CASE NO.:
Appeal (crl.) 124 of 2003

PETITIONER:
State of Maharashtra

RESPONDENT:
Vs.
Kashirao & Ors.

DATE OF JUDGMENT: 27/08/2003

BENCH:
DORAISWAMY RAJU & ARIJIT PASAYAT.

JUDGMENT:
J U D G M E N T

ARIJIT PASAYAT, J.

On 27.12.1987 Subhash Warankar (hereinafter referred to as the 'deceased') lost his life and Pundlik (PW-1) was seriously injured. Allegedly, the respondents were the assailants. The Additional Sessions Judge, Amravati found them guilty of offences punishable under Sections 302, 307, 147, 148, 452 read with Section 149 of the Indian Penal Code, 1860 (in short the 'IPC'). Each was sentenced to undergo imprisonment for life and three years for the offences relatable with Section 302 read with Section 149 and Section 307 read with Section 149 IPC respectively. One person, namely, Mohan was tried along with the respondents. Since he died during the pendency of the trial the matter was abated so far as he is concerned.

Factual scenario according to the prosecution is as follows:

Relationship between Pundlik (PW-1) and respondent-accused No.1 Kashirao was strained since a long time. Originally, Pundlik (PW-1) used to stay in a village Dhamori but he shifted his residence to another village along with family members about one year before the date of incident. On the date of incident when Gangadhar (PW-2), Jayawant (PW-5) and Charandas (PW-6) and the deceased were going to village Dhamori in an auto-rickshaw, PW-1 was standing and he enquired from them as to where they were going and when he learnt that they were going to Dhamori he also accompanied them and all of them reached there at about 5.00 p.m. They went to the house of father-in-law of Gangadhar (PW-2) who was the Sarpanch of the village. They rested there for some time. Thereafter, PW-1 went to the weekly market along with Jayawant (PW-5), Charandas (PW-6) and the deceased. Father of PW-1 met him at the market and PW-1 told his father to purchase mutton so that he could entertain his friends at night. Thereafter, he along with his friends returned to his house. PW-1 told his mother to prepare meat for his friends and asked PWs 5 and 6 to go to the house of Raghunath (PW-3) and invite Gangadhar (PW-2) for the feast. House of accused-respondent no.1 is at a short distance from the house of PW-1. All the accused persons came together and assembled near the house of PW-1 and they were all armed with deadly weapons. They proceeded towards the house of PW-1 with the common object of killing PW-1 and his friends. At about 6.30 p.m. accused Kashirao along with other accused persons and the deceased accused formed an unlawful assembly to cause death of PW-1 and his friends. Accused No.1-Kashirao was armed with sword, Mohan was armed with an axe and other accused persons were armed with lathis. All the accused persons hurled stones at the house of Pundlik (PW-1) and threatened to kill him and his friends. When the deceased tried to

escape from the rear door being afraid of assaults, the accused persons chased him and assaulted him with deadly weapons and committed his murder. Thereafter, they came back to the house of PW-1, pelted stones and when he ran away to save his life, the accused persons chased him and gave blows. As a result of the assaults given, left arm of PW-1 was severed and injuries were caused on his right arm. Another friend of PW-1 Jayawant (PW-5) was also chased, but he successfully managed to escape by getting into a State transport bus. On coming back to the house of PW-1, they shouted that they had killed one person from Amravati, others had run away and now they would kill PW-1. PW-1 tried to save himself by throwing tiles from the roof but he did not succeed and therefore, tried to run away from the house by jumping out from the roof. However, accused chased him and he was assaulted. Assuming him to be dead, they returned to the village. They also carried the severed arm and showed it to his mother and ran away. Mother of PW-1 went to the place where PW-1 was lying, gave him water and took him to Kolhapur Bus stand and then to Kolhapur police station. He was later on taken to the hospital. His statement was recorded and the FIR was registered. The weapons and blood stained swords were collected. The accused persons were arrested and the charge sheet was placed. Mohan is the son of accused No.1 Kashirao, Mahadeo (A-4) and Sahadeo (A-5) are real brothers and Ganesh (A-7) is the son of Ajab (A-6). All are residents of village Dhamori.

The prosecution sought to prove the assaults on the deceased and PW-1 with the testimonies of PWs 1, 2, 5, 6 and 7. PWs 1, 5 and 7 were stated to be eye-witnesses. Placing reliance on their version, the conviction was made and sentence was awarded as aforesaid.

The respondents preferred an appeal before the High Court questioning legality of the judgment passed by the trial Court. By the impugned judgment, the High Court held that only respondent No.1 Kashirao was guilty of offence punishable under Section 326 IPC in respect of the assault on deceased and other respondents were not guilty. The High Court came to the conclusion that the elements of Section 149 were not established. For the assaults on PW-1, it was held that the case was not covered by Section 307 IPC as held by the trial Court but by Section 326 IPC. All the respondents were held guilty of offence punishable under Section 326 IPC read with Section 147 IPC. Sentence of 3 years RI and fine imposed were maintained, though conviction was altered from Section 307 read with Section 149 IPC. It was also stipulated that sentences in respect of accused Kashirao were to run consecutively and not concurrently.

Coming to the accusations under Section 302 IPC, the High Court was of the view that the deceased was not the intended victim, and only the assault on his leg by accused-respondent No.1 Kashirao was established and nothing else. That being not a very vital part the case was not covered under Section 302 IPC and only Section 326 IPC was applicable.

In support of the appeal, learned counsel for the State submitted that the High Court’s judgment cannot stand scrutiny because practically no reason has been given to discard the prosecution evidence, more particularly, the evidence of eye-witnesses 1, 5 and 7 who have described in detail the roles played by each of the accused respondents. Further, the High Court has not even indicated any reason to show how Section 149 IPC was not applicable. After having accepted the fact that blows were given by a deadly weapon by accused-respondent No.1 Kashirao, there was no reason to hold him guilty of offence punishable under Section 326 IPC and not Section 302 IPC. The fact that the accused persons were armed with deadly weapons, chased the deceased and assaulted him and came back to assault PW-1 has been established by clear, cogent and credible evidence. There is no scope for entertaining any doubt about the applicability of Section 149 IPC.

Additionally, merely because PW-1 was the victim intended, does not take away the effect of the common object to do an illegal act. Mere fact that instead of the original intended victim, somebody else was also assaulted and killed does not take away the rigour of Section 149 IPC. Looked at from any angle, judgment of the High Court is unsustainable.

Per contra, learned counsel for the accused-respondents submitted that prosecution version being that PW-1 was the intended victim, Section 149 cannot be applied. Even if it is accepted for the sake of arguments that the deceased was chased and assaulted, the assailant alone can be convicted and others cannot be roped in by application of Section 149 IPC. Evidence of so-called eye-witnesses lacks acceptability and credibility. It does not establish what role, if any, played by the accused persons. None of them could have seen the various assaults allegedly made. It is also submitted that view taken by the High Court is a plausible one and considering the limited scope of interference in an appeal against acquittal there should not be any interference.

Rival contentions need to be carefully weighed.

Evidence of PWs 1, 5 and 7 is cogent and credible. Merely because there was some animosity between PW-1 and accused persons as claimed by the prosecution, that cannot be a ground to discard his evidence even if it is credible and cogent.

Additionally, the evidence of PWs. 5 and 7 more than strengthen the evidence of PW-1. They have graphically described the scenario as to how the accused persons were armed with weapons, pelted stones, chased the deceased, assaulted him, came back and assaulted PW-1. That being the position, the prosecution version has been amply established.

The important question is as to applicability of Section 149 IPC to the facts of the case.

A plea which was emphasized by the respondents relates to the question whether Section 149, IPC has any application for fastening the constructive liability which is the sine qua non for its operation. The emphasis is on the common object and not on common intention. Mere presence in an unlawful assembly cannot render a person liable unless there was a common object and he was actuated by that common object and that object is one of those set out in Section 141. Where common object of an unlawful assembly is not proved, the accused persons cannot be convicted with the help of Section 149. The crucial question to determine is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects, as specified in Section 141. It cannot be laid down as a general proposition of law that unless an overt act is proved against a person, who is alleged to be a member of unlawful assembly, it cannot be said that he is a member of an assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of Section 141. 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. 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.

'Common object' is different from a 'common intention' as it does not require a prior concert and a common meeting of minds before the attack. It is enough if each has the same object in view and their number is five or more and that they act as an assembly to achieve that object. The 'common object' of an assembly is to be ascertained from the acts and language of the members composing it, and from a consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. For determination of the common object of the unlawful assembly, the conduct of each of the members of the unlawful assembly, before and at the time of attack and thereafter, the motive for the crime, are some of the relevant considerations. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms carried by the members, and the behaviour of the members at or near the scene of the incident. It is not necessary under law that in all cases of unlawful assembly, with an unlawful common object, the same must be translated into action or be successful. Under the Explanation to Section 141, an assembly which was not unlawful when it was assembled, may subsequently become unlawful. It is not necessary that the intention or the purpose, which is necessary to render an assembly an unlawful one comes into existence at the outset. The time of forming an unlawful intent is not material. An assembly which, at its commencement or even for some time thereafter, is lawful, may subsequently become unlawful. In other words it can develop during the course of incident at the spot co instanti.

Section 149, IPC consists of two parts. The first part of the section means that the offence to be committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. In order that the offence may fall within the first part, the offence must be connected immediately with the common object of the unlawful assembly of which the accused was member. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 141, if it can be held that the offence was such as the members knew was likely to be committed and this is what is required in the second part of the section. The purpose for which the members of the assembly set out or desired to achieve is the object. If the object desired by all the members is the same, the knowledge that is the object which is being pursued is shared by all the members and they are in general agreement as to how it is to be achieved and that is now the common object of the assembly. An object is entertained in the human mind, and it being merely a mental attitude, no direct evidence can be available and, like intention, has generally to be gathered from the act which the person commits and the result therefrom. Though no hard and fast rule can be laid down under the circumstances from which the common object can be called out, it may reasonably be collected from the nature of the assembly, arms it carries and behaviour at or before or after the scene of incident. The word 'knew' used in the second branch of the section implies something more than a possibility and it cannot be made to bear the sense of

'might have been known'. Positive knowledge is necessary. When an offence is committed in prosecution of the common object, it would generally be an offence which the members of the unlawful assembly knew was likely to be committed in prosecution of the common object. That, however, does not make the converse proposition true; there may be cases which would come within the second part but not within the first part. The distinction between the two parts of Section 149 cannot be ignored or obliterated. In every case it would be an issue to be determined, whether the offence committed falls within the first part or it was an offence such as the members of the assembly knew to be likely to be committed in prosecution of the common object and falls within the second part. However, there may be cases which would be within first offences committed in prosecution of the common object would be generally, if not always, with the second, namely, offences which the parties knew to be likely committed in the prosecution of the common object. (See Chikkarange Gowda and others v. State of Mysore : AIR 1956 SC 731.)

In State of U.P. v. Dan Singh and Ors. (1997 (3) SCC 747) it was observed that it is not necessary for the prosecution to prove which of the members of the unlawful assembly did which or what act. Reference was made to Lalji v. State of U.P. (1989 (1) SCC 437) where it was observed that:

"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".

This position has been elaborately stated by this Court in Gangadhar Behera and Ors. v. State of Orissa (2002 (8) SCC 381).

Above being the position in law, when the facts are applied it becomes clear that all the accused person are liable in terms of Section 149 IPC. Looking at the nature of the injuries, weapons used and the manner of assaults, there was no reason to apply Section 326 IPC in case of accused-respondent No.1 alone. The trial Court had rightly convicted the accused persons under Section 302 IPC. The gruesome nature of the attack is amply demonstrated by the injuries noticed on the body of the deceased. One other aspect which was emphasized was that when prosecution version accepted PW-1 to be intended victim, Section 149 IPC cannot be invoked for deceased's murder. This plea has no legal foundation, when logic of Section 301 IPC is applied. Same reads as follows:

"Section 301- Culpable homicide by causing death of person other than person whose death was intended- If a person, by doing anything which he intends or knows to be likely to cause death, commits culpable homicide by causing the death of any person, whose death he neither intends or knows himself to be likely to cause, the culpable homicide committed by the offender is of the description of which it would have been if he had caused the death of the person whose death he intended or knew himself to be likely to cause."

The provision is founded on a doctrine called by Hale and Foster, a transfer of malice. Others describe it as a transmigration of motive. Coke calls it coupling the event with the intention and the end with the cause. If the killing takes place in the course of doing an act which a person intends or knows to be likely to cause death, it ought

to be treated as if the real intention of the killer had been actually carried out.

Though Section 149 IPC may not in a given case apply to a case covered by Section 301, it would depend upon the factual background involved. No hard and fast rule of universal application can be invoked. In the facts of present case, as adumbrated supra, the essential ingredients of Section 149 have been amply established. Though initially the malice was focused on PW-1, the fact that all the accused chased and assaulted the deceased is a case of transfer of malice. The same was again pursued by coming back and attacking PW-1.

So far as the assaults on PW-1 is concerned, the nature of the assaults and the injuries found clearly bring in application of Section 307 IPC. The trial Court was therefore justified in convicting accused-respondent No.1 under Section 307 IPC. The essential ingredients required to be proved in the case of an offence under Section 307 are:-

(i) That the death of a human being was attempted;
(ii) That such death was attempted to be caused by, or in consequence of the act of the accused;
(iii That such act was done with the intention of causing death; or that it was done with the intention of causing such bodily injury as; (a) the accused knew to be likely to cause death; or (b) was sufficient in the ordinary course of nature to cause death, or that the accused attempted to cause death by doing an act known to him to be so imminently dangerous that it must in all probability cause (a) death, or (b)such bodily injury as is likely to cause death, the accused having no excuse for incurring the risk of causing such death or injury.

In offence under Section 307 all the ingredients of offence of murder are present except the death of the victim. For the application of Section 307 it is not necessary that the injury capable of causing death should have been actually inflicted. The injuries sustained, the manner of assaults and the weapons used clearly make out a case of Section 307 IPC. But since sentence and fine have been maintained alteration of conviction notwithstanding no modification of sentence need be made. It is true that when two views are possible and if one view has been adopted by the Court to either acquit the accused or to apply a different provision of law, interference should not be made but when the judgment suffers from legal infirmities and application of legal position to the factual scenario is unsustainable, interference is not only necessary but also highly desirable. The appeal deserves to be allowed. In the ultimate, the judgment of the High Court is set aside and that of the trial Court is restored. The respondents shall surrender to custody and serve out the balance sentence.