

DLNE010005742021



**IN THE COURT OF SH. PULASTYA PRAMACHALA
ADDITIONAL SESSIONS JUDGE-03,
NORTH-EAST DISTRICT
KARKARDOOMA COURTS: DELHI**

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CNR No. DLNE01-000574-2021
State v. Mohd. Shahnawaz @ Shanu etc.
SC No. 65/2021, FIR No. 47/2020, PS Gokalpuri
Judgment dated 30.01.2023

Sessions Case No.	:	65/2021
Under Section	:	147/148/424/436 r/w. 149 IPC & 188 IPC
Police Station	:	Gokalpuri
FIR No.	:	47/2020
CNR No.	:	DLNE01-000574-2021

In the matter of: -

STATE

V E R S U S

1. MOHD. SHAHNAWAZ @ SHANU

S/o. Mohd. Rashid,
R/o. H.No. A-528, Gali No.22,
Phase-10, Shiv Vihar, Delhi.

2. MOHD. SHOAIB @ CHHUTWA

S/o. Sh. Islam,
R/o. H.No. 93, Gali No.5/2,
Behind Rajdhani School,
Babu Nagar, Delhi.

3. SH. SHAHRUKH

S/o. Sh. Salauddin,
R/o. B-262, Gali No.7, Babu Nagar,
Near Shiv Mandir, Delhi.

4. SH. RASHID

S/o. Sh. Riyajuddin,
R/o. A-22, Gali No.1, Chaman Park,
Shiv Vihar Tiraha, Delhi.

5. SH. AZAD

S/o Riyasat Ali,
R/o 824, Gali no.9, old Mustafabad,
Delhi.

6. SH. ASHRAF ALI

S/o Anisul Haq,
R/o A-18, Chaman Park, Indra Vihar,
Delhi.

7. SH. PARVEZ

S/o Riyajuddin,
R/o Gali no.1, Karawal Nagar,
Delhi.

8. MOHD. FAISAL

S/o Raheesuddin,
R/o F-14, Gali no.1, Babu Nagar,
Main Brijpuri Road, Delhi.

9. SH. RASHID @ MONU

S/o Khalil,
R/o 259, Gali no.7, Shiv Mandir,
Shakti Vihar, Delhi.

.....**Accused Persons.**

Complainant:

SH. YATENDER KUMAR SHARMA

D/o. Sh. Vijay Pal,
R/o. A-53, Main Johripur road,
Chaman Park, Delhi.

Date of Institution : 13.07.2020

Date of reserving order : 12.01.2023

Date of pronouncement : 30.01.2023

Decision : Acquitted

(Section 437-A Cr.P.C. complied with by all accused except Shahnawaz @ Shanu, Mohd. Shoaib @ Chhutwa and Parvez.)

JUDGMENT

THE CASE SET UP BY THE PROSECUTION: -

1. The above named accused persons have been charge-sheeted by the police for having committed offences punishable under Section 147/148/149/188/427/436 IPC.
2. Brief facts of the present case are that on 28.02.2020, FIR was registered at PS Gokalpuri pursuant to receipt of a written complaint dated 27.02.2020 from Sh. Yatender Kumar Sharma. In his complaint, complainant alleged that his shop in the name of "Priyanka Copy House" situated in the front portion of ground floor and house situated in the back portion of ground floor of property bearing no. A-5, Chaman Park, Main Brijpuri Road,

Delhi-94, were burnt during the night of 25.02.2020. This complaint was marked to Insp. Bineet Kumar Pandey for necessary action. On 28.02.2020, Insp. Bineet Kumar Pandey endorsed the complaint to DO to register a case under Section 147/148/149/427 IPC and to hand over further investigation of the case to SI L.N. Sharma.

3. During investigation, SI L.N. Sharma visited A-5 and prepared site plan at the instance of complainant. On 07.03.2020, he called crime team and got inspected the spot, where crime team also took several photographs. He collected inspection report as well as photographs and placed them on the record. He also collected ash of burnt articles from the house and shop of complainant. He also collected photographs and CD of burnt shop and house of the complainant. Thereafter, further investigation of the present case was handed over to ASI Manvir Singh, who after discussion with senior officers, added Section 436 IPC in the present case. During further investigation, IO examined Ct. Vipin and HC Hari Babu, who were witnesses to the incident. They named accused persons. IO came to know about arrest of accused persons by crime branch and he formally arrested accused Mohd. Shahnawaz @ Shanu, Mohd. Shoaib, Shahrukh and Rashid, from Mandoli Jail, Delhi, on 15.04.2020. On 16.04.2020, accused Azad, Ashraf Ali and Parvez, were formally arrested in Mandoli Jail. Accused Faisal and Rashid @ Monu were arrested in Tihar Jail on 20.04.2020. During further course of investigation, more witnesses including PCR callers were examined.

4. After completion of investigation, on 13.07.2020 a chargesheet was filed before Duty MM (North East), Karkardooma Courts, Delhi, against aforesaid accused persons. Thereafter, on 22.12.2020, ld. CMM (North East), Karkardooma Courts, Delhi, took cognizance of offences punishable under Section 147/148/149/427/436 IPC. Vide this order, ld. CMM (North East) declined to take cognizance of offence under Section 188 IPC, for want of complaint under Section 195 Cr.P.C. Thereafter, case was committed to the sessions court on 14.01.2021. On 18.10.2021, first supplementary chargesheet was filed before Link MM (North East), Karkardooma Courts, Delhi, along with a complaint under Section 195 Cr.P.C and other documents. This supplementary chargesheet was also sent to this court. Subsequently one more supplementary chargesheet with additional charge for offence under Section 380/454 IPC, was filed before this court directly.

CHARGES: -

5. On 06.12.2021, charges were framed against aforesaid accused persons for offences punishable under Section 147/148/424/436 IPC read with Section 149 IPC, in following terms: -

“That from 24.02.2020 to 26.02.2020 at Main Road, Chaman Park, Shiv Vihar Tiraha, Delhi within the jurisdiction of PS Gokalpuri, all of you from a particular community formed an unlawful assembly, the object whereof was to commit robbery and arson in the properties of the persons from other community by use of force or violence in prosecution of common object of such assembly and committed rioting and you all knew being members of the aforesaid unlawful assembly that an offence was likely to be committed in prosecution of that common object and thereby committed offences punishable under Section(s) 147/148 read with Section 149 IPC and within my cognizance.

Secondly, on 25.02.2020 at around 9 a.m.onwards, you all being members of unlawful assembly in furtherance of your common

object entered into property no.A-5, Chaman Park, Main Brijpuri Road, belonging to complainant Yatinder Kumar Sharma and dishonestly removed the various articles lying therein and thereafter also committed mischief by fire or explosive substance with the intent to destroy the aforesaid shop and thereby committed an offence punishable under Section 424/436 IPC read with Section 149 IPC and within my cognizance.”

6. Thereafter, on 20.09.2022, additional charge was framed against aforesaid accused persons for offence punishable under Section 188 IPC, in following terms: -

“That, from 24.02.2020 to 26.02.2020 and particularly on 25.02.2020 at and around 9 a.m. at and around area of main road, Chaman Park, Shiv Vihar, Delhi, within the jurisdiction of PS Gokalpuri, you all accused persons being member of an unlawful assembly alongwith your other associates (unidentified) were present at aforesaid place, in prosecution of the common object of an unlawful assembly and in violation of the proclamation issued u/s 144 Cr.PC by the competent authority/DCP, North East vide order dated 24.02.2020 bearing no.10094-170 X-1, North East, Delhi dt.24.02.2020, which was duly announced in all the localities of District North East including area of PS Gokalpuri, thereby you all committed offence punishable under Section 188 IPC and within my cognizance.”

7. Prosecution examined 12 witnesses in support of its case, as per following descriptions: -

Sl. No. & Name of Witness	Role of witness & Description of documents	Proved documents/ case properties
PW1/Sh. Atul Kumar; PW2/ Sh. Himanshu & PW5/Mohd. Arif	They were the PCR callers, who resided at different addresses. They deposed about commotion created by mob in their area and making call to police at 100 number.	
PW3/ASI Mahavir	On 07.03.2020, he was posted as IC, Mobile Crime Team, North-East District, Delhi. On that day, PW3 inspected the spot of incident i.e. A-5, Priyanka Copy House, Chaman Park and prepared the report and handed	Ex.PW3/A (inspection report prepared by PW3)

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Sl. No. & Name of Witness	Role of witness & Description of documents	Proved documents/ case properties
	over the same to IO/SI L.N. Sharma. PW3 identified his signature at point A on the same.	
PW4/Ct. Mohit	He was photographer in crime team and he took 12 photographs of the spot on the directions of IO/ASI L.N. Sharma. PW-4 produced certificate under Section 65-B of I.E. Act, in respect of photographs and identified his signature at circle X on the same.	Ex. PW4/A (colly.) (photographs taken by PW-4) & Ex. PW4/B (certificate u/s 65B of I.E. Act)
PW6/ Sh. Yatender Kumar Sharma	He was the complainant in the present case. PW6 had given a written complaint in PS and identified his signature at circle X on the same i.e. Ex. PW 6/A . However, he was not present at the time of incident.	
PW7/SI Ashish Garg	He was witness to formal arrest of accused Shahnawaz, Shoaib, Shahrukh, Rashid s/o. Sh. Riyajuddin, Azad, Ashraf Ali, Parvez, Faisal and Rashid @ Monu by IO ASI Manveer in the present case. PW7 identified his signature at point X on their arrest memos.	Ex. PW7/A to Ex. PW7/I (arrest memos of accused Shahnawaz, Shoaib, Shahrukh, Rashid s/o. Sh. Riyajuddin, Azad, Ashraf Ali, Parvez, Faisal and Rashid @ Monu, respectively.
PW8/HC Pradeep	In February 2020, he was posted at PS Gokalpuri, as reader to SHO. On 24.02.2020, he received copy of order under Section 144 Cr.P.C., issued by DCP (N/E), through Dak. Copy of same is Ex.A-4 (Admitted document). On the direction of SHO, PW-8 announced proclamation under Section 144 Cr.P.C. in the area of	

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	PS Gokalpuri, through loud speaker. A complaint under section 195 Cr.P.C was made by the DCP/NE against all accused persons for violation of aforesaid order, which is Ex.A-3 (Admitted document).	
PW9/HC Vipin	On 25.02.2020, he along with HC Hari Babu and other staff from different security agency reached Shiv Vihar Tiraha at about 9 AM. PW9 found 500-600 persons from muslim community assembled near Shiv Vihar Tiraha on the side of A Block, Chaman Park. PW-9 witnessed vandalism and arson in property no. A-5, which was shop of complainant in the name of Priyanka Copy House, Chaman Park, and A-52/13, which was godown of glass material, by the mob at about 5.30/6 p.m.	
PW10/ASI Hari Babu	He reiterated the same facts, as deposed by PW-9 HC Vipin, except the number of persons belonging to Muslim community assembled near Shiv Vihar Tiraha on the side of Chaman Park.	
PW-11/ ASI Manvir Singh	He was marked further investigation of the present case on 24.03.2020. On 07.04.2020 PW11 examined PW9/Ct. Vipin and PW10/HC Hari Babu. PW11 interrogated and formally arrested accused Shahnawaz, Shoaib, Shahrukh and Rashid @ Raja on 15.04.2020 and accused Azad, Ashraf Ali and Parvez on 16.04.2020, at Mandoli Jail. PW11 also interrogated and formally arrested accused Faisal and Rashid @ Monu on 20.04.2020 at Tihar Jail. PW11 identified his signature at circle X on Ex.PW7/A to Ex.PW7/I . PW11 examined PCR callers namely Himanshu, Atul, Khurshid, Jishan and one more person. PW11 also obtained complaint u/s. 195 Cr.P.C. on 07.01.2021, for violation of order u/s. 144 Cr.P.C. PW11 also obtained CDR of accused Faisal, Shoaib, Shahnawaz and one more accused. PW11 also	

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Sl. No. & Name of Witness	Role of witness & Description of documents	Proved documents/ case properties
	collected PCR form related to aforesaid PCR callers. PW11 had collected copy of DD entries regarding departure of police officials on 25.02.2020. PW11 also examined Ct. Pradeep on 26.07.2022. PW11 had sent ash to FSL Delhi on 07.09.2021 for examination and subsequently obtained FSL report. PW11 also recorded statement of Mohd. Arif, Zeshan and Khursheed in this case on 07.07.2020, which are Ex.PW11/D-1, Ex.PW11/D-2 and Ex.PW11/D-3, respectively. After completion of investigation, PW11 filed chargesheet before the court. PW11 identified all accused persons before the court.	
PW12/Retd. SI L.N. Sharma	On 28.02.2020 he was assigned complaint dated 27.02.2020 of PW6/Sh. Yatender Sharma in PS Gokalpuri and he got registered FIR on the basis of the same. PW12 visited A-5, Chaman Park, Brijpuri Road, Delhi and prepared site plan at the instance of complainant. PW12 identified his signature at circle X on the same. On 07.03.2020, PW11 called crime team consisting of ASI Mahavir and Ct. Mohit to A-5, where Ct. Mohit took photographs of the property and ASI Mahavir inspected that place and prepared his report. Subsequently, the photographs and inspection report were collected by PW12. PW12 lifted ash from that place and seized the same vide seizure memo bearing his signature at circle X on the	Ex.PW12/A (site plan prepared by PW12); Ex.PW12/B (seizure memo of lifting ash from A-5); Ex.PW12/C (seizure memo of ash lifted from shop and house of property A-5 and handed over by PW6 to PW12)

Sl. No. & Name of Witness	Role of witness & Description of documents	Proved documents/ case properties
	same. Complainant PW6 also handed over ash from his shop and house separately to PW12, which were also seized by him vide separate seizure memo, bearing signature of PW12 at circle X on the same. PW6 had also given a CD of video and 8 photographs of his shop and house, which were also seized by PW12 vide seizure memo Ex.PW12/C. PW12 deposited the case properties in the malkhana and on 20.03.2020, PW12 handed over the case file to MHC(R) on the directions of SHO.	

PLEA OF ACCUSED PERSONS U/S. 313 CR.P.C.

8. All accused persons denied all the allegations and pleaded innocence, taking plea that they were not present at the spot and they have been falsely implicated in this case. They also took plea that their name was implicated in this case just to work out the case. Accused persons did not opt to lead any evidence in their defence.

ARGUMENTS OF DEFENCE & PROSECUTION

9. I heard ld. Special PP and ld. counsels for accused persons. I have perused the entire material on the record.
10. **Sh. Z Babar Chauhan**, ld. defence counsel for accused Mohd. Shahnawaz @ Shanu, Parvez and Azad, argued that PW-1 and PW-2 did not identify any accused. PW6 did not see anything about incident in question. He further argued that PW9 and

PW10 were only witness of identification. Despite briefing and public notice, they did not give statement to IO at earliest time and they did not make call at 100 number nor did they make any DD entry. He further argued that they are not credible witnesses as they were planted to solve the case. He further argued that PW10 did not identify accused in FIR No.40/20, but again identified in FIR No. 83/20, which shows that they are tutored witnesses.

11. **Sh. Salim Malik**, ld. counsel for accused Rashid @ Raja, Shahrukh and Shoaib @ Chhutwa, argued that PW3 and PW4 did not verify the number of house visited by them. PW9 and PW10 did not lodge any complaint, though they claimed having seen incident and accused. He further argued that they were introduced only to solve the case. Before examination in the court, time of incident was not disclosed in any document. He further argued that it is not possible to identify 4-5 persons from the mob of 400-500 persons. He further argued that PW9 and PW10 did not see any incident.
12. **Mohd. Nazim**, ld. Counsel for accused Mohd. Faisal, Ashraf Ali and Rashid @ Monu, adopted aforesaid arguments.
13. **Per-contra, Sh. D.K. Bhatia**, ld. Special PP for State argued that PW9 and PW10 identified accused persons, as culprits. He further argued that consequence of PW10 making some statement in FIR No.40/20, should not be borrowed herein. He further argued that PW9 also identified the accused persons. Even PW10 identified three persons by face and name, which should be accepted. He further argued that PW10 stated about his mental

problem. He further argued that time of incident was mentioned in statement under Section 161 Cr.P.C. of PW9 and PW10. He further argued that there cannot be fixed parameter for all persons to identify persons in a mob. Ld. Special PP further argued that ideally PW10 should not have been examined, when he was unwell.

APPRECIATION OF FACTS AND EVIDENCE

UNLAWFUL ASSEMBLY & RIOTS

14. The testimonies of PW9 and PW10 refer to assembly of a mob of more than 5 persons on the road near Shiv Vihar Tiraha in the evening of 25.02.2020 and vandalism as well as arson by this mob in that area including in the property no. A-5, Chaman Park. PW6/Sh. Yatender Kumar Sharma was the complainant and owner of property No.A-5. According to his testimony on 24.02.2020 he had gone to Mansarovar Park. He left for his home at about 02:00 PM and when he reached the area of Chaman Park, he found that riot was going on and there was complete chaos on the road. He therefore, could not reach his home and he had to go to his brother's place in Shiv Vihar, Shanti Nagar. He remained there overnight and again tried on 25.02.2020 to come back to his home, but since the riots were still continuing, he could not reach his home. On 26.02.2020, he came back to his home in the morning and then he found that his home and shop therein were completely ransacked and burnt. Nothing was left there except a small purse containing Rs.3/-. From the testimony of this witness which remained unchallenged, it is clear that his home and shop at property no.A-5, Chaman Park was vandalized

and set on fire in the riots. Other public witnesses examined by the prosecution, did not depose about incident at A-5, Chaman Park. Charges in this case were framed only in respect of incident at A-5.

15. PW4/Ct. Mohit was photographer in crime team, who deposed about visiting this property with PW3. He proved 12 photographs stating that same were taken by him. He also proved certificate under Section 65-B of I.E. Act in respect of these photographs. The photographs Ex.PW4/A (Colly.) do show a shop with a board of “Priyanka Copy Shop, A-5, Chaman Park, Delhi”. The photographs leave no doubt that this shop and the property was ransacked and set on fire by the rioters. During cross-examination of PW3 and PW4, defence suggested that the photographs did not pertain to A-5. However, such suggestions were denied by the witnesses. Questions were also asked as to whether these witnesses verified document of this property from the complainant or from other sources and the response of witnesses was that they did not do so. For such reasons, defence challenged taking the photographs of this place by PW4.
16. First of all, I do not find any need for these witnesses to verify the address of scene of crime from other sources. They were called there by the IO and particular of the place was to be furnished by the IO. Secondly, the photographs show that there was already a board showing address of this place. Neither is there any suggestion that such board was falsely put there, nor do I find any material on the record to show that photograph of a different place was taken by PW4. Even IO (PW12) deposed that

complainant met him at this address, which was found in burnt condition during his visit on 28.02.2020. On the appreciation of all these evidences I come to the conclusion that there was an unlawful assembly, which vandalized and set on fire the property bearing no. A-5, Chaman Park on 25.02.2020 somewhere around 05:00-06:00 PM.

IDENTIFICATION OF ACCUSED

17. The foremost question is that whether accused persons named herein were also involved in the aforesaid incident, as member of above-mentioned unlawful assembly? For this purpose, prosecution produced PW1, PW2, PW9 and PW10 before the court. Out of these witnesses, PW1 and PW2, who were public witnesses, did not support the case of prosecution to identify accused Shahnawaz @ Shanu as member of the mob.
18. PW10 though vouched about being on duty with PW9 in the area near Chaman Park at Shiv Vihar Tiraha. He identified accused Shahnawaz and Azad, claiming that he knew them since prior to the riots. He identified other accused persons also in the court, stating that he knew them by their faces, but he did not know their names, except Ashraf Ali.
19. The certified copy of statement of this witness as recorded in FIRs no. 40/20 and 83/20 were filed on the record, which are admitted documents. When this witness was examined before the court in FIR no. 83/20, he stated that he knew Shahnawaz, Shahrukh and Shoaib and he had seen them in that mob. At that time also this witness stated that this mob set ablaze shop no. A-53. He was narrating the incident of 25.02.2020. He identified

Rashid @ Raja as Shoaib and could not identify third person namely Shahrukh. In that proceeding, it was mentioned by the court that same witness was examined in other case bearing FIR no. 40/20, just before examination in that case. In that case, this witness had stated that he could not identify any of the rioters due to long lapse of time, though accused in FIR 40/20 were the same persons. This witness thereafter, took plea that he was suffering from memory loss and was also taking medicine for the same. He was cross examined by ld. prosecutor, wherein he admitted the suggestion that he was unable to identify four rioters correctly because of memory loss. In FIR no. 40/20, this witness while deposing incidents of 25.02.2020, stated that he knew Shahrukh, Parvej and Azad and he had seen them in the mob. Thus, one can find different claim being made by this witness at different time in respect of his knowledge about the accused persons. Hence, it is for sure that identification of the accused persons by him in this case also, is not safe to be relied upon.

20. In these circumstances, PW9 remains the only witness, to prove the identity of the accused persons as member of the mob responsible for incident in question. Though defence claimed that PW9 was a planted and tutored witness, however, before dealing with such argument, I shall deal with the argument that test referred in the judgment passed in the case of ***Masalti v. State of U.P., AIR 1965 SC 202***, applies to the facts and circumstances of this case. In the case of Masalti, hon'ble Supreme Court dealt with a case of multiple murder by an unlawful assembly. The court while dealing with the aspect of identification of members

of that mob, made certain observations regarding test of consistent testimony by four witnesses as applied by High Court.

The relevant part of the same is as follows: -

“16. Mr. Sawhney also urged that the test applied by the High Court in convicting the appellants is mechanical. He argues that under the Indian Evidence Act, trustworthy evidence given by a single witness would be enough to convict an accused person, whereas evidence given by half a dozen witnesses which is not trustworthy would not be enough to sustain the conviction. That, no doubt is true; but where a criminal court has to deal with evidence pertaining to the commission of an offence involving a large number of offenders and a large number of victims, it is usual to adopt the test that the conviction could be sustained only if it is supported by two or three or more witnesses who give a consistent account of the incident. In a sense, the test may be described as mechanical; but it is difficult to see how it can be treated as irrational or unreasonable. Therefore, we do not think any grievance can be made by the appellants against the adoption of this test. If at all the prosecution may be entitled to say that the seven accused persons were acquitted because their cases did not satisfy the mechanical test of four witnesses, and if the said test had not been applied, they might as well have been convicted. It is, no doubt, the quality of the evidence that matters and not the number of witnesses who give such evidence. But sometimes it is useful to adopt a test like the one which the High Court has adopted in dealing with the present case.”

21. The test mentioned in the case of Masalti, was deliberated upon by Supreme Court in the case of **State of Maharashtra v. Ramlal Devappa Rathod, (2015) 15 SCC 77**, and the court made following observations: -

“24. The liability of those members of the unlawful assembly who actually committed the offence would depend upon the nature and acceptability of the evidence on record. The difficulty may however arise, while considering the liability and extent of culpability of those who may not have actually committed the offence but were members of that assembly. What binds them and makes them vicariously liable is the common object in prosecution of which the offence was committed by other members of the unlawful assembly. Existence of common object can be ascertained from the attending facts and circumstances. For example, if more than five persons storm into the house of the victim where only few of them are armed while the others are not and the armed persons open an assault, even unarmed persons

are vicariously liable for the acts committed by those armed persons. In such a situation it may not be difficult to ascertain the existence of common object as all the persons had stormed into the house of the victim and it could be assessed with certainty that all were guided by the common object, making every one of them liable. Thus, when the persons forming the assembly are shown to be having same interest in pursuance of which some of them come armed, while others may not be so armed, such unarmed persons if they share the same common object, are liable for the acts committed by the armed persons. But in a situation where assault is opened by a mob of fairly large number of people, it may at times be difficult to ascertain whether those who had not committed any overt act were guided by the common object. There can be room for entertaining a doubt whether those persons who are not attributed of having done any specific overt act, were innocent bystanders or were actually members of the unlawful assembly. It is for this reason that in Masalti [Masalti v. State of U.P., AIR 1965 SC 202 : (1965) 1 Cri LJ 226 : (1964) 8 SCR 133] this Court was cautious and cognizant that no particular part in respect of an overt act was assigned to any of the assailants except Laxmi Prasad. It is in this backdrop and in order to consider

“whether the assembly consisted of some persons who were merely passive witnesses and had joined the assembly as a matter of idle curiosity without intending to entertain the common object of the assembly”, this Court at SCR pp. 148-49 in Masalti [Masalti v. State of U.P., AIR 1965 SC 202 observed that his participation as a member of the unlawful assembly ought to be spoken by more than one witness in order to lend corroboration. The test so adopted in Masalti [Masalti v. State of U.P., AIR 1965 SC 202 was only to determine liability of those accused against whom there was no clear allegation of having committed any overt act but what was alleged against them was about their presence as members of the unlawful assembly. The test so adopted was not to apply to cases where specific allegations and overt acts constituting the offence are alleged or ascribed to certain named assailants. If such test is to be adopted even where there are specific allegations and overt acts attributed to certain named assailants, it would directly run counter to the well-known maxim that “evidence has to be weighed and not counted” as statutorily recognised in Section 134 of the Evidence Act.”

- 22.** In the same case, Supreme Court explained the nature of cases wherein test mentioned in the case of Masalti, can be applied, while making following observations: -

“26. We do not find anything in Masalti [Masalti v. State of U.P., AIR 1965 SC 202 : (1965) 1 Cri LJ 226 : (1964) 8 SCR 133] which in any way qualifies the well-settled principle that the conviction can be

founded upon the testimony of even a single witness if it establishes in clear and precise terms, the overt acts constituting the offence as committed by certain named assailants and if such testimony is otherwise reliable. The test adopted in Masalti [Masalti v. State of U.P., AIR 1965 SC 202 : (1965) 1 Cri LJ 226 : (1964) 8 SCR 133] is required to be applied while dealing with cases of those accused who are sought to be made vicariously responsible for the acts committed by others, only by virtue of their alleged presence as members of the unlawful assembly without any specific allegations of overt acts committed by them, or where, given the nature of assault by the mob, the Court comes to the conclusion that it would have been impossible for any particular witness to have witnessed the relevant facets constituting the offence. The test adopted in Masalti [Masalti v. State of U.P., AIR 1965 SC 202 : (1965) 1 Cri LJ 226 : (1964) 8 SCR 133] as a rule of prudence cannot mean that in every case of mob violence there must be more than one eyewitness.”

23. In the present case, PW9 stated that he knew some members of the mob and he named them before IO and before the court. Though, above mentioned observations of Supreme Court, make it clear that for inviting liability by virtue of Section 149 IPC, it is not required to prove overt act on the part of every member of the mob, but at the same time rule of prudence has been spoken about, for fastening vicarious liability with aid of S.149 IPC. That rule of prudence is the genesis of test mentioned in the case of Masalti. In that case also, it was approved as a mark of precaution, rather than laying it down as a hard and fast rule.
24. PW9 had though knowledge of the names and particulars of the accused persons, but he did not take any steps to formally get this information recorded, before 07.04.2020. In his cross examination, PW9 conceded that there had been briefing in the police station every day, which was attended by him as well as IOs. Still, the knowledge about involvement of the accused persons were not formally recorded anywhere, till 07.04.2020. PW9 stated that he had orally informed his senior officers about

informations with him, after about a week or 15 days from riots. No explanation has been offered for such delay in passing on such a crucial information to senior officers by this witness. Moreover, if actually such information was given to the senior officers, then what prevented the senior officers to get such information recorded in formal manner.

25. Keeping in view such delay in disclosure of vital information being recorded, I find it desirable to apply the test of consistent testimony of more than one witness, in present case also. Applying that test, I hold that sole testimony of PW9 cannot be sufficient to assume presence of accused persons herein in the mob, which set ablaze property no. A-5, Chaman Vihar. In such situation, accused persons are given benefit of doubt.

CONCLUSION & DECISION

26. In view of my foregoing discussions, observations and findings, I find that charges levelled against all the accused persons in this case are not proved beyond doubts. Hence, accused Mohd. Shahnawaz @ Shanu, Mohd. Shoaib @ Chhutwa, Shahrukh, Rashid @ Raja, Azad, Ashraf Ali, Parvej, Md. Faisal and Rashid @ Monu, are acquitted of all the charges levelled against them in this case.

Announced in the open court today on 30.01.2023
(This order contains 19 pages)

(PULASTYA PRAMACHALA)
ASJ-03 (North- East)
Karkardooma Courts/Delhi