosecution is admissible and can be relied upon by the Court. It will be useful at this stage to refer to the judgment of this Court in the case of *Bhajju @ Karan v. State of Madhya Pradesh* [(2012) 4 SCC 327] where this Court,
D after discussing the law in some elaboration, declared the principle as follows:-

"**33.** As already noticed, none of the witnesses or the authorities involved in the recording of the dying
E declaration had turned hostile. On the contrary, they have fully supported the case of the prosecution and have, beyond reasonable doubt, proved that the dying declaration is reliable, truthful and was voluntarily made by the deceased. We may also notice that this very judgment,
F *Munnu Raja* (1976) 3 SCC 104 relied upon by the accused itself clearly says that the dying declaration can be acted upon without corroboration and can be made the basis of conviction.

34. Para 6 of the said judgment reads as under: (*Munnu*
G *Raja case*, SCC pp. 106-07)

"6. ... It is well settled that though a dying declaration must be approached with caution for the reason that the maker of the statement cannot be subject to cross-examination,
H there is neither a rule of law nor a rule of prudence which

has hardened into a rule of law that a dying declaration cannot be acted upon unless it is corroborated (see *Khushal Rao* v. *State of BombayAIR 1948 SC 22*). The High Court, it is true, has held that the evidence of the two eyewitnesses corroborated the dying declarations but it did not come to the conclusion that the dying declarations suffered from any infirmity by reason of which it was necessary to look out for corroboration."

35. Now, we shall discuss the effect of hostile witnesses as well as the worth of the defence put forward on behalf of the appellant-accused. Normally, when a witness deposes contrary to the stand of the prosecution and his own statement recorded under Section 161 CrPC, the prosecutor, with the permission of the court, can pray to the court for declaring that witness hostile and for granting leave to cross-examine the said witness. If such a permission is granted by the court then the witness is subjected to cross-examination by the prosecutor as well as an opportunity is provided to the defence to cross-examine such witnesses, if he so desires. In other words, there is a limited examination-in-chief, cross-examination by the prosecutor and cross-examination by the counsel for the accused. It is admissible to use the examination-in-chief as well as the cross-examination of the said witness insofar as it supports the case of the prosecution.

36. It is settled law that the evidence of hostile witnesses can also be relied upon by the prosecution to the extent to which it supports the prosecution version of the incident. The evidence of such witnesses cannot be treated as washed off the records, it remains admissible in trial and there is no legal bar to base the conviction of the accused upon such testimony, if corroborated by other reliable evidence. Section 154 of the Evidence Act enables the court, in its discretion, to permit the person, who calls a witness, to put any question to him which might be put in

A cross-examination by the adverse party.

37. The view that the evidence of the witness who has been called and cross-examined by the party with the leave of the court, cannot be believed or disbelieved in part and has to be excluded altogether, is not the correct exposition B of law. The courts may rely upon so much of the testimony which supports the case of the prosecution and is corroborated by other evidence. It is also now a settled canon of criminal jurisprudence that the part which has been allowed to be cross-examined can also be relied C upon by the prosecution. These principles have been encompassed in the judgments of this Court in the following cases:

a. *Koli Lakhmanbhai Chanabhai v. State of Gujarat* D (1999) 8 SCC 624

b. *Prithi v.State of Haryana* (2010) 8 SCC 536

c. *Sidhartha Vashisht @ Manu Sharma v. State (NCT of Delhi)* (2010) 6 SCC 1

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d. Ramkrushna v. State of Maharashtra (2007) 13 SCC 525".

15. Another important aspect of the case is that all these witnesses had appeared at the place of occurrence or near the F place of occurrence or in the house of Barindra Nath Mukherjee only after the incident was over. Even if these witnesses were informed by some other persons as to how the incident had occurred or other persons including injured persons as to how the incident took place once they arrived at the place of G occurrence, it may not have been a very valuable piece of evidence as *ex facie* it would be hearsay evidence. It is not the quantity but the quality of evidence which is of Court's concern.

H 16. Now, I should examine the above version stated by

these hostile witnesses in conjunction with the statement of the eye-witnesses and other crucial witnesses produced by the prosecution. Unfortunately, Somnath Mukherjee, son of the deceased who was an eye-witness to the entire episode right from the beginning to the end, died during the pendency of the trial without appearing in the Court as a witness. According to PW10, Jiten Mukherjee, Somnath Mukherjee, son of the deceased on the relevant date, was sleeping in the western side room of southern viti with him. His four nieces along with their maternal uncle Biswajit were sleeping in the eastern side of the room of the southern viti. According to this witness, at about 12.30 a.m., he had heard hue and cry from the room of his elder brother, late Barindra Nath Mukherjee. He had also heard a person demanding papers from his elder brother. Then there was total silence. In the light of a torch which was in the hands of the miscreants, he was able to identify Haradhan Das. He could even identify this accused from his voice. He stated that he knew Haradhan Das prior to the incident. Then, the miscreants entered into the room of his niece by breaking open the door. They were looking for Somnath. Sima, his niece, informed them that Somnath was out of station. He heard all of this and saw the accused Haradhan Das by peeping through the wall made of bamboo. Sima offered articles to miscreants but they refused to take anything. When the miscreants were moving in the courtyard, PW10 was able to identify Ram Kumar Das and Chandra Kumar Das in the light of the torch. They were armed with bamboo sticks. The miscreants then hurled a bomb in the room where this witness was staying. He suffered injuries on his leg as a result of the bomb. Thereafter, they fled away and when PW10 came out of his room and rushed to his elder brother's room, he found that his brother was bleeding and was badly injured and that his sister-in-law had become unconscious. A lot of other people had also gathered there. PW10 narrated the incident to them and shifted the injured to the hospital. The inquest report, Ext.2 was prepared in his presence and it bore his signatures. He identified the accused persons in Court.

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A 17. PW8, Smt. Sima Mukherjee is the daughter of the deceased. According to this witness, she along with her sisters and maternal uncle, Biswajit Chatterjee, was sleeping in the eastern side of the room of southern viti. She heard sound of door of the room of her father breaking. She woke up and B heard her parents crying. She also recognized Haradhan Das from his voice as well as the other accused. She confirmed that the accused were asking for her brother, Somnath. After the miscreants left the premises, they took their parents to hospital in two rickshaw vans and on the way, her mother told C her that they were assaulted by Haradhan Das and that she had identified him in the torch light. The accused, Haradhan Das, Ram Kumar Das and Chandra Kumar Das were identified by Sima, her uncle, PW10, and her brother Somnath. On the next day, her father died of the injuries. In her statement, she D categorically stated that there was a long standing dispute between the accused and her father which they had won and the judgment had been passed in their favour. She also stated that many people had assembled at the place of incident.

18. PW9, Anuva Mukherjee, is an injured eye-witness and E is wife of the deceased. She stated that there was dacoity in their house at about 12.30 a.m. on 8th October, 1983. She gave complete description of her family and stated that three miscreants had entered into their room by breaking open the door and after entering they demanded the deed of their land F and other documents relating thereto. She told them that the papers were in Court but on hearing that they pulled down the deceased from the cot and started assaulting him with weapons. The deceased begged for mercy but to no avail. As a result of the assault, her husband Barindra Nath Mukherjee sustained G serious injuries. Then they assaulted her by giving her a dagger blow on her head and even she sustained injuries. Thereafter she became unconscious. She could identify Haradhan Das in the light of the torch. She heard about the rest of the incident from her Devar, PW10, Jiten and her daughter.

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19. PW 14 and PW15, namely, Ketaki and Shipra, the daughters of the deceased were also examined as witnesses and they duly supported the case of the prosecution on similar lines as PW8, PW9 and PW10. They had also identified Haradhan Das in light of the torch.

20. All these three witnesses, PW8, PW9 and PW10 were cross-examined at great length but nothing material or damaging to the case of the prosecution could come out. These are the witnesses whose presence at the place of occurrence cannot be doubted as they were sleeping in their own house at such late hour of night. Out of these three witnesses, PW9 and PW10 were injured. These witnesses have categorically stated that a number of people had gathered there and had taken their injured parents to the hospital. These facts are duly corroborated even by the hostile witnesses, PW1, PW3 and PW5. In face of this evidence, the contention of the appellant that these witnesses are not reliable or truthful is without any substance. Their statement cannot be doubted merely by the virtue of their close relationship with the deceased. At such late hour of the night, their presence in their own house was normal. In fact, these witnesses lost their close relation and had suffered serious injuries themselves. Thus, there is no occasion for them to falsely implicate the accused persons. As per the statement of the doctor and the investigating officer, the chain of events, as stated by the prosecution stands proved beyond reasonable doubt. To this extent, the findings recorded by the Courts do not call for interference.

21. These facts to some extent are even corroborated by the statement of hostile witnesses PW1, PW3 and PW5. The evidence of the injured witnesses has to be examined in light of the statement of the doctors and the investigating officers. According to PW16, Dr. V. Kumar who had examined Barindra Nath Mukherjee when he was brought to the hospital, the son of the patient had disclosed to him that the patient was attacked by some persons at his residence at about 12.30 a.m. with

A some sharp weapon. The patient was extremely restless, his pulse was not recordable and respiration was 30 per minute. There was active bleeding from the left ear. The injuries on the deceased were noticed as follows:-

B "1. One sharp cut injury 3½" x 1" over deep encircling the base of left thumb & dorsal and palmar aspect of left palm.

2. Another sharp cut injury 2½" x 1" over lateral aspect of lower 1/3rd of left arm."

C 22. According to PW16, the patient Barindra Nath Mukherjee died on the same day, i.e. 9th October, 1983. The post mortem on the body of the deceased was performed by PW11, Dr. S.C. Pandit, who noticed the above injuries and also stated in the Court that upon dissection, he noticed that the D abdominal wall and the spleen were injured and there was a fracture in the left temporal.

23. The doctor specifically stated that these kind of wounds were sufficient to cause death and that the injuries were caused by a sharp weapon. To complete the chain of events, the E prosecution had examined PW18, the investigating officer who conducted the investigation after it was marked to him for investigation. He had gone to the spot, prepared the site sketch map, Ext.8, sent the dead body for post mortem examination and seized ruminants of the crackers from the spot, blood F stained earth and other articles under the seizure list Ext. 4/1. He recorded the statement of various witnesses who stated that they could identify the dacoits. The statement of these witnesses read together clearly show that the prosecution has been able to prove its case beyond reasonable doubt. I see G no reason to interfere with the findings of the Court, recorded in the judgments impugned in the present appeal.

24. The accused persons were charged under Section 302 read with Sections 149, 148 and 326 as well as Section 460 IPC. The FIR had been lodged by Somnath Mukherjee, son H

of the deceased who, as already noticed, expired during the course of the trial. As per the statement of witnesses, the miscreants were five in number. The present appellant had duly been identified by the injured witnesses as well as by other persons who were present in the house at the time of occurrence. The Trial Court acquitted three accused primarily on the ground that they had not been identified and there was no direct evidence implicating the said three accused in the commission of the crime. This finding of the Trial Court had attained finality as the State did not challenge the same. One accused died during the trial.

25. The appellant alone has been found guilty and punished by the Trial Court and his sentence stands confirmed by the High Court. Five persons had got together to commit the offence of lurking house trespass and causing the death of Barindra Nath Mukherjee. Since there was no evidence of pre-determined mind of the accused persons to commit such an offence and except the appellant other accused were not even identified, the Trial Court acquitted the accused persons except the appellant. Even if other accused were acquitted in the above circumstances for an offence under Section 302/149 IPC, still there was direct evidence involving the appellant in committing the offence and particularly for causing the vital injuries to the deceased. The appellant had duly been identified by PW9, wife of the deceased who was present in the room itself. There is no reason to disbelieve her statement. The injuries were caused with the intention to kill the deceased and they were caused on the vital parts of the body. From the medical evidence on record itself, it is clear that the ribs of the deceased were fractured, the abdominal wall was injured and on the head there was an injury which continued to bleed till death of the deceased. Due identification of role attributable to the appellant clearly establishes the ingredients of Section 302 IPC and thus, makes him liable to be punished for the said offence.

A 26. If five or more accused are charged with an offence under Section 302 read with Section 149 IPC and the Court finally finds that the person's identification, role and object in participation against some of those accused is not proved, still other persons forming the unlawful assembly and against whom B the prosecution is able to prove its case beyond reasonable doubt can be punished for an offence under Sections 302/149 IPC. The statutory principle provided under the provision of Section 149 IPC will include the persons who were acquitted because that is the case of the prosecution. The conviction C recorded by the Trial Court cannot be vitiated on that ground. This Court in the case of *Khem Karan and Others v. The State of U.P. and Another* [AIR 1974 SC 1567], while discussing somewhat similar circumstances and dealing with an offence under Section 307 read with Section 149 IPC, applied the D principle of constructive liability and held as under:-

> "7. What remains is the question of sentence. It is true that those assailants who did not receive injuries have escaped punishment and conviction has been clamped down on those who have sustained injuries in the course of the E clash. It is equally true that those who have allegedly committed the substantive offences have jumped the gauntlet of the law and the appellants have been held guilty only constructively. We also notice that the case has been pending for around ten years and the accused must have F been in jail for some time, a circumstance which is relevant under the new Criminal Procedure Code though it has come into operation only from April 1, 1974. Taking a conspectus of the various circumstances in the case, some of which are indicated above, we are satisfied that G the ends of justice would be met by reducing the sentence to three years rigorous imprisonment under S. 307, read with S. 149, and one year rigorous imprisonment under S. 147, IPC, the two terms running concurrently. With this modification regarding sentence, we dismiss the appeal."

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27. There is another perspective from which the present case can be examined. As already noticed, the accused persons were charged for the offence under Section 460 IPC and were tried for the same offence. The Trial Court has not returned any finding as to the guilt of the accused under Section 460 IPC and found the accused persons guilty of the offence under Section 302 read with Section 149 IPC. Even the High Court has not dwelled upon this discussion in the judgment impugned. The provisions of Section 460 IPC read as follows:-

> "**460. All persons jointly concerned in lurking house-trespass or house- breaking by night punishable where death or grievous hurt caused by one of them.**—If, at the time of the committing of lurking house-trespass by night or house- breaking by night, any person guilty of such offence shall voluntarily cause or attempt to cause death or grievous hurt to any person, every person jointly concerned in committing such lurkking house-trespass by night or house- breaking by night, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

28. The bare reading of the above provision shows that every person who is jointly concerned in committing the offence of lurking house trespass by night or house breaking by night is to be punished with life imprisonment where death has been caused or with imprisonment which may extend to ten years where grievous hurt has been caused to any person. This joint liability is based upon the principle of constructive liability. Thus, the person who has actually committed the death or grievous hurt would be liable to be punished under the relevant provisions i.e. Section 302 or Section 326, as the case may be, while committing the offence of lurking house trespass by night. It is possible that common intention or object be not the foundation of an offence under Section 460 IPC. Thus, to

establish an offence under Section 460, it may not be necessary for the prosecution to establish common intention or object. Suffice it will be to establish that they acted jointly and committed the offences stated in Section 460 IPC. The principle of constructive liability is applicable in distinction to contributory liability. This Court in the case of *Abdul Aziz v. State of Rajasthan* [(2007) 10 SCC 283], clearly stated that if a person committing housebreaking by night also actually commits murder, he must attract the penalty for the latter offence under Section 302 and the Court found it almost impossible to hold that he can escape the punishment provided for murder merely because the murder was committed by him while he was committing the offence of housebreaking and that he can only be dealt with under Section 460.

29. Viewed from this angle, the conviction of the accused under Section 302 itself would be sustainable and the accused would be liable to be punished accordingly.

30. For the reasons afore-recorded, I see no reason to interfere with the judgments impugned in the present appeal. Consequently, the appeal is dismissed.

MADAN B. LOKUR, J. 1. While agreeing with Brother Swatanter Kumar, I would like to add that the murder was committed on the intervening night of 8th and 9th October, 1983. A charge sheet was filed sometime in 1987 and the Trial Court delivered its judgment on 29th June, 2001. These time gaps are telling.

2. The investigation took almost four years to complete despite eyewitnesses who knew the appellant. The trial concluded after another 14 years or about 18 years after the murder. This is a rather unhappy state of affairs. It is high time that the State and the Courts gear up their administrative machinery so that at least a trial for a heinous offence gets concluded within a reasonable period.

K.K.T. Appeal dismissed.