

AFR

RESERVED ON 9.11.2021
DELIVERED ON 24.12.2021

Case :- CRIMINAL APPEAL No. - 2345 of 1983

Appellant :- Harnath Singh And Others

Respondent :- State of U.P.

Counsel for Appellant :- S.D.N. Singh, Pradeep Kumar Mishra, V.S. Sengar, Vinay Saran

Counsel for Respondent :- D.G.A., V.S. Chauhan

Hon'ble Manoj Misra, J.

Hon'ble Sameer Jain, J.

(Delivered by Hon'ble Sameer Jain, J.)

1. The present appeal was filed by seven appellants. The appeal of appellant no.1 (Harnath Singh); appellant no.2 (Vishwa Nath Singh); appellant no.3 (Shivnath Singh); appellant no.4 (Raghvendra Singh) and appellant no.6 (Aditya Singh) has already been abated, on account of their deaths, vide order dated 23.12.2015.

2. The appeal of appellant no.5 (Brijendra Singh) and appellant no.7 (Saleem) survives. Therefore, by way of present judgment, we will decide the appeal of appellant no.5 (Brijendra Singh) and appellant no.7 (Saleem) the surviving appellants.

3. Appellant no.5 (Brijendra Singh) and appellant no.7 (Saleem) have been convicted vide judgment and order dated 29.9.1983 passed by 2nd Additional Sessions Judge, Farrukhabad in Sessions Trial No.210

of 1981(State Vs. Harnath Singh and others) under Sections 302/149 IPC and under Sections 147 and 323 IPC and awarded life imprisonment for offences under Sections 302/149 IPC; and six months rigorous imprisonment for offence under Sections 147 and 323 IPC.

4. The case of the prosecution in nutshell is that on 22.7.1980 at about 9.30 AM Kanchan Singh(PW-1) lodged FIR of the present case against appellant no.5 (Brijendra Singh) and appellant no.7 (Saleem) and five other co-accused persons at Police Station Kannauj, under Sections 147,148,149, 307, 323 and 302 IPC, District Farrukhabad vide Case Crime No. 395 of 1980.

5. As per the FIR, on 22.7.1980 at about 7.00 AM in the morning when nephew of Kanchan Singh (the informant) (PW-1), namely, Dharendra Singh, was returning back after attending nature's call, the appellant no.5 (Brijendra Singh) and appellant no.7 (Saleem) along with five other co-accused persons exhorted him and co-accused Harnath Singh fired at Dharendra Singh from his licensed gun whereas co-accused Aditya Singh opened fire from his country made pistol, which hit Rajendra (PW-2), the son of informant. In the incident, Dharendra Singh, nephew of the informant Kanchan Singh (PW-1), died at spot. The above incident is said to have taken place due to long standing enmity between both the parties. In the FIR it is further stated that number of cases of civil and criminal nature were pending in the court between the parties.

6. According to the FIR, appellant no.5 (Brijendra Singh) and appellant no.7 (Saleem), who were armed with lathies, along with co-accused Shiv Nath Singh, Vishwa Nath Singh and Raghvendra Singh, also wielded their lathies. It is further mentioned in the FIR that after the incident accused persons entered the house of co-accused Shiv Nath Singh and bolted it from inside, which was surrounded by villagers.

7. After the FIR, the Police arrived at the spot and arrested appellant no.5 (Brijendra Singh) along with co-accused Harnath Singh, Vishwa Nath Singh, Shiv Nath Singh, Raghvendra Singh and Aditya Singh from the house of co-accused Shiv Nath Singh. Appellant no.7 (Saleem), however, could not be arrested as he was not found there. At the time of arrest licensed gun of Harnath Singh was also recovered but country made pistol allegedly used by Aditya Singh could not be recovered.

8. During investigation, Investigating Officer prepared recovery memo of licensed gun and cartridges (Ext.Ka.18 and Ext. Ka.23). The Investigating Officer also prepared recovery memo of blood stained shirt of injured Rajendra Singh (PW-2) (Ext. Ka-24) and he also prepared recovery memo of blood stained soil (Ext.Ka.25). Injured Mahipal Singh (not examined), Kanchan Singh (PW-1) and Rajendra Singh (PW-2) were medically examined at Primary Health Centre, Saray Mira, Kannauj, District Farrukhabad on 22.7.1980 between 4.00 PM to 4.30 PM and their injury reports were exhibited as Ext.Ka.6, Ext.Ka.7 and Ext.Ka.8

respectively. The post mortem of the body of deceased Dhirendra Singh was conducted on 23.7.1980 at about 3.45 PM (Ext. Ka.5) and after investigation, Investigating Officer submitted charge sheet against surviving appellant no.5 (Brijendra Singh) and appellant no.7 (Saleem) and other co-accused persons, namely, Harnath Singh, Vishwa Nath Singh, Shivnath Singh, Raghvendra Singh and Aditya Singh on 9.8.1980 under Sections 147, 148, 149, 307, 323 and 302 IPC. After submission of charge sheet, the case was committed to the court of session and trial court framed charges against appellant no.5 (Brijendra Singh) and appellant no.7 (Saleem) for offences under Sections 302 read with 149 PC, Section 147 IPC and Sections 323/149 IPC. Both the appellants refused to plead guilty and claimed trial.

9. During trial, prosecution examined nine witnesses. Out of nine witnesses, two witnesses, namely, Kanchan Singh (informant) (PW-1) and Rajendra Singh (PW-2) were witnesses of facts and rest are formal witnesses.

10. The trial court convicted appellant no.5 (Brijendra Singh) and appellant no.7 (Saleem) for offences under Sections 302/149 IPC, 323 and 147 IPC along with other co-accused persons and sentenced them as above.

11. We have heard Sri Vinay Saran, learned Senior Advocate, assisted by Sri Pradeep Kumar Mishra, learned counsel for the surviving appellants; and Sri H.M.B.Sinha and Sri Amit Sinha, learned AGAs, for the State and have carefully perused the entire evidence

on record.

12. Learned counsel for the surviving appellants contended that although in the FIR as many as six eye witnesses were nominated but during investigation only two witnesses, Kanchan Singh (PW-1) (informant) and Rajendra Singh (PW-2) were examined and rest of the eye witnesses including one of the persons injured (Mahipal Singh) were not examined, which casts a serious doubt on the prosecution case. He further contended that it appears from the record that PW-1 (the informant) (Kanchan Singh) was not present at the spot and appellants were implicated due to long standing enmity and in fact the evidence produced by the prosecution is not of such nature on the basis of which surviving appellants, namely, Brijendra Singh (appellant no.5) and Saleem (appellant no.7), could be convicted under Section 302 IPC with the aid of Section 149 IPC as prosecution failed to prove the formation of unlawful assembly as well as its common object, which are essential ingredients and must be proved before convicting a person with the aid of Section 149 IPC. He submits that in absence of necessary ingredients of an unlawful assembly, the evidence on record should be analysed to ascertain the individual act of the surviving appellants. As there is no evidence on record, who caused lathi blow to whom, injured Mahipal having not been examined and injury of Kanchan Singh (PW-1) is a result of friction therefore, both the surviving appellants can not even be convicted under Section 323 IPC.

13. Learned defence counsel further contended that appellant no.7, namely, Saleem is neither related to other appellants, who were of the same family, nor was arrested from the house of co-accused Shivnath Singh from where rest of accused persons were arrested, therefore, his participation in the incident is highly doubtful especially when, as per prosecution case, all the accused persons including Saleem (appellant no.7) after commission of the crime entered the house of co-accused Shivnath Singh to protect themselves from the surrounding villagers. Further, there is no evidence on record, which can show that Saleem (appellant no.7) managed to escape either from the house of Shivnath Singh or from the spot. Therefore, he has been falsely implicated in the present case and should be acquitted.

14. Per contra, learned AGA contended that all the accused persons including the surviving appellants participated in the incident, which resulted in the death of Dhirendra Singh; and surviving appellants, namely, Brijendra Singh (appellant no.5) and Saleem (appellant no.7), also used lathies during the incident along with other co-accused persons, therefore, their conviction under Sections 302/149 and under Sections 323 and 147 IPC is justified and they, as a whole, formed an unlawful assembly with a common object.

Discussion of prosecution evidence:

15. Before discussing the prosecution evidence and evaluating the arguments advanced by both sides, it is necessary to examine in brief the prosecution evidence

adduced by the prosecution during trial.

16. The prosecution firstly examined PW-1(Kanchan Singh), who is the informant of the case. As per PW-1 (Kanchan Singh) a long standing enmity existed between both sides. The deceased Dharendra Singh was his real nephew. On 22.7.1980, at about 7.00 AM, when he along with his son Rajendra Singh (PW-2) were going to visit their fields, they heard shouts and shrieks, when they arrived there, they saw Dharendra Singh (deceased) was standing in the open field of Fatte Lal Katiyar and accused persons, namely, Harnath Singh, Shivnath Singh, Vishwa Nath Singh, Aditya Singh, Raghvendra Singh and Brijendra Singh (surviving appellant no.5) and Saleem (surviving appellant no.7) standing near the door of the house of Shiv Nath Singh. Harnath Singh held a licensed gun; Aditya Singh held a country made pistol whereas remaining five accused persons including the surviving appellants held lathies. All the accused persons were abusing his nephew Dharendra Singh. Harnath Singh opened fire from his gun upon Dharendra Singh, which hit him. He fell down in the field of Fatte Lal Katiyar and died. PW-1 further stated that co-accused Aditya Singh also opened fire from his country made pistol, which hit Rajendra Singh (PW-2) whereas rest of accused persons used lathies, which caused injuries to Rajendra Singh (PW-2), Mahipal Singh (not examined) and to him (PW-1). This witness proved the clothes worn by deceased Dharendra Singh, which were exhibited as Ext. 1 and Ext.2; and the shirt worn by Rajendra Singh

(injured)(PW-2) which was marked, Ext.3. PW-1 also proved FIR as Ext.Ka.16.

17. PW-1 in his cross-examination stated that only two gun shots were fired, one from the gun of co-accused, Harnath Singh and the other from the country made pistol carried by co-accused Aditya Singh. First gun shot hit Dharendra Singh. Thereafter, Aditya Singh opened fire from his country made pistol and after that, surviving appellants and three others, who were having lathies, gave a single lathi blow.

18. PW-1 also stated that his medical was conducted at Kannauj Hospital on the same day of incident at about 4.00 P.M. and from the Hospital, he went to Makkoo Lal and Ayodhya Prasad Firm where he was working as a servant and next day, he returned back to his village. PW-1 in his cross-examination stated that when co-accused Harnath Singh and Aditya Singh opened fire then the surviving appellants Brijendra Singh (appellant no.5) and Saleem (appellant no.7) were about 5-6 steps away from the co-accused persons, who opened fire. He further stated that lathi was used immediately after the fire but he was unable to state as to whose lathi caused injury to whom.

19. PW-2 (Rajendra Singh) is one of the injured and son of the informant, Kanchan Singh (PW-1). He also reiterated the same version as narrated by his father PW-1 (Kanchan Singh). PW-2 also stated that firstly Harnath Singh opened fire from his gun and thereafter Aditya Singh opened fire from country made pistol and thereafter accused persons including the surviving

appellants ran towards him and his father and used their lathies. PW-2 also stated that after the incident all the accused persons including appellant no.7 entered the house of co-accused Shiv Nath Singh from where, except appellant no.7 (Saleem) were arrested by the Police. He also stated that when they entered the house of accused Shiv Nath Singh, his house was surrounded by the villagers. PW-2 could not state that who caused lathi injuries to whom.

20. PW-3, Dr. B.P.Bhatnagar, Medical Officer, District Hospital Fatehgarh, who conducted post mortem (Ext.Ka.5) of deceased (Dhirendra Singh), on 23.7.1980, at about 3.45 PM, found following injuries on his body:

1. 6 gun shot wound of entry in an area of 3"x2.5inch on the middle of chest anterior aspect each measured 1/4"x1/4"x chest cavity deep. Margins inverted.
2. Abrasion 3/4x1/4 inch on the right side chest 2x2" below right nipple at 5'O Clock position.

21. According to PW-3, Dhirendra Singh (deceased) died about 1-1/2 day before. PW-3 proved the post mortem report as Ext. Ka.5. PW-3 stated deceased died due to shock and haemorrhage as a result of ante mortem injury.

22. PW-4 is Dr. J.C.Harsh, Medical Officer, Primary Health Centre, Kamalganj. He stated on 22.7.1980 he was posted at Medical Officer at PHC, Saraymira, Kannauj and at 4.00 PM he examined Mahipal Singh and found following injuries on his body:

- "1.Lacerated wound: 1cm x 0.5 cm x scalp deep left side head 4.5cm above left ear, bleeding.*
- 2.Traumatic swelling 1cm x1cm left side face 4 cm away*

from left ear.

***Opinion:-** Injury No.1 &2 caused by blunt weapon, simple in nature and about half day in duration."*

23. PW-4 on the same day also examined Kanchan Singh (the informant) (PW-1) at about 4.15 PM and found single abrasion 1cmx0.5 cm on inner side left thigh 11 cm above left knee joint.

According to him, injury was caused by friction, simple in nature and about half day in duration.

24. Dr. J.C.Harsh (PW-4) also examined Rajendra Singh (PW-2) on 22.7.1980 at about 4.30 PM and found following injuries on his body:

- (1) "Contusion: 5 cm x2cm on left foot, 4cm below from left ankle joint, radish in colour.
- (2) Abrasion:2cmx1cm on right shoulder region 4.5cm below from right clavicle.
- (3) Abrasion: 1cm x.5cm on right side chest. 6 cm away from right nipple.
- (4) One Gun short wound of entry 1/10"x1/10"x skin deep on left side chest 2cm x below left clavicle blood clotted.
- (5) One gun shot wound of entry 1/10" x x1/10" x skin deep on right side chest.5cm above right nipple, blood clotted.

Opinion:Injury no.1 due to blunt weapon. Injury Nos. 2 & 3 due to fraction and injury nos. 4&5 due to fire arm, simple in nature and half day in duration.

25. PW-4 proved injury reports of Mahipal Singh(not examined), Kanchan Singh (the informant) (PW-1) and Rajendra Singh (PW-2) which were exhibited as Ext.Ka-6, Ext.Ka-7 and Ext.Ka-8 respectively.

PW-4 in his cross-examination stated that the injury sustained by Kanchan Singh (the informant) (PW-1) cannot be caused by lathi and this injury may be self inflicted one.

26. PW-5 (Satskar Singh) is a Constable. He stated that

on 22.7.1980 he was posted at Police Station Kannauj and he received the body of deceased Dhirendra Singh in a sealed condition at about 1.15 PM. He along with Constable Maharaj Singh brought the dead body to Fatehgarh on a tractor and it was handed over to the Doctor for post mortem at 2.00 PM on 23.7.1980.

PW-5 (Satkan Singh) in his cross-examination stated that when Police arrived in the village then, at that time, the accused persons were inside the house but nobody surrounded the house though several persons were there at the door.

27. PW-6 (Ram Asrey Pandey) is the Junior Scientist Officer, Forensic Lab, Lucknow, U.P. This witness is a Forensic Expert and provided evidence in respect of gun used by co-accused Harnath Singh and the cartridges collected from the spot. Therefore, this witness is of no concern for the surviving appellants, who were with lathies only. Thus for deciding the present appeal, the testimony of PW-6 (Ram Asrey Pandey) is not relevant.

28. PW-8 is SI Narsingh Dayal. He stated that in September, 1980 he was posted as SI at Sadar Malkhana, Fatehgarh. According to him on 5.9.1980 the articles related to the present case were deposited and on 9.9.1980 three sealed packets were sent for chemical analysis to Agra through Constable Hanuman Prasad and on 11.9.1980 one sealed packet was sent to Lucknow for analysis by a ballistic expert.

29. PW-9 is Sri K.N.Singh, SI. He is the Investigating Officer of the present case. He stated that in July 1980 he was posted as SI at Police Station Kannauj and on

22.7.1980 the chik report of the present case was prepared by H.M.Phool Singh. He proved chik report (Ext.Ka.16) and the GD report no.5 as Ext. Ka.17. He stated H.M.Phool Singh had died. PW-9 (K.N.Singh) stated that he arrived at the spot on 22.7.1980 and arrested co-accused Harnath Singh, Shivnath Singh, Brijendra Singh, Raghvendra Singh, Aditya Singh and Vishwa Nath Singh from the house of co-accused Shivnath Singh whereas accused Saleem (appellant no.7) had escaped from the spot. He recovered the licensed gun from the possession of Harnath Singh and upon unloading the gun he found one live cartridge. The recovery memo of gun and live cartridge prepared by him was proved as Ext. Ka.18. He proved material Ext.11 and Ext.12, i.e., gun and live cartridge. This witness further stated that inquest report (panchayatnama) of the body of Dhirendra Singh was prepared and body was sent for post mortem examination. He proved the inquest report (panchayatnama) as Ext.Ka-19. He also stated that he did the spot inspection and the site plan prepared by him on the pointing out of the informant (Kanchan Singh) (PW-1) was proved as Ext.Ka.26.

30. The Investigating Officer (K.N.Singh) (PW-9) in his cross-examination stated that the accused persons opened the door without offering resistance and that he did not have to use force. He further stated that although he recovered the gun from co-accused Harnath Singh but he could not recover country made pistol allegedly used by co-accused Aditya Singh. He

further stated that none of the witnesses informed him that co-accused Saleem (surviving appellant no.7) had managed to escape from the spot.

31. After recording the statement of prosecution witnesses, trial court recorded the statements of the accused including the surviving appellants, Brijendra Singh (appellant no.5) and Saleem (appellant no.7) under Section 313 Cr.P.C. and, thereafter, on the basis of evidence adduced by the prosecution, convicted the surviving appellants amongst others under Sections 302/149 IPC and under Sections 323/147 IPC.

Analysis:

32. First, we deal with the case of Saleem (appellant no.7). As per the prosecution case mentioned in the FIR as well as narrated by the witnesses of facts, namely, Kanchan Singh (the informant)(PW-1) and Rajendra Singh (PW-2), appellant no.7 (Saleem) was also involved in the present case along with other six remaining accused persons. It is the case of the prosecution since the beginning that after commission of the offence, Saleem (appellant no.7) along with other accused entered the house of co-accused Shivnath Singh (appellant no.3) to hide and that the villagers surrounded the house of Shiv Nath Singh. This indicates that there was no scope for Saleem (appellant no.7) to escape from the house of co-accused Shiv Nath Singh (appellant no.3).

33. Prosecution evidence further shows that when, after the FIR, the police arrived then all the accused

persons were arrested from the house of co-accused Shivnath Singh except appellant no.7 (Saleem)) and their arrest could be made after the door of the house of co-accused Shivnath Singh was opened.

34. The Investigating Officer, K.N.Singh (PW-9) stated that he could not find Saleem (appellant no.7) in the house of co-accused Shivnath Singh and that he managed to escape. But there is no evidence on record on the basis of which it can be said that Saleem (appellant no.7) managed to escape from the house of co-accused Shivnath Singh. Non-arrest of Saleem (appellant no.7) from the house of co-accused Shivnath Singh creates doubt about his presence and involvement in commission of the present crime as all the other remaining six accused persons were arrested from the house of Shiv Nath Singh. Moreover, Saleem (appellant no.7) is not related to other accused persons. Further, as he was not arrested from where all other accused persons were arrested in spite of the fact that the house of Shiv Nath Singh was surrounded by the villagers and there was no chance for his escape from there, would suggest that he was not with the other accused as part of the alleged unlawful assembly.

35. The testimony of PW-1, Kanchan Singh and PW-2, Rajendra Singh in respect of Saleem (appellant no.7), therefore, does not inspire confidence. Hence, in our considered view, benefit of doubt should be extended in favour of Saleem (appellant no.7) to hold that he was not involved in commission of the present crime.

36. As both the surviving appellants, namely,

Brijendra Singh (appellant no.5) and Saleem (appellant no.7) were convicted by the trial court under Section 302 IPC with the aid of Section 149 IPC, we now proceed to examine whether they formed part of an unlawful assembly and could be convicted with the aid of Section 149 IPC.

The Section 149 IPC reads as follows:

"149. Every member of unlawful assembly guilty of offence committed in prosecution of common object.—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 that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence."

37. As per Section 149 IPC to convict a person with the aid of this Section, it is necessary to prove the following ingredients; namely, (1) the offence is committed by any member of an unlawful assembly; and (2) the offence must be committed in prosecution of the common object of an unlawful assembly; or such as the members of that assembly knew to be likely to be committed in prosecution of that object.

38. Section 141 IPC defines unlawful assembly and, according to 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 any one or more of those specified in that Section.

39. In the present case, the prosecution case is that co-accused Harnath Singh opened fire upon Dharendra Singh, who was standing in the open field of Fatte Lal

Katiyar; after that, co-accused Aditya Singh opened fire through his country made pistol. Following that, surviving appellants, namely, Birendra Singh (appellant no. 5) and Saleem (appellant No.7) started hurling their lathies along with other accused, who also had lathies. Admittedly, till both gun shots were fired, surviving appellants were standing in front of the house of co-accused Shivnath Singh and had not participated in causing any injury either to deceased (Dhirendra Singh) or to injured Rajendra Singh (PW-2). The allegation against them is that after two fires were made, they started using their lathies. From this, it cannot be said that they shared the common object with the other accused, who caused fire arm injuries to the deceased and the injured Rajendra Singh (PW-2). The role of causing fire arm injuries to Dhirendra Singh (the deceased) is specifically attributed to co-accused Harnath Singh and the role of causing fire arm injury to injured Rajendra Singh (PW-2) is attributed to accused Aditya Singh.

40. What is now to be examined is whether the surviving appellants were part of the unlawful assembly which had a common object of causing injury to the deceased. At this stage, we may notice that the accused were standing in front of the door of the house of co-accused Shiv Nath Singh, as per the prosecution case, and the deceased was standing on the field of one Fatte Lal. Accused persons were hurling abuses at Dhirendra from a distance of 13-14 paces. Upon hearing the abuses, PW-1 and others arrived at the

spot. Then the witnesses saw co-accused Har Nath pointing gun at the deceased and co-accused Aditya holding pistol in his hand. PW-1 in paragraph 12 of his cross-examination, held on 14.08.2012, stated that at that time he did not expect that the accused would use their weapon and, therefore, the complainant party was unarmed. But soon thereafter, co-accused Harnath moved ahead from the door of his house and from a distance of 7-8 paces fired at the deceased; and, thereafter, Aditya fired. Till then, there was nothing from which it could be held that all the accused persons had a common object to cause injury to the deceased. It appears that when, hot words were exchanged, on account of previous enmity, co-accused fired at the deceased. The co-accused persons alleged to be armed with lathi, only joined when the shots had already been fired. Thus, in our considered view, keeping in mind that all the accused were stated to be standing in front of their own house and not having gone as a group of persons, armed, to another place to commit an offence, they cannot be said to be part of an unlawful assembly with a common object, at the stage, when the gun shots were fired.

41. The Supreme Court in the case of **Shivjee Singh and others Vs. State of Bihar** reported in (2008) 11 SCC 631 discussed the import of the words 'object' and 'common' used in Section 149 IPC. The relevant portion, contained in paragraph no.-10 is as follows:-

“.....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. 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.”

Further, in the same paragraph the Apex Court held:

“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, 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.”

Thus, it is clear from the aforesaid decision that members of an unlawful assembly may have community of object upto the certain point of time and not beyond that.

42. In the present case, in the context of the

prosecution evidence led, it cannot with certitude be held that the common object of the assembly was either to commit the murder of Dhirendra Singh (the deceased) or to cause such bodily injuries to him or to anybody else that may result in death because the accused persons did not move as a group to assault the victims, the accused were in front of their own house and the incident occurred after exchange of hot words, when co-accused Har Nath Singh went ahead, perhaps in the heat of the moment, to fire at the deceased which, in our view, was his individual act and cannot be attributed to be in furtherance of the object of that group of accused persons. Similarly, the shot fired by co-accused Aditya Singh was his individual act. Consequently, as the prosecution failed to provide evidence to prove that accused persons including the surviving appellants held a common object to cause the death of Dhirendra Singh or to cause any such injury which in ordinary course of event would have resulted in his death, the surviving appellants cannot be held liable for the murder of Dhirendra Singh under Section 302 IPC with the aid of Section 149 IPC.

43. A similar question as to whether the commission of murder by an individual member of an unlawful assembly would attract the provisions of Section 149 IPC, came before Apex Court in the case of **Roy Fernandes Vs. State of Goa and others**, reported in **(2012) 3 SCC 221**. Apex Court after discussing the provisions of Sections 149 and 141 IPC observed that

the sudden action of one of the members of the unlawful assembly cannot fall under the ambit of Section 149 IPC as the members of unlawful assembly cannot be presumed to know that such an offence was likely to be committed by any of its member.

44. In the present case, as we observed earlier that there is no evidence on record, which can prove the common object of all the accused persons including the surviving appellants to commit the murder of deceased Dhirendra Singh, neither the surviving appellants nor the other co-accused persons, except Harnath Singh, could have had knowledge or awareness that Harnath Singh would open fire from his gun upon Dhirendra Singh. Therefore, in these prevailing circumstances, the conviction of surviving appellants, namely, Brijendra Singh (appellant no.5) and Saleem (appellant no.7) under Section 302 IPC with the aid of Section 149 IPC cannot be sustained.

45. At this stage, we may examine the prosecution evidence from another angle as to ascertain whether all the co-accused persons were there together from before at the door of the house of co-accused Shiv Nath or some of them may have arrived hearing the shouts or verbal exchanges between the deceased and co-accused Har Nath Singh. It is important to notice here that according to PW-1, the eye witness, and PW-2, the injured witness, both, in the morning, had set out to go to their fields, when they heard shouts, they went to the spot and witnessed the incident and found the accused and the deceased in a verbal duel. If PW-1 and

PW-2 could get drawn to the scene of occurrence upon hearing verbal duel, even the rest of the accused persons could get collected with their lathies but that by itself would not be sufficient to infer that they shared common object with the co-accused, who fired at the deceased. From all these angles, the conviction of surviving appellant cannot be with the aid of Section 149 IPC.

46. Since we have already held that the conviction of surviving appellants is unsustainable with the aid of Section 149 IPC, now we will analyse and examine the individual offence, if any, committed by surviving appellants, namely, Brijendra Singh (appellant no.5) and Saleem (appellant no.7).

47. At this stage, we may notice that the trial court also convicted them under Section 147 IPC along with Section 323 IPC. Thus, we first deal with the conviction of surviving appellants under Section 147 IPC.

48. Section 147 IPC provides punishment for rioting and Section 146 IPC defines the offence of rioting. As per Section 146 IPC, whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting.

49. In the present case there are three stages of the entire incident:-

(A) Altercation, Followed by shot fired by co-accused Harnath Singh at the deceased Dharendra Singh resulting in his death;

(B) Shot fired by co-accused Aditya Singh from his country made pistol causing injury to Rajendra Singh (PW-2); and

(C) After both the shots were fired, lathi was wielded by remaining five accused including the surviving appellants, namely, Brijendra Singh (appellant no.5) and Saleem(appellant no.7).

50. As we have already formed an opinion that common object cannot be attributed to surviving appellants, namely, Brijendra Singh (appellant no. 5) and Saleem (appellant no.7) for causing injuries to (deceased) Dhirendra Singh and Rajendra Singh (PW-2), for stages (A) and (B), therefore, appellant no.5, Brijendra Singh and appellant no.7, Saleem cannot be convicted under Section 147 IPC and under Section 323 IPC for stages (A) and (B).

51. In stage (C), according to the prosecution, a total of five persons including the surviving appellants Brijendra Singh (appellant no.5) and Saleem (appellant no.7) participated, but as we have earlier held that involvement and presence of Saleem (appellant no.7) appears to be doubtful and benefit of doubt is, therefore, extended in his favour, therefore, Saleem (appellant no.7) cannot be convicted under Section 147 and 323 IPC for even stage (C) of the entire incident.

52. Now we will examine the conviction of surviving appellant Brijendra Singh (appellant no.5) under Sections 147 and 323 IPC for stage (C).

In stage (C) accused persons, namely, Shivnath Singh, Vishwa Nath Singh, Raghvendra Singh, Brijendra

Singh (appellant no.5) and Salim (appellant no. 7), who were standing at the house of Shivnath Singh participated and caused injuries to Kanchan Singh (PW-1) and Mahipal singh (not examined) and Rajendra singh (PW-2) from their lathies, but we have already extended benefit of doubt to Saleem (appellant no.7), therefore for stage (C) only four accused persons remained including the surviving appellant no. 5 (Brijendra Singh). But as co- accused Harnath Singh and Aditya Singh, who participated in stages (A) and (B) of the entire incident, were already there, when appellant no. 5 (Brijendra Singh) participated in Stage-C along with other co-accused persons, they all formed an unlawful assembly with common object to cause injuries to PW-1 (Kanchan Singh), PW-2 (Rajendra Singh) and Mahipal Singh (not examined) and therefore, the conviction of appellant no.5 (Brijendra Singh) under section 147 IPC, in our considered view, is fully sustainable and, in our opinion, trial court rightly convicted Brijendra Singh (appellant no.5) for offence under Section 147 IPC.

53. As far as conviction of appellant No.5 (Brijendra Singh) under Section 323 IPC is concerned, in this regard it is important to point out that although charge against him was framed under Sections 323/ 149 IPC but the trial court convicted him under Section 323 IPC without the aid of Section 149 IPC. As we have already observed that appellant No. 5 (Bijendra Singh) was member of an unlawful assembly and participated in stage (C) of the entire incident and was armed with

lathi along with other co-accused persons and injury report of Rajendra Singh (PW-2) shows that he sustained a contusion with two abrasions, therefore, appellant no. 5 (Bijendra Singh) can be convicted under Section 323 IPC with the aid of Section 149 IPC.

54. Learned defence counsel although argued that there is on evidence on record, which can show, who caused the lathi injury to Rajendra Singh (PW-2) and Mahendra Singh (another injured), who was not examined, therefore, appellant no. 5 (Brijendra Singh) cannot be convicted even under Section 323/149 IPC, but, in our considered view, as appellant no. 5 (Brijendra Singh) was a member of an unlawful assembly, he can very well be convicted under Section 323 IPC with the aid of Section 149 IPC.

Therefore, we set aside the conviction of Brijendra Singh (appellant no.5) under Section 323 IPC but convicted him under Sections 323/149 IPC.

55. In view of the above discussion, we allow the appeal filed by Saleem (appellant no.7) and set-aside his conviction awarded by the trial court under Sections 302/149, 323 and 147 IPC and acquit him of all the charges.

56. As far as the appeal filed on behalf of Brijendra Singh (appellant no.5) is concerned, we partly allow his appeal and set aside his conviction under Sections 302/149 IPC but his conviction under Section 147 IPC is maintained. We also set aside the conviction of appellant no.5 (Brijendra Singh) awarded by trial court under Section 323 IPC but convict him under Section

323/149 IPC.

57. During the pendency of the present appeal appellant no.5 (Brijendra Singh) raised a claim of juvenility on date of the incident, i.e., on 12.7.1980. On his plea, this Court on 26.2.2018 directed the Juvenile Justice Board to hold a proper enquiry in accordance with law as provided under the Juvenile Justice (Care and Protection of Children) Act, 2015 (in short, 'the Act of 2015') as to whether on the date of occurrence surviving appellant no.5 (Brijendra Singh) was juvenile or not. In pursuance thereof, Juvenile Justice Board conducted an enquiry in respect of claim of juvenility of appellant no.5 (Brijendra Singh) and after enquiry Juvenile Justice Board found that the certificate of High School Examination, 1979 of Brijendra Singh (appellant no.5) was a reliable certificate and according to that his date of birth is 9.10.1962. The Juvenile Justice Board in its enquiry found that the age of Brijendra Singh (appellant no.5) on the date of incident, i.e., on 22.7.1980 was 17 years 9 months and 13 days and submitted its report dated 12.10.2018.

58. As per report of Juvenile Justice Board dated 12.10.2018, appellant no.5 (Brijendra Singh) was juvenile on the date of incident, i.e., 12.7.1980. On 26.10.2021, this Court granted 10 days' time to the counsel for the complainant to submit his objection in respect of the report of Juvenile Justice Board.

59. In spite of opportunity to file an objection to the report of Juvenile Justice Board dated 12.10.2018, no objection was taken on behalf of the complainant.

60. We have perused the report of the Juvenile Justice Board dated 12.10.2018. It is well settled principle that the claim of juvenility can be raised at any stage including the appellate stage. Very recently the Hon'ble Supreme Court in **Ashok Kumar Vs. the State of Madhya Pradesh (Special Leave to Appeal (Crl.) No.643 of 2020)** on 29.11.2021 observed as under:

“The Juvenile Justice Act, 1986, which was in force on the date of commission of the offence as also the date of the judgment and order of conviction and sentence by the Sessions Court was repealed by the Juvenile Justice (Care and Protection of Children) Act, 2000. The Act of 2000 received the assent of the President of India on 30.12.2000 and came into force on 01.04.2001. The Act of 2000 defined juvenile in conflict with The Juvenile Justice Act, 1986, which was in force on the date of commission of the offence as also the date of the judgment and order of conviction and sentence by the Sessions Court was repealed by the Juvenile Justice (Care and Protection of Children) Act, 2000. The Act of 2000 received the assent of the President of India on 30.12.2000 and came into force on 01.04.2001. The Act of 2000 defined juvenile in conflict with the law to mean a juvenile, who was alleged to have committed an offence and had not completed 18th year of age as on the date of commission of such an offence.

Under the 1986 Act, the age of juvenility was upto the 16th year. Section 7A of the 2000 Act as inserted by Act 33 of 2006 with effect from 22.08.2006 provided as follows:-

“7A. Procedure to be followed when claim of juvenility is raised before any Court.-(1) Whenever a claim of juvenility is raised before any court or a court is of the opinion that an accused person was a juvenile on the date of commission of the offence, the court shall make an inquiry, take such evidence as may be necessary (but not an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be:

Provided that a claim of juvenility may be raised before any Court and it shall be recognised at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in this Act and the rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of this Act.

(2) If the court finds a person to be a juvenile on the date of commission of the offence under sub-section(1), it shall forward the

juvenile to the Board for passing appropriate orders and the sentence, if any, passed by a court shall be deemed to have no effect.”

The claim of juvenility can thus be raised before any Court, at any stage, even after final disposal of the case and if the Court finds a person to be a juvenile on the date of commission of the offence, it is to forward the juvenile to the Board for passing appropriate orders, and the sentence, if any, passed by a Court, shall be deemed to have no effect.

Even though the offence in this case may have been committed before the enactment of the Act of 2000, the petitioner is entitled to the benefit of juvenility under Section 7A of the Act of 2000, if on inquiry it is found that he was less than 18 years of age on the date of the alleged offence.”

Thus, we accept the report of Juvenile Justice Board dated 12.10.2018 and hold that appellant no.5 (Brijendra Singh) was juvenile as defined by Section 2 (k) of Juvenile Justice (Care and Protection of Children) Act, 2000 (in short, 'the Act of 2000'); and Section 2 (35) of the Juvenile Justice (Care and Protection of Children) Act, 2015 on the date of incident.

61. As we have already declared appellant no.5 (Brijendra Singh) juvenile as per the provisions of Act of 2000. Therefore, now we will examine what was the sentence that could be awarded to appellant no.5 (Brijendra Singh). The Apex Court in the case of **Jitendra Singh alias Babbu Singh Vs. State of U.P.(2013) 11 SC 193** upheld the conviction and, on the question of sentence, by taking into account the provisions of Juvenile Justice Act, 1986 and Juvenile Justice (Care and Protection of Children) Act, 2000 held as follows:

"31. In the present case, the offence was committed by the appellant when the Juvenile Justice Act, 1986 was in force. Therefore, only the 'punishments' not greater than those postulated by the Juvenile Justice Act, 1986 ought to be awarded to him. This

is the requirement of Article 20(1) of the Constitution. The 'punishments' provided under the Juvenile Justice Act, 1986 are given in Section 21 thereof and they read as follows:

"21. Orders that may be passed regarding delinquent juveniles.--(1) Where a Juvenile Court is satisfied on inquiry that a juvenile has committed an offence, then, notwithstanding anything to the contrary contained in any other law for the time being in force, the Juvenile Court may, if it so thinks fit,--

(a) allow the juvenile to go home after advice or admonition;

(b) direct the juvenile to be released on probation of good conduct and placed under the care of any parent, guardian or other fit person, on such parent, guardian or other fit person executing a bond, with or without surety as that Court may require, for the good behaviour and well-being of the juvenile for any period not exceeding three years;

(c) direct the juvenile to be released on probation of good conduct and placed under the care of any fit institution for the good behaviour and well-being of the juvenile for any period not exceeding three years;

(d) make an order directing the juvenile to be sent to a special home,--

(i) in the case of a boy over fourteen years of age or of a girl over sixteen years of age, for a period of not less than three years;

(ii) in the case of any other juvenile, for the period until he ceases to be a juvenile:

Provided that.....

Provided further that

(e) order the juvenile to pay a fine if he is over fourteen years of age and earns money.

(2) Where an order under clause (b), clause (c) or clause (e) of subsection (1) is made, the Juvenile Court may, if it is of opinion that in the interests of the juvenile and of the public it is expedient so to do, in addition make an order that the delinquent juvenile shall remain under the supervision of a probation officer named in the order during such period, not exceeding three years, as may be specified therein, and may in such supervision order impose such conditions

as it deems necessary for the due supervision of the delinquent juvenile:

Provided that

(3) -(4)"

32. A perusal of the "punishments' provided for under the Juvenile Justice Act, 1986 indicate that given the nature of the offence committed by the appellant, advising or admonishing him [clause (a)] is hardly a "punishment' that can be awarded since it is not at all commensurate with the gravity of the crime. Similarly, considering his age of about 40 years, it is completely illusory to expect the appellant to be released on probation of good conduct, to be placed under the care of any parent, guardian or fit person [clause (b)]. For the same reason, the appellant cannot be released on probation of good conduct under the care of a fit institution [clause (c)] nor can he be sent to a special home under Section 10 of the Juvenile Justice Act, 1986 which is intended to be for the rehabilitation and reformation of delinquent juveniles [clause (d)]. The only realistic punishment that can possibly be awarded to the appellant on the facts of this case is to require him to pay a fine under clause (e) of Section 21(1) of the Juvenile Justice Act, 1986.

33. While dealing with the case of the appellant under IPC, the fine imposed upon him is only Rs.100/-. This is *ex facie* inadequate punishment considering the fact that Asha Devi suffered a dowry death.

34. Recently, one of us (T.S. Thakur, J.) had occasion to deal with the issue of compensation to the victim of a crime. An illuminating and detailed discussion in this regard is to be found in *Ankush Shivaji Gaikwad v. State of Maharashtra* (2013) 6 SCC 770. Following the view taken therein read with the provisions of Section 20 of the Juvenile Justice (Care and Protection of Children) Act, 2000 the appropriate course of action in the present case would be to remand the matter to the jurisdictional Juvenile Justice Board constituted under the Juvenile Justice (Care and Protection of Children) Act, 2000 for determining the appropriate quantum of fine that should be levied on the appellant and the compensation that

should be awarded to the family of Asha Devi."

62. After holding as above, in paragraphs 57 to 60 of the report, the Apex Court concluded as follows:-

"57. The appellant was a juvenile on the date of the occurrence of the incident. His case has been examined on merits and his conviction is upheld. The only possible and realistic sentence that can be awarded to him is the imposition of a fine. The existing fine of Rs.100/- is grossly inadequate. To this extent, the punishment awarded to the appellant is set aside. The issue of the quantum of fine to be imposed on the appellant is remitted to the jurisdictional Juvenile Justice Board. The jurisdictional Juvenile Justice Board is also enjoined to examine the compensation to be awarded, if any, to the family of Asha Devi in terms of the decision of this Court in Ankush Shivaji Gaikwad.

58. Keeping in mind our domestic law and our international obligations, it is directed that the provisions of the Criminal Procedure Code relating to arrest and the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 being the law of the land, should be scrupulously followed by the concerned authorities in respect of juveniles in conflict with law.

59. It is also directed that whenever an accused, who physically appears to be a juvenile, is produced before a Magistrate, he or she should form a prima facie opinion on the juvenility of the accused and record it. If any doubt persists, the Magistrate should conduct an age inquiry as required by Section 7A of the Juvenile Justice (Care and Protection of Children) Act, 2000 to determine the juvenility or otherwise of the accused person. In this regard, it is better to err on the side of caution in the first instance rather than have the entire proceedings reopened or vitiated at a subsequent stage or a guilty person go unpunished only because he or she is found to be a juvenile on the date of occurrence of the incident.

60. Accordingly, the matter is remanded to the jurisdictional Juvenile Justice Board constituted under the Juvenile Justice (Care and Protection of Children) Act, 2000 for determining the appropriate

quantum of fine that should be levied on the appellant and the compensation that should be awarded to the family of Asha Devi. Of course, in arriving at its conclusions, the said Board will take into consideration the facts of the case as also the fact that the appellant has undergone some period of incarceration."

63. While agreeing with the above conclusion, Hon'ble T.S. Thakur, J., while supplementing the judgment, in paragraphs 85 and 86 of the judgment, as per report, concluded as follows:-

"85. In the totality of the above circumstances, there is no reason why the conviction of the appellant should be interfered with, simply because he is under the 2000 Act a juvenile entitled to the benefit of being referred to the Board for an order under Section 15 of the said Act. There is no gainsaying that even if the appellant had been less than sixteen years of age, on the date of the occurrence, he would have been referred for trial to the Juvenile Court in terms of Section 8 of the 1986 Act. The Juvenile Court would then hold a trial and record a conviction or acquittal depending upon the evidence adduced before it. In an ideal situation a case filed before an ordinary Criminal Court when referred to the Board or Juvenile Court may culminate in a conviction at the hands of the Board also. But law does not countenance a situation where a full-fledged trial and even an appeal ends in a conviction of the accused but the same is set aside without providing for a trial by the Board.

86. With the above observations, I agree with the Order proposed by brother Lokur, J."

64. The aforesaid decision of the Apex Court was rendered at the time when the Juvenile Justice (Care and Protection of Children) Act, 2000 was in force. In the instant case, the claim of juvenility was raised after the Juvenile Justice (Care and Protection of Children) Act, 2015 had come into force with effect from 15.01.2016.

65. The proviso to sub-section (2) of Section 9 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (for short

Act, 2015) enables raising of a claim before any court even after final disposal of the case and such a claim is to be determined in accordance with the provisions contained in the Act and the Rules made thereunder even if the person has ceased to be a child on or before the date of commencement of the Act.

66. Pursuant to the order passed by this Court, an enquiry was held by Juvenile Justice Board, Fatehgarh District Farrukhabad and the appellant no.5 (Brijendra Singh) has been found to be of age below 18 years and, therefore, a child in conflict with law as per the provisions of Juvenile Justice (Care and Protection of Children) Act, 2015. Section 18 of the Juvenile Justice (Care and Protection of Children), Act, 2015 is extracted here-in-below:

"18. Orders regarding child found to be in conflict with law.- 1. Where a Board is satisfied on inquiry that a child irrespective of age has committed a petty offence, or a serious offence, or a child below the age of sixteen years has committed a heinous offence, then, notwithstanding anything contrary contained in any other law for the time being in force, and based on the nature of offence, specific need for supervision or intervention, circumstances as brought out in the social investigation report and past conduct of the child, the Board may, if it so thinks fit,--

a. allow the child to go home after advice or admonition by following appropriate inquiry and counselling to such child and to his parents or the guardian;

b. direct the child to participate in group counselling and similar activities;

c. order the child to perform community service under the supervision of an organisation or institution, or a specified person, persons or group of persons identified by the Board;

d. order the child or parents or the guardian of the child to pay fine: Provided that, in case the child is working, it may be ensured that the provisions of any labour law for the time being in force are not violated;

e. direct the child to be released on probation of good conduct and placed under the care of any parent, guardian or fit person, on such parent, guardian or fit person executing a bond, with or without surety, as the Board may require, for the good behaviour and child's well-being for any period not exceeding three years;

f. direct the child to be released on probation of good conduct and placed under the care and supervision of any fit facility for ensuring the good behaviour and child's well-being for any period not exceeding three years;

g. direct the child to be sent to a special home, for such period, not exceeding three years, as it thinks fit, for providing reformatory services including education, skill development, counselling, behaviour modification therapy, and psychiatric support during the period of stay in the special home:

Provided that if the conduct and behaviour of the child has been such that, it would not be in the child's interest, or in the interest of other children housed in a special home, the Board may send such child to the place of safety.

2. If an order is passed under clauses (a) to (g) of sub-section (1), the Board may, in addition pass orders to--

i. attend school; or

ii. attend a vocational training centre; or

iii. attend a therapeutic centre; or

iv. prohibit the child from visiting, frequenting or appearing at a specified place; or

v. undergo a de-addiction programme.

3. Where the Board after preliminary assessment under section 15 pass an order that there is a need for trial of the said child as an adult, then the Board may order transfer of the trial of the case to the Children's Court having jurisdiction to try such offences."

67. When we compare the provisions of Section 21 of Juvenile Justice Act, 1986 with the provisions of Section 18 of the Juvenile Justice (Care and Protection of Children) Act, 2015, we find that there exist similar provisions for orders that could be passed in respect of

a juvenile in conflict with law including direction to pay fine. Hence, by applying the law laid down by the Apex Court in **Jitendra Singh's case (Supra)** and by keeping in mind the provisions of Section 18(1) (d) of the Act, 2015, and provisions of Section 21 of Juvenile Justice Act, 1986, we are of the view that the appropriate punishment that ought to be awarded to appellant no.5 (Brijendra Singh), who was a juvenile on the date of the incident, would be 'fine'. We find that the court below while convicting appellant no.5 (Brijendra Singh) under Section 147 IPC has not awarded any fine and as we, in the present appeal, have convicted him under Section 323/149 IPC after setting aside his conviction under Section 323 IPC, therefore, the quantum of fine is to be determined by the Juvenile Justice Board after giving opportunity of hearing to appellant no.5 (Brijendra Singh) in the light of the observations contained in the judgment of the Apex Court in **Jitendra Singh's case (Supra)**.

68. Accordingly, the appeal of surviving appellant No. 7 (Saleem) is allowed as already mentioned in paragraph 55 here in above. Whereas, the appeal of appellant No. 5 (Brijendra Singh) is partly allowed to the extent indicated in paragraph 56 herein above and as below. The appellant no.5 (Brijendra Singh) who is on bail need not surrender. His sureties are discharged. The matter is remanded to the Juvenile Justice Board, Fatehgarh, District Farrukhabad constituted under the Juvenile Justice (Care and Protection of Children) Act, 2015 for determining the appropriate quantum of fine

that should be levied on appellant no.5 (Brijendra Singh) and the compensation that should be awarded to the family of the victim, as per the law. The appellant no.5 (Brijendra Singh) shall cooperate in the proceedings in that regard and shall put in appearance before the Juvenile Justice Board, Fatehgarh, District Farrukhabad by 15th January, 2022.

69. Let the record of the court below as well as the record of Juvenile Justice Board, Fatehgarh, District Farrukhabad be sent back.

Order Date :- 24.12.2021

SKM