

PETITIONER:
STATE OF U.P.

Vs.

RESPONDENT:
DAN SINGH AND ORS.

DATE OF JUDGMENT: 03/02/1997

BENCH:
M.K. MUKHERJEE, B.N. KIRPAL

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T

KIRPAL, J.

This is an appeal by special leave against the judgment of the Allahabad High Court which had upheld the acquittal of all the accused respondents of charges under Sections 147, 302/149, 436/149, 307/149 of the Indian Penal Code (for short the 'IPC') and under Section 4 (iv), (x) and Section 5.7 of the Protection of Civil Rights Act 1955. The aforesaid charges were framed pursuant to an occurrence which had taken place in village Kafalta Malla in district Bilaspur in the State of U.P. wherein 14 persons were killed and 7 injured. All the 32 accused-respondents were acquitted by the Sessions Judge and, in appeal, the acquittal of all of them was upheld except that accused Kishan Singh, respondent no.20, and Jeet Singh respondent no.14, who were convicted by the High Court under Section 325/34 IPC and sentenced to five years rigorous imprisonment.

The occurrence in question took place on 9th May, 1980. The complainant's side is Dom by caste. It was not disputed during the arguments that Dom is a scheduled caste. The prosecution case is that a marriage party from the complainant's village Birlagaon Talla was going to village Pinna. It had to pass through village Kafalta Malla. The marriage party, consisting of about 40 persons, reached the village kafalta Malla at 5p.m. There 4 women accused nos. 29 to 32 met the marriage party near the house of accused no.13, Lachman Singh Bangari, i.e., in the beginning of the village. These women stopped the doli of the bridegroom and asserted that these Doms could not take their bridegroom on a doli in front of the house of Thakurs and Brahmins. The complainant's side replied that when Brahmins and Thakurs could do it, the Doms had also right to do it. Then these women shouted for their men folk of the village and all the male accused, along with others, came at the spot. in all there were 70 to 80 persons, and they were armed with lathis, dandas, stones. When the marriage party reached near the house of one Nari Ram, PW-8, a resident of this village one Khima Nand Fauji attacked Diwani Ram, of the marriage party, with a knife. Diwani Ram received injuries. Khima Nand Fauji wanted to attack again. Then the bridegroom's

father Mohan Ram tried to snatch the knife from Khima Nand. In this scuffle the knife struck Khima Nand. (This Khima Nand died after a few days). When the knife struck Khima Nand and he got injured, the members of the marriage party started running helter skelter. Some of them entered into the house of Nari Ram as this Nari Ram was of their own caste. In order to save themselves these persons bolted the door of Nari Ram's house from inside. The accused assailants bolted it from outside and after making a hole in the roof, they put in dried grass, sprinkled kerosene oil and put it on fire. Some members of the marriage party ran else where to save themselves but they were attacked with lathis and stones etc. resulting in death of several persons. Complainant Narendra Prasad (PW 1) was also in the marriage party. He was injured. Some how he was able to escape and reached his house after it being dark. Then he went to Patwari's office which is at a distance of two or three kilometers from his house and six kilometers from the place of occurrence and lodged a written report (Ex. Ka.3) at 10 p.m. the same night.

Before the report was lodged by the complainant the accused no.2 Inder Singh also lodged a report in the same Patwari's office at 9.30 p.m. The version given in this report was that the marriage party reached the village at 5 p.m. In the village there is a temple of Badri Nath where bridegroom of every caste has to get down from doli. Then the marriage party was asked that they should also take the bridegroom on foot in front of them temple: but the members of the marriage party did not agree and started quarrel. They attacked Ram Singh accused no.10. As alarm was raised in the village, the villagers assembled. The members of the marriage party did not yield to persuasion. They took out knife and were bent upon assaulting, and they started it. They attacked Khima Nand with knife. Khima Nand received serious injuries and became unconscious. In this scuffle the marriage party, which consisted of fifty persons, dispersed while the accused No.2 Inder Singh and No.20 Kishan Singh had come to lodge the report on being asked by the villagers. According to the accused, there were 50 to 60 persons in the marriage party.

The accused pleaded not guilty. The four women accused merely said that they did not know anything about the occurrence.

The accused Kunwar Singh son of Hayat Singh, Harish Chandra, Trilok Singh son of Hayat Singh, Khushal Singh, Bishan Datt, Madhava Nand, Bachey Singh, Deo Singh Jasod Singh, Gosain Singh and Nardeo pleaded that they were not at the spot.

Accused Hari Datt, Jai Singh alias Jasod Singh, Ram Singh son of Daulat Singh, Trilok Singh son of Udai Singh, Kunwar Singh son of Param Singh and Aan Singh did not raise any particular defence.

Accused Dan Singh, Indra Singh, Chandra Mani, Khiali Ram, Jagdish Chandra, Lachhman Singh Bangari, Jeet Singh and Nardeo raised the defence that on the date of occurrence, there was a feast in the village at the house of Khiali Ram accused. His brother's marriage party had returned on the same day. There were quite a number of invites in the feast and Khima Nand deceased was sent to bring pan and cigarettes for the invitees. They had stated that in the village there is a temple of Badri Nath and the custom is that every person gets down from his vehicle or carrier and walks on foot in the village boundary.

Accused Kishan Singh and Ram Singh son of Parbat Singh Pleaded that the marriage party was passing through the

passage and the bridegroom was on doli. The marriage party had crackers and guns with which they fired. Ram Singh, who returned from the feast of Khiali Ram, requested the members of the marriage party to take down the bridegroom from the doli, because of the custom that the people go on foot in the village boundary, there being the temple of Badri Nath. The members of the marriage party did not agree and proceeded ahead. Diwani Ram from the marriage party showed a knife and Kishan Ram threatened with a lathi. Khima Nand also asked the members of the marriage party to take down their bridegroom from the doli and go on foot in view of the village custom; but the members of the marriage party quarrelled. Two of them, Mohan Ram and Kishan Ram caught hold of Khima Nand's hands and Diwani Ram inflicted knife injuries to Khima Nand due to which Khima Nand died and the marriage party dispersed. In cross-examination it was suggested that the house of Nari Ram caught fire due to crackers of the marriage party and the other invitees who had come to Khiali Ram's house might have indulged in this episode.

The post mortem report on the dead bodies showed that six persons had died of burns or suffocation. One of them also had head injury. Eight other persons had lacerated wounds, contusion and abrasion and they had died on account of shock and haemorrhage due to brain injury. In addition to the aforesaid 14 persons there were 7 other injured persons on the side of the complainant, all of whom are eye-witnesses in the case. Narendra Prasad, PW-1, had six injuries which were lacerated wounds and abrasions. Pitambar, PW-2, had lacerated wounds and some abrasions. Ganga Ram, PW-3, had 11 injuries consisting of lacerated wounds, contusion and abrasion. Bhawani Ram, PW-4, had 5 injuries which were abrasions and infected wounds. Diwani Ram, PW-7, who had the first scuffle with Khima Nand (the deceased on the side of the accused) had three injuries consisting of two lacerated wounds and one contusion. Nari Ram, PW-8, had two lacerated wounds, two contusions and three abrasions. There were lacerated wounds and contusions on the hand and shoulder and Bali Ram, PW-9, had 12 injuries, one of them was a contusion, one was abrasion and the rest were lacerated wounds. Of these injuries one had caused the fracture of mandible.

The matter was reported by Narendra Prasad, PW-1, to Patwari Narain Singh Khetri because under Section 2 of The Tehri-Garhwal Revenue Officials (Special Powers) Act, 1956 the Patwari had been invested with powers of an officer in charge of a police station. This report was lodged the same night at 10 p.m. whereupon the Patwari recorded the statements of Narendra Prasad, PW-1, and Pitambar, PW-2, at his office. The Patwari then sought help of one Devi Dutt Satti (PW-13) who was the Patwari of another circle. Both of these Patwaris then reached the place of incidence at 1.30 a.m. in the night and found Nari Ram, PW-8's, house burning and also saw some dead bodies. Thereafter report was made by Narain Singh to the higher officers while Devi Dutt Satti examined PW-3, Ganga Ram and PW-8, Nari Ram amongst others and also prepared the site plan. Inside the house of Nari Ram five burnt bodies were found. In the courtyard of the house one half burnt body of Kishan Ram was found. Other bodies were found in the near-by fields.

After the initial investigation was made by the local Patwaris, the investigation was transferred to the regular police and then to the C.I.D. Some of the accused were arrested by the police while others were arrested by the C.I.D. On 26th May, 1980 C.I.D. Inspector Ram Charan Singh,

PW-18, submitted the chargesheet whereupon the respondents were put up for trial.

The prosecution examined eight eye witnesses, out of who except for Amba Prasad, PW-5, all had been injured at the time of the incident. Three doctors who had conducted post mortem examination of the dead bodies, and had examined the injuries of the injured witnesses, were also examined. In addition thereto evidence of two Patwaries as well as the investigation officers of the police and the C.I.D. was also recorded.

The accused examined six witnesses in their defence in support of the plea of alibi raised by Hayat Singh, respondent no.5 and Harish Chandra, respondent no.6.

The Session Judge, Almora, vide his judgment dated 15th April, 1981 acquitted all the accused of the above mentioned charges framed against them. He came to the conclusion that the prosecution had failed to establish the guilt of the accused persons beyond a reasonable doubt.

Aggrieved by the aforesaid judgment the State filed a Criminal Appeal No.1573 of 1981 before the High Court of Allahabad. The said appeal came up for hearing before the Division Bench of B.N. Katju and Rajeshwar Singh, JJ. By his opinion dated 15th April, 1987 B.N. Katju, J. came to the conclusion that except for respondents Jeet Singh and Kishan Singh, the acquittal of all other respondents should be upheld. While accepting that the incident had taken place in the said village of Kafalta Malla, the learned judge expressed doubt whether the FIR had been lodged the same night at 10 p.m.. The learned judge did not accept the contention that the accused persons were members of the unlawful assembly or that any unlawful assembly had come into existence which had a common object of killing the deceased. Only the evidence of Bali Ram, PW-9, was partly believed to the extent that it implicated Jeet Singh and Kishan Singh for assaulting him and causing injuries with lathis and stones and in respect whereof the learned judge held that these two assailants be sentenced to five years rigorous imprisonment under Section 325/34 IPC.

By a separate opinion Rajeshwar Singh, J. observed that the appeal should be partly allowed. He came to the conclusion that the prosecution evidence clearly showed that respondent no.1, Dan Singh, respondent no.2, Indra Singh, respondent no.10, Ram Singh son of Parvat Singh, respondent no.14, Jeet Singh, respondent no.19, Trilok Singh son of Hayat Singh and respondent no.20, Kishan Singh were members of a unlawful assembly the object of which was not to let the bridegroom pass on doli and then to kill and burn the Doms who did not heed the accused and one of whom had injured Khima Nand. It was held that charges against them, under Section 4 (iv) and (x) of the Protection of Civil Rights Act, 1955 as well as charges under Sections 147, 302/149, 436/149, 232/149 and 307/149 IPC, stood established and the judge proposed to sentence them to imprisonment for life. The acquittal of your lady accused, namely, respondent no.29, Rajmati, respondent no.30, Jaintuli Devi, respondent no.31, Jhapri Devi and respondent no.32, Mana Devi under Section 4 (iv), (x) and 7 of the Protection of Civil Rights Act, 1955 was proposed to be set aside and they were to be sentenced to undergo simple imprisonment for one month each and to pay a fine of Rs.100/- each.

Thus while both the learned judges agreed on the acquittal of 22 of the accused there was a difference of opinion with regard to 6 other accused and the four ladies who were charged with different offences. On 15th April, 1987 two orders were passed by the Division Bench. the first

order regarding acquittal of 22 accused was as follows:

"Government appeal no.1573 of 1981 filed against the acquittal of Hari Datt alias Hari Datt, Jai Singh alias Jasod Singh, Hayat Singh son of Dewan Singh, Harish Chandra, Chandramani, Kunwar Singh son of Hayat Singh, Khayali Ram, Ram Singh son of Daulat Singh, Jagdish Chandra, Bishan Datt, Lachham Singh Bangari, Trilok Singh son of Udai Singh Madhavanand, Khushal Singh, Bache Singh, Dev Singh, Jasod Singh son of Jathal Singh, Gusain Singh, Kunwal Singh son of Param Singh. Mus Dev, Nar Dev and An Singh respondent under Section 302/149, 307/149, 436/149, 323/149 and 147 I.P.C. and sub-sections (iv) and (x) of Section 4 and Section 7 of the Protection of Civil Rights Act, 1955 is dismissed."

By the second order the papers were directed to be placed before the Chief Justice for the appeal to be placed before another judge under Section 392 of the Code of Criminal Procedure. This order was in the following terms:

"As there is a difference of opinion between us regarding Government appeal no.1573 of 1981 filed against the acquittal of Dan Singh, Inder Singh, Ram Singh son of Parvat Singh, Trilok Singh son of Hayat Singh, Jeet Singh, Kishan Singh, Smt. Rajmati, Smt. Jaintuli Devi, Smt. Jhapri Devi and Smt. Mane Devi respondents, we direct that the appeal filed against them along with our opinion shall be placed before Hon'ble the Chief Justice for being laid before another Hon'ble Judge under Section 392 Cr.P.C."

The appeal was then heard by V.P. Mathur, J. who agreed with the opinion of Katju, J. As a result thereof final order was passed on 19th May, 1988 which is as follows;

" In view of the opinion of the third Judge under Section 392 Cr.P.C. the Government Appeal against the acquittal of Dan Singh, Inder Singh, Ram Singh son of Parvat Singh, Trilok Singh son of Hayat Singh, Smt. Rajmati, Smt. Jaintuli Devi, Smt. Jhapari Devi and Smt. Mana Devi is dismissed. The Government Appeal against the acquittal of Jeet Singh and Kishan Singh accused is allowed in part. They are convicted under Section 325/34 I.P.C. and sentenced to five years rigorous imprisonment.

Dan Singh, Inder Singh, Ram Singh son of Parvat Singh, Trilok Singh son of Hayat Singh, Smt. Rajmati, Smt. Jaintuli Devi, Smt. Jhapari Devi and Smt. Mana Devi

respondents are on bail. They need not surrender. Their bail bonds are discharged.

Jeet Singh and Kishan Singh respondents are also on bail. They shall be taken into custody forthwith to serve out the sentence awarded to them."

Special leave petition was filed by the State against all the 32 accused. Vide order dated 21st July, 1989, leave was not granted in the case of the four ladies, namely, respondent nos.29 to 32 and their acquittal has become final. Leave was granted qua the other 28 accused.

Before dealing with the rival contentions of the parties it will be appropriate to not that as per the record of this Court, during the pendency of this appeal four of the respondents, namely, Har Datt, respondent no.3, Trilok Singh, respondent no.16, Madhavanand, respondent no.17 and Nar Dev, respondent no.27, have expired. the appeal against them, therefore, abates.

At the outset it was sought to be contended on behalf of the respondents that the appeal against the 22 respondents, qua whom the State's appeal was dismissed by the Division Bench of B.N. Katju and Rajeshwar Singh, JJ. vide order dated 15th April, 1987, had become final and no appeal has been filed against the said decision. The appeal had only been filed against the final order dated 19th May, 1988, pursuant to the opinion of the third judge. This order only pertains to the four ladies and six other respondents. Special leave not having been granted against the acquittal of the four ladies, this appeal, it was submitted, should be confined only to the case relating to the six accused in respect of whom there was a difference of opinion which was referred to the third judge.

In our opinion there is no merit in the aforesaid contention. As is evident from the bare perusal of Section 392 of the code of Criminal Procedure, 1973, which is as follows:

" Procedure where Judges of Court of Appeal are equally divided - When an appeal under this Chapter is heard by a High court before a Bench of Judges and they are divided in opinion, the appeal with their opinions, shall be laid before another Judge of that Court, and that Judge, after such hearing as he thinks fit, shall deliver his opinion and the judgment or order shall follow that opinion;

Provided that if one of the Judges constituting the Bench, or, where the appeal is laid before another Judge under this section, that Judge, so requires, the appeal shall be re-heard and decided by a larger Bench of Judges."

According to this section if there is a difference of opinion amongst the judges of the Bench, then their opinions are laid before another judge. It is only after the third judge gives his opinion that the judgment or order follows. it is clear from this that a judgment or order which can be appealed against, under Article 136 of the constitution, is only that which follows after the opinion of the third judge has been delivered. What B.N. Katju and Rajeshwar Singh, JJ.

wrote was not their judgments but they were their opinions. Due to disagreement amongst them, Section 392 of the Code of Criminal Procedure required the appeal as a whole was then required to be laid before the third judge (V.P. Mathur, J. in this case) whose opinion was to prevail. the first order of 15th April, 1987 was clearly not contemplated by Section 392 of the Code of Criminal Procedure and is, therefore, honest.

When the appeal as a whole is heard by the third judge, he not only has an option of delivering his opinion but, under the proviso to Section 392 of the Code of Criminal Procedure he may require the appeal to be re-heard and decided by a larger bench of judges. This was an option which, under the proviso, was also open for any one of the two judges, namely, B.N. Katju and Rajeshwar Singh, JJ. to exercise, but they choose not to do so. What is clearly evident is that the appeal is finally disposed of by the judgment and order which follows the opinion of the third judge. This being so special leave petition could only have been filed after the appeal was disposed of by the High Court vide its final order dated 19th May, 1988. Even though the said order purports to relate only to ten out of thirty two accused the said order has to be read along with the earlier order of 15th April, 1987 and, in law, the effect would be that the order dated 19th May, 1988 will be regarded as the final order whereby the appeal of the State was partly allowed, with only two of the thirty two accused being convicted under Section 325 read with Section 34 IPC, while all the other accused were acquitted.

Coming to the merits of the case the appellant has contended that all the 28 respondents, in respect of whom the special leave has been granted, should have been convicted of the charges framed against them. It was submitted by learned counsel that there was no valid reason not to accept the testimony of the eight eye witnesses, seven of whom were injured. It was contended that the evidence on record clearly showed that there existed an unlawful assembly the common object of which was to attack and kill the members of the marriage party who were scheduled castes. It is pursuant to this common object that the members of the unlawful assembly attacked the members of the marriage party which led to death of fourteen and injuries to seven. It was submitted that the said decision is contrary to the well established principles of law and no court could have, on the basis of the evidence on record, acquitted all the respondents of the charges framed against them.

Mr. U.R. Lalit, learned senior counsel, appearing for the respondents, on the other hand, submitted that while there can be no doubt that the marriage party was attacked by the villagers the Court cannot come to the conclusion that there was any unlawful assembly which had a common object of killing the members of the marriage party. He further submitted that even if it be assumed that an unlawful assembly was formed the prosecution had failed to prove, beyond reasonable doubt, that the respondent were members of that unlawful assembly or that they shared the same common object. It was also vehemently contended that the respondents having been acquitted, both by the trial court and the High court, this court should accept the concurrent findings of fact arrived at and it ought not to come to a different conclusion.

We are conscious of the fact that in dealing with an appeal where both the courts below have acquitted the respondents of the serious charges levelled against them,

there should be very strong reasons to set-aside the verdict of acquittal and to convict the respondents. There have, therefore, to be compelling reasons for us to come to the conclusion that the decisions of the courts below are clearly unsustainable both in fact and in law. If two views are possible then this Court would not, readily or ordinarily, reverse the concurrent findings of acquittal arrived at by the trial court and the High Court. On the other hand, if the only conclusion, which could be arrived at on the basis of the evidence on record, shows that there has been a serious mis-carriage of justice, then, notwithstanding the concurrent findings of fact arrived at by the courts below, this Court would not hesitate in coming to a different conclusion. It is for this reason that the evidence of witnesses and the other materials on record have to be carefully considered and examined before this Court can come to the conclusion that the prosecution was able to prove its case against all or some of the accused.

What has to be considered in this case is whether there was any unlawful assembly at the place of occurrence and, secondly what was the common object of the said assembly and, particularly, who were the members of the said unlawful assembly. It is only after the court comes to the conclusion that the respondents or any of them, was member of such unlawful assembly who shared the common object of killing the Doms can they be convicted even if no overt act can be assigned to any one of them.

Before examining the evidence of the eye-witnesses we may note the undisputed facts. On 9th May, 1980 an occurrence took place in the village of Kafalta Malla. Most of the residents of the said village were Thakurs of Brahmins. The only house of a scheduled caste in that village was that of Nari Ram, PW-8. The occurrence took place when the complainant's party reached the said village taking a doli in which the bridegroom was sitting. Even if the story with regard to the four ladies stopping the doli is not accepted as correct, it is not in dispute that near the house of Nari Ram, to which the doli had proceeded, some words were exchanged between Khima Nand (deceased) and Divani Ram, PW-7. A large number of villagers had collected there. According to the complainant, Khima Nand took out a knife and there was a scuffle between him and Diwani Ram and during this scuffle the father of the bridegroom, namely, Mohan Ram tried to snatch the knife. Dewani Ram was injured and Khima Nand was also injured, but he succumbed to those injuries after a few days. The defence version, believed by the High Court, was that Khimanand was attacked by Diwani Ram. The manner as to how injuries were caused to Khimanand is not very material but what is relevant is that after the injuries were sustained by Khima Nand the riot started. According to PW 1 to PW 5, PW 7 and PW 9 some of the villagers shouted that they should kill and burn the Doms and it was thereafter that the marriage party was attacked. Some of the members of the marriage party took shelter in the house of Nari Ram, but that house was set on fire which resulted in the death of five of them inside the house, while the body of another person was found in the courtyard of Nari Ram's house which was half burnt. Apart from these six deceased, eight other persons were killed and their bodies were found laying in the adjoining fields of the village. The nature of the injuries on the deceased and the assailants, except for the injury on Khima Nand (deceased) and, possibly Diwani Ram, were all caused by blunt instruments or stones. Except for Khimanand, no other villager was injured. On the other hand, except for those

members of the marriage party who ran away from the scene of occurrence, when the riot started, none were spared. It is accepted by the High Court that death of fourteen persons and injuries to seven others was caused by the villagers who were present there.

From the aforesaid facts, as found by the High court, let us examine whether there existed any unlawful assembly and what was its common object. It is possible that there was no unlawful assembly in existence at the time when the 'doli' was stopped. Nevertheless as per the evidence of all the eye witnesses, a large number of villagers had gathered there and they had with them lathis and sticks. According to the explanation to Section 141 I.P.C. and assembly which is not unlawful when it assembles may subsequently become an unlawful assembly. As observed by this Court in *Lalji & Ors. Vs. State of U.P.*, 1989(1) SCC 437 "that 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 the scene of occurrence. It is an inference to be deduced from the facts and circumstances of each case". What has happened in the present case is precisely what has envisaged in the explanation to Section 141 I.P.C. With Khima Nand being injured, all hell broke loose. A cry was raised that the doms should be burnt and killed, and this is precisely what happened. the marriage party was assaulted by the villagers. Six of the members of the marriage party were burnt, five of them having been locked inside the house of the only Dom resident of the village whose house was also burnt. Eight others were pursued and then mercilessly beaten and were killed elsewhere in the village. We fail to appreciate how anyone, under the circumstances, can possibly come to the conclusion that an unlawful assembly having the common object of killing the Doms did not exist when fourteen people have been killed without the use of any weapon more lethal than a stick or stone. Considering the number of injuries on the persons who had died, it is evident that a large number of persons must have taken part in the assault. Even if the assembly of villagers was initially lawful, the same, undoubtedly, became unlawful when the riot started after Khima Nand was injured. All the eye witnesses have said that fifty or more villagers had taken part in the attack. Who were members of the assembly will be considered later but what is relevant to note is that a large number of villagers were present, duly armed with lathis and sticks, when the occurrence started and except six people who were burnt, eight others were beaten to death by blows from lathis, sticks and stones. It is difficult to appreciate the conclusion of the High Court that, under the circumstances, the attackers probably had a similar object but not a common object.

It was sought to be contended that there is nothing to show that the unlawful assembly continued to exist during the course of the entire incident. it is not possible to accept this considering that when all that remained in the village, of the marriage party, were fourteen corpses. it is only those members of the marriage party who had ran away were able to save their lives. The only conclusion which we can arrive at, in the instant case, is that there was an unlawful assembly which attacked the marriage party and which had the common object of killing them, and they succeeded in their endeavour to a large extent.

This brings us to the next question as to who were the persons who were members of this unlawful assembly. it is no doubt true that some of the villagers may have been present

at the time of the occurrence who were mere spectators and could not be regarded as being members of the unlawful assembly. It also happens, when people are killed during a riot, there may be a possibility of the incident being exaggerated or some innocent persons being named as being part of the assailants party. This may happen wittingly or unwittingly. But just because there may be some inconsequential contradictions or exaggeration in the testimony of the eye witnesses that should not be a ground to reject their evidence in its entirety. In the cases of rioting, where there are a large number of assailants and a number of witnesses, it is but natural that the testimony of the witnesses may not be identical. What has to be seen is whether the basic features of the occurrences have been similarly viewed and/or described by the witnesses in a manner which tallies with the outcome of the riot, viz., the injuries sustained by the victims and the number of people who are attacked and killed.

Before we deal with the testimony of these witnesses, it will be important to bear in mind that in the present case the conviction is being sought under Section 302 I.P.C. with the aid of Section 149 I.P.C.. The two essential ingredients of this Section are that there must be a commission of an offence by any member of unlawful assembly and that such offence must be committed in prosecution of common object of that assembly or must be such as the members of that assembly knew to be likely to be committed. It is also a well-settled law (see Masalti Vs. State of Uttar Pradesh, AIR 1965 SC 202) that it is not necessary for the prosecution to prove which of the members of the unlawful assembly did which or what act. In fact as observed in Lalji's case (supra) "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".

Mr. Lalit is right in submitting that the witnesses would be revengeful as a large scale violence had taken place where the party, to which the eye witnesses belonged, had suffered and it is, therefore, necessary to fix the identity and participation of each accused with reasonable certainty. Dealing with a similar case of riot where a large number of assailants who were members of an unlawful assembly committed an offence of murder in pursuance of a common object, the manner in which the evidence should be appreciated was adverted upon by this court in Masalti's case (supra) at page 210 as follows:

"Then it is urged that the evidence given by the witnesses conforms to the same uniform pattern and since no specific part is assigned to all the assailants, that evidence should not have been accepted. This criticism again is not well founded. where a crowd of assailants who are members of an unlawful assembly proceeds to commit an offence of murder in pursuance of the common object of the unlawful assembly, it is often not possible for witnesses to describe accurately the part played by each one of the assailants. Besides, if a large crowd of persons armed with weapons assaults

the intended victims, it may not be necessary that all of them have to take part in the actual assault. In the present case, for instance, several weapons were carried by different members of the unlawful assembly, but it appears that the guns were used and that was enough to kill 5 persons. In such a case, it would be unreasonable to contend that because the other weapons carried by the members of the unlawful assembly were not used, the story in regard to the said weapons itself should be rejected. Appreciation of evidence in such a complex case is not doubt a difficult task; but criminal courts have to do their best in dealing with such cases and it is their duty to sift the evidence carefully and decide which part of it is true and which is not."

One more principle which was laid down in Masalti's case (supra), and which would be applicable here, is that where a "court has to deal with the 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 2/3 or more witnesses who give a consistent account of the incident. In a sense the test may be described as mechanical; but it cannot be treated as irrational or unreasonable".

It is in the background of the aforesaid principles that we now proceed to examine the testimony of the eye witnesses, in order to determine as to which of the respondents could be stated to have been a part of the unlawful assembly whose common object was to kill the members of the marriage party.

Out of the fourteen people who had been killed, six of them were burnt. This incident took place when PW 8 Nari Ram's house was burnt in which five of the victims had been locked in. It will be appropriate, therefore, to determine, if possible, as to which of the respondents were responsible for this act. Out of the seven eye witnesses PW 1 Narendra Parsad and PW 7 Diwani Ram named all the 28 respondents, other than four ladies, as being the assailants who were part of the unlawful assembly. PW3 Ganga Ram identified, apart from the four ladies, 26 of the respondents as having attacked the marriage party. The presence of these three witnesses at the place of occurrence has been accepted by the High Court. What, in our opinion, is the most important evidence with regard to the burning of the Nari Ram's house is the testimony of Nari Ram PW8 himself. He has deposed that his was the only scheduled caste Family in the village and he has stated, in no uncertain terms, that he witnessed the act of the burning of his house. He stated that he was coming back from his field at about 6 P.M. when he heard the noise in his court-yard. He saw Dan Singh respondent No. 1 & Ram Singh respondent No. 10 who were spraying kerosene oil on his house. According to him respondent No. 23 Jasod Singh and respondent No. 24 Gusain Singh were putting the house on fire from below by putting the light. He found his wife and children standing outside in the court-yard and they were crying. Some of the processionists, who were members of the

marriage party were inside the house and they had been locked from outside. The house, as well as his belonging inside, were burning and at that time "swarnas injured me also". He stated that he was injured as a result of the lathis blows and stones being thrown on him.

Nari Ram's evidence has been rejected by the High Court for two reasons. Firstly, it has been observed that before the Investigating Officer, he had stated that he came to his house after it had been set on fire and he did not know who had lit the fire and who killed the members of the marriage party. The second reason for not accepting his testimony is that he did not name who were the assailants who injured him. In our opinion, these are not good enough reasons for not accepting the evidence of PW8 Nari Ram. The High Court failed to appreciate that in his evidence Nari Ram has stated that when his house had been set on fire he and his family members hid themselves in the adjoining house of Keshi Ram. They stayed in that house the whole night and he further deposed that because of fear he did not come out of Keshi Ram's house even the next morning. In this state of fear and dread in which Nari Ram was on the day following the burning of his house if he did not mention to the Investigating officer the names of those persons who had set his house on fire, the same cannot be regarded as surprising. As already noticed, Nari Ram's was the only scheduled caste family in the village consisting of Thakurs and Brahmins. These Thakurs and Brahmins had attacked the marriage party of the Doms and had killed fourteen of them. If, due to fear, no assailants or attacker was named by Nari Ram to the investigation Officer on the following day, the same is not unexpected. We see no reason to dis-believe his evidence. The persons identified by him in his evidence as being responsible for setting the house on fire have also been named by the other witnesses. Apart from PW 1 and PW 7 who had named all the respondents as being the assailants, respondents Dan Singh, Ram Singh, Jasod Singh and Gusain Singh had been identified by PW 8 and other eye witnesses also as being part of the unlawful assembly. Other eye witnesses who had identified these four persons, as being part of the unlawful assembly, though they have not been specifically named as being the persons who set Nari Ram's house on fire, are PW 2, PW 3, PW 5 and PW 9 who had identified Dan Singh and Ram Singh and PW 3 who had identified Jasod Singh and Gusain Singh. It is true that Nari Ram has not named the persons who attacked him with sticks and stones but the very fact that he was attacked and he suffered injuries shows that at the time of the occurrence he was present at his house and, therefore, he must have seen the assailants specifically named by him, we have read his evidence with care and we see no reason as to why he would wrongly name only four persons out of a mob of more than sixty, as being responsible for burning his house with the five Doms and all of his belongs being inside. There is no justifiable reason for not accepting his evidence as being worthy of acceptance.

We, therefore, come to the conclusion that these four persons namely Dan Singh, Ram Singh, Jasod Singh and Gusain Singh were present who set the house of Nari Ram on fire and were responsible for the killing of six of the deceased who had died at this place due to burns.

Eight other persons were killed by the members of the unlawful assembly at different places in the adjoining fields. It is obvious that there must have been a fairly large number of assailants who could have chased and then beaten eight different people to death at different places.

Till the entire incident came to an end with the killing of these fourteen persons, the unlawful assembly which came into existence immediately on the injury of Khima Nand continued. The members thereof would be liable for the killing of these persons, even if it is not possible to ascribe the overt acts of each of the assailants.

In order to determine who were other members of the unlawful assembly in which eight other persons were killed, it will be necessary to see the evidence of the witnesses other than Nari Ram. The main case of the prosecution rested on the evidence of PW1 Narendra prasad who lodged the First Information Report with the patwari on the night of the incident itself. PW 1 Narendra Parsad stated that he was the teacher in this village Kafalta Malla from 1965 to 1969. He, as well as all other eye witnesses have deposed that the "doli" was sought to be stopped firstly by the four ladies and, thereafter by Khima Nand deceased. At that time when an altercation took place between Khima Nand deceased and Dewani Ram, there were about fifty to sixty villagers including some residents of near by villages who had assembled there. Though these fifty to sixty people are alleged to have taken part in the attack on the marriage party, Narendra Parsad named only the respondents as being part of the said assembly of fifty to sixty people who had taken part in the riot which had ensued after Khima Nand had been injured. PW 1 Narendra Parsad further deposed that after Khima Nand was injured, all the accused present in the court came and said "do not leave them alive. Kill them" and these people attacked on the processionists with lathis, knives, sticks and stones. PW1 further stated that some of the processionists, in order to save their lives, entered into the house of PW8 Nari Ram and some other processionists ran to the fields. He also deposed to the burning of the house of Nari Ram by the accused persons as a result of which five processionists were burnt to death inside the house and one died in the court-yard with half of his body having been burnt. PW1 further stated that the respondents chased those processionists who had ran away towards the fields and beat them with lathis, sticks and stones. As a result of this, some of the processionists died and other were seriously injured. At the time of this occurrence, PW1 Narendra Parsad was himself injured and, according to him, the whole occurrence took place within a period of 1 to 1 1/2 hours. He also mentioned in his evidence that he met Nari Ram his house when it was burning and that Nari Ram PW8 had told him about the injuries sustained by him only on the next day i.e. 10th may, 1980.

The High Court did not accept the evidence of PW1 Narendra Parsad as it came to the conclusion that when the marriage party was attacked, PW1 Narendra Parsad had concealed himself behind banana plants which were five to six feet high and he was there till it became dark. Katju, J. further observed that PW1 Narendra parsad had mentioned the names of five respondents as having broken the roof of Nari Ram and setting it on fire but their names had not been mentioned in the First Information Report lodged by him. it also dis-believed his statement that he had met Nari Ram PW 8 because according to the High Court Nari Ram was not there when his house was set on fire. Nari Ram's evidence in court was rejected by the High Court because in his statement under Section 161 I.P.C. Nari Ram had stated that he had come to his house after it had been set on fire.

We have gone through the evidence of PW1 Narendra Parsad very carefully and we find that there is a ring of truth in the same. Having worked as a teacher in the school,

one can safely presume that he would be in a position to identify at-least some of the villagers who were assembled there. Further more, he himself had suffered a number of injuries and it is difficult to accept that in an incident where fourteen people were killed and seven injured, including PW 1 himself, he would not have seen anyone taking part in the attack. Merely because he had not mentioned in the First Information Report the names of the persons who had set on fire the house of Nari Ram, can be no ground for rejecting his testimony. This was not a serious omission in the context of this case. Further more even though PW1 Narendra Parsad had sought shelter behind the banana plants, he has said in his statement that he remained hidden for about an hour. The incident had occurred, according to the prosecution, between 5 P.M. & 6.30 P.M. PW 1 Narendra Parshad, after going back to his villager, wrote out the First Information Report in which the entire incident which had occurred was mentioned in which all the respondents were implicated. This report was given to the patwari at 10 P.M. on the night of the incident. the mentioning of the names of all the respondents in this report soon after such a serious incident had occurred, does clearly indicate that PW1 Narendra Parsad must have been able to identify at-least some if not all the person named therein.

The evidence of these two witnesses, i.e., PW 1 Narendra Parsad and PW 8 Nari Ram is fully corroborated by the evidence of the other eye witnesses. In the evidence of Bali Ram PW 9 which corroborates the testimony of PW 1, he has named Jeet Singh respondent No. 14 and Kishan Singh respondent No. 20 as being the persons who assaulted him. To this extent the High Court has accepted his evidence and that is why these two respondents have been convicted and sentenced under Section 325/34 IPC. We, however, see no reason as to why testimony of Bali ram as a whole should not have been accepted. The incident, according to him, had occurred in the manner stated by the other eye witnesses and PW 1 in particular. That his evidence does not suffer from any exaggeration is evident from the fact that he identified only ten of the respondents from amongst the members of the unlawful assembly, apart from the four ladies identified by him.

We, however, find that Katju J. and Mathur, J. have not specifically dealt with the evidence of PW 2, PW3, PW 4, PW 5 and PW 7, No reason has thus been given for not believing their testimony. All of these witnesses have given a consistent version of the manner in which the occurrence started. They have given the names of the assailants who had identified by them. the assailants identified by them, other then the identification of the ladies, are sixteen by PW 2, twenty six by PW 3, nine by PW and eight by PW 5, PW 2's evidence is important for another reason because he had accompanied PW1 Narendra Prasad when Narendra Prasad had gone to the 'patwari' for lodging of the First Information report the same night. He and the other three witnesses no doubt ran away to save themselves, once the riots started, but at the time when the riot commenced they were present there and they were able to identify the persons named by them in their evidence who were the part of the riotous mob.

On behalf of the respondents, six defence witnesses were examined. DW 1 to DW 3 have been examined in support of the case of respondent No. 5 Hayat Singh that he was not present at the place of incident. DW 1 Khima Nand is only a clerk in the office of Deputy Inspector of Schools who proved some documents. His evidence is not very material. DW 2 and DW 3 have deposed that Hayat Singh was not present at

the place of incident. Inasmuch as only three eye witnesses have identified respondent no.5 as being one of the assailants, and in view of the fact that he has not been identified by four of the eye witnesses he, is, therefore, given the benefit of doubt and we do not propose to deal with the evidence of these defence witnesses. DW 5 Hira Singh Rawat is a clerk of a Court of Munsif Magistrate and is of no relevance. DW6 Harak Singh has been produced to support the case of the respondents that the marriage party came to the village and passed in front of his shop at 6.30 or 7 P.M. and it was dark at that time. He was also produced to support the case of the respondents that the house of Nari Ram was burnt because of the crackers which were being lit by the marriage party. The evidence of this witness is not worthy of acceptance because we have already found as a fact that the house of Nari Ram was set on fire by some of the respondents. It is unbelievable even if the marriage party had crackers with them, that the same could be the cause of Nari Ram's house being put on fire and that also in such a manner that five of the members of the marriage party would continue to remain inside and not be able to escape from the house. The fact that five members of the marriage party were burnt inside the house clearly shows that the door of the house was locked from outside preventing the five persons, stranded inside, to come out. This by itself clearly demonstrates the falsity of the testimony of DW 6 Harak Singh

Now remains the statement of DW 4 Chandan Singh Rawat. This witness was Physical Training Teacher in the Government Higher Secondary School in which the respondent No. 6 Harish Chandra was a student of class IX. This witness stated that on 9.5.1980 examination of physical training was going on. On that day the Physical training test was held from 3 P.M. to 6 P.M. and that the respondent Harish Chandra remained in school up to 6 P.M. the distance of the school from the house was stated to be 1 to 1 1/2 K.Ms.. He also produced the list giving marks in the physical training test which contained the name of Harish Chandra. This sheet also bears the signatures of the Principal as well as the class teacher. He has denied the suggestion that the accused Harish Chandra might have gone out after the physical training examination at 4 P.M. Four of the eye witnesses namely PW 1 Narendra Prasad, PW 2 Pitamber, PW 3 Ganga Ram and PW 7 Dewani Ram have identified Harish Chandra as being one of the person who was present at the time of the incident and took part in the attack. On the other hand, the testimony of DW4 Chandan Singh Rawat, who was a teacher in the school in which Harish Chandra was a student, is quite impeachable. He has stated that on the day of the incident. Harish Chandra was in the school till 6 P.M. and that he had taken the physical training examination. In view of the conflicting state of evidence as regards the presence of Harish Chandra, it cannot be said with certainty that the testimony of DW 4 Chandan Singh Rawat is false. While hearing this appeal against acquittal, we are of the opinion that benefit of doubt should be given to Harish Chandra and the appeal against him is also liable to be dismissed.

If we accept the testimony of PW 1 and PW 7 in its entirety then all the respondents must be regarded as being members of the unlawful assembly and provisions of Section 149 IPC would be applicable to them. Even though we see no reason to disregard their evidence, nevertheless, keeping in mind the observations of this Court in Masalti's case (supra), we feel that even though a very large number of members of the unlawful assembly had taken part in the

attack on the Doms, it would be safe if only those of the respondents should be held to be the members of the unlawful assembly who have been specifically identified by at-least four eye witnesses. Applying this test, we find that apart from respondent no.5 Hayat Singh, respondent No. 4 Jai Singh, respondent No. 21 Bache Singh, respondent No. 22 Dev Singh, respondent No. 26 Mus Dev and PW 28 An Singh have been identified by less than four eye witnesses. This being so, we give the benefit of doubt and their acquittal by the High Court is upheld.

The acquittal of other respondents, namely, respondent No. 1 Dan Singh, respondent No. 2 Inder Singh, respondent No. 7 Chandramani, respondent No. 8 Kunwar Singh, respondent No. 9 Khyali Ram, respondent No. 10 Ram Singh, respondent No. 11 Jagdish Chandra, respondent No. 12 Bishan Dutt, respondent No. 13 Lachhman Singh, respondent No. 14 Jeet Singh, respondent No. 15 Ram Singh s/o Daulat Singh, respondent No. 19 Trilok Singh, respondent No. 20 Kishan Singh, respondent No. 23 Jasod Singh, respondent No. 24 Gusain Singh and respondent No. 25 Kunwar Singh under Sections 147, 302/149, 436/149, 323/149 & 307/149 I.P.C. is set-aside and all these accused are found guilty and convicted under there aforesaid sections. They are sentenced to undergo rigorous imprisonment for one year under section 147 I.P.C., imprisonment for life under Section 302/149 I.P.C., rigorous imprisonment for seven years under Section 436/149 I.P.C., rigorous imprisonment for nine months under Section 323/149 I.P.C. and rigorous imprisonment for seven years under Section 307/149 I.P.C.. All the sentences will run concurrently. These accused persons, who are on bail, shall be taken into custody to serve out the sentences. The appeal in respect of other accused is dismissed and they are discharged from the bail bonds, if any.