'*REPORTABLE*'

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 382 OF 2015

IQBAL & ANR. ... Appellants

VERSUS

STATE OF UTTAR PRADESH ... Respondent

J U D G M E N T

The two appellants herein, along with four other persons, were charged for committing offences under Sections 148, 302, 302/149 as well as Section 307/149 of the Indian Penal Code, 1860 (IPC). First Information Report in this behalf was registered with Police Station Sahawar, District Etah, Uttar Pradesh. The case of the prosecution, as can be discerned from the FIR which was lodged by complainant-Netrapal (PW-1) on 24th March, 1985 at 9.05 a.m. and mentions the date and time of the incident as 23rd/24th March, 1985 at 00:30 hours, is to the following effect:

In the night of 23rd/24th March, 1985, the complainant-Netrapal, along with his father Sonpal, was sleeping in the *verandah* of their sitting room and his uncle Raghuvar Dayal, along with the brother of the complainant, viz., Bhoop Singh, was sleeping inside of the said sitting room. At about 12.30 a.m., six accused, viz., Genda Lal,

Ganpat, Sripal, Virendra, Ram Shankar Lodha and Iqbal came there armed with rifles and *katta*. They woke up the complainant's father-Sonpal and asked him where his son Chandrapal was. Hearing their voice, the complainant also woke up. His father told the accused persons that Chandarpal was plying rickshaw somewhere in Delhi and was not in the house. On hearing this, Genda started hurling filthy abuses and asked complainant's father as to where Bhoop Singh was, as they had come there to take revenge. At that very time, hearing the noise of these people, Bhoop Singh along with uncle Raghuvar Dayal woke up from sleep and came out of the room where they were sleeping. On seeing Bhoop Singh, Ganpat shouted loudly that he was Bhoop Singh and he could be killed as he was their enemy. On hearing this, Genda fired with his rifle at Bhoop Singh which hit Bhoop Singh and as a result thereof he fell down on the spot. Other persons also started firing from their rifles/weapons. The complainant came out running and raised alarm. On hearing his shouts, many persons from the village gathered there who also started shouting. Seeing all these persons from the village having gathered there, the accused persons fled away from the scene. Bhoop Singh succumbed to the injuries suffered by him. In the FIR, it was further mentioned that the dead body of Bhoop Singh was lying on the spot.

After recording of the aforesaid FIR, the police

reached the place of occurrence and inquest was done. The dead body was sent for postmortem. Two persons who sustained injuries viz., Raghuvar Dayal (PW-2) and Sonpal (PW-3), were sent for medical examination. The police took up the investigation and, thereafter, on completion of the investigation, filed chargesheet under Section 173 of the Code of Criminal Procedure, 1973 (Cr.P.C.) in the Court. Charges were framed under the aforesaid provisions.

The prosecution examined six witnesses which included three eye-witnesses viz., PW-1, PW-2 and PW-3, out of which PW-2 and PW-3 were injured eye-witnesses. Apart from these three witnesses, two doctors viz., Doctor O.P. Vaidya (PW-4) who had conducted post-mortem of Bhoop Singh and the Doctor who had medically examined the injured persons, were also examined. The Investigating Officer S.I. Dinesh Kumar Sisodiya, was examined as PW-5 and Head Constable Bhanwar Singh as PW-6. Statements of the accused persons were recorded under Section 313 Cr.P.C., who denied the material which had surfaced during the trial and with which they were confronted.

As per the postmortem report of Bhoop Singh, he suffered three ante mortem injuries. Two injuries were in the nature of abrasion below left eye and on chin, on left side which were not serious in nature. However, third injury which was the result of fire arm wound of entry 2X2 c.m.

through and cavity deep on left side front of neck middle part along with margins lacerated and inverted became fatal and, in the opinion of the Doctor (PW-4), death of Bhoop Singh was caused due to hemorrhage and shock as a result of the said fire arm injury.

Insofar as Sonpal is concerned, he suffered the following injuries:

> "Gunshot wound of entry 1/4Cm. X 1/4Cm. X depth not probed in the interest of the patient on the ant. Surface of right shoulder joint 8 1/2Cms. Below the clavicular joint. No shot palpable. Burning, singing, blackening and tattooing not present. Margins of the wound lacerated and inverted."

Injuries suffered by Raghuvar Dayal are described in the medical report in the following manner:

> "1. Two gunshot wound of entry 1/4Cm. X 1/4Cm. X depth not probed in the interest of the patient, on the left side of forehead 6 Cms. Apart from one another. Anterior wound is 6 Cms. Above the middle of left eye brow and posterior wound is 5 Cms. Above the left ear. Margins are inverted and lacerated No shot palpable. Burning, singing, blackening and tattooing not present. Advised X-ray of skull.
>
> 2. Abrasion 1 Cm. X 1 Cm. On the back of left fore-arm 7 1/2Cms. above the wrist joint."

It is clear from the nature of injuries suffered both by Sonpal and Raghuvar Dayal that they were hit by gun shots, whereas the place of wound insofar as Sonpal is concerned is on the surface of the right shoulder below the clavicular joint. Raghuver Dayal was hit by two gun shots on the left

side of forehead 6 cms. apart from one another. He also was shot on the back of left forearm above the wrist joint though the said shot caused abrasion of 1X1 c.m.

After analysing the evidence, the Trial Court came to the conclusion that five of the accused persons were armed with rifles and one with *katta* and they had formed an unlawful assembly with the common object of killing the persons from the victim's side. It is with this common object, they had fired on the family members of the complainant which resulted in the death of Bhoop Singh and the nature of injuries of PW-2 and PW-3 showed that there was an attempt to commit their murder as well. On the basis of these findings, all the six accused were convicted for offences under Section 148, Section 302 read with Section 149 as well as Section 307 read with Section 149 IPC.

All the six convicted persons filed appeal in the High Court of Judicature at Allahabad being Criminal Appeal No. 1240 of 1989 which has been dismissed by the High Court vide its judgment dated 11.12.2014 thereby confirming the conviction as well as sentences imposed by the Trial Court. Four of the convicted persons have died in the meantime. It is for this reason that there are only two appellants in the present appeal viz., Iqbal and Virendra.

Mr. Salman Khurshid, learned senior counsel appearing for the appellants, has contended that even as per the

prosecution, it is no case that there was previous animosity between the family of the victim on the one hand and Genda Lal and Ganpat on the other hand. Insofar as the two appellants Virendra and Iqbal are concerned, they are roped in only on the basis that they were friends of Genda Lal and Ganpat. He submitted that the prosecution witnesses have themselves stated that they included these two appellants as friends of Genda Lal and Ganpat. His statement was that there was no common object to kill the persons of the other side and, only as friends, these two appellants had accompanied Genda Lal, Ganpat and others. He further submitted that, in such circumstances, it had to be seen that whether there was any active role played by these two appellants. After reading through the depositions of the eye witnesses viz., PW-1, PW-2 and PW-3, he pointed out that even these witnesses only mentioned about the presence of these two appellants. No doubt, two of them stated that Virendra had also fired at them, but insofar as Iqbal is concerned, no specific role is attributed to him by any of the witnesses. As far as the appellant-Virendra is concerned, it was submitted that apart from stating that he had fired from the rifle he was carrying, no witness has stated as to whether the said rifle hit any of the persons. It was also submitted that the Investigating Officer (PW-5), in his deposition, accepted the fact of absence of pallets marks. Further no

cartridges, etc., were found on the spot and no evidence in this behalf was produced by the prosecution. On the basis of the aforesaid submissions, it was tried to be argued that the benefit of doubt could be extended to the two appellants. Mr. Khurshid referred to the judgment of this Court in '*Kuldip Yadav and others* v. *State of Bihar*' [2011 (5) SCC 324], in support of his statement that in order to attract the provisions of Section 149 IPC and to convict the accused of this provision, it was necessary for the Court to give specific findings about the said common object. It was also submitted that merely because the appellants were part of the unlawful assembly would not mean that they could be roped in for the offences under Sections 302 or 307 of the IPC unless it was shown as to what incriminating act was done by them to accomplish the common object of unlawful assembly. For this, he specifically referred to para 39 of the judgment which reads as under:

> **"39. It is not the intention of the legislature in enacting Section 149 to render every member of unlawful assembly liable to punishment for every offence committed by one or more of its members. In order to attract Section 149, it must be shown that the incriminating act was done to accomplish the common object of unlawful assembly and it must be within the knowledge of other members as one likely to be committed in prosecution of the common object. If the members of the assembly knew or were aware of the likelihood of a particular offence being committed in prosecution of the common object, they would be liable for the same under Section 149 IPC."**

Mr. Dash, learned senior counsel appearing for the State, countered the aforesaid submissions by pointing out that in the instant case, the testimonies of three eye-witnesses, two out of them injured eye-witnesses, were unblemished which had stood the test of severe cross examination and nothing could be pointed out which could dislodge their credibility. He further submitted that their ocular evidence matched with the medical evidence which was produced on the record which would further strengthen the case of the prosecution. It was argued that the FIR, which was lodged without any delay, names all the six persons who had formed unlawful assembly and had reached the place of the victims, which included the two appellants herein as well. All the eye-witnesses had mentioned about the presence of these two appellants with arms. Therefore, the prosecution was able to prove the occurrence of the incident as well as the presence of all the accused including the appellants there. He further pointed out that the manner in which the accused, armed with weapons, had come and executed their plan clearly showed that there was common objective of the unlawful assembly to eliminate the persons of the victim's family in which they partly succeeded as one person died and the other two received severe injuries. It was pointed out that, in the High Court, the validity of the judgment of the Trial Court was questioned only on two grounds, viz.: (a)

there was delay in lodging of the FIR; and (b) there was no sufficient light as the incident happened at 12.30 in the night and, therefore, the witnesses could not have identified or seen the accused persons.

He argued that both these aspects have been dealt with by the Trial Court as well as by the High Court in detail and even the defence could not argue about the justification of the conclusion arrived at in this behalf. He submitted that the common objective was clearly proved from the aforesaid circumstances. He referred to the decision in the case of '*Lalji and others* v. *State of U.P.*' [1989 (1) SCC 437] wherein the principles which are to be kept in mind while applying the provisions of Section 149 IPC are stated as follows:

> **"8. Section 149 IPC provides that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of the assembly knew to be likely to be committed in prosecution of that object, every person, who at the time of committing of that offence is a member of the same assembly, is guilty of that offence. As has been defined in Section 141 IPC, an assembly of five or more persons is designated an 'Unlawful Assembly', if the common object of the persons composing that assembly is to do any act or acts stated in clauses 'First', 'Second', 'Third', 'Fourth', and 'Fifth' of that section. An assembly, as the explanation to the section says, which was not unlawful when it assembled, may subsequently become an unlawful assembly. Whoever being aware of facts which render any assembly an unlawful assembly intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly. Thus, whenever so many as five or more persons meet together to support each other, even against**

opposition, in carrying out the common object which is likely to involve violence or to produce in the minds of rational and firm men any reasonable apprehension of violence, then even though they ultimately depart without doing anything whatever towards carrying out their common object, the mere fact of their having thus met will constitute an offence. Of course, the alarm must not be merely such as would frighten any foolish or timid person, but must be such as would alarm persons of reasonable firmness and courage. The two essentials of the section are the commission of an offence by any member of an unlawful assembly and that such offence must have been committed in prosecution of the common object of that assembly or must be such as the members of that assembly knew to be likely to be committed. Not every person is necessarily guilty but only those who share in the common object. The common object of the assembly must be one of the five objects mentioned in Section 141 IPC. 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 scene of occurrence. It is an inference to be deduced from the facts and circumstances of each case.

9. Section 149 makes every member of an unlawful assembly at the time of committing of the offence guilty of that offence. Thus this section created a specific and distinct offence. In other words, it created a constructive or vicarious liability of the members of the unlawful assembly for the unlawful acts committed pursuant to the common object by any other member of that assembly. However, the vicarious liability of the members of the unlawful assembly extends only to the acts done in pursuance of the common objects of the unlawful assembly, or to such offences as the members of the unlawful assembly knew to be likely to be committed in prosecution of that object. Once the case of a person falls within the ingredients of the section the question that he did nothing with his own hands would be immaterial. He cannot put forward the defence that he did not with his own hand commit the offence committed in prosecution of the common object of the unlawful assembly or such as the members of the assembly knew to be likely to be committed in prosecution of that object. Everyone must be taken to have intended the probable and natural results of the combination of the acts in which he joined. It is not necessary

that all the persons forming an unlawful assembly must do some overt act. When the accused persons assembled together, armed with lathis, and were parties to the assault on the complainant party, the prosecution is not obliged to prove which specific overt act was done by which of the accused. This section makes a member of the unlawful assembly responsible as a principal for the acts of each, and all, merely because he is a member of an unlawful assembly. 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. It must be noted that the basis of the constructive guilt under Section 149 is mere membership of the unlawful assembly, with the requisite common object or knowledge.

11. In the instant case after having held that the appellants formed an unlawful assembly carrying dangerous weapons with the common object to resorting to violence (as described in the charge) it was not open to the High Court to acquit some of the members on the ground that they themselves did not perform any violent act, or that there was no corroboration of their participation. In other words, having held that they formed an unlawful assembly and committed an offence punishable with the aid of Section 149 IPC, the High Court erred in examining which of the members only did actively participate and in acquitting those who, according to the court, did not so participate. Doing so would amount to forgetting the very nature and essence of the offence created by Section 149 IPC. The court in undeserving cases cannot afford to be charitable in the administration of criminal justice which is so vital for peace and order in the society."

After going though the records and considering the arguments of the counsel on either side, we are of the opinion that there is no error in the judgment of the Courts below convicting all the six accused persons, including the appellants, for the aforesaid offences. In the first instance, it may be mentioned that insofar as Virendra is

concerned, some of the witnesses have specifically attributed role to him as well, i.e., he also fired from the rifle which he was carrying. Presence of Iqbal also stands established.

In the instant case, where the moot question is as to whether there was common objective, if that is proved, then, in any case, the separate roles played by all the accused persons need not be examined as all the members of unlawful assembly would be vicariously liable for the acts done by the said assembly. There is a clinching evidence produced by the prosecution to show that all the six persons had come to the place of occurrence armed with deadly weapons. The moment they reached the house of the complainant and found the complainant along with his father Sonpal (PW-3) sleeping there, they woke them up and first asked as to where Chandrapal was. When they were told that Chandrapal was away to Delhi, they immediately asked for the whereabouts of Bhoop Singh. The moment Bhoop Singh appeared on the scene, Ganpat pointed out at him and told other members of the assembly that he was the person who could be finished. Immediately upon the exhortation of Ganpat in the aforesaid manner, Genda Lal fired at Bhoop Singh and other members, who were carrying rifles, also started firing.

Applying the ratio of *Lalji*'s case as stated above, it could safely be inferred that there was a common object to kill Chandrapal, Bhoop Singh and even others. As already

mentioned above, insofar as the occurrence and the presence of the six accused persons are concerned, it may not be doubted at all and have been proved to the hilt.

We, therefore, are of the opinion that the two appellants are rightly convicted for the aforesaid findings. Finding no merit in this appeal, the same stands dismissed.

......, J.
[A.K. SIKRI]

......, J.
[DR. D.Y. CHANDRACHUD]

New Delhi;
February 07, 2017.